
NEW RULES OR MORE GLOBAL GOVERNANCE?

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ABSTRACT

In *How Everything Became War and War Became Everything: Tales from the Pentagon*, Professor Rosa Brooks argues for “new rules and institutions to manage the paradoxes of perpetual war.” This short Essay suggests that to meet the challenges of the modern war paradigm it is at least as important to expand existing global governance structures as to develop new rules. Such expansion must resist the trend toward centering security and maintain a focus on peace and justice.

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Professor Rosa Brooks has written a captivating account of life at the United States Department of Defense that both chronicles some of her own challenges and experiences—including her involvement in targeted killings¹—and advances important arguments about the consequences of adopting the war paradigm in the age of terrorism. The central problems the book addresses—the expansion of military power and the extension of the war paradigm since 9/11—have been the subject of a great deal of scholarly and popular writing, yet the insights Brooks provides are particularly valuable because they are grounded in her first-hand experiences.

As the book demonstrates convincingly, the boundaries between war and “not-war” have become increasingly blurred, and the role of the U.S. military has expanded far beyond what many would consider its traditional functions. While more could be said about why our world has evolved the way it has, Brooks is undoubtedly correct that a key factor was the decision by important political actors to expand the concept of “war” to include the fight against terrorism. This led to changes in the very nature of the state. As Brooks notes, “when a state ‘makes’ war in this manner—redefining what counts as war—the shape of the state itself may begin to change, along with relationships between individuals and the state.”² The fact that our most feared “enemies” are terrorists (apart from a few totalitarian

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1. ROSA BROOKS, *HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON* 116–17 (2016).

2. *Id.* at 224.

states like North Korea) is used to justify an expanded military, increased executive secrecy, and reduced individual rights, among other troubling developments elaborated in the book.

Brooks reserves most of her prescriptive ideas to a short final section entitled “Managing War’s Paradoxes.”³ Here she provides some thoughts about what might be done to address the awkward fit between current rules and governance structures pertaining to conflict on the one hand and the realities of modern conflicts on the other. The suggestions she makes in this part of the book are mostly quite general. She urges us to “accept[] that some degree of global violence, conflict, and coercion is likely to remain the norm, not the exception,” and to “change the categories we use to make sense of [the world], and develop new rules and institutions to manage the paradoxes of perpetual war.”⁴ These new “norms and institutions” should not be “premised on the existence of sharp lines between war and peace.”⁵ Instead, they should operate at “different points along the continuum between war and peace.”⁶ With regard to the role of the military, she offers a more specific idea: All Americans could be asked to engage in a year or two of “work that fosters national and global security.”⁷ Interestingly, she is skeptical of the ability of lawyers to think outside their rule-bound boxes enough to contribute effectively to the big-thinking that is needed to effectuate such change.⁸ The necessary reimagining of law and institutions requires us to ask “[W]hat kind of world . . . we want to live in—and how . . . we get from here to there.”⁹ Yet Professor Brooks believes that few lawyers are good at conversations about “right and wrong, good and evil, fear and hope, cruelty and compassion.”¹⁰

Although Professor Brooks is probably right that we need some new rules to address the “space between”¹¹ war and peace, in my view, what we need most urgently is more global governance to enforce the rules and norms we have. Moreover, I believe lawyers are the right people to build those global governance structures; indeed, many are already engaged in that task. I am also resistant to the idea that security is our central national or global concern. Should we not focus at least as much, if not more, on promoting peace and justice? In my view, we should, for both moral and pragmatic reasons. Peace and justice ought to be our highest priorities because they are even more important values than security. While security can help promote peace and justice, in its current guise the concept often serves to undermine those values. Moreover, shifting the discourse from security to peace and justice could help to address many of the problems that result from the

3. *Id.* at 335.

4. *Id.* at 345.

5. *Id.* at 351.

6. *Id.* at 355–56.

7. BROOKS, *supra* note 1, at 360.

8. *Id.* at 363.

9. *Id.* at 365.

10. *Id.* at 363.

11. *Id.* at 353.

expansion of the war paradigm.

The work of international criminal tribunals illustrates how lawyers can and do build global governance structures that promote core global values, even in the face of apparently restrictive legal rules. They often do this work by explicitly or implicitly grappling with “right and wrong, good and evil, fear and hope, cruelty and compassion.”¹² For instance, when the judges of the International Criminal Tribunal for the former Yugoslavia declared that war crimes could be committed in non-international armed conflict, they did so in the absence of any supportive legal rules and in the face of virtually universal opinion to the contrary.¹³ The judges believed this was the right way to promote good and resist evil, in order to right wrongs. In their words, the new rule was justified: “No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.”¹⁴ Influential international judge and scholar Theodor Meron writes that “[t]his advance can be explained by the pressure, in the face of atrocities, for a rapid adjustment of law, process and institutions.”¹⁵ International criminal courts are “adjusting” law in that way all the time. The Extraordinary Chambers in the Courts of Cambodia recently ruled that crimes against humanity can be committed against a state’s own armed forces, even though the crime’s definition limits the victims to “civilian populations.”¹⁶ Again, the judges seem to be driven by the conviction that justice, rather than the letter of the law, demands that widespread or systematic crimes against a state’s armed forces be considered crimes against humanity. Likewise, when the International Criminal Court held in the *Ntaganda* case that members of an armed group who rape other members commit a war crime, the traditional rules related to war crimes were expanded in pursuit of a broader notion of justice.¹⁷ These and other expansions of the rules of international criminal law have met little resistance from either lawyers or policy makers. Indeed, they have largely been greeted with approval, particularly from the global civil society, as important efforts to promote the right and the good and to deliver hope to current and potential victims.

International criminal courts are not the only institutions promoting and expanding norms of international justice. As Professor Alexandra Huneeus has demonstrated, some human rights institutions have also gotten into the business.¹⁸

12. *Id.* at 363.

13. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 128–29 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

14. *Id.* ¶ 129.

15. THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* 94 (2006).

16. Prosecutor v. Muth, Case No. 003/07-09-2009-ECCC-OCIJ, Notification on the Interpretation of “Attack Against the Civilian Population” in the Context of Crimes Against Humanity With Regard to a State’s or Regime’s Own Armed Forces, ¶¶ 56–57 (Feb. 7, 2017).

17. See Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-1962, Appeal Judgment, ¶ 51 (June 15, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_03920.PDF (discussing protective role of international criminal appeals court).

18. See generally Alexandra Huneeus, *International Criminal Law by Other Means: The*

Moreover, new institutions are being created to address international criminal law violations, and they are being given quite expansive jurisdictions and mandates. A particularly interesting example is the proposed African Criminal Court, which is to have jurisdiction over a wide range of crimes, including terrorism.¹⁹

I do not mean to imply that more international criminal justice is the solution to the blurred lines between war and peace or the expansion of the military. Rather, it seems to me that the work of international criminal tribunals shows how lawyers can effectively promote the right and the good even when their efforts are governed by seemingly restrictive rules. It shows also how these developments can be accepted by the rest of the world and become the new normal. For example, hardly anyone seems to remember that until the early 1990s the definition of war crimes included only crimes committed in international armed conflict.

I suspect that given the right cases and political support, an international institution—whether a criminal court, a human rights body or some other kind—could develop appropriate norms to address targeted killings outside hot battlefields, secret detentions, “enhanced interrogation techniques,” privacy violations related to terrorism surveillance, and many of the other issues the book raises.²⁰ Further, they could probably do so within the bounds of current rules addressing human rights and global justice.

I would want the focus of any such institution—and indeed of our efforts at national reform—to be on peace and justice, rather than on security. Security implies threats, and threats generate fear. Fear of threats, real and imagined, fuels the expansion of our military, and not primarily in a rule of law promotion role. If, as Professor Brooks suggests, America’s youth are asked to engage in service²¹—a notion I support—I would want them to serve the goals of peace and justice. The difference in our proposals may seem largely semantic, since my “Peace and Justice Corps” would engage in many of the same projects as Brooks’s “Security Corps,” but my Corps members would not have the option of bearing arms. While I agree that we need a military (at least for now), I think it is important to keep some space between our laudable goals of promoting peace and justice at home and abroad, and our unfortunate need to defend ourselves against threats to whatever peace and justice we currently enjoy.

It may seem utopian to argue that more global governance is the solution to our current problems, particularly in the age of Trump, Brexit, and growing conservatism in many parts of the world. Any suggestion that such a vision is possible in the near term will probably be dismissed as Pollyannish. But I agree with Brooks that we should think big and work toward a better world, no matter

Quasi-Criminal Jurisdiction of the Human Rights Courts, 107 AM. J. INT’L L. 1, 1 (2013) (discussing new mechanisms available to prosecute war crimes).

19. See Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights art. 28A, May 15, 2014, EX.CL/846(XXV) (listing crimes over which the court has jurisdiction).

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

21. *Id.* at 360.

the obstacles.