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# A Universal Enemy? Legal Regimes of Exclusion and Exemption Under the 'Global War on Terror'

Darryl Li

Yale Law School, [darryl.li@yale.edu](mailto:darryl.li@yale.edu)

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

DARRYL LI\*

*This essay 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 U.S. 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 U.S. and its allies – enjoy various forms of exemption from local legal accountability. This essay illustrates this braided logic of exclusion and exemption by juxtaposing the problems of extraordinary rendition and military contractor impunity in both post-war Bosnia-Herzegovina and post-invasion Iraq. This framework – which predates and will likely outlast the Bush administration – undermines the rule of law and state-building efforts and occludes crucial questions surrounding the legitimacy of how U.S. global power is exercised. This essay employs treaties, Bosnian, Iraqi, and U.S. statutes, cases, and regulations 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 continues to haunt America after eight years of war – the specter of a universal enemy, purported foe not only of the United States but of humanity as such. Many epithets are employed to describe al-Qa‘ida and other armed transnational non-state Islamist groups that occupy the place of the universal enemy: terrorist, extremist, jihadist. But the term “foreign fighter” is particularly useful in analyzing the underlying, distinguishing, and persistent logic at work behind diverse U.S.-driven legal and policy interventions worldwide. From Bosnia-Herzegovina to Somalia to the Philippines, to say nothing of Afghanistan and Iraq, the U.S. 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 these campaigns’ most notorious institutional practices – such as extraordinary renditions, “black site” prisons, and of course, Guantánamo – have overwhelmingly targeted Muslims who are outside of their home countries.

Many have remarked at how the purportedly unique threat of terrorism from groups such as al-Qa‘ida has justified any number of extraordinary measures, including human rights abuses and impunity for them. This essay, however, 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. I argue that the extraordinary 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, there are measures that effectively immunize *other* foreigners – often Americans and their

allies – from local legal accountability in those same countries. Both of these types of arrangements can readily coexist because of a deeper assumption that the U.S. – 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 essay thus presents three contentions. *First*, the under-theorized 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 (GWOT)<sup>1</sup>, a term I will retain for the sake of simplicity. More so than repression at home or conquest abroad, it is the various U.S.-led efforts aimed at foreign fighters in multiple places where the U.S. is itself no less foreign that distinguishes GWOT from other states’ struggles with “terrorism.” 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” then leads to broader efforts to police transnational Muslim mobility, or “Muslims out of place.” Just as ordinary counterinsurgency involves monitoring and managing the entire local population in order to isolate the enemy hiding within it, a globalized counterinsurgency targeting border-crossing individuals sets its sights upon populations that are transnational in nature. The effect has been a targeting of out-of-place Muslims

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<sup>1</sup> A widely-circulated media report indicated that the administration of U.S. president Barack Obama had replaced the term “Global War on Terror” with “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 nonevent. 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.*, GENERAL ACCOUNTING OFFICE, 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.

for exclusion from local legal protection in various countries using a variety of 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 (often 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 – we see 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 both of these logics of exclusion and exemption, thus braiding them together.

This leads to the *third* contention, namely that this braided logic of exemption and exclusion seems natural – the U.S. can readily label these adversaries “foreign” as if it were not – because the U.S. claims to speak from the position of the universal. Unlike a sovereign that merely exercises its prerogative against rebels in his own territory, the U.S. also claims to fight in the name of supporting *other* sovereigns, protecting the order of nation-states against groups seen to be threatening it. When the U.S. declares foreign fighters to be enemies of mankind, it is making a political decision concerning not only its own differences *with* 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 sketched by this paper – namely, the policing of transnational Muslim populations, with its concomitant placement of some people outside the law and others above it – has had far-reaching and disturbing consequences. First and most obvious has been the corrosive effect on the rule of law due to impunity for abuses committed by the U.S. and its allies, both against locals and foreigners. Second, this braided logic ultimately subordinates some national sovereignties to U.S. global imperatives in a manner that undermines the very state-building projects that the U.S. and its allies ostensibly seek to sponsor. And third, the implicit distinction between universal and foreign occludes crucial normative questions about how to assess the legitimacy of political interventions across communities – western, Islamic, and otherwise – and the meanings of solidarity.

In order to demonstrate this structural logic, I use post-war Bosnia-Herzegovina and post-invasion Iraq as case studies, analyzing the transnational interplay between treaties, statutes, court cases, and regulations in each. At first glance, these two situations would seem to have little in common. In terms of historical moments, one is a paradigmatic case of post-Cold War humanitarian intervention, the other is commonly cited as exemplifying the challenges (or errors) of the post-9/11 era. In terms of political contexts, one is a post-conflict situation ruled largely through a multilateral Euro-American effort, the other a very active conflict managed mostly by the United States. In terms of legal backdrops, one is a *sui generis* constitutional protectorate, the other 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 has prompted various measures by the U.S. and its allies to deal with out-of-place Muslims. Although the tools – including bilateral and multilateral treaties, nationality and immigration statutes, and the laws of war – seem to vary widely on the surface, 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 even while elevating western soldiers, contractors, and bureaucrats above legal accountability.

This essay proceeds in three parts: In Part I, I sketch the structural logic that sets GWOT apart from other state-led campaigns against “terrorism” by introducing the category of the foreign fighter, providing some background on the policing of out-of-place Muslims, and analyzing the universal-foreign distinction. In Parts II and III, I 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 considers some of the consequences of this structural logic and presents some of 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 section of the essay sketches the broad outlines of a central, distinguishing, and enduring logic of the U.S.-led campaign against armed transnational non-state Islamist groups, in three parts. *First*, it introduces the figure of the “foreign fighter” as a purportedly unique threat and explains its utility in elucidating what makes the Global

War on Terror distinct from other states' struggles with "terrorism," even in the post-Bush era. *Second*, it describes how concerns over transnational non-state armed Islamist groups emerged in the 1990s, leading to early U.S. efforts to police "out-of-place Muslims." *Third*, it shows how the resulting braided logic of exclusion and exemption relies on an implicit distinction between two rhetorical positions – universal and foreign – on how to deal with difference.

Before proceeding, however, three caveats are in order. First, this is an essay about how the U.S. 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 those 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."

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 U.S. has added an entirely new dimension to them – it is that dimension that is the immediate concern of this paper, however relevant local dynamics may be.



Third, this essay 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 U.S. in the name of *other* sovereigns.<sup>2</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>3</sup> and both of these categories together comprise the vast majority of victims of GWOT-driven policies worldwide. This essay 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. The well-told story of how interrogation policies originally devised to break out-of-place Muslim detainees in Guantánamo – classified as “unlawful enemy combatants” without legal protections –

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<sup>2</sup> 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, 124 S. Ct. 2633 (2004) (U.S. citizen detained in Afghanistan); Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (U.S. citizen detained as criminal suspect inside the U.S., then designated as “unlawful enemy combatant”); Munaf v. Geren, 128 S. Ct. 2207 (2008) (U.S. citizens detained by U.S. forces in Iraq). Such individuals’ experiences, however, are in many ways dissimilar from the bulk of Muslims travelers outside the west who, lacking the relative protection of western passports, form the focus of this paper.

<sup>3</sup> 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 integration. *See, e.g.,* JOCELYNE CESARI, WHEN ISLAM AND DEMOCRACY MEET: MUSLIMS IN EUROPE AND IN THE UNITED STATES (2004); MUSLIM MINORITIES IN THE WEST: VISIBLE AND INVISIBLE (Yvonne Haddad & Jane Smith eds., 2002). An equally rich counterpart discourse in 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 AND MUSLIMS IN INDIA (2003); Ayesha Jalal, “Exploding Communalism: the Politics of Muslim Identity in South Asia,” *in* NATIONALISM, DEMOCRACY, AND DEVELOPMENT 76 (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 (2003).

migrated to Abu Ghraib, whose inmates' legal status was never in doubt, is but one particularly vivid reminder of this fact.<sup>4</sup>

### *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 regard for the welfare of civilians than even locally-bred rebels; and that ultimately they are beyond the realm of political legitimacy. George W. Bush was among those who described the phenomenon most vividly: “the 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>5</sup> Bush repeatedly invoked the need to:

[P]ursue the terrorists and foreign fighters in Iraq and Afghanistan and elsewhere. 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>6</sup>

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<sup>4</sup> The genesis of the structural conditions for such abuses has been widely located in the subordination of prison management to interrogation imperatives, despite longstanding military doctrine mandating a strict separation between the two functions. This process began upon the recommendation of Maj. Gen. Geoffrey Miller, commander of the Guantánamo facility, after a September 2003 visit to U.S. detention centers in Iraq. See Memorandum from Maj. Gen. Geoffrey D. Miller, Commander JTF-GTMO, Guantanamo Bay, Cuba on Assessment of DOD Counter-Terrorism Interrogation and Detention Operations in Iraq (Sept. 9, 2003) (“[I]t is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees.”). See also Article 15-6 Investigation of the 800th Military Police Brigade 8-9 (2004) [hereinafter Taguba Report]; AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 10, 24-25 (2004). Subsequent investigations have revealed how specific interrogation techniques “migrated” to Iraq from Guantánamo via Afghanistan even earlier, in the summer of 2003. See STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY at xxii-xxiv, 157-88 (Comm. Print 2008).

<sup>5</sup> President George W. Bush, Remarks at Fort Bragg, North Carolina (June 28, 2005).

<sup>6</sup> President George W. Bush, Remarks at Pensacola, Florida (Aug. 10, 2004). This line was part of Bush's stump speech during the 2004 campaign. See also, e.g., Remarks at Phoenix, Arizona (Aug. 11, 2004); Remarks at Chippewa Falls, Wisconsin (Aug. 18, 2004).

This perception of foreign fighters has been by no means confined to the foreign policy thinking of the Bush administration. Secretary of State Hillary Clinton has also declared that “members of the Taliban who are not hard-core 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>7</sup>

A simple Google 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>8</sup> “The foreign mujahideen . . . imposed strict Islamic codes of behavior on the neighborhood. They harassed Iraqis who smoked cigarettes or drank water using their 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>9</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>10</sup> While there is debate over the degree of influence foreign fighters have had in anti-U.S. insurgencies

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<sup>7</sup> Radio interview by Radio Free Afghanistan with Hillary Clinton, Secretary of State (Apr. 6, 2009).

<sup>8</sup> David Rohde, *Foreign Fighters of Harsher Bent Bolster Taliban*, N.Y. TIMES, Oct. 30, 2007, at A1.

<sup>9</sup> Nir Rosen, *Home Rule: A Dangerous Excursion into the Heart of the Sunni Opposition*, THE NEW YORKER, July 5, 2004, at 48.

<sup>10</sup> Ellen Knickerbocker, “*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.

over time,<sup>11</sup> there is a widespread 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>12</sup>: travel. 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 the areas they visit. As mentioned above, it is beyond the scope of this paper to evaluate these empirical or normative assumptions; I simply wish to note here, that they remain *assumptions*, having rarely been subjected to serious scrutiny, or weighed against countervailing arguments.<sup>13</sup>

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<sup>11</sup> One widely-cited study notes that “the insurgency [in Iraq] is largely homegrown” but that foreign fighters play a “large a 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 OBEID, SAUDI MILITANTS IN IRAQ: ASSESSMENT AND KINGDOM’S RESPONSE 6 (Center for Strategic & International Studies 2005). Moreover, “many are likely to survive and be the source of violence and extremism in other countries.” *Id.*

<sup>12</sup> 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 Rudy, *Pros and Cons: Americanism Against Islamism in the “War on Terror,”* 97 THE MUSLIM WORLD 1, 33 (2007).

<sup>13</sup> 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); ALAN KRUEGER, WHAT MAKES A TERRORIST?: ECONOMICS AND THE ROOTS OF TERRORISM 83-103 (2007); JOSEPH FELTER & BRIAN FISHMAN, AL-QA’IDA’S FOREIGN FIGHTERS IN IRAQ: A FIRST LOOK AT THE SINJAR RECORDS (Combating Terrorism Center at West Point 2007).

Foreign fighters are presented as a unique kind of adversary insofar as they are both non-local but also *non-state* in nature, a hybrid between a rebel and an invader with no fixed source of accountability. 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 manipulated cog in the wheel of world-revolutionary aggression. He is simply sent to slaughter, and betrayed of everything he was fighting for, everything the telluric character, the source of his legitimacy as an irregular partisan, was rooted in.”<sup>14</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 prerogative of states *as a category* to wage war across borders.<sup>15</sup> The U.S. has effectively argued that al-Qa’ida represents just such a challenge to the state system<sup>16</sup> and that therefore *all* states – not merely the U.S. and its allies – have an interest in defeating it.<sup>17</sup>

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<sup>14</sup> CARL SCHMITT, *THE THEORY OF THE PARTISAN* 52 (A.C. Goodson trans., 2004) (1963). 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 53 (“In the longer view of things the irregular must legitimize itself through the regular, and for this only two possibilities stand open: recognition by an existing regular, or establishment of a new regularity by its own force.”).

<sup>15</sup> See, e.g., Joseph 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.”); MOHAMED-MAHMOUD MOHAMEDOU, *NON-LINEARITY OF ENGAGEMENT: TRANSNATIONAL ARMED GROUPS, INTERNATIONAL LAW, AND THE CONFLICT BETWEEN AL-QAEDA AND THE UNITED STATES* 7 (Harvard University Program on Humanitarian Policy and Conflict Research 2005) (“Al Qaeda is a sub-state, international armed group that is making a claim to a legitimate war against a group of countries”).

<sup>16</sup> 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).

<sup>17</sup> See, e.g., S.C. Res. 1373, 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 UN Charter to impose obligations on all states to take actions against financing of terrorism).

It is not uncommon, of course, 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>18</sup>, outside of their own countries, in part due to criteria promulgated by Secretary of Defense Donald Rumsfeld that called for the transfer to Guantánamo of “non-Afghan Taliban personnel.”<sup>19</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>20</sup> Across the border, former Pakistani President Pervez Musharraf boasted that Pakistan handed over 369 detainees, presumably foreigners, to the

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<sup>18</sup> 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. See 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, although three Pakistani “high-value detainees” – including Khalid Sheikh Mohammed – were captured in Pakistan and subsequently transferred to CIA “black sites.” See INTERNATIONAL COMMITTEE OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY 5 (2007).

<sup>19</sup> Information Paper from 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. 9, 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 U.S. 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 U.S. could rely, with the requisite ability to control local populations.

<sup>20</sup> CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA 85 (2004).

U.S., with individuals there “earn[ing] bounties totaling millions of dollars.”<sup>21</sup> Many detainees at Guantánamo captured in both countries have claimed that they were sold for bounties essentially because they were foreign Muslims. “When [Taliban opponents] capture an Arab,” explained Tunisian Hisham Sliti to a panel of military officers, “they either sold him or stole his belongings and killed him.”<sup>22</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 their country of origin or had dual nationality or analogous status. 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>23</sup>

### *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 U.S. 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 of the U.S.,

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<sup>21</sup> 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).

<sup>22</sup> Summary of Administrative Review Board Proceedings for ISN 174 at 11 (2006). See also, e.g., CSRT Transcript for ISN 672 at 6 (Detainee describing 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 at 1 (“Any Arabs in Pakistan were being arrested at that time.”); MACKAY & MILLER, *supra* note 20, at 334-35 (“ . . . Indonesian intelligence agents were said to be collecting U.S. bounties for any Arab they turned in.”).

<sup>23</sup> See, for example, HORN OF AFRICA: UNLAWFUL TRANSFERS IN THE “WAR ON TERROR” (Amnesty International 2007); 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 (Muslim Human Rights Forum, 2007).

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 UN system.

First, crises of legitimacy within American-backed authoritarian regimes in the Middle East (especially Egypt and Saudi Arabia) manifested themselves in particularly violent struggles between states and armed opposition groups that spilled beyond those countries’ borders. Most important was the war in the 1990s between Egypt, a key U.S. client state, and the armed dissident groups al-Jama‘a al-Islamiyya and al-Jihad al-Islami. After these groups were blamed for the 1993 World Trade Center bombing in New York, the U.S. was more than willing to assist the Egyptian state in hunting down dissidents abroad. The overseas war soon intensified, with the June 1995 assassination attempt on president Hosni Mubarak in Ethiopia and the bombing of the Egyptian embassy in Islamabad in November of that year. In parallel, U.S. client states also participated in rounding up and at times expelling foreigners, especially Arabs, on their soil, as occurred in Pakistan after the Egyptian embassy attack.<sup>24</sup> And in concert with local intelligence agencies, the CIA orchestrated kidnappings of Egyptian dissidents in Croatia and Albania in 1995 and 1998 respectively (and perhaps elsewhere as well), arranging for their

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<sup>24</sup> 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).



repatriation to Egypt, where they were imprisoned, tortured, and in some cases executed.<sup>25</sup>

Second, atrocities befalling Muslim populations in Bosnia-Herzegovina, Chechnya, Kosovo, Kashmir 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>26</sup> – arrived in various conflict areas, they found that they were often not alone: other outsiders were also distributing aid, brokering diplomatic settlements, educating and reforming the people and, of course, fighting.<sup>27</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

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<sup>25</sup> 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; THOMAS KELLOGG & HOSSAM EL-HAMALAWY, *BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT* (Human Rights Watch 2005).

<sup>26</sup> 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) a sense of shared identity, procedures and codes for communicating and 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* (2007); Ilana Feldman, *The Quaker Way: Ethical Labor and Humanitarian Relief*, 34 AM. ETHNOLOGIST 689 (2007); Peter Redfield, *Doctors, Borders, and Life in Crisis*, 20 CULT. ANTHRO. 328 (2005). As usual, Amitav Ghosh led the way. See Amitav Ghosh, *The Global Reservation: Notes Toward an Ethnography of International Peacekeeping*, 9 CULT. ANTHRO. 412 (1994).

<sup>27</sup> If critical scholarship on Internationals is still embryonic, work on such transnational non-western actors is almost non-existent or viewed exclusively through the lens of “terrorism studies” whose attempts to discover charities providing a “cover for terrorism,” putting aside its ample empirical shortcomings, is 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* (Jérôme Bellion-Jourdain & Jonathan Benthall eds., 2003).

constituting “in effect an alternative international community to the official one”<sup>28</sup> is true for a much larger constellation of groups unrelated to al-Qa‘ida that operates outside of a western-dominated international system perceived as inefficient at best, anti-Muslim at worst.

To the extent Internationals took on the burdens of governance, the concern with a group of people grouped under the category of “foreign (Muslim) fighter” created an operational dilemma of how to determine *which* (Muslim) foreigners are fighters. This is no simple task, since many traveling Muslims operate within institutional frameworks that were already part of or compatible with the international community, such as UN-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>29</sup> In other words, in any given war zone there may be Muslim travelers with no political 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>30</sup>; and perhaps those few who, like al-Qa‘ida, wish to attack the

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<sup>28</sup> BARNETT RUBIN, *THE FRAGMENTATION OF AFGHANISTAN* at xiv-xv (2nd ed. 2002).

<sup>29</sup> 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). On the parallel between al-Qa‘ida 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.* 2, 210 (2004).

<sup>30</sup> 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*, *THE 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

United States on its own soil allegedly for its support for dictatorial regimes in the Middle East and Israel.

The application of a poorly defined category such as “foreign fighter” to a complex empirical reality of 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” (good) Muslims and “radical” (bad) Muslims presupposes the need to know *all* Muslims, the concern over foreign (Muslim) fighters necessarily renders (Muslim) foreigners into a categorical object that needs to be known and appropriately dealt with. Before long, however, the object of knowledge as constructed – Muslim foreigners – becomes a source of anxiety in itself. This is the problem of what can be called “Muslims out of place.”<sup>31</sup>

Since the early 1990s, the U.S. government and its allies have pursued various campaigns against out-of-place Muslims. We likely are aware of only a small part of the total picture, but it is possible to discern two broad approaches. First, there is the attempt 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 is the extraordinary rendition program, often used to send individuals to their countries of

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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.

<sup>31</sup> The phrase “out of place” appears prominently in two very different texts that inform the ambivalence of the term, as 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 (1966). To be “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 . . .”).

origin for interrogation beyond the apparent responsibility of the United States.<sup>32</sup> More broadly – 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.

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 2001 attacks in New York and Washington, the U.S. developed mechanisms for direct control over out-of-place Muslims through indefinite extraterritorial detention and 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>33</sup> In May 2005, the CIA held 94 such detainees in its own facilities.<sup>34</sup> The extraordinary rendition program has also been used to send individuals to third countries, especially Jordan and Morocco, some of whom were

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<sup>32</sup> The number of individuals who have passed through the extraordinary rendition program is unclear. In 2002, the CIA acknowledged “rendering” seventy 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. 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), [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. Either set of figures is true, they suggest that the CIA did not increase its use of rendition after 2001 and may even have decreased it.

<sup>33</sup> 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 is due to close by January 2010, although 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 U.S. continues to oppose habeas corpus rights for detainees held there. *See* *In re: Barack Obama, et al.*, No. 09-8004 (D.C. Cir. filed June 11, 2009) (appealing lower court ruling extending habeas corpus jurisdiction to Bagram detainees captured outside Afghanistan).

<sup>34</sup> *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 General Counsel, Central Intelligence Agency 29 (May 30, 2005) [hereinafter Bradbury Memorandum].

subsequently transferred to Guantánamo.<sup>35</sup> This arrangement, paradoxically, radicalizes the out-of-placeness of the people it targets by attempting to suspend them indefinitely beyond the protection of their own governments and outside the concern of the states hosting them, but nevertheless within the complete control of the United States.<sup>36</sup>

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. 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. I refer to this contrast – exclusion from legal protection for out-of-place Muslims, and exemption from legal accountability for the U.S. and its allies – as 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 U.S. and its allies regard “foreignness” as a potential problem.

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<sup>35</sup> 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 (June 7, 2006). For more on transfers to Jordan of individuals with no apparent tie to that country, see JOANNE MARINER, *DOUBLE JEOPARDY: CIA RENDITIONS TO JORDAN* (Human Rights Watch 2008).

<sup>36</sup> 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 Terror Cases*, N.Y. TIMES, May 24, 2009, at A1.

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

What makes the braided logic of exemption and exclusion at work in GWOT seem natural? Perhaps the most obvious answer is some reference to sovereignty. This critique has two sides: domestically, the executive branch is upsetting the balance of powers through sweeping assertions of power, while internationally it disregards international legitimacy and international law. In both cases, there is a concern about “lawlessness,” expressed as an arbitrary and destructive willfulness.<sup>37</sup> This analysis, however prescient, is nevertheless inadequate on both counts. Domestically, there is every reason to believe support is widespread (both across the major political parties as well as the branches of government) for the need to pursue foreign fighters abroad and for at least some of the measures employed to that end. Internationally, the Bush administration’s contemptuous attitude towards international law and institutions should not distract from the fact that cooperation with other states<sup>38</sup> has always been crucial to U.S. “anti-terrorism” policy, both operationally and in terms of legitimacy.<sup>39</sup> GWOT is

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<sup>37</sup> A variant on these accounts are the critiques of sovereignty as enabling permanent states of exception, enabling discretion that is unrestrained yet nevertheless juridically grounded. See GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans. 1998) (1995). As Nasser Hussain has correctly pointed out, however, the concrete problem is not one of lawlessness per se, but rather one of “hyperlegality” – “not a suspension of law but an intensification of an administrative and bureaucratic legality” through the proliferation of regulations, statutes, and other written binding norms. Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 *CRITICAL INQUIRY* 734, 744 (2007).

<sup>38</sup> Perhaps the most striking example of such international “cooperation” was the 2002 visit by officials of the People’s Republic of China to Guantánamo to interrogate Chinese citizens detained there. See, e.g., *Chinese Interrogation vs. Congressional Oversight: The Uighurs at Guantánamo: Hearing Before the H. Subcomm. on Int’l Orgs., Human Rights and Oversight*, 111th Cong. (2009).

<sup>39</sup> In the question period following a speech widely described as repudiating the “war on terror” framework, senior Obama advisor and former CIA National Counterterrorism Center director John Brennan signaled the ongoing importance of U.S. client states, claiming that GWOT detentions outside of Iraq and Afghanistan were “dwindling . . . because foreign governments are standing up to their responsibilities now.” John Brennan, Deputy Nat’l Sec. Adv. for Counterterrorism and Homeland Security, *Protecting the American People from Terrorism and Violent Extremism*, Speech at the Center for Strategic & International Studies (Aug. 6, 2009). See also Schmitt & Mazzetti, *supra* note 36.

far too broad an effort to rest solely on one government's asserted right to do as it pleases anywhere on earth.

In order to understand the normative framework justifying the braided logic of exemption and exclusion, let us 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 U.S. 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>40</sup> The point of this observation is not to 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.

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>41</sup> This is *not* tantamount to simply “imposing” one’s own system or views on

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<sup>40</sup> John J. Kruzal, *Afghan Minister Recommends Border Region Task Force*, AMERICAN 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, *see id.*, a statement clearly intended to downplay any domestic concerns over the legitimacy of the Karzai regime.

<sup>41</sup> 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 Jouanet, *Universalism and Imperialism: The True-False Paradox of*

others, nor does it necessarily imply arrogance; rather, the position of the universal always already 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 U.S. 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 U.S. ultimately exercises a veto. At the same time, the U.S. can assign a presumptively illegitimate value to differences *between* others. This position can be 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

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*International Law?*, 18 EUR. J. INT'L L. 3, 379 (2007). 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 EMANCIPATIONS 20 (1996).



a supporter of this logic would deny that the U.S. is “foreign” in a place 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 U.S. 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 at stake between the U.S. and local populations in sites of intervention, declaring 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, their choices as to who is merely a foreigner and who is the bearer of universal values cannot be assumed in advance. This further raises 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 essay, 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 U.S. 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*, 128 S. Ct. 2229 (2008). This shift reflects the increasing interest in time over former foreign fighters. In this section of the paper, I first provide 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. I then move to detail how the logic of exemption applies to a category of outsiders commonly referred to as "Internationals" who occupy the position of the universal as described above. Both of these moves undermine the very state-building project in BiH under the General Framework Agreement for Peace ("Dayton Accord")<sup>42</sup> that the U.S. and its allies ostensibly seek to sponsor.

The background of U.S. concerns over out-of-place Muslims is the participation of foreign (Muslim) fighters, especially Arab mujahids (religious warriors)<sup>43</sup>, in the

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<sup>42</sup> General Framework Agreement for Peace in Bosnia-Herzegovina, Dec. 14, 1995, 35 I.L.M [hereinafter Dayton Accord].

<sup>43</sup> 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 UN 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. For a sampling of publicly available primary 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; Abu 'Abd al-'Aziz (pseudonym), MAWQIF AMIR 'ALA AL-MUJAHIDIN AL-'ARAB [A COMMANDER'S POSITION TOWARDS THE ARAB MUJAHIDS], <http://www.paldf.net/forum/showthread.php?t=7023>. 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] (2002?). Audio hagiographies include: IN THE HEARTS OF GREEN BIRDS (Azzam Publications 1996); UNDER THE

Bosnian war (1992-1995) alongside or in the ranks of the Muslim-majority Army of the Republic of Bosnia-Herzegovina (Armija Republike Bosne i Hercegovine, ARBiH).<sup>44</sup>

There were also relief organizations from Arab or Islamic countries operating in the war zone<sup>45</sup>, whose relationships with Arab military volunteers are subject to much debate. In both the military and aid realms, Arabs already living in ex-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 Bosnians who had worked or studied in the Arab world.

The relationships between Bosnian Muslims and Arab activists is a complex matter beyond the scope of this paper; one can say that there was both gratitude at their solidarity and sacrifice and tension or even hostility over differences in religious practice and concerns over proper subordination to the military chain of command. Arab volunteers also developed a reputation for brutality towards captured prisoners, including grisly accounts of beheadings.<sup>46</sup> In part because of this perception, Arab non-combatants,

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SHADES OF SWORDS (Azzam Publications 1997). 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); JOHN SCHINDLER, UNHOLY TERROR: BOSNIA, AL-QA'IDA, AND THE RISE OF GLOBAL JIHAD (2007).

<sup>44</sup> Drawing far less attention have been volunteers from outside ex-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 1992-1995 at 205-06 (2003).

<sup>45</sup> See Jérôme Bellion-Jourdain, *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); 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); ANWAR AL-HADI, RIHLAT AL-NAR WAL-THULUJ [THE JOURNEY OF FIRE AND ICE] (1996).

<sup>46</sup> See Prosecutor v. Enver Hadžihanović and Amir Kubura, Case No. IT-01-47-T, Judgment (Mar. 15, 2006); Prosecutor v. Rasim Delić, Case. No. IT-04-83-T, Judgment (Sept. 15, 2008).

including relief workers, also found themselves the target of kidnappings and assaults by opposing forces hoping to exchange them as war captives.<sup>47</sup>

The presence of foreign Muslim fighters was a major concern for the U.S. 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>48</sup> “One of the key US 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>49</sup>

This concern was reflected in the final text of the Dayton Accord, which required the withdrawal of “All Forces . . . not of local origin” as well as of “all foreign Forces, including individual advisors, freedom fighters, trainers, [and] volunteers” within thirty days.<sup>50</sup> Curiously, the same provision specifically exempted UN and NATO-led peacekeeping forces and the UN International Police Task Force (IPTF). 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 UN) – 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 next two sections.

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<sup>47</sup> 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); H.R. and Mohamed Momani v. FBiH, CH/98/946 (Bosn. & Herz. Human Rights Chamber 1999).

<sup>48</sup> RICHARD HOLBROOKE, *TO END A WAR* 320 (Rev. ed. 1998).

<sup>49</sup> CARL BILDT, *PEACE JOURNEY: THE STRUGGLE FOR PEACE IN BOSNIA* 102 (Weidenfeld and Nicolson 1998) (1997).

<sup>50</sup> Dayton Accord, *supra* note 42, Annex IA, art. III.

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

Throughout the post-Dayton period, and especially after 9/11, the U.S. and its allies in BiH have sought the exclusion of out-of-place Muslims, including naturalized citizens, from legal protection, even at the expense of violating 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 most Arab combatants appear to have left the country around that time. An undetermined number, however, obtained BiH citizenship by virtue of their army service<sup>51</sup> or through marriage to BiH citizens, causing Western concerns over foreign fighters to linger.<sup>52</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>53</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>54</sup> In addition, articles 40 and 41 created a special

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<sup>51</sup> According to an amendment enacted in May 1993 and in effect until the OHR-imposed citizenship law, in 1997 foreign members of the Bosnian armed forces would obtain citizenship without having to fulfill the standard naturalization requirements (BH Gazette 11/93, 10 May 1993).

<sup>52</sup> 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 seeking refuge in BiH from war crimes charges in his own country, the State Court of BiH recently 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.” Decision, Ex-21/09 at 3 (Bosn. & Herz. State Court 2009).

<sup>53</sup> In 2005, SFOR was succeeded by a European Union Force (EUFOR) with largely the same composition, as well as a residual NATO element in the country.

<sup>54</sup> HR Decision on the Law on Citizenship of Bosnia and Herzegovina (BH Gazette 4/97, 23 Dec 1997) [hereinafter 1997 BiH Law on Citizenship] permitted denationalization in cases of fraudulent acquisition of

hybrid State Commission charged with reviewing wartime naturalizations, composed of six Bosnian and three international members. Although the Commission appears to have revoked few if any citizenships at the time, its composition and manner of establishment both reflect intimate external involvement over one of the core dimensions of sovereignty, namely citizenship.

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, aka ‘Imad al-Masri or Eslam Durmo, of his BiH citizenship without acquiring proper approval from all relevant state bodies or providing opportunity for appeal. Durmo 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>55</sup> A representative of the U.S. Embassy in Sarajevo participated in the meeting where the decision to expel Durmo was taken.<sup>56</sup> The Human Rights Chamber for BiH (HRC) – a hybrid court composed of local and European jurists – later 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>57</sup>

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citizenship, prohibited service in a foreign military, and failure to fulfill naturalization conditions after the law’s entrance into force (art. 23).

<sup>55</sup> “Egypt: Further information on forcible return / Risk of Torture, Al-Sharif Hassan Saad, Ussama Farag Allah,” Amnesty International urgent action (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.

<sup>56</sup> See *Eslam Durmo v. Bosnia and Herzegovina and FBiH*, CH/02/9842 ¶ 58 (Bosn. & Herz. Human Rights Chamber 2003).

<sup>57</sup> See *id.* ¶¶ 82-89, 130. Durmo was repatriated with Egyptian citizen and BiH resident Sa’d Hasan al-Sharif, who was reportedly released and lives in Egypt.

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 69-year-old former activist in the Egyptian Muslim Brothers and a well-known author<sup>58</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 stitched from beatings.<sup>59</sup> Khafagy was released by Egyptian authorities without charge and later returned to Germany<sup>60</sup>, where the Bundestag is investigating his mistreatment.<sup>61</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 them 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>62</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, "If we leave Bosnia, God save your

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<sup>58</sup> Ironically, Khafagy's best-known work is his memoir of 16 years as a political prisoner in Egypt. See 'ABD AL-HALIM KHAFAGI, '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).

<sup>59</sup> 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>.

<sup>60</sup> See Majdi Sa'id, *Fi Diyafat Muslimi Almanya [In the Hospitality of Germany's Muslims]*, ISLAMONLINE.NET, Aug. 1, 2006, <http://www.islamonline.net/arabic/Daawa/NonMuslims/2006/08/01.shtml>.

<sup>61</sup> See Press Release, Bundestag, Kanzleramt war über den Fall Khafagy informiert [Chancellor's Office Was Informed of Khafagy Incident] (July 17, 2009).

<sup>62</sup> Under the Dayton Accord, Bosnia-Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and Republika Srpska. See Dayton Accord, *supra* note 42, Annex IV, art. I(3).

country, Mr. Prime Minister.”<sup>63</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. Even the 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>64</sup> Local authorities subsequently exonerated the men of any wrongdoing and the HRC found that their handover to U.S. authorities and expulsion violated a number of BiH’s obligations under the ECHR.<sup>65</sup> Over six years and several U.S. Supreme Court decisions<sup>66</sup> later, the U.S. government withdrew nearly all of its allegations against the men and a federal district court judge ordered the release of five of them.<sup>67</sup>

The expulsion of the Algerians in particular provoked widespread outrage, including tense confrontations between protesters and police. Subsequent efforts to deal with the “problem” of naturalized foreigners and specifically some eight hundred people of “Afro-Asian” origin (approximately 5% of all naturalizations since independence), were more legalistic, multilateral, and systematic. In 2005, the BiH Parliamentary

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<sup>63</sup> 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>.

<sup>64</sup> *Id.*

<sup>65</sup> See Hadž Boudellaa et al. v. Bosnia and Herzegovina and FBiH, CH/02/8679 (Bosn. & Herz. Human Rights Chamber 2002); Belkasem Bensayah v. Bosnia and Herzegovina and FBiH, CH/02/9499 (Bosn. & Herz. Human Rights Chamber 2003).

<sup>66</sup> See, for example, *Rasul v. Bush*, 542 U.S. 466 (2004) (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).

<sup>67</sup> See *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). The sixth man, Belkacem Bensayah, is appealing the decision to continue his detention. See *Boumediene v. Obama*, No. 08-5537 (D.C. Cir. filed Dec. 31, 2008).



Assembly adopted a series of amendments to the citizenship law<sup>68</sup> empowering the State Commission to review all naturalizations from April 6, 1992 to January 1, 2006 (instead of 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 naturalization had not been applied.”<sup>69</sup> It is possibly the loosest standard for denationalization in the world,<sup>70</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 standard appeal process, leaving petitioners essentially without any right to a hearing, either in the first instance or upon review.<sup>71</sup>

In early 2006, the State Commission began reviewing the files of the 10% of those naturalized since independence who were not from other former Yugoslav

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<sup>68</sup> In the interests 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 in the case of *Al Husin Imad* (AP 1222/07).

<sup>69</sup> BiH Law on Citizenship (amended 2005), art. 41(4)(a). 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 1997 BiH Law on Citizenship, *supra* note 54, art. 41(3). 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), 41(4)(a)-(d).

<sup>70</sup> Major treatises on comparative nationality law do not contain any evidence of denationalization laws as sweeping as BiH’s. See, e.g., PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW (2nd ed. 1979); RUTH DONNER, THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW (1994). A recent survey of laws on loss of nationality amongst 24 (mostly European) states does not indicate anything similar. See Gerard-René de Groot, *Loss of Nationality: A Critical Inventory*, in RIGHTS AND DUTIES OF DUAL NATIONALS: EVOLUTION AND PROSPECTS 201 (David Martin & Kay Hailbronner eds., 2003).

<sup>71</sup> 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), *supra* note 69, art. 41(8). These include a number of procedural safeguards, including rights to participate in fact-finding processes guaranteed in the Law on Administrative Procedure (BH Gazette, 29/02, 12/04), arts. 133, 219, 225. Subsequent appeals to higher courts also do not include the right to a hearing.

republics, mailing out brief (often 1-2 page) decisions soon thereafter. 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>72</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>73</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>74</sup> As of July 2009, seven men were held in the Lukavica detention center outside Sarajevo pending deportation, six of them Arabs. 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>75</sup>

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<sup>72</sup> See IN THE NAME OF SECURITY: ROUTINE ABUSES IN TUNISIA 31 (Amnesty International 2008) (reporting that Ferchichi was “detained incommunicado for six days, during which he alleged he was beaten [and] suspended upside down and in the *poulet rôti* [“roast chicken”] position”).

<sup>73</sup> See Luiza Toscane, *Le Tribunal Militaire Condamne Badreddine Ferchichi* [Military Tribunal Convicts Badreddine Ferchichi], GENERATION TUNEZINE, May 21, 2009, <http://generationtunezine.20minutes-blogs.fr/archive/2009/05/21/le-tribunal-militaire-condamne-badreddine-ferchichi.html>.

<sup>74</sup> 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* [Deportation of Algerian Atau Mimun], NEZAVISNE NOVINE (Banja Luka), Dec. 13, 2007. 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-Bahrayn* [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; ‘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 (giving Maktouf’s surname as Ma‘tuf).

<sup>75</sup> 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>.

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>76</sup> The Constitutional Court of Bosnia-Herzegovina (CCBH) first considered this issue in an appeal by Imad Husin, aka 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 with a Bosnian woman. 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>77</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>78</sup> The CCBH did not attempt to reconcile this stance with jurisprudence of the European Court of Human Rights<sup>79</sup> or decisions of its own<sup>80</sup> that

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<sup>76</sup> 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 42, Annex IV, art. II(2).

<sup>77</sup> See Imad al Husin, AP-1222/07 ¶¶ 68, 92 (Bosn. & Herz. 2008). 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 International, Helsinki Committee 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. 17, 2008), <http://www.hrw.org/en/news/2008/10/23/bosnia-and-herzegovina-halt-effort-deport-syrian-risk-torture>.

<sup>78</sup> See Imad Al Husin ¶¶ 46-48 (quoting Philip Burnett Franklin Agee v. UK, 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 citizen challenging denationalization.

<sup>79</sup> See, e.g., *Le Compte, Van Leuven and De Meyere v. Belgium*, ECtHR 6878/75 (suspension of medical licenses), *Raimondo v. Italy*, ECtHR 12945/87 (land confiscation); *Skärby v. Sweden*, ECtHR

accorded the fair hearing protections of article 6(1) to 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>81</sup> An OHR task force works directly with the State Commission<sup>82</sup> and the Peace Implementation Council Steering Board, which oversees OHR, noted the State Commission’s “critical importance for the counter-terrorism agenda.”<sup>83</sup> In 2007, then High Representative Miroslav Lajčák linked expulsion of Arabs to progress on relaxing

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14/1989/174/230 (application of planning laws), *Guchez v. Belgium*, 40 Eur. Comm’n H.R. Dec. & Rep. 109 (1984) (right to practice architecture as profession); *Lombardo v. Italy*, ECtHR 12490/86 (judge’s right to pension).

<sup>80</sup> See DEPOS – Demokratski pokret Srpske, AP-2679/06 ¶ 21 (Bosn. & Herz. 2006) (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 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 (Bosn. & Herz. 2003) (emphasis added).

<sup>81</sup> See BiH Council of Ministers, 108th Session Conclusions (Feb. 16, 2006) (announcing appointment of State Commission members); Council of Europe Committee of Ministers, 956d 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) (CVs of international members).

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.

<sup>82</sup> See 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” (Jan. 31, 2006); “Report to the European Parliament by the OHR and EU Special Representative for BiH, June-December 2005” (Jan. 28, 2006).

<sup>83</sup> “Communique by the PIC Steering Board,” Mar. 15, 2006, [http://www.ohr.int/pic/default.asp?content\\_id=36760](http://www.ohr.int/pic/default.asp?content_id=36760).

European visa requirements.<sup>84</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>85</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>86</sup> According to one diplomatic source, “We can’t pretend there is some imminent threat. That is not the case.”<sup>87</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>88</sup>

### *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

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<sup>84</sup> 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).

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; *Bosnian Leader “Yielded” to U.S. “Pressure” Over Dismissal – Security Minister*, BBC MONITORING, July 23, 2009 (summary of interview with Sadović in *Dani* magazine).

<sup>85</sup> “U.S. Government Assistance to and Cooperative Activities with Central and Eastern Europe: Country Assessment – Bosnia,” January 2007, available at <http://www.state.gov/p/eur/rls/rpt/92672.htm>.

<sup>86</sup> There has been one war crimes conviction (KŽ 32/05) involving Arabs in BiH, plus a handful of criminal cases, including a September 1997 car bombing (KŽ 41/2000). 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.

<sup>87</sup> Nicholas Wood, *Bosnia Changes its Mind on Foreign Fighters: Once Welcomed, Many Face Deportation*, INT’L HERALD-TRIB., Aug. 1, 2007, at 2.

<sup>88</sup> Jonathan Finer, *In Bosnia, Former Fighters Face Expulsion*, WASH. POST, Sept. 4, 2007, at A14.

“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, giving rise to the charge that BiH is less an independent state and more a Euro-American protectorate often ruling undemocratically.<sup>89</sup> Most important is OHR, with its ability to impose legislation and sack elected officials.<sup>90</sup> One third of the nine-member Constitutional 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

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<sup>89</sup> See, e.g., DOMINIK ZAUM, THE SOVEREIGNTY PARADOX: THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING 81-117 (2007); Gerald Knaus & Felix Martin, *Travails of the European Raj: Lessons from Bosnia and Herzegovina*, 14 J. OF DEMOCRACY 3, 60 (2003); DAVID CHANDLER, BOSNIA: FAKING DEMOCRACY AFTER DAYTON (2000). 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., BETTER LATE THAN NEVER: ENHANCING THE ACCOUNTABILITY OF INTERNATIONAL INSTITUTIONS IN KOSOVO (Human Rights Watch 2009); THE APPARENT LACK OF ACCOUNTABILITY OF INTERNATIONAL PEACE-KEEPING FORCES IN KOSOVO AND BOSNIA-HERZEGOVINA (Amnesty International 2004).

<sup>90</sup> OHR’s mandate is based in the Dayton Accord, *supra* note 42, Annex X, 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 “PIC Bonn Conclusions,” art. 11, Dec. 10, 1997. 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 country to EU primacy. OHR’s previous June 30, 2008 closure date, however, has been indefinitely postponed. See Miroslav Lajčák, High Rep. of the Int’l Community, Remarks Following the Implementation Council Steering Board Sessions (Feb. 27, 2008) (outlining conditions for end of OHR’s mandate, including “Fiscal Sustainability of the State” and “Entrenchment of the Rule of Law”).

single ethnic group.<sup>91</sup> A European-staffed Integrated Police Unit (IPU), with the power to conduct autonomous operations, superseded the UN IPTF in 2002.<sup>92</sup>

The extensive role of the U.S. 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>93</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>94</sup> Similarly, the Dayton Accord grants IPTF personnel and even their families the sweeping privileges normally accorded only to diplomatic envoys and the most senior UN officials, including immunity from arrest or any criminal prosecution.<sup>95</sup> Ordinary international civil servants and their families also enjoy the status of diplomats under the Vienna Convention on Diplomatic

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<sup>91</sup> Dayton Accord, *supra* note 42, Annex IV, art. VI(1)(a).

<sup>92</sup> 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*, HUMAN RIGHTS CHAMBER FOR BIH: DIGEST OF DECISIONS, 1996-2002, 1 (2003).

<sup>93</sup> 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 UN peacekeeping forces enjoy immunity from local jurisdiction as a whole, but individual peacekeepers generally enjoy immunity from local civil jurisdiction only in relation to 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).

<sup>94</sup> See Dayton Accord, *supra* note 42, Appendix B to Annex IA, art. VII (emphasis added).

<sup>95</sup> See Dayton Accord, *supra* note 42, Annex XI, 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 [UN] 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, 1 U.N.T.S. 15 [hereinafter, U.N. Immunities Convention].

Relations. These include: OHR personnel, the head of the local mission of the Organization for Security & 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>96</sup>

One could argue that such sweeping powers were necessary in order to facilitate an ambitious post-war state-building project 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>97</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 UN peacekeeping missions. Normally civilian personnel working for the UN have only “functional” immunity, which does not protect against arrest or detention<sup>98</sup>; or they may enjoy “expert” 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>99</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

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<sup>96</sup> See Dayton Accord, *supra* note 42, Annex III, art. III(3)-(4); Annex VI, art. III(4); Annex VIII, art. III(3); Annex X, art. III(4). These immunities are described in the Vienna Convention on Diplomatic Relations arts. 29-36, Apr. 18, 1961, 500 U.N.T.S. 95.

<sup>97</sup> In the 14 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.

<sup>98</sup> 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 (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.”). Section 18 sets out a regime that is more limited than that accorded to either diplomats or experts on mission and does not include immunity from arrest. See U.N. Immunities Convention, *supra* note 95, art. VI., § 18.

<sup>99</sup> U.N. Immunities Convention, *supra* note 95, art. VI., § 22.



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>100</sup> This tension emerged clearly, for example, when Internationals resisted the use of the new Bosnian Konvertible Mark – which they introduced to help unify BiH through displacing the use of Yugoslav, Croatian, and other currencies – to pay their own salaries.<sup>101</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 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>102</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 consider applications directed against SFOR”<sup>103</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

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<sup>100</sup> Rawski also notes some of these objections. *See* Rawski, *supra* note 98.

<sup>101</sup> COLES, *supra* note 26, at 69-70.

<sup>102</sup> 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, CH/99/2425 ¶ 51 (Bosn. & Herz. Human Rights Chamber 2001).

<sup>103</sup> Decision on Admissibility, Hajder et al. v. FBiH, CH/00/3771 ¶ 19 (Bosn. & Herz. Human Rights Chamber 2002). Hence, in both cases, Internationals were ultimately dictating outcomes without possibility of appearing before the HRC as respondents.

priest and his son, neither of them linked to Karadžić<sup>104</sup>; SFOR rejected the victims' compensation claim.<sup>105</sup> SFOR has also detained BiH citizens without judicial authority or charge, in one case for over three months.<sup>106</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>107</sup> In November 2002, Human Rights Watch reported that 18 IPTF monitors implicated in sex trafficking or prostitution had been repatriated and never prosecuted. 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. A report by the UN Mission in Bosnia-Herzegovina documented the discovery by local police of two foreign sex workers being held against their will in the basement of an SFOR contractor's home

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<sup>104</sup> 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.”).

<sup>105</sup> See EUROPE & CENTRAL ASIA: SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS IN THE REGION: JANUARY-JUNE 2005 at 13(Amnesty International 2005).

<sup>106</sup> THE APPARENT LACK OF ACCOUNTABILITY OF INTERNATIONAL PEACE-KEEPING FORCES IN KOSOVO AND BOSNIA-HERZEGOVINA, *supra* note 89, at 23-26.

<sup>107</sup> 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, UK 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 UK. See Robert Capps, *Sex-slave Whistle-Blowers Vindicated*, SALON.COM, Aug. 6, 2002, <http://dir.salon.com/story/news/feature/2002/08/06/dyncorp/index.html>.

after having been purchased for 7,000 Deutschmarks. The contractor was subsequently repatriated.<sup>108</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, but in both of those cases, liability was limited to Bosnian authorities. The all-important role of the U.S. 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 section of the paper charts the emergence of out-of-place Muslims as a “problem” in Iraq, in the move from the Ba‘th regime’s pan-Arabist policies to the U.S. anxiety over controlling transnational Muslim mobility. It demonstrates how, as in Bosnia-Herzegovina, the U.S. in Iraq has consistently sought to place certain outsiders, namely

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<sup>108</sup> See MARTINA VANDENBERG, *HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION* 49-68 (Human Rights Watch 2002).

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 U.S. collided with the privileged position that citizens of Arab states enjoyed under pre-invasion Iraqi law, relative to other foreigners.<sup>109</sup> This distinction was grounded in the Ba‘thist commitment to pan-Arabism.<sup>110</sup> Pre-invasion Iraqi law explicitly exempted citizens of 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>111</sup> A 1975 law permitted the Interior Minister to exempt any adult Arab from standard naturalization requirements.<sup>112</sup> Unlike other foreigners, Arabs could be hired for state positions with the same duties and privileges as Iraqis.<sup>113</sup> They could also join professional and trade associations.<sup>114</sup>

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<sup>109</sup> 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). 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.

<sup>110</sup> See SALIH AL-HASSUN, HUQUQ AL-AJANIB FIL-QANUN AL-‘IRAQI MA‘A ISHARA KHASSA LI-WAD‘ AL-MUWATIN AL-‘ARAB 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] (1981).

<sup>111</sup> Qanun iqamat al-ajanib [Foreigners’ Residency Law], Law No. 118 (1978) 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 have work contracts or similar commitments. See *id.* art. 8(1).

<sup>112</sup> Qanun manh al-jinsiyya al-‘Iraqiyya lil-‘Arab [Law on Granting of Iraqi Nationality to Arabs], Law No. 5 (1975) art. 1. The provision, which specifically excludes Palestinians, was folded into the later Iraqi Nationality Law, Law No. 46 (1990) art. 7.

<sup>113</sup> See Revolutionary Command Council Decision 384 (1972).

<sup>114</sup> See AL-HASSUN, *supra* note 110, at 246-47.

These laws helped encourage large-scale emigration from the Arab world in the 1970s and 1980s; according to one conservative estimate, up to 1.25 million Egyptian workers alone lived in Iraq in 1990.<sup>115</sup> There were also 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, save for the then 34,000-strong Palestinian population.<sup>116</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>117</sup>

Many of the laws favoring Arabs over other foreigners were explicitly justified in pan-Arabist terms. The original 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.”<sup>118</sup> The 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

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<sup>115</sup> See RALPH SELL, GONE FOR GOOD?: EGYPTIAN MIGRATION PROCESSES IN THE ARAB WORLD 31 (1987); GIL FEILER, LABOUR MIGRATION IN THE MIDDLE EAST FOLLOWING THE IRAQI INVASION OF KUWAIT 15 (1993).

<sup>116</sup> See PETER BOUCKAERT, BILL FRELICK & CHRISTOPH WILCKE, NOWHERE TO FLEE: THE PERILOUS SITUATION OF PALESTINIANS IN IRAQ 8 (Human Rights Watch 2006).

<sup>117</sup> 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 (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).

<sup>118</sup> Eighth Amendment to Foreigners’ Residency Law of 1961, Law No. 99 (1972). The 1978 Foreigners’ Residency Law incorporated this exemption, see *supra*, note 111. A 1980 amendment to the same law also created a special category of expatriate citizen [al-muwatin al-mughtarib] – people of Arab origin not living in any Arab country and without citizenship in any Arab country – with rights to enter the country without a visa and to reside in Iraq with a permit. See Third Amendment to Foreigners’ Residency Law, Law No. 208 (1980), art. 2.

borders fabricated by the colonizer.”<sup>119</sup> These laws, of course, do not mean that pre-invasion Iraq was a borderless pan-Arab utopia: foreign Arab residents were, after all, as vulnerable to Saddam Hussein’s security apparatus as ordinary Iraqis. Rather, the point here 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.

This expressed ideological commitment to pan-Arabism was tied to at least three other factors: First, geopolitically, Iraq and Syria competed for the mantle of pan-Arab leadership, especially after the 1978 Camp David accords placed Egypt firmly in the U.S. orbit.<sup>120</sup> Second, the Iraqi economy experienced a massive demand for foreign labor driven by the oil industry and war with Iran,<sup>121</sup> providing additional rationales for such laws.<sup>122</sup> Third, the commitment to pan-Arabism in Iraq cannot be properly understood apart from the history of modern Iraqi nationalism – as the historian Eric Davis has argued, pan-Arabism provided a secular basis for national identity that simultaneously appealed specifically to the Ba’th regime’s most important political constituency, the minority Sunni Arab population.<sup>123</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 essay uses debates over

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<sup>119</sup> Law on Granting of Iraqi Nationality to Arabs, *supra* note 112, art. 1.

<sup>120</sup> See MALIK MUFTI, SOVEREIGN CREATIONS: PAN-ARABISM AND THE POLITICAL ORDER IN SYRIA AND IRAQ (1996); EBERHARD KIENLE, BA’ATH V. BA’ATH: THE CONFLICT BETWEEN SYRIA AND IRAQ 1968-1989 (1990).

<sup>121</sup> See KADHIM AL-EYD, OIL REVENUES AND ACCELERATED GROWTH: ABSORPTIVE CAPACITY IN IRAQ 115-16 (1979).

<sup>122</sup> Unlike similarly labor-hungry neighbors such as Kuwait and the United Arab Emirates who have relied more extensively on South and Southeast Asian as labor suppliers, Iraq appears to have maintained an overall preference for Arab workers. See ELIYAHU KANOVSKY, MIGRATION FROM THE POOR TO THE RICH ARAB COUNTRIES 34 (1984).

<sup>123</sup> See ERIC DAVIS, MEMORIES OF STATE: POLITICS, HISTORY, AND COLLECTIVE IDENTITY IN MODERN IRAQ (2005).

the laws of war (also called international humanitarian law) as a prism. The laws of war raise two important differences vis-à-vis this essay's other case study, postwar Bosnia-Herzegovina. First, whereas the U.S. 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 not: The situation has shifted from occupation to civil war, the latter being far less explicitly regulated by the laws of war. Accordingly, the U.S. 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 U.S. attempted to pursue out-of-place Muslims while also preserving the immunity of its own personnel.

#### *A. Exclusion: From Neutrals to Aliens*

Iraq has in U.S. public rhetoric been the ground zero of 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<sup>124</sup> public information available about how this took

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<sup>124</sup> 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. (June 11, 2007) (*rapporteur* Dick Marty); European Parliament, Temporary Comm. on the Alleged Use of European Countries by the CIA for the Transportation and Illegal

place or the legal rationales relied upon. What *is* clear is that the obstacles posed by the laws of war to the logic of exclusion have relaxed over time.

When the U.S. 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>125</sup> The Convention protects civilians in occupied territories, including citizens of neutral states.<sup>126</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>127</sup> The prohibition was unanimously adopted by the Convention’s authors and is “absolute and allows of no exceptions” apart

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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 (Jan. 30, 2007) (*rapporteur* Giovanni Fava).

<sup>125</sup> 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”).

<sup>126</sup> 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 art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [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., JEAN PICTET, OSCAR UHLER & HENRI COURSIER, *THE GENEVA CONVENTIONS OF 1949: COMMENTARY*, VOL 4: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR [hereinafter PICTET COMMENTARY] 47 (1958) (“there 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” 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. See *id.* art. 4.

<sup>127</sup> Fourth Geneva Convention, *supra* note 126, art. 49(1).



from those provided in the Convention itself.<sup>128</sup> Such deportations are not merely violations of treaty obligations, they are also war crimes.<sup>129</sup>

Second, Occupying Powers must preserve and enforce pre-existing local law unless “absolutely prevented” from doing so.<sup>130</sup> This rule would favor respecting pre-invasion Iraqi law’s exemption of foreign Arabs from provisions governing residency requirements and deportation.<sup>131</sup> The scope of this obligation, however, has never been clear, especially when balanced against the right of Occupying Powers to take certain necessary security measures regarding protected persons.<sup>132</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) 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>133</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>134</sup>

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<sup>128</sup> PICTET COMMENTARY, *supra* note 126, at 278.

<sup>129</sup> See Fourth Geneva Convention, *supra* note 126, 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).

<sup>130</sup> See Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

<sup>131</sup> See *supra* Part III.

<sup>132</sup> See Fourth Geneva Convention, *supra* note 126, art. 27(4). For more on the scope of the Occupying Power’s duty to preserve local laws, see Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* (Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper No. 1, 2004), available at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>.

<sup>133</sup> 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).

<sup>134</sup> See *Imhal al-‘Arab al-muqimin fil-‘Iraq usbu ‘ayn idafiyayn li-tathbit iqamatihim* [Two-Week Extension for Arab Residents to Confirm Their Residency], AL-SHARQ AL-AWSAT, Nov. 12, 2003; *Al-Dakhiliyya al-*

While CPA administrators were broadly finding ways to monitor and police out-of-place Muslims, their military and intelligence counterparts began 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>135</sup> Estimates on such transfers during the period of direct occupation are difficult, given instructions issued to military authorities not to register certain detainees so that they could be removed from the country by the CIA.<sup>136</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>137</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>138</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 specific attention, I have collected and summarized here the seven individual cases I was able to find from

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*‘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; *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.

<sup>135</sup> 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.

<sup>136</sup> 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 4, Annex 53, pp. 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.

<sup>137</sup> See *The Investigation of the 205th Military Intelligence Brigade at Abu Ghraib Prison, Iraq: Hearing Before the S. Armed Serv. Comm.*, 108th Cong., S. Hrg. 108-68 at 1061 (2004) (testimony of Gen. Paul Kern).

<sup>138</sup> See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

publicly available sources, all involving 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>139</sup>
- In January 2004, Kurdish forces seized an unnamed Jordanian man, who was held for 38 days by U.S. forces in Baghdad before being repatriated to Jordan and detained by secret police there.<sup>140</sup>
- On January 26, 2004, President George W. Bush announced the capture of an individual named Hassan Ghul in northern Iraq, alleging him to be a senior al-Qa‘ida operative.<sup>141</sup> Ghul was apparently held in CIA custody<sup>142</sup> for two years, before being transferred to further detention in Pakistan.<sup>143</sup>
- In February 2004, U.K. commandos captured two men in the Baghdad area believed to be Pakistanis and handed them over to U.S. forces, who subsequently transferred them to Afghanistan, where they remain in custody. They were

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<sup>139</sup> The case is extensively documented in A CASE TO ANSWER: FROM ABU GHRAIB TO SECRET CIA CUSTODY: THE CASE OF KHALED AL-MAQTARI (Amnesty International 2008).

<sup>140</sup> MARINER, *supra* note 35, at 28-29.

<sup>141</sup> President George W. Bush, Remarks at Little Rock, Arkansas (Jan. 26, 2004).

<sup>142</sup> See Bradbury Memorandum, *supra* note 34, at 7 (“The interrogation team ‘carefully analyzed Gul’s responsiveness to different areas of inquiry’ during this time . . .”) (quoting Aug. 25, 2004 letter from CIA Assoc. Gen. Counsel to Daniel Levin, Acting Ass’t Att’y Gen., Office of Legal Counsel).

<sup>143</sup> Rangzieb Ahmed, a UK national detained and allegedly tortured in Pakistan, says he met Ghul in a prison in Pakistan in January 2007 and believed him to be a Pakistani citizen. See Testimony of Rangzieb Ahmed to Cageprisoners 14, <http://www.cageprisoners.com/downloads/RangziebAhmed.pdf>.

allegedly members of Lashkar-e-Taiba, an armed group operating in Afghanistan, Pakistan, and Kashmir.<sup>144</sup>

- In April 2004, a Saudi detainee known as “Abu ‘Abd Allah” was reportedly transferred from Iraq to the CIA detention facility in Afghanistan where Khaled al-Maqtari was being held.<sup>145</sup>
- An unnamed Tunisian fighter was also reportedly captured by Kurdish forces and sent to Jordan for detention sometime in 2003 or 2004.<sup>146</sup>

The exact legal basis for some of these transfers has never been officially disclosed. What is apparent, however, is that by the autumn of 2003 a distinction between locals and foreigners tended to arise in general GWOT detention policy, 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. The last known significant transfer of Afghan detainees to Guantánamo was on November 23, 2003<sup>147</sup>; after that point, extraterritorial removal of Muslim detainees from their own countries by the U.S. 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 CIA detention in Afghanistan in the summer of 2003. 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, there was a consensus by October

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<sup>144</sup> See 488 PARL. DEB., H.C. (6th ser.) (2009) 395-97 (statement by Defence Secretary John Hutton).

<sup>145</sup> See A CASE TO ANSWER, *supra* note 139, at 23.

<sup>146</sup> See MARINER, *supra* note 35, at 28-29.

<sup>147</sup> THE “JOURNEY OF DEATH”: OVER 700 PRISONERS ILLEGALLY RENDERED TO GUANTANAMO WITH THE HELP OF PORTUGAL 29 (Reprieve 2008).

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. Goldsmith claims he issued a one-page 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>148</sup> According to press reports, the CIA accordingly returned Rashul to Iraq, where he was subsequently held as an unregistered “ghost detainee.”<sup>149</sup> Rashul’s fate remains unknown.

The reasoning behind Goldsmith’s October 2003 interim decision that non-Iraqis could be excluded from the Geneva Conventions is not publicly known, but is likely akin to that contained in a legal opinion establishing the administration’s official position, signed by Goldsmith on March 18, 2004.<sup>150</sup> This memorandum – made public only in the

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<sup>148</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 39-42 (2007).

<sup>149</sup> See Edward Pound, *Iraq’s Invisible Man*, U.S. NEWS & WORLD REP., June 28, 2004, at 32 (quoting a directive from Lt. Gen. Ricardo Sanchez, commander of Multi-National Forces-Iraq (MNF-I), that “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.”).

<sup>150</sup> 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. See 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) [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 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. Goldsmith’s reasoning and sourcing have been ably dissected elsewhere. See Weissbrodt & Bergquist, *supra* note 133, at 321-42; Leila Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 5/6, 1200, 1226-38 (2007).

Goldsmith has claimed that the draft was never finalized and never relied upon to remove anyone from Iraq. See GOLDSMITH, *supra* note 148, 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 U.S. can remove even some Iraqi civilians

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>151</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>152</sup>

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>153</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>154</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 from the definition of protected persons in article 4 of the

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“for a brief but not indefinite period, to facilitate interrogation.” Goldsmith Draft Memorandum, *supra*, at 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. 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.

<sup>151</sup> Memorandum from Jack Goldsmith, Ass’t 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) [hereinafter Goldsmith Memorandum].

<sup>152</sup> *See* Memorandum from George W. Bush on Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) [hereinafter Bush Memorandum].

<sup>153</sup> *See* Goldsmith Memorandum, *supra* note 151, 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 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 152, at 1-2. In any event, the relatively rapid installation of the Karzai regime and its ensuing international recognition enabled the U.S. to largely avoid questions concerning the application of the law of occupation, including the relevant provisions of the Fourth Geneva Convention.

<sup>154</sup> Goldsmith Memorandum, *supra* note 151, at 16-17.

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.” Goldsmith concedes that the text of the Convention unambiguously protects citizens and permanent residents of Iraqi who are members of al-Qa‘ida.<sup>155</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>156</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.

Goldsmith’s analysis 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>157</sup> There are three major problems with this analysis. First, it is 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 to the English version.<sup>158</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

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<sup>155</sup> See *id.* at 23. Goldsmith also correctly concedes that the Convention generally protects citizens of neutral states within occupied territories. See *id.* at 9-10.

<sup>156</sup> *Id.* at 14.

<sup>157</sup> *Id.*

<sup>158</sup> See Fourth Geneva Convention, *supra* note 126, art. 150; see also Vienna Convention on the Law of Treaties art. 33(3), Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (“The terms of the treaty are presumed to have the same meaning in each authentic text.”).

are rendered in the English as some variant of the verb “to be”<sup>159</sup> – only twice is it translated as “find themselves” or some variant thereof.<sup>160</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>161</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, tourists, people who have been shipwrecked and even, it may be, spies or saboteurs.*<sup>162</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

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<sup>159</sup> See Fourth Geneva Convention, *supra* note 126, 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).

<sup>160</sup> *Id.* arts. 4, 11(7).

<sup>161</sup> 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 151, at 15.

<sup>162</sup> PICTET COMMENTARY, *supra* note 126, at 47 (emphasis added). Instead of dealing with this text, Goldsmith argues that the expression 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 151, at 15.



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>163</sup>

Third, Goldsmith's voluntarist interpretation of the phrase "find themselves" as connoting a "lack of deliberate action"<sup>164</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 U.S., 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 Husayn'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 occupation law set the stage for what happened after the end of the formal occupation.

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 U.S. The U.S. occupation of Iraq formally ended and hostilities in the country

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<sup>163</sup> See Goldsmith Memorandum, *supra* note 151, at 5 ("The expression 'in the hands of' is used in an extremely general sense.").

<sup>164</sup> *Id.*, at 14.

were now considered to be a non-international armed conflict (civil war), in which the U.S. was participating not as a foreign invader but as an invited guest of the sovereign Iraqi state.<sup>165</sup> The treaty law of non-international armed conflict is considerably thinner than occupation law. It contains no equivalent prohibition on deportations<sup>166</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 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 without the 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 of large-scale round-ups and interrogations of hundreds of foreign Arabs. Under new Interior Ministry regulations, foreign residents had to obtain new residency papers in order to avoid deportation, which in turn required a

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<sup>165</sup> This position has gained acceptance from the UN Security Council. See S.C. Res. 1637 ¶ 1, U.N. Doc. S/RES/1637 (Nov. 8, 2005) (“ . . . the 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*, INT’L REV. RED CROSS, Mar. 2008, at 51 (2008). For more on the civil wars conducted with the participation of external state parties, see Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. UNIV. L. R. 145 (1983).

<sup>166</sup> 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), July 17, 1998, 2187 U.N.T.S. 90. This is more permissive than the rule in occupations, which prohibits *individual* as well as mass transfers. See Fourth Geneva Convention, *supra* note 126, 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.*

valid Iraqi visa, a valid foreign passport, and according to some reports, a work contract.<sup>167</sup> For long-term Arab residents, who never needed Iraqi visas in the first place and some of whom no longer had valid passports, the new regulations left them in a particularly vulnerable position. “Sometimes we take [foreigners 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>168</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 to Arabs under the 1978 law except in cases where this would lead to statelessness.<sup>169</sup>

These measures were accompanied by a series of stern official statements. As one unnamed Interior Ministry official put it, “The 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>170</sup> One journalist characterized a spreading fear of foreign Arabs amongst some Baghdad residents thus:

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<sup>167</sup> See Alissa Rubin, *Iraq Moves to Expel Foreign Arabs*, L.A. TIMES, Mar. 23, 2005, at A1. 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.” Foreigners’ Residency Law, *supra* note 111, art. 5(2).

<sup>168</sup> *Iraq: Focus on Treatment of Foreign Arabs*, UN INTEGRATED REGIONAL INFORMATION NETWORK, June 21, 2005. See also Rubin, *supra* note 167 (“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 167 (“Iraqi authorities have affirmed that no Arab resident has been deported from their territory . . .”).

<sup>169</sup> Qanun al-jinsiyya al-‘Iraqiyya [Iraqi Nationality Law], Law No. 26 (2006) art. 21(2).

<sup>170</sup> 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. 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).

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>171</sup>

The Arabic media also featured numerous stories about the fear and outrage amongst long-term Arab residents over how the campaigns had turned them overnight “from guests to suspects.”<sup>172</sup> While a full evaluation of the relations and attitudes across Iraqi society towards Arabs is beyond the scope of this paper, the U.S. concern over foreign fighters clearly dovetailed with Iraqi political dynamics, be they sectarian interests – since most foreign fighters were presumed to be Sunni<sup>173</sup> – or grievances stemming from the previous regime's perceived favoritism towards Arabs, especially Palestinians.<sup>174</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 with little or no attention and without Iraqi approval. Under this program, detainees could be

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<sup>171</sup> 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>.

<sup>172</sup> *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 yandaf'iun 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; Qasim, *supra* note 171.

<sup>173</sup> 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. *Nuwwab al-I'tilaf 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.

<sup>174</sup> See BOUCKAERT, FRELICK & WILCKE, *supra* note 116, at 9-10 (describing pre-invasion mandatory rent control provisions for Palestinians that “in effect, deprived” Iraqi landlords of their property).

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>175</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 are repatriated in cooperation with the ICRC.<sup>176</sup> There appears to be almost no independent information available at this time about the treatment, fate, or identity of these detainees.

The legal basis for these transfers has not been publicly disclosed,<sup>177</sup> but what is significant here is that as far as the laws of war are concerned (as opposed to obligations under international human rights or domestic laws), they are less likely to be problematic than those from before July 2004. As long as the sovereign Iraqi government has directly or indirectly authorized these transfers, they are arguably bilateral (or trilateral, given the U.S. role) matters not regulated by the laws of war. And 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>178</sup> As Henry Crumpton, former U.S. State Department Coordinator for Counterterrorism, put it: “All of us in the discussion agreed that

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<sup>175</sup> See Mark Mazzetti & Eric Schmitt, *Military Sending Foreign Fighters to Home Nations*, N.Y. TIMES, Aug. 27, 2008, at A1.

<sup>176</sup> Press conference with Maj. Gen. Douglas Stone, Commander, Detainee Operations, MNF-I, June 1, 2008. 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 Annestad, *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.

<sup>177</sup> 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 BEYOND ABU GHRAIB: DETENTION AND TORTURE IN IRAQ 39 (Amnesty International 2006).

<sup>178</sup> 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. See also Ma’ad Fayyad, *Asharq Al-Awsat Goes Inside Fort Suse*, AL-SHARQ AL-AWSAT (English ed.), May 3, 2007 (containing interviews with foreign Arab inmates at Fort Suse prison in northern Iraq).

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>179</sup>

*B. Exemption: Occupation or Assisted Sovereignty?*

Although much has been written about the failure of the U.S. to hold its own personnel or private contractors accountable for crimes committed in Iraq,<sup>180</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: If a state cannot punish criminals in its territory, especially foreigners, then 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 U.S. will stand down” – begs the inevitable question: How long should Iraqi justice stand back?

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<sup>179</sup> Mazzetti & Schmitt, *supra* note 175.

<sup>180</sup> *See, e.g.*, SCOTT HORTON, KEVIN LANIGAN & MICHAEL MCCLINTOCK, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY 15-32 (Human Rights First 2008); 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); 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. RTS & CIV. LIBERTIES 111, 117-22 (2006).

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>181</sup> The decree’s preamble recalled “that under 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>182</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 not governed by the Uniform Code of Military Justice (UCMJ) either until very recently.<sup>183</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

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<sup>181</sup> The Order granted immunity to the CPA, Coalition Forces, and Foreign Liaison Missions, as well as their property, funds, and assets. *See* 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.

<sup>182</sup> *See* UK 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 ¶ 12.22 (2001); U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE ¶ 374 (1956). *See also* 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).

<sup>183</sup> *See* U.S. v. Averette, 19 C.M.A. 363 (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 Congress. *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 through amendment to 10 U.S.C. §802(a)(10)). 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 (MEJA), Pub. Law. 106-523 (2000).

Power merely acts as a steward of the territory in place of the very sovereign against which it has been waging war.<sup>184</sup> This tension between the roles of adversary and caretaker is captured 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>185</sup> The civilian population is caught in a similar dilemma, owing the Occupying Power obedience, but not loyalty.<sup>186</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

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<sup>184</sup> See Hague Regulations, *supra* note 130, 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.”).

<sup>185</sup> Hague Regulations, *supra* note 130, 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 126, 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.”).

<sup>186</sup> See Hague Regulations, *supra* note 130, arts. 44 (“A belligerent 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 126, art. 51 (prohibiting conscription of civilians in occupied territory).



Conventions “in all circumstances.”<sup>187</sup> For this reason, the enforcement mechanisms envisioned by the Convention are largely decentralized and state-based.<sup>188</sup>

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.<sup>189</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>190</sup> Such “transformative occupations,”

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<sup>187</sup> Fourth Geneva Conventions, *supra* note 126, 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 occupation as existing *erga omnes*); *but see* 2004 I.C.J. 136 at 216-17 (Higgins, J., separate opinion) (calling *erga omnes* an “uncertain concept”).

<sup>188</sup> 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. See Fourth Geneva Convention, *supra* note 126, 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 transfer to prosecution) any individuals in their territory, regardless of nationality, who have committed such violations. See *id.* arts. 146-147.

<sup>189</sup> See, e.g., Coalition Provisional Authority, Orders No. 37, Tax Strategy for 2003 (entered into force Sept. 19, 2003) (rewriting Iraq’s tax code, including the institution of a 15% flat tax); No. 39, Foreign Investment ¶ 3 (entered into force Dec. 20, 2003) (purporting to “replace[] all foreign investment law”); No. 74, Interim Law on Securities Markets (entered into force Apr. 19, 2004) (replacing Baghdad Stock Exchange with a new Iraq Stock Exchange and securities market system); No. 83, Amendment to the Copyright Law 1 (entered into force May 1, 2004) (changing Iraqi copyright law to “meet[] internationally-recognized standards of protection, and to incorporate the modern standards of the World Trade Organization into Iraqi law”).

<sup>190</sup> See Melissa Patterson, *Who’s Got the Title? Or, Remnants of Debellatio in Post-Invasion Iraq*, 47 HARV. INT’L L.J. 2, 467 (2006). For a contrary view, see Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT’L L. 3, 580 (2006). On UN Security Council resolutions as potential authorities for deviating from the law of occupation, see David Scheffer, *Beyond Occupation Law*, 97 AM. J. INT’L L. 4, 842 (2003).

however, require more 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>191</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 U.S. 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 U.S. 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. 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>192</sup> And 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>193</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

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<sup>191</sup> See Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT’L L. 4, 721 (2005).

<sup>192</sup> CPA Order 17, §3 (2).

<sup>193</sup> *Id.* § 3(3).

ability to unilaterally classify their acts as “official.”<sup>194</sup> In other words, the CPA amendments effectively replaced automatic immunity for contractors with giving their governments the option of exercising a veto 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. This became more apparent in the uproar following the September 2007 shooting death of 17 Iraqi civilians in Nisoor square, Baghdad by Blackwater contractors working for the U.S. State Department.<sup>195</sup> As the U.S. 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. Most significantly, the agreement gives the Iraqi government primary jurisdiction over contractors<sup>196</sup> – but only those working with the military.<sup>197</sup> The legal status of other contractors, such as private security companies working with the State Department, remains unclear.

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<sup>194</sup> The new provision empowered states to certify, with conclusive legal effect “in any Iraqi legal process,” that their contractors were “act[ing] pursuant to the terms and conditions of the Contract.” CPA Order 17 (revised), § 4(5) (entered into force June 27, 2004), *available at* [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

<sup>195</sup> The incident has led to both a criminal prosecution under MEJA (although the defendants were State Department and not military contractors) as well as a civil suit under the Alien Tort Claims Act. *See USA v. Slough*, No. 08-cr-360 (D.D.C. filed Sept. 4, 2008); *Atban v. Blackwater USA*, No. 07-cv-1831 (D.D.C. filed Oct. 11, 2007).

<sup>196</sup> *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, art. 12(2), 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).

<sup>197</sup> *See id.* arts. 2(2), 2(5).

With regard to U.S. forces and their civilian component, Iraq enjoys primary jurisdiction over “grave premeditated felonies” committed outside of military bases and “outside duty status.”<sup>198</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 remain to be determined by a Joint Committee composed of both parties; until agreement on these matters is reached, Iraq cannot exercise jurisdiction.<sup>199</sup> Second, the U.S. retains the power to block Iraqi legal process for specific acts by certifying that the alleged offenses arose during duty status.<sup>200</sup> Third, Iraqi authorities can only hold U.S. personnel for 24 hours; even in cases where they exercise jurisdiction, custody shall reside with U.S. forces.<sup>201</sup> No equivalent provisions exist in SOFAs between the U.S. and its NATO and major non-NATO allies.<sup>202</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

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<sup>198</sup> *Id.* art. 12(1).

<sup>199</sup> *See id.* art. 12(8).

<sup>200</sup> *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 U.S.

<sup>201</sup> *See id.* art. 12(5).

<sup>202</sup> Unlike the U.S.-Iraq agreement, SOFAs with NATO and other major U.S. allies do not allow the U.S. to veto which crimes under the host state’s domestic law trigger local jurisdiction; they do not allow the U.S. 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, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? (Congressional Research Service 2008).

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.

## CONCLUSION

The structural logic of the American-led Global War on Terror is one that ultimately seeks to decide for other countries which outsiders should be outside 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 paper attempts to contribute to that process, in three ways: First, if there is to be a reckoning with the use of torture and unlawful detention over the past eight years, this paper suggests some of the areas – especially renditions from Iraq – where our knowledge is most lacking and where investigation is urgently required. Second, in outlining a basic logic at work across diverse contexts and the assumptions that justify it, this analysis may provide clues to finding and analyzing similar regimes of exclusion and exemption elsewhere. Third, these arguments help clarify some of the consequences of GWOT and the broader issues at stake.

The practices discussed in this paper – unlawful detention, deportation, and torture for some and impunity for others – are obviously deeply troubling for both the procedural as well as the substantive aspects of the rule of law, to say nothing of the fate of victims. It is their juxtaposition, however, which raises the more complex questions: while discrimination between citizens is widely seen as violating a fundamental principle

of equality, differential treatment amongst non-citizens is not as obviously impermissible. Yet in certain extreme situations (such as those illustrated in this paper), it raises disturbing and important questions about who should decide on the distinctions between outsiders, and with which criteria. Such questions cannot be resolved in any particular case, however, for two reasons that also arise from the logic of GWOT.

First, institutionally, outcomes concerning citizenship, nationality, and immigration in places such as Iraq and Bosnia-Herzegovina cannot be evaluated as ordinary sovereign decisions because of how the U.S. has subordinated these countries' institutions to its own priorities. In doing so, the U.S. has heightened the tension inherent in its approach to global power, which is premised on using the formal equality of sovereign states to mediate and legitimize a wide range of less than equal power relations.

Second, at a deeper level, evaluating the braided logic of exemption and exclusion requires a critique of its basic assumption, namely that the U.S. can decide on the differences between others because it occupies the position of the universal. This stance effectively forecloses any serious comparative analysis between the actions of the U.S. and those of other outsiders. Acknowledging this has nothing to do with moral relativism or "equivalency" with "terrorists"; it is simply a reminder that the views of others are an important part of the empirical world that must be properly understood. The rhetoric of GWOT, with its repeated invocation of the need to win "hearts and minds," appears to recognize this, in presenting people around the world with a choice between essentially competing offers of solidarity from the U.S. versus from those advancing pan-Islamist arguments. It cannot be taken for granted that the former will always be preferable to an

ordinary Bosnian Muslim after a UN arms embargo that hampered self-defense against ethnic cleansing or an Iraqi after nearly two decades of sanctions, occupation, and civil war. Foreignness, as well as the ability to embody the universal, is very much in the eye of the beholder.