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Steven R. Ratner
University of Michigan Law School

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Prior to joining the Law School in 2004, Professor **Steven R. Ratner** was the Albert Sidney Burleson Professor in Law at the University of Texas School of Law at Austin. He holds a J.D. from Yale, an M.A. (diplôme) from the Institut Universitaire de Hautes Etudes Internationales (Geneva), and an A.B. from Princeton. Before joining the Texas faculty in 1993, he was an attorney-adviser in the Office of the Legal Adviser at the U.S. State Department.

Ratner's research has focused on new challenges facing new governments and international institutions after the Cold War, including ethnic conflict, territorial borders, implementation of peace agreements, and accountability for human rights violations. He has written and spoken extensively on the law of war, and is also interested in the intersection of international law and moral philosophy and other theoretical issues. In 1998-1999, he served as a member of the UN Secretary-General's three-person Group of Experts for Cambodia, and has advised the United Nations on issues of counter-terrorism, the human rights responsibilities of corporations, and the role of amnesties in UN-mediated peace negotiations.

Among his publications are five books: *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War* (St. Martin's, 1995); *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford, 1997 and 2001) (co-author); *International War Crimes Trials: Making a Difference?* (University of Texas Law School, 2004) (co-editor); *The Methods of International Law* (American Society of International Law, 2004) (co-editor); and *International Law: Norms, Actors, Process* (Aspen, 2002 and 2006) (co-author). A member of the board of editors of the *American Journal of International Law,* he was a Fulbright Scholar at The Hague during 1998-99, where he worked in and studied the office of the OSCE (Organization for Security and Cooperation in Europe) High Commissioner on National Minorities. He teaches a variety of courses in international law and established and oversees the Law School's externship program with international organizations and NGOs in Geneva, Switzerland.

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James Boyd White is L. Hart Wright Collegiate Professor of Law Emeritus, Professor of English, and Adjunct Professor of Classics at the University of Michigan. He has published many books and articles on the nature of legal thought and expression, beginning with *The Legal Imagination* (Little, Brown 1973). His most recent book is *Living Speech: Resisting the Empire of Force* (Princeton, 2006). In this book he addresses some of the themes of the conference, as he also does in an interview published in 105 *Michigan Law Review* 1403 (1907).

Think again: The Geneva Conventions

By Steven R. Ratner

The following essay is based on the author's article of the same name in the "Think Again" section of the March/April 2008 issue of Foreign Policy *(pages 26-32). It is reproduced here with permission from* FOREIGN POLICY, *www.ForeignPolicy.com, #165 (March/April 2008). Copyright 2008 by the Carnegie Endowment for International Peace. The "Think Again" section of* Foreign Policy *seeks to educate readers by presenting and responding to common myths and conventional wisdom on important matters of international relations.*

"The Geneva Conventions are obsolete"

Only in the minor details. The laws of armed conflict are old; they date back millennia to warrior codes used in ancient Greece. But the modern Geneva Conventions, which govern the treatment of soldiers and civilians in war, can trace their direct origin to 1859, when Swiss businessman Henri Dunant happened upon the bloody aftermath of the Battle of Solferino. His outrage at the suffering of the wounded led him to establish what would become the International Committee of the Red Cross, which later lobbied for rules improving the treatment of injured combatants. Decades later, when the devastation of World War II demonstrated that broader protections were necessary, the modern Geneva Conventions were created, producing a kind of international "bill of rights" that governs the handling of casualties, prisoners of war (POWs), and civilians in war zones. Today, the conventions have been ratified by every nation on the planet.

Of course, the drafters probably never imagined a conflict like the war on terror or combatants like al Qaeda. The conventions were always primarily concerned with wars between states. That can leave some of the protections enshrined in the laws feeling a little old-fashioned today. It seems slightly absurd to worry too much about captured terrorists' tobacco rations or the fate of a prisoner's horse, as the conventions do. So, when then-White House Counsel Alberto Gonzales wrote President George W. Bush in 2002 arguing that the "new paradigm" of armed conflict rendered parts of the conventions "obsolete" and "quaint," he had a point. In very specific—and minor—details, the conventions have been superseded by time and technology.

But the core provisions and, more crucially, the spirit of the conventions remain enormously relevant for modern warfare. For one, the world is still home to dozens of wars, for which the conventions have important, unambiguous rules, such as forbidding pillaging and prohibiting the use of child soldiers. These rules apply to both aggressor and defending nations, and, in civil wars, to governments and insurgent groups.

The conventions won't prevent wars—they were never intended to—but they can and do protect innocent bystanders, shield soldiers from unnecessary harm, limit the physical damage caused by war, and even enhance the chances for cease-fires and peace. The fundamental bedrock of the conventions is to prevent suffering in war, and that gives them a legitimacy for anyone touched by conflict, anywhere, and at any time. That is hardly quaint or old-fashioned.

"If you've seen a classic war movie such as The Great Escape, *you know that prisoners of war are only obligated to provide name, rank, date of birth, and military serial number to their captors. But the Geneva Conventions do not ban interrogators from asking for more."*

"The conventions don't apply to al Qaeda"

Wrong. The Bush administration's position since Sept. 11, 2001, has been that the global war on terror is a different kind of war, one in which the Geneva Conventions do not apply. It is true that the laws do not specifically mention wars against nonstate actors such as al Qaeda. But there have always been "irregular" forces that participate in warfare, and the conflicts of the 20th century were no exception. The French Resistance during World War II operated without uniforms. Vietcong guerrillas fighting in South Vietnam were not part of any formal army, but the United States nonetheless treated those they captured as POWs.

So what treatment should al Qaeda get? The conventions contain one section—Article 3—that protects all persons regardless of their status, whether spy, mercenary, or terrorist, and regardless of the type of war in which they are fighting. That same article prohibits torture, cruel treatment, and murder of all detainees, requires the wounded to be cared for, and says that any trials must be conducted by regular courts respecting due process. In a landmark 2006 opinion, the U.S. Supreme Court declared that at a minimum Article 3 applies to detained al Qaeda suspects. In other words, the rules apply, even if al Qaeda ignores them.

And it may be that even tougher rules should be used in such a fight. Many other governments, particularly in Europe, believe that a "war" against terror—a war without temporal or geographic limits—is complete folly, insisting instead that the fight against terrorist groups should be a law enforcement, not a military, matter. For decades, Europe has prevented and punished terrorists by treating them as criminals. Courts in Britain and Spain have tried suspects for major bombings in London and Madrid. The prosecutors and investigators there did so while largely complying with obligations enshrined in human rights treaties, which constrain them far more than do the Geneva Conventions.

"The possibility that detainees could remain in legal limbo indefinitely at Guantánamo has turned the issue into a foreign-relations disaster for the United States."

"The Geneva Conventions turn soldiers into war criminals"

Only if they commit war crimes. For centuries, states have punished their own soldiers for violations of the laws of war, such as the mistreatment of prisoners or murder of civilians. The Geneva Conventions identify certain violations that states must prosecute, including murder outside of battle, causing civilians great suffering, and denying POWs fair trials, and most countries have laws on the books that punish such crimes. The U.S. military, for example, has investigated hundreds of service members for abuses in Iraq and Afghanistan, leading to dozens of prosecutions. Canada prosecuted a group of its peacekeepers for the murder of a young Somali in 1993.

Yet the idea that ordinary soldiers could be prosecuted in a foreign country for being, in effect, soldiers fighting a war is ridiculous. Yes, many countries, including the United States, have laws allowing foreigners to be tried for various abuses of war committed anywhere. Yet the risk of prosecution abroad, particularly of U.S. forces, is minuscule. Those foreign laws only address bona fide war crimes, and it is rarely in the interest of foreign governments to aggravate relations with the United States over spurious prosecutions.

The idea that the International Criminal Court could one day put U.S. commanders on trial is unlikely in the extreme. That court could theoretically prosecute U.S. personnel for crimes committed in, say, Afghanistan, but only if the United States failed to do so first. What's more, the court is by its charter dedicated to trying large-scale, horrendous atrocities like those in Sudan. It is virtually inconceivable that this new institution will want to pick a fight with the United States over a relatively small number of abuses.

"The Conventions prevent interrogations of terrorists"

False. If you've seen a classic war movie such as *The Great Escape*, you know that prisoners of war are only obligated to provide name, rank, date of birth, and military serial number to their captors. But the Geneva Conventions do not ban interrogators from asking for more. In fact, the laws were written with the expectation that states will grill prisoners, and clear rules were created to manage the process. In interstate war, any form of coercion is forbidden, specifically threats, insults, or punishments if prisoners fail to answer; for all other wars, cruel or degrading treatment and torture are prohibited. But questioning detainees is perfectly legal; it simply must be done in a manner that respects human dignity. The conventions thus hardly require rolling out the red carpet for suspected terrorists. Many interrogation tactics are clearly allowed, including good cop-bad cop scenarios, repetitive or rapid questioning, silent periods, and playing to a detainee's ego.

The Bush administration has engaged in legal gymnastics to avoid the conventions' restrictions, arguing that preventing the next attack is sufficient rationale for harsh tactics such as waterboarding, sleep deprivation, painful stress positions, deafening music, and traumatic humiliation. These severe methods have been used despite the protests of a growing chorus of intelligence officials who say that such approaches are actually counterproductive to extracting quality information. Seasoned interrogators consistently say that straightforward questioning is far more successful for getting at the truth. So, by mangling the conventions, the United States has joined the company of a host of unsavory regimes that make regular use of torture. It has abandoned a system that protects U.S. military personnel from terrible treatment for one in which the rules are made on the fly.

"The Geneva Conventions ban assassinations"

Actually, no. War is all about killing your enemy, and though the Geneva Conventions place limits on the "unnecessary suffering" of soldiers, they certainly don't seek to outlaw war. Assassinating one's enemy when hostilities have been declared is not only permissible; it is expected. But at the core of the conventions is the "principle of distinction," which bans all deliberate targeting of civilians. The boundless scope of the war on terror makes it difficult to decide who is and is not a civilian. The United States claims that it can target and kill terrorists at any time, just like regular soldiers; but the conventions treat these individuals like

quasi-civilians who can be targeted and killed only during "such time as they take a *direct* part in hostilities" [emphasis mine]. The Israeli Supreme Court recently interpreted this phrase to give Israel limited latitude to continue targeted killings, but it insisted on a high standard of proof that the target had lost protected status and that capture was impossible. What standards the United States might be using—such as when the CIA targeted and killed several al Qaeda operatives in Yemen in 2002—are highly classified, so there's no way to know how much proof is insisted upon before the trigger is pulled or the button pushed.

For European countries and others who reject the idea of a "war" against terrorists to begin with, targeted killings are especially abhorrent, as international law prohibits states in peacetime from extrajudicial killings. There are very specific exceptions to this rule, such as when a police officer must defend himself or others against imminent harm. To that end, a suicide bomber heading for a crowd could legally be assassinated as a last resort. By contrast, suspected terrorists—whether planning a new attack or on the lam—are to be captured and tried.

"The Conventions require closing Guantánamo"

No, but changes must be made. The Geneva Conventions allow countries to detain POWs in camps, and, if someone in enemy hands does not fit the POW category, he or she is automatically accorded civilian status, which has its own protections. But none of the residents of Guantánamo's military prison qualifies as either, according to the Bush administration, thus depriving the roughly 275 detainees who remain there of the rights accorded by the conventions, such as adequate shelter and eventual release.

The possibility that detainees could remain in legal limbo indefinitely at Guantánamo has turned the issue into a foreign-relations disaster for the United States. But let's be clear—the Geneva Conventions don't require the United States to close up shop in Cuba. The rules simply insist that a working legal framework be put in place, instead of the legal vacuum that exists now.

There are several options worth consideration. The prison at Guantánamo could be turned into a pre-trial holding area where detainees are held before they are brought before U.S. courts on formal charges. (The hiccup here is that most of the detainees haven't clearly violated any U.S. law.) Alternatively, the U.S. Congress could pass legislation installing a system of preventive detention for dangerous individuals. The courts could occasionally review detainees' particular circumstances and judge whether continued detention is necessary and lawful. (The problem here is that such a system would run against 200 years of American jurisprudence.) In the end, closing Guantánamo is probably the only option that would realistically restore America's reputation, though it isn't required by any clause in the conventions. It's just the wisest course of action.

"No nation flouts the Geneva Conventions more than the United States"

That's absurd. When bullets start flying, rules get broken. The degree to which any army adheres to the Geneva Conventions is typically a product of its professionalism, training, and sense of ethics. On this score, U.S. compliance with the conventions has been admirable, far surpassing many countries and guerrilla armies that routinely ignore even the most basic provisions. The U.S. military takes great pride in teaching its soldiers civilized rules of war: to preserve military honor and discipline, lessen tensions with civilians, and strive to make a final peace more durable. Contrast that training with Eritrea or Ethiopia, states whose ill-trained forces committed numerous war crimes during their recent border war, or Guatemala, whose army and paramilitaries made a policy of killing civilians on an enormous scale during its long civil conflict.

More importantly, the U.S. military cares passionately that other states and nonstate actors follow the same rules to which it adheres, because U.S. forces, who are deployed abroad in far greater numbers than troops from any other nation, are most likely to be harmed if the conventions are discarded. Future captors of U.S. forces will find new excuses to deny them treatment under the conventions; and depriving detainees in U.S. custody of decent treatment could decrease the likelihood that they will surrender, prolonging armed conflict and U.S. casualties. Career U.S. military commanders and lawyers have consistently opposed the various reinterpretations of the conventions by politically appointed lawyers in the Bush White House and Justice Department for precisely this reason.

It is enormously important that the United States reaffirms its commitment to the conventions, for the sake of the country's reputation and that of the conventions. Those who rely on the flawed logic that because al Qaeda does not treat the conventions seriously, neither should the United States fail to see not only the chaos the world will suffer in exchange for these rules; they also miss the fact that the United States will have traded basic rights and protections harshly learned through thousands of years of war for the nitpicking decisions of a small group of partisan lawyers huddled in secret. Rather than advancing U.S. interests by following an established standard of behavior in this new type of war, the United States—and any country that chooses to abandon these hard-won rules—risks basing its policies on narrow legalisms. In losing sight of the crucial protections of the conventions, the United States invites a world of wars in which laws disappear. And the horrors of such wars would far surpass anything the war on terror could ever deliver. ■