Part I

The legal nature of war

1 What is war?

I. The definition of war

A. The numerous meanings of war

1. The word 'war' lends itself to manifold uses. It is necessary, at the outset, to differentiate between 'war' as a figure of speech heightening the effect of an oral argument or a news story in the media, and 'war' as a legal term of art. In ordinary conversation, political manifestos, press reports or literary publications, 'war' may appear to be a flexible expression suitable for an allusion to any serious strife, struggle or campaign. Thus, references are frequently made to 'war on terrorism',[1] 'war against the traffic in narcotic drugs', 'class war' or 'war of nerves'. As a rule, this is a matter of poetic licence: the metaphor of war merely serves to convey the gravity of the situation. But the metaphor must not be taken literally, lest it create confusion and incongruities derived from the fact that, in legal parlance, the term 'war' is invested with a special meaning.[2] A metaphorical 'war' may admittedly segue into a real war in the legal sense: this is what happened when Taliban-led Afghanistan gave a haven to Al-Qaeda terrorists responsible for the outrage of 11 September 2001 (9/11) (see *infra* 692).

2. In pursuing the legal meaning of war, a distinction must be drawn between what war signifies in the domestic law of this or that State and what it denotes in international law. War, especially a lengthy one, is likely to have a tremendous impact on the internal legal systems of the Belligerent Parties (namely, the States that take part in the international armed conflict). A decision whether war has commenced at all, is going on, or has ended, produces far-ranging repercussions in many branches of private law, exemplified by frustration of contracts or liability for insurance coverage.[3] Similarly, there are multiple relevant issues arising in public law, such as constitutional 'war powers' (*i.e.* identification of the branch of

[1] See National Addresses by President Bush: 'War against Terrorism', [2001] *Digest of United States Practice in International Law* 856, 857, 859 (S. J. Cummins and D. P. Stewart eds.).
[2] See H. Tigroudja, 'Quel(s) Droit(s) Applicable(s) à la "Guerre au Terrorisme"?', 48 *AFDI* 81, 87–93 (2002).
[3] See Lord McNair and A. D. Watts, *The Legal Effects of War* 156 *et seq*., 259 *et seq*. (4th edn, 1966).

Government juridically competent to engulf the nation in war);[4] the authority to requisition enemy property; tax exemptions allowed to those engaged in military service in wartime;[5] and criminal prosecutions for violations of wartime regulations (spanning a wide range of topics, from trading with the enemy to rationing of scarce commodities). In consequence, domestic judicial decisions pertaining to war are legion. All the same, one must not rush to adduce them as precedents on the international plane. If a domestic tribunal merely construes the term 'war' in the context of the legal system within which it operates, the outcome may not be germane to international law. Even should a judgment rendered by a national court of last resort purport to set out the gist of war in accordance with international law, this need not be regarded as conclusive (except within the ambit of the domestic legal system concerned).

3. Occasionally, domestic courts – dealing, for instance, with insurance litigations – address the question whether war is in progress not from the perspective of the legal system (national or international) as a whole, but simply in order to ascertain what the parties to a specific transaction had in mind.[6] When insurance policies exclude or reduce the liability of the insurer once death results from war, the parties are free to give the term 'war' whatever definition they desire.[7] The definition may be arbitrary and incompatible with international law. Nevertheless, there is no reason why it ought not to govern the contractual relations between the parties.

4. At times, the parties to a private transaction mistakenly believe that a wrong definition of war authentically comports with international law. If a domestic court applies that definition, one must be exceedingly careful in the interpretation of the court's judgment. The dilemma is whether the contours of war, as traced by the court, represent its considered (albeit misconceived) opinion of the substance of international law, or merely reflect the intent of the parties.

5. When we get to international law, we find that there is no binding definition of war stamped with the *imprimatur* of a multilateral treaty in force. What we have is quite a few scholarly attempts to depict the general practice of States and to articulate, in a few choice words, an immensely complex idea. Instead of seeking to compare multitudinous definitions, all abounding with variable pitfalls, it may be useful to take as a point of departure one prominent effort to encapsulate the essence of war. This is the often-quoted definition, which appears in L. Oppenheim's classical treatise on International Law:

[4] See, e.g., D. L. Westerfield, *War Powers: The President, the Congress, and the Question of War passim* (1996).
[5] See W. L. Roberts, 'Litigation Involving "Termination of War"', 43 *Ken.LJ* 195, 209 (1954–5).
[6] *Cf.* L. Breckenridge, 'War Risks', 16 *Har.ILJ* 440, 455 (1975).
[7] See R. W. Young, 'Note', 42 *Mich.LR* 884, 890 (1953–4).

War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.[8]

B. An analysis of Oppenheim's definition of war

6. There are four major constituent elements in Oppenheim's view of war: (i) there has to be a contention between at least two States; (ii) the use of the armed forces of those States is required; (iii) the purpose must be overpowering the enemy (as well as the imposition of peace on the victor's terms); and it may be implied, particularly from the words 'each other', that (iv) both Parties are expected to have symmetrical, although diametrically opposed, goals.

7. It is proposed to examine in turn each of these characteristic features of war. However, it must be borne in mind that when references are made to the prerequisites of war, no attempt is made – as yet – to come to grips with the central issue of the *jus ad bellum*, *viz*. the legality of war. Questions of legality will be raised in subsequent chapters of this book. In the meantime, the only question asked is what conditions have to be fulfilled for a particular course of action to be properly designated 'war'.

(a) Inter-State and intra-State wars

8. Of the four ingredients in Oppenheim's definition of war, only the first can be accepted with no demur. 'One element seems common to all definitions of war. In all definitions it is clearly affirmed that war is a contest between states'.[9] It is indispensable to distinguish between inter-State wars (waged between two or more sovereign States confronting each other) and intra-State armed conflicts – sometimes called, confusingly, 'civil wars' – conducted between two or more parties within a single State (either insurgents revolting against the central Government or organized armed groups fighting each other in the effective absence of a central Government). A non-international armed conflict transcends an internal situation of disturbance and sporadic violence. Indeed, it may amount to 'sustained and concerted military operations', carried out by 'dissident armed forces or other organized armed groups' exercising control over a part of the territory.[10] However, the two definitive features of a non-international armed conflict are that (i) the fighting is taking place within the territory of a single country (although the armed conflict may have spill-over effects in a neighbouring country and perhaps trigger there a parallel non-international armed

[8] L. Oppenheim, II *International Law* 202 (H. Lauterpacht ed., 7th edn, 1952).
[9] C. Eagleton, 'An Attempt to Define War', 291 *Int.Con.* 237, 281 (1933).
[10] The quotations are from Article 1(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), [1977] *UNJY* 135, 136.

conflict); and (ii) no foreign Government is joining the hostilities against the local central Government (but see *infra* 9).[11] Solely armed conflicts in which States are clashing with one another qualify as wars in the full sense of the term in international law, and they will constitute the exclusive object of the inquiry in the present book. Non-international armed conflicts – notwithstanding their frequency and volatility – will not be examined here.

9. It is immaterial whether every Belligerent Party recognizes the enemy's statehood. War may actually be the device through which one State challenges the sovereignty of its opponent. As long as both Belligerent Parties satisfy objective criteria of statehood under international law,[12] any war between them should be characterized as inter-State. Even so, the States involved in an inter-State war must line up on opposing sides. If a non-international armed conflict is raging in Ruritania, and Atlantica assists the central Government of Ruritania in combating those who rise in revolt against it, the domestic upheaval does not turn into an inter-State war (see *infra* 317). In such a case, two States (Ruritania and Atlantica) are entangled in military operations, but since they stand together against the Ruritanian insurgents, the internal nature of the conflict remains intact. Conversely, if Atlantica joins forces with the insurgents, supporting them against the central Government of Ruritania, this is no longer just a 'civil war': it is a fully-fledged war in the sense of international law.

10. The overall armed conflict may have separate inter-State and intra-State strands, inasmuch as some hostilities may be waged exclusively between two (or more) States, whereas others may take place solely between the local central Government and those who rebel against it.[13] As the International Court of Justice enunciated in the *Nicaragua* case of 1986:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[14]

11. A country may simultaneously be engaged in both an intra-State and an inter-State armed conflict, without any built-in linkage between the external and internal foes, although it is only natural for the two disconnected armed conflicts to blend in time into a single war. This is what happened, for instance, in

[11] See *San Remo Manual on the Law of Non-International Armed Conflict* (M. N. Schmitt, C. H. B. Garraway and Y. Dinstein eds., 2006), 36 *IYHR*, Special Supplement, 2 (2006).
[12] For these criteria, see J. Crawford, *The Creation of States in International Law* 37 *et seq*. (2nd edn, 2006).
[13] See C. Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia', 2 *MPYUNL* 97, 118–20 (1998).
[14] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua v. United States), [1986] *ICJ Rep*. 14, 114.

Afghanistan in 2001. The Taliban regime, having fought a longstanding 'civil war' with the Northern Alliance, brought upon itself an inter-State war with an American-led Coalition as a result of providing shelter and support to the Al-Qaeda terrorists who had launched the 9/11 attack against the United States[15] (see *infra* 692–3). But even as the overall character of the armed conflict was transformed from an intra-State to an inter-State war, some specific hostilities continued to be waged exclusively between the domestic foes. Originally, these hostilities were conducted between the Taliban forces in Kabul and the Northern Alliance. After the overthrow of the Taliban regime in Kabul, they were carried out between the newly established Karzai Government and the Taliban insurgents.

12. In practice, the dividing line between inter-State and intra-State armed conflicts cannot always be delineated with a few easy strokes.[16] Thus, if the internal strife in Ruritania culminates in the emergence of a new State of Numidia on a portion of the territory of Ruritania, and the central Government of Ruritania contests the secession, the conflict may be considered by Ruritania to be internal while Numidia (and perhaps the rest of the international community) would look upon it as an inter-State war. Objectively considered, there may be a transition from a 'civil war' to an inter-State war which is hard to pinpoint in time. Yet, at the end of the day the transition may be glaring for all to see. This is particularly the case if the war is terminated by a treaty of peace between Ruritania and Numidia (see *infra* 94): 'Parties to a conflict that were not states at its onset can have attained that status by the time a peace agreement is reached'.[17]

13. The transition from an intra-State into an inter-State armed conflict may be relatively easy to spot if and when foreign States join the fray. Thus, Israel's War of Independence started on 30 November 1947 as a 'civil war' between the Arab and Jewish populations of the British Mandate in Palestine.[18] But on 15 May 1948, upon the declaration of Israel's independence and its invasion by the armies of five sovereign Arab countries, the war became inter-State in character.[19]

14. The disintegration of Yugoslavia exposed to light a more complex situation in which a 'civil war' between diverse ethnic, religious and linguistic groups inside the territory of a single country was converted into an inter-State war as a result of a fragmentation process within what used to be a single State.

[15] See C. Greenwood, 'International Law and the "War against Terrorism"', 78 *Int.Aff.* 301, 309 (2002).
[16] For a horizontal/vertical mixture of international and non-international armed conflicts, see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 26–8 (2nd edn, 2010).
[17] C. Bell, 'Peace Agreements: Their Nature and Legal Status', 100 *AJIL* 373, 380 (2006).
[18] For the facts, see N. Lorch, *The Edge of the Sword: Israel's War of Independence 1947–1949* 46 *et seq*. (2nd edn, 1968).
[19] For the facts, see *ibid*., 166 *et seq*.

The armed conflict in Bosnia may serve as an object lesson. As long as Bosnia constituted an integral part of Yugoslavia, any hostilities raging there among Serbs, Croats and Bosnians clearly amounted to a 'civil war'. However, when Bosnia-Herzegovina emerged from the political ruins of Yugoslavia as an independent country, the armed conflict transmuted into an inter-State war by dint of the cross-border involvement of Serbian (former Yugoslav) armed forces in military operations conducted by Bosnian Serbs rebelling against the Bosnian Government (in an effort to wrest control over large tracts of Bosnian land and merge them into a Greater Serbia). This was the legal position despite the fact that, from the outlook of the participants in the actual combat, very little seemed to have changed. The juridical distinction is embedded in the realignment of sovereignties in the Balkans and the substitution of old administrative boundaries by new international frontiers.

15. In 1997, the Trial Chamber of the ICTY (International Criminal Tribunal for the former Yugoslavia) held in the *Tadić* case that from the beginning of 1992 until May of the same year a state of international armed conflict existed in Bosnia between the forces of the Republic of Bosnia-Herzegovina, on the one hand, and those of the Federal Republic of Yugoslavia (Serbia/Montenegro), on the other.[20] Yet, the majority of the Chamber (Judges Stephen and Vohrah) arrived at the conclusion that, as a result of the withdrawal of Yugoslav troops announced in May 1992, the conflict reverted to being non-international in nature.[21] The Presiding Judge (McDonald) dissented on the ground that the withdrawal was a fiction and that Yugoslavia remained in effective control of the Serb forces in Bosnia.[22] The majority opinion was reversed by the ICTY Appeals Chamber in 1999.[23] The original Trial Chamber's majority opinion had elicited much criticism from scholars;[24] and even before the delivery of the final judgment on appeal, another Trial Chamber of the ICTY took a divergent view in the *Delalić* case of 1998.[25] Still, the essence of the disagreement must be viewed as factual in nature. Legally speaking, the fundamental character of an armed conflict as international or internal can indeed metamorphose – more than once – from one stretch of time to another. Whether at any given temporal framework the war is inter-State in character (or merely a 'civil war') depends on the level of involvement of a foreign State in hostilities waged against the central Government of the local State.

[20] *Prosecutor v. Tadić* (ICTY, Trial Chamber, 1997), 36 *ILM* 908, 922 (1997).
[21] *Ibid*., 933. [22] *Ibid*., 972–3.
[23] *Prosecutor v. Tadić* (ICTY, Appeals Chamber, 1999), 38 *ILM* 1518, 1549 (1999).
[24] See, e.g., T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*'s Fallout', 92 *AJIL* 236–42 (1998).
[25] *Prosecutor v. Delalić et al*. (ICTY, Trial Chamber, 1998), 38 *ILM* 56, 58 (1999).

(b) War in the technical sense and in the material sense

16. The second element in Oppenheim's definition is not uniformly in harmony with the general practice of States. According to Oppenheim, a clash of arms between the Belligerent Parties is of the essence of war. He even underlined that war is a '*contention*, i.e. *a violent struggle through the application of armed force*'.[26] But experience demonstrates that, in reality, there are two different types of war: there is war in the material sense, but there is also war in the technical sense.

17. War in the technical sense commences with a declaration of war (see *infra* 79) and is terminated with a treaty of peace or some other formal step indicating that the war is over (see *infra* 94). The crux of the matter is the taking of formal measures purposed to signify that war is about to break out (or has broken out) and that it has ended. *De facto*, the armed forces of the Parties may not engage in fighting even once in the interval. As an illustration, not a single shot was exchanged in anger between a number of Allied States (particularly in Latin America) and Germany in either World War.[27] Nevertheless, *de jure*, by virtue of the issuance of declarations of war, those countries were in a state of war in the technical sense.

18. Until a formal step is taken to bring it to a close, a state of war may produce certain legal and practical effects as regards, for example, the internment of nationals of the enemy State and the sequestration of their property, irrespective of the total absence of hostilities.[28] It can scarcely be denied, either in theory or in practice, that '[a] state of war may exist without active hostilities' (just as 'active hostilities may exist without a state of war', a point that will be analyzed *infra* 44–5).[29] Oppenheim's narrow definition must be broadened to accommodate a state of war that is not combined with any fighting.

19. War in the material sense unfolds regardless of any formal steps. Its occurrence is contingent only on the eruption of comprehensive hostilities between the Belligerent Parties, even in the absence of a declaration of war. This is where Oppenheim's reference to a violent struggle is completely apposite. The decisive factor here is deeds rather than declarations. What counts is not a *de jure* state of war, but *de facto* combat. Granted, even in the course of war in the material sense, hostilities do not have to go on incessantly and they may be interspersed by periods of cease-fire (see *infra* 138–9). But there is no war in the material sense without some acts of warfare.

20. Warfare means the use of armed force, namely, violence. Breaking off diplomatic relations with a State, or withdrawing recognition from it, does not

[26] Oppenheim, *supra* note 8, at 202.
[27] See J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes – and War – Law* 306 (2nd edn, 1959).
[28] See L. Kotzsch, *The Concept of War in Contemporary History and International Law* 248–9 (1956).
[29] See Q. Wright, 'When Does War Exist?', 26 *AJIL* 362, 363 (1932).

suffice. An economic boycott or a psychological pressure is not enough. A 'cold war', threats to use force, or even a declaration of war (unaccompanied by acts of violence), do not warrant the conclusion that war in the material sense exists. It is indispensable that violence will occur.

21. The setting of a foreign State's intervention in support of insurgents in rebellion against a central Government (see *supra* 9) raises some perplexing questions. What degree of the foreign intervention would bring about a state of war in the material sense? It appears that the mere supply of arms by a foreign State to the insurgents (epitomized by American equipment of fighters resisting the Soviet-backed Government in Afghanistan in the 1980s) does not qualify as an actual use of armed force (see *infra* 585). But there comes a point – for instance, when weapons are accompanied by instructors training the rebels – at which the foreign State is deemed to be waging warfare against the local Government.[30]

22. The *jus in bello* – governing the conduct of hostilities in the course of an international armed conflict – is brought into operation as soon as war in the material sense is embarked upon, despite the absence of a technical state of war. This principle is articulated in Article 2 common to the four 1949 Geneva Conventions for the Protection of War Victims:

> [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.[31]

A similar provision appears in Article 18(1) of the 1954 Hague Cultural Property Convention.[32] Of course, if a state of war exists in the technical sense only – and no hostilities are taking place – the issue of the application of the *jus in bello* rarely emerges in practice.[33]

[30] It is noteworthy that a breach of neutrality occurs when military advisers are assigned to the armed forces of one of the Belligerent Parties in an ongoing inter-State war (see *infra* 71).

[31] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 *UNTS* 31, 32; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *ibid*., 85, 86; Geneva Convention (III) Relative to the Treatment of Prisoners of War, *ibid*., 135, 136; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, *ibid*., 287, 288.

[32] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, 249 *UNTS* 240, 254.

[33] In some extreme instances, even when the state of war exists only in a technical sense, a Belligerent Party may still be in breach of the *jus in bello*. Thus, the mere issuance of a threat to an adversary that hostilities would be conducted on the basis of a 'no quarter' policy constitutes a violation of Article 40 of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, [1977] *UNJY* 95, 110. *Cf.* Article 23(d) of the Hague Regulations Respecting the Laws and Customs of War on Land (Annexed to Hague Convention (II) of 1899 and (IV) of 1907), *Hague Conventions* 100, 107, 116.