WORKING PAPER

Reviving Geneva

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In January 2002, then–White House legal counsel Alberto Gonzales wrote a memorandum to President Bush in which he argued that "the current paradigm renders quaint" many of the provisions of the 1949 Geneva Conventions.[1] This remark set the stage for a series of efforts by the Bush administration to claim that the Geneva Conventions did not apply to the global war on terror, that they applied to some detainees but not others or, at a minimum, that the president is entitled to interpret the treaty's "grave breaches" clauses as he pleases.

These and subsequent actions have set off what some have called a crisis in the laws of war, ironically pitting the U.S. government (perhaps the most Geneva-compliant superpower in history) against human-rights-minded elites whose admirable goal is to promote the very principles for which American political culture has long stood. The arguments of the Bush administration when it comes to torture, prisoner-of-war status and extraordinary rendition have been met with outrage by the international community, constitutional scholars and human-rights organizations like Amnesty International, which has referred to Guantánamo Bay as the "gulag of our times."[2]

But the polarization of these two camps obscures the broad middle ground that exists between them. Both have forgotten that the laws of war always represented a compromise between humanitarian principles and security needs. Advocates for applying current international humanitarian law to all detainees in the global war on terror may hold the moral high ground, but they often misconstrue the political logic of the Geneva regime and its historical context. Those who argue the conventions can and should be disregarded at great powers' discretion gravely underestimate the importance of the regime to securing U.S. interests in the new century.

The contemporary problem—for both governments and transnational rights advocates—is that neither sovereignty nor battle space is what it used to be. The solution is neither to blindly promote adherence to the letter of the law nor to continue to willfully flout its spirit. Instead, both the U.S. government and

[1] Albert Gonzales, 2002. "Memorandum for the President: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban." January 25.
[2] Amnesty International. 2005. *Annual Report.* London: Amnesty International.

members of the transnational human-rights network should seek to update and clarify these rules through an international conference that would lead toward a new additional protocol to the Geneva Conventions.

Striking a balance between timeless moral obligations and new strategic concerns would reaffirm, strengthen and be consistent with the principles of the original conventions. It is also the surest way to prevent the regime from buckling under the weight of our changing times. In this, the United States government and transnational human-rights community should be allies, not adversaries.

It is tempting to interpret the crisis in the laws of war as the inevitable triumph of realpolitik over morality. But this is not simply a case of might attempting to make right. The truth is powerful governments often incur significant short-term costs, even in war, to maintain a set of rules they view as in their long-term strategic or systemic interests.[3]However, social-science research shows that international rule-sets generally weaken when historical trends outpace the treaty provisions to which states have agreed. We are living in such an era. While the moral principles of Geneva may be timeless, the literal rules no longer speak either to the realities of warfare or to evolving global norms.

Consider the following. The Bush administration did not invent the idea that detainees could be held indefinitely. In fact, this principle forms the bedrock of the laws of war: prisoners are not to be punished but simply removed from the battlefield. They must be repatriated only at the conclusion of hostilities or when the detaining power is certain the individual will not resume hostilities if released. But times have changed. Some asymmetric conflicts may never have an official "end date." It is difficult to know who might, when released, join the insurgency. In such a situation, the very application of Geneva would seem to conflict with the human-rights outcome many wish to deliver to detainees: some guarantee of due process and an end to indefinite internments.

This is why an area in need of serious review is the relationship of nonstate actors to these rules and their status under the law. In the majority of conflict situations today, the parties to the conflict include nonstate entities of various types: guerilla groups, insurgents, maritime pirates and often mere criminal bandsconsisting ofdrugged-up child recruits and armed by a never-ending supply of illicit small arms. Even the most-powerful country in the world is waging a so-called war against a transnational network of private citizens,

[3] Ward Thomas. 2001. *The Ethics of Destruction: Norms and Force in International Relations.* Cornell University Press.

rather than a sovereign state. All this complicates conventional definitions of "armed conflict"—a concept fundamental to the original treaties.

These nonstate players were never asked to become party to humanitarian law: indeed, by definition, they were excluded from the negotiation of these norms as well as from the opportunity to gain legitimacy by committing to uphold them. (Were they involved in creating the rules, the rules might look notably different.) Yet governments now aim to hold nonstate actors accountable to rules created to serve states. This creates a sense of injustice among revolutionaries around the globe and a view that basic humanitarian standards are little more than a conspiracy by the club of sovereigns to trample on the self-determination of others.

Let's face facts: in today's conflicts, taming war depends on bringing nonstate actors into the humanitarian fold. Yet this cannot be done without giving those actors an opportunity to buy into a revised version of the rules themselves. True, by engaging nonstate actors, the international community runs the risk of legitimizing their use of violence. But aren't some uses of nonstate violence more legitimate than others? Might ceding that be a small price to pay if insurgents, for example, could agree to limit their attacks to military rather than civilian objectives, or could agree to a minimum age for recruitment? Whether governments invite some limited nonstate participation in the negotiation of new norms (with all the practical problems this creates), or simply take their interests into account informally, the importance of creating rule-sets with some measure of credibility for those players cannot be overstated. The current Geneva regime fails in this regard.

Another trend in warfare that has outpaced international law is the increasing delegation of military services to private security firms not bound by international treaties. While it is an exaggeration to argue that private contractors operate in a complete legal vacuum, serious jurisdictional problems exist with respect to holding private security firms accountable for their employees' behavior in conflict zones, and the existing legal options (such as the U.S. Alien Tort Claims Act) are beyond the scope of Geneva. Thus, while U.S. soldiers have been tried for the atrocities at Abu Ghraib, contractors also involved in those events have not; DynCorp employees found to have been involved in rape and trafficking in the former Yugoslavia faced no-more-serious consequence than termination of their contracts when caught.[4]

Speaking of which, consider another substantive weakness of humanitarian law. While the protection of civilians has become the rallying cry for military crusades in Kosovo and East Timor, the conventions actually provide

[4] Peter Singer. 2003. *Corporate Warriors: The Rise of the Privatized Military Industry.* Cornell University Press.

very few protections for civilians. To be sure, wanton slaughter is prohibited. But belligerents must merely avoid hitting civilians *on purpose* in order to comply with international law.[5] While the significance of even such a rule is not to be discounted, this leaves an enormous gap between protection on paper and the needs of innocent individuals on the ground. What governments call "collateral damage" is perfectly legal under the law and has resulted in untold carnage in the past fifty years. Nor are states required to do anything in the aftermath to assist those they have "regrettably" maimed or whose families have been killed.[6] And although the conventions include reference to the specific protection of women and children, they do not deal at all with the conflict-related factors that account for the majority of child and female deaths, including disease, malnutrition, displacement and gender-based violence.[7]And while the law pays at least some attention to those who hit civilians, it pays little to those (particularly insurgents) who make this likelier by using them as human shields.

Besides these substantive gaps in the law, the regulatory architecture of Geneva is out of touch with emerging human-rights norms. Unlike other security regimes like the Non-Proliferation Treaty, the Geneva regime provides absolutely no international mechanism for authoritatively interpreting or enforcing its rules. The International Committee of the Red Cross's (ICRC) role as "guardian of the conventions" comes closest. The treaties provide for the ICRC to monitor detention practices and quietly suggest improvements to states, but the ICRC's mandate also prohibits it from openly shaming any particular state or turning evidence over to the only international body that could potentially hold violators accountable, the International Criminal Court. It remains up to states to determine how the rules are to be interpreted and applied: the failure of the international community to hold the governments accountable is partly a result of the treaty drafters' failure to set up accountability architecture.

All of this explains why the U.S. government has managed to claim it is acting in the spirit of the original Geneva Conventions, while human-rights advocates claim it is violating international norms. The problem is not just that the law no longer fits with the realities of war. It is also that the conventions are no longer consistent with the spirit of contemporary human-rights principles as reinterpreted by tribunal judges, international lawyers, human-rights advocates and diplomatic precedent. For example, the original Geneva and Hague conventions were not originally intended to protect noncombatants, but rather to

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[5] See David Rivkin and Lee Casey. 2003. "Leashing the Dogs of War." *The National Interest.*

[6] For more on this issue, see the Campaign for Civilian Victims in Conflict website: http://www.civicworldwide.org.

[7] Judith Gardam and Michele Jarvis. 2001. *Women, Armed Conflict and International Law.* The Hague: Kluwer Law International.

draw a distinction between legitimate and illegitimate uses of political force by giving professional soldiers privileges if captured which were summarily denied to irregulars.[8] Today, however, the protection of noncombatants per se has been reconstructed as the raison d'être for the regime. Similarly, whereas adherence was originally understood to be dependent on reciprocity, reflecting the understandings of states that one party to a conflict could not be expected to incur losses to its vital interests in order to protect the humanitarian needs of the enemy, international opinion now understands the conventions to bind each state irrespective of what their enemies do.[9]

This places the emerging ethical norms seriously out of step with states' actual obligations under international law, providing many a loophole for savvy, security-minded international lawyers to exploit. International moral understandings—what lawyers call "soft" or "customary" law—have progressed to a higher standard of "humanity" than originally codified in the treaties. But this "consensus" has developed largely through international jurisprudence and non-binding declarations rather than through multilateral agreement among the governments that are now being asked to uphold these standards. And since it is the governments and their weapons-bearers who must be relied upon to exercise restraint in combat and upon capturing enemy soldiers, it stands to reason that the regime would be strengthened by incorporating an updated basic consensus among states abouthow far they are willing to trade humanitarian principles against their security-seeking practices.

When international rule-sets come under strain from changing historical circumstance, four options are available to policy makers. First, they can continue to draw nostalgically on existing rules as a means of criticizing the noncompliance of powerful actors. To date, this has been the strategy of the human-rights groups and certain foreign governments. Geneva proponents are so committed to the existing treaties that they are missing a chance to engage governments on how to reform these rules to better achieve humanitarian goals. This has a positive effect, and a negative one. It validates the spirit of the rules and of their undeniable moral legitimacy. But it also exposes the growing gap between the rules and the practice of governments, which increasingly sends a

[8] David Rivkin and Lee Casey. 2003. "Leashing the Dogs of War." *The National Interest.* September.

[9] Jeremy Rabkin notes that this is based on what a conflation of the laws of war, which originally were bargains between governments over how to treat one another's captured soldiers, with human rights law, whose purpose is to constrain governments' treatment of their own citizens. See Rabkin, 2002, "After Guantanamo," *The National Interest.* June Issue.

signal that the rules are meaningless and confirms the realist dictum that might makes right.

Second, actors can attempt to reinterpret the rules in accordance with the changed tides. This has been the policy of the Bush administration, first seeking to redefine the scope of application of the treaties, then the meaning of the wording. The problem with this approach is that it rarely reflects an international consensus required for converting one's own compliance into moral leverage. Because much of the value of soft power is the ethical high ground that assists in securing allies, giving troops a sense of purpose and galvanizing public opinion in favor of foreign policy, a sense of collective legitimacy to one's actions is vital to an effective foreign policy. Though even mere lip service to international law belies a commitment to the treaties themselves, if both allies and enemies view it as hypocrisy, a government foregoes the social benefits of rule following.

Third, political players can attempt to add to the existing rules in order to fill in the gaps. To some extent, this process has been occurring since the end of the cold war. Examples include the Ottawa Treaty on land mines, the Optional Protocol to the Convention on the Rights of the Child that bans the recruitment and use of child soldiers, the expansion of limits on conventional weaponry that may be used, such as blinding laser weapons, and the articulation of sexual slavery as a war crime and crime against humanity in the Rome Statute of the International Criminal Court. An additional protocol to the 1980 Convention on Conventional Weapons has recently been adopted, requiring signatories to clear "explosive remnants of war" from battlefields at the conclusion of hostilities. Work has just been concluded on a separate treaty to drastically curtail the use of cluster munitions.

Such efforts at building on existing law are certainly valuable. The perverse side effect, of course, is that such piecemeal attempts only multiply inconsistencies and abnormalities in the law. For example, the technically legal U.S. rules of engagement in Iraq allow for clearing houses identified as military objectives with fragmentation grenades, a set of rules which has led to atrocities, as at Haditha; whereas a nonlethal alternative, tear gas, is technically prohibited for use in international conflicts by the Chemical Weapons Convention. Similarly, while the Convention on Conventional Weapons now prohibits the use of lasers that blind people permanently, weapons-bearers ironically retain the right to shoot those same persons dead; while flamethrowers at point-blank range are considered inhumane when used on civilians, they are acceptable when used on soldiers; and burning civilians to death with fuel-air explosives designed to take down buildings remains acceptable under the doctrine of "double effect." Research on international-norm compliance suggests that bodies

of rules plagued by inconsistency and ambiguity are least likely to elicit strong legitimacy and compliance over time.[10]

A fourth solution, and the best option for both the United States and the international community, is to negotiate an updated version of specific treaty provisions through a new additional protocol to the Geneva Conventions. Additional protocols are, in essence, minitreaties that detail new provisions or clarify old ones, and take precedence over earlier versions of a document once in force, for those governments who sign and ratify them. They can also be used to consolidate and codify customary-law understandings that have evolved since an earlier treaty came into force. Whether or not any given state eventually ratifies, the presence of all states in the negotiating process provides a deliberative venue in which some consensus (albeit one that typically appeals to the lowest common denominator) can be achieved on deeply contentious issues. Participation in a negotiating process does not require states to sign if they are unsatisfied with the final document (thus being a low-risk strategy for the United States), nor does it invalidate preexisting commitments for those who do not sign (thus being a low-risk strategy for those concerned with "watering down" the original landmark conventions).

Of course there are opponents to this idea. Again we see the two poles in the Geneva Conventions debate: the human-rights advocates and the U.S. government. Some human-rights activists, including representatives of the ICRC, where these currents have stalled in recent years, argue that a new conference risks rolling back all the gains made in the last fifty years through international jurisprudence, transnational advocacy and persistent pressure on states. At an address to the U.S. Naval War College in 2003, legal advisor to the ICRC, Jean-Philippe Lavoyer, stated ambivalently, "To open up the Geneva Convention could easily mean opening a Pandora's box, with very uncertain results at the end of the day." But the United States and several other countries already reject many of those standards; a treaty where some common ground could be forged and enshrined in hard law might be the only way to change this.

The process itself will provide a venue for a reasoned discussion of how to weigh humanitarian ideals against security concerns. And, a new protocol is an opportunity for human-rights advocates as well to address many of the other shortcomings of the original treaties, and to engage the specific concerns of governments directly, through diplomacy rather than by lobbing condemnations from a distance. Precisely because international norms, if not law, have progressed since the last revision of the rules, human-rights advocates stand a

[10] Vaughn Shannon. 2000. "Norms Are What States Make of Them: The Political Psychology of Norm Violation." *International Studies Quarterly* 44 (2): 293–316.

chance **of** codifying many of the new moral understandings they have helped to generate since the end of the cold war.

And on the other side, we have the U.S. policy makers and analysts invested in Washington's current unilateralist approach to the war on terror. It may be argued that the United States is above the need for multilateralism given its peculiar power and involvement in conflicts abroad. But these arguments not only contradict the Declaration of Independence, which calls for "due regard for the opinions of Mankind," they also run counter to ensuring America's global power position.

On a most-basic level, the expectation that war will be circumscribed by standards of civility is crucial for maintaining desired levels of troop morale, recruitment quotas and public support for armed conflict among a democratic citizenry with a high casualty aversion. Social-science research has shown that adherence to the Geneva regime engenders reciprocity from other signatories.[11] And America's reputation for adherence to multilateral rules may yet matter in future foreseeable conflicts with China, Russia, Iran or Venezuela—the United States is currently sending the opposite signal. But most importantly for an incoming U.S. administration, the United States has a stake in the survival of these principles themselves, which lock in a view of international order favorable to powerful governments with sophisticated formal armies, and a view of justice consistent with the principled ideals the United States embodies and seeks to spread. So rather than seeing the inevitable difficulties along the way, we must see the greater good of surmounting the greater obstacles.

It is precisely at these kinds of historical junctures that additionalprotocols are most valuable because they help close the inevitable gap between legal rules, global norms and political realities. When the 1949 Geneva Conventions were appended in 1977, it was in response to the increase in intrastate war and nonstate military activity after decolonization, and to the sense that the specific limits on weaponry in the earlier treaties had become outdated. The new laws were only a limited improvement over the earlier conventions, but at the time, their achievements were significant. Whereas the 1949 conventions apply almost in total to international wars, the Additional Protocol II of 1977 developed a basic rule-set to apply to civil wars. Whereas the 1949 Civilians Convention protected innocents from mistreatment only once captured or under foreign rule, the additional protocols codified the principle that they should be protected from the conduct of hostilities as well, clarifying how to distinguish military from civilian objectives, and which actors constituted civilians and combatants.

Even these advances have become outmoded, however. A new Conference of State Parties is needed to address issues like the precise meaning

[11]For example, a recent statistical analysis of laws of war violations demonstrates "non-compliance tends to be met with non-compliance." See James Morrow, 2007. "When Do States Follow the Laws of War?" *American Political Science Review.* Volume 101, No. 3.

of terms such as "definite military advantage"[12]andthe specific process for making detainee status determinations (and who should oversee or provide oversight for this process). Other problems to be dealt with include the culpability of nonstate actors such as peacekeepers, insurgents and private contractors for their actions in conflict and postconflict zones and the responsibility of states for the comprehensive, rather than limited, protection of civilians against wars' short- and long-term effects.

The International Committee of the Red Cross has already taken steps in this direction, to which a new U.S. administration could usefully contribute. The organization has acknowledged that the war on terror poses special challenges to the Geneva regime, and Lavoyer has argued for both the clarification of the law in areas where it is vague, and the development of the law in areas where there are gaps.[13]The main obstacle to such legal development, he stated in his 2003 speech, was the "current international climate." He went on to say: "If the general mood were favorable to a normative development, the ICRC would be pleased to carry the ideas forward, together with governmental and other experts."

Whatever the outcome of the U.S. elections in November, the "general mood" within the United States government is likely to be favorable, at a minimum, to reconsidering existing policy on international humanitarian law. As is evident from the Bush administration's declining poll numbers, increasing tension with former allies, and floundering efforts to win hearts and minds in the global war on terror, no country in the world has a greater stake than the most powerful in a set of *collectively shared* ethical standards against which to measure "civilized" international behavior. If the existing standards are inconsistent with political reality, it is the hegemon's responsibility and opportunity to work with its partners—including the International Committee of the Red Cross—to update the standards. A "go it alone" approach to reinterpreting the existing rules has backfired and does nothing to address the treaties' real limitations. The Geneva Conventions must be revived, not reinterpreted. And the United States and the human-rights community should be working together, not against one another, to that end.

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[12]This is treaty language used to delimit when collateral damage is acceptable, but it's ambiguous and undefined, leaving the ethics of targeting decisions up to the subjective judgments of military planners.

[13] Jean-Philippe Lavoyer. "International Humanitarian Law: Should it be Reaffirmed, Clarified or Developed?" Address before the United States Naval War College, June 26, 2003.