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Zubaydah: Establishing International Accountability for Complicity of Torture and Transforming Enhanced Interrogation Rhetoric

CAMILLE SESPENE

I. INTRODUCTION

Shortly after the September 11th attacks, the Bush administration adopted the term “enhanced interrogation techniques,” a euphemism for extra-judicial practices of torture against suspected terrorists.¹ During an era of terror, few advocates sought public accountability of the United States Central Intelligence Agency’s (“CIA”) activities in detaining and interrogating such suspected terrorists in foreign states.² Now, thirteen years later, the threat of Al Qaeda has lost imminence, and publicity regarding the CIA’s Extraordinary Rendition program and operation of “black-sites” has garnered growing criticism, calling for increased CIA and foreign government accountability in domestic and international bodies.³

Husayn Abu Zubaydah, a “stateless Palestinian” believed by the CIA to be a “high value detainee” following the September 11th attacks, was one of many to be captured and transported to various countries by the CIA as a part of its Extraordinary Rendition program.⁴ Abu Zubaydah has been in U.S. custody since his capture in 2002, and con-

1. See *CIA tactics: What is “enhanced interrogation?”*, BBC NEWS (Dec. 10, 2014), <http://www.bbc.com/news/world-us-canada-11723189>.

2. See Alfred W. McCoy, *The US Helped Create International Law, Now We Just Ignore It*, MOTHER JONES (Feb. 27, 2015, 7:18 PM), <http://www.motherjones.com/politics/2015/02/international-law-america-exceptionalism>.

3. *Id.*

4. Brent Mickum, *The truth about Abu Zubaydah*, GUARDIAN (Mar. 30, 2009, 8:00 PM), <http://www.theguardian.com/commentisfree/cifamerica/2009/mar/30/guantanamo-abu-zubaydah-torture>.

tinues to be detained in Guantanamo Bay.⁵ To this day, he has yet to be charged by the U.S. government for any crimes.⁶ On January 28, 2013, Abu Zubaydah filed a complaint with the European Court of Human Rights ("ECtHR"), alleging that Poland violated several provisions of the European Convention on Human Rights.⁷ Specifically, Poland was complicit in the U.S.'s torture and unlawful detention of Zubaydah.⁸ On July 8, 2014, the ECtHR issued a judgment in Zubaydah's favor.⁹

The ECtHR's ruling in *Abu Zubaydah v. Poland* has helped to create a precedence of accountability for complicity in torture, both within Poland itself as well as within other European Union member states.¹⁰ This landmark ruling not only requires that EU domestic activities comport to international human rights standards, but also establishes accountability for activities conducted by foreign actors within an EU state's territory.¹¹ The effects of the *Zubaydah* ruling also extend beyond solely the jurisdiction of the ECtHR. The case has increased negative publicity regarding the CIA's extraordinary rendition program in the United States, thereby helping to call for increased CIA oversight, but has also helped, and will continue to help, change the rhetoric surrounding the Bush Administration's espoused "enhanced interrogation techniques."¹² As a result, this rhetorical transformation will help to further establish *jus cogens*, overriding principles or norms of international law, regarding torture.

Part II of this paper will provide a general overview of international human rights protection in Europe. Specifically, Part II will discuss the European Convention on Human Rights (ECHR), one of the main treaties governing human rights abuses within the European Union; the European Court of Human Rights (ECtHR), the main body for enforcement of the ECHR; and Poland's membership to the Council of Europe. Part III will provide an overview of the U.S. Central Intelligence Committee, its creation of the Extraordinary Rendition program under the

5. *Case of Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Eur. Ct. H.R. 43 (2014).

6. *Id.* at 44.

7. *Id.* at 91.

8. *Id.*

9. *Id.* at 212-213.

10. Crofton Black, *European court finds CIA tortured prisoners at Polish black site*, AL JAZEERA (Jul. 24, 2014, 11:15 AM), <http://america.aljazeera.com/opinions/2014/7/poland-cia-black-site-europeancourthumanrightstorture.html>.

11. *Husayn* Eur. Ct. HR at 212.

12. Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, NEW YORK TIMES (Jul. 24, 2014), <http://www.nytimes.com/2014/07/25/world/europe/europe-poland-cia-black-site-extraordinary-rendition.html>.

Administration of President George W. Bush, Jr. post-September 11th, and the CIA's development of "black sites," foreign extrajudicial prisons for suspected terrorists.¹³ The conclusion of Part II will detail the experience of one such suspected terrorist, Husayn Abu Zubaydah, who filed a complaint with the ECtHR after being transported to numerous black-sites, including a site in Stare Kiejkuty, Poland, where he was detained and tortured by CIA agents.¹⁴

Part III of this paper will analyze general accountability for CIA black site operations in both the European Union and the United States. First, this section will discuss CIA accountability in Europe pre-*Zubaydah*. Second, the section will address the effects that the *Zubaydah* judgment has had on Poland, and will potentially have on other European Union member states concerning similar cases brought to the ECtHR. Thirdly, while the United States is not within the purview of the ECHR, this section will discuss concerns regarding CIA oversight and *Zubaydah's* possible future effect on U.S. foreign policy and activities. Fourth, this section will address the recently public Senate Intelligence Committee report concerning the CIA's Extraordinary Rendition program, its potential effect on *Zubaydah's* case, and on establishing domestic and international accountability for CIA activities in foreign states. Fifth, this section will discuss the way in which *Zubaydah* has helped change the rhetoric regarding "enhanced interrogation techniques," thereby developing reaffirming *jus cogens*, preemptory norms, against torture, and establishing higher standards of international accountability in the detention and interrogation of suspected terrorists.

This paper will conclude by providing recommendations for European Union Member States and the United States to adhere to in order to ensure complicity with international law in its approach to foreign policy and protection of national security.

13. OPEN SOCIETY JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION, 11 (2013), <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>.

14. *Husayn* Eur. Ct. HR at 34.

II. INTERNATIONAL HUMAN RIGHTS PROTECTION UNDER THE COUNCIL OF EUROPE

A. *The European Convention of Human Rights*

On May 4, 1949, ten European states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom banded together under the Treaty of London to establish the Council of Europe.¹⁵ The Council, which was developed in response to the Communist threat of World War II, sought to unite European states and foster economic and social progress.¹⁶ While the Council dealt with numerous issues, including public education and health, and was instrumental in the negotiations and implementation of several multilateral agreements among member states, human rights served as a primary focus of the organization.¹⁷

On November 4, 1950, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights ("ECHR").¹⁸ Designed as a mechanism to protect civil and political rights when state safeguards and remedies failed, the ECHR was entered into force on September 3, 1953.¹⁹ Currently forty-seven European states have implemented the ECHR.²⁰ Recently, ratification of the ECHR became a prerequisite for joining the European Union, thereby extending the reach of the ECHR and the Council of Europe.²¹

The ECHR protects a number of individual civil and political rights, both substantive and procedural, though the two are not necessarily exclusive of one another.²² For example, substantively, Article 3

15. *Key Dates - The Council of Europe in Brief*, COUNCIL OF EUROPE, <http://www.coe.int/aboutcoe/index/asp?page=datescles&l=en> (last visited Nov. 17, 2015); Wikipedia, *Council of Europe*, https://en.wikipedia.org/wiki/Council_of_Europe (last updated Dec 1, 2015).

16. See *Council of Europe*, DUKE LAW (Mar. 2014), <http://law.duke.edu/lib/researchguides/councileurope/>.

17. *Id.*

18. *A Convention to Protect Your Rights and Liberties*, COUNCIL OF EUROPE, <http://human-rights-convention.org/> (last visited Nov. 25, 2015).

19. COUNCIL OF EUROPE EUROPEAN COURT OF HUMAN RIGHTS, *THE COURT IN BRIEF*, http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf.

20. Council of Europe, *A Convention to Protect Your Rights and Liberties*, *supra* note 18.

21. *Id.*

22. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 194,

of the ECHR prohibits torture or the subjection of individuals to inhuman or degrading punishment or treatment.²³ Under the same article, petitioners are also entitled to an effective investigation regarding their allegations of torture.²⁴ Article 5 of the ECHR guarantees an individual's right to liberty and security, and establishes that no individual can be deprived of this right save for lawful arrest or detention.²⁵ Under Article 6 of the ECHR, individuals are ensured a right to a fair trial, and for those whose rights have been violated, a right to an effective remedy under Article 13.²⁶ Article 38 allows the ECHR to investigate a case pending before it, and may require parties to furnish all the facilities it deems necessary for its examination.²⁷

B. *The European Court of Human Rights*

To monitor compliance with the ECHR, Article 19 of the ECHR created two judicial bodies: the European Commission on Human Rights (Commission) and the European Court of Human Rights (ECtHR).²⁸ Originally, the Commission was tasked with the initial hearing of cases and issuing reports on admissibility.²⁹ The Commission referred cases it deemed admissible to the ECtHR for hearing.³⁰ However, Protocol 11, which entered into force on November 1, 1998, restructured the organization, abolishing the Commission and enlarging the scope of the ECtHR.³¹ Under this protocol, individuals seeking to have their cases heard could petition the ECtHR directly.³²

The ECtHR, which is based in Strasbourg, France, is comprised of

<http://conventions.coe.int/treaty/en/treaties/html/005.html>.

23. *Id.*

24. *Husayn* Eur. Ct. HR at 212.

25. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 22, at 2.

26. *Id.* at 3-4.

27. *Id.* at 9.

28. Dana Neacsu, *European Human Rights System*, ARTHUR W. DIAMOND LAW LIBRARY RESEARCH GUIDES (Nov. 20, 2012), http://library.law.columbia.edu/guides/European_Human_Rights_System#The_European_Court_of_Human_Rights_28ECHR.29_Overview http://library.law.columbia.edu/guides/European_Human_Rights_System#The_European_Court_of_Human_Rights_28ECHR.29_Overview (last updated Feb. 4, 2015).

29. *Id.*

30. *Id.*

31. *Amendments to the Convention*, COUNCIL OF EUROPE, <http://www.coe.int/en/web/human%ADrights%ADconvention/amendments-to-the-convention> (last visited Jan. 19, 2016).

32. *Id.*

forty-seven judges, one per each member state of the Council of Europe.³³ While each state has a representative in the ECtHR, the judges hear cases on an individual capacity, not in representation of their respective states.³⁴ Cases are heard in four main formations.³⁵ A single judge typically examines the admissibility of applications.³⁶ In some cases, the unanimous vote of a three-judge commission determines admissibility and judgment.³⁷ In other instances, a seven-panel-judge chamber rules on a majority vote.³⁸ In special circumstances, cases are heard by the Grand Chamber, comprised of 17 judges, at the referral of a chamber.³⁹

Pursuant to Article 34, individuals are able to submit an application directly to the ECtHR so long as the case meets the admissibility requirements outlined in Article 35.⁴⁰ Specifically, under Article 35, the Court will deem a case admissible only if all domestic remedies have been exhausted, the case has been filed within six months of the date from which the domestic court's final decision was made,⁴¹ the complaint is based upon violation(s) of the European Convention, and the applicant has suffered a significant disadvantage as a result of the violation(s).⁴² During the initial analysis, if the case is determined inadmissible, it is automatically thrown out; however, if the case is determined admissible, the adjudicating body may make a decision on the merits simultaneously or in a separate proceeding.⁴³ If a party seeks to appeal a decision, the party may submit a request for re-examination of the case.⁴⁴ If the request is granted, the case is then sent to the Grand Chamber for final judgment.⁴⁵

If a chamber finds that no violation of the ECHR occurred, the

33. COUNCIL OF EUROPE EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS, 4 (2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 4-5.

40. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 22, at 8.

41. *Id.*

42. Council of Europe, *The life of an application*, EUROPEAN COURT OF HUMAN RIGHTS (May 6, 2015), http://www.echr.coe.int/Documents/Case_processing_ENG.pdf.

43. *Id.*

44. *Id.*

45. *Id.*

case is closed.⁴⁶ In the event that a violation has been found, the case is then sent to the Committee of Ministers who is charged with reviewing judgment implementation.⁴⁷ If a state is found to be in violation of the ECHR, the state may be required to provide compensation to the victim, adopt general measures by amending its legislation, or adopt individual measures such as reopening a prior proceeding.⁴⁸ Subsequent follow-up by the Committee of Ministers will determine whether the state satisfactorily implemented its obligations.⁴⁹ Once the result is to the satisfaction of the Committee of Ministers, the case is concluded.⁵⁰

C. *Poland's Membership to the Council of Europe*

Poland became an official member of the Council of Europe on November 26, 1991, following Poland's transition to democracy in 1989.⁵¹ On January 19, 1993, Poland ratified the ECHR without reservation to any of the ECHR's provisions,⁵² and adopted several of the ECHR's subsequent Protocols.⁵³ Because Poland functions on a nominally monist model of incorporation, international treaties such as the ECHR have direct force of law in Poland's domestic legal system.⁵⁴ Through ratification of the ECHR, Poland became bound to its provisions of the ECHR, and to judgments by the ECtHR.⁵⁵

III. THE CIA AND EXTRAORDINARY RENDITION

A. *The U.S. Central Intelligence Committee*

Ever since the first presidential administration, the U.S. government has engaged in secret intelligence activities.⁵⁶ However, centraliza-

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

51. *Poland in the Council of Europe*, PERMANENT REPRESENTATION OF THE REPUBLIC OF POLAND TO THE COUNCIL OF EUROPE IN STRASBOURG (Sep. 7, 2012), http://www.strasbourgre.mfa.gov.pl/en/poland_in_the_council_of_europe/poland_in_coe/.

52. *Id.*

53. *Id.*

54. *See* David Sloss, *Domestic Application of Treaties*, SANTA CLARA LAW DIGITAL COMMONS, APR. 7 (Apr. 29, 2015), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs>.

55. *See Poland in the European Court of Human Rights*, *supra* note 51.

56. *History of the CIA*, Central Intelligence Agency (Feb. 18, 2014, 12:50 PM), <https://www.cia.gov/about-cia/history-of-the-cia>.

tion of these activities did not occur until post-World War II, when President Harry Truman signed the National Security Act of 1947, creating the Central Intelligence Agency.⁵⁷ This new organization became responsible for “coordinating the nation’s intelligence activities and correlating, evaluating and disseminating intelligence affecting national security.”⁵⁸ For decades, the CIA engaged in numerous covert operations, from plots designed to overthrow elected governments in other countries, to operations calculated to assassinate foreign leaders.⁵⁹ While these operations were often justified under the guise of promoting national security and foreign policy interests, some critics maintain that the CIA’s operations are illegal and even immoral, and severely damage the U.S. values and laws.⁶⁰ Further, because of the covert nature of the CIA’s operations, some believe that little has or can be done to hold the organization accountable for its unlawful actions and to force reform of questionable practices.⁶¹ One such covert operation that is currently garnering significant publicity and controversy is the CIA’s participation in the creation and operation of Extraordinary Rendition.⁶²

B. *Using Extraordinary Rendition to Combat Terrorism*

“Extraordinary Rendition” is commonly used to refer to the secret transfer of detainees by the U.S. to the custody of foreign governments for the purpose of interrogation and incommunicado detention.⁶³ Although commonly associated with the events of September 11, 2001, previous U.S. administrations allowed the CIA to engage in extrajudicial transfers of detainees.⁶⁴ On September 17, 2001, President Bush authorized, without permission from the White House or the Departments of Justice or State, the creation of such a network where the CIA relocated suspected terrorists to secret prisons called “black sites.”⁶⁵ In order to induce cooperation and extract information from its detainees, the

57. *Id.*

58. *Id.*

59. Peter Kornbluh, *End C.I.A. Covert Operations*, THE NEW YORK TIMES (Dec. 21, 2014), <http://www.nytimes.com/roomfordebate/2014/12/21/do-we-need-the-cia/end-cia-covert-operations>.

60. *Id.*

61. *Id.*

62. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 13, at 5.

63. *Id.* at 13.

64. *Id.*

65. *Id.* at 15.

CIA often used “enhanced interrogation techniques.”⁶⁶ These techniques included “‘walling’ (quickly pulling the detainee forward and then thrusting him against a flexible false wall), ‘water dousing,’ ‘stress positions’ (forcing the detainee to remain in body positions designed to induce physical discomfort), ‘wall standing’ (forcing the detainee to remain standing with his arms outstretched in front of him so that his fingers touch a wall four to five feet away and support his entire body weight), ‘cramped confinement’ in a box, ‘insult slaps,’ (slapping the detainee on the face with fingers spread), ‘facial hold’ (holding a detainee’s head temporarily immobile during interrogation with palms on either side of the face), ‘attention grasp’ (grasping the detainee with both hands, one hand on each side of the collar opening, and quickly drawing him toward the interrogator), forced nudity, sleep deprivation while being vertically shackled, and dietary manipulation.”⁶⁷

Proponents of the use of enhanced interrogation techniques maintain that the methods employed by the CIA at black-sites are effective in gathering crucial, and even actionable information.⁶⁸ Others view the extraordinary rendition of prisoners to black-sites and the use of “enhanced interrogation techniques” as a way to outsource torture, circumventing potential liability for inhumane methods of interrogation.⁶⁹ Many opponents of these techniques have voiced concerns, not only about the CIA’s violation of human rights and international law obligations by engaging in abusive interrogation, but also about the ineffectiveness of these methods in gathering important information.⁷⁰

Although the CIA is the primary facilitator of the Extraordinary Rendition Program, many criticize the countries that have helped to facilitate the Program’s operation.⁷¹ Amrit Singh, the Open Society Foun-

66. *Id.* at 15, 16.

67. *Id.* at 16.

68. See Mark A. Thiessen, *Documented: The WikiLeaks That Show Enhanced Interrogation Worked*, WORLD AFFAIRS JOURNAL (Dec. 2011), <http://www.worldaffairsjournal.org/article/documented-wikileaks-show-enhanced-interrogation-worked>; see also, John Rizzo: *CIA’s Enhanced Interrogation ‘Necessary and Effective’*, PBS (Sept. 13, 2011), <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/the-interrogator/john-rizzo-cias-enhanced-interrogation-necessary-and-effective/>.

69. European Center for Constitutional and Human Rights, *CIA ‘Extraordinary Rendition’ Flights, Torture and Accountability: a European Approach*, ECCHR, 17, 19 (Wolfgang Kaleck, et al., 2nd ed. 2008), <http://www.ecchr.de/ecchr-publications/articles/publications.html>.

70. Greg Miller, *Report finds harsh CIA interrogations ineffective*, THE WASHINGTON POST (Dec. 13, 2012), https://www.washingtonpost.com/world/national-security/report-finds-harsh-cia-interrogations-ineffective/2012/12/13/a9da510a-455b-11e2-9648-a2c323a991d6_story.html.

71. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 13, at 61.

dation's top legal analyst for national security and counterterrorism, stated, "Responsibility for this damage does not lie solely with the United States . . . but also with the numerous foreign governments without whose participation secret detention and extraordinary rendition operations could not have been carried out."⁷² According to the Open Society Justice, as many as fifty-four foreign governments have participated in the Extraordinary Rendition Program, possibly including the following Council of Europe member states: Belgium, Croatia, Czech Republic, Denmark, Lithuania, Ireland, Italy, Lithuania, Macedonia, Portugal, Romania, Sweden and the United Kingdom.⁷³ One particular site that has garnered much attention in recent times is the black site in Stare Kiejkuty, Poland, where "high value terrorist suspects," Husayn Abu Zubaydah and Abd al Rahim al-Nashiri, were detained and subjected to torture.⁷⁴

C. *Husayn Abu Zubaydah*

Husayn Abu Zubaydah was one of numerous detainees to be filtered through the CIA's Extraordinary Rendition network, and to be subject to the organization's enhanced interrogation techniques.⁷⁵ On March 27, 2002, U.S. agents arrested Zubaydah, a stateless Palestinian, in Pakistan.⁷⁶ At the time, the CIA believed Zubaydah to be a key member of Al'Quaeda, and designated him a "high-value detainee."⁷⁷ After his arrest, Zubaydah was transferred to a black site in Thailand, where he was interrogated by the CIA and subject to various enhanced interrogation techniques.⁷⁸ A 2009 CIA Report stated that during this time, twelve tapes documenting interrogations of Zubaydah showed that the CIA waterboarded Zubaydah a total of eighty-three times.⁷⁹ On December 5, 2002, Zubaydah was transferred via secret flight from Thailand to Poland.⁸⁰ From December 5, 2002 until September 22, 2003,

72. Joshua Hersh, *Extraordinary Rendition Report Finds More Nations Involved In Global Torture Scheme*, HUFFINGTON POST (Feb. 4, 2013), http://www.huffingtonpost.com/2013/02/04/extraordinary-rendition-torture-report_n_2617809.html.

73. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 13, at 6, <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>.

74. A.H., *What Happened in Stare Kiejkuty*, THE ECONOMIST (July 9, 2013), <http://www.economist.com/blogs/easternapproaches/2013/07/rendition-poland>.

75. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 13, at 60.

76. *Husayn* Eur. Ct. HR at 32.

77. *Id.*

78. *Id.*

79. *Id.* at 33.

80. *Id.* at 34.

Zubaydah was detained incommunicado in a secret detention facility in Stare Kiejkuty.⁸¹ There, the CIA subjected him to numerous enhanced interrogation techniques and ill-treatment.⁸² According to the International Committee for the Red Cross Report on the Treatment of Fourteen “High-Value Detainees” in CIA custody of February 2007, Zubaydah and other detainees were subject to continuous solitary confinement incommunicado, where detainees had very minimal contact with persons other than their guards or interrogators.⁸³ Detainees were also denied access to legal representation.⁸⁴

While the CIA subjected the detainees to other methods of ill-treatment, only Zubaydah stated that all of the following techniques were used upon him during his detention: water-boarding, prolonged stress standing, beating by use of a collar, confinement in a box, sleep deprivation by the use of loud noise or music, exposure to cold temperature/water, threats, forced shaving, and deprivation/restriction of sold food.⁸⁵

From September 22, 2003 to September 26, 2006, Zubaydah was allegedly transported from Poland to various rendition sites, including Guantànamo Bay, Morocco, Lithuania, Afghanistan, and back to Guantànamo Bay.⁸⁶ Due to Zubaydah’s designation as a “high-value detainee,” he has been detained in Guantànamo Bay “in the highest security Camp 7 in extreme conditions of detention.”⁸⁷ Although Zubaydah is still imprisoned in a maximum security detention facility, the U.S. government has not charged him with any crimes.⁸⁸

In Zubaydah’s petition to the ECtHR, he alleged that Poland violated several provisions of the ECHR, including the following: Article 3, which prohibits torture, or inhuman or degrading treatment or punishment; Article 5 which prohibits unlawful detention; Article 6, which guarantees the right to a fair trial; and Article 38, which obliges a State to furnish all the necessary facilities to examine the case at hand.⁸⁹

After examination of Zubaydah’s case, the ECtHR stated that it found both substantive and procedural violations of Article 3 of the

81. *Id.* at 35.

82. *Husayn* Eur. Ct. HR at 35.

83. *Id.* at 37.

84. *Id.*

85. *Id.* at 37-38.

86. *Id.* at 42.

87. *Id.* at 32, 43.

88. *Husayn* Eur. Ct. HR at 43.

89. *Id.* at 140, 177, 197, 205.

ECHR, which states, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁹⁰ Although Polish agents were not found to have directly participated in the torture of the CIA’s detainees, substantively, the ECtHR determined that Poland knew of the nature and purpose of the CIA’s activities in Poland, yet failed to do anything to prevent such activities, or to ensure that the activities adhered to domestic and international law.⁹¹ Procedurally, the ECtHR found that Poland failed to provide an effective investigation for the alleged unlawful action.⁹² While Poland opened a criminal investigation into Zubaydah’s case on March 11, 2008, the investigation still remains pending “against persons unknown.”⁹³ The ECtHR interpreted the lack of investigatory progress as a sign of Poland’s continued complicity with the U.S. to keep their intelligence activities secret.⁹⁴

The ECtHR also found Poland in violation of Article 5, which protects an individual’s right to liberty and security.⁹⁵ Specifically, the ECtHR found Poland responsible for providing security and logistics for the facilitation of the CIA’s extraordinary renditions and secret detention facilities.⁹⁶ Poland was also found in breach of Article 6 of the ECHR, which guarantees the right to a fair trial.⁹⁷ The ECtHR determined that Poland did not ensure that Zubaydah was given a fair hearing, Polish authorities must have been aware that any suspect would be tried by a military commission and that there were serious concerns regarding the impartiality or independence of such tribunals.⁹⁸ Further the ECtHR determined that Poland should have known that the military commission was not recognized as legitimate under U.S. law and international law. Additionally, there was a high probability that evidence admitted in the trial would have been obtained through means of torture.⁹⁹

Lastly, the ECtHR found Poland in violation of Article 38, which allows the ECtHR to conduct its own investigation into a case pending

90. *Id.* at 177.

91. *Information Note on the Court’s case-law No. 176*, EUROPEAN COURT OF HUMAN RIGHTS 3-4 (July, 2014), [http://hudoc.echr.coe.int/eng?i=002-9597#%22itemid%22:\[%22002-9597%22\]](http://hudoc.echr.coe.int/eng?i=002-9597#%22itemid%22:[%22002-9597%22])}.

92. *Id.*

93. *Husayn Eur. Ct. HR* at 183.

94. *Id.* at 184.

95. *Id.* at 200.

96. *Information Note on the Court’s case-law No. 176*, *supra* note 91, at 4-5.

97. *Id.* at 5.

98. *Id.*

99. *Id.*

before it.¹⁰⁰ Under this provision, the ECtHR may require parties to furnish documents for examination.¹⁰¹ The Polish government refused to produce certain documents to the ECtHR, citing confidentiality and concerns regarding national security and the pending criminal investigation in Poland.¹⁰² Poland's inability to supply the requested documents left the ECtHR with concerns about the effectiveness of the Polish government in providing an effective and proper examination of this case.¹⁰³ The ECtHR was not persuaded by Poland's argument that the ECtHR's procedural rules did not provide enough of a safe-guard to protect confidentiality.¹⁰⁴

The Court required Poland to compensate Zubaydah within three months of the final judgment, in the amount of 100,000 euros for non-pecuniary damages, and an additional 30,000 euros for costs and expenses.¹⁰⁵ While Zubaydah also requested the Court to require Poland to open an effective and thorough investigation of his rendition into and out of Poland, inclusive of his treatment while in the state, the Court found that its judgment establishing Poland's violation of Article 3 and other related provisions of the ECHR was sufficient redress for Zubaydah's claim.¹⁰⁶ In October of 2014, the Polish government appealed the court's ruling.¹⁰⁷ On February 17, 2015, the ECtHR denied Poland's request for review by the Grand Chamber, making the judgment final.¹⁰⁸

IV. ESTABLISHING ACCOUNTABILITY FOR TORTURE IN POLAND AND OTHER COUNCIL OF EUROPE STATES

A. *Council of Europe Accountability Pre-Zubaydah*

Prior to *Zubaydah*, the only other state member to the Council of

100. *Husayn* Eur. Ct. HR at 137.

101. *Id.*

102. *Id.*

103. *Id.* at 147.

104. *Id.* at 146.

105. *Id.* at 213.

106. *Husayn* Eur. Ct. HR at 211.

107. Rick Lyman, *Poland Appeals European Court of Human Rights Ruling on C.I.A. 'Black Site,'* THE NEW YORK TIMES (Oct. 24, 2014), http://www.nytimes.com/2014/10/25/world/europe/extraordinary-rendition-ruling-appealed-by-poland.html?_r=0.

108. *Europe and the CIA, Paying for torture,* THE ECONOMIST (Feb. 25, 2015), <http://www.economist.com/news/europe/21645097-cia-tortured-suspected-terrorists-polish-soil-european-court-human-rights-making>.

Europe to have been held accountable by the ECtHR for its involvement in the CIA's Extraordinary Rendition program is Macedonia.¹⁰⁹ In *El-Masri v. the former Yugoslav Republic of Macedonia*, the Court found Macedonia responsible for mistakenly detaining and torturing El-Masri, a dual German and Lebanese citizen, before turning him over to the custody of the CIA.¹¹⁰

In terms of individual accountability at the domestic level, few Council of Europe states have taken measures to hold individuals answerable for their participation in CIA rendition activities.¹¹¹ To date, the only country that has convicted individuals for their involvement in these CIA operations is Italy.¹¹² In 2009, an Italian criminal court convicted, "in absentia, twenty-three U.S. citizens," only one of which was not a CIA agent, and five Italian secret service agents for the 2003 kidnapping and rendition of Hassan Mustafa Osama Nasr, an Egyptian cleric.¹¹³ In 2007, Munich prosecutors issued arrest warrants against thirteen CIA agents for their involvement in rendition activity, and transferred them to the International Criminal Police Organization.¹¹⁴ However, for political reasons, the German Government refused to extradite the agents.¹¹⁵ In both the United Kingdom and Sweden, judges have ruled against the government in civil proceedings, requiring the Government to compensate individuals who were allegedly subjected to CIA torture with the aid of the Government.¹¹⁶

B. *The Effects of Zubaydah on Poland and COE states*

Zubaydah and the publicity that it has generated, not only within the Council of Europe, but within the rest of the international community, is important for several reasons. First, it is the first time the Polish government is acknowledging what it has been denying for so many years, that it has hosted a CIA secret prison where individuals were de-

109. *Factsheet – Secret detention sites*, EUROPEAN COURT OF HUMAN RIGHTS (June 2015), http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF.

110. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 2012 Eur. Ct. H.R., [http://hudoc.echr.coe.int/eng?i=001-115621#%22itemid%22:\[%22001-115621%22\]](http://hudoc.echr.coe.int/eng?i=001-115621#%22itemid%22:[%22001-115621%22]); see also *Time for accountability in CIA torture cases*, COMMISSIONER FOR HUMAN RIGHTS (Sep. 11, 2013), <http://www.coe.int/en/web/commissioner/-/time-for-accountability-in-cia-torture-cas-1>.

111. *Time for accountability in CIA torture cases*, *supra* note 110.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

tained and tortured.¹¹⁷ Second, *Zubaydah* is the first ECtHR case establishing liability for the acts of a foreign state within the boundaries of an ECHR member state.¹¹⁸ Third, *Zubaydah* will likely set precedent for other cases relating to Extraordinary Rendition currently pending in the ECtHR.¹¹⁹ Presently, Abu Zubaydah is litigating a case against Lithuania, for identical charges.¹²⁰ Other cases currently before the ECtHR include *Nasr and Ghali v. Italy*, where an Egyptian national with refugee status in Italy was kidnapped, transferred back to Egypt, and secretly detained for several months in brutal conditions; and *Al Nashiri v. Romania*, where Al Nashiri, a suspected terrorist who was detained with Zubaydah in Poland, is alleging similar ECHR human rights violations against Romania.¹²¹ Purportedly, the U.S. had a number of bilateral agreements with several Council of Europe countries to facilitate the rendition program.¹²² *Zubaydah* may increase the exposure of these countries to liability should any prisoners who were detained within their borders pursue legal action within the ECtHR.

For Poland specifically, this judgment places public pressure on Polish officials to ensure that its intelligence operations are compliant with domestic and international law obligations. Although Polish officials stated that the *Zubaydah* decision was premature given that their criminal investigation was still pending, a spokesperson for Polish President Bronislaw Komorowski acknowledged that the judgment was “embarrassing for Poland” and a burden both in terms of the country’s finances and its image.¹²³ This judgment has also led the Polish public to reevaluate Poland’s relationship with the United States.¹²⁴ Some feel the U.S. took advantage of Poland, and that the U.S. has eluded all responsibility for the situation.¹²⁵ The judgment led others to evaluate the dis-

117. Amrit Singh, *Landmark European Court Decision Sends Clear Message on Ending Impunity for European Complicity in CIA Torture*, STRASBOURG OBSERVERS (Sept. 10, 2014), <http://strasbourgobservers.com/2014/09/10/landmark-european-court-decision-sends-clear-message-on-ending-impunity-for-european-complicity-in-cia-torture/>.

118. *Id.*

119. *Id.*

120. *Factsheet – Secret detention sites*, *supra* note 109.

121. *Id.*

122. Joseph Margulies, “*Black sites*” *Ruling a Rebuke to Poland, the CIA and Torture*, L.A. TIMES (Jul. 26, 2014), <http://touch.latimes.com/#section/-1/article/p2p-80903564/>.

123. Global Voices, *The European Court Confirms: The CIA’s ‘Black Sites’ Operated in Poland* (Sept. 7, 2014), <http://globalvoicesonline.org/2014/09/07/the-european-court-confirms-the-cias-black-sites-operated-in-poland/>.

124. *Id.*

125. *Id.*

connect between the Polish civil society and the Polish government.¹²⁶ Because of this judgment and the negative attention associated with it, the Polish government may be more inclined to refrain from engaging with the CIA on similar projects. Skeptics, however, remain concerned about the judgment's effectiveness as a deterrent of future interrogation practices.¹²⁷

C. Concerns about CIA Oversight and Zubaydah's Effect on U.S. Foreign Policy

Traditionally, there has been a lack of Congressional oversight over the CIA and its activities abroad, allowing the Executive Branch to take free reign over the intelligence group.¹²⁸ After September 11th, President Bush secretly authorized the CIA's use of "enhanced interrogation techniques" against suspected combatants.¹²⁹ The media attention given to the war, coupled with terrorism-focused shows such as the Fox Show "24" and public statements regarding the effectiveness of enhanced interrogation techniques, helped normalize torture.¹³⁰ This normalization was so strong within the U.S. that even following the events of Abu Ghraib prison, a poll showed that 35% of Americans still felt like torture was acceptable against suspected terrorists.¹³¹

On January 22, 2009, shortly after taking office, President Obama issued Executive Order 13491 ("Order").¹³² The Order directed all heads of departments and agencies to comply with requirements outlined in Army Field Manual 2-22.3 in their interrogations, ensuring the humane treatment of detainees.¹³³ Additionally, the Order directed the CIA to cease its operations of black-sites and to refrain from creating such sites in the future.¹³⁴ The Order also created an interagency task force for the purpose of reviewing interrogation and transfer polices and issuing rec-

126. *Id.*

127. *Id.*

128. Lauren Fox, *Spy Game: Why Congress is Limited in Its CIA Oversight*, U.S. NEWS AND WORLD REPORT (Mar. 12, 2014, 5:33 PM), <http://www.usnews.com/news/articles/2014/03/12/spy-game-why-congress-is-limited-in-its-cia-oversight>.

129. Alfred W. McCoy, *Impunity at Home, Rendition Abroad*, HUFFINGTON POST POLITICS (Sept. 14, 2012), http://www.huffingtonpost.com/alfred-w-mccoy/extraordinary-rendition-torture_b_1775438.html.

130. *Id.*

131. *Id.*

132. Exec. Order No. 13491 (Jan. 22 2009).

133. *Id.* at 2-5.

134. *Id.* at 6.

ommendations on such practices.¹³⁵ While Executive Order 13491 seemed to be a step in the right direction in addressing the CIA's torture of detainees, some argue that it has fallen short of addressing all of the CIA's extrajudicial practices.¹³⁶ Skeptics believe that the Order did not disavow the practice of extraordinary rendition, but was worded in such a way as to "preserve the CIA's authority to detain terrorist suspects on a short-term transitory basis prior to rendering them to another country for interrogation or trial."¹³⁷

Understandably, concerns may remain about the effectiveness of the *Zubaydah* judgment as a disincentive for foreign states' continued collaboration with the CIA and for the CIA's stop to extrajudicial transfers and torture. While *Zubaydah* may call for greater government accountability, it may also motivate the CIA to conceal its practices. Some reports suggest that the CIA continued to engage in extra-judicial detentions and interrogations even after President Obama issued Executive Order 13491.¹³⁸ In fact, in October 2013, the New York Post reported that the Obama Administration was operating transient black-sites via warships.¹³⁹ By keeping detainees in international waters, the CIA would be able to circumvent not only U.S. domestic law, but also potentially the domestic law governing other foreign states.¹⁴⁰

If the CIA continues to engage in these practices, despite public condemnation and the ECtHR's holding in *Zubaydah*, the CIA may potentially provide a strong financial incentive for foreign governments to continue collaboration with CIA. In the early 2000s, the Polish government allegedly threatened to discontinue extrajudicial transfers of al Qaeda suspects to Polish black sites for the CIA.¹⁴¹ However, according to a U.S. Senate report, the CIA persuaded Poland to continue its

135. *Id.* at 6, 8.

136. See Tom Kutsch, *Amid CIA Spying Scandal, a question of accountability on torture*, AL JAZEERA AMERICA (Mar. 13, 2014, 11:14 AM), <http://america.aljazeera.com/articles/2014/3/13/amid-cia-spying-scandal-a-question-of-accountability-on-torture.html>; see also Kenneth Brooker, *Closing Guantanamo: The Inconvenient Legal Truth*, THE INVESTIGATIVE PROJECT ON TERRORISM (Nov. 2009), <http://www.investigativeproject.org/1542/closing-guantanamo-the-inconvenient-legal-truth>.

137. Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the post 9-11 United States* 48 (2014), Google Books.

138. *Id.* at 9.

139. Associated Press, *Warships are the new interrogation 'black sites,'* N.Y. POST (Oct. 8, 2013), <http://nypost.com/2013/10/08/warships-are-the-new-black-sites-for-terror-interrogations/>.

140. *Id.*

141. Christian Lowe & Wiktor Szary, *CIA paid Poland to ease qualms over secret prison: Senate Report*, REUTERS (Dec. 9, 2014), <http://www.reuters.com/article/2014/12/10/us-usa-cia-torture-poland-idUSKBN0JO03320141210>.

cooperation by paying the Polish government a sizable sum of money.¹⁴² The *Washington Post* reported that two senior CIA officials purportedly paid the Polish government fifteen million dollars to allow the CIA to operate its black-site on Polish land.¹⁴³ In comparison, the ECtHR's judgment against Poland awarded Zubaydah, and fellow detainee, Abd al-Rahim al-Nashiri each 100,000 euros, roughly amounting to \$135,000.¹⁴⁴ The ECtHR also awarded Zubaydah an additional 30,000 euros, about \$34,000, to cover his costs.¹⁴⁵ These figures, while substantial, do little to compare to the sizable payoff received by the Polish government from the CIA.¹⁴⁶

Additionally, there will always be potential national security issues which may encourage the CIA to continue to cover-up its practices. Robert Grenier, a veteran CIA officer and a previous top counterterrorism official during the Bush Administration, believed that Democrats were apprehensive about releasing the Senate's investigative report on the CIA's detainment and interrogation practices because of the growing threat of the Islamic State, or ISIS.¹⁴⁷ He stated that, "At a time when ISIS is on the march and beheading American journalists, some Democrats apparently think now is not the time to be advocating going soft on terrorists."¹⁴⁸

Moreover, the interest of foreign states in preserving political relations may also provide incentive to continue collaboration with the CIA and its practices. After public exposure of the CIA's activities, world leaders found themselves in the difficult position of balancing public perception and political relations.¹⁴⁹ While compelled to express "some level of regret" about the CIA's torture, especially if there was evidence implicating the countries' own involvement, leaders knew they also had

142. Adam Goldman, *The hidden history of the CIA's prison in Poland*, WASH. POST 1 (Jan. 23, 2014), http://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html.

143. *Id.*

144. *Poland 'helped in CIA rendition,' European court rules*, BBC NEWS 3 (Jul. 24, 2014), <http://www.bbc.com/news/world-europe-28460628>.

145. *See Id.*

146. *See Low & Szary, supra* note 141.

147. Ali Watkins & Ryan Grim, *White House Chief of Staff Negotiating Redaction of Torture Report*, HUFFINGTON POST 3 (Oct. 21, 2014, 1:02 PM), http://www.huffingtonpost.com/2014/10/21/white-house-cia-torture_n_6018488.html.

148. *Id.*

149. Akbar Ahmed, *From Blame Game to Half Confessions, How Global Leaders Are Reacting To Torture Report*, HUFFINGTON POST 2 (Dec. 15, 2014, 12:50 PM), http://www.huffingtonpost.com/2014/12/15/torture-report-international-reaction_n_6327694.html.

to “tread carefully” as to not alienate the U.S., a global power many countries want to remain aligned with.¹⁵⁰

The potential impact of the *Zubaydah* judgment may not be fully realized, particularly concerning other ECHR states, until the judgment of the ECtHR has been finalized for some time. In October of 2014, Poland’s Foreign Ministry submitted an appeal to the ECtHR, requesting review of the *Zubaydah* judgment.¹⁵¹ While all the details of the appeal are not public, the Polish government purportedly based the appeal on procedural grounds.¹⁵² Specifically, Poland questioned the “standards of proof used by the court in determining that Abu Zubaydah False [was] in Poland, describing the evidence cited by the court as mostly circumstantial.”¹⁵³ Some believed there was a strong possibility that the case would proceed to the Grand Chamber in light of CIA information that has recently become public.¹⁵⁴ Specifically, given the release of the U.S. Senate Intelligence Committee’s report on the CIA’s Extraordinary Rendition Program, many believed Poland, along with other similarly-accused Council of Europe countries, would find itself exposed to liability.¹⁵⁵ While details into the ECtHR’s decision are not public, on February 17, 2015, the ECtHR denied Poland’s request for review, a denial which some could only speculate was attributed to information revealed in the U.S. Senate Intelligence Committee’s investigation on the CIA.¹⁵⁶

D. *Senate Intelligence Committee Exposes CIA Torture*

In the mid to late 2000s, both the *Washington Post* and *New York Times* published stories regarding the CIA’s extrajudicial detention centers, and its destruction of videotapes depicting interrogations in which enhanced interrogation techniques were used.¹⁵⁷ Shortly thereafter, in

150. *Id.*

151. *CIA secret prison ruling sees Poland appeal to the European Human Rights Court*, RT 1-2 (Oct. 24, 2014, 4:45 PM), <http://rt.com/news/199052-poland-cia-prison-court/>.

152. *Id.*

153. Christian Lowe, *Under pressure over CIA jail, Poland sends out mixed messages*, REUTERS, (Dec. 23, 2014, 9:42 AM), <http://www.reuters.com/article/2014/12/23/us-usa-cia-torture-poland-idUSKBN0K115O20141223>.

154. *Id.*

155. Ahmed, *supra* note 149.

156. Press Releases, *Open Society Foundations, Eur. Ct. Rejects Pol.’s Bid to Challenge CIA Black Site Ruling*, OPEN SOC’Y FOUND. (Feb. 17, 2015), <https://www.opensocietyfoundations.org/press-releases/european-court-rejects-polands-bid-challenge-cia-black-site-ruling>.

157. *The history of the CIA detention and interrogation program*, L.A. TIMES 4 (Dec. 9, 2014, 8:31 AM), <http://touch.latimes.com/#section/-1/article/p2p-82233870/>.

March 2009, the U.S. Senate Intelligence Committee, which is tasked with overseeing the CIA, voted to open an official investigation into the CIA's detention and interrogation program.¹⁵⁸ The five-year investigation, spanning six years of CIA activity, examined over six million government documents and cost \$40 million.¹⁵⁹ In April 2014, after a vote of 11-3, the Senate Intelligence Committee sent its executive summary, findings and conclusions, which spanned 6,7000 pages, to the White House for declassification review and public release.¹⁶⁰ On December 9, 2014, after months of contentious debate with the CIA over redaction of the Senate's report, the Senate publically released a 525-page summary of its findings.¹⁶¹

The declassified report detailed startling discoveries, including that the "use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation."¹⁶² Additionally, the "interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others."¹⁶³ The report also described many of the types of interrogation techniques used against detainees, including Abu Zubaydah, such as sleep deprivation, waterboarding, prolonged standing, and exposure to cold.¹⁶⁴ According to a legal memorandum ordered released by President Obama, Zubaydah alone was subject to water-boarding eighty-three times while in CIA custody.¹⁶⁵ At least one detainee, according to the Senate's report, died while detained by the CIA, likely as a result of hypothermia.¹⁶⁶

For years, Polish officials denied involvement in black-site operations.¹⁶⁷ However, while the Senate report did not specifically identify Poland as a black-site host, following the Senate report's release, former

158. *Id.*

159. Jeff Zeleny, *CIA Also Blamed for \$40 Million Cost of Torture Report*, ABC NEWS (Dec. 20, 2014 12:06 PM), <http://abcnews.go.com/Politics/cia-torture-report-cost-40-million/story?id=27505145>.

160. *The history of the CIA detention and interrogation program*, *supra* note 157.

161. *See id.*; *see also*, *Senate Report on CIA torture*, CNN (Dec. 9, 2014), <http://www.cnn.com/interactive/2014/12/politics/torture-report/>.

162. CNN Library, *CIA Torture Report*, CNN (Jan. 29, 2015), <http://www.cnn.com/2015/01/29/us/cia-torture-report-fast-facts/>.

163. *Id.*

164. *Id.*

165. Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES (Apr. 19, 2009), http://www.nytimes.com/2009/04/20/world/20detain.html?_r=0.

166. *CIA Torture Report*, *supra* note 162.

167. Carol J. Williams, *Polish ex-leaders confess complicity after CIA torture report*, L.A. TIMES (Dec. 10, 2014), <http://touch.latimes.com/#section/-1/article/p2p-82246787/>.

Polish President Aleksander Kwasniewski admitted via radio interview that he approved of the CIA's operations on Polish soil at the urging of President George W. Bush following the September 11th attacks.¹⁶⁸ This concession may have severely curtailed Poland's appeal with the ECtHR since Poland's appeal purportedly stated that it was "unproven a CIA jail operated in Poland and that if it had, officials might not have been aware."¹⁶⁹ Poland's Foreign Ministry stated that new information would be taken into consideration, presumably referring to both Kwasniewski's statement and the Senate's report.¹⁷⁰ Although it is not certain whether the ECtHR did consider these new findings in its decision, it rejected Poland's request for review in mid-February.¹⁷¹ Following the ECtHR's denial, Polish minister Grzegorz Schetyna said, in reference to abiding by the ECtHR's judgment, "We have to do it. We are a law-abiding country," on the state-owned Polish Radio.¹⁷² Schetyna also went on to say that Poland will compensate Zubaydah, along with al-Nashiri, within the next month, although there has been no update as to whether the Polish government has followed through on that promise.¹⁷³ Although finalization of the ECtHR judgment is significant for Zubaydah and other detainees like al-Nashiri, Zubaydah still seeks relief, asking the U.S. government to press charges against him, or to release him from his state of limbo in Guantanamo Bay.¹⁷⁴ Zubaydah's defense attorney, Joseph Marguiles, a law professor at University of Northwestern School of Law, wrote a letter to the U.S. military commissions requesting for proceedings against Zubaydah at the earliest opportunity.¹⁷⁵

The Senate report has not only had significant implications on the case of Abu Zubaydah, but may have implications on similar cases pending in the ECtHR. As previously mentioned, Zubaydah also filed

168. *Id.*

169. Lowe, *supra* note 153.

170. *Id.*

171. Nikolaj Nielsen, *European court confirms Polish complicity in CIA rendition*, EUOBSERVER (Feb. 18, 2015), <https://euobserver.com/justice/127697>.

172. Rich Lyman, *Poland to Pay \$262,000 to Inmates Held at Secret C.I.A. Prison*, N.Y. TIMES (Feb. 18, 2015), http://www.nytimes.com/2015/02/19/world/europe/poland-court-cia-prison.html?ref=topics&_r=0.

173. *Id.*

174. Phil Hirschorn, *Abu Zubaydah begs Guantanamo prosecutors to charge him*, CBS NEWS (May 16, 2012, 7:50PM), <http://www.cbsnews.com/news/abu-zubaydah-begs-guantanamo-prosecutors-to-charge-him/>.

175. *Id.*

suit against Lithuania for identical charges.¹⁷⁶ Following the Senate report's release, Prime Minister of Lithuania, Algirdas Butkevicius, called on Washington to answer whether the CIA used Lithuania to house and torture prisoners.¹⁷⁷ In 2001, the Lithuanian parliament held its own internal investigation into the CIA's activities on Lithuanian soil.¹⁷⁸ While it was determined that the CIA flew in and out of the country, the investigation, headed by Arvydas Anusauskas, could not determinatively conclude because of lack of U.S. cooperation whether or not the CIA housed prisoners there.¹⁷⁹ Prime Minister Butkevicius is currently seeking to reopen the investigation.¹⁸⁰ Meanwhile, Lithuania recently opened a new investigation concerning the possible illegal border crossing of Mustafa al-Hawsawi, another CIA detainee.¹⁸¹ Like Poland, the Senate Report indicated that the U.S. government paid Lithuanian, via "complex mechanisms," a substantial sum of money at least amounting to \$1 million in appreciation of establishing the "detention centre Violet."¹⁸²

While the Senate's report may compel other Council of Europe members to hold the CIA accountable for its actions, it has also compelled various domestic and international groups to action.¹⁸³ Since the report's declassification, civil rights groups, both in the U.S. and abroad, have been encouraging the prosecution of individuals who have used enhanced interrogation techniques.¹⁸⁴ Similarly, the Inter-American Commission for Human rights, a regional enforcer of international law, "called on the United States to 'carry out a full investigation . . . and prosecute and punish all persons within its jurisdiction responsible for acts of torture or other cruel, inhuman or degrading treatment or punishment.'"¹⁸⁵ The Commission observed that "the lack of punishment encourages practices that erode respect for integrity and human digni-

176. *Abu Zubaydah v. Lithuania*, App. No. 4645/11 Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115816>.

177. *Lithuania presses US to say whether it tortured prisoners there*, WORLD BULLETIN (Dec. 10, 2014), <http://www.worldbulletin.net/haber/150364/lithuania-presses-us-to-say-whether-it-tortured-prisoners-there>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Eric Tucker, *CIA report revives legal debate on interrogation*, MILITARYTIMES (Dec. 14, 2014), <http://www.militarytimes.com/story/military/capitol-hill/2014/12/14/cia-report-revives-legal-debate-on-interrogation/20400187/2>.

184. *Id.*

185. Eric Bradner, *Obama to do 'everything I can' to close Gitmo*, CNN (Dec. 21, 2014), <http://www.cnn.com/2014/12/21/politics/obama-to-do-everything-i-can-to-close-gitmo/>.

ty.”¹⁸⁶ The American Civil Liberties Union and Human Rights Watch also urged Attorney General Eric Holder to conduct a criminal investigation into the CIA’s practices.¹⁸⁷

The Senate report has also generated mixed feelings along the partisan divide regarding CIA oversight, and has affected the way in which parties believe the U.S. administration should handle overseas detention facilities such as Guantanamo Bay.¹⁸⁸ Democrats were fairly unified in their support of the transparency of CIA torture practices.¹⁸⁹ However, the Republican position, which is still mainly opposed to increased transparency, has not been as cohesive, with various members such as Senator Rand Paul (R-Ky.) and Senator John McCain (R-Ariz.) supporting the report’s declassification.¹⁹⁰ Even after the report’s release, the stance of the parties has remained firm regarding the CIA’s handling of national security.¹⁹¹ Late last December, President Obama reaffirmed his desire to close Guantanamo Bay, saying: “As Americans, we have a profound commitment to justice—so it makes no sense to spend three million dollars per prisoner to keep open a prison that the world condemns and terrorists use to recruit . . . I will not relent in my determination to shut it down.”¹⁹² Republicans, on the other hand, continue to oppose the transfer of prisoners from Guantanamo to other facilities, as well as Guantanamo’s closure.¹⁹³ This past January, GOP Senators introduced legislation seeking to block President Obama’s attempt to shut down the detention center.¹⁹⁴

E. Zubaydah: Changing Torture Rhetoric and Reaffirming Jus Cogens

Along with the recently released Senate Intelligence Report,

186. *Id.*

187. *Id.*

188. Burgess Everett, *Torture report divides Republicans*, POLITICO (Dec. 9, 2014), <http://www.politico.com/story/2014/12/cia-torture-report-republicans-react-113432>.

189. *Id.*

190. *Id.*

191. Rebecca Nelson, *Obama Again Promises to Close Guantanamo Bay In State of the Union Speech*, NATIONAL JOURNAL (Jan. 20, 2015), <http://www.nationaljournal.com/white-house/2015/01/20/Obama-Again-Promises-Close-Guantanamo-Bay-State-Union-Speech>.

192. *Id.*; Bradner, *supra* note 185.

193. Dan Roberts, *Senate passes legislation barring transfer of Guantánamo prisoners to US*, THE GUARDIAN (Nov. 10, 2015), <http://www.theguardian.com/us-news/2015/nov/10/senate-defense-budget-bill-bans-transfer-guantanamo-bay-prisoners-to-us>.

194. Jeremy Herb, *GOP senators move to keep Gitmo open*, POLITICO (Jan. 13, 2015), <http://www.politico.com/story/2015/01/republican-senators-guantanamo-114223.html>.

Zubaydah has and likely will continue to help change the rhetoric regarding “enhanced interrogation” techniques. Prior to the *Zubaydah* judgment, according to an April 2013 *New York Times* article, “news organizations have wrestled with whether to label the brutal methods unequivocally as torture in the face of some government officials’ claims that they were.”¹⁹⁵ Shortly following *Zubaydah*, at least one major news outlet, *The Times*, per a statement released by Dean Baquet, its executive editor, recalibrated its language, labeling some of the practices the CIA engaged in as “torture.”¹⁹⁶ Not only will *Zubaydah* help to change the language associated with the Bush Administration’s normalization of torture, but it is likely that the ECtHR’s judgment in *Zubaydah* will help to reaffirm *jus cogens*, a preemptory norm in international law.¹⁹⁷ In contrast to customary international law, which may be confined to a specific region, *jus cogens* must be binding upon all states, and is a norm from which no derogation is permitted.¹⁹⁸ In addition, the norm must be “accepted and recognized by the international community of States as a whole.”¹⁹⁹ While no international authorities explicitly list which laws are considered “jus cogens,” Article 53 of the Vienna Convention provides some guidance in identifying *jus cogens* from mere customary international law.²⁰⁰ During the Vienna Conference, the International Law Commission included in its final report illustrations of some of the most recognizable *jus cogens* norms, including the Charter of the United Nations principles prohibiting the unlawful use of force.²⁰¹ Thus, the prohibition against torture is considered a *jus cogens* norm.²⁰² The ECtHR’s decision in *Zubaydah* will help

195. Scott Shane, *U.S. Engaged in Torture After 9/11, Review Concludes*, THE NEW YORK TIMES (April 16, 2013), <http://www.nytimes.com/2013/04/16/world/us-practiced-torture-after-9-11-nonpartisan-review-concludes.html?pagewanted=all>.

196. Dean Baquet, *The Executive Editor on the Word ‘Torture,’* N.Y. TIMES (Aug. 7, 2014), http://www.nytimes.com/times-insider/2014/08/07/the-executive-editor-on-the-word-torture/?_r=0.

197. Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications on National and Customary Law*, 15 EJIL 97, 110 (2004), <http://www.ejil.org/pdfs/15/1/349.pdf>.

198. Rafael Nieto-Navia, *International Preemptory Norms (Jus Cogens) And International Humanitarian Law*, 10 (Lal Chand Vohrah et al. eds., 2003), <http://www.iccnw.org/documents/WritingColombiaEng.pdf>.

199. *Id.* at 11.

200. *Id.*

201. *Id.* at 13.

202. Wet, *supra* note 197, at 98.

202. *Id.* at 99.

to reaffirm torture as a preemptory norm.²⁰³ Further, as previously discussed, now that the *Zubaydah* judgment is final, the case may even help to expand the prohibition against torture *jus cogens* norm to include complicity of states, even if states were not actively involved in carrying out the torture.²⁰⁴

F. Ensuring Further Accountability against Practices of Torture

To ensure that ECHR member states adhere to *jus cogens* norms prohibiting torture, the ideal recommendation to ensure complicity would be to pressure states who have been suspected of collaborating with the CIA to conduct internal criminal investigations into their government's involvement. Further, international bodies, other states, and various human rights groups should pressure ECHR member states to refrain from collaborating with the U.S. regarding any further secret detention and rendition activity. Simultaneously, the public should place pressure on the CIA to refrain from engaging in such covert operations, which circumvent domestic law and international preemptory norms. Other recommendations for the U.S. to ensure complicity with its duties under international law include holding the U.S. government responsible for the CIA's acts of torture under the International Covenant on Civil and Political Rights ("ICCPR").²⁰⁵ Article 7 of the ICCPR, which the U.S. ratified in 1992, forbids "torture or cruel, inhuman or degrading treatment or punishment."²⁰⁶ Additionally, while the CIA issued a public apology to the Senate Intelligence Committee, the CIA should issue a public statement acknowledging their wrongdoing.²⁰⁷ Further, the Department of Justice should conduct a criminal investigation regarding the CIA's activities instead of evading the allocation of responsibility and solely conducting an internal investigation. Moreover, the Senate Intelligence Committee should continue to urge further declassification of the 6,700 page report concerning the CIA's detention and interroga-

203. *Husayn* Eur. Ct. HR at 66.

204. *Id.* at 212.

205. Paula Kweskin, et al., *The International Legal Landscape of Extraordinary Rendition*, N.C. STOP TORTURE NOW, <http://www.law.unc.edu/documents/clinicalprograms/theinternationallegallandscapeofextraordinaryrendition.pdf>.

206. *Id.*

207. Nick Gass, *Report: Brennan drafted apology to senators for CIA hacking*, POLITICO (Aug. 12, 2015), <http://www.politico.com/story/2015/08/john-brennan-cia-apologizes-hacking-dianne-feinstein-121296>.

tion program. Lastly, should the CIA oppose Congressional efforts at increased CIA oversight, the Senate should perhaps attempt to pass legislation limiting the CIA's budget in order to encourage complicity with domestic and international laws.

If ECHR member states are unable to adhere to the ideal recommendations set forth above, at bare minimum, the ECtHR should continue to impose compensatory judgments on states found to be complicit in the torture of individuals, in violation of the ECHR, like Poland. Poland itself should be compelled by the ECHR to complete its internal criminal investigation. Additionally, the ECtHR and Poland should put public pressure on the U.S. to provide any documentation that is needed for Poland to continue its criminal investigations. As for bare minimum U.S. recommendations, the U.S. should implement stronger Congressional oversight of CIA activity and work to better delineate the boundaries of the Executive in overseeing and managing the CIA.

V. CONCLUSION

Post September 11th, publicity regarding the CIA's "enhanced interrogation techniques" and operation of black-sites through the Extraordinary Rendition program has prompted public accountability for the organization's institutional practices of torture. In addition to the recently released Senate Intelligence Committee Report detailing the CIA's ineffective enhanced interrogation techniques, which amounted to torture, the *Husayn Abu Zubaydah v. Poland* judgment has helped to create international precedent, holding violators of international law responsible, both in the Council of Europe, but also within the United States as well, for inhumane acts of the CIA on foreign territory.²⁰⁸ Because of *Zubaydah*, pressure is being exerted on Poland, and other states subject to similar allegations, to hold individuals responsible for complicity in the torture of *Zubaydah*, as well as other CIA detainees like Abd al Rahim al-Nashiri.²⁰⁹ Further, the negative publicity surrounding the ECtHR's judgment has and will continue to help increase accountability within the US and further facilitate the change of rhetoric under the Bush Administration from one of "enhanced interrogation techniques" to that of "torture." Resultingly, *Zubaydah* will continue to establish *jus cogens*, preemptory norms in the international community,

208. *Abu Zubaydah v. Lithuania*, *supra* note 176.

209. *Husayn* Eur. Ct. HR at 66.

against the complicity and practice of unlawful rendition, detention and interrogation of suspected terrorists.