

LEGAL OPINION ON THE STATUS OF NON-COMBATANTS AND CONTRACTORS UNDER INTERNATIONAL HUMANITARIAN LAW AND AUSTRALIAN LAW

1. International Humanitarian Law as reflected in the four 1949 Geneva Conventions and the two accompanying 1977 Geneva Protocols makes important distinctions between the rights, privileges and immunities of combatants and non-combatants in armed conflicts. These distinctions have become the foundation upon which contemporary international humanitarian law is based and the cornerstone of the protections granted non-combatants.
2. The distinction between combatants and non-combatants have in recent years begun to blur. This has arisen not only through the emergence of mercenaries, but also because of the more active role civilian contractors have begun to play in military forces as a result of an increasing range of core, associated, and non-core military activities and operations being contracted out to the private sector. The blurring of the roles of civilians in armed conflict raise numerous issues for the operation of the Geneva Conventions and Protocols and international humanitarian law more generally. In addition, there are a number of domestic law issues including the capacity of governments to exercise national jurisdiction over contractors serving with military forces in foreign theatres.

The International Law Framework

3. The international law framework is based upon the four 1949 Geneva Conventions and the two additional 1977 Protocols. They are:
 - 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Force (Geneva I)
 - 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II)
 - 1949 Convention Relative to the Treatment of Prisoners of War (Geneva III)
 - 1949 Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV)
 - 1977 Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
 - 1977 Geneva Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Australia is a party of all of the Conventions and Protocols, subject to certain Declarations. There are also a number of other relevant international humanitarian law treaties and conventions, and relevant customary international law principles which govern this area of law.

4. In addition, there are a range of relevant international human rights instruments which may become operative, existing and developing anti-terrorism conventions,

relevant United Nations Security Council Resolutions, and multilateral and bilateral Status of Forces Agreements (SOFA) to which Australia is a party. Some of these international obligations are reflected in Australian municipal law, whilst others operate on a State-to-State basis. Much of this international law framework is overseen by the United Nations, however bodies such as the International Committee for the Red Cross (ICRC) also have a significant monitoring role.

The Status of Civilians in Armed Conflicts

5. The Geneva Conventions and Protocols grant protections to civilians in numerous capacities and situations. For example, Geneva III confers prisoner of war status upon:

“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of armed forces...”

Accordingly, it is clear that contractors accompanying a regular armed force such as the ADF into a military theatre, will be entitled to prisoner of war status. However, not all civilian contractors ‘accompany’ the armed forces. Some, as is clearly the case in Iraq and Afghanistan, have been engaged in the rebuilding effort independently of the work of the armed forces, or may have been engaged to provide private security during a period of recognised occupation under Geneva IV.

6. Protocol I makes clear that “armed forces” consist of “all organized armed forces, groups and units which are under a command responsibility” (Article 43 (1)). It likewise provides that members of “armed forces” are combatants and have “the right to participate directly in hostilities” (Article 43 (2)). As combatants, members of armed forces are importantly entitled to combatant immunity and are not subject to criminal prosecution for acts they undertake as combatants excepting war crimes.
7. The ICRC Commentary to Article 43 makes an important observation in this regard:

“All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of “quasi-combatants”, which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization ... becomes a member of the military and a combatant throughout the duration of the hostilities ... whether or not he is in combat, or for the time being armed.” (ICRC Commentary 515)

This makes clear, that especially under the regime created by Protocol I, persons in a conflict zone are either combatants or non-combatants. Generally, members of armed forces are combatants, unless rendered *hors de combat*. The civilian population are non-combatants and as such are granted extensive protections under both the Geneva Conventions and Protocols. There is no third category of ‘quasi-combatants’ for the purposes of the law.

Armed Civilians and their status under International Law

8. Civilians who are part of an international armed conflict and are armed create challenges for the operation of the Geneva Conventions and Protocols. In an international armed conflict they could be categorised as:
 - a) Non-combatants who whilst accompanying the armed forces are entitled to certain immunities if taken as POWs under Geneva III (Article 4) provided they are armed only for their own self defence
 - b) Privileged combatants who have taken up arms spontaneously to resist invading forces, who respect the laws and customs of war, and are entitled to immunities if taken as POWs under Geneva III (Article 4) (see also Protocol I, Article 44)
 - c) Non-privileged combatants who meet neither of the exceptions noted above and accordingly will be not entitled to POW status if captured nor any combatant immunity
 - d) A mercenary who has no right to be a combatant or a POW (Protocol I, Article 47).
9. While civilians accompanying an armed force will in the majority of circumstances be entitled to claim the status of (a) noted above, the more difficult situation arises for civilian contractors who are not regularly attached to military forces who are armed other than for purposes of personal self defence and who participate in some aspect of an armed conflict. As these persons are in an armed conflict zone for the “pursuit of monetary gain” there is a risk they will be categorised as mercenaries and have no privileges under international humanitarian law. However, for the purposes of Protocol I, Article 47, an important element in such a designation would be whether such persons had been “specially recruited locally or abroad in order to fight in an armed conflict”. This element in the definition of a mercenary would seem to immediately exclude a great many categories of civilian contractors, other than persons contracted specifically to provide security services who will carry light arms. As issue therefore arises as to whether armed and privately contracted security guards may be classified for some purposes as mercenaries. Here an important distinction could be made between recruitment to “fight” in an armed conflict, and recruitment to provide security of a defensive nature in an armed conflict, though in some instances this may prove a difficult distinction to make out.
10. In the case of non-international armed conflicts, it is clear that civilians who directly participate in hostilities do not enjoy the general protections afforded to the civilian population under Part IV of Protocol II (Article 13). Such persons will, however, remain entitled to the fundamental guarantees of humane treatment, especially those who are wounded or sick.
11. Civilians who are armed other than for purposes of self-defence in certain non-international armed conflicts may be considered as terrorists, freedom fighters, or mercenaries and subject to a range of international legal regimes according to their status.

Protections enjoyed by Civilian Contractors and ADF obligations

12. The Geneva Conventions and Protocols make clear the obligations upon State Parties to protect civilians during international and non-international armed conflict. However, the obligations upon Defence Forces towards civilians attached to them in conflict zones is less clear under international law.

13. Of particular relevance is Protocol I, Article 58 which relevantly provides:

The Parties to the conflict shall to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;¹

...

(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations

It should be noted that the intent of Article 58 was to address the obligations of a State Party in its own territory towards its own nationals, or in the case of territory under its control towards the civilian population. However, the terminology of Article 58 is broad enough to extend to situations where civilians accompanying military forces are within conflict zones.

14. The use of the terms “maximum extent feasible” in Article 58 is significant and suggests that elements of military necessity can be factored in when decisions are taken regarding the extent of the protection civilians should be afforded. Here, it has been noted that “a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary” (ICRC Commentary 693). This would suggest that a complete withdrawal of certain individual civilians who are considered essential to the military effort may not be required in all instances. Likewise, the ICRC Commentary also suggests that the obligation of to remove civilians clearly arises “where the risk of attack is greatest” and that protection can extend to the making available of shelters so as to “provide adequate protection against the effects of weapons” (ICRC Commentary 693, 694).

15. It would therefore seem clear that civilians can be deployed in support of military operations where the threat is not high and where they can be protected from any sudden threats which may arise (aerial or missile attack). Consistent with Protocol I, civilians would not be used extensively where the threat of attack is high or they are considered to be ‘at risk’, though there is no complete prohibition on their use nor must the military meet absolute levels of protection for certain individual civilians. Nevertheless, as recent cases such as the December 2004 bombing of US Military Barracks in Iraq demonstrate, even where high levels of protection of civilian employees and contractors can be assumed, in a conflict zone levels of protection can never be absolute.

16. Civilians in non-international armed conflicts enjoy “general protection against the dangers arising from military operations” (Protocol II, Article 13). However, it is clear that protection is not as extensive as that conferred in Protocol I, and there

¹ Geneva IV, Article 49 prohibits individual or mass forcible transfers of protected persons (civilians).

in no specific obligation upon State Parties to protect civilians in certain situations or to remove them from a zone of conflict. The extent of the obligation is:

- That civilians not be the object of attack
- Threats or violence so as to spread terror amongst civilians are prohibited

Civilians will however lose their right of protection “for such time as they take a direct part in hostilities”. The ICRC Commentary notes with respect to this phrase that it “implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.” (ICRC Commentary 1453). An issue of contention is whether this includes “preparation” for hostilities, such as civilian contractors conducting aircraft maintenance. It would seem therefore that certain categories of civilians engaged in the support of military forces would still enjoy the protection of Protocol II, but that others would have an uncertain status. Here it should be noted that the ICRC Commentary contends that “in case of doubt regarding the status of an individual, he is presumed to be a civilian” (ICRC Commentary 1453).

Operation of the Geneva Conventions and Protocols in Conflict Transition Zones

17. Issues arise under the Geneva Conventions and Protocols as to their operation in conflict transition zones which are moving from international armed conflict to a non-international armed conflict. It is clear that the principal protections and obligations of the Geneva Conventions apply to international armed conflict between two or more States [eg. GC I, Art 2; GC II, Art 2]. In addition, Geneva Protocol I extends to include “armed conflicts in which peoples are fighting against colonial domination and alien occupation” which it could be argued extends to the situation which has existed in Iraq since July 2004 given the significant presence of active US and UK military forces.
18. However Common Article 3 of the Geneva Conventions also creates relevant minimum obligations. Areas which are conflict transition zones moving from non-international armed conflict to eventual peaceful existence following cessation of hostilities and restoration of law and order will remain subject to the Geneva Conventions. In particular military forces bound by the Conventions operating in such zones will be subject to:
 - Respecting that persons taking no active part in the hostilities be treated humanely [Common Article 3];
 - Operation of any special agreements made by parties to the conflict [ie. SOFAs operating upon international peacemaking forces];
 - Relevant national laws dealing with discipline and conduct.

Therefore, forces currently operating in Iraq at a minimum are subject to the operation of Common Article 3 of the Geneva Conventions, relevant special agreements operating in Iraq adopted by the Coalition Provisional Authority and/or the interim Iraqi Government that apply to the Multinational Force authorized under relevant UN Security Council Resolutions, and their own relevant national laws which follow those forces wheresoever they operate.

19. In addition, Geneva Protocol II applies to non-international armed conflicts which take place within the territory of a Party “between its armed forces and dissident armed forces or other organized armed groups” [P II, Art. 1 (1)]. Protocol II creates general obligations for humane treatment for persons not taking part in the conflict including the wounded and sick, and for the protection of the civilian population.
20. With particular reference to the situation in Iraq, the current Multinational Force is required under UN Security Council Resolutions 1511 and 1546 to act consistently with international humanitarian law. This obligation extends to all relevant provisions of international humanitarian law applicable by way of treaty, customary international law, and adopted and applied by relevant municipal law either in Iraq or directly upon members of the multinational force by their respective national laws.
21. In Iraq, Coalition Provisional Authority Order Number 17 (27 June 2004) was adopted to apply to the Multinational Force established under UN Security Council Resolution 1511 and 1546. This CPA Order makes express reference to the application of Iraqi law, and seeks to address issues of jurisdiction. The principal elements of the CPA Order regarding the application of law include:
 - That certain civilians attached to the Multinational Force are subject to the exclusive jurisdiction of their Sending States and immune from Iraqi legal process;
 - That the Sending States of Multinational Force Personnel have the exclusive right to exercise criminal and disciplinary jurisdiction over those persons whilst in Iraq;
 - That Contractors including non-Iraqi legal entities or individuals supplying goods or services in Iraq under contract are immune from Iraqi legal process with respect to acts performed under the terms and conditions of their contract.

Importantly, the CPA Order makes clear that Private Security Organizations and their employees are to comply with CPA Orders governing their existence and activities whilst in Iraq, including registration and licensing of weapons and firearms.

22. The situation as it has existed in Iraq for private contractors is therefore one where the contractors are immune from Iraqi law, other than specific orders and measures which seek to regulate certain activities (ie. Private Security Companies). These contractors however do not operate in a legal vacuum, and will be subject to applicable national laws adopted to regulate their extraterritorial activities. Nevertheless, issues will arise as whether all States have adopted relevant laws to regulate the extraterritorial activities of their nationals and corporations.

Status of Forces Agreements and Civilian Contractors

23. Status of Forces Agreements (SOFA) are also relevant in determining the extent of criminal and civil liability of civilian contractors accompanying the ADF on missions external to Australia. A SOFA is normally concluded by Australia on every occasion the ADF sends its forces into foreign territory. In some instances,

standing SOFAs have been created to reflect ongoing ADF operations in foreign territory and these take the form of instruments of treaty status (ie. with New Zealand, Malaysia). In other cases, ad hoc SOFAs are created to deal with a temporary Australian operation in foreign territory (ie. INTERFET operation in East Timor, followed by Australian support for UNTAET). From time to time military forces may also utilize the model UN SOFA, whilst there is also a SOFA for NATO operations.

24. The 1997 Australian/Malaysia SOFA ² creates a criminal and civil law regime for Australian Visiting Forces and accompanying civilian components, described as “civilian personnel accompanying a Visiting Force who are employed in the service of a Visiting Force and who are not stateless persons, nor nationals of, nor ordinarily resident in, the Receiving State” [Article 1]. Whilst the criminal jurisdiction provisions of the SOFA recognise the primacy of the Sending State and establish mechanisms for where concurrent jurisdiction exists, no provision is made for civilian contractors. This is to be contrasted with certain provisions dealing with the purchase of local goods and the employment of local civilians, where express reference is made to contractors of the Government of the Sending State [Annex I, ss. 5, 6]. This SOFA is therefore silent on the general criminal liability of civilian contractors, nor does it completely address the extent of the other legal obligations of contractors engaged to support the Visiting Force.
25. Since 2003, Australia has concluded three Agreements with the Solomon Islands, ³ Nauru ⁴ and Papua New Guinea ⁵ dealing with the operations and status of Australian police and certain members of the ADF whilst in those countries. The Solomon Islands Agreement arising out RAMSI contains provisions which are less detailed than a normal SOFA but does encompass “other personnel” whose names have been notified to the Solomon Islands. Those persons have immunity from legal proceedings in the Solomon Islands, and are instead subject to the jurisdiction of an “Assisting Country” such as Australia (Article 10). The Nauru and Papua New Guinea Agreements include general provisions dealing with the “Status of Other Personnel” who for the purposes of the Agreements may become “Designated Persons” over whom concurrent or exclusive criminal law jurisdiction may be exercised by Australia.

Regulation of Australian-based operators in foreign conflict zones

26. Australian law has the capacity to extend to Australian-based operators in foreign conflict zones on a number of grounds. These extend to jurisdiction based on:

- Nationality

² 1997 Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces [1999] ATS No. 14.

³ 2003 Agreement between the Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security [2003] ATS No. 17.

⁴ 2004 Agreement Between Australia and Nauru Concerning Additional Police and other Assistance to Nauru [2004] ATS No. 21.

⁵ 2004 Joint Agreement on Enhanced Cooperation between Australia and Papua New Guinea [2004] ATS No. 24.

- Universality
 - Conferred jurisdiction of the host State
27. Jurisdiction based on nationality provides Australia with the most extensive reach of Commonwealth law and in theory can apply to any act, matter, thing or event undertaken by an Australian national which occurs in any place beyond the limits of Australia including maritime areas, airspace, and outer space. This jurisdiction can also extend to Australian vessels and aircraft and is consistent with the expanded interpretation given by the High Court of Australia to the Commonwealth's s. 51 (xxix) power over 'external affairs' in the Constitution.
 28. Likewise, the Commonwealth has the capacity to regulate the affairs of Australian corporations whether undertaken within Australia or extraterritorially, though the extent of the capacity to regulate the external activities of non-Australian employees of Australian corporations remains uncertain. The better view would be that they fall beyond the reach of Australian law based on nationality and instead would primarily fall under the jurisdiction of the relevant host State.
 29. Australian law can also operate extraterritorially when it seeks to rely on an exercise of universal jurisdiction consistent with international law. Accordingly, Australia must first find an accepted basis in either treaty law or customary international law to exercise universal jurisdiction (such as that over pirates, war criminals, persons suspected of certain international crimes) and then enact appropriate municipal legislation to create an appropriate offence under Australian law. The general operation of these types of provisions was confirmed by the High Court in *Polyukhovich v. The Commonwealth* (1991) 172 CLR 501.
 30. It may also be possible for Australia to exercise extraterritorial jurisdiction over non-Australian nationals associated with an Australian corporation or the ADF when that jurisdiction has been conferred upon Australia by a host State through legislative enactment or SOFA. Such conferral of legislative capacity may be appropriate in collapsed States or in situations where Australia wishes to retain control and oversight of all aspects of an Australian operation. Such conferral of jurisdiction would seem consistent with the operation of the s. 51 (x) 'defence' power and s. 51 (xxix) 'external affairs' power found in the Constitution.
 31. The Crimes (Foreign Incursions and Recruitment) Act 1978 seeks to primarily target the activities of Australian citizens and persons ordinarily resident in Australia who seek to engage in certain foreign hostile acts. Importantly, the Act goes beyond nationality as a basis of jurisdiction, and creates a category of 'effective' nationality based on "ordinarily resident in Australia" [Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), ss. 6 (2)(a)(ii), 7 (2)(a)(ii)]. The Act also seeks to apply a form of extended territoriality to persons who may have been present in Australia prior to the doing of certain acts but who were in Australia for purposes connected with that act however brief such a stay may have been [Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth), ss. 6 (2)(b), 7 (2)(b)].
 32. The Crimes (Foreign Incursions and Recruitment) Act 1978 therefore provides a model for regulating the extraterritorial activities of Australian citizens, persons resident in Australia, and persons who visit Australia in preparation for certain hostile external activities.

33. Commonwealth law is also expansive enough to regulate the activities of Australian-based operators who seek to export, trade, sell or provide in any manner arms to foreign military forces, insurgency groups, terrorist organisations, or private military forces. Through a combination of the Commonwealth's powers over overseas trade and commerce, corporations, and external affairs (Constitution, ss, 51 (i), (xx), xxix)) a more than adequate constitutional basis would exist for such laws which could purport to operate in a manner similar to the Crimes (Foreign Incursions and Recruitment) Act 1978.

Extraterritorial Operation of the Defence Force Discipline Act

34. The principal Commonwealth statute dealing with military discipline is the Defence Force Discipline Act 1982 (Cth) as amended. The Act creates a voluminous range of military offences and establishes a system of military justice. The Act does not address war crimes.
35. The Act applies within Australia and extraterritorially and specifically extends to a "defence civilian" (s. 9). This is a category of person who:
- with authority accompanies the ADF outside of Australia or on operations against the enemy; and
 - has consented in writing to Defence Force discipline while accompanying the ADF (s. 3).
36. Not all civilians which accompany or support ADF operations extraterritorially will therefore be bound by the Defence Force Discipline Act. Civilian contractors especially, may be exempt from its provisions.

Extraterritorial Operation of the Crimes (Overseas) Act 1964

37. The Crimes (Overseas) Act 1964 (Cth) as amended seeks to extend Australian criminal law jurisdiction to certain categories of persons whilst in foreign countries. If those persons are subject to the operation of the Act, they are subject to the criminal laws of the Jervis Bay Territory enacted by the Commonwealth under its expansive Constitutional power over territories (Constitution, s. 122).
38. The Act applies to a variety of situations, including:
- Actions of Australians in a foreign country who enjoy certain immunities;
 - Australians undertaking tasks or projects in foreign countries under a relevant agreement by which that person is not subject to criminal proceedings in the courts of the foreign country;
39. The apparent operation of the Act is broad enough that it will cover the criminal acts of Australian contractors engaged to support the ADF in external operations, subject to the technical provisions of the Act being met. The extent of potential criminal liability however depends upon the contemporary extent of the criminal law regime of the Jervis Bay Territory.
40. An issue arises as to whether the Act could be further extended to crimes committed by non-Australian contractors of the ADF whilst engaged overseas in support of the ADF. At present, the Crimes (Overseas) Act extends only to

Australian nationals, however the 'incidental' aspect of the s. 51 (x) 'defence' power could permit the Commonwealth to extend the operation of the Act to this class of persons. A further issue is whether such extension of jurisdiction would be permissible under international law. This would partly depend on the nature of the crime (ie. if a war crime has been committed), the position of the host state (the State in which the offence occurred), and the position of the state of nationality of the person subject to prosecution. It would seem possible however to resolve these issues through a combination of jurisdiction being exercised by Australia based on the so-called 'effects' or 'passive personality' doctrine, and through an appropriate SOFA extending to non-Australian nationals operating in the host country.



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