

# TORTURE ON TRIAL: HOW THE ALIEN TORT STATUTE MAY EXPOSE THE UNITED STATES GOVERNMENT’S ILLEGAL “EXTRAORDINARY RENDITION” PROGRAM THROUGH ITS USE OF A PRIVATE CONTRACTOR

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## I. INTRODUCTION

While traveling through Pakistan, British resident Binyam Mohamed (Mohamed) was arrested and handed over to U.S. government agents for four months of abusive first-round interrogation while denied access to a legal representation.<sup>1</sup> Abou Elkassim Britel (Britel), an Italian citizen, endured two months of initial interrogation in Pakistan, while denied access to the Italian consulate.<sup>2</sup> Ahmed Agiza (Agiza), an Egyptian citizen seeking asylum in

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1. Complaint at 1, *Mohamed v. Jeppesen Dataplan, Inc.*, Civ. No. C-07-2798 RS (N.D. Cal. filed May 7, 2007), available at <http://www.aclu.org/safefree/torture/299191gl20070530.html> (last visited Aug. 1, 2007).

2. *Id.* at 2.

Sweden was secretly apprehended and turned over to U.S. Central Intelligence Agency (CIA) agents.<sup>3</sup> Unbeknownst to them, the period of December 2001–April 2002 would mark the onset of a horrific fate: each stripped, shackled, and flown blindfolded to secret detention facilities across the globe, against their will, where they were physically and psychologically tortured<sup>4</sup> devoid of judicial safeguards.<sup>5</sup> None would know their seizures and secret detentions were part of a larger clandestine CIA secret rendition program,<sup>6</sup> in which suspected terrorists are methodically plucked from neighboring nations, and placed against their will to “black sites” across the globe to countries where it is more likely than not<sup>7</sup> that the transfer will lead to their torture.<sup>8</sup> They would each instantly become “ghost detainees”<sup>9</sup> and after prolonged detentions without charge, none have been released.<sup>10</sup>

In May 2007, the American Civil Liberties Union (ACLU) filed suit on behalf of these three plaintiffs<sup>11</sup> in the United States District Court for the

3. *Id.*

4. *Id.* at 1.

5. Complaint at 1, *Mohamed v. Jeppesen Dataplan, Inc.*, Civ. No. C-07-2798 RS (N.D. Cal. filed May 7, 2007), available at <http://www.aclu.org/safefree/torture/299191gl20070530.html> (last visited Aug. 1, 2007).

6. Authorities in Sweden and Italy opened investigations into the CIA’s role in seizing suspects from their respective countries and flying them to other countries such as Egypt where they were interrogated. See Scott Shane, Stephen Grey & Margot Williams, *C.I.A. Expanding Terror Battle Under Guise of Charter Flights*, N.Y. TIMES, May 31, 2005, at A1.

7. ASS’N OF THE BAR OF THE CITY OF NEW YORK & CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, N.Y.U. SCHOOL OF LAW, *Torture by Proxy: Int’l and Domestic Law Applicable to “Extraordinary Renditions”* (Oct. 29, 2004), available at [http://www.nyuhr.org/docs/Torture By Proxy.pdf](http://www.nyuhr.org/docs/Torture%20By%20Proxy.pdf) (last visited Aug. 1, 2007) [hereinafter *Torture by Proxy*] (committee report concluding the extraordinary rendition program violates both international and domestic law and recommends that it is immediately brought to an end).

8. AMNESTY INT’L, *BELOW THE RADAR: SECRET FLIGHTS TO TORTURE AND “DISAPPEARANCE”* (2006), available at [http://web.amnesty.org/library/pdf/AMR510512006ENGLISH/\\$File/AMR5105106.pdf](http://web.amnesty.org/library/pdf/AMR510512006ENGLISH/$File/AMR5105106.pdf) [hereinafter *Below the Radar*] (according to Amnesty, “the rendition network’s aim is to use whatever means necessary to gather intelligence, and to keep detainees away from any judicial oversight.”).

9. WORLD ORG. FOR HUM. RTS. USA, *Torture, Arbitrary Detention, and Other Major Human Rights Abuses by the United States: U.S. Non-Compliance with the International Covenant on Civil and Political Rights in the Context of the “War on Terror”* (Mar. 2006), available at <http://www.ohchr.org/english/bodies/hrc/docs/ngos/wofhr.pdf> (last visited July 31, 2007) (report submitted to the United Nations Human Rights Committee in preparation for NGO hearings before the Committee in March 2006).

10. As of July 2007, Mohamed remains incarcerated in Guantanamo, Cuba; Agiza is serving a twenty-five year sentence in Egypt for being a member of a banned Islamic organization, following a six-hour military trial; Britel is serving a nine-year sentence in Casablanca, Morocco after signing a forced confession for involvement in bombings that took place there. See generally Complaint, *supra* note 1.

11. Complaint, *supra* note 1, at 1–3.

Northern District of California, Ninth Circuit.<sup>12</sup> However, the named defendant is not the CIA, nor any of the plaintiffs U.S. citizens.<sup>13</sup> A Boeing Subsidiary, Jeppesen Dataplan, Inc. (Jeppesen)<sup>14</sup> headquartered in San Jose, California,<sup>15</sup> finds itself front stage on the torture debate that started brewing when rumors of the CIAs secret rendition flights were first given intense media spotlight.<sup>16</sup> The brief two-month period following the initial complaint, a probable result of broad international coverage, produced two additional plaintiffs who joined the suit against Jeppesen in August 2007.<sup>17</sup> Mohamed Farag Ahmad Bashmilah (Bashmilah), a Yemeni citizen, and Bisher al-Rawi (al-Rawi), a British resident whom was living in England since 1984 to escape Saddam Hussein's regime, endured experiences similar to those of Mohamed, Agiza, and Britel.<sup>18</sup> Hooded, drugged, and flown to countries in which both were systematically tortured, Bashmilah and al-Rawi were forcibly disappeared; what separates these two men from the others are their recent releases.<sup>19</sup> Freed from secret confines of the covert rendition program, their voices speak to the details of U.S. government policies which have quietly evaded mainstream discussion.

Though controversy embeds itself within the emotive and pragmatic implications of countering terrorism, this article embraces the global implications of a U.S.-led *rendition to torture* program. The discussion begins by outlining the legal framework from which five international citizens—none of which maintain American citizenship—likely have standing to bring their claims in U.S. courts. Next, the claims for relief sought against Jeppesen are referenced, while focusing upon their potential for dismissal, under a likely intervention by the United States, citing state-secrets privilege. The international rendition network, its operation and background, and Jeppesen's

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12. *See id.*

13. Anthony J. Sebok, *A Bid to Litigate the Legality of U.S.-Sponsored Torture in Federal Court: Will It Succeed?*, FindLaw.com, <http://writ.news.findlaw.com/sebok/20070605.html> (June 5, 2007) (last visited Aug. 1, 2007).

14. Jeppesen operates under the trade name of Jeppesen International Trip Planning. It is also a subsidiary of Jeppesen Sanderson based in Englewood, Colorado. Jeppesen Sanderson is a wholly owned subsidiary of Boeing Company headquartered in Chicago, Illinois. *See* Complaint, *supra* note 1, at 5.

15. Jane Mayer, *The C.I.A.'s Travel Agent*, NEW YORKER, at 34, (Oct. 30, 2006), available at [http://www.newyorker.com/archive/2006/10/30/061030ta\\_talk\\_mayer](http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer) (last visited Aug. 1, 2007).

16. Chandra Lekha Sriram, Op-Ed., *Exporting Torture: US Rendition and European Outrage*, JURIST, <http://jurist.law.pitt.edu/forumy/2005/12/exporting-torture-us-rendition-and.php> (Dec. 13, 2005) (last visited Aug. 1, 2007).

17. First Amended Complaint at 1, Mohamed v. Jeppesen Dataplan, Inc., Civ. No. 5:07-cv-02798 (JW) (N.D. Cal. filed Aug. 1, 2007), available at <http://www.aclu.org/safefree/torture/311641gl20070801.htm> (last visited Aug. 4, 2007).

18. *Id.* at 3.

19. *Id.* at 3, 4.

role in facilitating the illegal activities are enumerated for further understanding. Finally, the suit's implications, legally and sociologically, and its likelihood of success, are woven together to determine/analyze what the future may bring for multinational corporations complicit in violation of international law as well as whether the rendition program may be impacted at all.

## II. LEGAL FRAMEWORK

Five non-U.S. citizens are able to file suit within the federal court system, based solely on jurisdiction granted by the U.S. government.<sup>20</sup>

### A. Jurisdiction through the Alien Tort Statute (ATS)<sup>21</sup>

Alien's action for tort: the district courts "have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."<sup>22</sup> Adopted through the Judiciary Act of 1789,<sup>23</sup> as a means for providing recourse to non-citizens whom suffered at the hands of pirates on the high seas,<sup>24</sup> new life has breathed upon this once ancient statute.<sup>25</sup> The ATS allows aliens to bring suit in U.S. courts for violations of the law of nations or treaties of the United States by granting jurisdiction.<sup>26</sup> It does not, in and of itself, create a cause of action.<sup>27</sup> The Supreme Court carefully reviewed history when placing the ATS into a modern-day context in 2004 and viewed the statute to be practical in nature.<sup>28</sup> "The ATS recognizes

20. Jurisdiction is proper based upon 28 U.S.C. § 1331 (2000) (federal question). *Id.* § 1332 (diversity jurisdiction). *Id.* § 1350 (Alien Tort Statute). See First Amended Complaint, *supra* note 17, at 6.

21. The ATS will also be referenced as the Alien Tort Claims Act (ATCA) at times during this article to preserve quoted material. See Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 805 n.5 (2005) (noting the Supreme Court's reference to the statute in *Sosa v. Alvarez-Machain* as the Alien Tort Statute—rather than the ATCA.).

22. 28 U.S.C. § 1350.

23. *Id.*

24. Jenny B. Davis, *Old Law Bares Its Teeth: Alien Tort Claims Act Bites International Firms*, 89 A.B.A. J. 20, 20 (2003); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 A.J.I.L. 461, 488 n.120 (noting that piracy was not included in the enumeration of potential torts in the 1781 resolution and not excluded by the language of the statute).

25. *Id.*

26. Complaint, *supra* note 1, at 5.

27. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

28. *Id.*

as federal common law those international norms that have definite content and acceptance among civilized nations.”<sup>29</sup>

*B. Filartiga v. Peña-Irala*<sup>30</sup>

The modern-day usage of the ATS, giving birth to its revitalization, was the United States Court of Appeals for the Second Circuit decision in *Filartiga*, after near two-hundred years of dormancy.<sup>31</sup> In *Filartiga*, a Paraguayan national whose son was tortured to death by a Paraguayan police officer (Peña-Irala) filed suit in a United States court under the ATS, though the citizens were from Paraguay and the events exclusively occurred there.<sup>32</sup> While in the United States seeking asylum, the plaintiff-mother learned of Peña-Irala’s presence in the country on a VISA and commenced a wrongful death suit.<sup>33</sup> The Court held that torture which leads to the death of a person is a direct violation of the law of nations<sup>34</sup> and expanded the application of the Alien Tort Statute to include torts, in violation of international law, committed around the world.<sup>35</sup> Interpretation should not be strictly limited to laws of 1789 but rather international law as it exists today.<sup>36</sup> The *Filartiga* Court<sup>37</sup> viewed the ATS as a basis for providing a civil remedy to the victims of the enemies of mankind,<sup>38</sup> when it held, that deliberate torture committed under color of law violates

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29. Complaint, *supra* note 1, at 5.

30. 630 F.2d 876 (2d Cir. 1980).

31. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 610 (noting *Filartiga* paved the way for a new conceptualization of the ATS.).

32. *Filartiga*, 630 F.2d at 878.

33. *Id.* at 878–79.

34. *Id.* at 876, 880 n.4 (“Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is ‘a violation of international law formerly called the law of nations.’”).

35. *Filartiga*, 630 F.2d at 887–90.

36. *Id.* at 881.

37. *Torture by Proxy*, *supra* note 7 (“The Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law” (quoting *Filartiga*)).

38. *Filartiga*, 630 F.2d at 890 (“In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

universally accepted norms of international human rights law and is therefore a violation of United States law.<sup>39</sup>

C. *Kadic v. Karadzic*<sup>40</sup>

*Filartiga*, coupled with a Second Circuit ruling in *Kadic* in 1995, extended the ATS to include non-state actors.<sup>41</sup> In *Kadic*, the plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina who brought charges of atrocities such as torture, rape, and summary execution, *inter alia*, against Karadzic, on behalf of themselves and representative victims.<sup>42</sup> Karadzic, who was in lawful control of Bosnian-Serb forces carrying out these war crimes, could face liability as acting under the color of state law<sup>43</sup> or, in the alternative, as an individual due to the magnitude of the offenses.<sup>44</sup> The court laid down the principle that private parties could be liable, “for certain violations of customary international law,”<sup>45</sup> such as genocide, war crimes, summary execution, and torture.<sup>46</sup>

D. *Sosa v. Alvarez-Machain*<sup>47</sup>

The landmark United States Supreme Court case of *Sosa*, which originated in the United States Court of Appeals for the Ninth Circuit, was initiated by a Mexican citizen who was forcibly abducted by several Mexican nationals operating as bounty hunters, at the bequest of the United States Drug Enforcement Administration (DEA). Dr. Alvarez-Machain was tried and acquitted for the murder of a DEA agent, then later filed suit against one of the hired abductors (*Sosa*) for violation of the law of nations as spelled out in the ATS for his false arrest. Alvarez-Machain also brought an action under the Federal Tort Claims Act (FTCA), which the court summarily dismissed since the alleged harm took place outside of the United States, in Mexico.<sup>48</sup>

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39. *Id.* at 878.

40. 70 F.3d 232 (2d Cir. 1995).

41. Alan Frederick Enslin, *Commentary: Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695, 734 (1997).

42. *Kadic*, 70 F.3d at 236–37.

43. *Id.* at 237.

44. *Id.* at 239.

45. *Id.*

46. *Id.* at 242–46.

47. *Sosa*, 542 U.S. at 692.

48. *Id.* at 712 (“We therefore hold that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”); *see*

The Supreme Court held, in an opinion written by Justice Souter, that although the plaintiff was not entitled to a remedy on either the ATS claim or the FTCA claim, this did *not* preclude future human rights victims from the ability to bring suit under the ATS in U.S. courts.<sup>49</sup> The *Sosa* opinion has been a source of contention as both human rights advocates (potential future plaintiffs) and multinational corporations (likely future defendants) euphemistically view it as a victory: on one hand, the Supreme Court left a narrow window of recovery open for violations against international law, while at the same time, cautioned against an expansive view of the ATS.<sup>50</sup> At present, there have been little more than twenty cases brought under the modern-day interpretation of the ATS against multinational corporations for complicity in egregious human rights violations.<sup>51</sup>

### III. CUSTOMARY INTERNATIONAL NORMS

Generally, there are four ways in which international law may become binding on the United States: court interpretation of statutes, legislative reference to international law, use of international law principles to fill gaps in common law, and through direct incorporation<sup>52</sup> of treaties.<sup>53</sup> In *Sosa*, “the Supreme Court reaffirmed that ‘the domestic law of the United States recognizes the law of nations,’ a pronouncement in accord with a long lineage of precedents.”<sup>54</sup> Customary international law, also called, “the law of nations,”<sup>55</sup> are practices followed by state entities out of a sense of legal obligation and are of a “general and consistent practice” such as the prohibition on slavery and genocide.<sup>56</sup> Furthermore, Congress has affirmatively sided with court decisions which hold the statute refers to current norms of international

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also Beth Henderson, Note & Comment, *From Justice to Torture: The Dramatic Evolution of U.S.-Sponsored Renditions*, 20 TEMP. INT'L & COMP. L.J. 189, 210 (2006) (noting that under the FTCA one who had been rendered by the U.S. government in order to be tortured in a foreign country would not be able to sue under this statute.).

49. *Sosa*, 542 U.S. 692 at 724–25.

50. *Id.*

51. Daphne Eviatar, *A Big Win for Human Rights*, THE NATION, May 9, 2005, at 1, available at <http://www.thenation.com/doc/20050509/eviatar> (last visited Aug. 1, 2007).

52. See U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

53. AMNESTY INT'L, U.S. OBLIGATIONS UNDER INTERNATIONAL LAW, available at [http://www.amnestyusa.org/Detainees/US\\_Obligations\\_Under\\_International\\_Law/page.do?id=1031030&n1=3&n2=821&n3=837](http://www.amnestyusa.org/Detainees/US_Obligations_Under_International_Law/page.do?id=1031030&n1=3&n2=821&n3=837) (last visited Aug. 2, 2007).

54. David M. Lieberman, *Sorting the Revolutionary from the Terrorist: the Delicate Application of the “Political Offense” Exception in U.S. Extradition Cases*, 59 STAN. L. REV. 181, 205 (2006).

55. *Id.*

56. AMNESTY INT'L, *supra* note 53.

law.<sup>57</sup> Given precedent and public policy leanings, the Plaintiffs charge Jeppesen's with violating customary international law and treaties ratified by the United States legislature, due to their involvement in the CIAs extraordinary rendition program.<sup>58</sup>

#### IV. CLAIMS FOR RELIEF

The claims for relief are based on both forced disappearance and for "torture and other cruel, inhuman, or degrading treatment."<sup>59</sup> These are both, "specific, universal, and obligatory norm of customary international law," which is recognized under the ATS.<sup>60</sup> The complaint alleges that:

[Jeppesen had] actual or constructive knowledge that its involvement would result in the secret apprehension and detention of Plaintiffs . . . in the alternative, Jeppesen . . . participated in or committed a wrongful act in furtherance of conspiracy which resulted in injury to plaintiffs . . . [the] plaintiffs were subjected to torture and other cruel, inhuman, or degrading treatment by agents of the U.S., Morocco, and Egypt. Customary International law prohibits . . . against removing any person, regardless of status, to a country where there is a substantial likelihood that he will be tortured . . . [it] is a 'specific, universal, and obligatory' norm of customary international law cognizable under the Alien Tort Statute.<sup>61</sup>

#### V. CIA RENDITIONS

In the Post-9/11 world, the United States government expanded its global counter-terrorism role, utilizing state agencies such as the CIA. Covert operations conducted by the CIA operate within a *sphere of vagueness* in U.S. law,<sup>62</sup> making it an attractive vehicle for the government to carry out state objectives in a less than public fashion. Covert action is activity meant "to influence political, economic, or military conditions abroad, where it is

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57. Beth Stephens, *International Law Weekend Proceedings: Human Rights Accountability: Congress, Federalism, and International Law*, 6 ILSA J. INT'L & COMP. L. 277, 281 n.16 ("noting that the ATCA permits suits based on 'norms that already exist or may ripen in the future into rules of customary international law'").

58. See Complaint, *supra* note 1, at 5-6.

59. Complaint, *supra* note 1, at 42.

60. *Id.* at 41.

61. *Id.*

62. Jennifer D. Kibbe, *The Rise of Shadow Warriors*, 83 FOREIGN AFF. 102, 102-04 (2004), available at <http://www.foreignaffairs.org/20040301faessay83209/jennifer-d-kibbe/the-rise-of-the-shadow-warriors.html> (last visited Aug. 1, 2007).

intended that the role of the United States Government will not be apparent or acknowledged publicly."<sup>63</sup> The CIA operates clandestine prisons at different points around the globe, which were unknown to many to even exist.<sup>64</sup> One of the means through which these covert activities are carried out are through *extraordinary renditions*.<sup>65</sup> The phrase was first used by the United States Marshall Service to, "[bring] certain fugitives within the territorial jurisdiction of the United States by kidnapping them abroad."<sup>66</sup> However, this practice has morphed from one in which the U.S. government used formal proceedings to try the covertly abducted to a program where the suspects are transferred to countries where it is likely—if not a near-certain probability—they will be tortured.<sup>67</sup> It is considered a "hybrid human rights violation" with "elements of arbitrary arrest, enforced disappearance, forcible transfer, torture, denial of access to consular officials, and denial of impartial tribunals."<sup>68</sup> The rendered victims are taken to "black sites"—secret detention facilities—in countries in which the State Department acknowledges the clear and ongoing use of torture. A committee report, submitted by a nongovernmental agency (NGO) to the United Nations sheds light on this abusive practice:

[T]he CIA continues operating these secret detention facilities abroad and refuses access to these prisons to international monitors such as the International Committee of the Red Cross (ICRC). These 'ghost detainees' are being held abroad in secret sites to avoid judicial review of the legality of their detention and conditions of their confinement, and to avoid media attention. This denial of an impartial judicial determination of their status and treatment constitutes a violation of the Article 9 right to promptly challenge lawfulness of detention before a court and the Article 14 right to a fair trial by a competent, independent and impartial court of law or tribunal. Sources within the CIA indicate that approximately 100 'ghost detainees' are currently being held in these secret facilities despite the fact that over 70% of these detainees have little to no intelligence value to interrogators. Eight detainees held at Guantanamo Bay revealed in December 2005 that they were held in a secret detention

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63. *Id.*

64. Jackie Northam, *Morning Edition: U.S. Acknowledges Existence of Secret CIA Prisons*, NPR radio broadcast, available at <http://www.npr.org/templates/story/story.php?storyId=5780585> (September 7, 2006) (last visited Aug. 1, 2007).

65. *See infra*, note 68.

66. Henderson, *supra* note 48, at 210 (remarking "[t]oday, rendition to justice stands juxtaposed to a newer form of rendition developed with the advent of the U.S. war on terrorism: rendition to torture.").

67. *Id.* at 189.

68. David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 127 (2006).

facility near Kabul, Afghanistan at different times between 2002 and 2004 before being sent to Guantanamo. There, the detainees reported being chained to walls, deprived of food and clean drinking water, and kept in total darkness with loud music and other sounds blared over a stereo system for weeks at a time. U.S. interrogators slapped and punched the detainees during interrogations and shackled them in such a manner that made sleep impossible.<sup>69</sup>

All five plaintiffs were rendered to countries in which they endured similar torture abuses, and were beyond the reach of international safeguards.

The executive branch has strong incentives to withhold information from the public, albeit some of them legitimate.<sup>70</sup> However, valid concerns arise where an individual is not afforded even the barest of due process and is left, "in the hands of despotic governments."<sup>71</sup> It is common for states to deny their involvement in order to escape scrutiny.<sup>72</sup> The detentions are shrouded in secrecy and scant information—characteristic of the program itself—is made available on held individuals; even a person's name will likely be concealed by the government.<sup>73</sup> It was not until September, 2006, that President Bush publicly acknowledged the existence of the secret-run CIA prisons across the globe.<sup>74</sup> Prior to this, information slipped out through government leaks<sup>75</sup> or a minority of victims that were held captive and released.<sup>76</sup> There is consensus among experts that more than one hundred of these cases are thought to exist since September 11th.<sup>77</sup>

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69. WORLD ORG. FOR HUM. RTS. USA, *supra* note 9 (citing Dana Priest, *CIA Holds Terror Suspect in Secret Prisons*, WASHINGTON POST, (Nov. 2, 2005), at A01 and Human Rights Watch, *U.S. Operated Secret 'Dark Prison' in Kabul* (Dec. 19, 2005)).

70. Jared Perkins, Note & Comment, *The State Secrets Privilege and the Abdication of Oversight*, 21 BYU J. PUB. L. 235, 264 (2007).

71. Henderson, *supra* note 48, at 217.

72. *Id.*

73. Jonathan Hafetz, *Symposium: Secret Evidence and the Courts in the Age of National Security: Habeas Corpus, Judicial Review, and Limits on Secrecy Detentions at Guantanamo*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 127, 127 (2006).

74. Northam, *supra* note 64 (President Bush remarked, "It has been necessary to move these individuals to an environment where they can be held in secret, *questioned* by experts and, when appropriate, prosecuted for terrorist acts.").

75. Hafetz, *supra* note 73, at 127.

76. Michael V. Sage, Note, *The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT'L L.J. 121, 124 (2006).

77. *Id.* (citing Douglas Jehl, *Senate May Open Inquiry into C.I.A.'s Handling of Suspect*, N.Y. TIMES, Feb. 13, 2005, at 15).

The recent Executive Order,<sup>78</sup> signed into law by President Bush on July 21st, 2007 outlines new rules for the CIA's interrogation methods, yet does little to quell the controversy.<sup>79</sup> Unmistakably, there is no assertion the rendition program will cease; the Order speaks to modification rather than cessation. While the directive facially tones down some of the harsh interrogation methods which were previously authorized, the techniques which have been *approved* are classified, and beyond scrutiny.<sup>80</sup> Forbidden techniques include exposing detainees to extremes of hot and cold and "waterboarding" to induce a feeling of drowning.<sup>81</sup> However, the NEW YORK TIMES reports that the new, "rules would still allow some techniques more severe than those used in interrogations by military personnel in places like . . . Guantanamo Bay, Cuba."<sup>82</sup> Moreover, the order continues to prohibit the International Committee of the Red Cross (ICRC) from visiting detainees.<sup>83</sup>

Conceptually and in practice, a "rendition to torture"<sup>84</sup> program is fraught with complexities, as attitudes of world leaders clash within the fuzzy nexus where legality, morality, and necessity combine to shape state policies to combat terrorism.<sup>85</sup> Swiss Senator Dick Marty authored a report by the Council of Europe<sup>86</sup> on the CIA's secret rendition program, and condemned it to be directly at odds with the European Convention on Human Rights<sup>87</sup> and the Universal Declaration of Human Rights.<sup>88</sup> The report is also critical of the precarious methods in which both people and corporations are linked to terrorism, placed on special lists without charge, and with no way to remove one's self.<sup>89</sup> In defense, Dan Fried, the U.S. Assistant Secretary of State for European Affairs stated, "[w]e are attempting to keep our people safe; we are attempting to fight dangerous terrorist groups who are active and who mean what they say about destroying us. We are trying to do so in a way consistent

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78. Exec. Order No. 13440, 72 Fed. Reg. 40, 707 (July 20, 2007).

79. Mark Mazetti, *Rules Lay Out C.I.A.'s Tactics in Questioning*, N.Y. TIMES, July 21, 2007, at A1.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Henderson, *supra* note 48, at 189.

85. Paul Reynolds, *Rendition and the Rights of the Individual*, BBC NEWS (June 7, 2006), <http://news.bbc.co.uk/2/hi/europe/5055872.stm> (last visited July 31, 2007).

86. First Amended Complaint, *supra* note 17, at 5.

87. Reynolds, *supra* note 85.

88. *Id.*

89. *Id.*

with our values and our international legal obligations.”<sup>90</sup> State entities such as Britain and the United States maintain it is necessary in order to effectively combat the terrorism threat.<sup>91</sup> However, Marty points out that the “Old World” used existing legal institutions to deal effectively with threats in the past yet the United States opted, “to develop new legal concepts.”<sup>92</sup>

While many across the globe eagerly await an overdue torture on trial, some countries prove not so patient: the sovereign nations of both Italy and Germany have issued public arrest warrants for CIA agents in their alleged involvement in illegally abducting and rendering citizens from within their respective borders.

Meanwhile, the ACLU alleges Jeppesen provided the logistical support, travel, and operations for the CIA in these illegal renditions.<sup>93</sup> They are charged with knowledge, or in the alternative, constructive knowledge that facilitating the transport of these abductees was likely to lead to their torture and may face liability for complicity as, “aiding and abetting” the torture.<sup>94</sup>

While Jeppesen will likely claim in its answer to the complaint that it had no knowledge of the role the CIA played in the forced disappearances, in using its planes or planning expertise, it may not make for a convincing argument if the claim survives an inevitable motion to dismiss<sup>95</sup> and proceeds through discovery to trial. On record are published flight logs which document Jeppesen’s involvement in actual flights and planning,<sup>96</sup> which were uncovered by a journalist when investigating the disappearance of Italian citizen Britel.<sup>97</sup> At a minimum, the records demonstrate circumstantial proof, particularly when corroborated with known disappearances.

Crucial evidence could easily be swept up into the surreptitious vortex of “state secrets.” Legally, this presents a challenge beyond the obvious question of accountability: the Ninth Circuit will undoubtedly be forced to consider whether significant portions of information will be protected by the

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90. Reynolds, *supra* note 85.

91. *Id.*

92. *Id.*

93. Complaint, *supra* note 1, at 3.

94. *Id.* at 39–42.

95. FED. R. CIV. P. 12.

96. Diane Solomon, *Breaking Jeppesen: Behind the Story: How Investigative Journalists Used Flight Records to Uncover the Company’s Link to the CIA*, METROACTIVE, <http://www.metroactive.com/metro/06.13.07/jeppesen-0724.html> (Jun. 13–19, 2007) (last visited Aug. 1, 2007) (discussing Italian reporter Claudio Gatti who uncovered and decoded flight logs correlating to secret rendition flights). See also Mayer, *supra* note 15 (quoting managing director Bob Overby, “[w]e do all of the extraordinary rendition flights—you know, the torture flights.” Another executive was quoted saying, “[w]e do the spook flights.”).

97. Solomon, *supra* note 96.

government's state secrets privilege.<sup>98</sup> Only a government can assert this in a direct effort to protect its national security.<sup>99</sup> Though the torture and the transport of the plaintiffs is illegal and violates customary international law,<sup>100</sup> much of the supporting documentation would likely have to be obtained from the government itself: the CIA.

A. *El-Masri v. Tenet (El-Masri I)*<sup>101</sup>

In December of 2006, the U.S. District Court for the Eastern District of Virginia dismissed the suit of *El-Masri I*, based on the CIAs invocation of state secrets privilege.<sup>102</sup> El-Masri, whose identify was mistaken for another, was abducted while vacationing in Macedonia,<sup>103</sup> and consequently detained, drugged, and tortured for five months<sup>104</sup> by CIA operatives after having been flown via Air CIA<sup>105</sup> to one of the nefarious black sites located in Afghanistan.<sup>106</sup> Represented by the ACLU, El-Masri brought claims in the U.S. under the Alien Tort Statute for violating international legal norms<sup>107</sup> which

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98. Erin M. Stimp, Comment, *The Military and State-Secrets Privilege: The Quietly Expanding Power*, 55 CATH. U. L. REV. 831, 831 (2006) (noting "[t]he privilege permits the government to refuse discovery requests where 'there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.'" United States v. Reynolds, 345 U.S. 1, 10 (1953)).

99. *Id.* (citing Reynolds, 345 U.S. at 10).

100. *Torture by Proxy*, *supra* note 7, at 31.

101. 437 F. Supp. 2d 530 (E.D. Va. 2006).

102. *Id.* at 541.

103. El Masri's citizenship is German. *Id.* at 532.

104. See ACLU, STATEMENT: KHALED EL-MASRI, available at <http://www.aclu.org/safefree/extraordinaryrendition/22201res20051206.html#statement> (last visited July 31, 2007) [hereinafter STATEMENT].

105. See Michael Hirsh, Mark Hosenball & John Barry, *Aboard Air CIA*, available at <http://www.msnbc.com/id/6999272/site/newsweek> (Feb. 28, 2005) (last visited July 31, 2007).

106. STATEMENT, *supra* note 104.

107. See generally DIGEST OF JURISPRUDENCE OF THE UN AND REGIONAL ORGANIZATIONS ON THE PROTECTION OF HUMAN RIGHTS WHILE COUNTERING TERRORISM, General Comment No. 20, (Oct. 3, 1992) ("The right to freedom from torture and from cruel, inhuman or degrading treatment is, under both the universal and regional systems, absolute and non-derogable under all circumstances. In its General Comment No. 20 on article 7 of the Covenant, the Human Rights Committee underlined the non-derogable nature of this provision: The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority."). *Id.* ¶ 3.

prohibit, “prolonged, arbitrary detention.”<sup>108</sup> He also brought claims for violation of international norms such as the prohibition against cruel, inhuman, and degrading treatment.<sup>109</sup>

The United States took several approaches in defense of its extraordinary rendition program. First, it filed a formal claim of state secrets privilege.<sup>110</sup> Then, a motion to intervene was filed to preserve state secrets.<sup>111</sup> The District Court granted the government’s motion to dismiss and the presiding Judge remarked that, “any admission or denial of [El-Masri’s] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine program and such a revelation would present a grave risk of injury to national security.”<sup>112</sup> The court reasoned that, although El-Masri’s claims may be true, his “private interests must give way to the national security interest in preserving state secrets.”<sup>113</sup> Furthermore, while examining Fourth Circuit precedent, the court reasoned that trying the plaintiff’s claim would be akin to exposing the very methods used by the government, whose interests were [deemed] paramount.<sup>114</sup> According to this logic, this made a dismissal appropriate where El-Masri’s abduction and torture claims could not be proved without examining the CIAs methods, which are protected.<sup>115</sup> He is currently petitioning the U.S. Supreme Court for certiorari<sup>116</sup> after losing the appeal to the U.S. Court of Appeals for the Fourth Circuit.<sup>117</sup>

### B. *Mohamed v. Jeppesen Dataplan, Inc.*

The *El-Masri* case differs from the complaint filed against Jeppesen,<sup>118</sup> as the U.S. government, though inextricably linked, is not a named defendant<sup>119</sup>—seemingly reminiscent of President Nixon as the “unindicted co-conspirator”

108. Amanda Frost, Essay, *The State Secrets Privilege and Separation of Powers*, 75 *FORDHAM L. REV.* 1931, 1942 (2007).

109. *Id.*

110. *Id.* at 1943.

111. *Id.*

112. Frost, *supra* note 108, at 1943 (quoting *El-Masri*, 437 F. Supp. 2d at 536).

113. *Id.* at 1944 (quoting *El-Masri*, 437 F. Supp. 2d at 539).

114. *El-Masri*, 437 F. Supp. 2d at 538.

115. *Id.* at 539.

116. See Petition for Writ of Certiorari, *El-Masri*, 479 F.3d 296 (No. 06-0000), available at [http://www.aclu.org/pdfs/safefree/elmasri\\_cert20070530.pdf](http://www.aclu.org/pdfs/safefree/elmasri_cert20070530.pdf) (last visited July 31, 2007).

117. *El-Masri v. United States*, 479 F.3d 296, 313 (4th Cir. 2007). See also Adam Liptak, *German Loses Appeal on Abuse Suit Against CIA*, *INT’L HERALD TRIB.* (Mar. 3, 2007), available at <http://www.iht.com/articles/2007/03/03/news/web0303.terror.php> (last visited Aug. 1, 2007).

118. First Amended Complaint *supra* note 17.

119. See *El-Masri*, 437 F. Supp. 2d 530.

during Watergate.<sup>120</sup> The ACLU appears to be shifting its legal strategy on behalf of Mohamed, Britel, Agiza, Bashmilah, and al-Rawi by not taking direct aim at the state, rather circuitously through the corporation<sup>121</sup> which was instrumental in the rendition program.<sup>122</sup>

Flight logs housed by aviation authorities provide evidentiary support of Jeppesen's connection with the renditions.<sup>123</sup> Each flight log contains codes specifying the airport's departure, arrival, and *originator*.<sup>124</sup> "The originator files the flight plan and supports the flight."<sup>125</sup> Research obtained through flight records made available by the commissions of the European Parliament and Council of Europe, as well as civil aviation authorities, documented Jeppesen's undeniable involvement.<sup>126</sup> Although Jeppesen has had \$7.7 million in defense contracting since 2000, it is unclear how much of that went toward the rendition flight planning, as the CIA does not foreclose its contracts.<sup>127</sup> The raw data obtained through the flight lists provides more clarity when individual cases are brought to light and the rendition can be matched with the flight record.<sup>128</sup>

Amnesty International released a comprehensive report<sup>129</sup> explaining, "that the CIA has avoided detection by taking advantage of the terms of the Convention on International Civil Aviation, the so-called 'Chicago Convention' under which private, non-commercial flights may fly over countries and make

120. United States v. Nixon, 418 U.S. 683, 687 (1974).

121. First Amended Complaint, *supra* note 17.

122. Note that the Torture Victims Protection Act (TVPA) is not alleged to have been violated. For a potential explanation, see e.g., Eric Engle, Commentary, *The Torture Victim's Protection Act, The Alien Tort Claims Act, and Foucault's Archaeology of Knowledge*, 67 ALB. L. REV. 501, 504 n.16 (2003) ("Whether a corporation can be liable under the TVPA is contentious. The TVPA uses only the term 'individual' which argues against a finding that corporations may be liable for torture, but the overall purpose of the statute is to remedy torturous wrongdoings, irrespective of which individual is torturing." (quoting *Kadic*, 70 F.3d at 243-44)).

123. Solomon, *supra* note 96.

124. *Id.*

125. *Id.*

126. *Id.*

127. Rick Anderson, *Flog is My Co-Pilot: Boeing is Alleged to be Travel Agent for Torture*, SEATTLE WEEKLY (Dec. 2, 2006), available at <http://www.seattleweekly.com/2006-11-29/news/flog-is-my-co-pilot.php> (last visited July 31, 2007) (based on a review of Pentagon records).

128. *Below the Radar*, *supra* note 8, at 28.

129. *Id.* at 27.

The flight information comes from several sources: FAA flight records; European flight records; actual flight logs; aircraft movements recorded by airport authorities; airport records acquired in police and parliamentary investigations; photographs of aircraft in selected airports; and some press reports. Flight logs contain all movements carried out by the plane, including all stopovers between origin and destination airports. *Id.*

technical stops without notifying the country.”<sup>130</sup> Both tacit and explicit rules are established for flights which require national governmental approval in the 189 contracting states which are part of the Convention.<sup>131</sup> The most recent adoption was in 2000.<sup>132</sup> “[S]pecific agreement or authorization to fly over the territory of another state or to use its airports” is required of state aircrafts.<sup>133</sup> However, private flights are not required to seek prior approval and that is why it is held that private contractors are utilized.<sup>134</sup> Crucially, Jeppesen’s role, in addition to providing logistical support and the means to effectuate the renditions was to provide the illusion of civilian transit. Its decoy ensured the CIA could sidestep international law and avoid public scrutiny by arriving unmarked,<sup>135</sup> unannounced, and arguably increased the odds that, more likely than not, the secret abduction and transfer of rendition victims would be successful. The Ninth Circuit will be called upon to potentially decide whether this is actionable under the Alien Tort Statute, or in the alternative, whether to allow the case to proceed.

## VI. COMPLICITY LIABILITY

Both “the common law and modern jurisprudence . . . support the application of aiding and abetting, and complicit liability, under the ATS.”<sup>136</sup> In 2005, the Eleventh Circuit Court of Appeals in *Cabello* maintained that, “by [its] terms, the ATCA . . . [is] not limited to claims of direct liability.”<sup>137</sup> Citing Ninth<sup>138</sup> and Fifth<sup>139</sup> Circuit cases, the *Cabello* court noted that these two districts, “held that the ATCA reaches conspiracies and accomplice liability.”<sup>140</sup> Although, there has been only *one* final circuit decision<sup>141</sup> post-*Sosa* against a corporation under the ATS and one settlement,<sup>142</sup> the international business community is closely watching twelve pending federal appeals that could have

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130. Chris Buell, *CIA Used Private Air Carriers to Hide Rendition: Amnesty International Report*, JURIST, <http://jurist.law.pitt.edu/paperchase/2006/04/cia-used-private-air-carriers-to-hide.php> (Apr. 4, 2006) (last visited Aug. 1, 2007).

131. *Below the Radar*, *supra* note 8, at 22.

132. *Id.*

133. *Id.*

134. *Id.*

135. Flights implicated in the extraordinary renditions bore no markings related to the CIA. *Id.*

136. See Diskin, *supra* note 21, at 836 for a detailed discussion of the ATS’s underpinnings.

137. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005).

138. *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996).

139. *Carmichael v. United Tech. Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1988).

140. *Cabello*, 402 F.3d at 1157.

141. *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005).

142. *Eviatar*, *supra* note 51.

a significant impact on future liabilities.<sup>143</sup> Of particular relevance in the Ninth Circuit is the recent Ninth Circuit Appellate decision of *Sarei v. Rio Tinto*, which has recently survived in its ability to go forward under the ATS.<sup>144</sup> Critics argue that imposing civil liability on multinational corporations, under the Alien Tort Statute, does little for underlying human rights violations.<sup>145</sup> However, if it is possible to hold companies liable for egregious violations, such as their complicity with torture, then it presumably could alter their actions internationally. If the case against Jeppesen is seen to strike at the chord of complicity, then its aim is surely to shatter the rendition's tune.

## VII. CONCLUSION

While the aiding and abetting standard has been waged to put multinational corporations on the defensive in their complicity, and sometimes overt participation, with egregious foreign governments' human rights abuses, it remains to be decided what, if any, nepotism may be shown towards the home team: the United States government. Although there is a strong likelihood that the Jeppesen case may be dismissed, under a government invocation of the state-secrets privilege, perhaps it should not. A corporation's direct involvement, in violation of both international and domestic law, should not go unscathed. Had it not been for the covert activities of companies such as Jeppesen, making it possible for the renditions to continue, perhaps Mohamed, Agiza, Britel, Bashmilah, and al-Rawi might not have paid the ultimate price.

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143. NATIONAL CHAMBER LITIGATION CENTER, YAHOO! LATEST CORPORATE TARGET FOR ALIEN TORT STATUTE CLAIMS, U.S. CHAMBER OF COMMERCE, *available at* <http://www.uschamber.com/NR/rdonlyres/eqisp7upvvjc2276ehj5nwtbzr4ecfv3be5wqv4lceqgqgo3i6dqaipm3tct6wg4rcpwexvr72fljaey5oif7qywra/070515casealert.pdf> (May 15, 2007) (last visited Aug. 1, 2007).

144. 487 F.3d 1193 (9th Cir. 2007) (reversing dismissal by lower court for non-justiciable political question and affirming the ATCA does not require an exhaustion of local remedies before pursuing an ATCA claim).

145. Tawny Aine Bridgeford, Note & Comment, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism Note and Comment*, 18 AM. U. INT'L L. REV. 1009, 1056-57 (2003) (commentating that enforceable guidelines are needed for multinational corporations in foreign nations) (citing Demian Betz, *Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict-Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad*, 14 DEPAUL BUS. L.J. 163, 203 (2001-2002)).