

# **The United States, International Law, and the Struggle against Terrorism**

**Thomas Michael McDonnell**



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# The United States, International Law, and the Struggle against Terrorism

This book discusses the critical legal issues raised by the US response to the terrorist threat. The book analyzes whether the Bush–Cheney administration’s policies and practices in the so-called “war against terrorism” complied with international law, and extends that analysis to the Obama administration. Thomas McDonnell highlights specific topics of legal interest including torture, extrajudicial detentions and the invasions of Afghanistan and Iraq, and examines them against the backdrop of terrorist movements that have plagued Britain and Russia. The book extrapolates from the actions of the USA, going on to look at the difficulties that all modern democracies face in trying to combat international terrorism.

*The United States, International Law, and the Struggle against Terrorism* demonstrates why current counterterrorism practices and policies should be rejected, and new policies adopted that are compatible with international law. Written for students of law, academics and policymakers, the volume shows the dangers that breaking international law carries in the “war on terrorism”.

**Thomas Michael McDonnell** is a Professor of Law at Pace University School of Law, USA.

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**For my loving wife  
Kathryn Judkins McDonnell,  
forever my inspiration**

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# List of abbreviations

ACHR	American Convention on Human Rights
ADC	Arab American Anti-Discrimination Committee
ANC	African National Congress
AP I	1977 First Additional Protocol to the 1949 Geneva Conventions
AP II	1977 Second Additional Protocol to the 1949 Geneva Conventions
CAT	Convention against Torture (also, “the Torture Convention”)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CIA	Central Intelligence Agency
CRC	Convention on the Rights of the Child
CSRT	Combat Status Review Tribunal
DTA	Detainee Treatment Act of 2005
ECtHR	European Court of Human Rights
EIT	Enhanced Interrogation Techniques
FMLN	Farabundo Martí National Liberation Front
EEOC	Equal Employment Opportunity Commission
FBI	Federal Bureau of Investigation
FLN	Front de Libération Nationale
GIA	Islamic Armed Group (Gamaa al Islamiya)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICE	US Immigration and Customs Enforcement
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
INS	Immigration and Naturalization Service
IHL	International Humanitarian Law
IRA	Irish Republican Army
KFOR	NATO’s Kosovo Force
MCA	Military Commissions Act of 2006

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MVD	Ministertvo Vnutrennikh Del (Ministry of Interior Affairs, Russia)
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OIC	Organization of the Islamic Conference
PAIGC	African Party for the Independence of Guinea and Cape Verde
PKK	Kurdish Workers Party
POW	Prisoner of War
SAS	Special Air Service (principal special forces unit of the British Army)
SERE	Survival, Evasion, Resistance, and Escape program
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNMOVIC	UN Monitoring, Verification and Inspection Commission



# Preface

This book grew out of a series of articles I had written in the months and years following September 11, 2001 out of concern over the Bush–Cheney administration's counterterrorism policies and practices, which often disregarded international law. There seemed to have been an unstated assumption that violating international law did not matter in the aftermath of a megaterrorist event like 9/11. As I probed further into the history of the West's relationship with the Arab and Muslim worlds, it became clear that the course that the administration had adopted could lead in very dangerous directions, resulting not only in strengthening rather than weakening al Qaeda and its allies, but also in undermining the moral authority of the US. As of this writing, the Obama administration appears poised to move in a markedly different direction, but events will show whether the new administration's policies and practices will match its rhetoric. Whatever the philosophical makeup Congressional leaders and the administration in power possess, they will be tempted to bend or even violate the rules, both domestic and international, in face of deadly terrorist threats. They will also be tempted (and have been) tempted to drastically change domestic rules and push for significant changes in international ones.

This book argues for a more deliberate approach. Law, both international and domestic, has been crafted over generations, if not centuries, striking a balance between security and individual and collective freedom. Similar, if not identical, threats have arisen before. The undeniable truth in the struggle against terrorism is that the US needs the help and cooperation of other governments, their intelligence and police forces, and their individual citizens to meet the threat posed by highly organized, well-financed, transnational terrorist organizations. Complying with international law and restoring the US's moral authority may be the most effective way to obtain that help. In that light, this work discusses the terrorist challenge and the legal and policy issues that the country and government are facing.

Thomas Michael McDonnell  
White Plains, New York  
August 2009

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# 1 The West's colonization of Muslim lands and the rise of Islamic fundamentalism

Like locating fault lines to determine where earthquakes are apt to develop, examining the history of the affected peoples, particularly who did what to whom, helps explain the advent of terrorism perpetrated by extreme Muslim fundamentalist groups against the West and against the United States in particular. When Russian, American, or European leaders condemn Muslim terrorism and terrorists, they rarely, if ever, mention the behavior of Russia and European countries towards Muslim ones<sup>1</sup> in the seventeenth, eighteenth, nineteenth, and twentieth centuries. For example, in 1830, France invaded, and in 1834 annexed, Algeria. Only after a bitterly fought and bloody nine-year war of independence in which the rebels killed French civilians and targeted French bars and restaurants and the French engaged in ruthless counterterrorist methods, including torture, did General Charles de Gaulle finally accede to Algerian independence in 1962. In the 1600s, the Dutch, following the Portuguese, began the conquest and colonization of the Indonesian islands, today the most populous Muslim nation, only to give them up under intense internal and international pressure in 1949. In the late 1700s and in the 1800s, Russia annexed Transcaucasia, the Caucasus, including Chechnya and other Central Asian Muslim nations like Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. These latter six countries only achieved independence with the breakup of the Soviet Union in 1991. Chechnya, which Russia did not consider an independent state, remains under Russian rule.

Britain began the colonization of India and what is now Pakistan in the 1700s, with the activities of the government-sanctioned East India Company, only to fully colonize the Indian subcontinent in the 1800s.<sup>2</sup> The British left their former colony in 1947, agreeing to divide it along religious lines (Hindu and Muslim) into two bitterly separated states, India and Pakistan. Britain also had three times waged war against Afghanistan, invading in 1838 and in 1878, and fighting a rebellion in 1919.<sup>3</sup> To protect its hold on India and to thwart Russian influence, Britain took the Khyber Pass and other areas and installed the Afghan ruler in 1880 on the condition that Britain would run Afghanistan's foreign policy. After the 1919 rebellion, Britain recognized Afghanistan's independence. (The Soviet Union was to invade Afghanistan in

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1979. In response, the US armed the Afghan Mujahideen, unwittingly helping Osama bin Laden and his organization, al Qaeda, to emerge.)

Britain invaded Egypt in 1882, retaining a colonial relationship with that country until 1954. Britain also took over as “trust territories” Muslim states from the former Ottoman Empire after the First World War, literally drawing the map establishing Iraq, as well as taking Jordan and Palestine. Britain also exploited its economic ties to Iran, obtaining in 1901 an exclusive 60-year concession to explore for oil in that country and in 1907 agreeing with Russia to divide Iran into separate spheres of influence. In addition, the European countries colonized virtually all of Africa, including the Northern African Muslim states, generally not giving them up for independence until the 1960s.

The list does not end here. Almost every Muslim country on the planet was conquered and colonized by Europeans or Russians (see Table 1.1, pp. 19–27). Most of those countries became free of the colonizer only since the end of the Second World War, with many gaining independence in the 1960s. In every Muslim country that experienced colonization, there are still substantial numbers of the populace living today who also lived under colonization. Although most Muslims living today were born after the Second World War (and even after 1980), colonization has cast a long, dark shadow.

Just as abolishing *de jure* discrimination has not eliminated *de facto* racial discrimination in the US, the simple act of becoming independent does not immediately eliminate the attitudes, customs, and institutions of either the colonizer or the colonized. After casting off the yoke of white minority rule in South Africa, the government is nonetheless finding it particularly difficult to grapple with the issues of unemployment and underemployment, economic development, and the AIDS pandemic, not to mention transitional justice. Nelson Mandela’s declaration that the new South African constitution put to rest the 500 years of colonization starting with the Portuguese has not in and of itself made South Africa a stable or a prosperous country.

Even after independence, the colonizer often exerted inordinate influence on its former colony. The colonizer’s government, its private corporations, and its religions had been operating in the former colony for decades. Even after independence, these institutions often keep on operating. Sometimes for self-interest, sometimes out of a sense of obligation, the colonizer has intervened militarily or economically or both. Sometimes, the colonizer, if not pulling all the strings as it did previously, continues to run important businesses and to provide the major source of foreign capital and investment in the former colony. Culture, language, and religion, likewise, sometimes have bound former colonizer and colony in ways that neither had foreseen.

Explaining the British tactic of controlling another country without necessarily colonizing it, historian John Darwin’s words apply equally strongly to the post-colonization experience of many formally colonized states:

[T]he British had always been prepared to secure their imperial ends—trade, security, influence—by the widest variety of political means, using

the inflexible and expensive method of direct colonial rule only when necessary—and often grudging the necessity. Whenever possible they preferred to influence, persuade, inveigle (by economic benefits) or frighten local rulers into cooperation with them. All this means that we cannot easily measure the extent to which British dominance over client states and colonial peoples contracted by the crude yardstick of a change in constitutional forms.<sup>4</sup>

Until conquest and colonization were made illegal in the last century, the story of the human race mainly consists of peoples conquering, colonizing, often enslaving and, in some cases, destroying or banishing other peoples. The Muslim Ottoman Empire itself was established through conquest and colonization. The US was established through conquest and, to a great extent, by destruction of the native population. That conquest and colonization were commonly practiced does not, however, heal the wounds they caused any faster. Furthermore, the world community's outlawing conquest and colonization has heightened the consciousness, even of peoples who were conquered and colonized before the practice was banned. Most Muslim countries were subject to colonization within 100 years of the UN Charter, the multilateral treaty, concluded in 1945, which most clearly made conquest illegal.<sup>5</sup> A large number of Muslim countries achieved independence in the 1960s, so the wounds caused by colonization, from the perspective of world history, remain relatively fresh.

Most Muslim countries have had difficulty in the post-colonial period meeting the fundamental needs of their people. If one excludes the oil-producing states, Muslim countries are disproportionately represented among the bottom third of countries in terms of absolute and per capita gross domestic product.<sup>6</sup> Non-oil-producing Muslim countries rank in the bottom third of states in terms of industrial production and in income per capita.<sup>7</sup>

Many of the independent post-colonial Arab and Muslim states adopted far more draconian laws and policies than the former Ottoman Empire. The Ottomans often governed on the basis of accommodation rather than absolute force. The governments of the independent Arab and Muslim states often borrowed the repressive policies and practices of the European and Russian colonizers rather than the generally more relaxed practices of the Ottoman Empire.

Few Muslim countries have a democratic form of government; most, unfortunately, are run by authoritarian regimes. Freedom House lists only three Muslim countries as "free".<sup>8</sup> Muslim countries also score low on Transparency International's corruption index.<sup>9</sup> Of the large Muslim states, Turkey may be the most democratic. It also has suffered military coups and possesses one of the worst human rights records in Europe. In attempting to gain entry into the European Union, Turkey has commendably made real reform, such as abolishing the death penalty in peacetime. Amnesty International reports, however, that Turkey is still actively prosecuting individuals

under Article 301 of its penal law for “denigrating Turkishness,” going so far, for example, as to criminally prosecute an attorney for uttering the word, “Kurdistan.”<sup>10</sup> Amnesty also notes that Turkey is continuing to torture and mistreat prisoners.<sup>11</sup>

The literacy rate of Arab countries is 70.3 percent,<sup>12</sup> far behind the former Eastern bloc countries, Europe, Canada, and the US. The Arab states rate towards the bottom of countries on indices measuring freedom of speech and freedom of the press. Consequently, cultural life in these states has stagnated.

For many Muslims, it must be galling to have been passed by the West in almost every category. In the mid-1500s, the Ottoman Empire was the superpower, the unquestioned top military power in Europe, Asia, and Africa.<sup>13</sup> Muslim architecture was the most advanced; their mathematicians were making breakthroughs that made the rest of the world wonder.<sup>14</sup> Their scholars generally were the most respected in the world. Furthermore, Muslim societies were among those most tolerant of the “other.” For example, Muslim Turkey welcomed the Jews after they were expelled from Catholic Spain in 1492.<sup>15</sup> (Jews and Christians were generally tolerated in the Ottoman Empire probably because of the teaching of the Hanafite school of Islam.)<sup>16</sup> Given this history, Muslims must have found it particularly humiliating to be conquered and colonized by the Europeans and Russians. It must have resembled Detroit automakers being taken over by the Japanese (and now the Italians). Furthermore, as noted above, the post-colonial experience of Muslim countries has not generally been as positive as it might have been, and certainly has not cleansed those societies of the humiliation of colonization.

### 1.1 The colonial experience—Egypt

As noted above, nearly every Muslim country was colonized by European countries or Russia. It might be instructive to examine the colonial experience of one such country that is probably representative of many. Egypt had been a Muslim country since 641 CE.<sup>17</sup> Egypt was the only Muslim country to successfully fight off the thirteenth-century Mongol invasion that so devastated the Muslim world.<sup>18</sup> The army of Sultan Selim brought Egypt into the Ottoman Empire after defeating the ruling Mamluks outside Cairo in 1517.<sup>19</sup> In 1798, Egypt, however, was conquered by Napoleon. Napoleon’s conquest was short-lived. The Ottoman Turks and the British banded together and pushed the French out in 1801. One of the Turkish officers, Muhammad Ali (also known as Mehemet Ali), became the ruler of Egypt. He defeated the British in 1807, brutally confiscated the lands of rival feudal lords, persuaded the Ottoman Sultan to name him viceroy, and, of all Muslim leaders in the nineteenth century, did the most to modernize his country along European lines.<sup>20</sup> His modernization projects included the building of irrigation canals, the construction of shipbuilding plants, textile mills, and other factories, the creation of a huge conscripted standing army on the European model, the cultivation of cotton, sugar cane, and other cash crops, and the imposition

of tariffs on European imports to protect Egypt's nascent industries.<sup>21</sup> He ruthlessly impressed the peasantry into the army and into his textile mills. He also excluded the Muslim clergy, the ulama, from avenues of power.<sup>22</sup>

Muhammad Ali gained Egypt's *de facto* independence from the Ottoman Empire, an independence that displeased Britain. One of Ali's military campaigns threatened Constantinople. Britain and France supported the Ottoman Empire in fending off the attack and in defeating Ali. Under the terms of the Treaty of London of 1841, Ali had to give up Syria, limit his army to 18,000 troops and ease his tariffs on British imports, an act that contributed to the failure of his efforts to establish Egyptian manufacturing.<sup>23</sup> This Treaty did make Ali's heirs hereditary rulers, the only viceroys in the Ottoman Empire to have gained this privilege.

Ali was uninterested in cutting a canal through the Suez. His successor, Abbas Pasha, was likewise uninterested, but upon the latter's death in 1854, Said Pasha, Ali's son, began a nine-year rule. He wanted to continue the modernization of Egypt, and happened to be a childhood friend of French diplomat and engineer Ferdinand de Lesseps, to whom he gave the concession to build the canal.<sup>24</sup> The latter founded the Universal Company of the Maritime Suez Canal in 1858.<sup>25</sup> His company, financed by French and Egyptian investors, started construction that year. Using the forced labor of thousands of Egyptian peasants, the Company completed the canal nearly 11 years later at twice the estimated cost.<sup>26</sup>

When the company ran into financial trouble, Said Pasha bought 44 percent of its stock. In his attempts to modernize the country, from stringing telegraph lines up the Nile to expanding the railroad and building the Suez Canal, Said Pasha had run the government into debt.<sup>27</sup>

Said's successor, Ismail Pasha, under the thrall of the Europeans, continued modernization projects, including greatly expanding public education, railroads, harbors, and other public works. Unfortunately, Ismail spent far beyond his and his country's means, nearly bankrupting Egypt and permitting it to fall largely into the hands of French and British creditors.<sup>28</sup> In 1875, the dire financial situation virtually compelled the government to sell its shares in the canal to Britain. (By 1880, 66 percent of Egypt's revenue went to pay the debt and the tribute to the Sultan.<sup>29</sup>) The French and English governments urged Ismail to abdicate in favor of his son Toufik. When the Ottoman Sultan agreed, Ismail was deposed, and Toufik, at 27, became the viceroy of Egypt.

Toufik did not reign independently for long. Although he tried to turn the debt crisis around, he lacked the stature to control the army. A charismatic officer, Said Ahmed Urabi, led an army revolt in 1881, which resulted in Urabi's being appointed Minister of War in 1882 and shortly thereafter the military ruler of the country.<sup>30</sup> Urabi set to work wresting internal control of Egypt from the French and the British, and called for the expulsion of foreigners.<sup>31</sup> His policies alarmed the two European powers.

Although initially opposed to the canal's construction,<sup>32</sup> the British considered the completed Suez Canal vital to their interests as "the highway to



India.”<sup>33</sup> Concerned that Urabi’s revolt might threaten their access to the canal, the British invaded Egypt in 1882, beat Urabi’s troops with superior firepower, captured Urabi, and reinstated Toufik.<sup>34</sup> For the next 72 years, the British retained *de facto* if not *de jure* control of the country. Specifically, the British occupied Egypt, but permitted the Egyptian viceroy to exercise nominal authority. At the outbreak of the First World War, the British appointed their own sultan of Egypt, establishing a protectorate that lasted until shortly after that war.<sup>35</sup> After the protectorate ended, authority was supposedly passed to Egypt’s monarchy (Ali’s heir), but real power lay with the British who continued to station large troop contingents in Egypt until 1954.<sup>36</sup>

The colonization of Egypt had practical effects, for example, changing a diverse economy into a single commodity enterprise: “From a country which formed one of the hubs in the commerce of the Ottoman world and beyond, and which produced and exported its own food and textiles, Egypt was turning into a country whose economy was dominated by the production of a single commodity, raw cotton, for the global textile industry of Europe. By the eve of the First World War, cotton was to account for more than ninety-two percent of the total value of Egypt’s exports.”<sup>37</sup> Four-fifths of Egyptian cotton went directly to British textile mills.<sup>38</sup>

Some aspects of European colonization were particularly humiliating to Egyptians. For example, they were blatantly discriminated against in employment contracts. Furthermore, under a seventeenth-century agreement between the Ottoman Sultan and the French, which was ultimately applied to all Europeans, the Egyptian government had no authority to apply Egyptian laws to Europeans living in Egypt. Known as the Capitulations, this set of laws and practices enabled the Europeans to act with impunity in committing crimes and civil wrongs. The Earl of Cromer, the first British Viceroy, who was the real power in Egypt for 18 years, admitted: “At first sight, it appears monstrous that the smuggler should carry on his illicit trade under the eyes of the Custom-house authorities because treaty engagements forbid any prompt and effective action taken against him. These engagements have also been turned to such base uses that they have protected the keeper of the gambling hell, the vendor of adulterated drinks, the receiver of stolen goods, and the careless apothecary who supplies his customer with poison in the place of some healing drug.”<sup>39</sup> Cromer defended the practice on the grounds that the Egyptian government was “bad” and that the European colonizers had to be assured they could make money without the interference of such a government.<sup>40</sup>

After the First World War, representatives of the Egyptian people contested Britain’s holding onto Egypt. Several US members of Congress likewise objected. One of Woodrow Wilson’s 14 points declared that such nations as Egypt should be free of colonization of any sort.<sup>41</sup> Wilson himself criticized Britain’s practice of colonization. Britain and France successfully resisted all such claims. The 1920 San Remo Conference, the subsequent Treaty of Sèvres, and the League of Nations parceled out the Ottoman Empire