

Andreas S. Kolb

The UN Security Council Members' Responsibility to Protect



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Armin von Bogdandy · Anne Peters

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Andreas S. Kolb

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A Legal Analysis

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Preface

In this book, I undertake to formulate an answer to the question whether international law currently poses a duty for states that hold the power of Security Council membership to direct their acts or omissions in that body towards the prevention of mass atrocity crimes, including but not limited to genocide. As I will sketch in [Chap. 1](#), this question could hardly be more topical today. In the age of what has been labelled “new wars”, the most atrocious forms of violence are not just a concomitant feature but often an integral part of warfare. Civilians suffer excessively in times of armed conflict and often pay an enormous toll of lives and dignity. This was most evident in Rwanda and Srebrenica in the mid-1990s, and it currently is in Syria, but it has equally marked many conflicts which have received less public attention. As the international community opened its eyes to the extent to which its own passivity had enabled the Rwandan and Bosnian genocides, a new notion was created with a view to ensuring the protection of imperilled populations, which has eventually made its way not just into academic and diplomatic circles but even into mainstream media. At the heart of this “Responsibility to Protect” or “R2P” concept is the Security Council, the body which has indeed claimed for itself the competence to deal with massive human rights violations.

As I have sought to tie these ends together and assess whether international law contains a responsibility to protect framework that would obligate the members of the Security Council to prevent atrocity crimes, I have had to tackle two issues of a more general nature. Most basically, in [Chap. 2](#), I suggest that the criteria for determining the existence and contents of a legal norm are far from being settled but rather require some theoretical foundation, especially when the topic under consideration exerts such strong moral pulls as does the prevention of mass atrocities. Having outlined an understanding of the sources and methodology of international law that is, in my opinion, consistent both as a matter of legal theory and with the practice of international courts, I turn to substantive international law. In [Chap. 3](#), I confront a general obstacle to potential duties for Security Council members, namely the proposition, which is at times more and sometimes less explicit in scholarly works, that no substantive obligations apply to the decision-making of the Council. Having rejected this contention as being, at least in this generality, without

basis in the international legal system, the question is essentially whether any legal regime contains a norm that would require states to make sure that the Security Council gets involved for the prevention of certain crimes. Candidate regimes are not only unwritten, especially customary international law, but also the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the humanitarian law contained in the 1949 Geneva Conventions and their additional protocols as well as the Charter of the United Nations. In three successive steps, I will address in [Chaps. 4–6](#) whether any of these legal frameworks establishes duties of prevention that could commit the Security Council members to actively support or at least not to impede collective measures to prevent or halt atrocity crimes wherever they may occur.

In [Chap. 7](#), I propose some conclusions that may be drawn from the preceding analysis. They are necessarily contingent on the methodological approach in which this analysis is grounded as well as on the material that I have examined. Moreover, as international legal norms and the interpretation to be given to them may evolve over the course of time, these conclusions are a snapshot and could be subject to further refinement as relevant state practice keeps proliferating. Various processes that could potentially have an impact on both general international law and the interpretation of relevant treaty provisions are still underway – in fact, some of them have only begun or gathered pace while this book was written. I am namely thinking of the ongoing conceptual debates within the United Nations, such as the annual General Assembly informal interactive dialogues on the responsibility to protect or the debate concerning veto restraint, which has been promoted by the recent initiative on a Code of Conduct regarding Security Council action against atrocity crimes. Meanwhile, the bitter reality is that the Security Council keeps being confronted with conflicts in which atrocity crimes are being committed on a massive scale and which thus test the commitment of the Security Council members – and the international community at large – to a collective responsibility to protect in practice.

For the purposes of the present study, I have appraised actual state practice, with a particular focus on the post-Cold War era, up until the end of 2013 and, in the case of Syria, the beginning of 2014, as well as verbal state practice in the form of initiatives, debates and statements within the United Nations up into 2015. Time will show whether the debates of the United Nations will help to further clarify, consolidate and flesh out legal duties of the Security Council members or whether the prevention of atrocity crimes through the Security Council will rather be considered as a matter of politics and morality.

This book is a product of my doctoral studies at Bucerius Law School, Hamburg, which concluded with an oral examination on 18 November 2016. It corresponds – with some minor corrections and editorial amendments – to the dissertation that I submitted in November 2015. I am indebted to all those who enabled me to undertake this project and carry it through to completion. I should first mention my thesis supervisor, Prof. Dr. Doris König, M.C.L., whom I thank for the opportunity to carry out this research project under her supervision, for her feedback and advice on the extensive draft of this thesis as well as for the chance to gain valuable academic

experience as an assistant at her chair of public law, international and European law. I am also very grateful to Prof. Dr. Jasper Finke, LL.M., the second reader of my thesis, for his rapid evaluation and constructive criticism, specifically on the methodological approach that I have adopted therein. I have benefited greatly, both academically and personally, from working with Dr. Thilo von Bülow and Dr. Tim René Salomon; they also deserve credit for having been a constant source of feedback and advice as well as for their encouragement to engage in further academic projects that I would not have undertaken without their instigation. Most importantly, I am thankful to my family, especially to my parents for what has essentially been nothing less than a lifetime of support, and to my wife: this project would not have been completed without her backing, her virtually endless patience and the many sacrifices which she made over the course of the years that I spent to a significant degree on this project. This book is dedicated to her.

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List of Abbreviations

ABiH	Army of the Republic of Bosnia and Herzegovina
AMIB	African Union Mission in Burundi
AMIS	African Union Mission in Sudan
AMISOM	African Union Mission in Somalia
ARS	Alliance for the Re-liberation of Somalia
AU	African Union
BiH	Bosna i Hercegovina [Bosnia and Herzegovina]
BINUB	UN Integrated Office in Burundi
CARICOM	Caribbean Community
CNDD-FDD	National Council for Democratic Defence
CPA	Comprehensive Peace Agreement
CSCE	Conference on Security and Cooperation in Europe
DPA	Darfur Peace Agreement
DPKO	Department for Peacekeeping Operations
DRC	Democratic Republic of the Congo
DUTCHBAT	Dutch battalion
EC	European Community
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea
ECHR	<i>Convention for the Protection of Human Rights and Fundamental Freedoms</i> of the Council of Europe (European Convention on Human Rights)
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EU	European Union
FARDC	Forces armées de la République Démocratique du Congo
FDLR	Forces Démocratiques de la Libération du Rwanda
FRCI	Forces républicaines de Côte d'Ivoire
FRY	Federal Republic of Yugoslavia

HLP	High-level Panel on Threats, Challenges and Change
HVO	Croatian Defence Council
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IFOR	Implementation Force
IGAD	Intergovernmental Authority on Development
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
INTERFET	International Force in East Timor
JEM	Justice and Equality Movement
JNA	Yugoslav People's Army
KLA	Kosovo Liberation Army
LRA	Lord's Resistance Army
MINUCI	United Nations Mission in Côte d'Ivoire
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
MPCI	Patriotic Movement of Côte d'Ivoire
NATO	North Atlantic Treaty Organization
NCP	National Congress Party
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organization
NMT	Nuremberg Military Tribunal
NTC	National Transitional Council
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
ONUB	United Nations Operation in Burundi
P3	[The three Western permanent members of the Security Council: France, UK, US]
P5	[The five permanent members of the Security Council]
PFLP	Popular Front for the Liberation of Palestine
POC	Protection of Civilians
R2P	Responsibility to Protect
RDP	Rally of the Republicans
RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
SAF	Sudan Armed Forces
SFOR	Stabilization Force

SLM/A	Sudan Liberation Movement/Army
SLM/AW	SLM Abdul Wahid
SLM/MM	SLM Mini Minawi
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
TFG	Transitional Federal Government
TFP	Transitional Federal Parliament
TNG	Transitional National Government
UIC	Union of Islamic Courts
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNAMET	UN Mission in East Timor
UNAMID	AU/UN Hybrid operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMIS	United Nations Advance Mission in the Sudan
UNHCHR	United Nations High Commissioner for Human Rights
UNISFA	United Nations Interim Security Force for Abyei
UNITAF	Unified Task Force
UNMIS	United Nations Mission in the Sudan
UNMISSET	United Nations Mission of Support in East Timor
UNMISS	United Nations Mission in the Republic of South Sudan
UNO	United Nations Organization
UNOCI	United Nations Operation in Côte d'Ivoire
UNOMUR	United Nations Observer Mission Uganda-Rwanda
UNOSOM	United Nations Operation in Somalia
UNOTIL	United Nations Office in Timor-Leste
UNPROFOR	United Nations Protection Force
UNSMIL	United Nations Support Mission in Libya
UNSMIS	United Nations Supervision Mission in Syria
UNTAET	UN Transitional Administration in East Timor
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
VRS	Army of the Republika Srpska
WFP	World Food Programme

Chapter 1

The Security Council and the Responsibility to Protect in the Age of New Wars

“[T]he United Nations was not created in order to bring us to heaven, but in order to save us from hell.”¹ To discuss the role of the Security Council and its members in combating genocide, crimes against humanity, war crimes and ethnic cleansing, one could hardly find a better point of departure than these famous words endorsed by *Dag Hammarskjöld* in 1954.² When spoken by the then Secretary-General of the

¹ Dag Hammarskjöld, *Address at the University of California Convocation, Berkeley, CA, 13 May 1954*, reprinted in: Andrew W. Cordier & Wilder Foote, eds., *Public Papers of the Secretaries-General of the United Nations, Volume II: Dag Hammarskjöld 1953-1956* (New York: Columbia University Press, 1972) 295 at 301.

² Indeed, the quote has become a popular theme in all forms of statements on the prevention of mass atrocity crimes and on the responsibility to protect, in scholarly publications just like in political debates. One of *Hammarskjöld*'s successors, Secretary-General *Kofi Annan*, recalled these words when he addressed the Security Council on the situation in Sudan and called for urgent action to stop the atrocities committed against civilians in Darfur, see UN SCOR, 5125th Mtg., 16 February 2005, UN Doc. S/PV.5125 at 2. In interstate discussions on the responsibility to protect, the link between the responsibility to protect and this quote has been made e.g. by Costa Rica and Denmark, see Costa Rica, Statement on behalf of Costa Rica and Denmark at the General Assembly Debate on the Responsibility to Protect, UN GAOR, 63rd Sess., 97th Plen. Mtg., UN Doc. A/63/PV.97 (23 July 2009) 22. In scholarship, the quote has also repeatedly been cited in the discourse about the prevention of mass atrocity crimes, see e.g. Henning Melber, “Why normative frameworks? An introduction” in *id.*, ed., *Dealing with crimes against humanity*, (2011) 55 *Development Dialogue* 3 at 3, 7; Henning Melber & Peter Wallensteen, “Preface” in Francis Deng, *Idealism and Realism: Negotiating sovereignty in divided nations, 2010 Dag Hammarskjöld Lecture, Uppsala University* (10 September 2010), online: UN Office of the Special Adviser on the Prevention of Genocide <http://www.un.org/en/preventgenocide/adviser/pdf/DH_Lecture_2010.pdf> 3 at 7; B. Panglosse, *Responsibility to Protect and Responsibility to React – From Doctrine to Practice: The Military Intervention in Libya* (Thesis for the Master International and European Public Law, 2011-2012), online: Tilburg University <arno.uvt.nl/show.cgi?fid=121348> at 4.

United Nations, they were a response to disillusionment at the performance of the UN and a call for moderation in expectations towards the organization.³ At the same time, they resonate with the commitment that states made when they signed the Charter of the United Nations (UN Charter) to “save succeeding generations from the scourge of war” and to “reaffirm faith in [...] the dignity and worth of the human person”.⁴ Half a century later, the world that *Hammar skjöld* and the drafters of the UN Charter knew has changed profoundly and yet their concerns have lost nothing of their topicality. The parameters have been redefined in some respects while the essence of today’s challenges bears striking similarities to the constellation in which *Dag Hammarskjöld* reiterated the call upon the United Nations to save humanity from hell. A new notion has been born, stipulating an international “responsibility to protect” and providing an important impetus to the debate on how to save mankind from the scourge of war and defend the most basic precepts of human dignity. *Hammar skjöld*’s successors, Secretaries-General *Kofi Annan* and *Ban Ki-moon*, played a crucial role in the evolution and endorsement of this concept, which was prompted again by a perception that the UN, through the Security Council, had failed to effectively discharge its responsibility. A characteristic difference lies, however, in the nature of the evil with which the international community has found itself faced with increasing frequency and urgency in the post-Cold War era. “New wars”, as international relations theorists have labelled the phenomenon, have become the principal form in which violent conflict threatens the dignity of men and women. “Atrocity crimes”, i. e. genocide, crimes against humanity, war crimes and ethnic cleansing,⁵ have been claiming a heavy toll especially from civilian populations. In this situation, eyes turn back to the UN Security Council in the expectation of effective protection.

The purpose of this thesis is to assess to what extent this expectation has found a legal expression in the form of duties incumbent upon the individual members of the Security Council to take the necessary action for the prevention of such atrocity crimes. By the end of this chapter, I will have provided an introduction to the state of jurisprudential and scholarly opinion on this matter. Before turning attention to specific questions of law, however, it is appropriate to outline the current parameters of the issue. I will hence start with a brief introduction to the notion of “new wars” as a description of the conflicts that the United Nations primarily has to cope

³ Cf. Brian Urquhart, *Hammar skjöld* (New York: Harper & Row, 1972) at 47-48.

⁴ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 (entered into force 24 October 1945), online: United Nations <<http://www.un.org/en/documents/charter/index.shtml>> at preambular paras. 1 and 2 [UN Charter].

⁵ See United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A tool for prevention* (New York: 2014), online: United Nations <http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf> at 2; see also David Scheffer, “Atrocity Crimes Framing the Responsibility to Protect” (2007-2008) 40 *Case W. Res. J. Int’l L.* 111 (suggesting that the term “atrocity crimes” was a useful designation of genocide, war crimes, ethnic cleansing and crimes against humanity “both for purposes of accuracy when describing the basket of relevant crimes, and for simplicity as a means of communicating with the global populace”).

with in our days. Subsequently, I will sketch the position of the Security Council members in this context, including the tools at their disposal to react to such threats. Following these observations on the institutional framework, I will finally introduce the concept of the responsibility to protect as the emerging normative frame of reference which may have an impact on the international law in this field.

1.1 New Patterns of Warfare as a Challenge to the Traditional Normative System

Coined by international relations theorists such as *Mary Kaldor*, the notion of “new wars” has gradually imposed itself to describe the characteristic phenomena of contemporary warfare.⁶ *Kaldor*’s central argument is that the process of globalization led to the emergence of a new type of organized violence during the last decades of the twentieth century.⁷ To avoid any misunderstandings that could be caused by the terminology, a clarification may be in order here: when I make reference in this work to “new wars”, it is not my intention to distinguish two distinct categories of conflict, with one type qualifying as “old wars” and others being “new”.⁸ In particular, no distinction is intended between the wars of the Cold War era and those of the post-Cold War era. *Kaldor* herself elucidates that features which are characteristic of “new wars” may have existed in earlier wars and that the phenomenon of “new wars”, while reflecting a new reality, had been emerging before the end of the Cold War.⁹ The essential contribution that she intends to make by distinguishing “new wars” from “old wars” is to confront customary perceptions of war, namely amongst policy-makers, which stem from an earlier era, with those new realities of conflict that have emerged in the context of the globalization process.¹⁰ In other words, the added value of the “new war” theory lies not in establishing categories or labels for different incidents of warfare, but in identifying the characteristics that distinguish

⁶ See especially *Mary Kaldor, New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012).

⁷ *Ibid.*, at 1.

⁸ Some authors have indeed voiced doubts as to the appropriateness of the label “new wars”. Even *Thomas G. Weiss*, while accepting that change in armed conflict has been so substantial that the label “new” is a justified attribute for many contemporary wars, notes that this “simplistic shorthand can [...] lead to misunderstandings”, see *Thomas G. Weiss, Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 70. *Weiss* stresses that the elements which characterize “new” warfare are not totally new themselves. Rather, elements that had existed before but were considered either extinct or only tangential had now come to the fore or been combined in previously unknown ways, *ibid.*

⁹ See *Mary Kaldor, New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 3.

¹⁰ *Ibid.*, at 1-3, 17 (noting that traditional perceptions of armed conflict still profoundly affect our thinking about war and security).

contemporary patterns of violence from what conventional wisdom would suggest. For the present work, such a juxtaposition of “old war” perceptions with “new war” insights into modern or “postmodern”¹¹ conflicts is particularly valuable in that it explains the traditional legal framework for Security Council action on the one hand and its pitfalls as well as the reasons for the emergence of the concept of a “responsibility to protect” (R2P) on the other.

What exactly characterizes the new wars of our times as contrasted with conventional conceptions of war has been explained in varying terms by different authors.¹² Two developments that are key to understanding the legal issues of the following chapters are the decline of states as a defining parameter of hostilities and the qualitative as well as quantitative leap in atrocities against civilians. Conventional warfare had been intimately related to statehood, as it was in its strictest sense understood as a means employed by states against each other to pursue their respective political ends.¹³ “New wars”, by contrast, are marked precisely by an erosion of state autonomy, which is reflected in multiple aspects of contemporary conflicts. To begin with the goals of warfare, notions of state interest have increasingly given way to new and different forms of what *Kaldor* calls “identity politics”, i. e. claims to power based on particular concepts of identity.¹⁴ Relevant identity politics may refer to such diverse concepts as nationality, clan structures, religion or language.¹⁵ While *Kaldor* acknowledges that wars have always been clashes of different identities, she observes that contemporary identity politics are inherently exclusive, focussing on labels that cause fragmentation of societies rather than integration.¹⁶

Conflicts marked by such particularistic currents are complex and hence difficult to grasp, including for international law, in terms of both their locus and the belligerent parties.¹⁷ New wars are characterized by the active participation of a

¹¹ Cf. e.g. Michael Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (New York: Henry Holt and Company, 1997) at 5-6.

¹² *Kaldor*, for instance, specifically mentions three characteristics, namely the goals, the methods and the financing of contemporary warfare, see Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 7-11. *Thomas G. Weiss*, for his part, names four changes that he considers essential, concerning namely the locus of armed conflicts, the main agents, the role of economic interests, and the victims, see *Thomas G. Weiss, Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 70-80. He characterizes “new wars” as “internal armed conflicts waged primarily by nonstate actors who subsist on illicit and parasitic economic behavior, use small arms and other low-technology hardware, and prey upon civilians, including aid workers and journalists”, *ibid.* at 80.

¹³ See on this “Clausewitzian definition” of war *Mary Kaldor, New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 15-17 and c. 2. I should stress, as *Kaldor* herself does, that this notion is stylized and fails to account for nuances and evolutions even in the realities of old wars, *ibid.*, at 15-17.

¹⁴ *Ibid.*, at 7-8.

¹⁵ *Ibid.*, at 7.

¹⁶ *Ibid.*, at 7-8.

¹⁷ For details on these two aspects see *Thomas G. Weiss, Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-74.

multitude of diverse entities. Aside from states and clearly defined and well-organized movements, a variety of non-state actors such as militias, paramilitary groups and warlords, criminal gangs and private military companies take part in the conduct of hostilities.¹⁸ Constellations on the ground are often unclear and the lines between belligerents fluctuate, as former or temporary allies split and turn against each other.¹⁹ For wars involving such actors, moreover, international borders are no longer the determinative criterion.²⁰ In fact, the worst humanitarian disasters since the Cold War were mostly brought about by intrastate crises, such as in Somalia, Liberia, Rwanda, Haiti or East Timor. Others have occurred during conflicts that at least have a history of civil war, despite the fact that they may have developed into international armed conflicts sooner or later.²¹ In sum, a state-centric perspective is often inadequate to explain the realities of modern warfare.²²

Another crucial development is the prevalence in “new wars” of civilian casualties.²³ Civilian populations have always paid a heavy toll when wars were led.

¹⁸ *Ibid.*, at 74. Again, it should be noted that it is its degree and form rather than the involvement of private actors as such that is “new”, *ibid.*

¹⁹ Illustrative are the shifting alliances amongst the different warring factions in Bosnia and Herzegovina between 1992 and 1995, see Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May 2008) at 193-194, the multitude of rebel movements in the Democratic Republic of the Congo (DRC), cf. Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-72 (estimating “40 or so armed opposition movements in the DRC”) and the gradual disintegration of armed groups in Darfur, cf. Part 6.3.6 below.

²⁰ See on the whole Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-74.

²¹ In this latter category fall namely the wars accompanying the break-up of the former Socialist Federal Republic of Yugoslavia, which combined elements of international and internal armed conflict at the latest when the United Nations accepted the breakaway republics as new member states in May 1992, cf. for Croatia: UN Security Council, Resolution 753 (1992), UN SCOR, 3073rd Mtg., UN Doc. S/Res/753 (18 May 1992) and UN General Assembly, *Admission of the Republic of Croatia to membership in the United Nations*, GA Res. 46/238, UN GAOR, 46th Sess., 86th Plen. Mtg., UN Doc. A/Res/46/238 (22 May 1992) 5, and for Bosnia and Herzegovina: UN Security Council, Resolution 755 (1992), UN SCOR, 3078th Mtg., UN Doc. S/Res/755 (20 May 1992) and UN General Assembly, *Admission of the Republic of Bosnia and Herzegovina to membership in the United Nations*, GA Res. 46/237, UN GAOR, 46th Sess., 86th Plen. Mtg., UN Doc. A/Res/46/237 (22 May 1992) 5. Somewhat different, while leading to similar difficulties of categorization, is the situation in the DRC, which turns around conflicts between the Congolese army and diverse rebel groups and militia operating on and from the territory of the DRC. At the same time, neighbouring states have repeatedly intervened in support of one side to the conflict or the other, turning it into an international armed conflict and indeed into what has been labelled “Africa’s World War”, see Gérard Prunier, *Africa’s World War: Congo, the Rwandan Genocide and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009). Susan Breau nevertheless treats the conflict in the DRC essentially as a civil war, cf. Susan Breau, *Humanitarian Intervention: The United Nations and Collective Responsibility* (London: Cameron May 2008) at 180.

²² Cf. Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 73-74.

²³ See on this aspect of new wars e.g. Thomas G. Weiss, *ibid.* at 75-80.

Alexander B. Downes estimated in 2006 that about half of the war-related casualties of the previous three centuries had been civilians.²⁴ Already during the Second World War, the absolute number of victims amongst the civilian population may have been almost two-and-a-half times as high as that for soldiers.²⁵ For the 1990s, however, the percentage of civilians amongst the victims of warfare has been estimated, by different authors, to amount to a staggering 80 or even 95 %.²⁶ The immediate causes of this excess of civilian casualties are manifold, ranging from direct military targeting to conflict-related preventable disease and starvation.²⁷ In fact, even diseases and starvation may in some instances be part of a military strategy that deliberately imposes upon a population conditions of life that cause excess deaths.²⁸ This attests to the new qualitative rather than solely quantitative dimension of violence against civilians in contemporary warfare. Pursuant to Kaldor's theory, this mode of warfare, in which violence is directed not just tangentially but primarily against civilians, is the second characteristic of "new wars" and as such at least partly linked to divisive identity politics.²⁹ As Kaldor recalls, conventional wars were aimed at the conquest of territory through military encounters. The mode of new wars, by contrast, resembles that of guerrilla warfare in that it seeks to control territory through political control of its population. The distinctive feature of new warfare, however, are the means which it employs to ensure such control of the population, and which are drawn from counter-insurgency experience rather than guerrilla theory: instead of attempting "to capture 'hearts and minds'", Kaldor suggests, it "borrows [...] techniques of destabilization aimed at sowing 'fear and hatred'".³⁰ Essentially, control is established by instilling terror and ultimately even by getting

²⁴ See Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War" (2006) 30:4 *International Security* 152 at 152; Weiss notes that this estimate may still be too high in the eyes of most observers, see Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 76.

²⁵ Cf. Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 76 (calculating 23 million dead soldiers and 57 million civilian casualties).

²⁶ See with references to the different studies *ibid.*, at 76-77.

²⁷ On the "prevalence of civilian casualties" as a consequence of the intentional targeting of civilian populations and war-related fatalities, cf. e.g. *ibid.*, at 75-76.

²⁸ Cf. e.g. Alexander B. Downes, "Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War" (2006) 30:4 *International Security* 152 at 156 (including deaths by starvation and disease in his enumeration of methods of "civilian victimization"). A pertinent example is the deliberate destruction of resources, installations and utensils essential for water and food supplies in Darfur, cf. e.g. United Nations, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, online: United Nation <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf> at paras. 235, 305 (reporting that crops had been burnt and cut down, water pumps, containers and wells destroyed or poisoned, and food processing equipment wrecked).

²⁹ On the mode of warfare as the second characteristic of new wars, see Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 10 and chap. 5.

³⁰ *Ibid.*, at 9.

rid of those parts of the population that belong to or support a different identity.³¹ From the point of view of international law, this mounts the challenge that strategies which are prohibited under humanitarian law are employed as an essential method of new warfare.³²

These characteristics of new warfare pose problems for the United Nations and its legal system as it had existed during the Cold War. They explain some modifications that the UN collective security system, with the Security Council at its heart, has already undergone in the post-Cold War era, as well as additional difficulties with which it has to struggle, namely in its peacekeeping practice. As a state-centric perspective is no longer the appropriate approach to contemporary conflicts, the UN, and first and foremost the Security Council, has been compelled to reconsider its toolbox to address threats to international peace and security. When the Charter had been framed against the backdrop of the Second World War, it had primarily envisaged conflicts that could be viewed today as “old wars”. As will be seen in the context of the next part of this chapter, the Security Council has reacted to the shifted realities by understanding and applying its competences broadly, gradually considering intrastate conflicts as cases in which it could intervene with the powerful machinery of Chapter VII of the UN Charter.

Even if the international community has a normative basis to get involved, however, it will in practice often face a particularly intricate situation, without the clear lines between states or organized movements fighting for territory, but with a multitude of diverse actors pursuing ideological, economic or power interests, some of which are best achieved by a prolongation of the conflict. On the ground, the actual fighters involved in the combats may sometimes be hard to confront or demobilize, such as in the case of drugged child soldiers that were used, for instance, in Sierra Leone.³³ Moreover, even UN personnel and equipment have been increasingly less respected in recent years.³⁴ More generally, however, difficulties arise from the high stakes that influential actors tend to have in new wars. Thus, in addition to the complexities caused by the variety of actors involved in combat, new wars are characterized by what Kaldor calls a “new ‘globalized’ war economy”.³⁵ This war economy is based in the need of conflict parties to obtain external resources for their fight, which has on the other side led to different forms of revenue-generating. These frequently consist in control of natural resources or illegal trade, such as in arms, drugs, diamonds, or in human trafficking.³⁶ Such war economies can be most profitable, yet they depend on the continuation of violence.³⁷ Modifying the famous

³¹ *Ibid.*

³² *Ibid.*

³³ Cf. Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 71-72.

³⁴ *Ibid.*, at 77-80.

³⁵ See Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 10 and chap. 5.

³⁶ *Ibid.*, at 10.

³⁷ Cf. *ibid.*; Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 74-75.

statement by Prussian military theorist *Carl von Clausewitz*, according to whom war was the continuation of politics, *David Keen* has suggested that today “war may be a continuation of *economics* by other means.”³⁸ Aside from industries whose business is directly linked to and who have thus always benefitted from warfare, such as namely arms manufacturers, many contemporary conflicts and the absence of effective state authority that accompanies them offer opportunities to accumulate wealth for those controlling the relevant items of commerce.³⁹ The profiteers of war, however, have strong incentives to act as spoilers and undermine attempts at solving the conflict.⁴⁰ For *Kaldor*, the key to long-term solutions for regions unsettled by new wars therefore consists in restoring public authorities that act under the rule of law and control organized violence.⁴¹ The normative framework of the responsibility to protect avails itself of such insights, making the responsibility to rebuild post-conflict societies an essential part of a continuum of obligations.⁴² Still, international relations theory cautions against the illusion that halting new wars and preventing the crimes that characterize them was amenable to easy solutions. For the following discussion of duties to prevent and react to the commission of atrocity crimes, such insights may shed important light on the difficulties that will be confronted by international actors in implementing any such duties.

1.2 Tools for the Security Council and Its Members to Combat Atrocity Crimes

The international system that has gradually been developed since the Second World War knows a variety of actors that may have a share in the assessment, prevention and solution of conflicts and atrocity crimes. Within this fabric, a central role has been granted to the Security Council which bears “primary responsibility for the maintenance of international peace and security”.⁴³ To allow for an effective discharge of this responsibility, the drafters of the UN Charter endowed the Council with far-reaching powers. Once a situation falls into its area of competence, the

³⁸ See David Keen, “Incentives and Disincentives for Violence” in Mats Berdal & David M. Malone, *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder: Lynne Rienner, 2000) 19 at 27 [emphasis in the original]; see also Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 75.

³⁹ See Thomas G. Weiss, *Humanitarian Intervention: Ideas in Action*, 2nd ed. (Cambridge: Polity Press, 2012) at 74-75.

⁴⁰ On “spoiler behavior” motivated by economic interests, see *ibid.*, at 75.

⁴¹ See Mary Kaldor, *New & Old Wars: Organized Violence in a Global Era*, 3rd ed. (Stanford: Stanford University Press, 2012) at 12.

⁴² See International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre, 2001) at XI and, for details, *ibid.*, chap. 5.

⁴³ Article 24(1) UN Charter.

Council possesses a broad array of tools that may range, depending on the circumstances, from primarily preventive measures to binding resolutions that impose sanctions, order the deployment of military forces under UN command or authorize military intervention by UN member states. The Security Council itself has interpreted its powers increasingly broadly, especially since the end of the Cold War, in that it has considered intrastate conflicts with massive violations of human rights and humanitarian law as a matter that allows for the use of its sharpest sword, coercive action under Chapter VII of the UN Charter.⁴⁴ The various courses of action that are available to the Security Council and the ways in which the individual members influence its decisions give practical meaning to the discourse over a duty to prevent atrocity crimes.

1.2.1 The Competence and Toolbox of the Security Council in Addressing Atrocity Crimes

The first step for the Security Council to formally address a situation is to convene a meeting and place the matter on its agenda. The Security Council itself decides, at the beginning of each meeting, upon its agenda for that particular meeting.⁴⁵ While the provisional agenda, which is prepared by the Secretary-General, may include matters that have been submitted for the consideration of the Security Council by other organs of the United Nations or by states,⁴⁶ the Council is free to decide on a different agenda. The final agenda may include additional items, omit items provided for by the provisional agenda, or even reject the provisional agenda entirely.⁴⁷

⁴⁴ Cf. e.g. Nico Krisch, "Article 39", in Bruno Simma et al., eds., *The Charter of the United Nations: A Commentary*, 3rd ed., Vol. II (Oxford: Oxford University Press, 2012) 1272 at paras. 19-20, 23; High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2 December 2004) 8 at para. 202 (noting that "step by step, Security Council and the wider international community have come to accept that, under Chapter VII and in pursuit of the emerging norm of a collective international responsibility to protect, it can always authorize military action to redress catastrophic internal wrongs if it is prepared to declare that the situation is a 'threat to international peace and security', not especially difficult when breaches of international law are involved"); cf. also International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, *Prosecutor v. Dusko Tadić aka "DULE"*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 2005), online: International Criminal Tribunal for the Former Yugoslavia <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>> at para. 30 (affirming a "settled practice of the Security Council and the common understanding of the United Nations membership in general" that internal armed conflicts may constitute a "threat to the peace" in the sense of Article 39).

⁴⁵ See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 9.

⁴⁶ See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 7(1) in conjunction with Rule 6.

⁴⁷ See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 85.

In practice, it has become common for the Security Council to address only one item per meeting, or, put differently, to convene separate meetings for different matters.⁴⁸

Once the Security Council has placed an item on its agenda, it has at its disposal a variety of means to investigate the facts and lay the ground for an informed evaluation of the situation under consideration. Partly, such information may already be available elsewhere in the UN system and only need to be retrieved. According to its Provisional Rules of Procedure, the Security Council may receive information from any member of the Secretariat or other person of competence.⁴⁹ The Security Council may also take the initiative and request assessment missions.⁵⁰ Under Article 34 of the UN Charter, it can conduct investigations or establish fact-finding missions concerning “any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”⁵¹ The Security Council may also decide to invite a non-member to participate in its discussion.⁵² During so-called “Arria formula” meetings, the members of the Security Council can consult with persons, including representatives of non-members but for instance also relevant non-state parties, in a private and informal setting.⁵³ Security Council members may also meet to be briefed by NGOs.⁵⁴

If the Security Council arrives at the conclusion that it needs to get actively involved in a situation, the UN Charter places at its disposal different tools. Amongst the first steps taken will be statements exerting diplomatic pressure on the relevant

⁴⁸ *Ibid.*

⁴⁹ See UN Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (21 December 1982), Rule 39.

⁵⁰ See e.g. UN Security Council, Resolution 1304 (2000), UN SCOR, 4159th Mtg., UN Doc. S/Res/1304 (16 June 2000) at op. para. 14 (requesting the Secretary-General to submit an assessment of the atrocities committed in Kisangani in the Eastern DRC, which led to the establishment of an inter-agency assessment mission including personnel from the United Nations Development Programme, UNDP, the Office for the Coordination of Humanitarian Affairs, OCHA, the Department of Peacekeeping Operations, DPKO, and the United Nations Organization Mission in the Democratic Republic of the Congo, MONUC, see UN Secretary-General Kofi Annan, *Letter dated 4 December 1992 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2000/1153 (4 December 2000)); cf. also Katarina Månsson, “UN Peace Operations and Security Council Resolutions: A Tool for Measuring the Status of International Human Rights Law?” (2008) 26:1 *Netherlands Quarterly of Human Rights* 79 at 93-94.

⁵¹ Cf. Article 34 UN Charter; see also UN Secretary-General Ban Ki-moon, *Implementing the responsibility to protect: Report of the Secretary-General*, UN GAOR, 63rd Sess., UN Doc. A/63/677 (2009) at para. 52.

⁵² See Articles 31-32 UN Charter; see also Rule 37 of the Provisional Rules of Procedure.

⁵³ See Sydney D. Bailey & Sam Daws, *The Procedure of the Security Council*, 3rd ed. (Oxford: Clarendon, 1998) at 73.

⁵⁴ *Ibid.*, at 75 (on the meeting of 12 February 1997, following an initiative by the Chilean Ambassador Juan Somavía, noting however that the meeting was eventually convened by the Secretariat rather than taking place under the auspices of the Security Council, and that no formula akin to the Arria procedure has been established yet).