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TEACHING INTERNATIONAL LAW IN PURSUIT OF JUSTICE

*Beth Van Schaack**

As this Symposium reveals,¹ there are many ways the academy can contribute to, and catalyze, the identification, development, and enforcement of international law. Indeed, the Statute of the International Court of Justice² acknowledges the central role that academics (a.k.a. “the most highly qualified publicists”) can play in elucidating the major sources of international law, particularly when it comes to ascertaining customary international law (which requires a rigorous empirical analysis of State practice coupled with *opinio juris*³), investigating the drafting history and subsequent interpretation of treaties, and identifying general principles of law from a comparative analysis of the world’s legal systems.⁴ When it comes to the practice of international law, human rights and international justice clinics give students the opportunity to learn international legal doctrines, methodologies, and the structure of the system. Clinical students regularly participate in litigation under the Alien Tort Statute⁵ and related statutes as co-counsel or on behalf of *amici curiae*,⁶ and academics routinely appear as expert witnesses in cases in which international or comparative law will be raised (or may even be

* Leah Kaplan Visiting Professor of Human Rights, Stanford Law School. The ideas expressed herein, and any errors, are solely my own. In preparing this article, I benefited greatly from the astute comments of Lisa Reinsberg, founder and director of the International Justice Resource Center (a great resource for students) and Chris Moxley (SLS ’22). I am grateful to Kelly Kim (Stanford ’23) for her excellent research assistance. For the case study idea, I am indebted to Jenny Martinez, now Dean of Stanford Law School, with whom I used to team teach the introductory “Human Rights: Theory and Practice” course.

1. The Academy and International Law: A Catalyst for Change and Innovation (Sept. 24–25, 2021).
2. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993 [hereinafter ICJ Statute].
3. Mosiés Montiel Mogollón, *Fantastical Opinio Juris and How to Find It*, OPINIO JURIS (June 23, 2021), <http://opiniojuris.org/2021/06/23/fantastic-al-opinio-juris-and-how-to-find-it/> [<https://perma.cc/AUV2-8AP4>].
4. ICJ Statute, *supra* note 2, at art. 38(1)(d).
5. 28 U.S.C. § 1350.
6. *See, e.g.*, Brief of International Law Scholars, Former Diplomats, and Practitioners as *Amici Curiae* in Support of Respondents at 1, *Nestlé USA, Inc. v. John Doe I*, 593 U.S. (2021) (No. 19-416 & 19-453).

dispositive).⁷ University-based international law centers have sponsored treaty drafting exercises⁸ and track II negotiations⁹ aimed at the progressive development and application of the law. Programs such as the Franklin Fellowship enable academics to serve in government, where the content and application of international law is applied—and contested—on a daily basis.¹⁰ Finally, those of us who teach the subject have the august responsibility of training the next generation of international lawyers and nurturing students’ natural instincts toward justice. In this regard, I have always felt that my students represent my most important, and enduring, legacy as an international lawyer. The academy is charged with creating a cadre of committed international lawyers who will be rigorous in their research and analysis, culturally competent while working within legal systems unlike our own, and relentless in their pursuit of justice for those who most need it.

Teaching international law has never been more stimulating. Gone are the days when every course in international law began with the existential question: “Is international law really law?”¹¹ Now, professors of international law are beset with the opposite problem: there is too much material to cover in a single quarter, necessitating a careful curation for the general course and the development of additional specialized and upper division offerings on discrete subsets of the field.¹² And, just as Professor Laurence H. Tribe realized that constitutional law contains too many fissures, discontinuities, and indeterminate evolutions to be packaged in a single treatise or captured by a grand

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7. See FED. R. CIV. P. 44.1.
 8. Washington University in Saint Louis School of Law’s Crimes Against Humanity Initiative, launched under the aegis of the Whitney R. Harris World Law Institute, is an impressive case in point. See Madaline George, *Prospects for a Convention on the Prevention and Punishment of Crimes Against Humanity*, OPINIO JURIS (Oct. 8, 2019), <http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/> [https://perma.cc/2HAX-5SPE].
 9. See, e.g., THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION: MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 2003–2009 (Stefan Barriga et al. eds., 2009).
 10. See *Franklin Fellows Program*, U.S. DEP’T OF STATE, <https://careers.state.gov/work/fellowships/franklin-fellows/> [https://perma.cc/UK89-9RR2].
 11. See Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT’L L. 70, 74 (1999) (“[I]s international law really law? The pitiless refrain haunts us at every turn.”); Scott Horton, *Is International Law Really Law? Six Questions for Michael Scharf*, HARPER’S MAG. (Mar. 15, 2010), <https://harpers.org/2010/03/is-international-law-really-law-six-questions-for-michael-scharf/> [https://perma.cc/L85V-JGPN].
 12. See ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 51 (2017) (discussing the multifarious ways that international law is taught globally).

unified theory,¹³ so too is international law experiencing a period of fragmentation and great flux, hardening in some areas while being forsaken in others.¹⁴ The challenge of enforcement remains acute given the still vast chasm between international rules and rights on the one side and effective mechanisms for implementation and adjudication on the other.¹⁵ To truly master international law, students must grasp the continuing impact of geo-political power inequalities; the vagaries of State consent; the uneven incorporation of international law into national legal frameworks; and the architecture of the international law system—marked as it is by both decentralization and redundancy. At the same time, students must cultivate creativity and persistence—intangible virtues embodied by effective advocates operating within any legal system. Finally, human rights cases also require a trauma-informed approach to keep clients' well-being at the center of the representation.

On the first day of class, cognizant that students may not be familiar with the human rights system or have completed any advance reading, I introduce the harrowing story of Khalid El-Masri through the vehicle of his poignant op-ed in the *L.A. Times*.¹⁶ According to the facts that have emerged, El-Masri—a German citizen of Lebanese descent—was detained in Macedonia in 2003 because his name resembled that of a known terrorism suspect.¹⁷ He was transferred to the custody of the Central Intelligence Agency (“CIA”) in early 2004 and then transported to Afghanistan, where he was held *incommunicado* in a black site (the “Salt Pit”).¹⁸ During this ordeal, he

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13. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291–92, 296, 305 (2005).
 14. Vincy Fon & Francesco Parisi, *Stability and Change in International Customary Law*, 17 SUP. CT. ECON. REV. 279, 280 (2009).
 15. See, e.g., Crina Baltag & Ylli Dautaj, *Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS*, 45 FORDHAM INT’L L.J. 1, 2–4 (2021).
 16. Khaled El-Masri, *America Kidnapped Me*, L.A. TIMES (Dec. 18, 2005), <https://www.latimes.com/archives/la-xpm-2005-dec-18-oe-masri18-story.html> [<https://perma.cc/T9JQ-RXWU>]. See also *Timeline: Khaled El-Masri Case*, OPEN SOC’Y JUST. INITIATIVE, <https://www.justiceinitiative.org/publications/timeline-khaled-el-masri-case> [<https://perma.cc/5NXC-R76B>].
 17. *El-Masri v. Macedonia*, OPEN SOC’Y JUST. INITIATIVE (July 15, 2021), <https://www.justiceinitiative.org/litigation/el-masri-v-macedonia> [<https://perma.cc/6DNH-RR5G>].
 18. Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST (Dec. 4, 2005), <https://www.washingtonpost.com/archive/politics/2005/12/04/wrongful-imprisonment-anatomy-of-a-cia-mistake/939bc95a-4031-4f83-a916-aaacc9acc8e7/> [<https://perma.cc/AJ7L-6NLN>]. See also Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, WASH. POST (Mar. 3, 2005), <https://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>, [<https://perma.cc/X9SR-HZS9>].

was allegedly beaten, sodomized, hooded, sedated, repeatedly interrogated, and denied access to a lawyer or to consular assistance, despite repeated requests and fervent assertions of his innocence.¹⁹ He was later “reverse-rendered” to Albania,²⁰ given €14,450 (more than the \$3,000 he had in his possession when captured but just under the amount that might raise eyebrows at the border), and forced to make his way back to Germany.²¹ During the period in which he was disappeared, he apparently had no contact with his family or the German consular services.²² Thinking herself abandoned, his wife relocated to Lebanon with their children when he did not return from his trip to Macedonia.²³ It later emerged that the United States knew El-Masri was one of several individuals who had been wrongfully detained in the aftermath of the September 11th attacks.²⁴ Even with this knowledge, it still took two months to release him once then-National Security Adviser Condoleezza Rice intervened.²⁵ It appears that only then was Germany was informed of the fate of its citizen.²⁶ The CIA’s Office of Inspector General Report²⁷ and the executive summary of the Senate Select Committee on Intelligence report (“SSCI Report”),²⁸ among other accounts, both admit that El-Masri’s detention

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19. OPEN SOC’Y JUST. INITIATIVE, *supra* note 17.
 20. James A. Goldston, *Rendition Condemned*, N.Y. TIMES (Dec. 13, 2012), <https://www.nytimes.com/2012/12/13/opinion/condemnation-of-americas-abduction-of-khaled-el-masri.html> [<https://perma.cc/BEL9-LU4Q>].
 21. SCOTT PELLEY, TRUTH WORTH TELLING: A REPORTER’S SEARCH FOR MEANING IN THE STORIES OF OUR TIMES 355 (2019).
 22. OPEN SOC’Y JUST. INITIATIVE, *supra* note 17.
 23. *Id.*
 24. Scott Shane, *Amid Details on Torture, Data on 26 Who Were Held in Error*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/us/politics/amid-details-on-torture-data-on-26-held-in-error.html> [<https://perma.cc/FKF6-S5LB>].
 25. OPEN SOC’Y JUST. INITIATIVE, *supra* note 17.
 26. Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the ‘War on Terror’*, in HUMAN RIGHTS ADVOCACY STORIES 535 (Deena R. Hurwitz & Margaret Satterthwaite eds., 2009).
 27. CENT. INTEL. AGENCY OFF. INSPECTOR GEN., REPORT OF INVESTIGATION: THE RENDITION AND DETENTION OF GERMAN CITIZEN KHALID AL-MASRI ¶¶ 6, 12 (2007) [hereinafter CIA OIG REPORT] (“The al-Masri operation was characterized by a number of missteps from the beginning that were compounded by subsequent failures of both legal and management oversight. . . . His rendition and long detention resulted from a series of breakdowns in tradecraft, process, management, and oversight.”).
 28. See S. REP. NO. 113-228, at 128–29 (2012); see also Memorandum from John O. Brennan, Director, Cent. Intel. Agency, to Dianne Feinstein & Saxby Chambliss on CIA Comments on Senate Select Comm. on Intel. Rep. on Rendition, Det. & Interrogation Program 2 (June 27, 2013).

was based on a series of cascading mistakes and failures of oversight followed by “bureaucratic infighting” once it appeared that he was innocent of any wrongdoing.²⁹ The two individuals most involved with these events received only an oral admonition.³⁰

For this exercise, I provide the students with the following prompt:

You are a lawyer and the director of the national security and counterterrorism program for a major international non-governmental organization (“NGO”) called the Human Rights Initiative (“HRI”). HRI employs all the usual tools of human rights NGOs: report writing and “naming and shaming” campaigns to raise public awareness; lobbying national governments and international bodies; capacity building; and strategic litigation. HRI field offices are extremely important to its operations, and HRI takes care to be sensitive to local social and political conditions and tries to build relationships with governments and other civil society organizations in the countries in which it operates. HRI particularly prizes its ability to work with government officials on solving difficult human rights problems, and views its reputation as a reasonable and effective partner as an important, though intangible, asset. HRI has recently taken on Khalid El-Masri as a client. For class, please come prepared to discuss the following questions: What human rights violations are implicated by El-Masri’s experience? Who is responsible? Where might you pursue litigation? Against whom or which entity? How would you—as a practical matter—put together his case(s)? What other legal and advocacy options are available to you?

Once we are convened, the first question I pose relates to the rights violated. This is intuitive to the students, who variously invoke international human rights language and the domestic analogues they have studied in their criminal law or tort courses. They immediately identify the prohibitions against arbitrary detention,³¹ torture, and other forms of physical and psychological mistreatment. Students who

29. CIA OIG REPORT, *supra* note 27, ¶ 198.

30. S. REP. NO. 113-228, *supra* note 28, at 129–30 n.762.

31. Students can discuss what renders a detention “arbitrary” under international law. The Working Group on Arbitrary Detention has determined that a deprivation of liberty is arbitrary if it falls within one or more categories: when it is impossible to identify the legal basis justifying the detention (Category I), when the deprivation of liberty infringes upon the ability to exercise other rights or freedoms (Category II), when the individual is deprived of fair trial rights (Category III), when the individual is a refugee or asylum seeker and is subjected to administrative custody without judicial review (Category IV), or when the detention is discriminatory (Category V). U.N. High Comm’r for Refugees, *Engaging with the Working Group on Arbitrary Detention*, ¶ 3 (Nov. 6, 2018).

have worked in Latin America will inevitably be familiar with the concept of the disappearance,³² which encapsulates much of what El-Masri experienced.³³ This occasions a discussion of the spectrum of harm recognized by international law, which includes torture at the extreme end and various forms of cruel, inhuman, or degrading treatment toward the other, and the difficulty of quantifying these gradations.³⁴ The lack of an equivalent to the tort of intentional (or even negligent) infliction of emotional distress offers an opportunity to discuss the central role that gravity plays in delineating the reach of international human rights and international criminal law.³⁵

Although the students invariably start with the violations of physical integrity rights experienced by El-Masri, many will also identify the secondary rights at issue: to be informed of the charges against you, to appear before a judge, and to enjoy due process, even when accused of heinous crimes. Occasionally, those who have studied public international law will raise the issue of consular rights³⁶ and *non-*

32. See generally Vladimir Hernandez, *Painful Search for Argentina's Disappeared*, BBC (Mar. 24, 2013), <https://www.bbc.com/news/world-latin-america-21884147> [<https://perma.cc/G4J4-6YMU>].

33. International Convention for the Protection of All Persons from Enforced Disappearances, Dec. 23, 2010, 2716 U.N.T.S. 3-4 [hereinafter ICPPED]. Although it was ratified by Albania in 2007, the treaty did not enter into force until 2010. Neither the United States nor Macedonia has ratified it. *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N. TREATY COLLECTION, https://treaties.un.org/page/s/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4 [<https://perma.cc/7TGX-NXNJ>].

34. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85, 113, 116 [hereinafter Torture Convention]. It can be useful to point out that the major human rights treaties, except the Torture Convention, prohibit torture and cruel, inhuman and degrading treatment ("CIDT") in the same provision. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."). As such, human rights institutions will often find a violation of Article 3 without parsing whether the conduct in question constituted torture *per se*. See, e.g., *Çelik v. Turkey*, App. No. 34461/07, EUR. CT. H.R. ¶ 44 (2011).

35. See MARGARET M. DEGUZMAN, SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW (2020).

36. Article 36 of the Vienna Convention establishes that nationals of Member States are entitled to communicate with consular personnel of their home state if taken into custody. Vienna Convention on Consular Relations, Mar. 19, 1967, 596 U.N.T.S. 261. See also *Medellín v. Texas*, 552 U.S. 491, 552 (2008).

*refoulement*³⁷ as well. Someone will invariably note that El-Masri's family might also have claims against those responsible for the disappearance of their loved one. This enables a discussion of the cognizability of economic, social, and cultural rights, such as the right to family,³⁸ as well as the overarching rights to a remedy and to judicial protection and the emerging right to truth.³⁹ Later in the course, we read cases in which the family members of victims and survivors are able to recover for the psychological and economic harm they experienced by virtue of harm to another.⁴⁰

Once the implicated rights are identified, I can map the corresponding treaties, highlighting which ones have been ratified by the United States and other States involved in this rendition. This occasions a quick discussion about the domestic enforcement of treaty

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37. This concept finds expression in the Refugee Convention and applies to those refugees who might face persecution were they to be returned to their home State and whom the State does not have a reasonable basis for regarding as a danger to the community. Convention Relating to the Status of Refugees art. 33, Apr. 22, 1954, 189 U.N.T.S. 137, 176. Someone like El-Masri, who would not qualify as a refugee *per se*, could invoke an analogous provision in the Torture Convention. See Torture Convention, *supra* note 34, at art. 3; Written Submissions on Behalf of Amnesty International and the International Commission of Jurists, *El-Masri v. The Former Yugoslav Republic of Maced.*, App. No. 39630/09 (May 16, 2012).
38. International Covenant on Economic, Social and Cultural Rights arts. 10–11, Jan. 3, 1976, 993 U.N.T.S. 3, 3–4.
39. Human Rights Council Res. 9/11, U.N. Doc. A/HRC/9/11, at 2 (Sept. 24, 2008); Human Rights Council Res. 12/12, U.N. Doc. A/HRC/12/12, at 2 (Oct. 12, 2009) (recognizing “the right of the victims of gross violations of human rights and the right of their relatives to the truth about the events that have taken place, including the identification of the perpetrators of the facts that gave rise to such violations.”); Rep. of the Working Grp. on Enforced & Involuntary Disappearances, U.N. Doc. A/HRC/16/48, ¶ 39 (Jan. 26, 2011). See also ICPPED, *supra* note 33, at art. 12.
40. See, e.g., *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 131, ¶¶ 160, 198 (Sept. 9, 2005) (holding that the State must provide compensation as well as free medical and psychological care to the next of kin of two sisters disappeared during the Salvadoran dirty war). The *Serrano Cruz Sisters* case is also ideal for teaching temporal jurisdiction as well as the concept of a continuing violation. See also Rep. of the Working Grp. on Enforced & Involuntary Disappearances, *supra* note 39, ¶ 39.

norms, the challenges of treaty ratification in the U.S. Senate,⁴¹ and the United States' exceptionally dualist approach.⁴²

The next major question requires students to identify the individuals and entities responsible for this chain of events. The students will start with the United States itself, focusing in on those officials in leadership positions who devised and authorized the extraordinary rendition program (e.g., George Tenet who headed the CIA),⁴³ the lawyers who offered legal cover to their clients both before and after policies and practices were in place (e.g., John Yoo of Berkeley Law),⁴⁴ the psychologists who peddled dubious justifications and theories (e.g., John "Bruce" Jessen and James Mitchell),⁴⁵ and the individual operatives deployed to carry out the operation.⁴⁶ Attention then shifts to the other States implicated in the rendition—Macedonia, Afghanistan, and, to a lesser extent, Albania—as well Germany, which arguably fell short when it comes to offering diplomatic protection to

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41. John Cary Sims, *The Asymmetrical Nature of the U.S. Treaty Processes and the Challenges that Poses for Human Rights*, 30 *HAMLIN J. PUB. L. & POL'Y* 223, 223 (2008) ("The structural and political realities of U.S. treaty processes raise grave difficulties for efforts to make the United States a full participant in the global system of human rights treaties.").
 42. Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 530–31 (1999). *But see* David Sloss, *Domestic Application of Treaties*, in *THE OXFORD GUIDE TO TREATIES* 355 (Duncan Hollis ed., 2d. ed. 2020).
 43. *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007).
 44. *What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight & the Courts of the S. Comm. on the Judiciary*, 111th Cong., (2009) (statement of David Luban, Prof. of L., Geo. Univ. L. Ctr.). The Department of Justice's Office of Professional Responsibility concluded that Yoo committed "intentional professional misconduct" and recommended disciplinary action. DEP'T JUSTICE, OFF. PROF. RESP., INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 251, 254 (2009). However, the late David Margolis declined to refer Yoo to the Pennsylvania bar. *See* Memorandum from David Margolis, Assoc. Deputy Att'y Gen., to Eric Holder, Jr., Att'y Gen. (Jan. 5, 2010).
 45. *See generally Salim et al. v. Mitchell et al.*, ACLU WASH., <https://www.aclu-wa.org/cases/salim-et-al-v-mitchell-et-al-0> [<https://perma.cc/HS8S-CEJ6>]. A case against the psychologists ultimately settled on the eve of trial after the court rejected defendants' political question and derivative sovereign immunity claims. *See Salim v. Mitchell—Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU (Aug. 17, 2017), <https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psyc-hologists-behind-cia-torture-program> [<https://perma.cc/N3CH-TU5Z>].
 46. *El-Masri*, 479 F.3d at 300.

its citizen.⁴⁷ Eventually, someone will suggest investigating the corporate entities that enabled this fact pattern, including Premier Executive Transport Services, Inc. and Jeppesen Dataplan, Inc., the private aviation companies that allegedly transported El-Masri and others between the various detention centers.⁴⁸

Once the students have identified the rights that were violated and a set of potential defendants/respondents, they must next consider how they—as lawyers—can achieve some measure of justice for their client. This necessitates a discussion of the interlocking types of criminal versus civil relief that might be pursued; the distinction between retributive versus restorative justice; and the available fora, both domestic and international. No doubt because they have enrolled in an international law course, students immediately look to the international courts, with the International Criminal Court (“ICC”) enjoying pride of place. Most students understand that the United States has not ratified the Rome Statute and that the ICC adjudicates individual criminal responsibility (*vice* State responsibility).⁴⁹ I use this occasion in the simulation to outline the ICC’s more limited jurisdictional regime, including the lack of any corporate or entity liability.⁵⁰ Students immediately recognize a slim basis for territorial jurisdiction given that some of the events in question took place in Afghanistan and Albania, both ICC Member States.⁵¹ The issue of prosecutorial discretion looms

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47. For a history of this obligation, see the seminal text by Edwin M. Borchard, *Basic Elements of Diplomatic Protection of Citizens Abroad*, 7 AM. J. INT’L L. 497 (1913).
 48. Many of these were reportedly front companies. See Dana Priest, *Jet Is an Open Secret in Terror War*, WASH. POST (Dec. 27, 2004), <https://www.washingtonpost.com/archive/politics/2004/12/27/jet-is-an-open-secret-in-terror-war/260d0543-c0b5-4014-aeb1-969cab4ba5aa/> [<https://perma.cc/HH2C-5W52>]; Jane Mayer, *The C.I.A.’s Travel Agent*, NEW YORKER (Oct. 22, 2006), <https://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent> [<https://perma.cc/W7QA-CFSV>].
 49. Sydney McKenney, *The United States’ Need to Ratify the Rome Statute*, E-INTERNATIONAL RELS. (May 17, 2013), <https://www.e-ir.info/2013/05/17/the-united-states-need-to-ratify-the-rome-statute/> [<https://perma.cc/MRC8-8S83>].
 50. Rome Statute of the International Criminal Court art. 25(1), July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute] (“The Court shall have jurisdiction over natural persons”). See Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 171–72 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).
 51. Indeed, the previous Prosecutor indicated that her investigation of the Afghanistan situation would involve crimes committed on Afghan territory as well as “other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed

large here, and students are invited to discuss how they might bring their client's plight to the attention of the ICC Prosecutor through Article 15 of the Rome Statute or otherwise.⁵² The students then discuss how the Prosecutor is likely to receive such a petition given resource constraints, the enormity of the Afghan crime base, and the political costs of pursuing a matter involving the United States.⁵³

Once the limits of the ICC's territorial and personal jurisdiction are apparent, we then shift gears to consider the viability of the system of State responsibility. I briefly explain the abortive effort within the International Law Commission to conceptualize State criminality⁵⁴ and then turn our attention to the consent-based jurisdiction of the International Court of Justice ("ICJ"). Given that the ICJ's jurisdiction is limited to matters between States, with no direct access by individuals,⁵⁵ the students must consider what it would take for Germany to espouse the rights of its national.⁵⁶ They recognize that this might be unlikely given that Germany has been a close U.S. ally, although this relationship was painfully strained in connection with the so-called "Global War on Terror."⁵⁷

on the territory of other States Parties." See Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Request for Authorisation of an Investigation Pursuant to Article 15, ¶ 1 (Nov. 20, 2017). The current Prosecutor later announced his intent to prioritize crimes by Taliban and ISIS-K perpetrators. See Press Release, Karim A. A. Khan QC, Statement of the Prosecutor of the International Criminal Court Following the Application for an Expedited Order Under Article 18(2) Seeking Authorization to Resume Investigations in the Situation in Afghanistan (Sept. 27, 2021), <https://web.dev.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> [<https://perma.cc/M26D-V8M8>] [hereinafter Statement of Karim A. A. Khan QC].

52. Rome Statute, *supra* note 50, at art. 15(2) (allowing the Prosecutor to consider information from non-governmental organizations in determining whether to initiate an investigation *proprio motu*).
53. See Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What Does It Mean?*, JUST. SEC. (Nov. 3, 2017), <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/> [<https://perma.cc/XV6N-PDHG>].
54. See Andreas Zimmermann & Michael Teichmann, *State Responsibility for International Crimes*, in SYSTEM CRIMINALITY in INTERNATIONAL LAW 298, 298 (André Nollkaemper & Harmen van der Wilt eds., 2009).
55. ICJ Statute, *supra* note 2, at art. 34(1) ("Only states may be parties in cases before the Court.").
56. See Maximilian Koessler, *Government Espousal of Private Claims Before International Tribunals*, 13 U. CHI. L. REV. 180, 180 (1945).
57. See generally James M. McCormick, *The War on Terror and Contemporary U.S.-European Relations*, in AMERICA'S "WAR ON TERRORISM": NEW DIMENSIONS IN U.S. GOVERNMENT AND NATIONAL SECURITY 209 (John E. Owens & John W. Dumbrell eds., 2008) (tracing

As an alternative, I introduce the compromissory clauses found in many multilateral treaties indicating that any dispute arising out of the interpretation or application of the treaty—including questions of State responsibility—can go before the ICJ.⁵⁸ This invites a quick discussion about the recent *erga omnes* disputes initiated by the Gambia against Myanmar on behalf of the Rohingya Muslim minority under the Genocide Convention⁵⁹ and by Canada,⁶⁰ later joined by the Netherlands,⁶¹ against Syria under the Torture Convention. Students can discuss what must have transpired for these States' officials to overcome their seemingly natural reticence to formally accuse a fellow sovereign of human rights abuses and invoke a supranational dispute resolution mechanism with respect to allegations that may not directly implicate their immediate sovereign interests.

Students are intrigued by the ICJ option but are quickly disabused of its viability when they learn that the United States withdrew from the ICJ's compulsory plenary jurisdiction in 1985 (after being sued by Nicaragua over alleged U.S. support of the *Contras*⁶²) and has generally not accepted ICJ jurisdiction over disputes arising in connection with the various human rights treaties.⁶³ By way of example, upon ratifying the Torture Convention, the United States entered a reservation to the

the impact of the Bush Administration's war on the United States' European allies). *But see* LaGrand Case (Germ. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27) (alleging violations of the Vienna Convention by the United States).

58. Torture Convention, *supra* note 34, at art. 30.
59. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020 I.C.J. 3 (Jan. 23).
60. *Minister of Foreign Affairs Takes Action on Syria's Human Rights Violations*, GLOB. AFFS. CAN. (Mar. 4, 2021), <https://www.canada.ca/en/global-affairs/news/2021/03/minister-of-foreign-affairs-takes-action-on-syrias-human-rights-violations.html> [<https://perma.cc/ZT37-RTHS>] (announcing Canada's initiation of formal negotiations under the Torture Convention).
61. *See* Ministry of Foreign Affs., *The Netherlands Holds Syria Responsible for Gross Human Rights Violations*, GOV'T NETH. (Sept. 18, 2020, 11:34 AM), <https://www.government.nl/latest/news/2020/09/18/the-netherlands-holds-syria-responsible-for-gross-human-rights-violations> [<https://perma.cc/98LT-JN5M>] (announcing the Dutch decision to invoke Syria's responsibility under the Torture Convention). This matter remains in the mandatory negotiations phase; if negotiations fail, the States can take the matter to the ICJ. *See generally* Balkees Jarrar, *The Netherlands' Action Against Syria: A New Path to Justice*, HUM. RTS. WATCH (Sep. 22, 2020, 9:51 AM), <https://www.hrw.org/news/2020/09/22/netherlands-action-against-syria-new-path-justice#> [<https://perma.cc/E74M-JJAQ>].
62. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10206, THE UNITED STATES AND THE "WORLD COURT" 1-2 (Oct. 17, 2018).
63. *Id.* at 2-3.

effect that it does not consider itself bound by Article 30(1), which grants jurisdiction to the ICJ over “[a]ny dispute . . . concerning the interpretation or application of this Convention.”⁶⁴ The potential for more generic bilateral treaties—such as Treaties of Amity or of Friendship, Commerce and Navigation—to accord ICJ jurisdiction in situations involving alleged human rights abuses remains a possibility.⁶⁵

It often takes some nudging, but attention usually then turns to the regional human rights courts. Students are often unaware of the distinction between the Inter-American Commission on Human Rights (which evaluates the United States’ compliance with the American Declaration of the Rights and Duties of Man by virtue of the United States’ membership in the Organization of American States) and the Inter-American Court (which does not have jurisdiction over the United States, which has not ratified the American Convention on Human Rights).⁶⁶ I can lecture here briefly on efforts to challenge the resort to, and conditions within, the Guantánamo offshore prison before the Inter-American system.⁶⁷ Although these petitioners have won important symbolic and doctrinal victories before the Commission in the form of precautionary measures and a merits decision,⁶⁸ the lack of

64. See *U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (noting that the United States “does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.”).

65. For example, jurisdiction in the various cases between Iran and the United States before the ICJ is premised on a bilateral Treaty of Amity, Economic Relations, and Consular Rights. MULLIGAN, *supra* note 62, at 2.

66. See John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US Activities in Iraq*, 9 AM. SOC’Y INT’L L. INSIGHTS (Oct. 25, 2005). See generally *What Is the IACHR?*, ORG. AM. STATES, <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp> [<https://perma.cc/4G9T-FXTP>]. The Commission can also host thematic hearings, issue country reports, and make country visits. These raise awareness of human rights issues but have limited relevance for particular cases and do not lead to a determination of the facts or of responsibility.

67. For a discussion of these cases and others, see Lisa Reinsberg, *IACHR Condemns Guantánamo Abuses in First “War on Terror” Decision*, JUST. SEC. (July 7, 2020), <https://www.justsecurity.org/71150/iachr-condemns-guantanamo-abuses-in-first-war-on-terror-decision/> [<https://perma.cc/2NDZ-S6QM>].

68. See, e.g., *Ameziane v. United States*, Case 12.865, Inter-Am. Comm’n H.R., Report No. 29/20, Merits (Apr. 22, 2020) (finding the United States bears “aggravated international responsibility” for the torture and *refoulement* of a former Guantánamo detainee in violation of his rights under the American Declaration).

an enforceable judgment⁶⁹ has meant that the resolution of this vestige of the Global War on Terror remains locked in domestic political processes. The students assume that any determination by the Commission about El-Masri's experience is likely to achieve the same outcome.

Given the role of several European States in this rendition, the European Court of Human Rights emerges as a much more promising venue, which enables me to lecture briefly about the handful of cases that have gone to judgment against States that lent their territories to the United States during the War on Terror or otherwise failed to adhere to their human rights obligations vis-à-vis extraordinary renditions undertaken within their borders: Italy,⁷⁰ Poland,⁷¹ Lithuania,⁷² Macedonia,⁷³ and Romania.⁷⁴ In many of these opinions, the Court found the European State liable for its own breaches of international law but also for the wrongful acts committed on its territory and beyond by agents of the United States, which is not directly subject to the Court's jurisdiction.⁷⁵ Here, we can discuss the

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69. The United States has a long-standing position that the American Declaration does not create binding obligations and that the Commission has no jurisdiction over international humanitarian law, the *lex specialis*. Reinsberg, *supra* note 67. The human rights bodies have all insisted that human rights law and humanitarian law are complementary and not mutually exclusive. *See, e.g.*, Human Rights Commission, Op. No. 70/2019, U.N. Doc. E/CN.4/2003/8, ¶¶ 61–64 (Dec. 16, 2002).
70. Several of these States remain under the Council of Ministers' enhanced supervision given their failure to fully investigate the underlying allegations and the risk that detainees rendered to the United States might face the death penalty. *See Nasr & Ghali v. Italy*, App. No. 44883/09 (May 23, 2016), <https://hudoc.echr.coe.int/eng?i=001-161245> [<https://perma.cc/ZH W8-35J6>] (noting the enhanced supervision procedure).
71. *See Al Nashiri v. Poland*, App. No. 28761/11 (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146044> [<https://perma.cc/LRP9-SRZV>]; *Husayn (Zubaydah) v. Poland*, App. No. 7511/13 (July 24, 2014), <https://hudoc.echr.coe.int/eng?i=001-146047> [<https://perma.cc/WFZ2-FWK4>].
72. *See Zubaydah v. Lithuania*, App. No. 46454/11 (May 31, 2018), <https://hudoc.echr.coe.int/eng?i=001-183687> [<https://perma.cc/P7A8-RRWA>].
73. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (Dec. 13, 2012), <https://hudoc.echr.coe.int/eng?i=001-115621> [<https://perma.cc/5TUN-6HBY>].
74. *See Al Nashiri v. Romania*, App. No. 33234/12 (May 31, 2018), <https://hudoc.echr.coe.int/eng?i=001-183685> [<https://perma.cc/BK39-8Y4P>]. *See generally* Federico Fabbrini, *The European Court of Human Rights: Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for the Gross Human Rights Violations Committed in the Fight Against Terrorism*, 14 HUM. RTS. L. REV. 85 (2013).
75. André Nollkaemper, *The ECtHR Finds Macedonia Responsible in Connection with Torture by the CIA, but on What Basis?*, EJIL:TALK!

large swaths of the globe—encompassing much of Asia and the Middle East—that lack any regional human rights court or institution.⁷⁶

The limits of the regional human rights systems in this context prompts consideration of other multilateral human rights institutions. The human rights treaty bodies—such as the Human Rights Committee, which supervises compliance with the International Covenant on Civil and Political Rights,⁷⁷ and the Committee Against Torture, which plays the same role with respect to the Torture Convention⁷⁸—rise to the fore. That said, the United States rarely opts in to these treaties’ optional dispute resolution mechanisms, which generally allow for State-to-State or individual petitions only when the States affirmatively consent to have such claims lodged against them.⁷⁹ Nevertheless, all of these bodies require States Parties to conduct periodic reporting on their compliance with the terms of the treaties⁸⁰ and some undertake additional enforcement measures, such as the Torture Committee’s confidential inquiry procedure for reports of

(Dec. 24, 2012); Martin Scheinin, *The ECtHR Finds the US Guilty of Torture—As an Indispensable Third Party?*, EJIL:TALK! (July 28, 2014), <https://www.ejiltalk.org/the-ecthr-finds-the-us-guilty-of-torture-as-an-indispensable-third-party/> [<https://perma.cc/Y94Y-3R57>].

76. In the Middle East, the League of Arab States’ Arab Human Rights Committee oversees States’ implementation of the Arab Charter on Human Rights through periodic reports, although it has no individual petition or enforcement mechanisms. See *Middle East and North Africa*, INT’L JUST. RES. CTR., <https://ijrcenter.org/regional/middle-east-and-north-africa/> (last visited Oct. 25, 2021) [<https://perma.cc/X3A8-P3W9>]. While there is no Asia-wide human rights institution, the Association of Southeast Asian Nations (“ASEAN”) has created a human rights committee. See *About AICHR: Structure, Work and History of the AICHR*, ASEAN INTERGOVERNMENTAL COMM’N ON HUM. RTS., <https://aichr.org/about-aichr-2/> [<https://perma.cc/85FB-BF3X>].
77. *Civil and Political Rights: The Human Rights Committee: Fact Sheet No. 15 (Rev. 1)*, OFF. OF HIGH COMM’R OF HUM. RTS. (2005), <https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet15rev.1e.n.pdf> [<https://perma.cc/L5NW-WP7K>].
78. *Fact Sheet No. 17, The Committee Against Torture*, OFF. OF HIGH COMM’R OF HUM. RTS., <https://www.ohchr.org/Documents/Publications/FactSheet17en.pdf> [<https://perma.cc/4MY2-8VVL>].
79. See *Reporting Status for the United States of America*, U.N. TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN [<https://perma.cc/DF9C-3HAX>], for a snapshot of the United States’ obligations under these treaties. One exception is the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), which contains an automatic State-to-State dispute resolution process. See *Convention on the Elimination of Racial Discrimination* art. 11, 660 U.N.T.S. 195 (Jan. 4, 1969). Individual petitions, by contrast, are subject to an opt-in procedure. *Id.* at art. 14.
80. See, e.g., *Torture Convention*, *supra* note 34, at art. 14.

systemic torture.⁸¹ Likewise, the U.N. Human Rights Council's Universal Periodic Review mechanism evaluates all U.N. Member States on a periodic basis.⁸² Advocates are able to participate in these processes through the production of so-called "shadow reports," which purport to convey the "ground truth" and may counter States' at times self-serving claims of compliance.⁸³

In the alternative, resort can be had to the so-called "Special Procedures" of the U.N. Human Rights Council.⁸⁴ These entities are authorized to report on concerns and situations falling within their mandates and may ask States to respond to specific allegations.⁸⁵ Most relevant for this case study is the U.N. Working Group on Arbitrary Detention ("WGAD"),⁸⁶ which is the only body other than the Inter-American Commission that can receive individual human rights complaints against the United States.⁸⁷ The WGAD is the only Special

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81. *See id.*; *Committee Against Torture, Confidential Inquiries Under Article 20 of the Convention Against Torture*, OFF. HIGH COMM'R HUM. RTS. (Dec. 10, 1984), <https://www.ohchr.org/EN/HRBodies/CAT/Pages/InquiryProcedure.aspx> [<https://perma.cc/3GEQ-DPD6>]. The United States did not indicate at ratification that it does not recognize the competence of the Committee to conduct such an inquiry. *Id.*
 82. *See Universal Periodic Review*, OFF. HIGH COMM'R HUM. RTS., <https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/universal-periodic-review> [<https://perma.cc/LXM9-VW6K>].
 83. *See, e.g.*, TRUDY BOND ET AL., SHADOW REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE REVIEW OF THE PERIODIC REPORT OF THE UNITED STATES OF AMERICA (2014).
 84. *Special Procedures of the Human Rights Council*, OFF. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx> [<https://perma.cc/M7J9-WZWA>]. The Human Rights Council itself also has a confidential complaint procedure for systemic violations that builds upon the former "1503 procedure" of the Human Rights Commission. *See Human Rights Council Complaint Procedure*, OFF. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx> [<https://perma.cc/G6AQ-F6SA>].
 85. *Special Procedures of the Human Rights Council*, *supra* note 84.
 86. In 2005, the then-Commission on Human Rights (later reconstituted as the Human Rights Council) established a mandate for the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. *See* Human Rights Commission Res. 2005/80 (Apr. 21, 2005).
 87. *See Complaints and Urgent Appeals*, OFF. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx> [<https://perma.cc/V7F2-X6CP>]. The WGAD has entertained a number of petitions concerning individuals detained on Guantánamo and found their detention to be "arbitrary" under international law. *See, e.g.*, Human Rights Council Op. No. 70/2019, U.N. Doc. A/HRC/WGAD/2019/70, at 68 (Jan. 30, 2020); Leïla Zerrougu, Gen. Assembly, Rep. of the Working Grp. on

Procedure that has been empowered to investigate cases and issue reasoned “opinions” assessing State responsibility with regard to alleged arbitrary detentions; the other Special Procedures engage in dialogic processes with States but do not make their own factual or legal determinations.⁸⁸ The WGAD cannot investigate, however, if a final decision has been taken by a State in its domestic courts in conformity with its domestic law.⁸⁹ None of these institutions is tied to any particular treaty, which weakens the force of their pronouncements, but they can operate without the state’s consent, albeit only remotely unless granted access.⁹⁰

Unless someone brings it up independently, and before they get too excited about these international mechanisms, I eventually introduce the concept of exhaustion of local remedies and have the students opine upon its purpose within international law.⁹¹ The newfound recognition of the centrality of exhaustion in supranational adjudication inevitably shifts the students’ attention to domestic courts and remedies. Here, there are multiple legal systems that might exercise standard bases of jurisdiction (nationality⁹² and territoriality⁹³)—Afghanistan, Albania, Germany, Macedonia, and the United States—plus other States that might be willing to exercise universal jurisdiction over these events. The challenges of pursuing a remedy in each quickly emerge.

When it comes to remedies to be obtained in the United States, the students will explore potential criminal charges and civil claims in equal measure. This invites an introduction to the federal torture statute, which applies to extraterritorial conduct only (not a problem with these

Arbitrary Det., U.N. Doc. A/HRC/4/40, at 32–39 (Jan. 9, 2007) (compiling opinions on multiple Guantánamo detainees).

88. See *Complaints and Urgent Appeals*, *supra* note 87.

89. See Human Rights Commission Res. 1997/50, U.N. Doc. E/CN.4/1997/50, ¶ 15 (Apr. 15, 1997).

90. The United States, for example, invited the U.N. Special Rapporteur on Extreme Poverty and Human Rights to examine the persistence of extreme poverty in America. See *Statement on Visit to the USA*, by Professor Philip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, OFF. HIGH COMM’R HUM. RTS (Dec. 15, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533> [<https://perma.cc/JC42-HSLG>].

91. See *Exhaustion of Domestic Remedies*, INT’L JUST. RES. CTR., <https://ijrcenr.org/exhaustion-of-domestic-remedies/> [<https://perma.cc/S8AC-TU49>].

92. See Malcom Shaw, *Jurisdiction*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/international-law/International-organizations> [<https://perma.cc/Z9CJ-GCY3>] (“The nationality principle permits a country to exercise criminal jurisdiction over any of its nationals accused of criminal offenses in another state.”).

93. *Id.* (“According to the territorial principle, states have exclusive authority to deal with criminal issues arising within their territories.”).

facts, but a source of criticism more broadly⁹⁴) so long as the defendant is “present in” the United States.⁹⁵ The war crimes statute may also be of interest given that it applies only to war crimes committed by or against U.S. persons (another statutory defect when it comes to other potential charges and the demands of the 1949 Geneva Conventions).⁹⁶ The students will soon acknowledge, however, that criminal charges are not likely to be forthcoming given that the conduct alleged reflected U.S. policy, many U.S. personnel were operating under the advice of counsel (however flawed), the Assistant Attorney General of the Criminal Division must authorize any charges given the potential foreign policy implications,⁹⁷ and two presidential administrations—one Republican, one Democratic—ultimately decided not to pursue charges in the majority of circumstances where they may have been warranted in connection with the extraordinary rendition program.⁹⁸

On the civil side, many of the students will have heard of the Alien Tort Statute⁹⁹ or the Torture Victim Protection Act.¹⁰⁰ There is not time to get into the intricacies of the former at this point in the course,¹⁰¹ but students can parse the latter’s jurisdictional requirements. They quickly see that the statute is applicable only to those who are acting under color of *foreign* law, which renders it more difficult (but

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94. See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United States of America, U.N. Doc. CAT/C/USA/CO/2, ¶ 13 (July 25, 2006) (noting that the federal torture statute applies only to extraterritorial cases) [hereinafter 2006 CAT Concluding Observations]. See also Comm. Against Torture, Concluding Observations on the Third to Fifth Periodic Reports of the United States of America, U.N. Doc. CAT/C/USA/CO/3-5, ¶¶ 9–34 (Dec. 19, 2014) (providing recommendations for updating U.S. torture legislation).
 95. 18 U.S.C. §§ 2340A(b)(1)–(2).
 96. 18 U.S.C. § 2441. See Beth Van Schaack, *Animating the War Crimes Act*, 97 INT’L L. STUD. 1541, 1562–63 (2021) (cataloging flaws that have rendered the war crimes statute a dead letter).
 97. U.S. Dep’t of Just., Just. Manual § 9-142.000 (2018).
 98. See AM. SOC’Y INT’L L., ASIL TASK FORCE ON POLICY OPTIONS FOR U.S. ENGAGEMENT WITH THE ICC 77 (2021).
 99. 28 U.S.C. § 1350. If I have time, I mention the standard for alleging law of nations violations under the ATS. See *Sosa v. Álvarez Machaín*, 542 U.S. 692, 731–32 (2004).
 100. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).
 101. See generally STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE (2018).

not impossible) to sue U.S. personnel.¹⁰² Students may also be familiar with *Bivens* actions (and their attrition under U.S. law).¹⁰³ Regardless, I can take a foray into civil procedure and emphasize that El-Masri would have access to U.S. courts even as a German citizen so long as there is personal jurisdiction over the defendants and he can prevail over any *forum non conveniens* and other defenses.¹⁰⁴ The additional challenges of suing State officials for money damages become immediately apparent once students are made aware of the powerful work done by immunity doctrines and the concept of State secrets.¹⁰⁵

Someone may raise the possibility of suing one of the implicated States in domestic courts here or elsewhere. At this point, I introduce the Foreign Sovereign Immunities Act (“FSIA”),¹⁰⁶ which provides the sole basis for suing foreign States within U.S. federal courts.¹⁰⁷ The students will see that the facts do not fall cleanly within any of the United States’ codified exceptions to domestic or foreign sovereign immunity.¹⁰⁸ The FSIA’s “human rights” exception (which covers acts of torture, extrajudicial killing, and hostage taking committed by an agent of a foreign State) requires that the State in question be designated a State sponsor of terrorism.¹⁰⁹ More recent amendments to

102. See Ryan Goodman & Alex Whiting, *Smoking Gun Videos Emerge: US Citizen, Libyan Warlord Haftar Ordering War Crimes*, JUST. SEC. (Sept. 19, 2017), <https://www.justsecurity.org/45094/hifter-smoking-gun-video-s-emerge-citizen-libyan-warlord-khalifa-haftar-ordering-war-crimes/> [<https://perma.cc/6UMT-UJRB>].

103. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

104. See Laurel E. Miller, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1385–86 (1991).

105. Suits for personal injury caused by a federal government employee acting within the scope of their employment are brought under the Federal Tort Claims Act (“FTCA”). 28 U.S.C. §§ 1346(b), 2671. The FTCA’s waiver of governmental sovereign immunity generally does not apply when the alleged injury occurs abroad, even if the underlying policy emanated from, or was planned or initiated in, the relevant agency’s U.S. headquarters. *Sosa v. Álvarez-Machain*, 542 U.S. 692, 702–03 (2004).

106. 28 U.S.C. §§ 1330, 1441, 1602–1611.

107. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

108. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 87–88 (D.C. Cir. 2002) (noting that the FSIA is premised on a “presumption of foreign sovereign immunity” that is qualified by “discrete and limited exceptions”).

109. See 28 U.S.C. § 1605A. Presently, the United States designates Cuba, North Korea, Iran (since 1984), and Syria (since 1979) as State sponsors of terrorism. See U.S. Dep’t of State, *State Sponsors of Terrorism*,

the FSIA instituted by the Justice Against Sponsors of Terrorism Act (“JASTA”) abrogate this State sponsor of terrorism requirement but apply only to cases involving physical injury caused by an international act of terrorism occurring within the United States.¹¹⁰

Turning to other potential national courts, the students are understandably skeptical of Afghan courts, because of the continued insecurity in the country.¹¹¹ The European courts seem more promising, which occasions a discussion of the differences between civil and common law systems when it comes to the ability of victims to initiate criminal proceedings.¹¹²

At the end of the exercise, I lecture briefly on what actually transpired. In doing so, I structure my remarks, and the remainder of the course, around the matrix of accountability depicted below.¹¹³ This matrix is organized along two axes: the first (x) is premised on the type of tribunal (international, hybrid, regional, or domestic); the second (y) compares the types of justice institutions and legal authorities that are available and that might be imagined.¹¹⁴ The white boxes in the matrix indicate criminal liability options; the pale gray boxes indicate civil liability options, including State responsibility. The matrix reveals the dominant paradigms—State responsibility at the international level,

<https://www.state.gov/state-sponsors-of-terrorism/> [<https://perma.cc/B4U3-3GJU>]. Iraq, Libya, South Yemen, and Sudan were previously designated but have since been delisted. Cuba was removed in 2015 but was re-designated in 2021. North Korea was added in 1988, removed in 2008, and then returned to the list in 2017. Sudan was removed in 2020 after President Omar al-Bashir was ousted and an agreement was reached to compensate victims of the 1998 embassy bombings. See DIANNE E. RENNACK, CONG. RSCH. SERV., R43835, STATE SPONSORS OF ACTS OF INTERNATIONAL TERRORISM—LEGISLATIVE PARAMETERS: IN BRIEF (2021).

110. 28 U.S.C. § 1605B. See William S. Dodge, *Does JASTA Violate International Law?*, JUST. SEC. (Sept. 20, 2016), <https://www.justsecurity.org/33325/jasta-violate-international-law-2/> [<https://perma.cc/SR6V-WW8J>] (“The new terrorism exception added by JASTA is not limited to state sponsors of terrorism, but it is limited in other ways.”).
111. See generally *Afghanistan Overall Score, 2020*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2020/Afghanistan> [<https://perma.cc/B4YQ-QCTD>] (ranking Afghanistan 122nd out of 128 countries surveyed); *The Rule of Law in Afghanistan*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/our-work/research-and-data/special-reports/rule-law-afghanistan> [<https://perma.cc/N9B2-LBFS>].
112. *Compare* Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) (holding that victims have no standing to compel a criminal prosecution in the United States), *with* U.S. Inst. of Peace, *Victims in Criminal Proceedings, in 2 MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE* 131 (Vivienne O’Connor et al. eds., 2018) (noting the contrary approach in much of the European Union).
113. See *infra* Figure 1.
114. BETH VAN SCHAACK, IMAGINING JUSTICE FOR SYRIA 9 (2020).

individual criminal responsibility at the international and national levels, and the domestic law of tort—and those that remain nonexistent or nascent—State criminality, international corporate liability beyond the current soft law approach, and regional criminal jurisdiction. We walk through which cells are available to their client—and were, in fact, invoked by El-Masri’s lawyers—and which are foreclosed or were not pursued for various reasons.

1. El-Masri, with representation from the American Civil Liberties Union (“ACLU”), sued George Tenet, several implicated transport companies, and a number of “DOEs” in the Eastern District of Virginia, where the CIA is located.¹¹⁵ Federal jurisdiction was premised on a federal question (violations of the 5th Amendment due process protections), diversity, and the Alien Tort Statute (invoking the following torts in violation of the law of nations: prolonged arbitrary detention; torture; and cruel, inhumane or degrading treatment).¹¹⁶ The district court dismissed the suit when the U.S. government intervened and asserted the State secrets doctrine, which invites courts to balance an individual’s interests in vindicating a claim with the government’s asserted national interests in preserving sensitive information.¹¹⁷ This was even though much of the relevant information about El-Masri’s case was already in the public

115. See Complaint at 2–4, *El-Masri v. Tenet*, 437 F.Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-1417). See also *El-Masri v. Tenet: CIA’s Use of ‘Extraordinary Rendition’*, ACLU VA., <https://acluva.org/en/cases/el-masri-v-tenet> [<https://perma.cc/3RXY-BN9X>].

116. *El-Masri v. Tenet*, 437 F.Supp. 2d at 534–35.

117. *Id.* at 530. See also *United States v. Reynolds*, 73 S.Ct. 528, 531–532 (1953) (setting out the modern incarnation of the state secrets privilege). Incidentally, the information protected in the *Reynolds* case, which involved efforts by widows to recover against the Air Force following a fatal crash, later turned out to reveal negligence on the part of the government rather than information about secret technologies as was claimed. See generally Robert M. Chesney, *State Secrets and the Limits of National Security Regulation*, 75 GEO. WASH. L. REV. 1249 (2007) (noting how integral the state secrets privilege has been to counterterrorism litigation); Daniel J. Huyck, *Fade to Black: El-Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss Extraordinary Rendition Claims*, 17 MINN. J. INT’L L. 438 (2008) (discussing the expansion of the doctrine and risk of misuse).

domain.¹¹⁸ The U.S. Court of Appeals for the Fourth Circuit affirmed and the Supreme Court denied *certiorari*.¹¹⁹

2. Although the CIA Officer of Inspector General determined that the case had “prosecutive merit,” the U.S. Attorney for the Eastern District of Virginia declined to pursue a prosecution in favor of administrative remedies.¹²⁰ Ultimately, very few prosecutions went forward in connection with the post-9/11 rendition program or alleged custodial abuses (particularly with respect to individuals in leadership positions).¹²¹
3. In 2008, advocates filed a petition against the United States before the Inter-American Commission on Human Rights, citing violations of the American Declaration, including the right to life, the right to be free from arbitrary detention and to movement, the right to equal protection, and the right to due process of law and judicial protection.¹²² El-Masri has sought declarative relief (that the rendition program violated the American Declaration), compensation, a public acknowledgement of what transpired, and guarantees of non-

118. In another Global War on Terror case, the Supreme Court recently affirmed that the United States can invoke the state secrets privilege even though the information in question has been publicly revealed. *See United States v. Husayn*, 142 S. Ct. 959 (2022).

119. *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007). A parallel suit against Jeppesen met a similar fate in the Ninth Circuit with an en banc ruling. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S.Ct. 2442 (2011). *See generally* THE RENDITION PROJECT, www.therenditionproject.org.uk [<https://perma.cc/MB3R-5KMF>]. One enduring corporate tort case arising out of the United States’ post-9/11 policies involves CACI International, Inc., a private contractor. A set of plaintiffs has accused its interrogators of committing torture at Abu Ghraib prison in Iraq. *See Al Shimari v. CACI Int’l, Inc.*, 758 F.3d 516 (4th Cir. 2014). *See generally Al Shimari, et al. v. CACI, CTR. FOR CONST. RTS.*, <https://ccrjustice.org/alshimari> [<https://perma.cc/A7G5-SB73>].

120. CIA OIG REPORT, *supra* note 27, ¶¶ 14, 196.

121. *See, e.g.*, U.S. Dep’t of Justice, *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees* (Aug. 30, 2012), <https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees> [<https://perma.cc/B5WS-VHPE>].

122. *El-Masri v. United States, Petition Alleging Violations of the Human Rights of Khaled El-Masri by the United States of America with a Request for an Investigation and Hearing on the Merits* (Apr. 9, 2008), https://www.aclu.org/sites/default/files/field_document/elmasri_iachr_20080409.pdf [<https://perma.cc/8Y4K-AYKM>].

repetition.¹²³ The delay in filing stemmed from the need to pursue and exhaust local remedies in U.S. courts.¹²⁴ The Commission determined that the petition was admissible but has yet to order a hearing or issue a decision on the merits.¹²⁵ The United States has long argued (unsuccessfully) that the American Declaration is a political commitment that imposes no legal obligations on members of the Organization of American States and that the Commission has no enforcement jurisdiction over the United States.¹²⁶ It did not offer a responsive filing in the matter, which remains pending, underscoring what a slow (and frustrating from the plaintiff's perspective) process this can be.¹²⁷

4. El-Masri filed a criminal complaint in Macedonia alleging involvement by the Minister of the Interior.¹²⁸ The public prosecutor declined to move forward, after what appeared to be a perfunctory investigation, and the effort was ultimately time-barred as any charges should have been filed by 2009.¹²⁹ A civil suit was also filed.¹³⁰ The lack of progress in Macedonia laid the jurisdictional predicate for resorting to the European Court of Human Rights.
5. In 2004, Germany initiated a criminal investigation that resulted in the issuance in 2007 of arrest warrants against thirteen U.S. government personnel who appeared to be involved in the rendition.¹³¹ Nonetheless, Germany declined to

123. *See* El-Masri v. United States, Petitioner's Final Observations on the Merits, Inter-Am. Comm. H.R., Petition No. 13.027, https://www.aclu.org/sites/default/files/field_document/2018_10_17_iachr_el_masri_observations_-_final_signed.pdf [<https://perma.cc/T52T-SYH9>].

124. *Id.* at 29–32.

125. El-Masri v. United States, Petition 419-08, Inter-Am. Comm'n H.R., Report No. 21/16, OEA/Ser.L./V/II.157, doc. 25 ¶ 4 (2016).

126. *See* Letter from Michael J. Fitzpatrick, Interim Permanent Rep., Org. of Am. States, to Emilio Alvarez Icaza, Ex. Sec'y, Inter-Am. Comm'n on Hum. Rts. (Apr. 8, 2016), <https://www.state.gov/wp-content/uploads/2019/05/16-h.-El-Masri-Petn-No.-P-419-08-13.027-U.S.-Response-to-Petition-Apr.-8-2016.pdf> [<https://perma.cc/PXS4-XMUJ>].

127. *See* Reinsberg, *supra* note 67.

128. OPEN SOC'Y JUST. INITIATIVE, *supra* note 17.

129. *Id.*

130. *Id.*

131. Mark Landler, *German Court Seeks Arrest of 13 C.I.A. Agents*, N.Y. TIMES (Jan. 31, 2007), <https://www.nytimes.com/2007/01/31/world/eur/ope/31cnd-germany.html> [<https://perma.cc/4UZ9-MRVV>]; *See also* Declaration of Manfred Gnidjic in support of Plaintiff's Opposition to the

seek their extradition following pressure from the United States.¹³² Upon the release of the SSCI Report in April 2014, the European Center for Constitutional and Human Rights filed criminal complaints against George Tenet, George W. Bush, Dick Cheney, Donald Rumsfeld and others in December 2014.¹³³ This remains pending in German courts.¹³⁴ A German Parliamentary inquiry also arose.¹³⁵

6. A criminal investigation was initiated in Spain as well.¹³⁶ I encourage the students to speculate on the legal basis for this effort. Although such a case could presumably proceed on the basis of universal jurisdiction, it turns out that Spanish airports on the island of Majorca were used for stopovers and logistics in the U.S. rendition program.¹³⁷ Spanish investigators discovered the names of thirteen people involved through an analysis of flight manifests and hotels records; this information was apparently shared with German prosecutors.¹³⁸ Given these various national jurisdictions, we can discuss the comparative impact and pragmatic viability of litigation in the

United States' Motion to Dismiss, *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-1417-TSE-TRJ) (providing an account from the German lawyer Mr. El-Masri met with upon his return to Germany in 2004).

132. *Germany 'Drops CIA Extradition'*, BBC NEWS (Sept. 23, 2007), <http://news.bbc.co.uk/2/hi/europe/7008909.stm> [<https://perma.cc/B64M-SZLX>].
133. *Summary of Criminal Complaint*, EUR. CTR. FOR CONST. & HUM. RTS. 1 (Dec. 17, 2014), https://ccrjustice.org/files/ECCHR_Criminalcomplaint_Tenet_summary_engl_2014_12_17.pdf [<https://perma.cc/U74Q-KCLH>].
134. *Germany: Criminal Complaint Against CIA Director Gina Haspel*, EUR. CTR. FOR CONST. & HUM. RTS., <https://www.ecchr.eu/en/case/germany-criminal-complaint-against-cia-director-gina-haspel/> [<https://perma.cc/64GU-LK4G>].
135. Rachel Martin, *German Inquiry Keeps CIA Detentions in Spotlight*, NPR (Dec. 14, 2005), <https://www.npr.org/templates/story/story.php?storyId=5053837&t=1644786996289> [<https://perma.cc/G776-ZVM3>].
136. Jaime Jansen, *Spain Court Launches Investigation into CIA Rendition Flights*, JURIST (June 12, 2006, 12:59 PM), <https://www.jurist.org/news/2006/06/spain-court-launches-investigation/> [<https://perma.cc/CA5G-BM6J>]. See generally *El-Masri v. Macedonia*, OPEN SOC'Y JUST. INITIATIVE, <https://www.justiceinitiative.org/litigation/el-masri-v-macedonia> [<https://perma.cc/ZTV3-A46B>].
137. Landler, *supra* note 131.
138. See *id.* European war crimes units are increasingly coordinating their investigations around potential perpetrators located in Europe. See HUM. RTS. WATCH, *THE LONG ARM OF JUSTICE: LESSONS FROM SPECIALIZED WAR CRIMES UNITS IN FRANCE, GERMANY, AND THE NETHERLANDS* (2014).

territorial State, the State of nationality of the accused, and third States.

7. It appears that no criminal matters were pursued against any of the corporate entities involved in the El-Masri rendition. At the time, international law had very little to say about corporate liability. Since then, international law has evolved such that States, theoretically, have a duty to ensure that corporate actors respect human rights.¹³⁹ For the most part, this remains subject to corporate self-regulation.¹⁴⁰ However, European States in particular are starting to assert criminal charges against corporate actors that are engaged—either directly or through various forms of complicity—in violations of international criminal law.¹⁴¹
8. With assistance from the Open Society Justice Initiative, El-Masri filed suit against Macedonia before the European Court of Human Rights, arguing that the State was responsible for some of the treatment he experienced, including his illegal detention in Macedonia before being transferred to the CIA.¹⁴² The Grand Chamber of the Court found multiple violations of the European Convention, including violations of the right to be free from torture and arbitrary detention, protections against *non-refoulement*, the right to a remedy, and the right to family.¹⁴³ Macedonia paid El-Masri €60,000¹⁴⁴ and

139. See Elise G. Diggs et al., *Business & Human Rights as a Galaxy of Norms*, 50 GEO. J. INT'L L. 309, 311–12 (2019).

140. *Id.* at 310–11.

141. See generally Victoria Riello & Larissa Furtwengler, *Corporate Criminal Liability for International Crimes: France and Sweden Are Poised to Take Historic Steps Forward*, JUST. SEC. (Sept. 6, 2021), <https://www.justsecurity.org/78097/corporate-criminal-liability-for-human-rights-violations-france-and-sweden-are-poised-to-take-historic-steps-forward/> [<https://perma.cc/EAJ2-CBKY>]; CLIFFORD CHANCE, CORPORATE CRIMINAL LIABILITY (2016), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2016/04/corporate-criminal-liability.pdf> [<https://perma.cc/N4WC-VXKD>] (surveying international corporate criminal liability).

142. OPEN SOC'Y JUST. INITIATIVE, *supra* note 17.

143. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09 (Dec. 13, 2012), <https://hudoc.echr.coe.int/eng?i=001-115621> [<https://perma.cc/5TUN-6HBY>]; Fabbrini, *supra* note 74.

144. *El-Masri*, App. No. 39630/09, at 79–80. The ECHR also found that CIA detention centers were established in Poland, Lithuania, and Romania. See generally *Secret Detention Sites*, Eur. Ct. of H.R. (Mar. 2019), https://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF [<https://perma.cc/CB3P-QFDA>].

apologized in 2018 for its role in El-Masri's rendition.¹⁴⁵ Although his litigation in the United States was ultimately unsuccessful, El-Masri's declaration and U.S. filings were submitted to the European Court, which found his account credible and convincing.

9. Several U.N. human rights treaty bodies considered El-Masri's ordeal, including the Human Rights Committee,¹⁴⁶ the Committee Against Torture,¹⁴⁷ and the Committee on the Elimination of Racial Discrimination¹⁴⁸ in their Concluding Observations on Macedonia. Likewise, the U.N. Human Rights Council discussed Macedonia's role in El-Masri's mistreatment during the country's 2008 Universal Periodic Review.¹⁴⁹ Although the case was not specifically mentioned by the CAT Committee in its Concluding Observations on the United States,¹⁵⁰ the Committee did condemn prolonged *incommunicado* detention as a violation of the Torture Convention and raise other concerns regarding the rendition program generally.¹⁵¹ The case also came up in Germany's hearing in connection with its obligation under Article 5 to

145. *Macedonia Issues Apology for Involvement in Torture by CIA*, ACLU (Apr. 3, 2018), <https://www.aclu.org/press-releases/macedonia-issues-apology-involvement-torture-cia> [<https://perma.cc/3338-PP9W>].

146. U.N. Hum. Rts. Comm., Concluding Observations on the Former Yugoslav Republic of Macedonia, U.N. Doc. CCPR/C/MKD/CO/2, ¶¶ 4–6 (Apr. 3, 2008) (calling on Macedonia to undertake a comprehensive investigation of El-Masri's allegations).

147. Comm. Against Torture, Concluding Observations of the Committee Against Torture: The Former Yugoslav Republic of Macedonia, CAT/C/MKD/CO/2, ¶ 9 (May 21, 2008).

148. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations on the Former Yugoslav Republic of Macedonia, U.N. Doc. CERD/C/MKD/CO/7, ¶ 12 (June 13, 2007) (calling upon the State to ensure that measures taken in the struggle against terrorism do not discriminate on the basis of race or ethnic origin).

149. Int'l Comm'n of Jurists, ICJ Submission to the Universal Periodic Review of "The Former Yugoslav Republic of Macedonia" (Nov. 2008), https://lib.ohchr.org/HRBodies/UPR/Documents/Session5/MK/ICJ_MKD_UPR_S5_2009_InternationalCommissionofJurists.pdf [<https://perma.cc/P3K3-SN67>] (detailing the facts of the case and calling upon Macedonia to provide for a thorough and independent investigation).

150. *See generally* 2006 CAT Concluding Observations, *supra* note 94.

151. *See id.* ¶¶ 13–30.

prosecute acts of torture and under Article 14 to provide compensation to survivors.¹⁵²

10. Finally, although the situation in Afghanistan is before the ICC, no individual cases are specifically mentioned in the Prosecutor's filings.¹⁵³ The ICC Office of the Prosecutor at one point suggested that it was focused on conflict-related detentions,¹⁵⁴ although it did mention that at least twenty-four individuals were allegedly subjected to torture and other potential war crimes on the territory of other ICC Member States, which may have encompassed El-Masri, who was granted victim status by the Court.¹⁵⁵ The new Prosecutor's decision to focus on ongoing crimes committed by the Taliban and ISIS-K likely eliminates this potentiality.¹⁵⁶

El-Masri's tragic ordeal reveals a lot about international law and the themes that will emerge repeatedly in teaching this field. To name just a few: the elaboration of norms for which there is a high degree of articulated consensus without equally robust enforcement bodies; the existence of concurrent jurisdiction within multilevel and multi-scalar fora; the operation of subsidiarity, requiring matters to be resolved at the most local level and only once these options are exhausted can litigants move to supranational institutions; the possibilities and fragmentation inherent to a global system marked by legal pluralism; the enduring significance of consent even as many States withhold and withdraw their acquiescence to multilateral dispute resolution fora; and the challenges of making the voices of those with less wealth and power heard in legal institutions everywhere. It also enables a discussion of who is bound by international law. Transnational harm inevitably

152. See Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding Observations, ¶ 28 U.N. Doc. CAT/C/DEU/CO/5 (Dec. 12, 2011).

153. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶¶ 19-56 (2013).

154. See, e.g., *id.* ¶ 50 ("In relation to allegations of torture and ill-treatment, the OTP has focused on cases of those detainees captured in the context of the armed conflict in Afghanistan, and, short of a sufficient nexus to the latter, does not include other alleged conduct related to the treatment of detainees captured outside of Afghanistan.").

155. See OFF. OF THE PROSECUTOR, INT'L CRIM. CT., REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 254 (2017) ("The information available further provides a reasonable basis to believe that at least 24 detained persons (selected from a wider range of reported victims) were subject to torture, cruel treatment, outrages upon personal dignity, rape and/or sexual violence by members of the CIA on the territory of Afghanistan and other States Parties to the Statute (namely Poland, Romania and Lithuania), primarily in the period 2003-2004.").

156. See Statement of Karim A. A. Khan QC, *supra* note 51.

involves multiple actors of different nationalities who may be subject to different institutions, rules, and jurisdictional bases. While the field began with a virtually exclusive focus on State actors (with piracy as a notable exception),¹⁵⁷ advocates and lawmakers are increasingly working to find mechanisms to pin human rights obligations on non-State actors, from terrorists to individual profiteers to corporations to intimate partners.¹⁵⁸ In addition, some States continue to contest the extraterritoriality of human rights obligations, and their application in situations of armed conflict, in part due to treaty text that is open to multiple interpretations.¹⁵⁹

Students will grapple with the different retributive, deterrent, and expressive signals sent by criminal versus civil matters and by matters alleging individual versus State responsibility. At some point in the course, I invite a former client, the remarkable Zenaida Velásquez Rodríguez,¹⁶⁰ to give a guest lecture to discuss her experience alleging State responsibility before the Inter-American Court of Human Rights in the groundbreaking case of *Velásquez-Rodríguez v. Honduras*¹⁶¹ and as a civil plaintiff in a tort case under the Alien Tort Statute in the Southern District of Florida.¹⁶²

Given this mixed litigation roundup, this case can foster a hammer/nail conversation.¹⁶³ Law students will instinctively look to adversarial litigation for such a troubling set of facts, but they can be reminded that there may be other tactics that can be pursued as well, in conjunction with or in lieu of litigation—political advocacy, legal reforms, media outreach, truth-telling, and art—particularly given the many barriers to accessing the courts.¹⁶⁴ For example, the Council of

157. See Diggs et al., *supra* note 139, at 310–11.

158. See, e.g., *id.* (discussing the global and national mechanisms creating liability for corporations).

159. Smadar Ben-Natan, *Constitutional Mindset: The Interrelations Between Constitutional Law and International Law in the Extraterritorial Application of Human Rights*, 50 ISR. L. REV. 139, 146 (2017).

160. *Clients: Zenaida Velásquez-Rodríguez*, CTR. FOR JUST. & ACCOUNTABILITY <https://cja.org/what-we-do/litigation/reyes-v-lopez-grijalba/clients/clients-zenaida-velasquez-rodriguez/> [https://perma.cc/NU2T-GNCF].

161. *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988).

162. *Reyes v. López Grijalba*, Final Judgment, No. 02-22046-CIV-LENARD/KLEIN (S.D. Fla. Mar. 31, 2006).

163. Sarah Tiong, *If All You Have Is a Hammer, Everything Looks Like a Nail*, INT’L PEACE & SEC. INST., <https://ipsinstitute.org/the-hague/the-hague-2013/if-all-you-have-is-a-hammer-everything-looks-like-a-nail/> [https://perma.cc/CTG9-NQDP].

164. See, e.g., KATELIJN VERSTRAETE, *THE CREATIVE POWER OF THE ARTS: REIMAGINING HUMAN AND PLANETARY FLOURISHING* (2021).

Europe launched a comprehensive investigation into the use of European bases and air space for extraordinary renditions.¹⁶⁵ The so-called Marty report, named for the Swiss senator who conducted the investigation, addressed the *El-Masri* case, among others, and the essential role played by State officials in Macedonia and elsewhere in enabling unlawful renditions on European territories.¹⁶⁶ A similar effort proceeded in the European Parliament and resulted in resolutions condemning El-Masri's rendition and others like it and calling upon Member States to investigate allegations, compensate the victims, and better monitor the activities of the secret services.¹⁶⁷ In the United States, North Carolina established a truth commission to explore the State of North Carolina's role as a staging ground for rendition flights.¹⁶⁸ Ultimately, many survivors will recount that what they desire most is an acknowledgment that their rights were violated, which may include a formal apology; a means to pursue rehabilitation (including compensation); and measures to prevent recurrence and build deterrence.¹⁶⁹ Such outcomes may be more possible through negotiations than through adversarial litigation.¹⁷⁰ This can inspire a discussion of what it means to take a survivor-centered approach to human rights work¹⁷¹ and strategic concerns that may arise when civil society actors work with governments rather than always against them.

All told, El-Masri's case offers a vivid and resonant roadmap through the course and helps students begin to conceptualize how the different institutions operate as we proceed through the reading. As one

165. See Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, EUR. PARL. ASSEMBLY: COMM. L. AFFS. & HUM. RTS. § 1.4 (June 7, 2006).

166. *Id.* § 3.1.

167. See Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, EUR. PARL. DOC. A6-0020/2007), ¶¶ 185–94 (2007).

168. See THE N.C. COMM'N OF INQUIRY ON TORTURE, <http://www.nccit.org/> [<https://perma.cc/A8EK-QAXK>].

169. See generally Rebecca J. Hamilton, *Platform-Enabled Crimes: Closing the Accountability Gap for Social Media Companies that Facilitate International Crimes*, B.C. L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3905351 [<https://perma.cc/Z4R5-LKBX>] (identifying these intersecting goals as often articulated by survivors).

170. See Daniella Stoltz & Beth Van Schaack, *It's Never Too Late to Say "I'm Sorry": Sovereign Apologies over the Years*, JUST. SEC. (Mar. 16, 2021), <https://www.justsecurity.org/75340/its-never-too-late-to-say-im-sorry-sovereign-apologies-over-the-years/> [<https://perma.cc/C5VG-7CCZ>].

171. See Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 3–4 (2010) (stressing the need to involve survivors and their communities in the design of justice processes).

student noted, surveying the whole human rights matrix right from the start served as a good equalizer that gave the class a common starting point and then a point of reference moving forward. Indeed, we return to El-Masri's case repeatedly over the course of the term to demonstrate various international law precepts. At the end of the term, students have a tangible way to assess how much they have learned when they revisit the various legal efforts spurred by El-Masri's experience. Doing the simulation together also emphasizes the point that students will learn as much from each other, given their individual instincts and prior experiences, as they will from the professor. These are all important lessons as our students take flight into the field of international law.

FIGURE 1

			Type of Tribunal		
			International	Regional/Hybrid	Domestic
Respondent/Defendant	Individual	Criminal	International Criminal Court <i>Ad Hoc</i> Tribunals	Future African Court of Justice & Human Rights / Special Court for Sierra Leone	Domestic statutes codifying international crimes (e.g., the German Code of Crimes Against International Law (“CCAIL”))
		Civil	∅	∅	Suits under the Alien Tort Statute or <i>partie civile</i> system in Europe
	Corporate	Criminal	∅	Future African Court of Justice & Human Rights	European corporate proceedings
		Civil	∅	∅	Suits under the Alien Tort Statute & related statutes
	State	Criminal	∅	∅	∅
		Civil	International Court of Justice, human rights treaty bodies (e.g., Committee Against Torture)	European Court of Human Rights, Inter-American Commission	Suits under the U.S. Foreign Sovereign Immunities Act or other national equivalents