IF WAR IS EVERYWHERE, THEN MUST THE LAW BE NOWHERE?

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ABSTRACT

This response focuses on one of the most difficult questions posed by Rosa Brooks's *How Everything Became War and the Military Became Everything*: How should the erosion of the war / peace dichotomy impact the justifications for the use of lethal force by the United States government and what, if any, role is there for law in this context? While Brooks is unambiguously critical of Bush administration legal policies that asserted expansive executive war powers, she is less certain about the Obama administration's own reliance on the war paradigm to justify its targeted killing policies. While describing these policies as "undermining the international rule of law," Brooks declines to take a firm stance on whether they are lawful or unlawful, and she rejects the views of critics who would "jam war back into its old box." It is a credit to Brooks that she is willing to acknowledge such ambivalence, but her approach comes at a cost. It is difficult to maintain a critical stance on governmental policy while simultaneously undermining the very legal foundations that most plausibly support that stance. In this way, critique quickly turns into apology.

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Professor Rosa Brooks has written a compelling, insightful, and accessible book[1] that draws upon her experiences inside and outside government to explore the global and national security challenges of the early twenty-first century. The central theme—that war and peace have become blurred and are becoming more so—has purchase over many contexts that Brooks masterfully explores. In this response, I focus on one of the most difficult—and, I believe, unanswered—questions posed by Brooks's book: How should the erosion of the war–peace dichotomy impact the justifications for the use of lethal force by the United States government and what, if any, role is there for law in this context?

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* Professor, Pace University School of Law. I am grateful to Peter Spiro and Temple Law School for hosting the roundtable on Rosa Brooks's probing book, and to Rosa Brooks and the other roundtable participants for the enriching discussion. Many thanks also to Kyle Loder and the other editors of the *Temple International & Comparative Law Journal* for their help in publishing this response.

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

As a matter of existing legal frameworks, questions of war and peace have tremendous importance for the justification of killing. The norm against murder is one of the most fundamental rules of human society. The basic rule is that killing—whether conducted by law enforcement officials or private citizens—is prohibited in all except very few strictly defined circumstances, such as when imminently necessary to prevent the infliction of death or serious bodily injury by an unlawful aggressor or when necessary to prevent the escape of a dangerous fleeing felon. In wartime, as Brooks explains, the rule is quite different and far less protective of human life. Pursuant to international humanitarian law (IHL), enemy combatants may be targeted—with limited restrictions—based on their status, irrespective of the threat they may or may not pose at the particular time. In many cases, the law also permits the knowing killing of civilians so long as those deaths are incidental to a strike directed against a military objective. We think of these wartime rules as the exception—and even within that sphere IHL raises many legal and moral challenges—but if we have lost our ability to distinguish between war and peace such that "everything" is war, then the legal and moral implications are quite severe.

One can, of course, write about this question without normative commitments. Much of the book's contribution lies in Brooks's sociological observations about our contemporary moment and where it may be leading, but she also imbues her narrative with a moral urgency that assigns critical importance to human rights and the rule of law. For instance, when she confronts various Bush administration legal policies, Brooks responds with unhesitating condemnation. The claim that detainees in the war on terror lacked protection under the Geneva Conventions was, Brooks argues, "surely wrongheaded in a strategic and moral sense," although she allows that the legal reasoning (which she analogizes to the game of tennis) played by the rules, "though perhaps pushing the boundaries a bit."[2] Worse yet was the government's defense of waterboarding against accusations of torture. Those government arguments, she maintains, play the game of legal reasoning but are tantamount to cheating, relying as they do "on selective and misleading citations and odd logical leaps."[3] Then there were the Bush administration claims to sweeping executive power which, Brooks maintains, abandoned the rule-of-law game entirely, inspiring her to offer this ominous caution: "If we create a legal system in which cheating is widespread—or, worse, if we overlook game-ending moves by those with power and treat them as legitimate modifications of the game—then it isn't merely the rules that get bent, but the rule of law itself."[4]

Brooks, however, appears less confident about how to apply this taxonomy to the sometimes controversial arguments championed by the Obama administration in which she served. The book opens with a personal anecdote about the authorization of a drone strike against a man allegedly involved in various terrorist

2. *Id.* at 201.
3. *Id.*
4. *Id.* at 202.

plots.[5] The narrative hints at moral disquiet but draws no firm legal conclusions. Elsewhere, Brooks appears more explicitly critical. She emphasizes, but still ambiguously, that U.S. policy is "undermining the international rule of law,"[6] and she maintains that,

> U.S. drone strikes present not an issue of lawbreaking, but of law's brokenness: sustained U.S. assaults on the meaning of core legal concepts have left international law on the use of armed force not merely vague or ambiguous but effectively indeterminate, eroding law's value as a predictor of state conduct and a means of holding states accountable.[7]

This last statement is noteworthy for how it parallels Brooks's aforementioned description of the Bush administration's game ending claims to unbounded executive power.[8] In the drone context, Brooks is less decisive: the government has not actually violated the law because, she claims, the law itself is broken.[9] I am not sure why that conclusion follows, nor am I convinced that the law is as broken in this area as Brooks maintains. Consider the following possibilities.

One can argue—as critics have—that the U.S. targeted killing policy exceeds the limits on permissible lethal force imposed by international law.[10] The problem might be that the United States has defined war too broadly to justify lethal force against groups whom, properly understood, it is not actually at war. It might be that the United States has violated international law by pursuing attacks against non-state actors with whom it is at war within the territory of states with whom it is not permissibly at war. It might be that the United States has violated IHL—and even committed war crimes—by targeting persons who, properly understood, are neither combatants nor civilians directly participating in hostilities and, hence, are not permissible targets. It might be that the United States has failed to adequately consider nonlethal means or that its strikes have claimed excessive incidental civilian casualties.[11] If Brooks agrees with any of these—or any other—possible legal objections, then it is reasonable to argue, as she does, that U.S. policy has undermined the rule of law. But the most natural way to put the point would be to observe that the United States has undermined the rule of law by repeatedly breaking the law, much in the same way that the Bush administration undermined the rule against torture by authorizing and engaging in torture. If indeed U.S. drone strikes reflect "sustained U.S. assaults on the meaning of core legal concepts,"[12]

5. *Id.* at 3–4.

6. *Id.* at 284.

7. *Id.* at 290.

8. BROOKS, *supra* note 1, at 201–02.

9. *Id.* at 290.

10. *See, e.g.*, *United States of America: 'Targeted Killing' Policies Violate the Right to Life*, AMNESTY INT'L 5 (2012), https://www.amnestyusa.org/files/usa_targeted_killing.pdf.

11. In forthcoming work, I have explored the question of whether IHL imposes a legal duty to consider nonlethal means. *See* Alexander Greenawalt, *Targeted Capture*, 59 HARV. INT'L L.J. (forthcoming 2018).

12. BROOKS, *supra* note 1, at 290.

why resist concluding that the government has violated the law?

Perhaps, one might object, this comparison is off the mark because there is a greater legal and/or moral justification for the U.S. targeted killing policies than there was for the waterboarding of suspected terrorists. One important distinction is that, unlike torture, IHL permits the killing of combatants in wartime. On this point, Brooks observes that "the available evidence suggests that drone strikes cause far fewer *unintended* casualties than other types of strikes."[13] In cases of armed conflict where a drone strike against a military target reduces the threat to civilians in comparison to alternate means of achieving the same military advantage, the law may indeed demand that choice.[14]

The troubling aspect of drone strikes, then, has less to do with whether they are ever allowed, but rather when they are allowed. On this score, Brooks is particularly concerned with the government's expansive approach to self-defense, which justifies particular targeted killings by equating the concept of "imminent threat" with "lack of evidence of the absence of imminent threat."[15] If indeed, she observes, it is enough that "any terror suspect *might* be about to unleash another catastrophic attack on the scale of 9/11," then the putative "limitations on the use of force establish no limits at all."[16] And the weakness of the international order, Brooks notes, results in the disturbing situation in which these questions are all determined by the United States itself as "judge, jury, and executioner all rolled into one."[17] But even here, Brooks stops short of blanket condemnation: "However destabilizing U.S. counterterrorism legal theories are to the rule of law," she reflects, "they arose in response to real dilemmas—and it is not inconceivable that their very destabilizing qualities could ultimately help usher in a process of much needed legal change."[18] To return to Brooks's tennis analogy, it is not clear how we should evaluate the government's maneuvers. Is the government playing by the rules? Is it cheating? Has it destroyed the game entirely? Or has it begun the process of improving a game that is in desperate need of improvement? Brooks's analysis suggests support for each of these positions.

To illustrate the point, consider one of the legal complications Brooks briefly highlights. For the purposes of justifying a particular strike, it is important to know whether "drone strikes [should] be construed legally as a series of discrete uses of force, each of which must be independently evaluated for adherence to self-defense principles," or whether "they constitute, in effect, an ongoing use of force made up

13. *Id.* at 111 (emphasis original).

14. *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. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 3 (Prohibiting attacks "expected to cause incidental harm to civilians and civilian objects," when such harm would "be excessive in relation to the concrete and direct military advantage anticipated.").

15. BROOKS, *supra* note 1, at 287.

16. *Id.* at 288 (emphasis original).

17. *Id.* at 289.

18. *Id.* at 291.

of many individual strikes, which should be evaluated collectively . . . ."[19] The matter has critical importance for Brooks's own critique because it affects the framing of the government's self-defense theory. If the government can justify a particular killing by reference to an already ongoing armed conflict, then its target-by-target self-defense evaluation (with its troubling definition of imminence) may be unnecessary. In contrast to the Obama administration's policy on strikes outside the United States and areas of active hostilities, international law does not require combatants to ensure that a wartime targeted opponent is "a senior operational leader" who presents a "continuing, imminent threat," or that such a strike carries a "[n]ear certainty that non-combatants will not be injured or killed."[20] The general rule in armed conflict, Brooks notes, is that "it's lawful to target enemy combatants based simply on their status as enemy soldiers."[21] Seen against that more permissive background rule, the U.S. policy offers greater protection than IHL does, reflecting perhaps the very type of legal innovation that Brooks endorses.

Yet the validity of that perspective hinges on the plausibility of the underlying claim that the targets of these strikes are indeed combatants engaged in an armed conflict with the United States, and that their targeting otherwise complies with international legal restrictions on the conduct of war. If that is not the case, then U.S. policy reflects an aggressive expansion of the wartime right to kill. As with the Bush administration torture policy, the government may be cheating at the game of legal interpretation. It may, indeed, be committing murder.

The tangle of questions at the heart of this debate is too complex to evaluate in this brief reply, but it is hardly a stranger to the law. To take just one example, the case law of international criminal legal tribunals has routinely addressed the existence and classification of armed conflicts in the course of evaluating a tribunal's jurisdiction over specific criminal defendants. In the case of *Prosecutor v. Boškoski & Tarčulovski*, for instance, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia determined that the 2001 violence between Macedonian government forces and the insurgent National Liberation Army had risen to the level of an armed conflict, a necessary condition of the prosecution's attempt to establish the perpetration of war crimes.[22] In reaching this conclusion, the tribunal did not rely on the general claim that war was "everything," or as Brooks also puts it, that "for all practical purposes, war is whatever powerful states say it is."[23] Instead, the tribunal applied the international legal standard dictating that a non-international armed conflict exists when there is "protracted armed violence between governmental authorities and organized armed

19. *Id.* at 288–89.

20. Press Release, White House, Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 23, 2013), https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism.

21. BROOKS, *supra* note 1, at 289.

22. *See* Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

23. BROOKS, *supra* note 1, at 218.

groups or between such groups within a State."[24] As with much of the law, of course, that test is hardly self-applying, and will present complications in many scenarios. It will be necessary, as the *Boškoski* court did at great length, to elaborate upon its requirements, and there will be close and uncertain cases. But one can acknowledge those caveats without giving up on law's coherence or authority. The inevitable ambiguities of legal interpretation and application do not make everything war, nor do they make all legal arguments about war equally plausible.

In highlighting the legal controversies surrounding drone strikes, Brooks does not attempt the kind of rigorous analysis that would offer a definitive judgment on the plausibility of the government's legal claims, and perhaps it is too much to ask that such a broad-ranging book would do so. At times, Brooks appears skeptical that the endeavor is even worth attempting. She rejects, for instance, the approach of human rights and civil rights communities who have tried to "jam war back into its old box,"[25] and she maintains that "few lawyers are good at" having conversations about "right and wrong, good and evil, fear and hope, cruelty and compassion" that are necessary to "the messy world of policy and morality."[26]

It is a credit to Brooks that she is willing to acknowledge such honest ambivalence, and her ultimate goal of preserving human rights values in a changed and complicated world is undeniably both noble and creative. To be sure, her broad claims are both urgent and compelling. The world has changed and continues to change in destabilizing and often frightening ways. Government policy must adapt to these challenges with greater transparency and with an overarching commitment to rule of law values. But the approach also comes at a cost. It is difficult to maintain a critical stance on governmental policy while simultaneously undermining the very legal foundations that most plausibly support that stance. In this way, critique quickly turns into apology. The risk is that Brooks may inadvertently advance the very trends she seeks to resist.

24. *Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175.

25. BROOKS, *supra* note 1, at 344.

26. *Id.* at 363.