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The Geneva Conventions and New Wars

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Much attention has been given recently to the U.S. government's assertions that suspected terrorists and what it calls "enemy combatants" do not deserve the protections afforded to prisoners of war (POWs) under the Geneva Conventions. Administration officials assert that the nature of the terrorist threat has created a new kind of war. The Geneva Conventions do not apply to this battle, they argue, and, in some respects, the Conventions are "quaint" and "obsolete."¹ These arguments have provoked controversy, as legal scholars and policy analysts have debated the merits and dangers of adopting this approach.

The terrorist threat is but one "new" form of war, however. The U.S. position raises the broader question of how the Geneva Conventions apply, given the changing nature of wars and of those who participate in them. Mass battles between more-or-less evenly matched armies of uniformed soldiers from opposing states, the circumstances for which the Geneva Conventions were devised, are now the exception. Instead, wars today range from wildly unbalanced conflicts pitting highly trained and technologically sophisticated armies like that of the United States against irregular combatants on horseback, to conflicts in which paramilitaries and criminals intermingle and terrorize local populations to achieve their own goals. Moreover, today, war in much of the world takes place against the backdrop of failed states, and is fought by warlords, mercenaries, and children.

This diversity of conflicts is not new. Indeed, many of today's "new" wars hark back to older forms of warfare. What is new, however, is the growing

¹ Alberto R. Gonzales, "Memorandum for the President," 25 January 2002 in Karen L. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge, UK: Cambridge University Press, 2005), 118–121.

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recognition that these conflicts may have consequences far beyond the states involved in them.

The Geneva Conventions may indeed be ill-suited, in their present form, to addressing today's challenges, inasmuch as they focus on a narrow spectrum of wars. The remedy to this problem should not be the one proposed by the United States, however, of simply rejecting the utility of the Conventions. Nor should the solution focus solely on the terrorist threat. Instead, the United States and the international community should revitalize the Conventions, to take into account the full range of challenges posed by modern wars.

The United States has a strong interest in extending Geneva-type protections to a broader spectrum of war. Most simply, the Conventions provide the best protection for Americans in conflict zones and beyond. When their protections are eroded or the laws of war are ignored, U.S. soldiers may be at greater risk. Moreover, combating terrorism requires international cooperation, and the Conventions provide a foundation for building this cooperation. Additionally, the United States needs to regain support and moral credibility in a wide range of countries if it is to win the war on terror. Strengthening and broadening the application of the Conventions, rather than rejecting them, will generate greater international support for U.S. efforts to combat terrorism.

Domestically, the United States should reaffirm its commitment to the Geneva Conventions and other international laws pertaining to war, and it should strengthen U.S. laws to ensure that all soldiers and civilians working for the U.S. government will be held to these standards, or be punished. Internationally, the United States should lead efforts to strengthen the framework of protections and to ensure their application to the full scope of conflicts. These protections should be based on the principles of basic human dignity and safety that are at the core of the Conventions themselves.

In this article, I will first briefly describe the Geneva Conventions and the George W. Bush administration's justification for suspending them in the war on terror. I will then examine the nature of modern war and warriors in turn. I will assess how the Geneva Conventions apply to current conflicts, and discuss why it is in the U.S.'s interest to strengthen and expand the existing international legal framework. I will then make recommendations for strengthening domestic and international guidelines to provide greater protections for soldiers and civilians in light of the complexities of modern war.

THE GENEVA CONVENTIONS AND U.S. POLICY

The Geneva Conventions of 1949 built on several earlier international conventions regarding the conduct of war. Henri Dunant, a Geneva merchant, is credited with providing the impetus for the initial Geneva Convention, signed in 1864. Dunant and several colleagues established an international committee to aid soldiers wounded in battle, which eventually became the International Committee of the Red Cross (ICRC). This group decided that they could only

effect the changes they sought in the conduct of warfare if governments agreed to provide care for wounded soldiers and protection for medical workers aiding them. Although some states initially resisted the idea as either redundant or an impediment to military operations, twelve states signed the Convention in 1864, and most European states, as well as the United States, had signed by 1868.² The Convention provided for the protection of victims in conflicts, gave states a responsibility to aid the wounded, and stipulated that clearly designated medical personnel would not be hindered from aiding wounded combatants. These early principles were expanded in the Hague Conferences around the turn of the century, which extended protections to soldiers at sea and later to POWs.³

What we currently recognize as the Geneva Conventions are the four Conventions signed in 1949, which focus in turn on wounded members of the armed forces, naval forces, POWs, and, for the first time, civilians caught up in conflicts. These refine and expand on the protections of the earlier conventions, stipulating who shall be considered members of these groups, and laying out the rights they should be accorded, most of which focus on their protection from harm or humiliation.⁴ The Conventions also reinforce the need to distinguish between combatants and civilians.

The 1949 Geneva Conventions reflected the nature of inter-state war that had evolved in Europe, from the Napoleonic Wars to World War II. Indeed, one of the criticisms leveled at the Conventions by the Bush administration was that in detailing provisions such as mail delivery and cigarette rations for prisoners, they were “obsolete.”⁵ The Conventions have not been static, however. Two Additional Protocols (APs) were signed in 1977 specifically to address the dilemmas raised by civil wars and insurgencies, which were clearly as widespread at that point as inter-state conflicts. Seeking to encourage insurgent groups to comply with the laws of war, the APs extended both the Conventions’ protections and responsibilities to armed groups involved in internal conflicts.⁶ AP II also modified the conditions required for combatants to be recognized as POWs to ensure that revolutionaries and insurgents could claim this status. This was not without effect; some insurgent groups, such as

² On the development of the ICRC and the early Geneva Convention, see Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996), 69–88.

³ “International Humanitarian Law,” accessed at www.redcross.lv/en/conventions.htm, 2 May 2005.

⁴ The Conventions were accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>, 2 May 2005.

⁵ Alberto R. Gonzalez, “Memorandum for the President,” 119.

⁶ Additional Protocol I, Article 96 §3, accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>, 2 May 2005. The United States did not sign the two Additional Protocols to the Conventions, due to concern about extending protections to unlawful combatants. But the U.S. Army’s field manual on land warfare uses almost all of the language from the two protocols. U.S. soldiers have regular training on how their actions should be guided by the Geneva Conventions.

South Africa's African National Congress, publicly affirmed their adherence to the Geneva Conventions, because they wanted international recognition of their struggle.⁷ Chechnya's now-deceased president, Aslan Maskhadov, also stated that his troops would abide by the Conventions, although he was unable to enforce this standard.⁸

The Geneva Conventions and the APs are generally viewed as the core documents of international humanitarian law, along with the United Nations (UN) Convention against Torture, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights. Many of these require signatory states to pass implementing legislation to enforce them. The United States has done so through laws such as the Torture Victim Protection Act, the War Crimes Act of 1996, and the Torture Act of 2000, among others.

THE UNITED STATES AND THE GENEVA CONVENTIONS AFTER SEPTEMBER 11

The administration's determinations regarding the Geneva Conventions emerged from debates about the appropriate treatment of al Qaeda and Taliban combatants detained by the Northern Alliance forces allied with the United States during the 2001 campaign in Afghanistan. The Bush administration argued that it was not responsible for any abuses of prisoners carried out by the Northern Alliance, a collection of warlords and their followers who had opposed the Taliban during the 1990s. The decision to remove some of these prisoners to Guantanamo Bay put them squarely in U.S. hands, however, forcing the United States to define its own position regarding the status of these prisoners.⁹ Concern about future terrorist attacks led the Department of Defense (DOD) to question the Geneva Conventions' constraints on interrogation and the holding of prisoners. Not only did the DOD want greater freedom of action regarding interrogations, but it assumed that many prisoners in the open-ended war on terror must be held indefinitely, whereas the Conventions stipulate that prisoners must be repatriated when wars end. On 11 January 2002, Secretary of Defense Donald Rumsfeld announced that the United States would treat detainees at Guantanamo in a way that was "reasonably consistent with the Geneva Conventions," but was not obligated to do so because they did not qualify as POWs.¹⁰

⁷ Cornelio Sommaruga, "Appeal by the International Committee of the Red Cross on the 20th Anniversary of the Adoption of the Additional Protocols in 1977," *International Review of the Red Cross* 320 (October 1997): 471-472.

⁸ Elizabeth Fuller, "What Lies Ahead in Chechnya," *In the National Interest* 14 January 2004 accessed at <http://www.inthenationalinterest.com/Articles/Vol3Issue2/Vol3Issue2Fuller.html>, 27 December 2005.

⁹ Holly Burkhalter, "Roundtable on Old Rules, New Threats," 12 December 2002, accessed on the website of the Council on Foreign Relations at www.cfr.org/publication/php?id=5313, 2 May 2005.

¹⁰ "Pentagon: Geneva Convention Doesn't Cover Detainees," *Reuters*, 11 January 2002.

The Bush administration relied on two central arguments to conclude that the Geneva Conventions' protections for POWs did not apply in the war on terror. These are laid out in a memorandum for Alberto Gonzales, then White House Counsel, written by Assistant Attorney General Jay S. Bybee, and reiterated in a memo from Gonzales to President George W. Bush dated 25 January 2002.¹¹ Bybee argued, first, that the Conventions did not apply to al Qaeda because it is a non-state actor and cannot be party to an international agreement governing war. Such agreements are valid only between state parties to international treaties. Bybee acknowledged that the Conventions are designed to address more conflicts than merely those between two states, but he argued that the nature of the war on terror means that "a conflict with al Qaeda is not properly included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply."

Second, Bybee argued that because Afghanistan was a failed state, the President need not apply the Geneva Conventions to the Taliban. He argued that the Taliban did not fully control the territory of the Afghan state, that it was not recognized as the legitimate government of that state by the international community, and that it was incapable of fulfilling Afghanistan's international treaty obligations. The Taliban, therefore, was not a government. He concluded that Afghanistan's failed status was "sufficient ground alone for the President to suspend Geneva III, and thus to deprive members of the Taliban militia of POW status." Moreover, Bybee argued that Taliban detainees did not deserve POW status because they did not fall within the Conventions' legal definition of soldiers.¹²

The Justice Department provided similar legal opinions regarding the Taliban and al Qaeda to the Pentagon in January 2002, but the State Department rejected the argument that Afghanistan's "failed" status justified suspending the Geneva Conventions, noting that the official U.S. position both before and after the Taliban came to power "was that Afghanistan constituted a state."¹³ In the end, Bush announced on 7 February 2002 that the United States would apply the Geneva Conventions to the Taliban, but that they did not merit POW status.¹⁴

The ongoing litigation and debate in the United States on the status of "unlawful combatants," and the abuses that took place at the Abu Ghraib

¹¹ Jay S. Bybee, "Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense," 22 January 2002, in Greenberg and Dratel, eds., *The Torture Papers*, 81–117; Gonzales, "Memorandum for the President," 118–125.

¹² Bybee, "Memorandum for Alberto R. Gonzales," 81–117.

¹³ John Yoo, "Memorandum for William J. Haynes II," 9 January 2002, in Greenberg and Dratel, eds., *The Torture Papers*, 38–79; William Taft IV, State Department Legal Advisor, quoted by Jane Mayer, "Outsourcing Torture," *The New Yorker*, 14 February 2005.

¹⁴ George W. Bush, "Memorandum on the Humane Treatment of Al Qaeda and Taliban Detainees," 7 February 2002, in Greenberg and Dratel, eds., *The Torture Papers*, 134–135.

prison and elsewhere are beyond the scope of this article.¹⁵ It is important to note, however, that the determinations regarding the Geneva Conventions were part of a broader discussion about how to prosecute and interrogate suspected terrorists after the 11 September 2001 terrorist attacks in New York City and Washington DC. Some of the panels investigating the abuses that occurred during interrogations in the Abu Ghraib prison in Iraq have concluded that this combination of policies, starting with the suspension of the Geneva Conventions, contributed to the abuses that occurred.¹⁶

NEW WARS AND NEW WARRIORS

The original Geneva Conventions were designed with a singular vision of war in mind, one fought primarily by the regular armies of established states. Wars of this type are clearly the exception now, not the rule. Wars conducted by conventional forces fall along a broader continuum of conflicts that ranges from world wars involving many state actors to guerilla-style skirmishes within a state's borders. Indeed, only four major interstate wars have occurred since 1990.¹⁷ (See Table 1 for a list of ongoing inter- and intra-state wars in 2004.) The actors involved vary widely as well, since distinctions between soldiers and civilians have eroded in fluid conflict situations.

"New" Wars

Three variants of warfare, which often overlap, have been evident in recent years. First, civil wars broke out or were rediscovered by the international community as Cold War constraints were lifted. Often these resulted when one of the superpowers rescinded support for a leader with fragile domestic legitimacy, and as opposition groups gained newfound freedom to act. Ethnic grievances also have fueled civil conflicts. Their ethnic nature has fed the impression that these were chronic, insoluble struggles, and not subject to rational resolution.¹⁸

¹⁵ For some recent analyses of these issues, see Jennifer K. Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism*, Congressional Research Service Report (hereafter CRS Report) RL 31367, 13 January 2005; Srividhya Ragavan and Michael S. Mireles, Jr., "The Status of Detainees from the Iraq and Afghanistan Conflicts," *Utah Law Review* 2 (2005): 619–675; Jennifer K. Elsea, *U.S. Treatment of Prisoners in Iraq: Selected Legal Issues*, CRS Report RL 32395, 19 May 2005.

¹⁶ Mark Danner, "Abu Ghraib: The Hidden Story," *New York Review of Books* 51 (7 October 2004): 44–50; "The Fay-Jones Report," August 2004, in Greenberg and Dratel, eds., *The Torture Papers*, 987–1131.

¹⁷ The United States was involved in two, the 1991 and 2003 conflicts against Iraq; the others involved India and Pakistan, and Ethiopia and Eritrea. Some smaller conflicts like the Kargil conflict between India and Pakistan also fit this model. For an overview of conflict patterns since 1990, see "Appendix 3A. Patterns of Major Armed Conflicts, 1990–2003," *SIPRI Yearbook 2004* (Oxford, UK: Oxford University Press, 2004).

¹⁸ The best known statement of this view is Robert D. Kaplan, *Balkan Ghosts: A Journey Through History* (New York: St. Martin's Press, 1993). For some critical discussions of the "ancient hatreds"

TABLE 1
Inter-state and Intra-state Wars, 2005

<i>Inter-state Wars</i>	
<i>Active</i>	<i>Dormant or Cease-fire</i>
	Armenia-Azerbaijan
	Cyprus
	Ethiopia-Eritrea
	India-Pakistan
	Israel-Lebanon
	Israel-Syria (Golan Heights)
	North-South Korea
<i>Intra-state Wars</i>	
<i>Active</i>	<i>Dormant or Cease-fire</i>
Colombia	Afghanistan
Democratic Republic of Congo	Algeria
Ethiopia	Azerbaijan
Indonesia	Burundi
Iraq	Georgia
Israel	Mexico
Ivory Coast	Rwanda
Liberia	Somalia
Myanmar	Sri Lanka
Nepal	Sudan
Nigeria	Western Sahara
Pakistan	
Philippines	
Russian Federation	
Somalia	
Sudan	
Turkey	
Uganda	

Source: 2006 *Chart of Conflict*, International Institute for Strategic Studies, 2006.

Second, failed states have become breeding grounds for conflict. The term “failed state” is generally used to refer to a state in which the power structure has broken down; the physical shell remains, but no central authority capable of providing law or governance exists.¹⁹ Failed states stand in stark contrast to the Weberian state model, in which political authority is based on a legal system

argument, see V.P. Gagnon, “Ethnic Nationalism and International Conflict: The Case of Serbia,” *International Security* 19 (Winter 1994/1995): 130–166; John Mueller, “The Banality of ‘Ethnic War,’” *International Security* 25 (Summer 2000): 42–70. See also Barbara F. Walter and Jack Snyder, eds., *Civil Wars, Insecurity, and Intervention* (New York: Columbia University Press, 1999); Michael E. Brown, ed., *Ethnic Conflict and International Security* (Princeton, NJ: Princeton University Press, 1993).

¹⁹Daniel Thurer, “The ‘Failed State’ and International Law,” *International Review of the Red Cross* 836 (December 1999): 731–761.

applicable to all, carried out by a bureaucracy, and in which the government has a monopoly on the legitimate use of force over a given territory.²⁰ Failed states share several characteristics. They are subject to pervasive and intense violence that occurs at multiple levels: regime against society; rebels against regime; and criminals against all. The state cannot supply political goods, and has few functioning institutions; usually, only the executive branch works, but mainly to serve the ends of the ruler, not the population. The state's infrastructure deteriorates or is destroyed. Collapsed states are the most extreme form of failing states, in which there is almost a complete vacuum of political authority.²¹ (See Table 2 for a breakdown of states considered to be failing, failed, or collapsed in 2003.)

Asymmetric wars are a third category of conflict prevalent today. Simply put, these are conflicts in which the capabilities of the warring parties are qualitatively different in nature. By virtue of its military superiority, the United States will find itself confronting less-able adversaries for the foreseeable future. The overwhelming dominance of American military forces was made starkly apparent during the first Gulf War in 1991, when U.S. and coalition forces decimated Iraq's sizable army with ease.²² This superiority has only grown as the United States increasingly employs sophisticated weapons and communication systems, with the goal of ensuring dominance on the battlefield.²³ Precision-guided munitions were used in Kosovo and the recent wars in Afghanistan and Iraq to improve targeting—and to reduce civilian casualties—and drones that can spot battlefield targets were employed for the first time in Afghanistan in 2001.

The consequence of U.S. superiority is that its opponents, both state and non-state actors, will have little choice but to resort to guerilla tactics and urban warfare, because they simply cannot confront U.S. forces head-on.²⁴ Terrorist tactics may indeed become more widespread, as has been seen in the Iraqi insurgency's campaign against U.S. troops since 2003. The terrorist tactics employed by al Qaeda, however, represent an additional dilemma. By employing both military and nonmilitary means in "idiosyncratic" ways, al Qaeda was able

²⁰ Max Weber, "Politics as a Vocation" in H.H. Gerth and C. Wright Mills, eds., *From Max Weber: Essays in Sociology* (Oxford, UK: Oxford University Press, 1946), 77–83.

²¹ This summary is based on Robert I. Rotberg, "The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair" in Robert I. Rotberg, ed., *When States Fail: Causes and Consequences* (Princeton, NJ: Princeton University Press, 2004), 2–21.

²² On the U.S. victory in the Gulf War, see Michael R. Gordon and Bernard E. Trainor, *The Generals' War: The Inside Story of the Conflict in the Gulf* (Boston, MA: Little, Brown and Co., 1995).

²³ Lawrence Freedman, *The Revolution in Strategic Affairs*, Adelphi Paper #318 (Oxford, UK: Oxford University Press for the International Institute for Strategic Studies, 1998), 33. See also Michael O'Hanlon, *Technological Change and the Future of Warfare* (Washington DC: The Brookings Institution, 2000).

²⁴ Groups resorting to guerilla tactics will face the quandary that if they want to claim POW protections under the Geneva Convention, they must be made clearly identifiable as members of a militia by wearing uniforms and carrying arms openly.

TABLE 2
Failed or Failing States, 2003

<i>Failing States</i>	<i>Failed States</i>	<i>Collapsed States</i>
Colombia	Afghanistan	Somalia
Cote d'Ivoire	Burundi	
Indonesia	Democratic Republic of Congo	
Iraq	Liberia	
Nepal	Sierra Leone	
North Korea	Sudan	
Zimbabwe		

Source: Robert I. Rotberg, ed., *When States Fail: Causes and Consequences* (Princeton, NJ: Princeton University Press, 2004). As Rotberg notes, designating a state's status in this way provides only a snapshot. A state may move closer to failure if conditions worsen, or internal conditions may improve and the prospect of failure will recede.

to orchestrate an attack with catastrophic effects, and it and others will likely resort to such tactics again.²⁵

One dynamic that many modern conflicts share is the element of criminality and economic gain involved. Some observers have seen a trend of economic exploitation and perpetuation of conflicts by warring groups seeking to enrich themselves.²⁶ Both of these occurred in Sierra Leone and Liberia. During the Balkan conflicts of the 1990s, criminals and thugs were recruited into the Serbian Army in Bosnia, and many of the paramilitary groups fighting alongside the army were led by criminals. These groups often resorted to massive violations of human rights as a way to achieve their ends; indeed, their main goals have been characterized as personal enrichment and "war crimes."²⁷

As noted earlier, these "new" forms of warfare are better understood as a reversion to very old wars. One parallel may be war in early modern Europe, when warfare was "pervasive but undefined."²⁸ At the start of the seventeenth century, for example, swaths of territory in Europe were subject to vicious conflict that combined warfare and plunder, with little distinction made between civilian and soldier.²⁹ Another parallel can be seen in the asymmetries between

²⁵ Montgomery C. Meigs, "Unorthodox Thoughts about Asymmetric Warfare," *Parameters* 33 (Summer 2003): 4–18.

²⁶ Mats Berdal and David M. Malone, eds., *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner, 2000).

²⁷ Mueller, "The Banality of 'Ethnic War,'" 47–58; see also Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Stanford, CA: Stanford University Press, 1999).

²⁸ Michael Mann notes that "the warlords in Somalia, Liberia or Zaire resemble the vast majority of political regimes throughout premodern history. They are not monsters but reflections of our own past." Michael Mann, "Nation-States in Europe and Other Continents: Diversifying, Developing, Not Dying," *Daedalus* 122 (Summer 1993): 136; quote from M.S. Anderson, *War and Society in Europe of the Old Regime, 1618-1789* (London: Fontana, 1988), 13–16.

²⁹ Michael Howard, *War in European History* (Oxford, UK: Oxford University Press, 1976), 50.

European military forces and those of the countries they colonized during the nineteenth century.³⁰ Some of the guerilla conflicts in the 1970s and 1980s were also asymmetric in capabilities.

Likewise, the links between economic gain, criminality, and warfare are hardly new. Wars have long been financed and outfitted by a range of entrepreneurs and military contractors, often with unsavory reputations. Indeed, the need to generate resources to sustain wars was one of the factors that led to the development and bureaucratization of states—and of modern standing armies in the service of the state.³¹ Moreover, recent analyses suggest that economic motives alone are unlikely to drive a conflict, although they may contribute to the perpetuation of ongoing wars.³²

The key point about current conflicts is that they represent a present and future form of war that is far removed from the archetype for which the Geneva Conventions were designed. The modern European model of war involving state armies of soldiers meeting on a battlefield is a rarity today. The war between Iran and Iraq in the 1980s may have been the last such major war.

New Warriors

Terrorists are a critical opponent confronting the United States and others, but they are not alone in falling outside the Geneva Conventions' assumptions about who soldiers are. Prominent among the combatants in modern wars are warlords, mercenaries, and children.

Warlords. Warlords often provide what little authority exists in collapsed and failed states—although they also may be to blame for the state's failure. In some cases, a single ruler uses control of a state's government to prey on the population and enrich himself.³³ Mobutu Sese Seko's thirty-two-year rule in Zaire (now the Democratic Republic of Congo) epitomizes this model. Mobutu enriched himself while the state's infrastructure collapsed and the population grew ever poorer, despite the country's immense natural resource wealth.

³⁰ William H. McNeill, *The Pursuit of Power* (Chicago, IL: University of Chicago Press, 1982), 256–261.

³¹ Charles Tilly, *Coercion, Capital, and European States, AD 990-1990* (Cambridge, MA: Blackwell, 1990); Howard, *War in European History*, 38–74.

³² Karen Ballentine and Jake Sherman, eds., *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, CO: Lynne Rienner, 2003); Mats Berdal, "How 'New' are 'New Wars'?" *Global Economic Change and the Study of Civil War*, *Global Governance* 9 (October/December 2003): 477–502.

³³ William Reno refers to this as a "shadow state." William Reno, "Warfare and State-building in Africa" in Diane E. Davis and Anthony W. Pereira, eds., *Irregular Armed Forces and Their Role in Politics and State Formation* (Cambridge, UK: Cambridge University Press, 2003), 322–345.

In other cases, tribal or clan leaders become local and regional warlords, and exercise authority in the absence of—or at the expense of—central government. Afghanistan, as a consequence of nearly thirty years of civil war, exemplifies a state in which multiple warlords compete for power. Both before and after the Taliban took control of the capital, Kabul, in 1996, authority over much of the country was divided among local and regional warlords. Prior to the 2001 U.S. invasion, Afghanistan was the regional hub and transit point of a “criminalized war economy” that served the needs of armed groups in several neighboring states.³⁴ Today, in spite of the Taliban’s overthrow and the establishment of a new government, Afghanistan “has become a collection of warlord-run fiefs fueled by a multibillion-dollar opium economy.”³⁵ Afghan President Hamid Karzai made a concerted effort in 2004 to challenge or co-opt the warlords, but his control over the country does not extend much beyond Kabul. In Afghanistan’s October 2004 elections, some warlords consolidated their power by controlling the political parties contesting the election, and by intimidating voters.³⁶ The warlords’ continued strength, and their desire to solidify their power was evident in Afghanistan’s October 2005 parliamentary elections. About two hundred warlords ran for seats or put forward proxy candidates. Roughly half of the winning candidates are suspected of having links to various armed groups, and several prominent warlords won seats.³⁷

The Afghan case is particularly problematic because the United States had a hand in its creation, by supporting different warring factions in their struggle against, first, the Soviet Union, and later, the Taliban. The United States turned to the Northern Alliance for assistance against the Taliban in the fall of 2001, and it continues to rely on local and regional warlords for help in its ongoing hunt for Osama Bin Laden, al Qaeda’s leader, who is believed to be hiding in a mountainous region on the Afghanistan–Pakistan border.³⁸

Warlords and failed states matter because the lawlessness of such territories—and the self-enrichment goals of these leaders—makes them attractive to terrorists as havens from international law. Liberia’s Charles

³⁴ Barnett R. Rubin, “The Political Economy of War and Peace in Afghanistan,” Center on International Cooperation, June 1999, accessed at www.institute-for-afghan-studies.org/ECONOMY/political_economy_of_war_peace.htm, 10 May 2005.

³⁵ J. Alexander Thier, “Afghanistan I: Back to Warlords and Opium,” *International Herald Tribune*, 24 September 2004.

³⁶ “Human Rights Overview: Afghanistan,” *Human Rights Watch World Report 2005*, 13 January 2005, accessed on the website of Human Rights Watch at <http://www.hrw.org/>, 27 April 2005.

³⁷ Daniel Cooney, “Afghan Election Staffers Fired for Fraud,” *Washington Post*, 16 October 2005; Porter Barron, “Afghanistan Struggles to Keep Warlords Off the Ballot,” *Christian Science Monitor*, 8 September 2005.

³⁸ Laura Neack, “Peacekeeping, Bloody Peacekeeping,” *Bulletin of the Atomic Scientists* 60 (July/August 2004): 40–47.

Taylor, for example, was willing to shelter terrorists in the 1990s in return for financial compensation. These included high-level al Qaeda operatives, who also exploited Liberia's diamond market to convert financial resources into untraceable assets.³⁹ To be sure, completely collapsed states such as Somalia do not provide good terrorist havens, because infighting among clans, and the absence of foreigners in such states, due to their isolation and lawlessness, prevent terrorists from blending in. Collapsed states nonetheless remain potential transit zones, and warlord-run states like Liberia under Taylor, with multi-ethnic communities and thriving criminal economies, remain inviting havens.⁴⁰

Mercenaries and private security companies. Mercenaries, long a staple of warfare, have also reemerged prominently in modern wars.⁴¹ The classic image of the mercenary is the "soldier of fortune," willing to fight in any conflict if the price is right. Mercenaries are active in a wide range of conflicts, and they have been joined by private security companies that offer a range of security services to governments and individuals. Some companies offer front-line troops that could be likened to mercenaries, but the majority provide services ranging from military training to troop support and infrastructure.

Although a broad range of factors fueled the growth in this industry in the 1990s, two are worth noting. First, the Cold War's end and subsequent military downsizing created a large pool of former soldiers with marketable military skills. Second, particularly in the United States, the push toward privatization of "non-core" government functions led to the contracting out of tasks considered outside the military's core mission.⁴² Executive Outcomes (EO), a now-defunct company made up of former South African military officers, gained notoriety for the industry, while Great Britain's Sandline International, and Military Professional Resources Incorporated (MPRI), based in Virginia, exemplify the more respectable corporate model. EO gained attention in the 1990s for its work for the governments of Angola and Sierra Leone. From 1993 to 1996, 500 EO employees protected oil fields and trained

³⁹ Douglas Farah, "A Volatile Mix: Non-State Actors and Criminal States," Center for American Progress, 5 October 2004, accessed on the website of the Center for American Progress at www.americanprogress.org, 2 May 2005.

⁴⁰ Ken Menkhaus, *Somalia: State Collapse and the Threat of Terrorism* (New York: International Institute for Strategic Studies, 2004).

⁴¹ Prior to the rise of mass armies motivated by nationalism, mercenaries were a regular feature of wars in Europe and elsewhere. See, among others, Anthony Mockler, *The Mercenaries* (New York: Macmillan, 1970); Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns* (Princeton, NJ: Princeton University Press, 1994).

⁴² Deborah D. Avant, *The Market For Force: The Consequences of Privatizing Security* (New York: Cambridge University Press, 2005), 30–35; P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003), 49–60.

soldiers for the Angolan army. In Sierra Leone, EO helped the army defend the capital city against attacks by the Revolutionary United Front in 1995. Notably, the Sierra Leone example shows that private security companies, as well as states, can conduct asymmetric wars.⁴³

Reliance on private security firms is not merely a third-world phenomenon—or one that is limited to governments. The Croatian government, with U.S. encouragement, hired MPRI to train its army in the 1990s. This aid is credited with helping Croatian forces defeat Bosnian Serb forces in an offensive in the summer of 1995, which helped bring the Serbs to the negotiating table at Dayton. And virtually all parties in the conflict in Colombia, including rebels, drug traffickers, and landowners, are believed to have hired various private military firms.⁴⁴

Nor is the use of private security companies unique to small states; far from it. The United States now relies so heavily on contractors that it “cannot go to war without contractors.”⁴⁵ Increasingly, the DOD turns to private contractors as a way to free military forces for combat-related tasks. The Pentagon can also bypass congressionally mandated limits on how many military personnel it can deploy to certain regions by hiring contractors. In October 2004, for example, Congress approved an increase in the number of U.S. military personnel that could be deployed in Colombia—and also allowed the number of U.S. citizens working for private firms employed by the military to increase by half, from 400 to 600. U.S. soldiers and private contractors work together in Colombia to develop and analyze intelligence, to conduct surveillance, and to train Colombian troops in counter-guerilla operations.⁴⁶ The line between civilian contractors and military forces can be quite blurry. In Colombia, corporations supply pilots for planes tasked with spraying coca fields as part of the war on drugs; they are paid by the State Department and the Pentagon.⁴⁷

The use of contractors is even more widespread in Iraq. Private contractors with now familiar names like Kellogg, Brown and Root and Bechtel do everything from running mess halls to flying planes. They also provide key support for weapons systems, including maintaining and reloading weapons during combat operations. Private contractors have been killed and captured by insurgents in Iraq, raising questions about the protections they are guaranteed under the Geneva Conventions. Moreover, private contractors were at the center of the abuse scandal at Abu Ghraib (see discussion below).

⁴³ David Shearer, “Outsourcing War,” *Foreign Policy* 112 (Fall 1998): 68–81; Singer, *Corporate Warriors*, 4.

⁴⁴ Singer, *Corporate Warriors*, 14, 173–74.

⁴⁵ Colonel Kevin Cunningham, as cited by Avant, *The Market for Force*, 115.

⁴⁶ Juan Forero, “Congress Approves Doubling U.S. Troops in Colombia to 800,” *New York Times*, 11 October 2004.

⁴⁷ Nelson D. Schwartz, “The Pentagon’s Private Army,” *Fortune*, 17 March 2003, 100.

Children. Children also have become combatants in conflicts around the world, with their presence “the rule, not a rarity now.”⁴⁸ The UN estimates that 300,000 children are serving as soldiers in conflicts in at least thirty-two countries. Girls are almost as likely as boys to be pulled into combat, and not just in support roles.⁴⁹ Many of the children currently in combat are under eighteen, the age internationally accepted as the line between children and adults, but some are younger than fifteen or even thirteen.⁵⁰

Children are appearing more frequently in combat for three reasons. First, the chaos that results from failed states, civil wars, and disasters or disease creates a larger pool of available recruits. Indeed, there were reports that insurgents were scouting for potential “recruits” in refugee camps after the December 2004 tsunami that struck Southeast Asia.⁵¹ Second, the weapons of choice in most “new wars” are small arms and light weapons. Not only are these weapons cheap, but they are light enough for children to carry, and simple enough for them to learn to use.⁵² Third, the changes in the nature of conflict discussed above encourage the exploitation of children in battle. Warlords and other insurgent leaders often see children as “low-cost and expendable” foot soldiers. They often do not understand the risks they face and, particularly if brutalized as most child soldiers are, are quite obedient and will carry out very dangerous tasks, including suicide missions.⁵³

Children are now involved as fighters in almost all of the conflicts where U.S. troops are deployed. Terrorists, too, rely on children to carry out missions. As a consequence, U.S. and other Western troops face the challenge of learning how to fight in conflicts in which they may face children with guns. See Table 3 for a list of conflicts in which children are used as combatants by state or non-state actors.

⁴⁸ P.W. Singer, “Too Young to Kill,” *Newhouse News Service*, 9 January 2005.

⁴⁹ Dyan Mazurana and Susan McKay, “Child Soldiers: What About the Girls?” *Bulletin of the Atomic Scientists* 57 (September/October 2001): 30–35.

⁵⁰ The “Convention on the Rights of the Child,” Part I, Art. 1, states that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” Singer points out that eighteen is a long-standing international legal standard accepted by 190 countries on the basis of historical precedent; Convention accessed at www.unicef.org/crc.fulltext.htm, 25 February 2005; Singer, “Too Young to Kill.”

⁵¹ “Tigers Recruit 40 Child Soldiers Since Tsunamis,” *Agence France Presse*, 26 January 2005. These reasons are delineated by P.W. Singer, “Western Militaries Confront Child Soldiers Threat,” *Jane’s Intelligence Review* 17 (January 2005), accessed at <http://www.brook.edu/views/articles/fellows/singer20050115.htm>, 28 March 2005.

⁵² On the trade in small arms, see Kathi Austin, “Hearts of Darkness,” *Bulletin of the Atomic Scientists* 55 (January/February 1999): 34–37; Jeffrey Boutwell and Michael T. Klare, “A Scourge of Small Arms,” *Scientific American* 282 (June 2000): 30–35; Lora Lumpe, ed., *Running Guns: The Global Black Market in Small Arms* (London: Zed Books, 2000).

⁵³ Mike Wessels, “Child Soldiers,” *Bulletin of the Atomic Scientists* 53 (November/December 1997): 32–39.

TABLE 3
*Conflicts Involving Child Soldiers**

<i>Forces Employing Children, 2000–2001</i>			
<i>Governments</i>	<i>Paramilitary Organizations</i>	<i>Armed Opposition Groups</i>	
Afghanistan	Afghanistan	Afghanistan	Papua New Guinea
Angola	Algeria	Algeria	Peru
Burundi	Colombia	Angola	Philippines
Chad	East Timor	Burundi	Republic of Congo
Democratic Republic of Congo	India	Colombia	Russian Federation
Eritrea	Indonesia	Democratic Republic of Congo	Rwanda
Ethiopia	Mexico	East Timor	Sierra Leone
Iran	Sierra Leone	India	Solomon Islands
Iraq	Somalia	Indonesia	Somalia
Israel and Occupied Territories	Sudan	Iran	Sri Lanka
Myanmar	Yugoslavia (former Republic of)	Iraq	Sudan
Republic of Congo		Israel and Occupied Territories	Tajikistan
Rwanda		Lebanon	Turkey
Sierra Leone		Mexico	Uganda
Somalia		Myanmar	Uzbekistan
Sudan		Nepal	Yugoslavia (former Republic of)
Uganda		Pakistan	

* If children are employed by more than one type of group, the state appears in multiple columns.

Source: "World Map of Child Soldiers, 2000/2001," <http://www.un.org/works/goingon/soldiers/childsoldiermap.html>.

Child soldiers must nonetheless be considered victims in these conflicts. Children are not able to "choose" to participate in conflicts in the way that adults do, because they cannot understand the dangers or consequences of their actions.⁵⁴ Moreover, often they are not given the choice. Children involved in conflicts have often been abducted and forced to fight, or drugged. The Lords Resistance Army in Uganda, for example, has abducted over 14,000 children over about a ten-year period, and abduction is common in other conflicts.⁵⁵ Children may also join rebel groups in order to survive, because they are starving or their parents have been killed. Finally, nearly everywhere that girls are abducted into conflicts, they are raped, and often they are given to commanders as sexual slaves.⁵⁶

⁵⁴ The U.S. Supreme Court decision abolishing the death penalty for offenders under the age of eighteen was based in part on medical and scientific evidence that "children" are too immature to understand the consequences of their actions, as adults would be expected to do. Charles Lane, "5–4 Supreme Court Abolishes Juvenile Executions," *Washington Post*, 2 March 2005.

⁵⁵ Singer, "Western Militaries Confront Child Soldiers Threat," 2.

⁵⁶ Mazurana and McKay, "Child Soldiers," 32.

THE UTILITY OF THE GENEVA CONVENTIONS

Two issues deserve attention in considering the relevance of the Geneva Conventions to today's complex spectrum of war. First, how do the Conventions as they currently stand relate to the challenges of new wars and new warriors? Second, why should the United States care about upholding or expanding the Conventions?

Changing Warfare and the Geneva Conventions

Several points are worth making about the Geneva Conventions and "new" wars. First, the laws of war have no geographic boundaries; they apply in all places and conflicts. The ICRC has also pointed out that "as a matter of law, there can be no wars in which one side has all the rights and the other has none."⁵⁷ The 1977 APs were adopted in part to reinforce the universality of the laws of war, and to encourage non-state groups to adhere to the Geneva Conventions. Some states, including the United States, objected to this implied recognition of insurgent groups and worried that Protocol I's language would allow guerillas to operate in civilian populations without distinctive uniforms and still claim combatant status.⁵⁸ But the goal of the APs was to reinforce the Conventions' proscriptions on warfare in all conflicts, particularly with regard to non-combatants, and to reaffirm that "even legitimate ends do not justify certain means."⁵⁹ The problem is not an absence of legal guidelines protecting those caught up in conflicts, but that these are not respected by either states or non-state groups.

Moreover, the International Covenant on Civil and Political Rights, a core human rights treaty, prohibits abuses against "all persons deprived of their liberty."⁶⁰ Although in its ratification of the Covenant in 1992, the United States interpreted the clauses about acceptable punishment according to standards in the U.S. Constitution, it accepts that "no derogation is permitted" from key rules regarding the treatment of prisoners.⁶¹ Even "illegal combatants" would be protected by the Covenant.

Second, international law does not support the U.S. government's argument that a state's "failed" status justifies suspending the Geneva Conventions. The very notion of a failed state has no meaning in international law. Even

⁵⁷ International Committee of the Red Cross, "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts," Geneva, September 2003, accessed on the website of the International Committee of the Red Cross at www.icrc.org, 13 May 2005.

⁵⁸ Abraham D. Sofaer, "Terrorism and the Law," *Foreign Affairs* 64 (Summer 1986): 901-922.

⁵⁹ M. Cherif Bassiouni, "Legal Control of International Terrorism" in Charlotte Ku and Paul F. Diehl, eds., *International Law: Classic and Contemporary Readings* (Boulder, CO: Lynne Rienner, 2003), 319.

⁶⁰ Accessed at <http://www.ohchr.org/english/law/ccpr.htm>, 12 October 2005.

⁶¹ Elsea, *U.S. Treatment of Prisoners in Iraq*, 12.

states that are virtually shells retain their international legal rights and territorial integrity.⁶² In large part, this reflects the aim of ensuring the stability of the international system based on sovereign state members. Moreover, it is easier to maintain the existing state when trying to sort out the problems that accompany internal collapse, because often, residual national sentiment may help in reviving the state, and preserving the state's borders mitigates the danger of intervention by neighboring states.⁶³

Afghanistan is notable in this regard. Throughout the 1990s, the United States, the UN, and other international bodies accorded Afghanistan its rights as a sovereign member of the international community. The UN refused to acknowledge the Taliban, however, although it controlled much of Afghanistan's territory after 1996, and instead continued to recognize Afghanistan's previous President, Burhanuddin Rabbani, as its legitimate ruler. More importantly, UN and U.S. recognition took little notice of the fact that neither the Taliban nor its immediate predecessors were able to provide state services or authority in Afghan territory.

New warriors are also protected by the Geneva Conventions. Authorized civilian contractors supporting military operations are entitled to POW status under Geneva Convention III.⁶⁴ This has proven problematic in practice, however, because contractors may fall through the cracks in terms of legal jurisdiction. For example, three U.S. contractors conducting a surveillance mission in Colombia have been held hostage there since late 2003. The guerillas that captured them refer to them as prisoners of war, but the U.S. government calls them simply U.S. citizens.⁶⁵

The Coalition Provisional Authority that governed Iraq from May 2003 until the handover to the interim Iraqi government in June 2004 stipulated that contractors would be subject to the laws of their home country, rather than to Iraqi law. U.S. legislation charged the Secretary of Defense with initiating prosecutions against contractors accused of violating laws. But unlike soldiers, private contractors are not required to uphold the Geneva Conventions, and it has proven difficult to hold contractors accountable for their actions.⁶⁶

Uniform regulatory standards for private security companies do not exist. The United States licenses U.S. firms operating abroad under the International Traffic in Arms Regulations (ITAR), an implementation mechanism for U.S. export control laws. ITAR has proven unwieldy, however,

⁶² Ben N. Dunlap, "State Failure and the Use of Force in the Age of Global Terror," *Boston College International and Comparative Law Review* (Spring 2004): 453–475; Thurer, "The 'Failed State,'" 731–761.

⁶³ Reno, "Warfare and State-building," 342.

⁶⁴ Geneva Convention III, Article 4 (4), accessed at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>, 22 June 2005.

⁶⁵ Avant, *The Market for Force*, 233.

⁶⁶ *Ibid.*, 231–232.

because the offices and agencies involved in oversight are case dependent, and because firms have been able to avoid oversight by keeping their contracts under the \$50 million threshold at which ITAR approval is required or by splitting larger contracts into smaller pieces.⁶⁷ Some other states, including South Africa and several European states, have also begun to regulate private security companies. These regulations differ significantly from country to country.⁶⁸

In theory, the DOD can prosecute civilian employees for crimes under the Military Extraterritorial Jurisdiction Act (MEJA), passed in 2000. MEJA has faced few tests, however, because it took effect only in September of 2004. Moreover, until late 2004, it applied only to DOD employees.⁶⁹ In Abu Ghraib, the private contractors supervising interrogations were hired by the Central Intelligence Agency, and other contractors have been hired by the Department of the Interior, rather than the DOD.⁷⁰ One contractor was accused of raping a male prisoner, but was not charged because he was not subject to military law. A U.S. military officer investigating the Abu Ghraib scandal noted that “we had no jurisdiction over him. It was left up to the contractor on how to deal with him.” Many of the interrogators were employees of companies like CACI International and the Titan Corporation, U.S.-based defense contractors that specialize in information and intelligence. To date, none of these contractors have been prosecuted.⁷¹

Iraq is not the only place where military contractors apparently violated the Geneva Conventions. The United States hired contractors from DynCorp to train police forces in Bosnia, and some of DynCorp’s personnel were accused of owning women and girls as young as fourteen. DynCorp executives

⁶⁷ P.W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law,” *Columbia Journal of Transnational Law* 42 (2004): 522–549.

⁶⁸ Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva: Geneva Centre for the Democratic Control of the Armed Forces, March 2005), 103–115; Avant, *The Market for Force*, 143–177.

⁶⁹ *Military Extraterritorial Jurisdiction Act of 2000*, Public Law 106-523 (22 November 2000, 2488–2492); Jonathan Groner, “Untested Law Key in Iraqi Abuse Scandal,” *Legal Times*, 11 May 2004, accessed at www.law.com, 7 April 2005; “Private Military Contractors and the Law,” *Human Rights Watch*, 21 October 2004, accessed on the website of Human Rights Watch at <http://www.hrw.org/>, 8 April 2005.

⁷⁰ In light of the scandal, the U.S. Army stopped hiring contractors through the Department of the Interior, and moved these contracts back to DOD. David Phinney, “Torture for Profit,” *Guerilla News Network*, 21 September 2004, accessed at gnn.tv/articles/110/Torture_for_Profit, 8 April 2005.

⁷¹ Julian Borger, “US Military in Torture Scandal,” *The Guardian*, 30 April 2004. *The Guardian* printed a correction on 15 May 2004, noting that Titan Corporation claims to provide only interpreters to the U.S. military, not interrogators. According to the Fay Report, an Army investigation into the Abu Ghraib scandal, the Department of Defense referred cases of abuse by civilian contractors to the Department of Justice. “The Fay-Jones Report,” 989.

insist that these employees were fired, but there is no evidence that they or the U.S. government was held legally accountable.⁷²

Finally, children are accorded all the rights and protections of non-combatants in the Geneva Conventions. Moreover, the Convention on the Rights of the Child commits states to “take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take part in hostilities,” and that children under fifteen will not be recruited into state armed forces.⁷³ The UN General Assembly adopted an optional protocol to this Convention in May 2000 that urged states to raise the minimum age of recruitment to eighteen years and explicitly proscribed the use of children under eighteen by non-state armed groups.⁷⁴

The United States, however, has held juveniles at Abu Ghraib prison in Iraq. Several children between the ages of thirteen and sixteen were apparently incarcerated at Guantanamo Bay in 2003. One of the victims in the abuse scandals at Abu Ghraib was in his “mid-teens,” and an army sergeant pleaded guilty in 2004 to killing a seriously wounded Iraqi teenager.⁷⁵

The Geneva Conventions and the U.S. War on Terrorism

Upholding the Geneva Conventions and other guidelines will help the United States fight terrorism for three reasons. First, the Geneva Conventions protect American soldiers and civilians. Maintaining the Conventions means that those who harm U.S. soldiers or citizens abroad can be arrested and prosecuted. Without this precedent, other states are less likely to accord U.S. soldiers and military contractors the protections the Conventions provide, should they be captured. Tolerating “gray areas” with regard to protection and human dignity, as the administration’s judgments about the Geneva Conventions and interrogation techniques do, creates an environment in which others can do the same. The Department of State’s representatives emphasized this point in contesting the administration’s decision to suspend the Conventions, as did Brig-

⁷² One of those accused admitted to having purchased a young woman. The only DynCorp employee who was punished, however, was the whistle-blower, who was fired. Human Rights Watch, “Hopes Betrayed: Trafficking of Women and Girls to Post Conflict Bosnia and Herzegovina for Forced Prostitution,” *Human Rights Watch* 14 (November 2002): 17, 62–68; Kelly Patricia O’Meara, “DynCorp Disgrace,” *Insight Magazine*, 14 January 2002, accessed at http://www.truthout.org/docs_01/02.24C.DynCorp.Disgrace.htm, 10 May 2005.

⁷³ Article 38, “Convention on the Rights of the Child.”

⁷⁴ “Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,” UN General Assembly resolution A/RES/54/263, 25 May 2000. The U.S. was among the first states to ratify this Protocol, and it is also a signatory of the Convention on the Rights of the Child.

⁷⁵ “Children in Guantanamo: Letter from Amnesty International to President Bush,” 24 April 2003, accessed at www.amnesty.nl/artikelen/NK-ART0331.shtml, 25 February 2005; Borger, “US Military in Torture Scandal”; “More Than 100 Die in U.S. Custody in Iraq,” *Associated Press*, 16 March 2005.

adier General Mark Kimmitt after Abu Ghraib: “If we can’t hold ourselves up as an example of how to treat people with dignity and respect, we can’t ask that other nations do that to our soldiers.”⁷⁶

Second, combating terrorism requires multilateral collaboration, and the Geneva Conventions provide a foundation for building international cooperation. At their core, the Conventions are based on the belief that certain means can never be justified, however important the end goals are believed to be. To win the war against terrorism, the United States must delegitimize the means terrorists use. It can only succeed in making this case if it holds itself to widely accepted standards of behavior. The United States lost the moral high ground in the “trickle down” effect of the Geneva Conventions’ suspension in Guantanamo Bay and Afghanistan that led to the images of abuse at Abu Ghraib.⁷⁷ To regain at least some of this lost ground, U.S. leaders—and the military—must ensure that prisoners and civilians of all sorts are treated humanely, wherever they are held.

At the local level, defeating terrorists or groups using terrorist tactics requires gaining popular support and trust by creating a stable and secure environment for the communities in which terrorists seek to hide, including chronic war zones and failed states. Only then will local populations help identify potential troublemakers. This demands both scrupulous efforts to adhere to the rule of law and the minimal use of force.⁷⁸ The Geneva Conventions provide guidelines for the behavior of occupying powers, which can reinforce domestic laws or stand in for them where no laws exist.

Third, those who are the victims—and even the perpetrators—of the range of wars that abound today deserve the basic protections afforded by the Geneva Conventions and other international laws. This is the underlying logic of the Conventions.

These arguments are both principled and pragmatic. To achieve greater security for Americans, the United States must demonstrate that it cares about the safety of people in states on the front line in the struggle against terrorism. This is most likely to gain their cooperation. Moreover, the United States must affirm the basic values that define “who we are,” as Senator John McCain notes.⁷⁹ Upholding international standards is one way to make clear that the United States supports security for all.

⁷⁶ Colin Powell, “Memorandum to Counsel to the President,” 26 January 2002; William H. Taft IV, “Memorandum to Counsel to the President,” 2 February 2002; both in Greenberg and Dratel, eds., *The Torture Papers*, 122–125, 129–133; Borger, “US Military in Torture Scandal.”

⁷⁷ Andrew Sullivan, “Atrocities in Plain Sight,” *New York Times*, 23 January 2005; “Abu Ghraib General Says Told Prisoners ‘Like Dogs,’” *Reuters*, 15 June 2004.

⁷⁸ General Sir Michael Rose, “The Perils of Peacekeeping and Nation Building,” (paper presented at Maxwell School, Syracuse University, 26 April 2005).

⁷⁹ “Statement of Senator John McCain Amendment on Army Field Manual,” 25 July 2005 accessed at http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPressRelease&Content_id=1595, 27 September 2005.

GUIDELINES FOR CONFLICT IN THE TWENTY-FIRST CENTURY

In hearings on his nomination to be attorney general, Alberto Gonzales argued that “we are fighting a new type of enemy and a new type of war,” and suggested that it might be appropriate to revisit the Geneva Conventions. At the same time, he acknowledged that the basic principles of the Conventions regarding “decent treatment of human beings” remained unquestioned.⁸⁰

To ensure the cooperation that it needs to pursue terrorists, and to regain the high ground in this fight, the United States should lead the way, as Gonzales suggested, in creating a stronger framework to protect people from the dangers they face in conflict zones and lawless societies. However, the problem of modern war is broader than the administration’s focus on terrorism, and it demands a more comprehensive approach. The Geneva Conventions’ protections of human dignity should serve as a baseline. As a first step, the United States should ensure that its own policies and actions promote “decent treatment of human beings.” It should then encourage the strengthening and extension, where needed, of existing international guidelines for conflict.

U.S. Policies

For the principled and pragmatic reasons noted above, the U.S. government should ensure that its soldiers and civilians adhere to the Geneva Conventions and other laws of war. This will help to preserve the protections provided by the Conventions, and this is the strategy most likely to establish the trust needed to engender cooperation against terrorists. The military consistently trains its soldiers on their obligations, and most uphold these as a matter of course. But Abu Ghraib is one end of a spectrum of ill treatment in Iraq; U.S. soldiers casually breaking Coke bottles over Iraqi citizens’ heads also violates “decent treatment,” and needlessly alienates the population.⁸¹

First, the U.S. government must reinforce domestic and international laws protecting basic rights. The U.S. military did not weaken its guidelines regarding the Geneva Conventions in Afghanistan or Iraq, in spite of the policy modifications at the highest levels. The President should affirm this position, and state clearly that the Geneva Conventions apply to all combat situations and to all prisoners in these conflicts. In late 2004, the DOD retracted the more permissive guidelines for interrogation that were established in 2002, and new Army guidelines for interrogation were adopted in April 2005.⁸² This is a step in the right direction. The U.S. Congress’ passage of Senator McCain’s amendment to the 2006 Defense Appropriations Bill, which makes the Army Field

⁸⁰ Peter Wallsten, “Geneva Convention Overhaul Considered,” *Los Angeles Times*, 7 January 2005.

⁸¹ Bob Herbert, “From ‘Gook’ to ‘Raghead,’” *New York Times*, 2 May 2005.

⁸² Eric Schmitt, “In New Manual, Army Limits Tactics in Interrogation,” *New York Times*, 28 April 2005.

Manual the standard guideline for interrogation practices for all DOD detainees and prohibits “cruel, inhuman, and degrading treatment” of anyone in U.S. government custody, is another important step. The President diluted the intent of this amendment, however, in a “signing statement” that declared he would honor the amendment only if it did not interfere with his presidential powers.⁸³ The President and his subordinates must publicly reaffirm the national and international laws that prohibit torture and prisoner abuse. Simply stating that the United States does not condone torture will not ameliorate the damage caused by Abu Ghraib if the United States fails to ensure legal accountability for this abuse.

Legal scholars are currently debating the question of when torture or coercive interrogation techniques may be justified, particularly in situations where a “ticking time bomb” may raise ethical questions about saving lives.⁸⁴ I will leave this task to them. It is important to note, though, that easing the regulations on appropriate treatment of prisoners, as the Bush administration did, can have corrosive effects.

Second, the United States should strengthen and, where necessary, modify U.S. laws to ensure that U.S. civilians accused of committing abuses while supporting U.S. war or peace efforts can be investigated and, when appropriate, prosecuted. The MEJA was amended to cover contractors hired by other federal agencies in late 2004. Although questions remain about what the wording of the new law covers, this is a good start.⁸⁵ Now the military must use it, and make clear to victims in other countries that the United States will hold its citizens accountable for their actions.

For MEJA or similar laws to be effective, commanders in the field must have the authority to ensure, and take responsibility for ensuring that civilian contractors suspected of violating laws are investigated or prosecuted. This will require clarifying jurisdiction when contractors are working overseas, and follow-up. Contractors cannot be allowed simply to send employees home if they are caught breaking laws, as has happened in the past. The firms should be held responsible; if they obstruct efforts to investigate or prosecute their employees, then they should be fined or made ineligible for future government contracts. The point is that such contractors are the public face of the United States overseas. As one former contractor noted, the local population where some abuses occurred “think we’re all trash. It’s a shame. When I was there as a

⁸³ Eric Schmitt, “Senate Moves to Protect Military Prisoners Despite Veto Threat,” *New York Times*, 6 October 2005.

⁸⁴ See, for example, Philip B. Heymann and Juliette N. Kayyem, *Preserving Security and Democratic Freedoms in the War on Terrorism*, John F. Kennedy School of Government, 2004, accessed at the website of the John F. Kennedy School of Government at www.ksg.harvard.edu/bscia/longtermlegalstrategy, 4 April 2005.

⁸⁵ Glenn R. Schmitt, “Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforseen Loophole,” *Army Lawyer* (June 2005): 41–48.

soldier they loved us, but [company] employees have changed how they think about us. I tried to tell them that this is not how all Americans act, but it's hard to convince them when you see what they're seeing."⁸⁶

International Guidelines

In addition to affirming the Geneva Conventions, the United States also should lead the development of a broader framework of protections that addresses the full scope of new conflicts. This effort should reinforce the universally shared values that are at the core of the Geneva Conventions and the Universal Declaration on Human Rights.⁸⁷ The key to any effort, however, is ensuring enforcement.

A central problem in many conflict zones is the difficulty of distinguishing soldiers from civilians; from the U.S. perspective, this problem is most acute when trying to spot terrorists before they act. Local support is vital to identifying terrorists, so policies to engender local cooperation should be pursued. This is best accomplished by establishing stability, so that people can live normal lives. Three steps will help this effort. First, the United States and the international community should promote respect for the laws of war in all conflict zones, by all parties. As it has done in cases such as Cambodia, the international community should make clear to insurgent groups (like the Khmer Rouge) and governments that violations of basic rights will lead to isolation and sanctions.⁸⁸ Indeed, the United States could propose the provision of military assistance to the parties to a conflict that pledge to respect the laws of war, and abide by their pledge.⁸⁹

Notably, regional organizations have an important role to play in enforcing international laws and basic rights. There is a precedent in efforts by some regional organizations to promote good governance. The African Union (AU), for example, has established the African Peer Review Mechanism to monitor whether member states maintain what the AU considers appropriate standards regarding governance and the rule of law.⁹⁰ The AU's condemnation of the February 2005 coup that placed Faure Gnassingbé in power in Togo after his father's death helped pressure the new government into holding an election in

⁸⁶ O'Meara, "DynCorp Disgrace."

⁸⁷ On efforts to ensure that this document reflected universally held values, see Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights," *Notre Dame Law Review* 73 (May 1998): 1153–1189.

⁸⁸ Although sanctions are often controversial, they can be effective if narrow and targeted. See David Cortwright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000); Meghan L. O'Sullivan, *Shrewd Sanctions: Statecraft and State Sponsors of Terrorism* (Washington DC: Brookings Institution Press, 2003).

⁸⁹ I thank an anonymous reviewer for raising this point.

⁹⁰ Jakkie Cilliers, "NEPAD's Peer Review Mechanism," *Institute for Security Studies Occasional Paper* 64 (November 2002): 1–9.

April 2005, which Gnassingbé won.⁹¹ Similarly, Serbia's desire to join the European Union has led to an increase in arrests of war crimes suspects in the last year.⁹² The United States should encourage regional organizations to enforce similar standards with regard to the Geneva Conventions.

Second, international regulation of private security firms is needed to protect civilians and contractors; this is a global industry. The United States should take the lead in developing international standards, and in ensuring that its contractors uphold them.⁹³ These rules should ensure that contractors cannot exploit loopholes in jurisdiction if they commit crimes. Concurrently, the Geneva Conventions' protections for civilian contractors working with militaries should be reinforced.

Two options that have been proposed recently are voluntary codes of conduct for private security firms, and a UN database of private security firms, modeled along the lines of the UN Register of Conventional Arms, that could vet firms according to their professionalism and adherence to international law.⁹⁴ Each of these has merit; indeed, private security companies involved in peacekeeping operations created the International Peace Operations Association to promote self-regulation and ensure respect for humanitarian law, including the Geneva Conventions.⁹⁵ It is worth noting, however, that codes of corporate responsibility have often been promoted by corporations seeking to avoid state or international regulation. Moreover, the UK recently moved to national regulation after efforts at self-regulation by British private security firms failed.⁹⁶ The effectiveness of such codes in the private security sphere will depend on whether the market is truly competitive, and whether states, the main clients for their services, will hold companies to their commitments when national security concerns are at stake.

Third, international law already provides clear rules regarding the use of child soldiers that should be enforced. The United States has ratified the Optional Protocol to the Convention on the Rights of the Child, which requires states to do all they can to keep children from active participation in combat; it should do more to encourage its enforcement. Additionally, enlisting children under fifteen in the military or using them in combat is a war crime under the statute of the International Criminal Court (ICC). In spite of U.S. objections to

⁹¹ Lydia Polgreen, "African Nations to Step Up Pressure on New Togo Ruler," *New York Times*, 21 February 2005. The election was marred by violence, but most observers, including the United States, urged all parties to form a unity government after the elections. Bryan Mealer, "Togo Elections Spark Violent Protests," *Associated Press*, 27 April 2005.

⁹² Nicholas Wood, "Serbia Acts on War Crimes to Strengthen Ties to West," *New York Times*, 25 April 2005.

⁹³ Singer, *Corporate Warriors*, 240–242.

⁹⁴ Avant, *The Market for Force*, 186–188; Schreier and Caparini, *Privatising Security*, 116.

⁹⁵ Accessed at <http://www.ipoaonline.org/>, 6 October 2005.

⁹⁶ Schreier and Caparini, *Privatising Security*, 115.

the Court, it recently accepted the ICC as an appropriate venue for prosecuting war crimes in Sudan, so long as prosecutions are requested by the UN Security Council.⁹⁷ The United States could signal its acceptance in principle of using the ICC against any armed group that employs children in conflicts. Similarly, the United States could promote further measures explicitly to criminalize the use of child soldiers by sanctioning companies or countries that support insurgents that exploit child soldiers.

Failed and failing states present another critical issue. Not only may they provide havens for terrorists, but the wars that arise in failed states such as Liberia, Sierra Leone, and Afghanistan often degenerate into humanitarian catastrophes that require substantial help from the international community, as the examples of Somalia and Haiti in the 1990s show.⁹⁸ The international community cannot resolve the problems facing all failed states, but it should seek creative solutions to the security problems state failure engenders.

A range of options have been proposed to address the problem of failed states, including some that involve establishing at least partial international control over the territory of failed states through shared sovereignty or trusteeships.⁹⁹ Alternatively, if a sub-state actor is providing the functions of government, even if its efforts cover only part of the territory of a failed state, the international community might choose to acknowledge this, and work with it.¹⁰⁰ Respect for the Geneva Conventions and other laws of war could be criteria for supporting would-be rulers. Notably, recommendations for reforming UN peacekeeping operations include provisions for developing an interim legal code that could be used to regulate politics in transition, prior to the reestablishment of local legal and constitutional frameworks.¹⁰¹ Such measures would enhance international security by eliminating lawless territories and creating a more secure environment for local populations.

CONFRONTING TERRORISM

Strengthening the Geneva Conventions will not weaken U.S. efforts to fight terrorism; just the reverse. The United States long has sought to define itself in

⁹⁷ Warren Hoge, "U.N. Votes to Send Any Sudan War Crime Suspects to World Court," *New York Times*, 1 April 2005; Warren Hoge, "International War-Crimes Prosecutor Gets Lists of 51 Sudan Suspects," *New York Times*, 5 April 2005.

⁹⁸ On the costs to the international community of failed states, see Marina Ottaway and Stefan Mair, "States at Risk and Failed States," *Policy Outlook* (September 2004): 1–9.

⁹⁹ James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States," *International Security* 28 (Spring 2004): 5–43; Stephen D. Krasner, "The Case for Shared Sovereignty," *Journal of Democracy* 16 (January 2005): 69–83.

¹⁰⁰ Jeffrey Herbst, "Let Them Fail: State Failure in Theory and Practice" in Rotberg, ed., *When States Fail*, 311–316; Ottaway and Mair, "States at Risk," 7–8.

¹⁰¹ "Report of the Panel on UN Peacekeeping Operations," (Brahimi Report), August 2000, accessed at http://www.un.org/peace/reports/peace_operations/, 23 October 2005.

foreign policy by the promotion of liberal values, including respect for human rights and basic human dignity, the core elements of the Conventions. President Bush insists that “America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance.”¹⁰² Unless these declarations are backed up in practice, they will only engender cynicism and resistance.

Terrorist groups such as al Qaeda have repeatedly violated the Geneva Conventions by targeting civilians. Stronger U.S. support for the Conventions will not change this—but it will reinforce the stark differences between the two.

Moreover, the Geneva Conventions recognize that some of those engaged in combat are not entitled to POW status; these are generally referred to as “unlawful combatants,” although the phrase does not appear in the Conventions. Such combatants deserve the Conventions’ basic rights to decent treatment, but they are also subject to prosecution for their unlawful acts. Moreover, deliberately targeting civilians is a war crime in international law, which provides ample justification for terrorists’ incarceration and prosecution.

The United States has taken the lead in developing new international means to combat terrorism through mechanisms such as the UN’s Counter-Terrorism Committee, established in late 2001. The administration should build on this effort by supporting UN Secretary General Kofi Annan’s efforts to create a comprehensive convention for preventing, controlling, and suppressing terrorism.¹⁰³ Linking this to the Geneva Conventions’ proscriptions on attacking civilians will underscore the criminal nature of terrorist acts, and terrorists.

Establishing a convention on terrorism also will enable the United States to address some of the problems it sees in the Geneva Conventions’ guidelines regarding POWs without rejecting the Conventions’ broader utility. Opinions differ on whether the laws of war or criminal law provides the best framework for fighting terrorism. By establishing a convention on terrorism the administration might seek to develop a common approach to terrorist suspects that incorporates elements of criminal law as well as the laws of war, to help distinguish between terrorists and members of an armed group fighting a war, for example. Doing so would not deny terrorists the Conventions’ basic protections, but it would enable the United States to legally incarcerate suspected terrorists in a manner similar to the treatment of criminals, as other states fighting terrorist groups have done, rather than as POWs.

¹⁰² George W. Bush, “State of the Union Address,” 29 January 2002, accessed at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>, 4 April 2005.

¹⁰³ Kofi Annan, *In Larger Freedom: Towards Development, Security, and Human Rights for All* (New York: United Nations, 2005).

The Geneva Conventions' core protections for both soldiers and civilians remain vital, but they do not address the full continuum of conflicts that exist today. The United States has an interest in strengthening these conventions so that protections apply to a broader range of conflicts. This will strengthen protections for Americans, and it will indicate that the United States practices what it proclaims, by providing security and protection for others caught up in conflicts.*

POSTSCRIPT

The U.S. Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*¹⁰⁴ that detainees in U.S. custody have basic rights under the Geneva Conventions supports one of my central recommendations: the United States should sustain the Geneva Conventions even as it prosecutes the war on terror. The Supreme Court's ruling also creates an opportunity for the United States to strengthen both domestic and international laws that protect basic rights. It should use this opportunity to address not just terrorism but the new wars and warriors discussed here, by affirming a law-based approach to conflict and U.S. support for protections against cruel or degrading treatment by all participants in international and inter-state conflicts.

¹⁰⁴ *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, 548 U.S. — (2006).

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