Chapter 41

The Qualification of Specific Situations as International Armed Conflict*

1 Introduction

To begin with a trite observation: the Second World War has been an international armed conflict, and so were the wars between Iran and Iraq, 1980-1988, and, even more recently, between Eritrea and Ethiopia. There was never any doubt about the qualification of these conflicts: the Second World War was officially declared, and even if the others were not (as may have been the case) they were recognized by all concerned as armed conflicts between States, all of whom were High Contracting Parties to the core conventions on international humanitarian law (or IHL). Clearly, therefore, these cases are of no interest to us. Instead, we may save our time and energy for those situations which in the eyes of some participants and observers qualify as an international armed conflict, whereas others regard them, perhaps, not even as an armed conflict, or as an internal armed conflict at most.

Rather than discuss our subject of qualification in abstract terms, I intend to focus on some actual cases and on the attitudes of the actors involved: governments and other authorities, as well as international agencies and institutions. Three cases did not (yet) become the object of judicial scrutiny: Chechnya, Kosovo, and Guantánamo Bay. Two others were dealt with by judicial bodies: Nicaragua, and Bosnia-Herzegovina. A last situation is a case apart in every respect: it is the "war on terror".

2 Chechnya

Chechnya is one of the many territories that in the course of history were brought under Russian dominance. Like several other of those territories, it also is the theatre of prolonged and cruel armed conflict, with serious violations of applicable rules of IHL being alleged on both sides but without the international community doing much about it. Was there anything Chechnya could do itself?

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One theoretical option was for the authorities to recognize the situation as an internal conflict of the Protocol II type, claim that it was sufficiently virulent to pose a threat to international peace and security, and, on that basis, formally ask for Security Council intervention. Given the Russian veto power, this was indeed a purely theoretical possibility, and it does not seem likely that the Chechen authorities would have spent much time and energy on it.

Another option was for the authorities to claim that the Chechen people were fighting a war of self-determination. On that basis they might have attempted to get the war recognised as an international armed conflict in the terms of Article 1(4) of Protocol I.[1] As set forth in Article 96(3) of the Protocol, this would have required a unilateral declaration of the "authority representing the Chechen people" by which the authority undertook to apply the Conventions and the Protocol. The declaration would have to be addressed to the Swiss government as depositary of the Geneva Conventions and the Protocol, and it would then have the effects spelled out in Article 96.[2]

All of this may be true, and of course, Russia is a party to the Conventions and Protocol I. Yet, the precise language of Article 1(4) makes it very doubtful, to say the least, that a Chechen claim might have succeeded. The war is not against a racist regime, nor does it present a clear-cut case of colonial domination or alien occupation. Given the drafting history of Article 1(4) and the specific reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[3] even a team of particularly brilliant lawyers might have had a hard time concocting a *prima facie* convincing brief. Had they tried and succeeded, that would have represented the first actual application of Article 1(4). In

1 Art. 1(4) refers to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

2 The effects would be the following: (a) the 1949 Conventions and the Protocol would be brought into force for the authority as a party to the conflict, with immediate effect; (b) the authority would assume the same rights and obligations as those assumed by the adverse party; and (c) the Conventions and the Protocol would be equally binding on both parties to the conflict.

3 The Declaration is contained in the Annex to UNGA Res. 2625 (XXV) of 24 Oct. 1970. One of the principles it proclaims is the principle of equal rights and self-determination of peoples. This contains a paragraph cautioning that "[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States … possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."