ARTICLE: FROM ALTRUISTS TO OUTLAWS: THE CRIMINALIZATION OF TRAVELING ISLAMIC VOLUNTEERS

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Introduction

The volunteerist dimension of Islamic philanthropy, although often overshadowed of late by its financial counterpart as a focal point of interest, was until recently an equally vibrant expression of transnational Muslim solidarity. The emblematic figures of the itinerant doctor, the aid worker, the preacher and the fighter featured prominently in the actual mobilization and associated narratives spurred by bloody conflicts in Muslim-majority lands such as Bosnia-Herzegovina, Chechnya, and Afghanistan. ¹ Along with the scrutiny and policing of Islamic charities and financial networks amplified by the so-called War on Terror came a heightened military and intelligence focus on traveling Muslims who volunteered in various capacities in distant and troubled regions. "Out of place" Muslims

came to be regarded and treated as combatants by various governments. The aforementioned emblematic figures were conflated into one—that of the fighter—and were criminalized. This Article will begin to explore how that particular process of conflation, exclusion and criminalization occurred.

A host of fascinating questions arise in this connection which fall outside the intended scope of the inquiry at hand. One important question pertinent to how longstanding and established a tradition Islamic volunteerism represents. Some commentators have concluded that current or contemporary commitments to humanitarian intervention are beyond the level Islamic tradition would legitimate. Another question relates to the extent to which the aforementioned emblematic roles are distinct and whether they have been seen over time as fungible, complementary or situated on a single unified continuum of engagement. These questions, though important, are beyond the reach of this paper. They lie in a distinct realm, more at the intersection of cultural anthropology, history, theology and Islamic law. While there is some debate about how far back in Islamic tradition these volunteerist activities reach, it is clear that in recent times they have been seen as an important and intrinsic part of Islamic charitable conduct. It also bears noting that these activities can be more redistributive in spirit than charitable in the conventional Judeo-Christian philanthropic understanding. The emphasis is often on social justice rather than charity per se.

Typologies and Distinctions

There are multiple forms of traveling Islamic volunteerist commitment, undertaken broadly in the name of Islamic solidarity. They could be reduced to three main expressions. The first is da’wa, which is the act of calling others to the faith or to a better practice of the faith, best illustrated by the figure of the preacher. The second is ighatha, which can be translated as relief and is exemplified by the figures of the aid worker and the doctor. The final one is qital, which is military action, represented by the fighter. The term jihad is often reductively misapplied to this category. Over time, these roles have become distinct enough to sustain separate discussion, regardless of how fungible they may have been in past perception or practice.

This Article will deliberately ignore the fraught figure of the fighter in order to sidestep politically and positionally contingent viewpoints and controversies about both the legitimacy and legality of that particular variant of Islamic

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4 See Benthall & Bellion-Jordan, supra note 1, at 70.
5 Id.
6 Id.
7 Id.
9 Jihad is generally interpreted by Muslim scholars to include a concept of jihad akbar, or greater struggle, which refers to the "inner struggle for righteousness," and jihad asghar, or lesser struggle, which encompasses armed struggle against those who threaten the Muslim community. Ron Geaves, supra note 8. While acknowledging that jihad may have had a differing historical meaning, polemicists such as Daniel Pipes have sought to define and associate the term primarily with a violent struggle for Muslim world domination. See, e.g., Daniel Pipes, What is Jihad?, N.Y. Post, Dec. 31, 2002.
volunteerism. Engrossing as they would be, those discussions would distract from the Article's purpose. Instead the question explored here is how even those forms of Islamic volunteerism that most closely align with mainstream, non-Muslim or, more specifically, European and North American conceptions of conventional philanthropic volunteerism have fared in what has been referred to as the global War on Terror.

Criminalization of Volunteerism Before and After 9/11

This inquiry is rooted in the post-9/11 world and some of the illustrative examples detailed and examined herein are drawn from cases handled by the author and his students on behalf of individuals who were imprisoned for years in places like Guantanamo Bay, Cuba, Bagram Airbase, Afghanistan, and other U.S. and associated sites worldwide. However, it would be error to conclude that targeting and criminalization only began post 9/11. Though these approaches were scaled up dramatically at that historical juncture, they were not unprecedented. Another major escalation dates back to the end of the Cold War, when the United States no longer benefited from the services of some segments of the Islamic networks that existed in Afghanistan and other like places. The United States began pressuring certain allies and permitting other allies to dismantle the very networks it had sustained financially, militarily, and otherwise up to that time. These transnational solidarity networks were from their inception regarded as potential threats by many regimes in the Muslim world, including U.S. allies like Egypt and Pakistan.

With the Soviet Union's decline, these networks lost their redeeming qualities and became, to American eyes, solely a menace to the U.S. interest in the stability of its regional allies, an interest that existed irrespective of [*88] those allies' domestic practices and abuses. It is at that point that the balance of interests shifted and U.S. policy was realigned to encourage and promote the dismantling of those networks. In 1992, the Pakistani government under then-Prime Minister Nawaz Sharif began cracking down on many of the networks and organizations that were implanted along the Afghanistan-Pakistan border. 10 These efforts were undertaken in the name of anti-terrorist policy, with the encouragement and support of the United States and various Arab regimes. 11

Presence And Association As Transgression

After 9/11, the exclusion and criminalization of transnational Muslim volunteers by the United States and its allies happened in two main stages. The first level of exclusion and criminalization--imprisonment--is worth examining in some detail, focusing initially on the mechanisms that trigger it. Imprisonment is important because it is the first recognizable marker of criminalization and exclusion. The United States utilized two strikingly loose and arbitrary selection mechanisms that led to the incarceration of Muslim volunteers. First, it relied on actors in Pakistan and Afghanistan who were often driven by the prospect of financial gain or personal advancement. 12 It also extended the net of suspicion to individuals and groups that were at most tenuously and indirectly connected to persons or organizations of actual interest. 13

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10 See Benthall & Bellion-Jordan, supra note 1, at 77; cf. Kathy Gannon, Pakistan to Deport at Least 98 Arabs, Associated Press, Apr. 10, 1993 (“Islamabad is afraid their presence will lead Washington to declare it a terrorist state and deprive it of economic privileges.”).

11 In January 1993, Pakistan was in fact placed on the U.S. list of potential terrorist states. It was removed 6 months later. Ian Talbot, Pakistan: A Modern History 317 (2005); see also Benthall & Bellion-Jordan supra note 1, at 77.

12 See e.g., Michelle Faul, Gitmo Detainees Say Muslims Were Sold, Associated Press, May 31, 2005 (recounting that detainees captured in Afghanistan and Pakistan were sold to American, Afghan and Pakistani authorities for bounties); Jan McGirk, Pakistani Writes of His U.S. Ordeal, Boston Globe, Nov. 17, 2002, at A30 (citing intelligence sources that Northern Alliance commanders forced confessions of men near battlefields in order to sell them for a reward).

13 See Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Department of Defense Data Feb. 8, 2006, at 18, available at http://law.shu.edu/publications/guantanamoReports/guantanamo report final 2 08 06.pdf (noting that “only 11% of all organizations listed by the Combatant Status Review Board as proof of links to al Qaeda or the Taliban are identified as having any links to Qaeda or the Taliban in the Terrorist Organization Reference Guide” (emphasis in original)).
Bounty leaflets were designed by various U.S. national security agencies and intelligence services and disseminated in Afghanistan after the invasion that followed the 9/11 attacks. One such leaflet, for example, offered a reward of five thousand U.S. dollars in exchange for any presumed Taliban or al-Qa’ida fighter. Some offered far larger--and far less realistic--sums of money in exchange for captives. Many of the men who, like my clients, ended up in the U.S. military prisons at Bagram, Kandahar and Guantanamo were turned over for bounties similar to the ones offered in these leaflets, ranging from five to sometimes twenty thousand dollars, large amounts of money anywhere in the world but especially in countries with less affluent populations such as Pakistan and Afghanistan.

The leaflets reflect a broad and undiscerning framing. They speak of terrorists, of Taliban or al-Qa’ida fighters, quite broadly. Many individuals were seen, and more importantly sold, as fighters, whether or not they ever were. Loose selection mechanisms made it easy to cast a blanket of criminalization onto large groups in these regions. As a result, Arabs "out of place" in the Afghanistan-Pakistan border regions were frequently abducted and sold into U.S. custody for bounty by local authorities and residents who were often exclusively motivated by personal gain. The vetting mechanisms put in place by U.S. authorities to verify the identity and activities of hostages turned over to U.S. custody were all too often weak or non-existent.

Over-reliance on allies and actors of questionable motivation without a meaningful independent verification process was a primary mechanism yielding the outcome of imprisonment, which constitutes the first level of criminalization of traveling Islamic volunteers in the post-9/11 world. But it was not the only mechanism. It was paired with a blanket perception and characterization on the U.S. government's part of Islamic NGOs as fronts for terror organizations and of traveling Islamic volunteers in particular as fighters in disguise.

That categorical perception features quite prominently in the declassified records of tribunals at Guantanamo. References to "charity" appear in the tribunal records of eighty-four Guantanamo prisoners. One example arose in the case of a client, Mammar Ameur, an Algerian national unlawfully imprisoned for six years and three months at various U.S. sites including Guantanamo. The unclassified summary of the accusations directed against him before an Administrative Review Board ("ARB") focused on his affiliation with various humanitarian organizations. The factors favoring continued imprisonment enumerated by the military ARB read as might a seasoned humanitarian aid worker's curriculum vitae. The list displays five NGOs that employed Ameur in the Afghanistan-Pakistan border region reaching back to the early nineties. Ameur's task was to assist hospitals and various other aid-oriented institutions to achieve their purpose. His activities and affiliations were portrayed by the U.S. military as indicia of culpability and were cited to justify the prolongation of Ameur's unlawful imprisonment at Guantanamo. The blanket perception and characterization by the U.S. government of charitable work as cover for dangerous activity is evident in the cases of many other prisoners as well.

Another client, Ahmed Zuhair, was in the custody of the United States and associated governments at various sites including Guantanamo from December 2001 until June 2009, when he was finally repatriated to Saudi Arabia. An

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14 App. A.
15 App. B.
16 See Denbeaux & Denbeaux, supra note 13, at 15; see also Joseph Margulies, Guantanamo and the Abuse of Presidential Power 69 (2006).
17 Illustrative of the view was President George W. Bush's statement in his September 24, 2001 press conference: "Just to show you how insidious these terrorists are, they oftentimes use nice-sounding, non-governmental organizations as fronts for their activities. We have targeted three such NGOs. We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations." White House Office of the Press Secretary, President Freezes Terrorists' Assets, Remarks by the President (Sept. 24, 2001), http://georgew bush-whitehouse.archives.gov/news/releases/2001/09/20010924-4.html.
examination of the summary of accusations against Zuhair before a Combatant Status Review Tribunal ("CSRT") at Guantanamo is equally instructive when attempting to grasp the U.S. government's view of Islamic charity and volunteerism. 20 The summary was the only reflection of the evidence that a Guantanamo prisoner would be permitted to review before the CSRT convened to decide the prisoner's immediate fate. Prisoners were denied the assistance of an attorney 21 and they did not have access to the secret [*91] evidence. 22 They were offered an opportunity to respond to the summary, without more. 23 Some prisoners chose to avail themselves of that opportunity, others did not. Ameur debunked what little evidence he was permitted to see when he came before the military review panel. 24 Zuhair, on the other hand, like many Guantanamo prisoners, opted to boycott what he viewed as sham proceedings.

The evidence cited against Zuhair paints a typical picture of guilt by loose association. Patently at work in the portrayal is the notion that a single bad apple, or one bad link in the chain, suffices to cast a broad net of suspicion on entire organizations or even networks of organizations. Zuhair's work in Bosnia for the Charitable Community for Orphans was viewed as a factor favoring continued detention because an unnamed individual involved with the organization was characterized as an international terrorist. The summary of accusations also states that the relief agency Croatian Assistance is funded in part by the Saudi Al-Haramain foundation, then alleges the foundation

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22 Id. at 6§§G(9), G(10).

23 For example:

3.1 The Detainee was captured in a suspected al Qaida safehouse.

Detainee: ...I am disappointed that the Americans don't have a higher standard. The evidence is all fabricated. Of course, without a lawyer or attorney here, I will try by myself to defend myself. Whoever fabricated these accusations didn't know how. How could he not be lying in the classified information I don't know of. Whoever knows about what is happening in Islam would not fabricate something like this… In regards to accusation number one, that the house you say belongs to al Qaida is located behind the military and civilian airport in Peshawar, Pakistan. This house I was living in with my wife and four kids, has two rooms, one bathroom and one small kitchen… One of your intelligence members[sp.4],[sp.4],[sp.4],[sp.4] entered the house, took pictures, and may have taken things… Do you think the house would be for al Qaida people, to come and stay or live, in the bedroom of my kids or me and my wife?

Tribunal President: We just need you to answer the question; were you captured in an al Qaida safe house?

Detainee: No, of course not. I'm just trying to prove it was not possible, because whoever fabricated this didn't know how big the house was. Do you think al Qaida does not have money to rent a bigger house with more rooms?

Personal Representative: You also mentioned it was near a police station?

Detainee: Yes. Because the house was located behind the military and civilian airport… Pakistani intelligence is everywhere. Do you think al Qaida only has this dangerous place?. Only if they're stupid. I don't think they are stupid.

"maintains connections" with al-Qa'ida. Links of this nature were frequently offered to tie humanitarian relief work to terrorism and justify indefinite imprisonment at Guantanamo. 25

Legitimizing Criminalization

The second level of exclusion is marked by an effort to legitimize the criminalization of Islamic volunteerism. The U.S. government erected a range of quasi-legal systems in an attempt to justify its sweeping dragnet. The military Administrative Review Boards ("ARB") were established to review the findings of Combatant Status Review Tribunal ("CSRT") at Guantanamo. 26 By the end of the Bush administration, the ARBs had conducted three rounds of reviews. At the U.S. military prison at Bagram Airbase, Afghanistan, the Unlawful Enemy Combatant Review Boards ("UECRB") were replaced by the Detainee Review Boards ("DRB"), which are still operating today. 27 A veritable alphabet soup of processes and procedures was deployed at Guantanamo and Bagram to project the appearance of process and fairness while in fact conferring very little of either.

The CSRT, according to the U.S. government, was designed to determine whether an individual was properly designated and imprisoned as an enemy combatant. 28 The tribunal's purpose was to assess if an individual was a member of or supported the Taliban or al-Qa'ida forces or associated forces. The broad language defining an enemy combatant encompassed "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This included any person who has committed belligerent acts or has directly supported hostilities in aid of enemy combat forces." 29 The definition was not restricted to activities of a military nature. It was calibrated to capture individuals like Ameur, Zuhair and other Islamic volunteers in conflict zones, even if they never had any involvement in military activity of any sort.

That expansive definition inspired the detention authority standard proposed by the U.S. government to federal courts devising procedures and norms for the adjudication of Guantanamo habeas corpus petitions in the wake of Boumediene v. Bush. 30 The Bush administration asked courts to approve the indefinite imprisonment of any "individual who was part of or supporting Taliban or [al-Qa'ida] forces or associated forces that are engaged in

25 Of course, the CSRT accusation sheet also reflects that the U.S. government leveled even more inflammatory accusations against Zuhair. Those accusations were demonstrably unfounded. See Traverse at 42-56, Zuhair v. Bush, 08-CV-864 (D.D.C. Dec. 31, 2008), ECF No. 116 (demonstrating baseless nature of U.S. government's public allegations regarding Zuhair).


28 CSRT Process, supra note 21, at 1 § B.

29 Id.

hostilities against the United States or its coalition partners." 31 The Obama administration did not narrow the proposed definition much, asking courts to uphold the imprisonment of "persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners." 32 Federal district and appellate courts adopted and applied this permissive detention authority standard as they adjudicated the Guantanamo habeas cases on their merits. 33 The federal courts also held that the U.S. government only needed to meet that detention authority standard by a mere preponderance of the evidence—instead of by clear and convincing evidence or beyond a reasonable doubt—in order to warrant potentially lifelong imprisonment. 34

[∗94] It is within the second level of exclusion and criminalization that we witness the migration into established judicial systems and processes of the original impulse to legitimize the capture of broad swathes of Muslim volunteers that found its first expression in ad hoc, exceptional military mechanisms and entities such as the ARBs. In a very real sense, by adhering in their adjudication of Guantanamo habeas cases to an almost identical definition of who is detainable, the hallowed federal courts inherit a share of the imperfections of the infamous CSRTs in this domain. In so doing, the civilian courts also perpetuate—albeit in far more limited fashion—the improvised military tribunals’ core mission of legitimizing the sweeping criminalization of Islamic volunteerism. 35

Claiming Universality

The mechanisms operating at both aforementioned levels of the criminalization process are constructed in a way that leaves ample berth for arbitrariness in the use of force—including deprivation of liberty—against particular categories of individuals, while again seeking to project the appearance of process and fairness. That authorities would choose to direct the arbitrary power they wield at Muslim volunteers broadly should constitute no surprise because these transnational solidarity networks came to be viewed as a threat to local and U.S. interests in the Muslim world, but also because, post 9/11, the U.S. security apparatus resolved to err on the side of over-inclusivity in its targeting choices. That resolve, interestingly, was compounded and reinforced by a deeply problematic theme, which is where this inquiry concludes.

35 Only 38 of the 538 detainees who were subject to the CSRT process were released as a result. Mark Denbeaux & Joshua Denbeaux, No-Hearing Hearings CSRT: The Modern Habeas Corpus?, at 39, available at http://law.shu.edu/publications/guantanamoReports/final no hearing hearings report.pdf (last visited October 18, 2010). Of the 57 Guantanamo habeas cases decided by the federal courts, the writ has been granted in 37. However, of the 37, roughly a third remain in U.S. custody. The current Guantanamo population is at 172 prisoners. See Ctr. for Const. Rights, Guantanamo Bay Habeas Decision Scorecard, http://ccrjustice.org/learn-more/faqs/guantanamo-bay-habeas-decision-scorecard (last visited Apr. 17, 2011). The outcome disparity as between the CSRTs and federal courts, despite both systems’ application of broad and virtually indistinguishable detention authority standards, highlights the significance of representation, access to evidence, an impartial arbiter, and other core procedural and substantive safeguards.
[*95] The theme is that support for terror is the only possible reason for a foreign Muslim to be present in a conflict zone. It matters little, in this particular viewpoint, that non-Muslim NGOs and non-Muslim fighters, such as U.S. forces, are no less foreign and out of place in countries like Afghanistan. Given the power dynamic, the United States has arrogated to itself a position of universality and universal legitimacy. From that position the United States can justify one party's actions while, on the other hand, delegitimizing and criminalizing another party's actions. 36 Thus, Afghans, for instance, are permitted to exist and operate within parameters that are set by the universal American overlord, but they are not to overstep their ghetto of geographical and cultural specificity in any way. Only the United States can do that.

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APPENDIX A. Afghanistan Bounty Leaflet

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Appendix B

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36 See Li, supra note 2, at 376-78 (referring to a "braided logic of exemption and exclusion" which removes legal protection for foreign Muslims while protecting Westerners from local liability).