NOTES

EXTRADITION OR EXECUTION? POLICY CONSTRAINTS IN THE UNITED STATES' WAR ON TERROR

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I. INTRODUCTION

On February 19, 2003, a court in Hamburg, Germany convicted Moroccan national Mounir Motassadeq of over 3000 counts of accessory to murder in connection with the attacks of September 11, 2001. Motassadeq stood accused of being a member of the Hamburg terrorist cell that plotted and executed the hijacking of U.S. aircraft and subsequent attacks on the World Trade Center and Pentagon.[1] He was convicted in a Hamburg higher regional court and sentenced to the maximum term of fifteen years in prison.[2] Motassadeq's was the first conviction related to the September 11 attacks in any jurisdiction.

On March 4, 2004, a German appellate court vacated this conviction and ordered a new trial after Motassadeq's lawyers successfully argued that the U.S. government withheld potentially exculpatory evidence during the

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1. Press Release, German Embassy, Washington, D.C., First Charges Filed Against 9/11 Subject in Germany (Aug. 29, 2002), *at* http://www.germany-info.org/relaunch/politics/new /pol_terror_indictment2.htm.

2. If he serves the full sentence, this will equal approximately 1.8 days in prison per count.

first trial.[3] In citing the failure of the United States to cooperate with the German courts, Judge Klaus Tolksdorf, presiding judge of the five-judge panel, stated that "'under the German law, all available evidence must be made available . . . [and] the justice system could not bend to accommodate security concerns stemming from international efforts to fight terrorism. . . . [T]he fight against terrorism cannot be a wild, unjust war.'"[4]

Given that the murders took place on American soil and that the vast majority of victims were American citizens, it may come as a surprise to the American public that their government did not attempt to extradite Motassadeq so that he could face trial in U.S. courts. After all, the United States has held Zacharias Moussaoui since prior to September 11 and charged him with six counts of conspiracy in the aftermath of the attacks.[5] President George Bush himself promised "to pursue the terrorists in cities and camps and caves across the earth."[6] The United States was willing to pursue regime change in Afghanistan and indefinitely detain al-Qaida suspects in Cuba, and it would stand to reason that the United States would seek custody of anyone who was suspected of aiding the perpetrators of September 11.

Only two and a half weeks after Motassadeq was arrested in Hamburg, U.S. Attorney General John Ashcroft held a joint press conference in Berlin with German Interior Minister Otto Schily. After a series of introductory remarks by Attorney General Ashcroft and Interior Minister Schily, focusing mainly on German-American cooperation in the freshly launched war on terrorism, the attorney general was asked about Motassadeq:

> Question: There is a gentleman, Mr. Motassadeq, who is in custody here, who is accused of participating and planning in preparation of the 11 September events. Is that someone that you would like to try in the United States and has Germany expressed any concerns about him facing a potential death penalty?

3. Desmond Butler, *German Court Overturns Conviction in 9/11 Case*, N.Y. TIMES, Mar. 4, 2004, at A1. *See also infra* Part V.C.

4. Ariel Cohen, *Blind Justice Is Deadly*, TECH CENT. STATION, Mar. 17, 2004, *at* http://www.techcentralstation.com/031704E.html (first omission in original).

5. Zacharias Moussaoui currently faces charges in the Eastern District of Virginia, but the Department of Justice ("DOJ") has repeatedly suggested that he could eventually face charges in a military tribunal instead. *See infra* Part V.B.

6. President George W. Bush, President's Remarks to the Nation (Sept. 11, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/20020911-3.html.

> Attorney General Ashcroft: I just might indicate that we did not discuss individuals that are in German custody today and are not in a position to do so at this time.[7]

Soon after, the U.S. Department of Justice ("DOJ") made a strategic decision to cooperate with the German prosecution to a certain degree, yet no attempt has been made to extradite Motassadeq. The United States has a solid jurisdictional claim, as the trial court eventually concluded that Motassadeq aided the terrorists both during their time in Germany and after they had arrived in the United States.[8] The reason that the United States did not seek extradition of Motassadeq is alluded to by the questioner: Germany, along with an ever-increasing number of other nations, is loath to extradite any suspect to the United States if the suspect may face execution.[9]

Since the Supreme Court reinstated capital punishment in 1976,[10] the United States has been at odds with the vast majority of industrialized nations, including those in the European Union, which made abolition of capital punishment a condition for admission.[11] By the late 1980s, this divergence in attitude toward capital punishment began to have serious effects on the ability of the U.S. government to extradite certain suspects (those potentially eligible for execution) from Europe.[12] Although bilateral disputes over extradition of death-penalty-eligible suspects are nothing new, the late 1980s marked the first period in which the issue received considerable attention in supranational legal venues.

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7. Press Conference, Attorney General Transcript, News Conference with German Interior Minister Otto Schily (Dec. 14, 2001), *at* http://www.usdoj.gov/ag/speeches/2001/1214newsconferencewithschilyberlin.htm [hereinafter Ashcroft Press Conference].

8. *See infra* Part V.C.

9. *See generally* Alan Clarke, *Terrorism, Extradition, and the Death Penalty*, 29 WM. MITCHELL L. REV. 783, 793–808 (2003) (documenting an international drift toward a per se rule precluding extradition where capital punishment may be applied).

10. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (holding that state death penalty statutes do not invariably amount to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution).

11. *See* Rudolph J. Gerber & Peter J. O'Connor, *Capital Punishment Is Bad Public Policy*, ARIZ. ATT'Y, Nov. 2002, at 12, 16 (discussing the negative impact of the death penalty on U.S. diplomatic relations with European nations). One example of this has been the behavior of the Turkish government vis-à-vis captured Kurdish leader Abdullah Ocalan, former head of the outlawed Kurdistan Workers Party. After Ocalan's arrest, a Turkish court sentenced him to death in June 1999. Turkey, which has been seeking admission to the European Union, commuted Ocalan's sentence to life imprisonment and abolished the death penalty in 2002. *See* Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 137–38 (2002).

12. Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT'L L. & POL. 813, 835–36 (1993).

The first supranational attempt to constrain the power of the United States to extradite capital suspects came in *Soering v. United Kingdom*, a European Court of Human Rights' ("ECHR") decision.[13] In *Soering*, the court held that extradition to the United States from a European nation would violate Article 3 of the European Convention on Human Rights ("Convention") if the suspect faced the possibility of execution.[14] During the ensuing decade, attitudes hardened on both sides as the United States increased the rate of executions,[15] while opposition to capital punishment grew in Europe and other parts of the world. In 1996, the U.S. Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), drawing an explicit policy connection between capital punishment and terrorism and paving the way for more conflict with international courts. The dispute would erupt in the International Court of Justice ("ICJ"), which issued a 2001 opinion finding the United States in violation of the Vienna Convention on Consular Relations ("Vienna Convention").[16]

After September 11, the world faces a much larger number of criminal suspects sought by the United States in connection with terrorist attacks. Suspects have been apprehended throughout the United States, Europe, Africa, Asia, and the Middle East, and it is likely that this trend will continue for the foreseeable future. The United States' ability to seek the death penalty against these suspects in its own courts, however, depends on *where* such suspects are apprehended. Suspects who are apprehended in Europe, like Motassadeq, will likely be tried in Europe, even if their crimes were committed in the United States. Suspects apprehended in the United States, like Moussaoui, could eventually face the death penalty in U.S. courts,[17] but this policy is already jeopardizing investigative cooperation between the United States and its allies in the war on terror. International legal decisions have made it unlikely that suspects captured in Europe (or other jurisdictions that oppose capital punishment) will be extradited to the

13. Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989).

14. *See id. See also infra* Part II.

15. *See* Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. 719, 740 (2002) (noting that about five times as many people were executed in the United States in 1999 than in 1989, the year of the *Soering* decision).

16. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 140 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

17. At present, it appears that Moussaoui is less likely to face execution, as the district court recently precluded the death penalty due to the government's refusal to allow Moussaoui the opportunity to depose certain witnesses currently being detained by the government in connection with the terrorist attack. *See* United States v. Moussaoui, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003). *See also infra* Part V.B.

United States unless the death sentence is removed from the prosecutorial arsenal.

This Note explores the dispute between the United States and its allies over capital punishment in the context of the war on terror. It focuses on constraints relating to the death penalty that may hinder the war on terror and avoids a normative analysis of capital punishment. The United States has already lost in at least two major international fora, the ECHR and the ICJ, as well as in numerous national courts outside of Europe, including South Africa and Canada. Though these decisions had ostensibly nothing to do with terrorism (except the South African case),[18] they will severely limit the United States' ability to extradite suspected terrorists if they face possible execution. These decisions may indicate future minefields in the war on terror.

The United States must choose its battles over the death penalty wisely. Assuming that the current administration wishes to keep the death penalty as a sentencing option for terrorism suspects (as all indications would suggest), it must take steps to avoid the development of an ironclad per se rule barring extradition. The prosecutorial role of the executive branches (at both the state and federal levels)[19] has led them to press for the death penalty without regard for international considerations, and U.S. courts have granted less deference to international tribunals in this context than in virtually any other area of international law.[20] Even so, these international decisions have already had a constraining effect on both legal outcomes in U.S. courts and the federal government's ability to investigate and prosecute the war on terror.[21] If they wish to stand their ground on the death penalty for terrorists, U.S. policymakers in both the executive and judicial branches should keep these constraints in mind and minimize friction over the issue by abiding by the treaties to which the United States

18. *See infra* Part V.A.

19. Although the DOJ has taken the lead in virtually all terrorism investigations, international cases such as *Soering* and the *LaGrand Case* have been exclusively rooted in murder prosecutions at the state level.

20. *See* Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675, 683–85, 775–91 (2003) (describing the "No Deference" model toward international human rights tribunals in capital punishment cases as the far end of a continuum of varying degrees of deference that federal courts afford international tribunals). Although Roger Alford's analysis is limited to federal courts, state courts (as well as state executives, vis-à-vis state governors' powers of clemency) have also shown extreme indifference to international considerations in the death penalty context. *See infra* Part III (discussing states' refusals to defer to ICJ orders in the cases of Angel Breard, Walter and Karl LaGrand, and Carlos Avena).

21. *See infra* Part V.

is already a signatory, while continuing to press for extradition in cases of national interest.

This Note begins by exploring the international case law prior to September 11, which would later constrain the United States' response to terrorism. Part II examines the *Soering* ruling in the ECHR, which studied the "death row phenomenon" and held that extradition of capital suspects to the United States would violate Article 3 of the Convention. This case led to increased resistance to extradition from Europe to the United States, but had little effect on U.S. jurisprudence. Part III discusses cases in the ICJ concerning violations of the Vienna Convention. These cases involve foreign nationals facing execution in the United States. Part III.A focuses on the U.S. Supreme Court's rejection of the ICJ's Provisional Order, which paved the way for the execution of Paraguayan national Angel Breard. Part III.B analyzes the ICJ's ruling in the *LaGrand Case*, in which the ICJ ruled against the United States, finding that it had violated both the ICJ's own Order Indicating Provisional Measures and the Vienna Convention after the United States executed Karl and Walter LaGrand. Part III.C discusses *Mexico v. United States*, which addresses the same issues.

The remainder of this Note discusses these cases in the context of U.S. terrorism policy. Part IV discusses the United States' response to terrorism, beginning with AEDPA, and shows how provisions of this legislation would later conflict with ICJ rulings. Part V focuses on three cases evolving out of the war on terror, those of Khalfan Khamis Mohamed, Zacharias Moussaoui, and Mounir Motassadeq. Part VI concludes by drawing implications for the United States, foreign governments hoping to eliminate the use of capital punishment, international legal bodies like the ECHR and ICJ, and the terrorists themselves. This Note demonstrates that the dispute over capital punishment is already hampering the international war on terrorism, and it threatens to undermine the legitimacy of the international legal system.

II. THE ECHR'S DECISION IN *SOERING V. UNITED KINGDOM* AND ITS IMPACT ON INTERNATIONAL DEATH PENALTY JURISPRUDENCE

International disputes regarding extradition and capital punishment are nothing new to U.S. policymakers. Extradition is typically a two-party process between the extraditing nation and the nation seeking custody, and as such, it has historically been governed by bilateral rather than

international treaties.[22] In the past, when a country objected to the practice of capital punishment, the United States sometimes "include[d] a provision in extradition treaties formally acknowledging the right of a requested state not to extradite a fugitive unless the U.S. government promised to forego the death penalty," but resisted attempts to include waivers of capital punishment in the treaties themselves.[23] An early example of this policy occurred in the 1920s, when attempts by the United States to extradite convicted Italian-American mobsters were successfully opposed by Italy until their death sentences were commuted to life imprisonment.[24] Bilateral disputes continue to this day; however, in 1988, the European Commission on Human Rights ("Commission") and the ECHR raised the issue in a supranational forum for the first time.

A. *SOERING V. UNITED KINGDOM:* FACTS AND PROCEDURAL HISTORY

The ECHR placed the first important constraint on the ability of the United States to extradite and execute in its 1989 decision *Soering v. United Kingdom*.[25] By the time the ECHR rendered its opinion, *Soering* had weaved its way through three levels of British courts and the Commission. State prosecutors in three countries fought first in national (British) and then international (ECHR) courts.[26] These parallel legal proceedings require a detailed discussion of the procedural history of this case.

Jens Soering was a German national wanted in Bedford County, Virginia for the March 1985 murders of his girlfriend's parents, William and Nancy Haysom.[27] Soering and his girlfriend, Elizabeth Haysom, fled to Great Britain, were arrested in April 1985, and were subsequently convicted of check fraud.[28] While in British custody, Soering was interviewed by a Bedford County Sheriff investigator. During the interview, Soering provided details of the planning and commission of the

22. *See generally* Nadelmann, *supra* note 12, at 814, 820–28 (discussing the history of extradition treaties as "the preferred means of obtaining fugitives from abroad").

23. *Id.* at 836.

24. *Id*. at 835.

25. Soering v. United Kingdom, 11 Eur. Ct. H.R. 439 (1989).

26. All of these were pretrial proceedings and, thus, took place without any factual finding by a jury regarding the charges of capital murder.

27. *Soering*, 11 Eur. Ct. H.R. at 443.

28. *Id.* Elizabeth Haysom was extradited to the United States on May 8, 1987, after the Federal Republic of Germany filed a competing extradition application for Jens Soering. She later pled guilty to accessory to murder charges and was sentenced to ninety years of imprisonment. Presumably, West Germany did not file an extradition petition for Haysom because she was not a West German citizen. *See id*. at 445.

murder, including an attempt to set up an alibi, indicating premeditation.[29] After a federal grand jury indicted Soering for capital murder, the United States formally requested his extradition from the United Kingdom pursuant to the Extradition Treaty of 1972 between the United States and the United Kingdom.[30]

Two things occurred shortly after the formal U.S. extradition request. First, the British Embassy in Washington, D.C. formally raised the issue of capital punishment. Noting that the death penalty had been abolished in Great Britain, the British government requested that "in the event of Mr. Soering being surrendered and being convicted of the crimes for which he has been indicted . . . the death penalty, if imposed, will not be carried out."[31] Second, after a West German prosecutor interviewed Soering while in British custody during late 1986, a local court in Bonn issued a warrant for Soering's arrest in connection with the Haysom murders, and on March 11, 1987, the Federal Republic of Germany filed a competing request for Soering's extradition.[32] Capital punishment had been abolished in West Germany since 1949, and Soering would not have faced a death sentence had the event that the court granted the West German petition.[33]

Shortly thereafter, the United States formally requested extradition to the United States in preference to the West German request.[34] This led to extradition proceedings in a British Magistrate Court, which ruled on June 16, 1987, in favor of the United States' petition.[35]

Soering continued to fight extradition on two parallel tracks. First, he appealed unsuccessfully in the British courts, culminating with the secretary of state's signature of a warrant ordering extradition to the United States on August 3, 1988.[36] The warrant was never carried out, however, because Soering filed an application to the Commission a month earlier.[37]

29. *Id.* at 443.

30. *Id.* at 444.

31. *Id.*

32. *Id.*

33. Regina C. Donnelly, Soering v. United Kingdom: *Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking?*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 339, 343 (1990).

34. *Soering*, 11 Eur. Ct. H.R. at 445.

35. *Id.* at 447 ("The Chief Magistrate . . . committed the applicant to await the Secretary of State's order for his return to the United States.").

36. *Id.* Soering's petitions were rejected by the Divisional Court on December 11, 1987, and by the House of Lords on June 30, 1988. *Id.*

37. Soering first had to petition the European Commission on Human Rights ("Commission") before the case could be heard in the European Court of Human Rights ("ECHR"). This is because individuals do not have standing to bring cases before the court directly, even though they can directly

This application, filed on July 8, alleged that, should Soering be extradited to the United States, "there was a serious likelihood that he would be sentenced to death."[38] Such a sentence would expose him to a death row phenomenon, which he claimed would breach Articles 3, 6, and 13 of the Convention.[39] On August 11, the Commission issued a provisional measure formally advising the British not to extradite Soering to the United States until it could rule on the matter.[40] On January 19, 1989, the Commission declared that while there would be no violation of Article 3 or 6 in the event of extradition to the United States, Soering had been denied an effective remedy under Article 13.[41] Both Britain and West Germany subsequently referred the case to the ECHR, which issued its decision on July 7, 1989.[42]

B. THE ECHR'S OPINION

In a unanimous opinion, the ECHR held that "the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3,"[43] which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment of punishment."[44] The court accepted Soering's argument that the possible implementation of a death sentence would subject him to a death row

petition the Commission, which then has the power to refer matters to the ECHR. *See* Holly Dawn Jarmul, *The Effect of Decisions of Regional Human Rights Tribunals on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 311, 329 (1996).

38. *Soering*, 11 Eur. Ct. H.R. at 463.

39. *Id.* at 439. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention] ("No one shall be subjected to torture or inhuman or degrading treatment or punishment."). *See also* John Andrews & Ann Sherlock, *Extradition, Death Row and the Convention*, 1990 EUR. L. REV. 87, 88.

> The applicant's main argument was that . . . the risk of exposure to the "death row phenomenon" constituted a breach of Article 3 of the Convention. He also argued that there would be a breach of Article 6 if he were extradited and that, contrary to Article 13, there was no effective remedy available under British law to enable him satisfactorily to challenge the extradition order.

Id.

40. *See Soering*, 11 Eur. Ct. H.R. at 463.

41. Donnelly, *supra* note 33, at 344.

42. *Id.* at 346.

43. *Soering*, 11 Eur. Ct. H.R. at 478. The court additionally held that extradition to the United States would not violate Article 6 of the European Convention on Human Rights ("Convention") and that Soering was not denied an effective legal remedy in violation of Article 13. *Id.* at 479, 482. The court did, however, award Soering legal fees of £26,752.80 and F5,030.60 in light of his successful Article 3 complaint. *Id.* at 483.

44. European Convention, *supra* note 39, art. 3.

phenomenon, which would constitute torture, inhuman, or degrading punishment.[45]

In its holding, the ECHR maneuvered around Article 2 of the Convention, which expressly permitted capital punishment.[46] It further conceded that "Article 3 cannot be interpreted as generally prohibiting the death penalty."[47] Instead, the court focused on the relative age of Article 2 and evolving standards of decency within Europe toward outlawing capital punishment.[48] The court pointed to the then-unratified Sixth Protocol to the Convention, which abolished capital punishment in all nations that ratified it.[49] Although the ECHR "avoided the issue of the validity of the use of the death penalty in the United States,"[50] it turned specifically to implementation of capital punishment in Virginia and whether the conditions of death row inmates violated the Convention.[51]

After an exhaustive review of Virginia's death penalty laws and practices, the ECHR specifically addressed the following in reaching its conclusion that extradition to the United States would breach Article 3: (1) length of detention prior to execution,[52] (2) conditions on death row,[53]

45. *Soering*, 11 Eur. Ct. H.R. at 478–80.

46. *See* Jarmul, *supra* note 37, at 361. Article 2 reads:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
> a. in defence of any person from unlawful violence;
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c. in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention, *supra* note 39, art. 2.

47. *Soering*, 11 Eur. Ct. H.R. at 474.

48. *Id.* at 484.

> The second sentence of Article 2(1) of the Convention was adopted, nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit . . . capital punishment in time of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.

Id. Such punishment is not consistent with the present state of European civilization. *Id.*

49. *Id.* at 484–85. *See also* Donnelly, *supra* note 33, at 349. Significantly, the original version of Protocol Six included a provision (not applicable in *Soering*, but quite applicable in the post-September 11 world) that allowed the death penalty "in respect of acts committed in time of war or of imminent threat of war." European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, art. 5. The wartime exception was eliminated from the Convention last year. *See infra* Part VI.

50. Donnelly, *supra* note 33, at 349.

51. *Id.* at 350.

52. *Soering*, 11 Eur. Ct. H.R. at 475–76.

53. *Id.* at 476.

(3) applicant's age and mental state,[54] and (4) possibility of extradition to West Germany.[55] In particular, the court seemed highly concerned about the average six- to eight-year wait[56] that a condemned prisoner would spend on Virginia's death row "and the anguish and mounting tension of living in the ever-present shadow of death."[57] The court noted that much of this time is "in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law,"[58] but that, "however well-intentioned and even potentially beneficial"[59] Virginia's procedural safeguards regarding the death penalty appellate process, it still would constitute torture, inhuman, or degrading conduct.

C. *SOERING*'S IMPACT

Soering is one of the most widely commented decisions issued by the ECHR,[60] though its long-term impact remains somewhat unclear. Soering himself was eventually extradited to the United States after Britain sought and received assurances that he would not be executed.[61] These assurances, which had specifically been withheld prior to the ECHR's decision,[62] indicate that U.S. officials were forced to recognize the authority of the court's opinion, at least in this case.[63] The United States would be forced to forfeit capital punishment in seeking the extradition of capital murder suspects from Europe on more occasions in the future.

54. *Id.* at 476–77.

55. *Id.* at 477–78.

56. This six- to eight-year wait was noted by numerous commentators on the *Soering* case as one of the most important rationales for the verdict. *See* Andrews & Sherlock, *supra* note 39, at 91; Donnelly, *supra* note 33, at 350; Jarmul, *supra* note 37, at 362.

57. *Soering*, 11 Eur. Ct. H.R. at 476.

58. *Id.* at 475.

59. *Id.*

60. *See* Sharfstein, *supra* note 15, at 722–23 (noting that over 200 scholarly articles have been written on *Soering* in the past decade).

61. Jarmul, *supra* note 37, at 363.

62. *See Soering*, 11 Eur. Ct. H.R. at 446 ("[T]he Virginia authorities have informed the United Kingdom Government that Mr. Updike was not planning to provide any further assurances and intended to seek the death penalty in Mr. Soering's case . . . .").

63. *See* Jarmul, *supra* note 37, at 362–63 ("It is clear, however, that the ECHR's decision in this case did have an extraterritorial effect on the U.S. domestic law because the U.S. courts could not sentence Soering as they wished.").

1. *Soering*'s Effect on Extradition to the United States

Soering's effect in Europe was immediate and powerful. One of the first cases to cite it came from the Dutch Supreme Court, which, in March 1990, prevented the extradition of Sergeant Charles Short, a U.S. serviceman accused of killing his wife while stationed in Holland.[64] Just as in *Soering*, Short was eventually extradited to the United States after government officials provided assurances that he would not be executed.[65]

The rule since *Soering* and the case involving Sergeant Short has been that fugitives apprehended in European countries will not be extradited to the United States unless it agrees to withdraw capital punishment from the prosecutorial arsenal.[66] This rule, known by some as the "*Soering* principle,"[67] has been applied by various European courts, whether or not they cite *Soering* directly. For example, in 1996, the Italian Constitutional Court struck down portions of the 1983 U.S.-Italy Extradition Treaty to prevent the extradition of Pietro Venezia, an Italian national who had murdered a Florida tax collector named Donald Bonham and then fled to Italy.[68] Although the Italian court did not explicitly cite *Soering* in its opinion, "it is unlikely that *Venezia* was decided in a vacuum."[69]

Other high profile examples of this policy include France's refusal to extradite Ira Einhorn to Pennsylvania[70] and James C. Kopp to New York[71] until the death penalty was waived. Both Einhorn and Kopp fled to France after becoming suspects in capital murder cases and were convicted of murder in the United States after U.S. authorities waived the death penalty. Perhaps more importantly from a precedential standpoint, in 2001, the Canadian Supreme Court, in *United States v. Burns*, held that "in the absence of exceptional circumstances, which we refrain from trying to

64. Nadelmann, *supra* note 12, at 837. This case was also significant in its involvement of military justice and jurisdictional arrangements, which had previously been the subject of a NATO Status of Forces Agreement. *See also* Sharfstein, *supra* note 15, at 737.

65. *See* Nadelmann, *supra* note 12, at 837.

66. *See* Demleitner, *supra* note 11, at 145.

67. Colin Warbrick, *The Principles of the European Convention on Human Rights and the Response of States to Terrorism*, 2002 EUR. HUM. RTS. L. REV. 287, 296–97.

68. Mark E. DeWitt, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATH. U. L. REV. 535, 565–67, 570 (1998).

69. *Id.* at 582.

70. *See* Sharfstein, *supra* note 15, at 729.

71. *See* John J. Goldman, *Abortion Foe Says Slaying Was Unintended*, L.A. TIMES, Mar. 18, 2003, at A23 ("As part of the extradition agreement with French authorities, prosecutors had agreed not to seek the death penalty.").

anticipate, assurances in death penalty cases are always constitutionally required."[72]

Soering's impact may extend beyond extraterritorial constraints on capital punishment. At least one U.S. commentator warns that the ECHR's concern regarding prison conditions in the United States could threaten a much broader class of extraditable suspects.[73] While noting that the bulk of attention has been focused on capital punishment, Daniel Sharfstein argues that the scope of *Soering* could be expanded to prevent extradition to anyone facing prison in the United States, if they could successfully argue that U.S. prison conditions were "inhuman or degrading treatment."[74] In the least, such an attempt to expand the scope of *Soering* could drastically affect the ability of the United States to rely on bilateral extradition agreements and force an expensive reexamination of U.S. prison conditions.

2. *Soering*'s Impact on U.S. Courts and Policymakers

Although European courts relied on *Soering* to alter national and international policies regarding extradition, U.S. courts took limited notice of the ECHR's ruling. It was cited twice by Justice Stephen Breyer as persuasive authority in dissents from denials of certiorari in death penalty cases and four more times by Judge Jack Weinstein of the Eastern District of New York.[75] One of Judge Weinstein's opinions was overruled by the Second Circuit, which specifically objected to his application of *Soering*.[76]

While U.S. courts have been less than enthusiastic in their embrace of *Soering*, commentators and U.S. policymakers took notice of the case,

72. United States v. Burns, 1 S.C.R. 283, 323 (2001). *Burns* reversed a post-*Soering* case where the Canadian Supreme Court had found that extradition of death-penalty-eligible defendants to the United States was permissible under the Canadian Charter of Rights. *See generally* Clarke, *supra* note 9, at 798–803. Alan Clarke notes, however, "Of course terrorists from al-Qaeda might constitute those 'exceptional circumstances' reserved in the opinion." *Id.* at 799.

73. *See* Sharfstein, *supra* note 15, at 745 ("Compared to extraditions involving capital cases, a much larger number of defendants would be entitled to assurances. These assurances would be far more intrusive . . . and would force the United States to admit . . . that it has violated the rights of thousands of prisoners.").

74. *See id.*

75. *See id.* at 738. The two cases in which Justice Stephen Breyer cited *Soering* were *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J., dissenting), and *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting). According to Daniel Sharfstein, "of the four [opinions by Judge Weinstein], only *Ahmad v. Wigen*, 726 F. Supp. 389, 413–15 (E.D.N.Y. 1989), can be said to rely in any way on *Soering*'s reasoning." Sharfstein, *supra* note 15, at 738 n.61.

76. Sharfstein, *supra* note 15, at 738. *See* Ahmad v. Wigen, 910 F.2d 1063, 1067 (2d Cir. 1990) ("The interests of international comity are ill-served by requiring a foreign nation . . . to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced.").

particularly the similarity between Article 3 of the Convention and the Eighth Amendment prohibition against cruel and unusual punishment.[77] Article 3 reads that "[n]o one shall be subjected to torture or inhuman or degrading treatment or punishment,"[78] while the Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[79] This similarity cropped up in another international context when the United States ratified the International Covenant on Civil and Political Rights ("Covenant"), Article 7 of which prohibits "torture or . . . cruel, inhuman or degrading treatment or punishment."[80] Although the language mimics Article 3 of the Convention (a document to which the United States is not a party), the United States entered a formal reservation to the clause specifying that it would interpret the language as "identical to the Due Process Clauses and the Eighth Amendment to the Constitution."[81] The court held that capital punishment is not inherently a violation of the Eighth Amendment, and, as a result, this reservation attempts to prevent capital punishment (or prison conditions, for that matter) from being considered a violation of the Covenant.

III. THE ICJ'S BATTLE AGAINST CAPITAL PUNISHMENT IN THE UNITED STATES: CONSULAR NOTIFICATION

Whether or not *Soering* will eventually lead to consequences for U.S. prison conditions, it clearly has had a constraining effect on the ability of the United States to extradite capital suspects. Nonetheless, it has not led to a reduction in capital punishment in the United States. The pace of executions increased in the aftermath of *Soering*, and lawmakers have expanded the scope of the federal death penalty, particularly vis-à-vis terrorism.[82] International opponents of the death penalty, while continuing to fight extradition to the United States, have expanded their fight to include individuals already in U.S. custody.

77. *See* Andrews & Sherlock, *supra* note 39, at 92 ("[I]n the instant case, it was not clear whether the guarantee against cruel and unusual punishment in the United States Constitution covered the same area as Article 3 of the Convention.").

78. European Convention, *supra* note 39, art. 3.

79. U.S. CONST. amend. VIII.

80. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S 171.

81. Demleitner, *supra* note 11, at 141–42. This reservation, specifically designed to allow for continued United States' practice of capital punishment, was rejected by the European Parliament, which considers it to be incompatible with the International Covenant on Civil and Political Rights. *See id*.

82. *See infra* Part IV.

The main battleground has been the ICJ. Sometimes known as the World Court, the ICJ is the primary judicial body of the United Nations, and its jurisdiction includes disputes over international conventions and treaties.[83] Article 36 of the Vienna Convention provides that foreign suspects have a right to notify their consulate at their arrest or indictment.[84] Currently, there are over 100 foreign prisoners on death row in the United States, and the overwhelming majority of these cases include serious questions about whether U.S. authorities properly informed them of their rights.[85] To date, there have been three concerted attempts to address these questions in the ICJ. The first was completely unsuccessful and was withdrawn after the defendant was executed; the second was also unsuccessful in stopping the execution, but led to a dramatic decision against the United States; the third also went against the United States, this time before any executions had occurred.

83. *See* Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm. *See also* Cara S. O'Driscoll, Comment, *The Execution of Foreign Nationals in Arizona: Violations of the Vienna Convention on Consular Relations*, 32 ARIZ. ST. L.J. 323, 324–25 (2000); Jennifer Lynne Weinman, Note, *The Clash Between U.S. Criminal Procedure and the Vienna Convention on Consular Relations: An Analysis of the International Court of Justice Decision in the* LaGrand Case, 17 AM. U. INT'L L. REV. 857, 872 (2002).

84. *See* Vienna Convention on Consular Relations, *opened for signature* Apr. 18, 1961, art. 36, 21 U.S.T. 77, 79 (entered into force Mar. 19, 1967). Article 36 reads:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> a. consular officials shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officials of the sending State;
>
> b. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> c. consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.

Id.

85. Weinman, *supra* note 83, at 861 ("Of the one hundred twenty-three foreigners on death row in the United States, only four were promptly told that they could seek assistance from their consulate.").

A. *PARAGUAY V. UNITED STATES*: A PRELUDE

The first case in which the ICJ addressed alleged U.S. violations of the Vienna Convention's capital punishment provisions involved an unsuccessful appeal by Paraguay in 1998. Dual Argentinean and Paraguayan national Angel Breard was convicted and sentenced to death in Virginia for the February 1992 attempted rape and murder of Ruth Dickie.[86] After unsuccessfully appealing his conviction to the Supreme Court of Virginia[87] and the Supreme Court of the United States,[88] Breard filed unsuccessful petitions for writ of habeas corpus, first in state court, and then in federal district court.[89] He was given an execution date of April 14, 1998.[90]

Breard contended that his convictions and sentences should be vacated because the United States had not properly advised him of his consular rights under the Vienna Convention.[91] The district court, however, held that because he had not raised the consular-notification issue in state court, the issue was procedurally defaulted and barred from federal court.[92] In affirming the district court's judgment, the Fourth Circuit Court of Appeals held that "Breard is entitled to no relief on his Vienna Convention claim."[93]

As Breard's April 14 execution date approached, his native Paraguay stepped forward, introducing a new appeal to the ICJ on April 3. The petition charged that the United States had violated the Vienna Convention and that it had an international legal obligation to suspend the doctrine of procedural default.[94] Less than a week later, the ICJ issued an order directing the United States to "take all measures at its disposal" to ensure that Breard was not executed until the ICJ could hear the case.[95]

Coming as it did five days before Breard's scheduled execution, the ICJ's order proved to be too late. On the day of the execution, the U.S. Supreme Court denied Breard's appeal of the Fourth Circuit's ruling.[96] The

86. Breard v. Pruitt, 134 F.3d 615, 617 (4th Cir. 1998).
87. Breard v. Commonwealth, 445 S.E.2d 670 (Va. 1994).
88. Breard v. Virginia, 513 U.S. 971 (1994).
89. *See* Breard v. Netherland, 949 F. Supp. 1255, 1260 (E.D. Va. 1996).
90. *See* Breard v. Greene, 523 U.S. 371, 372 (1998).
91. *See Pruitt*, 134 F.3d at 618–19.
92. *See Netherland*, 949 F. Supp. at 1263.
93. *Pruitt*, 134 F.3d at 620.
94. Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99, ¶ 5(1), 5(3) (Summary of the Order of Apr. 9, 1998), *available at* http://212.153.43.18/icjwww/idocket/ipaus/ipauseframe.htm.
95. *Id.* ¶ 41.
96. *See* Breard v. Greene, 523 U.S. 371, 378 (1998) (per curiam).

per curiam opinion cited *Wainright v. Sykes*[97] in shutting the door to Breard's federal habeas claim. Furthermore, it claimed that as part of AEDPA, Congress codified a provision specifically denying habeas petitions to plaintiffs alleging they are being held in violation of international treaty.[98] Interestingly, the Court did note the ICJ's interest in the case, suggesting that the Governor of Virginia could still stay the execution pending its outcome, but it refused to issue the stay itself.[99] Breard was executed later that day, and Paraguay withdrew the case from the ICJ docket.[100]

B. THE *LAGRAND CASE*

The ICJ would not have to wait long before getting another chance to address the same issue. Less than a year later, it confronted a similar set of facts under nearly identical circumstances. Although the outcome was equally unsatisfactory for the individuals in question, this time the ICJ had an opportunity to respond to the U.S. Supreme Court.

Walter and Karl LaGrand were both convicted of first degree murder, first degree attempted murder, attempted armed robbery, and kidnapping in an Arizona court on February 17, 1984, in connection with a botched bank robbery two years earlier.[101] The two brothers were born in Germany, but moved to the United States with their mother when they were still young children.[102] Though they were German nationals, the German consulate was not aware of their convictions until 1992, when it was approached by the brothers themselves. The LaGrands learned of their consular rights from independent sources, without notification from U.S. officials.[103] For its part, the United States did not formally notify the LaGrands of their right to consular access until December 21, 1998, almost fifteen years after their original convictions.[104] By the time of consular notification, both the

97. Wainright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding that assertions of error must first be raised in state court in a habeas proceeding).

98. *Greene*, 523 U.S. at 375–76. It is significant that Congress linked terrorism, the death penalty, and the denial of federal habeas fora in its 1996 legislation. *See infra* Part IV.

99. *See Greene*, 523 U.S. at 378 ("If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our case law allows us to make that choice for him.").

100. *See* Weinman, *supra* note 83, at 861–62.

101. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 140, ¶ 14 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

102. *See id.* ¶ 13.

103. *See id.* ¶ 22.

104. *See id.* ¶ 24. From the record, it is not clear whether Angel Breard was ever formally notified of his consular rights, though he raised the issue for the first time in federal court. *See supra* cases accompanying notes 86–99.

district court and the Ninth Circuit ruled that the issue had been procedurally defaulted.[105] In January 1999, the Arizona Supreme Court set Karl and Walter LaGrand's execution dates for February 24 and March 3, respectively.[106]

The German government tried desperately to stop the executions by appealing directly to U.S. officials. In late January, letters were sent from the German foreign minister and minister of justice to the U.S. secretary of state and attorney general, and in early February, a second set were sent from the German chancellor to President Bill Clinton and the governor of Arizona.[107] Significantly, these letters focused on the German government's general opposition to capital punishment, and the issue of consular notification was not raised in any of these letters until February 22, two days before Walter LaGrand was to be executed.[108] Efforts at this point proved unsuccessful, and Walter LaGrand was executed on February 24.[109]

On March 2, Germany filed suit in the ICJ, alleging violations of the Vienna Convention and sought indication of provisional measures barring the execution of Karl LaGrand.[110] The following day, the ICJ issued an order instructing the United States to halt the execution of Karl LaGrand until it could hear the case.[111] The order was almost identical to the one issued eleven months earlier by the ICJ in the *Breard* case,[112] as was the Supreme Court's response.

Germany immediately brought action in the U.S. Supreme Court seeking enforcement of the ICJ's order, but the Supreme Court, in a per curiam opinion, declined to exercise its original jurisdiction, paving the way for Karl LaGrand's execution.[113] This opinion cited the Court's more extensive holding in *Breard* and sardonically noted that "the United States

105. *See LaGrand Case*, 2001 I.C.J. 140, ¶ 23.
106. *See id.* ¶ 25.
107. *See id.* ¶ 26.
108. *See id.*
109. *Id.* ¶ 29.
110. *Id.* ¶ 1.
111. *Id.* ¶ 32.
112. *Compare id.*, *with* Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99, ¶ 41 (Summary of the Order of Apr. 9, 1998), *available at* http://212.153.43.18/icjwww/idocket/ipaus/ipauseframe.htm. The only major difference is that in *LaGrand*, the ICJ added an additional clause instructing the "Government of the United States of America" (presumably the federal government) to "transmit this Order to the Governor of the State of Arizona." *LaGrand Case*, 2001 I.C.J. 140, ¶ 32. This may have been in response to the U.S. Supreme Court's insistence that it had no power to bind the governor of Virginia in *Breard*. *See supra* notes 89–92 and accompanying text.
113. *See* F.R.G. v. United States, 526 U.S. 111 (1999) (per curiam).

has not waived its sovereign immunity."[114] It further objected to the "tardiness of the pleas," noting that they came "within only two hours of a scheduled execution."[115] Hours after the Court issued its opinion, Karl LaGrand was executed. Due to the time difference between the ICJ in the Hague, the U.S. Supreme Court in Washington, D.C., and Karl LaGrand in Arizona, the case was heard in the ICJ and the Supreme Court on the same calendar day as LaGrand's execution.

Neither Germany nor the ICJ accepted the outcome of the events in the United States. The ICJ was effectively denied any chance to address the Supreme Court's rejection of its order in *Breard* after Paraguay withdrew the case subsequent to Breard's execution.[116] This time, Germany did not withdraw the case and instead pushed for further proceedings. More than two years after Karl LaGrand's execution, the ICJ issued its judgment, critically holding that the United States had violated its order indicating provisional measures,[117] and further, that it violated Article 36, paragraphs 1 and 2, of the Vienna Convention.[118] The opinion specifically addressed the doctrine of procedural default, claiming that while the rule itself does not violate the Vienna Convention, it cannot be used to bar claims of denial of consular assistance.[119] The ICJ, however, spent most of its opinion addressing the binding nature of its own provisional measures.[120] Essentially, the ICJ viewed its order as the equivalent of a U.S. preliminary injunction and believed that it should have had the effect of stopping the execution. Its frustration with the United States' disregard for the order was palpable:

> The Court notes that the United States has acknowledged that, in the case of the LaGrand brothers, it did not comply with its obligations to give consular notification. The United States has presented an apology to Germany for this breach. The Court considers however that an apology

114. *Id.* at 112.

115. *Id.*

116. Press Release, International Court of Justice, Case Removed from the Court's List at the Request of Paraguay (Nov. 11, 1998), *at* http://www.icj-cij.org/icjwww/ipresscom/iPress1998/ipr9836.htm.

117. *See LaGrand Case*, 2001 I.C.J. 140, ¶ 128(5).

118. *See id.* ¶ 128(3)–(4).

119. *See id.* ¶¶ 90–91.

120. *See id.* ¶¶ 92–113. This portion of the opinion is particularly opaque, delving into the minutia of Article 41 of the ICJ's statute, including a dispute between the French and English versions of the document. This dispute sheds some light on etymology of the confusing term "Request for the Indication of Provisional Measures." *Id.* A mind-numbing example comes from paragraph 106: "The language of the first paragraph of the English version was then made to conform to the French text: thus the word 'suggest' was replaced by 'indicate,' and 'should' by 'ought to.' However, in the second paragraph of the English version, the phrase 'measures suggested' remained unchanged." *Id.* ¶ 106.

> is not sufficient in this case, and would not be in other cases where foreign nationals have not been advised without delay of their rights under Article 36, paragraph 1 of the Vienna Convention and have been subjected to prolonged detention or sentenced to severe penalties.[121]

It may seem that the court circumvented the direct issue of capital punishment, limiting its holding to the violation of the Vienna Convention. The court could not avoid the issue, however, when trying to fashion a remedy.[122] Although the German government did not view the ICJ proceedings as a death penalty matter and focused its arguments almost exclusively on the Vienna Convention, after its victory, it spun the court's decision as a blow to capital punishment in the United States.[123] Indeed, it seems quite unlikely that the Germans would have brought proceedings in the ICJ if the LaGrands had not been facing execution. The ICJ's decision, therefore, is viewed by some as a potentially major victory for opponents of capital punishment.[124] Nonetheless, Germany's victory in the case was pyrrhic, at least from the standpoint of Walter and Karl LaGrand. Like Paraguay a year earlier, it had brought its case too late for anyone other than the U.S. Supreme Court to consider the ICJ's order. Recently, however, the ICJ took up the matter for the third time.

C. TAKE THREE: *MEXICO V. UNITED STATES*

On January 9, 2003, the United States was again sued in the ICJ, this time by Mexico, acting on behalf of fifty-four of its nationals incarcerated on death row in the United States.[125] All the nationals were capital murder

121. *Id.* ¶ 123.

122. *See* Amanda E. Burks, *Consular Assistance for Foreign Defendants: Avoiding Default and Fortifying a Defense*, 14 CAP. DEF. J. 29, 45 (2001) ("The I.C.J. has proved helpless to enforce its orders in decisions like that of the *LaGrand Case*. . . . The inherent problem with remedy for the I.C.J. in that case, as of the date of its final opinion, was the fact that both LaGrand brothers had been executed.").

123. *See* Demleitner, *supra* note 11, at 149 ("Even though Germany did not style the *LaGrand* case as an attack on the death penalty, after the World Court's final ruling . . . German politicians expressed the hope that the decision would lead the United States to reconsider its retentionist stance.").

124. *See* William A. Schabas, *The ICJ Ruling Against the United States: Is It Really About the Death Penalty?*, 27 YALE J. INT'L L. 445, 451 (2002).

> *LaGrand* is of immense assistance here in its suggestion that interim measures to prevent irreparable harm, preserving the status quo in cases which cannot otherwise be corrected by a final decision, are an inherent function of adjudicative bodies. . . . To this extent, then, the *LaGrand* decision is very much about capital punishment . . . .

Id.

125. *See* Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 128, ¶¶ 2, 9 (Feb. 5, 2003), *available at* http://212.153.43.18/icjwww/idocket/imus/imusorder/imus_iorder_20030205.pdf.

convicts,[126] and all alleged that the United States had violated their rights pursuant to Article 36 of the Vienna Convention.[127] Mexico's petition identified three nationals, Cesar Roberto Fierro Reyna, Roberto Moreno Ramos, and Osvaldo Torres Aguilera, who "risk execution in the next few months" unless the ICJ indicated provisional measures.[128] Obviously, Mexico's argument was largely predicated on the ICJ's findings in the *LaGrand* decision.[129]

The ICJ heard oral arguments on January 21, 2003, and issued a unanimous order two weeks later. Though the ICJ limited the operative portion of its order to the three Mexican nationals facing the most immediate threat of execution,[130] the second part of the order kept the door open for application to the other named subjects. Although the text is almost identical to orders preceding it in *LaGrand* and *Breard*, this time the ICJ acted while there was still time for appeals to consider the order.[131] In the previous two cases, the ICJ's order came on the day of or before the scheduled execution.

On March 31, 2004, the ICJ issued its judgment in *Mexico v. United States*.[132] Citing liberally from *LaGrand*,[133] the court found that the United States breached Article 36, paragraph 1(a) and (c) against all the Mexican prisoners, and Article 36, paragraph 2 with regard to Fierro Reyna, Moreno Ramos, and Torres Aguilera.[134] Still, the ICJ stopped short of ordering the vacating of convictions and sentences of all the named subjects in Mexico's

126. Frederic J. Frommer, *Minneapolis Lawyer Fights to Stop Execution of Mexicans*, A.P. WIRE, Mar. 10, 2003, *at* http://www.kansascity.com/mld/kansascity/news/breaking_news/5356155.htm ("Mexico's case is actually on behalf of all 51 nationals on death row—all convicted murderers . . . ."). There is some confusion here about the number of Mexican nationals on death row. Frederic Frommer seems to be excluding the three facing imminent execution. *See id.* The ICJ's order repeatedly talks of fifty-four nationals. *See Concerning Avena and Other Mexican Nationals*, 2003 I.C.J. 128, ¶¶ 2, 8(1), 24. Three of these defendants, however, were serving on the Illinois death row, and the outgoing governor of Illinois commuted their sentences. *See id.* ¶ 24. Mexico, therefore, withdrew the three from its request. *See id.*

127. *See id.* ¶ 2 (identifying forty-nine cases where no attempt was made to comply with the Vienna Convention, four cases where consular notification was delayed, and one case where it was given in connection with charges other than capital murder).

128. *Id.* ¶¶ 28, 59(a).

129. *See id.* ¶ 45 (noting Mexico's argument that clemency procedures in the United States "cannot and [do] not satisfy this Court's mandate [in the *LaGrand Case*]").

130. *Id.* ¶ 59.

131. *See* Frommer, *supra* note 126 (noting that none of the three convicts had been assigned an execution date).

132. Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 128 (Judgment of Mar. 31, 2004), *available at* http://212.153.43.18/icjwww/idocket/imus/imusframe.htm.

133. *See id.* ¶¶ 34, 37, 39–40, 46, 50, 99, 111–14, 128–50.

134. *Id.* ¶ 152. For the relevant portions of Article 36, see *supra* note 84.

complaint.[135] In observing that "review and reconsideration of conviction and sentence . . . is the appropriate remedy for breaches of Article 36" and noting that such review "has not [yet] been carried out [in these three cases]," the court concluded that "it is for the United States to find [such] an appropriate remedy."[136]

It will not take long for the effect of the ICJ's ruling to be known in U.S. courts. Although the United States previously disregarded ICJ provisional orders on this issue, it has not yet executed a prisoner contrary to an ICJ judgment.[137] Osvaldo Torres Aguilera is currently scheduled to be executed on May 18, 2004.[138] Last November, the U.S. Supreme Court denied certiorari in the case, but seemed to leave the door open pending the ICJ's ruling.[139] Now that the ICJ has ruled, one would expect Torres Aguilera's attorneys to press the issue again in further appeals.

IV. U.S. TERRORISM POLICY AND CAPITAL PUNISHMENT

Neither *Soering* nor the ICJ cases have any obvious connection to terrorism, as they both involve instances of "ordinary" capital murder. Both of these cases, however, have ties to and implications for U.S. terrorism policy. *Soering* was present in the minds of U.S. lawmakers who drafted the primary antiterrorism legislation of the 1990s—AEDPA.[140] This legislation was the trigger for the dispute between the ICJ and the U.S. Supreme Court. The significance of these ties was realized even more so on September 11.

Interestingly, at least one of AEDPA's key sponsors was well aware of the ECHR's ruling in *Soering* long before final passage of the bill. As early as 1991, Senator Arlen Specter of Pennsylvania, who cosponsored

135. *Id.* ¶¶ 115–25, 152.

136. *Id.* ¶ 152.

137. There was no final ruling in *Breard* because Paraguay dropped the case after the execution. The judgment in *LaGrand* came more than two years after the executions. *See supra* text accompanying notes 96–100, 114.

138. Siobhan Morrissey, *World Court: Review Death Row Cases*, ABA J. E-REPORT, Apr. 9, 2004, *at* http://www.abanet.org/journal/ereport/a9mexican.html.

139. *See* Torres v. Mullin, 124 S. Ct. 562, 565 (2003) (Breyer, J., dissenting) ("Depending on how the ICJ decides Mexico's related case against the United States, and subject to further briefing in light of that decision, I may well vote to grant certiorari in this case. Consequently, I would defer consideration of this petition.").

140. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). For a criticism of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), particularly regarding its effects on habeas corpus, see generally Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

AEDPA and previous versions of the legislation, feared the impact of the *Soering* decision on the ability of the United States to implement the death penalty.[141] Senator Specter and his compatriots, however, predicted that a terrorism death penalty statute would not cause significant extradition-related problems with other nations.[142] As the case of at least one September 11 terrorist will illustrate, Senator Specter and his colleagues may have underestimated international opposition to the death penalty and its repercussions for the United States.[143]

Large sections of the U.S. Code were rewritten when President Bill Clinton signed AEDPA in April 1996. Although consideration of terrorism and capital punishment legislation began much earlier,[144] AEDPA was passed largely as a response to the attack on the Alfred P. Murrah Federal Building in Oklahoma City.[145] The legislation addressed a plethora of topics, including assistance and restitution for victims of terrorism,[146] prohibitions against terrorist fundraising,[147] implementation of the plastic-explosives convention,[148] and funding for various federal agencies, among others.[149] The hodge-podge of measures has been described as a "symbolic statute"—a law motivated by political expediency and grandstanding that was inevitably accompanied by unanticipated, and often negative, policy repercussions.[150]

141. *See* Arlen Specter, *The Time Has Come for a Terrorist Death Penalty Law*, 95 DICK. L. REV. 739, 756–57 (1991) (discussing the "troublesome case" of Jens Soering). Senator Arlen Specter's understanding of the case seems limited, however, as he incorrectly stated that "British officials sought and received an assurance from Virginia authorities that the death penalty would not be used." *Id.* at 756. In fact, although the British did seek such assurances, not one was granted. The only assurance made was that Britain's views opposing the death penalty would be presented before the judge at the time of sentencing. *See* Soering v. United Kingdom, 11 Eur. Ct. H.R. 439, 445 (1989).

142. *See* Specter, *supra* note 141, at 757 ("The problem of extradition . . . in no way undermines the need for a death penalty for terrorists. Such a death penalty would give federal prosecutors an added tool. . . . They can use it or, if a foreign country objects to extradition, they can agree not to seek the death penalty.").

143. *See infra* Part V.B.

144. *See* Specter, *supra* note 141, at 739 (calling for death penalty provisions for terrorists who commit murder).

145. *See* Weinman, *supra* note 83, at 882. The attack in Oklahoma City occurred on April 19, 1995, a year to the week before the passage of AEDPA. Until September 11, the Oklahoma City attack was the worst terrorist attack ever on U.S. soil. *See* BBC News Online, *History of Attacks on U.S. Personnel* (Aug. 8, 1998), *at* http://news.bbc.co.uk/1/low/world/americas/147237.stm.

146. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 26 U.S.C., 28 U.S.C., and 42 U.S.C.).

147. *See id*. (codified as amended in scattered sections of 8 U.S.C., 22 U.S.C., and 49 U.S.C.).

148. *See* 18 U.S.C. §§ 841–45 (2000); 19 U.S.C. § 1595 (2000).

149. *See* 15 U.S.C. § 2207 (2000); 18 U.S.C. § 3059(b); 28 U.S.C. § 531 (2000).

150. *See* Tushnet & Yackle, *supra* note 140, at 2–3.

> [S]ometimes, perhaps often, legislators enact statutes to make a point, or to be able to tell their constituents that they have done something about a problem. We call these *symbolic* statutes.

Perhaps the most controversial portions of the law concern habeas corpus reform.[151] The effects of AEDPA's habeas reform go far beyond terrorism and the death penalty, restricting access to the federal courts for potentially all post-conviction petitioners.[152] AEDPA added a new chapter to title 28 of the U.S. Code, creating an entirely new system for dealing with habeas procedures for capital cases.[153] AEDPA shortened the time limits for raising appeals and restricted the scope of federal review to claims raised in state court.[154]

These provisions have been at the heart of the dispute between the ICJ and the U.S. Supreme Court. In *Breard*, the Supreme Court swept aside the ICJ's order, directly citing the changes to 28 U.S.C. § 2254 made by AEDPA.[155] In *LaGrand*, the Court again ignored the ICJ, this time by citing *Breard*.[156] When the ICJ finally got a chance to respond to the Supreme Court, it expressly rejected the legitimacy of the procedural default rule.[157] Again, this rule, as applied by the Supreme Court, is a

> Legislators may win politically by enacting symbolic laws, but courts, bureaucrats, and others affected by the statutes—here, criminals—may lose as they try to work out what the statutes mean. Symbolic statutes are real laws, posing real problems of interpretation and administration.

Id.

151. *See* 21 U.S.C. § 848 (2000); 28 U.S.C. §§ 2244, 2253–2255, 2261–2266.

152. *See* Tushnet & Yackle, *supra* note 140, at 1 (noting that AEDPA "modifies the habeas corpus statute in a number of ways, affecting the disposition of federal post-conviction challenges to all criminal convictions, not just those resulting in death sentences").

153. *See* 28 U.S.C. §§ 2261–2266.

154. *See id.* §§ 2255, 2261–2266.

155. *See* Breard v. Greene, 523 U.S. 371, 376 (1998). In 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted AEDPA, which provides that a habeas petitioner alleging that he or she is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if the petitioner "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U.S.C. § 2254(a), (e)(2). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the U.S. Constitution would be. *Id.*

156. *See* F.R.G. v. United States, 526 U.S. 111, 112 (1999) ("With respect to the action against the State of Arizona, as in *Breard v. Greene* . . . a foreign government's ability here to exert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles.").

157. *See* LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 140, ¶ 91 (June 27, 2001), *available at* http://www.icj-cij.org/icjwww/idocket/igus/igusjudgment/igus_ijudgment_20010625.htm.

> [T]he procedural default rule prevented counsel for the LaGrands to effectively challenge their convictions and sentences other than on United States constitutional grounds. As a result . . . the procedural default rule prevented them from attaching any legal significance to the fact, *inter alia*, that the violation of the rights set forth in Article 36, paragraph 1, prevented Germany, in a timely fashion, from retaining private counsel for them and otherwise assisting in their defence as provided for by the Convention. Under these circumstances, the procedural default rule had the effect of preventing "full effect [from being] given to the purposes for which the rights accorded under this article are intended," and thus violated paragraph 2 of Article 36.

Id. (alteration in original) (citations omitted).

product of AEDPA. Thus, the dispute between the ICJ and the Supreme Court has its roots in the United States' legislative response to terrorism.

Just as U.S. lawmakers did not foresee that AEDPA would eventually lead to judgments against the United States in the ICJ, the ICJ could not have known that less than two months after it issued its opinion in the *LaGrand* case, terrorists would slaughter more than 3000 people in New York, Washington, D.C., and Pennsylvania. The ICJ's audience in the United States—courts, lawmakers, Bush administration officials, and an increasingly angry and frightened public—would be reading the *LaGrand* decision in a significantly darker mood.

V. THE WAR ON TERRORISM AFTER SEPTEMBER 11

Though they were by far the most costly and destructive, the September 11 attacks were far from the first instance of international terrorism directed against the United States.[158] None of these previous terror attacks, however, elicited such a paradigm-altering response on behalf of the United States: From the President on down, virtually the entire federal government reprioritized itself, putting terrorism at the top of the agenda.[159]

To date, U.S. policy has combined elements of both the criminal justice system and military.[160] Indeed, the line between the two is increasingly blurred by the ongoing war and the Bush administration's

158. *See* Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1218–23 (2002) (discussing four episodes of terrorism and the United States' responses to them: the 1988 bombing of Pan American Flight 103, the 1993 World Trade Center Bombing, the 1998 Embassy Bombings in Africa, and September 11).

159. *See id.* at 1222–23.

> Law enforcement and intelligence authorities again launched an intense criminal investigation, quickly identifying bin Laden's terror network, Al Qaida, as responsible for the attacks. The Bush administration turned its entire attention to formulating and executing a response. . . . The administration promised that the United States' response would combine political, diplomatic, financial, intelligence, and military efforts . . . . Congress granted the President broad authority to use the armed forces of the United States to prevent future acts of terrorism. Within a month, the U.S. military embarked on a campaign in Afghanistan . . . .
>
> Domestic responses proceeded apace. The FBI compiled a list of its most wanted terrorists . . . . Hundreds of foreign nationals were arrested and detained, many for minor immigration violations; thousands more were targeted for questioning based on their nationalities. Congress quickly passed a set of reforms to the criminal justice system, giving broader investigative and surveillance authority to the Justice Department, eroding the Cold War barrier between foreign intelligence and domestic law enforcement, expanding the scope of criminal liability for terrorism, and stiffening punishments for terror crimes.

Id.

160. *See id.* at 1226 ("Whether a criminal justice process would have been an *appropriate* response to September 11, such a response was, at a minimum, *available*. . . . But the response to September 11 has, thus far, taken place largely outside the criminal justice system.").

threat to use military tribunals, rather than state or federal courts, to prosecute accused terrorists.[161] Additionally, the United States holds hundreds of al-Qaida and Taliban prisoners in Guantanamo Bay, Cuba outside the jurisdiction of civilian courts and in possible violation of the Geneva Convention.[162] Nevertheless, while military action in Afghanistan, Iraq, and elsewhere has certainly been at the forefront of the response to terrorism, the administration continues to use civilian courts, though only sparingly, in the prosecution of those tied directly with September 11 and the broader war on terror.

As much as the administration may wish to act in a unilateral fashion, successful prosecution of the war requires coordination with other countries.[163] Although an overwhelming number of these countries are considered allies in the war on terror, many strenuously oppose the use of capital punishment. This opposition has already manifested itself in three of the cases with the most intact record to date.

A. KHALFAN KHAMIS MOHAMED

September 11 was not the first attack by al-Qaida against U.S. targets. On August 7, 1998, nearly simultaneous bombings at the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, left hundreds dead.[164] Khalfan Khamis Mohamed, a participant in the Tanzania bombings, fled Tanzania shortly after the attacks. After traveling through Mozambique, Mohamed used fraudulent documents to enter South Africa on August 16, 1998, where he applied for political asylum.[165] U.S. authorities issued warrants for Mohamed's arrest on December 17, 1998, and July 1, 1999.

161. *See id.* at 1223 ("[T]he President issued a military order giving the Department of Defense authority to establish military tribunals that could . . . try captured members of Al Qaida unencumbered by the procedural and evidentiary rules of the federal district courts.").

162. *See* Erwin Chemerinsky, Editorial, *By Flouting War Laws, U.S. Invites Tragedy*, L.A. TIMES, Mar. 25, 2003, at B13. *See generally* Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371 (2003). Recently, the Supreme Court indicated its willingness to step directly into the military and civilian dispute when it granted certiorari in three cases concerning detention of terrorism suspects. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 1353 (2004) (No. 03-1027); Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted* 124 S. Ct. 981 (2004) (No. 03-6696); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (2003) (No. 03-334).

163. *See* Demleitner, *supra* note 11, at 157 (noting that "[a]s the 'War on Terrorism' is a global struggle, despite its military might, the United States will have to rely on the cooperation of its allies, including European countries").

164. *See* Clarke, *supra* note 9, at 803–05.

165. United States v. Bin Laden, 156 F. Supp. 2d 359, 362 (S.D.N.Y. 2001); Mohamed & Another v. President of the RSA and Others, 2001 (7) BCLR 685, ¶ 10 (CC). *See also* Clarke, *supra* note 9, at 803–05.

The following month, an FBI agent visited Cape Town and identified a photograph of Mohamed in the South African Home Office's immigration files. When he attempted to renew his immigration permit on October 5, 1999, South African authorities arrested him for submitting false documents in his political-asylum application. Significantly, an FBI agent was present at his arrest.[166]

Once in South African custody, Mohamed was taken to Cape Town International Airport, where, during interrogation by FBI agents, he "admitted to playing a role" in the bombings.[167] On October 6, Mohamed was handed over to the custody of the FBI and flown to the United States for trial,[168] and on May 29, 2001, he was convicted by a jury in federal court of multiple capital offenses arising out of his participation in the Dar es Salaam bombing.[169]

In the midst of his U.S. legal proceedings, Mohamed's lawyers filed a claim in South African court, arguing that his deportation to the United States constituted an illegal extradition under South African law and that his constitutional rights were violated when South African authorities handed him over to the FBI without assurances that the death penalty would be precluded in the event of a conviction.[170] On May 28, 2001, the day before Mohamed was convicted in New York, the South African Constitutional Court ruled in his favor. In an opinion that quoted directly from *Soering* and *Burns*,[171] the South African court reasoned as follows:

> For the South African government to cooperate with a foreign government to secure the removal of a fugitive from South Africa to a country of which the fugitive is not a national and with which he had no connection other than that he is to be put on trial for his life there, is contrary to the underlying values of our Constitution. It is inconsistent with the government's obligation to protect the life of everyone in South Africa, and it ignores the commitment implicit in the Constitution that South Africa will not be party to the imposition of cruel, inhuman or degrading punishment.[172]

The opinion also noted that Mahmoud Mahmud Salim, one of Mohamed's codefendants in the United States' case, had been extradited

166. *Bin Laden*, 156 F. Supp. 2d at 362 n.4.
167. *Id.*
168. *Id.* at 363.
169. *Id.* at 361.
170. *Mohamed*, 2001 (7) BCLR 685, ¶ 4 (CC).
171. *Id.* ¶ 56.
172. *Id.* ¶ 59.

from Germany only after that nation had received assurances precluding the death penalty.[173]

The timing and historical context of the court's decision is worth considerable examination. From a historical perspective, the South African court's decision against extradition was the first in a case against an al-Qaida terrorist. His codefendants in the United States included Osama bin Laden, Muhammad Atef, and Ayman al Zawahiri, all of whom are (or were)[174] September 11 suspects. Theoretically, if bin Laden could make it to South Africa, under this ruling he could not be extradited to the United States because he already faces a possible death sentence for his role in the embassy bombings.

From a practical standpoint, the similarity to *LaGrand* is striking: In both cases there was a dramatic last-minute intervention by a foreign court, though instead of on the eve of carrying out a death sentence, the South African court rendered its decision *while the jury was deliberating at trial.* A copy of the South African court's ruling was hand delivered to Judge Leonard Sand between the jury's rendering of a conviction and the initiation of the penalty phase.[175] The judge refused Mohamed's petition to quash the possibility of a death sentence in light of the South African court's opinion, but allowed excerpts to be shown to the jury as a mitigating factor.[176] After reviewing the South African opinion, the jury announced its failure to reach unanimity on July 10, 2001, and Mohamed was sentenced to life imprisonment without the possibility of parole.[177] One is free to speculate about the jury's unanimity had the sentencing been delayed another two months and a day—to September 11.

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173. *Id.* ¶ 45.

174. Mohamed Atef is believed to have been killed in Afghanistan. *See* CNN, *Reports Suggest al Qaeda Military Chief Killed* (Nov. 16, 2001), *at* http://www.cnn.com/2001/world/asiapcf/central/11/16/ret.atef/index.html.

175. United States v. Bin Laden, 156 F. Supp. 2d 359, 361 n.1 (S.D.N.Y. 2001).

176. *Id.* at 362.

> [T]he Court . . . declines to direct the Government to discontinue its capital case against Khalfan Mohamed. . . . [H]owever, the Court holds that he may present to the jury, as a mitigating factor, the fact that the Constitutional Court has ruled that had the proper procedures been followed by South African authorities, Mohamed's delivery to United States officials would have been conditioned on an assurance that he would not be eligible for the death penalty.

Id. Judge Leonard Sand's opinion includes significant analysis of the South African court's opinion and the weight it should be afforded by U.S. courts. *See id.* at 363–71.

177. *Id.* at 371.

B. ZACHARIAS MOUSSAOUI

Although the federal courts are currently being used to prosecute several accused terrorists, the only person under indictment in the United States for crimes relating specifically to September 11 is Zacharias Moussaoui, a French national of Moroccan ancestry who has been in U.S. custody since August 17, 2001, three weeks prior to the attacks.[178] Moussaoui, who was originally indicted three months after the attacks, on December 11, 2001, faces six counts, the most serious of which is conspiracy to commit acts of terrorism transcending national boundaries in violation of 18 U.S.C. § 2332b(a)(2) and (c).[179] The indictment includes many details relating to the September 11 attacks and alleges that Moussaoui was part of the conspiracy responsible for its planning and execution.[180] The following March, the DOJ declared its intention to seek the death penalty for Moussaoui if he is convicted on any of counts one through four of the indictment.[181]

Moussaoui faces charges in federal rather than state court, and, as a result, a narrow reading of the ICJ's *LaGrand* decision would not appear germane. The record is unclear about whether or not Moussaoui was ever informed of his rights to consular notification, but the point is rendered moot: Moussaoui must be convicted before any appellate process can begin because the case is at the trial level. Nevertheless, international legal principles regarding the death penalty have impacted the case.

Based on the actions of U.S. officials, including Attorney General Ashcroft, the DOJ needed more evidence to convict Moussaoui—evidence available in France and Germany. German officials possessed documentation of money transfers from Ramzi Binalshibh (one of the conspirators currently in U.S. custody at an undisclosed location) to Moussaoui while the latter was in the United States, and French officials had information regarding Moussaoui's early contacts with Islamic

178. *See* Demleitner, *supra* note 11, at 158 n.151 (noting that "[t]he only individuals indicted for offenses directly connected to terrorism are six U.S. citizens from upstate New York, Zacharias Moussaoui and Richard Reed"). While all of these suspects are accused of connections to al-Qaida, Moussaoui is the only one specifically charged with crimes relating to September 11. Subsequent to the publication of Nora Demleitner's article, the DOJ issued further terror-related indictments against a Portland terrorist cell and John Walker Lindh. Again, neither was charged with crimes arising out of the events of September 11.

179. Indictment at 1, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003), *available at* http://www.usdoj.gov/ag/moussaouiindictment.htm.

180. *See id.* at 4.

181. Notice of Intent to Seek a Sentence of Death, United States v. Moussaoui, 282 F. Supp. 2d 480 (E.D. Va. 2003) (No. 01-455-A), *available at* http://www.usdoj.gov/ag/mouss21.htm.

radicals. Attorney General Ashcroft and other top DOJ officials met repeatedly with French and German officials to obtain the evidence.[182]

Almost as soon as it was announced that the United States would seek the death penalty, France and Germany declared that they would not cooperate with U.S. authorities as long as Moussaoui faced a possible death sentence. Eventually they compromised, allowing the Europeans to turn over the data only after U.S. officials assured them that it would not be used to seek or impose the death penalty.[183] Nonetheless, the DOJ continued to seek the death penalty against Moussaoui, even as it refused to permit his lawyers access to possible defense witnesses in government custody.

The DOJ spent the entirety of 2003 fighting Moussaoui's attempts to depose government detainees, while continuing to seek his execution. On January 31, 2003, the trial court ordered the depositions of government detainees by Moussaoui's attorneys.[184] The Fourth Circuit upheld the district court order, even as the United States argued that allowing Moussaoui access to such persons jeopardized national security.[185] The government continued in its refusal to comply with the district court, which finally sanctioned the prosecution on October 2, 2003, by precluding the death penalty.[186] The government filed its appeal five days later in the Fourth Circuit and continues to seek Moussaoui's execution to this day.[187]

C. MOUNIR MOTASSADEQ AND ABDELGHANI MZOUDI

While Moussaoui was waiting for trial in the United States, Mounir Motassadeq became the only person convicted of crimes relating to September 11 when he was convicted in Germany of over 3000 counts of

182. *See* Dan Eggen, *U.S. to Get Moussaoui Data from Europe*, WASH. POST, Nov. 28, 2002, at A19.

183. *See id.* ("French and German authorities have agreed to turn over documents relating to terror suspect and French national Zacharias Moussaoui, after being assured by the Justice Department that the evidence will not be used to seek or impose the death penalty . . . .").

184. United States v. Moussaoui, No. 03-4162, 2003 WL 1889018, at *1 (4th Cir. Apr. 14, 2003).

185. United States v. Moussaoui, 333 F.3d 509, 515 (4th Cir. 2003), *petition for rehearing en banc denied*, 336 F.3d 279, 280 (4th Cir. 2003).

186. United States v. Moussaoui, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003) ("That the United States has deprived Moussaoui of any opportunity to present critical testimony from the detainees at issue in defense of his life requires, as sanction, the elimination of the death penalty as a possible sentence. The defendant remains exposed to possible sentences of life imprisonment.").

187. Motion to Expedite Appeal and for Longer Briefs, United States v. Moussaoui, 333 F.3d 509 (4th Cir. 2003) (No. 03-4792).

accessory to murder.[188] Motassadeq, a Moroccan national living in Hamburg, Germany, admitted signing the Islamic will of Mohammed Atta, the al-Qaida operative who flew the first plane into the World Trade Center.[189] He also admitted attending an al-Qaida training camp in Afghanistan after initially denying the allegation in court.[190] Additionally, prosecutors were able to show that Motassadeq had power of attorney over a bank account belonging to Marwan al-Shehhi (the pilot of the second plane to hit the Trade Center), and that he transferred money into the account, which may have paid for flight lessons for al-Shehhi and the other pilots.[191]

In order to convict Motassadeq under German law, the court had to find that he was directly involved in planning and carrying out the attacks.[192] Although it was clear that he was not a mastermind of the plot, Presiding Judge Albrecht Mentz found that Motassadeq had been a full member of the Hamburg cell since early 1999, when planning for the attacks began in earnest. This alone was sufficient for conviction.[193]

Shortly before Motassadeq's trial began, Germany arrested a second suspect, twenty-nine-year-old Abdelghani Mzoudi.[194] Like Motassadeq, Mzoudi is a Moroccan accused of participating in the Hamburg cell. German prosecutors have evidence that Mzoudi may have lived in an apartment used by al-Shehhi, Atta, and Binalshibh.[195] Days after Motassadeq was convicted, a spokeswoman from the German Federal Prosecutors Office announced that Mzoudi would be tried in the same Hamburg court that convicted Motassadeq and would face essentially the same charges of accessory to murder.[196]

Prosecutors were unable, however, to convict Mzoudi. Though the five-judge trial court was not convinced of his innocence, Mzoudi was acquitted in February 2004, largely because the United States refused to share evidence of Binalshibh's interrogations.[197] This is the same reason

188. Stevenson Swanson & John Crewdson, *Germany Convicts Moroccan in 9/11 Plot*, CHI. TRIB., Feb. 20, 2003, at 1.

189. *Id.*

190. *Id.*

191. Anton Notz, Deborah Steinborn & Hugh Williamson, *Guilty of Terrorism*, FIN. TIMES, Feb. 20, 2003, at P15.

192. *Id*.

193. *See id.*

194. Stephen Graham, *Germany to Charge a Second 9/11 Suspect*, A.P. ONLINE, Feb. 22, 2003.

195. *Id.*

196. *Id.*

197. *See* John Crewdson, *Only 9/11 Conviction Tossed Out in Germany; Judges Cite Lack of Cooperation by U.S. Government*, CHI. TRIB., Mar. 5, 2004, at 1.

why U.S. prosecutors were required to forfeit the death penalty in the Moussaoui case.[198]

Meanwhile, Motassadeq's lawyers pressed the same issue in their appeal of the conviction. Two weeks after Mzoudi's acquittal, Motassadeq's conviction was overturned and a new trial ordered. While noting that he was not "clear of suspicion,"[199] the appellate court held that the United States' refusal to allow Binalshibh's testimony impinged Motassadeq's right to a fair trial.[200] On April 7, 2004, German authorities released Motassadeq from custody, believing that he no longer posed an "urgent" risk.[201] At least one German commentator worried that "something isn't quite right in the way we're handling terrorism."[202]

Thus, the three cases to date where charges were brought stemming from September 11can be described as nothing short of a shocking failure on the part of U.S. and German authorities. The same stumbling block, namely the DOJ's exclusion of Binalshibh's testimony, resulted in the loss of the death penalty for Moussaoui, acquittal for Mzoudi, and an overturned conviction for Motassadeq.[203] Again, one must bear in mind that the only reason Mzoudi and Motassadeq were tried in Germany was because the DOJ preferred that outcome to forgoing the death penalty in a U.S. prosecution.[204]

198. *See supra* notes 184–86 and accompanying text.

199. Crewdson, *supra* note 197.

200. *See* David Rising, *War on Terror Is Suffering in Courtroom*, SALON, Mar. 22, 2004, *at* http://www.salon.com/news/wire/2004/03/22/courtroom/print.html. *See also German Court Is Denied Evidence from U.S. Sept. 11 Suspect*, AGENCE-FR. PRESSE, Jan. 14, 2003 (noting that the DOJ had refused the German court's request to allow FBI Director Robert Mueller and Ramzi Binalshibh to testify, but that an FBI agent had been sent to testify before the court in December).

201. Jeffrey Fleishman, *Man Convicted of Aiding 9/11 Plot Freed in Germany*, L.A. TIMES, Apr. 8, 2004, at A3. Motassadeq "must remain in Hamburg and check in with police twice a week" until his new trial, which is expected to begin later this summer. *Id.*

202. Andrew Tzortzis, *Al Qaeda and the Courts*, DW-WORLD, Mar. 5, 2004, *at* http://www.dw-world.de/english/0,3367,1432_A_1131276,00.html.

203. *See* Andrew C. McCarthy, *Kerry's Exaggerated Terror Problem*, NAT'L REV. ONLINE, Mar. 30, 2004, *at* http://www.nationalreview.com/comment/mccarthy200403300858.asp.

204. *See id.* In an otherwise effective commentary (that expresses a healthy amount of outrage at the behavior of German authorities), Andrew McCarthy attacks presumptive Democratic presidential nominee John Kerry (rather than Attorney General Ashcroft or President Bush) for treating terrorism as a law enforcement issue. *Id.* He notes that the Germans "would not even consider extraditing Mzoudi and Motassadeq to the U.S., where the death penalty—the bane of European sensibilities—would have been a real possibility." *Id.* Once the death penalty is off the table, as in Moussaoui's case, why not accept the ruling, apply it to Mzoudi and Motassadeq, and then demand their extradition for trial in the United States? McCarthy fears that this possibility is further precluded by the German doctrine of *ne bis in idem*, which he describes as a "super double-jeopardy doctrine that bars a second prosecution not only for the same charge but for any charge that is based in part on the same evidence that has already

Even though *Soering* is not factually related to terrorism, the *Soering* principle clearly shapes the landscape by which national courts have responded to September 11. U.S. officials have yet to issue indictments for Motassadeq and Mzoudi or attempt to extradite them to the United States, but only because the prospect of a death sentence prevented their extradition from Germany.

Policymakers on both sides of the Atlantic are somewhat silent on this point. As mentioned in Part I, during a trip to Berlin, Attorney General Ashcroft avoided a question explicitly linking extradition and the possibility of a death sentence for Motassadeq.[205] At the same press conference, the attorney general thanked the Germans for their cooperation and acknowledged that "for us to succeed we need the help and cooperation of the international community. We cannot do it alone because we know that terrorism is an international phenomenon."[206] Given the prosecutorial record of the last two and a half years, this cooperation can only be described as an enormous failure.

The understanding between Attorney General Ashcroft and Interior Minister Shily may have set a precedent for future suspects in the September 11 investigations. At the time of the Attorney General's trip, in December 2001, Germany had only made one arrest (presumably Motassadeq).[207] Subsequently, Mzoudi was arrested in October 2002. At the time of Mzoudi's arrest, a spokeswoman for the German Federal Prosecutors Office claimed that there were ten ongoing investigations against other Hamburg plotters of September 11.[208] None of these investigations has yielded convictions, other than Motassadeq's, which was overturned.

While the glacial pace of these investigations has yet to result in any further prosecutions, tentacles of the Hamburg cell have apparently continued to target Western civilians with acts of mega-terror.[209] On March 11, 2004, passenger trains in Madrid, Spain were bombed, killing 202 innocent people and injuring more than 1500.[210] Within ten days of

been presented in an earlier trial." *Id.* If this is true, it raises further questions as to why the DOJ would allow for any German prosecutions at all.

205. *See supra* text accompanying note 7.

206. Ashcroft Press Conference, *supra* note 7.

207. *See id.*

208. Graham, *supra* note 194.

209. *See* Sebastian Rotella, *Ties Run Deep in Probe of Spanish Blast*, L.A. TIMES, Mar. 21, 2004, at A1 (alleging links between Jamal Zougam, a prime suspect in the Madrid bombings, and Hamburg cell members Mohammed Atta and Ramzi Binalshibh).

210. *Id.*

the attack, Spanish authorities were able to link prime suspect Jamal Zougam to the Hamburg cell dating back to as early as the summer of 2001.[211] Although currently there is "no evidence that Zougam had prior knowledge of September 11,"[212] intelligence agencies clearly knew he moved in the same circles as the Hamburg cell.[213] The vast amount of information known about the Madrid bombers so quickly after the attacks suggests that not only have authorities been unable to prosecute members of the terror conspiracy, but they are so far unable to stop it from continuing to function.[214]

VI. CONCLUSION

As these words are written, the United States is demonstrating its willingness to fight the war on terror using both the military and criminal justice system. The military response is proceeding apace in Iraq, Afghanistan, the Philippines, and elsewhere, but use of the U.S. criminal justice system is increasingly constrained by conflicts with allies over capital punishment. The current situation creates a new set of challenges for national and international law. Past case law is already framing not just the debate, but the policies themselves.

For Europeans and Americans, the *Soering* principle is alive and well, operating in the earliest stages of international terrorism investigations. So far, it has resulted in two overseas criminal prosecutions of suspects connected with the conspiracy to murder thousands of Americans, and these prosecutions have been highly unsuccessful. It may have been easy for U.S. policymakers to ignore *Soering* a decade ago, but as the value of its precedent increases in Europe, it will make things very difficult for U.S. prosecutors seeking to bring terrorists to trial in the United States.

Concerning the ICJ, the dispute over the Vienna Convention may lack specific application to suspects in the war on terror, but the cases are at least as much about the death penalty as they are about consular notification. Besides the fact that the dispute concerned the validity of portions of U.S. terrorism legislation, the ICJ's ruling against the United States in *LaGrand* will undoubtedly frame future cases before the court and

211. *Id.*

212. *Id.*

213. *See id.* (noting that Zougam was with accused plotter Amer Aziz on August 2, 2001, shortly after Aziz may have participated in a final September 11 planning meeting with Atta and Binalshibh in Spain).

214. *See* Cohen, *supra* note 4 (arguing that "[t]he brutal March 11th attacks in Madrid might not have occurred if Spanish justice had been quicker to do its job").

will give some indication of the court's attitude toward U.S. death penalty practices. Furthermore, it is important to remember that the ICJ holds jurisdiction over a much larger body of law than simply the Vienna Convention, including possibly the Geneva Convention. The decision to hold some suspects in military custody outside of the jurisdiction of U.S. courts raises serious questions of due process violations, let alone the Geneva Convention.[215]

The United States might be able to make this dispute disappear by simply banning capital punishment outright, paving the way for smoother international cooperation and the extradition of terror suspects to the United States. Given the track record of the Bush administration and the Ashcroft Justice Department, however, such a policy swing at the federal level is highly unlikely. Furthermore, elimination at the federal level (as implausible as it seems) would not be sufficient to eliminate the problem, as both the *Soering* and *LaGrand* decisions involved state murder cases. Nothing short of overturning *Gregg v. Georgia*[216] is likely to satisfy international opponents of the death penalty, and such an event is only slightly more likely than a policy reversal by the Bush administration. In any case, the dispute between the United States and Europe must not be allowed to further disrupt intelligence and investigative cooperation.

As for the Europeans, opposition to capital punishment is now an issue of Continental policy, even under the new terrorist threat. As mentioned earlier, Protocol No. 6 of the Convention outlawed capital punishment except in times of war,[217] but this amendment was not ratified until after the *Soering* decision, forcing the court to base its opinion on the death-row-phenomenon argument. In the immediate aftermath of the September 11 attacks, the Europeans eliminated the wartime exception for capital punishment through the introduction and subsequent ratification of Protocol No. 13.[218] Opened for signature less than six months after September 11 and ratified in January 2003, the preamble to the protocol notes "that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty . . . does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war," and further

215. *See* Chemerinsky, *supra* note 162 ("Under the third Geneva Convention, those who were caught in Afghanistan are deemed prisoners of war if they were fighting for the Taliban."). The issue of prisoner-of-war status is actually governed by section II of the 1977 Geneva Protocol I. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 43–45, 1125 U.N.T.S. 3-608.

216. *See supra* note 10 and accompanying text.

217. *See supra* text accompanying note 44.

218. *See* European Convention, *supra* note 39, art. 3.

declared its resolve to "take the final step to abolish the death penalty in all circumstances."[219] In the meantime, it is clear that there will be no extradition to the United States in death penalty cases, and investigative cooperation between Europe and the United States may become compromised in other, more subtle ways.

The final parties for consideration are the terrorists themselves. It may be overstating the case to suggest that terrorists scrutinize international legal decisions, or that, if they did, they would take advantage of the dispute over capital punishment by hiding in European jurisdictions. In the aftermath of the Madrid bombing, one terrorism expert identified the threat as "a very broad global Islamic front where terrorist operatives of one nationality will go to a second country to plan a terror operation then move to a third country to carry out their attacks."[220] Although it is questionable whether the death penalty (or lack thereof) is a deterrent to terrorists, particularly given the suicidal nature of the attacks, it is clear that the terrorists will exploit disputes between Europe and the United States.[221] While proponents and opponents of the death penalty on both sides of the Atlantic scuffle about who will be tried where, and with what evidence, the only beneficiaries are the terrorists themselves.

219. *Id.* pmbl.

220. Rising, *supra* note 200 (quoting Richard Evans, editor of the Jones Terrorism and Insurgency Center in London).

221. Recently, Osama bin Laden issued a tape recording in which he called for a truce between his forces and Europe. The British Foreign Minister described it as "an attempt to divide the international community and [it] cannot be allowed to succeed." Richard Bernstein, *Tape, Probably bin Laden's, Offers "Truce" to Europe*, N.Y. TIMES, Apr. 16, 2004, at A3.