

The Geneva Trap

By Sonia Cardenas | March 25, 2005

Ongoing scandals of prisoner abuse by U.S. forces in Afghanistan and Iraq are fuelled by the Bush administration's criticism of the Geneva Conventions. The administration has perpetuated the myth, which domestic public opinion and the popular media have accepted, that the Conventions do not entirely protect suspected terrorists or other non-state combatants captured abroad. This myth allowed the administration to invent a new category of detainees outside the purview of international law—"unlawful combatants"—essentially legitimating subsequent mistreatment and abuse. This self-serving strategy has even distracted critics of U.S. policy, who have fallen for the trap by becoming embroiled in a defensive debate over *who* is entitled to "prisoner of war" status, when they should have been asserting aggressively the basic rights owed to all human beings (including suspected terrorists) under international law. Capitalizing on the ambiguity and historical specificity of the Geneva Conventions, the Bush administration has defined the terms of a pivotal debate, while opening the door to human rights abuses and disarming potential opponents.

Like all laws, the Geneva Conventions can be ambiguous, complex, and reflect their historical origins. Most of the controversy surrounding indefinite detention by the United States, for example, revolves around the scope of the Third and Fourth Conventions. On the one hand, the Third Geneva Convention defines "prisoners of war" largely in state-centric terms, as members of a recognized state's armed forces who are entitled to special protections. This definition excludes suspected terrorists captured in Afghanistan or Iraq, leading administration figures like Donald Rumsfeld and Alberto Gonzales to describe the 1949 Convention as anachronistic and vague. On the other hand, the Fourth Geneva Convention extends basic human rights protections (including the right to a "fair and regular trial") to all civilians in an armed conflict, whether or not they are engaged in hostilities.

The United States has focused exclusively on determining who is entitled to "prisoner of war" status (Third Convention), foreclosing an otherwise viable strategy: to extend the status of "civilians" to all non-state actors fighting the United States. Doing so would not preclude detaining suspected terrorists or restricting their freedom of movement and communication. Indeed, they would not have all of the rights accorded non-hostile civilians, but they would never have to forfeit their rights to due process and humane treatment (Article 5, Fourth Geneva Convention). Once the administration claimed exemptions to Geneva,

moreover, it was free to invent the category of "unlawful combatants," further circumventing international legal obligations to protect non-prisoners of war.

A Strategy of Deception

The Bush administration's reliance on the Geneva Conventions to justify the differential treatment of detainees is deeply flawed but unsurprising. It offers the American government substantial political payoffs. For example, despite its questionable legal premises, the overall strategy has resonated with a post-September 11 public, more attuned to the killing of Americans and Vietnam-era images of POWs than the treatment of civilians under international law. Furthermore, framing the debate in terms of who is *exempt* from the protection of the Geneva Conventions automatically legitimates the potential mistreatment of prisoners, a preferred weapon in the government's counter-terrorism arsenal. It is a short slippery slope from labeling prisoners "unlawful combatants" to subjecting them to indefinite detention, inhumane interrogation methods, and a policy of renditions (i.e., the extra-judicial transfer of detainees between governments, often tantamount to "disappearances"). More broadly, the administration's paradoxical use of human rights language and its actual defiance of international law is nothing new, illustrated by U.S. opposition to the Kyoto Protocol and the International Criminal Court and its unilateral launch of a putatively preemptive war against Iraq.



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Lured by a simplistic legal argument and fear-inducing rhetoric—“treaties as old as the Geneva Conventions are inadequate for the new threat of terrorism”—even the administration’s critics have become mired in a dispute over the status of prisoners, losing sight of a more central legal and ethical issue: certain behaviors are not permissible under any circumstances or against anyone, even purported terrorists. This fundamental claim is firmly ensconced in both international and domestic law. Not only does the Fourth Geneva Convention extend basic human rights to all civilians in armed conflict, but the Convention against Torture, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and international customary law all bind the United States to the humane treatment of prisoners, despite any U.S. reservations and understandings attached to these treaties or any appeal to executive prerogative. The foreign domestic law of the United States places similar restrictions on the detention of foreigners abroad, notwithstanding legal machinations after September 11.

Ironically, the same administration that labels the Geneva Conventions as anachronistic has an outdated conception of international human rights law. Today’s human rights norms are highly inclusive; they guarantee fundamental rights to all human beings by simple virtue of being human, and some of them cannot be suspended under any scenario. Denying suspected terrorists these rights is in principle no different from other exclusionary policies that deprive people of their rights on the basis of race, religion, or gender. Administration apologists would surely claim that terrorists threaten vital national security interests, and any temporary

suspension of their rights is justified on grounds of self-defense. The problem is that rights are always withheld in the name of a greater good. Violating detainees’ rights will not make the United States safer. It is only likely to threaten America’s reputation, while engendering greater terrorism and instability.

The Geneva Conventions have proved to be a red herring, a distraction from real U.S. interests in the “war on terror.” In the public imagination, the Bush administration has equated the Conventions with archaic images of “prisoners of war” and the Red Cross. This depiction was essential for rationalizing the category of “unlawful combatants,” which has unleashed a Pandora’s Box of abuses. This is not an accident. In the fight against terrorism, the Bush administration has simply not been willing to treat all detainees humanely or provide them with due process. It has preferred to fight terror with terror. Indefinite detention and inhumane interrogation procedures are not unintended or isolated cases; they are the *sine qua non* of the U.S. attempt to fight a global war on terror in an age of internationally recognized human rights. A selective reading of the Geneva Conventions has been the perfect cover for achieving these contradictory, but ultimately untenable, goals.

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