

The Rights of Irregular Combatants

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It's become fashionable in certain political circles to decry the provision of due process rights to terror suspects. On the other hand, some military officers have objected to trying detainees in the military justice system since this would seem to assign them a "warrior" status many military professionals are loathe to share with the denizens of Guantanamo. The Geneva Conventions are clear that anyone seized in wartime who does not qualify for POW status (covered under the Third Convention) is technically a civilian (covered under the Fourth Convention) and so is liable to local civilian criminal law for unlawful activities, including violent acts aimed at the detaining power's military apparatus.¹ Yet the relatively novel circumstances of the war on terror, which has seen suspected terrorists and insurgents being seized on and off the battlefield by intelligence and military operators, prompt renewed *moral* consideration of such irregular combatants' rights in detention, in interrogation, and at trial. A clear moral understanding could provide grounds for shaping new laws or new legal proceedings, or alternatively, retaining the status quo. This article will classify different types of detainees who might come under a state's control in the course of military or intelligence operations with a focus on articulating the relevant rights of irregular combatants like insurgents, intelligence agents, and terrorists.² We will first consider the moral foundation of the legal rights of POWs and use this foundation as a standard for assessing the merit of various kinds of combatants' claims to POW status. We will then have to consider whether a third track of detention, interrogation, and trial apart from the military justice and criminal justice tracks is warranted for combatants who do not merit POW status.



Determining the rights of various kinds of detainees who might come under the control of military or intelligence operators is a precondition to determining what modes of interrogation, detention, and trial are permissible with them. For example, unlike common criminals, POWs have a right to their operational secrets since they regard morally permissible activities; in this, they are akin to a business executive's trade secrets. Consequently, POWs cannot be threatened or punished for failing to disclose these secrets to interrogators. Unlike criminal suspects, POWs need not be admonished about a right to silence and do not enjoy a right to counsel, assuming they are not being charged with war crimes. This is because conventional warfighters are not being accused of doing something illegal that could result in a criminal charge. Barring charges of war crimes, POWs are also unlike criminal suspects in that they are immune from legal prosecution for their violent acts.

Though POWs may have committed acts physically identical to acts that in different contexts would be called murder, arson, or destruction of property, POWs' claims to being treated differently than common criminals is that they are political actors: their actions are in service of a political end and are the result of obedience to a superior, rather than a personal motivation such as pecuniary gain or revenge. It's important to remember—to be granted POW status is not to say one fought for laudable political aims. Troops fighting for the Nazi regime were afforded this status. Also, POWs who commit war crimes may be prosecuted for them.

There are two basic principles for POW treatment derivable from the sundry legal protections outlined in the Geneva Conventions: POWs are to be held in conditions similar to those enjoyed by the detaining power's own troops, and POWs enjoy legal immunity for ordinary combat violence. There are four legal criteria necessary for irregular combatants, such as insurgents or militias, to win POW status enumerated in the Third Geneva Convention: obeying orders of a superior responsible for his subordinates; wearing uniforms or identifiable emblems; carrying arms in the open; and otherwise obeying the laws and customs of war. Protocol I to the conventions allows irregular combatants to derogate from the criterion of wearing uniforms or emblems.³

To determine the moral rights of irregular combatants in detention and interrogation, we need to explore the moral foundations of the four legal criteria: Western Just War Theory. There are three main historical sources for this tradition: Roman political theory,

Christian theology, and the codes of medieval chivalry. These disparate sources recommend roughly the same treatment for conventional combatants; however, these sources produce some conceptual puzzles when they do not recommend the same treatment for martial detainees *other* than conventional warfighters, such as guerillas, terrorists, saboteurs, and spies.

The disparate historical sources produce three justifications for the principles of POW treatment found in the literature, which can be termed the warrior's honor justification, the prudential justification, and the political justification. The warrior's honor justification is drawn from the chivalric strand of Western Just War Theory. On this view, captured warfighters who have obeyed the laws of war *deserve* "benevolent quarantine" because of the respect warfighters owe one another. Warfighters expose themselves to mortal risk by donning uniforms and carrying their arms in the open during wartime. They also thereby do the service of distinguishing themselves from civilians, saving them from confusion with combatants. Another justification for affording POW status to combatants is simply prudential: the detaining power affords enemy detainees good treatment because it wishes its own captured troops to be treated in the same way.

From the other two strands of Just War Theory, we get what might be called the political justification. Warfighters enjoy moral impunity and legal immunity for military action because they are merely acting as agents of the state. Warfighters are not personally choosing to kill for the reasons murderers choose to kill; warfighters' moral faculties of reason and will are, in a sense, inert. It is the individual warfighter who pulls the trigger, but morally speaking, it is *the state* that kills enemy troops. Since warfighters engaged in ordinary combat violence have done nothing legally or morally wrong, their detention should not have a punitive character; detention is merely to remove them from the battlefield. Even though the POW may have killed the detaining power's troops and destroyed its equipment, the detaining power must acknowledge that it has authorized its own troops to do the same abroad, so enemy POWs are no better or worse, on this account, than the detaining power's own forces. This recognition of the "moral equality" of warfighters justifies parity in treatment between POWs and the detaining power's own troops.

We'll now assess these justifications for conventional combatants' POW status so we can determine which is salient, or most salient.

We will then know which justification to use in assessing irregulars' possible qualification for POW status.

From the warrior's honor perspective, one might argue that irregulars are cowardly or devious for avoiding the normal risks of combat and fighting "dirty," as well as for exposing civilians to needless danger by blurring the distinction between combatant and civilian. Now, to assess this argument: risk taking unto itself is not worthy of moral respect, because many risky behaviors are stupid and irresponsible. Serving the state in a dangerous role—at least a basically just state—is respectable insofar as one aids the state in protecting and bettering the lives of inhabitants. Yet it seems odd for a state to honor enemy troops' bravery and service, something akin to the U.S. National Endowment of the Arts awarding a medal to a French painter. Also, in most cases, brave enemy actions would be of the sort coming at the expense of the detaining power's own troops—hardly occasions to celebrate—and the enemies' merely dutiful behavior, presumably, would not be of the sort meriting special foreign attention.

Further, irregular combatants' failure to wear uniforms is not necessarily indicative of cowardice. Conventional combatants or intelligence officers sometimes slip behind enemy lines in civilian clothes to spy, destroy military targets, or conduct raids. While these so-called secret agents and intelligence officers *are* taking advantage of their enemy's lowered vigilance in his own territory, they are surely not acting cowardly, because they are taking tremendous risks behind enemy lines. On the other hand, wholesale acknowledgment of warfighters' courage simply by dint of wearing uniforms seems anachronistic given that modern military technology sometimes allows operators to kill without any great danger to themselves.

In the end, conscription obviates the claim about courage for many POWs, and military discipline for all others. Conscripted warfighters have not chosen to enter their dangerous profession; for all the detaining power knows, they are cowards and would-be traitors marched to the front at gunpoint. Also, all warfighters in conventional units, whether conscripted or not, are *compelled* by their superiors to wear uniforms. Even the cowardly warfighter who wishes to discard his uniform cannot so long as his command is competent. Viewed this way, the argument that an identifiable combatant is automatically due special honor seems an anachronistic holdover from the chivalric strand of the Just War tradition.

The second half of the justification concerning warfighters' honor argued that uniformed warfighters deserve POW status because they

are protecting civilians by identifying themselves as combatants. By wearing uniforms, combatants are in effect saying to the enemy: shoot here, at me (but not over there at the civilians). Urban operations in particular place civilians in peril; the Iraq War has seen huge numbers of civilian casualties. Civilians are not only killed in cross fires and airstrikes but also at checkpoints in cases of mistaken identity.

The involuntary nature of conventional troops' dress is determinative on this point as well. *Jus in bello* restrictions apply to the individual warfighter such that he is, for example, morally culpable for failing to discriminate between enemy combatants and civilians, or for failing to distinguish *himself* from nearby civilians—this tactic effectively makes civilians human shields. So the moral terms of *jus in bello* are relevant only in cases where the warfighter can exercise volition. He ought to be blamed if he *chooses* to discard his uniform and attack while disguised as a civilian, but he cannot be praised for doing in another instance what he was not able to refuse—wearing his uniform while his commander was in the vicinity. So, in sum, while individual combatants of all stripes may be due respect for their integrity and valor, honor among warfighters appears to be a weak justification for POW status being universally afforded to conventional combatants.

There is a stronger case to be made for the prudential justification of POW status. The reasoning seems unassailable: both states in an interstate conflict agree to treat POWs humanely and forgo criminal prosecution because each wishes for the humane treatment and speedy return of its own captured troops after the war. Simple self-interest motivates compliance.

However, difficulties arise in *intrastate* conflicts when irregular fighters may lack the means to hold government prisoners or hold them in humane circumstances. The rejoinder to the critics of this apparently unfair asymmetry⁴ is that a government holds out the promise of POW status to irregulars as an incentive for them to comply with the four criteria, even barring reciprocity in prisoner detention. (Presumably, the government would expect that the irregulars release disarmed government prisoners they do not have the ability to detain.)⁵ There are several prudential reasons for government forces wanting irregulars to comply with the four criteria. First, particularly since they may lack the facilities to hold government troops, irregulars lack an incentive to let such prisoners live if not promised benevolent quarantine themselves. Second, government

troops are endangered when irregulars disguise themselves as civilians or as fellow government troops since such irregulars can strike when government troops' guard is down. Third, simply, the government warfighter knows who his enemy is and whom to engage if the irregular identifies himself. Fourth, a warfighter's duty of discrimination is made much harder if irregular combatants masquerade as civilians. This tactic courts tragedy and forces the warfighter to view his personal safety at odds with his scruples. Thus, notwithstanding the 1977 Protocol's allowance of irregulars to act out of uniform, their opponents still have a prudential reason for demanding self-identification on the part of irregular combatants.

These prudential reasons can answer the question of why a government might want to grant irregulars POW status when the irregulars are not in a position to reciprocate. However, they are not moral reasons, linked, for example, to what combatants deserve by dint of their roles, intentions, or behaviors.

It cannot be that there are no moral but only prudential reasons for affording POW status to various combatants because there would be no nonarbitrary reason for treating POWs according to the principle of parity, or for giving them legal immunity for their combat activities. Prudentially, *any* kind of good treatment could serve as incentive for enemy combatants' compliance with the four criteria, particularly for some irregulars. It would seem sufficient (and cheaper), for example, for a wealthy country to treat detainees from its much poorer rival state better than their own government does, but not as well as the detaining power's own troops. Given the miserable state of some contemporary nations' militaries, to say nothing of the lifestyles of cave-dwelling irregulars, the promise of three meals a day or health care might suffice to encourage compliance with the four criteria—if not also prompting desertions. This could even be coupled with legal prosecution. Irregulars already know they will be viewed as outlaws or traitors by their government and know they face a high chance of death if they continue the fight, so the offer of humane treatment even coupled with prosecution may well serve as sufficient incentive to observe the four criteria.

It was argued above that the justification appealing to honor is weak on its own, and the argument appealing to prudence fails to account for the two main components of POW status. By contrast, the political justification *does* explain POWs' legal immunity and treatment equal to that of the capturing power's own warfighters. The political justification holds that all combatants meeting the four

criteria are moral equals, innocent of the political decisions their leaders make, engaged in a morally upright and legal activity. They have done nothing deserving of punitive detention or criminal prosecution. They should be held in conditions similar to those enjoyed by the detaining power's own troops because they are no better and no worse, as a class, than the detaining power's own troops.

So if the political justification is the salient one, what then of irregular combatants who do not formally represent a state or who lack some of the conventional elements signifying that role?

To answer this question, we need to determine the relevance of the four criteria understood by the light of the political justification; perhaps irregulars may derogate from some of the criteria and still sufficiently meet the spirit of the criteria in order to attain POW status. We will first consider the criteria involving self-identification for combatants: wearing uniforms and carrying arms in the open.

In a strictly physical sense, anyone *can* behave violently, but in war, it is primarily the military representatives of the state who *may* behave violently. Self-identification is part of the role of the combatant because combatancy is one of the many state roles that require a certain social recognition and reaction on the part of others for the state agent to do his or her job with its appropriate moral authority. For example (in a liberal state), were a person to barge into a restaurant's kitchen and rifle through the pantry, the chefs would be justified in demanding the intruder leave and even physically restraining him if he refused. However, the chefs would know that the person has the authority to inspect the kitchen—and that they would be wrong to stop him—if he was wearing a health department badge. The health inspector depends on this sort of compliance because he is not equipped to storm kitchens by force and fight off attacks from furious chefs while looking for tainted mushrooms. A uniform identifies the combatant as someone with the moral authority to act in this way, signaling to others how they ought to behave in response.

In order to do their jobs, state agents who deal with foreign counterparts, like diplomats, must be able to recognize these counterparts, also thereby recognizing their authority to act on behalf of other states. Similarly, warfighters must identify themselves to each other in order for both to do the job of warfighting: they need to know where to shoot and where not to shoot. This mutual recognition of combatancy has beneficial effects for both states' militaries even though warfighting is not a quasi-cooperative endeavor like diplomacy. Warfighters can do their job more efficiently if they know

who is an enemy combatant and who is not, potentially ending the war sooner, and warfighters on both sides can relax when in their own barracks, behind their own lines, and when among civilians. So the permissiveness of the 1977 Protocol regarding uniforms is not morally appropriate.

We will now address the relevance of the third and fourth criteria on the political justification. These criteria regard two substantive descriptors for warfighters, acting under orders ultimately from a political entity and behaving in a manner conducive to politico-military goals, respectively (i.e., obeying the laws of war). Insofar as the justification for POWs being treated differently than common criminals in that the former are acting violently in service of political entities rather than because of personal animus, the status of irregular combatants in detention should be determined by how nearly they approach the role of conventional troops in controlling territory and offering basic services to inhabitants of that territory (or protecting those who do).

The argument in this article assumes a minimal social contract theory that integrates inhabitants' rights with the protective obligation of police and other state agents.⁶ Politically legitimate instances of political coercion are those necessary to secure the conditions for inhabitants' autonomy, so politically legitimate acts are those to which it would be irrational for any inhabitant, enjoying his rights, to dissent. Or to frame it differently, politically legitimate acts are those rationally worthy of consent. One could not object, say, to the state having police powers or imposing a regulatory regime—objecting in the name of *greater* autonomy—without also criticizing the very institutions that protect that autonomy. Thus, it is irrational to dissent to whichever stable power effectively and fairly administers rights-protective-laws and maintains a relatively crime-free environment in the territory one finds herself in.

In the contemporary world, the entities able to protect the lives and rights of people within given territories will usually be the central governments of states, but in the absence of such centralized control, the entities in question could be warlords, tribal councils, or foreign occupying armies. Therefore, irregular combatants should get POW status if they serve entities controlling territory in which those entities provide basic governmental services in a rights-respecting manner in the context of foreign occupation, colonial rule, state collapse, or systematic unjust rule by an indigenous government, so long as the combatants wear identifying emblems, carry

their arms in the open, and otherwise obey the laws and customs of war. This standard precludes stateless groups agitating for global change—like Al-Qaeda or Che Guevara’s *foco*—as well as lone revolutionaries who wish to spark social change, like Timothy McVeigh or the Unabomber. It also precludes indigenous movements against basically just indigenous governments (like the Hutaree militia in Michigan recently arrested for plotting to make war on the U.S. government) and any group that systematically uses terrorist tactics or otherwise violates the laws and customs of war.

Captured intelligence agents present a difficult case. There might seem to be a moral case for affording POW status to military or civilian intelligence operators captured in civilian dress or enemy uniform while conducting violent acts in foreign countries—and then trying them for war crimes. This would follow since they are state agents rather than common criminals but are not acting fully in keeping with the roles of combatants since they fail to self-identify. (It is trivial from the capturing power’s perspective whether the person engaged in sabotage, raids, terrorism, or assassination works for the military or a civilian intelligence agency: in either case, he or she is a nonuniformed person engaging in political violence.) The argument would continue that while these operators could not plausibly be charged with cowardice, given the risks they are taking, he or she is not operating fully in accordance with the profile of state agents and so cannot enjoy the impunity and immunity of state agents. However, POW status in part serves as an incentive for compliance with the rules of war. The risk of having its agents criminally prosecuted under a hostile state’s internal law serves as a powerful disincentive for states considering sending undercover agents to commit acts of violence abroad.⁷ While the desire for military or intelligence personnel to feel safe from assassination in their homeland is a prudential, rather than moral, consideration, the risk posed to civilians who might be mistaken for undercover foreign agents creates the moral grounds for the disincentive (think of the harassment, and in some cases, arbitrary detention, of Americans or immigrants of Middle Eastern descent suspected of being Al-Qaeda sleeper agents following 9/11). Thus, captured operators of the sort described should be prosecuted under the detaining power’s internal law for crimes like murder or destruction of property.

Regarding captured intelligence agents engaged in nonviolent activities such as surveillance, recruitment, signals interception, or theft of information, agents under diplomatic cover can simply

be expelled from the country. Those without diplomatic cover would seem to be morally due POW status, or something like it, since they are carrying out political orders despite their lack of self-identification. On this point, there is a relevant difference between violent and nonviolent intelligence agents; the former are doing something that is morally problematic since their failure to self-identify partially derogates from the role of a combatant even while the agents perform the violent acts of combatants. As argued above, most state roles require self-identification for them to be performed with their proper moral authority. Yet deception is an inherent part of espionage. The intelligence agent posing as a diplomat or business executive is doing his or her job—and a job that most states find necessary—so the agent cannot be criticized for “cheating” in the manner of the irregular combatant in civilian dress. By collecting classified information, the intelligence agent is breaking the internal law of the country in which he or she is operating, but not international law. Additionally, civilians are not put in jeopardy by the intelligence agent’s nonviolent activities by virtue of their possibly being mistaken for spies in the way civilians are put in danger when warfighters wear civilian clothing. Whereas warfighters or other security officials have to drastically alter their behavior toward civilians when they suspect that combatants are concealing themselves among them—often to the detriment of civilians—no such change is necessary to defend against espionage. Officials with security-sensitive information should *always* protect that information with security protocols. They should secure documents or computers; transmit sensitive data with appropriate levels of encryption; and refrain from sharing sensitive information with anyone lacking the relevant security clearance and need to know. Therefore, the possible presence of spies in their midst should not lead them to behave in an extraordinary manner. On a wider level, it is appropriate for states to conduct background checks on security personnel and maintain a level of counterintelligence vigilance over government personnel commensurate with the sensitivity of their work. Acute fear of treason within a given department among peers with equal levels of security clearance will certainly lead to inefficiency in that department’s activity as additional security safeguards are imposed, but this is a prudential rather than moral concern. The concern might explain why a state would be reluctant to extend a quasi-POW status to intelligence agents, but not why it *should*—on a moral level—refuse to extend such status.

The intelligence agent's nonviolent acts seem to have much of the character of combatants' violent acts—normally illicit when perpetrated by private citizens but morally privileged when done in the service of a state. Legally, POW status cannot be afforded persons during peacetime. Yet from a moral perspective at least, it does not seem fitting to assign criminal culpability to the nonviolent intelligence agent.⁸ As we've seen, the concerns about self-identification and risk to civilians are not germane. Thus, there are some moral grounds for creating a quasi-POW category for captured intelligence agents. This said, prudential concerns would make such a category undesirable for both the agents and the detaining power. Offering legal immunity and POW-style detention to captured intelligence agents would be undesirable from the detaining power's point of view. There is no behavior such an incentive could plausibly encourage on the part of the intelligence agent that is advantageous to the detaining power analogous to the irregular combatant's obeying the laws of war. Whereas self-identification, obeying a unified command, and avoiding violence against civilians are beneficial to the detaining power and will not necessarily frustrate an organized irregular force's military activities, nearly any conceivable activity on the part of the intelligence agent conducive to the target state's national security—self-identifying, identifying assets, stealing data in some public way—would be inherently at odds with the craft of espionage. Also, whereas POWs can cooperate with interrogators without fear of self-incrimination (since they are legally immune for ordinary combat violence), a comparable promise of legal immunity and release at the end of hostilities would fail to encourage cooperation by captured intelligence agents since there is no “end of hostilities” promising a termination of detention. Any promise the detaining power could make of shorter detention would likely be offset by the detainee's calculation that a brief detention would indicate his capitulation in interrogation to his home country. Such a signal would likely end his career or his life if he returned home. Similarly, quasi-POW status would be undesirable from the intelligence agent's point of view because lifelong detention in humane conditions might not even be preferable to a death sentence in criminal court; and again, brief detention would carry with it the taint of collaboration.

More generally, states presumably have not sought and will not seek international accords addressing peacetime espionage—accords that perhaps could create a POW-like status for captured intelligence agents—because nations wish to conceal the extent of their

espionage activities. Intelligence agents do not self-identify, and their home nations presumably would be reluctant to claim captured agents lest the nations reveal their intelligence agendas and further jeopardize ongoing operations. Thus, while there seem to be some moral grounds for creating a third category of detainees for intelligence officers during peacetime, there does not seem to be a practical impetus for any of the parties to change the status quo.

Failure to qualify as POWs means irregular combatants are “unprivileged irregulars,” what some call unlawful enemy combatants. Their violent acts are not specially privileged by being at the behest of a statelike entity and/or lack the other appropriate features of political violence. Along with ordinary criminals, they lack a right to their operational secrets. They can be tried in a criminal court according to the detaining power’s internal law for crimes like murder or destruction of property. If they are going to be criminally tried, their interrogations need to include due process protections, including the rights to silence and counsel. These are basic human rights, not limited by citizenship, protecting against arbitrary arrest and detention.

A right to silence can be thought of as an expression, or protection of, the right to privacy when one is being questioned; it says that strangers do not have a standing right to one’s thoughts and that one in no way wrongs strangers by refusing to answer their personal questions. Such a right is ceded when one abuses one’s right to privacy by criminally plotting (since privacy is morally valuable as a protector of autonomy, a right to privacy cannot intelligibly be meant to protect criminal plots prejudicial to others’ autonomy), but it will be rarely clear to others that one is plotting. Due to this inherent ambiguity and the fallibility of all state agents, states cannot just summarily revoke a person’s right to silence (meaning he or she can be held legally liable for refusing to cooperate with authorities).

A right to counsel helps ensure that authorities behave responsibly in building a criminal case against a suspect: that they do not force a suspect to make a false confession; manufacture evidence; procure dishonest witnesses; or otherwise miscarry justice during prosecution. It has to be remembered that intelligence or military operators rarely capture positively identified “terrorists”; far more often they have a person whose identity and affiliation are ambiguous. The detainee may have been implicated by an unreliable source, or very often, simply found himself or herself in the wrong place at the

wrong time. The fact that many unprivileged irregulars do not self-identify with uniforms means that there are often going to be false-positive identifications in counterinsurgent and counterterror operations. It can be expected that operators will often make mistakes when capture occurs on the battlefield or via extralegal kidnappings on foreign soil. It has to be remembered, just as in domestic criminal prosecutions, that due process serves the state's interest in national security matters to the extent that these measures increase the reliability of convictions. No one save the actual terrorist is served by the state incarcerating an innocent man in his stead.

Some unprivileged irregulars will self-identify via some kind of uniform, self-description, or simply by dint of participating in political violence. If the detaining power judges that securing evidence and securing due process protections is impossible in foreign theaters, or if it wishes to conduct POW-style interrogations (no counsel provided, no admonition about a right to silence, no overall time limit on interrogation) with positively identified unprivileged irregulars chiefly in order to gather intelligence rather than to gather evidence for war crimes, its only option would appear to be designating unprivileged irregulars POWs and holding them in humane conditions until the end of hostilities. This, *despite* the irregulars' failure to meet POW criteria. This unhappy compromise allows the detaining power the flexibility of POW-style interrogations and removes the irregular from his operations until the end of hostilities (which may well be his natural life). The compromise also admits the cost of POW-style interrogations lacking due process protections—the inability to criminally try and sentence the irregular and possibly execute him. There is too high a risk of false confessions, tainted evidence, unreliable informants, and government error without these due process checks on state power.

This compromise is also dissatisfactory from the detainee's point of view. A criminal trial or court martial has a better chance of discharging innocent persons than the more summary review boards determining detainees' POW eligibility. While POW treatment should be reserved for positively identified unprivileged irregulars, there is still the possibility with this process that innocent people will be locked up indefinitely without criminal charge. Criminal trials—civilian or military—are therefore preferable from both the state's and the detainee's perspectives whenever possible.

There is no cause for constructing a third style of interrogation, detention, and trial for unprivileged irregulars since the only potentially

efficacious interrogation techniques impermissible for domestic criminal suspects and privileged irregulars—threats and blackmail—also carry serious practical drawbacks for the detaining power. Threats and blackmail are potentially permissible since unprivileged irregulars do not have a right to their operational secrets; therefore, they are not wronged if interrogators attempt to nonviolently coerce their confessions. However, these tactics are practically inadvisable because threats lose their potency both if they are not acted upon *and* once they are acted upon. Blackmail, particularly sexual blackmail, runs a significant risk of presenting a public relations debacle if it is publicized. There is a significant chance of scandalous public accusations at least being made against intelligence agencies by the blackmail victim or his allies if the damaging information is revealed.

Torture, which is legally and morally prohibited for POWs and criminal suspects, is ineffective and immoral to use against any sort of detainee. Physical violence is only justified when it is the sole means of halting a physical attack (in the relevant context of a state agent confronting a criminal). While a positively identified unprivileged irregular such as an Al-Qaeda operative may possess knowledge posing a deadly threat to civilians, he is not being violent when under the physical control of interrogators; torture is not directly related to revealing the truth in the way shooting a soldier is related to his incapacitation, and there may be numerous other ways of learning the concealed information. Torture's impermissibility is no hindrance to the detaining power because it is not a reliable interrogation tool anyway. If a person doesn't die under torture or go into shock, he will typically say anything to get the torture to stop; even if some statements are made, the torturer will usually not even be in a position to know which statement is true. Torture also tends to gravely corrupt both the personnel implementing it and the government authorizing it.⁹

The desire to muster a strong response to international terrorism, coupled with the strategic and tactical difficulties in conducting counterterror and counterinsurgent operations, prompt some to suggest stripping terror suspects of their rights in interrogation, during detention, and at trial. To the contrary, there are not strong grounds for developing a unique style of interrogation, detention, and trial for unprivileged irregulars. Unprivileged irregulars may be criminally tried in the civilian justice systems but then are owed standard due process safeguards during interrogation and trial. Alternately, if the detaining power desires the relative flexibility of POW-style inter-

rogations, for the sake of justice, it must refrain from the criminal prosecutions and sentencing that require due process protections and accordingly hold detainees as de facto POWs until the end of hostilities.

Notes

1. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, art. 4. Note that those eligible for POW status include civilians attached to military units, such as contractors and journalists.

2. This article draws from the arguments in my *An Ethics of Interrogation* (Chicago: University of Chicago Press, 2010).

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 44.

4. See, for example, Steven R. Ratner, "Revising the Geneva Conventions to Regulate Force By and Against Terrorists: Four Fallacies," 1 *IDF Law Review* 7, 13 (2003); Heather MacDonald, "How to Interrogate Terrorists," *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2005), 84–97.

5. Derek Jinks, "The Declining Significance of POW Status," *Harvard International Law Journal* 45: 367, 438 (2004).

6. See chapter 2 of *An Ethics of Interrogation* for this argument in full.

7. Thanks to my colleague Lieutenant Jake Romelhardt for pointing this out to me. I retract the relevant point made in chapter 6 of my book.

8. Intelligence agents' local contacts, however, may be charged according to criminal law for whatever local laws they break (e.g., theft or treason).

9. See chapter 8 of *An Ethics of Interrogation*.

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