



# 'Unlawful Combatants': The West's Treatment of Irregular Fighters in the 'War on Terror'

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*Abstract: The West's treatment of irregular fighters in the "war on terror" was highly problematic. This article contends that we must look beyond the assumption that political and strategic considerations compromised the law and led to the "invention" of the category of the "unlawful combatant." Rather, the law of armed conflict itself includes strong exclusionary mechanisms towards irregular fighters. These exclusionary strands in the law came to dominate the West's strategic decision-making on the treatment of irregular fighters. Moreover, the fact that irregular fighters became such a vital issue post-9/11 was not a result of the war on terror being a new kind of war, as has often been argued. Rather, this article suggests that it reflects an identity crisis of the West's regular armed forces at the start of the twenty-first century.*

The treatment of irregular fighters was among the most problematic aspects of the so-called "war on terror." Many of the issues relating to the West's approach to irregular fighters after 9/11 persist.<sup>1</sup> In spite of Barack Obama's

<sup>1</sup> This article will refer to the phenomenon at hand as "the West's treatment of irregular fighters." While the United States was, undoubtedly, the leading actor in the post-9/11 approach to irregular fighters—and most of the relevant documents that are publicly available were drafted within the U.S. Administration—its Western allies, in particular within NATO, played a relevant part in implementing this approach, as well. Until 2005 the U.S.'s NATO partners in Afghanistan handed over all irregular detainees to U.S. forces. Various European states also colluded with the U.S.-run program of "extraordinary renditions." However, the precise nature of the role that the U.S. allies played is not yet fully known and many relevant documents are still classified. Yet, restricting the object of analysis to the U.S. treatment of irregular fighters would be inaccurate and misleading.

2009 pledge to close the prison at Guantánamo Bay, it still holds a significant number of inmates. The notion of the “unlawful combatant” has developed into a potent symbol of these problematic policies. Yet it is not entirely clear what led to the emergence of these policies.

Most critics of the post-9/11 detention policies perceived them as a result of the Bush Administration’s decision to sacrifice legal constraints for the sake of political expediency and strategic efficiency. According to Philippe Sands, “Legal opinions became an expression of policy.”<sup>2</sup> Others referred to Guantánamo as a “legal black hole.”<sup>3</sup> Statements made by officials from within the Bush Administration corroborated this impression, since they frequently claimed that the law of armed conflict was outdated and ill-suited to wars in the twenty-first century.

However, others have pointed out that the detention regime in the war on terror was, in fact, not “removed from the law.” Rather, it was developed by lawyers and underpinned by legal arguments, even if some of the arguments were deeply erroneous. In fact, while the drafting history of the so-called “torture memos” has often been decried as a process of political expediency usurping the law, the second charge frequently leveled against the memos’ drafters was that they adopted a “narrowly legalistic approach.”<sup>4</sup> Jack Goldsmith, who resigned from his post as head of the Office of Legal Counsel of the U.S. Department of Justice in 2004 over the issue of detention and torture, echoed this assessment when he wrote in his political memoir that the “war on terror” had been “lawyered to death.”<sup>5</sup>

With hindsight it became clear that the post-9/11 detention policies were not only morally questionable, but also had disastrous political and strategic consequences. Although the war on terror started with the narrowly defined aim of combatting terrorism, the West’s wars in Afghanistan and Iraq soon evolved into “stabilization” operations. The vast majority of irregular fighters and “terrorists” encountered on the battlefields in Afghanistan and Iraq had little in common with the al Qaeda masterminds of 9/11. They were low- to mid-level militants or warlords who did not pose an acute threat to the West. Eventually it became evident that they would have to be involved in the post-war political process to enable a sustainable political situation to emerge, the establishment of which had become the explicit aim of Western strategy. Indefinite detention, torture and inhumane treatment proved counter-productive with respect to the aim of political stabilization. Not only were these practices perfect recruitment tools for the insurgent movements. They also undermined local societal structures and corrupted local political institutions. And these sent ambivalent messages to the governments in the target states and encouraged them to emulate dubious detention policies.

<sup>2</sup> Philippe Sands, *Torture Team: Deception, Cruelty and the Compromise of Law* (London: Allen Lane, 2008), p. 275.

<sup>3</sup> Johan Steyn, “Guantánamo Bay: The Legal Black Hole,” *International and Comparative Law Quarterly*, vol. 53, no. 1 (2004), pp. 1-15.

<sup>4</sup> Adam Roberts, “The Civilian in Modern War,” in Hew Strachan and Sibylle Scheipers, eds., *The Changing Character of War* (Oxford: Oxford University Press, 2011), p. 366.

<sup>5</sup> Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Company, 2009), p. 69.

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