

# A UNIVERSAL ENEMY?: “FOREIGN FIGHTERS” AND LEGAL REGIMES OF EXCLUSION AND EXEMPTION UNDER THE “GLOBAL WAR ON TERROR”

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## ABSTRACT

*This Article argues that the ongoing U.S.-driven “Global War on Terror” stands apart from similar state campaigns in its special focus on confronting “foreign fighters”—armed, transnational, non-state Islamists operating outside their home countries—in places where the United States is no less foreign. This global hunt for foreign fighters animates diverse attempts to exclude similarly “out-of-place” Muslim migrants and travelers from legal protection by reshaping laws and policies on interrogation, detention, immigration, and citizenship. Yet at the same time, certain other outsiders—namely the United States and its allies—enjoy various forms of exemption from local legal accountability. By juxtaposing the problems of extraordinary rendition and military contractor impunity in post-war Bosnia-Herzegovina and post-invasion Iraq, this Article illustrates*

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*this braided logic of exclusion and exemption. Predating and likely to outlast other legacies of the Bush administration, this logical framework undermines the rule of law and other state-building efforts while occluding crucial normative questions surrounding the legitimacy of the exercise of U.S. global power. This Article examines legal structures in Bosnia-Herzegovina and Iraq and their underlying premises to reframe post-Cold War debates about nation-building and post-9/11 arguments about the laws of war.*

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INTRODUCTION

A specter haunts America after eight years of war. It is the specter of a universal enemy, purported foe not only of the United States, but of humanity as such. Al-Qa’ida and other armed, transnational, non-state Islamist groups that occupy the place of this universal enemy have been tagged with numerous epithets: terrorist, extremist, jihadist. But the term “foreign fighter” is particularly useful in analyzing the underlying, distinguishing, and persistent logic at work behind the diverse legal and policy interventions worldwide that comprise the U.S.-driven Global War on Terrorism (GWOT). From Bosnia-Herzegovina to Somalia to the Philippines, to say nothing of Afghanistan and Iraq, the United States and its allies

have repeatedly invoked the need to separate *foreign* Muslim fighters—typically portrayed as Arab, rootless, fanatical, and brutal—from *local* Muslims, whose potential for moderation must be nourished whenever possible. With the universal enemy often glossed as “foreign,” it is little surprise that the most notorious institutional practices of these interventions—including extraordinary renditions, “black site” prisons, and of course, Guantánamo—have overwhelmingly targeted Muslims who are outside of their home countries.

The past eight years have amply demonstrated how the purportedly unique threat of terrorism from groups such as al-Qa’ida can be used to justify any number of extraordinary measures, including human rights abuses and impunity for them.<sup>1</sup> This Article focuses on a key slice of this picture in order to sharpen the terms of analysis and to inform the ongoing mapping of still-shadowy transnational U.S. detention practices. The threat allegedly posed by the figure of the foreign fighter, a special category of “terrorist,” has occasioned a diverse set of laws and policies specifically targeting transnational Muslim populations in various countries. At the same time and in those same countries, measures have been put in place that effectively immunize *other* foreigners, often Americans and their allies, from local legal accountability. Both of these types of arrangements can readily coexist because of a deeper assumption that the United States—as the one state that most convincingly speaks from the position of the universal—can make decisions on behalf of others as to how different outsiders should be treated.

This Article thus presents three contentions. *First*, the undertheorized category of the foreign fighter is key to understanding the logic of the amorphous campaign against transnational, armed, non-state Islamist groups that was until recently called the Global War on Terrorism,<sup>2</sup> a label I will retain for the sake of simplicity. More so

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1. The literature on this topic is varied and voluminous. *See, e.g.*, Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008) (documenting and discussing specific instances of government officials using the Global War on Terror to justify otherwise unlawful actions); Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* 143–222 (2005) (criticizing the U.S. government’s actions at Guantánamo and Abu Ghraib); Seymour M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (2004) (criticizing the U.S. government’s domestic and foreign policy abuses after 9/11).

2. A widely-circulated media report indicated that the administration of U.S. president Barack Obama had replaced the term “Global War on Terror” with

than repression at home or conquest abroad,<sup>3</sup> it is the various U.S.-led efforts aimed at foreign fighters in multiple places where the United States is itself no less foreign that distinguishes GWOT from other states' struggles with "terrorism."<sup>4</sup> This logic predated the administration of George W. Bush and will in all likelihood outlast it.

*Second*, the glossing of armed, transnational, non-state Islamist groups as "foreign" results in broader efforts to police transnational Muslim mobility, or "Muslims out of place." Just as traditional counterinsurgency measures involve monitoring and

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"Overseas Contingency Operation." Scott Wilson & Al Kamen, *Global War on Terror* is Given New Name; Bush's Phrase is Out, *Pentagon Says*, Wash. Post, Mar. 25, 2009, at A4. Notwithstanding any possible shifts in rhetorical style, this appears to be largely a non-event. GWOT was never a single government program, but rather always a loose assemblage of military and non-military initiatives, including various "overseas contingency operations" (a term that long predates the Obama administration) such as Operation Iraqi Freedom and Operation Enduring Freedom in Afghanistan. See, e.g., U.S. Gen. Accounting Office, *Military Operations: Fiscal Year 2003 Obligations Are Substantial, but May Result in Less Obligations Than Expected* 4 (2003) (featuring world map of "Fiscal Year 2003 Contingency Operations"). The activities that fell under the general umbrella of GWOT appear to be largely unaffected by any nomenclature change that may have taken place.

3. For analysis and criticism of aspects of domestic abuses, see, e.g., American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"* 9–17 (2009), available at <http://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf> (documenting the effects of governmental actions aimed at undercutting terrorism financing on U.S. Muslims' charitable giving); Human Rights Watch, *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11*, at 1–6 (2005), available at [http://www.hrw.org/sites/default/files/reports/us0605\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us0605_0.pdf) (discussing the use and abuse of material witness laws after 9/11 to indefinitely detain those whom the government wanted to investigate for terrorist activities); American Civil Liberties Union, *America's Disappeared: Seeking International Justice for Immigrants Detained After September 11*, at 6–20 (2004), available at <http://www.aclu.org/files/FilesPDFs/un%20report.pdf> (discussing cases of U.S. immigrants arbitrarily detained after 9/11 because they were deemed "of interest"); Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* 1, 9–16 (2002), available at <http://www.hrw.org/legacy/reports/2002/us911/USA0802.pdf> (discussing cases of non-citizens arbitrarily detained after 9/11 "when their nationality and religion drew the government's attention although they were never charged with terrorism").

4. Most other contemporary campaigns against "terrorists" (by Russia, China, India, Turkey, Colombia, Israel, Sri Lanka, etc.) seek to uphold a state's supremacy over a particular territory, to the exclusion of any other sovereign power. U.S. efforts overseas, in contrast, purportedly seek to uphold the sovereignty of *other* states.

managing entire local populations to isolate the enemy hiding within, a globalized counterinsurgency against border-crossing individuals sets its sights on populations that are transnational in nature. The effect has been a targeting of out-of-place Muslims for exclusion from local legal protection in various countries, using multiple tools, of which Guantánamo and extraordinary rendition are only the best known. Moreover, the exclusion of out-of-place Muslims from legal protection often coexists in tension with the exemption of other outsiders (mostly westerners) from local legal accountability in the same places. By juxtaposing two recurring problems of the post-9/11 legal landscape—military contractor impunity and extraordinary rendition—this Article illustrates a state of affairs in which some outsiders can commit crimes without facing trial, while others may be kidnapped and expelled without ever being charged in the first place. GWOT is distinctive insofar as the hunt for foreign fighters in other people's countries encourages and relies on this interwoven, or braided, logic of exclusion and exemption.

This leads to the *third* contention, namely that this braided logic of exemption and exclusion seems natural, allowing the United States to readily label these adversaries "foreign" as if it were not, because the United States claims to speak from the position of the universal. Unlike a sovereign that merely exercises its prerogative against rebels in its own territory, the United States also claims to fight in the name of supporting *other* sovereigns, protecting the order of nation-states against groups seen to be threatening it.<sup>5</sup> When the United States declares foreign fighters to be enemies of mankind, it is thus making a political decision concerning not only its own differences *from* others, but the differences *between* others as well. It is this ability to arbitrate between differences—more than any specific substantive content—that defines what I mean by "universal." Thus, foreign fighters are a universal enemy not because they may or may not have enmity towards humanity, but because they have been declared enemies by those who occupy the position of the universal.

The structural logic of policing transnational Muslim populations and the concomitant placement of some people outside the law and others above it has had far-reaching and disturbing

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5. See, e.g., S.C. Res. 1373, pmb, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (declaring the 9/11 attacks a "threat to international peace and security" and, with United States support, invoking Chapter VII of the U.N. Charter to impose obligations on all states to take actions against financing of terrorism).

consequences. First and most obvious has been the corrosive effect on the rule of law due to impunity for abuses committed by the United States and its allies, both against locals and foreigners. Second, this braided logic ultimately subordinates some national sovereignties to U.S. imperatives in a manner that undermines the very state-building projects that the United States and its allies ostensibly seek to sponsor. And third, the implicit distinction between universal and foreign occludes crucial normative questions about the meanings of solidarity and how to assess the legitimacy of political interventions across communities—western, Islamic, and otherwise.

In order to demonstrate this structural logic, I use post-war Bosnia-Herzegovina and post-invasion Iraq as case studies to analyze the interplay between domestic and international instruments that produced the transnational regimes of exclusion and exemption in each. At first glance, the two situations would seem to have little in common. In terms of historical moments, the former is a paradigmatic case of post-Cold War humanitarian intervention; the latter is commonly cited as exemplifying the challenges (or errors) of the post-9/11 era. In terms of political contexts, the former is a post-conflict situation ruled largely through a multilateral Euro-American effort; the latter a very active conflict managed mostly by the United States. In terms of legal backdrops, the former is a *sui generis* constitutional protectorate; the latter a situation of occupation and then civil war regulated by the international laws of armed conflict. Yet in both cases, a concern over foreign fighters prompted various measures by the United States and its allies to exclude out-of-place Muslims. Although the tools—including bilateral and multilateral treaties, nationality and immigration statutes, and the laws of war—vary widely, there is a common logic at work: to push out-of-place Muslims—even naturalized citizens in the case of Bosnia-Herzegovina—outside legal protection while elevating western soldiers, contractors, and bureaucrats above legal accountability.

This Article contributes to understandings of the concrete operation of American global hegemony by exploring how the United States seeks to determine on other countries' behalf which outsiders should be beyond the law and which should be above it. While differential treatment amongst non-citizens is not as obviously disturbing as discrimination between citizens, extreme contrasts of the sort discussed here demonstrate that the question of who should decide on the distinctions between outsiders (and with which criteria) is too important to ignore. Because these binding norms and decisions are justified and informed by certain assumptions about

cultural and religious differences, the legal analysis here is informed by an anthropological concern over how such differences are understood and argued over. Such an analysis is also important for rigorously evaluating invocations of solidarity from the position of the universal—whether they come from the United States, al-Qa'ida, or anyone else—by serving as a reminder that “foreignness” is very much in the eye of the beholder.

Proceeding in three parts, this Article begins by sketching the structural logic that sets GWOT apart from other state-led campaigns against “terrorism,” introducing the category of the foreign fighter, providing some background on the policing of out-of-place Muslims, and analyzing the universal-foreign distinction. Parts II and III use Bosnia-Herzegovina and Iraq, respectively, to demonstrate how the concern over foreign fighters plays out in a braided logic of exemption and exclusion in vastly different contexts, using different legal tools. Finally, the Conclusion examines some of the consequences of this structural logic and considers the crucial questions it has occluded.

#### I. FOREIGN FIGHTER, MUSLIM OUT OF PLACE, UNIVERSAL ENEMY: THE ENDURING LOGIC OF THE “GLOBAL WAR ON TERROR”

This part aims to explore the central, distinguishing, and enduring logic of the U.S.-led campaign against armed, transnational, non-state Islamist groups, beginning with an introduction to the “foreign fighter.” Examining the “foreign fighter” figure, a purportedly unique threat, is useful in elucidating what makes the Global War on Terror distinct from other states’ struggles with “terrorism.” The focus on the “foreign fighter” has resulted in efforts to police other “out-of-place Muslims” more generally. As Part I.B describes, these policing efforts did not originate with GWOT, but rather emerged out of concerns over transnational, non-state, armed Islamist groups in the 1990s. The resulting braided logic of excluding out-of-place Muslims and exempting certain westerners relies on an implicit distinction between two rhetorical positions—universal and foreign. Part I.C explores the distinction between these two ways of dealing with difference.

Before proceeding, however, three caveats are in order. First, this Article focuses on how the United States and its allies have understood and sought to deal with a particular empirical reality: namely the existence of non-state, transnational, armed Islamist groups. It is *not* about the groups themselves or their normative

claims. Such an analysis, however otherwise salutary or needed, would shed little additional light on the policies examined here precisely because, as described in more detail *infra*, these policies tend to conflate a staggeringly diverse array of Muslims—not merely the political and apolitical, violent and nonviolent, but violent groups with distinct or even conflicting agendas—on the basis of their “foreignness.” Instead, this Article aims to understand the singular logic underlying the policies towards such disparate groups.

Second, and for similar reasons, analyzing the complex relationships between diverse, transnational Muslim populations and their local counterparts is also beyond the scope of this paper. These relationships, fraught with expressions of mutual admiration and solidarity as well as rancor and even racism, must be rigorously evaluated and compared in their own specific contexts. But by treating such relationships as part of a common problem in a globalized counterinsurgency, the United States has added an entirely new dimension of universality and foreignness to them—it is that dimension that is the immediate concern of this Article, however relevant local dynamics may be.

Third, this Article focuses specifically on laws and policies towards “out-of-place” Muslims in sites of intervention outside the West, often made or heavily influenced by the United States in the name of *other* sovereigns.<sup>6</sup> It is not about Muslims living in the West, or those outside the West who remain in their own countries, even though the former are often treated very much as “out of place”<sup>7</sup> and

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6. Muslim citizens of western states traveling in zones of intervention do not fit neatly within the categories delineated in this paper, although their legal status has enabled them to play a central role in engendering litigation, diplomatic efforts, and political pressure surrounding GWOT. Only one western citizen, Canadian Omar Khadr, remains detained at Guantánamo and U.S. citizen petitioners have unsurprisingly been overrepresented amongst GWOT-related detainees whose cases have been heard by the U.S. Supreme Court. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (involving a U.S. citizen detained in Afghanistan); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (involving a U.S. citizen detained as a criminal suspect inside the United States, then designated as an “unlawful enemy combatant”); *Munaf v. Geren*, 128 S. Ct. 2207 (2008) (involving U.S. citizens detained by U.S. forces in Iraq). Such individuals’ experiences, however, are in many ways dissimilar from the bulk of Muslim travelers outside the West who, lacking the relative protection of western passports, form the focus of this paper.

7. In this respect, this paper stands apart from the extensive work on Muslim minorities in the West (whether seen as autochthonous or diasporic), often organized under headings such as multiculturalism, minority rights, or

both of these categories together comprise the vast majority of victims of GWOT-driven policies worldwide. This Article seeks to complement, rather than downplay, the voluminous extant literatures on such groups. It hardly bears repeating that GWOT is not a single policy or program, but rather a series of distinct, interconnecting, and mutually reinforcing logics.<sup>8</sup> With these caveats in mind, it is possible to outline the enduring logic of GWOT by starting with the category of the foreign fighter.

#### A. The Foreign Fighter as Figure of Threat

The figure of the "foreign fighter" has featured prominently in rhetoric and public discussion about GWOT, standing for the most fanatical and dangerous type of enemy. It is frequently claimed that they make up the bulk of suicide attackers; that they have less

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integration. *See, e.g.*, Jocelyne Cesari, When Islam and Democracy Meet: Muslims in Europe and in the United States 6, 9–88 (2004) (examining how the "nationalism and secularism of Western societies are transformed by Muslim presence, at the same time as these new political and cultural circumstances are transforming Muslims' Islamic practice into a [sic] individualized and less public act of faith"); Muslim Minorities in the West: Visible and Invisible (Yvonne Yazbeck Haddad & Jane I. Smith eds., 2002) (discussing the integration of Muslims into the United States and Europe). An equally rich counterpart discourse about South Asia (and areas that experienced colonial administration through British India, such as Malaysia and Singapore) tends to treat the question of Muslims in terms of nationalism or "communalism." *See, e.g.*, Ashutosh Varshney, Ethnic Conflict and Civic Life: Hindus & Muslims in India 23–54 (2002) (arguing that a lack of civic engagement for both Muslims and Hindus encourages "communalism" and creates tension between the two communities in India); Ayesha Jalal, *Exploding Communalism: The Politics of Muslim Identity in South Asia*, in Nationalism, Democracy and Development: State and Politics in India 76, 80 (Sugata Bose & Ayesha Jalal eds., 1997). Both contexts raise questions about the history and nature of "secularism" and its relationship to state power. *See, e.g.*, Talal Asad, Formations of the Secular: Christianity, Islam, Modernity 21–66 (2003) (arguing that secularism as an ideology and political practice should also be an object of anthropological inquiry).

8. The now infamous story of the migration from Guantánamo of interrogation policies originally devised to break out-of-place Muslim detainees, classified as "unlawful enemy combatants" without legal protections, to Abu Ghraib, whose inmates' legal status was never in doubt, is but one particularly vivid reminder of this fact. Congressional investigations have revealed how specific interrogation techniques "migrated" to Iraq from Guantánamo via Afghanistan as early as the summer of 2003. *See* Staff of S. Comm. on Armed Services, 110th Cong., Inquiry Into the Treatment of Detainees in U.S. Custody xxii–xxiv, 157–88 (Comm. Print 2008) (detailing how special unit forces in Iraq used interrogation procedures specifically designed for the Afghanistan conflict).

regard for the welfare of civilians than even local rebels; and that, ultimately, they are beyond the realm of political legitimacy. George W. Bush was among those who described the phenomenon most vividly: “[T]he violence you see in Iraq is being carried out by ruthless killers who are converging on Iraq to fight the advance of peace and freedom . . . from Saudi Arabia and Syria, Iran, Egypt, Sudan, Yemen, Libya and others.”<sup>9</sup> Bush repeatedly invoked the need to pursue “foreign fighters” in Iraq, Afghanistan, and elsewhere, explaining: “See, you can’t talk sense to these people. You cannot negotiate with them. You cannot hope for the best. We must engage these enemies around the world so we do not have to face them here at home.”<sup>10</sup>

This perceived threat of foreign fighters has been by no means confined to the foreign policy thinking of the Bush administration. President Obama’s Secretary of State Hillary Clinton has also declared that “members of the Taliban who are not hardcore extremists . . . shouldn’t be allied with foreign fighters and foreign interests who do not have the best interest of Afghanistan at heart—they’re merely using Afghanistan for other purposes.”<sup>11</sup>

A simple Internet search of the term “foreign fighters” calls forth thousands of items about Afghanistan, Iraq, Chechnya, Somalia, and other fronts in the struggle against the perceived global Islamist threat. The foreign fighter represents a globetrotting fusion of intolerant piety, political violence, patriarchy, hatred of “the West,” and sheer ruthlessness. The following snippets (and many of the headlines under which they run) typify this portrayal: “The foreign fighters . . . are more violent, uncontrollable and extreme than even their locally bred allies.”<sup>12</sup> “The foreign mujahideen . . . imposed strict Islamic codes of behavior on the neighborhood. They harassed Iraqis who smoked cigarettes or drank water using their

9. President George W. Bush, Remarks at Fort Bragg, N.C., 41 Weekly Comp. Pres. Doc. 1080 (June 28, 2005).

10. President George W. Bush, Remarks at Pensacola, Fla., 40 Weekly Comp. Pres. Docs. 1524 (Aug. 10, 2004). This line was part of Bush’s stump speech during the 2004 campaign. *See, e.g.*, Remarks at Phoenix, Ariz., 40 Weekly Comp. Pres. Docs. 1564 (Aug. 11, 2004) (containing this line); Remarks at Chippewa Falls, Wis., 40 Weekly Comp. Pres. Docs. 1640 (Aug. 18, 2004) (same).

11. Interview by Radio Free Afghanistan with Hillary Clinton, U.S. Sec’y of State (Apr. 6, 2009), *transcript available at* [http://www.rferl.org/content/Full\\_Transcript\\_Of\\_Interview\\_With\\_Hillary\\_Clinton/1602534.html](http://www.rferl.org/content/Full_Transcript_Of_Interview_With_Hillary_Clinton/1602534.html).

12. David Rohde, *Foreign Fighters of Harsher Bent Bolster Taliban*, N.Y. Times, Oct. 30, 2007, at A1.

left hand, which is considered impure. They banned alcohol, western films, makeup, hairdressers, 'behaving like women'—i.e., homosexuality—and even dominoes in the coffeehouses.<sup>13</sup> More lurid: "Screaming 'Allahu Akbar' to the end, the foreign fighters . . . proved to be everything their reputation had suggested: fierce, determined and lethal to the last."<sup>14</sup> While there is debate over the degree of influence foreign fighters have had in anti-U.S. insurgencies over time,<sup>15</sup> there is a widespread, if untested, view that they are politically and religiously more "hard-core" than local Muslims.

Unlike more commonly-used terms such as "terrorist," "extremist," or even "jihadist," the category of foreign fighter provides a relatively recognizable means for sorting, at least on a relative basis, "good" Muslims from "bad" Muslims.<sup>16</sup> The idea of the foreign fighter has a practical dimension: the notion that enemies who cross borders are more ambitious, more skilled, more elusive, and hence more dangerous. It also has a normative one: enemies who cross borders are illegitimate insofar as they have not been authorized by any sort of recognizable democratic mechanism, either at home or in

13. Nir Rosen, *Home Rule: A Dangerous Excursion into the Heart of the Sunni Opposition*, *The New Yorker*, July 5, 2004, at 50.

14. Ellen Knickermeier, "They Came Here to Die": *Insurgents Hiding Under House in Western Iraq Prove Fierce in Hours-Long Fight with Marines*, *Wash. Post*, May 11, 2005, at A1.

15. One widely-cited study notes that "the insurgency [in Iraq] is largely homegrown" but that foreign fighters play a "large . . . role in the most violent bombings and in the efforts to provoke a major and intense civil war . . . [and] give Bin Laden and other neo-Salafi extremist movements publicity and credibility." Anthony Cordesman & Nawaf Obaid, Center for Strategic & International Studies, *Saudi Militants in Iraq: Assessment and Kingdom's Response 6* (2005), available at [http://csis.org/files/media/csis/pubs/050919\\_saudimilitantsiraq.pdf](http://csis.org/files/media/csis/pubs/050919_saudimilitantsiraq.pdf). Moreover, "many are likely to survive and be the source of violence and extremism in other countries." *Id.*

16. Labeling of Muslims as either "good" or "bad" ultimately reflects not cultural or religious differences, but a *political* choice assigning "quasi-official names for those who support and oppose American policies." Mahmood Mamdani, *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terror* 260 (2004). One of the common critiques of GWOT, namely that it propagates a misleading stereotype of a monolithic Islam, is inadequate here, as the logic of protecting good local Muslims against bad foreign ones recognizes and indeed appropriates the diversity existing within Islam. See, e.g., Sayres S. Rudy, *Pros and Cons: Americanism Against Islamism in the "War on Terror,"* 97 *The Muslim World* 33, 36 (2007) (arguing that "[t]he warriors on terror have repudiated Orientalist platitudes about the 'clash of civilizations'; indicatively, it is academics and activists, huddled for warmth, who cannot let it go").

the areas they visit. As mentioned above, it is beyond the scope of this paper to evaluate these empirical or normative assumptions, but it is important to note that they remain *assumptions*, having rarely been subjected to serious scrutiny, or weighed against countervailing arguments.<sup>17</sup>

Foreign fighters are presented as a unique kind of adversary insofar as they are both non-local and also *non-state* in nature, a hybrid between a rebel and an invader with no fixed source of accountability.<sup>18</sup> Whereas an ordinary rebel challenges an individual state's monopoly on the legitimate use of force in its own territory, such non-state, transnational actors are challenging the exclusive

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17. The dearth of peer-reviewed scholarship on so-called "foreign fighters" is unsurprising, given the obvious data collection problems. Both the academic and policy literatures have focused primarily on identifying national origins, motivating factors, and organizational structures for foreign fighters without examining the presupposition that they are either more dangerous or less legitimate than local insurgents (to say nothing of U.S. forces). *See, e.g.*, Reuven Paz, *Arab Volunteers Killed in Iraq: An Analysis*, 3 PRISM Series of Global Jihad 1 (2005) (analysis of online lists of Arab volunteers killed in Iraq by national origin); Alan Krueger, *What Makes a Terrorist?: Economics and the Roots of Terrorism* 83–103 (2007) (providing statistical analysis of national origins of foreign fighters in Iraq based on data provided by U.S. forces, and finding that strongly correlative variables for countries include "large Muslim populations"; "proximity to Baghdad"; and low levels of civil liberties); Joseph Felter & Brian Fishman, *Combating Terrorism Center at West Point, Al-Qa'ida's Foreign Fighters in Iraq: A First Look at the Sinjar Records (2007)*, available at <http://www.ctc.usma.edu/harmony/pdf/CTCForeignFighter.19.Dec07.pdf> (examining database of captured foreign fighters, with a focus on places of origin, age, and occupation).

18. The political thinker Carl Schmitt foresaw such a scenario when he warned that an armed non-state actor without an essentially localized and defensive character "becomes a manipulable tool of global revolutionary aggressivity. He simply becomes fired up, and is deceived about why he undertook the struggle and about the roots of its telluric character and the legitimacy of his partisan irregularity." Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* 74 (G.L. Ulmen trans., 2007). Schmitt's primary concern with such mobile ("motorized") partisans, aside from the danger of their abstractly undefined enmity, would be their manipulation by external state sponsors. He did not seem to envision the possibility that they would go so far as to wage war while rejecting the goal of membership in the state system altogether. *Id.* at 75 ("From a longer perspective, the irregular fighter must be legitimated by the regular, and this means two possibilities are open to him: recognition by an existing regular power, or achievement of a new regularity through his own power.").

prerogative of states *as a category* to wage war across borders.<sup>19</sup> The U.S. has effectively argued that al-Qa'ida represents just such a challenge to the state system<sup>20</sup> and that therefore, *all* states—not merely the United States and its allies—have an interest in defeating it.<sup>21</sup> It is not uncommon for states to portray their adversaries as somehow foreign and therefore less legitimate; nor is it strange for them to argue that their enemies are also the enemies of mankind. What makes GWOT different, however, is the unusual, if not unique, ability of the United States to actually put such a vision into practice through policies specifically targeting Muslims outside their home countries.

Over two-thirds of detainees sent to Guantánamo were captured in Afghanistan or Pakistan,<sup>22</sup> outside of their own countries, in part due to criteria promulgated by Secretary of Defense Donald Rumsfeld calling for the transfer to Guantánamo of “non-Afghan

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19. See, e.g., Joseph P. Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. Rev. 1, 34 (2004) (“International Law Reserves Solely to States the Authority to Engage in International Armed Conflict”); Mohammad-Mahmoud Ould Mohamedou, Harvard Univ. Program on Humanitarian Policy and Conflict Research, *Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict Between Al Qaeda and the United States* 7 (2005), available at [http://www.hpcrresearch.org/pdfs/Non-Linearity\\_of\\_Engagement.pdf](http://www.hpcrresearch.org/pdfs/Non-Linearity_of_Engagement.pdf) (“Al Qaeda is a sub-state, international armed group that is making a claim to a legitimate war against a group of countries.”).

20. Transnational non-state armed groups do not necessarily challenge the state system as such, especially if they subordinate themselves to national governments or movements, as arguably occurred with most foreign Muslim fighters in the war in Bosnia-Herzegovina or the International Brigades during the Spanish Civil War. For more on the narrowing scope for transnational warfare by non-state actors in the nineteenth century, see Janice Thomson, *Mercenaries, Pirates and Sovereigns* 69–106 (1996).

21. See, e.g., S.C. Res. 1373, pmbl, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (declaring the 9/11 attacks a “threat to international peace and security” and invoking Chapter VII of the U.N. Charter to impose obligations on all states to take actions against financing of terrorism).

22. Of the 517 Guantánamo detainees known to have been processed by Combatant Status Review Tribunals (CSRTs), 66% were captured in Pakistan or by Pakistani authorities. Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* 14 (2006), [http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf). There are no known cases of Pakistani citizens being sent *directly* from Pakistan to Guantánamo. See, e.g., McClatchy Washington Bureau, *Guantánamo Inmate Database*, <http://detainees.mcclatchydc.com/> (last visited Feb. 8, 2010) (profiling the experiences of Guantánamo detainees).

Taliban personnel.”<sup>23</sup> According to one former military intelligence soldier serving in Afghanistan, the result was that “every Arab we encountered was in for a long-term stay and an eventual trip to Cuba.”<sup>24</sup> Across the border, former Pakistani President Pervez Musharraf boasted that Pakistan handed over 369 detainees, presumably foreigners, to the United States, with individuals there “earn[ing] bounties totaling millions of dollars.”<sup>25</sup> Many detainees at Guantánamo captured in both countries have claimed that they were sold for bounties essentially because they were foreign Muslims. As one Kuwaiti charity worker in Afghanistan wrote in a letter to his family after his capture by American forces there, “[t]he situation in the country turned upside down between one day and night and every Arab citizen has become a suspect.”<sup>26</sup> Similarly, virtually every individual known to have been detained as part of the CIA’s extraordinary rendition and “black site” detention programs was captured either outside of his country of origin or had dual

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23. Information Paper by Maj. Jeff Bovarnick, Legal Advisor, Bagram Collection Point, on SECDEF Detention Criteria ¶ 3(c) (Apr. 20, 2003), *available at* <http://file.sunshinepress.org:54445/secdef-detention-criteria.pdf> (citing Modification 1 of SECDEF Implementing Guideline on Detainee Screening and Processing for Transfers of Detainees in Afghanistan to Guantanamo Bay Naval Base, Jan. 2003). The directive further defines “non-Afghan Taliban” as “foreign fighters for the former regime.” *Id.* ¶ 4(d). Guantánamo also represents an important exception to the logic of pursuing out-of-place Muslims insofar as some two hundred local, Afghan, Muslims were also sent there. At no time before or since in the course of GWOT has the United States been known to have removed individuals from their own countries for detention elsewhere in such numbers. This aberration is likely explained by the unusual unavailability of a pre-existing, strong state apparatus upon which the United States could rely, with the requisite ability to control local populations.

24. Chris Mackey & Greg Miller, *The Interrogators: Inside the Secret War Against Al Qaeda* 85 (2004).

25. Pervez Musharraf, *In the Line of Fire: A Memoir* 237 (2006). The reference to bounties was subsequently excised from the Urdu edition of the book. *See* Pervez Musharraf, *Sab se Pahle Pakistan [Pakistan Above All]* 297 (2006).

26. *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 22 (D.D.C. 2009) (granting writ of habeas corpus to Guantánamo detainee). *See also* CSRT Summarized Detainee Testimony for ISN 672, Doc. No. 2001–14, at 6, *available at* [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/Set\\_29\\_2001-2047.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/Set_29_2001-2047.pdf) (noting detainee’s description of his captors as “talking about the Americans being willing to buy everybody who was a stranger in that country”); CSRT Summarized Detainee Testimony for ISN 719, Doc. No. 2780–90, at 1, *available at* [http://www.dod.mil/pubs/foi/detainees/csrt\\_arb/Set\\_42\\_2728-2810.pdf](http://www.dod.mil/pubs/foi/detainees/csrt_arb/Set_42_2728-2810.pdf) (“Any Arabs in Pakistan were being arrested at that time.”); Mackey & Miller, *supra* note 24, at 334–35 (“Indonesian intelligence agents were said to be collecting U.S. bounties for any Arab they turned in.”).

nationality or analogous status.<sup>27</sup> As late as 2007, U.S. authorities were covertly coordinating the detention and rendition of some one hundred foreign Muslims in Kenya who had fled the Ethiopian invasion of Somalia.<sup>28</sup> As the following section demonstrates, the framing of the primary enemy in GWOT as foreign fighters has had effects on broader transnational Muslim populations.

## B. Muslims Out of Place as Target Population

The post-9/11 worldwide hunt for Muslim foreign fighters—and the related slippage between this category and traveling Muslims in general—did not spring from a vacuum. The contours of this structural logic had been developing for nearly a decade, from the early years after the Cold War, as the United States and its allies repeatedly encountered—and conflated—diverse transnational movements operating under the banner of Islam. Some of these movements were violent, some not; some saw themselves as enemies

27. The ICRC’s report on CIA black sites noted three detainees, all Pakistanis, who were abducted from their own country: Khalid Shaykh Muhammad, Majid Khan, and Ali Abdul Aziz Mohammed (also known as ‘Ammar al-Baluchi). See International Committee of the Red Cross, ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody 5 (2007). Khalid Sheikh Muhammad, while a Pakistani national, was born and raised in Kuwait. See E-mail from Capt. Prescott L. Prince, Deputy Chief Defense Counsel-Navy, Office of Military Commissions (Muhammad’s military counsel) to author (Nov. 2, 2009) (on file with author) (noting that Kuwait does not recognize *jus soli* citizenship, but rather confers “citizenship based on heritage”). His nephew, Ali Abdul Aziz Mohammed, is believed to be a dual Pakistani/Yemeni national, but that fact has yet to be confirmed; and, Majid Khan, a Pakistani citizen, was granted legal asylum in the United States. See Center for Constitutional Rights, Our Cases, Khan v. Gates, <http://www.ccrjustice.org/ourcases/current-cases/khan-v.-obama/-khan-v.-gates> (last visited Nov. 10, 2009).

28. See, e.g., Amnesty Int’l, *Horn of Africa: Unlawful Transfers in the ‘War on Terror,’* AI Index AFR 25/006/2007, at 1–3, June 2007, available at <http://www.amnesty.org/en/library/asset/AFR25/006/2007/en/7b91df27-d398-11dd-a329-2f46302a8cc6/afr250062007en.pdf> (describing the covert detention of Muslims in Kenya and their transfer to Somalia and then to Ethiopia); Muslim Human Rights Forum, *Horn of Terror: Report of U.S.-Led Mass Extra-Ordinary Renditions from Kenya to Somalia, Ethiopia and Guantanamo Bay January-June 2007*, at 30–31 (2007) (giving a statistical summary of the Kenya-Somalia-Ethiopia renditions program). See also Compl., *Meshal v. Higgenbotham*, 09-cv-2178, ¶ 32 (filed D.D.C. Nov. 10, 2009), available at [http://www.aclu.org/files/assets/Meshal\\_v.\\_Higgenbotham\\_Complaint\\_11.10.09\\_0.pdf](http://www.aclu.org/files/assets/Meshal_v._Higgenbotham_Complaint_11.10.09_0.pdf) (“An armed Somali man . . . [said] that the Americans had offered the Ethiopian and Somali forces money in return for any foreigners they captured and handed over to the Americans for detention and interrogation.”).

of the United States, some as critics, others as potential allies. The most common narrative—that thousands of Arab fighters who fought in the Soviet-Afghan war (1979-1989) subsequently evolved into al-Qa'ida—threatens to collapse our historical understanding to a narrow chronology of covert wars and intelligence activities, or even more wrongly as a teleological prelude to the 9/11 attacks. Instead, it would be useful to frame U.S. encounters with transnational Islamist movements in the post-Cold War years in terms of two kinds of political crises: a crisis of legitimacy in U.S.-backed client states in the Middle East, and a crisis of legitimacy within the U.S.-dominated U.N. system.

Crises of legitimacy within American-backed authoritarian regimes in the Middle East (especially Egypt and Saudi Arabia) manifested themselves in particularly violent struggles between the state and armed opposition groups that spilled beyond those countries' borders. Most important was the intensification during the 1990s of the conflict between Egypt, a key U.S. client state, and the armed dissident groups al-Jama'a al-Islamiyya and al-Jihad al-Islami.<sup>29</sup> After these groups were blamed for the 1993 World Trade Center bombing in New York,<sup>30</sup> the United States became all too willing to assist the Egyptian state in hunting down dissidents abroad. The overseas war intensified in 1995, with the assassination attempt on Egyptian President Hosni Mubarak in Ethiopia in June, and the bombing of the Egyptian embassy in Pakistan in November. In parallel, U.S. client states also participated in rounding up and at times expelling foreign Muslims, especially Arabs, on their soil. This

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29. Both groups, lacking widespread popular support, have been largely broken by the Egyptian state, through the arrest, torture, and exile of their cadres. As a result, major figures in both groups have made numerous public statements renouncing armed opposition to the state, while some remaining fugitives have been reportedly absorbed by al-Qa'ida or otherwise sidelined. For brief English-language overviews of this process, see Mustapha Kamel Al-Sayyid, *The Other Face of the Islamist Movement* 12–22 (Carnegie Endowment for Int'l Peace, Working Paper No. 33, 2003), available at <http://www.carnegieendowment.org/files/wp33.pdf> (describing al-Jama'a al-Islamiyya's suppression by the Egyptian state and the leadership's renunciation of armed rebellion); Lawrence Wright, *The Rebellion Within*, *The New Yorker*, June 2, 2008, at 37 (describing al-Jihad leader Sayyid Imam al-Sharif's disavowal of violent opposition to the state).

30. Holly Fletcher, Council on Foreign Relations, *Backgrounder: Egyptian Islamic Jihad*, (May), [http://www.cfr.org/publication/16376/egyptian\\_islamic\\_jihad.html](http://www.cfr.org/publication/16376/egyptian_islamic_jihad.html); Holly Fletcher, Council on Foreign Relations, *Backgrounder: Jamaat al-Islamiyya*, (May), <http://www.cfr.org/publication/9156/>.

was particularly true in Pakistan after the Egyptian embassy attack.<sup>31</sup> And, in concert with local intelligence agencies, the CIA pioneered its "extraordinary rendition" program, orchestrating kidnappings of Egyptian dissidents in Croatia (1995), Albania (1998), and elsewhere, and arranging for their repatriation to Egypt, where they were imprisoned, tortured, and in some cases executed.<sup>32</sup>

In a separate development, atrocities befalling Muslim populations in Bosnia-Herzegovina, Chechnya, Kosovo, and Kashmir also prompted a crisis of legitimacy in the international system that further spurred Muslims in the Arab world and elsewhere to engage in acts of solidarity, both armed and unarmed. Hence, the concern over transnational Islamist activists found its way into the various western "interventions" in conflict zones that dominated the agenda of the international community during this period. As peacekeepers, diplomats, aid workers, and journalists—so-called "Internationals"<sup>33</sup>—arrived in various conflict areas, they found that

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31. See, e.g., *Pakistanis Probe Arabs on Bomb Blast*, United Press Int'l, Nov. 21, 1995 (describing seizures of dozens of Arabs and other foreign Muslims at major Pakistani airports and Lahore railway station, as well as raids on Arab and Afghan NGO offices in Peshawar after the embassy attack). Roundups and deportations of Arab aid workers and ex-combatants in Pakistan preceded the embassy attack as well. See, e.g., *Pakistani Police Detain 19 Arabs*, Agence France-Presse, Aug. 3, 1994 (noting Pakistani authorities periodically launch sweeps to pick up Arab veterans of the Afghanistan war living in Pakistan); *Afghans Stage Protest March Against Detention of Arabs*, Agence France-Presse, Apr. 12, 1993; Kathy Gannon, *Pakistan to Deport at Least 98 Arabs*, Associated Press, Apr. 10, 1993 ("Islamabad is afraid their presence will lead Washington to declare it a terrorist state and deprive it of economic privileges.").

32. See Andrew Higgins & Christopher Cooper, *Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell*, Wall St. J., Nov. 20, 2001, at A1 (discussing CIA operation in Albania in the 1990s to abduct and repatriate Egyptian dissidents); Human Rights Watch, *Black Hole: The Fate of Islamists Rendered to Egypt* 1–8 (2005), available at <http://www.hrw.org/reports/2005/egypt0505/egypt0505.pdf> (discussing the removal of detainees to Egypt and their treatment there).

33. I use the term "international community" here to denote both an ideal construct and also a set of institutions, ideologies, and practices that give those "Internationals" working in it (diplomats, aid workers, peacekeepers, etc.) a sense of shared identity and procedures and codes for communicating, acting, and understanding their work in the world. For a sampling of the burgeoning subfield of ethnographies studying "Internationals," see Kimberley Coles, *Democratic Designs: International Intervention and Electoral Practices in Postwar Bosnia-Herzegovina* 59–112 (2007) (discussing the arrival and effect of "Internationals" in Bosnia-Herzegovina); Ilana Feldman, *The Quaker Way: Ethical Labor and Humanitarian Relief*, 34 *Am. Ethnologist* 689, 692–702 (2007) (providing a historical ethnography of ethical dilemmas faced by Quaker humanitarian

they were often not alone: other outsiders were also distributing aid, brokering diplomatic settlements, educating and reforming the people, and of course fighting.<sup>34</sup> These outsiders, Muslims and specifically Arabs, often operated without the sanction of either a state or an inter-governmental organization. Barnett Rubin's description of al-Qa'ida in Afghanistan as constituting "in effect an alternative international community to the official one"<sup>35</sup> is true for a much larger constellation of groups unrelated to al-Qa'ida that operate outside of a western-dominated international system perceived as inefficient at best, and anti-Muslim at worst.

To the extent Internationals took on the burdens of governance in these countries, concern over who fell into the category of "foreign (Muslim) fighter" created an operational dilemma of how to determine *which* Muslim foreigners are fighters. This was no simple task, since many traveling Muslims operate within the institutional frameworks of the international community, such as U.N.-registered NGOs. In addition, in sites of intervention, there were often Muslim travelers present for educational, economic, religious, or kinship purposes, in some cases drawing on centuries-old networks of circulation, but without any necessary relation to these activist efforts.<sup>36</sup> In other words, in any given war zone, there

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workers in Gaza from 1948–1950); Peter Redfield, *Doctors, Borders, and Life in Crisis*, 20 *Cultural Anthropology* 328, 330–49 (2005) (examining Médecins sans Frontières and forms of power deployed by international humanitarian organizations); Amitav Ghosh, *The Global Reservation: Notes Toward an Ethnography of International Peacekeeping*, 9 *Cultural Anthropology* 412, 413–22 (1994) (offering observations on United Nations peacekeepers in Cambodia).

34. If critical scholarship on Internationals is still embryonic, work on such transnational, non-western actors is almost non-existent, or is viewed exclusively through the lens of "terrorism studies," whose attempts to discover charities providing a "cover for terrorism" contain ample empirical shortcomings and are predicated on a failure to recognize that for many people in the world support for political struggles can take both armed and unarmed forms without any contradiction or embarrassment. For a relatively nuanced study of this phenomenon, see *The Charitable Crescent: Politics of Aid in the Muslim World* 29–127 (Jonathan Benthall & Jérôme Bellion-Jourdan eds., 2003) (studying transnational Islamic aid movements, including links to armed action, and noting common problems with western aid efforts, such as misuse and politicization).

35. Barnett Rubin, *The Fragmentation of Afghanistan*, at xv–xvi (2d ed. 2002).

36. There is an extensive scholarly literature on travel and mobility within the broader Muslim world. *See, e.g.*, *Muslim Travellers: Pilgrimage, Migration, and Religious Imagination* (Dale Eickelman & James Piscatori eds., 1990) (investigating the role of religious doctrine in motivating travel in various medieval and contemporary Muslim societies). On the parallel between al-Qa'ida

may be Muslim travelers with no political or even religious motivation whatsoever; those who are activists of some kind, but without any ill-will towards the "West"; those who may think of themselves as critics of the "West," but have no relation to armed activities; those who wish to wage armed jihad, but conceptualize this as limited to defending fellow Muslims living under non-Muslim occupation or invasion<sup>37</sup>; and perhaps those few who, like al-Qa'ida, wish to attack the United States on its own soil, allegedly for its support for dictatorial regimes in the Middle East and Israel. Typical binary classifications of such individuals as either peaceful or violent, moderate or extremist, nationalist or global, provide scant analytical or practical guidance.

The application of a poorly defined category such as "foreign fighter" to a complex empirical reality with many different "foreign" Muslims necessarily occasions a set of particularly thorny, if not outright confused, problems of governance. Just as the standard refrain that one must distinguish between "moderate" and "radical" Muslims presupposes the need to know *all* Muslims, the concern over foreign (Muslim) fighters necessarily renders Muslim foreigners into a categorical object that must be known and appropriately dealt with. This category can be referred to as "Muslims out of place."<sup>38</sup>

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and earlier mobilizations of transnational resources in an Islamic context, see Engseng Ho, *Empire Through Diasporic Eyes: A View from the Other Boat*, 46 *Comp. Stud. in Soc'y and Hist.* 210, 237 (2004) (situating GWOT in a chain of historical examples dating to the sixteenth century in which "a very mobile, religious, cosmopolitan, and entrepreneurial member of the Hadrami diaspora [in today's case, Bin Laden] managed to rouse wider Muslim sentiment against European empire, on the back of local anti-colonial struggles").

37. One important example is Hudhayfa 'Azzam, son of 'Abd Allah 'Azzam, the most prominent Arab involved in the Afghan jihad against the Soviet Union. The younger 'Azzam views transnational Muslim participation in jihad against the United States as limited to and arising from the invasion of Iraq. See Mary Fitzgerald, *The Son of the Father of Jihad*, *Irish Times* (Dublin), July 7, 2006, at 12 ("If I saw an American or British man wearing a soldier's uniform inside Iraq I would kill him . . . . If I found the same soldier over the border in Jordan I wouldn't touch him. In Iraq he is a fighter and an occupier, here he is not."); see also Nir Rosen, *Iraq's Jordanian Jihadis*, *N.Y. Times Mag.*, Feb. 19, 2006, at 54 (discussing Hudhayfa 'Azzam's experiences in Iraq).

38. The phrase "out of place" appears prominently in two very different texts that inform the ambivalence of the term in signifying both alarming threat and poignant possibility. Dirt is, famously "matter out of place" in the work of anthropologist Mary Douglas, and hence a source of threat in the cultural systems that shape understandings of the world. See Mary Douglas, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo* 30–41 (1966). To be

Since the early 1990s, the U.S. government and its allies have pursued various campaigns against out-of-place Muslims. It is likely that only a small part of the total picture has become public, but it is possible to discern two broad approaches. The first approach attempted to put out-of-place Muslims back into their “rightful,” national places, as it were, by having them sent home, usually to ongoing detention. The best-known example of this policy is the extraordinary rendition program, which, as described *supra*, began in the mid-1990s and was often used to send individuals to their countries of origin for interrogation, beyond the apparent responsibility of the United States.<sup>39</sup> More broad—and more difficult to quantify—are deportations of out-of-place Muslims by U.S. client states without the operational involvement of the U.S. government, as may have been the case with Pakistan’s multiple roundups of Arabs after the fall of Afghanistan’s Najibullah regime in 1992.<sup>40</sup>

The second approach is not to erase out-of-placeness, but to perpetuate it by detaining such individuals in third countries with which they have no apparent relationship. After the 9/11 attacks, the United States developed mechanisms for direct control over out-of-place Muslims through indefinite extraterritorial detention and

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“out of place” is also, of course, a constitutive state of separation from “home” (conceived as family or homeland) that can condition new forms of subjectivity. See Edward W. Said, *Out of Place: A Memoir* 294 (1999) (“My search for freedom . . . could only have begun because of that rupture . . . . Now it does not seem important or even desirable to be ‘right’ and in place . . . . Better to wander out of place, not to own a house, and not ever to feel too much at home anywhere . . . .”).

39. The number of individuals who have passed through the extraordinary rendition program is unclear. In 2002, the CIA acknowledged “rendering” 70 individuals prior to September 2001. See Written Statement of Director of Central Intelligence George Tenet to the Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001 (Oct. 17, 2002), available at [http://www.fas.org/irp/congress/2002\\_hr/101702tenet.pdf](http://www.fas.org/irp/congress/2002_hr/101702tenet.pdf). But, in September 2007, CIA Director Michael Hayden estimated that the number of those who had been subjected to the program was “mid-range two figures.” Gen. Michael Hayden, CIA Director, Speech at the Council on Foreign Relations (Sept. 7, 2007), available at [http://www.cfr.org/publication/14162/conversation\\_with\\_michael\\_hayden\\_rush\\_transcript\\_federal\\_news\\_service.html](http://www.cfr.org/publication/14162/conversation_with_michael_hayden_rush_transcript_federal_news_service.html). It is not clear if Hayden was referring to total renditions or only those taking place after September 2001. If either set of figures is true, it suggests that the CIA did not increase its use of rendition after 2001 and may even have decreased it.

40. Human Rights Watch, *Black Hole* *supra* note 32, at 12 (2005) (noting that the fall of the Soviet-backed government in Afghanistan coincided with the Pakistani government’s detention of Arab militants).

interrogation, either openly at Guantánamo or the Bagram Theater Internment Facility in Afghanistan, or covertly in "black sites" in Afghanistan, eastern Europe, or southeast Asia.<sup>41</sup> In May 2005, the CIA held 94 such detainees in its own facilities.<sup>42</sup> The extraordinary rendition program has also been used to transfer individuals to the control of third countries with whom they had no previous ties, especially Jordan and Morocco; some of these individuals were subsequently transferred to Guantánamo.<sup>43</sup> Such arrangements, paradoxically, radicalize the out-of-placeness of the people they target: instead of repatriating these individuals and clearly assigning responsibility for controlling them to their own governments, the United States suspends detainees in a zone of legal ambiguity, beyond the protection of their own governments, as well as outside the concern of the states hosting them.<sup>44</sup>

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41. The shape of the global U.S. detention regime is currently undergoing readjustment. On January 22, 2009, President Obama ordered the CIA to close its own standing detention facilities "as expeditiously as possible." Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009). The Guantánamo detention facility was due to close by January 2010; the fate of detainees there is yet to be determined. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009). As for Bagram, the United States continues to oppose habeas corpus rights for detainees held there. See Brief of Respondents-Appellants at 18, Fadi Maqaleh, et al. v. Robert Gates et al., lead case docket No. 09-5265 (D.C. Cir. Sept. 14, 2009), available at <http://politics.theatlantic.com/US-opening-brief-as-filed.pdf> (appealing lower court ruling extending habeas corpus jurisdiction to Bagram detainees captured outside Afghanistan).

42. See Memorandum from Steven Bradbury, Principal Deputy Ass't Att'y Gen., Office of Legal Counsel on Application of U.S. Obligations Under Art. 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees to John Rizzo, Senior Deputy Gen. Counsel, Central Intelligence Agency 29 (May 30, 2005) [hereinafter Bradbury Memorandum].

43. The best-known case of an individual apparently sent to a non-U.S. facility in a third country is British resident Binyam Mohamed, who was captured in Pakistan and rendered to Morocco, as flight records obtained by the Council of Europe attest. See Council of Europe, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States, Draft Report – Part II (Explanatory Memorandum)* ¶ 202, AS/JUR (2006) 16 Part II (2006). For more on transfers to Jordan of individuals with no apparent tie to that country, see Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan 13–31* (2008), available at [http://www.hrw.org/sites/default/files/reports/jordan0408\\_1.pdf](http://www.hrw.org/sites/default/files/reports/jordan0408_1.pdf).

44. The Obama administration has thus far appeared to combine both approaches by allowing "out-of-place" Muslims detained in client states to remain there for interrogation, while preserving the option of renditions to home countries. See Eric Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in*

Sending out-of-place Muslims home or to another location, however, has often required effectively excluding them from the protection of the law wherever they are, with varying degrees of direct or indirect U.S. involvement. At the same time, the U.S. government, through its diplomats, soldiers, and spies, often carries out such campaigns while effectively exempted from accountability to local law.<sup>45</sup> Any U.S. desire for such exemptions is, of course, neither surprising nor entirely based on GWOT imperatives. But juxtaposing them with the measures taken in the name of defeating an enemy itself marked primarily as “foreign” elucidates the important question of how different outsiders are treated, and how such decisions are made. This contrast—exclusion from legal protection for out-of-place Muslims, and exemption from legal accountability for the United States and its allies—creates a braided logic of exemption and exclusion. Before demonstrating how this logic works in practice, however, it is necessary to clarify what is at stake when the United States and its allies regard “foreignness” as a potential problem.

### C. The Foreign, the Universal (and Enemies)

In order to understand the normative framework justifying the braided logic of exemption and exclusion, we must return to the emphasis on foreign fighters and analyze not what is said *about* them, but rather the silence *around* them. This is where the equal, if not greater, “foreignness” of the United States and some of its allies in the same sites of intervention stands out. This attitude was vividly demonstrated by Afghan Defense Minister Abdul Rahim Wardak when he stressed the foreignness—and hence, illegitimacy—of certain rebels by remarking that “[i]n some cases, they have to use interpreters to talk to” the local population, as if that were not the case for NATO forces as well.<sup>46</sup> The point of this observation is not to

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*Terror Cases*, N.Y. Times, May 24, 2009, at A1 (noting that the United States now relies “heavily on foreign intelligence services to capture, interrogate and detain all but the highest-level terrorist suspects seized outside of Iraq and Afghanistan”).

45. See discussion of immunities and exemptions for Internationals in post-conflict Bosnia-Herzegovina and post-war Iraq in Parts II and III *infra*.

46. John J. Kruzal, *Afghan Minister Recommends Border Region Task Force*, Am. Armed Forces Press Service, Sept. 22, 2008. Of course the adoption of this rhetoric by U.S. client states operates also according to these regimes’ own political calculations. Wardak’s statement came in the context of his claim that foreign insurgents in Afghanistan outnumbered local ones, a statement clearly

decry or to satirize, but rather to point out how the concern over foreign fighters tends to go hand-in-hand with a curious silence about the "foreignness" of others present in sites of intervention.

This blindspot is made possible by a particular rhetorical position towards the otherwise unremarkable fact of human diversity that I call the position of the universal. To speak from the position of the universal is to assert a veto over the evaluation of differences according to a worldview or set of criteria that one has adopted as universal.<sup>47</sup> This is *not* tantamount to simply "imposing" one's own system or views on others, nor does it necessarily imply arrogance; rather, the position of the universal always acknowledges that some residual differences will remain and may in some cases even celebrate diversity. It also allows for a certain margin of self-critique and self-correction. The position of the universal merely gives one the final say as to *which* (empirical) differences are (normatively) permissible and which are ultimately problematic.

From the position of the universal, the United States can frame its own differences with local populations as stemming essentially from either side's failure to live up to certain standards—standards over which the United States ultimately exercises a veto. At the same time, the United States can assign a presumptively illegitimate value to differences *between* others. This position can be

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intended to downplay any domestic concerns over the legitimacy of the Karzai regime. *See id.*

47. My approach to the question of universalism is largely anthropological rather than philosophical insofar as it is driven by the analysis of how human beings talk about and invoke ideas of the universal rather than an attempt to determine its proper content or the validity of its existence. I take it as a starting point of this analysis that such notions are always historically contingent, yet their contingency is not by itself an argument for or against their normative force in a given context, nor is it a rejection of universalisms as such. *See, e.g.,* Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law?*, 18 *Eur. J. Int'l L.* 379, 380–407 (2007) (arguing that international law is subject to a paradox—its universalism provides both a promise for regulating common humanity while also carrying with it the potential to justify the violent imposition of particular norms—and suggesting a pragmatic ethics in dealing with this). This approach draws more from attempts to complicate the relationship between the universal and the particular and to emphasize the plurality of both. *See, e.g.,* Ernesto Laclau, *Universalism, Particularism, and the Question of Identity*, in *Emancipation(s)* 20, 20–35 (1996) (challenging the mutual exclusivity of the universal and the particular by arguing that the content of the former is always contingent and that the impossibility of overcoming the division is therefore a dynamic one and constitutive of the possibility of democratic politics).

restated thus: *our differences with local Muslims are generally legitimate, but the differences between local and certain foreign Muslims are not, therefore the latter are enemies to us all—a universal enemy.* The foreign fighter is a *universal enemy* not because of any alleged enmity towards or from humanity but because he has been declared an enemy by those who occupy the position of the universal.

It then becomes easy to justify excluding out-of-place Muslims from legal protection while exempting certain westerners from local legal accountability. The unique danger of foreign fighters, local incapacity (to be remedied by training and equipping local regimes who must then prove their readiness to “fight their own battles”), and a presumption that those occupying the position of the universal can be trusted to effectively police themselves all follow quite readily. I am not suggesting, of course, that a supporter of this logic would deny that the United States is “foreign” in places such as Afghanistan and Iraq; but such a person would then have only two choices. First, she could admit that evaluating the legitimacy of these respective outsiders has nothing to do with “foreignness” and must instead be done in terms of other substantive or procedural values. Second, she could somehow argue that the United States is not foreign in the “same way” as foreign fighters, again most likely in reference to those same substantive or procedural values. Either way, there is an irreducible gap between the word “foreign” and the normative value for which it stands—and that gap marks the position from which one enjoys the ultimate authority to assign value to difference.

In distracting from the differences in what is at stake for the United States and local populations in sites of intervention, declaring particular groups enemies of the universal allows one to elide crucial questions of what local populations actually think and to ignore how they might evaluate and compare different outsiders. As the phrase “struggle for hearts and minds” implicitly recognizes, local choices as to who is merely a foreigner and who is the bearer of universal values cannot be assumed in advance. This raises other important questions of who is empowered to make such decisions, and with what consequences. Addressing all of these questions is beyond the scope of this Article, but elucidating the stakes involved is not. The following two case studies are thus devoted to demonstrating how the braided logic of exemption and exclusion, arising from the effort to police transnational Muslim mobility, works in very different

contexts with consequences that are nevertheless similar, as well as disquieting.

## II. CONTENTIOUS INTERVENTIONS: BOSNIA-HERZEGOVINA AND STATE-BUILDING

In recent decades, Bosnia-Herzegovina's (BiH) significance for the United States has transformed from a site of ethnic conflict, humanitarian intervention, and nation-building to a front in the Global War on Terror that has given Guantánamo one of its most famous detainees: Lakhdar Boumediene, the eponymous plaintiff in the landmark Supreme Court decision *Boumediene v. Bush*.<sup>48</sup> This shift reflects the increasing interest over time in former foreign fighters. This part begins by providing some background on out-of-place Muslims in BiH before describing how the logic of exclusion has operated in the detention and removal of out-of-place Muslims under U.S. pressure. In contrast to the logic of exclusion, the logic of exemption applies to a category of outsiders commonly referred to as "Internationals" who occupy the position of the universal, as described *supra*. These moves to exclude some while simultaneously exempting others undermine the very state-building project in BiH under the General Framework Agreement for Peace ("Dayton Accord")<sup>49</sup> that the United States and its allies ostensibly seek to sponsor.

Providing the backdrop to U.S. concerns over out-of-place Muslims is the participation of foreign (Muslim) fighters, especially Arab *mujahids* (religious warriors),<sup>50</sup> in the Bosnian war (1992-1995),

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48. 128 S. Ct. 2229 (2008) (holding that Guantánamo detainees have a constitutional right to habeas corpus).

49. General Framework Agreement for Peace in Bosnia-Herzegovina, Bosn. & Herz.-Croat.-Yugo., Dec. 14, 1995, 35 I.L.M. 75, 89 [hereinafter Dayton Accord].

50. Much remains to be investigated about the numbers and nature of Arab volunteers in the war (to say nothing of Turks, Iranians, and others). Most of the information in this section is drawn from and cross-checked between interviews conducted in BiH in 2006 and 2007, including with Arab and Bosnian ex-combatants; evidence used by the U.N. International Criminal Tribunal for former Yugoslavia (ICTY); and the copious media production of Arab and other non-Bosnian Muslim participants themselves, including first-hand accounts. The ICTY's treatment of this issue can be found in *Prosecutor v. Rasim Delić*, Judgment, ICTY-04-83-T, ¶¶ 165–99 (ICTY Trial Chamber 2008); *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Judgment, ICTY-01-47-T, ¶¶ 403–853 (ICTY Trial Chamber 2006). For a sampling of publicly available primary source

alongside or in the ranks of the Muslim-majority Army of the Republic of Bosnia-Herzegovina (Armija Republike Bosne i Hercegovine, ARBiH).<sup>51</sup> In addition to these fighters, there were also relief organizations from Arab or Islamic countries operating in the war zone.<sup>52</sup> In both the military and aid realms,

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materials, see Khalid Hammadi, *Tanzim al-Qa'ida min Dakhil Kama Yarwi Abu Jandal (Nasir al-Bahri) al-Haris al-Shakhsi li-Bin Ladin (2) [Al-Qa'ida from the Inside, as Told by Abu Jandal (Nasir al-Bahri), Bin Ladin's Personal Bodyguard, part 2]*, Al-Quds al-'Arabi (London), Mar. 19/20, 2005, at 17, available at <http://81.144.208.20:9090/pdf/2005/03Mar/19MarSat/Quds17.pdf> (describing, *inter alia*, the composition and military style of two units of Arab *mujahids* in Bosnia-Herzegovina); Abu 'Abd al-'Aziz (pseudonym), Mawqif: Amir 'Ala al-Mujahidin al-'Arab [Position: Prince of the Arab Mujahids], <http://www.paldf.net/forum/showthread.php?t=7023> (last visited Feb. 8, 2010) (recounting the experiences of a commanding officer leading a brigade in Bosnia-Herzegovina composed of Arabs and non-Arabs from 70 nationalities). There is also a hagiographic genre focusing on accounts of miracles [*karamat*]. See Hamad al-Qatari & Majid al-Madani, *Min Qisas al-Shuhada' al-'Arab fil-Busna wal-Harsak* [Stories of the Arab Martyrs in Bosnia-Herzegovina] 27–216 (2002) (providing autobiographical accounts by 45 Arab *mujahids* fighting in Bosnia-Herzegovina). Audio hagiographies include: *In the Hearts of Green Birds* (Azzam Recordings 1996), available at [http://ia311503.us.archive.org/2/items/In\\_The\\_Heart\\_Of\\_Green\\_Birds/In\\_the\\_Hearts\\_of\\_Green\\_Birds.mp3](http://ia311503.us.archive.org/2/items/In_The_Heart_Of_Green_Birds/In_the_Hearts_of_Green_Birds.mp3); *Under the Shades of Swords* (Azzam Recordings 1997), available at [http://www.kalamullah.com/others/Under\\_the\\_Shades\\_of\\_Swords.mp3](http://www.kalamullah.com/others/Under_the_Shades_of_Swords.mp3) (describing a variety of accounts of Arab *mujahidin shuhada'* (martyrs) in Bosnia-Herzegovina). Unfortunately, one must also be aware of a burgeoning sensationalist literature, whose flaws, though glaring, are too extensive to be dealt with in detail here. See, e.g., Evan Kohlmann, *Al-Qaida's Jihad in Europe: The Afghan-Bosnian Network* (2004) (alleging that Arab fighters in Bosnia were part of a global jihadist conspiracy under the direction of al-Qa'ida); John Schindler, *Unholy Terror: Bosnia, al-Qa'ida, and the Rise of Global Jihad* (2007) (same).

51. Drawing far less attention have been volunteers from outside the former Yugoslavia on other sides in the war, including Greeks, Ukrainians, and Russians with the Serbs, and Dutch and Germans with the Croats. See Cees Wiebes, *Intelligence and the War in Bosnia 205–06* (2003) (outlining the deployment of mercenaries and volunteers on behalf of all warring factions in the former Yugoslavia).

52. See Jérôme Bellion-Jourdan, *Les Réseaux Transnationaux Islamiques en Bosnie-Herzégovine [Transnational Islamist Networks in Bosnia-Herzegovina]*, in *Le Nouvel Islam Balkanique [The New Balkan Islam]* 429 (Xavier Bougarel & Nathalie Clayer eds., 2001) (Fr.) (examining transnational Islamist efforts in Bosnia); Ziyad Hadhul & Muhammad al-Humaydi, *Al-Qissa al-Kamila lil-Dawr al-Sa'udi fil-Busna wal-Harsak [The Full Story of the Saudi Role in Bosnia-Herzegovina]* (1998) (detailing Saudi diplomatic and aid efforts in the Bosnian war); Anwar Abdallah Hadi, *Rihlat al-Nar wal-Thuluj [The Journey of Fire and*

Arabs already living in the former Yugoslavia who had come to study from other non-aligned states such as Syria and Iraq played an important facilitating role as interpreters and guides, as did some Bosnians who had worked or studied in the Arab world.

The relationships between Bosnian Muslims and Arab activists have been complex, with both gratitude for their solidarity and sacrifice, and tension or even hostility over differences in religious practice and concerns over the proper subordination to the military chain of command. Arab military volunteers also developed a reputation for brutality towards captured prisoners, including grisly accounts of beheadings.<sup>53</sup> In part because of this perception, Arab non-combatants, including relief workers, also found themselves the target of kidnappings and assaults by opposing forces hoping to exchange them as war captives.<sup>54</sup>

The presence of foreign Muslim fighters in the conflict zone was a major concern for the United States during the negotiations at Dayton, Ohio that ended the war. "With NATO forces about to arrive in Bosnia, we could not tolerate the continued presence of these people in Bosnia," wrote U.S. mediator Richard Holbrooke in his memoirs, citing some *mujahids'* unspecified "ties to groups in the Middle East that had committed terrorist acts against American troops."<sup>55</sup> "One of the key U.S. objectives was to get them out of the country as soon as possible," recalled former Swedish Prime Minister Carl Bildt, who co-chaired the Dayton conference and later served as the first High Representative of the International Community to BiH.<sup>56</sup>

Ice] (1996) (travelogue of a journalist who accompanied a Saudi aid delegation to Bosnia in March 1995).

53. See Prosecutor v. Enver Hadžihasanović and Amir Kubura, Judgement, ICTY-01-47-T, ¶¶ 1080–1100, 1116–27, 1359–90 (ICTY Trial Chamber 2006) (describing war crimes committed by foreign and Bosnian *mujahids*); Prosecutor v. Rasim Delić, Judgement, ICTY-04-83-T, ¶¶ 213–18, 239–52, 257–61, 287–94, 298–305, 315–20 (ICTY Trial Chamber 2008) (same).

54. The Human Rights Chamber for Bosnia-Herzegovina (HRC) has heard several cases arising from the kidnapping, assault, and unlawful detention of Arab students and aid workers. See Samy Hermas v. FBiH, CH/97/45 (Bosn. & Herz. Human Rights Chamber 1998) (finding that Bosnian Croat forces unlawfully detained and mistreated Arab civilian detainees before exchanging them for captured fighters); H.R. and Mohamed Momani v. FBiH, CH/98/946 (Bosn. & Herz. Human Rights Chamber 1999) (same).

55. Richard Holbrooke, *To End a War* 320 (rev. ed. 1998).

56. Carl Bildt, *Peace Journey: The Struggle for Peace in Bosnia* 191 (Weidenfeld and Nicolson 1998).

This concern was reflected in the final text of the Dayton Accord, which required the withdrawal of “[a]ll Forces . . . not of local origin” as well as of “all foreign Forces, including individual advisors, freedom fighters, trainers, [and] volunteers” within thirty days.<sup>57</sup> The same provision specifically exempted U.N. and NATO-led peacekeeping forces and the U.N. International Police Task Force (IPTF) from the requirement to withdraw. The structure of this provision—the exclusion of “foreign” forces paired with an exemption for certain outsiders who occupy the position of the universal (NATO and the U.N.)—is perhaps the clearest example of the braided logic that sustains policies against out-of-place Muslims. The consequences of this distinction are traced in the following two sections.

#### A. Exclusion: From Fellow Muslims to Foreign Arabs

Throughout the post-Dayton period, the United States and its allies in BiH have been leery of out-of-place Muslims.<sup>58</sup> After 9/11, these concerns intensified, leading to the exclusion from legal protection of even naturalized citizens; policies which, at times, violated BiH and international law. These efforts have been justified in the name of dealing with terrorist threats, including from so-called ex-foreign fighters.

The Elmudžahedin detachment of ARBiH, where most of the Arab volunteers served, was dissolved shortly after the war, and as a result most Arab combatants appear to have left the country around that time. An undetermined number, however, obtained BiH

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57. Dayton Accord, *supra* note 49, Annex 1-A, art. III.

58. A flashpoint for these tensions was the central Bosnian village of Bočinja, where several dozen Arab ex-combatants, along with Bosnian kin and associates, took over former Serb homes after the war in a reported attempt to create an ideal religious community. Tensions with Serb residents and NATO forces persisted until most of the Arabs were evicted in 2000 and 2001. *See, e.g.*, Chris Hedges, *Outsiders Bring Islamic Fervor to the Balkans*, N.Y. Times, Sept. 23, 1996 at A1 (describing tensions between Arabs and Serbs, and Arabs and NATO forces); Alix Kroeger, *Bosnia's Holy Warriors Ready to Fight Evictions*, The Observer (London), July 23, 2000, at 23 (calling the Arab *mujahidin* a “source of potential political and ethnic instability in central Bosnia”); John Pomfret, *U.S. Protests Mideast Fighters in Bosnia; Demand that Foreigners Be Evicted Follows Threats to Americans*, Wash. Post, Sept. 13, 1996, at A34 (noting threats against NATO troops from the *mujahidin* in Bočinja); Alexandre Barb, *Bocinja: Back to Peace*, SFOR Informer Online #116, June 27, 2001, available at <http://www.nato.int/SFOR/indexinf/116/p06a/t0106a.htm> (NATO newsletter reporting the village to be calm following evictions).

citizenship by virtue of their army service<sup>59</sup> or through marriage to BiH citizens, causing western concerns over foreign fighters to linger.<sup>60</sup> In late 1997, the Office of the High Representative of the International Community in BiH (OHR)—the country's de facto chief executive after the Dayton Accord, backed by thousands of troops in the NATO-led Stabilization Force (SFOR)<sup>61</sup>—imposed the country's first post-war citizenship law, later approved by the BiH Parliament without possibility of amendment; the law included fairly standard denaturalization powers.<sup>62</sup> In addition, articles 40 and 41 created a special hybrid State Commission charged with reviewing wartime naturalizations, composed of six Bosnian and three international members.<sup>63</sup> Although the Commission appears to have revoked few if any citizenships at the time, both its composition and manner of establishment reflect intimate external involvement over one of the core dimensions of sovereignty, namely citizenship.

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59. According to an amendment enacted in May 1993 and in effect until the OHR-imposed citizenship law took effect in 1997, foreign members of the Bosnian armed forces would obtain citizenship without having to fulfill the standard naturalization requirements. Amendment to 1992 Citizenship Act, BH Gazette 11/93 (May 10, 1993) (adding a new article 9(5) for this exception) (translation on file with author).

60. In contrast to the widespread (and culturally coded) concern that BiH citizenship in itself could facilitate "terrorist" activities, there has been no action to revoke the naturalization of individuals from other ex-Yugoslav republics implicated in war crimes. In the case of a retired Croatian general with dual nationality seeking refuge in BiH from war crimes charges in Croatia, the State Court of BiH expressed concern that "the privilege of dual citizenship and constitutional ban on extradition of a country's own nationals[ ] are frequently abused for the purpose of avoiding criminal prosecution in the former [Yugoslav] republics." *Prosecutor v. Glavaš*, Case No. Ex-21/09, Decision on Motion to Order Custody, 3 (May 14, 2009), available at [http://www.sudbih.gov.ba/files/docs/Glavas\\_Branimir\\_Decision.pdf](http://www.sudbih.gov.ba/files/docs/Glavas_Branimir_Decision.pdf).

61. In 2004, SFOR was succeeded by a European Union Force (EUFOR) with largely the same composition, as well as a residual NATO element in the country. See Press Release, NATO, Istanbul Summit Communiqué (June 28, 2004), available at <http://www.nato.int/docu/pr/2004/p04-096e.htm>.

62. HR Decision on the Law on Citizenship of Bosnia and Herzegovina, art. 23, BH Gazette 4/97 (Dec. 23, 1997) (adopted by Parliamentary Assembly on July 27, 1999 and published in BH Gazette 13/99, Aug. 26, 1999), available at <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/HR-DECISION-ON-LAW-ON-CITIZENSHIP.doc>. The decision permitted denaturalization in cases of (a) fraudulent acquisition of citizenship, (b) prohibited service in a foreign military, and (c) failure to fulfill naturalization conditions after the law's entrance into force. *Id.*

63. *Id.* arts. 40, 41.

In the aftermath of the September 2001 attacks on New York and Washington, U.S. pressure to “clean up” the problem of foreign Muslims increased dramatically. In October, Bosnian authorities summarily stripped war veteran Usama Faraj Allah, a.k.a. ‘Imad al-Misri or Eslam Durmo, of his BiH citizenship without acquiring proper approval from all relevant state bodies or providing opportunity for appeal.<sup>64</sup> Faraj Allah was forcibly repatriated to Egypt the next day, where he was reportedly tortured before being convicted by a military court in a trial that failed to meet minimum international standards.<sup>65</sup> A representative of the U.S. Embassy in Sarajevo participated in the meeting where the decision to expel him was made.<sup>66</sup> The Human Rights Chamber for BiH (HRC), a hybrid court composed of local and European jurists, subsequently found that the denationalization and expulsion had violated the European Convention on Human Rights (ECHR), including the right to be free of torture or inhuman treatment and the right to a remedy.<sup>67</sup>

Also in October 2001, authorities arrested Abdel Halim Khafagy, an Egyptian resident of Germany who was visiting BiH in connection with his business as a publisher of translations of Islamic books into European languages. Khafagy, then a sixty-nine-year-old former activist in the Egyptian Muslim Brothers and a well-known author,<sup>68</sup> was detained at the U.S. Eagle base at Tuzla for several weeks before being expelled to Egypt. German intelligence officers visiting him at Eagle base reported seeing his face bloody and

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64. Amnesty Int’l, *Further information on Urgent Action 257/01*, MDE 12/015/2002, Apr. 23, 2002. Faraj Allah had been arrested in Bosnia several months before 9/11 on suspicion of having certified untrue statements.

65. *Id.* See also Amnesty Int’l, *Egypt: No protection - systematic torture continues*, MDE 12/031/2002, Nov. 13, 2002 (documenting risk of torture to anyone taken into detention in Egypt).

66. See *Eslam Durmo v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Case No. CH/02/9842, Decision, Human Rights Chamber of Bosnia and Herzegovina, ¶ 58 (Jan. 10, 2003), available at <http://www.hrc.ba/database/decisions/CH02-9842%20Durmo%20Admissibility%20and%20Merits%20E.pdf>.

67. See *id.* ¶¶ 82–89, 130. Durmo was repatriated with Egyptian citizen and BiH resident Sa’d Hasan al-Sharif. See Amnesty Int’l, *Further information on Urgent Action 257/01*, MDE 12/015/2002, Apr. 23, 2002.

68. Ironically, Khafagy’s best-known work is his memoir of 16 years as a political prisoner in Egypt. See ‘Abd al-Halim Khafaji, ‘*Indama Ghabat al-Shams: Qissat al-Umr al-Thani fil-Sujun wal-Mu’taqalat* [When the Sun Vanished: The Tale of the Second Spell in Prisons and Detention Centers] (1979).

stitched from beatings.<sup>69</sup> Khafagy was released by Egyptian authorities without charge and later returned to Germany,<sup>70</sup> where the Bundestag is investigating his mistreatment.<sup>71</sup>

In perhaps the best-known case of actions against Arabs in BiH, authorities in October 2001 detained six men of Algerian origin, five of them naturalized BiH citizens, at the behest of U.S. authorities who accused the men of plotting to bomb the American and British embassies in Sarajevo. In a meeting with Alija Behmen, Prime Minister of the Federation of Bosnia and Herzegovina (FBiH),<sup>72</sup> U.S. chargé d'affaires Christopher Hoh reportedly delivered a threat to withdraw U.S. peacekeeping forces and cut diplomatic relations if the men were not arrested, adding, "[i]f we leave Bosnia, God save your country, Mr. Prime Minister."<sup>73</sup> In January 2002, the men were handed over to U.S. authorities and transferred to Guantánamo, notwithstanding an order for their release from the FBiH Supreme Court due to lack of evidence.<sup>74</sup> Even the international community's High Representative, Wolfgang Petritsch, claimed he was powerless to stop the move: "If I would have protested more vocally at the time against this obvious breach of law, I believe it would have jeopardized the international mission."<sup>75</sup> Local authorities subsequently exonerated the men of any wrongdoing and the HRC found that their handover to U.S. authorities and expulsion

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69. See Martin Kreickenbaum, *Germany's Role in Illegal U.S. "Anti-Terror" Activities*, World Socialist Web Site, Nov. 9, 2006, <http://www.wsws.org/articles/2006/nov2006/germ-n09.shtml>.

70. See Majdi Sa'id, *Fi Diyafat Muslimi Almanyia [In the Hospitality of Germany's Muslims]*, Islamonline.net, Aug. 8, 2008, <http://www.islamonline.net/arabic/Daawa/NonMuslims/2006/08/01.shtml> (describing Khafagy's abduction in Bosnia and subsequent return to Germany).

71. See Press Release, Bundestag, Kanzleramt war über den Fall Khafagy informiert [Chancellor's Office Was Informed of Khafagy Incident] (July 17, 2009) available at [http://www.bundestag.de/dokumente/textarchiv/2008/20186311\\_kw19\\_lua/index.html](http://www.bundestag.de/dokumente/textarchiv/2008/20186311_kw19_lua/index.html).

72. Under the Dayton Accord, Bosnia-Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina, and Republika Srpska. See Dayton Accord, *supra* note 49, Annex 4, art. I, ¶ 3.

73. Marc Perelman, *From Sarajevo to Guantanamo: The Strange Case of the Algerian Six*, Mother Jones Online, Dec. 4, 2007, <http://www.motherjones.com/politics/2007/12/sarajevo-guantanamo-strange-case-algerian-six>.

74. *Id.*

75. *Id.*

violated a number of BiH's obligations under the ECHR.<sup>76</sup> After six years and several U.S. Supreme Court decisions,<sup>77</sup> the U.S. government withdrew nearly all of its allegations against the men. In a subsequent evidentiary hearing, a federal district court judge rejected the remaining allegations against five of the men, ordering their release.<sup>78</sup>

The expulsion of the Algerians provoked widespread outrage, including tense confrontations between protesters and police.<sup>79</sup> Subsequent efforts to deal with the "problem" of naturalized foreigners and specifically some eight hundred people of "Afro-Asian" origin (approximately five percent of all naturalizations since independence) were more legalistic, multilateral, and systematic. In 2005, the BiH Parliamentary Assembly adopted a series of amendments to the citizenship law,<sup>80</sup> empowering the State

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76. See Hadž Boudellaa et al. v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina, Case No. CH/02/8679, Decision on Admissibility and Merits, Human Rights Chamber of Bosnia and Herzegovina, ¶ 323 (Oct. 11, 2002), available at <http://www.hrc.ba/database/decisions/CH02-8679%20BOUDELAA%20et%20al.%20Admissibility%20and%20Merits%20E.pdf> (finding that BiH and F BiH violated of the right not to be arbitrarily expelled, the right of liberty and security, the right to be presumed innocent, and the right not to be subjected to the death penalty); Belkasem Bensayah v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina, Case No. CH/02/9499, Decision on Admissibility and Merits, Human Rights Chamber of Bosnia and Herzegovina, ¶ 220 (Apr. 4, 2003), available at <http://www.hrc.ba/database/decisions/CH02-9499%20Bensayah%20Admissibility%20and%20Merits%20E.pdf> (finding same).

77. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that detainees in Guantánamo are entitled to seek the writ of habeas corpus pursuant to the federal habeas statute, 28 U.S.C. § 2241); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (holding that the writ extends to Guantánamo under the U.S. Constitution).

78. See *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). The sixth man, Belkasem Bensayah, is appealing the decision to continue his detention. See *Boumediene v. Obama*, No. 08-5537 (D.C. Cir. filed Dec. 31, 2008).

79. See, e.g., *Bosnia Suspects Headed for Cuba*, BBC News Online, Jan. 18, 2002, <http://news.bbc.co.uk/2/hi/europe/1767554.stm>.

80. In the interest of full disclosure: I worked with the Helsinki Committee for Human Rights in Bosnia-Herzegovina on an amicus curiae brief before CCBH challenging the compatibility of the 2005 citizenship law amendments with the BiH constitution and BiH's international legal obligations. See Expert Opinion on Deprivation of Nationality, submitted by the Helsinki Committee for Human Rights in Bosnia and Herzegovina and the Allard K. Lowenstein International Human Rights Clinic, Yale Law School, as Amici Curiae Supporting Appellants/Applicant Al Husin Imad, Case No. AP 1222/07, Constitutional Court of Bosnia and Herzegovina, available at [www.cageprisoners.com/download.php?download=718](http://www.cageprisoners.com/download.php?download=718).

Commission to review all naturalizations from April 6, 1992 to January 1, 2006 (rather than those granted during the war only) and to withdraw citizenship in any case where "regulations in force in the territory of Bosnia and Herzegovina at the time of the naturalisation had not been applied."<sup>81</sup> This is possibly the loosest standard for denationalization in the world,<sup>82</sup> lacking requirements of intent or even knowledge of regulatory improprieties on behalf of the individual concerned. Further, the State Commission conducted its reviews in closed sessions without affording applicants the right to a hearing. The amendments also eviscerated the standard appeal process, leaving petitioners essentially without any right to an evidentiary hearing, either in the first instance or upon review.<sup>83</sup>

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81. 2005 BiH Law on the Amendments to the Law on Citizenship of BiH, art. 41(4)(a), BH Gazette 82/05 (Nov. 2005), available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/foreigners\\_and\\_citizens/nationality/documents/national\\_legislation/BiH%20Law%20Citizenship%20Amendment%20Nov%202005\\_ENG.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/foreigners_and_citizens/nationality/documents/national_legislation/BiH%20Law%20Citizenship%20Amendment%20Nov%202005_ENG.pdf) (unofficial translation). The original version of the law employed the same standard but placed the burden on the State Commission to demonstrate that the individual concerned was clearly aware of the impropriety; the law also allowed people to keep their citizenship if they subsequently fulfilled naturalization requirements anyway. See HR Decision on the Law on Citizenship of Bosnia and Herzegovina, art. 41(4), BH Gazette 4/97 (Dec. 23, 1997) (adopted by Parliamentary Assembly on July 27, 1999 and published in BH Gazette 13/99, Aug. 26, 1999), available at <http://www.ohr.int/ohr-dept/legal/oth-legist/doc/HR-DECISION-ON-LAW-ON-CITIZENSHIP.doc>. The 2005 amendments did away with these constraints. This provision is also separate from and supplemental to the Commission's power to denationalize in cases of fraud, lack of a "genuine link" with the country or other more traditional grounds. See BiH Law on Citizenship (amended 2005), arts. 23(4)–(6), arts. 41(4)(a)–(d).

82. Major treatises on comparative nationality law do not contain any evidence of existing denationalization laws as sweeping as BiH's. See, e.g., Paul Weis, *Nationality and Statelessness in International Law* 115–27 (2d ed. 1979) (noting the global variance of denationalization procedures and discussing common reasons for loss of nationality, such as entry into foreign military service, departure from country, conviction of certain crimes, political activities, and racial or nationalistic grounds); Ruth Donner, *The Regulation of Nationality in International Law* 151–52, 244–45 (2d ed. 1994) (discussing when a country may lawfully withdraw nationality and noting that denationalization is generally attributable to discrete acts of an individual). A recent survey of laws on loss of nationality amongst 24 (mostly European) states does not indicate anything similar to the regime in BiH. See Gerard-René de Groot, *Loss of Nationality: A Critical Inventory, in Rights and Duties of Dual Nationals: Evolution and Prospects* 201, 201–52 (David A. Martin & Kay Hailbronner eds., 2003).

83. Under the 2005 amendments, the State Commission's decisions are no longer open to standard administrative appeal processes. See BiH Law on Citizenship (amended 2005), art. 41(8) (permitting those adversely affected to

In early 2006, the State Commission began reviewing the files of the ten percent of those naturalized since independence who were not from other former Yugoslav republics, mailing out brief (often one-or two-page) decisions soon thereafter.<sup>84</sup> In September 2006, BiH authorities deported one denationalized individual, a Tunisian named Badreddine Ferchichi, under murky circumstances. Ferchichi was allegedly abused upon his return home<sup>85</sup> and later sentenced by a military tribunal to three years in prison for service in a “foreign army or terrorist organization operating abroad.”<sup>86</sup> By December 2008, 660 citizenships had been revoked, about 400 of them held by individuals of “Afro-Asian” origin, and deportation proceedings have begun against an unknown number.<sup>87</sup> As of March

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institute an “administrative dispute”). Standard appeals processes include a number of procedural safeguards guaranteed in the Law on Administrative Procedure, including rights to participate in fact-finding processes and a right to a hearing on appeal. Law on Administrative Procedure, arts. 133–34, 218, 225, BH Gazette 29/02, 12/04 (June 2002), available at [http://www.sudbih.gov.ba/files/docs/zakoni/en/zakon\\_o\\_upravnom\\_postupku\\_29\\_02\\_12\\_04\\_-\\_eng.pdf](http://www.sudbih.gov.ba/files/docs/zakoni/en/zakon_o_upravnom_postupku_29_02_12_04_-_eng.pdf).

84. See, e.g., Amnesty Int’l, *The Balkans: Summary of Amnesty International’s Concerns in the Region 7–13* (2007), available at <http://www.amnesty.org/en/library/asset/EUR05/003/2007/en/15ea9354-d372-11dd-a329-2f46302a8cc6/eur050032007en.pdf> (describing the actions of the State Commission).

85. See Amnesty Int’l, *In the Name of Security: Routine Abuses in Tunisia 31* (2008), available at <http://www.amnesty.org/en/library/asset/MDE30/007/2008/en/b852a305-3ebc-11dd-9656-05931d46f27f/mde300072008eng.pdf> (reporting that Ferchichi was “detained incommunicado for six days, during which he alleged he was beaten, suspended upside down and in the *poulet rôti* [“roast chicken”] position”).

86. Posting of Luiza Toscane to Generation Tunezine, *Le Tribunal Militaire Condamne Badreddine Ferchichi* [Military Tribunal Convicts Badreddine Ferchichi], <http://generationtunezine.20minutes-blogs.fr/archive/2009/05/21/le-tribunal-militaire-condamne-badreddine-ferchichi.html> (May 21, 2009). Ferchichi was released from prison in September 2009. See Posting of Luiza Toscane to Nawaat, *Libération d’un Prisonnier de Conscience: Badreddine Ferchichi a Quitté la Prison* [Liberation of a Prisoner of Conscience: Badreddine Ferchichi has Left Prison], <http://www.nawaat.org/portail/2009/09/07/liberation-d%E2%80%99un-prisonnier-de-conscience-badreddine-ferchichi-a-quitte-la-prison/> (Sept. 7, 2009).

87. See *Bosnian Commission Head Outlines Results of Citizenship Review Probe*, BBC Monitoring, Dec. 15, 2008 (summary of interview with State Commission chairman on BiH television). At least three other Arabs have been deported from BiH in recent years. In December 2007, an Algerian, Atau Mimun, was forcibly repatriated after having lost his BiH citizenship. Notably, Dragan Mektić, director of the BiH Security Ministry’s department of foreigners’ affairs, alluded to “assistance from other agencies” [uz pomoć drugih agencija] in tracking and deporting Mimun. See Marija Taušan, *Deportovan Alžirac Atau Mimun* [Algerian Atau Mimun Deported], *Nezavisne Novine* (Banja Luka), Dec. 13, 2007,

2010, four denationalized Arabs were held in the Lukavica detention center outside Sarajevo as alleged threats to "national security." In October 2009, Arab detainees there began a hunger strike against their indefinite detention on the basis of secret evidence.<sup>88</sup> Human rights groups have expressed concerns that some of these men may face torture or other ill-treatment if deported to their countries of origin for alleged dissident activities, suspected affiliation with "Islamist" movements, avoidance of military service in their countries of origin, or violation of laws prohibiting participation in foreign armies.<sup>89</sup>

The State Commission's refusal to allow individuals a hearing before deciding on denationalization is particularly disturbing, as ECHR article 6(1) guarantees a "fair and public hearing" by "an independent and impartial tribunal" in proceedings that determine an individual's "civil rights and obligations."<sup>90</sup> The Constitutional Court of Bosnia-Herzegovina (CCBH) first considered this issue in an appeal by Imad Husin, a.k.a. Abu Hamza al-Suri, a Syrian-born ARBiH war veteran who had lived in the former Yugoslavia since the early 1980s and raised a family in Bosnia-

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available at <http://www.nezavisne.com/dogadjaji/vijesti/17944/Deportovan-Alzirac-Atau-Mimun.html> ("With the assistance of other agencies, we found him in Tešanj and on Sunday forcibly deported [him] to Algeria,' Mekić said.") (translation on file with author). Two other Arab war veterans, Ali Hamad al-Zayar and Abduladhim Maktouf, were deported in 2009 after completing prison sentences. See Hani al-Fardan, *Ba'da an qada 12 'am fil-sijn bi-tuhmat taffir "Mustar al-Kuruwatiyya" al-'Intirbul yanqul al-Zayar min al-Busna ila al-Bahrain* [After Spending 12 Years in Prison Accused of the Bombing of Croatian Mostar, Interpol Moves al-Zayar from Bosnia to Bahrain], *al-Wasat* (Manama), Apr. 1, 2009, at 1, available at <http://www.alwasatnews.com/2399/news/read/45143/1.html>; 'Abd al-Baqi Khalifa, *al-Busna: Tarhil 'Iraqi wa matalib bi-tard Abu Hamza al-Suri* [Bosnia: Iraqi Deported, Demands for Expulsion of Abu Hamza], *al-Sharq al-Awsat* (London), June 23, 2009, available at <http://www.aawsat.com/details.asp?section=4&article=524569&issueno=11165> (giving Maktouf's surname as Ma'tuf).

88. See Wanda Troszczyńska-Genderen, *Bosnia: Citizenship and Detention*, OpenDemocracy.net, Jan. 12, 2010, available at <http://www.opendemocracy.net/wanda-troszczyńska-van-genderen/bosnia-citizenship-and-detention>.

89. See Joint Letter from Amnesty International, Helsinki Committee for Human Rights in Bosnia-Herzegovina, and Human Rights Watch to Bosnian authorities on Forced Return to Risk of Torture (May 9, 2007), <http://www.hrw.org/en/news/2007/05/09/letter-bosnian-authorities-forced-returns-risk-torture>.

90. Under the BiH Constitution (which is also an annex to the Dayton Accord), the ECHR applies directly in BiH and "shall have priority over all other law." Dayton Accord, *supra* note 49, Annex 4, art. II, ¶ 2.

Herzegovina with a Bosnian woman.<sup>91</sup> The CCBH noted that the Commission's conduct—given the lack of any evidence of a “threat to national security” from the petitioner—gave “rise to a suspicion” that the denationalization decision was “made for an ulterior purpose.”<sup>92</sup> The CCBH nevertheless held that article 6(1) did not apply, relying on a case from the now-defunct European Commission of Human Rights interpreting the provision's reference to “civil rights and obligations” as limited to *private* law matters only. Therefore, according to this reasoning, article 6(1) is inapplicable to so-called “public law” acts, including citizenship and immigration decisions.<sup>93</sup> The CCBH did not attempt to reconcile this stance with jurisprudence of the European Court of Human Rights<sup>94</sup> or decisions of its own<sup>95</sup> that accorded the fair hearing protections of article 6(1) to

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91. Imad al Husin, Case No. AP-1222/07, Decision on Admissibility and Merits (Const. Ct. Bosn. & Herz. 2008), *available at* [http://www.ccbh.ba/eng/odluke/povuci\\_pdf.php?pid=149941](http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=149941).

92. *Id.* ¶¶ 68, 92. The CCBH upheld the petitioner's denationalization but cancelled the deportation order against him, remanding to a lower court for an evidentiary hearing to determine if deportation resulting in separation from petitioner's cancer-stricken Bosnian wife and their children would violate his family rights under ECHR. Nevertheless, two days after the decision, the petitioner was arrested without charge and placed in immigration detention pending the resolution of the case. *See* Joint statement from Amnesty Int'l, Helsinki Comm. for Human Rights in BiH, and Human Rights Watch, Halt Efforts to Deport Syrian at Risk of Torture: Abide by European and Bosnian Court Warnings Against Expulsion (Oct. 23, 2008), <http://www.hrw.org/en/news/2008/10/23/bosnia-and-herzegovina-halt-effort-deport-syrian-risk-torture>.

93. *See* Imad Al Husin, ¶¶ 46–48 (quoting Philip Burnett Franklin Agee v. U.K., 7 Eur. Comm'n H.R. Dec. & Rep. 164, 175 (1976)). That portion of the *Agee* case dealt with an *alien's* right to contest expulsion; the petitioner in that case was not a citizen challenging denationalization.

94. *See, e.g.,* Le Compte, Van Leuven and De Meyere v. Belgium, 54 Eur. Ct. H.R. 4 (1982) (suspension of medical licenses); Raimondo v. Italy, 281 Eur. Ct. H.R. 7 (1994) (land confiscation); Skärby v. Sweden, 180 Eur. Ct. H.R. (Ser. A) 28 (1990) (application of planning laws); Lombardo v. Italy, 249 Eur. Ct. H.R. 38 (1992) (judge's right to pension); Guchez v. Belgium, App. No. 10027/82, 40 Eur. Comm'n H.R. Dec. & Rep. 109 (1984) (right to practice architecture as profession).

95. *See* DEPOS – Demokratski pokret Srpske [Democratic Movement of Sprska], AP-2679/06, ¶ 21, Decision on admissibility and merits, (Const. Ct. Bosn. & Herz. 2008), *available at* [http://www.ccbh.ba/eng/odluke/povuci\\_pdf.php?pid=58111](http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=58111) (finding that the right to stand in a parliamentary election was a “civil right” deserving of Art. 6 procedural guarantees). In another case, CCBH applied article 6(1) to customs tariffs decisions, rightfully treating it as a broad safeguard against arbitrary state action:

[E]ven if some rights could clearly be classified as being in the field of public law which falls outside the scope of Article 6 of

other rights apparently no less “public” in nature, such as the right to stand in parliamentary elections.

There is little doubt that the State Commission’s work was driven primarily by western, and especially U.S., pressure. One of the State Commission’s nine members was a U.S. Air Force lieutenant colonel and chief legal adviser to NATO headquarters in BiH.<sup>96</sup> An OHR task force works directly with the State Commission<sup>97</sup> and the Peace Implementation Council Steering Board, which oversees OHR, noted the State Commission’s “critical importance for the counter-terrorism agenda.”<sup>98</sup> In 2007, then High Representative Miroslav Lajčák linked expulsion of Arabs to progress on relaxing

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European Convention, it is necessary, within the national framework, to secure the minimum procedural guarantees of the conduct of proceedings in accordance with Article 6 . . . [T]he individual must be protected from the arbitrary actions of the state and . . . any failure in this regard may call for an application of Article 6 of the European Convention. The main purpose of this Article, as well as of the entire European Convention, is indeed the protection of individuals from the arbitrary actions of the state.

Meat Industry «Lijanovići» LLC, U-148-03 ¶¶ 51–52, Decision (Const. Ct. Bosn. & Herz. 2003) (emphasis added).

96. See 108th Session Conclusions, BiH Council of Ministers, (Feb. 16, 2006) (announcing appointment of State Commission members), *available at* <http://www.vijeceministara.gov.ba/akti/zakljucci?id=1112>; Comm. of Ministers, Council of Europe, *Notes on the Agenda*, 956th mtg., Agenda Item 13.1: Bosnia and Herzegovina: Commission for the Revision of Naturalisation Decisions, Appointment of the International Members Appendix 2, CM/Notes/956/13.1 (Feb. 14, 2006) (curriculum vitae of international members), *available at* <https://wcd.coe.int/ViewDoc.jsp?id=966077>. The credibility of the State Commission was further called into question when its chairman, Assistant Security Minister Vjekoslav Vuković, was arrested in Croatia (whose nationality he also holds) in January 2009 in connection with an attempted murder there. Vuković was suspended from his post, which includes responsibility for combating organized crime and terrorism, for several months. The charges are still pending.

97. See Office of the High Representative and EU Special Representative (OHR), 29th Report of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina to the Secretary-General of the United Nations (2006), *available at* [http://www.ohr.int/other-doc/hr-reports/default.asp?content\\_id=40836](http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=40836); OHR Report to the European Parliament by the OHR and EU Special Representative for BiH, June-December 2005 (2006), *available at* <http://www.eusrbih.eu/reports/1/?cid=111,1,1>.

98. See Office of the High Representative and EU Special Representative, Communique by the PIC Steering Board (Mar. 15, 2006), *available at* [http://www.ohr.int/pic/default.asp?content\\_id=36760](http://www.ohr.int/pic/default.asp?content_id=36760).

European visa requirements.<sup>99</sup> The U.S. government has praised the amendments strengthening the State Commission as “critical . . . to address[ing] the problem of foreign extremists who obtained Bosnian citizenship illegally.”<sup>100</sup>

Notably, the State Commission’s sweeping mandate was likely necessary given the paucity of actual cases involving alleged criminal or subversive activity on the part of naturalized citizens of Arab origin.<sup>101</sup> According to one diplomatic source, “[w]e can’t pretend there is some imminent threat. That is not the case.”<sup>102</sup> The mindset at work was probably most bluntly expressed by Lajčák’s deputy, U.S. State Department official Raffi Gregorian, when he described Arab ex-combatants in BiH as alien: “They look alien. They talk alien. They act alien. This is a parochial society that has its own approach to Islam, and they don’t fit in.”<sup>103</sup>

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99. After a tense meeting with BiH Security Minister Tarik Sadović reportedly dealing with the expulsion of denationalized Arabs, Lajčák warned: “Further visa facilitation with the European Union and other states will depend in large part on whether the Minister is able to carry out the tough actions needed in this area . . .” Press Release, Office of the High Representative, Lajčák meets Sadović; concerned by developments in Ministry of Security (July 20, 2007), *available at* [http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content\\_id=40238](http://www.ohr.int/ohr-dept/presso/pressr/default.asp?content_id=40238). Sadović was removed from his post in July 2009, an incident widely attributed in Bosnian media to pressure from U.S. officials to speed up deportations of Arabs. *See, e.g., Bosnia Parliament Sacks Security Minister*, Agence France Presse, July 22, 2009 (discussing Sadović’s removal); *Bosnian Leader “Yielded” to U.S. “Pressure” Over Dismissal – Security Minister*, BBC Monitoring, July 23, 2009 (summary of interview with Sadović in *Dani* magazine).

100. U.S. Department of State, U.S. Government Assistance to and Cooperative Activities with Central and Eastern Europe: Country Assessment – Bosnia, (Jan. 2007), *available at* <http://www.state.gov/p/eur/rls/rpt/92672.htm>.

101. There has been one war crimes conviction involving Arabs in BiH. Abduladhim Maktouf, Case No. KŽ 32/05, Ct. of BiH (Apr. 4, 2006), *available at* [http://www.sudbih.gov.ba/files/docs/presude/2006/Maktouf\\_ENG\\_KPZ-32-05.pdf](http://www.sudbih.gov.ba/files/docs/presude/2006/Maktouf_ENG_KPZ-32-05.pdf). In addition, there have been a handful of criminal cases, including one involving a September 1997 car bombing. Ahmed Zuhair, Case No. KŽ 41/2000, Sup. Ct. of Fed. of BiH (Apr. 18, 2000), *available at* [http://www.wilmerhale.com/files/upload/Boumediene\\_96.pdf](http://www.wilmerhale.com/files/upload/Boumediene_96.pdf). Full disclosure: I was part of a clinical legal team representing Ahmed Zaid Zuhair, a Saudi detainee in Guantánamo who was convicted in absentia in the bombing case, in his habeas corpus action before the U.S. government. Mr. Zuhair denied the allegation and was repatriated to Saudi Arabia in June 2009.

102. Nicholas Wood, *Bosnia Changes its Mind on Foreign Fighters: Once Welcomed, Many Face Deportation*, Int’l Herald-Trib., Aug. 1, 2007, at 2.

103. Jonathan Finer, *In Bosnia, Former Fighters Face Expulsion*, Wash. Post, Sept. 4, 2007, at A14.

## B. Exemption: Constitutionalism or Protectorate?

In stark contrast to the efforts to push out-of-place Muslims in Bosnia-Herzegovina outside of legal protection despite court decisions and other legal obstacles, exemption of “Internationals” from local legal accountability is part of the DNA of the post-Dayton state.

This is unsurprising, as much of the constitutional and institutional blueprint of the state was laid out in a multilateral peace treaty implemented by the international community. Internationals—even at the level of individual foreign citizens serving as government officials—play a central role in governance through a variety of institutions, often ruling undemocratically, and giving rise to the charge that BiH is less an independent state and more a Euro-American protectorate.<sup>104</sup> The most important international body is OHR, with its ability to impose legislation and sack elected officials.<sup>105</sup> One third of the nine-member Constitutional

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104. See, e.g., Dominik Zaum, *The Sovereignty Paradox: The Norms and Politics of International Statebuilding* 81–117 (2007) (analyzing the “influence of sovereignty norms” on multiple aspects of state-building); Gerald Knaus & Felix Martin, *Travails of the European Raj: Lessons from Bosnia and Herzegovina*, 14 *J. of Democracy* 3, 60 (2003) (discussing the need for checks and balances as part of a post-conflict mission to establish democracy); David Chandler, *Bosnia: Faking Democracy after Dayton* 37 (2000) (explaining the contours of Bosnia’s democratization process as imposed by an external administration). The problem of accountability of international institutions is common to other “transitional administrations,” where international organizations take on full governance powers, as in Kosovo and East Timor. See, e.g., Human Rights Watch, *Better Late Than Never: Enhancing the Accountability of International Institutions in Kosovo* (2007), available at <http://www.hrw.org/sites/default/files/reports/kosovo0607web.pdf> (describing abuses by and limited accountability of NATO-led forces and UNMIK, the U.N. interim administration in Kosovo); Amnesty Int’l, *The Apparent Lack of Accountability of International Peace-Keeping Forces in Kosovo and Bosnia-Herzegovina*, AI Index EUR 05/002/2004 (2004), available at [http://asiapacific.amnesty.org/library/pdf/EUR050022004\\_ENGLISH/\\$File/EUR0500204.pdf](http://asiapacific.amnesty.org/library/pdf/EUR050022004_ENGLISH/$File/EUR0500204.pdf).

105. OHR’s mandate is based in the Dayton Accord, *supra* note 49, Annex 10, art. II. The specific power to impose legislation and remove officials was elaborated by the Peace Implementation Council (PIC), which oversees the implementation of Dayton. See Peace Implementation Council (PIC) Bonn Conclusions, art. 11, (Dec. 10, 1997), available at [http://www.ohr.int/pic/default.asp?content\\_id=5182#11](http://www.ohr.int/pic/default.asp?content_id=5182#11). The OHR is concurrently the European Union Special Representative (EUSR) to BiH, charged with overseeing the European Union’s role in BiH and the country’s possible move towards EU integration. The closure of OHR, long-envisioned as a transitional institution, would ostensibly signal a shift from shared U.S.-EU dominance in the

Court of Bosnia-Herzegovina (CCBH) consists of foreign nationals appointed by the president of the European Court of Human Rights in consultation with the BiH presidency, giving the international community a greater voting bloc than any single ethnic group.<sup>106</sup> A European-staffed Integrated Police Unit (IPU), with the power to conduct autonomous operations, superseded the U.N. IPTF in 2002.<sup>107</sup>

The extensive role of the United States and EU in managing post-Dayton Bosnia has given rise to an entire class of peacekeepers, bureaucrats, and contractors, who enjoy broad exemptions from the BiH legal system. Some of these immunities resemble those enjoyed by an occupying power far more than they do a status of forces agreement (SOFAs) between allies.<sup>108</sup> The Dayton Accord grants “exclusive jurisdiction” over NATO military personnel to their home states “in respect of any criminal or disciplinary offenses which may be committed by them” in BiH.<sup>109</sup> Similarly, the Dayton Accord grants IPTF personnel and even their families the sweeping

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country to EU primacy. OHR’s previous June 30, 2008 closure date, however, has been indefinitely postponed. See Press Conference, Miroslav Lajčák, High Rep. of the Int’l Community, Following the Implementation Council Steering Board Sessions (Feb. 27, 2008), available at [http://www.ohr.int/ohr-dept/presso/pressb/default.asp?content\\_id=41353](http://www.ohr.int/ohr-dept/presso/pressb/default.asp?content_id=41353) (outlining conditions for end of OHR’s mandate, including “Fiscal Sustainability of the State” and “Entrenchment of the Rule of Law”).

106. Dayton Accord, *supra* note 49, Annex 4, art. VI, ¶ 1(a).

107. In addition, a variety of key state institutions in BiH were staffed by non-BiH nationals for years after Dayton. Until 2005, the Central Bank of BiH was run by foreign governors. Until the end of 2003, respect for the European Convention on Human Rights was guaranteed by the HRC, which had a majority of non-BiH judges. For an overview of the mandate and history of HRC, and a critique of its allegedly premature dissolution, see Manfred Nowak, *Introduction to Human Rights Chamber for BiH: Digest of Decisions, 1996-2002*, at 1 (2003).

108. See the discussion on immunities of Occupying Powers, *infra*, Part III(B). The immunities are also more sweeping than the standard status of forces agreements for consensual peacekeeping operations. Most U.N. peacekeeping forces enjoy immunity from local jurisdiction, but immunity for individual peacekeepers from local civil jurisdiction generally covers only their official acts. See Chanaka Wickremasinghe & Guglielmo Verdirame, *Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations, in Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* 465, 482 (Craig Scott ed., 2001) (reviewing various legal regimes under which peacekeepers or peacekeeping operations may be held liable for human rights abuses).

109. See Dayton Accord, *supra* note 49, app. B to Annex 1-A, ¶ 7 (Agreement between BiH and NATO) (emphasis added).

privileges normally accorded only to diplomatic envoys and the most senior U.N. officials, including immunity from arrest or any criminal prosecution.<sup>110</sup> Ordinary international civil servants and their families also enjoy the status of diplomats under the Vienna Convention on Diplomatic Relations.<sup>111</sup> These include: OHR personnel, the head of the local mission of the Organization for Security and Cooperation in Europe (OSCE), and those she or he designates as part of the election commission, the human rights Ombudsperson, members of the HRC, and even members of the Commission to Preserve National Monuments.<sup>112</sup>

One could argue that such sweeping powers were necessary in order to facilitate an ambitious post-war state-building project adopted in the face of entrenched ethnic division; that they were agreed upon by the people of BiH through their political representatives who signed the Dayton Accord; and that they are being gradually dispensed with.<sup>113</sup> While such arguments undoubtedly have some merit, there are competing considerations. First, in granting diplomatic immunity to ordinary mission staff and their families, the post-Dayton state goes far beyond conventional U.N. peacekeeping missions. Normally civilian personnel working for the United Nations have only “functional” immunity, which does not protect against arrest or detention;<sup>114</sup> or they may enjoy “expert”

110. See *id.* Annex 11, art. II, ¶ 6 (“In particular, they shall enjoy inviolability, shall not be subject to any form of arrest or detention, and shall have absolute immunity from criminal jurisdiction.”). This provision extends the protections of section 19 of the Convention on the Privileges and Immunities of the United Nations to IPTF personnel and their families. Section 19 stipulates that “the [U.N.] Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.” Convention on the Privileges and Immunities of the United Nations art. V, § 19, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 [hereinafter U.N. Immunities Convention].

111. Vienna Convention on Diplomatic Relations *opened for signature* Apr. 18, 1961, arts. 29–36, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Apr. 24, 1964) (describing the immunities granted to diplomats under the convention).

112. See Dayton Accord, *supra* note 49, Annex 3, art. III, ¶¶ 3–4, Annex 6, art. III, ¶ 4, Annex 8, art. III, ¶ 3, Annex 10, art. III, ¶ 4.

113. In the 15 years since the Dayton Accord was signed, some of the institutions granted immunity therein have either closed or are now entirely staffed by BiH citizens. The Human Rights Ombudsman and the electoral commission are no longer run by Internationals, and the HRC no longer exists.

114. See Frederick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 Conn. J. Int’l L. 103, 110

immunity, which protects from arrest, but only insofar as is “necessary for the independent exercise of their functions during the period of their missions.”<sup>115</sup> Second, whereas diplomatic immunity is always constrained by the ultimate ability of states to declare diplomats *persona non grata* and expel them, in BiH, international personnel perform crucial governmental functions and, for all practical purposes, cannot be expelled by the local sovereign—in other words, diplomatic immunity in BiH seems to equal absolute immunity. Third, there is an inherent tension between this lack of accountability (on the part of foreigners, no less) and the project of building a sovereign, independent, and democratic state.<sup>116</sup> This tension emerged clearly, for example, when Internationals resisted the use of the new Bosnian convertible mark, which they had introduced to help unify BiH through displacing the use of Yugoslav, Croatian, and other currencies, to pay their own salaries.<sup>117</sup>

Unfortunately, these immunities have effectively shielded Internationals for a variety of acts against individuals and property that would otherwise likely violate international human rights standards or BiH law. The litigation over the property in Glamoč training ground and firing range, divided between SFOR (the NATO-led peacekeeping force) and the FBiH Army, illustrates the problem of accountability for Internationals. The area’s Bosnian Serb former residents petitioned the HRC for return of their property or monetary compensation; the claims by owners of land used by the FBiH Army prevailed,<sup>118</sup> whereas the petition by those whose land was used by SFOR was rejected as inadmissible. The HRC noted that its mandate (itself part of the Dayton Accord) did “not give [it] jurisdiction to

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(2002) (“The vast majority of United Nations civilian personnel recruited by the Department of Peacekeeping Operations and deployed to the field enjoy only the limited immunity granted under Immunities Convention Article V Section 18.”); U.N. Immunities Convention, *supra* note 110, art. V, § 18 (setting out a regime that is more limited than that accorded to either diplomats or experts on mission, and not including immunity from arrest).

115. U.N. Immunities Convention, *supra* note 110, art. VI., § 22.

116. See Rawski, *supra* note 114, at 124 (noting some of these objections).

117. Coles, *supra* note 33, at 69–71.

118. The dispute arose when funds set aside to compensate the petitioners became unavailable due to severe budget cuts imposed on FBiH by the World Bank and International Monetary Fund. See Ubović et al. v. FBiH, Case No. CH/99/2425, Decision on Admissibility and Merits ¶ 51 (Bosn. and Herz. Human Rights Chamber 2001), available at <http://www.hrc.ba/database/decisions/CH99-2425%20et%20al%20Ubovic%20Admissibility%20and%20Merits%20E.pdf>.

consider applications directed against SFOR"<sup>119</sup> and reasoned that because SFOR's actions could not be imputed to FBiH, there was simply no respondent available. In another well-known case, SFOR peacekeepers in April 2004 raided an Orthodox parish in Pale in a failed attempt to capture Radovan Karadžić, the Bosnian Serb politician wanted for war crimes. The raid resulted in severe injuries to an Orthodox priest and his son, neither of them linked to Karadžić;<sup>120</sup> SFOR rejected the victims' compensation claim.<sup>121</sup> SFOR has also detained BiH citizens without judicial authority or charge, in one case for over three months.<sup>122</sup>

The logic of exemption featured prominently in the scandals over the involvement of Internationals in sex trafficking in BiH. IPTF personnel and civilian employees of Virginia-based DynCorp working on contract for both IPTF and SFOR have been accused of involvement with prostitution and sex trafficking in BiH, as customers, procurers, and purchasers, but none have faced criminal prosecution in any country.<sup>123</sup> In November 2002, Human Rights Watch reported that 18 IPTF monitors implicated in sex trafficking

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119. Hajder et al. v. FBiH, Case No. CH/00/3771, Decision on Admissibility, ¶ 19 (Bosn. & Herz. Human Rights Chamber 2002), available at <http://www.hrc.ba/database/decisions/CH00-3771%20et%20al%20Hajder%20et%20al%20Inadm.%20E.pdf> (stating that the Chamber did not have competence to consider applications directed against SFOR). Hence, in both cases, Internationals were ultimately dictating outcomes without possibility of appearing before the HRC as respondents.

120. See Press Statement, SFOR, SFOR Operation in Pale – Additional Information (Apr. 2, 2004) ("Neither of the injured personnel are being investigated or detained in anyway by SFOR.").

121. See Amnesty Int'l, *Europe & Central Asia: Summary of Amnesty International's Concerns in the Balkans, January-June 2005*, at 10, AI Index: EUR 05/001/2006 (2006).

122. See *The Apparent Lack of Accountability of International Peace-Keeping Forces in Kosovo and Bosnia-Herzegovina*, supra note 104, at 26.

123. Much of this information was brought to light through labor disputes with whistleblowers. Kathryn Bolkovac, a DynCorp contractor detailed to IPTF, won a wrongful termination suit against her employer in an employment tribunal in Southampton, U.K. in November 2002. Former DynCorp engineer Ben Johnston brought a RICO suit against DynCorp in a Texas court alleging that his firing was part of a conspiracy to obstruct a U.S. Army investigation into DynCorp involvement in sex trafficking; the case was settled shortly after Bolkovac's victory in the U.K. See Robert Capps, *Sex-slave Whistle-Blowers Vindicated*, Salon, Aug. 6, 2002, <http://dir.salon.com/story/news/feature/2002/08/06/dyncorp/index.html>.

or prostitution had been repatriated and never prosecuted.<sup>124</sup> An investigation by the U.S. Army Criminal Investigation Division (CID) named five DynCorp employees in Bosnia as having purchased women for sex work, all of them subsequently repatriated by DynCorp before they could face charges or testify against others.<sup>125</sup> A report by the U.N. Mission in Bosnia-Herzegovina documented the discovery by local police of two foreign sex workers being held against their will in an SFOR contractor's home after having been purchased for 7,000 Deutschmarks. The contractor was subsequently repatriated.<sup>126</sup>

Having sketched both the logics of exemption and exclusion, we can now see how they come together if we recall that the Human Rights Chamber for Bosnia-Herzegovina has twice rendered verdicts in favor of out-of-place Muslims unlawfully deported. However, in both of those cases, liability was limited to Bosnian authorities. The all-important role of the United States figured prominently in the narratives of both decisions, but there was never any question of its potential accountability to local authorities for acts committed in BiH territory against BiH citizens and foreigners. At the same time, Internationals enjoy immunity for their acts, including involvement in sex crimes. Both of these types of exclusions and exemptions reflect a subordination of the rule of law in BiH and the integrity of its nascent institutions to U.S. imperatives. It is indisputable that the project of building a sovereign democratic state in BiH from the outside would always be riddled with tensions. But U.S. pressures have turned these tensions into outright contradictions.

### III. THINKING LOCALLY, DETAINING GLOBALLY: IRAQ AND THE LAWS OF WAR

Nowhere has the targeting of out-of-place Muslims, and the accompanying braided logic of exclusion and exemption, been more apparent than in U.S.-dominated Iraq. This part charts the emergence of out-of-place Muslims as a "problem" in Iraq, in the

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124. See Human Rights Watch, *Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prostitution* 49–61 (2002), available at <http://www.hrw.org/legacy/reports/2002/bosnia/Bosnia1102.pdf> (discussing the involvement of IPTF officers in sex trafficking and prostitution and criticizing the "record of impunity" in response to those actions).

125. See *id.*, at 62–64.

126. See *id.*, at 67.

move from the Ba'th regime's pan-Arabist policies to U.S. anxiety over controlling transnational Muslim mobility. It then demonstrates how, as in Bosnia-Herzegovina, the United States in Iraq has consistently sought to place certain outsiders, namely westerners, above local legal accountability while consistently placing other outsiders, suspected of being foreign fighters, outside legal protection. The failure to bring U.S. troops and contractors to local (or any other form) of justice for crimes has been extensively documented elsewhere; but the treatment of other foreigners, including torture and expulsion to detention outside the country, has received far less attention.

In Iraq, the local-foreign divide, seen as pivotal by the United States, collided with the privileged position that citizens of Arab states enjoyed relative to other foreigners under pre-invasion Iraqi law.<sup>127</sup> This distinction was grounded in the Ba'thist commitment to pan-Arabism.<sup>128</sup> Pre-invasion Iraqi law explicitly exempted citizens of

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127. Under pre-invasion Iraqi law, a "foreigner" was often defined as someone who was neither Iraqi nor Arab [*al-ajnabi ghayr al-'Iraqi wa-ghayr al-'Arabi*]. Qanun al-jinsiyya al-'Iraqiyya wal-ma'lumat al-madaniyya [Law on Iraqi Nationality and Civil Information], Law No. 46 (1990) art. 2(6), available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=240120067455941>. For the purposes of this essay, I will use the term "Arab" to refer to citizens of Arab League member states; this could include those who do not ethnically self-identify as Arab and would exclude citizens of other countries of Arab descent.

128. Many of the laws favoring Arabs over other foreigners were explicitly justified in pan-Arabist terms. A 1972 provision exempting Arabs from the law on foreign residents referenced "the unity of the Arab nation [*umma*]" and a desire to end colonial practices that "treated Arab citizens as foreigners." Eighth Amendment to Foreigners' Residency Law of 1961, Law No. 99 (1972), available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=061220059529339>. See also Qanun iqamat al-ajanib [Foreigners' Residency Law], Law No. 118 (1978) art. 2, available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=020320068855474> (incorporating same). Similarly, a 1975 law permitting the exemption of any adult Arab from standard naturalization requirements spoke of the need for "unity amongst the Arab people [*sha'b*] in all of its lands to remove the artificial borders fabricated by the colonizer." Qanun manh al-jinsiyya al-'Iraqiyya lil-'Arab [Law on Granting of Iraqi Nationality to Arabs], Law No. 5 (1975) art. 1, available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=281220057235032>. See also Salih al-Hassun, *Huquq al-Ajanib fil-Qanun al-'Iraqi ma'a Ishara Khassa li-Wad' al-Muwatin al-'Arabi fi Daw' Fikr Hizb al-Ba'th al-'Arabi al-Ishtiraki* [The Rights of Foreigners in Iraqi Law, with Special Focus on the Situation of the Arab Citizen in Light of the Thought of the Arab Socialist Ba'th Party] 8–10 (1981) (tracing the paradigm shift in the Ba'th party toward Arab nationalism and emphasizing the resulting distinction between an Arab and a non-Arab foreigner).

Arab states from the Foreigners' Residency Law, which regulates entry, exit, and deportation (though their entry could be blocked and they could be imprisoned for any number of offenses).<sup>129</sup> A 1975 law permitted the Interior Minister to exempt any adult Arab from standard naturalization requirements.<sup>130</sup> Unlike other foreigners, Arabs could be hired for state positions with the same duties and privileges as Iraqis.<sup>131</sup> They could also join professional and trade associations.<sup>132</sup> These laws, of course, do not mean that pre-invasion Iraq was a borderless pan-Arab utopia: foreign Arab residents were as vulnerable to Saddam Hussein's security apparatus as ordinary Iraqis. Rather, the point is simply to note that these relatively liberal naturalization and residency provisions, even if not widely respected, at least signaled an orientation that did not automatically regard expulsion as the obvious way of dealing with foreigners.

These laws helped encourage large-scale emigration from the Arab world in the 1970s and 1980s, especially as the mass conscription during the Iran-Iraq war fueled demand for foreign labor;<sup>133</sup> according to one conservative estimate, up to 1.25 million Egyptian workers alone lived in Iraq prior to 1990.<sup>134</sup> There were also

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129. 1978 Foreigners' Residency Law, art. 2. Indeed, the most important movement control on foreign Arabs in pre-invasion Iraqi law was a provision in this law forbidding them from *departing* the country without permission if they had work contracts or similar commitments. *See id.* art. 8(1).

130. 1975 Law on Granting of Iraqi Nationality to Arabs, art. 1. The provision, which specifically excludes Palestinians, was folded into article 7 of the 1990 Law on Iraqi Nationality and Civil Information.

131. *See* Qarar Majlis Qiyadat al-Thawra [Revolutionary Command Council Decision] No. 384 (Mar. 3, 1977), s. 1, *available at* <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=141220058349935>. *See also* al-Hassun, *supra* note 128, at 220 (describing the effects of the decision).

132. *See* al-Hassun, *supra* note 128, at 246–47 (describing the legislation granting Arab “foreigners” the right to join unions, trade, professional, and social organizations).

133. *See* Kadhim al-Eyd, *Oil Revenues and Accelerated Growth: Absorptive Capacity in Iraq 115–16* (1979) (describing the Iraqi government's encouragement of Arab workers to come work in Iraq following a labor shortage and subsequent wage increase in the mid 1970s); Eliyahu Kanovsky, *Migration from the Poor to the Rich Arab Countries* 34 (1984).

134. *See* Ralph Sell, *Gone for Good?: Egyptian Migration Processes in the Arab World* 31 (1987) (noting that, while an exact accounting of migration statistics is not possible, the Egyptian Foreign Ministry's estimate of 1.25 million Egyptians in Iraq is the accepted figure); Gil Feiler, *Labour Migration in the Middle East Following the Iraqi Invasion of Kuwait* 15 (1993) (noting that “estimates put the number of Egyptians working in Iraq prior to its invasion of Kuwait at more than one million”).

sizeable communities of Sudanese, Palestinians, and Syrians. Although these numbers undoubtedly diminished after the 1991 Gulf War and a decade of sanctions, it is safe to say that at least tens of thousands of non-Iraqi Arabs remained in the country at the time of the American invasion, although no solid figures are available except for the then 34,000-strong Palestinian population.<sup>135</sup> The subsequent occupation and civil war, as well as the measures described below, have taken their toll on these groups. As of 2008, one official estimated that only five thousand foreign Arab families remained in the country.<sup>136</sup>

In analyzing the collision between pre-invasion Iraq's pan-Arabist laws and the U.S.-driven imperatives of policing out-of-place Muslims, this Article uses debates over the laws of war (also called international humanitarian law) as a prism. The laws of war raise two important differences vis-à-vis this Article's other case study, postwar Bosnia-Herzegovina. First, whereas the United States could essentially write its own rules for operating in post-conflict BiH (the Dayton Accord), the laws of war presented serious textual constraints that U.S. officials in Iraq had to go to extraordinary interpretive lengths to argue around. Second, while the overall Dayton framework has remained relatively static, the law of war regime in Iraq has been far more fluid: the situation has shifted from occupation to civil war, the latter being far less explicitly regulated by the laws of war. Accordingly, the United States has transformed its formal status from that of an occupying power to a mere provider of assistance to the putatively sovereign Iraqi government. Taken together, and unlike in BiH, the laws of war in Iraq thus presented shifting pressures and opportunities as the United States attempted to pursue out-of-place Muslims while simultaneously preserving the immunity of its own personnel.

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135. See Human Rights Watch, *Nowhere to Flee: The Perilous Situation of Palestinians in Iraq* 8 (2006), available at <http://www.hrw.org/en/node/11181/section/1>.

136. See *Mas'ul amn Baghdad lil-Sharq al-Awsat: Hunaka 5 alaf a'ila 'Arabiyya . . . wa iqamatuhum sariyat al-maf'ul* [Baghdad Security Official Tells al-Sharq al-Awsat: There Are Five Thousand Arab Families, and Their Residency is Valid], *Al-Sharq al-Awsat*, Jan. 26, 2008, available at <http://www.aawsat.com/details.asp?section=4&issueno=10651&article=455739> (quoting official who claims that a "large proportion" of the five thousand families have legal residency, whereas an undetermined number are in the country illegally).

### A. Exclusion: From Neutrals to Aliens

In U.S. public rhetoric, Iraq has been ground zero for concern over foreign fighters. Since 2003, U.S. forces' campaign against "foreign fighters" has led to the removal of hundreds of non-Iraqis for detention in other countries, apparently with little or no legal process. Yet there is relatively little public information available about how this took place or the legal rationales relied upon.<sup>137</sup> What is clear is that the obstacles posed by the laws of war to the logic of exclusion have relaxed over time as the legal situation shifted from a belligerent occupation to a non-international armed conflict. In order to highlight this contrast, this part of the Article is subdivided into two sections tracking this change.

#### i. Deportations from Occupied Iraq: Circumventing the Absolute Prohibition

When the United States first conquered Iraq, it accepted that it was bound by the laws of war regulating occupations, including the 1949 Fourth Geneva Convention and the 1907 Hague Regulations.<sup>138</sup> The Convention protects civilians in occupied territories, including

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137. The two best-documented major routes in the U.S. global detention regime are, of course, transfers from Afghanistan/Pakistan to Guantánamo and renditions from Europe. The relative lack of information about transfers from Iraq may be due to the fact that flights to Afghanistan (the destination for most documented cases of transfer from Iraq) do not have to stop for refueling in Europe. The paper trail left at European airports and political will in the EU have been major factors in the exposure of CIA rendition operations in that part of the world. *See, e.g.*, Council of Europe Parliamentary Assembly, Comm. on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Doc. 11302 rev. (2007) (documenting the existence of secret detention sites in Poland and Romania); European Parliament, Temporary Comm. on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, A6-0020/2007 (2007) (highlighting the CIA's use of EU airspace and airports for extraordinary rendition).

138. *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (recognizing "the specific authorities, responsibilities, and obligations under applicable international law of [the U.S. and U.K.] as occupying powers"); *see also id.* ¶ 5 (calling upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907").

citizens of neutral states.<sup>139</sup> The law of occupation works at cross-purposes with the logic of exclusion in two ways. First, the Convention absolutely prohibits "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory . . . regardless of motive."<sup>140</sup> The prohibition was unanimously adopted by the Convention's authors and is "absolute and allows of no exceptions" apart from those provided in the Convention itself.<sup>141</sup> Such deportations are not merely violations of treaty obligations, they are also war crimes.<sup>142</sup>

Second, Occupying Powers must preserve and enforce pre-existing local law unless "absolutely prevented" from doing so.<sup>143</sup> This rule would favor respecting pre-invasion Iraqi law's exemption of foreign Arabs from provisions governing residency requirements and deportation.<sup>144</sup> The scope of this obligation, however, has never been clear, especially when balanced against the right of Occupying

139. The Convention protects "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals," but excludes neutrals "in the territory of a belligerent state." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 3520, 75 U.N.T.S. 287, 290 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]. The term "belligerent state" is widely read to mean only the sovereign domestic territory of a state at war. *See, e.g.*, Int'l Comm. of the Red Cross, Commentary: IV Geneva Conventions Relative to the Protection of Civilian Persons in Time of War 46 (Jean S. Pictet ed., 1958) [hereinafter Pictet Commentary] ("[T]here are two main classes of protected person: (1) 'enemy nationals' within the national territory of each of the Parties to the conflict and (2) 'the whole population' of occupied territories . . ."). This reading is supported by language elsewhere in the Convention that posits "belligerent" and "occupied" territory as mutually exclusive categories. *See* Fourth Geneva Convention, *supra*, art. 11 ("The provisions of this Article shall extend and be adapted to cases of nationals of a neutral State who are in occupied territory or who find themselves in the territory of a belligerent State . . ."). Nationals of the occupying state and its co-belligerents are excluded regardless of location. *See id.* art. 4.

140. Fourth Geneva Convention, *supra* note 139, art. 49(1).

141. Pictet Commentary, *supra* note 139, at 279.

142. *See* Fourth Geneva Convention, *supra* note 139, art. 147 (Grave breaches include "unlawful deportation or transfer . . . of a protected person . . ."). Grave breaches are criminalized under U.S. law by 18 U.S.C. § 2441(c)(1).

143. *See* Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land art. 43, *opened for signature* Oct. 18, 1907, 36 Stat. 2277, 2306, T.S. No. 539 [hereinafter Hague Regulations].

144. *See supra* notes 127–131 and accompanying text.

Powers to take certain necessary security measures regarding protected persons.<sup>145</sup>

U.S. authorities moved quickly to alter the status of foreigners in Iraq other than themselves and their allies. On June 27, 2003, the Coalition Provisional Authority (CPA)<sup>146</sup> promulgated a new set of entry requirements that effectively revoked the longstanding visa waiver for citizens of Arab states and enabled the deportation of foreign Arabs violating the order.<sup>147</sup> By October, the Iraqi Interior Ministry was reportedly issuing directives requiring foreign Arabs already in the country to obtain new residency documents or risk deportation.<sup>148</sup>

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145. See Fourth Geneva Convention, *supra* note 139, art. 27(4). For more on the scope of the Occupying Power's duty to preserve local laws, see Yoram Dinstein, Harvard Program on Humanitarian Policy and Conflict Research, Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding (2004), available at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf> (discussing the dual obligations imposed by article 43 to restore public order and to preserve local laws of occupied territory).

146. The Coalition Provisional Authority (CPA) was the civil administration of the U.S.-led occupation of Iraq and was dissolved on June 28, 2004.

147. See Coalition Provisional Authority (CPA), Order No. 16, Temporary Control of Iraqi Borders, Ports and Airports, §§ 3, 4, 5, 8 (entered into force June 27, 2003), available at [http://www.dod.mil/dodgc/ia/docs/CPAORD16iraqi\\_borders.pdf](http://www.dod.mil/dodgc/ia/docs/CPAORD16iraqi_borders.pdf). For a fuller analysis of this order, see David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Humanitarian Law of War and Occupation*, 47 Va. J. Int'l L. 295, 330–34 (2007) (arguing that post-invasion changes to Iraqi immigration law should not be used to facilitate deportations).

148. See *Imhal al-'Arab al-muqimin fil-Iraq usbu'ayn idafiyyayn li-tathbit iqamatihim* [Two-Week Extension for Arab Residents to Confirm Their Residency], Al-Sharq al-Awsat, Nov. 12, 2003, available at <http://aawsat.com/details.asp?section=4&issueno=9115&article=202661> (alluding to the Iraqi Department of Interior extending the deadline for regularization of status for foreign Arabs); *Al-Dakhiliyya al-'Iraqiyya tafhas milaffat al-'Arab al-muqimin fil-Iraq wa ijra'at li-akhdh basamatihim* [Iraqi Interior Ministry to Check Files of Arab Residents in Iraq and Take Measures to Fingerprint Them], Al-Sabil (Amman), Nov. 4, 2003 (on file with author) (citing concerns of Arab foreigners in Iraq that the measures could result in arrests based on mere suspicion); *Al-Kharijiyya al-'Iraqiyya tumahhil al-'Arab 15 yawm lil-husul 'ala al-iqama* [Iraqi Foreign Ministry Gives Arabs 15 Days to Obtain Residency], Al-Sharq al-Awsat, Oct. 8, 2003, available at <http://aawsat.com/details.asp?section=4&issueno=9080&article=196768> (citing an Interior Ministry directive requiring foreign Arabs to regularize their documents within 15 days or risk immediate action, including expulsion).

While CPA administrators identified ways to monitor and police out-of-place Muslims, their military and intelligence counterparts had begun shipping some of them to detention overseas. The CIA reportedly sought authority to secretly remove non-Iraqis from the country as early as April 2003.<sup>149</sup> Estimates on such transfers during the period of direct occupation are difficult to find, given instructions issued to military authorities not to register certain detainees in order to facilitate their removal from the country by the CIA.<sup>150</sup> Up to one hundred so-called “ghost detainees” were held in Iraq before September 2004, hidden from the International Committee of the Red Cross (ICRC) and never registered.<sup>151</sup> At the lower end of estimates is one press report estimating that the CIA transported a dozen non-Iraqis out of the country in 2003 and 2004.<sup>152</sup> It is unclear how many ghost detainees were transferred out of the country or if other foreign prisoners were transferred even if registered.

Because the issue of transfers from Iraq has received little detailed attention, this section collects and summarizes the seven individual cases gleaned from publicly available sources, all involving

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149. See Douglas Jehl, *U.S. Action Bars Rights of Some Captured in Iraq*, N.Y. Times, Oct. 26, 2004, at A1. The segregation of foreign from Iraqi detainees began during the “major combat operations” phase of the invasion, when U.S. forces separated foreign nationals from Iraqi prisoners of war if they were carrying concealed weapons and not wearing uniforms, holding at least two hundred such individuals in May 2003. See Kathleen Rhem, *Coalition Holds 2,000 Prisoners in Umm Qasr; 7,000 Others Released*, American Forces Press Service, May 8, 2003, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=29007>.

150. Lt. Col. Steven Jordan, director of the Joint Interrogation Debriefing Center at Abu Ghraib, told Army investigators of an informal agreement between his superior and “Other Government Agencies” (OGA, a euphemism for the CIA) to hold some detainees without standard screening, fingerprinting, and registration procedures. “The OGA folks wanted to be able to pull somebody in 24, 48, 72 hours if they had to get ‘em to [Guantánamo], do what have you.” Taguba Report, *supra* note 8, Annex 53, at 132–33. While there is no record of transfers from Abu Ghraib to Guantánamo, Jordan seems to have been under the impression that the non-registration of detainees was linked to the possibility of transfer abroad.

151. See *The Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq: Hearings on Review of Dep’t of Defense Detention and Interrogation Operations Before the S. Comm. on Armed Services*, 108th Cong. 1060–1061 (2004) (testimony of Gen. Paul Kern).

152. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, Wash. Post, Oct. 24, 2004, at A1.

Arab Muslims transferred from Iraq in 2003-2004 without any charge or apparent legal process:

- The most detailed account relates to the January 2004 detention of Yemeni citizen Khaled al-Maqtari in Fallujah. After nine days of torture, including at Abu Ghraib, Maqtari was transported to Afghanistan and held there for three months before being sent to a “black site” in an unknown country, most likely in eastern Europe. Al-Maqtari was later transferred to Yemeni custody in September 2006, and finally released in May 2007.<sup>153</sup>
- In January 2004, Kurdish forces seized an unnamed Jordanian man, who was held for thirty-eight days by U.S. forces in Baghdad before being repatriated to Jordan and detained by secret police there.<sup>154</sup>
- On January 26, 2004, President George W. Bush announced the capture of an individual named Hassan Ghul in Iraq, alleging he was a senior al-Qa’ida operative.<sup>155</sup> Ghul was apparently held in CIA custody<sup>156</sup> for two years, before being transferred to further detention in Pakistan.<sup>157</sup>
- In February 2004, U.K. commandos captured two men believed to be Pakistanis in the Baghdad area and handed them over to U.S. forces, who subsequently transferred them to Afghanistan, where they remain in custody. U.K. authorities alleged that they were members of Lashkar-e-Taiba, an armed Sunni group operating in Afghanistan,

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153. The case is extensively documented in Amnesty Int’l, *A Case to Answer: From Abu Ghraib to Secret CIA Custody: The Case of Khaled al-Maqtari*, AI Index AMR 51/013/2008 (2008), available at <http://www.amnesty.org/en/library/asset/AMR51/013/2008/en/1788d961-f1d3-11dc-adcd-cdafd0ab0dfe/amr510132008eng.pdf>.

154. Human Rights Watch, *Double Jeopardy*, *supra* note 43, at 28–29, n. 55.

155. President George W. Bush, Remarks at Little Rock, Arkansas (Jan. 26, 2004).

156. See Bradbury Memorandum, *supra* note 42, at 7 (“The interrogation team ‘carefully analyzed Ghul’s responsiveness to different areas of inquiry’ during this time . . . .”) (quoting Aug. 25, 2004 letter from CIA Assoc. Gen. Counsel to Daniel Levin, Acting Assistant Att’y Gen., Office of Legal Counsel).

157. Rangzieb Ahmed, a U.K. national detained and allegedly tortured in Pakistan, said Ghul occupied the cell next to his from August 2006–January 2007; Ahmed believed Ghul to be a Pakistani national. See Testimony of Rangzieb Ahmed to Cageprisoners 14, <http://www.cageprisoners.com/downloads/RangziebAhmed.pdf> (last visited Nov. 15, 2009).

Pakistan, and Kashmir.<sup>158</sup> One of the men, Amanatullah Ali, however, is Shi'i and according to his family was on a Shi'i pilgrimage in Iraq at the time of his abduction.<sup>159</sup>

- In April 2004, a Saudi detainee known as "Abu Abdullah al Saudi" was reportedly transferred from Iraq to the CIA detention facility in Afghanistan where Khaled al-Maqtari was being held.<sup>160</sup>
- An unnamed Tunisian fighter was also reportedly captured by Kurdish forces and sent to Jordan for detention sometime in 2003 or 2004.<sup>161</sup>

The exact legal basis for some of these transfers has never been officially disclosed, but it seems that by the autumn of 2003, general GWOT detention policy tended to distinguish between locals and foreigners, with transfer to detention abroad primarily, if not exclusively, reserved for the latter. This appears consistent with pre-2001 policies focusing on out-of-place Muslims in other parts of the world, as described in detail *supra*. The last known significant transfer of Afghan detainees to Guantánamo was on November 23, 2003;<sup>162</sup> after that point, extraterritorial removal of Muslim detainees from their own countries by the United States appears to have been very rare.

The question of whether local and foreign detainees were to be treated alike, as they effectively were in Afghanistan, appears to have been brought to a head by the transfer of an Iraqi detainee, named in media reports as Hiwa Abdul Rahman Rashul, from Iraq to

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158. See 488 Parl. Deb., H.C. (6th ser.) (2009) 395–97 (statement by Defence Secretary John Hutton).

159. See David Rose, *Why Bagram is Guantanamo's Evil Twin and Britain's Dirty Secret*, The Daily Mail Online (London), Dec. 9, 2009, available at <http://www.dailymail.co.uk/home/moslive/article-1232665/Why-Bagram-Guantanamos-evil-twin-Britains-dirty-secret.html>. Notably, Ali's name was not on the list of Bagram detainees released by the Pentagon and dated September 22, 2009. See Redacted List of Detainees Held at Bagram Air Base, available at <http://www.aclu.org/files/assets/bagramdetainees.pdf>.

160. See *A Case to Answer*, *supra* note 153, at 23.

161. See Human Rights Watch, *Double Jeopardy*, *supra* note 43, at 28–29.

162. Reprieve, *The "Journey of Death": Over 700 Prisoners Illegally Rendered to Guantanamo with the Help of Portugal 29* (2008) (noting that one Afghan was transferred to Guantánamo from Afghanistan in September 2004).

CIA detention in Afghanistan in the summer of 2003.<sup>163</sup> According to Jack Goldsmith, then head of the Office of Legal Counsel (OLC) in the U.S. Department of Justice and now a professor at Harvard Law School, by October 2003, a consensus had formed among lawyers across the government that the Geneva Conventions applied to Iraqi insurgents, but not to foreign “terrorists” who entered the country after the invasion.<sup>164</sup> Goldsmith claims to have issued an interim ruling that non-Iraqis who were not members of the Ba’th party and had come to the country after the invasion were not covered by the Conventions and therefore could be transferred, but that Iraqis could not.<sup>165</sup> According to press reports, the CIA accordingly returned Rashul to Iraq, where he was subsequently held as an unregistered “ghost detainee.”<sup>166</sup> Rashul’s fate remains unknown.

The best publicly available evidence as to Goldsmith’s legal reasoning is contained in a legal opinion he signed establishing the administration’s official position, dated March 18, 2004.<sup>167</sup> This

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163. See Edward T. Pound, *Iraq’s invisible man; A ‘ghost’ Inmate’s Strange Life Behind Bars*, U.S. News & World Rep., June 28, 2004, at 32; Priest, *supra* note 152, at A1.

164. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 39–42 (2007).

165. *Id.* See also Priest, *supra* note 152, at A1.

166. See Pound, *supra* note 163 (quoting a directive from Lt. Gen. Ricardo Sanchez, commander of Multi-National Forces-Iraq (MNF-I): “Notification of the presence and or status of the detainee to the International Committee of the Red Cross, or any international or national aid organization, is prohibited pending further guidance”).

167. Goldsmith’s memorandum should not be confused with a draft memorandum dated March 19, 2004 and leaked several months later. That draft opinion argued that even foreigners who *are* protected by the Fourth Geneva Convention can be expelled from occupied territories if they are otherwise deportable under local immigration law. Memorandum from Jack Goldsmith, Ass’t Att’y Gen., Office of Legal Counsel, on Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq to Alberto Gonzales, Counsel to the President (Mar. 19, 2004) in *The Torture Papers: The Road to Abu Ghraib* 367, 370–71 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Goldsmith Draft Memorandum]. Goldsmith’s draft memorandum is narrower than the position ultimately adopted insofar as it argues that protected persons retain their protections even if expelled, *id.* at n.14, whereas his formal opinion denies certain individuals protected status altogether. Although less sweeping, the draft memorandum is nevertheless deeply flawed in its interpretation of the Fourth Geneva Convention’s absolute prohibition on deportations from occupied territory. It reasons that expulsions of foreigners are not “deportations” within the sense of the Convention, citing putative Roman law definitions restricting the term only to citizens or permanent residents. *Id.* at 368–71. Goldsmith’s reasoning and sourcing have been ably dissected elsewhere. See Weissbrodt &

memorandum—made public only in the final days of the Bush administration—argued that people “who are not Iraqi nationals or permanent residents of Iraq” should receive no protection under the Fourth Geneva Convention if they are members of any group found to be “engaged in global armed conflict against the United States,” regardless of whether they are connected to al-Qa’ida or the September 2001 attacks.<sup>168</sup> Consequently, such individuals would receive no protections under the laws of war whatsoever, pursuant to Bush’s previous determination that alleged al-Qa’ida operatives were not entitled to the protections of the laws of war.<sup>169</sup>

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Bergquist, *supra* note 147, at 322–23 (citing an authority whom “Goldsmith himself concedes . . . is ‘authoritative’” for the proposition that “the term deportation as used by the parties drafting the Geneva Conventions is similar to the ordinary understanding of the term, and quite different from Goldsmith’s ‘term of art’ definition”); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 *Geo. Wash. L. Rev.* 1200, 1233 (2007) (asserting that the broader meaning of “deportation” was “explicitly confirmed in the adoption of the Elements of Crimes for the Rome Statute for the International Criminal Court, whereby the drafters *explicitly rejected* OLC’s proposed new understanding of article 49”) (emphasis in original). Goldsmith has claimed that the draft was never finalized and never relied upon to remove anyone from Iraq. Goldsmith, *supra* note 164, at 172. If this is true, it is nevertheless misleading, insofar as the opinion officially adopted by Goldsmith is far more sweeping. The true significance of the draft memorandum likely lies in its second argument, namely that the United States can remove even some Iraqi civilians “for a brief but not indefinite period . . . to facilitate interrogation.” Goldsmith Draft Memorandum, *supra*, at n. 14. This argument would retroactively legalize Rashul’s transfer to Afghanistan as “temporary,” thus absolving the officials involved of possible criminal liability. Because the draft memorandum is narrower than the position ultimately adopted, it is also possible that Goldsmith prepared it as an alternative in an attempt to rein in Bush administration detention policies, as he appears to have attempted elsewhere. *See, e.g.*, Inquiry Into the Treatment of Detainees in U.S. Custody, *supra* note 8, at 146–47 (describing Goldsmith’s decision to rescind two previous decisions on detainee interrogation). In the absence of an independent investigation, however, this remains speculative. Goldsmith himself has publicly opposed any new inquiries that could shed additional light on the matter. *See* Jack Goldsmith, *No New Torture Probes*, *Wash. Post*, Nov. 26, 2008, at A13.

168. Memorandum from Jack Goldsmith, Assistant Att’y Gen., Office of Legal Counsel, on “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention to Alberto Gonzales, Counsel to the President 23, 14 n.18 (Mar. 18, 2004), *available at* <http://www.justice.gov/olc/2004/gc4mar18.pdf> [hereinafter Goldsmith Memorandum].

169. *See* Memorandum from George W. Bush on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), in *The Torture Papers*, *supra* note 167, at 134 [hereinafter Bush Memorandum].

Goldsmith's memorandum finds that the object and purpose of the Geneva Conventions, as analyzed by his predecessor Jay Bybee (now a judge on the Ninth Circuit Court of Appeals) with regard to Afghanistan,<sup>170</sup> militate in favor of excluding members of non-state groups "who engage in transnational armed conflict" from any protection under the laws of war.<sup>171</sup> Goldsmith's only significant departure from the Bybee framework used in Afghanistan lies in his attempt to distinguish between Iraqis and foreigners. Goldsmith begins with the definition of protected persons in article 4 of the Fourth Geneva Convention, namely those who "at a given moment and in any manner whatsoever, find themselves in the hands of a Party to the conflict or Occupying Power of which they are not nationals."<sup>172</sup> Goldsmith concedes that the text of the Convention unambiguously protects citizens and permanent residents of Iraq who are members of al-Qa'ida.<sup>173</sup> He argues, however, that the phrase "find themselves" is ambiguous and could be read to connote happenstance or lack of volition, thus excluding travelers and other foreigners who are not permanent residents.<sup>174</sup> In order to interpret this purported ambiguity, Goldsmith turns to the interpretive framework for the laws of war developed by Bybee, and finds that such foreigners fall outside the Convention altogether.

There are three major problems with Goldsmith's analysis insofar as it is based on a strained attempt to impute textual ambiguity to article 4's use of the phrase "find themselves": "While 'are' may be a possible reading of 'find themselves,' it is not the only, or even a particularly obvious, reading of that phrase."<sup>175</sup> First, it is

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170. See Goldsmith Memorandum, *supra* note 168, at 18 (quoting Memorandum from Jay S. Bybee, Ass't Att'y Gen., Office of Legal Counsel on Application of Treaties and Laws to al Qaeda and Taliban Detainees to Alberto R. Gonzales, Counsel to the President (Jan. 22, 2002)). In Afghanistan, Bush agreed that the Geneva Conventions generally applied—or rather he "decline[d] to exercise" his purported "authority under the Constitution to suspend Geneva as between the United States and Afghanistan." Bush Memorandum, *supra* note 169, at 1–2. In any event, the relatively rapid installation of the Karzai regime and its ensuing international recognition enabled the United States to largely avoid questions concerning the application of the law of occupation, including the relevant provisions of the Fourth Geneva Convention.

171. Goldsmith Memorandum, *supra* note 168, at 16–17.

172. *Id.* at 5 (setting out the exact language of article 4).

173. *Id.* at 23. Goldsmith also correctly concedes that the Convention generally protects citizens of neutral states within occupied territories. See *id.* at 9–10.

174. *Id.* at 14.

175. *Id.*

highly doubtful as to whether the text is ambiguous in the manner Goldsmith suggests, since the attempt to accord special meaning to the phrase "find themselves" is not supported by the plain language of the French text of the Convention, which is equally authoritative as the English version.<sup>176</sup> The phrase "find themselves" in article 4 corresponds to *se trouvent* in the French text, a reflexive use of the verb "to find" often translated simply as "to be" in English. There are over twenty uses of the verb *se trouver* in the Convention which are rendered in the English as some variant of the verb "to be"<sup>177</sup>—only twice is it translated as "find themselves" or some variant thereof.<sup>178</sup> Goldsmith's attempt to invest the term "find themselves" with distinct meaning would thus make no sense in light of the French text, which clearly treats it as interchangeable with the verb "to be."

Second, Goldsmith's analysis of relevant authority is highly selective. His only support for reading ambiguity in the phrase "find themselves" is dicta contained in a concurrence in an Israeli High Court of Justice decision that did not consider the issue (a reading rejected by the majority) and unsupported speculation in a single law review article footnote.<sup>179</sup> At the same time, Goldsmith's extensive search for interpretive guidance as to the alleged ambiguity ignores entirely the ICRC's Commentary on the provision:

The words "at a given moment and in any manner whatsoever," [in art. 4] were intended to ensure that all situations and cases were covered. The Article refers both to people who were in the territory before the outbreak of war (or the beginning of the occupation) and to those who go or are taken there as a result of circumstances: *travellers*

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176. See Fourth Geneva Convention, *supra* note 139, art. 150; see also Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 33(3), 1155 U.N.T.S. 331, 344 (entered into force Jan. 27, 1980) ("The terms of the treaty are presumed to have the same meaning in each authentic text.")

177. See Fourth Geneva Convention, *supra* note 139, arts. 11(5), 11(7), 25(1), 27(3), 29, 30, 37, 39(1), 40(1), 41(1), 42, 47, 51(3), 52(1), 62, 93(2), 98(3), 99(2), 101(1), 104(3), 126, 136(1), 143(1).

178. *Id.* arts. 4, 11(7).

179. Goldsmith cites *Affo v. Commander Israel Defense Force in the West Bank*, 29 I.L.M. 139, 180 (1990) (Bach, J., concurring in judgment) and Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 29 Brook. J. Int'l L. 871, 922 n. 384 (2003). See Goldsmith Memorandum, *supra* note 168, at 15.

[sic], *tourists*, people who have been shipwrecked *and even, it may be, spies or saboteurs*.<sup>180</sup>

This interpretation is clearly at odds with Goldsmith's attempt to exclude visitors and newly arrived foreigners from the scope of "find themselves" in an occupied territory in the sense of article 4. Elsewhere in the memorandum, Goldsmith quotes from a neighboring provision on the same page of the ICRC Commentary, strongly suggesting that his failure to engage with this text was avoidance and not oversight.<sup>181</sup>

Third, Goldsmith's voluntarist interpretation of the phrase "find themselves" as connoting a "lack of deliberate action"<sup>182</sup> simply does not mesh with his other key contention, that the Convention's object and purpose is to protect citizens and permanent residents. If Goldsmith's textual interpretation is taken seriously, then it could also exclude from protection anyone who voluntarily traveled to Iraq after the beginning of the occupation, even Iraqi exiles returning to work for the United States, to say nothing of civilian aid workers and journalists from neutral countries. Moreover, because the phrase "finds themselves" describes not only people in occupied territory but also individuals in the sovereign territory of a state with which their governments are at war, Goldsmith's reading would have allowed Saddam Hussein's regime to exclude, for example, American journalists arriving in Iraq during the war.

Although the full story of how policy on extraterritorial transfers and detention has yet to be told, two things are clear from the Goldsmith memorandum: first, it embodies the logic of exclusion by seeking to distinguish between local and out-of-place Muslims, reflecting what Goldsmith claims was a consensus across the U.S. government; second, this exclusion of out-of-place Muslims from the protection of the law of occupation set the stage for what happened after the end of the formal occupation.

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180. Pictet Commentary, *supra* note 139, at 47 (emphasis added). Instead of dealing with this text, Goldsmith argues that the express absolute language of "in any manner whatsoever" does not inform or expand, but instead depends upon and is limited by" Goldsmith's idiosyncratic reading of the expression "find themselves." Goldsmith Memorandum, *supra* note 168, at 15 n. 19.

181. See Goldsmith Memorandum, *supra* note 168, at 5 ("The expression 'in the hands of' is used in an extremely general sense.").

182. *Id.* at 14.

ii. Expulsions in the Iraqi Civil War: The Laws of War Give Way

Insofar as Iraq putatively resumed its status as a sovereign independent state on June 29, 2004, the laws of war no longer expressly forbade the deportation of foreigners by the United States. The U.S. occupation of Iraq has formally ended and hostilities in the country are now considered to be a non-international armed conflict (civil war), in which the United States is participating not as a foreign invader but as an invited guest of the sovereign Iraqi state.<sup>183</sup> The treaty law of non-international armed conflict is considerably thinner than occupation law. It contains no equivalent prohibition on deportations;<sup>184</sup> similarly, the requirement to preserve local law unless absolutely prevented from doing so evaporates. In short, whereas most out-of-place Muslims would be protected as neutrals under the law of occupation, in non-international, armed conflict,

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183. This position has gained acceptance from the U.N. Security Council. See S.C. Res. 1637, ¶ 1, U.N. Doc. S/RES/1637 (Nov. 8, 2005) (“[T]he presence of the multinational force in Iraq is at the request of the Government of Iraq . . .”). It has also been accepted by the ICRC. See Press Release, ICRC, Iraq Post 28 June 2004: Protecting Persons Deprived of Freedom Remains a Priority (Aug. 5, 2004) (ICRC “no longer considers the situation in Iraq to be that of an international armed conflict between the US-led coalition and the state of Iraq and covered by the Geneva Conventions of 1949 in their entirety.”). Some scholars have suggested that the situation should still be considered an occupation, as long as MNF-I retains de facto authority over Iraqi forces. See, e.g., Zouhair Al Hassani, *International Humanitarian Law and its Implementation in Iraq*, 90 *Int'l Rev. Red Cross* 51 (2008) (reviewing applicable rules of international humanitarian law before and after the end of formal occupation). For more on the civil wars conducted with the participation of external state parties, see generally Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 *Am. Univ. L. Rev.* 145 (1983).

184. The closest equivalent is found in the Rome Statute of the International Criminal Court, which criminalizes “[o]rdering the displacement of the civilian population for reasons related to [a non-international armed] conflict, unless the security of the civilians involved or imperative military reasons so demand.” Rome Statute of the International Criminal Court art. 8(2)(e)(viii), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 98 (entered into force July 1, 2002). This is more permissive than the rule in occupations, which prohibits *individual* as well as mass transfers. See Fourth Geneva Convention, *supra* note 139, art. 49. This provision of the Rome Statute also omits the limitations and safeguards on evacuations required in occupations, such as the right of evacuees to be able to return “as soon as hostilities in the area in question have ceased” and requirements that Occupying Powers strive to provide basic accommodations to evacuees. *Id.*

they have no special status and are mere aliens under domestic law, which itself can now be more easily rewritten. This paved the way for more expulsions with far less need for elaborate legal justifications as far as the laws of war are concerned.

As the Iraqi civil war intensified, efforts against out-of-place Muslims intensified. In March 2005, media reports began to spread documenting large-scale round-ups and interrogations of hundreds of foreign Arabs.<sup>185</sup> Under new Interior Ministry regulations, foreign residents had to obtain new residency papers in order to avoid deportation, which in turn required a valid Iraqi visa, a valid foreign passport, and according to some reports, a work contract.<sup>186</sup> The new regulations left long-term Arab residents, who had never needed Iraqi visas in the first place and some of whom no longer had valid passports, in a particularly vulnerable position. “Sometimes we take [a foreigner without proper documentation] direct from our office to the border if he is found to be suspect and his family will follow him later,” a senior interior ministry official said.<sup>187</sup> In one of the most significant repudiations of Iraq’s pan-Arabist laws, the Presidency Council in 2006 promulgated a new nationality law that erased the special status of Arabs and retroactively revoked citizenships granted

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185. See, e.g., Alissa Rubin, *Iraq Moves to Expel Foreign Arabs*, L.A. Times, Mar. 23, 2005, at A1 (noting that over 250 foreign Arabs had been expelled from Iraq).

186. See *id.* (reporting that more than 200 Iraqis were being detained daily based on improper permits). The exact nature of these provisions and their relationship with the regulations reported in 2003 are unclear, as the regulations have not been published in the Iraqi Official Gazette, posted on Iraqi government websites, or entered into the Iraqi Legal Database ([www.iraq-ild.org](http://www.iraq-ild.org)).

According to one report, anyone who does not fulfill the entry visa requirements of the Foreigners’ Residency Law art. 5(2) can be expelled. See Usama Mahdi, *Nafi tarhil ‘Arab Baghdad [Expulsion of Baghdad Arabs Denied]*, Elaph.com, Mar. 22, 2005, <http://www.elaph.com/Politics/2005/3/49773.htm>. That provision lists broad grounds for denying entry visas, such as reasons “related to public health, security, general customs, or the national economy.” Qanun iqamat al-ajanib [Foreigners’ Residency Law], Law No. 118 (1978) art. 5(2), available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=020320068855474>.

187. U.N. OCHA Integrated Regional Information Network, *Iraq: Focus on Treatment of Foreign Arabs*, ReliefWeb, June 21, 2005, available at <http://www.reliefweb.int/rwarchive/rwb.nsf/db900sid/VBOL-6DKJGD?OpenDocument>. See also Rubin, *supra* note 185 (“So far the program has swept up mostly Syrians, Sudanese, Saudis and Egyptians, and about 250 people have been asked to leave.”). But see Mahdi, *supra* note 186 (“Iraqi authorities have affirmed that no Arab resident has been deported from their territory . . .”).

to Arabs under the 1975 law except in cases where this would lead to statelessness.<sup>188</sup>

These measures were accompanied by a series of stern official statements. As one unnamed Interior Ministry official put it, "[t]he time for dillydallying [*al-'abth*] has passed. The state has a new political direction. It has now decided that he who doesn't serve Iraq must leave, must not enter, and must not stay."<sup>189</sup> One journalist characterized a spreading fear of foreign Arabs amongst some Baghdad residents thus:

The presence of Arabs has turned into a source of concern anywhere in Baghdad. For once an inhabitant comes to know that someone present in the neighborhood is Egyptian or Palestinian or Syrian or Jordanian, caution and circumspection overtake him: [The person] could be a leader of an armed group, or even Zarqawi's right-hand man.<sup>190</sup>

The Arabic media also featured numerous stories about the fear and outrage among long-term Arab residents over how the campaigns had turned them overnight "from guests to suspects."<sup>191</sup> Without dwelling on the relations and attitudes across Iraqi society towards Arabs, it is clear that U.S. concern over foreign fighters clearly dovetailed with Iraqi political dynamics, be they sectarian interests

188. Qanun al-jinsiyya al-'Iraqiyya [Iraqi Nationality Law], Law No. 26 (2006) art. 21(2), available at <http://www.iraq-ild.org/LoadLawBook.aspx?SP=REF&SC=040120082042747>.

189. Walid Ibrahim, *Al-Hukuma al-'Iraqiyya satattikhdh ijra'at bi-haqq al-muqimin ghayr al-shar'iyyin fil-bilad* [*The Iraqi Government Will Take Measures Against Illegal Residents in the Country*], *Aswat al-'Iraq* (Baghdad), Feb. 23, 2005 (on file with author). See also Bassem Mroue, *Anger at Foreign Arabs Builds in Iraq*, Associated Press, Feb. 19, 2007 (describing government-sponsored television ads featuring depictions of men with Egyptian accents to encourage Iraqis to report suspicious activity by foreign Arabs).

190. Muhammad Qasim, *Al-Muwatinun al-'Arab fil-'Iraq mutajawwisun* [*Arab Citizens in Iraq Wary*], Elaph.com, May 7, 2006, <http://www.elaph.com/ElaphWeb/Reports/2006/5/146676.htm>.

191. *Mahattat: Qawa'id jadida sarima lil-iqama fil-'Iraq* [*Mahattat: Harsh New Rules for Residency in Iraq*] (Al-'Arabiyya television broadcast Apr. 16, 2005), transcript available at <http://www.alarabiya.net/programs/2005/04/16/12221.html>; see also 'Ali al-'Ubaydi, *Al-Misriyyun al-muqimun yandafi'un li-mughadarat al-'Iraq bi-sabab hamalat al-mulahaqa al-hukumiyya* [*Egyptian Residents Rush to Leave Iraq Due to Government Crackdowns*], *Al-Quds al-'Arabi*, Mar. 21, 2005 (recounting the post-invasion insecurities of Egyptians in Iraq); Qasim, *supra* note 190 (noting the increased suspicion that foreign Arab citizens in Iraq have faced since 2003, leading at times to interrogation, detention, and deportation).

(since most foreign fighters were presumed to be Sunni)<sup>192</sup> or grievances stemming from the previous regime's perceived favoritism towards Arabs and Palestinians, in particular.<sup>193</sup>

It appears that the reclassification of the situation from occupation to civil war paved the way for accelerating transfers of foreigners from Iraq. Without the restrictions of the Fourth Geneva Convention, transfers no longer required the kind of elaborate attempts to circumvent the laws of war such as those found in the Goldsmith memoranda. Between 2006 and August 2008, the U.S. military reportedly transferred 214 non-Iraqi prisoners to the intelligence services of client states such as Saudi Arabia and Egypt without Iraqi approval and with virtually no media scrutiny.<sup>194</sup> Under this program, detainees could be held in secret for two weeks (with extensions possible) at a special operations camp in Balad, north of Baghdad, before transfer to custody in another country.<sup>195</sup> In June 2008, the commander of detainee operations in Iraq, Marine Maj. Gen. Douglas Stone, publicly acknowledged the existence of the program, claiming that non-Iraqi detainees were repatriated in cooperation with the ICRC.<sup>196</sup> As of this writing, there appears to be

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192. In one particularly virulent exchange, deputies from the governing (and Shi'i dominated) United Iraqi Alliance called for the expulsion of foreign Arabs from Iraq, causing Parliamentary speaker (and prominent Sunni politician) Mahmud al-Mashhadani to retort that the expulsion should encompass both "Arabs and non-Arabs"—a clear reference to the Alliance's Iranian allies. *Nuwab al-Ittilaf yutalibun bi-tarhil al-'Arab wal-Mashhadani yutalib bi-tarhil al-Iraniyyin . . . usbu' al-alaf qatil fil-'Iraq* [Alliance Deputies Demand Expulsion of Arabs, and al-Mashhadani Demands Expulsion of Iranians . . . a Week of Thousands Killed in Iraq], Al-Hayat (London), Feb. 5, 2007, at 1.

193. See Human Rights Watch, *Nowhere to Flee*, *supra* note 135, at 9–10 (describing pre-invasion mandatory rent control provisions for Palestinians that "in effect, deprived" Iraqi landlords of their property).

194. See Mark Mazzetti & Eric Schmitt, *Military Sending Foreign Fighters to Home Nations*, N.Y. Times, Aug. 27, 2008, at A1.

195. *Id.* Prior to September 2009, many of the detainees were held without ICRC notification until the initiation of the repatriation process. *Id.*; see also Eric Schmitt, *U.S. Shifts, Giving Detainee Names to the Red Cross*, N.Y. Times, Aug. 23, 2009, at A1.

196. Press conference with Maj. Gen. Douglas Stone, Commander, Detainee Operations, MNF-I, June 1, 2008, available at [http://www.cjtf7.army.mil/images/stories/Press\\_briefings/2008/june/080601\\_transcript.pdf](http://www.cjtf7.army.mil/images/stories/Press_briefings/2008/june/080601_transcript.pdf). U.S. military detention operations in Iraq are organized by Task Force 134 (TF-134). For more on the relationship between TF-134 and the Iraqi criminal justice system, see James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, 2007 Army Law. 72, 75.

almost no independent information available about the treatment, fate, or identity of these detainees.<sup>197</sup>

The legal basis for these transfers has not been publicly disclosed,<sup>198</sup> but the shift to a civil war likely meant fewer legal obstacles to transfer policies than those that existed prior to July 2004, at least with respect to the laws of war (as distinct from obligations under international human rights law or domestic laws that remained in place). As long as the sovereign Iraqi government directly or indirectly authorized the transfers, they became arguably bilateral (or trilateral, given the U.S. role) matters not regulated by the laws of war. Moreover, whatever the legal basis, the logic of the policy is entirely consistent with a desire to put out-of-place Muslims back into place.<sup>199</sup> As Henry Crumpton, former U.S. State Department Coordinator for Counterterrorism, put it: "All of us in the discussion agreed that Guantánamo was not working for lots of reasons and that the simplest way to proceed is that when you have foreign fighters captured you send them back home . . . . If you don't send them to Gitmo, and the C.I.A. doesn't want them, then where do you put them?"<sup>200</sup> Yet as the United States pushed these outsiders

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197. In September 2009, U.S. forces in Iraq claimed that they had transferred some 120 Arab and foreign detainees to Iraqi authorities over the preceding two months, leaving only 17 in U.S. custody. See *Masir Majhul li-Mu'taqalin 'Arab bil-'Iraq* [Unknown Fate for Arab Detainees in Iraq], Al-Jazeera Online, Sept. 16, 2009, <http://www.aljazeera.net/NR/exeres/181D1165-6509-4DB6-90CB-4DCDC3DD3EA2.htm> (reporting the handover of prisoners, many of whom were university students or business people held without charge).

198. One possible basis for these determinations is the Memorandum of Understanding between MNF-I and the Iraqi Interim Government "concerning the handling of High Value Detainees," referred to in CPA Provisional Order No. 99, Joint Detainee Committee § 4 (entered into force June 27, 2004), available at [http://iraqcoalition.org/regulations/20040627\\_CPAORD\\_99\\_Joint\\_Detainee\\_Committee.pdf](http://iraqcoalition.org/regulations/20040627_CPAORD_99_Joint_Detainee_Committee.pdf). U.S. authorities have refused requests to disclose this memorandum. See Amnesty Int'l, *Beyond Abu Ghraib: Detention and Torture in Iraq* 39, AI Index MDE 14/001/2006, Mar. 6, 2006.

199. Extra-territorial transfer is not the only means used to deal with out-of-place Muslims, of course. According to statements issued by MNF-I, at least 132 foreigners, mostly Arabs alleged to be "foreign fighters," were convicted in the Iraqi Central Criminal Court for a variety of offenses between December 2005 and July 2007 (figures based on press releases collected and on file with author). See also Ma'ad Fayyad, *Asharq Al-Awsat Goes Inside Fort Suse*, Al-Sharq al-Awsat (English ed.), May 3, 2007, available at <http://www.aawsat.com/english/news.asp?section=3&id=8845> (interviews with foreign Arab inmates at Fort Suse prison in northern Iraq).

200. Mazzetti & Schmitt, *supra* note 194.

beyond the law, it simultaneously struggled to elevate others above it, as the next section demonstrates.

#### B. Exemption: Occupation or Assisted Sovereignty?

Although much has been written about the failure of the United States to hold its own personnel or private contractors accountable for crimes committed in Iraq,<sup>201</sup> less attention has been paid to the exemption of such individuals from *local* legal process. The logic of exemption in Iraq, however, differs from the logic of exclusion for out-of-place Muslims described above. In the shift from occupation to civil war, exclusion becomes more, rather than less, difficult to justify. On the one hand, the law of occupation is generally held to exempt Occupying Powers from the jurisdiction of local courts, instead relying on self-regulation or horizontal accountability amongst the community of states. On the other hand, the law of non-international armed conflict presupposes the creation of a sovereign Iraqi state, yet the logic of exemption threatens that same sovereignty, in that, if a state cannot punish criminals in its territory, especially foreigners, how can it claim to be sovereign? The oft-heard American slogan for its role in the state-building project in Iraq—"As Iraqi troops stand up, the United States will stand down"—begs the inevitable question: how long should Iraqi justice stand back?

In the early days of the occupation (and on the day before revoking the visa waiver for Arab nationals), CPA head L. Paul Bremer promulgated CPA Order 17, granting coalition forces and their contractors and sub-contractors complete immunity from Iraqi legal process.<sup>202</sup> The decree's preamble recalled "that under

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201. See, e.g., Human Rights First, *Private Security Contractors at War: Ending the Culture of Impunity* 15–32 (2008), available at <http://www.humanrightsfirst.info/pdf/08115-usls-psc-final.pdf> (criticizing the lack of U.S. accountability mechanisms for military contractors); Peter Singer, *Wars, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 Colum. J. Transnat'l L. 521, 534–41 (2004) (analyzing a purported gap in international legal regimes for private military forces); Kateryna Rakowsky, *Military Contractors & Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq & Afghanistan*, 2 Stan. J. of Civ. Rights & Civ. Liberties 111, 117–22 (2006) (analyzing liability of military contractors for torts in the U.S. legal system and arguing against expansion of contractor immunity under federal common law).

202. The Order granted immunity to the CPA, Coalition Forces, and Foreign Liaison Missions, as well as their property, funds, and assets. See

international law, occupying powers . . . are not subject to the laws or jurisdiction of the occupied territory." Although the customary international rule on local immunity for occupying armies and their civilian components is indeed well-established,<sup>203</sup> the extension of immunity to civilians working under contract with these forces (as opposed to those under their command) has less precedent to rely upon. This has led to the oft-noticed accountability gap for contractors—exempt from Iraqi law and, until very recently, not governed by the Uniform Code of Military Justice (UCMJ).<sup>204</sup>

The general principle of exemption follows from occupation law's premise that the social contract normally presumed to exist between a population and its government has been interrupted by forcible subjugation of the territory by a belligerent army. Because modern international law forbids annexation of territory by force, the Occupying Power merely acts as a steward of the territory in place of the very sovereign against which it has been waging war.<sup>205</sup> This tension between the roles of adversary and caretaker is captured

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Coalition Provisional Authority, Order No. 17, Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors, §§ 2.1, 2.4 (entered into force June 26, 2003), available at [http://www.dod.mil/dodgc/ia/docs/CPAORD17foriegn\\_mission\\_liaisons.pdf](http://www.dod.mil/dodgc/ia/docs/CPAORD17foriegn_mission_liaisons.pdf). Contractors were granted immunity for acts performed as part of their official duties; for other acts, any legal process against them still required the written permission of the CPA Administrator. *See id.* § 3.

203. *See* U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* ¶ 11.26 (2004); Canadian Armed Forces Office of the Judge Advocate General, *The Law of Armed Conflict at the Operational and Tactical Level* ¶ 1210 (2001); U.S. Dep't of the Army, *Field Manual 27-10: The Law of Land Warfare* ¶ 374 (1956); Georg Schwarzenberger, *The Law of Armed Conflict* 183–90 (1968); Lassa Oppenheim, *War and Neutrality* 237 (1921); Coleman Phillipson, *Termination of War and Treaties of Peace* 210 (1916).

204. *See* U.S. v. Averte, 19 C.M.A. 363, 365 (C.M.A. 1970) (holding that civilian contractors accompanying armed forces are only covered by UCMJ in wars declared by Congress). This loophole has subsequently been eliminated by legislative amendments to the UCMJ's personal jurisdictional statute, 10 U.S.C. § 802(a)(10). *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. 109-364, § 552 (2006) (expanding UCMJ jurisdiction over civilians to include contingency operations). Before this amendment, the only legal vehicle for contractor accountability was the more onerous route of prosecution in U.S. federal courts pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), Pub. L. 106-523 (2000).

205. *See* Hague Regulations, *supra* note 143, art. 55 ("The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.").

perfectly by the provision of the Hague Regulations, discussed above, which requires the occupier to “take all the measures in his power to restore . . . public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>206</sup> The civilian population is caught in a similar dilemma, owing the Occupying Power obedience, but not loyalty.<sup>207</sup>

The law of occupation does not pretend that the local population has much say in these matters. Instead, it first relies on self-regulation, assuming that occupying forces will fall under the jurisdiction of their own states. And second, the responsibilities of Occupying Powers are primarily conceptualized as existing towards the entire community of states, arising from the obligation of all states to “ensure respect” for the Geneva Conventions “in all circumstances.”<sup>208</sup> For this reason, the enforcement mechanisms envisioned by the Convention are largely decentralized and state-based.<sup>209</sup>

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206. *Id.* art. 43. *See also id.* art. 48 (“If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force . . . .”); Fourth Geneva Convention, *supra* note 139, art. 64 (“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.”).

207. *See* Hague Regulations, *supra* note 143, art. 44 (“A belligerent [sic] is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense.”); *id.*, art. 45 (“It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.”). *See also* Fourth Geneva Convention, *supra* note 139, art. 51 (prohibiting conscription of civilians in occupied territory for “military operations” but allowing compelled non-military work “which is necessary either for the needs of the army of occupation” or for humanitarian needs).

208. Fourth Geneva Conventions, *supra* note 139, art. 1. Obligations under international humanitarian law pertaining to occupation are arguably of an *erga omnes* nature—opposable to all states—as well. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9) (describing certain rules of international humanitarian law pertaining to armed conflict (including occupation) as existing *erga omnes*); *but see* 2004 I.C.J. 136, 216 (Higgins, J., separate opinion) (calling *erga omnes* an “uncertain concept”).

209. The Geneva Conventions envision two primary enforcement mechanisms: First, they provide for the appointment of certain neutral states as “Protecting Powers” with certain powers to monitor issues related to treatment of detainees and provision of aid—a mechanism that has rarely if ever been used.

But the U.S. project in Iraq—not simply military control incident to war, but an attempt to build a new regime—has been far more ambitious than what the legal institution of belligerent occupation allows. Thus, the CPA issued a number of decrees radically remaking the country’s legal, economic, and social institutions, with few if any attempts to argue that they were “absolutely” required, per the Convention’s stipulation.<sup>210</sup> Some supporters of this effort have even argued that the situation should not be regulated by the law of occupation at all, but rather analyzed using the largely lapsed category of *debellatio*—total conquest leading to dissolution of the state’s international legal personality, as has been claimed regarding post-World War II Germany and Japan.<sup>211</sup> Such “transformative occupations,” however, require more

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See Fourth Geneva Convention, *supra* note 139, arts. 9, 11–12, 14, 23–24, 49, 52, 55, 59–61, 71–72, 74–76, 83, 96, 98, 101–102, 104–105, 108–109, 111, 113, 123, 129, 131, 137, 143, 145. Second, the Conventions establish individual criminal liability through the “grave breaches” regime by requiring states to enact penal legislation for certain violations of the Conventions and to search for and prosecute (or, optionally, transfer to prosecution) any individuals in their territory, regardless of nationality, who have committed such violations. *See id.*, arts. 146–147.

210. *See, e.g.*, Coalition Provisional Authority, Order No. 37, Tax Strategy for 2003 (entered into force Sept. 19, 2003), *available at* [http://www.iraqcoalition.org/regulations/20030919\\_CPAORD\\_37\\_Tax\\_Strategy\\_for\\_2003.pdf](http://www.iraqcoalition.org/regulations/20030919_CPAORD_37_Tax_Strategy_for_2003.pdf) (rewriting Iraq’s tax code, including establishing a ceiling of 15% for individual and corporate income tax); Order No. 39, Foreign Investment § 3 (entered into force Dec. 20, 2003), *available at* [http://www.iraqcoalition.org/regulations/20031220\\_CPAORD\\_39\\_Foreign\\_Investment.pdf](http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment.pdf) (purporting to “replace[ ] all existing foreign investment law”); Order No. 74, Interim Law on Securities Markets § 2(1) (entered into force Apr. 18, 2004) *available at* [http://www.iraqcoalition.org/regulations/20040419\\_CPAORD\\_74\\_Interim\\_Law\\_on\\_Securities\\_Markets.pdf](http://www.iraqcoalition.org/regulations/20040419_CPAORD_74_Interim_Law_on_Securities_Markets.pdf) (replacing Baghdad Stock Exchange with a new Iraq Stock Exchange); Order No. 83, Amendment to the Copyright Law § 1 (entered into force Apr. 29, 2004) *available at* [http://www.iraqcoalition.org/regulations/20040501\\_CPAORD\\_83\\_Amendment\\_to\\_the\\_Copyright\\_Law.pdf](http://www.iraqcoalition.org/regulations/20040501_CPAORD_83_Amendment_to_the_Copyright_Law.pdf) (changing Iraqi copyright law to “ensure that [it] meets current internationally-recognized standards of protection, and to incorporate the modern standards of the World Trade Organization into Iraqi law”).

211. *See* Melissa Patterson, *Who’s Got the Title? Or, Remnants of Debellatio in Post-Invasion Iraq*, 47 *Harv. Int’l L.J.* 467, 467 (2006) (arguing that the CPA’s actions can best be understood under a modern variation of the *debellatio* doctrine). For diverging views, see Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 *Am. J. Int’l L.* 580, 581–82 (2006) (arguing against application of the *debellatio* concept to Iraq and for an improved application of the existing law of occupations, even in the context of non-traditional occupations); David Scheffer, *Beyond Occupation*

than grudging obedience from the civilian population for the duration of the war; they demand genuine allegiance to a new order. This ambition stretches the inherent tensions in occupation law to their limit: in order to establish their legitimacy, transformative occupiers must subordinate the population, but the more harshly they try to subordinate, the more they undermine their legitimacy.<sup>212</sup> And if a transformative occupation is justified in the name of democracy, the problem of accountability produces contradictions that would not normally emerge in an occupation law context.

Thus, as the United States made “progress” towards creating a sovereign Iraqi state, the problem of impunity only became more glaring, forcing the logic of exemption to work itself out in increasingly convoluted ways. The day before the United States purported to “transfer” sovereignty to the interim Iraqi government, the CPA made a number of amendments to CPA Order 17 designed to be binding upon its successors.<sup>213</sup> The only alteration to the immunity regime related to contractors. In the original order, contractors enjoyed two layers of immunity: officially, they enjoyed immunity only for acts committed in the course of “their official activities pursuant to the terms and conditions” of their contracts.<sup>214</sup> For acts falling outside their official duties, they enjoyed *de facto* immunity from Iraqi law, since no legal action against them for such acts could commence “without the written permission” of the head of the CPA.<sup>215</sup> Under the amended order, the CPA’s silent veto of legal action against contractors for non-official acts was eliminated; but, at the same time, contractors’ home governments were given the ability to unilaterally classify their acts as “official.”<sup>216</sup> In other words, the

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*Law*, 97 Am. J. Int’l L. 842, 853, 859 (2003) (arguing that U.N. Security Council resolutions could provide legal authority for deviating from the law of occupation).

212. See Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 Eur. J. Int’l L. 721, 724 (2005) (explicating different theories of occupation and arguing that the occupation of Iraq requires a “precarious” balance between “subordination and legitimation”).

213. See Coalition Provisional Authority, Order No. 17, *supra* note 202.

214. *Id.* § 3(2).

215. *Id.* § 3(3).

216. The new provision empowered a state to certify, with conclusive legal effect “in any Iraqi legal process,” that its contractors “acted pursuant to the terms and conditions” of a contract. Coalition Provisional Authority, Order No. 17 (revised), § 4(5) (entered into force June 27, 2004), *available at* [http://www.iraqcoalition.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

CPA amendments effectively replaced automatic immunity for contractors with a veto option for their governments over legal actions, shifting the burden only slightly against the logic of exemption.

As the stories of atrocities committed by U.S. forces and contractors in Iraq spread, it became increasingly difficult to reconcile the logic of exemption with the U.S. project of state-building, particularly in the wake of the September 2007 shooting death of seventeen Iraqi civilians in Baghdad's Nisoor square by Blackwater contractors working for the U.S. State Department.<sup>217</sup> As the United States moved to create a longer-term basis for its military presence in Iraq, exemption had to be repackaged and renegotiated anew. Thus, the 2008 agreement on the status of U.S. forces ended blanket immunities, forcing the logic of exemption to be worked out through a number of practical and procedural obstacles to balance both states' interests.<sup>218</sup> Most significantly, the agreement gave the Iraqi government primary jurisdiction over contractors<sup>219</sup>—but only those working with the military.<sup>220</sup> The legal status of other contractors, such as private security companies working with the State Department, remains unclear.

With regard to U.S. forces and their civilian components, Iraq now enjoys primary jurisdiction over "grave premeditated felonies" committed outside of military bases and "outside duty status."<sup>221</sup> A number of obstacles remain before such jurisdiction could be exercised, however. First, the list of offenses covered and the procedures for asserting Iraqi jurisdiction are to be determined by a Joint Committee composed of both parties; until agreement on these

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217. The incident has led to both a failed criminal prosecution under MEJA as well as a civil suit under the Alien Tort Claims Act that was settled. *See* Mem. Op., *U.S. v. Slough*, 2010 U.S. Dist. LEXIS 121809 (D.D.C., Dec. 31, 2009) (granting defendants' motion to dismiss indictment); Order, *In Re: Xe Services Alien Tort Litigation*, 09-cv-615 (E.D. Va., Jan. 6, 2010) (dismissing civil action with prejudice due to settlement), available at [http://ccrjustice.org/files/1.6.10%20Order%20dismissing%20case%20due%20to%20settlement\\_2.pdf](http://ccrjustice.org/files/1.6.10%20Order%20dismissing%20case%20due%20to%20settlement_2.pdf).

218. *See* Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, available at [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf).

219. *See id.* art. 12(2).

220. *See id.* arts. 2(2), 2(5).

221. *Id.* art. 12(1).

matters is reached, Iraq cannot exercise jurisdiction.<sup>222</sup> Second, the United States retains the power to block Iraqi legal process for specific acts by certifying that the alleged offenses arose during duty status.<sup>223</sup> Third, Iraqi authorities can only hold U.S. personnel for twenty-four hours; even in cases where they exercise jurisdiction, custody shall reside with U.S. forces.<sup>224</sup> No equivalent provisions exist in SOFAs between the United States and its NATO and major non-NATO allies.<sup>225</sup>

Thus, “progress” towards the U.S. goal of state-building in Iraq has forced the logic of exemption to take on increasingly complicated and uneasy legal forms. When juxtaposed with the concomitant easing of the legal obstacles to the exclusion of out-of-place Muslims described above, one can discern the essential features of the paradox of sovereign equality in a world of unequal power: strong enough to authorize the exclusion of some outsiders, but too weak to hold others accountable, Iraq seems well on its way to taking its rightful place alongside the other sovereign clients of the United States.

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222. *See id.* art. 12(8).

223. *See id.* art. 12(9). Iraqi authorities may contest the certification and force consultation with the Joint Committee, but the final decision appears to rest with the United States.

224. *See id.* art. 12(5).

225. Unlike the U.S.-Iraq agreement, SOFAs with NATO and other major U.S. allies do not allow the United States to veto which crimes under the host state’s domestic law trigger local jurisdiction; they do not allow the United States to unilaterally certify that alleged acts occurred as part of the duties of the accused; nor do they require local authorities to hand over U.S. personnel accused of crimes while pending trial. *Cf.* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. 7, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67; Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, art. 17, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248; Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, U.S.-S. Korea, art. 22, July 9, 1966, 17 U.S.T. 1677, 674 U.N.T.S. 163. For a helpful comparative overview of SOFAs and similar arrangements, see R. Chuck Mason, Congressional Research Service, Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? 3–5 (2008), *available at* <http://www.fas.org/sgp/crs/natsec/RL34531.pdf> (providing a summary of different jurisdictional provisions in SOFAs).

## CONCLUSION: SOLIDARITY AND THE UNIVERSAL

The structural logic of the American-led Global War on Terror is one that ultimately seeks to decide on other countries' behalf which outsiders should be beyond the law and which should be above it. As this conflict enters a new and what has been promised as a more enlightened stage, understanding its fundamental premises—as opposed to its Bushian excesses—is as crucial as ever to the twin tasks of critique and action. This Article contributes to that effort by detailing the consequences of this logic and by unmasking its fundamental assumption: that the United States speaks from the position of the universal, setting the boundaries of which differences are benign and which are suspect. By way of conclusion, it may be helpful to challenge this assumption more directly using a theme mentioned earlier in this Article: the concept of solidarity.

If the position of the universal allows one side to determine which differences are prohibited and which are justified, the stance of solidarity requires different parties to make deliberate choices to stand together on the basis of both shared interests and values, in specific contexts. Solidarity does not refute or deny claims to the universal, but instead provides some benchmarks for evaluating them and the resultant interventions in their name. Instead of sentimental,<sup>226</sup> managerial,<sup>227</sup> atavistic, or other apolitical grounds, it would be useful to evaluate interventions by asking which specific interests and values are in convergence, and which are not. Such a contextual evaluation also requires sharp attention to the question of power: to the extent relations between allies are unequal, such assertions of solidarity should be carefully scrutinized.<sup>228</sup>

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226. Here I draw in part upon Hannah Arendt's contrast between solidarity and pity as principles of action as part of an attempt to situate proper political action within the realm of reason and principle rather than sentiment. See Hannah Arendt, *On Revolution* 88–89 (Penguin 1990) (1963) (describing solidarity as a calculated, beneficial alternative to pity, which is sentimental and in her view thus potentially dangerous).

227. See Jacques Rancière, *Disagreement: Politics and Philosophy* 123–40 (Julie Rose trans., 1998) (criticizing armed humanitarian interventions as a non-political sort of "policing," in which the unused "rights" of disempowered victims are transformed into the absolute "right" of powerful states to wage war in their name).

228. For one study that attempts to analyze and critique such asserted relations of solidarity, see Laleh Khalili, "Standing With My Brother": *Hizbullah, Palestinians, and the Limits of Solidarity*, 49 *Comp. Stud. in Soc'y & Hist.* 276,

The rhetoric of both GWOT and al-Qa'ida tends to postulate a false dichotomy: choices are reduced either to presumptively shared values ("freedom" or "Islam"), or a narrowly-construed notion of interest (hence the competition for "hearts and minds" through provision of material benefits). Moreover, they often ignore context: there is no reason to presume, for example, that U.S. definitions of who is "foreign" and who is an ally embodying universal values would be accepted *a priori* by any given Bosnian Muslim after a U.N. arms embargo that hampered self-defense against ethnic cleansing or by an Iraqi after nearly two decades of sanctions, occupation, and civil war. Acknowledging this has nothing to do with moral relativism or "equivalency" with "terrorists"; it is simply a reminder that the views and interests of others are an important part of the empirical world that must be properly understood and taken seriously. Blindness to the possibility that others may pursue substantively different cosmopolitan or transnational projects is not merely hypothetical: it also explains why the presence of foreign Muslims in places like Bosnia-Herzegovina or Iraq is more likely to be treated as a potential "terrorism" issue rather than, say, understood through the lens of the Non-Aligned or pan-Arabist movements, respectively.

The notion of solidarity and its criteria for evaluating interventions can help guide action as well. Take the particular case of the human rights movement: conventional human rights advocacy in the West, with its combination of compelling victim narratives and abstract international law norms, faces a special challenge with groups such as out-of-place Muslims, who may be marginal to the societies in which they find themselves, let alone to the countries that ultimately determine their fate. The criteria of solidarity, however, could suggest a different approach attuned to the interests of the constituencies whose views one is seeking to change: here, efforts to monitor and, where necessary, oppose "cooperation" between the United States and other countries by their respective publics could become especially important.

For example, when the CIA set up its secret prisons in Poland, it decided not to cooperate with certain local security agencies "precisely because they are subject to civil supervision, both by Parliament and Government."<sup>229</sup> Instead, the CIA partnered with

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278 (2007) (arguing that solidarity relations are influenced by symmetry of power between the actors).

229. Council of Europe Parliamentary Assembly, *supra* note 137, ¶ 167 (quotation marks omitted).

the military intelligence service (Wojskowe Służby Informacyjne, WSI), which not only operated beyond parliamentary oversight, but also benefited “to a large extent” from “its covert penetration of other state and parastatal institutions . . . with undercover ‘functionaries’ in their ranks,” including in the aviation authority, border guard, and customs service.<sup>230</sup> Barely a decade after emerging from an authoritarian regime, Poland’s unaccountable shadow state apparatus acquired support from another government’s attempt to circumvent its own constitutional framework. In contrast to conventional human rights approaches demanding that states simply end abuses and render justice to victims, the concept of solidarity here would highlight how states collude against their own citizens by expanding transnational grey zones of unaccountability. This in turn requires civil society groups on both ends of the relationship to mobilize jointly in response. The aim would not solely be to remedy the abuse of individuals and restore the rule of law, but also to actualize a democratic politics capable of confronting transnational inequalities.

As this example demonstrates, solidarity provides not an organizational program or a substantive political vision per se, but rather basic criteria to evaluate acts of cooperation or mobilization between different groups. Using the requirements of solidarity to assess invocations of the universal will remain crucial as America’s global campaign against “foreign fighters”—structured by the braided logic of exclusion and exemption—gradually settles into its post-Bush incarnation. Solidarity is a reminder that the United States is not the only actor capable of speaking from the position of the universal and that no attempts to do so, whether under banners labeled “the international community,” “Islam,” “socialism,” or anything else, should lie beyond critique.

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230. *Id.* ¶ 171.