# RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

## BOOK REVIEWS

*How Everything Became War and the Military Became Everything*. By Rosa Brooks. New York, New York: Simon & Schuster, 2016. Pp. viii, 438. Index. $29.95.
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*How Everything Became War and the Military Became Everything: Tales from the Pentagon* by Rosa Brooks, a professor of law at Georgetown Law, is perhaps most easily understood as two separate books, each one both analytical and autobiographical in nature. The first book, *How the Military Became Everything*, is a specifically American tale about the vast U.S. Department of Defense, whose outsized role today, Brooks recounts, is the product of decades worth of unmatched military spending; vested bureaucracy; abiding popular admiration for the military; cuts in government spending on alternative programs (at the Department of State, for example); and an embrace of counterinsurgency doctrine focused not just on killing enemies, but on winning "hearts and minds." The tale of how the Pentagon's role expanded far beyond basic warfighting has been recounted more than once in the contemporary literature.[1] But it is a tale engagingly told here, and no less true for the retelling.

The second book, *How Everything Became War*, traffics, sometimes interchangeably, in U.S. and international literature, history, anthropology, politics and law, and, at its most ambitious, aims to describe how it is we have arrived at "our current state of unbounded war" (p. 25). Indeed, there can be little doubt that the United States has embraced the instrument of military power wholeheartedly in its post-September 11 counterterrorism operations. To pick one of the most dramatic examples, the U.S. government reports having killed nearly 2,600 people in countries *other than* Afghanistan, Iraq, and Syria since 2009 through the use of armed drones.[2] As the book recounts, these and other U.S. operations have been justified with the legal theory that international law supports (or at least tolerates) the recognition of a singular armed conflict between a state and a shifting, at times loosely connected and internally fighting, set of nonstate groups—a conflict not confined by geographic or apparent temporal borders, but one in which killing is, broadly speaking, allowed.

The bureaucracy book is at one point nominally stitched to the unbounded war book on the back of the maxim that when one has the world's biggest hammer (the U.S. military), one is inclined to see every problem as a nail (susceptible to correction by military methods) (p. 21).

[1] *See, e.g.*, MISSION CREEP: THE MILITARIZATION OF US FOREIGN POLICY? (Gordon Adams & Shoon Murray eds., 2014); DAVID H. UCKO, THE NEW COUNTERINSURGENCY ERA: TRANSFORMING THE U.S. MILITARY FOR MODERN WARS (2009); Stewart Patrick & Kaysie Brown, *The Pentagon and Global Development: Making Sense of the DoD's Expanding Role* (Center for Global Development, Working Paper No. 131, Nov. 2007), *available at* https://www.cgdev.org/files/14815_file_PentagonandDevelopment.pdf (addressing the Department of Defense's growing aid role, including foreign aid policy, training, and equipping foreign military beyond theaters of war).

[2] Office of the Director of National Intelligence, Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities (2016), *available at* https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF.

Were this the book's primary thesis, one might expect an argument to the effect that one reason the United States has been so inclined to use military force against transnational terrorism is that the tool is vast and available to be used. But Brooks is mostly not interested in demonstrating that this is the only, or even especially important, reason why the United States has embraced the theory and practice of military force it has. Neither does the book much engage in assessing the tactical or strategic wisdom of U.S. counterterrorism policy in this respect. Rather, Brooks's primary claim is essentially descriptive in nature: global technological, political, and legal changes in the past fifty years have collapsed all meaningful distinction between "war" and "peace" writ large. Under these circumstances, Brooks argues, continued insistence on the application of international legal rules based on the vitality of such a distinction only undermines "our ability to place meaningful constraints on violence and power" (p. 24).

The most significant legal implications of such a conclusion are of course for the vast and elaborately developed body of international law currently governing the conduct of any number of wars involving both state and nonstate actors around the world. The application of the law of armed conflict (LOAC), also called international humanitarian law or the law of war, turns centrally on the expectation that it is legally possible (and normatively wise) to distinguish between circumstances amounting to "armed conflict," to which one set of rules applies, and circumstances that do not. Among the differences between the rules, in circumstances of armed conflict, one side can lethally target fighters on the other side, by dint of mere membership in the enemy organization, as a first resort. There need be no separate assertion of self-defense in each instance, and no general obligation to pursue, for example, capture rather than killing wherever possible. Outside armed conflict, under otherwise applicable domestic and international human rights laws, status-based, first-resort killing is against the law.[3] Brooks's central legal argument is that insisting on the maintenance of a distinction between what is armed conflict, and what is not, in order to establish when this kind of killing is lawful is no longer either possible or wise (e.g., p. 351). Given the singular importance of this aspect of Brooks's book, the remainder of this review is devoted to setting forth and evaluating its basis.

Brooks's case about the increasingly diffuse nature of war begins with an assessment of its participants and weaponry, describing phenomena that transcend America's particular post-9/11 war against Al Qaeda and its associates: the global weaponization of cyberspace; the proliferation of drone technology; and the rapidly developing fields of autonomous, bioengineered, and non-lethal weaponry. Such technologies, and the growing range of individuals capable of deploying many of them, threaten traditional conceptions of war writ large as happening between soldiers and in a particular battlespace (p. 141). On top of these changes comes the past fifteen years of U.S. military operations, including a "war" against Al Qaeda and its allies, fought all over the world against non-uniformed fighters. In this conflict, Brooks maintains, it has been difficult even to "define the enemy" amidst "numerous other networks and movements, loosely knit, nonhierarchical, geographically dispersed, and diverse in size, structure, methods and aims" (p. 278). Acknowledging President Obama's pre-Islamic State of Iraq and the Levant (ISIL) belief (shared by his then-General Counsel to the Department of Defense) that even this post-9/11 war would one day end,[4] Brooks is unpersuaded: "[H]ow

[3] One of many useful summaries of this body of law is: Louise Doswald-Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 Int'l Rev. Red Cross 881 (2006), *available at* https://www.icrc.org/eng/assets/files/other/irrc_864_doswald-beck.pdf; *see also* Laurie R. Blank & Gregory P. Noone, International Law and Armed Conflict: Fundamental Principles and Contemporary Challenges in the Law of War (2013).

[4] Remarks of U.S. President Barack Obama at National Defense University (May 23, 2013), *at* https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university ("[O]ur commitment to Constitutional principles has weathered every war, and every war has come

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do we end a nonterritorial armed conflict against an ill-defined, amorphous, protean enemy, with no leaders authorized to speak on its behalf, no set membership, and only the vaguest of goals?" (p. 279). Brooks cannot imagine an American political leader who will ever end this. In Brooks's view, this state of affairs is with us forever.

It is a state of affairs Brooks sees carrying with it multiple problems. Domestically, the "blurring" of war and peace has seen the seepage of war tools into traditionally civilian realms of U.S. life —from the increasing militarization of domestic police (p. 298), to intensified scrutiny of immigrants and foreign nationals (p. 302), to a vast expansion in electronic communications surveillance (p. 304). But the far greater problem for America and the rest of the world, the book suggests, is one of law. The legal reasoning the United States has relied on post-9/11 to justify its use of military force in more than a half-dozen different countries around the world has been "a sustained challenge to the generally accepted meaning of core legal concepts including 'self-defense,' 'armed attack,' 'imminence,' 'necessity,' 'proportionality,' 'combatant,' 'civilian,' and 'hostilities'" (p. 284). Above all, in this respect, has been the United States' adoption of an unprecedented understanding of the legal term for war—"armed conflict," which the United States has interpreted to justify the extension of LOAC rules to a borderless, transnational conflict between a state and a set of nonstate actors. (While LOAC unquestionably recognizes the existence of conflicts involving nonstate actors, classically in settings like an *internal* civil war (known as NIACs, or non-international armed conflicts), no country before the United States (or since) has suggested that it is possible to have a NIAC that is global in scope.) Together with the technological developments that have put more and more destructive power in the hands of smaller and smaller numbers of individuals,[5] this definitional manipulation has made it harder than ever to tell, Brooks argues, whether or not a particular situation is appropriately viewed as criminal activity (to which ordinary law applies) or armed hostilities (to which LOAC rules apply). In Brooks's summary of current law, "[i]f we can't tell whether a particular situation counts as war" (p. 22), it is impossible to assess meaningfully when killing is legal and when it is murder (p. 274), when it is reasonable to detain someone without charge (p. 275), or even "if mass government surveillance is reasonable or unjustifiable" (p. 22).

Four of the final thirteen pages of the book are thus devoted to suggesting we develop an alternative legal regime to manage the current state of affairs—one in which the United States champions new "laws, politics, and institutions" to govern the blurry but perpetually occupied "space between" war and peace, a space characterized by "'subversion, destabilizing social media influence, disruptive cyberattacks, and anonymous 'little green men' [(an ambiguous phrase attributed to defense policy analysts)] instead of recognizable armed forces making overt violations of international borders'"[6] (p. 353). Acknowledging that what form these new rules and institutions take will be "the work of many minds and many years," and leaving all transition costs aside, Brooks proposes we be guided by reliance on a set of familiar but still powerful principles: "that life and liberty are unalienable rights, that no person should be arbitrarily deprived of these rights, and that no one . . . should be

to an end."); *see also* Remarks of Jeh Charles Johnson, General Counsel of the U.S. Department of Defense at the Oxford Union, Oxford University (Nov. 30, 2012), *available at* https://www.state.gov/documents/organization/211954.pdf ("[O]n the present course, there will come . . . a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.").

[5] Concerns about weapons technologies and the (resulting) rising power of small groups of nonstate actors have been detailed in the security literature for years. *See, e.g.*, Christopher F. Chyba & Alexander L. Greninger, *Biotechnology and Bioterrorism: An Unprecedented World*, 46 SURVIVAL 143 (2004).

[6] The book quotes: David Barno & Nora Bensahel, *Fighting and Winning in the 'Gray Zone,'* WAR ON THE ROCKS (May 19, 2015), *at* https://warontherocks.com/2015/05/fighting-and-winning-in-the-gray-zone.

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permitted to exercise power without being held accountable for mistakes or abuses" (*id.*). Among the concrete forms these principles might take, Brooks suggests: improved transparency in use of force operations; better oversight and accountability; and better mechanisms to prevent "arbitrariness, mistake, and abuse in targeted killings" (p. 354).

Given a book whose primary mission is to describe the ways in which "our fine new technologies and fine new legal theories" are blurring the boundaries of war and peace (p. 4), there are certainly grounds for quibbling with one or another aspect of the book's broad comparisons between old and new. It is not clear, for instance, in which period it was ever settled, as Brooks suggests, that the U.S. military's *raison d'être* was simply "defending America from armed attack by foreign states" (p. 13). The U.S. Constitution's framers of course balked at the idea of a standing army at all,[7] a view that came under pressure early when, faced with the felt necessity of having a military to devote much of the nineteenth century to fighting (non-foreign) Native American tribes on this continent who, although nominally sovereign under law, were treated in practice far more like (nonstate) insurgent groups.[8] Likewise, it seems true enough that the notion of the "battlefield" is changing (p. 12), though this was also true when, for example, the U.S. Supreme Court noted the same phenomenon of the changing definition of battlefields in 1953.[9]

Indeed, it is at times a challenge to pin down Brooks's view of the significance, or even relevance, of the (non-legal) changes she describes to the book's core thesis of newly blurred boundaries between war and peace. Brooks regularly cites as a critical change the modern rise of decentralized, nonstate organizations (p. 11), but at other times rightly acknowledges that "[m]essy forms of conflict have always been a part of human reality . . ." (p. 345). Conversely, there can be little doubt that Brooks views various technological innovations as part of the categorical blurring she sees—cyber weaponry, instant global electronic communications and social media platforms, bioengineered viruses, and drone technology, among others. But is the advent of these technologies important to the blurring thesis because they turn otherwise peaceful civilian tools into vehicles for the delivery of harm? (If that is the argument, then one might have hoped for an explanation as to how these tools are *categorically* different from dual-use civilian utilities—from roads and bridges to electrical grids and radio stations—that have long vexed war fighters.) Or is the notion that these innovations matter because nonstate actors can now wield them? (In which case, one might readily concede that nonstate actors have more power at their disposal, but still recognize that they are just as capable as ever at being in conflict with states.) Or is the blurring effect achieved by these technologies because harm can be delivered without breaching physical, territorial borders? (Yet there, too, the assembly of these technologies in a group seems inexact, for while it is certainly true that certain forms of cyber harm can be carried out without classic territorial violation, it is not the case for attacks by, for example, biological agents or drones.) Or perhaps these technologies belong in the same group as evidence of blurred lines between "war" and peace because these particular threats justify greater or more frequent or otherwise different state uses of lethal force as a matter of policy? (But if it is a normative argument of this sort Brooks has in mind, it seems critical to evaluating its strength to know how Brooks might characterize the conditions under which she thinks it is normatively justified to, for example, lethally target hackers, propagandists, or molecular

[7] *See* Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797 (2012) (discussing constitutional history).

[8] On the history of the legal status of federal Indian tribes, see, for example, Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73 (1988). On the history of U.S. military operations against the Indian tribes, see, for example, Barry M. Pritzker, *First Seminole War*, *in* THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN WARS, 1607–1890: A POLITICAL, SOCIAL, AND MILITARY HISTORY 715, 716 (2010).

[9] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (acknowledging the government's argument that "'theater of war' be an expanding concept").

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biologists.) The normative case, to the extent it was intended, is left implicit.

More accessible is Brooks's critique of the law that currently regulates responses to the contemporary universe of threats, particularly her assessment of the failure of LOAC to define "armed conflict," especially non-international armed conflict, with any clarity. Indeed, Brooks suggests, even were this definition clear, the substantive rules it triggers—permitting detention "for the duration of the conflict" (p. 275) or killing without traditional due process—no longer make sense when "a conflict can confidently be expected to last a lifetime," and when "killings can take place anywhere on earth, any time, against an ill-defined, nonuniformed, and changing foe" (p. 350). Brooks's recommended solution—broadly to decouple the determination about whether killing and detention is justified, from the legal classification of a state of affairs as an "armed conflict" or not—echoes a debate that has raged in far more technical terms in scholarship and the legal blogosphere in recent years.[10] Might it not make more sense, clarify matters, or better capture our current moral and political sensibilities about the propriety of the use of force in various settings, to have the legal availability of detention, surveillance, and killing depend on some other kind of test?

Although this is an important question to pose, Brooks's discussion struggles to explain its answer. At times, the trouble is a preference for breadth over depth in supporting claims about legal meaning. In the chapter addressing the current law's definition of "armed conflict," for instance, Brooks devotes three pages to historic attempts to define war (from *The Epic of Gilgamesh* to military theories espoused by Prussian General Carl von Clausewitz) followed by a single paragraph summarizing the current LOAC understanding of the definition of armed conflict (p. 171). The paragraph includes mention of the influential International Criminal Tribunal for the Former Yugoslavia's (ICTY) *Tadić* decision, which crystallized the notion that a non-international armed conflict exists only when there are both organized parties (rather than scattered, loosely allied actors), and hostilities of sufficient intensity in violence and duration.[11] The paragraph also notes a lack of international consensus about how intense hostilities must be. But the discussion does not engage either the facts of that case, or the detailed list of criteria the ICTY subsequently developed to determine intensity (including metrics of death, damage, and social upheaval).[12] It does not engage any of the decisions by numerous other courts including the International Criminal Tribunal for Rwanda, European Court of Justice, and (since September 11) American tribunals as well, applying the definition (and therefore giving it growing content) in a range of settings.[13] The book engages neither the negotiating history of the Geneva Conventions, nor the Convention Commentaries, nor the purpose of the body of law more broadly, all of which shed further light on the kind of "non-international armed conflicts" LOAC most clearly intended to address (for instance, that they be something more than "short-lived insurrections . . . or terrorist

[10] *See, e.g.*, Monica Hakimi, *Taking Stock of the Law on Targeting*, EJIL: *Talk!* (Dec. 12, 2016), *at* https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i; Michael J. Adams & Ryan Goodman, *De Facto and De Jure Non-international Armed Conflicts: Is It Time to Topple Tadić?*, Just Security (Oct. 13, 2016), *at* https://www.justsecurity.org/33533/de-facto-de-jure-non-international-armed-conflicts-time-topple-tadic; Deborah Pearlstein, *The NIAC Threshold*, Opinio Juris (Oct. 4, 2016), *at* http://opiniojuris.org/2016/10/04/the-niac-threshold; Adil Ahmad Haque, *Triggers and Thresholds of Non-international Armed Conflict*, Just Security (Sept. 29, 2016), *at* https://www.justsecurity.org/33222/triggers-thresholds-non-international-armed-conflict.

[11] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, paras. 688–93 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[12] *See, e.g.*, Prosecutor v. Haradinaj, Case No. IT-04-84-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 19, 2010).

[13] *See, e.g.*, *id.*; C-285/12, Aboubacar Diakité v. Commissaire Général aux Réfugiés et aux Apatrides, ECLI: EU:C:2014:39 (Ct. Just. E.U. Jan. 30, 2014); United States v. Hamdan, 801 F. Supp. 2d 1247, 1278 & n. 54 (U.S. Ct. Mil. Comm'n Rev. 2011) (en banc), *rev'd* Hamdan II, 696 F.3d 1238 (D.C. Cir. 2012), overruled on other grounds by Al Bahlul v. United States, 2014 WL 3437485 (D.C. Cir. July 14, 2014).

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activities").[14] And the book attends not at all to the deep consensus that may be found with respect to the existence of dozens of (definitionally undisputed) non-international armed conflicts in the world in recent decades—to which the United States' novel and internationally unique conception of its hostilities against Al Qaeda and associates as a NIAC of global scope stands as a notable exception. There are certainly circumstances in which the application of the "armed conflict" trigger, as with any definition in law, is uncertain; there are also a vast number of cases in which it is not.[15]

At least as concerning, the book itself blurs the legal reality that only a very limited category of questions depend on the determination whether a situation is an "armed conflict" or not. For instance, Brooks mentions the dilemma of mass communications surveillance on a variety of occasions, suggesting that "[i]f we can't tell whether a particular situation counts . . ." as armed conflict, it is impossible meaningfully to assess, inter alia, "if mass government surveillance is reasonable or unjustifiable" (p. 22). Yet apart from a sparse handful of rules about the entitlement of spies to prisoner of war protections in circumstances of *international* armed conflict (a conflict between states, not the focus of Brooks's book), LOAC is silent on the legality or propriety of surveillance.[16] Likewise, the primary sources of domestic U.S. law authorizing the surveillance practices that have been so controversial in recent years care not at all whether or not that surveillance is occurring in circumstances of armed conflict; U.S. law has been interpreted to authorize bulk collection in war and in peace.[17] Furthermore, while Brooks is certainly right to highlight detention without charge as a major policy preoccupation post-9/11, and the LOAC applicable in *international* armed conflict has detailed rules governing such detention,[18] the LOAC of non-international armed conflict (that is, the LOAC ostensibly applicable to the United States' post-9/11 conflict) is substantially silent on the circumstances justifying non-criminal detention.[19] In the meantime, the United States and countless other countries have a range of administrative detention regimes that apply in times of conflict and not—including security-related detention regimes—and there is nothing in LOAC (or indeed, international human rights law) that categorically prohibits such detention (provided compliance with certain baseline treatment and procedural conditions).[20] In other words, on these topics, the United States is already in exactly the legal universe Brooks seeks: a universe in which it is possible to ask independently, without reference to a determination of armed

[14] Prosecutor v. Tadić, *supra* note 11, at 562 (describing the need for factors to distinguish a non-international armed conflict (NIAC) from "banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law").

[15] *See, e.g.*, Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 Int'l Rev. Red Cross 69 (2009); Hans-Peter Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 Am. U. L. Rev 145 (1983).

[16] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I], Art. 46, June 8, 1977, 1125 UNTS 3.

[17] *See, e.g.*, FISA Amendments Act of 1978, 50 U.S.C. § 1801 et seq. (regulating domestic intelligence surveillance); Exec. Order No. 12333, 46 Fed. Reg. 59941 (1981) (regulating bulk communications collection under Article II of the U.S. Constitution in any "lawful foreign intelligence, counterintelligence, international narcotics or international terrorism investigation").

[18] *See, e.g.*, Geneva Convention [III] Relative to the Treatment of Prisoners of War, Arts. 12, 33, Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 [hereinafter GC III].

[19] *Id.* Art. 3 (requiring only that "[p]ersons taking no active part in the hostilities, including . . . those placed *hors de combat* by . . . detention . . . shall in all circumstances be treated humanely . . .").

[20] For discussions of various U.S. and foreign security detention regimes and their legality, see, for example, articles included in the 2009 symposium issue of the *Case Western International Law Journal* on this topic, beginning with Michael S. Scharf and Gwen Gillespie, *Foreword: Security Detention*, 40 Case W. Res. J. Int'l L. 315 (2009).

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conflict or not, whether a particular practice is a good, moral, wise, or effective idea.

That leaves one question of central preoccupation in the book to which the existence of an armed conflict matters critically: whether and when it is lawful to kill. Here, Brooks is exactly right, the existence of "armed conflict" is a proxy on/off switch of inescapable importance. When "armed conflict" exists as a matter of law, deliberate, lethal targeting, without regard to particular self-defensive need or anything more than group membership, is permitted as a first resort. When "armed conflict" does not exist, it is not. In this respect, LOAC makes the determination of legality dependent not on criteria otherwise familiar elsewhere in law—criteria like individual culpability or dangerousness—but rather on the ambient degree of violence already existing between organized groups. The wisdom or utility of this approach is hardly past question. Indeed, one could imagine a variety of criticisms.

One criticism—the one Brooks makes directly—is that it is effectively impossible to identify a meaningful line between ambient levels of violence that justify first-resort killing, and ambient levels of violence that do not. While the book scarcely scratches the surface of what existing law has to say on the topic of how much violence is enough, it cannot be doubted that it is not always clear when violence crosses the threshold from sporadic and scattered (not "armed conflict") to sustained and intense ("armed conflict"). At the same time, it is difficult to see how the *Tadić* test for the existence of NIACs is in this sense categorically different from any other legal standard in any other body of law. It is always necessary to refer to information beyond the words of the standard themselves to give interpretive meaning to what process is due,[21] or indeed what treatment is "humiliating and degrading."[22] All law proves ambiguous in certain applications, including, most famously, even the simplest law banning vehicles in the park.[23] All legal line-drawing efforts involve gray areas in which lines blur. What law has on its side—indeed, part of what makes law *law*—is the capacity of legal interpreters to identify, make, and marshal recognizable *legal* arguments about where the line should be drawn in a particular gray case. These arguments are visible in the growing body of judicial opinions assessing the existence of NIACs in various settings (none of which has embraced the fully borderless NIAC the United States asserts),[24] and in the growing body of conduct that adds customary meaning to the term through the practice of states (not one of which has yet agreed that a global NIAC, as it were, exists). They are largely absent from the book.

Another criticism one might make of the "armed conflict" proxy is that the legality of killing should not, as a normative matter, depend on the ambient level of violence (or for that matter, the involvement of discernably organized parties). Regarding this view, one might argue for example that the legality of first-resort killing should depend instead on a far more individualized assessment—the imminence of the threat or the magnitude of the violence capable of achievement by a particular target, the necessity of self-defense, or the availability of less violent alternatives to mitigate the threat in the particular case. Others have made such arguments in

[21] U.S. CONST. amend. V.

[22] GC III, *supra* note 18, Art. 3(I)(c).

[23] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607–08 (1958) ("A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? . . . There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. . . . Human invention and natural processes continually throw up such variants on the familiar, and if we are to say that these ranges of facts do or do not fall under existing rules, then the classifier must make a decision which is not dictated to him . . . . [I]n applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand. . . .").

[24] *See, e.g.*, *supra*, notes 11–15. While *Hamdan v. Rumsfeld* is often cited for the proposition that there exists between the United States and Al Qaeda a transnational NIAC, the *Hamdan* Court was in fact careful to limit its holding to the conflict between those parties then occurring "in the territory" of Afghanistan. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006).

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normative terms,[25] and such a case might be usefully supported even in a popular work by a variety of justifications: the "armed conflict" proxy produces unfair or even immoral results, or handicaps justifiable interests or policies. To make this argument fully given her other positions, Brooks would have to explain why a putatively more normatively attractive legal standard—the target's individual degree of dangerousness, for instance—would be less likely to suffer from ambiguities in application than the current standard. But the far greater problem with assessing the book in these terms is its determined reluctance to address whether current applications of existing law—most acutely, the United States' application of the definition of "armed conflict"—is indeed a normatively undesirable result.

The book's ambiguity in this regard is in critical measure a function of a deeper problem with its descriptive case. Namely, Brooks's decision to lump into one pile—a "what war is" pile—certain facts about the world (such as the existence of dangerous technologies and violent nonstate groups) with certain, uniquely American legal and policy choices in the years following September 11, 2001. The U.S. characterization of its operations against Al Qaeda as a global NIAC has remained, despite sixteen years of attempts, unpersuasive to any other state in the world, including America's closest allies, some of which are also globally engaged against terrorist groups. Equally idiosyncratic has been the U.S. decision (driven by Congress' unwillingness to enact new domestic authorization to use force) to describe ISIL as part of the same global conflict with Al Qaeda—despite the reality that ISIL and Al Qaeda are sworn and active enemies. One might (as Brooks does) blame "war" for making it harder to define our enemy. Or one might at least as plausibly blame policy officials, such as former Defense Intelligence Agency Director (and briefly Trump Administration National Security Director) Lt. Gen. Michael Flynn, on whom Brooks relies for the suggestion that our war-like enemies include not only the groups our government expressly names—Al Qaeda; its affiliates AQAP, Al Nusrah, and al Shabaab; ISIL; and the Taliban[26]—but also "41 Islamic terrorist groups spread out in 24 countries" (p. 278). For while Brooks describes our conflict as one against "an ill-defined, amorphous, protean enemy, with no leaders authorized to speak on its behalf, no set membership, and only the vaguest of goals," (p. 279) in fact, the U.S. government has identified over time a highly specific list of enemy groups[27]—groups that do have named leaders,[28] and troublingly specific goals.[29] Through such overbreadth, personification ("[w]ar has burst out of its old boundaries" (p. 13)), passive voice ("events march inexorably on" (p. 344)), and inapposite generalization ("war has been the norm for much of human history" (p. 348)), the book

[25] *See, e.g.*, Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012); Ryan Goodman, *The Power to Kill or Capture Enemy Combatants* 24 EUR. J. INT'L L. 819–20 (2013) (arguing that the modern law of armed conflict should be understood to require, in certain circumstances, that "if enemy combatants can be put out of action by capturing them, they should not be injured; if they can be put out of action by injury, they should not be killed . . ."). *But see* Geoffrey Corn, Laurie Blank, Christopher Jenks & Eric Talbot Jensen, *Capture Instead of Kill: A Dangerous Conflation of Law and Policy*, LAWFARE (Feb. 25, 2013).

[26] Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations (Dec. 2016), *available at* https://fas.org/man/eprint/frameworks.pdf.

[27] *Id.*

[28] *See, e.g.*, CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, THE ISLAMIC STATE AND U.S. POLICY (Congressional Research Service, Feb. 2, 2017), *available at* https://fas.org/sgp/crs/mideast/R43612.pdf (summarizing background on the Islamic State organization, including "goals, operations, and affiliates. . .") [hereinafter CRS Islamic State Report]; CARLA E. HUMUD, AL QAEDA AND U.S. POLICY: MIDDLE EAST AND AFRICA (Congressional Research Service, Aug. 11, 2016), *available at* https://fas.org/sgp/crs/mideast/R43756.pdf (discussing Al Qaeda leadership and affiliates) [hereinafter CRS Al Qaeda Report].

[29] *See, e.g.*, CRS Islamic State Report, *supra* note 28, at 18, 26 (discussing goals of "reestablishment of the caliphate" and protecting "true Muslim believers from threats posed by idolaters, apostates, and other non-believers"); CRS Al Qaeda Report, *supra* note 28, at 10–11 (describing the group's focus on targeting America and on avoiding conflict with local governments).

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too often elides general phenomena of global violence with a singular lawyerly construct—a construct by which one country (the United States) maintains its involvement in an "armed conflict" in which it has suffered fewer military deaths in action than in accidents in the past several years.[30]

The descriptive conflation of indisputable factual realities and highly disputed legal interpretations makes it possible not only to avoid the more difficult normative questions at the heart of post-9/11 law and policy, but also to avoid considering another possible explanation for the "blurring" Brooks laments—namely, that it is not "war" as an independent truth in the world that has become categorically more blurry (for Brooks at times herself acknowledges that war has always been "messy"), but the law of war that has become blurred because the United States (alone in the world) has decided to take a set of rules that apply reasonably clearly in some circumstances and apply them to other circumstances in which it seems reasonably likely they do not.[31]

None of this is to suggest that the world has not changed, the threats are not real, or that lethal force may not sometimes be required to address a danger we face. Quite the contrary. It is rather to say that the law of armed conflict does not apply and was never intended to apply in all of the circumstances in which a state faces a national security threat. LOAC was designed to apply under a specific set of conditions, the existence of which were thought essential to justifying the kind of killing that law permits: conditions in which the intensity of fighting is great enough that more detailed inquiries into individual identity and culpability are either impossible or unreasonable, and in which the groups fighting each other are organized enough to be capable of holding group members accountable to certain baseline rules governing the way they fight. Asking whether a set of circumstances amounts in legal terms to an "armed conflict" is, in this sense, no different from asking whether a particular set of justifications for this kind of killing exists.

The threats that seem to worry Brooks most—the availability of cyber and biological weapons, and the existence of a great many state and nonstate actors in the world with an ability and desire to wield them—may well arise in the context of conditions justifying armed conflict-type killing. (Russia's use of cyberweapons as part of its invasion of Ukraine is but one evident case.[32]) Or they may arise in circumstances in which intelligence officials conduct a relatively lengthy investigation and identify a relatively isolated set of actors—actors planning a particular attack but otherwise incapable of mounting any sustained use of force. Neither domestic nor international law would deny a state recourse in the latter situation just because the situation cannot reasonably be described as armed conflict. Even killing may be justified in some such circumstances under, for instance, a national right of self-defense.[33] But in the absence of conditions that make more individualized inquiry unreasonable, the law will not justify killing as a first resort, and not on the basis of group membership alone. We could

[30] The U.S. Department of Defense reported twenty-nine U.S. military deaths in action in operations in Afghanistan from January 1, 2015 through September 11, 2017; and twelve U.S. military deaths in action in operations in Iraq and Syria from Oct. 15, 2014 through September 11, 2017. U.S. Defense Department Casualty Status Statistics, *available at* https://www.defense.gov/casualty.pdf. For some perspective, the U.S. Army reports that sixty-four soldiers died in on-duty accidents in fiscal years 2014–2016. U.S. Army Accident Statistics, *available at* https://safety.army.mil/Portals/0/Documents/STATISTICS/Standard/PublicReports/ArmyAccidentStatisticsYearEndData.pdf. Solely considering U.S. military deaths in operations against Al Qaeda and the Taliban in Afghanistan, and against ISIS in Syria and Iraq, is a terribly incomplete measurement of the intensity of the conflicts between the United States and these groups. But given the absence of reliable, unclassified statistics about enemy deaths at U.S. hands in these conflicts, it is one of few concrete indicia available to the public.

[31] *See supra* text accompanying notes 11–15.

[32] David E. Sanger & Steven Erlangermarch, *Suspicion Falls on Russia as 'Snake' Cyberattacks Target Ukraine's Government*, N.Y. TIMES (Mar. 8, 2014).

[33] *See* U.N. Charter Art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . ."); *see also* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE (5th ed. 2011).

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call the latter circumstance an absence of conditions justifying first-resort killing. For now, the law happens to call it, more simply, not war.

It is certain that conditions justifying first-resort killing continue to exist in conflicts between the United States and certain organized groups in some parts of the world—Syria and Iraq, for instance.[34] It may also be that those conditions do not exist, or no longer exist, between the United States and other organized groups in other places.[35] To assess this meaningfully as a matter of law, there are a set of specific, nameable facts we need at least to attempt to know—like the number, duration, and intensity of individual confrontations; the number of forces engaged; the extent of material destruction; and, of course, the number of casualties.[36] As to the conflict at the book's core—the one between Al Qaeda and the United States—this book sheds light on none of those specifics. Rather, the book eschews specifics just when they are needed most.

In the end, Brooks faults President Obama for insisting, as "history advises," that "this war, like all wars, must end." Not so, Brooks insists: "History advises no such thing," for "war has been the norm for much of human history" (*id.*). War writ large has of course been around forever. But it has hardly been the same war, between the same parties; it has not been the state of affairs for all people, everywhere, all of the time. Brooks's answer to President Obama is, in this respect, characteristically beside the point. For the more important word in President Obama's statement was not "war"; it was "this."

DEBORAH PEARLSTEIN
*Cardozo School of Law, Yeshiva University*

[34] U.S. and allied estimates of the number of ISIS fighters killed since coalition strikes began in 2014 vary radically. *See, e.g.*, Ryan Browne, *UK Puts Number of ISIS Fighters Killed at Half US Figure*, CNN (Dec. 16, 2016), *at* http://www.cnn.com/2016/12/16/politics/uk-us-number-isis-fighters-killed (citing figures from 50,000 to 25,000 to 2,500 ISIS fighters killed by coalition forces).

[35] *See supra* note 30 (U.S. military deaths in operations against Al Qaeda, the Taliban, and ISIS).

[36] Prosecutor v. Haradinaj, *supra* note 12, at 49

*The Continent of International Law: Explaining Agreement Design*. By Barbara Koremenos. Cambridge: Cambridge University Press, 2016. Pp. xviii, 437. Index. $29.99. doi:10.1017/ajil.2017.44

In the *Continent of International Law: Explaining Agreement Design*, Barbara Koremenos sets out to empirically demonstrate that there is considerable variation in the way that international treaties are designed, and that the variation reflects states making rational decisions based on the specific cooperation problems they are facing when drafting agreements. The book is the culmination of a research program that Koremenos—a political science professor at the University of Michigan—initially launched fifteen years earlier when she coauthored the seminal article "The Rational Design of International Institutions."[1] That article tried to move beyond the debate about whether international law is an exogenous constraint on state behavior by focusing on the variation in how international institutions are set up. Now a staple on seminar syllabuses in international relations classes, the article inspired a line of research that sought to answer questions like: why do some international agreements have dispute resolution provisions, while others do not specify what happens when a state fails to comply with their obligations?[2] In her new book, Koremenos goes beyond her own prior work by both clearly developing a theoretical framework to explain why states design agreements the way they do and by empirically testing the hypotheses derived from her theory on an original dataset that codes the design of a random sample of international agreements. Koremenos thus makes both an important theoretical and empirical contribution to the study of international law.

Koremenos's project begins with the observation that, although a handful of international

[1] Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001).

[2] Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189 (2007).

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