Serial War Crimes in Response to Terrorism Can Pose Threats to National Security

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SERIAL WAR CRIMES IN RESPONSE TO TERRORISM CAN POSE THREATS TO NATIONAL SECURITY

Jordan J. Paust†

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I. INTRODUCTION

Serious short- and long-term consequences can ensue for the United States, other countries, U.S. and other military and intelligence agency personnel, and other U.S. nationals with respect to violations of the laws of war¹ that are not merely

† Mike and Teresa Baker Law Center Professor, University of Houston.
¹ U.S. DEP'T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 178, § 499 (1956) ("The term 'war crimes' is the technical expression for a violation of
systematic and widespread, but also an admitted part of a "common plan" or "program" of the Bush administration in response to terrorism. As noted previously,

the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime.

2. Concerning the admitted program and common plan, see, e.g., JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 1, 5, 9, 12, 14, 17-19, 23-24, 30, 45-46 (2007); Jan Crawford Greenburg et al., Bush Aware of Advisers’ Interrogation Talks, ABC NEWS, Apr. 11, 2008, http://abcnews.go.com/politics/wirestory?id=4635175 (An “inner circle” composed of the National Security Council’s Principals Committee conducted meetings in the White House situation room to approve various specific coercive interrogation tactics, including waterboarding. The meetings were attended by Cheney, Rice, Rumsfeld, Tenet, Ashcroft, and others. “[T]he most senior Bush administration officials repeatedly discussed and approved specific details,” “meetings . . . were typically attended by most of the principals or their deputies,” and “[s]ources said that at each discussion, all the Principals present approved . . .”). See also JOHN YOO, WAR BY OTHER MEANS 30–91 (2006) (starting in December 2001, “senior lawyers from the attorney general’s office, the White House counsel’s office, the Departments of State and Defense, and the NSC met . . . This group of lawyers would meet repeatedly over the next months to develop policy of the war on terrorism. We certainly did not all agree . . . Meetings were usually chaired by Alberto Gonzales . . . At meetings, his deputy, Timothy Flanigan, usually played the role of inquisitor . . .”); id. at 32–33 (William Howard Taft IV, John Bellinger, Jim Haynes, and David Addington were often at the meetings, and “Bellinger often shared Taft’s accommodating attitude toward international law . . .”); id. at 39 (“[I]n mid-January 2002,” “the lawyers met again in the White House situation room . . . Consensus eluded the group[,]” but Gonzales would later summarize the positions for the President); Barton Gellman & Jo Becker, Angler: The Cheney Vice Presidency, WASH. POST, June 24, 2007, at A01, available at http://blog.washingtonpost.com/cheny/chapters/chapter_1/ (describing the general roles of Cheney, Addington, Flanigan, and Gonzales in denying Geneva law protections to detainees); Jan Crawford Greenburg et al., Sources: Top Bush Advisors Approved “Enhanced Interrogation,” ABC NEWS, Apr. 9, 2008, http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1; Lara Jakes Jordan & Pamela Hess, Cheney, Others OK’d Harsh Interrogations, AP NEWS, Apr. 11, 2008, http://abcnews.go.com/politics/wirestory?id=4631535; Lara Jakes Jordan, Cheney Led Approvals of Harsh Interrogations, STAR-LEDGER (Newark, N.J.), Apr. 11, 2008, at 1; Deirdre Jurand, Ashcroft Involved with Torture Memos: Bush Administration Lawyers, JURIST, June 27, 2008, http://jurist.law.pitt.edu/paperchase/2008/06/ashcroft-involved-with-torture-memos.php; Matthew Lee, Rice Defends Post 9/11 Torture, AP NEWS, May 23, 2008, http://www.commondreams.org/archive/2008/05/25/9144; Mark Mazzetti, Bush Aids Tied to Talks on CIA Interrogations, INT’L HERALD TRIB., Sept. 25, 2008, http://www.iht.com/articles/2008/09/25/americaitalia.php (adding that John Bellinger has stated that John Yoo issued oral guidance to the CIA during such meetings); Greg Miller, Cheney Says He Had Key Role in Interrogation Methods, BALT. SUN, Dec. 16, 2008, at 14A, available at http://www.baltimoresun.com/news/nation/politics/balt.cheny16dec16,0,110697.story (Cheney said he was “directly involved in approving severe interrogation methods,” including waterboarding. Cheney also
there are short- and long-term consequences of illegality. For example, war crimes policies and authorizations are not merely a threat to constitutional government and our democracy. They threaten law and order more generally, violate our common dignity, degrade our military, place our soldiers and CIA personnel in harm’s way, thwart our mission, and deflate our authority and influence abroad. They can embolden an enemy, serve as a terrorist recruitment tool, lengthen social violence, and fulfill other terrorist ambitions.\(^3\)

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It is the purpose of this essay to more fully articulate the types of detrimental consequences that can arise from these and other unlawful responses to terrorism. For several reasons, it is evident that our Nation's security is not well-served by a lawless executive.\textsuperscript{4}

II. PLACING OUR PEOPLE IN HARM'S WAY

A. Criminal Liability

The Bush program of manifestly unlawful transfer, detention, and interrogation has subjected various members of the executive branch, including U.S. military and CIA personnel, to possible criminal prosecution here and in foreign courts exercising territorial\textsuperscript{5} or universal\textsuperscript{6} jurisdiction, future ad hoc international criminal tribunals, and, in some circumstances, the International Criminal Court (ICC).\textsuperscript{7} With respect to war crimes, it is important

\begin{itemize}
  \item \textsuperscript{4} See also Justice Wilson's warning in 1791 that "[n]o one should be secure while he violates the Constitution and the laws," quoted in Jordan J. Paust, International Law as Law of the United States 497 n.2 (2d ed. 2003).
  \item Under international law, states have jurisdictional competence to prosecute or allow civil suits against persons who engage in illegal conduct in their territory. See, e.g., Paust, supra note 4, at 416–19; see also Sarah H. Cleveland, Our International Constitution, 31 Yale J. Int'l L. 1, 93 n.643 (2006) (citing Cunard S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923)) ("[T]he definition of territorial jurisdiction now is settled in the United States and recognized elsewhere . . . .")
  \item Under international law, all states have jurisdictional competence to address a violation of customary international law wherever it has occurred and whoever has committed it. See, e.g., Paust, supra note 4, at 420–23; Christopher Hale, Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law, 35 Denv. J. Int'l L. & Pol'y 429, 432–33 (2007) (defining universal jurisdiction as "a principle of law that enables and/or requires a State to exercise jurisdiction over specific crimes without a connection between the offense, offender, or victim and the State exercising jurisdiction"). Various international criminal law treaties also provide a type of universal jurisdictional competence by consent among the parties to a treaty that can reach the nationals of a party. See, e.g., Paust, supra note 4, at 423.
  \item Concerning possible jurisdiction of the ICC over U.S. nationals, see, e.g., Jordan J. Paust, The Reach of ICC Jurisdiction over Non-Signatory Nationals, 33 Vand. J. Transnat'l L. 1, 1–15 (2000). ICC jurisdiction is possible when a crime within the Statute of the ICC has been committed within the territory of a party to the treaty and that state or any other party transfers the accused to the Court. See Statute of the International Criminal Court arts. 12(2)(a), 13(a), 13(c), 2187 U.N.T.S. 90. Afghanistan is a party to the treaty, and so are the following: Albania, Bulgaria, Jordan, Poland, Romania, and the United Kingdom—which controls Diego Garcia as a British overseas territory in the Indian Ocean, where secret detention and interrogation sites were suspected. See also Paust, supra note 2, at 152–53 n.96; Elaine Ganley, Prober: CIA Ran Secret Jails in Europe, WASH. POST, June 8, 2007,
to note that every relevant federal and state court decision and dicta since the dawn of the United States has recognized that the President and all persons within the executive branch are bound by the laws of war.⁸

Four general types of criminal responsibility can exist under international law. First, it is obvious that direct perpetrators of violations of the laws of war, the Convention Against Torture, and crimes against humanity (such as forced disappearance of persons as part of the President’s “program” of secret detention) have direct liability. Leaders who issue orders or authorizations to commit international crimes can also be prosecuted as direct perpetrators.⁹

Second, any person who aids and abets an international crime is liable as a complicitor or aider and abettor before the fact, during the fact, or after the fact.¹⁰ Liability exists irrespective of whether the person knows that his or her conduct is criminal.¹¹ Under customary international law, a complicitor or aider and abettor need only be aware that his or her conduct would or does assist a direct perpetrator or facilitates conduct that is criminal.¹²


¹⁰ See, e.g., PAUST, BASSIOUNI ET AL., supra note 9, at 32, 35, 44–49 (citing Prosecutor v. Akayesu, Case No. ICTR-96-T, Trial Chamber, ¶ 545 (Sept. 2, 1998)); PAUST, supra note 2, at 18, 24, 30, 165, 167, 185, 193, 199, 277.


¹² See, e.g., Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 286-87 (E.D.N.Y.)
In any case, ignorance of the law is no excuse. Especially relevant in this respect are the criminal memoranda and behavior of various German lawyers in the German Ministry of Justice, high-level executive positions outside the Ministry, and the courts in the 1930s and 1940s that were addressed in informing detail in *United States v. Altstoetter* (The Justice Case). Clearly, several memo writers and others in the Bush administration abetted the “common, unifying” plan and their memos substantially facilitated its effectuation.

Third, individuals can also be prosecuted for participation in a “joint criminal enterprise,” which the International Criminal Tribunal for Former Yugoslavia has recognized can exist in at least two relevant forms: (1) where all the accused “voluntarily participate in one aspect of a common plan” and “intend the criminal result [whether or not they knew it was a crime], even if not physically perpetrating the crime”; and (2) where “(i) the crime charged is the natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness participated in that enterprise.”

Fourth, civilian and military leaders with either de facto or de jure authority can also be liable for dereliction of duty with respect to acts of subordinates when: (1) the leader knew or should have known that subordinates were about to commit, were committing, or had committed international crimes; (2) the leader had an opportunity to act; and (3) the leader failed to take reasonable corrective action, such as ordering a halt to criminal activity or

2007); Prosecutor v. Blaskic, Case No. IT-95-14-T-A, Appeals Chamber, ¶ 50 (July 29, 2004); Prosecutor v. Furundzija, Case No. ICTY-95-17/1, Trial Chamber, ¶¶ 236–38, 245, 249 (Dec. 10, 1998); supra note 10. But see Statute of the International Criminal Court art. 25(3)(c), 2187 U.N.T.S. 90 (adding a new “purpose” to facilitate a test that will leave ICC jurisdiction incomplete).


16. Id. ¶ 265; see also Prosecutor v. Blaskic, Case No. IT-95-14-T-A, Appeals Chamber, ¶ 50 (July 29, 2004).
initiating a process for prosecution of all subordinates reasonably accused of criminal conduct.\textsuperscript{17}

B. Civil Liability

Civil liability for participation in unlawful responses to terrorism, including unlawful measures of interrogation, is also possible. Civil actions might be brought here or abroad by the direct victims of illegal conduct and possibly by indirect victims such as family members of those who have suffered from illegal interrogation tactics.\textsuperscript{18}

C. Mental Harm and Impacts on Well-Being

Persons who engage in illegal interrogation tactics and other unlawful treatment of human beings can suffer mental and even physical stress and other bodily harm both during and after the person engages in such conduct.\textsuperscript{19} Such consequences are sometimes ignored by governmental elites who place our people in harm’s way when authorizing unlawful programs of detention and treatment, but short- and long-term mental and physical harm should be recognized as foreseeable outcomes of illegality when making policy choices. Furthermore, they should be recognized after they occur so that persons who suffer from post-traumatic stress and related symptoms obtain needed medical and psychological treatment and rehabilitation. While untreated, such persons might cause harm to others in our community, including their family members. More generally, effectuation of a program or common plan of unlawful interrogation of other human beings resulting, for example, in torture, cruel treatment, or inhumane

\textsuperscript{17} See, e.g., PAUST, BASSIOUNI ET AL., supra note 9, at 51–73; PAUST, supra note 2, at 18–19, 153, 202, 220, 261; see also Johnson v. Eisentrager, 339 U.S. 763, 765, 789 (1950) (no public official immunity exists for war crimes); Prosecutor v. Milosevic, Case No. ICTY-99-37-PT, ¶¶ 26–34 (Nov. 8, 2001) (nonimmunity of heads of state reflected in Article 7 of the Statute of the ICTY reflects a rule of customary international law).


\textsuperscript{19} See Mary Ellen O’Connell, Affirming the Ban on Harsh Interrogation, 66 OHIO ST. L.J. 1231 (2005); Edgardo Rotman, Therapeutic Jurisprudence and Terrorism, 30 T. JEFFERSON L. REV. 525, 542 (2008) (torture is “largely ineffective” and has “negative psychological effects” for the perpetrators).
treatment of detained persons can have a dehumanizing impact on large numbers of participants in such forms of interrogation and detrimentally impact larger numbers of others. An indirect consequence can involve the creation of a generation of guilt, especially among those who knew what was happening and did not care to oppose an admitted program of inhumane treatment of other human beings.  

D. Denial of POW Status and Combatant Immunity

The Bush administration’s denial of prisoner-of-war status to members of the regular armed forces of the Taliban who were captured during the international armed conflict in Afghanistan that began in October 2001 is a violation of Article 4(A)(1) and/or (3) of the Geneva Convention Relative to the Treatment of Prisoners of War that can produce dire consequences for U.S. and other military personnel if such a denial is repeated in other armed conflicts. The concomitant denial of combatant status to members of the regular armed forces of the Taliban and the denial of combatant immunity for lawful acts of warfare is a violation of the customary laws of war that are of central importance to U.S. and other military personnel. The Military Commissions Act of 2006 attempted to perpetuate these violations, sometimes in ways that were not only dangerous but also nonsensical. Each violation of the laws of war is a war crime that can result in criminal and civil responsibility. Additional war crime responsibility results when these and other rights to status and treatment are “declare[d]
abolished, suspended, or inadmissible in a court of law.”

III. MISSION FAILURE

A. Unlawful Interrogation Can Produce Faulty Intelligence

Unlawful interrogation tactics can produce faulty intelligence and other deleterious consequences. In response to the Bush program of coercive interrogation and before a vote by the House of Representatives to approve the Detainee Treatment Act of 2005, former CIA Director Stansfield Turner and thirty-two retired CIA and other professional intelligence and interrogation experts wrote a letter to Senator McCain expressing their “strong support” for the McCain amendment “reinforcing the ban on cruel, inhuman and degrading treatment by all US personnel around the world.” The letter also declared that “use of torture and other cruelty against those in US custody undermines” U.S. efforts to combat terrorist violence and that “[s]uch tactics fail to produce reliable information, risk corrupting the institutions that employ them, and forfeit the ideals that attract others to our nation’s cause.”


B. Inhibition of Cooperative Prevention and Responses

1. Sharing of Intelligence

The sharing of intelligence is often critical to the effective prevention and defeat of terrorism. It is significant, therefore, that unlawful forms of detention and interrogation of suspected terrorists and other detainees can spawn a lack of trust and refusals by foreign states to share intelligence with a state that engages in unlawful behavior.\textsuperscript{29} Foreign intelligence agencies might be reluctant to fully participate because of possible international criminal liability for personnel who become complicit in international criminal conduct involving illegal rendition, detention, interrogation, and other treatment of detainees. Reluctance might also exist because of the possibility of domestic and foreign discovery of complicit involvement in an internationally criminal program and consequential state responsibility (leading to various types of sanctions against the state), deflation of authority and respect, and detrimental domestic political and foreign policy outcomes.

More generally, Justice Kennedy has remarked: “Security depends upon a sophisticated intelligence apparatus and the ability of our military to act and to interdict. . . . Security subsists, too, in fidelity to freedom’s first principles.”\textsuperscript{30}

2. Cooperative Apprehension of Accused and Prosecution

For similar reasons, a governmental program of unlawful rendition, detention, treatment, and prosecution can also inhibit cooperative efforts to capture, arrest, and render alleged terrorists to other countries for prosecution.\textsuperscript{31} Such a program can also be

\textsuperscript{29} Colin Powell stated before the U.N. Security Council on February 5, 2003, that he “can trace the story of a senior terrorist operative telling how Iraq provided training in” weapons of mass destruction to members of al Qaeda. In January 2004, Ibn al-Shaykh al-Libi stated that the information sent to Powell was false and that he said anything to avoid the torture that he had experienced. See, e.g., Katherine R. Hawkins, The Promises of Torturers: Diplomatic Assurances and the Legality of “Rendition,” 20 GEO. IMMIGR. L.J. 213, 248–50 & nn.299–302 (2006).


See, e.g., Mora, supra note 29, at 822–23; Sadat, Nightmares, supra note 28,
detrimental for the assurance of cooperative criminal investigation and mutual legal assistance for prosecution in the form of cooperative exchanges of evidence, expert testimony, and availability of other witnesses. Why would a state and its nationals risk liability for aiding and abetting such a criminal governmental program of another state?

In 1991, the U.N. General Assembly made an oblique reference to possible consequences of “acts of terrorism” with respect to international cooperation when deploring “the pernicious impact of these acts on relations of cooperation among States.” These consequences can also pertain when the state that is responding to non-state actor terrorism uses terroristic forms of interrogation of suspected terrorists, such as threatening to kill family members, using dogs for terroristic purposes, and using waterboarding to instill an intense fear of drowning.

3. Extradition

A program of unlawful rendition, detention, interrogation, and prosecution can also result in a refusal by some states to extradite persons who are reasonably accused of having committed acts of terrorism to a country that has adopted such a program. It has been reported that this was the case with the Bush administration’s program of coercive interrogation and executive-created military commissions that would deny basic laws of war and human rights to due process. For example, Spain indicated that it would not extradite eight persons suspected of complicity in the September 11 attacks on the United States unless the Bush administration promised that they would not be tried in a Bush military commission. One news report added that “[a] senior European Union official . . . doubted that any of the 15 [EU] nations . . . would agree to extradition that involved the possibility of a military trial.” At one point, “Britain and France warned they might not turn over Taliban and [a]l Qaeda fighters captured by their troops in Afghanistan unless Mr. Bush pledged to honor” the Geneva Conventions.

34. Id.
35. See Thom Shanker & Katharine Q. Seelye, A Nation Challenged: Captives;
In fact, states have an absolute duty under treaty-based and customary international law to not extradite or render a person to another country where there is a real risk that the person will suffer human rights violations in the country or where there are substantial grounds for believing that the person will be persecuted, for example, because of that person's religion, race, national origin, or political opinion. Furthermore, the U.S. program of rendition to other countries for secret detention and unlawful interrogation has been criticized for violating such international legal obligations.

C. Degradation of Our Military

Degradation of our military through a program of unlawful responses to terrorism can include moral and psychological degradation and detrimental impacts upon military professionalism, honor and integrity, morale, retention, and recruitment. This in turn can degrade mission readiness and performance. Participation in coercive interrogation in violation of the laws of war and human rights can also foster lack of respect for fellow human beings and the rule of law, which can lead to further illegality that impacts detrimentally on the overall mission. Ultimately, a strong and effective military that serves the national interest in a constitutional democracy is one that operates within the law.

D. Degradation of Inter-Agency Cooperation

Unlawful responses to terrorism by some members of the

36. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 475 cmt. g, 476 cmt. h, 711 reporter's note 7 (1987); PAUST, supra note 2, at 35, 106, 163, 193 n.76, 187 n.43, 188 n.45, 200 n.145; PAUST, BASSIOUNI ET AL., supra note 9, at 344-45, 348-53, 396, 401.
executive branch can foster a lack of respect among executive agencies and lead to a lack of effective cooperation, especially if cooperation is thought to contribute to illegal programs and plans and such contributions can lead to criminal and civil sanctions against those who are complicit in international crimes.

E. Contribution to the Causes of Terrorism

In 2006, the U.N. General Assembly announced a Plan of Action as part of the United Nations Global Counter-Terrorism Strategy. The Plan of Action expressly recognized that "conditions conducive to the spread of terrorism" can include "dehumanization of victims of terrorism[,] . . . lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism." Some of the conditions, of course, could be created or exacerbated by war crimes and other violations of international law perpetrated in response to acts of terrorism. This is undoubtedly why the Plan of Action reaffirmed "that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy" and recognized "that effective counter-terrorism measures and the protection of human rights are . . . complementary and mutually reinforcing." Later in 2006, the General Assembly also recognized that "respect for human rights for all, international humanitarian law and the rule of law" can help to defeat terrorism while affirming that such respect for human rights and law is "the fundamental basis for the fight against terrorism." Implicit in such an affirmation is the recognition that


41. Id. at Annex, pt. I.; see also G.A. Res. 46/51, supra note 32, ¶ 6 ("causes underlying international terrorism [can include] situations involving mass and flagrant violations of human rights and fundamental freedoms").

42. Global Counter-Terrorism Strategy, supra note 40, at Annex, pt. IV; see also Rotman, supra note 19, at 543–47 (identifying the therapeutic significance of legal responses to terrorism).

43. See Protection of Human Rights and Fundamental Freedoms While
violations of human rights, humanitarian law, and the rule of law can exacerbate the fight against terrorism. It is assuredly one of the reasons why the General Assembly has consistently declared that "[s]tates must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law" and has reaffirmed "that it is imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism."

IV. AID TO THE ENEMY

A. Rallying the Enemy

A serial war crimes governmental policy can serve terrorist ambitions in several ways. As noted in a prior writing, the common plan of the Bush administration to use unlawful coercive interrogation undoubtedly contributed to increased violence in Afghanistan and Iraq, inspired the enemy to greater violence, and served as a terrorist recruitment tool. This can lengthen and intensify violence, influence barbarity, and create a generation of violence in alleged revenge. Some terrorist groups count on

44. Id. ¶ 1.
45. Id. ¶ 9.
46. PAUST, supra note 2, at 46; see also Origins, supra note 28, at 1 ("The abuse at Abu Ghraib was a potent recruiting tool for al Qaeda and handed al Qaeda a propaganda weapon they could use to peddle their violent ideology."); Drumbl, supra note 29, at 347, 347 n.46 (addressing the risk of feeding violence); Editorial, The Torture Report, N.Y. TIMES, Dec. 18, 2008, at A42 ("Alberto Mora . . . told the Senate Committee that 'there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively, the symbols of Abu Ghraib and Guantanamo.").
47. See also Bassiouni, supra note 20, at 424 ("each person tortured, as well as his/her family, are likely to become enemies of the U.S. and seek revenge for their treatment, thus generating more potential enemies likely to threaten the security of this country and its people"); Rotman, supra note 19, at 538–47.
governmental overreaction and criminal behavior in an attempt to deconstruct the impermissibility of their own behavior and demonstrate the unlawful and immoral nature of a government. War crime responses to terror can play into their hands.

B. Unwitting Support of Enemy Status and Methods

Lawless overreaction on the part of governments can serve terrorist ambitions by contributing to the deconstruction of the impermissibility of terrorist tactics and by influencing use of further lawless responses and counter-responses. As Professor Karima Bennoune recognized, if illegal means are used in response to terrorism, the impermissibility of terrorist means might blur and the illegal methods of governmental response might deconstruct the impermissibility of strategies of the terrorists as well. She warns, therefore, that such “counterterrorism is pregnant with future terrorists” and, hence, doomed to failure.48

As noted previously with respect to al Qaeda, being at “war” with non-state actor terrorists is favored by elite members of al Qaeda, since it tends to equalize their status and their violent conduct and they can have certain “victories” against a powerful “enemy” while engaging in a protracted “war” during which their status is enhanced from that of a member of a non-state terrorist organization to that of an “enemy combatant.” Such a paradigm might also serve al Qaeda’s efforts at recruitment and attempted justification for its “war” and terrorist

tactics as means of “warfare” and, thus, contribute to the continuation of social violence.\(^{49}\)

C. Inhibition of Prosecution

Use of unlawful interrogation tactics can inhibit prosecution of terrorists and others who might be reasonably accused of having violated international and U.S. domestic law. Use of some forms of interrogation will violate U.S. constitutional strictures where the U.S. Constitution applies\(^{50}\) and can result in the exclusion of information and physical evidence obtained from such violations in a U.S. court or tribunal. As the district court in \textit{In re Guantanamo Detainee Cases}\(^{51}\) recognized, “[t]he Supreme Court has long held that due process prohibits the government’s use of involuntary statements obtained through torture or other mistreatment.”\(^{52}\)

\footnotesize
49. PAUST, supra note 2, at 64; see also M. Cherif Bassiouni, \textit{Terrorism: The Persistent Dilemma of Legitimacy}, 36 Case W. Res. J. Int’l L. 299, 303 (2004) (“By overreacting, heightening fear levels, curtailing civil liberties, and sometimes engaging in abuses, governments lose the high moral ground in the struggle, and diminish their ability to engage in effective prevention and control, and, ultimately, genuine suppression of this type of [terrorist] activity.”); Mary Ellen O’Connell, \textit{Enhancing the Status of Non-State Actors Through a Global War on Terror?}, 43 Colum. J. Transnat’l L. 435 (2005); Rotman, supra note 19, at 538–40 (“[E]xpansion of the notion of combatancy, including its unlawful forms, favors the terrorist self-image because it absolves them of criminal culpability. A therapeutic jurisprudential approach to terrorism should oppose rhetoric like the ‘War on Terror,’ which glorifies terrorists as warriors instead of vilifying them as criminals . . . labeling terrorist attacks as . . . conflicts legitimizes them and makes attacks on military targets . . . appear as legitimate waging of war . . . The military response . . . is seriously counter-productive. Perpetrators become martyrs or heroes, and military countermeasures enhance the status of terrorist groups . . . .”).

50. In view of the expectations of the Framers and the text and structure of the U.S. Constitution, it should be recognized that the U.S. Constitution applies wherever U.S. officials act, as a restraint on their power and authority, since they are entirely creatures of the Constitution and have no powers outside the Constitution. \textit{See, e.g.}, Reid v. Covert, 354 U.S. 1, 5–6, 12, 35 n.62 (1957); United States v. Lee, 106 U.S. 196, 220 (1882); PAUST, supra note 2, at 75–76, 106–07, 109, 189 n.59, 227–28 n.85, 260 n.112, 279–80 nn.44–50.


52. \textit{Id.} at 472 (citing Jackson v. Denno, 378 U.S. 368, 386 (1964)). The Supreme Court has condemned the totalitarian practice of using “unrestrained power to seize persons . . . [and] hold them in secret custody, and wring from them confessions by physical or mental torture.” Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944); \textit{see also} Beecher v. Alabama, 389 U.S. 35 (1967); United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (“[i]n the name of security the police state justified its arbitrary oppressions on evidence that is secret”); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (“The rack and
Exclusion of such information and evidence might leave prosecutors unable to initiate prosecution or to prove guilt beyond a reasonable doubt.

The same adverse consequences can result under treaty law of the United States. For example, Article 15 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment mandates that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be involved as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) also requires that "everyone shall be entitled... [n]ot to be compelled... to confess guilt." The U.N. General Assembly has also declared that while responding to terrorism, states should “ensure that any statement that is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." The Human Rights Committee under the auspices of the ICCPR has similarly recognized that “[i]t is important... that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” addressed in Article 7 of the ICCPR. The Inter-American Commission on Human Rights has also recognized that an exclusionary rule applies to material seized during a search in violation of due process and other human rights. Within the European context, the British House of Lords has recognized similarly that evidence obtained by torture engaged in by a foreign government cannot be used in view of the prohibition of torture in the European Convention on Human Rights.
Rights and Freedoms.59

During the Subsequent Nuremberg Proceedings, the U.S. Military Tribunal recognized in United States v. Altstoetter (The Justice Case), while addressing the war crime responsibility of defendant Klemm:

it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo... was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber... More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interrogations... While he was in the Party Chancellery he wrote the letter... denying the application of the German... law to Poles, Jews, and gypsies.60

V. DEFLATION OF AUTHORITY, LAW, AND POWER

A program or common plan involving violations of human rights and the laws of war in response to terrorism can deflate the authority, influence, and general power of a government. Degradation of a government’s authority and respect can detrimentally impact effective political and diplomatic power and general foreign policy efforts to enhance human rights, democracy, and the rule of law. As the U.N. General Assembly has recognized more generally, “the respect for human rights, the respect for democracy and the respect for the rule of law are interrelated and mutually reinforcing.”61 Such outcomes and interrelations are

59. See A (FC) & Others (FC) v. Sec'y of State for the Home Dep't [2004] UKHL 56.
60. Supra note 13, at 1093–94.
evident with regard to the degradation of U.S. authority and influence in the global community as a result of the shameful and unlawful Bush program of secret detention and coercive interrogation. A government that systematically violates human rights and law of war treaties does not serve international peace and security founded on respect for law.

At home, the criminal program and behavior of the Bush administration can degrade continued acceptance of traditional American values, including human rights, democracy, respect for the rule of law, and morality. Particularly threatening is the unacceptable claim that the President and his entourage are not bound by any inhibiting domestic or international law and should be free from any meaningful judicial supervision. Such an
unconstitutional claim and autocratic theory must continue to be opposed in our country and in any democracy attentive to human rights and the rule of law. As the U.S. Supreme Court declared during the Civil War, the suspension of law "leads directly to anarchy or despotism" and is contrary to our Constitution; and when faced with such claims over the last several years, the Supreme Court has consistently drawn the line in favor of the rule of law in Hamdi, Rasul, Hamdan, and Boumediene. While dissenting in Padilla, Justice Stevens stressed the overriding importance of "the constraints imposed on the Executive by the rule of law," rightly condemned torture of the mind imposed through incommunicado detention, and offered a prescient warning:

Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not yield the tools of tyrants even to resist an assault by the forces of tyranny.

VI. CONCLUSION

What resonates more than the details of deprivation and serial crime is the grating, mean-spirited, and ultimately anti-American tone of the Bush program of unlawful transfer, secret detention, and coercive interrogation. The violations of international law that

65. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).
71. Id. at 465 (Stevens, J., dissenting).
72. Id.; see also Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 532 (E.D. Va. 2002) ("Implicit in the term 'national defense' is the notion of defending those values and ideals which sets this Nation apart.") (quoting United States v. Robel, 389 U.S. 258, 264 (1967)).
are an inherent part of the Bush program and common plan are unnecessary. They degrade this country, its values, and its influence. They can fulfill terrorist ambitions and pose long-term threats to our national security and the rule of law. Our long-term national security can best be protected by adhering to human rights, democracy, and the rule of law while also participating in their greater effectuation abroad.