Belgium and Brazil, Explanations of Vote on Protocol II

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: *VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH)*, Geneva, 1974-1977, Federal Political Dept., Bern, 1978, Annex, p. 76]

A. Belgium

Article 1 of draft Protocol II

This Article 1, concerning the field of application of Protocol II, gives a fairly specific description of a widely prevalent type of non-international armed conflict, without, however, covering all the forms which civil war may take. Indeed, the 1949 negotiators took care in laying down common Article 3 not to define its field of application.

Furthermore, while this Article 1, which develops and supplements common Article 3, does not cover all possible applications of Article 3, neither does it modify the conditions of application. These remain as they stand and are integrated into the Protocol, although the Conference seems to have decided not to try to reaffirm or to develop all the provisions of Article 3 in this instrument. In other words, the entire philosophy of the provisions of common Article 3, whether explicitly reaffirmed or not, is included in the Protocol.

It is implicit that the same applies to the basic sovereign principle that the obligations of the Protocol are equally binding on both Parties to the conflict, and particularly to the provision in Article 3 that an impartial humanitarian body, such as the ICRC, may offer its services to the Parties to the conflict.

The same is true of the obligation in both Parties to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the four Conventions.

B. Brazil

Article 1 of draft Protocol II

When Article 1 was adopted by consensus in Committee I during the second session of the Conference, the Brazilian delegation stated that the conditions laid down in the article to define its material field of application could be recognized only by the Government of the State on whose territory the conflict was allegedly taking place. These were indeed distinctive factors the verification of which could not be a matter either for the dissident armed forces or for third States, in connection with which [...] Article 3 [...] point[s] out clearly the fundamental principle of non-intervention. These motives justified the Brazilian delegation's abstention when the article was voted upon in the plenary Conference.

Discussion

1. a. In which situations does Art. 3 common to the Geneva Conventions apply? When does Protocol II become applicable? (P II, Art. 1) Is its field of application the same as common Art. 3?
   b. Is Belgium's explanation concerning the field of application of common Art. 3 correct? If it was not explicitly reaffirmed, why is Belgium so sure?
   c. Which aspects of common Art. 3 were neither developed nor reaffirmed by Protocol II? Can you imagine why? Are those parts of common Art. 3 still valid? Or have they become obsolete?
   d. What does Belgium mean when it states that the right of the ICRC to offer its services is equally applicable to both sides in a non-international armed conflict? May the ICRC offer its services to only one side? If only one side accepts its services, may the ICRC deploy its activities only on that side? Even if it is the rebel side?
2. a. Who normally determines whether an international treaty is applicable to a State Party? A judge? The State Party concerned?
   b. Who determines the applicability of Protocol II? Do you agree with Brazil that only the government of the State on whose territory the conflict is allegedly taking place may recognize the applicability of Protocol II? Which concerns does such a manner of recognition raise? Does such a manner of recognition exist for the four Conventions or Protocol I? And more specifically for common Art. 3? Why would States find common Art. 3 and Protocol II to be more problematic?
   c. If the decision were again left to the government alone, would this not undermine much of the purpose of Art. 1 of Protocol II, which is to define the elements of armed conflict in such a way that authorities can no longer deny the existence of a conflict?
3. Is Protocol II based on the principle of equality of the parties to the conflict, thus imposing the same duties and granting the same rights on both sides?
4. Does the applicability or application of the IHL of non-international armed conflicts have any effect on the legal status of the parties to the conflict? Has the application of either common Art. 3 or Protocol II been used for the purpose of claiming recognition?