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## Analyzing Accountability: Examining the Domestic and International Redress Measures for War on Terror Detainees

**ABSTRACT.** Despite the nation's former dedication toward providing redress for victims of international law violations under the Alien Tort Statute (ATS), in the period after 9/11, the United States reneged on its commitment to international legal norms by failing to provide redress to victims of rights infringements. Although scholarship on the legality of the United States' conduct during the War on Terror is abundant, much of this research fails to highlight how the nation's legacy of avoiding redress stands in stark contrast to our allies. European nations that aided the Central Intelligence Agency (CIA)'s detention and interrogation program by hosting secret detention centers, known as black sites, were found liable for international law violations under the European Court of Human Rights (ECtHR) and forced to pay redress to the victims. After analyzing the limited redress options available in the ECtHR versus in domestic courts, this paper proposes that Congress should pass an amendment to the ATS enshrining the right to sue non-domestic corporations, which includes military contractors, for violating the international law of freedom from torture in line with the cause of action provided by previous ATS cases. In creating such an amendment, the United States can ease the strain on military operations and intelligence connections resulting from conduct during the War on Terror. Although victims still endure damages, it would provide a clear avenue for those seeking redress. Furthermore, the amendment would disincentivize further rights violations, allowing the United States to reassert its commitment to international legal norms.

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**INTRODUCTION**

The 9/11 attack on United States soil fundamentally altered the nation's dedication to international legal norms. Launching the War on Terror against the actors responsible for the attack, the country cited national security concerns as justification for the violation of human rights. In pursuit of intelligence collection, the CIA detained numerous foreign nationals suspected of terrorist activities and utilized Enhanced Interrogation Techniques (EITs), such as waterboarding and sleep deprivation.<sup>1</sup> These techniques elicited domestic and international controversy, as many saw the interrogations as breaching international treaties and infringing upon human rights, particularly freedom from torture and undisclosed detention.<sup>2</sup> Furthermore, a Senate Select Committee report on the CIA's detention and interrogation program discovered that the EITs were ineffective in procuring intelligence and the CIA was unprepared when it began operating detention facilities in foreign countries.<sup>3</sup> To justify their conduct to outside audiences, the United States exploited loopholes in international treaties and created domestic legislation. The CIA also employed military contractors, which played a crucial role in the day-to-day operations of these sites, using 85 percent of the personnel "for detention and interrogation operations."<sup>4</sup> An internal assessment by CIA personnel found that these contractors "had a financial interest in [the program's] continuation and expansion," highlighting the crucial role the agency and contractors played in continuing operations.<sup>5</sup>

While the United States avoided liability, countries that provided aid did not. The Council of Europe, an international organization dedicated to upholding human rights and democracy, tried member nations for their conduct through the European Court of Human Rights (ECtHR). By allowing the United States to establish black sites where CIA officials and/or military contractors mistreated detainees suspected of harboring relevant intelligence, the court found that Poland, Romania, and Lithuania

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<sup>1</sup> S. Rep. No. 113-288 (2014).

<sup>2</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *3rd Geneva Convention*].

<sup>3</sup> S. Rep. No. 113-288, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

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were liable for violations of the European Convention on Human Rights (ECHR).<sup>6</sup> Also known as the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR was a treaty created so European nations could “take the first steps for the collective enforcement of certain rights stated in the [United Nations’ (U.N.)] Universal Declaration” of Human Rights.<sup>7</sup> After the court’s rulings, these nations were required to compensate detainees housed and interrogated within their borders. The Council of Europe’s Parliamentary Assembly also conducted investigations to determine the level of European involvement during the War on Terror.

Secrecy regarding the EIT program impeded the executive’s ability to conduct foreign policy, and the involvement of the United States has infringed upon domestic court procedures in European nations investigating the black sites. This paper proposes that Congress should pass an amendment to the Alien Tort Statute (ATS) allowing non-citizens to sue for human rights violations in the United States’ courts.<sup>8</sup> This amendment would incorporate the ability to sue domestic corporations for infringing on the right to freedom from torture. By opening up avenues for War on Terror detainees to obtain financial redress through suits against military contractors, the United States can alleviate strains placed on foreign courts. This pressure occurs when detainees whose rights were violated seek out alternative forums because they lack domestic avenues for redress. Creating barriers that disincentivize corporations from taking contracts that involve potential international law violations, the legislation would impede the United States’ capability to open black sites and conduct unlawful enhanced interrogations. Further, these barriers will limit the United States in convincing foreign hosts to cooperate with its agenda. Instituting avenues of redress that alleviate foreign policy burdens and constructing barriers to deter the creation of black sites will enable the United States to regain its image as a protector of human rights and international law.

### I. DOMESTIC ACCOUNTABILITY

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<sup>6</sup> Department of Justice, Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists (2009).

<sup>7</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S 221.

<sup>8</sup> Alien Tort Claims Act, 28 U.S.C. § 1350.

*A. International Legal Obligations*

After World War II, the United States became a signatory to the first four international treaties of the Geneva Conventions, which dictate international law and the rules of proper conduct during war. The two relevant treaties for this paper are the Third and Fourth Conventions, the Convention Relative to the Treatment of Prisoners of War,<sup>9</sup> and the Convention Relative to the Protection of Civilian Persons in Time of War.<sup>10</sup> Article 3 of the Third Geneva Convention asserts that those not actively taking part in hostilities, for reasons including their detention, should be treated humanely.<sup>11</sup> The treaty prohibits violence of any kind to these individuals, including torture and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”<sup>12</sup>

Two additional protocols, adopted in 1977, expanded the Geneva Conventions. Protocol I extended protection to Victims of International Armed Conflicts,<sup>13</sup> as the Third Convention only applies to non-international conflicts. Protocol II expanded upon the victims of Non-International Armed Conflicts,<sup>14</sup> prohibiting “torture of all kinds, whether physical or mental... outrages upon personal dignity, in particular humiliating and degrading treatment... any form of indecent assault... and threats to commit any of the foregoing acts,” even for participants in international conflict.<sup>15</sup> However, the United States never ratified Protocol I, as Defense Secretary Caspar Weinberger claimed that the treaty “would radically change humanitarian law in favor of terrorists... at the expense of citizens.”<sup>16</sup> By failing to adopt Protocol I, the United States defined the War on Terror as international, arguing that detainees are not protected under the Geneva Convention. Other than the United States, the only

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<sup>9</sup> 3rd Geneva Convention, *supra* note 2.

<sup>10</sup> Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T 3516, 75 U.N.T.S 287.

<sup>11</sup> 3rd Geneva Convention, *supra* note 2.

<sup>12</sup> *Id.*

<sup>13</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3.

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609.

<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 13.

<sup>16</sup> Memorandum from George P. Shultz, U.S. Dep’t of State on 1977 Protocols Additional to the Geneva Conventions of 1949 on Protection of War Victims, to Adm John M. Pointdexter (Mar. 21, 1986).

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nations that have not ratified or acceded to Protocol I are Pakistan and Iran, demonstrating universal acceptance within international law.<sup>17</sup>

The United States is also a signatory to the 1984 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>18</sup>

What constituted “severe” became important to the Department of Justice (DOJ)’s Office of Legal Counsel as they attempted to explain the legality of conduct by the United States.<sup>19</sup>

### *B. Circumventing Illegality*

The United States justified its use of EITs and detainment during the War on Terror by restructuring interrogation methods and by arguing against the applicability of the Geneva Convention to War on Terror prisoners. In documents known as the torture memos, the Executive Legal Council advised the United States on how to avoid international law violations by analyzing the legal definitions of torture. Arguments centered around what constituted lasting psychological or physical harm, approving certain techniques and tweaking others to ensure interrogators did not cause (or intend

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<sup>17</sup> International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Jun. 8, 1977) (International Humanitarian Law Database) (38 nations did ratify the treaty with a reservation/declaration, meaning they “exclude[d] or modif[ied]” the impact of certain parts of the treaty, but reservations could not be “incompatible with the object and purpose of the treaty”).

<sup>18</sup> United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1988, T.I.A.S. No. 94-1120.1, 1465 U.N.T.S. 85.

<sup>19</sup> Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, on Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005).

to cause) lasting harm.<sup>20</sup> One week after 9/11, Congress passed the Authorization of the Use of Military Force (AUMF). This law permitted President George W. Bush “to use all necessary and appropriate force” against “persons he determines planned, authorized, committed, or aided the [9/11] terrorist attacks” in the name of national security.<sup>21</sup> The AUMF was also used to justify the legally murky EITs.<sup>22</sup>

In a memorandum released on February 7, 2002, President Bush argued that members of Al-Qaeda and the Taliban should not receive protection under the Geneva Conventions because they do not qualify as “prisoners of war”;<sup>23</sup> instead, they were considered “unarmed combatants”, an obscure legal concept used by the executive branch.<sup>24</sup> As Article 3 of the Third Convention applies only to “conflicts not of an international character,” the executive branch insisted the global nature of the terrorist threat did not qualify the actors for Geneva status.<sup>25</sup> The memorandum also argued that Al-Qaeda and the Taliban are members of non-state groups rather than “High Contracting Part[ies]” (defined as states in the Geneva Convention),<sup>26</sup> providing further reasoning to exclude them from receiving privileges.<sup>27</sup> The United States exploited technicalities within international law to justify excluding War on Terror detainees from convention protection.

Detainees would also have difficulty obtaining redress by holding the United States or its employees accountable for Geneva Convention violations in domestic courts. Although the country can be held liable for tort suits under the Federal Tort Claims Act (FTCA),<sup>28</sup> this does not apply to claims that “[arise] out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>29</sup> The FTCA has been controversial since its passage in 1946 for waiving government

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<sup>20</sup> Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Justice, to John Rizzo, Acting General Counsel of the Central Intelligence Agency, on Interrogation of Al Qaeda Operative (Aug. 1, 2002).

<sup>21</sup> Authorization for Use of Military Force, 107 P.L. 40, 115 Stat. 224 (Sept. 18, 2001).

<sup>22</sup> Memorandum on Interrogation of Al Qaeda Operative, *supra* note 20.

<sup>23</sup> Memorandum from George W. Bush, President, to Richard B. Cheney, Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S 31.

<sup>27</sup> Memorandum on Humane Treatment of al Qaeda and Taliban Detainees, *supra* note 23.

<sup>28</sup> 28 U.S.C.A. § 2674.

<sup>29</sup> 28 U.S.C.A. § 2680.

immunity to tort lawsuits.<sup>30</sup> Sovereign immunity was established during the founding of the United States, which exempts the nation from criminal or civil suits.<sup>31</sup> The FTCA undermined this principal when they gave federal courts jurisdiction over civil cases regarding “injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>32</sup> The FTCA has been invoked in cases such as *Saleh v. Titan Corp* to argue that (1) contractors are not state actors, so they cannot be sued under the ATS and (2) torts are subjected to “battlefield preemption,”<sup>33</sup> eliminating the applicability of tort law during wartime. By denying the petition for certiorari and refusing to hear the case, the Supreme Court affirmed that military contractors received the same privileges as the military itself during wartime suits, meaning neither the nation nor its contractors could be held accountable for human rights violations during wartime.<sup>34</sup> This highlights the difficulty of obtaining redress through the suit of contractors within the existing legal framework.

### C. *Lack of International Accountability*

As a premier global power, the United States faces minimal repercussions for its actions in the international sphere, other than statements of distaste from its allies and supranational organizations.<sup>35</sup> The United States does not submit to the jurisdiction of supranational courts, and allies will not punish the nation lest it degrade their respective relations and jeopardize the vital support they receive. For example, the United States does not recognize the authority of the International Criminal Court (ICC), which prosecutes individuals for grave international crimes such as aggression and genocide.<sup>36</sup> The treaty establishing the use of the ICC was signed by President Bill Clinton in 2000, but was never ratified by the United States Senate. The Bush Administration expressed to the U.N. Secretary General that “the United States does

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<sup>30</sup> United States as defendant, 28 USCS § 1346.

<sup>31</sup> See Walter P. Armstrong et al., *The Federal Tort Claims Act*, 56 Yale Law Journal 3, 534-61 (1947), <https://doi.org/10.2307/793285>.

<sup>32</sup> 28 USCS § 1346.

<sup>33</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 16 (D.C. Cir. 2009) (the case set forth the battlefield preemption clause by applying the Federal Tort Claims Act’s combatant activities exception).

<sup>34</sup> *Id.*

<sup>35</sup> Memorandum from Dick Marty, Rapporteur, on Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States (Jun. 7, 2006).

<sup>36</sup> 2187 U.N.T.S. 90.; 37 I.L.M. 1002 (1998).

not intend to become a party to the treaty” and that it “has no legal obligations arising from its signature.”<sup>37</sup> Furthermore, President Donald Trump has expressed his discontent with the ICC, threatening sanctions if the organization prosecutes citizens of the United States or Israel.<sup>38</sup> The U.N. Security Council, of which the United States is a permanent member, decides to implement sanctions or authorize the use of force. Permanent Security Council members can veto requests for investigations, allowing the United States to exempt itself from international scrutiny.<sup>39</sup> Because of the country’s prominence and position, the international community can do little more than urge the nation to adhere to the law. An investigation by the U.N. Human Rights Council’s Working Group on Arbitrary Detention found that the detention and transfer of prisoners by the United States fell outside of domestic and international legal norms.<sup>40</sup> However, the only “consequence” of this investigation was that the Working Group requested that the government of the United States “take the necessary steps to remedy the situation... and to bring it into conformity with the principles set forth in the Universal Declaration of Human Rights.”<sup>41</sup> This exemplifies the international community’s inability, and often lack of willingness, to hold the United States liable for its breaches of international law.

The nation also failed to hold personnel accountable for human rights abuses that arose when interrogators utilized tactics unauthorized by the CIA to procure intelligence. After two overseas detainees died in the custody of the United States, Attorney General Eric Holder launched a preliminary review to determine whether federal law was ignored and if individuals must be prosecuted.<sup>42</sup> However, Holder also declared that those who “acted in good faith... regarding the interrogation of detainees” would not be prosecuted.<sup>43</sup> The criminal investigation was closed in 2012, and no one was charged.<sup>44</sup> Moreover, the 2014 Senate Report revealed that individuals who conducted “inappropriate activities” in violation of CIA procedures and managers

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<sup>37</sup> Jean Galbraith, *The Bush Administration’s Response to the International Criminal Court*, 21 Berkeley Journal of International Law 683, 686 (2003).

<sup>38</sup> Exec. Order No. 14, 203, 3 C.F.R.

<sup>39</sup> Norman J. Padelford, *The Use of the Veto*, 2 Int’l Org. 227 (1948).

<sup>40</sup> Human Rights Council, Rep. on Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, U.N. Doc. A/HRC/4/40/Add.1 (2007).

<sup>41</sup> *Id.*

<sup>42</sup> Eric Holder, Att’y General, U.S. Dep’t of Justice, Regarding a Preliminary Review into the Interrogation of Certain Detainees (Aug. 24, 2009).

<sup>43</sup> *Id.*

<sup>44</sup> Press Release, Eric Holder, Att’y General, U.S. Dep’t of Justice, Closure of Investigation into the Interrogation of Certain Detainees (Aug. 30, 2012).

who failed to hold them accountable skirted liability, avoiding repercussions or removal from their roles.<sup>45</sup> This lack of intraorganizational discipline, coupled with the inability of the international community to force the United States into action, underscores the necessity of utilizing the judiciary to find remedies for rights violations.

*D. Alternative Forms of Redress - the Alien Tort Statute*

Cases against the United States are not the only way an individual can pursue redress. There are legal avenues that allow non-citizens to seek compensation against other parties. This was made possible by the Alien Tort Statute (ATS). Established in the Judiciary Act of 1789, the ATS has been a prominent force for transnational tort law, as it enables non-citizens to sue other individuals for “violation of the law of nations or a treaty of the United States.”<sup>46</sup> The statute was not utilized until *Filartiga v. Pena-Irala*, when two Paraguayan citizens sued a Paraguayan government official for the torture and wrongful death of their relative through United States courts.<sup>47</sup> The case was remanded, and the United States District Court for the Eastern District of New York ruled in favor of the plaintiff in 1984.<sup>48</sup> Fundamentally altering human rights legislation, this case allowed non-citizens to sue for violations of international legal norms, even if these violations occurred on foreign soil.

*Filartiga* represented a strong commitment toward upholding international law, but starting in 2004, a series of rulings have significantly narrowed the ATS’s scope. In *Sosa v. Alvarez-Machain*, the Supreme Court ruled that the international legal norms of concern must be “specific, universal, and obligatory”<sup>49</sup> and comparable to the international torts of concern at the statute’s inception.<sup>50</sup> These rulings prevented the court from recognizing and ruling on an abundance of international norms that could interfere with the executive and legislative branches’ ability to control foreign affairs.<sup>51</sup> Nearly a decade later, *Kiobel v. Royal Dutch Petroleum Co.* further constrained the statute. *Kiobel* concerned a group of Nigerian citizens who sought to sue various

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<sup>45</sup> S. Rep. No. 113-288 (2014).

<sup>46</sup> 28 U.S.C.A. § 1350.

<sup>47</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, (2nd Cir. 1980).

<sup>48</sup> *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

<sup>49</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (*Sosa* concerned Mexican citizen Humberto Alvarez-Machain, who sued a number of Mexican nationals, including Jose Francisco Sosa, for allegedly kidnapping him in Mexico to bring him into the United States for trial).

<sup>50</sup> *Id.* at 725.

<sup>51</sup> *Id.* at 727.

corporations, including Royal Dutch Petroleum Co., for allegedly facilitating the Nigerian government's violation of international law on Nigerian soil.<sup>52</sup> The petitioners claimed Royal Dutch Petroleum Co. aided and abetted the Nigerian government in committing numerous crimes, including torture and cruel treatment.<sup>53</sup> Accusations arose from accounts that the corporation provided "food, transportation, and compensation" to the Nigerian forces that committed these crimes.<sup>54</sup> Additionally, the company reportedly allowed the soldiers to use their property as a staging ground for their attacks.<sup>55</sup> *Kiobel* limited the ATS by asserting the presumption against extraterritoriality, meaning the human rights violations must occur on the United States' soil or "touch and concern" the nation with "significant force" to be applicable under the ATS.<sup>56</sup> Thus, "mere corporate presence" in the nation where the violation occurred became insufficient to overcome the presumption against extraterritoriality.<sup>57</sup>

In addition to arguing against extraterritoriality, the court in *Kiobel* also expressed concerns with foreign corporate liability under the ATS, insisting it would enable judicial overreach, impede the executive's ability to conduct foreign policy, and create diplomatic and separation of power concerns.<sup>58</sup> Under *Jesner v. Arab Bank, PLC*, the Supreme Court officially ruled against foreign corporate liability under the ATS.<sup>59</sup> In *Jesner*, injured individuals and the family members of those killed sued Arab Bank for allegedly facilitating terrorist attacks.<sup>60</sup> Citing the strain the case placed on United States-Jordanian relations, as Jordan viewed the litigation as a violation of its sovereignty.<sup>61</sup> The court concluded that the statute went against the ATS's initial purpose of "promot[ing] harmony in international relations."<sup>62</sup>

While the court preempts rulings on the conduct of international corporations, cases that call into question the behavior of United States-based companies abroad have seen mixed results. The Supreme Court's ruling in *Nestle USA, Inc. v. Doe* reaffirmed that mere corporate presence in the United States does not automatically permit the

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<sup>52</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 113.

<sup>55</sup> *Id.* at 113.

<sup>56</sup> *Id.* at 124-5.

<sup>57</sup> *Id.* at 125.

<sup>58</sup> *Id.* at 124.

<sup>59</sup> *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 292 (2018).

<sup>60</sup> *Id.* at 248.

<sup>61</sup> *Id.* at 243.

<sup>62</sup> *Id.* at 243.

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suit of a company due to conduct overseas.<sup>63</sup> Plaintiffs were trafficked as children and forced into child labor on cocoa farms in the Ivory Coast, farms from which Nestle USA and Cargill, two corporations based in the United States, purchase their cocoa.<sup>64</sup> Plaintiffs sued the corporations under the ATS, arguing that they knowingly aided and abetted child slavery by providing these farms with “technical and financial resources” to continue operations.<sup>65</sup> However, in finding Nestle’s United States-based behavior insufficient to overcome the presumption against extraterritoriality, the court did not answer whether “aiding and abetting child slavery” was a recognizable cause of action or whether domestic corporations should be held liable under the ATS.<sup>66</sup> In their concurrence, Associate Justices Neil M. Gorsuch and Sonia Sotomayor asserted that “there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.”<sup>67</sup> The Supreme Court also disagreed over whether the ATS should be limited to the three international law torts initially considered at the statute’s inception: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>68</sup> The court majority favored avoiding the creation of an additional cause of action beyond the original three “whenever there is even a single sound reason to defer to Congress,”<sup>69</sup> but disagreed regarding whether an additional cause of action should ever be recognized. Associate Justice Clarence Thomas contended that the ATS should always be limited to the original three torts, and expansion beyond the historical basis would cause foreign policy and separation of power tensions.<sup>70</sup> However, Justice Sotomayor found Thomas’s argument unpersuasive.<sup>71</sup> She asserted that limiting the application of the ATS to international law violations established in 1789 was “unmoored from both history and precedent.”<sup>72</sup> The statute’s creation was motivated by the fact that “foreign powers [had] expressed their displeasure with the United States’ failure to provide redress for law-of-nations violations against their citizens.”<sup>73</sup> To oppose recognizing

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<sup>63</sup> Nestle USA, Inc. v. Doe, 593 U.S. 628, 634 (2021).

<sup>64</sup> *Id.* at 631.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 634.

<sup>67</sup> *Id.* at 652 n.4.

<sup>68</sup> *Id.* at 635.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 644-5.

<sup>71</sup> *Id.* at 648-9.

<sup>72</sup> *Id.* at 649.

<sup>73</sup> *Id.*

additional causes of action would be to ignore the wishes of the First Congress, which intended the ATS to identify new actionable torts as international law evolved.<sup>74</sup> This emphasizes the statute's diplomatic significance and supports enshrining the violation of freedom from torture as a cause of action under the ATS. Furthermore, disagreement over acknowledging new causes of actions under the ATS became relevant in conversations surrounding the use of EITs during the War on Terror, especially regarding whether or not victims could sue domestic contractors involved in the detention and interrogation of prisoners.

*E. Military Contractors and the ATS: Al Shimari v. CACI*

As previously established, various laws and readings of international treaties have made pursuing redress difficult against the United States government. Even though domestic legislation preempts suits against the nation and its employees, there are still avenues by which foreign and domestic victims can pursue redress, such as launching suits against military contractors. Cases were previously limited by the extension of battlefield preemption, but *Al Shimari, et al. v. CACI* represents a recent breakthrough in favor of War on Terror detainees.<sup>75</sup> Utilizing the ATS, the plaintiffs sued CACI Premier Technology, Inc., an American-based corporation that provided translation services to detainees held in the Abu Ghraib prison in Iraq.<sup>76</sup> The three Iraqi plaintiffs claimed the company aided in their unlawful torture and detention abroad.<sup>77</sup> A jury in the Eastern District of Virginia ruled in favor of the plaintiffs, ordering the defendant to pay each of the plaintiffs "\$3 million in compensatory damages and \$11 million in punitive damages."<sup>78</sup> Initially filed in 2008, CACI has attempted to dismiss the case over 20 times, arguing that it cannot be held liable for conduct at the behest of the United States.<sup>79</sup> The case was previously ruled invalid on technicalities within state law before ruling whether or not contractors could be held accountable under United

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<sup>74</sup> *Doe*, 593 U.S., *supra* note 63, at 650.

<sup>75</sup> *Al Shimari, Et Al. v. CACI Premier Tech., INC.*, 300 F.Supp.3d 758 (E.D. Va. 2024).

<sup>76</sup> Pls.' Opp'n to Def. CACI Premier Tech. Inc.'s Motion to Dismiss (*Al Shimari, Et Al. v. CACI Premier Tech.*), 2013 C.A. No. 08-cv-0827 (Jan. 28, 2013).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *CACI Premier Tech.*, 300 F.Supp.3d, *supra* note 75 (def.'s memorandum in support of its motion for judgement as a matter of law, or, alternatively, for a new trial).

States law.<sup>80</sup> CACI moved to dismiss the case by claiming derivative sovereign immunity, which provided the corporation with the same lawsuit immunities as the United States, because it was carrying out a contract for the state.<sup>81</sup> While previously granted in cases such as *Saleh v. Titan Corp.*, the *Al Shimari* court held that to receive derivative immunity, CACI had to adhere to the terms of the contract, which stated that employees must comply with international legal norms and the code of the United States.<sup>82</sup> The Supreme Court ruled that corporations that violated their contracts cannot receive derivative immunity, and by “conspir[ing] with and aid[ing] and abett[ing] military personnel in committing acts of torture,”<sup>83</sup> the court found that the corporation was not eligible for derivative immunity. After the verdict requiring CACI to pay redress to the victims, the company moved for a new trial, which was denied,<sup>84</sup> leading CACI to appeal yet again.<sup>85</sup> Thus, the plaintiffs have yet to receive compensation, and proceedings are still ongoing, despite promising initial results.<sup>86</sup> This highlights the difficulty War on Terror victims face in United States courts when attempting to obtain redress, emphasizing the necessity to enshrine the protections into law.

## II. EUROPEAN BLACK SITES AND LEGAL ACCOUNTABILITY

### A. Background

#### 1. Council of Europe and the European Court of Human Rights

While the United States has faced minimal legal accountability for its actions during the War on Terror, the same cannot be said for its allies. European nations that aided the United States during the War on Terror by hosting CIA black sites within their borders are being held responsible for violating the ECHR.

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<sup>80</sup> *Al Shimari v. CACI Int'l, Inc.*, 933 F. Supp. 2d 793 (E.D. Va. 2013) (the detainees took up their claim under Virginia law, but their case was ruled invalid because Virginia has a statutory period of two years, and the case fell outside this time frame).

<sup>81</sup> Memorandum Opinion, *Al Shimari, Et Al. v. CACI Premier Tech., INC v. United States*, No. 1:08-cv-827 (E.D. Va. 2019).

<sup>82</sup> *Id.* at 52.

<sup>83</sup> *Id.*

<sup>84</sup> Notice of Appeal, *Al Shimari, Et Al. v. CACI Premier Tech., INC.*, No. 1:08-cv-0827 (E.D. Va. 2024).

<sup>85</sup> Denial of Plaintiff's Motion for Judgement as Matter of Law and Motion for a New Trial, *Al Shimari, Et Al. v. CACI Premier Tech., INC.*, No. 1:08-cv-827 (E.D. Va. 2025).

<sup>86</sup> *Id.*

The Council of Europe held three European nations liable for violating the rights of detainees by hosting black sites: Poland, Romania, and Lithuania. These countries were required to pay redress to the victims whose rights were breached on their soil. All European nations, save Russia and Kosovo, are members, meaning many key United States allies, like France, Germany, and the United Kingdom, are all subject to the court's jurisdiction. Furthermore, court judgements are binding and hold jurisdiction over the 46 Council of Europe member states.<sup>87</sup> How these countries were found to be culpable, as well as the legal backlash they encountered, will be discussed below. Analysis of these cases will serve to illuminate the gap in adequate redress mechanisms in the United States, as well as the shortcomings, foreign policy concerns, and symbolic implications of redress through the ECtHR.

## 2. *Black Site Investigations*

In November 2005, the Washington Post reported that numerous eastern European democracies were housing CIA detention sites, locations United States officials used to interrogate War on Terror detainees.<sup>88</sup> Three days later, Human Rights Watch released a report claiming that flight logs revealed CIA planes transporting War on Terror detainees had landed in Poland and Romania, although further research was required to ascertain their level of involvement.<sup>89</sup> The ECtHR case detailed how, in November 2005, the Council of Europe Parliamentary Council's Secretary General, Terry Davis, sent a questionnaire to member states in response to circulating reports of European involvement in the CIA rendition program, requiring nations to ensure they were upholding domestic law and implementing the ECHR. This required an explanation of the "adequate safeguards" in place to avoid "deprivation of liberty, including transport, with or without the involvement of foreign agents" and to prevent external actors from violating human rights on their soil.<sup>90</sup>

The subsequent 2006 Marty report, published by the Committee on Legal Affairs and Human Rights, an extension of the Parliamentary Assembly, acknowledged the news stories, speculating on the involvement of Poland and Romania.<sup>91</sup> The culpability

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<sup>87</sup> Statute of the Council of Europe, 87 U.N.T.S. 103, E.T.S. 1.

<sup>88</sup> *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ¶227 (Jul. 24, 2014).

<sup>89</sup> *Id.* at 221.

<sup>90</sup> *Id.* at 235.

<sup>91</sup> Eur. Parl. Ass., Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, doc. 11302 ¶2 (Jun. 11, 2007).

of these states was “factually established” in the 2007 Marty Report.<sup>92</sup> In 2009, an ABC News report exposed Lithuania as the third European country to host a CIA black site.<sup>93</sup> After urging from the international community, Lithuania’s legislative body (the Seimas) adopted Resolution No. XI-459, prompting the nation’s Committee on National Security and Defence to launch a parliamentary investigation, which eventually resulted in a denial of the allegations.<sup>94</sup>

### *B. Detainees*

Three applicants have successfully sued European nations through the ECtHR for violations of the ECHR. These individuals are Zayn Al-Abidin Muhammad Husayn—also known as Abu Zubaydah—, Abd Al Rahim Husseyn Muhammad al-Nashiri, and Mustafa Ahmed Adam al-Hawsawi. All three men were considered prominent detainees and subjected to the United States’ High Value Detainee (HVD) program, which wielded their status as justification for the use of EITs.<sup>95</sup> Seized in foreign nations and sent to the black sites, the three men were suspected of orchestrating past attacks, harboring information regarding future plans, and possessing relevant knowledge of Al Qaeda’s internal operations. Lawyers working on the ECtHR cases, specifically those of Abu Zubaydah (housed in the United States’ Internment Facility in Guantanamo Bay), noted difficulties regarding communication between the plaintiff, legal counsel, and the court:

‘the unprecedented restrictions on communication’ between Mr Abu Zubaydah, his counsel and the Court... ‘precluded the presentation of information or evidence directly from or in relation to the client.’ Only the applicant’s [United States] counsel with top-secret security clearance could meet with the applicant, and all information obtained from him was presumptively classified. In consequence, counsel could not disclose to other members of the legal team or to the Court any information obtained from the applicant... without obtaining the

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<sup>92</sup> Eur. Parl. Ass., *supra* note 91.

<sup>93</sup> Abu Zubaydah v. Lithuania, App. No. 46454/11, ¶500 (May 31, 2018).

<sup>94</sup> *Id.* at ¶171.

<sup>95</sup> S. Rep. No. 113-288 (2014) (upon their capture, the CIA sorted detainees into “medium-value” or “high-value” targets; the latter group was suspected of having intelligence imperative to quelling imminent threats).

declassification of that information by the [United States'] authorities.<sup>96</sup>

The rigid classification surrounding the cases meant the facts were “reconstructed from threads of information gleaned from numerous public sources” to prevent disclosing classified information.<sup>97</sup> Reconstruction was also deemed necessary for Al Nashiri and Al-Hawsawi’s cases. This quote also exemplifies how the United States’ classification demands and detention procedures impeded the ECtHR proceedings by complicating the ability to obtain and disseminate evidence from the detainee.

A series of six cases regarding CIA black sites have come before the ECtHR, with a seventh still being processed.<sup>98</sup> The court ruled in favor of the plaintiffs in all six cases, with each applicant receiving EUR 100,000 in compensation. The first cases to face the court regarding black site culpability were *Husayn (Abu Zubaydah) v. Poland* and *Al Nashiri v. Poland*.<sup>99</sup> Serving as landmark cases, these rulings were the first to hold a European nation accountable for facilitating and permitting the CIA to abuse human rights within their borders during the War on Terror. The ECtHR ruled on these cases concurrently, holding that Poland violated Article 38 of the ECHR by failing to submit documents for the criminal case, obstructing the court.<sup>100</sup> The Polish government argued that the ECtHR failed to “indicate at all the manner in which sensitive documents submitted by the parties, especially the States, were to be protected,” highlighting the nation’s discontent with the court’s proceedings.<sup>101</sup> Poland also refused to comply with the court investigation by withholding aviation logs when requested by the ECtHR Committee on Legal Affairs and Human Rights as part of

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<sup>96</sup> *Poland*, App. No. 7511/13, *supra* note 88, at ¶80.

<sup>97</sup> *Id.* at ¶400.

<sup>98</sup> While the ECtHR has ruled on two other cases regarding participation in the CIA’s extraordinary rendition and detention program (*El-Masri v. The Former Yugoslav Republic of Macedonia and Nasr and Ghali v. Italy*), neither case concerned hosting black sites, so while representing the ECtHR’s stringent commitment toward upholding rights violations, they fall outside the scope of this paper.

<sup>99</sup> *Al-Hasawi v Poland*, App. No. 15925/16 (Oct. 22, 2018) (*Al-Hawsawi v. Poland* was struck out, as the applicant rescinded his case upon the declassification of CIA documents revealing that a portion of his detention occurred in Site Cobalt, revealed to be in Afghanistan, rather than in Poland).

<sup>100</sup> *Poland*, App. No. 7511/13, *supra* note 88, at ¶488 (Article 38 of the ECHR requires “all High Contracting Parties concerned” to “furnish all necessary facilities,” which was violated when Poland refused to provide the aviation documents).

<sup>101</sup> *Id.* at ¶342.

## ANALYZING ACCOUNTABILITY: EXAMINING THE DOMESTIC AND INTERNATIONAL REDRESS MEASURES FOR WAR ON TERROR DETAINEES

the inquiry into whether Council of Europe states were aiding the United States in its detention and interrogation program.<sup>102</sup>

In *Husayn (Abu Zubaydah) v. Poland*, the court concluded that Poland violated numerous ECHR articles, denied by the Polish government.<sup>103</sup> Abu Zubaydah was seized and taken into CIA custody in Pakistan in March 2002.<sup>104</sup> He was housed and transported between CIA black sites for four years, until he was transferred into the custody of the Department of Defense.<sup>105</sup> Using testimony from the applicant and information regarding flight plans released from a variety of sources, the court deduced that Abu Zubaydah was transferred to the black site in Stare Kiejkuty, Poland, on December 4 or 5, 2002.<sup>106</sup> A variety of EITs were utilized during his detention, including waterboarding, prolonged stress standing positions, prolonged nudity, beatings, threats, and confinement within a box.<sup>107</sup> Abu Zubaydah was subjected to these methods, alongside other forms of ill-treatment, until his extraordinary rendition from Polish territory on September 22, 2003.<sup>108</sup> Poland violated Article 3 ECHR by failing to investigate the claims of severe infringements upon detainees' rights and by enabling the United States to subject detainees to unlawful treatment in Poland and other locations after the transfer.<sup>109</sup> The court held that Poland violated Article 5 (the right to liberty and security) of the ECHR because the applicant's detention in the nation was undisclosed, and because the Polish government allowed the United States to transfer the detainee.<sup>110</sup> The applicant additionally argued that Article 8 (the right to respect for private and family life) was violated by depriving him of the ability to contact his family, a charge that the court upheld.<sup>111</sup> The ECtHR held that Article 13—taken in conjunction with Articles 3, 5, and 8—was violated because the applicant was denied access to an effective remedy in response to the violation of his rights.<sup>112</sup> Lastly, the ECtHR concluded that Poland violated Article 6 § 1 (which dictates the

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<sup>102</sup> Council of Europe, Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States*, doc. 10957 (Jun. 12, 2006).

<sup>103</sup> *Poland*, App. No. 7511/13, *supra* note 88.

<sup>104</sup> *Id.* at ¶85.

<sup>105</sup> *Id.* at ¶85.

<sup>106</sup> *Id.* at ¶92-6.

<sup>107</sup> *Id.* at ¶103-4.

<sup>108</sup> *Id.* at ¶100.

<sup>109</sup> *Id.* at ¶512-4.

<sup>110</sup> *Id.* at ¶525.

<sup>111</sup> *Id.* at ¶3.

<sup>112</sup> *Id.* at ¶535.

right to a fair trial) because when Polish officials allowed the CIA to transfer Abu Zubaydah from the black site, they did so knowing the United States would likely subject him to further detention without trial, exposing the applicant to a serious risk of “a flagrant denial of justice.”<sup>113</sup>

In *Al Nashiri v. Poland*, the court held the same article violations as in *Abu Zubaydah v. Poland*. Al Nashiri was transferred to Poland on December 5, 2002,<sup>114</sup> where he stayed until June 6, 2003.<sup>115</sup> In Poland, he was subjected to prolonged standing positions and threats, which included threatening “the arrest and rape of his family.”<sup>116</sup> The court affirmed Al Nashiri’s appeal that Poland violated Articles 2 and 3 as they apply to Article 1 of Protocol 6, which abolishes the death penalty.<sup>117</sup> This transgression is applicable because, in allowing his transfer to the United States, the Polish government risked the chance that the nation would subject Al Nashiri to the death penalty.<sup>118</sup> The applicant also alleged violations of Articles 2, 3, 5, and 10, arguing that the nation violated “his and the public’s right to truth” by failing to “acknowledge, disclose and promptly and effectively investigate details of his secret detention, ill-treatment and rendition.”<sup>119</sup> However, this appeal was rejected by the ECtHR, as it found the accusation “manifestly ill-founded.”<sup>120</sup> Furthermore, the appeal overlapped with other affirmed Article 3 violations, meaning the court believed the concern was properly addressed.<sup>121</sup> All other proposed article violations were upheld.<sup>122</sup>

In *Al Nashiri v. Romania*, the court held the same violations as *Al Nashiri v. Poland*, save the violation of Article 38, as the Romanian government complied with the proceedings and submitted requested documents before the court.<sup>123</sup> *Al Nashiri v. Lithuania* is currently pending before the court and was submitted in 2024.<sup>124</sup> In *Abu Zubaydah v. Lithuania*, the ECtHR held the same violations as it did concerning its

<sup>113</sup> *Poland*, App. No. 7511/13, *supra* note 88, at ¶557-61.

<sup>114</sup> *Al Nashiri v. Poland*, App. No. 28761/11, ¶91 (Jul. 24, 2014).

<sup>115</sup> *Id.* at ¶103.

<sup>116</sup> *Id.* at ¶504.

<sup>117</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S 221.

<sup>118</sup> *Poland*, App. No. 28761/11, *supra* note 114, at ¶578-9.

<sup>119</sup> *Id.* at ¶580-2.

<sup>120</sup> *Id.* at ¶581.

<sup>121</sup> *Id.* at ¶463.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Al Nashiri v. Lithuania*, App. No. 31908/22, (Mar. 4, 2024).

Polish counterpart, except for the violation of Article 6 § 1, which the applicant did not pursue.<sup>125</sup> Notably, the court also established that the evidence was significant enough to confirm both the existence of the CIA's detention center and the awareness of the Lithuanian government.<sup>126</sup> *Al-Hawsawi v. Lithuania* is the most recent case regarding CIA black sites in Europe, ruled on April 2024 by the ECtHR, holding the Lithuanian government accountable for the same ECHR violations as in *Abu Zubaydah v. Lithuania*.<sup>127</sup>

### C. Council of Europe Reaction

The rulings exemplify the Council of Europe's dedication to upholding the ECHR. This commitment sets the Council apart from the United States, even though the state parties are being held accountable for treaty violations that occurred after aiding the United States in its pursuits. The United States has not paid redress to the detainees whose extradition and detention it organized; instead, the burden falls on the nation's allies. The disapproval of the Council of Europe and the black site host nations regarding the United States' conduct during the War on Terror will be discussed below.

Dick Marty, the lead investigator for the Committee on Legal Affairs and Human Rights, has been vocal about the committee's discontent with the conduct of the United States. In the report investigating the extent to which Council of Europe nations aided the United States during the War on Terror, Marty wrote that the nation "has introduced new legal concepts, such as 'enemy combatant' and 'rendition,' which were previously unheard of in international law and stand contrary to the basic legal principles that prevail" in Europe.<sup>128</sup> Furthermore, he claimed that the network created by the United States to orchestrate its detention and interrogation program, a network that included multiple member states, lacked "democratic legitimacy" and "spawned a system... utterly incompatible with the fundamental principles of the Council of Europe."<sup>129</sup> Responding to Marty's investigation, the Parliamentary Assembly urged the United States to "issue official apologies and award compensation to the victims of illegal detentions against whom no formal accusations, nor any court proceedings, have

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<sup>125</sup> *Lithuania*, App. No. 46454/11, *supra* note 124.

<sup>126</sup> *Id.* at ¶572.

<sup>127</sup> *Al-Hawsawi v. Lithuania*, App. No. 6383/17 (Jan. 16, 2024).

<sup>128</sup> Council of Europe, *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees* involving Council of Europe Member States. doc. 10957, Jun. 12, 2006.

<sup>129</sup> *Id.*

ever been brought” as well as “align its definitions of torture and other cruel, inhuman or degrading treatment with the definition used by the U.N. Committee Against Torture.”<sup>130</sup> This statement emphasized the Council of Europe’s disdain for the circumvention of international legal obligations by the United States.

#### *D. Polish, Romanian, and Lithuanian Response*

As discussed in the Senate Committee investigation, the CIA had difficulty finding nations willing to host detention sites.<sup>131</sup> Poland, Romania, and Lithuania housed the CIA centers because they believed it would improve their relations with the United States.<sup>132</sup> The Polish president eventually acknowledged his awareness of the operations, but denied understanding the severity of the affairs.<sup>133</sup> However, the Lithuanian government continues to uphold an air of secrecy regarding its involvement.<sup>134</sup> The Romanian government has also denied the accusations, claiming the parliamentary inquiry issued in 2005 found no evidence of culpability.<sup>135</sup> Furthermore, a criminal investigation launched after a complaint by Al Nashiri in 2012 was still pending at the time of the ECtHR ruling.<sup>136</sup>

In 2010, Abu Zubaydah filed in Poland to pursue a domestic criminal case against Polish nationals complicit in his detention and interrogation. Polish prosecutors requested information from the United States for the case under 28 U.S.C. §1782, a resolution which allows district courts to order relevant parties to submit testimony for foreign tribunals with the nation’s consent.<sup>137</sup> However, the United States refused to aid Poland, claiming the requested documents could not be procured, as this would violate the state secrets privilege.<sup>138</sup> The Supreme Court reaffirmed this view, dismissing the case and claiming that although Poland had been found culpable in the ECtHR,

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<sup>130</sup> Council of Europe, *Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees* involving Council of Europe Member States. doc. 10957, Jun. 12, 2006.

<sup>131</sup> S. Rep. No. 113-288 (2014).

<sup>132</sup> *Abu Zubaydah v. Lithuania*, App. No. 46454/11, ¶258 (May 31, 2018).

<sup>133</sup> Andrew Higgins, *A C.I.A Black Site Remains a Touchy Subject for Lithuania*, N.Y. Times, Apr. 7, 2024, <https://www.nytimes.com/2024/04/07/world/europe/cia-black-site-lithuania.html>.

<sup>134</sup> *Id.*

<sup>135</sup> *Al Nashiri v. Romania*, App. No. 33234/12, ¶169 (May 31, 2018).

<sup>136</sup> *Id.* at ¶171-2.

<sup>137</sup> *United States v. Zubaydah*, 595 U.S. 195, 196 (2022).

<sup>138</sup> *Id.* (the state secrets privilege is a common law privilege, formally recognized in *United States v. Reynolds*, which allows for the denial of evidentiary requests on the premise that the documents are “state secrets” that would harm foreign/national interests if released).

confirmation from the government itself would have adverse foreign policy effects.<sup>139</sup> The CIA Director further stated that vital intelligence connections between governments depend on a system of “mutual trust that the classified existence and nature of the relationship will not be disclosed.”<sup>140</sup> Despite claiming to prioritize international alliances, by refusing to provide this information, the United States hindered Polish prosecutors and Zubaydah’s suit. Supreme Court Justice Elena Kagan agreed with the court’s decision, arguing that while the treatment was declassified, the locational aspect was not.<sup>141</sup> Gorsuch felt the government did not properly demonstrate that sharing the requested danger would reasonably harm the nation’s security.<sup>142</sup> In a dissenting opinion, he stated that “it seems that the government wants this suit dismissed because it hopes to impede the Polish criminal investigation and avoid (or at least delay) further embarrassment for past misdeeds.”<sup>143</sup> To Gorsuch, the United States inhibited these investigations while continuing to evade responsibility. The nation goes so far as to extend its reach into foreign courts, impeding Poland’s domestic legal procedures to avoid acknowledging its unlawful conduct.

*E. Foreign Policy Implications*

When allied states aided the United States by housing black sites, these nations violated international treaties as well as their respective domestic laws.<sup>144</sup> This is evidenced by Abu Zubaydah’s pursuit of the Polish prosecutions, which were inhibited by the United States’ refusal to procure documents.<sup>145</sup> Although little is known about the content of the investigations, the ECtHR cases reveal that Polish prosecutors launched an investigation covering:

alleged commission of offences under Article 231 § 1 of the Criminal Code and other, relating to alleged abuse of powers by public officials,

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<sup>139</sup> *Zubaydah*, 595 U.S., *supra* note 137, at 196.

<sup>140</sup> *Id.* at 207.

<sup>141</sup> *Id.* at 196.

<sup>142</sup> *Id.* at 262-3.

<sup>143</sup> *Id.* at 266.

<sup>144</sup> *Poland*, App. No. 7511/13, *supra* note 88, at ¶201-6 (In this case, the court mentioned Poland’s violation of other relevant international treaties of which it is a signatory, such as the International Covenant on Civil and Political Rights and International Law Commission and the 2001 Articles on Responsibility of States for Internationally Wrongful Acts).

<sup>145</sup> *Zubaydah*, 595 U.S., *supra* note 137, at 195.

acting to the detriment of the public interest, in connection with the alleged use of secret detention centres located in the territory of Poland by the Central Intelligence Agency to transport and illegally detain persons suspected of terrorism.<sup>146</sup>

This reveals how, in aiding the United States, Polish officials violated domestic law.

Conduct by the United States has strained relations with allies who criticize the country's lack of accountability. International alliances are imperative to the United States for a variety of reasons, such as intelligence collection and military operations. Given the transnational nature of the threat posed by terrorism, diplomatic alliances and intelligence agreements were also essential in fighting the War on Terror.<sup>147</sup> To illustrate, in his testimony to the Senate Foreign Relations Committee, Ambassador and former Director of the Counterterrorism Center Cofer Black shared that intelligence gathered by the European Union was essential in stopping numerous large-scale attacks after 9/11.<sup>148</sup> Collaboration increases domestic and international security, and hindering our allies' domestic proceedings and circumventing international legal obligations jeopardizes these connections.

Nations assisting the United States must contend with potential public backlash due to allegations of human rights abuses. For example, State Department Cables revealed that the Dutch army was interested in providing troops to help the nation fight in Afghanistan as early as 2003.<sup>149</sup> However, politicians were concerned about subsequent civilian outrage if leaders captured by the Dutch army ended up at CIA black sites,<sup>150</sup> delaying the Dutch Parliament's approval to send troops by three years.<sup>151</sup> Military lawyers from Australia, Canada, New Zealand, and the United Kingdom told Alberto Mora, former General Counsel to the United States' Navy, that their "military, intelligence, and law enforcement" collaboration with the nation would begin to decay if the torture of detainees continued.<sup>152</sup> Concerns about involvement in rights violations complicated the efficiency of the country's military operations in Ireland and

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<sup>146</sup> *Poland*, App. No. 7511/13, *supra* note 88, at ¶129.

<sup>147</sup> Derek S. Reveron, *Old Allies, New Friends: Intelligence-Sharing in the War on Terror*, 50 *ScienceDirect Journal* 453 (2006).

<sup>148</sup> *Id.* at 135.

<sup>149</sup> Douglas A. Johnson et al., *The Strategic Costs of Torture: How 'Enhanced Interrogation' Hurt America*, 95 *Foreign Affairs* 121 (2016), <http://www.jstor.org/stable/43946963>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

the United Kingdom, as both countries required the United States to request government permission before landing military aircraft on their soil.<sup>153</sup> These are just a few examples of how the United States' conduct during the War on Terror degraded relations with its allies.

### III. FINDING ACCOUNTABILITY AND OBTAINING REDRESS

#### *A. Comparing Redress Measures Between the ECtHR and United States Courts*

Due to the compulsory jurisdiction of the ECtHR, detainees who faced human rights violations can obtain redress, as the Council of Europe's member states are held accountable through the use of force. However, detention of detainees must have taken place within the borders of a member state to pursue a case through the ECtHR, meaning only War on Terror victims interrogated in European black sites can receive redress through this avenue. This leaves dozens of detainees without a clear method of obtaining redress. ECtHR cases also take years to make their way through the court, illustrated by *Al-Hawsawi v. Lithuania*, which was submitted to the court on December 19, 2016<sup>154</sup> and judged on April 16, 2024.<sup>155</sup> While ECtHR proceedings are protracted, cases moving through the United States' court system would take just as long, assuming they were not preempted.

In comparison to the substantial barriers that prevent victims from obtaining redress in United States courts, pursuing cases through the ECtHR appears to be a superior route. The court has a precedent of providing victims of rights violations with redress, and applicable international law is clearly defined. However, the ECtHR cannot control state behavior, only enact punishments. While the court attempts to dissuade member states from assisting the United States, it lacks preventative abilities. Rulings can only deter states from aiding the United States in its unlawful conduct by forcing nations to provide financial redress to the victims. Because redress amounts are generally low, nations dedicated to improving their relationship with the United States are unlikely to be deterred by a EUR 100,000 fine. Thus, while the cases provide financial redress to victims, they do little to combat the root of the problem. This is why it is imperative to create a structure that disincentivizes other actors, such as military contractors and the United States itself, from violating human rights.

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<sup>153</sup> Johnson et al., *supra* note 149.

<sup>154</sup> *Al-Hawsawi v. Lithuania*, App. No. 6383/17 (Jan. 16, 2024).

<sup>155</sup> *Id.*

While a supranational court that rules on human rights cases, such as the ECtHR, is ideal for preventing infringements from occurring in the first place, it is unlikely the United States would submit to the jurisdiction of another body. During his first presidency, the Trump administration expressed discontent with supranational organizations, which it perceived as impeding the United States' sovereignty,<sup>156</sup> a view shared by the Bush administration during the War on Terror.<sup>157</sup> Supranational courts are already perceived as a hindrance, and one that would directly question the United States' wartime behavior would be unthinkable. Therefore, pursuing domestic legislation would be a more viable route for the nation.

## *B. Solutions*

### *1. Amending the ATS for Domestic Corporation Liability*

Congress should pass an amendment to expand the ATS and allow the courts to hold domestic corporations accountable for infringements of international law, specifically regarding the human right of freedom from torture and cruel and degrading punishment, in line with both the Geneva Conventions and UNCAT. If the United States wants to dissuade detainees whose rights were breached from seeking redress in foreign courts, which strains its relations with allies and harms the nation's image, domestic legislation allowing suits against corporations may be a superior avenue. However, the United States government has continued to deny redress to the victims of rights violations, making legislation allowing lawsuits against the nation unfeasible. National accountability, especially during wartime, is viewed as an impediment to conducting war and a potential source of national security concerns. However, a broadening of the ATS to include the freedom from torture as a cause of action, while failing to fully resolve the issue of American accountability, would allow victims to seek financial compensation. This amendment would still be in line with the initial purpose of the ATS, as torture was recognized as a cause of action in *Filartiga*. Furthermore, it would help enshrine the conception of the ATS that adapts to the evolving international environment.

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<sup>156</sup> Donald Trump, President, Remarks to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018) (in this speech, Trump expressed his distaste for the International Criminal Court (ICC), claiming that the court “has no jurisdiction, no legitimacy, and no authority”); *See also* H.R. 23, 119th Cong. (2025) (a proposed bill to sanction those who aid ICC investigations against citizens or entities of the United States and its allies without the nation's consent).

<sup>157</sup> Galbraith, *supra* note 37.

Passing an amendment to the ATS would also serve as a symbolic step toward enforcing human rights violations, even if defendants are limited to domestic corporations, as these companies can still be complicit in rights infringements. This legislation would not overly obstruct the dealings of United States businesses, as they would operate under the *Kiobel* precedent, which asserts that extraterritorial matters must “touch and concern” the United States with “significant force” to qualify under the ATS.<sup>158</sup> Military contractors violating international human rights meet this standard of significant force. Such an amendment would prevent the nation from outsourcing labor with the belief that contractors would not be held accountable, disincentivizing the use of black sites. Moreover, enforcing infringements upon human rights regarding the freedom from torture is narrow, such that they would not greatly impede the ability of corporations to operate.

Allowing the suit of military contractors through the ATS would provide plaintiffs with a more direct route to take legal action, circumventing steps that require plaintiffs to prove the contractors can be sued and that torture should be considered a cause of action. However, as outlined at the beginning of this paper, plaintiffs would still first need to prove that torture occurred, a significant burden to overcome given the numerous roundabout explanations provided by the DOJ’s Office of Legal Counsel. Although many plaintiffs fail to demonstrate this, an amendment would open up an avenue for those with the most egregious rights violations to pursue redress. This prevents the courts from being overwhelmed, while still allowing many to obtain compensation for international law infractions.

## 2. *Limitations*

An amendment allowing the courts to hold domestic corporations liable for international law violations would place strain on the United States’ military, as fewer contractors would be inclined to work with the nation if they could be held financially liable under the ATS. Thus, by complicating the state’s ability to find willing contractors, opponents argue that the amendment impairs the United States’ ability to ensure national security. However, the proposed law would not inhibit military contractors who operate in accordance with international law.

Ideally, if contractors are discouraged from taking on projects that may break international law, the amendment would also influence the behavior of the United States. Thus, to ensure it can secure contractors, the nation would be incentivized to

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<sup>158</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-5 (2013).

employ companies in line with their legal obligations. However, rather than limiting the employment of contractors, the nation may increase secrecy surrounding potentially illegal conduct, evading Congressional oversight. The United States' government may also promise contractors to pay off charges if international law infringements force corporations to compensate victims. However, if the redress is similar to *Al Shimari*, the government would be required to pay \$14 million per person, a far greater sum than EUR 100,000 per person, as required in ECtHR cases.<sup>159</sup> If the amendment is successful in holding these contractors accountable, the fees could surpass what the United States is willing to provide.

A further limitation is that an amendment, in providing an avenue for redress, predominantly burdens the contractors, a strength if corporations are aware that the torture is occurring. However, if they are unsure whether their contracts aid in international law violations, companies may be unable to launch a proper investigation due to the classification surrounding the government's dealings. If the corporation is unsure, it would hopefully err on the side of caution and refuse to aid the nation. However, if the corporation lacked awareness that it was facilitating torture, it would likely not be found liable, as the court would need to find tangible culpability to overcome mere corporate presence. Additionally, contractors may follow the United States government, exploiting legal loopholes to circumvent their actions that constitute torture. However, it is unlikely that contractors have vast legal resources, hindering their ability to find loopholes. While this may prevent some victims from obtaining compensation, those who experienced the most egregious conduct will likely succeed in finding redress in the courts.

### 3. *Advantages*

If the amendment passes into law, both the United States and the contractors would share a vested interest in ensuring human rights are protected and international law is upheld. This amendment may have the added benefits of ensuring military contractors strictly adhere to the law in further pursuits. This is especially important given the Senate Select Committee on Intelligence's 2014 report on the efficiency of the CIA's detention and interrogation program, which found that many contractors did not receive training before conducting interrogations and profited from the continuation of the programs.<sup>160</sup> Ideally, contractors more concerned with profits than

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<sup>159</sup> *CACI Premier Tech.*, 300 F.Supp.3d, *supra* note 75.

<sup>160</sup> S. Rep. No. 113-288 (2014).

## ANALYZING ACCOUNTABILITY: EXAMINING THE DOMESTIC AND INTERNATIONAL REDRESS MEASURES FOR WAR ON TERROR DETAINEES

human morality will opt out of participating, allowing the United States to conduct military operations with contractors dedicated to upholding international law.

Morally and legally, as outlined in the Geneva Convention and the ECHR, the United States must protect the fundamental human rights and freedoms of all individuals. Concern for a nation's citizens and security does not justify encroachments on the human rights of others.<sup>161</sup> Circumvention of international law by the United States also risks conduct toward detainees being reciprocated through the mistreatment of United States troops abroad.<sup>162</sup> Enacting legislation allowing corporate liability for violations under the ATS would help remedy human rights abuses and dissuade contractors from inhibiting these rights. Not only would an amendment enhance corporate standards, but it would also ease the strain placed on the United States' relations with its allies. Lastly, the amendment would improve the country's international reputation by exemplifying its dedication toward upholding human rights. This is crucial, as the United States' conduct sets an example on the global stage that other nations may emulate.

### CONCLUSION

With *Al-Hawsawi v. Lithuania* becoming final in 2024 and the court still open to another case, these human rights violations continue to be relevant, despite having occurred two decades ago. All three plaintiffs in the ECtHR case, in addition to a dozen more, are still held within the Guantanamo Bay detention center.<sup>163</sup> Al Nashiri and Al-Hawsawi have been charged in the military commissions system under Executive Order 13567, which established a measure to periodically review the detention of individual prisoners,<sup>164</sup> although their cases are "mired in pretrial proceedings."<sup>165</sup> As for Abu Zubaydah, an interagency Periodic Review Board ruled that his "continued law of war detention" is necessary to ensure the nation's security,

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<sup>161</sup> Johnson et al., *supra* note 149.

<sup>162</sup> See Memorandum from William H. Taft, IV, Gen Counsel, U.S. Dep't of State to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (Feb. 2, 2002) (concerns raised to the central government).

<sup>163</sup> *The Guantánamo Docket*, N.Y. Times, Apr. 21, 2025,

<https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#held-table>.

<sup>164</sup> Exec. Order No. 13,567, 3 C.F.R § 227 (2012).

<sup>165</sup> Periodic Review Board, Unclassified Summary of Final Determination, regarding Zayn al-Ibidin Muhammed Husayn (Jun. 26, 2023).

making him an indefinite prisoner despite his case never being prosecuted.<sup>166</sup> United States allies emulate conduct around rights abuses and are forced to bear the consequences, creating foreign policy concerns regarding intelligence sharing and further willingness to collaborate. Additionally, as the ECtHR forces the Council of Europe member states complicit in the CIA black site abuses to pay redress to the victims, the United States prioritizes the rights of its citizens alone, while encroaching upon the sovereignty of its allies.

As the United States continues to deny liability for breaches of human rights by finding loopholes within treaties and international conventions, Congress must enact an amendment to the ATS allowing suits against military contractors. This would reinstate the jurisdiction of torture in line with its initial ruling in *Filartiga v. Pena-Irala*, reversing the cause of action limitations established by *Sosa*. Legislation alone is not sufficient; the United States must also implement preventative measures to stop rights violations from occurring in the first place, rather than only providing redress after they have transpired. By implicating military contractors, the proposed amendment can help disincentivize the nation from employing corporations for actions that violate international legal norms, specifically freedom from torture. Passing an amendment would allow the United States to reaffirm its reputation as a defender of rights, rather than leaving redress options to the sole jurisdiction of the ECtHR. The legislation would also have more wide-ranging impacts by revitalizing the ever-narrowing ATS and providing clear guidelines to remedy inconsistencies present in lower courts. Symbolizing the United States' dedication to upholding human rights, an amendment would boost the nation's international image and improve its relations with allies. While imperfect, the amendment would provide a clear avenue of suit under the ATS for victims of torture, aiding them in their pursuit of redress and charting a new path forward regarding the nation's dedication to human rights.

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<sup>166</sup> Periodic Review Board, *supra* note 165.