1

Introduction

1.1 Introduction

This is a book about how international law related to the regulation of
political violence fails to address the contemporary experience of what we
call 'new wars' – bouts of armed violence in places such as Syria and
Ukraine, Mali and Libya, the Democratic Republic of Congo and South
Sudan, to name but a few of these zones of hostilities and insecurity at the
time of writing. Contemporary international law, largely constructed in
the nineteenth and twentieth centuries, rests to a great extent on out-
moded conceptions of war drawn from the experience of European wars –
inter-state clashes involving battles between regular armed forces, which
we call 'old wars'.

   In the twenty-first century, there have been efforts to adapt the
international legal framework relating to the use of force, often in what
we perceive as dangerous directions. Former US President George
W. Bush talked about a 'new paradigm', which required 'new thinking'
about international law,[1] while UK Prime Minister Tony Blair said that
the 'rules of the game have changed'.[2] Whether we are talking about
Bush's conception of 'pre-emptive self-defence' to justify the invasion of
Iraq in 2003 or his depiction of detainees at Guantánamo Bay as 'illegal
combatants', President Obama's justifications for targeted killings, Presi-
dent Putin's claim to be permitted to come to the defence of so-called
Russian nationals in Ukraine or Georgia, or debates about the legality of

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[1] 'Strengthen Alliances to Defeat Global Terrorism and Work to Prevent Attacks against Us
and Our Friends', *The White House Archives*, 14 September 2001, http://georgewbush-
whitehouse.archives.gov/nsc/nss/2002/nss3.html.

[2] 'Blair, in His Own Words', *BBC,* 5 August 2005, http://news.bbc.co.uk/1/hi/uk_politics/
3750847.stm. Blair's comments followed the 7 July 2005 bombings on the London
transport system.

3

airstrikes against the Islamic State (IS)[3] in Syria, attempts are made to stretch international law to accommodate current responses to 'new wars' in ways which, even if not widely accepted, tend to weaken the constraints on violence in international affairs agreed upon after the end of the Second World War. And indeed a similar argument may apply to some of the more well-meaning additions to international law relating to humanitarian interventions and/or peace agreements, put forward in international and regional institutions like the United Nations, the European Union or the African Union. In almost all of these cases, these purported adaptations of international law, we argue, are based on 'old war' assumptions.

We argue that war, both 'old' and 'new', needs to be reconceptualised as a humanitarian catastrophe. Despite the fact that the use of force in international relations was prohibited in the United Nations Charter adopted in 1945, the idea of war as a legitimate phenomenon has a powerful resonance, lingering on in the self-defence exception as well as in geo-political assumptions about the importance of military power and deeply rooted ideas of national (state) security. In the post–World War Two period, an important development has been the emergence of international human rights law, which offers a different perspective to how we understand 'new wars'. On this basis, we make the case for an alternative rights-based response to 'new wars', a second generation Human Security approach, as a practical rather than a utopian solution. We do not reject the reality that international law must – as it always has – develop and evolve, but we argue that such evolution must be based on a principled understanding of the realities of new wars and not on expedient responses to crisis.[4] We emphasise too the gender dimension of conflict and the critical role of gender in developing an alternative approach.

'War' is no longer a term used in modern international legal discourse[5] although it remains in popular discourse. By 'war' we refer to the collective use of force involving two or more actors. In international law terms, the

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[3] This body is variously called Islamic State (IS), the Islamic State of Iraq and Syria (ISIS), the Islamic State of the Levant (ISIL), or, in Arabic, *Daesh*. Our use of IS does not in any way denote that we consider it as a state, or putative state.

[4] Charlesworth, Hilary 2002. 'International Law: A Discipline of Crisis', *Modern Law Review* 65: 377–392.

[5] The Covenant of the League of Nations, 1919, refers to 'war or the threat of war' and 'resort to war' (articles 11 and 12), while the United Nations (UN) Charter, 1945, refers to the use of force in international relations (article 2 (4)).

use of force refers to military force, or the use of armed force in conflict, governed by the laws of war. In contrast the (legitimate) use of force domestically refers to policing, which operates according to much tighter rules of engagement, at least in rights-based societies. Our argument that war is illegitimate does not imply that all uses of force are illegitimate. Rather it means that if force is used legitimately in the globalised arena, it must operate under similar sorts of constraints and with similar objectives as operate traditionally within rights-based societies.

We recognize that political developments are moving in the opposite direction. In 2016, the election of Donald Trump as President of the United States and the United Kingdom referendum vote to leave the European Union were both expressions of aspirations similar to those found in Russia or some east European countries, for a return to national sovereignty and the simplicities of geo-politics and polarisation around national and religious divisions. We take the view that these tendencies will only make things worse and exacerbate the various forms of violence to be found in 'new wars'. This is why a different and realistic understanding of security is all the more needed.

In this first chapter, we begin by describing what we mean by 'new wars'. We then discuss what has become known as the gap between legality and legitimacy. This has gained prominence as a consequence of challenges to international law as an inadequate tool to regulate contemporary forms of violence and recourse to arguments asserting the legitimacy of the use of force in preference to legal analysis. We then outline five different models or ways of responding to new wars and how they construct, interpret, adapt or stretch international law in accordance with their differing conceptions of legitimacy. These models then form the conceptual basis for analysis throughout the book. And in the concluding section, we outline the plan of the book.

1.2 New Wars

1.2.1 The Logic of New Wars

In a speech to the Academy of Military Science in January 2013, the Russian Chief of the General Staff, Valery Gerassimov, talked about the appearance of a new type of warfare, which he called 'non-linear war'. In an eerie anticipation of what was to happen in Crimea and Eastern Ukraine the following year, he argued that in 'the 21st century, we have seen a tendency towards blurring the lines between the state of war and

peace. Wars are no longer declared and, having begun, proceed according to an unfamiliar template'. He went on to describe how 'a perfectly thriving state can, in a matter of months and even days . . . sink into a web of chaos, humanitarian catastrophe, and civil war'. He said that 'frontal engagements of large formations of force . . . are becoming a thing of the past' and that, instead, the use of special forces, exploitation of internal opposition 'as well as informational actions, devices and means' are the methods of contemporary warfare.[6]

In the literature about contemporary war, an array of terms has been used to make a similar point. The American military often use the term 'hybrid wars'.[7] Other terms include 'wars among the people',[8] 'wars of the third kind',[9] 'privatized wars',[10] 'post-modern wars'[11] as well as 'new wars'.[12] In this book, building upon earlier work by Mary Kaldor, we use the term 'new wars'. The advantage of the term is that it draws attention to the way that contemporary political violence is different from the predominant 'old war' conception that tends to underlie scholarly analysis, legal practice and policymaking.

The concept of 'new wars' has been criticised on the grounds that new wars are not 'new' and that they may not be 'war'.[13] We agree that 'new wars' are not necessarily empirically new; rather they are different from an idealised conception of 'old wars'. The aim is to elucidate different ways of understanding and analysing extreme political violence. It would be odd if all aspects of 'new wars' were empirically new, but it would be equally odd if there were no new features – the globalised aspects of new

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[6] Gerassimov, Valery 2013. 'The Value of Science in Prediction', published in *Military-Industrial Kurier*, English version available at http://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/.

[7] Hoffman, Frank 2007. *Conflict in the 21st Century: The Rise of Hybrid Wars*. Arlington, CA: Potomac Institute for Policy Studies.

[8] Smith, Rupert 2005. *The Utility of Force*. London: Alfred A. Knopf.

[9] Rice, Edward 1990. *Wars of the Third Kind: Conflict in Underdeveloped Countries*. Berkeley: University of California Press.

[10] Eppler, Erhard 2001. *Vom Gewaktmärkte zum Gewaltmarkt? Die Privatisierung und Kommerzialisierung der Gewalt*. Frankfurt: Suhrkmamp.

[11] Hables Gray, Chris 2007. *Post-Modern War: The New Politics of Conflict*. London: Routledge.

[12] Duffield, Mark 2001. *Global Governance and the New Wars: The Merging of Development and Security*. London: Zed Books; Kaldor, Mary 1999. *New and Old Wars: Organised Violence in a Global Era*. Cambridge: Polity Press, 3rd edn.; Munkler, Herfried 2005. *The New Wars*. Cambridge: Polity Press.

[13] These critiques are addressed in Kaldor, Mary 2013. 'In Defence of New Wars', *Stability Journal* 2:1–16.

wars, as we stress, are extremely important. For our purposes, however, the differences between 'old' and 'new wars' have to do with the logic and dynamics of these different types of wars rather than with their empirical characteristics. Indeed, the expression 'new wars' is a conceptual rather than descriptive categorisation.[14] We have some sympathy for the argument that new wars are not war since they can also be described as criminal enterprises, banditry, terrorism or massive violations of human rights; nevertheless they are fought in the name of political goals, and politics accordingly has to be part of the response.

The central argument is that new wars have a different logic from old wars. Clausewitz was the key theorist of 'old wars'. He defined war as 'an act of violence intended to compel our opponent to fulfil our will'.[15] From this definition, he derived the proposition that war is a clash of wills that tends to the extreme; the politicians want to achieve their political objective; the generals need to disarm the opponent; and the war releases hatred and passion among the people. If, however, we define war as 'an act of (organised) violence framed in political terms' then war might be understood either as a clash of wills or what we could describe as a mutual enterprise in which the various armed groups have more to gain from war itself, from fighting, than from winning or losing. In what follows, we elaborate this notion of a mutual enterprise, the way in which the various armed groups need the condition of war for economic and political purposes – war as a means of extracting resources or instrumentalising extremist identities. Where wars have more of the logic of a mutual enterprise than the logic of a contest of wills, they are likely to lead to persistence and spread, to be long, sporadic, difficult to end and difficult to contain geographically, in contrast to Clausewitzean wars that tend to the extreme. We argue that it is the failure to take into account the logic of new wars that, to a large extent, explains why most responses to new wars are so problematic.

1.2.2 The Characteristics of New Wars

We recognise that large-scale collective forms of violence – wars – all have their own unique histories, topographies[16] and trajectories, but

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[14] A point made by Orly Stern.
[15] Von Clausewitz, Carl 1968. *On War*. London: Penguin Books, English edition, 5.
[16] For example, fighting in the urban areas of Ukraine differs greatly from the vast spaces of Northern Mali.

nevertheless we argue that there are some common features in 'new wars'. Accordingly, to elucidate this alternative logic of war, in this section we briefly describe how new wars differ from old wars in terms of goals and identities, actors, tactics and forms of finance, although these aspects interlink and are not easily discussed separately. We illustrate our discussion with examples drawn especially from the conflicts in Ukraine, Syria, Iraq and Mali.[17] However, the situation in these countries is fluid and constantly changing, so our examples are intended only as illustrative of particular points and not as an account of the course of the different conflicts.

Goals and Identities: New wars are largely fought in the name of identity – ethnic, religious or tribal – rather than for political ideas or geo-political goals. That is to say, the expressed goal of new wars is exclusive access to the state for those identified with a particular label.

Religious wars can be about ideas, such as the imposition of fundamentalist or extremist interpretations of Sharia law, or about identity, such as the right of representation in the name of a specific identity. The religious wars of seventeenth-century Europe between Protestants and Catholics were about ideas, dealing with the break-up of the Catholic Church's power, emerging secular power and the role of individuals; by contrast, the war in Northern Ireland from the late 1960s was about the identity and the rights of the different communities, defined by their religion, to political power. Other ascribed identities are ethnicity-based, such as the case of Hutus and Tutsis in Rwanda and Burundi, or both religion and ethnicity-based as in the case of Serbs, Croats and Muslims in the war in Bosnia.

Identity is fluid and changing; most human beings have multiple identities. War is an important mechanism through which identities are constructed and 'fixed', through the imposition of a binary 'us' and 'them'.[18] Even if previously they thought of themselves in terms of national identity, as 'Yugoslav' or 'Rwandan', people began to self-identify as Muslim or Tutsi because these were the identities that established them as the target once violence erupted. In neither of these cases nor, for example, in Northern Ireland could individuals change allegiance

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[17] Mary Kaldor's original analysis of new wars was largely drawn from the wars around the breakup of the former Yugoslavia in the 1990s, although it also took into account wars in Africa and post-Soviet space. Its continued application to conflicts in 2016 attests to its durability.

[18] Kaldor, Mary 2013. 'Identity and War', *Global Policy* 4(4): 336–346.

by converting from one religion or ethnicity to another, as these became ascribed identities. Moreover, as several writers have observed, identities constructed in war, whether ethnic, religious or tribal, tend to be closely linked to gender and related to a (male) warrior mythology.[19]

In the era of decolonisation following World War II numerous conflicts were fought for the political goals of national liberation and sovereign independence. Some of these wars share features of new wars, indeed they could be viewed as the precursor of new wars. Post-independence, further conflict has broken out in many places, for instance, Rwanda, Burundi, Sudan, Ethiopia, Somalia, Sri Lanka, Libya, Yemen, which have often pitted against each other people of different ethnicities or tribal affiliations who were caught by the continuation of colonial boundaries.[20] In some instances these identities had been constructed by colonial powers who imposed classifications on what had previously been loose and inchoate groupings.[21]

An example of the identity-oriented goal of new wars in a post-colonial state is Mali. In Mali some of the northern nomadic Tuareg people (a term stemming from the French colonisers who divided and classified different groups in Northern Mali)[22] have made separatist claims virtually since the independence of the state in 1960 and have engaged in armed challenges against the government in the South on a number of occasions. In 2012 the violence took on a new intensity for two reasons; first, following the fall of Gaddafi in Libya, there was an influx of heavy weaponry into Mali and a return of migrant Tuareg who had been trained militarily by the Gaddafi government, and, second, they were backed by Islamist groups whose goal of imposing Sharia law

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[19] Elshtain, Jean Bethke 1987. *Women and War*. University of Chicago Press.

[20] The legal principle of *uti possidetis* – the continuity of colonial boundaries – was upheld throughout decolonisation and accepted as customary international law; *Case Concerning the Frontier Dispute (Burkino Faso v. Mali),* 1986 ICJ Reports 554, judgment of 22 December 1986.

[21] The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* defines genocide in terms of intention to destroy a national, ethnical, racial or religious group. The International Criminal Tribunal for Rwanda thus had to determine whether Hutus and Tutsis are identified through ethnicity – this despite the fact that their earlier differentiation was based on lineage, and it was the Belgian colonisers who introduced distinction based on 'ethnicity'. See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations Treaty Series, vol. 78, 277.

[22] See Grémont, Charles 2012. 'Villages and Crossroads: Changing Territorialities among the Tuareg of Northern Mali', in McDougall, James and Scheele, Judith (eds). *Saharan Frontiers: Space and Mobility in Northwest Africa*. Indiana University Press.

differed from their own. Much of the new separatist and religious ideology had been forged in exile by Tuareg (Tamachek) migrants in North Africa. This network of fighters controlled much of the North by March 2012. Following further instability and violence (both with respect to a coup against the Malian government and fighting between the various rebel groups) French troops entered the country at the request of the Malian government in January 2013. It should be noted that as in other cases of identity-based ideologies, the separatists never represented 'all' Tuareg. Moreover the main Tuareg separatist group, the MNLA (National Movement for the Liberation of Azawad–Northern Mali), remained distinct from the main jihadist factions; one of these, the Movement for Oneness and Justice in West Africa (MUJAO), expelled MNLA from Gao, and another, Al Qaeda in the Islamic Maghreb (AQIM), operated mainly in Timbuktu.

In a different manifestation of the genesis of new wars, in Ukraine, what began as a pro-democracy protest against the government[23] was manipulated and channelled into what appeared as sectarian conflict between ethnic Ukrainians and Russians.[24] Many of those who were engaged in the democracy movement explicitly rejected ethnic identities – the slogan 'I'm a drop in the ocean' was meant to symbolise the loss of traditional identities, and indeed the first person to die in the protests was neither Ukrainian nor Russian but Armenian.[25] After President Yanukovych fled from Ukraine in February 2014, following months of pro-democracy protests, pro-Russian separatists seized Crimea with the support of Russian forces. A referendum was quickly held in Crimea which resulted in a treaty being agreed between the Russian Federation and the Crimean Republic on the accession of the latter into the former. In effect Crimea was annexed by Russia.[26] A few months later, pro-Russian separatists seized administrative buildings in the Donetsk and

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[23] This has been the case in several other new wars, e.g., Libya and Syria.

[24] For an account of the demographic shifts in Ukraine and the waves of violence against the different peoples see Snyder, Timothy 2010. *Bloodlands: Europe between Hitler and Stalin*. New York: Basic Books.

[25] See Forostyna, Oksana 2015. 'Poaching, Simmering and Boiling: The Declining Relevance of Identity Discourse in Ukraine', in Wilson, Andrew (ed.), *What Does Ukraine Think?* London: European Council on Foreign Relations, 25–33.

[26] In light of inaction in the Security Council because of the Russian veto, the General Assembly called upon states and international organisations not to recognise any change of status in Ukraine. UN GA Resolution 68/262, 1 April 2014 ('Territorial integrity of Ukraine') was adopted by 100 states in favour to 11 against, with 58 abstentions.

Luhansk regions of Eastern Ukraine. The consequence has been a conflict between Russian separatists, backed by Russia, and Ukraine. As Tim Judah, writing at the beginning of the war, reported: '[P]eople tell me that they don't believe war is coming and that Russians and Ukrainians are brothers. I remember the same brave talk, the same euphoria, and the same delusions before the Yugoslavs tipped their country into catastrophe in the 1990's'.[27] Language was already an issue in Ukraine, and one of the first acts of the Parliament after President Yanukovych fled the country was to pass an act downgrading the Russian language; even though it was vetoed by the new President, it provided another pretext for Russian actions in Crimea and Eastern Ukraine. As in the case of similar identity-based ideologies that characterise 'new wars', this ideology has a significant gender dimension: as illustration a rebel told Tim Judah that this was a conflict between the Russian world and the West where people no longer believe in families (what he meant was that people in the West tolerate gender equality and sexual minorities).[28] As long as the war continues, the narrative of a sectarian conflict between Ukrainians and Russians gains ground while the alternative narrative of the protestors (democracy versus the criminalised oligarchies of both Ukraine and Russia) is weakened; in other words sectarian identities are constructed through new wars.[29]

Actors: Old wars were fought by regular armed forces wearing uniforms and those recruited by the state through conscription or payment who were subject to national laws and military codes. In contrast, the participants in the new wars are often loose and fluid networks of state and non-state actors that cross borders. They include remnants or bits of the regular armed forces, paramilitary groups, warlords, jihadists, terrorists, mercenaries, private security contractors and criminal groups.

For example, the IS is a transnational network of fighters primarily from Iraq and Syria, but also from what might be described as a roll call of new wars – Chechnya, Gaza, Kosovo, Bosnia, Sudan, the Middle East,

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[27] Judah, Tim. 'Ukraine: The Phony War?' *New York Review of Books*, 22 May 2014, www.nybooks.com/articles/2014/05/22/ukraine-phony-war/.

[28] Judah, Tim. 'Ukraine: What Putin Has Won', *The New York Review of Books,* 9 October 2014, www.nybooks.com/articles/2014/10/09/ukraine-what-putin-has-won/.

[29] Nevertheless, many of the pro-democracy protesters were Russian speakers, and the separatists have failed to mobilise support in other Russian-speaking regions. Indeed, the strongest support for military action against the separatists has come from the Russian-speaking neighbouring region of Dnipropetrovsk. See Hrystak, Yaroslav 2015, 'Rethinking Ukraine', in Wilson Andrew (ed.), *op. cit.*, 34–44.

as well as other parts of Europe and the United States. Arrayed against IS are a similar collection of networks. In Iraq they include the Kurdish *peshmerger*, various Shi'ia militias including the Mahdi army (previously a major enemy of the Western[30] occupation) and the Badr corps.[31] In Syria as well, IS faces networks of non-state actors. As of 2016, these included the Syrian Democratic Forces, an alliance of anti-Assad armed groups including Kurdish brigades as well as moderate rebels, and an array of Islamist militia including Jabhat Fatah al-Sham (Conquest of Syria Front) that changed its name from Jabhat al-Nusra and announced that it was severing ties with Al Qaeda. The Assad regime relies on similar types of armed groups and militias for use against the opposition including what are called the National Defense Forces (often recruited from regular soldiers and trained by the Iranian Revolutionary Guard), Hezbollah and Shabbiya (an Alawite militia).

Ukraine as of 2016 further illustrates the diversity of actors in new wars. The separatist forces include various armed groups generally attached to an individual, either the 'heads' of the so-called People's Republics of Donetsk and Luhansk, or adventurers like Igor Girkin (known as Igor Strelkov), a former colonel in the Russian Federal Security Service, a veteran of the conflicts in Bosnia, Transdiniester and Chechnya, a monarchist and supporter of the White anti-communist movement. Many such individuals have adopted *noms de guerre* drawn from superhero comics, for instance, after Alexander Bednov, killed on 1 January 2015, who was better known as Batman. Brigades include the Prizrak (Ghost) brigade headed by Alexei Mozgovoy, the Oplot (Strong-hold) brigade led by Alexander Zakharchenko, a former mining engineer and head of the self-proclaimed Donetsk People's Republic, as well as the Vostok (East) brigade, Cossacks and military groups with names like Sparta and Somalia. Many of these groups include volunteers from other parts of the world, especially but not only, orthodox Christians from Russia, Serbia, Brazil and elsewhere.[32] They were supported initially with arms, money and information from Russia and subsequently by Russian volunteers known as 'holiday-makers'; this last is a reference to a

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[30] By 'West' or 'Western' we refer to advanced capitalist countries, primarily the United States and its allies.

[31] Cockburn, Patrick. 'War against ISIS: US Strategy in Tatters as Militants March On', *Independent on Sunday,* 12 October 2014, www.independent.co.uk/voices/comment/war-against-isis-us-strategy-in-tatters-as-militants-march-on-9789230.html.

[32] International Crisis Group. 'Eastern Ukraine: A Dangerous Winter', *Crisis Group Europe Report* No. 235, 18 December 2014.