

**Contemporary Asymmetric Security Threats and the
Continuing Applicability of the Geneva Conventions:
Background Brief**

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

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

“Plus Ça Change, plus C'est La Même Chose”

INTRODUCTION

Did “9-11 change everything?” The assertion has been made in foreign policy debates, from political, bureaucratic, and academic figures, that the events of September 11, 2001 (hereafter 9-11) did just that. The attacks had immediate and powerful effect upon the populous of the United States;¹ it lead to the first invocation of Article 5 of the North Atlantic Treaty Organization (NATO) charter; former President George W. Bush described it as the beginning of “the decisive ideological struggle” of the age;² and it was said to be the harbinger of a “new kind of war.”³

Such a fundamental shift would imply that many of the international institutions designed in the post-World War II era are no longer applicable to the current state of world affairs. Nowhere has this assertion generated more debate than with regard to the

¹Howard F. Stein “Days of Awe: September 11, 2001 and its Cultural Psychodynamics” *Journal for the Psychoanalysis of Culture and Society* 8.2 (2003), 187

² 10 January 2007 [Surge Speech]: “The challenge playing out across the broader Middle East is more than a military conflict. It is the decisive ideological struggle of our time.”; 11 September 2006: “The war against this enemy is more than a military conflict. It is the decisive ideological struggle of the 21st century, and the calling of our generation”

³ Alberto R Gonzales *Memorandum for the President, Decision RE application of the Geneva Conventions on prisoners of war to the conflict with Al Qaeda and the Taliban* Jan 25 2002

institutions pertaining to the laws of war—most especially, the Geneva Conventions (hereafter the Conventions). Specifically, the claim has been made that the Conventions are simply a “quaint” relic of a bygone era of interstate conventional warfare due to the fundamentally different nature of contemporary warfare, so much so that the Conventions simply cannot be used as the basis for *jus in bello* determinations.

Is this true? Did 9-11 shift the nature of warfare to such an extent that the international legal regime circumscribed by the Conventions was rendered inadequate, antiquated, or perhaps even so burdensome to national security efforts as to be dangerous? Does a lack of reciprocity in compliance with the Conventions exacerbate these issues? Do the Conventions need to be altered—as they have been amended previously, to respond to changes in the international system and the nature of warfare—or even abandoned?

This paper argues that the Conventions are not only relevant to contemporary security threats, but the soft power element of following the Conventions is even more critical today than in conventional battlefields of previous decades. It does so by, first, investigating the historical development of the Conventions, identifying their original primary purpose not as the promotion of reciprocity in warfare, but in the promotion of soft power. Secondly, it examines the conditions under which the Conventions were amended in 1977, drawing key distinctions with contemporary issues. Thirdly, the observations regarding the Conventions will be applied to the conflicts in Iraq and Afghanistan, arguing they can—and, in fact, should—have critical relevance to U.S. efforts. Fourthly, the argument that modern terrorist movements render the Geneva framework obsolete will be similarly dismissed, arguing in fact that complying with the

Conventions can be helpful in intelligence efforts. Finally, this manuscript will outline the ramifications for decisions by U.S. policy makers and future directions in academic research. An additional addendum will describe emerging threats and the continued applicability of both the Conventions and their underlying principles of discriminate violence.

I. GENEVA AND THE CRITICS: FAULTY ASSUMPTIONS

Alberto Gonzales, former U.S. Attorney General, epitomized the sentiment that the Conventions are outdated when, while serving as White House legal counsel, he argued that the “new paradigm” of warfare “renders obsolete . . . and renders quaint”⁴ much of the Conventions. This memo—along with guidance from the Department of Defense and Central Intelligence Agency (CIA)—“set the stage” for the Bush Administration’s decision to not apply the Conventions to certain categories of combatants in the “war on terror.”⁵ Mr. Gonzales was far from alone in the sentiment. A number of highly influential individuals, from the government and the academe alike, have suggested that the nature of contemporary security threats render the laws governing the humanitarian elements of war “out of date.” Specifically, “to address contemporary battlefield reality, new questions need to be elaborated in international law.”⁶

Primarily, the central role of non-state actors in modern armed conflict drives

⁴ Alberto R Gonzales *Memorandum for the President, Decision RE application of the Geneva Conventions on prisoners of war to the conflict with Al Qaeda and the Taliban* Jan 25 2002

⁵ Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 60

⁶ Gregory 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

calls for reform of the Conventions.⁷ The central uncertainty of whether the label “insurgent” or “terrorist” should be applied, and what consequent rights result from such application, is blamed on the deficiencies—specifically, the “ambiguities and anachronisms”—of the Conventions.⁸ A very eclectic group of reformers has emerged. Publications from *The National Interest* to *The Washington Quarterly* have printed articles advocating reform.⁹ Some would-be reformers seek to “revive” or “modernize” the Conventions, even expanding them to include non-state actors as players.¹⁰ Others argue that the Conventions and the alleged constraints they place on American military, law enforcement, and intelligence services should be abandoned wholesale—or at least, ignored due to the “novel nature” of current conflicts.¹¹ In this view, the “compromise” between humanitarian principles and security needs that represented by Conventions is untenable in the face of contemporary threats. Would-be reformers span the political and policy spectrum; the Conventions as currently written seem beset on all sides. The number of suggestions as to how the Conventions can be “revived,” “re-made,” or “updated and clarified” in a new additional protocol are unsurprising. Doing so could allow the government, according to some policymakers, Non-Governmental

⁷“Private organisations are likely to dominate armed conflicts for the foreseeable future” – Gregory Rose “Updating International Humanitarian Law and the Laws of Armed Conflict for the Wars of the 21st Century” *Defender, The National Journal of the Australia Defence Association* VOL XXIV No. 3 (Spring 2007), 22; “The contemporary problem . . . is the neither sovereignty nor battle space is what it used to be.” –Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 60

⁸Gregory Rose “Updating International Humanitarian Law and the Laws of Armed Conflict for the Wars of the 21st Century” *Defender, The National Journal of the Australia Defence Association* VOL XXIV No. 3 (Spring 2007), p21

⁹ Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 60-72; Renee De Nevers, “Modernizing the Geneva Conventions” *The Washington Quarterly* Vol. 29 No.2 (Spring 2006)

¹⁰ “. . . an area in need of serious review is the relationship of non-state actors to these rules and their status under the law.” – Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 61

¹¹John Yoo *Memorandum for William J Hayes II, General Counsel, Department of Defense RE Application of Treaties and Laws to al Qaeda and Taliban Detainees* United States Department of Justice, Office of Legal Counsel, Jan 9, 2002

Organizations, and academics, “to tailor them for a war they were never designed to address.”¹²

The fundamental assumption of all these critics is that the Conventions were not meant to be applied, and *cannot* be applied, to the types of combat and types of combatants the United States now faces. Even the defenders of the Conventions agree that there are some elements of the Conventions have been superannuated by the passage of time and advance of technology, such as the fate of a prisoner’s horse or their tobacco rations.¹³ Yet the essential principles of conflict have not changed, nor has the importance of soft power— “winning hearts and minds” —in warfare. Perhaps even more importantly, the idea that the Conventions represent a burden on the part of U.S. intelligence and prosecutorial efforts is based on false paradoxes. The Conventions do not represent a compromise between the incompatible polarities of liberty and security. The Conventions, in fact, are a deliberate policy choice based on sound, rational assessment of strategic goals. Is applying the Conventions, therefore, the “right” policy choice when facing today’s threats?

II. GENEVA’S HISTORICAL DEVELOPMENT: DISCRIMINATE VIOLENCE AND SOFT POWER GOALS

The impetus behind the Conventions are well know: in 1859, during the Second Italian War of Independence, the bloody battle of Solferino left Henri Dunant horrified at the treatment of wounded soldiers. Consequently, he organized the International Committee of the Red Cross (ICRC) “to promulgate a new set of standards for the

¹²Steven Ratner, “Rethinking the Geneva Conventions” *Crimes of War Project*. January 30, 2003

¹³Steven Ratner, “Think Again” *Foreign Policy* 165 (March/April 2008), 26

governing of conduct during war.”¹⁴ These standards would consequently evolve in both the Hague and Geneva Conventions pertaining to conduct of warfare. After World War II, the ICRC hosted a diplomatic conference in Geneva, Switzerland, which led to the adaptation of the four Geneva Conventions on August 12, 1949.¹⁵ Included in the Conventions was Common Article III. Common Article III bestows the minimum provisions of being “treated humanely,” which prohibits, among other things, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” “outrages upon personal dignity, in particular humiliating and degrading treatment;” “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” on all detainees.¹⁶

However, the origins of the Conventions can be traced back well before 1864. For the past two thousand years, mankind has attempted to reduce and control international violence.¹⁷ The concept of *jus in bello*, the universal standards of limitation in war, is as old as organized violence itself. Rules of warfare appear in the Book of Deuteronomy, the Third Lateran Council, the Hindu Code of Manu, law of Szu-ma in China’s Chou dynasty, and the proclamation of Caliph Abu Bakr.¹⁸

The United States has had an important and distinct impact on the development of

¹⁴Elizabeth Grimm, *Power, Politics, and POWs: When Good Norms Go Bad* (Unpublished PhD Dissertation, 2009), 8

¹⁵The four conventions are: the Geneva Convention for the Amelioration of the Wounded and Sick in the Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, Shipwrecked and Members of Armed Forces at Sea; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; and the Geneva Convention Relative to the Treatment of Prisoners of War.

¹⁶The Geneva Convention relative to the Treatment of Prisoners of War, Article III

¹⁷John Moore and Robert F Turner, *National Security Law* (Durham: Carolina Academic Press, 2005), 29

¹⁸CR Mack and HH Lesesne, eds. *Francis Lieber and the Culture of the Mind* (Columbia: University of South Carolina Press, 2005), 69-75

the laws of war. The Continental Congress expressed in its commission to General Washington on June 17, 1775 that “established principles of humanity should prevail in warfare.”¹⁹ General Washington himself refused to adopt the abusive practice of the British when dealing with captured enemies, including both British soldiers and Hessian mercenaries. In fact, after his great victory at Trenton on December 25, 1776, he ordered: “let them [the Hessians] have no reason to complain of our copying the brutal example of the British army,” making the humane treatment of captured enemies “a uniquely American value.”²⁰ Values aside, it was also an instance of a military commander recognizing the strategic advantage possessed by the side with the “moral high ground,” what it is now often called the “battle for hearts and minds.” In particular, the American Revolution was an asymmetric conflict in which the insurgents struggled in a battle for the hearts and minds of the colonists at home and as well as key European powers abroad.

In the Civil War, when the United States also faced an asymmetric conflict, the development and articulation of humane principles of warfare continued with the codification of the Lieber Code, also known as the General Orders No. 100. The basic question that prompted the creation of Lieber Code was: could Confederate prisoners be exchanged without recognizing the Confederate States of America (CSA)? Similar to any insurgency, the captured Confederates could not be massacred or indefinitely incarcerated; most would have to be incorporated into the post-war political framework of the South. The Lieber Code helped promote this stability by ensuring that Confederate prisoners, despite the non-recognized status of the CSA, were treated as captured

¹⁹ Ford, W.C., Ed. “Journals of Continental Congress, 1774-1789” (Washington: Government Printing Office, 1906)

²⁰ Grimm, 2

prisoners of war rather than common criminals.²¹ The Lieber Code laid significant groundwork for future international humanitarian agreements regarding the treatment of prisoners and the laws of war in the late nineteenth and early twentieth century, including the 1929 Geneva Conventions Relative to the Treatment of Prisoners of War that, after World War II, were further expanded and codified with the four Geneva Conventions of 1949.²²

The United States played an integral role in the development of the laws of war, specifically including those related to prisoner of war (POW) treatment. It has faced asymmetric conflicts in the past and has elected to follow the very principles that led to the development of the Conventions. Furthermore, the United States did so based on a strategic rationale, a conscious effort to promote soft power and discredit both the British in the eighteenth century and the Confederacy in the nineteenth—not a compromise between liberty and security, which the United States could ill afford during either the Revolutionary or Civil Wars.

The Additional Protocols

Many contemporary advocates of altering the Conventions point to the Additional Protocols of 1977 as precedent for altering the Conventions to keep pace with the evolving geopolitical and battlefield realities. The process of de-colonization in the 1970s led to the two additional Protocols to the Conventions. The basic motivation behind these Protocols was the expansion the legal status of POW to those individuals fighting for independence, particularly in insurgent movements, to gain international

²¹Grimm, 3

²²Grimm, 5-8

recognition and a sovereign state. While insurgents and other irregular fighters are covered, those who engage in “isolated and sporadic acts” of violence such as terrorists or those who propagate criminal violence are explicitly excluded.²³ Parties to armed conflicts fall under the scope, therefore, of these Protocols, regardless of the legal status of the entity for which they are fighting.

Protocol I states that any such person “who falls into the power of an adverse Party shall be a prisoners of war,” consequently expanding the scope of the Convention’s POW protections to irregular combatants in international armed conflicts. Protocol II states anyone captured by a state in a conflict:

. . . between its [the state’s] armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol . . .

These classifications expanded POW status and the protection of the Conventions, affording it to domestic insurgencies as well.²⁴

Fundamentally, the Conventions represent a universal, internationally recognized limit to the legitimate use of organized violence. For both state and, after the 1977 Additional Protocols, non-state actors, the temporal-spatial realm of political violence is constrained to the battlefield. Those no longer an active threat—the sick, the wounded, the captured—are not legitimate targets for violence. Citizens cannot be punished for

²³Protocol II states: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

²⁴The United States is not a party to either of these Additional Protocols; it is, however, a party to the four 1949 Conventions, and thus Common Article III

exercising their right to engage in warfare on behalf of a sovereign state and civilians cannot be purposefully targeted. Thus, the questions driving this research are: Has the realm of political violence been altered by 9-11? Does applying the Conventions, specifically Common Article III, to contemporary insurgents hamper American security interests? Under what conditions should the Conventions be revised?

III. GENEVA AND COUNTER INSURGENCY: APPLICABILITY IN ASYMMETRY AND CONVENTIONALITY ALIKE

Soft power is as important in today's conflicts as any "traditional" war of the past. Soft power is defined by Joseph Nye as "is the ability to obtain what you want through co-option and attraction rather than the hard power of coercion and payment."²⁵ The usage of "soft power" in political science and policy lexicon is a relatively recent development of the late twentieth century; however, the concept of soft power is not new; it can be dated as far back as the ancient Chinese philosophers as Lao Tsu in the seventh century BCE.²⁶ The underlying logic of soft power might be best expressed by the Thomas Dictum, named after sociologist William Isaac Thomas: things perceived as real have real consequences; that is, when people define a situation as real, the situation will be real in its consequences. Thus, subjective opinions and desires can have tangible effects, including in politics and, in the famous "politics by other means" of Clausewitz, war.

History is replete with examples of soft power use and utility in warfare. The Declaration of Independence, written with "decent respect to the opinions of mankind" as

²⁵Joseph S Nye Jr *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004)

²⁶George R. Goethals, Georgia Jones Sorenson, *The Quest for a General Theory of Leadership* (Northampton, Massachusetts: Edward Elgar Publishing, 2006)

part of a larger diplomatic effort to win European allies in the war for independence is one example.²⁷ Christian states during the Crusades used the soft power gained by religious faith to achieve very material, and secular, political gains—such as the Venetian Republic’s use of the Fourth Crusade to gain the allies necessary to sack Constantinople. During the Cold War soft power and public diplomacy were deemed essential parts of foreign policy: Radio Free Europe, UN speeches from Adlai Stevenson and Nikita Khrushchev, graffiti on the west side of the Berlin Wall which the East German Government called an “anti-fascist protective rampart” (*antifaschistischer schutzwall*), the miracle on ice, etc. “The Cold War was won with a strategy . . . that used soft power along with hard power.”²⁸ Soft power is as critically important as hard power in both international politics and warfare, and its importance is only increasing.²⁹

Soft power is no less applicable to asymmetric conflicts than traditional ones, a fact that has been acknowledged by those seeking to update both international human rights law³⁰ and military strategy.³¹ The most common criticism of the Conventions—that they are obsolete because we do not expect reciprocity from today’s foes—does not hold. In fact, the lack of reciprocity is even more of a reason to uphold the Conventions. Applying the Conventions provides a critical soft power advantage over enemies in

²⁷Richard B Bernstein, *Thomas Jefferson* (New York: Oxford University Press, 2004), 45

²⁸Joseph S. Nye, Jr. “The Decline of American Soft Power” *Foreign Affairs* Volume 83, Number 3 (May/June 2004)

²⁹Joseph S. Nye, Jr. *Bound to Lead: The Changing Nature of American Power* (New York: Basic Books, 1990), 33

³⁰“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 action is vital to an effective foreign policy.” – Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 64-65

³¹General Rupert Smith, a veteran of the British struggle against the IRA in Northern Ireland, NATO’s campaign against Serbia, and the UN liberation of Kuwait, has written in his book about modern warfare, which he refers to as ‘war amongst the people,’ that “the objective of all our operations amongst the people is the will of the people.” – Rupert Smith *The Utility of Force: The Art of War in the Modern World* (New York: Alfred A Knopf, 2007), 387

confrontations in which securing local support is more important than physical battle. In asymmetric warfare, the path to victory lies not in pouring more troops into the battlefield, but in winning the hearts and minds of the people.³² Torture, in fact, aids the cause of the enemy. An Army sergeant addressing the treatment of detainees in Abu Ghraib stated: “Half of these guys got released because they didn't do nothing. We sent them back to Fallujah. But if he's a good guy, you know, now he's a bad guy because of the way we treated him.”³³ The central point is that the key to victory in asymmetric conflicts is cutting off the enemy's “recuperative power;” that is, ending its ability to gain new adherents to its cause by diminishing its legitimacy respective to your own.³⁴ Actions that violate the Conventions, such as indiscriminate violence and torture, produce more adherents to the insurgency's cause than it deters. The United States should recognize “brutalizing” the foreign insurgency is wrong from a strategic perspective, because it plays to our enemies' strength: horrific violence.

In contrast, adhering to the Conventions exposes the fatal flaw of organizations like al-Qa'ida in Iraq. Peter Bergen, an authority on Usama bin Laden, suggests that al-Qa'ida's tactics sow the seeds of their own destruction, because “at some point . . . though, local populations turn against their supposed champions.”³⁵ In an insurgency, the citizens will ultimately back the side that defends. In fact, counterinsurgency theorist David Galula states that the bulk of counterinsurgency forces should be devoted not in

³²Richard L Clutterbuck *The Long, Long War: Counterinsurgency in Malaya and Vietnam* (New York: Praeger, 1966), 3

³³ Human Rights Watch *Leadership failure: Firsthand accounts of torture of Iraqi detainees by the U.S. Army's 82nd Airborne Division* 17 (3[G]) (2005): <http://hrw.org/reports/2005/us0905/>

³⁴Tom Malinowski and 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)

³⁵*The Economist* “Al-Qaeda: The self-destructive gene” 17 July 2008

“upping the body count” of the enemy, but to protecting civilians from the insurgents.³⁶ Applying the Conventions would promote highly discriminate and proportional violence against the insurgents, protect civilians, win local support, and foster positive outcomes for the United States in an asymmetric conflict. The application of the laws of war, as a calculus of appropriate force, is not a burden in counterinsurgency, but rather an essential element in its successful execution.

As previously mentioned, General Washington acknowledged the importance of soft power when fighting the British. This fact was also well understood by General David Petraeus who, after assuming command of U.S. forces in Iraq, reminded those under his command that: “This fight depends on securing the population, which must understand that we – not our enemies – occupy the moral high ground.”³⁷ This letter clearly indicates General Petraeus understood the critical soft power element in asymmetric conflicts such as Iraq. He further noted that: “This strategy has shown results in recent months. Al-Qa’ida’s indiscriminate attacks, for example, have finally started to turn a substantial proportion of the Iraqi population against it.”³⁸

The full force of this alienation of the Iraqi citizens to al-Qa’ida in Iraq, and the dramatic impact it has on the course of war, can be seen in the Anbar Awakening. Colonel Martin Stanton, chief of reconciliation and engagement for the Multinational Corps-Iraq, described the cause of the shift of popular support as such:

³⁶David Galula *Counterinsurgency Warfare* (Westport: Praeger, 2006), 58

³⁷General David H. Petraeus *Letter to United States forces serving in Multi-National Force-Iraq* May 10, 2007: [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).

³⁸General David H. Petraeus *Letter to United States forces serving in Multi-National Force-Iraq* May 10, 2007: [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).

These were people who last year were being hammered from two different directions: by [Al-Qa'ida] and by us. It was probably a distasteful choice to make back then because, after all, they viewed us as invaders, and they probably still do, but it was a survival choice and they made it.³⁹

In the insurgency, Iraqi citizens themselves faced with a choice: support al-Qa'ida in Iraq or the United States. Initially they tended to side with their fellow countrymen and foreigners that had come to fight the “occupiers,” but “after two years of [al-Qa'ida] violence, their hatred of the terrorist group outweighs any lingering dislike of the US [forces].”⁴⁰ The success in Iraq due to this development was so significant a similar approach is currently being implemented in Afghanistan.⁴¹

The Conventions bolster soft power when accepted in principle *and* applied in action. The counterinsurgent “is judged on what he does, not on what he says. If he lies, cheats, exaggerates, and does not prove, he may achieve some temporary successes, but at the price of being discredited for good.”⁴² Thus, it is not enough to merely “talk the talk” of the Conventions. In order for the support of the populace to be won, action must reflect the humanitarian principle of the laws of war. Abu Ghraib therefore represents such a setback to the U.S. war effort in Iraq, as the brutality inflicted there was coupled with duplicity.

The Conventions can be applied to asymmetric conflicts and, from a strategic perspective, should be. An insurgent movement is, above all else, a war for the people—the Conventions thus provide the United States with an avenue by which soft power can

³⁹Alissa Rubin and Damien Cave “In a Force for Iraqi Calm, Seeds of Conflict” *The New York Times*. 23 December, 2007

⁴⁰Colin Freeman “Iraqi neighbours rise up against al-Qa'eda” *The Daily Telegraph*. 6 January, 2009

⁴¹Helene Cooper and Sheryl Stolberg, “Obama Ponders Outreach to Elements of Taliban” *The New York Times* 7 March 2009; Michael O’Hanlon “Toward Reconciliation in Afghanistan” *The Washington Quarterly* Vol. 32 No.2 (April 2009) 143

⁴²Galula, 9

be applied to winning the people in a conflict.

IV. GENEVA IN INTELLIGENCE GATHERING: A HELPER, NOT A HINDRANCE

Some observers have cited the restraints imposed by the Conventions with regards to interrogations of insurgents and terrorists as a sign of their inapplicability to modern security threats. It is very true that in both Iraq and Afghanistan, as well as in the greater struggle against transnational terrorist networks, information is key: “In war amongst the people the currency is information rather than firepower.”⁴³ Furthermore, in modern warfare, “. . . there is a need to have . . . that basic understanding that gathering of information is the primary purpose.”⁴⁴ If it was the case that adhering to the Conventions hampered intelligence efforts, it would be a serious hurdle to compliance in contemporary conflicts.

The Conventions were written with the understanding that States would interrogate prisoners—their purpose was to manage the process.⁴⁵ The Conventions require POWs “to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information” when questioned.⁴⁶ Beyond that:

⁴³Smith, 394

⁴⁴Smith, 384

⁴⁵Steven Ratner, “Think Again” *Foreign Policy* 165 (March/April 2008), p. 28
Geneva Convention relative to the Treatment of Prisoners of War, Article XVII

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.⁴⁷

With regards to those detainees without POW status, Common Article III demands they be “treated humanely,” precluding, among other things, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁴⁸

In fact, forswearing the tactics proscribed by the Conventions assists intelligence gathering efforts. Most interrogation experts agree that coercive interrogations “are actually counterproductive to extracting *quality information*” [emphasis added].⁴⁹ Operationally, according to a 2002 memo from the Joint Personal Recovery Agency, torture is ineffective because it does not garner reliable information.⁵⁰ According to General Petraeus:

Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong . . . history shows that [such actions] are frequently neither useful nor necessary. Certainly, extreme physical action can make someone ‘talk;’ however, what the individual says may be of questionable value.⁵¹

The critical element at play is the quality of any information gathered; torture and

⁴⁷Geneva Convention relative to the Treatment of Prisoners of War, Article XVII

⁴⁸Geneva Convention relative to the Treatment of Prisoners of War, Article III

⁴⁹Steven Ratner, “Think Again” *Foreign Policy* 165 (March/April 2008), p. 28; also see: *ForeignPolicy.com/extras/torture* for the interview of former FBI interrogator Jack Cloonan regarding his interrogations of al-Qa’ida members

⁵⁰Joint Personal Recovery Agency “Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation” HG JPRA-CC/25 Jul 02/DSN 654-2509

⁵¹General David H. Petraeus *Letter to United States forces serving in Multi-National Force-Iraq* May 10, 2007: [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).

other methods of interrogation banned by the Conventions frequently tend to reinforce pre-conceived notions, including false assumptions, held by intelligence officers. Torture is designed not to get to acquire “the truth,” but rather to get what the interrogators want to hear.⁵² *Camp 020: MI5 and the Nazi Spies*, a book published in 2000, which is only now gaining notice, documents the interrogations by British intelligence of Nazi agents as lead by lead by Colonel Robin Stephens (“Tin-Eye”).⁵³ According to “Tin-Eye”:

There is no room for a percentage assessment of reliability. If information is correct, it is accepted and recorded; if it is doubtful, it should be rejected *in toto* . . . Violence is taboo, for not only does it produce answers to please, but it lowers the standard of information.⁵⁴

In addition, ample evidence exists of *successful* interrogations in that do not violate the Conventions. A memo from a military agency cites over a 90% success rate for non-coercive interrogation methods.⁵⁵ “Tin-Eye” was remarkably successfully; one example of his success was a Nazi spy, code named TATE, who was deceived into thinking a cohort had given him up and subsequently provide invaluable intelligence.⁵⁶ Arguably the greatest intelligence victory of the post-9-11 era was determining the location of Abu Musab al-Zarqawi, the leader of al-Qa’ida in Iraq. At the time of his death at the hands of U.S. forces, Zarqawi was considered a higher intelligence priority

⁵²Tom Malinowski and 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)

⁵³Christopher Hitchens “Ruthless yet Humane, Why Obama cited Churchill on torture” *Slate* (Posted Monday, May 4, 2009, at 11:16 AM ET), see at: <http://www.slate.com/id/2217583/>

⁵⁴Christopher Hitchens “Ruthless yet Humane, Why Obama cited Churchill on torture” *Slate* (Posted Monday, May 4, 2009, at 11:16 AM ET), see at: <http://www.slate.com/id/2217583/>

⁵⁵Joint Personal Recovery Agency “Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation” HG JPRA-CC/25 Jul 02/DSN 654-2509

⁵⁶Christopher Hitchens “Ruthless yet Humane, Why Obama cited Churchill on torture” *Slate* (Posted Monday, May 4, 2009, at 11:16 AM ET), see at: <http://www.slate.com/id/2217583/>

than even Usama bin Laden; special military intelligence interrogators played off of the ego of one of Zarqawi's captured lieutenants and induced him to give up the vital information that led to Zarqawi's death.⁵⁷ Intelligence victories such as these do require considerable skill on the part of interrogators, but they do not require the violation of the Conventions.

Beyond the cost of bad intelligence, the damage to soft power that comes with detaining—let alone torturing—innocent individuals is significant. In conflicts like Iraq and Afghanistan where long-term, sustained efforts are imperative, the public support of both the domestic populace and allies is critical to victory. The support of the local population greatly diminishes when interrogations are not compliant with the Conventions.

Thus, any interrogation techniques or detention procedures banned by the Conventions should be recognized not as valuable tools the Conventions prevent the U.S. from utilizing, but simply as ineffective strategies, tactics, and policies. Adhering to the Conventions, therefore, do not impede either the successful waging of asymmetric warfare against insurgent groups, nor effective investigations and interrogations in counterterrorism efforts. They, in fact, encourage effective and accurate intelligence gathering and promote the soft power critical to counterinsurgency efforts.

⁵⁷For the full account, see: 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)

V. GENEVA'S LEGAL DISTINCTION: DISCRIMINATE PROSECUTIONS

Not prosecuting combatants

The “War on Terror” is a difficult phrase, for a number of reasons. First, it implies we are at war with a tactic or state of mind. Secondly, it fixates on a presumed military paradigm in addressing the problem of terrorists. The confusion regarding the nature of the threat faced and the tools available to address it resulted in those detained by the United States being placed a situation that “either demand[ed] a new category within [international human rights law and the laws of war], which [was] unlikely and not necessary, or else a recategorization of the detainees in line with it.”⁵⁸ While rhetoric of war possesses powerful emotional and political substance, it distorted the nature of the threat posed by al-Qa’ida to the United States as well as skewed the toolkit with which policy makers largely based their counterterrorist methods.

Terrorism has, in fact, existed throughout human history. Contemporary efforts to combat terrorism draw heavily on the “intellectual underpinnings of the laws of war and neutrality.”⁵⁹ There is no debating that terrorism and warfare, especially asymmetric warfare, are related: both are forms of coercion. In fact, because of the current technological and geopolitical situation of today’s world, they may be increasingly interwoven. However, it is critical to make a key distinction between these two types of coercive violence: war, within defined confines of international law, is considered a legitimate right of states; terrorism, regardless of whether it is committed by a state, an organization, or an individual, is considered criminal.

⁵⁸Smith, 387

⁵⁹Moore and Turner, 29

The international community seeks to deter violation of the “conflict management norms” – which, among other things, restricts the spacial-temporal zone of political violence by establishing their violation as criminal acts for which there is personal responsibility.”⁶⁰ In fact, the first international effort to combat terrorism, a series of meetings in the late 1920s and early 1930s called the International Conference for the Unification of Penal Law, specifically revised some extradition treaties to “exclude certain terrorist acts from the category of ‘political offenses,’ thereby making them extraditable.”⁶¹ The Conventions, when last updated in 1977, specifically excluded “isolated and sporadic acts” of violence.

Both the Conventions and the laws of war writ large have developed in such a way that terrorist acts, deliberate targeting of non-combatants, would be considered criminal; that is, outside of the spacial-temporal zone of sanctioned violence that made up “just” warfare. The legal implication is terrorists have legal culpability as individuals for the violence they perpetrated. In contrast, the laws of war do not allow for punishment or legal action against individuals simply for participating in an armed conflict. “The Bush Administration did not invent the idea that detainees could be held indefinitely. This principle forms the bedrock of the laws of war: *prisoners are not to be punished but simply removed from the battlefield.*” [emphasis added].⁶² In fact, the Lieber Code stated that “a prisoner of war is subject to no punishment for being a public enemy . . .”⁶³ Not treating POWs as criminals helps foster the building of a post-war political framework that includes some former foes—such as is currently the case in Iraq. It also help exploits

⁶⁰Moore and Turner, 30

⁶¹Moore and Turner, 462

⁶²Charli Carpenter “Geneva 2.0” *The National Interest* No. 96 (July-August 2008), 61

⁶³F. Lieber “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*

any fissures within the insurgency, preventing more moderate elements from being thrown out with the bath water.⁶⁴ A soldier engaging in counterinsurgency operations must operate in this context of winning “hearts and minds,” which requires engaging in such practical political solutions as reconciliation with former opponents.⁶⁵ As a military lawyer stated, “in the law of war [you do] . . . not [prosecute] the foot soldiers.”⁶⁶

Thus, even if an enemy combatant is not recognized as soldier fighting for a sovereign state, the laws of war have developed in such a manner that such individuals are protected from punishment for the act of taking up arms. Yet if terrorism is prosecutable and insurgency is not, how can one distinguish one from the other, especially when an individual or organization may serve as one or the other at different times or even both simultaneously? Always equating the two would imply that states can kill terrorists anywhere or detain them indefinitely, a “significant expansion of the notion of armed conflict.”⁶⁷

The Israeli Supreme Court has reviewed the issue of targeted killings of individual that serve the role of both terrorist and insurgent at different times. The Court found such actions legal when meeting the following requirements: that such killings be attempted only when solid information indicates that the target is taking a direct part in hostilities and when the arrest of the target would be impracticable, among other

⁶⁴Successfully splinter insurgent groups is an important counterinsurgent strategy, as “careful analysis may also reveal goal disagreements within an insurgency movement, enabling governments to craft policies that may satisfy some rebellious group, thereby exacerbating divisiveness in the insurgency.” – Bard E O’Neil *From Revolution to Apocalypse: Insurgency and Terrorism* (Washington: Potomac Books, 2005), 157

⁶⁵Galula, 66

⁶⁶Nina Totenberg “Hamdan v. Rumsfeld: Path to a Landmark Ruling” *All Things Considered*, 5 September, 2006; it should be noted that quote continues “. . . unless of course, the foot soldiers are lining up civilians and shooting them.” Thus, while the law of war do not allowing for the prosecution of the act of engaging in warfare, it does allow for the prosecution of acts of committing war crimes. This point shall be emphasized later in the paper.

⁶⁷Steven Ratner, “Rethinking the Geneva Conventions” *Crimes of War Project*. January 30, 2003

considerations.⁶⁸ The most important questions to ask when applying discriminate violence are those regarding (1) Action: are attacks random and sporadic acts of violence against non-military targets? Or are they a part of a military campaign, regular or irregular, against targets with a strategic or tactical value, lacking a deliberate attempt at civilian loss of life, as part of a larger military or paramilitary campaign? (2) Ability: does the individual represent an existential or significant military threat to our security? Can law enforcement successfully execute an arrest of the individual in question? Simply put, does an individual fall within the spacial-temporal limits of the Conventions? Discriminate violence, the underlying soft power principle of the Conventions, dictates that the strategic application of hard power in the form of military force should be used only when non-violent, i.e. soft power, means are ineffective. For insurgents, this means non-prosecution, as opposed to execution or indefinite detention, to foster a post-war political framework. For terrorists, this means criminal prosecution, as opposed to targeted killing, to de-legitimize their act of indiscriminate violence. The question remains, however, how applying the Conventions to criminal prosecutions of terrorists can promote soft power.

Civilian prosecution of terrorists

The United States recognized the applicability of the Geneva Conventions to Taliban members captured in Afghanistan; the Taliban constituted the government of Afghanistan, a signatory of the Conventions. However, because the Taliban commonly violated the laws of war, they were denied POW status; moreover, the United States argued that the Conventions did not apply to al-Qa'ida personnel, as they constitute a

⁶⁸Dan Izenberg "High Court allows conditional targeted killings" *The Jerusalem Post* 14 December, 2006

non-state terrorist network and a non-signatory to the Conventions.⁶⁹ However, the United States Supreme Court recently rejected this logic in *Hamdan v. Rumsfeld*. The Court found that Common Article III applies to al-Qa'ida and the Taliban. Specifically, the Court held that “Common Article [III] . . . affords some minimal protection . . . to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not).”⁷⁰

The hypothetical critic could claim the Court’s *Hamdan* ruling perfectly demonstrates how the Conventions hamper counterterrorism prosecutions and that civilians courts are insufficient to deal with al-Qa’ida members. The Court ruled that the Conventions, under Common Article III, precluded the use of the recently created military tribunal system⁷¹ and, furthermore, that the charge of conspiracy to commit terrorist acts did not fall under the laws of war.⁷² One could claim that: (1) the Conventions blocked the successful prosecution of a terrorist, which clearly demonstrates their deficiency as legal framework for twenty-first century threats, and (2) the charge of conspiracy, which might allow successful prosecution of terrorists in civilian courts without a need for direct evidence of a physical act of criminal violence—as opposed to plan for said act—is void. Yet it is essential to remember that “*Hamdan* is neither about the legitimacy of military commissions nor about the propriety of charging conspiracy

⁶⁹Alberto R Gonzales *Memorandum for the President, Decision RE application of the Geneva Conventions on prisoners of war to the conflict with Al Qaeda and the Taliban* Jan 25 2002

⁷⁰*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)

⁷¹Common Article III bans: “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.”

⁷²George Fletcher “*Hamdan* Confronts the Military Commissions Act of 2006” *Columbia Journal of Transnational Law* 24 (2007) 427

against suspected terrorists. It is about the combination of these two elements.”⁷³ The Court, led by Justice Stevens, ruled that the specific charge of conspiracy is repugnant to the laws of war.⁷⁴ The solution is not to abandon conspiracy as the legal tool by which to prosecute perpetrators of terrorist attacks, but to do so in the appropriate venue—not under the laws of war, but under domestic statutes that have long served to prosecute terrorists, both domestic and foreign, in the past.

Of course, using civilian courts to try foreign terrorists is not the only option post-*Hamdan*. The government could amend the military tribunal system in place to make it consistent with the requirements of Common Article III, or it could abandon the charge of conspiracy. Or, it could even attempt to supersede the Court’s decision, which was Congress’ motivation in passing the 2006 Military Commissions Act. The best option, however, would be to use the federal court system—doing so utilizes a proven legal system that is consistent with the requirement of the Conventions and significantly promotes soft power.

The arguments against the use of the federal courts include the allegation that system is unequipped to handle prosecutions involving sensitive or classified information, that too many lives are at stake in such cases, and that these transnational criminal organizations are too complex. Yet these are issues federal prosecutors deal with on a daily basis, as a number of federal judges and prosecutors have attested.

Examples include Judge John C. Coughenour,⁷⁵ who presided over the criminal trial of

⁷³George Fletcher “Hamdan Confronts the Military Commissions Act of 2006” *Columbia Journal of Transnational Law* 24 (2007) 427, 433

⁷⁴See Stevens plurality opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) or Professor Fletcher’s article in the *Columbia Journal of Transnational Law* for a full explanation of the charge of conspiracy as related to the laws of war and Supreme Court jurisprudence

⁷⁵John C Coughenour, letter to the editor, *The New York Times*, 1 November 2007

Ahmed Ressam, the Algerian terrorist who confessed to plotting to bomb Los Angeles International Airport, and former Assistant United States Attorney Kelly Anne Moore,⁷⁶ who served as the chief of the Violent Crimes and Terrorism Section in the United States Attorney's Office for the Eastern District of New York. That office prosecuted Sheik Moayad and Mohammed Mohsen Yahya Zayed in an extremely complicated case that involved an international conspiracy to send money from Brooklyn to the terrorist groups al-Qa'ida and the Islamic Resistance Movement (Ḥarakat al-Muqāwamat al-Islāmiyyah, HAMAS).⁷⁷ Both cite their experiences with prosecutions of terrorists in federal court as evidence of its feasibility. Both note that sensitive and/or classified information can be handled under Classified Information Procedures Act. Ms. Moore also makes the critical point that:

Besides terrorists, the Justice Department has successfully prosecuted Ku Klux Klan bombers, members of violent groups like the Weathermen in the 1960s and '70s, and members of Italian organized crime in the '80s and '90s. The same system has been used repeatedly against complex drug trafficking and human trafficking syndicates, many of which operate primarily overseas.⁷⁸

Federal law enforcement and the Department of Justice can build off these past experiences of successful organized crime and terrorists prosecutions. The long term legal and investigatory campaigns cited above by Ms. Moore are examples of such past successes that can be utilized, as is the Judge Coughenour's example of Mr. Ressam—arrested before he could carry out his attack, he became a vital source of intelligence,

⁷⁶Kelly Anne Moore, letter to the editor, *The New York Times*, 21 August 2007

⁷⁷John C Coughenour, letter to the editor, *The New York Times*, 1 November 2007; Kelly Anne Moore, letter to the editor, *The New York Times*, 21 August 2007

⁷⁸Kelly Anne Moore, letter to the editor, *The New York Times*, 21 August 2007

without the use of any coercive interrogation methods.⁷⁹

It is important to consider the comparative successes of the civilian criminal justice system and new military tribunal system since 9-11. For example, “U.S. federal courts have successfully prosecuted dozens of terrorism suspects, putting many of them away for life. Military commissions have . . . successfully prosecuted only one man.”⁸⁰ According to Ms. Moore, “If the Guantánamo detainees were prosecuted in federal courts instead of being designated as ‘combatants,’ most by now would be serving prison time as convicted terrorists.”⁸¹

Most importantly, using civilian courts to try foreign terrorists reinforces the critical notion of soft power. A critical source of the information that is so vital in counterterrorism efforts, as well as contemporary asymmetric conflicts, are the communities in which terrorists operate. Consider the importance of public cooperation in preventing a plot to bomb several transatlantic flights: British authorities were acting on a tip from a member of the Muslim community in London.⁸² Similarly, as noted by the April 2006 National Intelligence Estimate, the United States should seek to “divide [terrorists] from the audiences they seek to persuade” and make “the Muslim mainstream . . . the most powerful weapon in the war on terror.”⁸³

Additionally, treating terrorists as common criminals denudes them of influence and sterilizes their romantic image as holy warriors or freedom fighters. At the

⁷⁹John C Coughenour, letter to the editor, *The New York Times*, 1 November 2007

⁸⁰Tom Malinowski and 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)

⁸¹Kelly Anne Moore, letter to the editor, *The New York Times*, 21 August 2007

⁸²Craig Whitlock and Dafna Linzer, “Tip followed '05 attacks on London transit” *The Washington Post*, 11 August 2006

⁸³National Intelligence Estimate; Declassified key judgments, “Trends in global terrorism: Implications for the United States” April, 2006

sentencing hearing of Richard Reid, Federal Judge William Young pointedly stated:

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature . . . war talk is way out of line in this court . . . You're no warrior . . . You are a terrorist. A species of criminal guilty of multiple attempted murders . . . [and in the end] You're no big deal.⁸⁴

There is not only an advantage in de-legitimizing and belittling terrorists, but a danger in doing the opposite. According to military analysis William Arkin:

Every time we pretend we are fighting for our survival we not only confer greater power and importance than they deserve but we also at the same time act as their main recruiting agent by suggesting that they have the slightest potential for success.⁸⁵

The exclusion of terrorist from the laws of war is, in itself, a soft power victory that the United States should exploit through the usage of the federal court system in the prosecution of terrorists.

The Conventions have two complementary soft power benefits in their implication for prosecutions in the context of asymmetric security threats: (1) The Conventions promote the possibility of political reconciliation post-conflict in conventional and unconventional warfare and protects of the rights of citizens in warfare. (2) The Conventions promote soft power, by allowing for the treatment of terrorist as common criminals, denying them status and voice. Furthermore, the Conventions do not place an undue burden on criminal prosecutions of those that do violate the laws of war.

⁸⁴See transcript at: <http://www.cnn.com/2003/LAW/01/31/reid.transcript/>

⁸⁵John Mueller *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them* (New York: Free Press, 2006), 47

Terrorists were never meant to fall under the same category as combatants—traditional soldiers or irregulars such as insurgents—in warfare, but to be classified as criminals; therefore, they should be prosecuted as criminals.

VI. POLICY IMPLICATIONS: WHERE TO GO FROM HERE?

The most important policy implication of this research is that the Conventions should not be amended in light of the wars in Iraq and Afghanistan, nor revised for the purposes of counterterrorism. The Conventions can and should be applied to today's security threats. Alteration of the Conventions would only be appropriate if a need arose to fundamentally shift the spacial-temporal zone of accepted international violence; as long as terrorists acts are viewed as illegitimate, they should remain outside of the scope of the laws of war. Until such a time, the Conventions provide utility by promoting soft power in the acceptance and application of their principles in war and, conversely, by delegitimizing those whose acts of violence violate those principles. More specifically, the Conventions should be explicitly incorporated into U.S. counterinsurgency policy, such that following the Conventions is understood to be an essential part of a larger plan to achieve victory, no different from any other strategic or tactical approach.

With regards to interrogations, proven, non-coercive methods that are consistent with the Conventions should be utilized at all times. These methods are the most effective strategic tools in the intelligence effort that is so critical to effective 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.

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 result in civilian victims should be publicized in local and international media outlets. Members of the media, as well as organizations such as the ICRC, should also be given the greatest possible access to U.S. detention facilities so U.S. humane treatment of prisoners can be objectively verified and contrasted with the actions of insurgent and terrorist groups. In this way, the United States can increase its soft power and delegitimize its opponents.

Finally, with regards to prosecuting individuals in the context of asymmetric security threats, insurgents should not be prosecuted as criminals merely for taking part in a conflict. Doing so harms efforts to build a functional post-war political order. 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 "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," as required by the Conventions and which has been successfully done in the past.

Terrorists should be prosecuted in the civilian court system, outside of the general framework of the Conventions and the laws of war more generally. The Department of Justice should build off the successes of past cases against terrorist and transnational criminal organizations. Interacting with the intelligence community, long-term investigatory strategies should aim at penetrating the upper ranks of groups such as al-

Qa'ida, leading to a successful dismantlement of the organization and prosecutions of the individuals involved. Prosecuting al-Qa'ida members as common criminals in civilian courts denudes their self-proclaimed status as holy warriors and sterilizes their rhetoric of global jihad.

The Conventions, and the soft power benefits provided by discriminate violence, 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. For scholars, future research on the applicability of the Conventions should focus on how soft power gained by applying the Conventions can best be maximized and most effectively utilized. Additional research could explore in more depth the nature of the spacial-temporal zone of legitimate violence that the Conventions define. The most important implication of this research is that the Conventions can and should have an important role to play in the world of policymakers, military strategists, and academics well into the next century.

VII. ADDENDUM ON EMERGING THREATS: APPLICABILITY TO TOMORROW'S SECURITY ISSUES

During the period in which this paper was composed, new asymmetric security threats have caught the eye of both the public and policy makers. The (re)emergence of drug cartels as a serious threat, as well as the growth of piracy in the Gulf of Aden, seem to be the issues of tomorrow.

With regards to the “drug war” in Mexico, while the violence is significant, the

cartels are still criminal organizations that represent a threat to civil society. They have yet to pose an existential threat to the integrity of the Mexican state—claiming so is sensationalism.⁸⁶ As such, they should be combated by law enforcement to the greatest extent possible. Acts of abuse by the Mexican police, which violate the Conventions, damage the soft power of the Mexican government when battling cartels. The legal rules under the framework of the Conventions promote the legitimacy of the Mexican state and help in the creation of professional and effective law enforcement.

It is critical, therefore, that the United States encourage reform of the police forces and greater utilization of the more professional Federal Investigations Agency (AFI). In the short-term, the creation of a paramilitary force out of highly screened, military members trained for urban operations should be considered to better allow the military to adopt to its temporary role of a police force; it could either be a new force, or be created on the framework of the current Mexican gendarmerie, the Federal Preventive Police. Such a force could bridge the gap between using military force, which may be necessary in the short-term, and the use of law enforcement, which is necessary in the long-term for the legitimacy of the Mexican state. Additionally, the United States should utilize U.S. law enforcement to investigate, arrest, and convict members of Mexican Cartels, as well providing training for the Mexican AFI, army, and police. While the current efforts to invest in military equipment⁸⁷ 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. As an expert on Mexico stated, “until [local law enforcement agencies] have the power and funding to provide strong and

⁸⁶*The Economist* "Taking on the narcos, and their American guns" 2 April 2009

⁸⁷*The Economist* "Taking on the narcos, and their American guns" 2 April 2009

well-paid local police, Mexico's criminal gangs will remain a national threat, not a regional nuisance.”⁸⁸

The issue of piracy in the greater Gulf Aden region has become a significant threat to international shipping as well as U.S. economic and security interests. Piracy is not a new issue for the United States; Thomas Jefferson deployed ships and marines to the Mediterranean to combat the Barbary Coast pirates in 1801. Piracy is a long standing crime under the laws of war and has been acknowledged as such by the Supreme Court,⁸⁹ in addition to being a violation of the U.S. criminal code.⁹⁰ The Conventions would not hamper any prosecution of pirates; in fact, international law holds pirates to be *hostis humani generis*, enemies of mankind, and obligates all nations to combat piracy.

Thus, the United States can utilize either a military tribunal system, so long as it meets Common Article III requirements, or the U.S. federal court system in prosecuting captured pirates. Due to piracy’s unique status as falling under both the paradigm of criminality and a violation of *jus in bello* principles by the current international legal framework, there is no legal barrier to the use of military force by the U.S. Navy and the use of civilian courts in prosecution—which meet the requirement of Common Article III—as is currently being done.⁹¹

Other nations have not incorporated international legal standards into their own domestic legal systems, causing difficulty in prosecution and inconsistency in treatment

⁸⁸Sam Quinones "State of War" *Foreign Policy* 171 (March/April 2009), 76-80

⁸⁹THE PAQUETE HABANA, 175 U.S. 677 (1900)

⁹⁰18 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."

⁹¹*United States Attorney Southern District of New York* "Somalian Pirate Brought To U.S. To Face Charges For Hijacking The Maerska Alabama And Holding The Ship's Captain Hostage" Press Release, 21 April 2009; <http://www.usdoj.gov/usao/nys/pressreleases/April09/museabduwaliabdukhadircomplaintpr.pdf>

among the nations with naval forces operating in the region.⁹² The United States should help other nations fully integrate international standards into their own laws—both pirates’ legal culpability and their rights afforded by Common Article III, as the United States has done—to promote effective international efforts against piracy.

These issues, as well as any others that may arise in the foreseeable future will have their unique developments and challenges, but the soft power principles of the Conventions will remain applicable and a critical element of any successful security strategy; the nature of threats will change, but the more they do, the more the applicability of the Conventions and their underlying principles remain the same.

⁹²*The Economist* “Wrong signals” 7 May 2009