

COMMENT ON AUSTRALIA'S RATIFICATION OF THE 1977 ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS OF 1949

by

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On 21st June 1991 Australia ratified the 1977 Additional Protocols¹ to the Geneva Conventions of 1949² with the Geneva Conventions Amendment Act.³ The Protocols, supplementary to the Four Geneva Conventions, were previously signed during the Diplomatic Conference of 1974-1977.⁴ Since 1977 there have been two attempts to ratify the Protocols, in March and August of 1989, both failing due to Opposition objections. The Protocols were intended to address the deficiencies of the 1949 Conventions and extend protection to the victims of international (Additional Protocol I) and non-international (Additional Protocol II) armed conflicts.

The Protocols developed in response to changes in warfare and scale of conflicts. The collapse of the colonial system and subsequent increase in internal conflicts had highlighted a lacuna in the international laws of war. The Protocols represent an attempt to codify the existing treaty and customary international law relating to the rules of warfare and add new law to govern the conduct of hostilities. The Geneva Conventions did not protect civilians from the effects of war unless they were in the power of the adversary and, with the exception of Common Article 3, did not apply to conflicts of a non-international character.

Whilst Protocol II was ratified without reservation or declaration by the Federal Parliament, Protocol I was subject to considerable discussion. In

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1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949; Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

3 *Geneva Conventions Amendment Act 1991 (Cwth)*. Entering into force 21 December 1991.

4 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1974-1977, Geneva.

addition to the protection of victims of international armed conflicts,⁵ Protocol I applies to wars of national liberation.⁶ The experience afforded by the few international armed conflicts since 1949, particularly the use of incendiary weapons in Vietnam against civilians and the environment, demonstrated the need for limits on means and methods of warfare.

Australia having ratified Protocol I is bound by its provisions during wartime. The paramount concerns include a requirement to direct operations only against military targets, as opposed to civilian objects⁷; to not employ weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering,⁸ and; to not commit reprisals against civilian objects and the environment.⁹

There were three primary objections to ratification of the Protocols. Firstly, with the United States seen as Australia's most likely ally in a conflict situation, their refusal to ratify the Protocols would leave Australia in the position of having to conduct hostilities under different rules.¹⁰ However, as the United States claims that the Protocols embody customary law, this objection may be illusory.¹¹ Secondly, Protocol I has been opposed on the grounds that it 'places an unfair and burdensome restriction upon the ability of our own armed forces to conduct war to their best endeavours'.¹² This objection overlooks the central feature of the Protocols, namely that they were drafted with the full participation of military forces from all nations, including the United States and Australia, '...In fact, virtually the opposite is the case, with Australian military personnel not only actively involved in developing these protocols but also giving their positive endorsement to Australia being one of the first signatories.'¹³ Finally, it has been argued that there is adequate provision already in existence within international law to punish and deter actions contrary to the principles of international humanitarian law. This contention ignores the important additions in the Protocols of an enforcement mechanism, wider protection of civilians and the recognition of non-governmental armed forces. In any case, there can be no justification for not setting coded rules for war,

5 As provided in common article 2 of the Geneva Conventions.

6 Providing that both parties to the conflict have accepted the Protocols (Protocol I Arts.1 and 96).

7 Protocol I Arts. 48, 52 and 57

8 Protocol I Art. 35(2)

9 Protocol I Arts. 52 and 55

10 However, as more than half of the NATO countries have ratified the Protocols, this is in no way a convincing objection, as they functioned under these rules in the Gulf conflict with little difficulty.

11. 'Washington has also warned if Australia ratifies the document the "interoperability" of US and Australian forces...would be at stake.' (Peter Hastings, Sydney Morning Herald, 20 March 1989). The response of Senator Faulkner being 'In other words when the US says jump the Opposition jumps.' (Senate Hansard, 18 February 1991, 749).

12 Senator Bishop, Senate Hansard, 19 February 1991, 794.

13 Senator Cooney, Senate Hansard, 18 February 1991, 737.

as the likely result is a free-for-all on civilians during times of armed conflict.¹⁴

Despite these concerns, Protocol I was accepted with declarations of understanding in relation to Articles 5, 44, and 51 to 58 inclusive.¹⁵ For example, in relation to Articles 51(5)(b) and 57(2)(a)(iii) Australia interpreted 'military advantage' to mean the advantage anticipated from the attack as a whole as opposed to any particular part of that attack.

During peacetime Australia's commitment to the Protocols involves, *inter alia*, preparation to train qualified people (lawyers, military personnel, diplomats, etc.) to enable the application of the Conventions and the Protocols; to establish procedures to ensure new weapons purchased by Australia are not such as to cause superfluous injury or unnecessary suffering; to revise procedures and penalties for wartime criminals, ensuring that they are in keeping with the Protocols; to plan for demilitarised zones to protect civilians; increase dissemination of the Conventions and the Protocols; to ensure correct symbols are prepared for civil defence, and; to not locate military installations near civilian objects or heavily populated areas. The Australian Defence Forces should ensure that military personnel are adequately trained and instructed to maintain proper observance of the Conventions and Protocols during times of armed conflict.

Upon ratification of the 1977 Additional Protocols Australia becomes the 103rd Party to Protocol I and the 93rd Party to Protocol II. This incorporation of the codified laws of war into the domestic sphere signals Australia's commitment to International Humanitarian Law and to the protection of fundamental human rights in times of armed conflict.

14. In the Second World War, there were 50 per cent of casualties in the civilian area; in Korea, 80 per cent; and in Vietnam, 90 per cent' (Senator Coulter, Senate Hansard, 19 February 1991, 796).

15. Such declarations do not alter Australia's obligations under international law, unlike the lodging of a reservation. The Australian 'Government has taken the view that any reservation to the protocol would be incompatible with its objects...' (Senator Hill, Senate Hansard, 18 February 1991, 731).