

# Compensation for Extraordinary Rendition: A Comparative Study and the Need for a Domestic Cause of Action in the United States

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	132
II.	MAHER ARAR: AN EXAMPLE OF EXTRAORDINARY RENDITION AND CURRENT CAUSES OF ACTION .....	135
	A. <i>Factual Background</i> .....	135
	B. <i>Arar’s Complaint Brought in U.S. Court: Analysis of the TVPA Claim</i> .....	137
	C. <i>Arar’s Complaint Brought in U.S. Court: Analysis of the Fifth Amendment Claim</i> .....	137
	D. <i>Arar’s Complaint Brought in U.S. Court: Analysis of the Bivens Claim</i> .....	140
III.	STATE SECRET PRIVILEGE AND CONFIDENTIAL INFORMATION: THE MAIN BARRIERS TO RELIEF IN U.S. COURTS .....	143
	A. <i>The Canadian Approach Taken for Maher Arar</i> .....	143
	B. <i>Approaches Taken in International Courts</i> .....	145
IV.	EXTRAORDINARY RENDITION CASES IN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UNITED KINGDOM .....	146
	A. <i>The United Kingdom: Sami Al-Saadi</i> .....	148
	B. <i>The European Court of Human Rights: Khaled El-Masri</i> .....	150
V.	RECOMMENDATION: THE UNITED STATES NEEDS TO LEGISLATIVELY CREATE A CAUSE OF ACTION FOR VICTIMS OF EXTRAORDINARY RENDITION .....	151

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## 2014 / Compensation for Extraordinary Rendition

### I. INTRODUCTION

The 2001 terrorist attacks and the subsequent “war on terror” have created a widespread culture of fear within the United States.<sup>1</sup> As a result, national security efforts have focused significantly on fighting terrorism and capturing terrorist suspects.<sup>2</sup> Since 2001, U.S. officials have exercised significantly broader discretion in domestic counter terrorism enforcement,<sup>3</sup> to which the judiciary has largely acquiesced.<sup>4</sup> This enforcement involves varying methods of questioning and removing terrorist suspects when such practices are considered necessary to national security.<sup>5</sup> The general fear of terrorism provides the foundation for a political and social landscape that accepts extreme interrogation techniques at the hands of U.S. officials, and the removal of suspects to countries that practice torture.<sup>6</sup> As a result of this landscape, along with various other legal factors, U.S. courts dismiss claims of torture and extraordinary rendition<sup>7</sup> brought by falsely accused terrorist suspects.<sup>8</sup>

While U.S. courts have a pattern of denying extraordinary rendition claims,<sup>9</sup> international courts and other countries have shown a willingness to assert jurisdiction and provide relief.<sup>10</sup> For example, the European Court of Human Rights and the United Kingdom have recently provided compensation to

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1. See WILLIAM SCHULZ, *TAINTED LEGACY: 9/11 AND THE RUIN OF HUMAN RIGHTS* 8 (2003). See generally Patryk Pawlak, *Ten Years After 9/11, Fears Trump Freedoms*, DW (Sept. 9, 2011), <http://www.dw.de/ten-years-after-9-11-fears-trump-freedoms/a-15377165-1>.

2. See BARBARA OLSHANSKY, *DEMOCRACY DETAINED: SECRET UNCONSTITUTIONAL PRACTICES IN THE U.S. WAR ON TERROR I* (2007).

3. *Id.* See *Arar v. Ashcroft*, 585 F.3d 559, 566 (2d Cir. 2009) (where U.S. officials participated in transferring a terrorist suspect to Syria, where he was tortured for information); see also *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007) (where the CIA held and tortured a terrorist suspect in a secret prison).

4. See *Arar*, 585 F.3d at 582 (dismissing Arar’s claims against U.S. officials); see also *El-Masri*, 479 F.3d at 348 (dismissing El-Masri’s claims against U.S. officials based on confidentiality and state secret privilege).

5. See OLSHANSKY, *supra* note 2, at 1; see *Arar*, 585 F.3d at 565 (where U.S. officials participated in transferring a terrorist suspect to Syria, where he was tortured for information); see also *El-Masri*, 479 F.3d at 300 (where the CIA held and tortured a terrorist suspect in a secret prison).

6. See OLSHANSKY, *supra* note 2, at 2. See generally Pawlak, *supra* note 1.

7. Rendition refers to the transfer of a fugitive from one state to another or from one country to another. BLACK’S LAW DICTIONARY 1410 (9th ed. 2009). Extraordinary rendition (or irregular renditions) is a “transfer, without formal charges, trial, or court approval, of a person suspected of being a terrorist or supporter of a terrorist group to a foreign nation for imprisonment and interrogation on behalf of the transferring nation.” *Id.*

8. See *Arar*, 585 F.3d at 582 (dismissing Arar’s claims against U.S. officials); see also *El-Masri*, 479 F.3d at 348 (dismissing El-Masri’s claims against U.S. officials based on confidentiality and state secret privilege).

9. See *El-Masri*, 479 F.3d at 348 (dismissing El-Masri’s claims against U.S. officials based on confidentiality and state secret privilege). See generally *Arar*, 585 F.3d 559 (dismissing Arar’s claims against U.S. officials).

10. See *El-Masri v. The Former Yugoslav Republic of Macedonia*, 66 Eur. Ct. H.R. at 87 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>; see also Dominic Casciani, *UK Pays £2.2m to Settle Libyan Rendition Claim*, BBC NEWS UK (Dec. 13, 2012), <http://www.bbc.co.uk/news/uk-20715507>.

*Global Business & Development Law Journal / Vol. 27*

individuals alleging extraordinary rendition and the resulting torture.<sup>11</sup> Whether the United States' reluctance to hear extraordinary rendition cases stems from legal doctrines or fear of international repercussions, the United States is facing widespread criticism for failing to hear valid claims domestically.<sup>12</sup> Therefore, the United States should take legislative steps to create a cause of action that compensates victims of extraordinary rendition and torture where U.S. officers are involved.<sup>13</sup> Failure to take these legislative steps will allow U.S. officers to continue violating international and domestic law without accountability.<sup>14</sup> Furthermore, commentators believe that when the United States is responsible for injuries, it should compensate the victims of extraordinary rendition.<sup>15</sup>

This Comment will look at the inadequacies of domestic causes of action through the example of Maher Arar's case in U.S. courts, and use this illustration to show why such claims have not been successful domestically.<sup>16</sup> It will also compare similar cases that have been decided recently in the European Court of Human Rights and the United Kingdom.<sup>17</sup> The contrast of domestic and international cases will show not only that the U.S. causes of action are unlikely to provide relief to victims in their current state,<sup>18</sup> but also that the United States needs to be held legally accountable for its involvement.<sup>19</sup> Part II, will look at the case of Maher Arar,<sup>20</sup> since it helps to express the need for compensation in extraordinary rendition cases.<sup>21</sup> A close examination of this case identifies the causes of action that are currently available under U.S. law.<sup>22</sup> This section will also analyze the district court's reasoning for dismissing his case and explain why any future cases would likely have the same result.<sup>23</sup>

Part III will analyze the issues of confidentiality and state secret privilege,<sup>24</sup> which are currently two of the largest barriers for a U.S. court to hear

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11. *El-Masri*, 66 Eur. Ct. H.R. at 88; Casciani, *supra* note 10.

12. James Goldston, *U.S. Cannot Close Door on Legacy of Torture So Easily*, OPEN SOCIETY JUSTICE INITIATIVE (Aug. 1, 2011), <http://www.opensocietyfoundations.org/voices/us-cannot-close-door-legacy-torture-so-easily>.

13. *See infra* Part V.

14. *See* OLSHANSKY, *supra* note 2, at 216.

15. Goldston, *supra* note 12.

16. *See infra* Part II.

17. *See infra* Part IV.

18. *See infra* Parts II, IV.

19. Goldston, *supra* note 12.

20. *See generally* Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).

21. *See infra* Part II.

22. *See Infra* Part II.

23. *See Infra* Part II.

24. State secret privilege is an evidentiary rule, which excludes any evidence that would expose information that may endanger national security. OLSHANSKY, *supra* note 2, at 207. The court will do an in-camera assessment of the evidence and use affidavits of government officials to determine whether there is a state secret issue. *Id.*

### 2014 / Compensation for Extraordinary Rendition

extraordinary rendition cases on the merits.<sup>25</sup> To propose possibilities for overcoming these issues, this section will look at how state secret privilege and confidentiality are dealt with in other countries and in international courts.<sup>26</sup>

Part IV will discuss the recently decided cases in the European Court of Human Rights and the United Kingdom.<sup>27</sup> These international cases have similar factual backgrounds to *Arar*<sup>28</sup> and other cases previously brought in U.S. courts,<sup>29</sup> but have provided compensation for victims.<sup>30</sup> The comparison of cases in international courts and foreign countries with U.S. cases makes the reluctance of the United States to provide compensation for internationally accepted human rights violations even more controversial.<sup>31</sup>

Lastly, Part V will explain the changes that are needed in the United States to provide compensation for victims of extraordinary rendition when U.S. officials are directly involved.<sup>32</sup> This section will explain why creating a remedy through the judiciary, such as expanding the current *Bivens*<sup>33</sup> claim, is unlikely. Instead, a new cause of action will likely need to be created legislatively.<sup>34</sup> A new statute would avoid the separation of powers concerns that the U.S. judiciary currently holds with regards to expanding the *Bivens* action to new contexts.<sup>35</sup> However, in order for new legislation to occur, there will need to be a change in public perception.<sup>36</sup> U.S. culture generally needs to move away from blind fear of terrorism and focus on the rights of individuals who have been harmed.<sup>37</sup>

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25. See *infra* Part III.

26. *Infra* Part III.

27. See generally *El-Masri*, 66 Eur. Ct. H.R. (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>; see generally Casciani, *supra* note 10.

28. See *Arar v. Ashcroft*, 585 F.3d 559, 560 (2d Cir. 2009).

29. See *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007) (where the CIA held and tortured a terrorist suspect in a secret prison. The U.S. court dismissed the case due to state secret privilege).

30. *El-Masri*, 66 Eur. Ct. H.R. at 79; Casciani, *supra* note 10.

31. Goldston, *supra* note 12.

32. *Infra* Part V.

33. A *Bivens* claim is a judicially created action that allows an individual to bring a cause of action against federal officers for constitutional violations. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971).

34. *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009) (stating that it would abstain from expanding the *Bivens* claim judicially, arguing that the legislature is better suited to creating a new cause of action).

35. *Id.*

36. See Pawlak, *supra* note 1.

37. See OLSHANSKY, *supra* note 2, at 2. See generally Pawlak, *supra* note 1.

*Global Business & Development Law Journal / Vol. 27*

## II. MAHER ARAR: AN EXAMPLE OF EXTRAORDINARY RENDITION AND CURRENT CAUSES OF ACTION

A. *Factual Background*

The story of Maher Arar is typical of many extraordinary rendition cases, both in its facts and in its dismissal by a U.S. court.<sup>38</sup> Maher Arar is a dual Canadian-Syrian citizen who lived in Canada since he was 17 years old.<sup>39</sup> While returning home from a trip to Tunisia in September 2002, Arar was detained at John F. Kennedy (“JFK”) Airport by U.S. airport security and asked questions regarding affiliation with known terrorists.<sup>40</sup> Although Arar admitted to a connection with one individual known to have terrorist associations during questioning, he denied any personal affiliation with a terrorist group.<sup>41</sup>

After spending a night in the airport, where Arar was denied any contact with an attorney or family members in Canada, Arar was given the opportunity to voluntarily return to Syria.<sup>42</sup> Despite his adamant objections and insistence that he would be tortured if he returned to Syria, Arar was told that there was no risk of torture.<sup>43</sup> That same day he was transferred to the Metropolitan Detention Center in New York for a period of twelve days.<sup>44</sup> On October 1<sup>st</sup>, removal proceedings were begun by the Immigration and Naturalization Service (“INS”) stating that Arar was excludable from the United States based on his membership in a terrorist organization.<sup>45</sup> At this point he was able to communicate with family members in Canada who in turn contacted the Canadian embassy and retained a lawyer for Arar.<sup>46</sup> Despite having representation and a visit from a consular official, Arar’s attorney was denied basic information as to Arar’s whereabouts and was therefore unable to properly represent him.<sup>47</sup>

Before being removed from the United States, Arar signed a written statement declaring that his desired country of removal was Canada and not Syria.<sup>48</sup> This desire was based on Arar’s knowledge that Syrian officials have a history of torturing prisoners.<sup>49</sup> Notwithstanding his written statement, U.S. officials stated that removing Arar to Syria was not inconsistent with domestic

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38. OLSHANSKY, *supra* note 2, at 199.

39. *Arar*, 585 F.3d at 565.

40. *Id.*

41. *Id.*

42. *Id.*

43. OLSHANSKY, *supra* note 2, at 203.

44. *Arar*, 585 F.3d at 565.

45. *Id.*

46. OLSHANSKY, *supra* note 2, at 201.

47. *Id.* at 202-03.

48. *Arar*, 585 F.3d at 566.

49. OLSHANSKY, *supra* note 2, at 202.

### *2014 / Compensation for Extraordinary Rendition*

obligations under Article 3 of the Convention Against Torture<sup>50</sup> since there was no evidence that Arar would be tortured upon removal.<sup>51</sup> Later that day, Arar was flown to Amman, Jordan where he was brutally beaten<sup>52</sup> before being transferred to Syrian officials.<sup>53</sup> Syrian officials detained Arar at a Syrian Military Intelligence Facility where he was interrogated using torture methods for twelve days.<sup>54</sup> After an inquiry by Canadian officials as to Arar's whereabouts, the interrogations ceased but Arar was not released for almost a year.<sup>55</sup>

During his confinement, Canadian officials were aware of Arar's whereabouts and location.<sup>56</sup> However, it was not until almost a full year later that Arar informed the Canadian officials that he was being held in a windowless cell six feet by three feet, and seven feet high.<sup>57</sup> Arar also informed officials that he had been tortured, and five days later, he signed a confession that he was trained in Afghanistan as a terrorist.<sup>58</sup> Even after being moved from the small cell where he had spent the past ten months, Arar was not returned to Canada until October 5, 2003; more than a year since his original detention at JFK Airport.<sup>59</sup>

Arar alleged that U.S. officials created the questions asked by Syrian officials<sup>60</sup> and that his responses were being used for U.S. intelligence purposes.<sup>61</sup> Despite this allegation, and Arar's belief that U.S. officials used his confession, no claims were ever brought against Arar alleging he was a member of a terrorist organization.<sup>62</sup> After his return to Canada, Arar brought four claims against U.S. officers and all were dismissed for varying reasons.<sup>63</sup>

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50. "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

51. OLSHANSKY, *supra* note 2, at 202.

52. *Id.* at 203.

53. *Id.*

54. *Arar v. Ashcroft*, 585 F.3d 559, 566 (2d Cir. 2009).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. Arar states that the questions he was asked by Syrian officials were the same questions asked by U.S. interrogators, leading him to believe that the questions were provided by the U.S. government. OLSHANSKY, *supra* note 2, at 204.

61. *Id.*

62. *Id.* at 205.

63. *See Arar*, 585 F.3d. at 582.

*Global Business & Development Law Journal / Vol. 27**B. Arar's Complaint Brought in U.S. Court: Analysis of the TVPA Claim*

In January 2004, Arar filed a four-count complaint in the Eastern District of New York seeking damages from federal officials.<sup>64</sup> The claims addressed both his detention in the United States and his detention and interrogation in Syria.<sup>65</sup> The first count brought by Arar was under the Torture Victim Protection Act ("TVPA").<sup>66</sup> As a statutory cause of action, a TVPA claim can be brought against an "individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture."<sup>67</sup> The assessment whether an individual is acting under color of foreign law is a fact specific judgment, where the authority of the foreign law needs to be proven.<sup>68</sup> Therefore, in order for Arar to bring a claim under the TVPA, Arar would have to prove that the defendants were acting under Syrian authority.<sup>69</sup>

Instead of claiming color of foreign law, Arar claimed that U.S. federal officers were conspiring with Syrian officials to encourage the torture and detention.<sup>70</sup> Therefore, the claim was dismissed as being insufficiently pleaded since solicitation or conspiracy is inadequate under a TVPA claim.<sup>71</sup> The only way Arar could have potentially succeeded with a TVPA claim would be to show that the U.S. officials were given orders from Syrian officials to turn Arar over.<sup>72</sup> Not only would this be very difficult to prove without access to confidential information, but Arar was in fact making the opposite allegation;<sup>73</sup> Arar claimed that the Syrians detained, questioned, and tortured him in order to transfer information back to the Americans.<sup>74</sup>

*C. Arar's Complaint Brought in U.S. Court: Analysis of the Fifth Amendment Claim*

Counts two and three of Arar's claim were for violations of the Fifth Amendment for Arar's detention and torture in Syria.<sup>75</sup> The final count was for violation of the Fifth Amendment for Arar's detention in the United States before

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64. *Id.* at 567.

65. *See id.* at 567.

66. Torture Victim Protection Act of 1991 § 3(b)(1), 28 U.S.C. § 1350 (2006). *See also Arar*, 585 F.3d at 567.

67. Torture Victim Protection Act of 1991 § 3(b)(1).

68. *Arar*, 585 F.3d at 568.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.*

74. *See Arar*, 585 F.3d at 568.

75. *Id.* at 567.

*2014 / Compensation for Extraordinary Rendition*

he was removed to Syria.<sup>76</sup> The claimant has an extremely high burden to prove these Fifth Amendment claims.<sup>77</sup> In satisfying these burdens, inferences that an official is involved in a conspiracy will be insufficient unless they can point to specific facts leading to the allegation.<sup>78</sup> For a claimant in a civilian position, the specific facts needed to allege a conspiracy are generally confidential information.<sup>79</sup> The plaintiff “must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end.”<sup>80</sup> Therefore, a Fifth Amendment claim is unlikely to ever be successful in the context of extraordinary rendition, since the claimant needs to prove far more than speculative facts in order to have the case heard on its merits.<sup>81</sup>

Absent from Arar’s case were any specific facts tending to prove the United States had any agreement with Syria to extract information from Arar through torture.<sup>82</sup> This put him at a distinct disadvantage in pleading with specificity since he was dealing with airport personnel, guards, and interrogators.<sup>83</sup> Therefore, the information Arar was given throughout being held would be intentionally vague and it would be difficult to access further facts in order to specify his complaint.<sup>84</sup>

Although the Fifth Amendment counts were dismissed for failure to state a claim, the original argument raised by the defense was that the court lacked subject-matter jurisdiction to hear the claims.<sup>85</sup> The Second Circuit declined to decide this issue since it dismissed the claims for other reasons.<sup>86</sup> However, a brief assessment of this argument is worth examining for clarity.<sup>87</sup>

Since Arar is not a citizen of the United States,<sup>88</sup> the decision to exclude or deport him is largely within the discretion of the Attorney General (“AG”).<sup>89</sup>

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76. *Id.* at 568.

77. *See id.* at 569.

78. *Id.* *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

79. *See e.g. Arar*, 585 F.3d at 576.

80. *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation marks omitted) (addressing conspiracy claims under 42 U.S.C. § 1985).

81. *See e.g. Arar*, 585 F.3d at 569.

82. *Id.* (internal quotation marks omitted) (explaining why the claim was insufficiently pleaded by Arar: “[h]e alleges (in passive voice) that his requests to make phone calls were ignored, and that he was told that was not entitled to a lawyer, but he fails to link these denials to any defendant, named or unnamed”).

83. *See generally id.*

84. *See generally id.*

85. *Id.* at 570.

86. *See id.* at 563.

87. *Arar*, 585 F.3d at 570. The court goes through a brief analysis of the application of U.S. immigration law to Arar’s claims. *Id.*

88. OLSHANSKY, *supra* note 2, at 199.

89. *Arar*, 585 F.3d at 570 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)) (“any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so

*Global Business & Development Law Journal / Vol. 27*

Once a person is admitted with inspection into the United States, they are afforded greater substantive and procedural due process rights than a person who was not lawfully admitted.<sup>90</sup> When a person is not lawfully admitted into the country, or enters without inspection, they are considered to be “stopped at the border” for immigration purposes.<sup>91</sup> Thus, they are considered “excludable” as opposed to “deportable,”<sup>92</sup> which grants them fewer rights under the Constitution.<sup>93</sup> Even though Arar was transferred to a facility in Brooklyn and there is no doubt that he was physically present in the United States in literal terms, he was not considered present within the United States under legal principles.<sup>94</sup> In order to be present in the United States for purposes of immigration, he would need to make it through the border inspection process, which Arar never did.<sup>95</sup>

Therefore, the defendants made the argument that because areas of immigration were within the discretion of the AG, the court should not have subject-matter jurisdiction over a claim where a person was never admitted into the United States.<sup>96</sup> Although the due process review of inadmissible aliens is limited,<sup>97</sup> the court should still be able to hear extraordinary rendition cases since they bring up an exception to the AG’s discretion.<sup>98</sup> The discretion of the AG can be reviewed by courts when their actions are in violation of U.S. and international law, such as is the case when a person is removed to a country where their life or freedom may be threatened.<sup>99</sup> This is known as the principle of non-refoulement and it is a limitation on discretion.<sup>100</sup> Although also a part of

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exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”).

90. See, e.g., *Harisiades*, 342 U.S. at 594. See generally Erin Craddock, *Tortuous Consequences and the Case of Maher Arar: Can Canadian Solutions “Cure” the Due Process Deficiencies in the US Removal Proceedings?*, 93 CORNELL L. REV. 621 (2008) (explaining the differences between when a person is deportable and when they are excludable).

91. Craddock, *supra* note 90, at 623 (explaining the level of due process a person is given, dependent on whether a person has been admitted to the United States).

92. *Id.* at 623-25. In order to be considered deportable, a person has to be originally admitted into the United States. If they are being deported, this benefit of admission is being revoked either because they are no longer eligible, such as an expired visa, or they have taken actions that the United States determines are grounds for deportation. *Id.*

93. *Id.* at 625 (explaining how the court has only specified the minimum level of due process given to inadmissible aliens, but not specified the outer limit).

94. See *id.* at 623.

95. See *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009).

96. *Id.* at 570.

97. Craddock, *supra* note 90, at 625 (explaining how the court has only specified the minimum level of due process given to inadmissible aliens, but not specified the outer limit).

98. *Id.* at 627 (explaining that the AG may not remove an alien to a country where the alien’s life or freedom would be threatened).

99. *Id.*

100. *Id.*

### *2014 / Compensation for Extraordinary Rendition*

customary international law,<sup>101</sup> Congress enshrined non-refoulement into U.S. law when the Foreign Affairs Reform and Restructuring Act passed in 1998.<sup>102</sup> Therefore, although extraordinary rendition involved removal proceedings generally granted to the discretion of the AG, the violation of non-refoulement should allow the court to have subject-matter jurisdiction.<sup>103</sup>

#### *D. Arar's Complaint Brought in U.S. Court: Analysis of the Bivens Claim*

The most likely judicially created claim for relief in extraordinary rendition cases is a *Bivens* claim,<sup>104</sup> a claim that was also unsuccessfully alleged by Arar.<sup>105</sup> The court in the *Bivens* case recognized an individual cause of action against federal officers for constitutional violations.<sup>106</sup> This was the first time claimants had a judicially created right to bring federal claims directly under the Constitution.<sup>107</sup> However, even this claim is limited almost exclusively to its original context.<sup>108</sup> The two extensions were for misconduct by prison officials<sup>109</sup> and employment discrimination.<sup>110</sup> Neither of these situations is similar enough to the situation of extraordinary rendition to create a direct cause of action in this context.<sup>111</sup>

In *Arar*, the court assessed the claim in light of the contexts that had already successfully utilized the *Bivens* claim.<sup>112</sup> To decide whether Arar's case was extending *Bivens* to a new context, the court "construe[d] the word context as it is commonly used in law; to reflect a potentially recurring scenario that has similar legal and factual components."<sup>113</sup> To extend *Bivens* to a new context, the court makes a two-part determination, it decides: (1) if there is an alternative remedy for the plaintiff, and (2) if "special factors counsel hesitation."<sup>114</sup> Based

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101. Customary international law is law that has become so widely accepted in the international community that it is considered binding on all countries, regardless of whether any treaty or agreement has been signed. *Customary International Law Definition*, THE FREE DICTIONARY.COM, <http://encyclopedia.thefreedictionary.com/customary+international+law> (last visited Aug. 24, 2013).

102. 8 U.S.C. § 1231 (2006). Craddock, *supra* note 90, at 627.

103. *See* Craddock, *supra* note 90, at 627; *see* 8 U.S.C. § 1231.

104. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390 (1971) (where the plaintiff was subjected to an unlawful warrantless search by federal officers and the court created a cause of action for a claimant to directly sue the officers involved).

105. *Arar v. Ashcroft*, 585 F.3d 559, 563-64 (2d Cir. 2009).

106. *See Bivens*, 403 U.S. at 390.

107. *Arar*, 585 F.3d at 571. *See Bivens*, 403 U.S. at 390.

108. *Arar*, 585 F.3d at 571. The claim has been in existence since 1971 and has only twice been extended past its original context.

109. *See Carlson v. Green*, 446 U.S. 14, 14 (1980).

110. *See Davis v. Passman*, 442 U.S. 228, 229 (1979).

111. *See Carlson*, 446 U.S. at 24-26; *see also Davis*, 442 U.S. at 248-55.

112. *Arar*, 585 F.3d at 571.

113. *Id.* at 572.

114. *Id.*

*Global Business & Development Law Journal / Vol. 27*

on this assessment, and the fact that international law generally considers extraordinary rendition to be a distinct act, the court held that *Arar* would be extending *Bivens* to a new context.<sup>115</sup>

Once the new context of a claim has been established, the first prong looks at alternative remedial schemes, such as an Immigration and Nationality Act (“INA”) review or TVPA action.<sup>116</sup> In *Arar*, the court sidestepped a complete analysis of this issue by stating that extraordinary rendition would fail under the second prong of new context analysis in *Bivens*.<sup>117</sup> Despite this determination, the court did a cursory assessment of whether a remedy existed in the context of immigration, or a statutorily created right.<sup>118</sup> The assessment comes up with no concrete remedies because *Arar*’s previous actions were dismissed and INA review is limited when the person being removed is considered a threat to national security.<sup>119</sup> The only remedy mentioned is that *Arar* received ten million dollars in compensation from the Canadian government for their part in *Arar*’s rendition.<sup>120</sup> However, the court does not cite this compensation as the reason for dismissing the first prong.<sup>121</sup> Thus, it is unlikely that a more thorough analysis of the first prong would be able to produce a sufficient domestic remedial scheme.<sup>122</sup>

The second prong of the test is whether “special factors counsel hesitation” in expanding a *Bivens* remedy to a new context.<sup>123</sup> This prong has traditionally proven the most difficult to overcome because there have been many special factors considered and applied by the court.<sup>124</sup> Special factors that have defeated other cases are: separation of powers, military concerns, foreign policy considerations, and national security concerns.<sup>125</sup> Clearly, these can be read as expansive and grant courts with broad discretion to decline to extend a *Bivens* claim.<sup>126</sup> In the context of extraordinary rendition, many of these factors could be used to defeat the claim because terrorism involves national security interests as well as military and international relations issues.<sup>127</sup>

Based on the court’s broad discretion,<sup>128</sup> it is unlikely that any court would allow an extraordinary rendition case to withstand the second prong of *Bivens*. Thus, the only possibility of a successful *Bivens* claims rests in judicially

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115. *Id.* at 573.

116. *Id.* at 572.

117. *Id.* at 574.

118. *Arar*, 585 F.3d at 573.

119. *Id.* at 571.

120. *Id.* at 580.

121. *Id.*

122. *See id.*

123. *Id.* at 572.

124. *Arar*, 585 F.3d at 573.

125. *Id.*

126. *See id.*

127. *Id.*

128. *See id.*

*2014 / Compensation for Extraordinary Rendition*

removing the second prong and focusing the inquiry on whether the complainant has an alternative remedial scheme.<sup>129</sup> Because the court's analysis of alternative remedies in *Arar* was not fully addressed,<sup>130</sup> and other avenues of redress are equally difficult to achieve, an analysis of the first prong alone should allow a *Bivens* claim to be expanded to a new context.

In justifying the dismissal of Arar's *Bivens* claim, the court went on to discuss the underlying hesitation for allowing judicial review of extraordinary rendition cases.<sup>131</sup> The court explained that by their very nature, cases such as Arar's involve national security and foreign relations concerns best addressed by the executive branch.<sup>132</sup> Because extraordinary rendition involves cases where there is a potential threat to national security, and relations with a foreign government, the judiciary is hesitant to involve itself.<sup>133</sup> Although the court admitted that in certain specific circumstances they would review decisions involving national security and state secrets, these are very limited.<sup>134</sup> In general, the court expressed concern that extending *Bivens* actions to extraordinary rendition would allow for judicial review in an area traditionally left to the executive.<sup>135</sup>

With respect to the separation of powers, the court admitted a judicial avenue for redress would exist if Congress was to create a statutory remedy.<sup>136</sup> Absent this authority, however, extraordinary rendition extends too far into those foreign affairs issues traditionally assessed by the executive.<sup>137</sup> The justification for the judiciary to abstain from national security concerns is that they have limited knowledge of the security threats generally facing the nation.<sup>138</sup> Therefore, the executive branch is better suited to address international relations because they have access to all information on issues of national security and can speak with one voice.<sup>139</sup> Furthermore, if there were judicial review of all executive decisions, it could undermine the ability of the executive branch to act in situations of necessity and take a firm stance on issues of national importance.<sup>140</sup>

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129. *See id.*

130. *Arar*, 585 F.3d at 574.

131. *Id.* at 575.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See Arar*, 585 F.3d at 576.

137. *Id.* at 575. *See generally* United States v. Curtiss-Wright Exp. Co., 299 U.S. 304, 320-22 (1936) (noting the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations").

138. *See Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

139. *See id.*

140. *See id.* at 796-97.

*Global Business & Development Law Journal / Vol. 27*

This does not mean, however, that the judicial branch has no jurisdiction to assess executive actions in foreign affairs.<sup>141</sup> In *Arar*, the court stated that the courts may reexamine judgments if “there is an unflagging duty to exercise our jurisdiction.”<sup>142</sup> However, the court does not specify a set of facts where this would be the case.<sup>143</sup> Otherwise, “the danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.”<sup>144</sup> In making this statement, the court strongly asserted that extending relief to plaintiffs such as *Arar* is unlikely to occur under a judicially created cause of action.<sup>145</sup> The opinion does, however, leave open the possibility of a congressionally created remedy, albeit it appears narrow.<sup>146</sup>

III. STATE SECRET PRIVILEGE AND CONFIDENTIAL INFORMATION: THE MAIN BARRIERS TO RELIEF IN U.S. COURTS

Although the court in *Arar* declined to discuss issues of state secret privilege since they ruled on other grounds, this is a major barrier to extraordinary rendition claims.<sup>147</sup> The concern of the court, and the U.S. government, is that hearing certain cases in open court will expose state secrets and confidential information.<sup>148</sup> Because these cases generally involve the removal of terrorist suspects from U.S. soil, domestic claims would likely have to involve the exposure of some classified information.<sup>149</sup>

A. *The Canadian Approach Taken for Maher Arar*

One alternative would be to provide compensation without a formal legal process—a remedy that would dissolve the need for an evidentiary presentation. The court in *Arar* discusses that this is what Canada did when they gave *Arar* a \$10.5 million settlement.<sup>150</sup> However, the *Arar* court also mentions the need for Canada to keep its own materials confidential.<sup>151</sup> The Canadian process did involve a formal investigation into the nature of the terrorist allegations lasting

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141. *Arar*, 585 F.3d at 575.

142. *Id.* at 576.

143. *See id.*

144. *Id.* (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985)).

145. *Id.*

146. *Id.*

147. *Arar*, 585 F.3d at 576.

148. *Id.*

149. *Id.*

150. *Id.* at 590 (quoting Office of the Prime Minister, Press Release, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), available at <http://pm.gc.ca/eng/media.asp?id=1509>).

151. *Id.* at 576.

### 2014 / Compensation for Extraordinary Rendition

longer than two years.<sup>152</sup> It was not done, however, through a lawsuit resulting in a formal trial.<sup>153</sup> Instead, Canada established the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* in order to investigate the claim.<sup>154</sup> At the end of the commission's investigation, Arar was given a settlement as well as a formal apology from the RCMP Commissioner stating:

Mr. Arar, I wish to take this opportunity to express publicly to you and to your wife and to your children how truly sorry I am for whatever part the actions of the RCMP may have contributed to the terrible injustices that you experienced and the pain that you and your family endured.<sup>155</sup>

Because Canada was the source of intelligence on Arar's alleged terrorist ties, a lawsuit would have likely exposed the source of the Canadian information.<sup>156</sup> In giving compensation after a formal inquiry, Canada essentially admitted fault without having an evidentiary hearing,<sup>157</sup> which it likely determined would be too costly from a national security perspective. As a result, it is possible that Canada provided the compensation without judicial process as a means to avoid exposure of state secrets.<sup>158</sup>

Although Canada compensated Arar, it appears unlikely that the United States would do so for several reasons. First, because the United States has far more cases dealing with extraordinary rendition and other terrorist related claims,<sup>159</sup> providing compensation for every claim against the United States could result in too many settlements for the U.S. government. If the U.S. government established a commission similar to the one created by Canada however,<sup>160</sup> a formal investigation could be done privately, without the risk of exposing confidential information.

This issue raises a debate over striking the proper balance between national security and compensation for victims of torture.<sup>161</sup> Even though protecting state secrets is a valid reason for courts to deny jurisdiction over claims for extraordinary rendition,<sup>162</sup> it does not necessarily follow that extraordinary

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152. J. Hashmi, *Outsourcing Torture: U.S. Court Blocks Maher Arar's Lawsuit*, MUSLIM MATTERS (Nov. 3, 2009), <http://muslimmatters.org/2009/11/03/outsourcing-torture/>.

153. *See id.*

154. *Id.*

155. *Id.*

156. *See Ottawa Trying to Hold Back Documents from Arar Inquiry*, CBC NEWS (Apr. 29, 2004, 6:34 PM), <http://www.cbc.ca/news/canada/story/2004/04/29/arar040429.html> [hereinafter *Ottawa*].

157. *See Hashmi, supra* note 152.

158. *See Ottawa, supra* note 156.

159. Jonathan Horowitz & Stacy Cammarano, *20 Extraordinary Facts About CIA Extraordinary Rendition and Secret Detention*, OPEN SOC'Y FOUND. (Feb. 5, 2013), <http://www.opensocietyfoundations.org/voices/20-extraordinary-facts-about-cia-extraordinary-rendition-and-secret-detention>.

160. *See Hashmi, supra* note 152.

161. *See generally* Horowitz & Cammarano, *supra* note 159.

162. *Arar v. Ashcroft*, 585 F.3d 559, 576 (2d Cir. 2009).

*Global Business & Development Law Journal / Vol. 27*

rendition victims should be denied compensation in all future cases. The court in *Arar* stated that because the United States has a long history of public trials, creating an exception requires special circumstances.<sup>163</sup> Despite this statement, the court also recognized that even when the right to an open trial presumptively attaches, this presumption could be overcome.<sup>164</sup> It is likely that information in *Arar*'s case could have exposed some state secrets if they were made publically available during trial.<sup>165</sup> One solution to this issue would be for portions of court proceedings to be closed to the public, as has been done before in both domestic<sup>166</sup> and international courts.<sup>167</sup>

*B. Approaches Taken in International Courts*

International courts also hear cases involving information that needs to be kept from the public, since these cases deal with government actions, state secrets, and other confidential information.<sup>168</sup> Despite the nature of the material, international courts continue to decide these cases in an effective, compensatory manner.<sup>169</sup>

One of the major issues that often makes public trials difficult, but is dealt with by international criminal tribunals, is sensitive witness testimony.<sup>170</sup> Although these tribunals recognize that a public trial is an important part of a fair trial, they also recognize that there are exceptions to this right.<sup>171</sup> Specifically, the European Court of Human Rights ("ECHR") allows for closed or private sessions for reasons of morality, security, safety, public order, and non-disclosure of the identity of the protected witness or interests of justice.<sup>172</sup> Similarly, the rules of the International Criminal Court ("ICC") allow for private sessions to protect an

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163. *Id.* at 577.

164. *Id.* (listing cases where the court may grant closed proceedings including *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *United States v. Alcantara*, 396 F.3d 189, 199-200 (2d Cir. 2005); *United States v. Doe*, 63 F.3d 121, 127-28 (2d Cir. 1995)).

165. *Id.* at 576.

166. *See id.* at 577 (listing cases where the court may grant closed proceedings including *Waller*, 467 U.S. at 45; *Alcantara*, 396 F.3d at 199-200; *Doe*, 63 F.3d at 127-28).

167. INTERNATIONAL CRIMINAL LAW SERVICES, INTERNATIONAL CRIMINAL LAW & PRACTICE TRAINING MATERIALS: PROCEDURE AND EVIDENCE, 11-12, available at [http://wcjp.unicri.it/deliverables/docs/Module\\_12\\_Procedure\\_and\\_evidence.pdf](http://wcjp.unicri.it/deliverables/docs/Module_12_Procedure_and_evidence.pdf) [hereinafter ICLS].

168. *Id.*

169. *See El-Masri v. The Former Yugoslav Republic of Macedonia*, 66 Eur. Ct. H.R. at 79 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>; *see also Casciani*, *supra* note 10.

170. ICLS, *supra* note 167, at 12.

171. *Id.* at 11.

172. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, at art. 6(1), ETS 5 (Nov. 4, 1950), available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

### *2014 / Compensation for Extraordinary Rendition*

accused, witnesses, victims, or confidential or sensitive evidence.<sup>173</sup> Consequently, these international tribunals are granted broad discretion to limit public access to trials when any of these concerns are present.<sup>174</sup>

Whether to make portions of a trial public is a decision left to the judge.<sup>175</sup> In making the decision, the judge must seek to balance the public interest in access to the trial against the nature of the interest being protected.<sup>176</sup> Generally, closed trials occur in circumstances where the exposure of testimony could mean potential harm to either a witness or the witness's family.<sup>177</sup> However, the ICC also creates exceptions for when testimony may create concerns over national security and state secrets.<sup>178</sup> Considering trials have been conducted in closed court in many international tribunals with relative ease, closed courts could likely be implemented in the United States with similar provisions. However, since the United States must abide by the Constitution, legislation, and binding precedent, the implementation of closed courts would be much more complex<sup>179</sup> than international courts that are only regulated by a single document. Despite these complications, the United States could use international tribunals as a guide to implementation.

#### IV. EXTRAORDINARY RENDITION CASES IN THE EUROPEAN COURT OF HUMAN RIGHTS AND THE UNITED KINGDOM

Although extraordinary rendition cases have never been successful in U.S. courts,<sup>180</sup> they have recently been successful in international courts and other countries.<sup>181</sup> These cases involve very similar fact patterns, wherein a terrorist suspect is detained and removed to a foreign country where they are tortured and held for an extended period without judicial process.<sup>182</sup> One case involved Central Intelligence Agency ("CIA") officers operating under U.S. authority in a secret

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173. Rome Statute of the International Criminal Court arts. 64(7), 68(2), July 17, 1998, 2187 U.N.T.S. I-38544, 127, 130, available at <http://www.refworld.org/docid/3ae6b3a84.html>.

174. See ICLS, *supra* note 167, at 12; see also Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 129-30.

175. See ICLS, *supra* note 167, at 12; see also Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 130.

176. See ICLS, *supra* note 167, at 12; see also Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 127.

177. ICLS, *supra* note 167, at 12; Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 129-30.

178. Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 133.

179. See *Arar v. Ashcroft*, 585 F.3d 559, 577 (2d Cir. 2009).

180. See *id.* at 563 (where U.S. officials participated in transferring a terrorist suspect to Syria, where he was tortured for information); see also *El-Masri v. United States*, 479 F.3d 296, 299-300 (4th Cir. 2007) (where the CIA held and tortured a terrorist suspect in a secret prison).

181. See *El-Masri v. The Former Yugoslav Republic of Macedonia*, 66 Eur. Ct. H.R. at 79 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>; see also Casciani, *supra* note 10.

182. See *El-Masri*, 66 Eur. Ct. H.R. at 4; see also Casciani, *supra* note 10.

*Global Business & Development Law Journal / Vol. 27*

prison, but in a foreign jurisdiction.<sup>183</sup> The other recent case involved a joint U.K. and U.S. mission, where the suspect was transferred to a foreign operated prison where he was tortured and detained by foreign officials.<sup>184</sup> Even though these cases have been successfully litigated in other forums, none have held the United States responsible.<sup>185</sup>

One way for an international court, such as the ICC, to have jurisdiction over either type of claim against a U.S. national is if the occurrence took place within the territory of a state party.<sup>186</sup> If this occurred, then the state could refer the case to the court against a U.S. national, but not against the United States as a state unless there was consent or a treaty provision.<sup>187</sup> Therefore, the only international tribunal with the real potential to accept jurisdiction over a U.S. extraordinary rendition claim is the Inter-American Commission on Human Rights (“IACHR”).<sup>188</sup> However, the claims filed with the IACHR have presently not moved forward and thus, an international tribunal is yet to hear this type of case against the United States.<sup>189</sup>

Instead, suspected terrorists have asserted claims of extraordinary rendition and torture against state parties that played some role in the rendition,<sup>190</sup> or against the country to which the individual was removed.<sup>191</sup> Although this may be an effective way to compensate victims in instances where a country accepts an international court’s jurisdiction, or a country hears the case domestically, the United States is still not being held legally accountable for their primary role in the extraordinary renditions and torture.<sup>192</sup>

The most compelling comparisons of the treatment of extraordinary rendition cases in other jurisdictions are the recent cases of Sami al-Saadi in the United Kingdom,<sup>193</sup> and Khaled El-Masri in the European Court of Human Rights.<sup>194</sup> Both cases were recently settled for \$3.5 million and \$78,000 respectively.<sup>195</sup> Comparing and contrasting the facts and treatment of these cases is an effective

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183. See *El-Masri*, 66 Eur. Ct. H.R. at 5.

184. Casciani, *supra* note 10.

185. Jamil Dakwar, *Seeking International Accountability for Victims of U.S. Torture*, ACLU BLOG OF RIGHTS (June 26, 2013, 3:12 PM), <https://www.aclu.org/blog/human-rights-national-security/seeking-international-accountability-victims-us-torture>.

186. Rome Statute of the International Criminal Court, *supra* note 173, 2187 U.N.T.S. at 99.

187. *Id.*

188. Dakwar, *supra* note 185.

189. *Id.*

190. Casciani, *supra* note 10.

191. See *El-Masri v. The Former Yugoslav Republic of Macedonia*, 66 Eur. Ct. H.R. at 78-79 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>.

192. Goldston, *supra* note 12.

193. Casciani, *supra* note 10.

194. See *El-Masri*, 66 Eur. Ct. H.R. at 78.

195. Casciani, *supra* note 10.

### *2014 / Compensation for Extraordinary Rendition*

way to determine the inadequacies and possible remedies for the U.S. system.<sup>196</sup> Since other tribunals are able to overcome the issues present in extraordinary rendition cases, it is likely that U.S. courts could find means to do the same.<sup>197</sup>

#### *A. The United Kingdom: Sami Al-Saadi*

In December 2012, the U.K. government agreed to a settlement in the amount of \$3.5 million with Sami Al-Saadi and his family.<sup>198</sup> Because the case never made it to court,<sup>199</sup> the U.K. government has not made any admission of guilt, although the victims of extraordinary rendition were still compensated for the harm they suffered.<sup>200</sup> In this case, Al-Saadi and his family were forced to board a plane from Hong Kong to Libya in a joint U.K.-U.S. operation, where he was held and tortured.<sup>201</sup> As a known oppositional leader to Colonel Muammar Gaddafi, Al-Saadi was viewed as a threat to the government.<sup>202</sup> It was not until the fall of the Gaddafi regime that documents outlining the rendition came to light.<sup>203</sup> These documents allegedly prove that the U.K. government was involved in the extraordinary rendition of Al-Saadi and his family.<sup>204</sup>

Al-Saadi expressed disappointment that the case was not actually heard and decided in a court of law,<sup>205</sup> because this would have allowed the actual facts to come to light and the government would likely have been forced to admit to their wrongdoing.<sup>206</sup> Despite this disappointment, the settlement allows for coverage of Al-Saadi's medical costs and the education of his children.<sup>207</sup> Since he continues to need treatment for the injuries he suffered while being held in Libya,<sup>208</sup> the settlement at least allows him to have some compensation.

Like our own courts have noted, one of the major issues in this case was a problem of national security.<sup>209</sup> This is likely one of the main reasons the case was never heard in open court; the inquiry would have involved exposure of

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196. Dakwar, *supra* note 185.

197. *See id.*

198. Casciani, *supra* note 10.

199. *Id.*

200. *Family Rendered by UK to Gaddafi Accepts Settlement*, REPRIEVE (Dec. 13, 2012), [http://www.repriev.org.uk/press/2012\\_12\\_13\\_Saadi\\_rendition\\_settlement/](http://www.repriev.org.uk/press/2012_12_13_Saadi_rendition_settlement/).

201. *Id.*

202. Casciani, *supra* note 10.

203. *Id.*

204. REPRIEVE, *supra* note 200.

205. Casciani, *supra* note 10.

206. *Id.*

207. *Id.*

208. *Id.*

209. *See Sami Al-Saadi, THE RENDITION PROJECT*, <http://www.therenditionproject.org.uk/global-rendition/the-detainees/sami-al-saadi.html> (last visited Oct. 14, 2013).

*Global Business & Development Law Journal / Vol. 27*

confidential documents that prove the United Kingdom's involvement.<sup>210</sup> However, that such a large settlement was given in this case is an indicator that some of the evidence available would have been harmful to the U.K. government.<sup>211</sup> Therefore, even though the case was not able to deal with all the issues that are present in extraordinary rendition cases, it served the purpose of compensation.<sup>212</sup>

Al-Saadi has claimed that because of his personal experience with secret courts in Libya, he did not want to proceed with a case in U.K. courts that would not be public.<sup>213</sup> This case comes at a time of great debate over the operation of secret courts, which has both supporters and dissenters in the United Kingdom.<sup>214</sup> On the one hand, some kind of closed-door hearings would allow for issues that implicate state secret information to be decided.<sup>215</sup> However, this type of hearing does not involve the public and therefore could be viewed by some as lacking the transparency that is central to the rule of law.<sup>216</sup> As more cases involving confidential international relations come to the forefront of public knowledge, there will likely be additional pressure on domestic governments to find a way to hear the cases.<sup>217</sup> Perhaps this will result in offers of settlements without an official legal process, such as what occurred in the *Al-Saadi* case.<sup>218</sup> Although, it is also possible that this will appear to be an insufficient remedy when the public feels they have the right to know the truth.<sup>219</sup>

The main difference between the *Al-Saadi* case and the *Arar* case is that *Arar* involved direct contact with U.S. personnel.<sup>220</sup> Since *Arar* was actually on U.S. soil when he was transferred, the transport to another country was from the United States and not a third country.<sup>221</sup> This would seem to be stronger evidence of U.S. involvement than in the *Al-Saadi* case, and therefore should be sufficient for U.S. courts to provide compensation in *Arar* as well. However, the *Al-Saadi* case allegedly included more specific documentation, which was seized when the Gaddafi regime fell.<sup>222</sup> In this sense, Al-Saadi probably had much greater access to damning documents than would be possible in a case like *Arar's* where the stated facts were insufficient to allege a conspiracy.<sup>223</sup>

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210. *See id.*

211. Casciani, *supra* note 10.

212. *See* REPRIEVE, *supra* note 200.

213. Casciani, *supra* note 10.

214. *Id.*

215. *See* THE RENDITION PROJECT, *supra* note 209.

216. REPRIEVE, *supra* note 200.

217. *See* Goldston, *supra* note 12.

218. Casciani, *supra* note 10.

219. Goldston, *supra* note 12.

220. *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009).

221. *Id.* at 566.

222. Casciani, *supra* note 10.

223. *See Arar*, 585 F.3d at 569.

## 2014 / Compensation for Extraordinary Rendition

### B. The European Court of Human Rights: Khaled El-Masri

Although the Al-Saadi settlement has much in common with Arar's case and the types of cases involving U.S. renditions, the December 2012 ruling for Khaled El-Masri is the most compelling case to date.<sup>224</sup> El-Masri originally brought suit in the District Court for the Eastern District of Virginia in 2006, where he was represented by the American Civil Liberties Union.<sup>225</sup> However, the case was dismissed in U.S. courts, because the central facts would reveal state secrets and were therefore privileged.<sup>226</sup> The fact that the ECHR not only heard the case on the merits, but also provided compensation shows a direct contrast between the two systems.<sup>227</sup>

The European Court of Human Rights provided a \$78,000 settlement to El-Masri after hearing the case and coming to a verdict.<sup>228</sup> This differentiates the case from both Arar's Canadian and Al-Saadi's British settlements,<sup>229</sup> since the Macedonian government was found to be legally at fault.<sup>230</sup> Additionally, the fault found on behalf of Macedonia was transferring El-Masri to a CIA operated secret jail, which served the purpose of harboring suspected Islamist militants for questioning.<sup>231</sup> Therefore, El-Masri's case has a more substantial connection to the United States, and the completed legal process proves there were some actions taken by U.S. officials.<sup>232</sup>

According to the record, El-Masri was held in Macedonia for twenty-three days and mistreated, at which time he was transferred to a CIA secret detention facility in Afghanistan.<sup>233</sup> Once he was in Afghanistan, the torture and mistreatment continued for four months, at which time U.S. agents left El-Masri by the side of the road.<sup>234</sup> After many years of fighting legal battles with different countries, the verdict from the European Court of Human Rights provided some compensation, but more importantly allowed El-Masri to finally clear his name.<sup>235</sup> This case is the first time a European country has been held accountable for its involvement with U.S. secret prisons.<sup>236</sup>

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224. *Europe Court Award for Rendition Victim Khaled Al-Masri*, BBC NEWS EUROPE, <http://www.bbc.co.uk/news/world-europe-20712615> (last updated Dec. 13, 2012, 10:27 AM).

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

226. *See id.* at 313.

227. *See id.* *But see El-Masri*, 66 Eur. Ct. H.R. at 80 (2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621>.

228. *El-Masri*, 66 Eur. Ct. H.R. at 80; BBC NEWS EUROPE, *supra* note 224.

229. Casciani, *supra* note 10.

230. *See El-Masri*, 66 Eur. Ct. H.R. at 80.

231. *See* BBC NEWS EUROPE, *supra* note 224.

232. *See El-Masri*, 66 Eur. Ct. H.R. at 80.

233. OLSHANSKY, *supra* note 2, at 209.

234. *Id.* at 210; *El-Masri*, 66 Eur. Ct. H.R. at 7.

235. BBC NEWS EUROPE, *supra* note 224.

236. *Id.*

*Global Business & Development Law Journal / Vol. 27*V. RECOMMENDATION: THE UNITED STATES NEEDS TO LEGISLATIVELY CREATE  
A CAUSE OF ACTION FOR VICTIMS OF EXTRAORDINARY RENDITION

Through the case of Maher Arar, the unwillingness of the court to grant relief under any of the currently available causes of action is apparent.<sup>237</sup> Despite the argument that the AG has exclusive discretion over immigration removals, and that courts lack subject-matter jurisdiction over the related due process claims, the principle of non-refoulement calls this discretion into question.<sup>238</sup> However, since extraordinary rendition claims involve accessing largely confidential information, it is very difficult for any claimant to plead with enough specificity to succeed in making a due process claim.<sup>239</sup>

Additionally, the courts have declined to expand a judicially created remedy to new contexts.<sup>240</sup> The *Bivens* claim,<sup>241</sup> which allows a plaintiff to bring a claim directly under the Constitution against federal officers, is not available in the context of extraordinary rendition.<sup>242</sup> The *Arar* court's primary reasoning is that this is an area too close to foreign relations to be handled by the judiciary, and instead, Congress needs to pass new legislation.<sup>243</sup> Without access to a *Bivens* claim, victims have few other means of getting compensation since the United States has not set up commissions to assess claims outside of court.<sup>244</sup>

Instead, the United States needs to look outside its borders to create a new legislative cause of action without the flaws of the existing causes of action. Although state secret privilege is an issue in extraordinary rendition cases, the court in *Arar* admitted that courts can be closed in certain circumstances.<sup>245</sup> Just as these circumstances have been extended to state secrets in international courts, the United States should adopt this approach in these cases.<sup>246</sup> Having a closed hearing may not create the most transparency, but it would allow for victims to receive much deserved compensation, and allow the United States to comply with its international obligations.<sup>247</sup>

With the two recent decisions by the United Kingdom and The European Court of Human Rights,<sup>248</sup> the pressure to compensate is increasing for the United States.<sup>249</sup> Now that both international tribunals and other countries have processed

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237. See *supra* Part II.

238. See 8 U.S.C. § 1231.

239. See *supra* Part II.

240. See *supra* Part II.

241. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390 (1971).

242. See *Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009).

243. *Id.* at 576.

244. See *supra* Part IV.

245. *Arar*, 585 F.3d at 577. See *supra* Part II.

246. See *supra* Part III.

247. *Arar*, 585 F.3d at 577. See *supra* Part II.

248. See *supra* Part IV.

249. See *Dakwar*, *supra* note 185.

*2014 / Compensation for Extraordinary Rendition*

these claims through a formal judicial process, the United States will be under added pressure to adopt new approaches.<sup>250</sup> The most likely avenue for this will be for Congress to pass new legislation that specifically creates a cause of action for victims of extraordinary rendition when U.S. officials play a role.<sup>251</sup> The legislation will need to state a lower level of specificity required to survive summary judgment, since claimants have less access to confidential information than in an average case.<sup>252</sup> Additionally, the legislature can specify that certain portions of the hearing will be held in closed court, in order to bypass issues of state secret privilege.<sup>253</sup>

With these primary issues out of the way, the court should be able to apply new legislation without the separation of powers concerns expressed by the *Arar* court.<sup>254</sup> Although public perception towards the treatment of terrorist suspects may need to change in order for Congress to pass a new statute, added international pressure may help to ease this cultural shift.

In the last decade, the increasingly globalized world has become focused on fighting terrorism, especially within the United States.<sup>255</sup> Fueled by fear, the United States has intensified methods of removal and interrogation, many of which are contrary to domestic and international law.<sup>256</sup> Although protection of the public is important, there must be means of maintaining national security without infringing on recognized individual rights. Specifically, the problem of extraordinary rendition is becoming an international issue with increased focus and scrutiny.<sup>257</sup> As this area of the law develops, critics agree that the United States needs to comply with their domestic and international legal agreements and compensate those who have been harmed by this practice.<sup>258</sup>

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250. *Id.*

251. *Arar*, 585 F.3d at 576.

252. *See supra* Part II.C.

253. *See Arar*, 585 F.3d at 577.

254. *See supra* Part II.

255. *See generally* Pawlak, *supra* note 1.

256. *See supra* Part II; *see* Pawlak, *supra* note 1; *see also* OLSHANSKY, *supra* note 2.

257. *See supra* Part I.

258. *See generally* Goldston, *supra* note 12.