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# The Business of Torture: The Domestic Liability of Private Airlines in the U.S. Extraordinary Rendition Program

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# THE BUSINESS OF TORTURE: THE DOMESTIC LIABILITY OF PRIVATE AIRLINES IN THE U.S. EXTRAORDINARY RENDITION PROGRAM

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*"It wasn't Afghani people flying the aircraft, it wasn't Afghanis who shackled me . . . It was Americans."*
*–Victim of rendition*

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## I. INTRODUCTION

As he walks home one evening, the victim is grabbed off the street by a group of masked men and shoved into a waiting car. He is then driven

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to a nearby airport, where he is subjected to a process known as the "twenty minute takeout."[1] During this time, the victim is photographed, blindfolded, hooded, and shackled. His clothes are cut from him, and he is subjected to a full-body cavity search. The victim is then forcefully tranquilized and dressed in a diaper and either overalls or a loose jumpsuit. To complete his transformation into a state of "almost total immobility and sensory deprivation,"[2] the victim is then strapped to a stretcher, mattress, or chair that totally restricts his movement. He is boarded onto a waiting plane, which later transports him to a top-secret detention facility in another country where the laws on torture are significantly relaxed. For days, weeks, or even months, the victim is subjected to brutal methods of interrogational torture where he is cut, burned, and beaten.

This man is a victim of the American-led extraordinary rendition program, under which the United States [U.S.] government supervised the extrajudicial transfer and interrogational torture of terrorism suspects during the early years of the War on Terror. Although this rendition program has come under intense public scrutiny in recent years, "'not a single victim of the Bush administration's torture program has had his day in a US [sic] court [to date]'."[3] This is largely due to the government's "'misuse[] [of] the 'state secrets' privilege to deny justice to torture victims'."[4] However, the debate regarding liability has recently been renewed through a series of domestic court cases examining the role of private airline companies in the rendition program.

These airline companies were hired by the government to arrange and execute the transport of suspects from one country to another. Although these companies have yet to be held liable for their roles in the rendition program, the U.S. legal system provides a basis for such liability via the principles of corporate complicity, which impose criminal liability upon companies that were complicit in the violation of an individual's human rights. The Alien Tort Statute [ATS] similarly provides civil remedies to foreign nationals who were injured in violation of domestic law.

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[1] Complaint at 13, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. 2007) (No. 5:07-CV-02798).

[2] *Id.*

[3] *Boeing Suit Over CIA Renditions Goes to US Supreme Court*, AFP (Dec. 9 2010), http://www.google.com/hostednews/afp/article/ALeqM5gqEG5CvFJtVxmbEOQaex5zuunNuw?docId=CNG.9aed0bb42e6143acab5dd7633a8f7fc7.4c1.

[4] *Id.*

Although the state secrets and political question doctrines are certainly valid principles under domestic law, they simply do not override corporate responsibility in cases of extraordinary rendition. As such, the courts overseeing these cases have an entirely valid legal basis for imposing liability upon the private airlines that executed renditions during the War on Terror.

## II. U.S. EXTRAORDINARY RENDITION PROGRAM

Rendition is not a new concept in American legal history. As first used, the term referenced the abduction and transfer of foreign nationals to the U.S. or their country of origin to face trial for their alleged crimes.[5] However, given the extraordinary and extrajudicial nature of the act, the rendition process has evolved into something entirely different in recent years, coming to be known as "extraordinary rendition." This change was largely spurred by the events of September 11th, 2001 ("9/11"), "when 'the gloves came off,' [and] the phenomenon [of rendition] exploded. As Cofer Black, onetime director of the CIA's counterterrorist unit, put it: 'There was a before-9/11 and an after-9/11'."[6] As a result, the once lawful process of rendition has since transformed into that which is "meant to evade any semblance of [a] lawful process."[7]

### *A. The History of Rendition in the U.S.*

The modern concept of rendition was shaped by the Reagan administration in the 1980s. During the earlier half of the decade, President Ronald Reagan and his staff largely refused to utilize rendition

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[5] This refers to a specific category of rendition known as "extradition." *See* David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VA. J. INT'L L 585, 586-87 (2006) ("Criminals have historically crossed boundaries in an effort to escape the reach of law enforcement. In response, governments have pursued extradition policies whereby a person who is charged with a crime in one jurisdiction may be brought to justice with the aid of the jurisdiction where the accused is found . . . There were two categories of renditions: (1) renditions in which agents of the state where the person was present seized the individual and surrendered him or her to agents of another state without using formal or legal processes and (2) renditions in which other persons conducted the seizure with or without the awareness or approval of that state.").

[6] Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 22 (2009) (citing Peter Popham and Jerome Taylor, *The War on Terror: Inside the Dark World of Rendition*, THE INDEP., (June 8, 2007), http://www.independent.co.uk/news/world/politics/the-war-on-terror-inside-the-dark-world-of-rendition-452261.html).

[7] *Id.* at 5.

as a tool for combating terrorism.[8] However, a series of attacks between 1984 and 1986 compelled President Reagan to reevaluate his counterterrorism strategies. In 1986 the President signed a covert directive authorizing the Central Intelligence Agency [CIA] to kidnap terrorism suspects located on foreign soil.[9] The first such initiative was known as "Operation Goldenrod," a joint operation between the CIA and Federal Bureau of Investigation [FBI] in 1987.[10] Operation Goldenrod targeted Fawaz Yunis, an alleged terrorist leader who was wanted for his role in hijacking a Jordanian airplane with American citizens onboard.[11] Agents tracked Yunis to Cyprus, where he was lured into international waters with promises of a drug deal, arrested, and later brought to the U.S. for trial.[12]

The rendition process garnered significant support in the years following Operation Goldenrod. Although primarily intended by the Reagan administration as a tool for combating terrorism, the practice of rendition was slowly "expanded to include garden varieties of serious crimes"[13] as well. President George H.W. Bush further legitimized the practice by drafting the first official guidelines for rendition in 1992.[14] This did little to assuage the fears of incoming President Bill Clinton, who expressed his hesitation over the legality of the expanded practice in 1993.[15] However, President Clinton allegedly fell victim to the misguidance of Vice President Al Gore, who laughed-off the President's concerns, saying something to the effect of: "That's a no-brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."[16]

With that President Clinton was seemingly swayed in favor of rendition, and the process grew considerably under his administration. In 1995, Clinton issued Presidential Decision Directive 39, which held that:

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8 Tim Naftali, *Milan Snatch: Extraordinary Rendition Comes Back to Bite the Bush Administration*, SLATE, (June 30, 2005), http://www.slate.com/id/2121801/.

9 *Id.*

10 *Id.*

11 *Id.*

12 Clarke, *supra* note 6, at 12-13.

13 *Id.* at 16.

14 National Security Directive No. 77 (Jan. 1992) (remains classified). *See* Fed'n of Am. Scientists, National Security Directives (NSD) [Bush Administration 1989–1993], *available at* http://www.fas.org/irp/offdocs/nsd/index.html (confirming classified status of NSD-77).

15 RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR 143-44 (Free Press 2004).

16 *Id.*

> We shall vigorously apply extraterritorial statutes to counter acts of terrorism and apprehend terrorists outside of the United States. When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and conclusion of new extradition treaties. If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government.[17]

According to former CIA counterterrorism expert Michael Scheuer, rendition became a particularly critical tool in the Clinton administration's fight against militant Islamic groups such as al Qaeda. Scheuer helped establish the rendition program in part because, "'[w]e knew where these people were, but we couldn't capture them because we had nowhere to take them.' The agency realized that 'we had to come up with a third party'."[18] The U.S. then began soliciting international support for the practice by engaging such countries as Egypt, Morocco, Syria, and Jordan, "all of which [had] been cited for human-rights violations by the State Department, and [were] known to torture suspects."[19] Once U.S. forces captured a suspect, he was to be transferred to detainment facilities in these third-party states.

It was thus under the Clinton administration that the rendition program "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."[20] This shift marked the beginning of

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[17] Presidential Decision Directive No. 39 (June 21, 1995), *available at* http://www.fas.org/irp/offdocs/pdd39.htm.

[18] Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_ fact6?currentPage=all.

[19] *Id.*

[20] Jamie A. Baron Rodriguez, *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*, 14 ILSA J. INT'L & COMP. L. 189, 197 (2007).

the extraordinary rendition program, which targeted a small number of suspects to be "removed from foreign states and transported to other foreign states where they were wanted for trial or detention without affording such suspects the opportunity to contest their removal."[21] Although a suspect's civil liberties were largely disregarded during this process, renditions were still subject to several procedural safeguards at that time. As such, the rendition of a suspect could not be approved without the existence of

> [an] 'outstanding legal process' against the suspect (usually consisting of a conviction connected to terrorist-related offenses in a foreign state); a CIA profile; review and approval by senior government officials, including the CIA's legal counsel; the existence of states willing to assist in the apprehension and incarceration of the suspect; and diplomatic assurances that the suspect would be treated in accordance with applicable national laws.[22]

The U.S. and its allies used these limitations to justify its actions under domestic and international law.[23] With a growing network of global support, the U.S. rendered some 70 suspects to foreign jurisdictions before the attacks of 9/11.[24]

### *B. Extraordinary Rendition in the War on Terror*

Although the U.S. had long been moving in this direction, it was the attacks of 9/11 that compelled the government to fully implement the extraordinary rendition program. The attacks provided the "Bush Administration [with] a broad mandate from a frightened American public 'to bring [the] terrorists to justice'"[25] by whatever means possible. In the name of counterterrorism and using the public's fear to justify its

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[21] Lucien J. Dhooge, *The State Secrets Privilege and Corporate Complicity in Extraordinary Rendition*, 37 GA. J. INT'L & COMP. L. 469, 473 (2009).

[22] *Id.* at 472 (referencing Eur. Parl. Ass'n, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, 57th Sess., Doc. No. 10957, ¶ 26 (2006)).

[23] *Id.*

[24] Lucien Dhooge, *The Political Question Doctrine and Corporate Complicity in Extraordinary Rendition*, 21 TEMP. INT'L & COMP. L.J. 311, 315 (2007).

[25] Clarke, *supra* note 6, at 26 (citing George W. Bush, U.S. President, State of the Union Address (Jan. 20, 2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_presidential_documents&docid=pd29ja01_txt-2.pdf).

actions, the government instructed the CIA to establish "'secret detention facilities outside the United States, and to question those held in them with unprecedented harshness'."[26] Suspects were abducted and transferred to facilities in territories such as Afghanistan, Egypt, Guantanamo, Iraq, Jordan, Morocco, Pakistan, Poland, Syria, Romania, Thailand, and Uzbekistan, "allegedly for the purpose of subjecting such individuals to detention and interrogation methods that did not comport with U.S. law or international standards."[27] Thus the extraordinary rendition program existed to execute the forcible, extrajudicial kidnapping and transfer of suspects to secret detention facilities in third-party states, where the suspect was subjected to torture, indefinite detention, and effectively denied the "due process protections afford[ed] by U.S. law."[28]

This denial of due process was apparent at every stage of an extraordinary rendition:

> [E]ach [victim was] stripped, shackled, and flown blindfolded to secret detention facilities across the globe, against their will, where they were physically and psychologically tortured devoid of judicial safeguards. None would know their seizures and secret detentions were part of a larger clandestine CIA secret rendition program, in which suspected terrorists are methodically plucked from neighboring nations, and placed against their will to "black sites" across the globe to countries it is more likely than not that the transfer will lead to their torture. They would each instantly become "ghost detainees" and [suffer] prolonged periods without charge . . . .[29]

Not only were rendition victims denied the most basic of their due process rights during this process, but often no justification for rendering suspects was given. In 2005 the CIA Inspector General was forced to investigate the program after receiving evidence of several "erroneous renditions" where the CIA "'picked up the wrong people[] who had no

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[26] *Id.*, citing Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, *available at* http://www.newsweek.com/2004/05/23/the-roots-of-torture.html.

[27] Dhooge, *supra* note 21, at 473.

[28] Dhooge, *supra* note 24, at 314.

[29] Baron Rodriguez, *supra* note 20, at 190 (citing WORLD ORG. FOR HUM. RTS. USA, TORTURE, ARBITRARY DETENTION, AND OTHER MAJOR HUMAN RIGHTS ABUSES BY THE UNITED STATES: U.S. NONCOMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS IN THE CONTEXT OF THE "WAR ON TERROR" (February 2006), *available at* http://www2.ohchr.org/english/bodies/hrc/docs/ngos/wofhr.pdf).

information'."[30] Because these so-called "ghost detainees" were kept off of prison rosters and never presented to the International Committee of the Red Cross,[31] it is incredibly difficult to track how many individuals were subjected to the extraordinary rendition program. However, recent estimates suggest that President Bush's "aggressive policy expanded the rendition process [by] sending hundreds, or by some estimates, thousands of people into a legal no-man's land."[32]

Despite the covert nature of this program, extraordinary rendition eventually came to be known as "one of the biggest nonsecrets in Washington."[33] As more information was leaked to the public, U.S. officials tried to justify the program by explaining that, "[w]e don't kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them."[34] This did little to quiet their critics, who referred to extraordinary rendition as nothing more than "torture by proxy[,]"[35] thus allowing the U.S. to "outsource [its] torture."[36] Nevertheless, the extraordinary rendition program was not abolished until President Barack Obama assumed office in January 2009.[37]

### *C. Extending Justice to Victims of Extraordinary Rendition*

Academic Lucien Dhooge acknowledges that "[e]ven the staunchest supporter of the Bush administration's antiterrorism policies must admit that the U.S. rendition policy, as modified in the wake of September 11th, has resulted in human rights abuses."[38] Yet the perpetrators of extraordinary rendition have gone entirely unpunished. With the government hiding behind the state secrets and political question doctrines, it has long seemed that victims could seek no redress for their

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30 Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, (Dec. 4, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/03/AR2005120301476.html.

31 *See* HUMAN RIGHTS WATCH, THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM "GHOST DETAINEES" 5 ( 2004), *available at* http://www.hrw.org/en/reports/2004/10/12/united-states-disappeared-cias-long-term-ghost-detainees.

32 Clarke, *supra* note 6, at 26.

33 Editorial, *Torture by Proxy*, N.Y. TIMES, March 8, 2005, http://www.nytimes.com/2005/03/08/opinion/08tue1.html.

34 Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901356.html (emphasis added).

35 *Torture by Proxy*, *supra* note 33.

36 Clarke, *supra* note 6, at 6.

37 Exec. Order 13,491, 74 Fed. Reg. 4,893, 4,894 (Jan. 22, 2009).

38 Dhooge, *supra* note 24, at 344.

suffering. However, those possessing this belief failed to consider the full scope of the extraordinary rendition program. For though the U.S. government was largely responsible for the execution of extraordinary renditions, it was not the *only* party responsible.

Indeed, a series of recent court cases has examined the liability of secondary parties to extrajudicial transfers. Specifically, these cases have examined the liability of the private airline companies that were hired by the U.S. government to execute the transport of individuals from one country to another. Although these companies were not responsible for the creation or supervision of the extraordinary rendition program, they certainly enabled its nearly decade-long success. As such, these companies not only provided for the physical transportation of suspects, but also arranged for various pre- and post-flight logistical details including flight itineraries and on-the-ground security measures.

Although the courts have yet to assign liability to these private airline companies, there is certainly a basis for doing so. This basis is particularly grounded in theories of corporate social responsibility. Though the parameters of this field are still evolving, "there are growing expectations that corporations should do everything in their power to promote universal human rights standards."[39] When companies fail to abide by this duty and promote the violation of human rights in the performance of their professional duties, they should be held responsible for breaching their corporate social responsibilities.

## III. CORPORATE COMPLICITY

One theory of corporate social responsibility is that of corporate complicity, which refers to the "alleged knowing involvement of corporations in human rights abuses committed by others."[40] Under this theory, allegations of corporate complicity do not hold the corporation responsible as the principal offender of a human rights abuse. Instead, the corporation is responsible for providing support to those who committed the abuses, "either by encouraging them and/or by providing some form of assistance."[41] The term stems from traditional notions of complicity,

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[39] Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 339 (2001).

[40] Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 901 (2008).

[41] *Id.* at 905.

which are widely recognized as providing a basis for criminal liability under domestic and international law.[42]

Academic Jonathan Clough has isolated the four key features of a corporate complicity case:

> 1. The defendant is a large, well-resourced transnational corporation.
> 2. The alleged human rights abuses occurred in a country (the 'host jurisdiction') other than the transnational corporation's country of incorporation (the 'home jurisdiction').
> 3. The host jurisdiction is unable and/or unwilling to investigate and prosecute the alleged abuses.
> 4. The transnational corporation is alleged to be complicit in the human rights abuses either directly or, more commonly, indirectly through the interposition of subsidiaries or other intermediaries . . . .[43]

Corporations are thus viewed as accomplices to be punished for their "knowing involvement in the crime of another."[44] The theories of corporate complicity extend to varying levels of corporate involvement in the abuses, yet all are still punishable.

### *A. Categories of Corporate Complicity*

The concept of corporate complicity can be divided into three categories: direct, indirect, and silent complicity.[45] A corporation is liable for direct complicity when "it decides to participate through assistance in the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another."[46] Direct complicity "requires intentional participation,"[47] where the corporation did not intend to cause harm but did possess knowledge of the foreseeable harmful effects of the principal offender's actions.[48] In asserting direct complicity, "the primary perpetrator does not necessarily have to have

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42 *Id.* (noting criminal complicity is "almost universally recognized as a legitimate basis for criminal liability.").

43 *Id.* at 901-02.

44 *Id.* at 905.

45 Clapham & Jerbi, *supra* note 39, at 341-42.

46 *Id.* at 346.

47 *Id.* at 342.

48 *Id.*

been found responsible in order for the corporate accomplice to be found liable for having contributed to those same human rights abuses."[49]

However, asserting liability for corporate complicity does not always require such direct involvement on behalf of the corporation. "Indirect corporate complicity," also commonly referred to as "beneficial corporate complicity," "describe[s] the corporate position vis-à-vis government violations when the business *benefits* from human rights abuses committed by someone else."[50] This theory of liability stems from the desire to force businesses to "'be discerning in identifying their indirect connection to violations'."[51] As such, a corporation is responsible for indirect complicity when human rights abuses occur in the context of its business operations, regardless of whether the corporation itself was the direct cause of the harm.

The final theory of complicity is not based on the action of a corporation but on its inaction instead. Silent complicity may be asserted against a corporation that fails to "raise systematic or continuous human rights abuses with the appropriate authorities."[52] This theory reflects the notion that "'[s]ilence or inaction will be seen to provide comfort to oppression and may be adjudged complicity . . . silence is not neutrality. To do nothing is not an option'."[53] Consequently, corporations increasingly confront positive obligations to prevent complicity and to promote human rights in the regions in which they work.

### *B. Elements of Corporate Complicity*

The above theories are of such importance to the international community that, to date, multiple instruments for policing corporate complicity have arisen.[54] However, both foreign and domestic legal systems have struggled to define the scope of liability in such cases. As it stands, the only globally acknowledged elements for a showing of

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49 *Id.* at 346.

50 *Id.* (emphasis added).

51 Clapham & Jerbi, *supra* note 39, at 346 (quoting MARGARET JUNGK, DANISH CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS & BUS. PROJECT, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD 11 (Jan. 20, 2005), http://www.humanrightsbusiness.org/files/320569722/file/defining_the_scope_of_business_responsibiliy_.pdf).

52 *Id.* at 348.

53 *Id.* (quoting CHRISTOPHER L. AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE (1999), *available at* http://198.170.85.29/Chapter2.htm).

54 These include voluntary instruments, civil actions against corporations, and statutory regulations of complicity.

complicity are: (1) a principal offender (other than the complicit corporation); (2) the *actus reus* of the corporation in knowingly assisting a human rights violation; and (3) the *mens rea* of the corporation in intending to assist the commission of the principal offense.[55]

With regards to the first factor, it has been determined that "liability for complicity is derivative."[56] As such, liability for complicity relies first on the commission of a principal offense by a principal offender. The accused corporation is then liable for its role as a secondary party to this principal offense. Thus, for liability to be imposed, a court must be convinced that the principal offense did take place. However, it is not necessary that the principal offender has also been convicted of the principal offense: "So long as the trier of fact is satisfied that the principal offense was committed by some person, and is satisfied of the accused's involvement in that offense, then [the corporation] may be liable as an accessory."[57]

A court must also be convinced that the corporate actor possessed the necessary *actus reus*, that the corporation "'is in some way linked in purpose with the person actually committing the crime, and is by [its] words or conduct doing something to bring about, or rendering more likely, such commission'."[58] This may be proven through evidence that the corporation knowingly provided assistance or encouragement to the principal offender, or failed to intervene and prevent the principal offense. Although efforts to further define this element have largely failed, it has consistently been noted that evidence of a corporation's aiding,[59] counseling,[60] or procuring[61] would be sufficient to establish the *actus reus* of complicity. However, "mere acquiescence in or assent to the principal offense is not sufficient to constitute complicity."[62] Instead, a more active showing of support is needed.

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55 *See generally* Clough, *supra* note 40, at 906-13.

56 *Id.* at 906.

57 *Id.*

58 *Id.* at 907-08 (citing *R v Russell* [1933] VR 59, 67 (Austl.)).

59 "Aiding" is defined as the provision of help, support, or assistance to a principal offender. Typical acts of aiding include the provision of materials or other physical support. *See id.* at 908.

60 "Counseling" involves advice or encouragement prior to the commission of the offense. *Id.*

61 "Procuring" suggests the accused went beyond mere encouragement of the commission of the principal offense and actually caused its commission. This is the only form of complicity requiring proof of a causal connection between the corporation's conduct and the commission of the principal offense. Clough, *supra* note 40, at 909.

62 *Id.* at 910.

Finally, a court must be convinced as to the *mens rea* of a corporation in its "inten[tion] to assist or encourage the commission of the principal offense."[63] This requires proof that the corporation knew of the principal offender's intent to commit a crime, and proof that the crime was actually committed.[64] This does not, however, require proof that the corporation and principal offender shared a common purpose; a corporation is still liable for complicity if its actions were motivated by nothing more than its business interests. Rather, a shared intent exists where the principal offense was either a possible,[65] or natural and probable,[66] consequence of the corporation's encouragement or support.[67]

Efforts to impose liability for corporate complicity raise a particularly complex question when applied to parent companies and their subsidiaries. Although there is little information available on the matter, what research does exist suggests that "[b]ecause of the principle of separate corporate identity, the subsidiary or related company is treated as a separate legal entity."[68] Accordingly, a parent company is not commonly held liable for the conduct of its subsidiary. The theories of limited liability similarly strengthen the distinction between parent and subsidiary, so that "in the multi-tiered corporate group, with its first-tier, second-tier, and even third-tier subsidiaries, traditional entity law provides multiple layers of limited liability, with each upper-tier company insulated from liability for its lower-tier subsidiaries."[69] However, courts are not prohibited from regarding a group of companies as an integrated entity, and will look to the context of the case in making this determination; here "[r]elevant factors include the level of control actually exercised by the parent over the subsidiary, the extent to which the companies are economically integrated, the level of financial and administrative interdependence, overlapping employment structures, and a common group persona."[70]

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63 *Id.* at 910-11.

64 *Id.* at 911 ("It is sufficient that the accused has knowledge of the principal offender's intention to commit a crime of the type that was in fact committed.").

65 *Id.* at 913 ("In some jurisdictions, the level of foresight required is low, requiring only that the defendant foresaw the offense actually committed was a *possible* consequence of the joint enterprise.").

66 *Id.* ("In other[] [jurisdictions], such as the United States, the acts of the principal offender must have been a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided.").

67 Clough, *supra* note 40, at 913.

68 *Id.* at 915.

69 *Id.* at 916.

70 *Id.* at 917.

Thus, the principles of complicity place a significant burden on corporations to "'support and respect the protection of international human rights within their spheres of influence'" and to ensure that "'their own corporations [are] not complicit in human rights abuses'."[71] In recent years corporations have come to be regarded as fundamental organs of society with a moral and social responsibility to respect universal human rights. Even if a corporation is not the principal offender in a human rights abuse, its role as a secondary complicit party is often sufficient for extending liability.

## IV. ALIEN TORT STATUTE

The theories of complicity are central to the field of corporate social responsibility. Yet, while these theories certainly help to identify when a corporation has breached its duty to respect human rights, they fail to provide a vehicle by which victims can hold these companies liable. That is not to say that such a vehicle does not exist.

The Alien Tort Statute [ATS][72] was adopted through the Judiciary Act of 1789,[73] and was intended as "a basis for providing a civil remedy to the victims of the enemies of mankind."[74] Although this statute is not in itself a cause of action, it allows foreign nationals to bring suit in domestic courts for two types of alleged violations: (1) violations of those human rights embodied in the laws of nations; and (2) violations of U.S.-ratified treaties committed while abroad. The current language of the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[75]

As first enacted, the statute was "intended [only] to give federal courts jurisdiction to hear common law tort suits for the 18th century law of nations paradigms of 'violation of safe conducts, infringement of the rights of ambassadors, and piracy'."[76] However, the scope of the ATS has evolved with time, and now "recognizes as federal common law those

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71 Clapham & Jerbi, *supra* note 39, at 341 (quoting *The Ten Principles*, UNITED NATIONS GLOBAL COMPACT, http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Mar. 24, 2011) (internal quotation marks omitted)).

72 Alien Tort Statute, 28 U.S.C. § 1350 (1948) [hereinafter ATS].

73 Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77 (1789).

74 Baron Rodriguez, *supra* note 20, at 193.

75 ATS, *supra* note 72.

76 Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 318 (2008) (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004)).

international norms that have definite content and acceptance among civilized nations."[77] More specifically, the claim must be founded on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[78] Accordingly, contemporary customary norms—such as the prohibition of genocide, war crimes, crimes against humanity and torture—have sufficiently widespread global acceptance and definitional specificity as to constitute torts under the ATS.

There exists some controversy as to whether the ATS extends to cases of indirect liability or cases involving corporations. Although domestic courts have provided little guidance on this matter, what evidence does exist suggests that the ATS is applicable. In 2005, the Eleventh Circuit Court of Appeals held that the ATS is "not limited to claims of direct liability."[79] As a result, cases alleging corporate complicity might fall under the purview of the ATS. However, courts have placed some restrictions on these cases: "In cases against private actors, such as corporations . . . courts must . . . consider whether the norm extends not merely to states, but also to private actors."[80] These assertions reveal a fine distinction, as corporations cannot be sued for violating norms that apply *only* to states, while the courts have not yet definitively determined "whether a corporation can *aid and abet* a violation committed by state actors."[81]

## V. THE STATE SECRETS AND POLITICAL QUESTION DOCTRINES

Two legal doctrines pose significant challenges to extraordinary rendition cases: the state secrets and political question doctrines. Both limit the power of domestic courts to examine particular categories of information. First, the state secrets doctrine prohibits courts from examining evidence that might endanger national security. Second, the political question doctrine prohibits courts from reviewing decisions that are constitutionally designated to a separate governmental branch. Given the sensitive nature of the extraordinary rendition program and its supervision by the Executive branch, these two doctrines appear to be

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77 Baron Rodriguez, *supra* note 20, at 192-93.

78 *Sosa*, 542 U.S. at 724-25.

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

80 Cassel, *supra* note 76.

81 *Id.* at 319 (emphasis added).

those most commonly cited by parties seeking to quash claims against private corporations.

### *A. The State Secrets Doctrine*

The state secrets doctrine has long been established in U.S. legal history, having first been explored during the treason trial of Aaron Burr in 1807.[82] Since then, the privilege has developed to serve as a "'common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security'."[83] The doctrine derives from the "'President's constitutional authority over the conduct of [the] country's diplomatic and military affairs'."[84] As a result the government may claim the privilege to protect the disclosure of information that could impair national security capabilities, disclose methods of intelligence gathering, or impede diplomatic relations with foreign governments.[85]

Once the state secrets privilege has been asserted, the court must engage in a two-part analysis to determine its applicability to the case at hand. First, the court must determine if the privilege has been properly invoked and can be sufficiently established. If the court answers affirmatively, the state secrets privilege will remain absolute and the protected information may not be revealed.[86] The court must then consider the impact of barring the evidence on the overall litigation. In doing so, the court will "determin[e] the centrality of the privileged material to the claims."[87] If the state secrets form the "very subject matter"[88] of the proceedings, the case will be dismissed.

The majority of cases dealing with the state secrets privilege address the first prong of a court's analysis, and attempt to set a standard for when the privilege may be properly established. The "doctrine today is marked

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82 Michael P. Jensen, *Torture and Public Policy:* Mohamed v. Jeppesen Dataplan, Inc. *Allows "Extraordinary Rendition" Victims to Litigate Around State Secrets Doctrine*, 2010 BYU L. REV. 117, 122 (2010).

83 Dhooge, *supra* note 21, at 485–86 (citing Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 980 (N.D. Cal. 2006)).

84 *Id.* at 486 (citing El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006)).

85 *See id.* at 486 (citing Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983)).

86 *Id.* at 495 ("Once determined to be secret and present a 'reasonable danger' of negative impact upon national security and foreign relations, details of the extraordinary rendition program are protected from disclosure without further judicial inquiry.").

87 *Id.* at 497.

88 *Id.* (citing Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2008)).

by 'two parallel strands' from two landmark Supreme Court cases[,]"[89] *Totten v. United States*[90] and *United States v. Reynolds*.[91]

1. The *Totten* Case

In *Totten*, the Supreme Court set an extreme, bright-line rule barring the adjudication of all claims based on confidential agreements. In 1861, William A. Lloyd was hired by President Abraham Lincoln to serve as a spy during the Civil War.[92] According to their agreement, Lloyd was to be paid $200 a month for his services, which he faithfully performed until the conclusion of the war.[93] At that time, Lloyd requested that his wages be paid, yet he was only reimbursed for expenses incurred.[94] Lloyd then brought suit seeking to compel the government to honor its agreement and to pay his wages.[95]

The Court did not question the validity of the contract, noting only that the President "was undoubtedly authorized during the war . . . to employ secret agents"[96] and to enter into binding agreements for their reimbursement. Instead, the Court questioned its capacity to adjudicate cases based on secret information. In exploring the context of the agreement between Lloyd and the government, the Court reasoned that the contract was for a "secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed."[97] Given the nature of the contract, the Court reasoned that both parties understood its confidential nature and knew that they were prohibited from disclosing it to or discussing it with others.[98] Consequently, "[t]he publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery."[99] Accordingly, Lloyd's claim was dismissed.

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89 Jensen, *supra* note 82, at 22 (citing Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1084 (9th Cir. 2009)).

90 Totten v. United States, 92 U.S. 105 (1875).

91 United States v. Reynolds, 345 U.S. 1 (1953).

92 *See Totten*, 92 U.S. at 105-06.

93 *See id.* at 106.

94 *See id.*

95 *See id.* at 105.

96 *See id.* at 106.

97 *Id.* at 106.

98 *See Totten*, 92 U.S. at 106.

99 *Id.* at 107.

The Court not only dismissed Lloyd's claim but also noted the expansive nature of the precedent set by this case:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.[100]

As a result, the *Totten* bar applied "not just to contract actions but any case where proof of a confidential relationship with the U.S. government is necessary for success on the merits."[101] This directive from the Court served as a blanket denial of jurisdiction over any case requiring the disclosure of state secrets.

*2.* The *Reynolds* Case

The Supreme Court revisited the *Totten* holding in the 1953 case of *United States v. Reynolds*. This case arose from an incident involving a B-29 aircraft, which had been taken out for the "purpose of testing secret electronic equipment."[102] Onboard at the time were four civilian observers and nine crewmembers.[103] While aloft, a fire broke out in one of the aircraft's engines, killing three of the civilians and six of the crewmembers.[104] The widows of the deceased civilians brought suit against the government and moved for the production of the Air Force's official accident investigation report and official statements given by the

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100 *Id.*

101 Dhooge, *supra* note 21, at 505.

102 United States v. Reynolds, 345 U.S. 1, 3 (1953).

103 *See id.*

104 *See id.*

surviving crewmembers in conjunction with the investigation.[105] The government sought to quash the motion by asserting the state secrets privilege.[106] Although the district court ordered the production of the documents, the government staunchly refused to comply and a judgment was entered for the plaintiffs.[107]

The Supreme Court granted certiorari to determine whether the privilege applied.[108] The Court noted the challenges in working with the state secrets privilege, as the "court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect."[109] Consequently, the Court identified the need for a balancing test:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.[110]

The *Totten* holding was thus discarded for a new standard, where the state secrets privilege was validly asserted only when a court was satisfied "from all the circumstances of the case, that 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."[111]

To better define this standard, the Court conditioned a successful state secrets claim on three elements:

> First, the privilege must be asserted by the head of an executive branch agency with control over the secrets at issue. Second, the head of the agency must personally consider the matter prior to assertion of the privilege. Finally, the information sought to be protected from disclosure must be a state secret.[112]

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105 *See id.*

106 *Id.*

107 *See id.* at 5.

108 *Reynolds*, 345 U.S.at 3.

109 *Id.* at 8.

110 *Id.* at 9-10.

111 *Id.* at 10.

112 Dhooge, *supra* note 21, at 487.

However, the information itself need not have great significance to qualify under the state secrets privilege. Instead, courts later applying the *Reynolds* standard held that "even 'seemingly innocuous information' is privileged if that information is part of a classified 'mosaic' that 'can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate'."[113] Thus the "'most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake'."[114]

However, the Court maintained that the existence of a state secret did not necessitate automatic dismissal of the case. As long as the information protected by the privilege was not "indispensable to a prima facie case or a valid defense,"[115] the case was to continue. In the *Reynolds* case, the Court noted "necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege."[116] Thus, although the Court determined that the information in the official incident reports constituted state secrets because there was a "reasonable danger that [they] would contain references to the secret electronic equipment[,]"[117] the case was not altogether dismissed. Instead, the case was remanded to district court upon the Court's reasoning that "[t]here is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets."[118] It is this standard that now serves as the modern bar for successful state secrets claims.

### *B. The Political Question Doctrine*

The political question doctrine first appeared in 1803 as part of the Supreme Court's decision in *Marbury v. Madison*,[119] which stated that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[120] The purpose of the doctrine is to distinguish between the branches of

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113 *Id.* at 488 (citing Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

114 *See generally id.*

115 Jensen, *supra* note 82, at 125.

116 *Reynolds*, 345 U.S. at 11.

117 *Id.* at 10.

118 *Id.* at 11.

119 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

120 *Id.* at 170.

government and to ensure that no branch encroaches upon the decision-making powers of another. To that end, the doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch."[121]

The Court in *Baker v. Carr*[122] explored this assertion further, holding the doctrine to be "essentially a function of the separation of powers."[123] However, this doctrine does not expressly arise from the Constitution, "but rather from 'pragmatic considerations based on the separation of powers concept and [the] system of checks and balances'."[124] There is great significance in making this distinction, "as Article III does not prohibit courts from resolving cases posing political questions."[125] Instead, the doctrine simply limits the exercise of judicial power in such cases.

It is the *Baker* case that guides modern judicial inquiries into the application of the political question doctrine. In this case, the Supreme Court identified six independent factors to be considered before a lawsuit could be dismissed on the grounds of political question. In order of descending importance, they are:

> (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[126]

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121 Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986).

122 Baker v. Carr, 369 U.S. 186 (1962).

123 *Id.* at 217.

124 Dhooge, *supra* note 24, at 323 (quoting Atlee v. Laird, 347 F. Supp. 689, 701 (E.D. Pa. 1972)).

125 *Id.* at 323-24.

126 *Id.* at 330 (quoting *Baker*, 369 U.S. at 217).

If any one of these factors is linked to a crucial issue in a case, it will be rendered nonjusticiable.[127] Courts are to make this determination on a case-by-case basis.[128]

Yet the balance of justiciability is not so clear as to require the automatic dismissal of cases involving traditionally political questions. As acknowledged by the court in *Al-Aulaqi v. Obama*,[129] "[a]n examination of the specific areas in which courts have invoked the political question doctrine reveals that national security, military matters and foreign relations are 'quintessential sources of political questions'."[130] Further, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action[,]"[131] as these are traditionally questions committed to the political branches. However, federal courts are not automatically disqualified from adjudicating cases involving foreign affairs: "The courts have adjudicated cases alleging violations of international human rights standards and disputes arguably connected to military operations, including combat."[132] Thus, the *Baker* factors provide the only definitive guidance in determining whether the political question doctrine applies given the context of a case.

## VI. CASE STUDIES

There is certainly a considerable body of law relevant to cases of extraordinary rendition. However, there have been surprisingly few cases brought before domestic courts seeking to impose liability upon private airline companies for their role in rendering victims during the War on Terror. To date, two primary U.S. cases exist that directly touch upon this issue: *El-Masri v. United States*[133] and *Mohamed v. Jeppesen Dataplan, Inc.*[134]

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127 *See Baker*, 369 U.S. at 217.

128 *See id.* at 210-11; *see also* Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 51 (D.D.C. 2010) (quoting El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 841 (D.C. Cir. 2010) ("[The] political question doctrine requires courts to engage in a fact-specific analysis of the 'particular question' posed by a specific case.")).

129 *Al-Aulaqi*, 727 F.Supp.2d at 1.

130 *Id.* at 45 (quoting *El-Shifa*, 607 F.3d at 841).

131 *El-Shifa*, 607 F.3d at 844.

132 Dhooge, *supra* note 24, at 332.

133 El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

134 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010).

*A. El-Masri v. United States*

The courts allowed the state secrets privilege to override a claim of liability against private airline companies in the *El-Masri* case in 2007. In December 2003, Khaled El-Masri, a German citizen of Lebanese descent,[135] was traveling by bus in Macedonia.[136] Police removed El-Masri from the bus at the Tabanovce border after discovering his name was similar to that of a known 9/11 associate.[137] El-Masri was detained in a Macedonian motel for 23 days, during which he was repeatedly questioned about his passport, al Qaeda, and his hometown mosque.[138] On that 23rd day,

> police videotaped [El-]Masri, then bundled him, handcuffed and blindfolded, into a van and drove to a closed-off building at the airport . . . There, in silence, someone cut off his clothes. As they changed his blindfold, "I saw seven or eight men with black clothing and wearing masks," [he said] . . . he was [then] drugged to sleep for a long plane ride.[139]

El-Masri was handed over to CIA agents, who flew him to a detention facility near Kabul, Afghanistan.[140] There he was allegedly

> held against his will, but . . . also mistreated in a number of ways . . . . including being beaten, drugged, bound, and blindfolded during transports; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government.[141]

El-Masri was finally released on May 28, 2004, when he was transported to Albania and abandoned in a remote area.[142] Albanian officials picked him up and transported him to a local airport, from which he traveled

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135 *See El-Masri*, 479 F.3d at 300.

136 *See* Priest, *supra* note 30.

137 *See id.*

138 *See id.*

139 *Id.*

140 *See El-Masri*, 479 F.3d at 300.

141 *Id.*

142 *See id.*

back home to Germany.[143] It was later revealed that El-Masri's detention was simply a case of mistaken identity, as the head of the CIA Counterterrorist Center's al Qaeda unit "believed he was someone else"[144] and she "just had a hunch."[145]

Pursuant to the ATS and relevant case law, El-Masri brought a civil suit against former CIA Director George Tenet, three corporate defendants, ten unnamed employees of the CIA, and ten unnamed employees of the defendant corporations.[146] According to the Complaint,

> the corporate defendants provided the CIA with an aircraft and crew to transport El-Masri to Afghanistan, pursuant to an agreement with Director Tenet, and they either knew or reasonably should have known that "Mr. El-Masri would be subjected to prolonged arbitrary detention, torture and cruel, inhuman, or degrading treatment in violation of federal and international laws during his transport to Afghanistan and while he was detained and interrogated there."[147]

The government was granted a motion to intervene based on the state secrets privilege, and El-Masri's case was subsequently dismissed.[148] The order was later affirmed upon review of the government's claim by the Court of Appeals.[149]

The Appeals Court meticulously applied the modern standard for a state secrets claim, according to its three-part analysis:

> At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the

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143 *See id.*

144 Priest, *supra* note 30.

145 *Id.*

146 *El-Masri*, 479 F.3d at 299.

147 *Id.* at 300 (citing Complaint at 61, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-CV-1417)).

148 *Id.* at 299-300.

149 *Id.* at 313.

matter should proceed in light of the successful privilege claim.[150]

The court spent little time debating the first two elements. Using the *Reynolds* precedent as its guide, the court first found that the procedural requirements for invoking a state secrets claim were satisfied by the facts of the case, as the claim had been launched by Porter Goss, then-Director of the CIA, upon his personal review of the matter.[151]

The court just as neatly found the second element to be satisfied, as "evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged."[152] Although the Executive bears the burden of proving the reasonable danger standard, the court revealed its almost unbridled deference to Executive claims of state secrets: "In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the 'utmost deference' to the responsibilities of the executive branch."[153]

It was the third element of the analysis that caused contention amongst the litigating parties. Legal doctrine dictates that if a proceeding involving state secrets can be fairly litigated without resorting to exposure of the privileged information, then it may continue; yet, if the circumstances are such that the sensitive information is so central to the subject matter of the litigation that any effort to proceed threatens its disclosure, then dismissal is the proper remedy.[154] In making this analysis, the "central facts" and "very subject matter" of an action are "those facts that are essential to prosecuting the action or defending against it."[155] The court found that the privilege applied to the instant case because El-Masri was unable to establish a prima facie case under the ATS without implicating state secrets:

> To establish a prima facie case, he would be obliged to produce admissible evidence not only that he was detained and interrogated, but that the defendants were involved in his detention and interrogation in a manner that renders them

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150 *Id.* at 304.

151 *See id.* at 301.

152 *El-Masri*, 479 F.3d at 307-08.

153 *Id.* at 305 (citing United States v. Nixon, 418 U.S. 683, 710 (1974)).

154 *Id.* at 306 (citing Sterling v. Tenet, 416 F.3d 338, 348 (4th Cir. 2005)).

155 *Id.* at 308.

> personally liable to him. Such a showing could be made only with evidence that exposes how the CIA organizes, staffs, and supervises its most sensitive intelligence operations.[156]

The court also noted that the government was unable to pursue valid defenses without disclosing the means and methods by which the CIA gathered intelligence.[157]

El-Masri refuted this argument, arguing that his case could be established solely on information contained in public records relating to his rendition.[158] As that information was already so widely accessible, El-Masri contended that the state secrets privilege could not prevent its entry as evidence.[159] The court disagreed, maintaining that the information available to the public did not include facts that were central to litigating his claim.[160] Instead, those central facts forming the subject matter of El-Masri's claim, including the CIA's means and methods, retained their state secret status.[161] Though the court noted that the state secrets privilege applied only to a narrow category of information, it ultimately held that "the matter before us falls squarely within that narrow class."[162]

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

The courts applied a similar analysis in the *Jeppesen* case. The plaintiffs in *Jeppesen* cast a slightly smaller net "by not taking direct aim at the state"[163] and instead pursuing a case exclusively against the private airline company responsible for their transport under the extraordinary rendition program. The case was brought by five plaintiffs: Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi,[164] all of whom were detained, forcibly transferred to black sites in different countries, and subjected to brutal methods of physical and psychological torture.[165] While Agiza and Britel were ultimately sentenced to fifteen years in Egyptian and Moroccan

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156 *Id.* at 309.

157 *Id.*

158 *El-Masri*, 479 F.3d at 311.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 313.

163 Baron Rodriguez, *supra* note 20, at 203.

164 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1074-75 (9th Cir. 2010).

165 *Id.*

prisons respectively, Mohamed, Bashmilah, and Al-Rawi have since been released.[166]

The plaintiffs argued that publicly available information established the critical role of defendant Jeppesen Dataplan, Inc. [Jeppesen], a U.S. corporation and subsidiary of the Boeing Company,[167] in providing flight planning and logistical support services to the aircraft and crew for all five of their renditions. Their complaint further alleged that

> "Jeppesen played an integral role in the forced" abductions and detentions and "provided direct and substantial services to the United States for its so-called 'extraordinary rendition' program," thereby "enabling the clandestine and forcible transportation of terrorism suspects to secret overseas detention facilities." It also alleges that Jeppesen provided this assistance with actual or constructive "knowledge of the objectives of the rendition program," including knowledge that the plaintiffs "would be subjected to forced disappearance, detention, and torture" by U.S. and foreign government officials.[168]

The plaintiffs brought suit under the ATS, alleging seven theories of liability positioned under two claims. Under the first claim of forced disappearance, the plaintiffs alleged four theories of liability:

> (1) [D]irect liability for active participation, (2) conspiracy with agents of the United States, (3) aiding and abetting agents of the United States and (4) direct liability "because [Jeppesen] demonstrated a reckless disregard as to whether Plaintiffs would be subjected to forced disappearance through its participation in the extraordinary rendition program and specifically its provision of flight and logistical support services and crew that it knew or reasonably should have known would be used to transport them to secret detention and interrogation."[169]

The plaintiffs filed three other claims of liability founded in their alleged torture and cruel, inhuman or degrading treatment: (1) conspiracy with

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166 *Id.*

167 Baron Rodriguez, *supra* note 20, at 191.

168 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1075.

169 *Id.* at 1075-76 (citing Complaint at 254-57, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C07-02798 JW)).

U.S. agents in torturing and degrading the plaintiffs; (2) aiding and abetting U.S. agents in their torture and degrading treatment; and (3) reckless disregard as to whether plaintiffs would be subjected to torture or other such treatment, by providing flight and logistical support that it knew or reasonably should have known would be used as part of the extraordinary rendition program.[170]

Though the government was not listed as a defendant in this case, it intervened before Jeppesen could respond to the complaint by seeking dismissal on the grounds of the state secrets privilege.[171] Then-Director of the CIA, General Michael Hayden, filed two declarations asserting the privilege as "[d]isclosure of the information . . . could be expected to cause serious—and in some instances, exceptionally grave—damage to the national security."[172] The district court granted the motion as "at the core of Plaintiff's case . . . are 'allegations' of covert U.S. military or CIA operations in foreign countries against foreign nationals—clearly a subject matter which is a state secret."[173] The plaintiffs appealed and the case was reversed and remanded after a finding that the government had failed to establish a basis for dismissal under the state secrets privilege.[174] The court of appeals agreed to take the case en banc to resolve "questions of exceptional importance regarding the scope and application of the state secrets doctrine."[175] In doing so, the court noted that "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets . . . because the facts underlying plaintiffs' claims are so infused with these secrets . . . that the risk of disclosing them is both apparent and inevitable."[176]

The government argued that neither it not Jeppesen could be compelled to release any

> (1) information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities; (2) information about whether any foreign government cooperated with the CIA in clandestine intelligence activities; (3) information about the scope or

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170 *Id.* at 1076 (citing Complaint at 262-64, Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (No. C07-02798 JW)).

171 *Id.*

172 *Id.* (citation omitted).

173 *Id.* at 1076-77 (citation omitted).

174 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1077.

175 *Id.*

176 *Id.* at 1087-89.

> operation of the CIA terrorist detention and interrogation program; or (4) any other information concerning CIA clandestine intelligence operations that would tend to reveal intelligence activities, sources, or methods.[177]

The court seemingly agreed, stating that it could not disclose which of these categories applied to the case at hand but that at least one was applicable.[178] Accordingly, the earlier dismissal was affirmed pursuant to the state secrets privilege as outlined in *Reynolds*.

The court's decision greatly furthered legal doctrine regarding the applicability of the state secrets privilege, particularly in its acceptance of a government claim when it was not a named party to the litigation. It also granted the government authority to launch a claim at any time during legal proceedings, even if no obligation to produce specific evidence has yet arisen.[179] Consequently, the government need not wait for an evidentiary dispute to arise during discovery or trial before asserting the privilege.[180] Instead the privilege may be raised with respect to discovery requests seeking information that the government, upon its discretion, designates as privileged,[181] including during responsive pleadings.[182]

However, the court also limited the deference granted to government claims of state secrets. Once the privilege has been properly invoked, courts are instructed to make "'an independent determination whether the information is privileged'."[183] While the earlier standard of "reasonable danger" endures, the court also noted that "an executive decision to *classify* information is insufficient to establish that the information is privileged. Although classification may be an indication of the need for secrecy, treating it as conclusive would trivialize the court's role."[184] Accordingly, a successful state secrets claim does not necessitate the dismissal of a case. While the privileged information is completely removed from the case, courts had a responsibility to ensure that "whenever possible, sensitive information [is] disentangled from nonsensitive information to allow for the release of the latter."[185]

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177 *Id.* at 1086.

178 *See id.*

179 *Id.* at 1080.

180 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1080.

181 *Id.*

182 *Id.* at 1081.

183 *Id.* (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1202).

184 *Id.* at 1082.

185 *Id.* (citing Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998)).

To further define this point, the court highlighted three distinct circumstances when dismissal is justified: (1) when the plaintiff cannot prove the prima facie elements of his case without the privileged information; (2) when the defendant is denied the opportunity to launch a valid defense, in which case the court may grant summary judgment in his favor; and (3) if it is impossible to proceed because the privileged evidence is inseparable from the non-privileged information, thus creating an unacceptable risk of disclosing the state secrets.[186] The plaintiff must be able to disentangle the evidence, as a successful state secrets claim means "the evidence is absolutely privileged, irrespective of the plaintiffs' countervailing need for it."[187] This caused the ultimate downfall of the plaintiffs' claims. Although they argued that certain information about the program and Jeppesen's involvement was made public, the court still ruled that "Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected."[188]

What is particularly important about this case was the court's suggestion that other remedies be made available in similar cases. While the court acknowledged its denial of a judicial forum for the plaintiffs, it also maintained that given the government's access to secret information, the administration was uniquely positioned to determine whether the plaintiffs' human rights had been violated and if so, what appropriate remedies could be made available.[189] Similarly, the court looked to Congress' authority to "investigate alleged wrongdoing and restrain excesses by the executive branch," as well as to enact private bills or remedial legislation authorizing appropriate alternative remedies for victims.[190] It is here, the court asserted, that "the government's power to remedy wrongs is ultimately reposed."[191]

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186 *Jeppesen Dataplan, Inc.*, 614 F.3d at 1083.

187 *Id.* at 1081.

188 *Id.* at 1088.

189 *Id.* at 1091 ("[The] government, having access to the secret information, can determine whether . . . [the] claims have merit and whether misjudgments or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harm while maintaining the secrecy [that] national security demands.").

190 *Id.*

191 *Id.* at 1092. On May 16, 2011, the Supreme Court denied the plaintiffs' petition for writ of certiorari. Mohamed v. Jeppesen Dataplan, Inc., No. 10-778, 2011 WL 1832889, at *1 (U.S. May 16, 2011).

## VII. ANALYSIS

During an internal corporate meeting several years ago, Jeppesen's Managing Director of International Trip Planning Bob Overby explained to his coworkers that "'[w]e do all of the extraordinary rendition flights—you know, the torture flights. Let's face it, some of these flights end up that way'."[192] Overby was just as candid about the perks of the job, stating, "'[i]t certainly pays well. They [the CIA] spare no expense. They have absolutely no worry about costs. What they have to get done, they get done'."[193] Jeppesen's eagerness to maintain this lucrative partnership is evident, as the company did much more than shuttle passengers between destinations. In fact, multiple staffers were assigned solely to handle the rendition flights, "including flight plans, clearance to fly over other countries, hotel reservations, and ground-crew arrangements."[194] Moreover, Jeppesen's deep involvement in the extraordinary rendition program has caused some to label the company the "CIA's travel agent."[195] Yet in working so closely with the CIA and thereby enabling the torture of several hundreds of victims, Jeppesen has committed an egregious violation of its legal duties.

### *A. Legal Analysis*

There should be no question that victims of rendition can launch a claim against private airline companies in domestic courts. The principles of corporate complicity impose liability upon any corporation that was knowingly involved in the human rights abuses committed by another. The courts must look no further than Overby's statements for confirmation that Jeppesen's employees were well aware of the company's role in the torture of rendition victims at an executive level. As such, Jeppesen is liable at the highest level of corporate complicity for its intentional and knowing participation in the commission of human rights abuses. Direct complicity requires only that the corporation possessed knowledge of foreseeable harmful effects of the principal offender's actions, and Overby's comments relay an actual knowledge of the torture that occurred. Accordingly, victims may use the principle of corporate

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192 Jane Mayer, *The C.I.A.'s Travel Agent*, NEW YORKER, Oct. 30, 2006, *available at* http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer.

193 *Id.*

194 *Id.*

195 *Id.*

complicity to impose criminal liability upon those companies that were complicit to their torture.

Victims also have authority to launch a claim under the ATS. Domestic courts have already determined that torture constitutes a direct violation of the laws of nations, and expanded the reach of the ATS to "include torts, in violation of international law, committed around the world."[196] The scope of the ATS has not only expanded to include new categories of torts, but also to apply to those cases of indirect liability or those involving corporations. Consequently, the ATS provides a basis for civil remedy to these victims.

Although victims have a solid basis for launching a claim in domestic courts, the government's invocation of the state secrets doctrine poses a significant challenge to their case. However, U.S. courts have misapplied the standards of this doctrine. During the proceedings of *El-Masri*, the court acknowledged that the purpose of this doctrine is to provide a foundation for the dismissal of cases where "the entire aim of the suit is to prove the existence of state secrets."[197] Yet little remains unknown about the extraordinary rendition program, as it was the topic of significant media attention both during and after the War on Terror. The media did much more than simply confirm the existence of the program; it also provided explicit details about the CIA's methodology, with one reporter even publishing actual "flight logs which document Jeppesen's involvement in actual flight and planning."[198] A plaintiff can thus overcome dismissal on state secrets grounds if the court finds that "the program is within the realm of public knowledge[,]"[199] as is the case with the extraordinary rendition program.

This argument is only successful if the court deems the sources of disclosure to be reliable. In making this determination, the courts have "uniformly disregarded media reports as inherently unreliable."[200] As a result, "neither extensive reporting by the media . . . nor the detailed allegations contained within the complaint abrogate the state secrets privilege."[201] Currently the only sources deemed inherently reliable "are public admissions or denials by the government or defendants to the

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196 Baron Rodriguez, *supra* note 20, at 193.

197 El-Masri v. Tenet, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006).

198 Baron Rodriguez, *supra* note 20, at 200.

199 Dhooge, *supra* note 21, at 510.

200 *Id.* at 511.

201 *Id.*

litigation."[202] The existence of the rendition program has been publicly confirmed by both President Bush[203] and his officials, and has been "disclosed in reports prepared by other national governments and international organizations."[204] Although general statements acknowledging the existence of the program are insufficient to overcome a state secrets claim, that coupled with the publication of Jeppesen's flight plans should, at the very least, allow the plaintiff to make a prima facie showing of his case. There is certainly judicial support for making this assertion, as a court recently concluded that the similarly situated Terrorist Surveillance Program "no longer qualified as a state secret due to widespread disclosures regarding its existence and operation by the federal government."[205] Courts might also override a state secrets claim if the matters at hand are "beyond reasonable dispute"[206] and thus no longer constitute a secret, but they will look again to government and defendants' admissions in making that determination.

The final factor that a court will consider is whether it is beyond reasonable dispute that the government program could not exist without the "'acquiescence and cooperation' of the private party named as a defendant and seeking to preserve secrecy."[207] In the governing case on this matter, the court considered the scope and power of AT&T in examining its role in the government wiretapping program. Here, "Jeppesen dominates the international travel planning industry to an even greater degree than AT&T dominates the telecommunications field."[208] Jeppesen exerts a global dominance, and "its services are comprehensive and not limited to a specific field."[209] Jeppesen is clearly a global leader in its field, and it granted the CIA access to its unrivalled capacity to supervise and implement the rendition flights. Without Jeppesen's

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202 *Id.*

203 In a speech on September 6, 2006, President Bush stated: "[A] small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency." President George W. Bush, Address to the Nation (Sept. 6, 2006), *available at* http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all.

204 Dhooge, *supra* note 21, at 510.

205 *Id.* at 514 (citing Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1198-2000 (9th Cir. 2007)).

206 Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 990-991 (C.D. Cal. 2006).

207 Dhooge, *supra* note 21, at 515 (citing *Hepting*, 439 F. Supp. 2d at 992).

208 *Id.*

209 *Id.*

intricate management, the extraordinary rendition program could easily have failed.

Although the extraordinary rendition cases rarely touch upon the political question doctrine, this principle has been cited as a foundation for dismissal. The courts have a long history of "defer[ring] to the executive branch with respect to national security and foreign policy questions,"[210] and have held that "limitations established by the political questions doctrine [are] applicable to human rights claims."[211] However, there is also a basis for questioning the applicability of the doctrine to cases "where the underlying action subject to challenge is private rather than public in nature."[212] In the 2005 case of *Ibrahim v. Titan Corp.*,[213] the court refused to dismiss the claims of Iraqi nationals who alleged they were subjected to torture, cruel, inhuman or degrading treatment, and extrajudicial killing during their time at Abu Ghraib.[214] The court held that the political question doctrine was inapplicable for two reasons: first, because the inmates sought monetary damages and not injunctive relief, and second, because the case was brought against a private military contractor and not the government itself. As determined by the court, "[a]n action for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in 'overseeing the conduct of foreign policy or the use and disposition of military power'."[215] Given this precedent, litigation imposing liability upon private parties, "even those in privity of contract with the U.S. military,"[216] likely avoids dismissal under this doctrine.

Further questions can be raised regarding the applicability of the *Baker* political question standards to cases of extraordinary rendition. Dhooge argued in 2007 that the *Jeppesen* complaint "does not merely touch upon foreign relations; rather, it challenges a program created and implemented by the United States in which it has been and continues to be deeply involved."[217] Yet this point is now moot. President Obama abolished the extraordinary rendition program in 2009. Although case-related disclosures would certainly speak to the policies and methods of the program as it existed, there is no reason to believe that this illicit program

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210 *Id.* at 503.

211 Dhooge, *supra* note 24, at 325.

212 *Id.* at 329.

213 Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12 (D.D.C. 2005).

214 *Id.* at 12-13.

215 *Id.* at 15 (citing Luftig v. McNamara, 373 F.2d 664, 666 (D.C. Cir. 1967)).

216 Dhooge, *supra* note 24, at 329.

217 *Id.* at 333.

will ever be restored. Particularly as the general War on Terror has been called to its conclusion by the Obama administration,[218] there is no evidence suggesting that the disclosure of information speaking to the rendition program will place the nation at any risk. There is a similar lack of tangible evidence that the release of such information would "undermine[] the international consensus necessary to successfully combat the spread of global terrorism."[219] Instead, one might easily assume that foreign nations would more willingly engage in counterterrorism efforts with the U.S. if it acknowledged past mistakes, extended reparations to the victims, and moved forward with new and legal procedures.

Litigating the extraordinary rendition cases is admittedly difficult, as courts must discern the national security risk posed by information they cannot access and plaintiffs are often unable to present outside evidence sufficient to prove human rights violations. However, the courts have too easily granted deference to the state secrets and political question doctrines, when they do not necessitate the dismissal of these cases. Jeppesen's instrumental role in the success of this program imposes liability upon the corporation under a number of legal doctrines, and future cases should be allowed to proceed accordingly.

### *B. Suggested Action*

Further steps must be taken to ensure the accountability of private airline companies participating in government-operated counterterrorism programs. In allowing the extraordinary rendition cases to move forward, the judicial system would provide a basis for future victims of corporate complicity to seek reparations in domestic courts. However, the potential success of these cases remains questionable given a series of practical concerns, such as the collection of evidence from foreign jurisdictions and the capacity of individual victims to overcome the massive resources of corporations vigorously defending themselves. As a result, one option for providing "the best chance of a successful prosecution is to enhance

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218 *See White House: "War on Terrorism" is Over*, WASH. TIMES, Aug. 6, 2009, *available at* http://www.washingtontimes.com/news/2009/aug/06/white-house-war-terrorism-over/?feat=home_headlines ("'The President does not describe this as a 'war on terrorism,' said John Brennan, head of the White House homeland security office, who outlined a 'new way of seeing' the fight against terrorism. The only terminology that Mr. Brennan said the administration is using is that the U.S. is 'at war with al Qaeda'.").

219 Dhooge, *supra* note 24, at 335.

specific provisions tailored to corporate defendants and imposing extraterritorial liability."[220] To ensure the application of consistent standards, these new laws would impose extraterritorial criminal liability upon U.S. corporations and those corporations with their principal place of business in the U.S. for alleged acts of complicity. This would particularly extend liability to a broader range of perpetrators, as defendants are not tried as the principal offender and the theories of complicity extend to a broad range of potential acts.

However, the tragic stories of rendition victims calls for a more proactive approach to corporate social responsibility, one that better prevents human rights violations in the first place. The Voluntary Principles on Security and Human Rights [Voluntary Principles][221] were drafted in 2000, with the goal of guiding companies in "maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms."[222] Although the Voluntary Principles are nonbinding, they provide significant guidance to companies in ensuring the protection of human rights through the course of their work. The Principles are divided into three sections: risk assessment, interactions between companies and public security, and interactions between companies and private security.

The final set of principles is of great relevance to counterterrorism programs dually executed by the U.S. and private companies, as it addresses the relationship between private security and state forces. The first principle holds: "Private security should observe the policies of the contracting Company regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and promote the observance of international humanitarian law."[223] Although these principles provide little guidance speaking to the

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220 Clough, *supra* note 40, at 926.

221 Introduction, THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/principles/introduction (last visited Mar. 28, 2011).

222 *Id. See also* Who's Involved: Participants, THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/participants/ (noting that the Principles were established by "[t]he governments of the United States, the United Kingdom, Norway, the Netherlands, Canada, Colombia, and Switzerland plus companies operating in the extractive and energy sectors and non-governmental organizations, all with an interest in human rights and corporate social responsibility.").

223 Interactions Between Companies and Private Security, THE VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS, http://www.voluntaryprinciples.org/principles/private_security (last visited Mar. 28, 2011).

best methods for their implementation, they provide a strong foundation upon which an ethical business relationship between a corporation and a state may be built. In the future, the U.S. should be required to contract only with private companies that have signed the Voluntary Principles, or that will sign a tailored version of the principles that are specific to the relationship between the parties and provides for legal remedies should the provisions be broken.

## VIII. CONCLUSION

The *El-Masri* case has been called "a reminder of how easy it seems to be for innocent people to be swept up into the torture gulag without recourse of any kind."[224] There can be no denying the illicitness of the U.S.-led extraordinary rendition program, which supervised the kidnapping and transport of suspects to CIA black sites where they were subjected to brutal methods of physical and psychological torture, as well as indefinite detention. Sadly, these victims have consistently been denied access to justice in our own domestic courts.

Aside from the general legal implications of the extraordinary rendition cases, the precedent of *El-Masri* and *Jeppesen* also set a dangerous standard for international business practices. The global media has clearly identified Jeppesen as the private airline company that managed the physical transport of suspects during the extraordinary rendition program. Yet Jeppesen's role was much more engaged than the public was first led to believe. This is a company that provided detailed logistical and operational support for the extraordinary rendition program. This is a company that arranged for people to be kidnapped, stripped, drugged, and taken to a facility designed for their torture. This is a company with employees who were sickeningly aware of their role in the torture of several hundred victims. This is a company that not only enabled the extraordinary rendition program, but played a critical role in its success.

Yet courts have been unwilling to hold these companies responsible for their actions, despite legal doctrine that calls for them to do so. The theories of corporate complicity arose from a global need and desire to hold businesses responsible for their role in the perpetration of gross human rights abuses. This is of particular importance today as corporations steadily amass more money, land, and power. Still courts choose to misapply the state secrets and political questions doctrines for fear of jeopardizing national security.

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224 Clarke, *supra* note 6, at 65.

While the protection of national security is certainly a valid concern, nowhere do our laws explicitly allow for the phrase "national security" to override basic human rights. The U.S. must now take active measures to support corporate social responsibility, so that global corporations may no longer continue their commercial assaults on human rights. Some tools of corporate responsibility already exist, such as the Voluntary Principles; others, such as congressional remedies to victims, have yet to be explored. The extraordinary rendition cases reveal an urgent need to implement greater policies of corporate liability, so that past victims might finally know justice and future potential victims are never put at risk.