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Introduction

In a distant land, tensions are brewing. After long years of suffering under a military regime described by many as despotic, racist, and corrupt, the opposing factions have finally united and risen up to depose the hated government. Under the banner of national liberation and supported by much of the population, the insurgents quickly consolidate control over a large part of the territory. However, after the initial shock at the opposition's rapid progress, the government armed forces soon mount a powerful counteroffensive. And then, as the fighting stalls, the rebels' morale receives a sudden boost when several neighbouring countries issue public declarations of support. Some even pad their words with wads of cash. However, not all neighbours are equally supportive. One country makes a statement that because the conflict has now reached the level of a 'true civil war', strict neutrality must be observed in dealings with all belligerents. Another sends in its troops, stripped of their official insignia, to assist the embattled government. Refugees are now fleeing the country by the tens of thousands, further destabilizing the region. Meanwhile, the rebel leadership, keen not to lose the momentum and the popular support it now enjoys in parts of the country, declares an independent republic there. As the hostilities continue, gradually, a sizable proportion of the international community recognize the nascent state. However, the actual control over territory continues to shift over time, with the erstwhile rebels establishing authority over several areas outside their new state, and vice versa. Hundreds of enemy fighters are captured and held by both sides. The end of conflict is nowhere in sight.

If this factual pattern sounds more than faintly familiar, it is because parts of it play out around the world at almost all times. It is true that most armed confrontations, like this hypothetical example, begin as internal conflicts.¹ However, in a world defined by the twin forces of globalization and fragmentation,² virtually no armed conflict remains confined to the territory of one state, free from foreign involvement. This holds true for nearly all major conflicts that have shaped the post-Cold War era: ex-Yugoslavia, Rwanda, Afghanistan, Iraq, Libya, Syria, Yemen, and so on. As this book goes to press, the armed conflict in eastern Ukraine continues

¹ M Allansson, E Melander, and L Themnér, 'Organized violence, 1989–2016' (2017) 54 Journal of Peace Research 574, 576.

² See generally I Clark, *Globalization and Fragmentation: International Relations in the Twentieth Century* (OUP 1997).

to simmer, with conflicting claims made by both sides as to the extent of Russian involvement in the fighting.³

This is not a book about any of these conflicts, and yet it is a book about all of them. Each of them illustrates, albeit in differing ways, that an originally internal conflict may change and evolve, acquiring gradually additional elements of international character. Such developments have profound implications for the application of international law to these situations. This is because international humanitarian law (IHL), as the branch of international law that regulates armed conflict, is based on a persisting bifurcation between international armed conflicts (IACs) and non-international armed conflicts (NIACs).⁴ Each of these legal categories is governed by a different legal framework, and traditionally the regulation of the former has been much more comprehensive than the regulation of the latter.⁵ Although the last few decades have seen a progressive trend of convergence between the two, the distinction between IACs and NIACs is here to stay. It is therefore essential to understand at what point a NIAC transforms into an IAC and what consequences that transformation brings from the legal point of view.

And that is the focus of this book. Rather than examining the nature of specific conflict situations at a given *static* point in time, it adopts a *dynamic* lens for its scrutiny. Accordingly, it searches for the tipping points that may convert NIACs into IACs. On that basis, the book argues for a specific conceptualization of internationalized armed conflict in international law. Such conflicts are understood here as *prima facie* NIACs, the legal nature of which has transformed, with the effect that the law of IAC becomes applicable to them.⁶ However, the intra-state origin of such conflicts provides for an uneasy match with many of the precepts of the law of IAC, which has historically evolved as a regulatory framework for inter-state wars. Of those, the regulation of combatancy and the law of belligerent occupation are where the principal legal questions lie and which will be examined in depth in this book.

³ Compare, eg, Russia, Remarks by Deputy Permanent Representative of the Russian Federation to the OSCE Dmitry Balakin on the situation in Ukraine (7 November 2017) <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2939398> (referring to the situation as to 'the internal Ukrainian conflict') and Russia, Comment by Foreign Ministry Spokesperson Maria Zakharova (14 December 2017) <www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2990728> (describing the anti-government forces as 'the Donbass self-defence forces'), with Ukraine, Statement of the Ministry of Foreign Affairs of Ukraine on Escalation in Donbas (21 July 2017) <<http://mfa.gov.ua/en/press-center/comments/7576-zajava-mzs-ukrajini-shhodo-zagostrennya-situaciji-na-donbasi>> (referring to the situation as to 'Russia-instigated international armed conflict') and Ukraine, Statement on 'Russia's ongoing aggression against Ukraine and illegal occupation of Crimea' (14 December 2017) <<http://mfa.gov.ua/en/press-center/news/61906-statement-on-russias-ongoing-aggression-against-ukraine-and-illegal-occupation-of-crimea>> (protesting against 'Russia's presence as an invasion force in Donbas').

⁴ The distinction between IACs and NIACs is discussed further in Section 1.2.

⁵ E Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 2; S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 1; L Hill-Cawthorne, *Detention in Non-International Armed Conflict* (OUP 2016) 1.

⁶ The notion of internationalization is discussed further in Section 1.3.

1.1 Research Overview

1.1.1 Aim, objectives, and scope

The aim of this book is to provide a comprehensive examination of the notion, process, and effects of internationalization of armed conflicts in international law. In achieving that aim, this research project has been guided by three primary objectives: (1) to set forth a clear, reasoned, and practical conceptualization of conflict internationalization; (2) to comprehensively identify the existing forms of conflict internationalization in contemporary international law; and (3) to establish how the law of armed conflict applies to conflicts that have been internationalized in this sense. Together, the fulfilment of these objectives should confirm the continuing relevance of the concept of internationalized armed conflicts for the theory and practice of international law.

A few remarks should be made regarding the scope of enquiry of the present work. First and foremost, this book does not purport to exhaust all legal questions concerning conflict internationalization. Rather, its focus and methodological approach is grounded in the discipline of public international law. In particular, that means that the enquiry is not into standards for conflict qualification under domestic laws, nor into the domestic regulation of military operations that may qualify as internationalized armed conflicts. To the extent that the analysis refers to such materials (for instance, domestic military manuals or amnesty laws issued by various states), it is only with the aim of assessing their relevance for the international legal rules governing the situations within the scope of this study.

Secondly, the book examines conflict internationalization from the viewpoint of IHL (also referred to as the law of armed conflict throughout the text). Accordingly, the enquiry is restricted to the law applicable in armed conflicts (*jus in bello*) and excludes questions of the lawfulness of the use of force (*jus ad bellum*).⁷ Moreover, the study touches only incidentally on the related areas of international human rights law (IHRL) and international criminal law (ICL). It is important to note that IHRL

⁷ The literature on the distinction between *jus in bello* and *jus ad bellum* is vast; see, eg, H Lauterpacht, 'The Limits of the Operation of the Law of War' (1953) 30 BYBIL 206; C Greenwood, 'The Relationship between *Jus ad Bellum* and *Jus in Bello*' (1983) 9 Review of International Studies 221; R Kolb, 'Origin of the Twin Terms *Jus ad Bellum*/*Jus in Bello*' (1997) 37 IRRC 553; J Martinez et al, 'The Relationship between *Jus ad Bellum* and *Jus in Bello*: Past, Present, Future' (2006) 100 ASIL Proceedings 109, 109–24 (proceedings from a panel discussion); A Orakhelashvili, 'Overlap and Convergence: The Interaction Between *Jus ad Bellum* and *Jus in Bello*' (2007) 12 JCSL 157; J Moussa, 'Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 IRRC 963; RD Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 34 YJIL 47; K Okimoto, *The Distinction and Relationship between Jus ad Bellum and Jus in Bello* (Hart 2011); JHH Weiler and A Dushman, 'Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between *Jus ad Bellum* and *Jus in Bello*' (2013) 24 EJIL 25; K Okimoto, 'The Relationship between *Jus Ad Bellum* and *Jus In Bello*' in M Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 1209–23.

does not cease to operate in times of armed conflict⁸ and it may thus provide additional protection to victims of internationalized armed conflicts, although the exact relationship between IHL and IHRL remains subject to ongoing debate.⁹ For its part, ICL primarily contributes to the enforcement of IHL by criminalizing serious violations of IHL.¹⁰ Additionally, international criminal tribunals have refined and developed IHL by applying the rules relevant to cases involving such violations.¹¹ Although the present study recognizes these important overlaps, it looks to IHRL and ICL only to the extent that these bodies of law bear upon the correct understanding of the rules of IHL applicable to conflict internationalization.

Thirdly, within IHL, the focus of the enquiry is on (1) the rules governing conflict qualification, and (2) the regulation of combatancy and belligerent occupation. The former are, in a way, meta-rules of IHL, determining which legal framework (or part thereof) applies to a particular situation. Accordingly, the book examines those rules to identify the specific modalities of conflict transformation. The enquiry then turns to the latter sets of rules in its analysis of the effects of internationalization. This is because combatancy and belligerent occupation are widely accepted as the two main areas of crucial difference between the law of IAC and NIAC, as attested by the wealth of literature referring to them in this connection.¹² That difference,

⁸ *Legality of the Threat or Use of Nuclear Weapons Case* (Advisory Opinion) [1996] ICJ Rep 226 [25] (hereafter *Nuclear Weapons Advisory Opinion*); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [106].

⁹ Again, the relevant literature is particularly extensive: see, eg, R Provost, *International Human Rights and Humanitarian Law* (CUP 2002); MJ Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 AJIL 119; R Arnold and N Quéniwet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008); C Droegge, 'Elective Affinities? Human Rights and Humanitarian Law' (2008) 90 IRRC 501; M Sassòli and LM Olson, 'The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts' (2008) 90 IRRC 599; I Scobbie, 'Principle or Pragmatics? The Relationship between Human Rights Law and the Laws of Armed Conflict' (2009) 14 JCSL 449; O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011); M Milanovic, 'A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law' (2012) 23 EJIL 121; D Bethlehem, 'The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2013) 2 Cambridge J Int'l & Comp L 180; L Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict' (2015) 64 ICLQ 293; A Clapham, 'The Complex Relationship Between the Geneva Conventions and International Human Rights Law' in A Clapham, P Gaeta, and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) (hereafter Clapham et al, *Geneva Conventions*); C De Koker and T Ruys, 'Foregoing *Lex Specialis*: Exclusivist v. Symbiotic Approaches to the Concurrent Application of International Humanitarian and Human Rights Law' (2016) 49 RBDI 244; M Hakimi, 'The Theory and Practice at the Intersection Between Human Rights and Humanitarian Law' (2017) 111 AJIL 1063.

¹⁰ P Gaeta, 'Geneva Conventions and International Criminal Law' in Clapham et al, *Geneva Conventions* (n 9) 739 [3].

¹¹ M Sassòli, 'Humanitarian Law and International Criminal Law' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 114.

¹² See, eg, R Baxter, '*Ius in Bello Interno*: The Present and Future Law' in JN Moore (ed), *Law & Civil War in the Modern World* (Johns Hopkins University Press 1974) 530–31; M Bothe, KJ Partsch, and WA Solf, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 671–72; WA Solf, 'The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice' (1983) 33 AUILR 53, 57–59; Y Sandoz, C Swinarski, and B Zimmermann (eds), *Commentary on the Additional*

however, is certainly not exhausted by those two matters and other issues might also be mentioned in this connection.¹³ To some extent, the analysis may be applicable *mutatis mutandis* to these other issues. Additionally, it may serve as a bellwether of sorts: in other words, if the two cardinal bastions of the law of IAC are found to be transposable to internationalized armed conflicts, this may be taken as an inductive indicator with respect to other matters subject to different regulation. However, such considerations are excluded from the scope of the present enquiry.

1.1.2 Methodology

The analytical thrust of the study is on what the law is (analysis *de lege lata*), not on what the law should be (*de lege ferenda*). Admittedly, the distinction between *lex ferenda* and *lex lata* is not always strictly pronounced in international law.¹⁴ In fact, arguments as to the existence and interpretation of specific international legal rules (dimension *lex lata*) quite frequently feature elements of policy, desirability and progressiveness (dimension *lex ferenda*).¹⁵ Moreover, it is acknowledged that

Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC 1987) 1332 [4397] (hereafter Sandoz et al, *APs Commentary*); C Greenwood, 'International Humanitarian Law (Laws of War)' in F Kalshoven (ed), *The Centennial of the 1st International Peace Conference: Reports & Conclusions* (Kluwer Law International 2000) 234; M Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in S Yee and Wang Tieya (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge 2001) 312; R Kolb and R Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) 69; R Kolb, 'International Humanitarian Law and Its Implementation by the Court' in J Doria, H-P Gasser, and MC Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (Brill 2009) 1018–19; N Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 93; GS Corn, 'Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?' (2011) 22 *Stanford Law & Policy Review* 253, 277; Crawford (n 5) 47; Sivakumaran (n 5) 513; E Mikos-Skuza, 'International Law's Changing Terms: "War" becomes "Armed Conflict"' in ME O'Connell (ed), *What Is War?: An Investigation in the Wake of 9/11* (Martinus Nijhoff 2012) 28; H Harrison Dinness, *Cyber Warfare and the Laws of War* (CUP 2012) 142; Fleck (n 13) 604–05; Y Sandoz, 'Land Warfare', 116–17, P Spoerri, 'The Law of Occupation', 185, and N Melzer, 'The Principle of Distinction Between Civilians and Combatants', 318, all in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014); M Sassòli, 'The Concept and the Beginning of Occupation' in Clapham et al, *Geneva Conventions* (n 9) 1415 [57].

¹³ See, eg, D Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in E Wilmschurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 36 (considering 'the rules relating to detention of combatants and civilians' as one of 'two key parts' of IHL regulated differently in IACs and NIACs); D Fleck, 'The Law of Non-International Armed Conflicts' in D Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 604–05 (listing, additionally, '[p]ublic property', '[r]elease of persons deprived of their liberty', '[b]elligerent reprisals', and '[m]ilitary objectives'). But see Section 9.4.2.3 in this book (discussing the rules on the seizure of public property in occupied territories in the context of the treatment of the law of belligerent occupation).

¹⁴ cf, eg, R Higgins, *Problems and Process: International Law and How We Use It* (OUP 1995) 10 (arguing that the distinction between *lex lata* and *lex ferenda* in international law is 'in large measure a false dichotomy').

¹⁵ See further K Mačák, 'Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law' (2015) 48 *Isr L Rev* 55, 60–62 (discussing the distinction between *lex lata* and *lex ferenda* from the perspective of the horizontal legal framework of international law).

the norms of applicability of IHL in particular have been decried as ambiguous,¹⁶ arbitrary,¹⁷ archaic,¹⁸ and artificial,¹⁹ to name just a few of the unflattering epithets. Nevertheless, the focus of the study is not on how the law should be developed or what the preferred policy of conflict parties should be.

In determining what the law is, the sources of analysis in this book mirror closely the two main sources of international law,²⁰ namely international treaties and customary international law.²¹ The study may thus be considered orthodox in its methodological approach; in particular, it does not interpret the law applicable to armed conflicts 'liberally' to include 'soft law'²² and it does not consider practice of armed groups to contribute in and of itself towards the creation of international custom.²³ Rather, soft law, non-state practice, and other sources are considered relevant to the extent that they lead to reactions by states, because it is those reactions that form the 'building block[s] in the edifice of ... customary rule[s]'.²⁴

The identification and analysis of norms arising from treaties present few methodological difficulties. The relevant international conventions are few in number and easy to access; the canons of interpretation are well-known and generally free from controversy. The present work principally relies on the 1899 and 1907 Hague Conventions governing land warfare,²⁵ the 1949 Geneva Conventions (GCs),²⁶

¹⁶ JG Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313, 349.

¹⁷ RJ Dupuy and A Leonetti, 'La notion de conflit armé à caractère non international' in *The New Humanitarian Law of Armed Conflict*, vol 1 (Editoriale scientifica 1979) 258.

¹⁸ R Ehrenreich Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 University of Pennsylvania Law Review 675, 755.

¹⁹ R Abi-Saab, 'Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern' in AJM Delissen and GJ Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff 1991) 209.

²⁰ cf H Thirlway, *The Sources of International Law* (OUP 2014) 11.

²¹ Art 38(1)(a)–(b) ICJ Statute.

²² cf S Rondeau, 'Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts' (2011) 93 IRRC 649, 651 ('reference to "the law applicable to armed conflicts" should be interpreted liberally, as to include ... soft law').

²³ cf J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005) (hereafter *ICRC CIHL Study*) vol 1, xxxvi (considering the legal significance of non-state actors' practice as 'unclear'); but see, eg, R McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477, 498; J-M Henckaerts, 'The ICRC Customary International Humanitarian Law Study: A Rejoinder to Professor Dinstein' (2007) 37 IYHR 259, 261; M Sassòli, 'Taking Armed Groups Seriously: Ways to Improve Compliance with International Humanitarian Law' (2010) 1 JIHLS 5, 22; Sivakumaran (n 5) 3–4 (all suggesting that some weight should be given to non-state practice in determining the content of customary IHL).

²⁴ M Mendelson, 'The Formation of Customary International Law' (1999) 272 RdC 155, 266 fn 299.

²⁵ Hague Convention (II) with Respect to the Laws and Customs of War on Land (signed 29 July 1899, entered into force 4 September 1900) 32 Stat 1803, TS 403; Hague Convention (IV) respecting the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 277.

²⁶ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 3 (hereafter GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (hereafter GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (hereafter GC III);

and their 1977 Additional Protocols.²⁷ The interpretive approach taken throughout the book is based on the relevant rules of the Vienna Convention on the Law of Treaties.²⁸ In general, that means that any treaty provisions should be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in the light of their object and purpose.²⁹ More specifically, the indeterminate duration and the humanitarian nature of the principal IHL treaties justify an evolutive approach to their interpretation,³⁰ in particular with respect to the generic terms³¹ contained therein.³² Finally, the *travaux préparatoires* and the subsequent practice of states parties to the treaties are also taken into account in the analysis.³³

By contrast to treaties, working with international custom in this area is generally more challenging. Although the traditional, cumulative test of state practice and *opinio juris* is well-known,³⁴ its ingredients are not always easy to identify. The central problem in this respect is in the reluctance of states to engage publicly in the legal qualification of armed conflicts.³⁵ On occasion, states even admit as much themselves: for instance, the UK military manual notes that ‘states have been, and always will be, reluctant to admit that a state of armed conflict exists’.³⁶ Even when states do acknowledge the applicability of IHL to a particular situation in which they are not themselves involved, they often refrain from specifically qualifying the type of conflict at hand.³⁷ For example, the Australian foreign minister stated in 1991

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (hereafter GC IV).

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 3 (hereafter AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609 (hereafter AP II).

²⁸ Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereafter VCLT).

²⁹ Art 31(1) VCLT.

³⁰ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (Advisory Opinion) (Ser A) No 16 (1 October 1999) (IACtHR) [114]; S Jacquement, ‘The Cross-Fertilization of International Humanitarian Law and International Refugee Law’ (2001) 83 IRRC 651, 658; V Chetail, ‘The Contribution of the International Court of Justice to International Humanitarian Law’ (2003) 85 IRRC 235, 259.

³¹ cf *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 [66] (‘[W]here the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is “of continuing duration”, the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.’).

³² See further Maćák (n 15) 68–71 (arguing in favour of the evolutive interpretation of AP I).

³³ cf Arts 32 and 31(3)(b) VCLT.

³⁴ *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Rep 3 [74].

³⁵ See, eg, J Pejić, ‘Status of Armed Conflicts’ in E Wilmshurst and SC Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007) 78; E Wilmshurst, ‘Conclusions’ in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 479; N Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 3.

³⁶ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) 386 [15.3.1].

³⁷ Wilmshurst (n 35) 480.

that the attacks of the Yugoslav National Army against civilian targets throughout Croatia had been 'quite contrary to the precepts of international humanitarian law', without specifying whether it was the 'precepts' of the law of IAC or NIAC that he deemed applicable to the situation. Similarly, when referring to their own conduct, states often hide behind ambiguous terms as 'operations' or terms with questionable legal valence such as 'armed conflict short of war' rather than use the established categories of IAC or NIAC.³⁸ Overall, this reluctance may perhaps be due to the states' desire to 'avoid contaminating humanitarian questions with the political considerations which are inseparable from their international relations in periods of conflict.'³⁹ Whatever the motivation, it makes the identification of customary rules in this area rather challenging.

In order to abate this problem to some extent, the present author attempted to gauge the relevant *opinio juris* by way of direct collection of data conducted in the early phases of the research project. A questionnaire concerning states' views on the applicability of IHL to internationalized armed conflicts was prepared and dispatched to all states with diplomatic representation in the UK and to the UK itself. The questionnaire was sent on 20 June 2011 by post to 163 diplomatic and consular missions in London and to the UK's Inter-departmental Committee for International Humanitarian Law. The addressees were requested to either answer the questions set out in the questionnaire or to forward it to the appropriate department of the respective state's government. Out of the 33 responses received in the following seven months, only 11 contained substantial or otherwise relevant answers. Given this limited number, the utility of the returned questionnaires thus remains illustrative at best.⁴⁰ The full text of the questionnaire and the replies thereto are available online for interested readers.⁴¹

1.1.3 Structure

This book is structured into eleven chapters. Following this brief research overview, the remainder of the present introductory chapter lays out the conceptual and normative framework for the entire analysis. It first justifies the need for this study by confirming the continuing distinction between IACs and NIACs in IHL (Section 1.2); and it then puts forward a conception of internationalization that expresses the transformation from a NIAC to an IAC (Section 1.3).

Part I of the book examines the process of conflict transformations. Chapter 2 provides a comprehensive map of the currently available modalities of conflict internationalization. Chapter 3 specifically considers the legal qualification of complex situations that feature more than two conflict parties. Chapter 4 then contrasts the mechanism of internationalization of armed conflicts with the reverse process of de-internationalization. The book then turns from the question of process to the effects that are produced by conflict internationalization in IHL.

³⁸ See further Zamir (n 35) 3.

³⁹ 'The International Committee of the Red Cross and Torture' (1976) 16 IRRC 610, 613.

⁴⁰ See, eg, note 160 in this chapter.

⁴¹ See <www.kubomacak.org> (tab Data).

Part II focuses on the issue of combatant status. Since internationalized conflicts at their outset necessarily feature at least one non-state party, the traditional understanding would bar persons belonging to such entities from being eligible for combatant status. Accordingly, Chapter 5 examines the access to combatant status by members of non-state armed groups from a historical perspective. Chapter 6 then considers the normative underpinnings of the present-day regulation of combatancy. Finally, Chapter 7 analyses whether fighters engaged in internationalized armed conflicts may actually qualify for combatant status in practice.

Part III is concerned with the law of belligerent occupation. An internationalized armed conflict breaks out in the territory of a single state, which poses a number of difficulties vis-à-vis the applicability of occupation law, premised as it is on the existence of two independent warring states. In that regard, Chapter 8 traces the development of the law of occupation in order to identify trends relevant to its applicability to internationalized conflicts. Chapter 9 then considers the theoretical ramifications of extending the law of occupation to such conflicts. Chapter 10 rounds off the analysis by considering the practical application of the law in its temporal, geographical, and personal dimensions.

The final chapter summarizes the argument of the book. In particular, it argues that the study stands for a specific understanding of the notion of internationalized armed conflicts, which is subject to an extensive application of IHL. Nonetheless, the book also uncovers a number of gaps in the legal regulation that result from the particular features of internationalized conflicts. The conclusion thus sketches potential directions, in which the law and practice may develop to alleviate these deficiencies.

1.2 Distinction Between International and Non-international Armed Conflicts

1.2.1 Historical overview⁴²

1.2.1.1 *Pre-modern times: religion as the dividing line*

Before the modern concept of state sovereignty took hold in international law, the extent of the rules applicable to armed conflict depended on religious affiliations of the belligerents rather than on the type of territories they controlled.⁴³ On the one hand, inter-religious conflicts were purportedly waged in the name of God and limited by few rules.⁴⁴ In this vein, the thirteenth-century canonist Hostiensis

⁴² For a more detailed discussion see, eg, L Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Martinus Nijhoff 2006) 1–112; R Bartels, ‘Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts’ (2009) 91 IRRC 35, 42–64; Zamir (n 35) 10–47.

⁴³ See also L Arimatsu, ‘Territory, Boundaries and the Law of Armed Conflict’ (2009) 12 YIHL 157, 161–65 (emphasizing that in pre-modern era, before the emergence of cartography, spatial conceptions were markedly different to those prevailing today: boundaries did not exist and rulers controlled people, not territories).

⁴⁴ cf Zamir (n 35) 11–12.

considered as legitimate those wars that Christian rulers waged against 'infidels'.⁴⁵ Even the otherwise progressive sixteenth-century theologian and jurist Francisco de Vitoria still considered it 'indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery' although he duly warned that such 'enslaving is not lawful in a war between Christians'.⁴⁶ Similarly, at least until the twelfth century, the prevailing view among Muslims was that holy war (*jihad*) was 'the only kind of relationship that could exist between those who believed in Islam and those who did not'.⁴⁷ These inter-religious wars were placed under very few restraints as their goal was to secure the domination of one religion over another using all available means.

On the other hand, intra-religious conflicts—that is, conflicts waged between princes of the same religious affiliation—were much more strictly regulated both in the Christian and the Muslim worlds. Hostiensis condemned such conflicts as illegitimate unless one of the strict exceptions was met.⁴⁸ By contrast, Vitoria was willing to grant that 'Christians may serve in war and make war' against one another,⁴⁹ but he still subjected their conduct to stringent rules.⁵⁰ Certain means and methods of warfare had been outlawed long before: for instance, already in 1139, the Second Lateran Council banned the use of crossbow in armed disputes between Christian princes, determining it to be 'suitable for use only against heathens'.⁵¹ Similarly, a tenth-century Baghdadi scholar Al-Mawardi divided intra-religious wars between Muslim princes into three classes, each of which was supposed to be waged with different methods and based on a different set of obligations towards the enemy.⁵²

In addition to religiously motivated conflicts, popular uprisings against rulers were frequent even in the pre-Westphalian times. In the Christian world, virtually no limitations were imposed on the means used to quell domestic rebellions.⁵³ Given that the authority of rulers was seen as deriving directly from God, rebels were to be treated in the same way as heathens.⁵⁴ By contrast, the Muslim scholar Al-Mawardi did consider the *ahl al baghi* ('war against rebels') to be one of the types of intra-religious war that were subject to constraints on permissible conduct.⁵⁵ However, as the role of religion in international relations continued to decline following the Thirty Years' War (1618–48), wars against rebels gradually evolved into a separate category even in the Christian-dominated part of the world.

⁴⁵ GM Reichberg, H Syse, and E Begby, *The Ethics of War: Classic and Contemporary Readings* (Blackwell 2006) 160–61.

⁴⁶ F de Vitoria, *De Indis and De Jure Belli* (JP Bate tr, 1557) vol I, book VI, §42.

⁴⁷ Bartels (n 42) 43. ⁴⁸ Reichberg et al (n 45) 161.

⁴⁹ de Vitoria (n 46) vol I, book VI, §1. ⁵⁰ *ibid* §§3–60.

⁵¹ M Van Creveld, *The Transformation of War* (Free Press 1991) 138.

⁵² *ibid* 140 (listing wars against apostasy (*ahl al ridda*), against rebels (*ahl al baghi*), and against those who had renounced the authority of the *imam* (*ahl al muharabin*)).

⁵³ See, eg, de Vitoria (n 46) vol I, book VI, §18 ('it is lawful to employ all appropriate measures ... against internal foes, that is, against bad citizens').

⁵⁴ Perna (n 42) 2; Zamir (n 35) 12. ⁵⁵ Van Creveld (n 51) 140.

1.2.1.2 Westphalian era: remit of the law defined by state borders

The Peace of Westphalia (1648) is often seen as the starting point for the development of modern international law.⁵⁶ In contradistinction to the war it concluded, it established an international community based on the principle of religious equality—albeit initially only with respect to denominations of the Christian faith—and thus contributed to the decline of the influence of religious ideas on the international plane.⁵⁷ With respect to the typology of conflicts, the emergence of a sovereign order contributed to a different treatment of inter-state and civil wars. This was also reflected in the seventeenth-century writings on the law of nations.

Already in 1625, Hugo Grotius divided wars into public and private based on the parties involved: wars between sovereign powers were public, while wars between persons without authority from the state were private.⁵⁸ He further introduced a subdivision of public wars into ‘formal’ and ‘less formal’ categories, the former being a war waged under the authority of state sovereigns on both sides and observing certain formalities (such as a declaration of war).⁵⁹ The latter subtype included conflicts that did not meet those conditions, for example if the war was ‘waged against private persons’.⁶⁰ For Grotius, civil wars were thus seen as either private wars (if no sovereign power was involved) or as less formal public wars (if such a war was waged by the sovereign against his subjects).⁶¹

Later in the seventeenth century, the German jurist Samuel von Pufendorf made the distinction clearer and more express. Building on the categories introduced previously by Grotius, he expressly stated that ‘civil wars’, together with undeclared wars and those waged against private citizens, belonged to the class of ‘informal’ wars.⁶² However, similarly to his predecessor, von Pufendorf left open the question whether the limits to permissible conduct in war should also extend to conflicts we would today describe as non-international.⁶³ Accordingly, the idea that some forms of internal wars should be subject to international law constraints only started to develop in the next period.⁶⁴

⁵⁶ See, eg, D Anzilotti, *Cours de droit international* (G Gidel tr, Sirey 1929) vol 1, 5; L Gross, ‘The Peace of Westphalia, 1648–1948’ (1948) 42 AJIL 20, 26; P Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edn, Routledge 2002) 9–11; but see, eg, V Lowe, *International Law* (OUP 2007) 9–10 (criticizing ‘the fixation with Westphalia as the birth of international law’); Arimatsu (n 43) 165–66 (highlighting the emergence of cartography as an independent discipline in the period of Enlightenment and its importance for the development of the notion of territorial jurisdiction).

⁵⁷ Bartels (n 42) 44; see also Gross (n 56) 26 (arguing that the Peace of Westphalia ‘promoted the laicization of international law by divorcing it from any particular religious background’).

⁵⁸ H Grotius, *The Law of War and Peace in Three Books* (FW Kelsey tr, 1625), book I, ch III, s I, §1.

⁵⁹ *ibid*, book I, ch III, s IV, §1.

⁶⁰ *ibid*, book I, ch III, s IV, §2.

⁶¹ At the outset of the chapter entitled ‘Distinction Between Public and Private War; Explanation of Sovereignty’, Grotius also referred to ‘mixed wars’ as those that are ‘on one side public, on the other side private’. He did not elaborate on the relationship of this category to less formal public wars waged against private persons. It appears that such conflicts could fall simultaneously into both of these categories. See *ibid*, book I, ch III, s I, §1; see further SC Neff, *War and the Law of Nations* (CUP 2005) 253–54.

⁶² S von Pufendorf, *On The Duty of Man And Citizen According to the Natural Law* (F Gardner Moore tr, John Hayes 1682), ch XVI, §7.

⁶³ See further Bartels (n 42) 45.

⁶⁴ Zamir (n 35) 15.

In the eighteenth century, the Swiss scholar Emmerich de Vattel argued that the laws of war should apply in full in those civil wars, which in their intensity resembled an international war. To Vattel, as soon as the rebels acquired 'sufficient strength to give [the sovereign] effectual opposition', the bands of society and government were broken, there was no common superior recognized by the enemy parties, and the war between them was equivalent in every respect to a public war between two states.⁶⁵ Because a true civil war was fully tantamount to an inter-state war, it activated the law of neutrality, thus affecting not only the conflict parties, but also all foreign countries.⁶⁶ Conversely, the sovereign was not bound by the laws of war when suppressing rebellions of lower intensity.⁶⁷ The only duty incumbent upon him by operation of international law in those cases was one of clemency, requiring him to grant amnesty where the offenders were numerous.⁶⁸

The doctrine of belligerency, developed in the nineteenth century, resolved the difficulty of distinguishing between rebellions that triggered the application of the laws of war and those that did not.⁶⁹ It stipulated that an internal conflict could only come within the scope of international law if the insurgents were recognized as belligerents. According to Lassa Oppenheim, a civil war was not a 'real war in the strict sense of the term in International Law'⁷⁰ because 'war is an armed contention between *States*'.⁷¹ However, such a conflict could be elevated to the international plane by way of recognition.⁷² The process of recognition structured the status acquired by the anti-government forces into three stages: rebellion, insurgency, and belligerency.⁷³

A *rebellion* was an internal conflict characterized by non-recognition both by the territorial government and the outside states. As such, it was to be dealt with exclusively by domestic law.⁷⁴ If a rebellion was sustained and presented a credible threat to the ruling government, it could evolve into an *insurgency*.⁷⁵ The territorial state could recognize the existence of an insurgency, indicating that it regarded the insurgents as legal contestants and not as mere lawbreakers.⁷⁶ Finally, a formal recognition of the non-state party to the conflict as *belligerents* by the incumbent

⁶⁵ E de Vattel, *The Law of Nations or the Principles of Natural Law* (J Chitty tr, 1758), book III, ch XVIII, §§292–93, 295.

⁶⁶ Neff (n 61) 258.

⁶⁷ It is controversial whether Vattel's view was motivated by humanitarian concerns or simply by the fact that the conflicts in question were similar in magnitude: compare L Moir, *The Law of Internal Armed Conflict* (CUP 2004) 3 and Perna (n 42) 20–22.

⁶⁸ de Vattel (n 65), book III, ch XVIII, §§290–91.

⁶⁹ See further Neff (n 61) 258–68.

⁷⁰ L Oppenheim, *International Law: A Treatise* (1st edn, Longmans, Green & Co. 1905 & 1906) vol II, 67.

⁷¹ *ibid* 65 (emphasis original).

⁷² *ibid* 65–66.

⁷³ cf YM Lootsteen, 'The Concept of Belligerency in International Law' (2000) 166 MLR 109, 113; Bartels (n 42) 48; Zamir (n 35) 16.

⁷⁴ BR Roth, *Governmental Illegitimacy in International Law* (Clarendon Press 1999) 173.

⁷⁵ Moir (n 67) 4; Lootsteen (n 73) 113–14.

⁷⁶ R Higgins, 'International Law and Civil Conflict' in E Luard (ed), *The International Regulation of Civil Wars* (NYU Press 1972) 170; see also RA Falk, 'Janus Tormented: The International Law of Internal War' in JN Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press 1964) 200 (stating that rebels, whose insurgency was recognized, acquired an intermediate legal status, causing 'a partial internationalization of the conflict, without bringing the state of belligerency into being').

government made the laws of war applicable to the conflict in full;⁷⁷ recognition by a third state also invoked the law of neutrality between this third state and the parties to the conflict.⁷⁸ It was on this basis that, for instance, Great Britain was held liable for the violation of her neutrality obligations by allowing the construction and sale of warships to the Confederacy during the American Civil War (1861–65).⁷⁹ Over time, recognition of belligerency became less and less frequent, with the last known express recognition by the territorial state having been granted during the Boer War (1899–1902).⁸⁰ Critically, no recognition was issued during the Spanish Civil War in the 1930s, leading some scholars to argue that the doctrine had fallen into *desuetude*.⁸¹ It will be shown later in this work that the present author does not share that view.⁸²

As for inter-state conflicts, traditional international law developed von Pufendorf's distinction between formal and informal wars to require a formal declaration of war in order to trigger the application of the laws of war.⁸³ The 1907 Hague Convention (III) relative to the Opening of Hostilities codified this customary law requirement, stipulating that hostilities must only commence by either an explicit declaration of war or an ultimatum with a conditional declaration of war.⁸⁴ More than twenty years later, the 1928 Kellogg-Briand Pact prohibited the use of war in international relations.⁸⁵ Although in theory, these steps were taken to liberate humanity from the scourge of war altogether, or at least to subject its outbreak to rigid rules, their actual outcome was markedly different.⁸⁶ As a result, by denying the existence of war

⁷⁷ cf also Zamir (n 35) 15 fn 37 (noting that in this regard, the doctrine of belligerency echoed Vattel's approach).

⁷⁸ D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 RdC 117, 145 (hereafter Schindler, 'Different Types of Armed Conflicts'); Moir (n 67) 7–10.

⁷⁹ *Alabama Claims (United States v Great Britain)* (Award) (1872) 29 RIAA 125, 129–31.

⁸⁰ H-P Gasser, 'International Humanitarian Law' in H Haug (ed), *Humanity for All: The International Red Cross and Red Crescent Movement* (P. Haupt 1993) 559; E La Haye, *War Crimes in Internal Armed Conflicts* (CUP 2008) 14 fn 87.

⁸¹ See, eg, RR Oglesby, *Internal War and the Search for Normative Order* (Martinus Nijhoff 1971) 100; R Higgins, 'International Law and Civil Conflict' in E Luard (ed), *The International Regulation of Civil Wars* (New York University Press 1972) 171; L Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' (1985) 56 BYBIL 189, 252; J Crawford, 'First Report on State Responsibility', UN Doc A/CN.4/490 and Adds 1-6 (1998) [270]; Provost (n 9) 279; R Kolb, *Ius contra bellum: Le droit international relatif au maintien de la paix* (2nd edn, Helbing Lichtenhahn 2009) 326; E David, *Principes de droit des conflits armés* (5th edn, Bruylant 2012) 138; A Sanger, 'The Contemporary Law of Blockade and the Gaza Freedom Flotilla' (2010) 13 YIHL 397, 424–25; Hill-Cawthorne (n 5) 13; see also Baxter (n 12) 520 ('[the] institution [of recognition of belligerency has] fallen into disuse'); A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 8 fn 2 ('the doctrine of belligerency ... has fallen into disuse and is now considered obsolete'); Moir (n 67) 41 (arguing that the doctrine 'has fallen into disuse as a legal concept'); D Guilfoyle, 'The Mavi Marmara Incident and Blockade in Armed Conflict' (2011) 81 BYBIL 1, 192 (considering it doubtful that the doctrine had survived the nineteenth century).

⁸² See Section 2.5.1.1.

⁸³ See Pufendorf (n 62) ch XVI, §7; see also, eg, de Vattel (n 65), book III, ch IV, §51; JC Bluntschli, *Le droit international codifié* (C Lardy tr, 5th edn, Guillaumin 1895) 296 §521.

⁸⁴ Hague Convention (III) relative to the Opening of Hostilities (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 263, Art 1.

⁸⁵ Kellogg-Briand Pact (signed 27 August 1928, entered into force 24 July 1929) 94 LNTS 57, Art 1.

⁸⁶ cf Neff (n 61) 293–96.

in a *formal* sense, states could escape allegations of violations of both *jus ad bellum* and *jus in bello*.⁸⁷ The interbellum American jurist John Bassett Moore had simple advice for states involved in drafting the Pact: ‘When once you have outlawed war, do not use the word war any more.’⁸⁸ And indeed, instead of refraining from the use of force in the settlement of their disputes, states resorted to practising what has been described as the ‘art of avoiding war’.⁸⁹ For instance, after the Sino-Japanese conflict broke out in 1937, the Chinese and Japanese governments both denied that a state of war existed between them, despite the intense fighting and the subsequent Chinese occupation of Manchuria.⁹⁰

In summary, traditional international law stipulated rules that applied almost exclusively to inter-state wars understood in the formal sense. Conflicts taking place within one state’s borders were beyond the reach of international law—unless they reached intensity similar to that observed in inter-state conflicts and were formally recognized as such by one of the relevant international actors. In 1949, the adoption of the four GCs dramatically changed this state of affairs.

1.2.2 Current dichotomy

1.2.2.1 *International armed conflicts*

The 1949 GCs developed the pre-existing ‘Geneva law’ which had dated back to the second half of the nineteenth century.⁹¹ Crucially, the decision to revise and expand the prior treaties⁹² was prompted by the unprecedented violence and human suffering during the Second World War.⁹³ The events of that war had exposed a number of deficiencies in the legal framework valid at the time that were to be addressed by the new treaties.⁹⁴ Among other developments, the Conventions radically modified the approach to the applicability of IHL in inter-state conflicts.⁹⁵ The bedrock

⁸⁷ See also Provost (n 9) 249 (‘With the prohibition of war in international law by way of the Briand-Kellogg Pact ... there was an even greater incentive not to admit to being in a state of war with another country.’).

⁸⁸ Q Wright, ‘The Meaning of the Pact of Paris’ (1933) 27 AJIL 39, 51.

⁸⁹ Neff (n 61) 296.

⁹⁰ CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2nd rev edn, Little, Brown & Co 1947) vol III, 1687 fn 5.

⁹¹ See, eg, F Kalshoven and L Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn, CUP 2011) 16–19.

⁹² On the relationship of the 1949 Conventions with the older Geneva Conventions, see generally P Benvenuti, ‘Relationship with Prior and Subsequent Treaties’, in Clapham et al, *Geneva Conventions* (n 9) 694–97 [16]–[25].

⁹³ J-M Henckaerts and H Niebergall-Lackner, ‘Introduction’ in ICRC (ed), *Commentary on the First Geneva Convention* (CUP 2016) 16 [62].

⁹⁴ On which see further L Nurick, ‘The Distinction between Combatant and Noncombatant in the Law of War’ (1945) 39 AJIL 680; EA Korovin, ‘Second World War and International Law’ (1946) 40 AJIL 742; L Nurick and RW Barrett, ‘Legality of Guerrilla Forces Under the Laws of War’ (1946) 40 AJIL 563; JAC Gutteridge, ‘The Geneva Conventions of 1949’ (1949) 26 BYBIL 294; RT Yingling and RW Ginnane, ‘The Geneva Conventions of 1949’ (1952) 46 AJIL 393.

⁹⁵ Similarly Bartels (n 42) 57; Zamir (n 35) 11; T Ferraro and L Cameron, ‘Article 2: Application of the Convention’, in ICRC (ed), *Commentary on the First Geneva Convention* (CUP 2016) 69–70 [192]–[96] (hereafter Ferraro and Cameron, ‘Article 2’).

provision in that regard was Common Article 2, the first two paragraphs of which read as follows:

[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.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Since their adoption, the GCs have gained universal acceptance,⁹⁶ supporting the claim that Common Article 2—like most if not all of the rest of the instruments—has become customary international law.⁹⁷ Consequently, when the conditions of that provision are met, the entire corpus of the customary law of IAC, together with any treaties that the conflict parties may have ratified, will be activated.⁹⁸ It is thus essential to correctly understand the criteria of applicability mandated by Article 2.

To begin with, a key consequence of the wording used by Common Article 2 is that the formal conception of war was replaced by a radically different material conception.⁹⁹ In other words, rules of the law of IAC would now come into effect immediately after the first shot was fired,¹⁰⁰ whether or not a war was formally declared or whether the situation was labelled as ‘police action’ or ‘legitimate self-defence’.¹⁰¹ This is the consequence of including an objectively ascertainable notion of ‘armed conflict’ next to the more equivocal term ‘war’ in the text of the provision.¹⁰² In fact, states very rarely admit to being in a state of war, even in situations in which they

⁹⁶ ICRC, ‘Geneva Conventions of 1949 Achieve Universal Acceptance’ (21 August 2006) <www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/geneva-conventions-news-210806.htm>.

⁹⁷ See, eg, T Meron, ‘The Geneva Conventions as Customary Law’ (1987) 81 AJIL 348; *ICRC CIHL Study* (n 23) vol 1, xxiii and xxxvi; J-M Henckaerts, ‘The Grave Breaches Regime as Customary International Law’ (2009) 7 JICJ 683, 686–88; GD Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, CUP 2016) 88.

⁹⁸ C Greenwood, ‘The Concept of War in Modern International Law’ (1987) 36 ICLQ 283, 295; D Turns, ‘The International Humanitarian Law Classification of Armed Conflicts in Iraq since 2003’ (2010) 86 International Law Studies 97, 102–03; S Wills, ‘The Legal Characterization of The Armed Conflicts in Afghanistan and Iraq: Implications for Protection’ (2011) 58 NILR 173, 177; JK Kleffner, ‘Scope of Application of International Humanitarian Law’ in Fleck *Handbook of International Humanitarian Law* (3rd edn) 44; Zamir (n 35) 48.

⁹⁹ L Kotzsch, *The Concept of War in Contemporary History and International Law* (E Droz 1956) 298.

¹⁰⁰ This is the prevailing view in the scholarship: see, eg, JS Pictet (ed) *Geneva Convention IV relative to the Protection of Civilian Persons in Time of War: Commentary* (ICRC 1958) 20–21 (hereafter Pictet, *GC IV Commentary*); Sandoz et al, *APs Commentary* (n 12) 35; Provost (n 9) 250; Kleffner (n 98) 45; A Clapham, ‘Concept of International Armed Conflict’ in Clapham et al, *Geneva Conventions* (n 9) 16 [38] (hereafter Clapham, ‘Concept of IAC’); Ferraro and Cameron, ‘Article 2’ (n 95) 79 [218]; Zamir (n 35) 53–55; see also *Prosecutor v Delalić et al (Čelebići Trial Judgment)* IT-96-21-T (16 November 1998) [184] (juxtaposing IACs and NIACs insofar as the requirements of organization and intensity are concerned); but see C Greenwood, ‘Scope of Application of Humanitarian Law’ in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP 2008) 48; ILA Use of Force Committee, Final Report on the Definition of Armed Conflict in International Law (2010) 32; Solis (n 97) 162 (all arguing for a more restrictive view).

¹⁰¹ JS Pictet (ed), *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (ICRC 1952) 32.

¹⁰² Kalshoven and Zegveld (n 91) 31.

otherwise acknowledge that IHL applies.¹⁰³ Similarly, it is unimportant whether the parties involved recognize each other as independent states.¹⁰⁴ For instance, although the Arab countries did not recognize Israel throughout the Arab-Israeli conflict, both sides accepted that the laws of war applied to the conflict.¹⁰⁵

Although the matter is not entirely free of controversy, the prevailing view is that there is virtually no threshold requirement of intensity or duration of the conflict.¹⁰⁶ This means that the law of IAC comes into effect with any resort to force between two states,¹⁰⁷ even in the briefest of clashes such as the thirty-minute shootout between the US and Mexico in 1916¹⁰⁸ or the downing of the US Naval pilot Lt Bobby Goodman over Lebanon by Syria in 1983.¹⁰⁹ In summary, whatever the name, the intensity or the duration of the use of force between two or more states, IHL applies.

In addition, the law of IAC may exceptionally come into effect even when states do not resort to force in two specific situations. Firstly, this is the case if a state declares war on another state, but the declaration is not followed by armed hostilities between the parties.¹¹⁰ Historical examples of practice of this kind have included declarations of war against the Axis powers issued by a number of Latin American countries during the Second World War, as well as those made by several Arab states against Israel in 1967.¹¹¹ The fact that a declaration of war triggers the law of armed conflict even if it is not followed by any fighting is a residue of the formal conception of war that had prevailed in international law until 1949.¹¹²

Secondly, IHL is also triggered by situations that amount to a belligerent occupation even if that occupation is not resisted.¹¹³ Although a definition of occupation is absent from the GCs, it may be found in Article 42 of the 1907 Hague Regulations, which the GCs supplement but do not supersede.¹¹⁴ According to that provision, a territory is considered occupied when it is actually placed under the authority

¹⁰³ For example, the UK denied that its 'military and naval operations' in Falkland Islands after the Argentine invasion in 1982, or 'hostilities against Iraq' in which it 'engaged' in 1991, or again the NATO intervention against Yugoslavia in which it prominently participated in 1999 had amounted to a state of war with any of these states. See Letter from Lord President of the Council, Mr John Biffen, to Mr George Foulkes, MP (20 May 1982), reproduced in (1982) 53 BYBIL, 519–20 (on the UK-Argentine conflict); Statement of British Prime Minister, HC Debs, vol 184, col 375 (28 January 1991) (on the Gulf War); Statement by the Minister of State, Ministry of Defence, HL Debs, vol 605, WA 5-6 (14 June 1999) (on the NATO intervention).

¹⁰⁴ Ferraro and Cameron, 'Article 2' (n 95) 84 [231].

¹⁰⁵ Kleffner (n 98) 48.

¹⁰⁶ See note 100 in this chapter for references to the relevant academic debate.

¹⁰⁷ *Prosecutor v Tadić* (Decision on Jurisdiction) IT-94-1-AR72 (2 October 1995) [70].

¹⁰⁸ Provost (n 9) 250.

¹⁰⁹ See US Department of State, Telegram 348126 to American Embassy at Damascus (8 December 1983), in M Nash (ed), *Cumulative Digest of United States Practice in International Law 1981–1988* (1995) 3456–57 (qualifying the situation as one to which IHL had applied).

¹¹⁰ cf Common Art 2(1) GCs (referring to 'all cases of declared war'). See, eg, Clapham, 'Concept of IAC' (n 100) 6 [7]; Ferraro and Cameron, 'Article 2' (n 95) 74 [206].

¹¹¹ Schindler, 'Different Types of Armed Conflicts' (n 78) 132.

¹¹² See Section 1.2.1.2.

¹¹³ Common Art 2(2) GCs.

¹¹⁴ cf Arts 135 GC III and 154 GC IV. With respect to the definition of occupation, this interpretation has also been confirmed in the case law of the ICTY: see *Prosecutor v Naletilić and Martinović* (Trial Judgment) IT-98-34-T (31 March 2003) [215]–[16]; *Prosecutor v Kordić and Čerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) [339]; *Prosecutor v Prlić et al* (Appeal Judgment) IT-04-74-A (29 November 2017) vol 1 [316]. See further Benvenuti (n 92) 696–97 [23]–[25].

of the hostile army.¹¹⁵ Thus even if force is not used in acquiring control over another state's territory (as in the cases of the Nazi occupation of Czechoslovakia or Denmark in 1938–40), IHL will apply.¹¹⁶ By contrast to the first exception, this scenario is thus in line with the material conception of war: the law applies due to the facts on the ground, irrespective of any formal proclamations by the parties.¹¹⁷

Finally, the adoption of Additional Protocol I to the Geneva Conventions in 1977 created a legal fiction, extending the application of the norms pertaining to IACs to those internal wars in which 'peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.¹¹⁸ By the inclusion of this provision, the Protocol provided for an *ex lege* internationalization of a class of internal armed conflicts, which will be discussed at greater length later in this work.¹¹⁹

1.2.2.2 *Non-international armed conflicts*

In February 1945, the ICRC announced its goals with respect to the revision of the law of Geneva as threefold: to extend the protection of detained civilians, to improve the enforceability of IHL, and, most importantly for the present purposes, to provide protection to victims of civil wars.¹²⁰ As discussed earlier, the law valid at the time did not extend to internal conflicts and states remained generally unconstrained when responding to domestic insurgencies.¹²¹ The view prevailing among states in this regard was fairly straightforward. Prior to the outbreak of an internal conflict, it was considered foolish to give an incentive to potential revolutionaries by assuring them that they would be granted protection equivalent to that of foreign soldiers in international wars.¹²² Once a conflict was underway, governments were more than reluctant to recognize the belligerency of their adversaries who were fighting to undermine these governments' authority.¹²³ For all these reasons, the ICRC's proposal at the outset of the diplomatic conference in Geneva to oblige parties to NIACs to 'implement the provisions' of the Conventions had had very limited prospects of success.¹²⁴

¹¹⁵ Hague Conventions (n 25) Art 42; see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 116 [172] ('territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised').

¹¹⁶ Pictet, *GC IV Commentary* (n 100) 21; Ferraro and Cameron, 'Article 2' (n 95) 104 [286].

¹¹⁷ cf Ferraro and Cameron, 'Article 2' (n 95) 105 [288].

¹¹⁸ Art 1(4) AP I.

¹¹⁹ See Section 2.4.

¹²⁰ F Bugnion, 'From the End of the Second World War to the Dawn of the Third Millennium: The Activities of the ICRC during the Cold War and its Aftermath' (1995) 305 *IRRC* 207, 211.

¹²¹ See Section 1.2.1.2.

¹²² See, eg, Switzerland, *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department 1949) (hereafter *Final Record*) vol II B, 11 (Greece) (arguing that extending protection to political opponents might 'incite [them] to take up arms against a legitimate government'); *ibid* 330 (Burma) (criticizing the proposed text of Common Article 3 for being 'an encouragement and an incentive to the insurgents').

¹²³ Perna (n 42) 30.

¹²⁴ cf *Final Record* (n 122) vol I, 47, 61, 73, 113 (draft Common Art 2(4)).

Indeed, the majority of the states present at the conference were not willing to concede what they saw as their sovereign right to maintain law and order in face of potential domestic upheavals.¹²⁵ The text proposed by the ICRC was criticized as striking ‘at the root of national sovereignty’ and as posing a threat to national security.¹²⁶ Lawrence Hill-Cawthorne has observed in this regard that the primary concern of many delegations was not so much ‘with extending *humanitarian law* to internal conflicts but rather more generally with extending *international law* to intra-state matters’.¹²⁷ Among Western states, this legal view was mirrored by political worries that the proposed text could be instrumentalized by the countries of the Soviet bloc in their attempts to destabilize the Western colonial empires.¹²⁸ Nonetheless, after weeks of deliberations at the conference, a compromise solution was found.¹²⁹ The delegates agreed to limit the number of provisions applicable in civil wars to a bare minimum, resulting in the adoption of the present text of Common Article 3:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for. [...]

Because the article’s aim was to impose fundamental humanitarian principles of the Conventions on the belligerents in internal conflicts, it has often been referred

¹²⁵ Moir (n 67) 24.

¹²⁶ *Final Record* (n 122) vol II B, 10 (United Kingdom).

¹²⁷ Hill-Cawthorne (n 5) 15 (emphases original).

¹²⁸ A Cassese, ‘Civil War and International Law’ in A Cassese (ed), *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (OUP 2008) 116–17.

¹²⁹ For a detailed treatment of the progress of the debates at the diplomatic conference, see Bartels (n 42) 61–64.

to as a ‘convention in miniature’¹³⁰ or a ‘mini-convention’.¹³¹ The International Court of Justice (ICJ) has described its contents as ‘elementary considerations of humanity’¹³² and as ‘general principles of humanitarian law’,¹³³ and held that it was part of the universally binding customary international law.¹³⁴ For its part, the ICTY has consistently ruled that Common Article 3 applies as a matter of custom both to NIACs and IACs.¹³⁵

The text of the provision does not, on its face, include a bottom threshold of application, referring only to the existence of an armed conflict ‘not of an international character’. Nevertheless, the *travaux préparatoires* indicate¹³⁶ and modern-day case-law confirms¹³⁷ the generally accepted view that Common Article 3 implies a two-fold requirement of minimum organization and intensity.¹³⁸ First, the rebels must be militarily *organized*, the indicators of which include the presence of a command structure, the ability to determine a unified military strategy and speak with one voice, the adherence to military discipline, as well as the capability to comply with IHL.¹³⁹ Second, the hostilities must surpass a certain level of *intensity*, for instance when the police forces of the state in question are no longer capable of dealing with the insurrection, and therefore the army has to be mobilized in order to defeat the insurgents.¹⁴⁰ Although the precise application of these criteria depends on the case at hand, the requirement of a certain minimum threshold of application stands in stark contrast to the law of IACs.¹⁴¹ It also indicates that there is not, at present, a unitary or generic notion of ‘armed conflict’ of which IACs and NIACs would form

¹³⁰ See, eg, *Final Record* (n 122) 326 (Soviet Union); Moir (n 67) 31; L Cameron et al, ‘Article 3: Conflicts Not of an International Character’ in ICRC (ed), *Commentary on the First Geneva Convention* (CUP 2016) 131 [356] (hereafter Cameron et al, ‘Article 3’).

¹³¹ See, eg, Kalshoven and Zegveld (n 91) 66; Kleffner (n 98) 69; Zamir (n 35) 62.

¹³² *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22.

¹³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14 [218].

¹³⁴ *Nuclear Weapons Advisory Opinion* (n 8) [79].

¹³⁵ *Tadić* Decision on Jurisdiction (n 107) [102]; *Prosecutor v Delalić et al* (Čelebići Appeal Judgment) IT-96-21-A (20 February 2001) [138]–[139] and [147]; *Prosecutor v Gotovina* (Trial Judgment) IT-06-90-T (15 April 2011) vol 2 [1671].

¹³⁶ See *Final Record* (n 122) 129 (Report drawn up by the Joint Committee and presented to the Plenary Assembly).

¹³⁷ See *Tadić* Decision on Jurisdiction (n 107) [70], as applied in *Prosecutor v Tadić* (Trial Judgment) IT-94-1-T (7 May 1997) [562]; *Prosecutor v Limaj, Bala and Musliu* (Trial Judgment) IT-03-66-T (30 November 2005) [84]; *Prosecutor v Haradinaj, Balaj and Brahimaj* (Trial Judgment) IT-04-84-T (3 April 2008) [37]–[60]; *Prosecutor v Boškoski and Tarčulovski* (Trial Judgment) IT-04-82-T (10 July 2008) [175]–[205].

¹³⁸ See, eg, Schindler, ‘Different Types of Armed Conflicts’ (n 78) 147; Kolb and Hyde (n 12) 78; M Sassòli, AA Bouvier, and A Quintin, *How Does Law Protect in War?* (3rd edn, ICRC 2011) vol I, 123; Sivakumaran (n 5) 167–80; L Moir, ‘The Concept of Non-International Armed Conflict’ in Clapham et al, *Geneva Conventions* (n 9) 404–13 [34]–[61]; Zamir (n 35) 63; Cameron et al, ‘Article 3’ (n 130) 153–59 [422]–[437].

¹³⁹ *Limaj et al* Trial Judgment (n 137) [129]; *Boškoski and Tarčulovski* Trial Judgment (n 137) [199]–[203].

¹⁴⁰ *Limaj et al* Trial Judgment (n 137) [90]; *Boškoski and Tarčulovski* Trial Judgment (n 137) [177].

¹⁴¹ See text to notes 99–109 in this chapter.

specific subtypes,¹⁴² an issue that gains particular importance with respect to the process of de-internationalization discussed later in this work.¹⁴³

Apart from these minimum requirements, the scope of NIACs under Common Article 3 is fairly broad. In particular, the provision does not establish any requirement as to the nature of the belligerents, and it therefore applies equally to ‘vertical’ civil wars (confrontations between governmental armed forces and the forces of one or more armed groups) and to ‘horizontal’ civil wars (confrontations between the forces of several armed groups without the involvement of the government).¹⁴⁴ Moreover, although the provision speaks of conflicts ‘occurring *in the territory* of one of the High Contracting Parties’, it would be inaccurate to limit the notion of NIACs to intraterritorial situations (sometimes referred to as ‘internal armed conflicts’).¹⁴⁵ The formulation used in Common Article 3 likely reflects the historical fact that pre-1949, conflicts between a state and a non-state armed group—or those between several such groups—were practically always confined to the territory of a single state.¹⁴⁶ However, modern state practice¹⁴⁷ and the object and purpose of Common Article 3¹⁴⁸ suggest that the law of NIAC applies also to conflicts that cross international borders, as long as they satisfy the minimum criteria outlined previously.¹⁴⁹

Dealing with the absence of a clear definition of the concept of NIAC was one of the hopes placed on the delegates at the Diplomatic Conference of 1974–77.¹⁵⁰ The states agreed on an applicability provision according to which the newly adopted Second Additional Protocol would:

apply to all armed conflicts which are not covered by Article 1 of [AP I] and 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

¹⁴² Schindler, ‘Different Types of Armed Conflicts’ (n 78) 131; D Kritsiotis, ‘The Tremors of Tadić’ (2010) 43 *Isr L Rev* 262, 293–99; K Mačák and N Zamir, ‘The Applicability of International Humanitarian Law to the Conflict in Libya’ (2012) 14 *ICLR* 403, 407; Akande (n 13) 32; S Sivakumaran, ‘Re-envisioning the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum’ (2011) 22 *EJIL* 273, 273; M Milanovic and V Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’ in N White and C Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar 2013) 269–72; M Milanovic, ‘The Applicability of the Conventions to “Transnational” and “Mixed” Conflicts’ in Clapham et al, *Geneva Conventions* (n 9) 28–30 [5]–[10] (hereafter Milanovic, ‘“Transnational” and “Mixed” Conflicts’); Zamir (n 35) 68–69.

¹⁴³ See further Section 4.2.1.

¹⁴⁴ Moir (n 138) 397 [13]; Cameron et al, ‘Article 3’ (n 130) 143 [394].

¹⁴⁵ Moir (n 138) 400–03 [22]–[31].

¹⁴⁶ See Cameron et al, ‘Article 3’ (n 130) 164 [455].

¹⁴⁷ See, eg, Ecuador, Ministry of Foreign Affairs, Ecuadorian Government Protests Assassination of Raul Reyes in Ecuador (1 March 2008); Germany, Federal Prosecutor General, Targeted Killing in Pakistan case, Case No. 3 BJs 7/12-4, Decision to Terminate Proceedings (23 July 2013) 742; US DoD, *Law of War Manual* (December 2016) [17.1.1.2].

¹⁴⁸ cf Cameron et al, ‘Article 3’ (n 130) 168 [467].

¹⁴⁹ See further K Mačák, ‘Silent War: Applicability of the *Jus in Bello* to Military Space Operations’ (2018) 94 *International Law Studies* 1, 34–36.

¹⁵⁰ See V Potapov, ‘Reaffirmation and Development of International Humanitarian Law: An Analysis of Some Key Issues’ (1977) 17 *IRRC* 3, 7–10.

control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁵¹

This definition of NIAC raises the applicability bar established by Common Article 3 in two main ways. First, it only covers ‘vertical’ civil wars, as governmental armed forces must be involved in the conflict. Second, it requires the insurgent group to be in control of a discernible part of the state’s territory, thereby excluding guerrilla-type violence from its scope.¹⁵² The conditions contained in AP II resemble those required for recognition of belligerency.¹⁵³ However, because the full scope of IHL does not come into operation even if these requirements are met, the applicability rules contained in AP II have been portrayed as regrettable¹⁵⁴ and even regressive.¹⁵⁵

Wide discontent with the stringency of AP II conditions can also be illustrated on the way the states defined NIACs twenty years later for the purposes of the Rome Statute establishing the International Criminal Court (ICC).¹⁵⁶ The drafters deliberately deviated from the definition in Article 1(1) AP II, opting instead for a wording which required only a protracted armed conflict between governmental authorities and organized armed groups or between such groups to exist in order to establish the court’s jurisdiction over war crimes committed in a NIAC.¹⁵⁷ It can thus be summarized that the general trigger for the application of the law of NIAC is contained in Common Article 3, while in situations that additionally fulfil the requirements of Article 1(1) AP II and occur in the territory of states that have ratified AP II, the rules of that instrument will also apply.

1.2.3 Convergence and its limits

The adoption of Common Article 3 in 1949 marked the first significant inroad into the otherwise exclusively domestic sphere of regulation of internal conflicts. Because its substance drew from the law of IAC, the provision simultaneously codified the distinction between IACs and NIACs and started the trajectory towards narrowing it.¹⁵⁸ Since then, the development of international law has continued to bring the two legal categories closer to one another. A growing number of international conventions regulating the use of weapons apply equally to both types of conflict.¹⁵⁹

¹⁵¹ Art 1(1) AP II.

¹⁵² For example, in the Guatemalan Civil War, the insurgents were able to carry out sustained and concerted military operations without placing any part of the national territory under their control, which made AP II inapplicable to the conflict. Provost (n 9) 264.

¹⁵³ See Section 2.5.1.1.

¹⁵⁴ Kleffner (n 98) 133.

¹⁵⁵ Provost (n 9) 264.

¹⁵⁶ Art 8(2)(f) Rome Statute.

¹⁵⁷ *ibid*; see La Haye (n 80) 9.

¹⁵⁸ cf Hill-Cawthorne (n 5) 16 (‘The new treaty law of non-international armed conflict was . . . modelled on the law applicable in international armed conflict, with the result that, whilst codifying the distinction, the Geneva Conventions partially narrowed it.’).

¹⁵⁹ See, eg. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (signed 10 April 1972, entered into force 26 March 1975) 1015 UNTS 163, Art 1; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (signed 13 January 1993, entered into force 29 April 1997) 32 ILM 800, Art 1; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

Some states expressly declare in their military manuals that they apply IHL to any type of conflict whatever its legal characterization.¹⁶⁰ In addition, the ICTY has held that customary rules governing internal armed conflicts comprise many principles traditionally thought to regulate international conflicts only, including the protection of civilians and civilian objects from hostilities or the prohibition of means and methods of warfare proscribed in IACs.¹⁶¹ More recently, this has been further corroborated by an extensive study conducted by the ICRC, according to which approximately 90% of customary rules of IHL identified therein applied in both types of conflict.¹⁶²

Still, the distinction between IACs and NIACs has anything but disappeared, in spite of the recurring calls for its elimination.¹⁶³ The two types of conflict arise in markedly different ways: while IACs ‘would usually be triggered by an armed attack, the evolution of [NIACs] is more likely to follow a path of escalation of internal strife and violence’.¹⁶⁴ Although the adoption of the two Additional Protocols in

(signed 18 September 1997, entered into force 1 March 1999) 2056 UNTS 211, Art 1; Convention on Cluster Munitions (signed 30 May 2008, entered into force 1 August 2010) UN Doc CCM/77, Art 1.

¹⁶⁰ See, eg, US Department of Defense, Directive 2311.01E ‘DoD Law of War Program’ (9 May 2006) [4.1]; German Ministry of Defence, *ZDv 15/2 Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch* [Humanitarian Law in Armed Conflicts: Manual] (1992) [211]. The statement in the newest edition of the German manual has since been toned down: see German Ministry of Defence, *ZDv 15/2, Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch* [Humanitarian Law in Armed Conflicts: Manual] (2013) [210]. Other types of official pronouncements also indicate confluence, including submissions in court proceedings stating that characterization of conflict is of lesser importance because many of the rules have become identical: cf D Turns, ‘The “War on Terror” through British and International Humanitarian Law Eyes: Comparative Perspectives on Selected Legal Issues’ (2007) 10 New York City Law Review 435, 469–70 (making this point in relation to the State of Israel’s submissions in the *Targeted Killings* case); see also Letter from the UK Foreign and Commonwealth Office to author (11 July 2011), on file with author (stating that ‘in many cases of armed conflict in which UK forces are engaged, the UK will apply the more developed rules of LOAC applicable to international armed conflicts as a matter of policy’); Letter from the Embassy of the Principality of Monaco to author (10 August 2011), on file with author (stating that Monaco ‘doesn’t distinguish between international and non-international conflicts’); Letter from the Ministry of Foreign Affairs of the Republic of Latvia to author (15 July 2011), on file with author (stating that ‘Latvia does not distinguish between international and non-international armed conflicts applying the law of armed conflicts’).

¹⁶¹ *Tadić* Decision on Jurisdiction (n 107) [127].

¹⁶² *ICRC CIHL Study* (n 23). The study’s methodology has not, however, been free from criticism. See, eg, GH Aldrich, ‘Customary International Humanitarian Law: An Interpretation on behalf of the International Committee of the Red Cross’ (2005) 76 BYBIL 503, 507; J Bellinger and W Haynes, ‘U.S. Initial Reactions to ICRC Study on Customary International Law’ (2006) 101 AJIL 639; Y Dinstein, ‘The ICRC Customary International Humanitarian Law Study’ (2006) 82 International Law Studies 99, 101–05; J Bellinger and WJ Haynes, ‘A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law’ (2007) 89 IRRC 443, 444–48; D Bethlehem, ‘The Methodological Framework of the Study’ and I Scobbie, ‘The Approach to Customary International Law in the Study’, both in E Wilmshurst and S Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (CUP 2007).

¹⁶³ See, eg, Stewart (n 16) 348; D Wilmott, ‘Removing the Distinction between International and Non-International Armed Conflict in the *Rome Statute of the International Criminal Court*’ (2004) 5 MJIL 196; E Crawford, ‘Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts’ (2007) 20 LJIL 441; K Mastorodimos, ‘The Character of the Conflict in Gaza: Another Argument Towards Abolishing the Distinction between International and Non-International Armed Conflicts’ (2010) 12 ICLR 437.

¹⁶⁴ Lubell (n 12) 91.

1977 contributed towards the trend of convergence, it also underscored that the two types of conflict remained governed by separate legal frameworks.¹⁶⁵ Similarly, the 1998 Rome Statute, an indicative recent multilateral convention, preserved the distinction in its provisions on war crimes.¹⁶⁶ Furthermore, declarations in military manuals do not necessarily amount to an obligation under international law; norms of this sort may be expressions of state policy, not of *opinio juris*.¹⁶⁷ Even the ICTY emphasized that only some of rules and principles governing IACs have gradually been extended to internal conflicts and that only the ‘general essence’ of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.¹⁶⁸

In addition, there are notions in the law of IAC, which do not easily square with the reality of NIACs, and which thus might not ever be fully transposable from the former to the latter. In particular, this is the case with the concepts of combatant status and belligerent occupation.¹⁶⁹ The former is a closely guarded prerogative of states and as such it is restricted to conflicts characterized by inter-state hostilities.¹⁷⁰ The latter is predicated on the existence of two enemy states: one in the role of the occupying power, the other as the displaced sovereign.¹⁷¹ Both of these concepts are of central importance for the present study and they are, accordingly, subject to detailed scrutiny later in the text.¹⁷²

To recapitulate, despite the trend of gradual convergence between the two main types of armed conflict, the distinction is here to stay.¹⁷³ As a result, the rights and duties of those engaged in armed conflicts depend to a considerable extent on the exact qualification of the situation at hand. Alison Duxbury has correctly observed that ‘[o]nly in a system which creates a distinction between the rules that apply in international and internal armed conflict, would the concept of an internationalized armed conflict be considered necessary.’¹⁷⁴ Therefore, having confirmed that the said distinction still persists in IHL, the next section turns to the concept of internationalization.

¹⁶⁵ Frits Kalshoven, who had participated in the 1974–77 diplomatic conference, commented that this was ‘one of the issues the conferences of the 1970s failed to tackle, leaving us with a dividing line separating the two main categories of armed conflict that we all knew did not reflect reality’. F Kalshoven, ‘From International Humanitarian Law to International Criminal Law’ (2004) 3 Chinese JIL 151, 158.

¹⁶⁶ See Art 8(2) Rome Statute; see also *Prosecutor v Thomas Lubanga Dyilo* (Trial Judgment) ICC-01/04-01/06 (14 March 2012) [539] (confirming the relevance of the IAC/NIAC distinction in IHL).

¹⁶⁷ Crawford (n 163) 457; see also Bellinger and Haynes (n 162) 640–41.

¹⁶⁸ *Tadić* Decision on Jurisdiction (n 107) [126].

¹⁶⁹ See also Section 1.1.1 and particularly notes 12–13 in this chapter and the accompanying text.

¹⁷⁰ But see Crawford (n 5) 153–73 (arguing for a universal combatant status applicable in IACs and NIACs alike).

¹⁷¹ But see Sivakumaran (n 5) 529–32 (arguing for an extended applicability of the law of belligerent occupation to NIACs).

¹⁷² See Chapters 5–7 and 8–10, respectively.

¹⁷³ Similarly Wilmschurst (n 35) 500; Milanovic, ‘“Transnational” and “Mixed” Conflicts’ (n 142) 30–31 [10]; Zamir (n 35) 47.

¹⁷⁴ A Duxbury, ‘Drawing Lines in the Sand: Characterising Conflicts for the Purposes of Teaching International Humanitarian Law’ (2007) 8 MJIL 259, 267.

1.3 Concept of Internationalization of Armed Conflicts

1.3.1 Emergence of the term ‘internationalization’ in international law

The observation that a domestic uprising may grow into hostilities that come within the purview of international law is anything but novel. As discussed earlier, the Swiss scholar Emmerich de Vattel wrote in 1758 that a civil war in which the rebels wield strength sufficient to effectively oppose the sovereign is equivalent to a war between two states under international law.¹⁷⁵

The phrase ‘to internationalize a war’, although absent in Vattel’s writings, had entered the English language by 1865, when it was first included in Webster’s *American Dictionary of the English Language*.¹⁷⁶ It was, however, still used only to denote a change in the factual circumstances rather than to express the transformation of the law applicable to the situation at hand.

In 1901, the international legal scholar Hannis Taylor used the term ‘internationalization’ in a meaning more relevant for the present purposes. He wrote that a part of state territory that was subject to foreign invasion and occupation would become ‘internationalized’, meaning that in a district temporarily placed under the control of the foreign army, certain rules of international law would become applicable.¹⁷⁷

However, it took until the mid-1960s when, against the backdrop of the Vietnam War, a number of publicists started to write about ‘international’ or ‘internationalized’ civil wars in the context of the law applicable to such types of violence. For instance, Major Talmadge Bartell argued in 1964 that the ‘communist’ practice of providing military assistance to insurgents in civil wars had ‘internationalized’ such conflicts, thus modifying the applicable law.¹⁷⁸ In the same year, Richard Falk wrote that the recognition of belligerency of the insurgents by outside states would render the internal war ‘fully internationalized’.¹⁷⁹

Finally, in 1965, Dietrich Schindler offered the first systematic treatment of conflict internationalization.¹⁸⁰ He referred to internal conflicts, in which outside states provided military assistance to one of the conflict parties, as to ‘international civil wars’.¹⁸¹ He further discussed whether the international law of war should apply to all or only some of the relationships in such conflicts.¹⁸² Schindler’s principal contribution was in his use of the term ‘internationalization of civil wars’

¹⁷⁵ de Vattel (n 65), book III, ch XVIII, §§292–95; see also text to notes 65–68 in this chapter.

¹⁷⁶ N Webster, *An American Dictionary of the English Language* (G&C Merriam 1865) 707 (‘Internationalize, v.t. To make international; to cause to affect or pertain to the mutual relations of two or more nations; as, to internationalize a war.’) (emphasis added).

¹⁷⁷ H Taylor, *A Treatise on International Public Law* (Callaghan & Co 1901) 556–57. For example, international law would permit the appropriation of public property to prevent it from falling into enemy hands.

¹⁷⁸ TL Bartell, ‘Counterinsurgency and Civil War’ (1964) 40 North Dakota Law Review 254, 254, 290.

¹⁷⁹ Falk (n 76) 194.

¹⁸⁰ D Schindler, ‘Die Anwendung der Genfer Rotkreuzabkommen seit 1949’ (1965) 22 ASDI 75, 93–98.

¹⁸¹ *ibid* 93 (‘[i]nternationale Bürgerkriege’).

¹⁸² *ibid* 94–97.

(*Internationalisierung der Bürgerkriege*)¹⁸³ to imply the change in the law applicable to (at least some relationships within) a previously purely internal conflict.

1.3.2 Towards the definition of ‘internationalization’ in international law

Dietrich Schindler’s work and its revised English versions published in 1979¹⁸⁴ and 1982¹⁸⁵ became perhaps the most widely cited sources in the contemporary legal analysis of conflict internationalization. However, a review of the literature reveals an absence of a consensus on the exact meaning and scope of the term. Instead, two views can be said to dominate in the scholarship. On the one hand, many authors, including Schindler, have regarded internationalized conflict as a civil war with some form of outside armed interference.¹⁸⁶ On the other hand, a number of writers have

¹⁸³ *ibid* 98. ¹⁸⁴ Schindler, ‘Different Types of Armed Conflicts’ (n 78) 150–51.

¹⁸⁵ D Schindler, ‘International Humanitarian Law and Internationalized Internal Armed Conflicts’ (1982) 230 *IRRC* 255.

¹⁸⁶ See, eg, Schindler, ‘Different Types of Armed Conflicts’ (n 78) 150 (defining internationalized armed conflicts as ‘non-international conflicts in which foreign States or international organizations intervene with armed troops’); H-P Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon’ (1983) 33 *AULR* 145, 145 (‘An internationalized non-international armed conflict is a civil war characterized by the intervention of the armed forces of a foreign power.’); R Bierzanek, ‘Quelques remarques sur l’applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés’ in C Swinarski (ed), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC 1984) 282 (‘le phénomène de conflit interne internationalisé: l’intervention d’Etats tiers dans les guerres civiles’); Stewart (n 16) 315 (‘the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government’); APV Rogers, *Law on the Battlefield* (3rd edn, Manchester University Press 2012) 299 (‘Sometimes what starts as an internal armed conflict becomes “internationalized” by the military intervention of a state in support of an armed group.’); Pejić (n 35) 84 (‘a non-international armed conflict in which a third State or a multinational force intervenes (internationalised non-international conflict)’); S Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 *IRRC* 69, 71 (considering a conflict to be ‘internationalized’ in case of ‘intervention in a previously existing internal conflict’); T Hoffmann, ‘Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts’ in MJ Matheson and D Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts* (Brill 2010) 218 fn 4 (‘The notion of “internationalized non-international armed conflict” ... specifically pertains to civil wars characterized by the intervention of the armed forces of a foreign State.’); Lubell (n 12) 93 (considering internationalized conflicts to mean ‘armed conflicts involving a third state as well as internal violence between the government and non-state actors’); E Holland, ‘The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts’ (2011) 34 *Suffolk Transnational Law Review* 145, 162 (‘An “internationalized” conflict exists if there is a non-international armed conflict in which an outside state becomes involved on behalf of the non-state actor.’); KA Johnston, ‘Transformations of Conflict Status in Libya’ (2012) 17 *JCSL* 81, 95 (arguing that internationalization occurs ‘as a result of the intervention of another state [in a NIAC] on the side of the non-state party’); T Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict’ (2015) 97 *IRRC* 1227, 1230 (noting that the ICRC had used the term ‘“[i]nternationalized internal armed conflict” ... to refer to situations in which one or more third States intervened in a pre-existing armed conflict’); P Muggleton, *Muggleton on the Law of Non-International Armed Conflict* (APCML 2017) 14 (‘Internationalised armed conflicts are NIACs that become internationalised due to direct or indirect intervention by an outside state on behalf of an armed group party to the NIAC’).

highlighted the ‘mixed’ or ‘hybrid’ nature of internationalized conflicts, defining these as conflicts which have both non-international and international elements.¹⁸⁷

However, it is submitted that neither of these interpretations captures fully the essence and meaning of conflict internationalization. With respect to the first view, this is due to its underinclusiveness. As this study shows, foreign intervention is just one vehicle of transformation from a NIAC to an IAC.¹⁸⁸ The American Civil War of the 1860s or the Yugoslavian Civil War of the 1990s have been, it is argued, prominent examples of internationalized armed conflicts, albeit not on account of external interference.¹⁸⁹ It can thus be said that the first view is unsatisfactory because of its incompleteness *ratione materiae*.¹⁹⁰

By contrast, the second view, although not principally incorrect, is question-begging and potentially overinclusive. It begs the question which of the supposed international elements must be present in a conflict for it to be considered internationalized. Additionally, it is overinclusive in that it refers to conflicts as ‘internationalized’ even if they had never been non-international in the first place. For instance, this view would quite illogically characterize a conflict involving two states and a *subsequently* formed non-state armed group as ‘internationalized’.¹⁹¹ This conceptualization should therefore also be rejected.

¹⁸⁷ See, eg, A Roberts, ‘Counter-terrorism, Armed Force and the Laws of War’ (2002) 44 *Survival* 7, 16 (‘“internationalised civil war” ... is not a formal legal category, but an indication that the rules pertaining to both international and civil wars may be applicable in different aspects and phases of the conflict’); Stewart (n 16) 314 (‘internationalized armed conflicts’ are ‘conflicts that contain both international and non-international elements’); K Dörmann and L Colassis, ‘International Humanitarian Law in the Iraq Conflict’ (2004) 47 *GYIL* 293, 313 (describing the conflict in Iraq after 2004 as ‘one or possibly several internationalized internal armed conflicts’ governed by the law of NIAC); UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) 16 (‘many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international’); Crawford (n 163) 446 (‘a type of armed conflict that possesses qualities of both international and internal armed conflict ... came to be known as “internationalized” armed conflict.’); Arimatsu (n 43) 177 (describing the conflict in Afghanistan after 2002 as ‘a non-international armed conflict, albeit internationalized’); R Geiss and M Siegrist, ‘Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?’ (2011) 93 *IRRC* 11, 13–16 (describing the conflict in Afghanistan after 2002 as ‘an “internationalized” non-international armed conflict’ (internal quotation marks kept)); J Odermatt, ‘Between Law and Reality: “New Wars” and Internationalised Armed Conflict’ (2013) 5 *Amsterdam Law Forum* 19, 29 (describing ‘internationalised armed conflicts’ as ‘“mixed” conflicts, since they involve both internal and international elements’); MG Janaby, ‘The Legal Status of Hezbollah in the Syrian Conflict: An International Humanitarian Law Perspective’ (2016) 33 *Ariz J Int’l & Comp L* 383, 397 (‘Internationalized armed conflict has the characteristics of both international and non-international armed conflicts.’).

¹⁸⁸ See generally Chapter 2.

¹⁸⁹ See Section 2.5.1 and Section 2.3.1, respectively.

¹⁹⁰ This would also be the case with the small number of publications which equate internationalized armed conflict with one of the other modalities of internationalization. See, eg, H McCoubrey and N White, *International Organizations and Civil Wars* (Dartmouth 1995) 62–63 (considering the term ‘internationalized’ armed conflicts as covering wars of national liberation only); W Heintschel von Heinegg, ‘Introduction’ in MN Schmitt and W Heintschel von Heinegg (eds), *The Scope and Applicability of International Humanitarian Law* (Ashgate 2012), vol 1, xi (stating that Art 1(4) AP I recognized ‘so-called “internationalized” wars’).

¹⁹¹ For instance, the hostilities between Vietnam and Cambodia (Kampuchea) broke out in May 1975. An insurgent group aligned with Vietnam, the Kampuchean United Front for National Salvation (KUFNS), was formed in Cambodia in December 1978; it invaded Cambodia together with Vietnam the following year. The conflict between Cambodia and Vietnam had been international at least until the Khmer Rouge government was toppled in early 1979. Although the creation of the KUFNS added a

Reflecting some of these criticisms, the ICRC announced in 2015 that it had abandoned the use of the related term ‘internationalized internal armed conflict’.¹⁹² Specifically, the ICRC’s concern was that the term was ‘misleading’ because it ‘might seem to suggest that a single legal framework—the law of IAC—applies to such situations or that they constitute a third category of armed conflict for which the applicable legal framework is uncertain’.¹⁹³ Although the ICRC’s position was limited to conflicts involving foreign intervention,¹⁹⁴ its concern about the appropriate terminology can be extended to all modalities of conflict transformation and as such it deserves some attention at this point.

As discussed earlier in this chapter, IHL applies if there is a situation that can be characterized either as an IAC or as a NIAC.¹⁹⁵ There is no ‘third category of armed conflict’ in that sense and it would indeed be inaccurate to describe internationalized armed conflicts as such.¹⁹⁶ However, it is submitted that the worries about the introduction of a ‘third category’ are the product of the prevailing *static* approach to conflict qualification, which assesses the legal nature of a conflict in isolation at a particular point in time. Instead, the notion of internationalization is better understood as highlighting the *dynamic* idea of conflict transformation, in other words, the conversion from a NIAC to an IAC.

On the basis of the foregoing, this book defines internationalization as the process of transformation of the legal nature of a *prima facie* NIAC, which renders the law of IAC applicable to such a conflict. Conflicts that have undergone the process of internationalization in this sense are referred to as ‘internationalized armed conflicts’. The process of internationalization is considered in detail in Part I, while the precise application of the law of IAC to internationalized armed conflicts is the subject of Parts II and III of this book.

In addition to the points raised thus far, several final remarks should be made as to the overall strengths of this conceptualization. Firstly, it is consistent with the understanding of the term ‘to internationalize’ in general language, namely ‘to make international’.¹⁹⁷ An internationalized armed conflict is indeed ‘made international’ insofar as the law to be applied to it is concerned. Secondly, this conceptualization is

non-international element to the existing situation, it could not have internationalized the conflict—it had already been international at the time. See Gasser, ‘Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon’ (n 186) 153–54; *Case of Kaing Guek Eav alias ‘Duch’* (Trial Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) [59]–[81] and [423].

¹⁹² Ferraro (n 186) 1227. ¹⁹³ *ibid* 1251.

¹⁹⁴ cf *ibid* (using the heading ‘Terminology used by the ICRC to refer to *armed conflict situations involving foreign intervention*’ to introduce the analysis) (emphasis added).

¹⁹⁵ See Section 1.2.

¹⁹⁶ Similarly, calls for the recognition of a supposed third category of ‘transnational armed conflict’ or ‘extra-state armed conflict’ have to acknowledge that such notions are currently without legal basis in positive IHL and that their introduction would necessitate a substantial reform of the existing law. See, eg, RS Schöndorf, ‘Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?’ (2004) 37 NYU JILP 1, 4–5; GS Corn and ET Jensen, ‘Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations’ (2012) 42 Isr L Rev 46, 50; Milanovic, ‘“Transnational” and “Mixed” Conflicts’ (n 142) 46–47 [68]–[69].

¹⁹⁷ See the dictionary definition quoted at note 176 in this chapter.

capable of covering all possible modalities of conflict internationalization and it does not limit itself to foreign intervention in civil wars. Thirdly, it is not overinclusive, as it stresses the process of conflict transformation instead of simply stating the presence of both internal and international elements in a given conflict. There are some examples of academic writing, which have used the concept of internationalization in this sense.¹⁹⁸ It is also the meaning ascribed to it throughout the rest of this book.

¹⁹⁸ See, eg, R Cryer, 'The Fine Art of Friendship: *Jus in Bello* in Afghanistan' (2002) 7 JCSL 37, 43; Crawford (n 5) 15; Milanovic and Hadzi-Vidanovic (n 142) 292–93; Milanovic, '“Transnational” and “Mixed” Conflicts' (n 142) 34–35 [26]; D Kritsiotis, 'War and Armed Conflict: The Parameters of Enquiry' in R Liivoja and T McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 18–20; Zamir (n 35) 8.