
THE CATEGORICAL IMPERATIVE

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ABSTRACT

As Rosa Brooks persuasively argues, many of the traditional categories within the law of war inadequately address contemporary conflicts, which involve new weapons, new types of adversaries, and new modes of warfare. Her book is a wake-up call for the need for a paradigm shift in the law of war, focusing on the “space between” war and peace. Brooks also vividly describes how the military has taken on many tasks traditionally performed by civilian agencies. Where Brooks’s book falls short is in elaborating what a new paradigm of the law of war might look like, and in exploring the relation between everything becoming war and the military becoming everything.

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In the classic animated science fiction film *WALL-E*,¹ the title character—a trash-collecting robot that classifies and stores its favorite objects—cannot decide how to categorize a spork: Should it be placed with the forks or the spoons? WALL-E ends up solving the dilemma by placing it in neither group, but instead in the “space between” (as Rosa Brooks calls it),² rotated 90 degrees.

Professor Rosa Brooks’s 2016 book, *How Everything Became War and the Military Became Everything: Tales from the Pentagon*,³ addresses the mother of all legal sporks: the always, everywhere, everyone war on terrorism—which Brooks argues is blurring the boundaries between the categories of war and peace. Is the effort to combat terrorism really a war, a criminal enforcement operation, or something else? The answer matters, because how we categorize the conflict determines what legal rules apply. As Brooks notes, “if we can’t figure out whether or not there’s a war—or where the war is located, or who’s a combatant in that war and who’s a civilian—we have no way of deciding whether, where, or to whom the law of war applies.”⁴

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1. See generally Ed Gonzalez, *WALL-E*, SLANT (June 26, 2008), <https://www.slantmagazine.com/film/review/wall-e> (describing the overall plot of WALL-E and the robot’s confusion over how to categorize a spork).

2. ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 353 (2016).

3. *Id.*

4. *Id.* at 342.

The war on terrorism is not the only legal spork that needs addressing. Cyberwarfare, drug violence, and modern piracy all raise similar issues of categorization. Why is the effort to control drug cartels, for example, usually put in the box of law enforcement rather than armed conflict? In terms of intensity and organization—the standard criteria of armed conflict⁵—it seems more akin to warfare than to episodic and sporadic acts of criminal violence.⁶

The problem is not limited to the categories of war and peace. As Brooks's *Tales from the Pentagon* engagingly illustrates, many of the traditional concepts within the law of war no longer seem up to the task of addressing contemporary conflicts. The distinction between "uses of force" and "non-forcible measures"—which defines the boundaries of the *jus ad bellum*⁷—has difficulty capturing cyberwarfare, leading to feats of mental gymnastics to decide when cyberwarfare constitutes a use of force within the meaning of Article 2(4) of the U.N. Charter or customary international law.⁸ The distinction between combatants and civilians—a core feature of the *jus in bello*⁹—has difficulty addressing the "occasional terrorist," who commits violent acts only episodically, leading to scholastic efforts to interpret when someone can be said to take "direct part in hostilities" and hence be a legitimate target.¹⁰ The distinctions between permissible and impermissible means and methods of warfare are challenged by drones and targeted killings—which seem to satisfy the traditional legal requirements of the *jus in bello*, but nevertheless cause significant disquiet—leading to suspicions that the traditional rules do not adequately capture all of our moral intuitions.¹¹ The distinction between international and non-international conflicts—which determines the applicable rules of *jus in bello*—is challenged by military actions in a non-

5. See Int'l Comm. Red Cross, *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Mar. 17, 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>; cf. Arne Willy Dahl & Magnus Sandbu, *The Threshold of Armed Conflict*, 45 MIL. L. & L. WAR REV. 369, 377 (2006) (explaining that the threshold of "armed conflict" is crossed when a government abandons the "police doctrine" minimum use of force approach in favor of a "military doctrine").

6. See Carina Bergal, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1083 (2011) (arguing that the Mexican drug war should be classified as armed conflict and not mere "sporadic acts of violence").

7. See generally Tom Ruys, *The Meaning of "Force" and the Boundaries of the Jus Ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT'L L. 159 (2014) (arguing for a broader reading of "force" under UN Charter Article 2(4)).

8. See, e.g., Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 425 (2011) (noting the challenges in applying the current UN legal framework to cyber-attacks).

9. The ICRC makes the principle of distinction Rule 1 in its study of customary international humanitarian law. JEAN MARIE HENCKAERTS & LOUISE DOSWALD BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3 (2005).

10. NILS MELZER, INT'L COMM. RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 45 (Feb. 26, 2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

11. DRONE WARS: TRANSFORMING CONFLICT, LAW, AND POLICY (Peter L. Bergen & Daniel Rothenberg eds., 2014).

consenting state against organized armed groups such as ISIS or al-Qaeda.¹² Indeed, the very notion of “a war” does not map well onto independent but interrelated acts of terrorism, which are hard to categorize as either a single conflict or multiple conflicts.¹³ There was no doubt that World War II was a single conflict and that each individual battle did not require a separate *jus ad bellum* justification. But the legal analysis of drone strikes often is not confined to *jus in bello*; it is mixed with the *jus ad bellum* concept of “imminence,”¹⁴ suggesting that each individual strike may be a separate conflict, requiring its own *jus ad bellum* justification.

These difficulties of categorization are mostly familiar. Many are not completely new. As Brooks notes, “there have always been actors and actions that didn’t fit into [the] neat boxes” of the law of armed conflict.¹⁵ But through its wonderfully vivid vignettes, *How Everything Became War* shows how much more pronounced the problems have become as a result of new weapons, new adversaries, and new modes of warfare.

Some commentators continue to maintain that the war on terrorism, cyberwarfare, and other novel types of conflicts can be adequately addressed with our existing conceptual apparatus.¹⁶ *How Everything Became War* serves as a wake-up call that more fundamental change is necessary. “Bury[ing] our heads deeply in the sand and pretend[ing] nothing has changed,” or “try[ing] to jam war back into its old box,” is an “exercise in self-deception,” Brooks argues.¹⁷

I am in broad sympathy with this conclusion, although Brooks’s almost exclusive focus on the United States in her book gives one pause, and raises an unanswered question: How have other countries addressed the same issues? Be that as it may, the problems Brooks describes are reminiscent of the anomalies preceding a paradigm shift in science when an existing theory encounters phenomena that it has difficulty addressing.¹⁸ For years, the old paradigm may

12. See Jonathan Horowitz, *Untangling the Web of Actors in Syria and Additional Complexities of Classifying Armed Conflicts*, JUST SECURITY (Oct. 25, 2016) <https://www.justsecurity.org/33838/untangling-web-actors-syria-additional-complexities-classifying-armed-conflicts/> (discussing conflicting views about whether to classify Syrian conflict as international or non-international armed conflict).

13. See Linda J. Bilmes & Michael D. Intriligator, *How Many Wars Is the US Fighting Today?*, 19 PEACE ECON. PEACE SCI. & PUB. POL’Y 8, 8–9 (2013) (distinguishing five wars the US is currently fighting, rather than a single war on terrorism).

14. See U.S. Dep’t of Justice, White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or an Associated Force 7–8 (Nov. 8, 2011) (noting that modern terrorism challenges the requirement of providing a legal justification for each defensive response); see also Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 770, 775–76 (2012) (identifying factors to determine whether an armed attack by nonstate actors is imminent).

15. BROOKS, *supra* note 2, at 339.

16. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 320 (2003).

17. BROOKS, *supra* note 2, at 344.

18. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (Univ.

continue to survive, attempting to account for anomalies through ever-greater convolutions, but finally it gives way to a new paradigm. Similarly, we may have reached a tipping point in the law of war, as new forms of conflict have rendered the existing categories and rules “fundamentally incoherent.”¹⁹ The difference is that—in Max Planck’s mordant quip—where science advances “one funeral at a time” as adherents of the old theory die off, dramatic changes in the law of war have arisen out of “cataclysm” and have generally involved “a slow, brutal, and agonizing process.”²⁰

What would a paradigm shift in the law of war look like? After convincingly describing the problems with our existing paradigm, *How Everything Became War* comes up short on solutions. Brooks suggests that we develop norms and institutions “not premised on the existence of sharp lines between war and peace,” but focused instead on the “space between.”²¹ This seems generally right. The new paradigm should be less categorical than the old, and should recognize that war and peace are the “outer limits of a continuum”²²—as are other dichotomies, such as between “combatants” and “non-combatants,” and between “force” and “non-forcible measures.”

Recategorization, however, represents only the beginning of an answer. More importantly, we need to figure out the substantive and procedural norms that should govern the “space between.” The task may not be impossible, but it is certainly not easy, as Brooks herself recognizes. For example, it is all well and good to say that “life and liberty are unalienable rights” and that “no person should be arbitrarily deprived of these rights.”²³ But this does not tell us much about who can be killed, and when, where, and for what reasons. Brooks focuses on procedure, including the need for greater transparency, oversight, and accountability. But do we need new substantive rules as well? If “imminence” is too malleable a test for determining when a state may use force in self-defense,²⁴ then what is a better rule? If the “unwilling or unable” test gives states too much discretion,²⁵ then what is a better approach?

So far, I have been focusing on Brooks’s argument that everything has become war. The other, equally fascinating half of her book describes how the military has become everything—how it has gotten “into the business of health care, education, news and information, economic development, and local politics”²⁶—a trend that President Trump’s reliance on “his generals” seems to be

of Chicago Press ed. 2012) (explaining that a scientific revolution takes place after anomalies create a crisis in the existing paradigm).

19. BROOKS, *supra* note 2, at 339.

20. *Id.* at 342.

21. *Id.* at 351–52.

22. *Id.* at 352.

23. *Id.* at 353.

24. See *id.* at 290 (arguing that the United States uses a “malleable definition” of “imminent”).

25. BROOKS, *supra* note 2, at 274.

26. *Id.* at 79.

accelerating. As Brooks describes, military personnel now

. . . analyze lines of computer code in Virginia office buildings, build isolation wards in Ebola-ravaged Liberia, operate health clinics in rural Malaysian villages, launch agricultural reform programs and small business development projects in Africa, train Afghan judges and parliamentarians, develop television soap operas for Iraqi audiences, and conduct antipiracy patrols off the Somali coast.²⁷

Although Brooks engages mostly in description rather than explanation, the growing role of the military is not simply the product of defective categories—of the inability to distinguish clearly between military and non-military functions²⁸—but reflects broader political and cultural forces. The expansion of the military into civilian arenas, the militarization of domestic law enforcement, mass surveillance, and the growing disconnect between military and civilian life—these are not the types of problems that could be cured simply by rethinking our categories.

A question Brooks touches on only briefly is the relationship between the two halves of her book. It seems hardly likely that the two trends she describes are coincidental. But in which direction does the causation run? Is the fact that everything has become war the reason why the military has become everything? Or is it the other way around? Or has neither change caused the other, but both are the product of the same exogenous factors, such as changes in technology, geopolitics, or political organization? Most likely, the causal arrows run in multiple directions. To someone with a hammer, everything looks like nails; but, by the same token, to someone with nails, everything looks like a hammer. The expanding boundaries of war and the military seem similarly co-dependent.

Finally, there are two paradoxes that Brooks acknowledges but does not fully address. First, if “everything” has really become war, how does war seem so distant and often invisible to the average American? Second, if the military has really become “everything,” how is there such a “chasm” between civilian and military life?²⁹ Both paradoxes suggest that, compelling as *How Everything Has Become War* is, there is still much more to life, thankfully, than war and the military.

27. *Id.* at 13–14.

28. *Id.* at 259–60.

29. See *id.* at 14–22 (noting the general U.S. population’s vast ignorance of the role and purpose of the military).

