Should Irregular Fighters Be Excluded From Legal Protections Such As POW Status?

https://www.e-ir.info/2015/12/14/should-irregular-fighters-be-excluded-from-legal-protections-such-as-pow-status/

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The titular question is a pertinent issue in security studies, comprising conflicting moral and legal viewpoints that engender blurry boundaries and generate a dangerous legal dialogue regarding the treatment of so-called irregular combatants. Though the United States of America (USA) is not the first to hold security detainees (those detained for national security purposes) under a dubious national security narrative, this essay examines the construction of the 'unlawful combatant' category through a putatively narrow and strict interpretation of International Law in the Global War on Terror (GWOT). It will problematise the assertions that: a) the GWOT is a new form of conflict, making redundant previous laws governing warfare (temporal argument); and b) the legal exclusions applied detainees at Black Sites like Abu Ghraib Prison were permissible on the basis that they were outside US soil (spatial argument), outlined by Sibylle Scheipers (2015: 202; Roberts 2010: 263).

This essay postulates that the Bush Administration employed a discourse analogous to historical forms of ostracism, replicating exclusionary norms evidenced in the French Revolutionary and Napoleonic Wars, as well as Nineteenth and Twentieth Century colonial era arguments that irregular fighters are uncivilised, 'savages,' unworthy of legal rights; yet appealing to future unknowns as reinforcement for extreme interpretations of IL, both old and new (For example: The Lieber Code, 1907 Hague Convention and the 1949 Geneva Conventions). This consequently established the ultimate biopolitical space of exception whereby detainees were reduced to bare life, that is life which is non-human and exempt from certain rights, and "stripped of every political status" (Mégret 2006: 286ff.; Doty 2011: 599; Agamben 1998: 97). Ergo, it is posited that the term 'irregular' is a pejorative and demonising weapon of war applied only to those opposing US goals and for the purposes of improving the legitimate guise of its actions. Hence, rendering it morally reprehensible to remove *all* legal rights of irregulars on the basis that they exemplify Otherness; and for the purposes of strengthening contentious security policies (torture), when faced with the precipice of the unknown, in the name of national interest (Mégret 2006; Daase and Kessler. 2007: 425; Scheipers 2015: 29).

For the purposes of this essay the definition of irregular combatant will be, tentatively, taken, in line with the exclusionary parlance of US legal memos, as unlawful combatants: non-state actors using military force for personal gain, without due authorisation and standing in direct opposition to established legal norms (1949 Geneva Conventions) governing warfare (Greenberg and Dratel 2005: xvii-xviii ff.; Lieber 1983: 33). The 'Other' is defined as the social construction of those "in difference to self," and is a concept used to justify policy decisions and establish (self) dominance and (Other's) subjugation (De Buitrago 2012: xiii-xxv). Biopolitics is a form of power concerned with correcting, administrating and regulating populations (Van Munster 2007: 145). The biopolitical state of exception is born from juridical process establishing a zone of indistinction between outside and inside, chaos and normal and is a space that must, by definition, remain hidden from justice, for example black sites like Abu Ghraib (Agamben 1998: 19, 28). Bare life is defined in Doty's terms as: "life that can be taken without apology, classified as neither homicide nor sacrifice" (Doty 2011: 601). Torture will be defined under the 1984 UN Convention Against Torture (CAT) as:

'Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession… inflicted by or at the instigation of or acquiescence of a public official or other person acting in an official capacity' (Article 1).

Antithetical to the rhetoric employed by the Bush Administration, this paper refers to activities at Abu Ghraib as torture and as neither "enhanced interrogation techniques" nor legal, as evidenced in *The Torture Papers* (Greenberg and Dratel 2005; Donnelly 2013: 8). From this delineation, it is demonstrated that the USA deliberately refused legal rights such as Prisoner Of War (POW) status under a questionable reading of the 1949 Geneva Conventions, though this essay focuses primarily on the denial of POW status and the Third Geneva Convention. Zero-risk politics is linked to prevention whereby no form of risk is deemed acceptable in contemporary security practice (Aradau and Van Munster 2007: 101-109).Daase and Kessler's conceptualisation of the unknown will be invoked throughout this essay: unknown unknowns comprising non-knowledge about what we do not and cannot know; and unknown knowns, knowledge we don't want to know, knowledge that is ignored, forgotten, suppressed or repressed (2007: 412-414).

By the very nature of its name, irregular warfare, especially in the GWOT, is exactly that: it is unconventional, ambiguous in meaning and there is no all-embracing consensus on what constitutes 'irregularity' except for the commonly invoked tenet that it is the complete conceptual opposite of the Napoleonic 'conventional' war, comprising definitive battles between state parties (Scheipers 2015: 223ff). How we deal with the irregular combatant in the Twenty-First Century is laden with (unacknowledged) historical influence and a paradoxical appeal to the future that is demonstrated by the Bush Administration's christening of GWOT as a novel, 'new paradigm' (Greenberg and Dratel 2005: xxi, 39). This paper intersects two explanations: the presence of unknown unknowns and Scheipers' assessment that the exclusionary category of the irregular combatant had been historically recurrent before 9/11, thus implying that rhetoric of future unknown unknowns concerning the danger of irregular combatants was not a new phenomenon, arguably rendering it an unknown known (2015: 190).

Although Scheipers' argument problematises 9/11 as the precipitating factor of the US legal position on irregular combatants, Claudia Aradau and Rens Van Munster convincingly expound that a politics of zero-risk governed security policy in the shadow of the unknown and paired with Scheipers' double-historical amnesia position (USA 'forgot' history and argued that 9/11 changed the face of warfare forever) generated a powerful and dangerous legal dialogue (2007: 91). Thus, (re)establishing exclusionary legal norms at the fore of contemporary conflict, based on a morally dangerous dialogue engendering Othering that echoes the French Government's denunciation of revolutionaries as illegitimate actors in Eighteenth Century; thereby confirming the assertion that the terms 'irregular' and 'unlawful combatant' have been used as exclusionary categories, deployed as a weapon to cast irregular fighters as abject (Scheipers 2015: 28-33). Thus, unjustifiably eradicating irregular fighters' basic legal protection rights, which cannot be justly argued as forgone by taking up arms, especially when confronted with the subjectivity of jus ad bellum motivations; hence, vilifying the legitimacy of denying legal protection (Mégret 2006: 272-303).

The irregular enemy was portrayed as so new and 'insidious' that, unwittingly or not, the Bush Administration pulverised and moulded irregular fighters into a 'savage' Other image, reminiscent of colonial era discourses (Greenberg and Dratel 2005: xii; Mégret 2006: 272). This Othering, paired with Donald Rumsfeld's position on the unpredictability of the future (an unknown unknown), invoked legal exclusionary mechanisms, transforming the future into a to-be-feared institution, laden with potential irregular threats (Kinsella 2005: 166). Hence allowing lawyers to fill the legal gaps comprising the Geneva Conventions, as well as the widely unratified 1977 Additional Protocol I, with extraordinary and limitless policies including the refusal to accord detainees at Abu Ghraib with POW status, rendering them bare life (Van Munster 2007: 143; Bellinger 2010: 253).

Accordingly, the social construction of the category of unlawful combatant (and more broadly irregular fighters) generated norms that allowed the exclusion of certain 'illegitimate' individuals, promising a morally and legally sound justification yet throwing into jeopardy the USA's credibility by invoking policy that verged on glorifying torture; a morally deplorable and illegal practice under CAT, which the Bush Administration transgressed in the face of ultimate danger: the unknown 'savage' (Van Munster 2012: 99).

This problematises the notion of the West as 'civilised' and the assumption that by extension it wages 'regular' and restricted warfare. Owing to 'new' limitless warfare it is duly tenable that the USA is now equatable with the 'savage' beast (al Qaeda and irregular fighters) it had tried to alienate and castigate, leading to the following questions: a) what position is the West now in to denounce the tactics of irregulars when an inherent tactic in the GWOT was a

manipulation of International Law to spread fear amongst potential unlawful combatants; and b) can torture be permissible as a *last resort* to gain intelligence — the latter 'last resort' argument being characteristic of irregular fighters' justifications for their 'barbaric' measures (Aradau and Van Munster 2007: 91; Richardson 2007: 16; Scheipers 2015)? Therefore, the USA could now be deemed an irregular actor in the GWOT, thence highlighting the paradoxes at the core of the Bush Administration's application of International Law (Greenberg and Dratel 2005: 606ff).

Inveigled by a desire for intelligence, to limit the potential threat posed by unlawful combatants (unknown unknown), and influenced by historical rhetorics of illegitimacy, the justifications for legal exclusions were reinforced with such legality that the GWOT has been deemed "lawyered to death" in its endeavours to justify extraordinary action that applied bare life to detained unlawful combatants (Aradau and Van Munster 2007: 91; Scheuerman 2006: 120; Goldsmith 2009: 69). The strict interpretation argument has been used to support the position that the USA *merely* interpreted International Law in a very strict and legal manner; strict meaning a very specific applications of laws and attempts to completely exclude individuals from any and all protections under the Geneva Conventions (Greenberg and Dratel 2005). The 'strict' argument is partially convincing, if not mostly because the Bush Administration truly believes it to be true, as exemplified in Donald Rumsfeld's discourse in the recent documentary *The Unknown Known* (Morris 2013). However, this strict interpretation is questionable, particularly when Assistant Attorney General Jay S. Bybee redefined, for the purposes of justifying extralegal treatment of detainees in the GWOT, the Jus Cogens CAT definition of torture as:

'Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death' (Greenberg and Dratel 2005: 172)

Contextualised by this redefinition, the US assertion that al Qaeda is excluded from Geneva Conventions because of its non-state status and because it "[violates] the very core principle of the laws of war by targeting innocent civilians for destruction" further demonstrates the sliding moral scale and inconsistencies towards the legal categorisation of irregular combatant as good and bad, emphasising legal vituperative and exclusionary semiotic effects of the term 'irregular' (Yoo 2004; Scheipers 2015: 1, 28, 220). This is demonstrated by the hiring of irregular parties during Operation Enduring Freedom Afghanistan because they aligned with US needs at the time — neither were referred to as unlawful combatants even if they did fit the aforementioned definitional outline (Scheipers 2015: 1). Hence, it is confirmed that the term is one employed to reinforce political power relations and reduce the enemy to illegitimacy and bare life whereby an "any means necessary" approach appears legally and morally just, if not warranted (Van Munster 2007: 147). An abstract reading of Huntington and Clausewitz reiterates this politicisation of war whereby it is an instrument of political object, which is, here, the reduction of the irregular to an unlawful actor (Huntington 1957: 57-58; Clausewitz 1997: 49). In effect, categorisation as irregular, and thus illegitimate, allowed previous (restrained) norms to be contaminated and countermanded, institutionalising exclusionary action and the reduction of individuals to bare life in the name of security (Scheuerman 2006: 121).

This leads to the question: at what point did the USA become the savage? Legitimising extra-legal (that which is deemed above the law) protocols that engender irregular qualities like torture, a concept widely unassociated with 'regular' and restrained warfare, established a double standard of International Law where transgressions by the identified conceptual opposite (unlawful combatants) resulted in the full force of the USA's exclusionary legal apparatus yet its own transgression (torture) was justified by a zero-risk policy that legitimised Black Sites where the understanding is that, as Cheney states, "the risks of inaction [in the face of the unknowns of savage warfare] are far greater than the risks of action," rationalising any mode of mitigating risk (Daase and Kessler 2007: 425).

This double standard was implicit in the permissibility of the moral and legal digressions, highlighted by invocation of Article 42 of the Fourth Geneva Convention (again, withholding POW status) as legitimisation for US detention of suspects in the name of national security (an illegitimate implementation as this clause only applies to the State whose territory is theatre of conflict); yet central to legal argument is a paradoxical refusal to apply the convention in its entirety for the purposes of detainee protection under the 'protected persons' stipulation, and the argument that Geneva Conventions apply "only to international conflicts between States that have signed them" (Scheipers 2015: 198; Greenberg and Dratel 2005: 588-590; Mégret 2006: 299; Yoo 2004). Hence, it is incontrovertible that

International Law has been subject to an à la carte selection where only rules favourable to US security policy were applied, which I posit only encourages increased irregularity on the basis that, "a sense of alienation from the status quo" is furthered because irregular fighters are now subject to no protection, with no right to wage any kind of fight for what they see as a legitimate cause (Richardson 2007: 69). This realisation is necessary to prohibit a relapse to the Eighteenth Century French rhetoric that attributes such negative, savage qualities to the irregular (unlawful combatant) that the regular party is: "purged from all negative traits" and given pure legitimacy (Bellinger 2010: 263; Scheipers 2015: 53ff). By extending legal rights to so-called unlawful combatants the USA would, arguably, cause less international uproar and may have limited future attacks justified by torture at Abu Ghraib — this is an unknown unknown, yet the point remains pertinent with ISIS's recent activities where 'detainees' (for want of a better word) have been waterboarded and dressed in orange jumpsuits akin to those seen at Guantanamo Bay and Abu Ghraib (Khan).

It can, thus, be satisfactorily argued that there exists a stark recrudesce of the Bush Administration's actions to Eighteenth Century principles; an era of 'unprofessional' military action where war "is a science replete with shadows in whose obscurity one cannot move with an assured step" and regarding rules and principles, "War has none" (de Saxe 1944: 17; Huntington 1957: 28-29). Undercurrents of French exclusions and the colonial portrayal of savagery reinforce, and perhaps encourage, appeals to future unknowns as a justification for extraordinary legal exclusionary policies when faced with irregular fighters as: "[they are] castigated as a threat to social stability, prosperity and social safety" (Mégret 2006; Greenwood and Wæver 2013: 495). Abu Ghraib is evidence of the resulting biopolitical exemption forced upon irregular fighters in the GWOT and reinforces Agamben's argument that spaces of exception have "transgressed [their] spatiotemporal boundaries and now, overflowing outside them, [are] starting to coincide with the normal order, in which everything again becomes possible" (1998: 28). Here, the spatiotemporal exclusionary arguments of the Bush Administration become redundant given the evidenced historical backlog of rhetorically constructed supposed 'new' forms of warfare and the fact that, even a liberal reading of the 1899 Hague Convention (Regulations Article 8) shows that, those detained are "subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen" meaning that the US must apply its own laws irrespective of theatre, if not the Fourth Geneva Convention. Ergo, the notion that unlawful combatants should be *entirely* exempt from legal rights verges on conjecture and undermines the rule of law (Greenberg and Dratel 2005: 607, 618).

Ultimately, an interplay between the historical category of the irregular combatant and unknown unknowns led the USA into a situation whereby morally reprehensible abuse of International Law became its own quasi-irregular tactic of war, legitimating the renunciation of POW status for 'Other' irregular fighters involved in this inherently extralegal and extra-normal GWOT.Perhaps the question is not which persons we should exclude but how we can adapt the laws of warfare to adequately deal with the increased nuances of contemporary warfare, generating debate about ensuring all parties involved in war are adequately incorporated within its legal frameworks. The fundamental, and avoided, averment is that using the term 'unlawful combatant' is a pejorative label afforded only to enemies of the 'legitimate' party. Hence, those deemed in complete opposition to Western interests are reduced to bare life, causing a manipulation of International Law tantamount to irregular tactics in its own right. Ultimately, I propose that the marginalisation of individuals into the broad category of 'unlawful combatant' is a Twenty-First Century manifestation of exclusionary principles, evident throughout history, continually invoked by Western powers justifying what would otherwise be deemed tyrannic policies in the name of national security, here using the precipice of the unknown as a scapegoat. The US has (re)established a legal norm of torture: what this affords others, like ISIS, to do remains an unknown unknown; hence, legal rights ought to be given.

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Date Written: February 2015

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