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## TIME, LAW, AND JUDGMENT

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### ABSTRACT

As *How Everything Became War* describes, the methods and practices of contemporary violence have gradually eroded traditional legal and political distinctions between war and peace. Classifying a particular time and space as war, peace, or something in between defines the universe of permissible harms, relevant victims, and appropriate experts. It also has ramifications for governance: Who governs the war or the peace when so little separates the two? This article explores this question through two lenses: time and judgment. It first describes the ways in which temporality frames conflict and violence. The article then examines how decisions about the applicability of war or peace paradigms are equally choices about allocating authority, responsibility, and judgment.

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### I. INTRODUCTION

In *How Everything Became War and the Military Became Everything*,<sup>1</sup> Professor Rosa Brooks offers an accessible and stimulating exploration of a perennial preoccupation of contemporary international law: Have the categories of war and peace lost their meaning? And if so, should law transform to reflect the

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1. ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (2016).

impossibility of distinguishing war from peace or continue its attempt to delineate a bright line between them?

Brooks points to a number of ways in which the distinctiveness of war (and, concomitantly, of peace) has disappeared. Rather than an exceptional state of permissible killing, in which the military has particular tasks and law provides a regulatory framework for their appropriate completion, war has become simultaneously over- and under-declared, both regularly invoked and consistently disclaimed. Deliberate and increasing secrecy coexists with an open and vast war on terror. On one hand, Brooks argues, this fuzziness means that there are no bright-line distinctions anymore; the methods and means of distinguishing war from peace have become tenuous at best. On the other hand, military actors now perform duties that would once have been considered far outside their purview, taking over traditionally civilian activities. The metastasizing nature of the military and the blurring boundaries of war inevitably raise questions about the nature and utility of law and legal categorization.

Along with other contemporary commentators, Brooks views the gap between a traditional law of war that relies on sharp distinctions and a new mode of war that erases them with unease. She draws our attention to what many have come to see as the essence of contemporary conflict: no longer do belligerents always step over a boundary, follow a ritual, or make a declaration; today, there is constant military activity with no declaration of war, or war is invoked continuously but the actions taken in its name seem far from military in nature. In conventional legal terms, war represents a time and space of permissible violence, when the governing actors shift and actions unthinkable in peacetime become acceptable. International humanitarian law traditionally regulates the exceptional moment of war, chastens excess within it, and monitors the temporary emergency it represents.<sup>2</sup> Yet spatially, temporally, and conceptually, the meaning of “war” has changed. That change raises the question: Will constructing more categories related to war and peace—or openly admitting the flexibility of those we have—answer the political, ethical, and moral concerns that attach to endless war or simply enable and reinforce configurations of power and politics that privilege certain actors over others?

At stake in this debate are three crucial issues: the distribution of governance authority, definitions of permissible harm and violence, and the politics of judgment and responsibility. The blurring line between war and peace redistributes violence and harm. As Mary Dudziak points out, the “new kind of peacetime”<sup>3</sup> experienced by Americans is “not a time without war, but instead a time in which war does not bother everyday Americans.”<sup>4</sup> In other words, making wartime unexceptional and peace impossible occurs in part by trying to ensure a separation between not only those who inflict violence and those who suffer, but between

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2. Int'l Comm. of the Red Cross, *What is International Humanitarian Law?*, (July 2014), [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

3. MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 78 (2012).

4. *Id.* at 145.

those who engage with violence directly and those seemingly immune from its direct effects.

Responses to the blurring lines of war and peace have tended to include either expanding categories to encompass new actors and actions (such as “post-conflict” time and territory or “part-time” combatants) or eliminating such categories in favor of a spectrum approach (in which war and peace are not clear categories but points on a continuum). In either case, proclaiming war and peace has become part of the battle. The rhetorical claims of “[d]eclaring war, declaring not-war, or not-declaring-war all need to be seen—alongside the actual use of force—as instruments of warfare.”<sup>5</sup> Understanding a particular time and space as one of war, peace, or something in between has implications for identifying permissible harms, victims, and relevant experts. It also has ramifications for governance: Who governs the war or the peace when so little separates the two?

There are multiple areas in which to grapple with the expanding nature of the military and the blurring boundaries of war: territorial expansion, temporal ambiguity, enlarged circles of participants, and changing technological or technical tasks.<sup>6</sup> These are, of course, overlapping categories—e.g., the particular technology of drone warfare has altered the space of war. The expanded time of war means sweeping more individuals into conflict, whether as victims, bystanders, perpetrators, military, combatants, or civilians. This short article focuses on two of these areas: temporality and judgment. Part II identifies ways in which decisions about time frame conflict and violence. Part III argues that decisions about the applicability of war or peace paradigms are equally choices about the distribution of authority, and that both increasing categorization and eliminating it, present problems of judgment and responsibility.

## II. TIMES OF WAR AND PEACE

Legal definitions of war have tended to rely on a combination of action, space, and time. The *Tadić* judgment counted the “protracted” nature of the violence as one of its factors in determining the applicability of the law of armed conflict, along with the organization of the armed forces and the intensity of the fighting.<sup>7</sup> The temporal distinction between war and peace has been both entrenched and often invisible: there is wartime and peacetime, and they are distinguished by specific government actions in a particular place. War is ostensibly an exceptional, temporary, emergency period when the guarantees of democratic states are permissibly relaxed and international legal protections of the

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5. DAVID KENNEDY, OF WAR AND LAW 76 (2006).

6. Among others, the categorical separations in law between *jus ad bellum* and *jus in bello*, international and non-international armed conflict, and the application of international humanitarian law and international human rights law continue to be vigorously debated, defended, and contested.

7. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, at 192–99 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), *citing* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

individual decrease.<sup>8</sup> Once the emergency has taken over regular life, however, the exception can swallow the norm. In her detailed examination of wartime in the United States, Dudziak argues that the presumed temporary nature of peacetime has “become[] an argument for exceptional policies, such as torture” and that wartime seems to be constant rather than momentary.<sup>9</sup> Moreover, this may not be an entirely new phenomenon; as Nathaniel Berman has pointed out, the tension between an imagined stability of time and space in war, and real discontinuities in both, did not emerge after the Cold War or the September 11 attacks, but has a much longer genealogy.<sup>10</sup>

The indefinite nature of wartime raises two questions. First, should the categories of time be expanded and nuanced, or eliminated in light of unending war? Second, without a clear time of war or peace, what is an appropriate temporal horizon for justice and judgment?

#### A. Post-Conflict Time

In the aftermath of the Cold War, a post-conflict classification for states emerging from war became increasingly common.<sup>11</sup> Rather than assuming a clear move from wartime to peacetime, international policy anticipated an intermediate period for reconstruction and transition. Implicit in the label, which came in the context of broad state-building and peacebuilding initiatives by international organizations, was a “simple chronology: after conflict comes post-conflict, which is in turn followed by stability.”<sup>12</sup> Certain states and territories were classified as “post-conflict,” despite the lack of clear consensus on the definition of the category. Arguably, the post-conflict label represented a response to the blurring nature of wartime and peacetime: rather than eliminate categories, the strategy was to invent a new category to account for the gap in reality between the two.<sup>13</sup>

By definition, the post-conflict endeavor presumed both war and peace, as

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8. OREN GROSS, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 7–8 (James Crawford et al. eds., 2006).

9. DUDZIAK, *supra* note 3, at 4.

10. See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 24 (2004) (suggesting that conflicts in both the colonial and occupation context resemble the terrorism/counter-terrorism context due to their “discontinuous qualities”); see also Marko Milanovic & Vidan Hadzi-Vidanovic, *A Taxonomy of Armed Conflict*, in RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 4 (Nigel White & Christian Henderson eds., 2009) (providing that a “gap [exists] . . . between a common sense, factual understandings of ‘war’ and one derived from the niceties of international law, a gap to be exploited when it served state interests”).

11. U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, ¶ 55, U.N. Doc. A/47/277-S/24111 (June 17, 1992).

12. Brett Bowden et al., *Introduction to THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS* 5 (Brett Bowden et al. eds., 2009).

13. This may not have been an entirely new phenomenon: Milanovic and Hadzic excavate earlier arguments for a *status mixtus* between war and peace to escape the rigidity of a war/peace framework in international law. See Milanovic & Hadzi-Vidanovic, *supra* note 10, at 5.

well as the ability to consistently move states and societies from one category to the other. The enterprise offered specific roles for external actors who could offer both expertise and resources for building peace. It shared with earlier theories of democracy promotion a commitment to the deliberate construction of societal and governmental change.<sup>14</sup> The post-conflict reconstruction enterprise suggested that common techniques and institutions sponsored by foreign actors (albeit with local participation) could consistently build peace and stabilize new regimes. Just as the transition paradigm offered certain steps for democratization,<sup>15</sup> so too state-building processes relied on a kind of “policy science” of governance that authorized international actors to create and construct institutional change.<sup>16</sup> At the same time, the effort to define a post-conflict period foundered as it began to reflect the same problems that defining war and peace presented. How many years, how few deaths, what type of violence, or what definition of war classified certain places as post-conflict, others as at war, and still others as outside the paradigm altogether? If no definitive answer existed, then it became increasingly plausible that the answer was political rather than empirical—a method for sorting the world’s places and peoples.

Like the post-conflict reconstruction project, post-9/11 U.S. military doctrine enunciated a new relationship between war and peace, a doctrine which attempted to reflect the impossibility of moving from one to the other as if by flipping a switch. Yet the military doctrine cited by Brooks<sup>17</sup> emphasizes a spectrum of conflict rather than the construction of a new category. The six phases of conflict from the 2008 edition of the U.S. Doctrine for Joint Operations include phases for deterrence, stabilization, restoration of authority, and “shaping” future operations through relation-building and information-gathering.<sup>18</sup> In other words, no clear line can be drawn between the stages of war and the phase of peace, including through the creation of a new singular category to bridge between the two.<sup>19</sup> Rather, the continuity of multiple phases suggests that conflict is always either approaching or active and can either be anticipated, prevented, or obstructed only by maintaining constant surveillance and engagement.

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14. It is worth noting that the formulations of both democracy and peace remained limited. As Susan Marks argued, the “low intensity democracy” promoted was a deliberately deradicalized program that prioritized stability over equality. Peacebuilding programs have similarly been critiqued for promoting narrow conceptions of negative peace, rather than a positive peace that could attend to continuities of structural violence. SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY 56–57 (2000).

15. Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002).

16. See, e.g., Nehal Bhuta, *Democratisation, State-Building and Politics as Technology*, in THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT 59 (Brett Bowden et. al eds., 2009).

17. BROOKS, *supra* note 1, at 82.

18. *Id.*

19. By contrast, some international humanitarian lawyers argue for a new category of transnational armed conflict that could respond to contemporary events, particularly the “war on terror.” See Milanovic & Hadzi-Vidanovic, *supra* note 10, at 43.

Despite their different approaches, both the project of creating a new category (“post-conflict”) and that of eliminating categories (by creating a spectrum of war and peace) reconfigure war and peace and use a conceptually vague definition of time to distribute governance authority. The post-conflict model suggests that “during” war and “after” war remain separate—and that both may differ from “peace.” Without clear parameters, however, the achievement of peace or stability may remain elusive. By contrast, the military model frames conflict as a constant for those states included in its ambit. Both projects suggest the necessity of external governance and lack a definitive metric for its end. Moreover, the two approaches share a tendency to classify states and societies in ways that appear neutral but carry value-laden judgments.<sup>20</sup> A post-conflict state appears by definition to be one subject to external intervention; the reconstruction effort from outside is meant to resolve a problem created locally or regionally. Yet the notion of a problem-solving intervention is belied by longer histories of external involvement. As Anne Orford has argued in relation to humanitarian intervention, the narrative of international involvement as a response to need or crisis erases longer term contributions by international financial institutions, international organizations, and external states which affected instability and conflict.<sup>21</sup> To structure intervention as a necessary response to crisis is to occlude the contingency of historical action that created the crisis itself. Moreover, international state-building and peacebuilding projects have been consistently critiqued for overriding local preferences, limiting participation, and enforcing an externally-produced institutional checklist through conditional aid and other coercive processes. A military-first model might rely on force rather than other forms of coercion and justify action based on security rather than democracy, but it similarly states the necessity of taking particular steps for an undefined timeframe to achieve an elusive peace.

The lack of temporal clarity has important implications for politics and governance. The indefinite nature of both the spectrum and the new category of post-conflict reshape the distribution of governance. They place war and peace under external authority while simultaneously complicating the distribution of authority among multiple actors. Who governs in the time “after” active conflict? How should authority be distributed between humanitarian and military actors? For example, the expanded role of counterinsurgency operations places humanitarian actors in the field in close proximity to military actions that threaten the core principle of neutrality. Activities that were once the purview of humanitarian actors alone have become part and parcel of the military’s actions, not least because of the expanded time period of military engagement. Militarized aid projects threaten both the recipients of aid (since neutrality is meant to ensure that

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20. Bhuta describes the ways in which a social scientific approach places “socio-political order and practices that become the object of reform . . . within a schema that is at once descriptive and evaluative.” *See* Bhuta, *supra* note 16, at 60.

21. *See* ANNE ORFORD, READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 2 (2003).

ideology, background, or politics will not interfere with aid provision) and those providing it (since neutrality makes them less likely to be military targets). The erosion of neutrality and the politicization of aid are perennial concerns among the humanitarian community. Just as some express concern about the effects of aid workers paying local warlords for safe passage (and thus helping to prop up particular players in a conflict), others might question the involvement of the U.S. army in ostensibly civilian activities.<sup>22</sup> Similarly, debates over the role of humanitarian and development actors, in fostering and obscuring structural violence in potentially violent societies, have inevitable implications for a set of military projects premised on building stability and security through institutions, resources, and aid.<sup>23</sup> The consequences of a more militarized aid project—brought about due to the expanded time, theater, and operation of “war”—can be contextualized within a set of ongoing conversations among humanitarian actors about their role in the world.

### B. *The Times of Justice*

The fluid nature of post-conflict, war, and peace times reflect a second conundrum: how to bracket a relevant time period for justice. The plasticity of wartime makes both the beginning and end of conflict almost impossible to mark. This has any number of implications for projects of justice, not least of which are determining the starting point for judging guilt or innocence. Remembering a Council on Foreign Relations discussion he attended in 2005, David Kennedy recalls the frustration of high-level military professionals in dating the onset of war. If “post[-]conflict action is the continuation of conflict by other means” (reflecting the twinned nature of post-conflict reconstruction and continuous military action discussed above), then “when did the war start—on September 11? In 1991? In 2003?”<sup>24</sup> The blurred nature of wartime highlights the complexity of judging injustice in conflict: focusing on immediate actions and short-term harms may underplay the crucial context of violence and coercion. Making all time wartime, however, risks eliminating the rules of permissible violence that begin only at the moment conflict starts. The longer the time period of war becomes, the more the authorization to commit violence seems infinite or normal rather than bounded and exceptional.

Brooks, herself, raises the question of a starting point for considerations of crime, punishment, and justice in her discussion of the *Erdemović* case.<sup>25</sup> A Croatian foot soldier indicted for crimes against humanity at the International

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22. See generally THE GOLDEN FLEECE: MANIPULATION AND INDEPENDENCE IN HUMANITARIAN ACTION (Antonio Donini ed., 2012) (discussing ways in which humanitarian action is often misused to pursue non-humanitarian goals).

23. PETER UVIN, AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA 226–32 (1998).

24. KENNEDY, *supra* note 5, at 113.

25. BROOKS, *supra* note 1, at 212–16, discussing Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

Criminal Tribunal for the Former Yugoslavia (ICTY) for his participation in the Srebrenica massacre, Drazen Erdemović unsuccessfully pleaded duress as a defense.<sup>26</sup> No one disputed Erdemović's account of his participation, which took place at the barrel of a gun; when he attempted to protest the killings, Erdemović's commanding officer told him his only choice was to die rather than to kill innocent civilians.<sup>27</sup> A majority of the Appellate Chamber of the ICTY refused to allow duress as a defense to charges of crimes against humanity, although it was later permitted as a mitigating factor in sentencing.<sup>28</sup> As a result, the Appellate Chamber's judgment implicitly suggested, in Brooks's words, that "[a]t Srebrenica, the only way to be innocent was to be dead."<sup>29</sup>

The decision, however, raises the spectre of temporality obliquely by linking duress to prior decisions. One's temporal purview will influence whether Erdemović's actions seem chosen or predetermined.<sup>30</sup> At sentencing, Erdemović submitted that he was an anti-nationalist pacifist who joined multiple armed groups to feed his family.<sup>31</sup> Perhaps he was indeed under duress at Srebrenica but made prior choices that led him to the situation of being brutally coerced to follow illegal and immoral orders. Perhaps his earlier choices to join the Army of the Republic of Bosnia-Herzegovina, the Croatian Defense Council, and the Bosnian Serb Army were understandable due to financial need, or perhaps he should have looked further for a different job. Perhaps he failed to pay attention until it was too late or perhaps it is implausible to expect that Erdemović could have known the horrors awaiting him.<sup>32</sup> Were Erdemović's actions a choice in the moment or predetermined by an earlier decision? At what point should he be held responsible for his responses to a time of war, particularly if it remains unclear when peacetime might return or when conflict begins? Erdemović's legal or moral guilt depends directly on the time at which his choices become relevant to the decision.

Brooks suggests that the Appellate Chamber's decision not to allow a duress defense might be read as an attempt to signal alarm about how quickly the ordinary can morph into the atrocious, to argue that "by the time we see that war has swallowed us whole, it's usually too late."<sup>33</sup> In other words, the majority's refusal to permit Erdemović to defend his actions represented an attempt to draw a legal

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26. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, ¶ 10.

27. See Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 17 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

28. Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment.

29. Rosa Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*, 43 VA. J. INT'L L. 861, 868 (2003).

30. BROOKS, *supra* note 1, at 213.

31. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 16.

32. Defense Counsel suggested at sentencing that Erdemović's statements of guilt should be taken "as a plea for understanding of how far the limits of the abuse of man in this region were stretched, not only in his local environment but also in the wider scope." *Id.*

33. BROOKS, *supra* note 1, at 214.

line between wartime and what precedes it. The plurality opinion argued that law must have the “appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations.”<sup>34</sup> Yet this too raises a question of time: If the principles of humanitarian law and the decisions of international criminal tribunals are meant to offer, in part, normative lessons for action during conflict, when should those lessons begin?

Although the Erdemović case has some unique circumstances (the focus on duress, his relatively low rank, his guilt and remorse), the trial and judgment reflect a broader time-related tension in international criminal justice. Justice in relation to conflict is filled with normative temporal questions, not least of which involve the choices of temporal horizon for crime and punishment. One of the many critiques of international criminal law has been the ways in which using the method of criminal law to address atrocity dehistoricizes violence and individualizes guilt.<sup>35</sup> International criminal trials struggle between a commitment to legalism that excises history (and thus maintains an artificially narrow timeline) and a preoccupation with narrating history that appears alternately inevitable and inappropriate. Criminal law may be an “exercise in abstracting motivation from situation, in decontextualizing events, and in substituting individual culpability for social or political responsibility.”<sup>36</sup> At the same time, “historical debate has become an inescapable feature of many international criminal trials[,]” not least because crimes such as genocide and crimes against humanity require accounts and judgments of “intergroup relations over time.”<sup>37</sup>

These are questions not only in the relatively narrow arena of international criminal law but in the broader questions about justice in transition, in relation to conflict, or for past human rights violations. Framing conflict and peace as temporally proximate or continuous reinforces a short-term conception of justice. It makes it harder to connect the dots between violence and reparation over a long timeframe, one that might link contemporary inequity and harm to colonialism or slavery.

### III. LAW, VIOLENCE, AND THE POLITICS OF JUDGMENT

In her analysis of transitional justice, Bronwyn Leebaw argues that the field has embraced depoliticization as a measure of its own legitimacy, obscuring the importance of political judgment and hiding from view the “gray zones” in which both collaboration and resistance take place.<sup>38</sup> Among other problems, according to

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34. Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

35. See generally GERRY SIMPSON, LAW, WAR AND CRIME 79–104 (2007).

36. *Id.* at 157.

37. RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 20–21 (2011).

38. See BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE 4 (2011) (“Depoliticization is embraced as a way to establish the legitimacy

Leebaw, “depoliticization does not *transcend* the politics of transitional justice, but rather functions to obfuscate and naturalize the way that politics operate in the process of judging the past. Depoliticization masks the particular political and social values that frame the investigation and its judgments.”<sup>39</sup> In a similar manner, debates over the appropriate role, utility, and efficacy of international law in relation to war can radically underplay the use of law to evade responsibility for political judgments and radical consequences. To argue over the applicability of law to war is to contest licenses to kill, permission to harm, and the uneven experience of violence.

#### A. *Competing Visions of Law*

In the blurring time of war and not-war, in which peace seems ethereal and the temporary has swallowed the norm, law appears in multiple, sometimes overlapping roles: as a reformist force trailing behind bloody reality, as a constitutive force shaping action, or as an instrumentalized discourse. The first offers itself as a limit on violence, a set of rules that can chasten war and prevent excess, albeit with no ambitions for ending its practice. It is a progressive and minimalist conception, describing law as a reform project which “presupposes the improbability, if not perfectibility, of humankind[,]”<sup>40</sup> but which cannot end or perhaps even change the trajectory of battle. This law is, as Brooks suggests, fundamentally an “optimistic enterprise” that seeks to conquer emotion and violence with rationality and to judge war in its aftermath.<sup>41</sup>

The second vision of law suggests that choices of legal paradigm (and thus of legal language and rules) have significant material consequences and political stakes, which raises questions about the inherently progressive role of law. Asserting the relevance of a particular legal paradigm—law enforcement or war, policing, counter-terrorism, or military intervention—or instrumentally deploying them alternately or simultaneously changes perceptions of a given set of events. Legal paradigms identify permissible violence, legitimate victims, and rightful authority. And the choice of paradigm may itself be a function of power: for example, the United States “has an outsized ability to impose its vision of the facts and the law on the rest of the world.”<sup>42</sup> Whereas the image of legal rules as reformist and limited suggests an endless, infinite gray zone defined by the absence of law, the constitutive view suggests that it is the act of the powerful to enforce a vision of the world structured by a particular legal paradigm, one that influences not only the choice of regulations, but also the object of regulation.

Finally, law’s centrality might be seen in its discursive role. One of the interesting developments in recent years has been the expanded and intensive deployment of the language of law in war and its resistance, as well as in

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of transitional justice institutions.”).

39. *Id.* at 15.

40. BROOKS, *supra* note 1, at 204.

41. *Id.*

42. *Id.* at 224.

humanitarian action in and around conflict. Just as the assertion of war or peace, occupation or post-conflict, has become part of governance itself, the assertion of legality or illegality has become an integral part of discussion about war. Scholars have contrasted past anti-war protests, which hinged on explicit invocations of politics and ethics, with protests against the 2003 invasion of Iraq by the United States and United Kingdom.<sup>43</sup> The latter integrated an entire legal vocabulary about the use of force—as did the arguments of those supporting and defending the war.<sup>44</sup> The emphasis on the legality or illegality of that war contrasts sharply with past examples; imagine, suggests one commentator, “Napoleon consulting a lawyer to discuss targeting[,]” or how “bizarre” it would have seemed “to oppose Hitler’s invasions—let alone the Holocaust—principally because they were *illegal*.<sup>45</sup>

It is not only the pervasive presence of “law-talk” that has infiltrated war and peace; law and legal categories are now being deployed routinely *as part of* the fighting of, and resistance to, war. The blurred relationship of war to peace has offered an opportunity not only to add categories or to erase them but to use instrumentally the lack of clarity between them. Each is a method for destabilizing the traditional legal regime, but today, there has been a “strategic instrumentalization” of the categories through a “deliberately deployed oscillation” between two extremes of war and peace.<sup>46</sup> In the contemporary era, “powerful actors, such as the United States and some of its adversaries, have not sought to conflate the distinction between war and not-war—but rather, to deploy the two rubrics’ categories and practices for strategic effect.”<sup>47</sup> Numerous commentators note the use of argument as part of the war: “When we understand that ‘wartime’ is an argument, rather than an inevitable feature of our world, then we can see that it need not cause us to suspend our principles. Our times do not determine our actions, they do not absolve us from judgment.”<sup>48</sup>

Thus, to borrow from Brooks, has everything become law and law become everything? The integration of law into the fighting and protesting of war, which has largely been naturalized, has a number of potential consequences: It might outsource ethical responsibility onto a technical legal vocabulary; it can foreground

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43. “Opposition to the [Vietnam] war, or moral outrage about its conduct, came in the first instance not from lawyers or in terms of law but in ethical frameworks and not infrequently linked to visions of domestic and international transformation.” Samuel Moyn, *From Antiwar Politics to Antitorture Politics*, in *LAW AND WAR* 156 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2014).

44. SIMPSON, *supra* note 35, at 3.

45. KENNEDY, *supra* note 5, at 8 (emphasis original). Moyn adds that those lawyerly discussions that did occur around Vietnam were focused on *jus ad bellum* justifications rather than *jus in bello* actions and that there has been a far greater preoccupation with the latter in the post-9/11 era—a “palpable shift from a legal concern with aggression to one with atrocity.” Moyn, *supra* note 43, at 156–57.

46. See BERMAN, *supra* note 10, at 7, 34, 37.

47. *Id.* at 37.

48. DUDZIAK, *supra* note 3, at 136.

certain modes of intervention, particularly military action and international criminal law; it can bolster a series of divisions between “us and them,” interveners and intervened. To move from vocabularies of politics, morality, and ethics to one of law also creates the possibility of displacing responsibility for decision making on legal rules themselves, envisioning law as agentic and controlling rather than instrumental and open to interpretation.

### B. *The Politics of Judgment*

Among other things, what is at stake in these discussions is the role of judgment. The traditional bright lines between war and peace, civilian and combatant, permissible and impermissible violence, can seem tragically naïve today. A regime premised on standards, flexible frameworks, and cost-benefit analyses seems inevitably more pragmatic. Yet both the bright-line categorization and the flexible framework offer the possibility for the displacement of political judgment.

In insisting on strict rules and bright lines, we run the danger of detaching law altogether from reality. Law will play an infinite game of catch-up in which the realities of technology, violence, and politics will always outstrip the reformist possibilities of law. From this perspective, it seems clear that a more flexible framework with more nimble and transparent laws and institutions would ensure that “every space remains a zone subject to the rule of law.”<sup>49</sup> A flexible legal framework informed and shaped by standards seems more consonant with reality “on the ground,” giving militaries and humanitarians alike useful tools for mitigating the horrors of war. Arguably, the persistence of imagining war as exceptional “enables a culture of irresponsibility, as ‘wartime’ serves as an argument and an excuse for national security-related ruptures of the usual legal order.”<sup>50</sup> According to this argument, it is only by recognizing—politically and legally—the reality of continuity between war and peace (or, alternately, the elimination of peace itself) that adequate oversight, regulation, and responsibility can follow.

Yet the flexible framework too has its limitations—potentially outsourcing, diluting, and displacing responsibility for decision-making. It risks outsourcing responsibility to experts who can substitute technical requirements for political judgment. It dilutes responsibility when it unbundles the decision-making process among multiple actors, all of whom are responsible to the same standards and none of whom are solely responsible for the inevitable deaths and violence involved.<sup>51</sup>

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49. See BROOKS, *supra* note 1, at 353–56.

50. DUDZIAK, *supra* note 3, at 8.

51. Modirzadeh suggests that one of the potential costs of applying human rights law in relation to effective control is that “we treat governance as something that can be parceled out, diminished to some set of basics, and diluted to a generic palette of tasks that could be equally borne and applied by any actor who happens to be part of the invading/occupying forces.” Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, in 86 INT'L L. STUD., THE WAR IN IRAQ: A LEGAL ANALYSIS 349, 371 (Raul A. “Pete” Pedrozo ed., 2010).

And it displaces responsibility when it makes some deaths and violence more visible than others. Kennedy uses cholera deaths in the aftermath of the Gulf War due in part to the destruction of important generators in Iraq, which was agreed to be a strategic mistake but not viewed as disproportional or unnecessary,<sup>52</sup> as an example of both dilution and displacement: There is an enormously long chain of decisions and events that led to the deaths by cholera, and each of those decisions involved a cost-benefit analysis that did not include the likelihood of cholera.<sup>53</sup> Diluted decision-making makes it impossible to see the possibility and “if no one noticed, and it was no one’s job to notice, then perhaps no one was responsible, no one did decide—they just died.”<sup>54</sup>

Moreover, while the transformation of categories and bright lines into spectrums and standards may seem more attuned to reality, it also makes less available a vocabulary of outrage and transgression. If all time and space are potentially wartime and battle zones, it becomes less clear who stands far enough outside to protest action. When humanitarians and military professionals speak the same, anti-formalist language, they share a methodology of cost-benefit analysis. This reflects the character of international humanitarian law, whose life and death calculus is often defended on the grounds that “the only way to maintain the legitimacy of the law in the eyes of commanders” is to be “modest in our aims for complex legal restraints during the most brutal and unregulated fog of war.”<sup>55</sup> In contrast, human rights advocates were envisioned as those who stood outside the conflict, speaking truth to power. Yet in a world of converging human rights and humanitarian law, this separation too has become questionable, in ways that may bring everyone into the room on behalf of civilian life and leave no one outside to resist the paradigm of violence. If a new class of experts emerged who were comfortable with the vocabulary of humanitarian and human rights law, it might “diminish the capacity of the human rights movement to speak with a clear voice and to advocate on behalf of individuals against States.”<sup>56</sup>

Finally, despite the radical differences between relying on bright lines and deferring to blurred spectrums, the two approaches share the potential suspension

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52. KENNEDY, *supra* note 4, at 106–07. For vying evaluations of claims to proportionality and necessity with regard to the bombing of the electrical grids in Iraq, see, e.g., Michael Lewis, *The Law of Aerial Bombardments in the 1991 Gulf War*, 97 AM. J. INT’L L. 481, 504–07 (2003). See also Roger Normand & Chris Jochnick, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT’L L. J. 387, 400–02 (1994) (discussing the detrimental impact the destruction of Iraqi’s power infrastructure had on Iraqis).

53. The Harvard Study Team concluded that the “predominant factor contributing to epidemic waterborne diseases was clearly the destruction of the electrical infrastructure” and pointed out a recommended revision of the definition of “civilian casualties” as only “those that are a direct result of injury during war.” THE HARVARD STUDY TEAM, *The Effect of the Gulf Crisis on the Children of Iraq*, 325 NEW ENG. J. MED. 977, 980 (1991).

54. KENNEDY, *supra* note 5, at 145.

55. Modirzadeh, *supra* note 51, at 356.

56. *Id.* at 382. As Modirzadeh points out later, however, there could be salutary aspects to constructing a more pragmatic human rights approach that learns from the humanitarian law approach. *Id.* at 398–400.

of politics and thus of responsibility for decision-making. The complexities of attributing responsibility bleed into the role of legal and political judgment. Each act of violence or experience of harm involves a chain of decisions. For Dražen Erdemović, those decisions resulted in an impossible position at Srebrenica. Overall, however, international justice often fails to contend with the inevitability of political judgment.<sup>57</sup> Simpson points out in the context of international criminal law that the “criminalization of aggression promises a sort of anti-politics where responsible and responsive decision-making is suspended in favour of the mechanical application of legal categories.”<sup>58</sup> In other words, by “drawing bright lines between acceptable and unacceptable behavior[,]” the transformation of war into crime allows the “supplant[ing] of] prudential, strategic, and moral judgment.”<sup>59</sup>

#### IV. CONCLUSION

Debates over law’s relevance to war, the utility of legal categories, and the plausibility of mitigating violence through legal rules depend in large part upon contests over the degree to which the world has fundamentally changed. New wars, new methods, new actors, and new targets seem to require not only innovative regulatory reforms but conceivably a novel legal paradigm. While some suggest a radical rupture and others a gradual slide, both political scientists and legal scholars have argued of late that something fundamental about war has changed,<sup>60</sup> and as a result, the legal order itself must be rethought. Yet the claim to newness too may turn out to carry political freight, whether regressive or progressive: newness may open the door to previously impermissible abuses and exploitation while reinforcing global inequity, or it may be an opening for overturning or rebalancing entrenched power structures. Moreover, newness itself may not be new. As Obiora Okafor has argued:

The structure of the newness argument that has been made in support of the imperial-style international law reforms that have been urged [since 9/11] by the United States and some of its allies bears an unnerving resemblance to the structure of the kinds of newness claims that European powers deployed in the sixteenth and nineteenth centuries . . . as they sought to legitimize their imperial conquests and occupations of the Third World.<sup>61</sup>

Okafor points to the political nature of declaring fundamental change: it comes under the heading of fact and empirical observation (e.g., the world has changed, wars operate differently, militaries have new roles), and thus naturalizes choice as

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57. BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE 25 (2011).

58. See SIMPSON, *supra* note 35, at 158.

59. *Id.*

60. For one of the more influential accounts from political science, see MARY KALDOR, NEW AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA (2007).

61. Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 OSGOODE HALL L.J. 171, 187 (2005).

inevitability. Thus, Okafor's model of change and inevitability here serves to soften or eliminate legal boundaries between war and peace, and collapse distinctions (such as those between international humanitarian and human rights law, or to defer to military judgment in traditionally civilian activities).

This is not to underestimate the importance of contemporary events, changes, or shifts in the worlds of war and conflict; nor to dismiss the need to reassess the choice, force, and use of legal paradigms in relation to them. Rather, it is to insist on the consequences of these assessments and the assumptions that underpin them. Brooks introduces readers to the conceptual morass into which conflict seems to have fallen and the simultaneous strength and vulnerability of law in the current moment. Grappling with the crucial questions she raises requires engagement with the distribution of authority and governance power that comes with them. Arguing for more law or less, or further categories or fewer, can be ways to hide and to displace judgment and responsibility. "Cry havoc," declared Shakespeare's Mark Antony famously, and "let slip the dogs of war."<sup>62</sup> International law has sometimes sought to authorize the unleashing of the proverbial dogs and more often sought to mitigate the violence they would inevitably commit. The rupture between war and peace was defined by the moment of unleashing. Yet what if instead, the dogs run continuously free and wild, never leashed nor let go? Violence will still be unequally distributed and harm unevenly felt. The difference will be in the capacity to assess and accept responsibility for deciding to let slip the dogs, and for the havoc they wreak once freed.

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62. WILLIAM SHAKESPEARE, JULIUS CAESAR, ACT III, SCENE 1.

