Part I

The Legal Nature of War

1 Armed Conflict, War and Neutrality

I. Armed Conflict and War

1. The existence of an armed conflict is premised on the use of force between two or more organized parties. An armed conflict can be international (inter-State) or non-international (intra-State) in nature. This book deals exclusively with the former, and a companion volume covers the latter.[1]

2. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) pronounced in 1995, in the seminal *Tadić* case, an international armed conflict takes place 'whenever there is resort to armed force between States'.[2] This terse statement of the law contains three interlinked elements. First, there must be resort to armed force (although, as we shall see *infra* 24–5, in some exceptional war situations there is no actual use of force). Second, States – in the plural, *i.e.* two or more – must be involved in the armed clash. Third, and most significantly, the military confrontation must be between those States. In other words, for an international armed conflict to arise, two or more States must employ force against each other. No international armed conflict can come into being if, and as long as, States (in the plural) are engaged in hostilities against non-State actors. Such hostilities produce an armed conflict, but the conflict is non-international in character.

3. An international armed conflict can be a major event, amounting to a fully fledged war (to be defined *infra* 7 *et seq*.). It may equally be a 'short-lived or minor' episode.[3] A closed incident of the latter type – not crossing the threshold of war – is usually categorized as 'short of war'. This occurs quite often in the relations between States. Border patrols of neighbouring countries may exchange fire; naval units may attack vessels flying another flag; interceptor

[1] Y. Dinstein, *Non-International Armed Conflicts in International Law* (2014).
[2] *Prosecutor v. Tadić* (Decision on Jurisdiction) (ICTY, Appeals Chamber, 1995), 35 *ILM* 35, 54 (1996).
[3] See L. R. Blank and B. R. Farley, 'Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post-9/11 World', 36 *Mich.JIL* 467, 474 (2014–15). For a recent illustration, see *ibid.*, 475.

planes may shoot down aircraft belonging to another State; and so forth. The reasons for 'short of war' incidents vary. They may be caused by trigger-happy junior officers acting on their own initiative; they may be engendered by simmering tensions between the two countries; and they may be the fallout of an open dispute revolving around control over a strategically or economically important area (traversed by a vital line of communication; containing a ridge of mountains or a waterway deemed a 'natural border'; possessed with subterranean oil or gas deposits, etc.).

4. Perhaps the most appropriate way to demarcate the line of division between wars and incidents 'short of war' is to evaluate the 'character, gravity and scale' of the international armed conflict (cf. the formula coined in Kampala in the context of the crime of aggression, *infra* 381). But whatever formula is employed, it must necessarily be generic and therefore somewhat vague. In a concrete setting, there is often room for discord as regards the proper classification of a given military confrontation between States. Hence, the contemporary practice indicates a preference – whenever possible – to allude to international armed conflicts in a holistic manner, without adverting *eo nomine* either to wars or to incidents 'short of war'.

5. The semantic evolution from 'war' to 'international armed conflict' stands out when one compares the titles of the following key treaties:

(i) Hague Convention (IV) of 1907 – originally Hague Convention (II) of 1899 – on the Laws and Customs of War on Land (and the Regulations annexed thereto).[4]
(ii) The four Geneva Conventions of 1949 for the Protection of War Victims.[5]
(iii) The two Additional Protocols of 1977 – complementing the Geneva Conventions – one relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I),[6] and the other to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).[7]

This semantic trend is not inexorable. Conspicuously, in 2015, when the United States Department of Defense produced for the first time a joint military manual for all American armed services, the title chosen was *Law of War*

[4] Hague Convention (II) with Respect to the Laws and Customs of War on Land and Hague Convention (IV) Concerning the Laws and Customs of War on Land, *Hague Peace Conferences* at 207; Annexed Regulations Respecting the Laws and Customs of War on Land, *ibid*., 219.
[5] Geneva Conventions for the Protection of War Victims, 1949, 75 *UNTS* 2.
[6] 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.
[7] 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, [1977] *UNJY* 135.

Manual.[8] There can be little doubt that the terminology of war is far from *passé* even in this day and age.

II. The *Jus ad Bellum* and the *Jus in Bello*

6. The law of international armed conflict is subdivided into two main parts: *jus ad bellum* (dealing principally with the legality of war) and *jus in bello* (governing the conduct of hostilities in warfare). In the words of Judge C. G. Weeramantry, in his Dissenting Opinion in the 1996 Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, 'while the *jus ad bellum* only opens the door to the use of force (in self-defence or by the Security Council), whoever enters that door must function subject to the *jus in bello*'.[9] Despite the linguistic linkage in both Latin expressions to *bellum* (*i.e.* war), incidents 'short of war' are also covered by both the *jus ad bellum* and the *jus in bello*. The contemporary *jus ad bellum* addresses the legality of any use of inter-State force (see *infra* 243), and the *jus in bello* regulates all inter-State hostilities. The present book is confined to the *jus ad bellum*, and a companion volume covers the *jus in bello*.[10]

III. The Definition of War

A. The Numerous Meanings of War

7. 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 trope suitable for an allusion to any serious strife, struggle or campaign. Thus, references are frequently made to 'war on terrorism',[11] '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.[12]

[8] United States Department of Defense, *Law of War Manual* (2015).
[9] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, [1996] *ICJ Rep*. 226, 519.
[10] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, 2016).
[11] 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.).
[12] See H. Tigroudja, 'Quel(s) Droit(s) Applicable(s) à la "Guerre au Terrorisme"?', 48 *AFDI* 81, 87–93 (2002).

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* 639).

8. 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 does 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.[13] Similarly, there are multiple relevant issues arising in public law, such as constitutional 'war powers' (*i.e.* identification of the branch of Government juridically competent to engulf the nation in war);[14] the authority to requisition enemy property; tax exemptions allowed to those engaged in military service in wartime;[15] 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 domestic 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).

9. 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.[16] 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.[17] The definition may be arbitrary and incompatible with international law. Still, there is no reason why it ought not to govern the contractual relations between the parties.

[13] See Lord McNair and A. D. Watts, *The Legal Effects of War* 156 *et seq*., 259 *et seq.* (4th edn, 1966).
[14] See, e.g., D. L. Westerfield, *War Powers: The President, the Congress, and the Question of War, passim* (1996).
[15] See W. L. Roberts, 'Litigation Involving "Termination of War"', 43 *Ken.LJ* 195, 209 (1954–5).
[16] Cf. L. Breckenridge, 'War Risks', 16 *Har.ILJ* 440, 455 (1975).
[17] See R. W. Young, 'Note', 42 *Mich.LR* 884, 890 (1953–4).

10. 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.

11. 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 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:

> 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.[18]

B. An Analysis of Oppenheim's Definition of War

12. 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.

13. 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, we shall inquire solely into the conditions that have to be fulfilled for a particular course of action to be properly designated 'war'.

(a) Inter-State and Intra-State Armed Conflicts

14. 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

[18] L. Oppenheim, II *International Law* 202 (H. Lauterpacht ed., 7th edn, 1952).

of war. In all definitions it is clearly affirmed that war is a contest between states'.[19] In other words, war is the archetypical manifestation of international armed conflicts. It is true that non-international armed conflicts are often called (rather confusingly) 'civil wars'. Yet, in strict international legal terminology, all wars are inter-State in character (waged between two or more sovereign States confronting each other).

15. When Atlantica (a foreign State) enters the fray in a non-international armed conflict raging within Ruritania, the classification of the armed conflict is a corollary of the identity of the adversary.[20] In an inter-State (international) armed conflict, the Belligerent Parties are pitted on opposing sides (see *supra* 2). As long as Atlantica is refraining from a military clash with the incumbent Government of Ruritania, the non-international nature of the conflict remains intact.[21] Usually, this would mean that Atlantica is aligned with the Government of Ruritania (acting at the latter's request) in opposing insurgents who rise against the incumbent regime. However, as the massive foreign intervention in the Syrian armed conflict demonstrates, Atlantica may fight non-State actors within Ruritania without leave from the Ruritanian Government.[22] The Syrian armed conflict includes two closed inter-State incidents (in 2017) in which the United States struck a Syrian Government airfield, in retaliation for the use of chemical weapons against civilians, and shot down a Syrian military aircraft. But otherwise the United States and its allies have done whatever they could to avoid a military confrontation with the Damascus regime. As long as Atlantica and Ruritania do not intentionally get entangled in military operations against one another, the armed conflict does not acquire inter-State dimensions. By contrast, should Atlantica join the insurgents in the fight against the Government of Ruritania, the nature of the hostilities would transform from a non-international into an international armed conflict.

16. A related question is: what degree of a foreign State's intervention in a non-international armed conflict – in support of the insurgents – would transform the hostilities into an inter-State armed conflict? An intriguing case was that of the armed conflict in Eastern Ukraine in 2014/15. Its fuse was an insurgency by Russian-speaking separatists in the Donbas region, seeking to secede from Ukraine and join Russia. The insurgents were supplied by Russia

[19] C. Eagleton, 'An Attempt to Define War', 291 *Int.Con.* 237, 281 (1933).
[20] On foreign intervention in a non-international armed conflict, see in detail Dinstein, *supra* note 1, at 76–86.
[21] See D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', *International Law and the Classification of Conflicts* 32, 62 (E. Wilmshurst ed., 2012).
[22] As we shall see *infra* 847, the foreign military intervention in Syria by the United States against the so-called Islamic State is linked to the construct of 'extra-territorial law enforcement'. Attempts have been made to explain on other legal grounds why the Syrian armed conflict is non-international in character notwithstanding foreign intervention in Syria without the consent of its Government. But such attempts are fraught with difficulties. For an example, see T. D. Gill, 'Classifying the Conflict in Syria', 92 *ILS* 353, 366–77 (2016).

with heavy armaments (including tanks and artillery), and there were numerous indications of both direct and indirect participation of Russian troops in the fighting. We shall address separately (*infra* 623) the topic of supply of arms by Atlantica to the Ruritanian insurgents. But, even if the provision of arms *per se* did not alter the legal equation in Ukraine, Russian troops' engagement in the hostilities tipped the scales in turning the conflict from an internal strife into an inter-State war with Ukraine.

17. It is immaterial whether every Belligerent Party taking part in war recognizes the statehood of the enemy. War may actually be a device through which one State challenges the sovereignty of its opponent. Provided that Belligerent Parties on both sides satisfy objective criteria of statehood under international law (cf. *infra* 271), any war between them has to be characterized as inter-State.

18. Some armed conflicts are intricately embroidered with separate inter-State and intra-State strands, inasmuch as some hostilities are waged exclusively between two (or more) States, whereas others take place solely between an incumbent Government and those who rebel against it.[23] 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.[24]

19. 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 imbroglio. This is what happened, for instance, in Afghanistan in 2001. The Taliban regime, having fought a long-standing non-international armed conflict 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[25] (see *infra* 639). But even as the overall character of the armed conflict was transmuted, some specific hostilities continued to be waged exclusively between domestic foes (thereby constituting an intra-State strife), while others amounted to an inter-State war. As for the non-international armed conflict, originally the hostilities were conducted between

[23] See C. Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia', 2 *MPYUNL* 97, 118–20 (1998).

[24] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (Nicaragua v. United States), [1986] *ICJ Rep.* 14, 114.

[25] See C. Greenwood, 'International Law and the "War against Terrorism"', 78 *Int.Aff.* 301, 309 (2002).

the Taliban Government in Kabul and the Northern Alliance insurgents. After the overthrow of the Taliban regime in Kabul, the fighting was carried out between a newly formed Afghan Government and the Taliban insurgents.

20. In practice, the dividing line between inter-State and intra-State armed conflicts cannot always be delineated with a few easy strokes.[26] Thus, if the internal strife in Ruritania culminates in the emergence of a new State of Numidia on a portion of the Ruritanian territory, and the incumbent Government of Ruritania forcibly contests the secession, the armed conflict may be subjectively considered by Ruritania to be internal while Numidia would look upon it as an inter-State war. Objectively considered, there may be an eventual transition from a non-international armed conflict to an inter-State war. For a while, at least, the moment of transition may be hard to pinpoint. However, at the end of the day, the inter-State nature of the armed conflict 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* 99 *et seq*.). 'Parties to a conflict that were not states at its onset can have attained that status by the time a peace agreement is reached.'[27]

21. The transformation from an intra-State into an inter-State armed conflict may be relatively easy to spot if and when foreign States join the fray. For example, Israel's War of Independence started on 30 November 1947 as a non-international armed conflict between the Arab and Jewish populations in the fading days of the British Mandate in Palestine.[28] 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.[29]

22. The disintegration of Yugoslavia exposed to light a more complex situation in which a non-international armed conflict between diverse ethnic, religious and linguistic groups was converted into an inter-State war as a result of a fragmentation process within what used to be a single State. 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 non-international armed conflict. However, when Bosnia-Herzegovina emerged from the political ruins of Yugoslavia as an independent country, the armed conflict mutated 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

[26] For a horizontal/vertical mixture of international and non-international armed conflicts, see Y. Dinstein, *supra* note 10, at 35–6.
[27] C. Bell, 'Peace Agreements: Their Nature and Legal Status', 100 *AJIL* 373, 380 (2006).
[28] For the facts, see N. Lorch, *The Edge of the Sword: Israel's War of Independence 1947–1949* 46 *et seq*. (2nd edn, 1968).
[29] For the facts, see *ibid.*, 166 *et seq*.

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 with new international frontiers.

23. 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.[30] Yet, the majority of the Chamber (Judges N. Stephen and L. C. 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.[31] The Presiding Judge (G. K. McDonald) dissented on the ground that the withdrawal was a fiction and that Yugoslavia remained in effective control of the Serb forces in Bosnia.[32] The majority opinion was reversed by the ICTY Appeals Chamber in 1999.[33] The original Trial Chamber's majority opinion had elicited much criticism from scholars;[34] 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.[35] 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 non-international armed conflict) depends on the level of involvement of a foreign State in hostilities waged against the Government of the local State.

(b) War in the Material and in the Purely Technical Sense

24. 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*'.[36] As noted (*supra* 2), a similar definition of war was set out in the *Tadić* case. This is an accurate description of war in its typical,

[30] *Prosecutor v. Tadić* (ICTY, Trial Chamber, 1997), 36 *ILM* 908, 922 (1997). [31] *Ibid.*, 933.
[32] *Ibid.*, 972–3.
[33] *Prosecutor v. Tadić* (ICTY, Appeals Chamber, 1999), 38 *ILM* 1518, 1549 (1999).
[34] See, e.g., T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua*'s Fallout', 92 *AJIL* 236–42 (1998).
[35] *Prosecutor v. Delalić et al*. (ICTY, Trial Chamber, 1998), 38 *ILM* 56, 58 (1999).
[36] Oppenheim, *supra* note 18, at 202.