

# **The Geneva Conventions & Contemporary Asymmetric Security Threats**

Matthew Kenneth Dinan  
The Project on International Peace and Security (PIPS)  
Department of Government  
The College of William and Mary  
P.O. Box 8795  
Williamsburg, Virginia 23187-8795  
pips@wm.edu

Original paper presented for delivery at the first annual Project on International Peace and Security conference sponsored by Booz Allen Hamilton in McLean, Virginia, April 17, 2009.

Institute for Theory and Practice of International Relations  
Government Department  
The College of William and Mary  
P.O. Box 8795  
Williamsburg, VA 23187-8795  
T. 757.221.3020  
F. 757.221.1868  
pips@wm.edu

## **The Geneva Conventions and Contemporary Asymmetric Security Threats**

Alberto Gonzales, along with other policy makers and academics, have called the Geneva Conventions a “quaint” relic of a bygone era of interstate conventional warfare and argue that the Conventions are therefore inapplicable and of little utility to contemporary non-state security threats.<sup>i</sup> Some, such as Gonzales, wish to disregard the Conventions when dealing with non-state security issues, while others seek to revise the Conventions in the hope that such edits will renew their applicability. However, the Conventions are in fact applicable to contemporary security threats and should be an integral part of U.S. counterterrorism and counterinsurgency operations.

### **Arguments against the Conventions’ applicability**

Those seeking to dismiss or rewrite the Conventions make a number of false assumptions about the nature and purpose of the Conventions that leads to poor policy recommendations. These assumptions are:

- Contemporary threats are not the type of threats to which the Conventions were meant to apply. The Conventions were designed exclusively for interstate conflicts fighting traditional wars. Non-state actors, such as terrorists and insurgent groups, did not have the significant role in the types of conflicts that the Conventions were meant to apply to as they do in present-day security issues. These new security threats require a new paradigm in the laws of war.<sup>ii</sup>
- There is no benefit to following the Conventions where our enemies do not do so themselves. The primary purpose of the Conventions, the humane treatment of prisoners of war, was to improve the treatment of our own service members detained by an enemy power. Al Qa’ida and the Taliban do not respect the Conventions in their actions and therefore the United States has no obligation and no reason to follow the Conventions in its actions.<sup>iii</sup>

- The Conventions harm U.S. intelligence efforts. Common Article III of the Conventions, which the Supreme Court has ruled applies to all detainees, hamstring investigation and intelligence gathering, which are critical to counter-terrorism and counterinsurgency efforts, because it does not allow for the full range of effective techniques to be utilized. The Conventions are therefore harmful to U.S. security interests because they deny the use effective interrogation methods.<sup>iv</sup>
- The Conventions do not allow for the successful prosecution of terrorists. Common Article III, as interpreted by the Supreme Court, hampers the prosecution of terrorist suspects by providing them with the full protection of due process under the Constitution in civilian criminal court. Civilian courts are ill-equipped to handle contemporary international terrorism cases because:
  - Terrorism cases involve sensitive or classified information
  - A large number of lives are at stake
  - Terrorist organizations are international, sophisticated, and complex<sup>v</sup>

### **The Conventions as a Tool of Soft Power**

Each of these assumptions underlying the criticism of the Conventions and the calls for their reform are based on misguided understanding of what applying the Conventions to non-state security threats entails.

- The Conventions can be applied to irregular warfare. The Conventions, and their underlying principles, have been applied to insurgents before. The United States treated rebels in the Civil War as prisoners of war<sup>vi</sup> and applied the Conventions to the Viet Cong in Vietnam.<sup>vii</sup> While the nature of warfare varies across history, the basic principles behind them remain. Soft power as a strategic tool dates at least to the seventh century Chinese philosopher Lao Tsu.<sup>viii</sup> The concept of *jus in bello*, a standard of limiting violence in warfare, is as old as organized violence itself. Rules of warfare date back at least to the Book of Deuteronomy.<sup>ix</sup> Discriminate usage of violence promotes soft power goals, in any type of conflict. Furthermore, irregular warfare and asymmetric security threats are not radically new to the United States.
- Applying the Conventions provide a strategic benefit. Soft power goals, such as the “moral high ground” and “winning the hearts and mind,” are promoted by the Conventions. Better treatment for our own captured service members is not the only reason to apply the Conventions to detainees. The moral high ground is an important part of combating asymmetric security threats. For example, the United

States treated captives in the Revolutionary War humanely to gain the moral high ground.<sup>x</sup> In counterinsurgency operations such Iraq and Afghanistan, winning the “hearts and minds” of the local population is critical.<sup>xi</sup> Insurgencies are a war for the people and the Conventions provide the United States with a soft power tool to help win that battle. Furthermore, doing so in face of our enemies’ indiscriminate violence improve our image relative to theirs.<sup>xii</sup> By de-legitimizing our enemies we inhibit their ability to recruit and lessen the threat they pose.<sup>xiii</sup>

- The Anbar Awakening shows how the backing of the local population can shift to the side that harms the locals the least. Al Qaeda’s indiscriminate attacks lead many local Sunni militia groups to start backing the U.S.<sup>xiv</sup>

- Torture is an ineffective interrogation technique. The coercive techniques banned by the Conventions are ineffective because they do not elicit truthful information from detainees. States did not sign the Conventions because they were willing to give up a useful tool for the sake of advancing humanity, but because doing so provided a soft power benefit. Torture is designed not to get to acquire “the truth,” but rather to get what the interrogators want to hear.<sup>xv</sup> Operationally, according to memos from the military, it is ineffective as garnering reliable information.<sup>xvi</sup> As General Petraeus says:

*“Certainly, extreme physical action can make someone ‘talk;’ however, what the individual says may be of questionable value”<sup>xvii</sup>*

Furthermore, non-coercive techniques that are allowed by the Conventions have proven to be effective; a military agency cites over a 90% success rate for non-coercive interrogation methods.<sup>xviii</sup> For example, the leader of al Qaeda in Iraq was successfully found and killed with intelligence gathered from non-coercive methods.<sup>xix</sup>

- Criminal prosecutions are possible under the framework of the Conventions. While the Conventions do not allow for legal action to be taken against those who merely fought in a war, prosecution of large numbers of insurgents hampers efforts at building a functioning post-war political system—an important part of an exit strategy for counterinsurgency.<sup>xx</sup> Prosecutions of war crimes are quite possible under the Convention’s legal framework. The Conventions forbid only “The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>xxi</sup> This does not represent an undue burden on those seeking to create military tribunals to prosecute war crimes. Additionally, the United States already possesses a

functioning legal system that meets these requirements for terrorists. There have been many successful prosecutions of highly complex, dangerous international terrorist and criminal organizations in U.S. federal court.<sup>xxii</sup> Furthermore, prosecuting terrorists in civilian courts denies them legitimacy and potency.

### **Policy Recommendations**

In light of these facts, the United States should adopt the following policy recommendations:

1. The Conventions should not be amended. They should be applied to non-state actors. Doing so allows the United States to seize the moral high ground and helps the United States win the hearts and minds of the international community in what should be seen as a “counterinsurgency” against al Qaeda and its allied terrorist groups. By applying the Conventions to non-state actors, the United States legitimizes its action while de-legitimizing the actions of terrorists and insurgents. The Conventions must be understood as an essential part of a larger plan to achieve victory, no different from any other strategic or tactical approaches, because they help diminish the support for terrorist and insurgent groups.
1. Proven, non-coercive methods of interrogations that are consistent with the requirements of the Conventions should be utilized at all times. These methods represent the most effective strategic tool in the intelligence effort so critical to counterterrorism and counterinsurgency. Torture and other coercive methods, such as degrading, de-humanizing and humiliating treatment, should be strictly banned. Interrogators who violate these guidelines should be punished for insubordination and removed from their position as a result of hampering U.S. intelligence efforts.
2. Soft power should be part of U.S. strategy to counter asymmetric threats. The United States should make an explicit and focused effort to publicize our enemies’ failure to comply with international law while promoting our own compliance, utilizing it as a public diplomacy advantage. Insurgent attacks that results in civilian victims should be publicized in local and international media outlets. Members of the media, as well as organizations such as the Red Cross, should also be given reasonable access to U.S. detention facilities so that U.S. humane treatment of prisoners can be objectively verified and contrasted to the actions of insurgent and terrorist groups. In this way, the United States can increase its soft power and de-legitimize its opponents.
3. Insurgents should not be treated as criminals. Not treating insurgents as criminals helps foster the building of a post-war political framework that includes some

opponents, as is the case in contemporary Iraq. Doing so also exploits any fissures within the insurgency, preventing more moderate elements from being thrown out with the bath water. When insurgents or other combatants, including our own troops, commit violations of the laws of war, they should be prosecuted under military tribunals that are consistent with the requirements of the Conventions and has been successfully done in the past.

4. Terrorists should be prosecuted in civilian court. The Department of Justice should utilize institutional memory gained from the successful investigations and prosecutions of past cases involving terrorist and transnational criminal organizations. Interacting with the intelligence community, long-term investigatory strategies can penetrate the upper ranks of groups such as al-Qa'ida, leading to successful dismantlement of the organization and prosecutions of the individuals involved.

### ***Emerging Threats Addendum: Analysis and Policy Recommendations***

Beyond terrorists and insurgents, new asymmetric threats are emerging. The international legal framework of the Conventions is applicable to these developing threats as well.

- Mexican Drug Cartels

While the violence in Mexico is significant, the cartels are still criminal organizations that represent a threat to civil society. They are yet to pose an existential threat to the integrity of the Mexican state---claiming so is sensationalism.<sup>xxiii</sup> As such, they should be combated by law enforcement to the greatest extent possible. Acts of abuse which violate the Conventions by the Mexican police damages the soft power of the Mexican government when battling cartels. The legal rules under the framework of the Convention promote the legitimacy of the Mexican state and helps in the creation of a professional and effective law enforcement.

*Therefore* the United States should encourage reform of the police forces and greater utilization of the more professional Federal Investigations Agency (AFI). Creating a paramilitary force out of highly screened, urban combat trained military members, perhaps replacing the current Gendarmerie, the Federal Preventive Police, could bridge the gap between using military force, necessary in the short-term, and law enforcement, necessary in the long-term for the legitimacy of the Mexican state. The United States should utilize U.S. law enforcement to investigate, arrest, and convict member of Mexican Cartels, as well providing training the Mexican AFI, army, and police. While the current events to investment in military equipment<sup>xxiv</sup> are a step in the right direction, the building of capable, dependable, and professional law

enforcement in Mexico should be the cornerstone of U.S. policy in Mexico's drug war.

· Somali Pirates

The issue of piracy in the greater Gulf Aden region had become a significant threat to international shipping, as well as U.S. economic and security interests. As well as being a violation of the criminal code,<sup>xxv</sup> piracy is a long standing crime under the laws of war and has been acknowledge as such by the Supreme Court.<sup>xxvi</sup> The Conventions would not hamper any prosecution of pirates.

*Therefore*, the Untied States can utilize either a military tribunal system, so long as it meets Common Article III requirements, or the federal court system in prosecuting captured pirates. While any long term strategy to combat piracy would have to initial elimination of ports available to such pirates, the current anti-piracy efforts can proceed with the use of military force by the U.S. Navy and the use of civilian courts in prosecution, due piracy unique status as falling under both the paradigm of criminality and a violation of jus in bello principles by the current international legal framework.

## Conclusion

The Conventions should play a major role in the wars of the twenty-first century and should be recognized for the strategic advantage they afford the United States when waging asymmetric wars. Policy makers should adhere to them when formulating counterinsurgency, counterterrorism, and intelligence strategies.

---

i. Alberto Gonzales "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, 2005

ii. Gonzales; Renee De Nevers, "Modernizing the Geneva Conventions" *The Washington Quarterly* Vol. 29 No.2 (Spring 2006); Charli Carpenter, "Geneva 2.0" *The National Interest*. No. 96 (July-August 2008) 60-72; Greogry Rose "Updating International Humanitarian Law and the Laws of Armed Conflict for the Wars of the 21th Century" *Defender, The National Journal of the Australia Defence Association* VOL XXIV No. 3 (Spring 2007) 21-22

iii. Memorandum for the President, Alberto Gonzales, Decision re application of the Geneva Convention on Prisoners of War to the conflict with Al Qaeda and the Taliban, January 25, 2005

iv. For a summarization and debunking of this critique, see: Steven Ratner, "Think Again" *Foreign Policy*. (March/April 2008)

v. Michael B. Mukasey, letter to the editor, *The Wall Street Journal*., Wednesday, August 22, 2007

vi. Lieber, F. "Law of War: General Order No. 100 Instructions for the Government of the Armies of the United

---

States in Field.” *The Avalon Project at Yale Law School*

vii. “The United States Government is applying the provisions of the Geneva Conventions and we expect the other parties to the conflict to do likewise.” -- 53 U.S. Dept. State Bull. (No. 1368) 447 (Sept. 13, 1965)

viii. George R. Goethals, Georgia Jones Sorenson, *The Quest for a General Theory of Leadership* (Northampton, Massachusetts: Edward Elgar Publishing, 2006)

ix. GA Raymond, “Lieber and the International Laws of War.” (Columbia, South Carolina: University of South Carolina Press, 2005)

x. W.C. Ford, Ed., “Journals of Continental Congress, 1774-1789” (Washington, D.C.: Government Printing Office, 1906)

xi. Petraeus, General David H. Letter to United States forces serving in Multi-National Force-Iraq. May 10, 2007.; see [http://www.mnf-iraq.com/images/stories/CGs\\_Corner/values\\_message\\_\(10\\_may\\_07\).pdf](http://www.mnf-iraq.com/images/stories/CGs_Corner/values_message_(10_may_07).pdf).

xii. *The Economist*. Al-Qaeda: The self-destructive gene, Jul 17th 2008

xiii. Tom Malinowski, Richard Clarke, “Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay” *The Annals of The American Academy of Political and Social Science*. 618 Annals 148 (July, 2008)

xiv. Alissa Rubin, Damien Cave, “In a Force for Iraqi Calm, Seeds of Conflict,” Middle East, *The New York Times*, December 23, 2007

xv. Malinowski, Clarke

<sup>xvi</sup> “Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation” HG JPRA-CC/25 Jul 02/DSN 654-2509

xvii. Petraeus

<sup>xviii</sup> “HG JPRA-CC/25

xix. Mark Bowden, “The Ploy: The inside story of how the interrogators of Task Force 145 cracked Abu Musab al-Zarqawi’s inner circle—without resorting to torture—and hunted down al-Qaeda’s man in Iraq,” *Atlantic Monthly* Volume 299 No. 4 (May 2007)

xx. David Galula, “Counterinsurgency Warfare: Theory and Practice” (Westport, Connecticut: Greenwood Publishing Group, 2006)

xxi. Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

xxii. Kelly Anne Moore, letter to the editor, *The New York Times*, August 21, 2007; John C Coughenour, letter to the editor, *The New York Times*, November 1 2007

<sup>xxiii</sup> *The Economist* “Taking on the narcos, and their American guns” Apr 2nd 2009

<sup>xxiv</sup> *The Economist* "Taking on the narcos, and their American guns" Apr 2nd 2009

<sup>xxv</sup> 18 U.S.C. 2280 - Violence against maritime navigation and the prime section from Chapter 81 (Piracy and Privateering) § 1651. Piracy under law of nations: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."

<sup>xxvi</sup> *THE PAQUETE HABANA*, 175 U.S. 677 (1900)