The Armed Conflict in Chechnya before the Russian Constitutional Court

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I. Introduction

The constitutionality of four decrees of the central government in the prosecution of the Chechen conflict was challenged in the Russian Constitutional Court by a group of deputies of the State Duma and the Federal Council of the Russian Federation (hereinafter RF).[1] Among other things, the applicants argued that two of the decrees at issue, namely those providing for the dispatch of armed forces on the territory of the Chechen Republic,[2] had resulted in a violation of international treaties to which the Russian Federation was a party,[3] and of Article 15, paragraph. 4, of the Constitution, by virtue of which both general and conventional international law shall be part of the Russian legal system.[4]

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1 The acts whose constitutionality was challenged were: (1) the Decree of the President of the RF of 2 November 1993 No. 1833 on the Main Provisions of the Military Doctrine of the Russian Federation; (2) the Decree of the President of the RF of 30 November 1994, No. 2137 on Measures to Restore Constitutional Legality and Law and Order on the Territory of the Chechen Republic; (3) the Decree of the President of the RF of 9 December 1994, No. 2166 on Measures to stop the Activities of Illegal Armed Formations on the Territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict, and (4) the Resolution of the Government of the RF of 9 December 1994, No. 1360 on Ensuring State Security and Territorial Integrity of the Russian Federation, Legality, the Rights and Freedoms of Citizens and Disarmament of Illegal Armed Formations on the Territory of the Chechen Republic and Adjacent Areas of the Northern Caucasus. It must be pointed out that the Federal Council of the Russian Federation disputed the constitutionality of all four decrees at issue, while the group of deputies of the State Duma challenged only two of them; the Presidential Decree of 9 December 1994, No. 2166 and the Resolution of the Government of 9 December 1994, No. 1360.
The Court delivered its decision on 31st July 1995. An unofficial English translation of this judgement has been published by the European Commission for Democracy through Law of the Council of Europe, CDL-INF (96) 1. This paper will refer to that text.

2 The Decree of the President of the RF of 2 November 1993 No. 1833, and the Resolution of the Government of the RF of 9 December 1994 No. 1360.

3 The RF is a party to the 1949 Geneva Conventions. The Soviet Union ratified both the 1977 Additional Protocols on 29 September 1989 to become effective on 29 March 1990. The Russian Federation deposited a notification of continuation on 13 January 1992.

4 Paragraph 4 of this Article states: 'The commonly recognised principles and norms of the international law and the international treaties of the Russian Federation shall be a component part of its

It is not unusual for domestic courts to be called upon to settle cases relating to armed conflict taking place within the territory of a sovereign state. Nevertheless, this decision can be regarded as unique in national case-law, since the Russian Constitutional Court was asked to pronounce upon the lawfulness under international law of *coercive measures by a State against a segment of its own population seeking to secede from the state*. In fact, this could well be the first time a national court has been called upon to scrutinise compliance by a state's armed forces with international rules concerning the protection of civilians and the conduct of hostilities during an armed conflict[5].

This paper will briefly comment upon the determinations of the Court. It will focus in particular on two issues, namely (*i*) whether the Chechen Republic had a right of secession under international law and (*ii*) whether Additional Protocol II of 1977 to the 1949 Geneva Conventions or other rules of international humanitarian law applied to the armed conflict in Chechnya.

II. The Right of the Chechen Republic to Secession

In order to ascertain the constitutionality of the acts under discussion, the Court had to tackle a preliminary question: whether or not, under Russian constitutional law, the Chechen Republic had the right to secede unilaterally from the Russian Federation. Clearly, had the Court found a basis for such a right, the decrees in questions aimed at preventing the Chechen secession could not have been constitutional.

In the event the Court found that:

> [T]he Constitution of the Russian Federation, like the previous Constitution of 1978, does not envisage a unilateral resolution of the issue of changing the status of the subject of the Federation and its secession from the Russian Federation[6]

legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply'. The Russian text as well an official English translation of the Constitution of the Russian Federation can be found in Blaustein, Flanz (eds), *Constitutions of the Countries of the World* (1994), XVI.

5 For some recent cases relating to internal armed conflict see, among others, Dreyfuss & Co. v. Duncan in 82 *ILR* (concerning whether or not damage caused by rebel troops was covered by an insurance policy which did not specifically refer to war risks but merely to riot, social disorder and malicious damage); Echeverria-Hernandez v. Ins, in 95 *ILR* (concerning a request for asylum of a citizen of El Salvador on the grounds that customary international law requires states to grant temporary asylum to refugees fleeing from an internal armed conflict). See also Linder v. Portocarrero, in 99 *ILR* at 55 ff. (concerning a US citizen who resided in Nicaragua and was wounded, tortured and murdered by the Contras while working for the Nicaraguan Government).

6 It must be pointed out that Article 72 of the 1978 Constitution of the Soviet Union provided the right of each Republic to unilateral secession from the USSR. This provision has remained a dead letter (see, among others, A. Cassese, *Self-determination of Peoples: A Legal Appraisal* (1995), 264 ff.). The statement of the Court regarding the absence of a right to unilateral secession under the 1978 Constitution must therefore be taken to be based on a factual assessment rather than a correct legal construction of that constitutional provision.

It went on to say that:

> State integrity is one of the foundations of the Constitutional system of the Russian Federation.

Moreover, in the opinion of the Court:

> [T]he constitutional goal of preserving the integrity of the Russian State accords with the universally recognised principles concerning the right of nations to self-determination.

In this connection, the Court mentioned the first part of the 'saving clause' of the 1970 U.N. Declaration on Friendly Relations to the effect that the right to self-determination should not be construed

> as authorising or encouraging any acts leading to the dismemberment or complete disruption of territorial integrity or political unity of sovereign independent States conducting themselves in compliance with the principle of equal rights and self-determination of people.[7]

It is worth emphasising that the Court deemed it necessary to test the legitimacy of the decrees of the central authorities not only under the Russian constitutional legal order, but also under international law and, in particular, under the principle of self-determination as laid down in the U.N. 1970 Declaration on Friendly Relations.[8] In this it could be argued that the Court misinterpreted the very meaning of the saving clause embodied in the Declaration. This clause does not provide that the right of self-determination leaves unaffected the territorial integrity of any sovereign State. The saving clause provides that the right to territorial integrity applies only to those States 'conducting themselves in compliance with the principle of equal rights and self-determination'. The criteria for establishing whether states have acted in accordance with this principle are spelled out in the last part of the clause: a state should have a government representing the whole people belonging to the territory *without distinction as to race, creed or colour* (emphasis added).[9]

7 *GA Resolution 2625(XXV), 24 October 1970.*

8 A similar approach was taken by the Court in the Tatarstan case, concerning an attempt of the Tatarstan Republic to break away from Russia. The Court examined the constitutionality of this attempt from both an internal and an international point of view. It held that the unilateral secessionist steps of the Tatarstan Republic did not find a basis in the Russian Constitution and that, even if the Republic was entitled to change its political status on the ground of the principle of self-determination, this principle did not necessarily provide a legal basis for separatism. In this regard, the Court in particular underscored that the realisation of the principle of self-determination had to be construed in accordance with the principle of territorial integrity of States and of universal respect for human rights. To support this conclusion, the Court cited many international instruments, such as the 1966 Covenants on Human Rights, the 1970 Declaration on Friendly Relations and the 1975 Helsinki Final Act (see Danilenko, 'The New Russian Constitution and International Law', 88 *AJIL* (1994, 463-464).

9 The saving clause provides that: 'Nothing in the foregoing paragraphs [laying down the principle *of self-determination] shall be construed as authorising or encouraging any action which would* dismember or impair, totally or in part, the territorial integrity or political unity of sovereign states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.

It follows that, under the saving clause, only those states having a 'representative government' which makes no distinction as to race, creed or colour can claim that their right to territorial integrity must not be affected by secessionist groups, since their central governments comply with the principle of self-determination.

What is it meant by 'representative' in the context of the clause under discussion? In other words, when can a secessionist group claim that it is not 'represented' and is consequently entitled to self-determination? According to some commentators, the language of the saving-clause warrants the following conclusions. Firstly, if racial and religious groups living in a sovereign State are denied access to the political decision-making process, they have the right to internal self-determination. Secondly, these groups are also entitled to seek secession (i.e. they have the right to external self-determination) if they face 'extreme and unremitting persecution' and there exists no 'reasonable prospect for a peaceful challenge'.[10]

Whether or not one shares this view, it seems unquestionable that the saving clause has been misconstrued in the judgement under discussion. The Court, rather surprisingly, failed to mention the last part of the saving clause quoted above. In so doing, it avoided the central issue raised by that saving-clause, *i.e.* is the Government of the RF sufficiently representative and not discriminating? Plainly, without some examination of the representative nature of the Russian government the U.N. 1970 Declaration on Friendly Relations could not support the determination of the Court to the effect that the principle of territorial integrity envisaged in the Russian Constitution is in accordance with general international law.[11] In other words, it appears that the Court jumped to a conclusion and simply took it for granted that, under the 1970 Declaration and its saving clause, the Chechen Republic was not entitled to the right to secession on the grounds of the principle of self-determination. Rather paradoxically, the Court would appear to have based its judgment in part on a international instrument providing for the right, under extreme circumstances, to secession of groups living within the territory of sovereign states.

III. The Applicability of Additional Protocol II to the 1949 Geneva Conventions to the Armed Conflict in Chechnya

As mentioned earlier, the applicants argued that two decrees of the central authorities were unconstitutional, contending that *they had resulted* in a violation of article 15 of the Russian Constitution, under which all international law is part of the Rus-

10 See Cassese, *Self Determination of Peoples, supra* note 6, at 112 ff. On the distiction between internal and external self-determination see *ibidem*, 71 ff. and the authors cited at note 6, p. 70 in the same work.

11 The 1970 Declaration could support the statement of the Court only if the latter had established (which it did not) that the Chechen people did not constitute a racial or religious group and that the conditions allowing secession did not exist.

sian domestic legal system.[12] The Court had thus been asked, *inter alia*, to verify whether the military action of the Russian armed forces in Chechnya resulted in, or gave rise to, breaches of international humanitarian law.

The Court refrained from dealing with this matter. It stated that an examination of the actions of the Russian armed forces from the point of view of compliance with international law:

> may not be a subject for consideration by the Constitutional Court of the Russian Federation and ought to be performed by other competent organs.

The Court consequently scrutinised the constitutionality of the decrees by only taking into account their *normative* content and not their *actual* application. The Court found that only one of the challenged acts did not conform to the Russian Constitution,[13] while the other was to be considered in accordance with the Constitution.[14]

12 See Danilenko, *supra* note 8, 464 ff.; Vereschetin, 'New Constitutions and the Old Problem of the Relationship between International Law and National Law', *EJIL* (1996) 29.

13 The Court considered that only some of the measures provided for in the Resolution of the Government of the RF of 9 December 1994, No. 1360, which implemented the laws in force of the RF and the Decree of the President of the RF of 9 December, No. 2166, were not in accordance with the Constitution. More specifically the Court stated that the stipulations of Part V paragraph 1, point 3 of the Resolution 'On the expulsion out of the Chechen Republic of persons who pose a threat to public security and to the personal security of citizens, who do not live on the territory of the said Republic' contradicted both Article 27, Part I (which provides that every person who is lawfully on the territory of the RF has the right to freely move and choose his place of residence), and Article 55, Part III (under which the establishment of restrictions on human rights and freedoms and on the rights and freedoms of a citizen can be established solely by federal law) of the Constitution of the RF. The Court also asserted that Paragraph 2, point 6, of the Resolution at issue, which instructed the provisional information centre under Roskompechat immediately to revoke, in given circumstances, the accreditation of journalists, was not in conformity with Article 29, Parts 4 and 5 (which establish the right to free information), Article 46 (which provides for the judicial protection of rights and freedoms) and, moreover, with the already mentioned Article 55, Part III, of the Constitution of the Russian Federation.

14 It was the Decree of the President of the RF of 9 December 1994, No. 2166 which authorised the Russian Federation Government, in realisation of its constitutional powers, to apply in the territory of the Chechen Republic 'all means at the disposal of the State to ensure State security, legality, citizens' rights and freedoms, public order protection, to combat crime and to disarm all illegal formations. The Court held that in so doing the President of the RF had not exceeded the limits of its constitutional power and, at the same time, had not conferred on the Government any powers to act outside its remit, as had been alleged by one of the two applicants (the Federation Council). In the opinion of the Court, by instructing the Government to use 'all the means at the disposal of the State' the President had indeed proceeded from the assumption that these means had to be in conformity with the powers vested in the Government under the Russian Constitution. Furthermore, the Court underscored that not only the Constitution of the RF and the 1992 federal laws 'On Security' and 'On Defence', but also 'international treaties in which the RF participates' allow for the use of armed forces 'to defend the national unity and territorial integrity of the State'. Indeed, as the Court pointed out, 'taking into account the possibility of such situations, the international community formulates in an additional protocol to the Geneva Conventions of 12 August 1949 (Protocol 2), two rules on the protection of victims of armed non international conflicts'.
As for the remaining two decrees challenged by the Federal Council of the RF, it should be noted that the Court held that they were of such a nature as to warrant the closing of the hearings concerning them.

Although the Court deemed it inappropriate to pronounce on the question of whether the decrees, as applied by the Russian military authorities, were in conflict with Article 15 of the Constitution, nonetheless it was not unresponsive to the issue of actual compliance with international humanitarian law raised by the applicants. The Court determined that at the international level the provisions of Protocol II were binding on both parties to the armed conflict and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia's international obligations under Additional Protocol II to the 1949 Geneva Conventions. Nonetheless, the Court sought to excuse this non-compliance because Protocol II had not been incorporated into the Russian legal system.

It should be noted that states parties to Protocol II tend normally to do their utmost to avoid admitting the applicability of this Protocol to conflicts within their borders. It is therefore surprising that the Court clearly labelled the armed conflict in Chechnya as a civil war fulfilling the conditions required by Article I of Protocol II to the Geneva Conventions, namely as a prolonged internal armed conflict having great intensity. The Court did not specify why in its view the Chechnyan conflict came within the purview of Protocol II. The Court could have categorised the conflict under three other headings: *(i)* as a civil war of short duration and with a low threshold of intensity regulated by common Article 3 of the Geneva Conventions; *(ii)* as an instance of internal disturbance and tension to which no humanitarian international rule would apply;[15] or *(iii)* as a war of national liberation, covered by Protocol I to the Geneva Conventions.[16] It is likely that the long duration and the great intensity of the armed conflict in Chechnya led the Court to refrain from classifying it under the first two categories. As for the possibility of qualifying the conflict as a war of national liberation, the Chechen people could be said to be entitled to the right to secession on the basis of the principle of self-determination.[17] In this case, a liberal construction of art. I para 4 of Protocol I to the Geneva Convention might warrant the conclusion that the armed conflict in Chechnya amounted to a war of national liberation covered by that Protocol.[18] It is a matter of regret that the Court

15 See Art. 1, para. 2, of Additional Protocol II. Of course, human rights standards would apply even to internal disturbances.

16 See Art. 1, para. 4, of Protocol I.

17 Some commentators hold that there exists a right to secession under the principle of self-determination. See especially Turp, 'Le droit de sécession en droit international public', *Canadian Yearbook of International Law* (1984) 24. However this seems to be a minority view. Most commentators argue that no international rule exists which confers a right of secession to groups living in a sovereign State (see, among others, Crawford, *The Creation of States in International Law* (1979) 247 ff.; Quoc Dinh, Daillier, Pellet, *Droit international public*, 4th ed. (1992) 497-499. On this issue, see the decision of the French Conseil Constitutionnel of 9 May 1991, in *Revue française de droit constitutionnel* (1991) 305 ff., as well as the Opinion No. 2 delivered in 1991 by the Badinter Arbitration Committee, in 3 *EJIL* (1992) 183-184. On this last Opinion, see Pellet, 'The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-determination of Peoples', *ibidem*, 178 ff.

18 It has been noted by a distinguished commentator that if the principle of self-determination is taken as a criterion for wars of national liberation, 'these wars would encompass all armed struggles against the denial of self-determination, including those which may take place in plural States'. Bearing this in mind, the author at issue has questioned whether Art. 1, para. 4, of Protocol

did not dwell on this matter and seemed to take it for granted that the conflict in Chechnya was covered by Protocol II.

Another point which deserves to be highlighted is that the Court clearly spelled out that the provisions of Protocol II are binding upon *both* parties to the armed conflict, *i.e.* that the Protocol confers rights and imposes duties also on insurgents. This statement is all the more important if one considers that, at the Geneva Conference, some States expressed the opposite view, for they were eager to keep rebels at the level of criminals without granting them any international status.[19] This view has also found support in the legal literature.[20]

It is important to emphasise the determination by the Court that the Russian Parliament had failed to pass legislation to implement Protocol II, and that this failure was one of the grounds – probably even the primary ground – for non-compliance by Russian military authorities with the rules embodied in the Protocol. It is probably true that the enactment of *ad hoc* legislation to implement Protocol II was necessary even if Article. 15, para. 4, of the Russian Constitution provides that international treaties are part of the Russian domestic legal system: indeed Protocol II cannnot be considered as self-executing in all its provisions.

However, it is fitting to emphasise that the Court altogether ignored the fact that a set of international treaty rules governing internal civil strife have now become part of customary international law.[21] Article 15, para. 4, of the Russian Constitution provides that 'commonly recognised principles and norms of international law' are a component part of the internal legal system. Arguably, these customary rules are self-executing in that they do not need implementing legislation.[22] If this contention is accepted, it follows that such customary rules could and should be applied by

II, which refers only to people fighting against colonial domination, alien occupation and racist régimes, in the exercise of their right to self-determination, should be constructed as limited to these three specific cases of denial of self-determination. This author has concluded that an exstensive construction of that Article whereby the enumeration of the specific types of situations is illustrative and not exhaustive, 'is more in accord with the spirit of the Protocol and the Conventions; for if we proceed from a humanitarian point of view, we have to favour the application to as many conflicts as possible. This has been the systematic policy of the ICRC; and it is through the practice of the ICRC, of international organisations and of States that such a liberal interpretation can progressively consolidate.' Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols', 165 *Recueil des Cours* (1979-IV) 397-398).

19 See Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflict', 30 *ICLQ* (1981) 415.

20 On Protocol II see, among others, Dupuy and Leonetti, 'La notion de conflit armé à caractère non international', in A. Cassese (ed), *The New Humanitarian Law of Armed Conflict*, Volume I, (1979) 272.

21 The customary nature of common Article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in the Nicaragua case (ICJ *Reports* 1986, at 218) and, more recently, by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case (decision of 2 October 1995, No. IT-94-1-AR72) para. 98 ff. In its decision, the Appeals Chamber also held that many of the provisions of Protocol II can be regarded as customary law (*ibidem*, para. 117 ff.)

22 For example, Art. 4 (on fundamental guarantees), Art. 7 (on protection and care), Art. 12 (on distinctive emblem), Art. 13 (on protection of the civilian population), Art. 16 (on protection of cultural objects) of Protocol II could be considered as reflecting customary international law; they could also be regarded as having a self-executing character.

Russian military authorities even in the absence of any national implementing legislation. Strikingly, the Constitutional Court completely ignored the existence of this body of customary rules and principles and focused solely on Protocol II.

IV. Concluding Remarks

In spite of these apparent flaws in the Court's reasoning, its decision must be commended for the strongly internationalist outlook it reflects. The Court has given pride of place to international law, by taking into account international rules and principles in assessing the constitutionality of the challenged decrees. This approach clearly demonstrates that the Court is fully aware of the close interplay between constitutional and international law. The Court proves to be fully conscious that even the highest bodies of the Russian Federation must comply not only with constitutional provisions, but also with international rules whenever such rules impinge upon the conduct of State organs at home or abroad. Under the principle of the rule of law laid down in the Russian Constitution, the Court emphasised that 'the bodies of power in their activities are bound both by internal and international law'.

This laudable approach has manifested itself not only in the various points made by the Court on international law relating directly to the Chechen conflict, but also in two more specific respects. First, the Court has expressly directed the Russian Parliament to implement Protocol II, thus showing how much importance it attaches to actual compliance with that treaty. Secondly, the Court underscored that according to the Russian Constitution and the U.N. Covenant on Civil and Political Rights 'victims of any violations, crimes and abuses of power shall be granted efficient remedies in law and compensation for damages caused'. In this way the Court has established the applicability of these human rights instruments to remedy at least the most blatant violations of international humanitarian law.

This decision thus clearly demonstrates that the Russian Constitutional Court has become an important institution promoting compliance with international law in the Russian legal system.