

Switzerland, Qualification of the Conflict in El Salvador

N.B. As per the disclaimer ^[1], 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: *Annuaire Suisse de Droit International*, 1987, pp. 185-187; original in French, unofficial translation.]

Law of Armed Conflicts: Conditions Governing the Application of Protocol II Additional to the 1949 Geneva Conventions (case of El Salvador)

Below we reproduce a note which was drawn up by the Directorate for Public International Law and which relates to the applicability to El Salvador of the Protocol II additional to the Geneva Conventions of August 12, 1949 concerning the protection of victims of war, of

June 8, 1977, and that relating to the protection of victims of non-international armed conflicts.

[Translation:]

1. El Salvador ratified the four 1949 Geneva Conventions on June 17, 1953. It did likewise with respect to the two Additional Protocols on November 23, 1978.

2. The question of whether Additional Protocol II relating to the protection of victims of non-international armed conflicts applies to the conflict between regular Salvadorian troops and the Frente Farabundo Martí Liberación Nacional (FMLN) must be answered in the affirmative. That answer is based on the following factors:

a) Article 1 of Additional Protocol II defines the field of application of the Protocol as follows:

[1.] This Protocol ... shall apply to all armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

[2.] This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, the material field of application of the Protocol is defined by using purely objective criteria. As is the case with the Geneva Conventions, both with regard to

international armed conflicts and non-international armed conflicts such as those referred to in Article 3 common to the four Conventions, where the objective conditions laid down are satisfied application of the Protocol is triggered automatically – the parties to the conflict do not have to carry out an assessment of the situation as it is in the territory of the State in which they are in conflict. A type of criterion of effectiveness applicable to the dissidents – a criterion which will be dealt with below – in particular features among those objective conditions in question.

First, the guerilla movement in El Salvador has a military wing which is composed essentially of five groups (Frente Popular de Liberación Farabundo Martí (FPL), Ejército Revolucionario Popular (ERP), Fuerzas Armadas de la Resistencia Nacional (FARN), and Partido Revolucionario de Trabajadores Centro-Americanos (PRTC)) which are joined together in a grouping known as Frente Farabundo Martí Liberación Nacional (FMLN). It also has a political wing (Frente Democrático Revolucionario, FDR). [...] The various groups are coordinated by bodies of military and political management which ensure collaboration between them. However, it is not possible to talk of the concerted conduct of operations in the sense of the joint preparation and execution of military actions. Nonetheless, it is not necessary to attain such an advanced degree of integration in terms of organisation. The term control exercised over a part of a territory is not easy to apply. In general, it will be noted that the hold of the Salvadorian guerilla movement has weakened over recent years, first because the Salvadorian army has been able to increase its mobility and effectiveness [...], and second on account of political changes. At present the FMLN exercises, over the inhabited rural parts [...] a degree of control which enables it to successfully counter the operations launched by government forces. On the other hand, its own operations carried out with forces equivalent to a company and launched outside those regions, as was still the case a few years ago, have become fewer in number on account of the increased effectiveness of the government forces. Furthermore, in certain regions the

FMLN maintains a level of civil control comparable to that exercised by a State administration (police, schools, the collection of taxes). In conclusion, it may be stated that although the FMLN has been weakened, it continues to control, more or less permanently, just under one quarter of the territory of the country and that control prevents the Salvadorian army entering it without running the risk of being attacked. From a military point of view, it is now possible to talk of a balanced situation.

Furthermore, Article 1 of Protocol II requires that the insurgents be able to implement this Protocol. Therefore, it is necessary to establish, having regard to the actual situation, whether the dissidents are able to implement that instrument. The question of whether or not they do so effectively is of little importance. In the light of the circumstances described above and having regard to the particular characteristics of a war waged by means of guerilla warfare, that question must also be answered in the affirmative because the guerilla movement exercises a level of control over certain parts of the territory which enable it to take care of the sick and wounded, treat prisoners humanely and also comply with the other provisions contained in Article 4 of the Protocol (such as the prohibition on torture, collective punishments, the taking of hostages, acts of terrorism against third parties, and rape). Finally, the parties to that non-international conflict are, on the one hand, the armed forces of El Salvador and, on the other, organised armed forces which have never belonged to the army.

It follows from the foregoing that at present the conditions set out in Article 1 are objectively satisfied. Thus, the FMLN meets the above-mentioned criterion of effectiveness with the result that Additional Protocol II is applicable. That conclusion is borne out by the following factors:

b) The General Assembly, the Economic and Social Council and the United Nations Commission on Human Rights have, on several occasions, been concerned at the

situation in El Salvador and specifically called for compliance with the Geneva Conventions and the two Additional Protocols [...].

c) In 1978 El Salvador was among the first countries to ratify the Additional Protocols at a time when the armed conflict was already under way in its territory. That demonstrates that the Salvadorian Government, for its part, envisaged the application of Protocol II to that conflict.

d) It is known that in 1984 two meetings took place between the Government and the FMLN in the presence of representatives of other States (including Switzerland) who were to guarantee the security of those meetings. The involvement of representatives of third countries is further evidence in support of the applicability to the conflict of Article 1.

e) Finally, mention should be made of the activities of the International Committee of the Red Cross (ICRC). Unlike the situation in other States of Central America, the Committee has easy access to the two parties and can work without any great hindrance.

Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs of January 20, 1986.

Unpublished document.

Discussion

1. Would you qualify the situation in El Salvador as falling within the ambit of Protocol II?
2. a. Which criteria need to be fulfilled in order to qualify a conflict as non-international? Which additional criteria must be met for a non-international

- armed conflict to fall within the ambit of Protocol II?
- b. What are the objective criteria mentioned in Art. 1 of Protocol II, and do they apply to the situation of El Salvador?
 - c. Does the note correctly state that for Protocol II to be applicable, it is sufficient that the insurgents could apply it but need not necessarily actually respect it?
3. Do you accept the conclusion drawn above that the objective criteria have been met?
 4. Do you agree that ratification by El Salvador of Protocol II in 1978, an international presence at meetings between the parties, and the possibility for the ICRC to work freely in El Salvador indicate that Protocol II is applicable? What are the risks of referring to such criteria?
 5. Does Switzerland interfere in the internal affairs of El Salvador by qualifying the conflict in that country? Has Switzerland a legitimate interest in doing so?
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