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**THE EUROPEAN UNION'S EXTERNAL IMPACT ON HUMAN RIGHTS:
THE CASES OF THE UNITED STATES' DEATH PENALTY
AND THE WAR ON TERROR**

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SUMMARY

The influence of the European Union has been an area of continuing debate among academics. While there is general agreement regarding the importance of the European Union to its member states, candidate states, and some other actors in the world, disagreement remains regarding the extent of the European Union's ability to have an impact on a world power such as the United States. This is true at a time when the United States has engaged in highly controversial practices relating to human rights, particularly with regard to the death penalty and War on Terror. While the death penalty and the War on Terror involve extremely important issues of democracy, justice, and security for the United States, the European Union has criticized the United States for violating human rights and advocated for the United States to change its laws, policies, and behaviors concerning the death penalty and the War on Terror. With regard to these areas in particular, scholars have expressed doubts and disagreement on the European Union's ability to influence the United States.

Accordingly, this research examines the European Union's impact on the United States on human rights issues, focusing in particular on the death penalty and arbitrary detention, extraordinary rendition, torture and ill treatment, and drone killings within the context of the War on Terror. Roy H. Ginsberg provides one of the most developed frameworks for analyzing the European Union's external impact in particular, and this research expands upon that framework in terms of time frame, receiving United States governmental levels (federal and state) and branches (executive, legislative, and judicial) examined, by explicitly including diffusion mechanisms, and by explicitly adding the impact on laws to the impact on policies, behavior, or interests.

In doing so, this research answers important questions regarding whether the United States takes the European Union seriously in its human rights policy, whether the European Union is able to have significant impact on a world power like the United States, and the extent that the European Union has had an impact on the United States on human rights issues. This dissertation concludes that for human rights issues, while the European Union does not have a perfect record, the United States at least sometimes

takes the European Union seriously and the European Union has sometimes had a significant impact on the United States.

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1. INTRODUCTION

Today, European governments, whether as individual countries or in the context of international organizations such as the Council of Europe or the Organization for Security and Cooperation in Europe, frequently speak up about moral issues.¹ In particular, the European Union, of which the impact on the United States in the area of human rights is the focus of this research, promotes several normative principles that within the United Nations system are generally acknowledged as universally applicable, including human rights, among several others.² The European Union's efforts have extended across the globe on various human rights issues.

For example, the European Union has prioritized the abolition of the death penalty. Abolition of the death penalty is a precondition for membership to the European Union, and the European Union has advocated for worldwide elimination of the death penalty since 1998.³ Specifically, the European Union has frequently targeted the United States in its efforts because it is one of the only advanced industrial democracies that continues to practice the death penalty.⁴ By 2010, and even today, the only two retentionist states (i.e. states which retain the death penalty in times of peace in law and practice) in the OSCE area were the United States and Belarus.⁵

Despite the European Union's efforts, the United States continues to have one of the highest execution rates in the world.⁶ Such efforts by the European Union suggest that Roy H. Ginsberg's inquiry into the extent of the European Union's impact on third countries in the 1990s remains relevant today.⁷ In the years since Ginsberg's research on

¹ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 124.

² Manners, I. (2008). The Normative Ethics of the European Union. *International Affairs*. 84(1), p. 46.

³ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 124.

⁴ Ibid.; see Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>.

⁵ OSCE Office for Democratic Institutions and Human Rights (2010). *The Death Penalty in the OSCE Area: Background Paper 2010*, p. 2. Retrieved from <http://www.osce.org/odihr/71484>.

⁶ Ibid. p. 13.

⁷ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc.

the European Union's external impact, political scientists continue to debate the ability of the European Union to have an influence on the world stage.⁸

The United States' human rights practices in relation to the War on Terror have also come under question in the European Union in recent years. As some examples, the European Union has expressed its concerns regarding United States' practices and policies in its fight against terrorism in consultations with the United States⁹ and the European Parliament has taken up human rights issues in hearings and resolutions on Guantanamo Bay.¹⁰ European Union leaders have called for the closure of the prison at Guantanamo Bay, arguing that holding suspected terrorists without trial at Guantanamo Bay violates human rights.¹¹

Although the European Union's human rights policy towards the United States covers a variety of human rights issues, the decade of the 2000s is particularly important with the War on Terror beginning after the September 11, 2001 attacks and the development of the European Union's guidelines on the death penalty a few years earlier (and revised in 2008),¹² setting off an era of advocacy towards the United States for its abolition by the European Union. As the United States has sometimes regarded itself as a leader in promoting Western values and remains an important power in world politics today, some questions remain as to whether the European Union's human rights foreign policy is taken seriously by the United States and is able to have significant impact on a world power like the United States. Specifically, to what extent, if any, does the European Union have impact on the United States on human rights issues? Which outputs

⁸ See, e.g., Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 24-25; Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan.; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*. 17(2), p. 224-241.

⁹ European Union (2008). EU Annual Report on Human Rights 2008, p. 19. Retrieved from http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/169233_02_2008_2971_EN_INT.pdf.

¹⁰ Ibid. p. 19, 38.

¹¹ Ibid.; Landberg, E. (2006). EU Puts Closing of Guantanamo Bay on Agenda for Talks with Bush. *Bloomberg*. Retrieved from <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBZk08Vr3Sec&refer=europe>.

¹² European Union External Action Service (2008). Revised EU Death Penalty Guidelines. Retrieved from http://eeas.europa.eu/human_rights/adp/index_en.htm.

and diffusion mechanisms has the European Union used towards human rights violations in the War on Terror and the continued use of death penalty executions in the United States? Which outputs and diffusion mechanisms have had the most impact on the United States?

This doctoral research examines such issues, focusing in particular on human rights issues within the War on Terror and the continued use of the death penalty, utilizing a modified version of Ginsberg's analytical framework¹³ for analyzing the external impact of the European Union.

1.1 Background on the Death Penalty

Compared to the (renewed) threat of terrorism that has spawned a debate about balancing security, justice, and human rights, the European Union has been more uniform and consistent in its abolitionist position on the death penalty since 1998. The modern abolitionist movement, however, has roots dating back to the late eighteenth century, when Italian criminologist Cesare Beccaria argued that the death penalty is inhumane and should be abolished.¹⁴ Beccaria's 1764 book, *Dei Delitti e delle pene*, influenced important statesmen of the time about "the uselessness and inhumanity of capital punishment."¹⁵ Although the abolitionist movement expanded over the next few decades, death penalty practices varied across individual European countries for much of modern history.¹⁶ Some European countries abolished the death penalty in the nineteenth century, but most did not do so until after the middle of the twentieth century.¹⁷ Nevertheless, there was a general decrease in the kinds of people, such as juveniles and pregnant women, and types of crimes subject to the death penalty in the nineteenth and

¹³ Discussed in Chapter 2.

¹⁴ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 132.

¹⁵ Schabas, W. (1996). *The Death Penalty as Cruel Treatment and Torture*. Northeastern University Press: Boston. p. 18.

¹⁶ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 133.

¹⁷ Ibid.

the beginning of the twentieth centuries throughout much of Europe.¹⁸ The abolitionist trend experienced a setback, however, with the rise in Europe of fascist regimes and new criminological theories after World War I and an increase in the number of executions during World War II and its aftermath.¹⁹

After this increase in executions, capital punishment was again on the decline over the next decades, with many European countries *de facto* or *de jure* significantly limiting or ending executions by the 1970s.²⁰ In 1947, Italy abolished the death penalty, except during war time.²¹ West Germany abolished the death penalty in 1949.²² In 1965, the United Kingdom ended capital punishment for murder, but retained it for other crimes, including treason.²³ Countries *de facto* ending capital punishment during this time include Belgium (1950), Denmark (1950), the Netherlands (1952), Spain (1975), and France (1977).²⁴

The Sixth Protocol to the European Convention on Human Rights, open for signature since 1983, forbids capital punishment except in times of war or threat of war.²⁵ Although then current members of the Council of Europe were not required to sign the sixth protocol, it is important to emphasize that the Council of Europe was very important in Europe's turn against the death penalty, and states are expected to sign the Sixth Protocol before admission to the Council of Europe.²⁶ By 1985, Portugal, Denmark, Luxembourg, France, and the Netherlands abolished capital punishment as a matter of law.²⁷ Many communist countries of Central and Eastern Europe, however, continued

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid. p. 133-134; Yorke, J. (2010). Inhuman Punishment and Abolition of the Death Penalty in the Council of Europe. *Towards Universal Abolition of the Death Penalty*. p. 82-83. Retrieved from http://www.academicsforabolition.net/repositorio/ficheros/361_135.pdf.

²¹ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 125.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ European Convention on Human Rights (1950). Retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf; Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 137.

²⁶ Ibid.

²⁷ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 126.

capital punishment under totalitarian regimes.²⁸ Protocol No. 13, Article 1, to the European Convention on Human Rights forbids capital punishment in all circumstances, and, except for Armenia, Azerbaijan, and Russia, all of the members of the Council of Europe signed (between 2002 and 2004) and ratified the protocol.²⁹ The European Court of Human Rights has been particularly important in the judicial protection of international human rights within the Council of Europe,³⁰ including with regard to multiple cases dealing with the death penalty.³¹

Popular opinion on the death penalty in most European countries continued in favor of capital punishment during most of these decades, however, and it was not until the 1990s that popular opinion became abolitionist in at least some European states.³² Nonetheless, many Europeans continued to support the death penalty in at least some circumstances, and abolition of the death penalty in Europe was largely driven by elites.³³ The European elites seeking abolition did not, however, have negative reactions to their plans, perhaps because “ordinary Europeans . . . do not have really strong feelings on the issue.”³⁴ Amnesty International and the European Parliament also played an important role in pressuring European Union member state governments into accepting abolition.³⁵ The Treaty of Maastricht³⁶ in 1992 generally set the stage for eventually furthering an abolitionist policy in the EU as a whole. As explained by Schmidt:

“One of the key goals of Maastricht was to set in motion a process that would, over time, establish ‘an ever closer union’. As part and parcel of

²⁸ Ibid. p. 125.

²⁹ Council of Europe Treaty Office (2016). Chart of Signatures and Ratifications of Treaty 187. Retrieved from <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/187/signatures>.

³⁰ Lauren, P. (2011). *The Evolution of International Human Rights: Visions Seen*. 3rd ed. University of Pennsylvania Press: Philadelphia. p. 268.

³¹ See, e.g., European Court of Human Rights (2015). Death Penalty Abolition. Retrieved from http://www.echr.coe.int/Documents/FS_Death_penalty_ENG.pdf. (listing and summarizing European Court of Human Rights cases from 1989 to 2015).

³² Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 134.

³³ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 128.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Treaty on European Union (1992). Retrieved from http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf.

this, the EU sought to create common policies in selected areas across the full spectrum of governance. In the area of human rights, the death penalty provided an issue ready to hand that potentially involved both foreign and domestic policy.”³⁷

Attempting to move in this direction, the European Union set its sight on acceding to the European Convention on Human Rights, but the European Court of Justice ruled that, as the European Union was not a state, “it did not have standing under international law to ‘adopt rules or conclude international agreements on human rights.’”³⁸ The European Union Charter of Fundamental Rights,³⁹ however, was created as a response to this setback, and forbid the death penalty, torture, inhuman, or degrading treatment or punishment, as well as extradition to states where there is a serious risk of their occurrence.⁴⁰ During the time that the charter was under negotiation, the death penalty was abolished by the last three European Union member states to have it, ending with the United Kingdom in 1998.⁴¹

With the last member states abolishing the death penalty, the European Union turned from internal abolition to a foreign policy seeking abolition world-wide, promulgating the “Guidelines to EU Policy Towards Third Countries on the Death Penalty” in 1998, revised in 2008.⁴²

These guidelines state that the European Union’s objectives include:

³⁷ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 126.

³⁸ Ibid.; European Court of Justice (1996). Opinion 2/94 of 28 March 1996. Retrieved from http://eur-lex.europa.eu/resource.html?uri=cellar:3645916a-61ba-4ad5-84e1-57767433f326.0002.02/DOC_1&format=PDF.

³⁹ The European Union Charter of Fundamental Rights did not, however, become legally binding until 2009 when the Treaty of Lisbon entered into force. European Commission (2016). EU Charter of Fundamental Rights. Retrieved from http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

⁴⁰ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 128.; Charter of Fundamental Rights of the European Union (2010). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG.

⁴¹ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 126.

⁴² Ibid.; European Union External Action Service (2008). Revised EU Death Penalty Guidelines. Retrieved from http://eeas.europa.eu/human_rights/adp/index_en.htm.

- “To work towards universal abolition of the death penalty as a strongly held policy view agreed by all EU member states; if necessary with the immediate establishment of a moratorium on the use of the death penalty with a view to abolition.
- Where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards . . . while seeking accurate information about the exact number of persons sentenced to death, awaiting execution and executed.”⁴³

The minimum standards enumerated in the guidelines include, among other things, limits on the types of crimes and persons subject to the death penalty as well as procedural safeguards, such as a right to appeal and postponing execution while international procedures are ongoing, in capital cases.⁴⁴ In the pursuit of the European Union’s objectives, the guidelines call for, in appropriate circumstances, the use of general and specific demarches, human rights reporting, encouraging the accession to and compliance with international agreements against the death penalty, and raising the issue in multilateral fora.⁴⁵ According to Manners, “since 1998, the EU’s promotion of the international abolition of the death penalty . . . has been part of a global movement that has met with considerable success. In the [first] ten years since the 1998 EU abolitionist policy was launched, thirty-two states have moved to abolish the death penalty for ordinary or all crimes, bringing the total number of abolitionist states to 135 against sixty-two retentionist states,”⁴⁶ a general trend that has continued in recent years.⁴⁷

Even after the death penalty was abolished in many European Union member states, however, some public opinion polls continued to indicate support for the death

⁴³ European Union External Action Service (2008). Revised EU Death Penalty Guidelines. Retrieved from http://eeas.europa.eu/human_rights/adp/index_en.htm.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Manners, I. (2009). The EU’s International Promotion of the Rights of the Child. *The European Union and the Social Dimension of Globalization: How the EU Influences the World*, eds. Jan Orbie and Lisa Tortell. Routledge. p. 236.

⁴⁷ United Nations Economic and Social Council (2015). Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General. E/2015/49, p. 15-16.

penalty.⁴⁸ This has changed overtime, however, with popular support in some countries leaning against the death penalty.⁴⁹ Today, membership in the European Union is conditioned upon abolition of the death penalty, and the European Union has turned its efforts towards the United States as one of the only advanced industrialized democracies retaining capital punishment in law and practice.⁵⁰

In the past, the United States followed a generally similar path to Europe until the 1970s.⁵¹ Capital punishment existed in the United States from its beginning, with the first documented execution in 1608.⁵² The framers of the Constitution were conscious of capital punishment⁵³ and refer to capital crimes in the Fifth Amendment.⁵⁴ While the Framers did not intend for the Eighth Amendment's prohibition on cruel and unusual punishment to forbid capital punishment at that time, United States courts have interpreted the prohibition as an evolving standard, and abolitionists cite the Eighth Amendment to support their arguments for the unconstitutionality of the death penalty today.⁵⁵

The Michigan Territory abolished capital punishment, except for treason, in 1846, and sixteen more states abolished the death penalty by 1929.⁵⁶ After World War I, there

⁴⁸ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 150.

⁴⁹ Ibid.

⁵⁰ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 124; Delegation of the European Union to the United States (2015). Leading the Fight Against Capital Punishment. *EU Matters*. p. 1-2. Retrieved from http://www.euintheus.org/wp-content/uploads/2015/07/EU_MATTERS_Death_Penalty_WO12.pdf; see Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>.

⁵¹ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 134.

⁵² Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55, 1224.

⁵³ Ibid.

⁵⁴ Constitution of the United States (1787). Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>.

⁵⁵ Ibid.; *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, at 100-01, (1958)); Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55, 1224-1225.

⁵⁶ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 134.

was a resurgence in capital punishment in the United States.⁵⁷ By the 1960s, however, capital punishment was declining in the United States, and it was becoming more of a regional practice, particularly in the South.⁵⁸ States that retained capital punishment in law used it less frequently in practice. In 1972, the United States Supreme Court started a *de facto* moratorium on capital punishment in *Furman v. Georgia*, in general because of the arbitrary manner in which it was imposed.⁵⁹

Unlike Europe, capital punishment began to increase in the United States starting in the late 1970s.⁶⁰ Opposition developed to the Supreme Court's *de facto* moratorium, and state legislatures revised their statutes to reinstate capital punishment and attempt to correct the deficiencies described in *Furman*.⁶¹ In *Gregg v. Georgia*,⁶² the Supreme Court approved of some states' capital punishment frameworks under the new statutes, while rejecting others, effectively providing more guidance to states on permissible frameworks for imposing the death penalty and ending the *de facto* moratorium on capital punishment.

Although the United States Supreme Court ended the *de facto* moratorium on capital punishment, it continued to restrict the types of crimes and persons subject to capital punishment in the following decades.⁶³ In the 1980s and 1990s, the death penalty expanded in various individual states, including in some states that had previously abolished the death penalty in law, as well as at the federal level with the 1994 Federal Death Penalty Act.⁶⁴ After nearly forty years without a federal execution, the federal

⁵⁷ Ibid.

⁵⁸ Ibid. p. 134-135.

⁵⁹ *Furman v. Georgia*, 408 U.S. 238 (1972); Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 135.

⁶⁰ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 135.

⁶¹ Ibid.

⁶² *Gregg v. Georgia*, 428 U.S. 153, (1976).

⁶³ Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55, 1228-1229; see, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Roper v. Simmons*, 543 U.S. 551 (2005).

⁶⁴ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 136; 18 U.S.C. 3591-3598.

government executed Timothy McVeigh on June 11, 2001 for his actions in the Oklahoma City Bombing.⁶⁵

As the United States expanded the use of capital punishment, the European Union set its sights on its abolition. In its specific abolition policy towards the United States, the European Union has issued demarches to federal and state officials, chastised the United States in public declarations and international forums, filed amicus curiae briefs in the United States Supreme Court, entered into extradition agreements with the United States, and conducted an extensive information campaign against the death penalty through the funding of NGOs in the United States.⁶⁶

1.2 Background on the War on Terror

In a September 20, 2001 speech addressing a joint session of the United States Congress, then United States President George W. Bush described the “War on Terror”⁶⁷ as “a lengthy campaign unlike any other we have ever seen” that “begins with Al Qaeda” but does “not end until every terrorist group of global reach has been found, stopped and defeated”.⁶⁸ In that speech, President Bush promised to “direct every resource at our command--every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war--to the destruction and to the defeat of the global terror network.”⁶⁹ What was not clear at the

⁶⁵ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 136.

⁶⁶ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 127; Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>.

⁶⁷ Although the War on Terror has also been referred to as the “Overseas Contingency Operation” under President Obama, this dissertation uses War on Terror for consistency.

⁶⁸ Bush, G.W. (2001). President Bush Addresses the Nation. Retrieved from http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html.

⁶⁹ Ibid.

time of this speech was the extent that human rights concerns would be secondary to ensuring security and getting “justice” for terrorist crimes in the War on Terror.⁷⁰

Europe is also not a stranger to its own experiences with terrorism, considering the thousands of victims of terrorism in the last thirty years in Spain, Britain, Ireland, and elsewhere in Europe.⁷¹ The September 11, 2001 attacks, as well as later terrorist attacks in Madrid, London, Paris, Brussels, and elsewhere, nonetheless presented strengthened and renewed security concerns within the European Union. The challenge for the European Union was not only one of balancing protection of its own area and citizens with promoting normative principles, but also how to respond to the needs and demands of other countries, particularly in the relationship with the United States. Europe’s initial reaction to the September 11, 2001 attacks was of general support and sympathy for the United States people.⁷² As the years passed, however, there was greater division over the United States response to the threat of terrorism. Although Europe generally looked favorably upon the United States’ use of the United Nations and multilateralism in 2001 and 2002 to pursue al-Qaeda and the Taliban in Afghanistan,⁷³ as the War on Terror progressed the European Union became more internally divided on the United States approach to combating terrorism, including when it comes to balancing security and justice concerns with human rights. This dissertation focuses on some of the most prominent of these human rights issues, extraordinary rendition, torture and ill-treatment, arbitrary detention, and drone strikes, which have also been the focus of involvement or advocacy within the European Union in the time frame examined.

The United States Central Intelligence Agency’s (CIA) extraordinary rendition program, for example, was conducted with the help of officials in European Union member states, while the European Parliament and the Parliamentary Assembly of the Council of Europe (with support from the European Commission) investigated the United

⁷⁰ See Ignatieff, M. (2004). *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton University Press: Princeton. (discussing the challenges of addressing terrorism in a democracy)

⁷¹ Council of the European Union (2013). EU Fight Against Terrorism. Retrieved from <http://www.consilium.europa.eu/en/policies/fight-against-terrorism/?lang=en>.

⁷² Manners, I. (2006): European Union ‘Normative Power’ and the Security Challenge. *European Security*. 15(4), p. 410.

⁷³ Ibid.

States program and the European support for it and produced reports condemning the practices.⁷⁴

Extraordinary rendition is a program in which individuals are secretly kidnapped and transferred without process of law to third states often known for torture.⁷⁵ As such, extraordinary rendition can involve a number of practices that constitute human rights violations by themselves, both in the process of removing an individual without any legal protections or knowledge of that person and his/her family as well as in the ensuing arbitrary detention or torture.⁷⁶ One of the most difficult challenges with protecting human rights for such a process of abduction and detention is the secrecy involved that creates difficulty in accessing victims, evidence, and courts on the matter.⁷⁷

Although the extraordinary rendition program has been used in the post September 11 War on Terror, its legal origins in the United States began in part with Presidential Decision Directive (PDD) 39⁷⁸ issued in 1995 to the CIA in reaction to the 1993 World Trade Center bombing and 1995 Oklahoma City and Tokyo bombings.⁷⁹ PDD 39 provides:

“Return of Indicted Terrorists to the U.S. for Prosecution: We shall vigorously apply extraterritorial statutes to counter acts of terrorism and

⁷⁴ European Parliament (2007). Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners. A6-0020/2007. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN>; Council of Europe (2006). Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States, Doc. 10957, 12 June 2006. p. 2.

⁷⁵ According to Black’s Law Dictionary, rendition is “the return of a fugitive from one state to the state where the fugitive is accused or convicted of a crime.” *Black’s Law Dictionary* (2004). Eight Edition. p. 1322. The term extraordinary rendition has been used to describe the CIA’s abduction of terrorist suspects in the context of the War on Terror, with “extraordinary” possibly intended to describe the unusual nature of responding to terrorism by using means that go beyond ordinary (international) legal procedures. See Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 38-39.

⁷⁶ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 587-588.

⁷⁷ *Ibid.* p. 588.

⁷⁸ Presidential Decision Directive 39 (1995). Retrieved from <http://www.fas.org/irp/offdocs/pdd39.htm>.

⁷⁹ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 39.

apprehend terrorists outside of the United States. When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority and shall be a continuing central issue in bilateral relations with any state that harbors or assists them. Where we do not have adequate arrangements, the Departments of State and Justice shall work to resolve the problem, where possible and appropriate, through negotiation and conclusion of new extradition treaties.

If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.”⁸⁰

The terms of PDD 39 thus provide for attempting to apprehend terrorists outside the United States with the cooperation of the host government, including through adoption of extradition treaties, but it also provides for the return of terrorist suspects through force without the cooperation of the host government. Interstate cooperation among law enforcement bodies is often based on treaties, but treaties may take considerable time to negotiate and their enforcement can be time consuming and full of political hurdles.⁸¹ As such, conducting renditions through such treaties arguably affects the efficiency and effectiveness of the United States ability to obtain terrorist suspects and gather intelligence, potentially preventing counterterrorist measures from moving as quickly and allowing terrorists additional time to plan or execute attacks.⁸²

Extraordinary rendition is thus a strategy in which extradition and human rights treaties are ignored for the sake of gathering intelligence on potential security threats. Former Secretary of State Condoleezza Rice explained that the United States renditions

⁸⁰ Presidential Decision Directive 39 (1995). Retrieved from <http://www.fas.org/irp/offdocs/pdd39.htm>.

⁸¹ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 40.

⁸² Ibid.

are an adaptation to the “new kind of conflict” that the War on Terror presents, in which “we must track down terrorists who seek refuge in areas where governments cannot take effective action, including where the terrorists cannot in practice be reached by the ordinary processes of law.”⁸³

Justifying the practice, Rice contended that some suspected terrorists captured “have information that may save lives, perhaps even thousands of lives. . . . The captured terrorists of the 21st Century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt.”⁸⁴ The “adaptation” may be viewed as a justification for circumvention of or exceptions to international law.⁸⁵ In other words, the extraordinary threat of terrorism has led the United States government to extraordinary rendition operations outside of the ordinary rendition process governed by (ordinary) international law. Less than one week after the September 11, 2001 attacks, President Bush signed off on a classified directive known as the “memorandum of notification,” which authorized the CIA “to capture, detain and interrogate terrorism suspects, providing the foundation for what became its secret prison system.”⁸⁶

The arbitrary detention of prisoners without habeas corpus⁸⁷ and due process rights, particularly at the Guantanamo Bay detention center and other secret sites, has been another area of major concern to human rights advocates. The detention of prisoners at Guantanamo Bay spawned a number of cases in United States courts

⁸³ Rice, C. (2005). Full Text: Rice Defends US Policy. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/4500630.stm>.

⁸⁴ Ibid.

⁸⁵ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*, 30, p. 42.

⁸⁶ Johnston, D. (2006). At a Secret Interrogation, Dispute Flared Over Tactics. *The New York Times*. Retrieved from http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=all&_r=1&.

⁸⁷ Habeas corpus is a “writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.” *Boumediene v. Bush*, 553 US 723, 737 (2008) (quoting Black’s Law Dictionary 728 (8th ed. 2004)). In other words, it allows a detainee to challenge the lawfulness of his/her detention.

challenging the deprivation of habeas corpus and related due process rights.⁸⁸ In the earlier cases, the United States Supreme Court tended to exercise a degree of judicial restraint, declining to decide as a constitutional matter whether the detainees at Guantanamo Bay had the privilege of habeas corpus, instead basing their decisions on more limited grounds.⁸⁹ This resulted in a “curious game of legal ping-pong . . . between the judicial and political branches” in which the United States administration and Congress complied with the Supreme Court decisions through minimalistic interpretations of those decisions and enactment or revisions to the statutes upon which those decisions were based, which only led to additional cases to address the same human rights issues under the revised legal framework.⁹⁰ It was only after six years that the United States Supreme Court, on June 12, 2008 in *Boumediene v. Bush*, declared that detainees at Guantanamo Bay have the privilege of habeas corpus under the United States Constitution.⁹¹

The European Union has sought to curb arbitrary detention by the United States. For example, it pressured the United States government to treat Guantanamo detainees as prisoners of war and to provide them protection under the Geneva Convention(s).⁹² While some countries in the European Union were critical of the United States detention of prisoners at Guantanamo Bay, others were helping the United States capture and transfer prisoners to Guantanamo Bay, allowing secret prisons within their own borders, or detaining suspected terrorists under similar circumstances. For example, secret detention facilities were in Poland and Lithuania, with a detention facility in Lithuania built after it had joined the European Union.⁹³ Although of a different magnitude,

⁸⁸ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 575; see, e.g., *Hamdi v. Rumsfeld*, 542 US 507, 509 (2004); *Rasul v. Bush*, 542 US 466, 484 (2004); *Hamdan v. Rumsfeld*, 548 US 557, 567 (2006); *Boumediene v. Bush*, 553 US 723, 737 (2008).

⁸⁹ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 575-579; see Section 6.1.

⁹⁰ *Ibid.*

⁹¹ *Boumediene v. Bush*, 553 US 723 (2008); Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 573; Constitution of the United States (1787). Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>.

⁹² BBC News (2002). Court Challenge to US Detentions. Retrieved from <http://news.bbc.co.uk/2/hi/americas/1774643.stm>; see Section 6.1.

⁹³ Swann, S. (2010). What Happened in Europe’s Secret CIA Prisons? *BBC News*. Retrieved from <http://www.bbc.com/news/world-11469369?print=true>.

Belmarsh Prison in London has been compared to Guantanamo Bay, as suspected terrorists were also held there for extended periods without charge or trial.⁹⁴ Over time, however, the United Kingdom's position on Guantanamo Bay became more critical, with Harriett Harman, the Constitutional Affairs Minister calling for it to be closed.⁹⁵

Torture and ill-treatment has also been an increasingly problematic occurrence during the War on Terror. While it is debatable how high up the military or administration ladder responsibility should lie for scandals such as those at Abu Ghraib or Baghram, the extraordinary rendition program, where suspected terrorists are often taken to countries known for torture, and the "Torture Memos,"⁹⁶ which argue for the legality of certain highly coercive interrogation techniques, suggest that torture and ill-treatment has been sanctioned at least in some circumstances by the highest levels of government. Not only has the legality of highly coercive interrogation techniques been discussed, but the CIA has admitted to using such techniques on suspected terrorists, including waterboarding Khalid Sheikh Mohammed, accused of masterminding the September 11, 2001 attacks.⁹⁷

Five months before the September 11 attacks, the European Union Guidelines on torture and other cruel, inhuman or degrading treatment or punishment were adopted by the Council of the European Union.⁹⁸ Despite this, the United Kingdom has also been involved in the torture or ill-treatment of prisoners. Baha Mousa was an Iraqi who died

⁹⁴ Winterman, D. (2004). Belmarsh – Britain's Guantanamo Bay? *BBC News*. Retrieved from http://news.bbc.co.uk/2/hi/uk_news/magazine/3714864.stm.

⁹⁵ Reynolds, P. (2006). Pressure Grows on Guantanamo Bay. *BBC News*. Retrieved from <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/5071870.stm>.

⁹⁶ Bradbury, S. (2005). Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency. U.S. Department of Justice. Retrieved from [http://www.therenditionproject.org.uk/pdf/PDF%2016%20\[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2016%20[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf); Mazzetti, M. and Shane, S. (2009). Interrogation Memos Detail Harsh Tactics by the C.I.A. *The New York Times*. Retrieved from http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all&_r=0.

⁹⁷ BBC News (2008). CIA Admits Waterboarding Inmates. Retrieved from <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/7229169.stm>.

⁹⁸ European Union External Action Service (2013). Human Rights Guidelines – Torture. Retrieved from http://eeas.europa.eu/human_rights/guidelines/torture/index_en.htm.

in September 2003 while in the custody of British soldiers after being tortured.⁹⁹ Mousa and his fellow inmates “were beaten with bars, repeatedly kicked and forced to drink their own urine . . . kept hooded with hessian sacks in temperatures of 60C, made to maintain a painful stress position for hours and deprived of sleep.”¹⁰⁰ In March 2008, Defence Secretary Des Browne admitted that there were “substantial breaches” of the European Convention on Human Rights in Mousa’s death.¹⁰¹

Further, the United Kingdom, Lithuania, Latvia, and Portugal have all intervened in European Court of Human Rights cases where persons allege that their deportation is to states where “there is a real risk of their being subject to torture and ill-treatment”.¹⁰² They asked the Court to create a new balancing test between national security interests and protection from ill-treatment in light of the growing threat of terrorism.¹⁰³ In addition, in *A v. Secretary of State for the Home Department*,¹⁰⁴ the United Kingdom has argued that evidence acquired by foreign officials through torture should be admissible evidence, making a distinction from evidence obtained by torture by UK officials, an argument later rejected by the House of Lords.¹⁰⁵ Such positions are revealing of the re-evaluation of security interests and human rights that not only occurred in the United States, but also in a limited number of European Union member states. As explained by Duffy:

“Although they were unsuccessful, the very fact that governments made these interventions, despite the odds of success being seriously stacked against them (in the light of clear and on-point jurisprudence from the Court itself, quite apart from any of the principles at stake), is telling. It

⁹⁹ Sengupta, K. (2008). MoD Admits Human Rights Breaches Over Death of Tortured Iraqi Civilian. *The Independent*. Retrieved from <http://www.independent.co.uk/news/uk/politics/mod-admits-human-rights-breaches-over-death-of-tortured-iraqi-civilian-801761.html>.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 585.

¹⁰³ Ibid.

¹⁰⁴ *A v. Secretary of State for the Home Department* [2005] UKHL 71, Judgment of 9 December 2005.

¹⁰⁵ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 586-587.

arguably reveals a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections. The resolute rejection of this approach by the European Court is an example of the important role of the courts in reaffirming fundamental principles”.¹⁰⁶

The United States utilization of drones for targeted killings of persons in the War on Terror has also become increasing controversial. With regard to the use of drones for targeted killings, President Obama’s administration has substantially increased the practice compared to the Bush administration.¹⁰⁷ The Obama administration has carried out approximately 90 percent of the drone strikes by the United States.¹⁰⁸ The use of drones, also known as unmanned aerial vehicles, provides the United States with “an unprecedented ability to track and kill individuals with great precision, without any risk to the lives of the forces that use them.”¹⁰⁹ The United Kingdom has also utilized armed drones to kill individuals,¹¹⁰ but not to the same degree as the United States particularly outside of the battlefield.¹¹¹

The use of drones for targeted killings has sometimes been criticized, including by the European Parliament and officials from European Union member states.¹¹² In addition to potential issues with state sovereignty, the use of drone strikes has raised concerns about arbitrary killing in violation of human rights, particularly when they take place away from the zones where conventional hostilities are taking place.¹¹³ Although there has been some criticism of the use of drones in such circumstances, the European

¹⁰⁶ Ibid. p. 586.

¹⁰⁷ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

¹⁰⁸ Ibid. p. 1-2.

¹⁰⁹ Ibid. p. 1.

¹¹⁰ Ibid.; see, e.g., BBC (2015). UK Drone Strikes Subject to Legal Challenge by Greens. *BBC News*. Retrieved from <http://www.bbc.com/news/uk-politics-34339925>.

¹¹¹ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

¹¹² Ibid. p. 2; European Parliament Resolution on the Use of Armed Drones (2014/2567(RSP))

¹¹³ United Nations (2015). Study on Armed Unmanned Aerial Vehicles. p. 26-30. Retrieved from <http://www.un.org/disarmament/publications/more/drones-study/drones-study.pdf>; Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

Union has to a large extent been silent regarding the issue with regard to the United States.

The example provided by United States human rights practices also affects the European Union's human rights advocacy in other countries throughout the world. With regard to the War on Terror in particular, other states are able to look to the actions of the United States to justify their own human rights practices. For example, "the war on terror retrospectively legitimated Russian actions in Chechnya" and the "Chinese repression of Uighurs in Xinjiang has been framed in terms of the total war on terror since September 2001."¹¹⁴ The European Union's human rights dialogue with other states is negatively affected by the use of the War on Terror as an excuse for human rights violations.¹¹⁵ As such, the human rights issues involved in the War on Terror are important not only for the European Union's human rights policy towards the United States, but also towards the world generally.

1.3 The European Union in the World

Scholars continue to discuss the European Union in the world. A variety of terms have been used by scholars to discuss the European Union in the world, such as the power, actorness, role, performance, influence, impact, success, and/or effectiveness of the European Union, often with variation within individual works of scholarship.¹¹⁶ With

¹¹⁴ Manners, I. (2006). European Union 'Normative Power' and the Security Challenge. *European Security*. 15(4), p. 411-412.

¹¹⁵ Ibid.

¹¹⁶ See, e.g., Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc; Jorgenson, K., et al. (2011). Assessing the EU's Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*. 33(6), p. 559-620; Baroncelli, E. (2011). The EU at the World Bank: Institutional and Policy Performance. *Journal of European Integration*. 33(6), p. 637-650; Oberthur, S. (2011). The European Union's Performance in the International Climate Change Regime. *Journal of European Integration*. 33(6), p. 667-682; Shahin, J. (2011). The European Union's Performance in the International Telecommunication Union. *Journal of European Integration*. 33(6), p. 683-698; Young, A. (2011). The Rise (and Fall?) of the EU's Performance in the Multilateral Trading System. *Journal of European Integration*. 33(6), p. 715-729; Thomas, D. (2012). Still Punching Below Its Weight? Coherence and Effectiveness in European Union Foreign Policy. *Journal of Common Market Studies*. 50(3), p. 457-474; Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International*

the variation of terminology used (including mixtures within individual works of scholarship), it is important to look into the scholarship to understand what is more specifically being examined and/or measured. As stated by Graeger and Haugevik, “it seems clear that any assessment of performance will depend on how we define performance in the first place.”¹¹⁷

Some early studies of the European Union in the world focused on the European Union’s actorness. In 1977, Gunnar Sjostedt defined actorness as the “the capacity to behave actively and deliberately in relation to other actors in the international system.”¹¹⁸ Since then, scholars have continued to discuss the concept of the European Union’s actorness.¹¹⁹ With studies of actorness often centering around the capacity or “ability to act” of the European Union,¹²⁰ “actorness is often analysed largely on the basis of EU internal criteria.”¹²¹ While the existing studies regarding European Union actorness

Relations, 27(3), p. 261-275; Groen, L. & Niemann, A. (2013). The European Union at the Copenhagen Climate Negotiations: A Case of Contested EU Actorness and Effectiveness. *International Relations*, 27(3), p. 308-324; Elsig, M. (2013). The EU as an Effective Trade Power? Strategic Choice of Judicial Candidates in the Context of the World Trade Organization. *International Relations*, 27(3), p. 325-340; Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 113-137; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*, 17(2), p. 224-241; Langbein, J. & Wolczuk, K. (2012). Convergence Without Membership? The Impact of the European Union in the Neighborhood: Evidence from Ukraine. *Journal of European Public Policy*, 19(6), p. 863-881.

¹¹⁷ Graeger, N. & Haugevik, K. (2011). The EU’s Performance with and within NATO: Assessing Objectives, Outcomes and Organisational Practices. *Journal of European Integration*. 33(6), p. 754.

¹¹⁸ Sjostedt, G. (1977). *The External Role of the European Community*. Saxon House, Swedish Institute of International Affairs, p. 16.

¹¹⁹ See, e.g., Jupille, J. & Caporaso, J. (1998). States, Agency and Rules: the European Union in Global Environmental Politics, in: Rhodes, C. (ed.), *The European Union in the World Community*, Boulder, CO: Lynne Rienner, pp. 213-229; Ginsberg, R. (1999). Conceptualizing the European Union as an International Actor. *Journal of Common Market Studies*, 37(3). p. 429-454; Bretherton, C. & Vogler, J. (2006). Conceptualizing actors and actorness. in: Bretherton, C. & Vogler, J. (2006). *The European Union as a Global Actor*. London: Routledge. p. 12-36; Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267.

¹²⁰ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267; Brattberg, E. (2013). Actorness and Effectiveness in International Disaster Relief: The European Union and United States in Comparative Perspective. *International Relations*, 27(3), p. 357; Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115.

¹²¹ Schaik, L. (2013). The EU’s Growing Pains in Negotiating International Food Standards. *International Relations*, 27(3), p. 293; see, e.g., Jupille, J. & Caporaso, J. (1998). States, Agency and Rules: the European Union in Global Environmental Politics, in: Rhodes, C. (ed.), *The European Union in the World Community*, Boulder, CO: Lynne Rienner, pp. 213-229; Niemann, A. & Bretherton, C. (2013). EU External

certainly have value, it is also important for political science scholars to “go beyond studies of actorness (or ability to act).”¹²² “Ginsberg’s innovative study” attempted to address this concern, with Ginsberg at that time aiming “to take analysis of EU external policy ‘to its next logical stage of development – to analyse the effects (or outcomes) of actions.’”¹²³ As discussed below, recent political science scholarship generally continue with this aim in attempts at examining the influence, impact, performance, success, and/or effectiveness of the European Union.¹²⁴

Scholars have also often discussed and debated the European Union’s power in the world, with descriptions of the European Union as a civilian power,¹²⁵ normative power,¹²⁶ a structural power,¹²⁷ a superpower,¹²⁸ and a small power,¹²⁹ among others.¹³⁰ Although there is variation in the descriptions of the European Union’s power, the concept of power has often explicitly or implicitly centered on an ability or potential to have an influence.¹³¹ While such a focus on power has value, some scholars have expressed concern that it at least sometimes is “insufficiently grounded in empirical

Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 261-275.

¹²² Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267.

¹²³ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267, quoting in part Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc., p. 15.

¹²⁴ See, e.g., Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267 (stating that Ginsberg’s “aim, and the systematic application of his analytical framework, accords with the concerns of this Special Issue.”).

¹²⁵ Duchêne, F. (1972). Europe’s Role in World Peace, in R. Mayne (ed.) *Europe Tomorrow: Sixteen Europeans Look Ahead*. London: Fontana.

¹²⁶ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 235-258.

¹²⁷ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan.

¹²⁸ McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York.

¹²⁹ Toje, A. (2008). The European Union as a Small Power. *Journal of Common Market Studies*. 49(1).

¹³⁰ See also discussion in Section 2.2.

¹³¹ Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1194; See Schunz, S. (2010). How to Assess the European Union’s Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis’, *Journal of Contemporary European Research*. 6(1), p. 24-25 (discussing other examples); Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 264.

findings,”¹³² sometimes insufficiently addresses the effects of the European Union’s actions,¹³³ and is still “in the process of attaining a more systematic empirical focus.”¹³⁴

Given these concerns, scholars have increasingly begun to examine the effects of the European Union’s foreign policy activity.¹³⁵ In 2010 Simon Schunz explained, “virtually no attempts have been made” with regard to the examination of the European Union’s foreign policy “to specify what influence means and how to assess it (with the partial exception of Ginsberg 2001, who employs the term ‘impact’).”¹³⁶ In 2011, Jorgensen, Oberthur, and Shahin likewise point out that European foreign policy literature “has not developed systematic conceptualisations of performance” and so they aimed to provide a conceptual framework for assessing performance of the European Union in international institutions, which they suggest has effectiveness, relevance, efficiency, and financial/resource viability as core elements.¹³⁷ Similarly, Niemann and Bretherton state that “the literature contains relatively few systematic empirical explorations of the actual extent of EU actorness and especially effectiveness in international relations” and that “systematic empirical analyses of EU effectiveness are still relatively rare.”¹³⁸

¹³² Schunz, S. (2010). How to Assess the European Union’s Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis’, *Journal of Contemporary European Research*. 6(1), p. 24.

¹³³ Smith, K. (2007). The EU in the World: Future Research Agendas. European Foreign and Security Policy Studies Programme, p. 13. Retrieved from <http://iep-berlin.de/wp-content/uploads/2014/07/Vortrag-von-Dr.-Karen-E.-Smith.pdf>.

¹³⁴ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 264.

¹³⁵ Beach, D. (2015). Liberal International Relations Theory and EU Foreign Policy. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 92-96.

¹³⁶ Schunz, S. (2010). How to Assess the European Union’s Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis’, *Journal of Contemporary European Research*. 6(1), p. 26. In his article, Schunz makes an “initial attempt” to further develop the concept and assessment of the European Union’s influence in order to “stimulate debate” but does not have a fully developed framework for doing so. Schunz, S. (2010). How to Assess the European Union’s Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis’, *Journal of Contemporary European Research*. 6(1), p. 38. Ginsberg specifically defines “external political impact”, but also frequently uses the term influence. Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc.

¹³⁷ Jorgenson, K., et al. (2011). Assessing the EU’s Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*. 33(6), p. 601-602. Relevance, efficiency, and viability focus more on issues internal to the European Union than effectiveness alone. Ibid, p. 603-605.

¹³⁸ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 263; Brattberg, E. (2013). Actorness and

Much of the recent scholarship on the European Union's influence, impact, performance, success, and/or effectiveness¹³⁹ has focused on whether the European Union has (partially or fully) achieved its goals, objectives, or preferences.¹⁴⁰ For example, Jorgensen, Oberthur, and Shahin define the European Union's effectiveness "in an international institution as the degree to which the EU has achieved its goals and objectives in the decision-making process within that institution," and point out that many "studies of EU performance have, implicitly or explicitly, used EU goals and objectives as a central performance standard" and similarly state that their "standard of

Effectiveness in International Disaster Relief: The European Union and United States in Comparative Perspective. *International Relations*, 27(3), p. 359.

¹³⁹ Again, a mixture of terminology is often used within a single publication.

¹⁴⁰ Jorgensen, K., et al. (2011). Assessing the EU's Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*. 33(6), p. 559-620; Baroncelli, E. (2011). The EU at the World Bank: Institutional and Policy Performance. *Journal of European Integration*. 33(6), p. 637-650; Kissack, R. (2011). The Performance of the European Union in the International Labour Organization. *Journal of European Integration*. 33(6), p. 652; Oberthur, S. (2011). The European Union's Performance in the International Climate Change Regime. *Journal of European Integration*. 33(6), p. 667; Schaik, L. (2011). The EU's Performance in the World Health Organization: Internal Cramps after the 'Lisbon Cure.' *Journal of European Integration*. 33(6), p. 700, 702; Graeger, N. & Haugevik, K. (2011). The EU's Performance with and within NATO: Assessing Objectives, Outcomes and Organisational Practices. *Journal of European Integration*. 33(6), p. 744, 754; Thomas, D. (2012). Still Punching Below Its Weight? Coherence and Effectiveness in European Union Foreign Policy. *Journal of Common Market Studies*. 50(3), p. 458, 460; Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267; Schaik, L. (2013). The EU's Growing Pains in Negotiating International Food Standards. *International Relations*, 27(3), p. 294; Groen, L. & Niemann, A. (2013). The European Union at the Copenhagen Climate Negotiations: A Case of Contested EU Actorness and Effectiveness. *International Relations*, 27(3), p. 311; Elsig, M. (2013). The EU as an Effective Trade Power? Strategic Choice of Judicial Candidates in the Context of the World Trade Organization. *International Relations*, 27(3), p. 328; Carbone, M. (2013). Between EU Actorness and Aid Effectiveness: The Logics of EU Aid to Sub-Saharan Africa. *International Relations*, 27(3), p. 343; Brattberg, E. (2013). Actorness and Effectiveness in International Disaster Relief: The European Union and United States in Comparative Perspective. *International Relations*, 27(3), p. 359; Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 113-137; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*, 17(2), p. 224-241; Quaglia, L. (2014). The Sources of European Union Influence in International Financial Regulatory Fora. *Journal of European Public Policy*, 21(3), p. 328; Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 27; Basu, S. et al. (2012). The European Union's Participation in United Nation's Human Rights and Environmental Governance: Key Concepts and Major Challenges. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 6.

EU goal achievement thus stays central among established standards in (EU) policy evaluation.”¹⁴¹

While there is overlap between the research on goal/objective/preference achievement and Ginsberg’s notion of external impact, they are not necessarily conceptually interchangeable nor operationalized the same in measurement. First, when the European Union’s goals/objectives/preferences are (partially or wholly) *internal*, there will be a divergence of focus between effectiveness and *external* impact.¹⁴² Second, goals can be to varying extents under- or overambitious. On the one hand, an overambitious goal may not be (wholly or partially) reached but nonetheless have an external impact on the target state. On the other hand, an underambitious goal may be wholly reached but be of little or no vital importance to the target state. Third, it may be difficult to determine what the goals of the European Union are, and there may be conflicting goals from which the achievement of one takes away from the achievement of another. As explained by Jorgensen, Oberthur, and Shahin:

“We need and want to acknowledge that assessing EU goal achievement itself is likely to raise important challenges. To start with, objectives can be so broad as to render them nearly meaningless for an assessment. Consider the example of the European Security Strategy of 2003, which lists five broad strategic objectives, the achievement of which can hardly be assessed. In other cases, EU objectives may not necessarily be clear or explicit. It is also not difficult to imagine that policy may pursue several objectives that may be partially contradictory, in which case effectiveness may need to be assessed per objective and weighted overall. . . . Finally, we may wish to take into account how easy or difficult the achievement of

¹⁴¹ Jorgenson, K., et al. (2011). Assessing the EU’s Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*.33(6), p. 603-604.

¹⁴² See, Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 132; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*, 17(2), p. 225.

the goals has been, given their level of ambition, the characteristics of the problem and the preferences of other actors.”¹⁴³

Similarly, Jorgensen, Oberthur, and Shahin state that “the case studies [within the special issue of the *Journal of European Integration* they introduce] show that it is frequently difficult to identify the EU policy objectives in their respective policy areas. In almost all cases, there is no explicit description of the goals set out for the EU.”¹⁴⁴

These concerns are particularly relevant for the focus of this research. As discussed in Section 1.2, terrorism has presented complex and sometimes conflicting issues of security, justice, and respect for human rights, and the European Union and its member states have not always acted consistently on these challenging issues. Goals relating to security or justice can arguably conflict with respecting the human rights of terrorist suspects. While the European Union’s position with regard to the death penalty in the United States has been much more consistent, the United States response to the European Union’s criticisms of human rights has at times pointed to the fact that the death penalty system in the United States is the result of democratic processes (with democracy also being a value promoted by the European Union). In this context, Ginsberg’s analytical framework for assessing external impact thus has not only the benefit of focusing on the actual effects (rather than only the European Union’s capacity or “ability to act”¹⁴⁵) on the non-member target (in this research, the United States), but it also does not base the measurement of *external impact*¹⁴⁶ primarily on whether the

¹⁴³ Jorgenson, K., et al. (2011). Assessing the EU’s Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*.33(6), p. 604.

¹⁴⁴ Jorgenson, K., et al. (2011). Assessing the EU’s Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*.33(6), p. 609; see, e.g., Shahin, J. (2011). The European Union’s Performance in the International Telecommunication Union. *Journal of European Integration*.33(6), p. 690, 694; Schaik, L. (2011). The EU’s Performance in the World Health Organization: Internal Cramps after the ‘Lisbon Cure.’ *Journal of European Integration*.33(6), p. 702; Graeger, N. & Haugevik, K. (2011). The EU’s Performance with and within NATO: Assessing Objectives, Outcomes and Organisational Practices. *Journal of European Integration*.33(6), p. 745, 754-755; see also, Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267; Schaik, L. (2013). The EU’s Growing Pains in Negotiating International Food Standards. *International Relations*, 27(3), p. 294.

¹⁴⁵ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267.

¹⁴⁶ See Chapter 2.

European Union's goals, objectives, or preferences have been fully accomplished. Thus, while the European Union's goals, objectives, or preferences are sometimes discussed in this research as part of the context or background, they are not used as the primary basis for determining the level of external impact on the United States.

While power and influence are not necessarily conceptually interchangeable, the ability of the European Union to have an external impact is (at least) sometimes implied within (some of) the debates regarding the European Union's power in the world.¹⁴⁷ As explained by Forsberg, "the concept of 'power' implies the ability to achieve results. With the notable exception of enlargement policy, the record of the EU achieving normative ends is, however, mixed and contested."¹⁴⁸ Thus, an examination of the European Union's external impact is not only important in its own regard, but it may also have implications for at least some of the various debates concerning the European Union's power.¹⁴⁹

1.4 European Union-United States Relations

The transatlantic relationship today has roots in "the Second World War and the Cold War, conflicts that bound the United States to Europe."¹⁵⁰ Both sides struggled together against communism and fascism based in part on shared values of democracy and capitalism.¹⁵¹ After World War II, the United States security presence, financial support (through the Marshall Plan), and political support "provided valuable support for European integration and the creation of an EU that today incorporates most of

¹⁴⁷ See Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 24-25 (discussing examples).

¹⁴⁸ Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1194; See Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 24-25 (discussing other examples).

¹⁴⁹ See Chapter 8, discussing possible further research.

¹⁵⁰ Oliver, T. & Williams, M. (2016). Special Relationships in Flux: Brexit and the Future of the US-EU and US-UK Relationships. *International Affairs*, 92(3), p. 548; see Smith, M. (2015). The EU and the US. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 570-571.

¹⁵¹ Oliver, T. & Williams, M. (2016). Special Relationships in Flux: Brexit and the Future of the US-EU and US-UK Relationships. *International Affairs*, 92(3), p. 548.

Europe.”¹⁵² While some predicted that the end of the Cold War would also mean the practical end of NATO, “the economic, political, social and military links across the Atlantic proved strong enough to support the relationship in the post-Cold War world.”¹⁵³ On the economic side, the European Union and the United States continue to have a high level of trade in goods and services.¹⁵⁴ In this context, academics have often examined the European Union and the United States from a comparative perspective¹⁵⁵ or the relations between them. As explained by Tortola:

“Ever since the early days of European integration, supporters of the project have time and again pointed at the US as, if not a historical example to follow entirely, at least a model from which to borrow selectively or, at other times, a competitor to match in the international arena”¹⁵⁶

Michael Smith has also called the United States “Europe’s most significant ‘other’”, while acknowledging the “ambivalent” attitude of the United States towards European

¹⁵² Ibid., p. 550

¹⁵³ Ibid., p. 548.

¹⁵⁴ Ibid., p. 548-549.

¹⁵⁵ See, e.g. Tortola, P. (2014). The Limits of Normalization: Taking Stock of the EU-US Comparative Literature. *Journal of Common Market Studies*, 52(6), p. 1342-1357; Brattberg, E. (2013). Actorness and Effectiveness in International Disaster Relief: The European Union and United States in Comparative Perspective. *International Relations*, 27(3), p. 356-374; Fabbrini, S. (2004). Transatlantic Constitutionalism: Comparing the United States and the European Union. *European Journal of Political Research*, 43, p. 547-569; Fabbrini, S. & Sicurelli, D. (2008). Bringing Policy-Making Structure Back In: Why are the US and the EU Pursuing Different Foreign Policies? *International Politics*, 45, p. 292-309; Howorth, J. & Menon, A. (2009). Still Not Pushing Back: Why the European Union is not Balancing the United States. *Journal of Conflict Resolution*, 53(5), p. 727; Bridoux, J. & Kurki, M. (2014). Cosmetic Agreements and the Cracks Beneath: Ideological Convergences and Divergences in US and EU Democracy Promotion in Civil Society. *Cambridge Review of International Affairs*, Aug. 2014; Olsen, G. (2008). The Post September 11 Global Security Agenda: A Comparative Analysis of the United States and European Union Policies Towards Africa. *International Politics*, 45, p. 457-474; Kelemen, R. & Vogel, D. (2010). Trading Places: The Role of the United States and the European Union in International Environmental Politics. *Comparative Political Studies*, 43(4), p. 427-457; Oehri, M. (2015). Comparing US and EU Labour Governance ‘Near and Far’ – Hierarchy vs Network? *Journal of European Public Policy*, 22(5), p. 731-749.

¹⁵⁶ Tortola, P. (2014). The Limits of Normalization: Taking Stock of the EU-US Comparative Literature. *Journal of Common Market Studies*, 52(6), p. 1342.

integration with general support for it “as a stabilising and energising force” but also as a potential economic and diplomatic challenger.¹⁵⁷

The literature today discussing the relations between the European Union and the United States suggests a complicated mixture of commonalities, convergence, collaboration/cooperation, and interdependence in combination with disagreements, tensions, and competition.¹⁵⁸ This complexity of the European Union-United States relationship has been described as “schizophrenic” with its combination of working together and divergence on different issues.¹⁵⁹ Examples include on the one hand the European Union and United States standing together at times concerning Iran’s nuclear policy and working towards strengthening their economic relationship and, on the other hand, disagreements regarding regulatory standards and the United States’ conduct during the War on Terror.¹⁶⁰ The literature also suggests that the mixture of these features of the relationship between the European Union and the United States has varied to some degree depending on the area and time period as well as between member states themselves.¹⁶¹ For example, the US-led invasion of Iraq placed the United Kingdom at odds in its support for the United States efforts relative to some of the other European Union member states, such as France and Germany.¹⁶² As noted by Oliver and Williams,

¹⁵⁷ Smith, M. (2009). Between ‘Soft Power’ and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 606.

¹⁵⁸ See, e.g., Tortola, P. (2014). The Limits of Normalization: Taking Stock of the EU-US Comparative Literature. *Journal of Common Market Studies*, 52(6), p. 1342; Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 96-103; Howorth, J. & Menon, A. (2009). Still Not Pushing Back: Why the European Union is not Balancing the United States. *Journal of Conflict Resolution*, 53(5), p. 727; Allen, D. & Smith, M. (2012). Relations with the Rest of the World. *Journal of Common Market Studies*, 50, p. 173-174; Moravcsik, A. (2010). U.S.-EU Relations: Putting the Bush Years in Perspective, in Bindi, F. (ed.). *The Foreign Policy of the European Union: Assessing Europe’s Role in the World*. Brookings Institution Press: Washington, D.C. p. 203-204, 207; Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 224.

¹⁵⁹ See Hadfield, A. & Fiott, D. (2014). Relations with the Rest of the World: From Chaos to Consolidation? *Journal of Common Market Studies*, 52, p. 181.

¹⁶⁰ Hadfield, A. & Fiott, D. (2014). Relations with the Rest of the World: From Chaos to Consolidation? *Journal of Common Market Studies*, 52, p. 181.

¹⁶¹ Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 96-103; Oliver, T. & Williams, M. (2016). Special Relationships in Flux: Brexit and the Future of the US-EU and US-UK Relationships. *International Affairs*, 92(3), p. 554.

¹⁶²

“enthusiasm for Atlanticism varies among European states and among the US political elite.”¹⁶³

With regard to the European Union’s foreign policy, the relationship with the United States (and questions and disagreements about it) has played an important role particularly in the context of issues relating to world order or security.¹⁶⁴ For example, there was a “sharpening” of tensions between the European Union and the United States to some degree with regard to world order issues during the George W. Bush administration.¹⁶⁵ During the Reagan administration, the United States’ focus on the discourse of the “politics of strength” was largely in the context of contending with another Superpower.¹⁶⁶ During the George W. Bush administration, such discourse by the United States occurred in the context of a “peculiar sense of vulnerability resulting from the biggest ever attack on the mainland of the USA.”¹⁶⁷ In that context, the United States was often accused of unilateralism in at least some circumstances while multilateralism was being promoted by the European Union.¹⁶⁸

According to Michael Smith, such a situation in the United States can “translate into problems in the management of American Power” for Europe.¹⁶⁹ Michael Smith suggests that during the Bush Administration, the European Union and the United States policy elites saw “each other as ‘foreign bodies’” more than in previous decades when confronting issues related to hard security, while in other areas such as “business, corporate affairs and ‘everyday integration’ there continued to be more responsiveness

¹⁶³ Oliver, T. & Williams, M. (2016). Special Relationships in Flux: Brexit and the Future of the US-EU and US-UK Relationships. *International Affairs*, 92(3), p. 559; see Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 177-178.

¹⁶⁴ See Smith, M. (2009). Between ‘Soft Power’ and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 597; Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 96.

¹⁶⁵ Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 96.

¹⁶⁶ *Ibid.*, p. 101.

¹⁶⁷ *Ibid.*

¹⁶⁸ Smith, M. (2009). Transatlantic Economic Relations in a Changing Global Political Economy: Achieving Togetherness but Missing the Bus? *The British Journal of Politics and International Relations*, 11, p. 98.

¹⁶⁹ Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 101.

and interpenetration.”¹⁷⁰ The demands and challenges placed by the United States and the Islamic world have also to some degree made it more difficult for the development of consensus within the European Union and its member states,¹⁷¹ and the reaction to the September 11, 2001 terrorist attacks could be considered a continuation of the debate within the European Union and its member states with regard to aligning with or separating further from the United States positions.¹⁷²

There is some disagreement in the literature as to whether the European Union can challenge the United States in the world, particularly outside of the economic arena.¹⁷³ Although the European Union’s influence on its member states, candidate states, and some other actors is generally accepted, “majority thinking holds that the EU has too many internal problems – including divisions of political opinion, declining population growth, and enlargement fatigue – to stand up to the Americans on anything much more than economic matters”.¹⁷⁴ Similarly, Kissack explained that “the central criticism that the EU is faced with is that it promotes [human rights] when it is easy or cost free, but is far less willing and/or able to do so when faced with powerful states that have the potential to impose high costs on the EU.”¹⁷⁵ Likewise, Mattlin suggests that the European Union “practically never” makes use of its formal foreign policy tools “towards the USA, Russia, China or India.”¹⁷⁶ Similarly, Allen and Smith explained that in 2010 during the Spanish Presidency there was a context in which the European Union sought “to be taken seriously” while the United States had an “apparent inclination to take the Union for granted.”¹⁷⁷ While Keukeleire and MacNaughtan argue that the European Union has structural power, they also have suggested that the European Union has

¹⁷⁰ Ibid.

¹⁷¹ Smith, M. (2009). Between ‘Soft Power’ and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 608.

¹⁷² Ibid., p. 605.

¹⁷³ See, e.g., McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York. p. 2; Howorth, J. & Menon, A. (2009). Still Not Pushing Back: Why the European Union is not Balancing the United States. *Journal of Conflict Resolution*, 53(5), p. 727-728.

¹⁷⁴ McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York. p. 2.

¹⁷⁵ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 826.

¹⁷⁶ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184.

¹⁷⁷ Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 224-225.

difficulty managing its relationship with the United States and have had mixed results in doing so.¹⁷⁸ Describing the disparity between the European Union's relationship with the United States relative to other countries in the world, Keukeleire and MacNaughtan explained their position as follows:

“The EU has proved reluctant to criticize and unable to sanction the US even where American policy has run counter to the EU's fundamental values. If the US were any other country, concern over its record on human rights protection, lack of respect for international law, the death penalty, extraordinary rendition, Guantanamo Bay and trial by military tribunal would in all likelihood trigger EU sanctions and a policy of concerted non-cooperation. However, the EU and EU member states are rarely willing to openly criticize the US, and never dare actually to use the sticks at their disposal to add weight to their concerns.”¹⁷⁹

Thus, the United States is not only a potential economic and diplomatic challenger for the European Union,¹⁸⁰ but previous literature also suggests that it presents a potential challenge for the European Union specifically in the area of human rights.

¹⁷⁸ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 310; see also Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 224 (stating that in 2010 the Spanish Presidency “was doomed to frustration in its efforts to manage the EU—US agenda”); Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184 (stating that the European Union practically never “uses its formal foreign policy tools... towards the USA, Russia, China, or India”).

¹⁷⁹ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 314; see Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 275; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*. 17(2), p. 235-236 (in the United Nation's Human Rights Council, “The EU is not keen to discuss the human rights records of friends or allies”).

¹⁸⁰ Smith, M. (2009). Between ‘Soft Power’ and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 606.

1.5 The European Union's Human Rights Promotion

Scholars have often emphasized the importance of human rights in the external relations of the European Union.¹⁸¹ Kissack suggests that “for the EU, [human rights] promotion has shifted from being *a* concern of external action to *the* concern of external action.”¹⁸² Wiessala likewise stated that “few observers doubt today that the EU has a human rights-guided foreign policy identity.”¹⁸³ Similarly, Manners description of the European Union as a normative power in particular has often been influential in the

¹⁸¹ See, e.g., Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 116; Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 822; Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 181; Wiessala, G. (2010). Intellectual Legacies, Ethical Policies and Normative Territories: Situating the Human Rights Issue in EU-Asia Relations. *International Politics*, 47(3/4), p. 422; Vadura, K. (2015). The EU as 'Norm Entrepreneur' in the Asian Region: Exploring the Digital Diplomacy Aspect of the Human Rights Toolbox. *Asia Europe Journal*, 13, p. 350; Basu, S. et al. (2012). The European Union's Participation in United Nation's Human Rights and Environmental Governance: Key Concepts and Major Challenges. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 8-9; Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 135; see also European Union (2011). Joint Communication to the European Parliament and the Council: Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach. Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF>, p. 4 (“The protection and promotion of human rights is a silver thread running through all EU action at home and abroad.”); European Union (2001). Communication from the Commission to the Council and the European Parliament: The European Union's Role in Promoting Human Rights and Democratisation in Third Countries. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0252&from=EN>, p. 3 (“Changes in the external environment, as well as internal Commission reforms, require a re-focusing of human rights and democracy strategies, in particular to ensure that these issues permeate all Community policies, programmes and projects.”).

¹⁸² Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 822; see European Union (2011). Joint Communication to the European Parliament and the Council: Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach. Retrieved from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0886:FIN:EN:PDF>, p. 4 (“The protection and promotion of human rights is a silver thread running through all EU action at home and abroad.”); European Union (2001). Communication from the Commission to the Council and the European Parliament: The European Union's Role in Promoting Human Rights and Democratisation in Third Countries. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0252&from=EN>, p. 3 (“Changes in the external environment, as well as internal Commission reforms, require a re-focusing of human rights and democracy strategies, in particular to ensure that these issues permeate all Community policies, programmes and projects.”).

¹⁸³ Wiessala, G. (2010). Intellectual Legacies, Ethical Policies and Normative Territories: Situating the Human Rights Issue in EU-Asia Relations. *International Politics*, 47(3/4), p. 422.

academic literature,¹⁸⁴ and the European Union's human rights promotion may be considered "intrinsically linked" to the idea of "normative power Europe."¹⁸⁵ The "core norms" of the European Union identified by Manners in his 2002 article included peace, liberty, democracy, rule of law, and, particularly relevant for this research, human rights.¹⁸⁶ Despite the importance the European Union places on human rights, overall the academic literature indicates that the European Union's efforts have had mixed results in this area.¹⁸⁷

In 2006, Karen Smith, for example, pointed out that "the European Union has repeatedly and prominently declared that it seeks to promote human rights issues within the United Nations," which is "in line with its commitments to the UN and to promoting respect for human rights in third countries."¹⁸⁸ Karen Smith specifically examined the cohesiveness and effectiveness of the European Union's human rights promotion in the United Nations.¹⁸⁹ Smith suggested that "the EU certainly has the potential to lead within the UN" but opposition to the EU can also exist by some that "view it as neo-colonial and domineering."¹⁹⁰ Smith found that although the European Union "wins" most of the resolutions it introduces in the United Nations, "EU decisions to put forward resolutions

¹⁸⁴ See Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 183; Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 235-258.

¹⁸⁵ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 832; see Vadura, K. (2015). The EU as 'Norm Entrepreneur' in the Asian Region: Exploring the Digital Diplomacy Aspect of the Human Rights Toolbox. *Asia Europe Journal*, 13, p. 350.

¹⁸⁶ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 242; Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 183.

¹⁸⁷ See, e.g., Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 132-133; see also Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115-117; Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184; see, e.g., Maas, M. (2012). The European Union, Vietnam, and Human Rights as Law: the Case of the 1995 EU—Vietnam Framework Agreement and its Human Rights Clause. *Asia Europe Journal*, 10, p. 215-231.

¹⁸⁸ Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 113.

¹⁸⁹ *Ibid.*, p. 113-137.

¹⁹⁰ *Ibid.* p. 132.

are based partly on whether they are ‘winnable’.”¹⁹¹ Smith also suggested that the European Union’s influence on human rights in the United Nations may vary depending on who is speaking on behalf of the European Union, support from the European Union member states, and the European Union’s internal coordination.¹⁹² In a 2010 article, Karen Smith further argued that, despite increased European Union voting cohesion, its external effectiveness on the United Nation’s Human Rights Council was limited.¹⁹³

With regard to democracy, human rights, and the rule of law, Mattlin indicates that the European Union has more leverage over “prospective accession countries” and “small developing countries” than “established democratic countries” (such as the United States) and “major non-democratic countries.”¹⁹⁴ He further indicates that the European Union’s human rights dialogue with China “is now commonly seen as being at least a partial failure.”¹⁹⁵ Mattlin argues that the European Union’s challenges with regard to China may be at least partially attributable to the human rights issues within the war on terror:

“Losing the moral high ground Following Tiananmen, there was considerable respect within China, especially among educated people, for the Western political system and political values. However, this respect is all but gone today. Western efforts to take the moral high ground on human rights, liberty and democracy took a serious beating due to the war on terror and the infringements on political and civil rights that it has entailed. Western critique of Chinese human rights rings hollow in the face of secret detentions, a gradual dismantling of habeas corpus and

¹⁹¹ Ibid.

¹⁹² Ibid., p. 132-133; *see also* Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115-117.

¹⁹³ Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*. 17(2), p. 226, 234.

¹⁹⁴ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184; *see, e.g.*, Maas, M. (2012). The European Union, Vietnam, and Human Rights as Law: the Case of the 1995 EU—Vietnam Framework Agreement and its Human Rights Clause. *Asia Europe Journal*, 10, p. 215-231.

¹⁹⁵ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 189.

incidents of indirect condoning of torture. The EU has pursued the war on terror just as aggressively as the USA, although trying to underline the differences by emphasising legality.”¹⁹⁶

Despite this, the European Union has been criticized for taking stronger actions against weak states for human rights violations than powerful ones such as the United States, China, and Russia.¹⁹⁷ Mattlin argues that “Brussels faces an almost impossible task in trying to uphold a consistent normative policy towards major countries like China and Russia without appearing inconsistent or hypocritical.”¹⁹⁸ Like Mattlin, other scholars have also suggested that the European Union’s human rights promotion has had the most influence over states seeking accession to the European Union or seeking greater access to the European market or aid.¹⁹⁹ Indeed, guaranteeing human rights, including abolition of the death penalty, is a requirement for membership in the European Union.²⁰⁰ As explained by Kissack:

“The success of enlargement policy in transforming the economic, political and social structures of former communist states has been attributed to the prize that awaited – the ‘golden carrot’ of membership.

¹⁹⁶ Ibid., p. 191-192.

¹⁹⁷ See, Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 823-824; see, e.g., Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 314.

¹⁹⁸ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 181.

¹⁹⁹ See, e.g., Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 825, 830 (“It is widely accepted that the most successful way of promoting [human rights] has been through the ‘carrot’ of membership.”); Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184; see Broberg, M. (2012). From Colonial Power to Human Rights Promoter: on the Legal Regulation of the European Union’s Relations with the Developing Countries. *Cambridge Review of International Affairs*, 26(4), p. 686; Cierco, T. (2011). Human Rights Promotion in Serbia: A Difficult Task for the European Union. *Revista Brasileira de Política Internacional*, 54(1), p. 142, 144, 148; Conant, L. (2014). Compelling Criteria? Human Rights in the European Union. *Journal of European Public Policy*, 21(5), p. 724.

²⁰⁰ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 825; Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 124.

To states for which membership is not an option, aid and trade privileges are the EU's most influential tools...²⁰¹

Particularly with regard to the European Union's efforts eliminate the death penalty as part of its human rights promotion, the European Union's (potential) influence on the United States death penalty remains unsettled. Some scholars have indicated that the European Union may have limited success in its advocacy against the United States death penalty specifically. For instance, although Manners has used the issue of the death penalty to illustrate the European Union's normative power, early on he expressed some doubts specifically with regard to the European Union's ability to change the mind of the United States government on this issue.²⁰² Manners later pointed out, however, that the United States Supreme Court looked to the EU (among other actors) in determining world opinion on capital punishment for juveniles.²⁰³ Similarly, focusing primarily on the federal administration, Ginsberg concluded that the European Union had "no effect" on capital punishment in the United States in the 1990s, when the European Union's efforts in this regard were largely just getting started.²⁰⁴

Somewhat more optimistically, Dieter argues that "slowly, but impressively, international law and opinion are beginning to have an impact on law in the United States, and particularly on the death penalty" but "international concerns about the death penalty would probably never be enough alone to make the U.S. abandon the practice".²⁰⁵

²⁰¹ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 826.

²⁰² Manners, I. (2000). Normative Power Europe:: A Contradiction in Terms?. Copenhagen: Copenhagen Peace Research Institute. p. 17. Retrieved from [http://politicalscience.ku.dk/staff/Academic_staff/?pure=en%2Fpublications%2Fnormative-power-europe\(24e87faf-d711-4e20-a644-79f40406a5d2\).html](http://politicalscience.ku.dk/staff/Academic_staff/?pure=en%2Fpublications%2Fnormative-power-europe(24e87faf-d711-4e20-a644-79f40406a5d2).html); Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 248.

²⁰³ Manners, I. (2009). The EU's International Promotion of the Rights of the Child, in *The European Union and the Social Dimension of Globalization: How the EU Influences the World*, eds. Jan Orbie and Lisa Tortell. Routledge. p. 235; *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

²⁰⁴ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. P. 255.

²⁰⁵ Dieter, R. (2003). International Influence on the Death Penalty in the U.S. *Foreign Service Journal*. October 2003, p. 31, 38.

He notes that the United States Supreme Court cited a European Union amicus curiae brief when it banned execution of mentally retarded persons.²⁰⁶

Similarly, Schmidt argued that the European Union's²⁰⁷ world-wide campaign against the death penalty has been "fairly successful" with more than 20 European and non-European countries abolishing the death penalty in the nearly ten years after the promulgation of the European Union guidelines on the death penalty.²⁰⁸ Schmidt also notes that while the European Union's advocacy towards the United States at the federal government level and in international bodies has returned responses noting the complexity of the United States federal system and that the death penalty is largely a state issue, the European Union can probably take some credit for some United States Supreme Court decisions limiting the death penalty.²⁰⁹ Nonetheless, Schmidt concludes that it remains "unclear where the EU campaign may eventually lead."²¹⁰

With greater optimism, Demleitner suggested that in the long run Europe's abolitionist advocacy "may prove decisive for the future development of the death penalty in the United States".²¹¹ Similarly, Trail suggests that if the European Union acts uniformly in its advocacy against the death penalty then the United States will be forced to make changes to its death penalty policy.²¹²

Unlike the death penalty, where the European Union has presented a relatively united front in its advocacy against the death penalty over the last decade, the European Union and its member states struggled themselves with how to balance security and human rights in a time of concerns regarding terrorism. At the same time, problematic human rights practices, such as the extraordinary rendition program, are surrounded by secrecy in the name of security interests. In this context, much of the discussion among

²⁰⁶ Ibid., p. 35; *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁰⁷ While this dissertation's focus is the European Union, it is important to again emphasize that other actors in the world, such as the Council of Europe, have also made important contributions to abolition of the death penalty in the world.

²⁰⁸ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 131.

²⁰⁹ Ibid; see *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005).

²¹⁰ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 131.

²¹¹ Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 131.

²¹² Trail, R. (2002). The Future of Capital Punishment in the United States: Effects of the International Trend Towards Abolition of the Death Penalty. *Suffolk Transnational Law Review*. 26, p. 125-126.

academics has focused on how the European Union and its member states *have reacted* to the War on Terror, including in terms of the help provided in Europe to the United States, as well as how the European Union *should react* to the United States War on Terror and the threat of terrorism.²¹³

For example, while Manners utilizes the death penalty in arguing that the European Union is a normative power, in a later article Manners focuses on how the European Union should act normatively in response to the “security challenge” posed by terrorism.²¹⁴ Manners explained this security challenge:

“The security challenge to the EU presented by acts of terrorism against civilians in places such as New York, Bali, Istanbul, Madrid, London, Sharm el-Sheikh, Amman and Mumbai is doubly challenging because these terrorist acts raise fundamental questions as to the merits of the EU’s normative approach to world politics. In the face of such undifferentiating, non-negotiable ‘new terrorism’ and the need for effective counter-terrorist strategy, what place is there for the niceties of normative principles such as democracy, human rights or good governance? Surely the EU must be pragmatic about putting aside its normative ideals in the pursuit of terrorists and the prevention of terrorism, if only to ensure the security of its citizens? And, finally, whilst the principles Hume advocates are clearly successful in resolving conflict within Europe, the new terrorism of al-Qaeda inspiration is obviously a radically different manifestation of violence.”²¹⁵

²¹³ See, e.g., Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90; Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30; Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Manners, I. (2006): European Union ‘Normative Power’ and the Security Challenge. *European Security*. 15(4); Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006.

²¹⁴ Manners, I. (2006): European Union ‘Normative Power’ and the Security Challenge. *European Security*. 15(4), p. 405.

²¹⁵ *Ibid.* p. 406.

Nonetheless, Manners suggests that the European Parliament's report on the United States extraordinary rendition program played a role in White House admissions regarding extraordinary rendition.²¹⁶ Similarly, Winkler is somewhat optimistic about the European Parliament's and other European actors' condemnations of human rights practices in the War on Terror, suggesting that it would be difficult for governments to ignore such pressure or defend those practices.²¹⁷

Examining the European Union's impact on these human rights issues also has implications in the study of EU-US relations (discussed earlier). It provides empirical support indicating whether common or diverging interests and values exist as well as how (intentionally or unintentionally) receptive the United States is to European Union stimuli in this specific context. As explained by Schmidt:

“Just as the United States constructed a unique identity by adopting and internalising a unique set of political principles, based on individual liberty and laissez-faire economics, so too is the EU, led as always by its political elites, now in the process of constructing its own identity. Although there are considerable points of overlap, the death penalty issue shows these are competing visions, which could cause increasing frictions in transatlantic relations over time.”²¹⁸

Understanding the European Union's impact on the United States on the complicated and contentious human rights issues in the War on Terror and the death penalty helps provide clarity as to whether the relationship between the two is one sided, with the United States the dominant partner, or whether the European Union can successfully assert itself where there is disagreement. Michael Smith, for example, has called the United States “a key

²¹⁶ Ibid. p. 411; European Parliament (2007). Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners. A6-0020/2007. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN>.

²¹⁷ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 76.

²¹⁸ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 125.

test” of the European Union’s foreign policy.”²¹⁹ As such, if the European Union has frequent, high levels (i.e. considerable or significant) of impact in these areas of diverging interests and values, then that suggests that the European Union is not merely the weaker partner or a follower, but has the demonstrated ability to influence the United States.

1.6 Diffusion Mechanisms

An important aspect in the debate over the European Union’s impact on the United States, as well as the world generally, is understanding the means by which the European Union achieves that impact, i.e. through which diffusion mechanisms has the European Union achieved its impact.²²⁰ A variety of taxonomies have been developed to describe diffusion mechanisms. For instance, Towns describes the main diffusion mechanisms as coercion, persuasion, learning, and mimicry.²²¹ Goodman and Jinks offer coercion, persuasion, and acculturation as the mechanisms that influence state practice with regard to human rights.²²² Borzel and Risse list coercion, manipulation of utility calculations, socialization, persuasion, and emulation.²²³ Simmons, et. al. describe coercion, competition, learning, and emulation.²²⁴

Depending on the actors and issues involved, however, some diffusion mechanisms are more useful or relevant than others. A state with a small military that has not developed advanced military weapons is unlikely to threaten the United States, China, or Russia with coercion through its military and unlikely to achieve much success

²¹⁹ Smith, M. (2015). The EU and the US. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 570.

²²⁰ For further discussion of diffusion mechanisms, see Section 2.2.3.

²²¹ Towns, A. (2012). Norms and Social Hierarchies: Understanding International Policy Diffusion “From Below.” *International Organization*. 66, p. 184-185.

²²² Goodman, R. and Jinks, D. (2004). How to Influence States: Socialization and International Human Rights Law. *Duke Law Journal*. 54(3).

²²³ Borzel, A. and Risse, T. (2009). Diffusing (Inter-) Regionalism: The EU as a Model of Regional Integration. *KFG The Transformative Power of Europe Working Paper Series #7*. September 2009, p. 6.

²²⁴ Simmons, B. et al. (2006). Introduction: The International Diffusion of Liberalism. *International Organization*. 60(4), p. 789-801.

in doing so. Similarly, diffusion through competition is more often applicable to economic policies than to human rights in the United States.²²⁵

Although the literature has produced a variety of taxonomies to describe diffusion mechanisms, the different taxonomies generally revolve around the concepts of coercion, persuasion, and setting an example, when broadly understood.²²⁶ For example, Manners and Forsberg's focus on the European Union's normative power leads them to discuss in more detail non-coercive mechanisms of influence while essentially dividing the concepts of persuasion and setting an example into sub-types for the spread of norms.²²⁷

For instance, Forsberg's "invoking norms" involves the activation of commitments made through promises, agreements, or other authority.²²⁸ Forsberg distinguishes "invoking norms," which he describes as "activation of commitments" or "promises," from a narrow definition of persuasion in that it does not require that one be "persuaded about the goodness of the orders" from an authority.²²⁹ This is, however, a fine distinction that makes divisions between the content of the persuasion (whether the argument was based upon and accepted for its goodness rather than if the argument was based upon and accepted for its (moral, legal, practical, social, etc.) appropriateness) rather than focusing only on persuasion more broadly as a mechanism of influence that explains how the diffusion process occurred.

Persuasion, broadly understood, can certainly include the "invoking norms" argument (even if made implicitly) form of: you promised x, when you make a promise you have an obligation to keep it, therefore you should do x. Of course, this may also

²²⁵ Ibid. p. 792.

²²⁶ See Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 50; Towns, A. (2012). Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below." *International Organization*. 66, p. 184; Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1195-1198.

²²⁷ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2); Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6).

²²⁸ Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1197.

²²⁹ Ibid.

overlap to some extent with legal coercion if legal remedies are sought from violation of a treaty or other legal obligation.

While Ginsberg correctly identifies the central concepts for diffusion mechanisms as carrots and sticks (coercion), persuasion, and leading by example, his analysis of the European Union's external impact does not explicitly include these concepts, despite acknowledging the importance of diffusion mechanisms for having an external impact.²³⁰

Krista Patterson, on the other hand, argues that coercion and persuasion alone do not explain similarities between trends in the last centuries in the United States and Europe (as a whole, not strictly the European Union) on capital punishment, and suggests that acculturation could explain how the similarities occurred.²³¹ Patterson *explicitly* operates, however, on the assumption that Europe has influenced the United States on the matter because of broadly similar trends.²³² Such an approach, in Ginsberg's words, largely ignores "the individual trees in the forest".²³³ When assessing how (i.e. which diffusion mechanisms) Europe has had an impact on the United States it is crucial to determine whether there was any impact in the first place.

Utilizing Ginsberg's analytical framework, discussed further in Chapter 2, to examine inputs, outputs, and outcomes, in combination with diffusion mechanisms, can be of great assistance in this regard and is used as a basis for more thoroughly examining the European Union's external impact on the United States with regard to the prominent human rights issues in the War on Terror and the death penalty. "Only after a careful reading of the individual trees in the forest will we know if the forest itself is gaining ground."²³⁴

²³⁰ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc.

²³¹ Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55.

²³² Ibid.

²³³ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 16.

²³⁴ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 16.

2. RESEARCH QUESTIONS AND METHODOLOGY

2.1 Research Questions

External impact is an important component of foreign policy decision making.²³⁵ When a foreign policy has external impact it demonstrates that the action has influence and provides legitimacy for further foreign policy action.²³⁶ As Ginsberg explains, “Without external political impact, there is no reinforcing link back to new sources of action, there is no expectation of effective action, foreign policy decision making would not be sustainable, and the Europeans would continue to react to world political events shaped by others”.²³⁷ When the European Union has an impact it affirms the European Union’s identity as an international actor, which in turn encourages further foreign policy activity.²³⁸ In light of the importance of external impact for foreign policy, this doctoral research will examine the following questions:

Core question:

To what extent, if any, does the European Union have impact on the United States on human rights issues?

Subquestions:

Which outputs and diffusion mechanisms has the European Union used towards human rights violations in the War on Terror and the continued use of death penalty executions in the United States?

Which outputs and diffusion mechanisms have had the most impact on the United States?

External impact, unlike success or failure that is often subject to judgment from various perspectives, is based upon the European Union’s foreign policy effects on outsiders.²³⁹ Success or failure, on the other hand, depends on the internal and/or external objectives and expectations that may come from different perspectives, which

²³⁵ Ibid. p. 2.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid. p. 5.

can potentially vary widely particularly in the European Union context where multiple levels and actors may be involved. In accordance with Ginsberg's analytical framework, this research takes an external approach to the evaluation of the European Union's impact on the United States.

2.2 Case Selection

The reality of any research entails that choices are made. The examination of the European Union's influence on human rights in the United States, specifically with regard to the War on Terror and the death penalty, is both of societal importance and has the possible potential for generalizability. Arguably, societal importance is one of the most crucial reasons for performing research and should not be ignored. "A principle as elementary as it is easily forgotten in the profession... is that we should study problems and questions linked, *at least indirectly*, to the well-being of the societies in which we live."²⁴⁰ As a preliminary matter in this regard, examining *external impact* relates to at least some degree to the more foundational issue of how important the European Union is for other societies (or at least other governments that affect other societies).

Further, the choice of examining the *European Union's* external impact on the *United States* is justified at least in part by both of their sizes and multi-national reach.²⁴¹ Comparisons between the European Union and the United States have specifically pointed to the historical importance of the United States for the European project as well as the United States as a "competitor to match in the international arena."²⁴² The European Union's external impact on the United States in the area of human rights in particular could also have implications for human rights issues elsewhere in the world. For example, Mattlin suggests that the European Union's challenges with regard to China may be at least partially attributable to the human rights issues within the War on

²⁴⁰ Tortola, P. (2014). The Limits of Normalization: Taking Stock of the EU-US Comparative Literature. *Journal of Common Market Studies*, 52(6), p. 1352 (emphasis added).

²⁴¹ See *ibid.*

²⁴² *Ibid.*, p. 1342.

Terror.²⁴³ Similarly, Manners suggested that “the war on terror retrospectively legitimated Russian actions in Chechnya” and the “Chinese repression of Uighurs in Xinjiang has been framed in terms of the total war on terror since September 2001.”²⁴⁴

With regard to generalizability, the European Union’s external impact on the United States on the human rights issues of the War on Terror and death penalty could be considered particularly challenging cases in at least some ways. Mattlin suggests that the European Union’s normative role in the world varies depending on the target country and identifies four categories of states: “1. prospective accession countries, 2. small developing countries, 3. established democratic countries, [and] 4. major non-democratic countries.”²⁴⁵ Mattlin generally suggests that the European Union’s influence over the first two groups may be based in part on the “other countries’ fear of exclusion from EU markets or the promise of future membership,” which “works reasonably well in the asymmetric relationships that the EU has with countries in the first group... and to some extent also with countries in the second group” but “does not work with the third and fourth groups of countries.”²⁴⁶ Likewise, Kissack stated that “the significance of [human rights] promotion clauses incorporated into ACP, Enlargement and Neighbourhood policies is that these are the countries the EU has traditionally had the greatest degree of influence over.”²⁴⁷ Examining the European Union’s influence on the Ukraine, Langbein

²⁴³ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 191-192.

²⁴⁴ Manners, I. (2006). European Union 'Normative Power' and the Security Challenge. *European Security*. 15(4), p. 411-412.

²⁴⁵ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184.

²⁴⁶ Ibid.; see, e.g., Broberg, M. (2012). From Colonial Power to Human Rights Promoter: on the Legal Regulation of the European Union’s Relations with the Developing Countries. *Cambridge Review of International Affairs*, 26(4), p. 686; Cierco, T. (2011). Human Rights Promotion in Serbia: A Difficult Task for the European Union. *Revista Brasileira de Politica Internacional*, 54(1), p. 142, 144, 148; Conant, L. (2014). Compelling Criteria? Human Rights in the European Union. *Journal of European Public Policy*, 21(5), p. 724; Beach, D. (2015). Liberal International Relations Theory and EU Foreign Policy. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 93; Smith, M. (2015). The EU and the US. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 570.

²⁴⁷ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 825.

and Wolczuk similarly stated that “membership aspirations of non-accession countries generate openness to EU influence,” particularly for rule selection.²⁴⁸

Mattlin suggests that the European Union’s “biggest test” of its normative commitment is in the fourth group that does “not share the European Union’s political values.”²⁴⁹ Nonetheless, as noted earlier, Mattlin argues that the European Union’s challenges with regard to China may be at least partially attributable to the human rights issues within the war on terror,²⁵⁰ which would arguably relate back to the (world-wide) societal importance of the cases examined in this research. Furthermore, Mattlin also indicates that the countries in the third group (such as the United States) “share many of the EU’s political values” but “this perceived commonality in values may, in fact, often be more assumed than actual, as positions on many substantive issues, such as the death penalty, often diverge considerably.”²⁵¹ The European Union’s human rights promotion in particular has at times been challenged “as a form of Western imperialism,”²⁵² and, despite the United States sharing some political values with the European Union, the United States history as a British colony can also potentially raise challenges for the European Union today.²⁵³ In addition, Keukeleire and Delreux have pointed out that the differences in voting patterns between the European Union and United States on treaties dealing with “the abolition of the death penalty, the ICC, the Kyoto Protocol, the Comprehensive Nuclear Test Ban, the prohibition of anti-Personnel mines, biological

²⁴⁸ Langbein, J. & Wolczuk, K. (2012). Convergence Without Membership? The Impact of the European Union in the Neighborhood: Evidence from Ukraine. *Journal of European Public Policy*, 19(6), p. 877.

²⁴⁹ Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 185.

²⁵⁰ *Ibid.*, p. 191-192.

²⁵¹ *Ibid.*, 10, p. 184-185; see Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 277 (“beyond these broad brushstrokes which form the basic foundations of the European and the American political systems and of their intensive cooperation, there lies a remarkable array of divergences which go to the very core of the EU and the US relationship”).

²⁵² Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 833.

²⁵³ For example, Former Texas Governor Rick Perry, responding to the European Union on the issue of the death penalty, stated: “230 years ago, our forefathers fought a war to throw off the yoke of a European monarch and gain the freedom of self-determination. Texans long ago decided that the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens. While we respect our friends in Europe, welcome their investment in our state and appreciate their interest in our laws, Texans are doing just fine governing Texas.” Rosen-Molina, M. (2007). Texas Governor Rejects EU Request to End Use of Death Penalty. *Jurist*. Retrieved from <http://jurist.org/paperchase/2007/08/texas-governor-rejects-eu-request-to.php>.

diversity, economic, social and cultural rights, civil and political rights, elimination of discrimination against women, the rights of the child and the status of refugees... are greater than the difference between the EU and either China or Russia (although this in and of itself is no guarantee of either China or Russia adopting EU-style behavior).”²⁵⁴ Michael Smith has also called the United States “integral to European Foreign Policy” and stated that the United States “constitutes a key test of that foreign policy and it will continue to do so.”²⁵⁵

Although international human rights promotion is one of the priorities of the European Union, it is also an area in which the European Union has been critically challenged²⁵⁶ and can potentially face particular difficulty with regard to the United States. Manners own use of the issue of the death penalty to illustrate the European Union’s normative power while expressing some strongly phrased doubts specifically with regard to the European Union’s ability to change the mind of the United States government on this issue suggests that the United States represents a particularly challenging case in this area.²⁵⁷ Along these lines, Manners stated, “What is self-evident about [the European Union’s] engagement [on the death penalty issue] is the extent to which the EU is *clearly not* going to change the minds of the [Chinese or United States] governments...”²⁵⁸ With regard to the United States’ War on Terror, “the unilateralism and assertiveness of US foreign policy under the George W. Bush Administrations provide possibly the most testing challenge for the Europeans since the end of World War

²⁵⁴ Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 277-278.

²⁵⁵ Smith, M. (2015). The EU and the US. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 570.

²⁵⁶ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 822.

²⁵⁷ Manners, I. (2000). Normative Power Europe:: A Contradiction in Terms?. Copenhagen: Copenhagen Peace Research Institute. p. 17. Retrieved from [http://politicalscience.ku.dk/staff/Academic_staff/?pure=en%2Fpublications%2Fnormative-power-europe\(24e87faf-d711-4e20-a644-79f40406a5d2\).html](http://politicalscience.ku.dk/staff/Academic_staff/?pure=en%2Fpublications%2Fnormative-power-europe(24e87faf-d711-4e20-a644-79f40406a5d2).html); Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 248.

²⁵⁸ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 248 (emphasis added).

II,”²⁵⁹ and these new challenges included the United States connections between security and human rights, among others.²⁶⁰

The European Union’s efforts with regard to the death penalty and the War on Terror in the United States have been extensive, and a wide spectrum of specific cases are examined in this research that include all relevant death penalty cases until 2009 gathered from the Death Penalty Archive of the European Union Delegation to the United States²⁶¹, the abolition of the death penalty in the European Union, each case of funding by the European Union of NGO’s focusing on the death penalty in the United States through EIDHR,²⁶² and United States federal and state court cases in which the European Union has been involved.²⁶³ The Death Penalty Archive of the European Union Delegation to the United States contains the European Union’s formal diplomatic actions on the death penalty towards the United States, organized by year, and it has been particularly useful in providing (and thus allowing for review and analysis of) copies of government documents in this regard.²⁶⁴ For the War on Terror, this dissertation focuses on European Union actions related to extraordinary rendition, torture and ill-treatment, arbitrary detention, and drone strikes, which are cases that have also been the focus of involvement or advocacy within the European Union in the time frame examined, but not the right to privacy since much (but not all) of the European Union’s actions in this area

²⁵⁹ Smith, M. (2015). The EU and the US. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 573.

²⁶⁰ Ibid., p. 570.

²⁶¹ Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>.

²⁶² European Union (2010). Compendium 2007-2010. p. 2. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; European Union (2009). Promoting Democracy & Human Rights Worldwide. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; Gardiner, N. (2011). The European Union Gives Millions in Taxpayers’ Money to Anti-Death Penalty Groups in America. *The Telegraph*. Retrieved from <http://blogs.telegraph.co.uk/news/nilegardiner/100078360/the-european-union-gives-millions-in-taxpayers%E2%80%99-money-to-anti-death-penalty-groups-in-america/>.

²⁶³ These cases were generally retrieved using the Westlaw database. In searching, reviewing, and analyzing these cases, I have utilized my own previous educational and professional experience in law in the United States, including experience as a judicial clerk for a federal district court in which I helped in researching and writing many decisions for a judge.

²⁶⁴ Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>; Whiteman, R. Personal communications. June 24, 2013.

fall outside of the time period examined and thus could potentially provide a particularly incomplete picture of the external impact on that right.²⁶⁵

2.3 Analytical Framework: A Modified Ginsberg Approach

To examine the European Union's external impact on the United States in the sphere of human rights issues, this doctoral research utilizes a modified analytical framework originally elaborated by Roy H. Ginsberg in his book entitled *The European - Union in International Politics: Baptism by Fire*. This research, as explained in Sections 2.2.2, 2.2.3, and 2.2.4, makes important modifications to that framework in terms of time frame, in receiving United States governmental levels (federal and state) and branches (executive, legislative, and judicial) examined, by explicitly including diffusion mechanisms, and by explicitly adding the impact on laws to the impact on policies, behavior, or interests.

Ginsberg connects the European Union's foreign policy system inputs and outputs to the effects that these outputs have on nonmembers and elaborates on an analytical framework for evaluating this impact on the nonmembers.²⁶⁶ Inputs are defined as the sources that initially stimulate European Union foreign policy activity.²⁶⁷ In other words, inputs are sources that set the decision making process in motion. Such sources of European Union foreign policy activity can include external stimuli, the logic of collective action, and national, subnational, and nongovernmental actors, among others.²⁶⁸

²⁶⁵ Ibid.; Official from the EU Institutions, Personal communications. August 21, 2015; Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90, p. 573-597; see, e.g., Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 225-226; Kuschewsky, M. EU-US Umbrella Agreement About to be Concluded: Towards a Transatlantic Approach to Data Protection? Covington & Burling LLP, retrieved from <https://www.insideprivacy.com/international/eu-us-umbrella-agreement-about-to-be-concluded-towards-a-transatlantic-approach-to-data-protection/>.

²⁶⁶ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 11.

²⁶⁷ Ibid. p. 26.

²⁶⁸ Ibid.

“[European foreign policy] activity refers to the outputs generic to the foreign policy system.”²⁶⁹ Outputs produced by the foreign policy system range from economic and political actions to common declarations and positions.²⁷⁰ Actions implement policies and require something to be done by the European Union while “declarations and positions are not specifically action oriented.”²⁷¹ The European Union interacts with the outside world through outputs.²⁷² An output with an external impact is an outcome.²⁷³ Outputs and outcomes may generate feedback that affect the European and international contexts and may generate new inputs for the European Union foreign policy system.

Thus, not only is knowledge of the European Union’s external impact essential to an understanding of the European Union’s role in international affairs, but it also plays an important part in the European Union’s foreign policy decision making structure.²⁷⁴ An evaluation of the level of external impact of the European Union is thus necessary.

External impact refers to the various effects of European Union foreign policy activity on nonmembers, in this case the United States, such that 1. “nonmembers modify or change the direction or substance” of a policy, law, or behavior “that would not likely have occurred in the absence of the EU stimulus or EU stimulus accompanied by stimuli from other” actors,²⁷⁵ and/or 2. “nonmembers interests are beneficially or adversely affected by a [European foreign policy] action” or inaction.²⁷⁶ External impact will generally involve some sort of interaction between the sending state (for this research, the

²⁶⁹ Ibid. p. 48.

²⁷⁰ Ibid. p. 38.

²⁷¹ Ibid. p. 38-39.

²⁷² Ibid. p. 39.

²⁷³ Ibid. p. 10.

²⁷⁴ Ibid.

²⁷⁵ Ginsberg allows for impact where the “EU stimulus” is “accompanied by stimuli from other international actors.” Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 49 (emphasis added). However, as discussed in Section 2.2.2, this dissertation expands Ginsberg’s framework to include not only the impact on the foreign policy arm of the United States federal administration, which is Ginsberg’s focus, but also the impact on the legislative and judicial branches at the state and federal level in the United States. In line with this expansion and the various types of actors attempting to exert influence in the different branches and levels of the United States, this dissertation allows for impact where the “EU stimulus” is “accompanied by stimuli from other” international or (non-governmental) domestic actors.

²⁷⁶ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 49.

European Union) and the target state (for this research, the United States).²⁷⁷ Temporally, the European Union's output will precede the outcome in the United States.²⁷⁸ In some cases, the link between the output of the sending state and the outcome in the receiving state may be relatively straight forward, potentially more so if the output and outcome are close in time.

However, in many cases there may be, for example, multiple actors involved across a (relatively) extended time period, which can potentially leave more room for judgment in assessing the external impact of the European Union. This research takes account of such issues of causation in two main ways: First, Ginsberg's method of assessing levels of impact, discussed in more detail below, distinguishes between circumstances when the European Union is acting alone versus in conjunction with other actors, and assigns a higher level of impact if the European Union is directly and primarily responsible for a change or modification in the behavior, laws, or policies of the United States.²⁷⁹ Second, in cases in which causation is relatively less clear, counterfactuals can be a useful tool for identifying the link (or lack thereof) between European Union outputs and outcomes in the United States.²⁸⁰ Counterfactual reasoning can be particularly suitable in examining some cases with regard to the first part of Ginsberg's definition of external impact.²⁸¹ The use of Ginsberg's levels of external impact and counterfactuals, however, while providing useful methods for assessing external impact, does *not* convert this research into an exact science.²⁸² Nonetheless, these methods will help provide insight and further understanding of the plausible external impact of the European Union on the United States.

²⁷⁷ See Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 25.

²⁷⁸ See *ibid.* p. 26.

²⁷⁹ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 52.

²⁸⁰ See *ibid.*, p. 49, 51.

²⁸¹ See *ibid.*

²⁸² See Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 38-39.

Although the primary focus of this research concerns the European Union's impact and not directly power,²⁸³ it is important to note that external impact will be used in a broad sense in order to take into account the various kinds of power (soft, hard, civilian, military, relational, structural, normative, etc.), as well as the related means of influence, that the European Union potentially has in relation to the United States. Manners, for example, describes the European Union as a "normative power" based in part on "its ability to shape conceptions of 'normal' in international relations."²⁸⁴ In this context, the European Union would have an external impact when the European Union shapes conceptions of "normal" such that United States' policy, law, behavior, or interests are affected, whether the United States is internalizing those norms or reacting to those norms.

The conception of external impact also takes into consideration the continuum between relational power and structural power. Relational power is "the power of one actor to get another actor to do something it would not otherwise do."²⁸⁵ Structural power is "the authority and capacity to set or shape the organizing principles and rules of the game and to determine how others will play that game."²⁸⁶ With regard to relational power, the European Union would have an external impact on the United States when the European Union gets the United States to do "something it otherwise would not do," i.e. causes the United States to modify or change its behavior, laws, or policies. With regard to structural power, the European Union would have an external impact on the United States when the European Union "set[s] or shape[s] the organizing principles and rules of the game" affecting United States' interests, behavior, laws, or policies.

Likewise, external impact includes the effects of the European Union's use of hard power as well as soft power. Thus, the European Union would also have an external impact if a change in the United States' interests, behavior, laws, or policies was a result

²⁸³ See Chapters 1 and 8 regarding implications for further research.

²⁸⁴ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 239.

²⁸⁵ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 24.

²⁸⁶ Ibid.

of a change of United States preferences based on the attractiveness or legitimacy of the European Union's culture, values, political ideals, or policies.²⁸⁷

The European Union is unique in character, exhibiting characteristics of both an international organization and a state with "a hybrid of supranational and international forms of governance"²⁸⁸ and a multilevel and multiple actor foreign policy.²⁸⁹ At the same time, as Ginsberg explains:

"National and EU foreign policies are products of different levels of governmental decision making and respond in different ways to different internal and external demands. When an EU member state or group of EU member states takes a foreign policy action outside of the EU context (outside the contexts of the treaties, outside areas where the EC and member governments share competence, and outside *acquis communautaire*, *acquis politique*, and CFSP), such action is not a [European foreign policy] action."²⁹⁰

Although member states sometimes take action in support of or within the framework of the European Union, the individual actions of member states are not always conducted within or in support of the European Union, and as such cannot always be attributed to the European Union.

Such a distinction is especially important when considering the European Union's external impact on the United States. From the United States' perspective, it can often be preferable to work through bilateral relations with individual member states than with the

²⁸⁷ Ibid.

²⁸⁸ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 240.

²⁸⁹ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 31-32; Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 33.

²⁹⁰ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 49.

European Union as a whole.²⁹¹ Furthermore, the United States and the United Kingdom's shared history are sometimes relevant to United States common law, placing the United Kingdom in a special position when it comes to the interpretation of some legal rights, including some human rights protections. From the United States perspective, it is thus important for at least some judges to distinguish the common history with the United Kingdom from the United Kingdom's actions as a member state of the European Union (which is further complicated by the recent events concerning Brexit). For example, Justice Scalia of the United States Supreme Court explained:

“It is beyond comprehension why we should look . . . to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom's recent submission to the jurisprudence of European courts dominated by continental jurists—a legal, political, and social culture quite different from our own.”²⁹²

The separate impact of the national policies of each of the individual member states is thus beyond the scope of this research.

2.3.1 Measuring External Impact

This research will utilize Ginsberg's four categories for measuring levels of impact: nil, marginal, considerable, and significant impact. Nil external impact occurs when, alone or in conjunction with other actors, the European Union's action or inaction has no impact on the nonmember.²⁹³ In other words, there is nil impact when the European Union has had no influence on nonmembers or their interests.²⁹⁴

²⁹¹ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 311-312.

²⁹² *Roper v. Simmons*, 543 U.S. 551, 626-627 (2005).

²⁹³ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 52.

²⁹⁴ *Ibid.*

Marginal impact occurs when, alone or in conjunction with other actors, the European Union influences the behavior, interests, laws, or policies of the United States generally or indirectly, but there is not a tangible change in the United States' behaviors, laws, or policies.²⁹⁵ An example would be if the European Union condemned the United States for human rights violations, causing the United States to become isolated but no tangible change in United States human rights. Another example is if the European Union alters conceptions of "normal" in the world without the United States internalizing those norms, causing the United States to become isolated without a tangible change.

Considerable impact occurs when, alone or in conjunction with other actors, the European Union has a tangible influence on the behavior, interests, laws, or policies of the United States.²⁹⁶ In this category, the European Union, alone or in conjunction with others, may have a major impact on United States' interests and may cause a tangible change or modification in the laws, behavior, or policies of the United States.²⁹⁷ An example would be if the European Union, working with a large group of other actors, helps persuade a United States court to expand legal protections to suspected terrorists or capital defendants.

Finally, significant impact occurs when the European Union, alone or in conjunction with only one to three other actors,²⁹⁸ is directly and primarily responsible for a change or modification in the behavior, laws, or policies of the United States.²⁹⁹ Further, to fall under the significant impact category, the European Union action must have a major beneficial or adverse effect on the vital interests of the United States.³⁰⁰ This is thus the highest level of impact, requiring primary responsibility for the change with fewer other actors involved than the considerable impact category. The European Union action must directly influence the United States, i.e. not through an intermediary

²⁹⁵ Ibid. p. 53.

²⁹⁶ Ibid.

²⁹⁷ Ibid. p. 54.

²⁹⁸ One advantage of Ginsberg's framework is that it takes into consideration the fact that the European Union may not be acting alone (including in pressuring the United States) in its distinctions between levels of impact (i.e. considerable vs. significant impact).

²⁹⁹ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 52.

³⁰⁰ Ibid.

reacting to the European Union that in turn influences the United States. The four levels for measuring impact are summarized in the following table:

Levels of External Impact³⁰¹

| | Nil | Marginal | Considerable | Significant |
|---|------------|-------------------------------|-------------------------------------|---|
| Degree of Influence | none | general, indirect | tangible | primary, direct |
| Quality of Influence | none | beneficial or adverse effects | major beneficial or adverse effects | major beneficial or adverse effect on vital interests |
| Change/Modification in behavior/policy/law of US | none | none | yes | yes |

The European Union has multiple instruments at its disposal for reaching the various levels of external impact.³⁰² The European Union’s foreign policy instruments are used to affect outsiders and include, for example, offering or refusing diplomatic recognition, imposing economic or diplomatic sanctions, hosting international conferences, and issuing demarches.³⁰³ Such instruments may be used unilaterally or multilaterally.³⁰⁴ Instruments are linked together with outputs, with individual outputs of the European Union employing instruments in response to particular issues and inputs.³⁰⁵

³⁰¹ Adapted from Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 53; see also Ginsberg, R. & Penksa, S. (2012). *The European Union in Global Security: The Politics of Impact*. Palgrave Macmillan. p. 53-54.

³⁰² Ibid. p. 49-50.

³⁰³ Ibid.

³⁰⁴ Ibid. p. 50.

³⁰⁵ See discussion of inputs and outputs in Section 2.2.

2.3.2 Extending the Scope of Ginsberg’s Approach from the Impact on the United States Federal Administration to the Legislative and Judicial Branches at the State and Federal Level

Ginsberg’ study on the European Union’s external impact on the United States primarily focuses on the effects of the European Union at the United States federal level administration (i.e., the federal executive branch).³⁰⁶ As explained by Ginsberg:

“U.S. relations with the EU are conducted by members of the U.S. Administration and managed by the federal foreign policy bureaucracy, both of whom are clearly subject to EU political impact because they are the principal agents of U.S. foreign policy with regard to the EU. However, when the question of EU political impact is directed at the pluralist U.S. political system of individual actors and constituencies, cognizance of the EU and its political impact varies widely.”³⁰⁷

Thus, although Ginsberg’s study focuses on the United States federal administration, Ginsberg acknowledges that the European Union may have impact on other levels and actors in the United States.

With regard to the human rights issues involved with the United States death penalty and War on Terror, the European Union has focused its advocacy or had a potential impact not only on the United States federal level administration, but also on the legislature and courts at the federal and state level. This makes sense given that the United States death penalty and War on Terror can involve human rights issues dealt with at different branches or levels of government. Human rights involve both the policies, interests, and behaviours of the executive branch as well as the laws affecting or governing human rights enacted by legislatures and interpreted by courts. In the United States federal system, each state has its own policies and laws governing the death

³⁰⁶ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 181-267.

³⁰⁷ Ibid. p. 186-187.

penalty in particular in addition to those that exist at the federal level. As such, this research examines the European Union's impact in the executive, legislative, and judicial branches at both the federal and state levels, thus broadening the scope of Ginsberg's original research.

Although this research focuses on the European Union's impact on the branches and levels of United States government (as opposed to the wide variety of private actors), the European Union has also provided considerable funding to multiple non-governmental organizations working in the United States on human rights issues. As the European Union can indirectly impact the various branches and levels of government through such funding, such advocacy by the European Union is examined in Chapter 7.

In addition, this research expands Ginsberg's examination of the European Union's impact on non-members policies, interests, or behaviours to explicitly include the European Union's impact on laws in the United States. In the context of the European Union's impact on the United States for the human rights issues involved in the death penalty and War on Terror, it is particularly crucial to include the European Union's impact on United States laws (and their interpretation and application). In the United States political system of separation of powers and checks and balances, the legislature and courts can limit abuses of power by the executive through legislation and judicial interpretation of laws (especially the United States Constitution) respectively, at least where the rule of law is followed.

Further, in the United States, death penalty and War on Terror human rights issues are deeply intertwined with legal issues and the criminal justice system for alleged domestic and international crimes. It is through laws and their interpretation that the death penalty is or is not limited to certain crimes or persons or *de jure* abolished. Likewise, it is through laws and their interpretation that terrorist suspects receive or fail to receive human rights protections, and it is through the United States Constitution, as the law of the land, and its interpretation by courts that the United States administration must provide those protections in accordance with the rule of law.

Appropriately, the European Union recognizes the deep connection of law and human rights in its specific advocacy concerning the United States death penalty and War on Terror human rights issues and has sought both *de facto* and *de jure* limits on or

abolition of the death penalty as well as legal protections for terrorist suspects and respect for those legal protections through the rule of law. Considering the United States political system, the issues examined, and the European Union's actual advocacy on these issues, this research extends Ginsberg's framework to explicitly include the European Union's impact on United States laws in addition to its impact on United States policies, interests, and behaviour. This research thus has an interdisciplinary element combining law and politics to the extent that it also utilizes Ginsberg's political framework for examining the European Union's impact on United States laws, including case law.

2.3.3 Adding Diffusion Mechanisms to Ginsberg's Approach

As already discussed, diffusion mechanisms have been the subject of a large body of literature.³⁰⁸ As enumerated by Ginsberg, the European Union's diffusion mechanisms include coercion (carrots and sticks), persuasion, and leading by example.³⁰⁹ These diffusion mechanisms may be combined or used alone.

While Ginsberg recognizes that diffusion mechanisms are essential to having external impact, and as such are implicitly involved in the cases he examines, Ginsberg does not elaborate much on these mechanisms or (at least explicitly) systematically include diffusion mechanisms in his study of the European Union's external impact in the 1990s.³¹⁰ An explicit inclusion of these mechanisms, however, provides an important link that explains how the European Union's outputs are connected to particular outcomes, and therefore should be included in the analysis of the European Union's external impact.

Coercion: Coercion involves the threat or use of material or legal force in an attempt to influence another state. It corresponds to Ginsberg's description of the European Union's

³⁰⁸ Towns, A. (2012). Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below." *International Organization*. 66, p. 184.

³⁰⁹ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 50.

³¹⁰ Ibid.

use of carrots and sticks as a means of influence. Coercion may involve the threat or use of military force, manipulation of economic benefits or costs, or manipulation of opportunities and constraints of the target state.³¹¹ Some forms of coercion are more likely than others based on the context. Power asymmetry may be a factor in the decision to utilize coercion,³¹² with militarily weak actors less likely to threaten military action against states with large, advanced militaries except, perhaps, on the most crucial issues. The decision to pursue economic sanctions may involve consideration of the impact on one's own state due to interdependence.

Persuasion: Persuasion concerns convincing another actor of the truth, validity, or appropriateness of norms, beliefs, policies, laws, or behaviors, without resort to coercion, through rhetoric, argumentation, or the spread of information.³¹³ It includes “both manipulative moves and propaganda, public diplomacy and (dis)information campaigns, as well as the force of the better argument.”³¹⁴ While persuasion is often conducted directly between two (or more) parties, such as during bilateral discussions or through demarches, it may also be performed indirectly, such as through financial support for NGOs that themselves lobby governments and disseminate information. Persuasion, broadly understood, thus encompasses Manners informational diffusion³¹⁵ and Forsberg's notions of persuasion, “invoking norms,” and to a large extent “shaping the discourse of what is normal.”³¹⁶

³¹¹ Simmons, B. et al. (2006). Introduction: The International Diffusion of Liberalism. *International Organization*. 60(4), p. 790; Goodman, R. and Jinks, D. (2004). How to Influence States: Socialization and International Human Rights Law. *Duke Law Journal*. 54(3), p. 633-644.

³¹² Simmons, B. et al. (2006). Introduction: The International Diffusion of Liberalism. *International Organization*. 60(4), p. 790.

³¹³ See Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 50; Goodman, R. and Jinks, D. (2004). How to Influence States: Socialization and International Human Rights Law. *Duke Law Journal*. 54(3), p. 635; Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1196.

³¹⁴ Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1196.

³¹⁵ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 244.

³¹⁶ Forsberg, T. (2011). Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type. *Journal of Common Market Studies*. 49(6), p. 1196-1197.

Setting an Example: The European Union may also have an impact through the model it provides to others.³¹⁷ The model provided by the European Union may be intentionally or unintentionally copied or, if the model has (or is perceived to have) failed in some manner, may provide an example of what *not* to do. Broadly understood, setting an example thus includes the notions of learning,³¹⁸ mimicry,³¹⁹ acculturation,³²⁰ and contagion,³²¹ among others. The example may be followed due to various socialization pressures as well as learning from the good or bad practices of others.

2.3.4 Time Frame: A New Decade

This research will focus on the external impact of the European Union's foreign policy on the United States resulting from European Union outputs in the late 1990s through 2009. There have been important developments in the area of human rights covering this time frame. In particular, the European Union developed its guidelines on the death penalty in 1998 and has continued its advocacy for the death penalty's abolition throughout the 2000s. Further, the September 11, 2001 attacks were the catalyst for the War on Terror and the corresponding human rights issues that have arisen. This research does not focus on outputs beyond 2009 because outcomes do not always instantaneously follow outputs, so focusing on the most recent outputs could increasingly and misleadingly skew the results in favor of less impact.³²² In order to provide a complete and accurate picture of the European Union's impact, however, this research does incorporate *outcomes* occurring beyond 2009 because the chain of inputs, outputs,

³¹⁷ Ibid. p. 1197.

³¹⁸ Towns, A. (2012). Norms and Social Hierarchies: Understanding International Policy Diffusion "From Below." *International Organization*. 66.

³¹⁹ Ibid.

³²⁰ Goodman, R. and Jinks, D. (2004). How to Influence States: Socialization and International Human Rights Law. *Duke Law Journal*. 54(3).

³²¹ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2).

³²² I also started this research in 2011, so, as a practical matter, ending with the previous decade was a natural time to end the focus of this research.

outcomes, and corresponding impact between the European Union and the United States may generally begin before 2009 but continue afterwards. The effects of foreign policy activity are not always instantaneous.

2.3.5 Data Collection

Various kinds of data have been utilized for evaluating the European Union's impact on the United States. This research involves a variety of inputs, outputs, and outcomes relating to the European Union's foreign policy system and its relations and effects on different levels and branches of government in the United States. As such, a variety of sources have been used. In the course of this research, information has been gathered and examined from numerous European Union and United States government documents such as treaties, demarches, letters, public statements and speeches, resolutions, reports, laws, court-related documents, executive and legislative documents and videos, responses to oral and written interviews,³²³ journal articles and books, and various news sources, among others.

With regard to the death penalty in the United States and the European Union's actions on the issue, information has largely been accessible and publicly available. Although the United States has been criticized for its use of the death penalty, the United States generally does not operate secretly in its death penalty policies or practices. However, the United States has to a large extent maintained secrecy concerning some of its policies and practices with regard to the War on Terror. The United States has not been alone in this regard, as human rights activists have also struggled to obtain full information from some European governments. Such secrecy presents challenges for human rights advocates and researchers, as it is difficult to address potential human rights abuses if there is little or no information about those abuses.

³²³ Nine interviews with government officials and NGO representatives were conducted between 2013 and 2015. All but one of the interviews were semi-structured oral interviews with notes taken during the interviews. Due to scheduling difficulties, one interview consisted of (open-ended) written questions and responses.

Overtime, however, greater information regarding United States practices, such as extraordinary rendition, arbitrary detention, torture and ill treatment, and drone strikes, has been exposed by various governmental and non-governmental groups, including through the efforts of the European Union and media organizations, among others. As explained later, the European Union's actions in reducing the secrecy of the United States is highly important and relevant to this research.

2.4 Structure

The following chapters utilize this modified analytical framework to examine the European Union's impact on the human rights issues in the War on Terror and the death penalty in the United States. Chapter 3 examines the European Union's impact on the death penalty in the United States, specifically focusing on the executive and legislative branches at the state and federal level. Chapter 4 focuses on certain human rights issues in the War on Terror (extraordinary rendition, arbitrary detention, torture and ill treatment, and drone strikes) and also focuses on the impact on the executive and legislative branches in the United States. As Ginsberg's analytical framework has been expanded to include the European Union's impact on United States laws and the judicial branch, Chapters 5 and 6 examine the European Union's impact on the United States for the death penalty and War on Terror, respectively, and focus on the impact towards the federal and state courts in the United States. With regard to the death penalty, the European Union has also funded multiple non-governmental organizations that have pursued abolition of the death penalty in the United States, so Chapter 7 focuses on the European Union's impact through such funding. Finally, Chapter 8 combines the results from the previous chapters and provides overall findings and conclusions based upon the research.

3. THE EUROPEAN UNION'S IMPACT ON THE DEATH PENALTY IN THE EXECUTIVE AND LEGISLATIVE BRANCHES

This chapter examines the European Union's impact on federal and state executive and legislative branches of government in the United States. The European Union's advocacy against the death penalty relating to the executive branches of government has been particularly extensive. In fact, the European Union's repeated and continuous advocacy against the death penalty has caused some United States diplomats to grow concerned with the extent to which they have been consumed with responding to objections to the death penalty rather than focusing on other issues of interest to the United States.

This chapter specifically examines 79 individual death penalty cases in which the European Union has argued for commutations, as well as the impact of the European Union on consular access rights, extradition, access to drugs used in lethal injections, the death penalty as a whole at the United States federal and state level, and a world-wide moratorium on the death penalty. All three diffusion mechanisms, coercion, persuasion, and setting an example, have been at play for these issues, and the European Union has sought to influence these issues through multiple instruments, including public statements and declarations, direct communications and negotiations with the United States, bilateral treaties, parliamentary resolutions, sponsorship of United Nations resolutions, European Commission regulations, as well as the European Union's internal abolition of the death penalty. The European Union's impact through the financial support of NGOs (which may, in turn, influence the federal and state executive and legislative branches in the United States) is discussed separately in Chapter 7.

3.1 The European Union's Impact on US Federal and State Capital Punishment Through its Own Abolition

With the abolition of the death penalty in the European Union and all of its member states, the United States has become increasingly isolated on the issue from its

traditional allies in the world, causing concern among United States diplomats and in individual US states. Indeed, Taiwan, Japan, and the United States are now the only advanced industrial democracies that continue to practice the death penalty,³²⁴ and the United States and Belarus are the only two retentionist states in law and practice in the OSCE area.³²⁵

With regard to specific death penalty issues, the United States has not only been out of sync with its traditional allies in the European Union, but finds company with countries that the United States would not ordinarily associate itself with on human rights issues. For example, in the four years preceding the United States Supreme Court decision in *Roper v. Simmons* to abolish the juvenile death penalty, the only countries to execute juvenile offenders in practice were the Democratic Republic of Congo, China, Iran, Pakistan, and the United States.³²⁶ As explained by nine former United States diplomats in their amicus curiae brief in *Roper v. Simmons*, “In no other area of human rights does the United States consider these nations to be our equals.”³²⁷

For these former United States diplomats, it was problematic that the United States found company with these countries rather than the European Union, “whose members include our closest allies” that “have expressed vehement opposition to the death penalty, particularly as applied to juveniles.”³²⁸ The former diplomats expressed concern that given the trend against the execution of juvenile offenders, the United States would “soon stand alone as the only country in the world” endorsing the practice.³²⁹

Based on their experience, the former diplomats asserted that allowing the juvenile death penalty to continue would “diplomatically isolate the United States and

³²⁴ Schmidt, J. (2007). The EU Campaign Against the Death Penalty. *Survival*. 49(4), p. 124; Death Penalty Information Center (2015). Abolitionist and Retentionist Countries. Retrieved from <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>.

³²⁵ OSCE Office for Democratic Institutions and Human Rights (2010). *The Death Penalty in the OSCE Area: Background Paper 2010*. p. 2. Retrieved from <http://www.osce.org/odihr/71484>; ; Death Penalty Information Center (2015). Abolitionist and Retentionist Countries. Retrieved from <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140>.

³²⁶ Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2004 WL 1636448 p. 5.

³²⁷ Ibid.

³²⁸ Ibid. p. 12.

³²⁹ Ibid. p. 18.

hinder its foreign policy goals by alienating countries that have been American allies of long standing. These allies, with strong rule-of-law traditions and political histories, social values, and legal systems similar to ours, have led a worldwide protest against the practice of executing juvenile offenders in the United States.”³³⁰ The United States maintenance of the juvenile death penalty thus “impairs important U.S. foreign policy interests” and allowed the European Union to challenge the United States claim to world leadership in the area of human rights.³³¹

With regard to the execution of persons suffering from mental retardation in the United States, these former United States diplomats similarly expressed concern that such practices create “diplomatic isolation” and harm the foreign policy interests of the United States.³³² In their view, applying the death penalty to persons with mental retardation would “create friction with and alienate” United States allies “with strong rule-of-law traditions and histories, legal systems and political cultures similar to ours.”³³³ With regard to these concerns, the former diplomats pointed specifically to the criticism received by the European Union in formal diplomatic demarches and letters concerning specific executions.³³⁴ As with the juvenile death penalty, the former diplomats were concerned with the challenge to the United States “claim of moral leadership in international human rights.”³³⁵

While these concerns were expressed with regard to specific death penalty issues, the death penalty as a whole has presented similar challenges. As two former State Department officials pointed out, the United States death penalty has led to a “diplomatic fallout” that isolates the United States from its allies in the European Union and elsewhere and has caused challenges to “our claim of moral leadership in international

³³⁰ Ibid. p. 20.

³³¹ Ibid. p. 1, 25.

³³² Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2001 WL 648607.

³³³ Ibid. p. 8.

³³⁴ Ibid. p. 9.

³³⁵ Ibid.

human rights, and probably helped contribute to the embarrassing (if temporary) loss in 2001 of America's seat on the U.N. Human Rights Commission."³³⁶

The United States loss of its seat on the UN Commission on Human Rights in 2001 was the first time the US was not on the Commission since 1947.³³⁷ The United States lacked the voting support, particularly from its European allies, needed to maintain a seat on the Commission in part because of its support for the death penalty.³³⁸ Whether it be in international forums such as the OSCE or in its bilateral meetings with the United States, the European Union has repeatedly made clear its position against the death penalty in the United States. While the immediate United States federal response on each individual occasion often reflects an unchanged position on the death penalty by the United States, the European Union has nonetheless isolated the United States on the world stage from its Western allies.

Of course, the European Union was not alone in isolating the United States. As pointed out by the former United States diplomats, "numerous international and regional bodies have passed resolutions, statements, and judgements" that expressed opposition to the death penalty generally or in particular circumstances, including for example in the United Nations (e.g., the United Nations Economic and Social Council, the United Nations Commission on Human Rights, the United Nations Sub-Commission on the Promotion and Protection of Human Rights, the United Nations Human Rights Committee), the Council of Europe, the European Union, and the Inter-American Commission on Human Rights.³³⁹ As previously stated, Manners also pointed out that from 1998 to 2008, "thirty-two states have moved to abolish the death penalty for ordinary or all crimes, bringing the total number of abolitionist states to 135 against

³³⁶ Koh, H. and Pickering, T. (2003). For a Country that Aspires to be a World Leader in Human Rights, the Death Penalty Has Become Our Achilles' Heel. *Foreign Service Journal*. October 2003, p. 20-21.

³³⁷ Warren, M. (2004). Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations. *Willian & Mary Bill of Rights Journal*. 13, p. 320.

³³⁸ Ibid.

³³⁹ Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2004 WL 1636448 p. 8-14.

sixty-two retentionist states,”³⁴⁰ a general trend that has continued in recent years.³⁴¹ Although this trend exists outside of the European Union as well, it is unlikely that the former United States diplomats would be as concerned to the same degree with the world-wide trend had the European Union and its member states not abolished the death penalty nor repeatedly reminded the United States of their position and of world-wide trends. Indeed, the former United States diplomats repeatedly (dozens of times) pointed to the positions and efforts of the European Union and its member states in order to explain their own positions in two amicus curiae briefs on the death penalty.³⁴²

The European Union’s abolition of the death penalty has also been pointed to by individual states abolishing the death penalty. Eight of the twenty states that have abolished the death penalty in the United States have done so after 1998,³⁴³ when the European Union began its world-wide efforts towards abolition. In three of the states abolishing or establishing a moratorium on the death penalty during the time period examined in this research,³⁴⁴ governors and legislators deciding to end or forego

³⁴⁰ Manners, I. (2009). The EU’s International Promotion of the Rights of the Child. *The European Union and the Social Dimension of Globalization: How the EU Influences the World*, eds. Jan Orbie and Lisa Tortell. Routledge. p. 236.

³⁴¹ United Nations Economic and Social Council (2015). Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General. E/2015/49, p. 15-16.

³⁴² Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2004 WL 1636448 p. 12, 13, 21, 24, 25, 28; Brief of Amici Curiae Former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2001 WL 648607, p. 9, 10, 12, 13, 14.

³⁴³ Death Penalty Information Center (2015). States With and Without the Death Penalty. Retrieved from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

³⁴⁴ New Mexico, New York, and New Jersey de jure abolished the death penalty between 1998 and 2009, and Illinois established a moratorium on the death penalty in 2000 and legally abolished it in 2011. Death Penalty Information Center (2015). States With and Without the Death Penalty. Retrieved from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>. New Mexico, New York, and Illinois are discussed below. As discussed in section 7.2, the death penalty in New Jersey was not abolished based on the European Union’s example. The European Union’s example is treated somewhat unique as an output since it is a continuing output. In this case this research focuses on that example from 1998 to 2009 even though it is indefinitely continuing. It is worth noting, however, that other states abolishing the death penalty after 2009 also referred to the European Union. For example, on April 25, 2012, Connecticut also abolished the death penalty through legislation, S.B. 280, replacing it with life in prison without the possibility of parole. Similar to other states, the abolition of the death penalty in Connecticut was for a variety of reasons, and world trends played a role in the process. In Connecticut, the legislature sought and obtained research concerning countries with the death penalty, and after signing the legislation Governor Malloy announced that Connecticut was joining “the rest of the industrialized world by taking this action”.

reinstatement of the death penalty in their states expressed their concerns regarding the growing isolation of the United States from its allies in the European Union and elsewhere in the world in favor of association with countries often known for poor human rights records.

New Mexico, for example, abolished the death penalty legislatively with House Bill 285 in 2009, replacing it with life imprisonment without the possibility of parole.³⁴⁵ Representative Gail Chasey introduced the bill in January 2009, and had been sponsoring similar bills since 1999.³⁴⁶ Chasey has cited a number of reasons for abolition, such as the additional costs involved in maintaining the death penalty system, unfairness in administration, and a lack of effectiveness in deterring crime.³⁴⁷

While there were multiple reasons for abolition in New Mexico, Representative Chasey also stated that abolition and views in the European Union were raised in the legislature and they were “not discounted and lent weight.”³⁴⁸ Similarly, Marcia Wilson of the New Mexico Coalition to Repeal the Death Penalty explained that there were a number of factors and actors contributing to the repeal of the death penalty in New Mexico, and abolition of the death penalty in the European Union played an incredibly important role through the example it provided.³⁴⁹ During the debate in the legislature, legislators supporting abolition frequently pointed to the views on the death penalty around the world.³⁵⁰ As New Mexico state Senator Gerald Ortiz y Pino explained, “We

Death Penalty Information Center (2012). Recent Legislation: Governor’s Signature Makes Connecticut Fifth State in Five Years to End Death Penalty. Retrieved from <http://www.deathpenaltyinfo.org/recent-legislation-governors-signature-makes-connecticut-fifth-state-five-years-end-death-penalty>; Reinhart, C. (2012). Death Penalty. OLR Research Report. Retrieved from <http://www.cga.ct.gov/2012/rpt/2012-R-0321.htm>.

³⁴⁵ New Mexico House Bill 285 (2009). Retrieved from <http://www.sos.state.nm.us/uploads/Files/Bills2009/SignedAndChapteredBills/Chapter11.pdf>.

³⁴⁶ Ibid.; Guzman, G. (2007). Death Penalty Repeal Advances. *Albuquerque Journal*. Retrieved from <http://lawschool.unm.edu/news/achievements/07-08/chasey.php>.

³⁴⁷ Death Penalty Information Center (2007). Legislative Activity – New Mexico. Retrieved from <http://www.deathpenaltyinfo.org/legislative-activity-new-mexico>; Guzman, G. (2007). Death Penalty Repeal Advances. *Albuquerque Journal*. Retrieved from <http://lawschool.unm.edu/news/achievements/07-08/chasey.php>.

³⁴⁸ Chasey, G. Personal communication. May 22, 2013.

³⁴⁹ Wilson, M. Personal communication. May 20, 2013.

³⁵⁰ Kerrigan, H. (ed.) (2010). Gov. Bill Richardson Signs Bill to Repeal New Mexico's Death Penalty. *In Historic Documents of 2009*. CQ Press, Washington, DC. p. 137-42; Chasey, G. Personal communication. May 22, 2013; Wilson, M. Personal communication. May 20, 2013.

are the last Western society that holds on to it. . . . It makes us less than we should be.”³⁵¹

Further, former New Mexico Governor Bill Richardson signed the bill on March 18, 2009, citing as his reasons the imperfections of any system imposing the death penalty, that minorities are disproportionately sentenced to death, and that “from an international human rights perspective, there is no reason the United States should be behind the rest of the world on this issue.”³⁵² Six days later, he further explained his decision, pointing out that America is isolated internationally “as one of the few countries with the death penalty, saddled along with other repressive regimes that had the death penalty” and that “the world has moved ahead of us, Europe, Latin America, most nations have repealed it.”³⁵³

Governor Richardson’s concern with US isolation and international trends in Europe and the rest of the world is not surprising considering his previous background as United States Ambassador to the United Nations. Worldwide trends against the death penalty, including within the European Union, were thus one of the considerations in the New Mexico legislature as well as by Governor Richardson in abolishing the death penalty in their state.

Nonetheless, it is unlikely that New Mexico would not have abolished the death penalty “in the absence of the EU stimulus or EU stimulus accompanied by stimuli from other” actors.³⁵⁴ While the European Union’s example was, as discussed above, referenced by persons in both the executive and legislative branches of New Mexico’s government during the process of abolishing the death penalty in New Mexico, there were multiple other reasons for abolishing the death penalty in New Mexico and the

³⁵¹ Kerrigan, H. (ed.) (2010). Gov. Bill Richardson Signs Bill to Repeal New Mexico's Death Penalty. *In Historic Documents of 2009*. CQ Press, Washington, DC. p. 137-42.

³⁵² Gallegos, G. (2009). Governor Bill Richardson Signs Repeal of the Death Penalty. Death Penalty Information Center. p. 2. Retrieved from <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf>; New Mexico House Bill 285 (2009). Retrieved from <http://www.sos.state.nm.us/uploads/Files/Bills2009/SignedAndChapteredBills/Chapter11.pdf>.

³⁵³ Death Penalty Focus (2009). Interview with Bill Richardson. Retrieved from <http://www.deathpenalty.org/article.php?id=341>.

³⁵⁴ Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 49.

European Union's example acted more as a confirmation of a decision to do so than as a reason in and of itself to change direction on the death penalty. The primary reasons for abolishing the death penalty in New Mexico were cost, the possibility of executing innocent persons, and issues of discrimination in the death penalty system, reasons that existed regardless of the European Union's example.³⁵⁵ Former Governor Richardson, for example, stated that for him "what we cannot disagree on is the finality of this ultimate punishment. Once a conclusive decision has been made and executed, it cannot be reversed. And it is in consideration of this, that I have made my decision."³⁵⁶ Governor Richardson then goes on to discuss the possibility of mistakes occurring in the system and resulting in innocent people being placed on death row or executed, as well as the concern that minorities are more likely to end up on death row.³⁵⁷ It is only after these explanations for abolishing the death penalty that Richardson states that the United States should not "be behind the rest of the world on" the issue of the death penalty.³⁵⁸

In New York, the Court of Appeals decision in *People v. LaValle*³⁵⁹ held part of a New York death penalty law violated its state constitution. Specifically, pursuant to New York statutory law, the trial court instructed the jurors in the case to decide whether Stephen LaValle, found guilty of first degree murder and rape, should be sentenced to death or life without parole, but the decision of the jurors must be unanimous.³⁶⁰ If the decision was not unanimous, the defendant would be sentenced to life with the possibility of parole in 20-25 years.³⁶¹

³⁵⁵ Death Penalty Information Center (2007). Legislative Activity – New Mexico. Retrieved from <http://www.deathpenaltyinfo.org/legislative-activity-new-mexico>; Guzman, G. (2007). Death Penalty Repeal Advances. *Albuquerque Journal*. Retrieved from <http://lawschool.unm.edu/news/achievements/07-08/chasey.php>; Death Penalty Focus (2009). Interview with Bill Richardson. Retrieved from <http://www.deathpenalty.org/article.php?id=341>; Gallegos, G. (2009). Governor Bill Richardson Signs Repeal of the Death Penalty. Death Penalty Information Center. p. 1-3. Retrieved from <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf>.

³⁵⁶ Gallegos, G. (2009). Governor Bill Richardson Signs Repeal of the Death Penalty. Death Penalty Information Center. p. 1. Retrieved from <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf>.

³⁵⁷ Ibid. p. 1-2.

³⁵⁸ Ibid. p. 2-3.

³⁵⁹ *People v. LaValle*, 3 N.Y.3d 88 (2004).

³⁶⁰ Ibid. at 116.

³⁶¹ Ibid. at 117.

The New York statutory scheme in the event of deadlock among the jury members was unique because, unlike other states, deadlock resulted in a less severe sentence than the ones the jury was allowed to consider.³⁶² According to the court, studies have indicated that some jurors may then select the death penalty even though they prefer life without parole because of fears of the possibility of release if the jurors become deadlocked.³⁶³ As a result, the Court of Appeals held the statutory scheme violated the Due Process Clause of the New York Constitution “because it creates the substantial risk of coercing jurors into sentencing a defendant to death.”³⁶⁴ The Court of Appeals also declined to set out a new death sentencing procedure, explaining that providing a different procedure is within the power of the legislature, not the courts.³⁶⁵

Three years later in *People v. Taylor*, the New York Court of Appeals held that the ruling in *People v. LaValle* applied to the last person on death row in New York, effectively ending the death penalty in New York absent further legislative action.³⁶⁶

In response to the *LaValle* decision, five public hearings were conducted by the New York State Assembly’s standing committees on Codes, Judiciary and Correction between December 2004 and February 2005.³⁶⁷ Rather than immediately responding to the Court of Appeals ruling by restoring the death penalty in some form or formally abolishing the death penalty, the legislature sought to first review the death penalty, allowing for testimony during public hearings, so that it could make a more deliberative decision on the matter.³⁶⁸

With 146 persons testifying and 24 individuals and groups submitting additional written testimony, a wide variety of issues were addressed during the hearings on the death penalty.³⁶⁹ In the hearings, the committees sought testimony directed at whether

³⁶² Ibid.

³⁶³ Ibid. at 118.

³⁶⁴ Ibid. at 128.

³⁶⁵ Ibid.

³⁶⁶ *People v. Taylor*, 2007 NY Int. 135 (2007).

³⁶⁷ Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

³⁶⁸ Ibid. p. 1.

³⁶⁹ Ibid. p. 3.

the death penalty should be reinstated in New York.³⁷⁰ Among five other questions to address this issue, the public notices for the hearings specifically asked for testimony regarding the trends and experiences of other nations: “What do the trends and experiences of other states and nations which have considered or implemented the death penalty or life imprisonment without parole teach us about whether capital punishment should be reinstated in New York?”³⁷¹

That such information was specifically sought after by the legislative committees deliberating on the issue suggests an interest in international views regarding the death penalty. While officials representing the European Union did not provide official testimony before the New York State Assembly standing committees, the testimony nonetheless made clear that the United States is almost alone among industrialized nations in the world, including across Europe, when it comes to retaining the death penalty.³⁷² After obtaining the information sought through five days of hearings, the New York Assembly Codes Committee voted 11 to 7 against legislation reinstating the New York death penalty.³⁷³ While information about foreign experiences were sought by the New York legislature, they once again are not the main reason for abolishing (and not reinstating in this case) the death penalty, and only a small fraction of the New York State Assembly’s standing committee on Codes, Judiciary and Correction discusses the international trends.³⁷⁴ New York’s Assembly members were particularly concerned with the possibility of executing innocent people, again a concern that exists regardless of the situation in the European Union.³⁷⁵

³⁷⁰ Ibid. appendix.

³⁷¹ Ibid.

³⁷² Ibid. p. 50.

³⁷³ Death Penalty Information Center (2007). Legislative Activity – New York. Retrieved from <http://www.deathpenaltyinfo.org/legislative-activity-new-york>.

³⁷⁴ Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

³⁷⁵ Death Penalty Information Center (2007). Legislative Activity – New York. Retrieved from <http://www.deathpenaltyinfo.org/legislative-activity-new-york>; *see* Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

When Illinois enacted legislation abolishing the death penalty in 2011, it was the culmination of a variety of circumstances taking place over decades.³⁷⁶ Through the work of “a cadre of public defenders, pro bono lawyers, journalists, academics, and assorted activists,” it became clear that it was not possible to create a death penalty system free from flaws and discriminatory treatment.³⁷⁷

The progression towards abolition in Illinois began in 1987 when exculpatory evidence was discovered that led to the exoneration of two persons on death row, Perry Cobb and Darby Tillis.³⁷⁸ In the decades leading up to abolition, there were eighteen more exonerations in the state, making the error rate at least 6% since the reinstatement of capital punishment in Illinois in 1977.³⁷⁹ Confidence in the Illinois death penalty system was further eroded by misconduct by the Chicago police, some of whom had tortured suspects into confessions that led to capital sentences, an Illinois circuit judge convicted of taking bribes, and a *Chicago Tribune* story revealing prosecutors across the United States engaging in discriminatory practices and hiding evidence in order to win cases.³⁸⁰

Following some efforts to improve the death penalty system, on January 31, 2000 then Illinois Governor Ryan declared a moratorium on executions until the flaws in the Illinois capital punishment system were addressed.³⁸¹ Two months later, Governor Ryan created, through an executive order, the Commission on Capital Punishment, which issued a report in April 2002 recommending major reforms to the Illinois criminal justice system.³⁸²

After a concerted effort by activists, on January 11, 2003 Governor Ryan announced the commutation of all Illinois death row inmates in an address at

³⁷⁶ Warden, R. (2012). How and Why Illinois Abolished the Death Penalty. *Law and Inequality*. 30.

³⁷⁷ Ibid. p. 245.

³⁷⁸ Ibid. p. 247.

³⁷⁹ Ibid. p. 248.

³⁸⁰ Ibid. p. 254-256.

³⁸¹ Ibid. p. 263.

³⁸² Ibid. p. 264.

Northwestern University School of Law.³⁸³ During that address, he explained his various reasons for his decision, from the potential of executing an innocent person to the many flaws in the Illinois death penalty system.³⁸⁴ During his explanation, Governor Ryan stated his concern about the isolation, including from Europe, of the United States in its retention of the death penalty: “Today the United States is not in league with most of our major allies: Europe, South Africa, Canada, Mexico, most of South and Central America. These countries rejected the death penalty. We are partners in death with several third world countries. Even Russia has called a moratorium.”³⁸⁵

In the following years, reforms were made to the Illinois death penalty system based upon the recommendations of the Commission on Capital Punishment, but additional exonerations highlighted the inadequacy of the reforms.³⁸⁶ In October 2010, the Illinois Capital Punishment Reform Study Committee, created in 2003 by statute, issued its final report on the Illinois death penalty, which outlined continued flaws and reforms needed in the Illinois capital punishment system.³⁸⁷

With the Illinois death penalty system still plagued by problems, in January 2011 legislation was passed in both the Illinois House and Senate to abolish the Illinois death penalty.³⁸⁸ Illinois state Senator Kwame Raoul, one of the sponsors of the legislation, indicated that the legislators that voted in favor of abolition had done so for a variety of reasons.³⁸⁹ Senator Raoul called on his colleagues in the legislature to “join the civilized

³⁸³ Ryan, G. (2003). Text of Gov. George Ryan’s Speech Announcing His Commutation of All of Illinois’ Death Sentences. *SFGATE*. Retrieved from <http://www.sfgate.com/nation/article/Text-of-Gov-George-Ryan-s-speech-announcing-his-2680319.php>.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Warden, R. (2012). How and Why Illinois Abolished the Death Penalty. *Law and Inequality*. 30, p. 272-273.

³⁸⁷ Bienen, L. et al. (2010). Sixth and Final Report. Illinois Capital Punishment Reform Study Committee. Retrieved from <http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC%20-%20Sixth%20and%20Final%20Report.pdf>.

³⁸⁸ Warden, R. (2012). How and Why Illinois Abolished the Death Penalty. *Law and Inequality*. 30, p. 272-280-281.

³⁸⁹ IllinoisChannelTV (2011). Sen Kwame Raoul (D) on Abolishing the Death Penalty in Illinois. Youtube. Retrieved from <https://www.youtube.com/watch?v=Xc-6PmnFu1A>.

world” by abolishing the death penalty in Illinois.³⁹⁰ Similarly, Senator Toi Hutchinson expressed her desire for Illinois not to be associated “with Afghanistan, China, Iran, Iraq, Congo, Saudi Arabia and other countries that allow the death penalty.”³⁹¹

After signing the legislation, Governor Quinn explained his decision, particularly pointing to the flawed death penalty system and the impossibility of designing a perfect system.³⁹² In closing his speech, he stated that, although his decision to sign the legislation was his most difficult decision as Governor, he had a firm belief “that we are taking an important step forward in our history as Illinois joins the 15 other states and many nations of the world that have abolished the death penalty.”³⁹³ World views on the death penalty were thus of interest to former Governor Ryan in issuing a blanket commutation of death sentences and legislators and former Governor Quinn in *de jure* abolition of the death penalty in Illinois. They had an interest in joining their European and other allies in this area, rather than be associated with nations not known for positive human rights records. Nonetheless, as described above, Illinois was on track to abolishing the death penalty regardless of the European Union’s example, with repeated issues of innocence and other flaws within the capital punishment system at the forefront.³⁹⁴ In this context, Illinois would likely have abolished the death penalty regardless of whether the European Union’s example was present.³⁹⁵

³⁹⁰ Wilson, T. And Long, R. (2011). Illinois Death Penalty Ban Sent to Gov. Pat Quinn. *Chicago Tribune*. Retrieved from http://newsblogs.chicagotribune.com/clout_st/2011/01/illinois-death-penalty-ban-a-step-closer-to-governors-desk.html.

³⁹¹ Ibid.

³⁹² Maassen, K. (2011). Illinois Gov. Quinn Abolishes Death Penalty. KSDK.com. Retrieved from <http://archive.ksdk.com/rss/article/248309/3/VIDEO-Gov-Quinn-signing-death-penalty-bill>.

³⁹³ Ibid.

³⁹⁴ See Warden, R. (2012). How and Why Illinois Abolished the Death Penalty. *Law and Inequality*. 30; ³⁹⁴ Ryan, G. (2003). Text of Gov. George Ryan’s Speech Announcing His Commutation of All of Illinois’ Death Sentences. *SFGATE*. Retrieved from <http://www.sfgate.com/nation/article/Text-of-Gov-George-Ryan-s-speech-announcing-his-2680319.php>; Maassen, K. (2011). Illinois Gov. Quinn Abolishes Death Penalty. KSDK.com. Retrieved from <http://archive.ksdk.com/rss/article/248309/3/VIDEO-Gov-Quinn-signing-death-penalty-bill>; Bienen, L. et al. (2010). Sixth and Final Report. Illinois Capital Punishment Reform Study Committee. Retrieved from <http://www.icjia.state.il.us/public/pdf/dpsrc/CPRSC%20-%20Sixth%20and%20Final%20Report.pdf>; IllinoisChannelTV (2011). Sen Kwame Raoul (D) on Abolishing the Death Penalty in Illinois. Youtube. Retrieved from <https://www.youtube.com/watch?v=Xc-6PmnFu1A>.

³⁹⁵ See Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 49.

In each of these three states, there were multiple reasons for the decision to abolish (or not reinstate) the death penalty, and the example of the European Union was never the primary reason leading to abolition. Instead, as discussed in more detail above, the European Union's example tended to confirm the decisions that were being made by these states. As such, the European Union's impact through its example cannot be considered to fall under the considerable or significant impact categories. Likewise, the isolation of the United States on the death penalty also failed to achieve any tangible change on the death penalty with regard to the federal level administration. Although not causing a tangible change in the United States, the European Union's example has affected the interests of the federal government as well as individual states as described above, which places the European Union's impact as marginal in this case.

3.2 The European Union's Impact on Extradition of Persons Subject to the Death Penalty

When accused or convicted criminals (possibly) subject to the death penalty in the United States are present in the European Union, it presents a situation in which the United States needs cooperation from European Union member states to extradite those persons to the United States. "International extradition is the formal process by which a person found in one country is surrendered to another country for trial or punishment."³⁹⁶

Extradition primarily occurs under extradition treaties, which impose legal requirements before surrender of persons can occur.³⁹⁷ Where there have been differing approaches to the death penalty between countries, some abolitionist countries included

³⁹⁶ United States Department of Justice (1997). United States Attorneys' Manual. Section 9-15.100. Retrieved from <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.100>; see Amnesty International (2001). United States of America: No Return to Execution – The US Death Penalty as a Barrier to Extradition. Retrieved from <https://www.amnesty.org/en/documents/AMR51/171/2001/en/>.

³⁹⁷ Amnesty International (2001). United States of America: No Return to Execution – The US Death Penalty as a Barrier to Extradition. Retrieved from <https://www.amnesty.org/en/documents/AMR51/171/2001/en/>; United States Department of Justice (1997). United States Attorneys' Manual. Section 9-15.100. Retrieved from <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters#9-15.100>.

provisions in their extradition treaties allowing them to obtain so-called ‘diplomatic assurances’ or ‘guarantees’ that the death penalty would not be imposed or carried out by the requesting country.³⁹⁸ In practice, it has become standard for nations that have abolished the death penalty to respond to extradition requests with demands for assurances that the death penalty will not be used.³⁹⁹ When confronted by refusals to extradite individuals without assurances that the death penalty will not be imposed or carried out, the United States has been forced to either make such assurances, lose the ability to prosecute the individuals in the United States, or resort to extraordinary rendition.⁴⁰⁰

In the Council of Europe, the 1957 European Convention on Extradition allowed for cooperation between European countries with regard to extradition of persons to jurisdictions with the death penalty.⁴⁰¹ Article 11 of the European Convention on Extradition provides:

“If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.”⁴⁰²

In interpreting the European Convention on Human Rights, the European Court of Human Rights has also been faced with the issue of extradition of persons potentially subject to the death penalty in the requesting country. For example, in *Soering v. United*

³⁹⁸ Amnesty International (2001). United States of America: No Return to Execution – The US Death Penalty as a Barrier to Extradition. Retrieved from <https://www.amnesty.org/en/documents/AMR51/171/2001/en/>.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Council of Europe (1957). European Convention on Extradition. Retrieved from <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680064587>.

⁴⁰² Ibid.

Kingdom, the European Court of Human Rights stated that the “circumstances relating to a death sentence” could (and would, in *Soering*’s case involving the issue of extradition to the United States,) violate the prohibition of torture, inhuman, or degrading treatment or punishment in Article 3 of the European Convention on Human Rights.⁴⁰³ The European Union Charter of Fundamental Rights was also signed on December 7, 2000, and under Article 19(2) of the Charter of Fundamental Rights of the European Union, “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁴⁰⁴

Despite these developments, following the September 11, 2001 attacks the United States reportedly proposed that the European Union “eliminate discrimination against the United States and third (non-EU) countries’ extradition requests to member states.”⁴⁰⁵ However, the September 11, 2001 terrorist attacks did not weaken the European Union’s resolve concerning extradition of persons potentially subject to the death penalty. On the contrary, it presented an opportunity for the European Union to secure an extradition treaty with the United States that provides the right to condition extradition of persons on assurances that the death penalty will not be pursued or carried out for those persons.

In the wake of the September 11, 2001 attacks, the European Union and the United States began negotiations to improve cooperation on criminal matters.⁴⁰⁶ However, agreement with the United States was delayed for nearly a year during the

⁴⁰³ *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989. Retrieved from <http://hudoc.echr.coe.int/eng?i=001-57619>; Schabas, W. (1996). *The Death Penalty As Cruel Treatment and Torture*. Northwestern University Press: Boston. p. 114-116; see also *Case of Othman (Abu Qatada) v. The United Kingdom*, 8139/09, Council of Europe: European Court of Human Rights, 17 January 2012. Retrieved from [http://hudoc.echr.coe.int/eng?i=001-108629#{"itemid":\["001-108629"\]}](http://hudoc.echr.coe.int/eng?i=001-108629#{).

⁴⁰⁴ Charter of Fundamental Rights of the European Union (2010). Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG.

⁴⁰⁵ Amnesty International (2001). United States of America: No Return to Execution – The US Death Penalty as a Barrier to Extradition. Retrieved from <https://www.amnesty.org/en/documents/AMR51/171/2001/en/>.

⁴⁰⁶ The United States Department of Justice (2010). U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force. Retrieved from <http://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force>.

negotiations.⁴⁰⁷ Importantly, the European Union sought and obtained a right for its member states to refuse extradition absent guarantees that the death penalty would not be imposed or applied to the person extradited.⁴⁰⁸

As a result, two agreements were signed on June 25, 2003, the Agreement on Extradition Between the European Union and the United States of America and the Agreement on Mutual Legal Assistance Between the European Union and the United States of America, after which each European Union member state effectively implemented the EU-US treaties by entering into new or modified extradition and mutual legal assistance agreements of their own with the United States. The EU-US extradition agreement provides for a modern dual criminality standard, measures streamlining the exchange of information and transmission of documents, and rules for determining priority in competing requests for extradition, among other things, while the mutual legal assistance agreement aims to enhance and modernize law enforcement and judicial cooperation.⁴⁰⁹ Importantly, Article 13 on Capital Punishment of the extradition agreement provides:

“Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out. If the requesting State accepts extradition subject to conditions pursuant to this Article, it shall comply

⁴⁰⁷ Warren, M. (2004). Death, Dissent and Diplomacy: The U.S. Death Penalty as an Obstacle to Foreign Relations. *William & Mary Bill of Rights Journal*. 13, p. 335.

⁴⁰⁸ Ibid.

⁴⁰⁹ The United States Department of Justice (2010). U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force. Retrieved from <http://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force>.

with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.”⁴¹⁰

After being ratified by the parties, the treaty instruments were exchanged by the European Union and United States on October 28, 2009 and entered into force on February 1, 2010.⁴¹¹

With regard to extradition, the European Union has had a significant impact on the United States. The European Union was primarily and directly responsible for this agreement with the US limiting extraditions for persons where there might be a risk that the US would impose or carry out the death penalty. As explained in a press release by the Council of the European Union, the extradition treaty

“significantly improves the protection against the death penalty. Extradition to the US will henceforth only be possible under the condition that the death penalty will not be imposed or, if for procedural reasons such condition cannot be complied with, that the death penalty will not be carried out. Unlike what is currently the prevailing practice, the non-execution of the death penalty will no longer depend on case-by-case guarantees from the US.”⁴¹²

The European Union’s insistence on extradition limits relating to the death penalty has had a major effect on the vital interests of the United States of obtaining suspected criminals for interrogation, prosecution, and/or punishment, particularly in the larger post-September 11 context in which such limits were questioned. The significant impact of the European Union is through a combination of persuasion, with regard to

⁴¹⁰ Agreement on Extradition Between the European Union and the United States of America (2003). Official Journal of the European Union L 181/27.

⁴¹¹ The United States Department of Justice (2010). U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter into Force. Retrieved from <http://www.justice.gov/opa/pr/useu-agreements-mutual-legal-assistance-and-extradition-enter-force>.

⁴¹² Council of the European Union (2009). EU/US Agreements on Extradition and on Mutual Legal Assistance. Retrieved from http://europa.eu/rapid/press-release_PRES-09-303_en.htm?locale=en.

negotiating the agreement, as well as coercion, with regard to the refusal to provide requested persons without assurances regarding the non-application of the death penalty by the United States.

3.3 The European Union's Impact on Lethal Injection

The death penalty in the United States today is most frequently carried out by lethal injection. However, in recent years, it has become more difficult for individual US states with the death penalty to obtain the drugs used in their lethal injection procedures. At first, 2005 Council Regulation No. 1236/2005, concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, contained a loophole allowing sodium thiopental and pentobarbital, anesthetics often used during lethal injection executions in the US, to be exported from European Union member states for use in executions. Council Regulation No. 1236/2005 placed import and export restrictions on instruments such as gallows and guillotines, electric chairs, automatic drug injection systems, vaults used in executions, as well as torture devices.

The 2005 regulation, however, failed to limit the death penalty in the United States, particularly with the supplies of drugs such as sodium thiopental and pentobarbital unaffected by the regulation for use in US executions.⁴¹³ Had the European Union included restrictions on drugs used in lethal injections in the 2005 regulation, some executions could possibly have been avoided or delayed.⁴¹⁴ Supplies of sodium thiopental, however, fell relative to demand after a shortage of raw materials to produce the drug in 2009.⁴¹⁵ The shortage was exacerbated by a number of medical suppliers that stopped supplying some drugs for use in carrying out the death penalty, some of which

⁴¹³ Foa, M. Personal Communications. May 23, 2013.

⁴¹⁴ Amnesty International (2011). Stop Trade of Torture and Death Penalty Equipment. Retrieved from <http://www.amnesty.org/en/appeals-for-action/stop-trade-torture-and-death-penalty-equipment>.

⁴¹⁵ Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>.

did so in response to demands by European Union member states.⁴¹⁶ The British government banned the export of sodium thiopental for use in executions after it was discovered that Arizona had received the drug from a company based in the United Kingdom.⁴¹⁷ In January 2011, Hospira Inc., an Illinois-based company that had planned to manufacture sodium thiopental in a plant in Italy, also announced its decision to stop selling sodium thiopental because Italy wanted assurance that the drug would not be used to carry out the death penalty.⁴¹⁸ Some states, such as Oklahoma and Ohio, turned to pentobarbital instead, but Lundbeck Inc., which is based in Denmark and is the only company that provided pentobarbital in the United States, asked that the drug not be used in executions.⁴¹⁹

With pressure from NGO's and the European Parliament, on December 20, 2011 the European Commission amended Council Regulation (EC) 1236/2005 with Commission Implementing Regulation (EU) 1352/2011, such that all "short and intermediate acting barbiturate anaesthetic agents" including pentobarbital and sodium thiopental, among others, are included in a list of items requiring export authorization.⁴²⁰ These 2011 restrictions have had important implications for the US death penalty, with some of the drugs already in short supply and for which the US does not manufacture domestically.⁴²¹ This also suggests that the original 2005 Council Regulation No.

⁴¹⁶ Grissom, B. (2011). A Drug Used in Executions Becomes Very Hard to Get. *New York Times*. Retrieved from http://www.nytimes.com/2011/02/06/us/06ttdrug.html?_r=1; Hospira (2011). Regarding its Halt of Production of Pentothal (Sodium Thiopental). Retrieved from <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf>.

⁴¹⁷ Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>.

⁴¹⁸ Grissom, B. (2011). A Drug Used in Executions Becomes Very Hard to Get. *New York Times*. Retrieved from http://www.nytimes.com/2011/02/06/us/06ttdrug.html?_r=1; Hospira (2011). Regarding its Halt of Production of Pentothal (Sodium Thiopental). Retrieved from <http://www.deathpenaltyinfo.org/documents/HospiraJan2011.pdf>.

⁴¹⁹ Grissom, B. (2011). A Drug Used in Executions Becomes Very Hard to Get. *New York Times*. Retrieved from http://www.nytimes.com/2011/02/06/us/06ttdrug.html?_r=1.

⁴²⁰ Amnesty International (2012). No More Delays: Putting an End to the EU Trade in "Tools of Torture." p. 26. Retrieved from <https://www.amnesty.org/download/Documents/16000/act300622012en.pdf>.

⁴²¹ Vox, F. (2011). Why America's Death Penalty Just Got Us Sanctioned by Europe. *The Atlantic*. Retrieved from <http://www.theatlantic.com/international/archive/2011/12/why-americas-death-penalty-just-got-us-sanctioned-by-europe/250324/>.

1236/2005 would similarly have prevented or delayed executions in the United States had it not contained the loophole.⁴²²

Following the amended regulation closing the loophole, Fresenius Kabi USA informed healthcare providers that they were implementing restrictions and controls on the sale and distribution of Propofol, another anesthetic being considered by some departments of correction for executions, to prevent its use in United States executions while ensuring “that this important drug continues to be immediately available to those patients and health care facilities where its use is medically necessary.”⁴²³ In their letter to healthcare providers, they explained that all of their Propofol is manufactured in Europe and that

“European Union (EU) regulation prevents products that may reasonably be expected to be used in executions from being exported from the EU. Should Propofol begin to be used in executions in the U.S. and should the EU Commission place Propofol on its list of export restricted substances under the anti-torture regulation, it could severely restrict U.S. access to the drug.”⁴²⁴

The shortage of sodium thiopental in particular has delayed executions and forced some US states to search for alternatives to their procedures that utilize the drug.⁴²⁵ California, Texas, Florida, Georgia, Missouri, and Arkansas have all faced shortages of

⁴²² In this sense, 2005 Council Regulation No. 1236/2005 could arguably be framed as an area in which European Union inaction (the loophole) resulted in the impact on the United States rather than the action in 2005, with the 2011 amendment demonstrating that the lack of restrictions in this area by the European Union allowed the United States to continue or not delay executions. See Amnesty International (2011). Stop Trade of Torture and Death Penalty Equipment. Retrieved from <http://www.amnesty.org/en/appeals-for-action/stop-trade-torture-and-death-penalty-equipment>; Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>; Meacham, S. (2012). Fresenius Propofol Statement. p. 1. Retrieved from <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf>.

⁴²³ Meacham, S. (2012). Fresenius Propofol Statement. p. 1. Retrieved from <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf>.

⁴²⁴ Ibid.

⁴²⁵ Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>; Whiteman, R. Personal communications. June 24, 2013.

sodium thiopental for their executions.⁴²⁶ As a result, the restrictions on the export of lethal injection drugs in the European Union has made it more difficult for some jurisdictions in the United States to obtain the drugs used in their lethal injection procedures, forcing some jurisdictions to continue searching for alternatives.⁴²⁷ Sarah Ludford, a European Parliamentarian, stated, “By persuading responsible pharmaceutical companies to supervise their distribution chain and by getting controls on exports from Europe tightened, U.S. prisons’ ability to procure their death machine supplies has been thwarted”.⁴²⁸

This research focuses on outputs from 1998 to 2009. However, 2005 Council Regulation No. 1236/2005 could be considered as an area in which the European Union’s inaction (the loophole) in 2005 also resulted in an impact on the United States, with the 2011 amendment demonstrating that the lack of restrictions in this area by the European Union allowed the United States to continue with executions as scheduled.⁴²⁹ The EU has thus had a significant impact on the US as it is primarily and directly responsible for decreasing (or failing to decrease)⁴³⁰ the supply of lethal injection drugs that were already difficult for the US to obtain outside of the European Union. The primary diffusion mechanism for achieving this outcome was through coercion (or lack thereof), as the European Union (failed to) restrict United States access to material goods.⁴³¹

⁴²⁶ Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>.

⁴²⁷ Foa, M. Personal Communications. May 23, 2013; Whiteman, R. Personal communications. June 24, 2013.

⁴²⁸ Kitamura, M. and Narayan, A. (2013). Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons. *Bloomberg*. Retrieved from <http://www.bloomberg.com/bw/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons>.

⁴²⁹ See Amnesty International (2011). Stop Trade of Torture and Death Penalty Equipment. Retrieved from <http://www.amnesty.org/en/appeals-for-action/stop-trade-torture-and-death-penalty-equipment>; Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>; Meacham, S. (2012). Fresenius Propofol Statement. p. 1. Retrieved from <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf>.

⁴³⁰ See Amnesty International (2011). Stop Trade of Torture and Death Penalty Equipment. Retrieved from <http://www.amnesty.org/en/appeals-for-action/stop-trade-torture-and-death-penalty-equipment>; Stone, Z. (2011). Access to Sodium Thiopental Forces States to Change Death Penalty Laws. *Death Penalty Focus*. Retrieved from <http://www.deathpenalty.org/article.php?id=550>; Meacham, S. (2012). Fresenius Propofol Statement. p. 1. Retrieved from <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf>.

⁴³¹ Vox, F. (2011). Why America’s Death Penalty Just Got Us Sanctioned by Europe. *The Atlantic*. Retrieved from <http://www.theatlantic.com/international/archive/2011/12/why-americas-death-penalty-just-got-us-sanctioned-by-europe/250324/>. These results suggest that the Transatlantic Trade and Investment

3.4 The European Union's Impact Through United Nations Resolutions

Although the European Union is an observer in the United Nations without the ability to vote,⁴³² the European Union has nonetheless played a key role in United Nations' resolutions concerning the death penalty. In particular, the European Union has repeatedly sponsored multiple legally non-binding resolutions calling for a moratorium on the death penalty. The European Union sponsored its first resolution calling for a moratorium in 1999, but that resolution was later withdrawn.⁴³³ In addition to a worldwide moratorium on executions, the 1999 resolution also sought progressive restriction of the offenses subject to capital punishment, banning extradition of persons to countries where they would face the death penalty, and limits on the types of persons subject to the death penalty.⁴³⁴

Starting in 2007, however, the European Union has successfully sponsored resolutions calling for a world-wide moratorium on the death penalty.⁴³⁵ The United

Partnership (TTIP), although not primarily focused on human rights, could possibly in the future have consequences for human rights issues. There has been some concern that the TTIP could create negative consequences for health and human rights issues. *See, e.g.*, European Commission (2015). How TTIP Would Affect You. Retrieved from http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/impact/#_concerns; Inman, P. (2015). UN Calls for Suspension of TTIP Talks Over Fears of Human Rights Abuses. *The Guardian*. Retrieved from <http://www.theguardian.com/global/2015/may/04/ttip-united-nations-human-right-secret-courts-multinationals>.

⁴³² European Union Delegation to the United Nations – New York (2011). About the EU at the UN in New York. Retrieved from http://eu-un.europa.eu/articles/en/article_9389_en.htm.

⁴³³ Farley, M. (2007). U.N. Adopts Death Penalty Moratorium. *Los Angeles Times*. Retrieved from <http://www.latimes.com/news/nationworld/world/la-fg-moratorium19dec19,0,5475500.story>.

⁴³⁴ The New York Times (1999). U.N. Panel Votes for Ban on Death Penalty. *The New York Times*. Retrieved from <http://www.nytimes.com/1999/04/29/world/un-panel-votes-for-ban-on-death-penalty.html>.

⁴³⁵ United Nations (2016). Death Penalty. Retrieved from <http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx>; United Nations (2008). Moratorium on the Use of the Death Penalty. A/RES/62/149. Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/62/149&Lang=E; United Nations (2009). Moratorium on the Use of the Death Penalty. A/RES/63/168. Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/63/168&Lang=E; United Nations (2011). Moratorium on the Use of the Death Penalty. A/RES/65/206. Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/206; United Nations (2013). Moratorium on the Use of the Death Penalty. A/RES/67/176. Retrieved from http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/176.

Nations General Assembly adopted European Union sponsored resolution A/RES/62/149 on December 18, 2007, which, in addition to a moratorium, calls for respect for international standards concerning the rights of persons facing the death penalty as well as progressive restriction on the use of the death penalty and the offences subject to the death penalty. While the resolution was jointly introduced by 87 countries, including all the European Union member states, the European Union was one of the driving forces behind it,⁴³⁶ while also to some extent downplaying its part during negotiations.⁴³⁷ Resolution A/RES/62/149 passed with a 104 in favor and 54 against vote.⁴³⁸ The resolution does not call for immediate abolition of the death penalty and is not legally binding, but carries with it moral weight. Nonetheless, the resolution faced a highly contentious debate before adoption, and was opposed by the United States, China, Iran, Sudan, and Syria, among 49 others.⁴³⁹ The European Union had to garner enough support to overcome the opposition that claimed the sponsors were attempting to limit their sovereignty.⁴⁴⁰

Similar resolutions calling for a moratorium were passed with slightly increasing support in 2008, 2010, and 2012. On December 18, 2008, the United Nations General Assembly reaffirmed its 2007 call for a global moratorium with European Union sponsored resolution A/RES/63/168, which passed with a vote of 106 in favor and 46 against. On December 21, 2010, a similar resolution was adopted with a vote of 109 in

⁴³⁶ Farley, M. (2007). U.N. Adopts Death Penalty Moratorium. *Los Angeles Times*. Retrieved from <http://www.latimes.com/news/nationworld/world/la-fg-moratorium19dec19,0,5475500.story>; Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115.

⁴³⁷ Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115.

⁴³⁸ United Nations (2007). General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty. Retrieved from <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>.

⁴³⁹ United Nations (2007). Two-Day Deliberations End with Contentious Resolution Calling for Moratorium on Use of Death Penalty Approved by Third Committee After Vote. Retrieved from <http://www.un.org/News/Press/docs/2007/gashc3906.doc.htm>; Farley, M. (2007). U.N. Adopts Death Penalty Moratorium. *Los Angeles Times*. Retrieved from <http://www.latimes.com/news/nationworld/world/la-fg-moratorium19dec19,0,5475500.story>.

⁴⁴⁰ United Nations (2007). General Assembly Adopts Landmark Text Calling for Moratorium on Death Penalty. Retrieved from <http://www.un.org/News/Press/docs/2007/ga10678.doc.htm>.

favor and 41 opposed.⁴⁴¹ On November 19, 2012, yet another vote was held in the United Nations General Assembly calling for a moratorium on the death penalty, this time with 110 countries for and 39 against the resolution.⁴⁴² Unsurprisingly, the United States also voted against each of these resolutions.⁴⁴³

The European Union, in combination with multiple other actors, contributed to achieving these results through persuasive efforts utilizing a “comprehensive and in-depth consultation process.”⁴⁴⁴ Some countries in the Asian, African, and Caribbean regions supported the moratorium as well, with their contributions to the passage also of importance within a context in which some of their neighbors were retentionist.⁴⁴⁵ Amnesty International also played a particularly crucial role in the United Nations resolutions calling for a moratorium on the death penalty.⁴⁴⁶ As explained by Kissack:

“[Amnesty International] played an important role in shaping the behavior of all states, be they abolitionist, retentionist, or undecided. [Amnesty International’s] network of offices around the world and capacity to mobilise its supporters allow it to lobby governments in their national capitals as well as diplomats based in New York. [Amnesty International] was extensively involved in the entire death penalty resolution process.”⁴⁴⁷

European Commissioner for External Relations and European Neighbourhood Policy
Benita Ferrero-Waldner and European Commission Vice President Franco Frattini

⁴⁴¹ Death Penalty Information Center (2010). International: United Nations Resolution Shows Increasing Support for International Moratorium. Retrieved from <http://www.deathpenaltyinfo.org/international-uk-uk-united-nations-resolution-shows-increasing-support-international-moratorium>.

⁴⁴² Death Penalty Information Center (2012). International: U.N. Death Penalty Resolution Backed by Record Number of Countries. Retrieved from <http://www.deathpenaltyinfo.org/international-un-death-penalty-resolution-backed-record-number-countries>.

⁴⁴³ Ibid.

⁴⁴⁴ European Union (2007). EU Presidency Statement on the Adoption of the UN Resolution on the Moratorium on the Use of the Death Penalty. Retrieved from http://www.eu-un.europa.eu/articles/en/article_7513_en.htm.

⁴⁴⁵ Ibid. p. 116-117.

⁴⁴⁶ Ibid. p. 115.

⁴⁴⁷ Ibid.

attributed the passage of the first United Nations resolution calling for a moratorium to European Union solidarity and persuasiveness on the issue, stating:

“Once again, the European Union has expressed itself as a single and firm voice in protecting human rights. It has proved to be an efficient persuasive power in the world, steadily supporting any action in favour of human dignity. In this case, the death penalty being the most evident institutional disregard for this human dignity, such a UN Moratorium constitutes a step forward.”⁴⁴⁸

Although the passage of these resolutions calling for a world-wide moratorium on the death penalty contributes to United States isolation on the issue of the death penalty and the United States was opposed to the resolutions, the resolutions are non-binding and have not had a tangible effect on the United States. The United States has dismissed international calls in the United Nations regarding the death penalty⁴⁴⁹ and the United States has not changed its position based on these non-binding resolutions.⁴⁵⁰ Thus, while the European Union may have played a key role in the passage of such resolutions, its impact on the United States in these cases was only marginal.

3.5 The European Union’s Impact on Specific Cases

The European Union has advocated against individual executions in the United States on numerous occasions. The European Union’s advocacy has included public statements and declarations, including in the OSCE, as well as direct communications

⁴⁴⁸ European Union (2007). EU Welcomes UN Resolution on a Moratorium on the Death Penalty. Retrieved from http://www.eu-un.europa.eu/articles/fr/article_7514_fr.htm.

⁴⁴⁹ Jordans, F. (2010). US Rejects UN Call to Abolish the Death Penalty. *The Huffington Post*. Retrieved from <http://www.huffingtonpost.com/huff-wires/20101109/un-un-us-human-rights/>.

⁴⁵⁰ Death Penalty Information Center (2013). United Nations Calls for a Global Moratorium on Executions. Retrieved from <http://www.deathpenaltyinfo.org/united-nations-calls-global-moratorium-executions>.

with federal officials, state governors, and pardon boards.⁴⁵¹ Prior to May 2010, the country holding the rotating European Union presidency presented letters to United States federal and state officials on behalf of the European Union arguing for commutation of death sentences in individual cases.⁴⁵² After May 2010, following entry into force of the Lisbon Treaty, similar communications have been made by the European Union Delegation to the United States.⁴⁵³ The European Parliament has also been similarly involved in individual death penalty cases, issuing statements and resolutions and sending letters to state officials requesting commutation of death sentences.⁴⁵⁴ This section reviews 79 cases in which the European Union has advocated against the execution of specific individuals, gathered from the Death Penalty Archive of the European Union Delegation to the United States,⁴⁵⁵ which contains the European Union's formal diplomatic actions on the death penalty in the United States.⁴⁵⁶

While the European Union has involved itself in a large number of individual cases through such actions, the European Union's efforts are nonetheless focused on a limited scope of cases because limited resources do not allow the European Union to become involved in every death penalty case in the United States.⁴⁵⁷ The European Union has largely targeted those cases where international law and treaties provide support for their position or where European Union citizens are subject to the death penalty in the United States.⁴⁵⁸ Such a focus is in line with the European Union Guidelines on the Death Penalty, which provides for specific demarches in "individual death penalty cases which violate minimum standards."⁴⁵⁹ The European Union has focused on individual cases involving juveniles, mental disorders (including mental

⁴⁵¹ Delegation of the European Union to the United States (2016). Death Penalty Archive. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/>.

⁴⁵² See Ibid.

⁴⁵³ See Ibid.

⁴⁵⁴ See Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Whiteman, R. Personal communications. June 24, 2013.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ European Union (2013). Human Rights Guidelines – Torture. Retrieved from http://eeas.europa.eu/human_rights/guidelines/torture/index_en.htm.

illness and mental retardation), lesser crimes, VCCR violations, possible innocence, ends to *de facto* moratoriums, significant time on death row, and procedural and administrative issues.

Although the European Union also focuses on some of these issues on a more general level outside of the context of individual executions, raising the issue in individual cases allows the European Union to address some of the finer issues in United States death penalty laws and policies and their application in real cases. For example, while there are legal restrictions within the United States on the death penalty for persons with mental disorders, advocacy in specific cases allows the European Union to address the specific limitations of these laws, such as whether it is appropriate to medicate the mentally ill so that they become competent for execution or capital punishment for persons that are borderline mentally retarded but fall outside of the legal protections provided under *Atkins v. Virginia*.⁴⁶⁰

The United States federal government has responded to the European Union's efforts in individual cases by generally explaining that the death penalty in the United States is the result of decisions by federal and state level democratically elected governments, the death penalty is not prohibited by international law, and that death penalty cases involve extensive procedural safeguards and exhaustive protections within the United States legal system and sometimes also briefly explains aspects of the specific case.⁴⁶¹

At the state level, the European Union's communications are sometimes given consideration but generally did not affect the outcome in individual cases.⁴⁶² For former Ohio Governor Ted Strickland, for example, "a great deal of consideration" is given to information received from death penalty advocates such as the European Union, but clemency decisions are "guided by the facts of the particular case, his oath in office, the

⁴⁶⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁶¹ See generally, Embassy of the United States, Brussels, Belgium (2013). United States Policy Towards the Death Penalty Dossier. Retrieved from, <http://www.uspolicy.be/dossier/death-penalty-united-states-policy-toward-death-penalty-dossier>.

⁴⁶² See Specific Cases Table; Whiteman, R. Personal communications. June 24, 2013; see, e.g., Torres, J. (2009). Letter to Angelos Pangratis. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2009/romellbroomvohio-govstricklandlett-to-ap-11-2-09/>.

law in the State of Ohio, and his conscience.”⁴⁶³ The Connecticut Board of Pardons and Paroles indicated that the European Union’s efforts were misdirected altogether, and that the European Union’s “position regarding capital punishment more properly should be directed to any public debate which may occur in Connecticut’s legislative body, the General Assembly . . . rather than clemency support for a single individual.”⁴⁶⁴ In 2007, a press release by a spokesman for former Texas Governor Rick Perry clearly rejected the European Union’s efforts, stating:

“230 years ago, our forefathers fought a war to throw off the yoke of a European monarch and gain the freedom of self-determination. Texans long ago decided that the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens. While we respect our friends in Europe, welcome their investment in our state and appreciate their interest in our laws, Texans are doing just fine governing Texas.”⁴⁶⁵

While the primary diffusion mechanism in the specific efforts seeking commutation of individual sentences is persuasion, with arguments and information based on the specific issues at hand, there is the potential for the European Union’s example to come into play. The European Union’s example has not, however, been a factor in the commutation of sentences in the 79 individual cases examined.

The European Union’s advocacy against individual executions has not met with a large number of cases of impact, with 76 cases involving nil impact and 3 cases with only marginal impact, summarized in the Specific Cases Table below. In each of the cases of marginal impact, there was no tangible change caused by the European Union as the

⁴⁶³ Torres, J. (2009). Letter to Angelos Pangratis. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2009/romellbroomvohio-govstricklandlett-to-ap-11-2-09/>.

⁴⁶⁴ Everett, G. (2004). Connecticut Board of Pardon and Parole Response. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2004/>.

⁴⁶⁵ Rosen-Molina, M. (2007). Texas Governor Rejects EU Request to End Use of Death Penalty. *Jurist*. Retrieved from <http://jurist.org/paperchase/2007/08/texas-governor-rejects-eu-request-to.php>.

outcome would likely have resulted even in the absence of EU action, with multiple abolitionist advocates, including those directly representing the inmate, seeking commutation of the death sentences and presenting the same facts and arguments.⁴⁶⁶ In the majority of cases, the European Union failed to have any impact on the individual death penalty cases.

Although the European Union's advocacy in individual cases only infrequently had an impact on the individual cases themselves, the European Union's repeated advocacy in combination has been problematic for United States diplomats and affected their behavior. The combined effect of the European Union's repeated advocacy against the death penalty places United States diplomats on the defensive, requiring them to continually respond to foreign criticism of the death penalty instead of advancing United States interests.⁴⁶⁷ As a result, some former diplomats have expressed concern with the extent that "important bilateral meetings with our closest allies — particularly from the European Union, Central and Eastern Europe, and Latin America — were increasingly consumed with answering demarches challenging the death penalty".⁴⁶⁸

Thus, the European Union's repeated combined advocacy against the death penalty has had a considerable impact on the United States because it has had a tangible effect on United States behavior, creating a situation where "instead of focusing on advancing U.S. interests, U.S. diplomats abroad are increasingly called into meetings to answer foreign criticisms of the death penalty."⁴⁶⁹

⁴⁶⁶ See Fireston, D. (2002). Georgia Will Not Execute Mentally Ill Killer. *The New York Times*. Retrieved from <http://www.nytimes.com/2002/02/26/us/georgia-will-not-execute-mentally-ill-killer.html>.

⁴⁶⁷ Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G. Wisner in Support of Respondent, 2004 WL 1636448 p. 23.

⁴⁶⁸ Ibid. p. 9.

⁴⁶⁹ Ibid. p. 23.

SPECIFIC CASES TABLE⁴⁷⁰

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|---------------------------|---------------|
| Virginia v. Douglas Thomas (juvenile) | Demarche with federal Principal Deputy Assistant Secretary and letter to governor of Virginia arguing international law against juvenile death penalty (1998-99) | Persuasion | Executed January 10, 2000 | nil |
| Oklahoma v. Sean Sellars (juvenile) | Demarches at federal and state level arguing international law against juvenile death penalty (1998-99) | Persuasion | Executed February 4, 1999 | nil |
| Texas v. Stan Faulder (VCCR; time on death row) | Letter to governor of Texas arguing violations of VCCR and excessive length of time on death row (1998) | Persuasion | Executed June 17, 1999 | nil |
| Virginia v. Steve Roach (juvenile) | Demarche arguing international law against juvenile death penalty (1999) | Persuasion | Executed January 13, 2000 | nil |
| Texas v. Glen McGuinnis (juvenile) | Letter to governor of Texas arguing international law against juvenile death penalty (2000) | Persuasion | Executed January 25, 2000 | nil |

⁴⁷⁰ Specific cases examined were gathered from the Death Penalty Archive of the European Union Delegation to the United States. Information regarding these cases were analyzed from multiple sources, including the Death Penalty Archive of the European Union Delegation to the United States, The Death Penalty Information Center, the Archives at America.gov, and the Dossier on the Death Penalty from US Embassy in Brussels website at <http://www.uspolicy.be/dossier/death-penalty-united-states-policy-toward-death-penalty-dossier>.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|---|----------------------------|---------------------------|---------------|
| Texas v. Larry Robison (mental disorder) | Demarche arguing international law against death penalty for persons with mental disorders (2000) | Persuasion | Executed January 21, 2000 | nil |
| Virginia v. Douglas Thomas (juvenile) | Demarches arguing international law against juvenile death penalty (1999-2000) | Persuasion | Executed January 10, 2000 | nil |
| Juan Garza (federal moratorium) | Demarche to President Clinton and European Parliament resolution making general arguments against the US death penalty and calling on President Clinton to grant clemency for Garza and impose a moratorium on all federal executions | Persuasion | Executed June 19, 2001 | nil |
| Texas v. Gary Graham (juvenile; possible innocence) | Letters to governor of Texas arguing international law against juvenile death penalty and possible innocence (2000) | Persuasion | Executed June 22, 2000 | nil |
| Texas v. Jessy San Miguel (procedural issues) | Letter to governor of Texas arguing procedural deficiencies (2000) | Persuasion | Executed June 29, 2000 | nil |
| Texas v. Oliver Cruz (mental disorder) | Letter to governor of Texas arguing international law against death penalty for persons with mental disorders (2000) | Persuasion | Executed August 9, 2000 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|---|----------------------------|---|---------------|
| Texas v. John Satterwhite (mental disorder) | Letter to governor of Texas arguing international law against death penalty for persons with mental disorders (2000) | Persuasion | Executed August 16, 2000 | nil |
| Georgia v. Alexander Williams (juvenile; mental disorder) | Letters to governor of Georgia and Georgia pardon board arguing international law against death penalty for juveniles and persons with mental disorders (2000-2002) | Persuasion | Sentence commuted to life without parole | marginal |
| Virginia v. Derek Barnabei (possible innocence; procedural issues) | European Parliament resolution, open letter from President of the European Parliament, and letter to governor of Virginia arguing procedural deficiencies and possible innocence (2000) | Persuasion | Executed September 14, 2000 | nil |
| Texas v. Miguel Flores (VCCR) | Letters to governor of Texas and Texas pardon board arguing violations of VCCR (2000) | Persuasion | Executed November 9, 2000 | nil |
| Texas v. John Penry (mental disorder) | Letters to governor of Texas and Texas pardon board (2000) | Persuasion | Plea agreement to a life sentence for other reasons | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|---|----------------------------|---|---------------|
| Oklahoma v. Wanda Allen, Dion Smallwood, Floyd Medlock, Eddie Trice, Mark Fowler, Billy Fox, Loyd Lafavers, and D. L. Jones (multiple executions scheduled for short time, two of which with mental disorders) | Letters to governor of Oklahoma and Oklahoma pardon board arguing international law against death penalty for persons with mental disorders, noting large number of upcoming executions, and general EU position against the death penalty (2001) | Persuasion | All executed between January 9, 2001 and February 1, 2001 | nil |
| Missouri v. Antonio Richardson (juvenile; mental disorder) | Letters to governor of Missouri and Missouri pardon board arguing international law against death penalty for juveniles and persons with mental disorders (2001) | Persuasion | Sentence reduced through court system for other reasons | nil |
| Nevada v. Thomas Nevius (mental disorder) | Letters to governor of Nevada and Nevada pardon board arguing international law against death penalty for persons with mental disorders (2001) | Persuasion | Clemency granted following <i>Atkins v. Virginia</i> US Supreme Court decision ⁴⁷¹ | nil |
| Illinois v. Gregory Madej (VCCR) | Letter to governor of Illinois arguing violations of VCCR | Persuasion | Sentence commuted for other reasons | nil |

⁴⁷¹ See discussion of European Union impact through *Atkins v. Virginia* in Chapter 5.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|---|----------------------------|------------------------------------|---------------|
| Ohio v. Jay Scott (mental disorder) | Letter to governor of Ohio arguing international law against death penalty for persons with mental disorders (2001) | Persuasion | Executed June 14, 2001 | nil |
| Tennessee v. Philip Workman (moratorium) | Letters to governor of Tennessee and Tennessee pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2001) | Persuasion | Executed May 9, 2007 | nil |
| Oklahoma v. Gerardo Valdez Maltos (VCCR; mental disorder) | Letters to governor of Oklahoma and Oklahoma pardon board arguing international law against death penalty for persons with mental disorders and violations of VCCR (2001) | Persuasion | Sentence reduced for other reasons | nil |
| Texas v. Napoleon Beazley (juvenile) | Memo to US Department of State and letters to governor of Texas and Texas pardon board arguing international law against juvenile death penalty (2001-2002) | Persuasion | Executed May 28, 2002 | nil |
| Texas v. Gerald Mitchell (juvenile) | Letters to governor of Texas and Texas pardon board arguing international law against juvenile death penalty (2001) | Persuasion | Executed October 22, 2001 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|--|---------------|
| New Mexico v. Terry Clark (moratorium) | Letter to governor of New Mexico making general arguments against the US death penalty and for a continued moratorium on executions (2001) | Persuasion | Executed November 6, 2001 | nil |
| Georgia v. José Martínez High (juvenile; mental disorder) | Letters to governor of Georgia and Georgia pardon board arguing international law against death penalty for juveniles and persons with mental disorders (2001) | Persuasion | Executed November 6, 2001 | nil |
| Georgia v. Tracy Housel (mental disorder) | Letters to governor of Georgia and Georgia pardon board arguing international law against death penalty for persons with mental disorders (2002) | Persuasion | Executed March 12, 2002 | nil |
| Tennessee v. Abu-Ali Abdur'Rahman (mental disorder) | OSCE statement and letters to governor of Tennessee and Tennessee pardon board arguing international law against death penalty for persons with mental disorders (2002-2003) | Persuasion | On death row | nil |
| Missouri v. Christopher Simmons (juvenile; mental disorder) | Letter to governor of Missouri arguing international law against death penalty for juveniles and persons with mental disorders (2002) | Persuasion | US Supreme Court holds juvenile death penalty unconstitutional in <i>Roper v. Simmons</i> ⁴⁷² | nil |

⁴⁷² But see discussion of European Union impact in United States courts through *Roper v. Simmons* in Chapter 5.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|---|----------------------------|---|---------------|
| Texas v. T. J. Jones (juvenile) | Letter to governor of Texas arguing international law against juvenile death penalty (2002) | Persuasion | Executed August 8, 2002 | nil |
| Texas v. Javier Suarez Medina (VCCR) | Letters to Texas governor and Texas pardon board arguing violations of VCCR (2002) | Persuasion | Executed August 14, 2002 | nil |
| Texas v. Toronto Patterson (juvenile) | Letters to governor of Texas and Texas pardon board arguing international law against juvenile death penalty (2002) | Persuasion | Executed August 28, 2002 | nil |
| Kentucky v. Kevin Stanford (juvenile) | Letter to governor of Kentucky arguing international law against juvenile death penalty (2002) | Persuasion | Sentence reduced to life without parole | marginal |
| Texas v. James Colburn (mental disorder) | Letters to governor of Texas and Texas pardon board arguing international law against death penalty for persons with mental disorders (2002-2003) | Persuasion | Executed March 26, 2003 | nil |
| Georgia v. James Brown (mental disorder) | Letters to governor of Georgia and Georgia pardon board arguing international law against death penalty for persons with mental disorders (2002-2003) | Persuasion | Executed November 4, 2003 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|---|----------------------------|---|---------------|
| Mississippi v. Ronald Foster (juvenile) | Letter to governor of Mississippi arguing international law against juvenile death penalty (2002) | Persuasion | Given life sentence following <i>Roper v. Simmons</i> US Supreme Court decision ⁴⁷³ | nil |
| Texas v. John Elliott (possible innocence and pending procedures) | Letter to governor of Texas and Texas pardon board arguing possible innocence and noting pending procedures in Inter-American Commission on Human Rights (2003) | Persuasion | Executed February 4, 2003 | nil |
| Oklahoma v. Scott Hain (juvenile) | Letters to governor of Oklahoma and Oklahoma pardon board arguing international law against juvenile death penalty (2003) | Persuasion | Executed April 3, 2003 | nil |
| Virginia v. Percy Walton (mental disorder) | OSCE statements and letters to governor of Virginia arguing international law against death penalty for persons with mental disorders (2003-2008) | Persuasion | Sentence reduced to life without parole based on <i>Atkins v. Virginia</i> and <i>Roper v. Simmons</i> ⁴⁷⁴ | nil |
| Alabama v. Glenn Holladay (mental disorder) | Letter to governor of Alabama arguing international law against death penalty for persons with mental disorders (2003) | Persuasion | Sentence reduced following <i>Atkins v. Virginia</i> ⁴⁷⁵ | nil |

⁴⁷³ See discussion of European Union impact through *Roper v. Simmons* in chapter 5.

⁴⁷⁴ See discussion of European Union impact through *Roper v. Simmons* and *Atkins v. Virginia* in Chapter 5.

⁴⁷⁵ See discussion of European Union impact through *Atkins v. Virginia* in Chapter 5.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|---|---------------|
| Oklahoma v. Kenneth Charm (mental disorder) | OSCE statement arguing international law against death penalty for persons with mental disorders (2003) | Persuasion | Executed June 5, 2003 | nil |
| Oklahoma vs. Hung Thanh Le (VCCR) | Letters to governor of Oklahoma and Oklahoma pardon board arguing violations of VCCR | Persuasion | Executed March 23, 2004 | nil |
| Arkansas v. Charles Singleton (mental disorder) | Letters to governor of Arkansas and Arkansas pardon board arguing international law against death penalty for persons with mental disorders (2003) | Persuasion | Executed January 6, 2004 | nil |
| Texas v. Scott Panetti (mental disorder) | Letters to governor of Texas and Texas pardon board arguing international law against death penalty for persons with mental disorders (2004) | Persuasion | On death row | nil |
| Texas v. Kelsley Patterson (mental disorder) | OSCE statements arguing international law against death penalty for persons with mental disorders (2004) | Persuasion | Executed May 18, 2004 | nil |
| Oklahoma v. Osvaldo Torres (VCCR) | OSCE statement arguing violations of VCCR | Persuasion | Sentence reduced to life without parole | marginal |
| Texas v. Jose Medellin (VCCR) | Letters to governor of Texas arguing violations of VCCR | Persuasion | Executed August 5, 2008 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|--|----------------------------|---------------------------------------|---------------|
| Pennsylvania v. George Banks (mental disorder) | Letters to governor of Pennsylvania and Pennsylvania pardon board arguing international law against death penalty for persons with mental disorders (2004) | Persuasion | Execution suspended through courts | nil |
| North Carolina v. Charles Walker (mental disorder) | Letter to governor of North Carolina arguing international law against death penalty for persons with mental disorders (2004) | Persuasion | Sentence reduced through court system | nil |
| Connecticut v. Michael Ross (moratorium) | OSCE statement and letters to governor of Connecticut and Connecticut pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2004) | Persuasion | Executed May 13, 2005 | nil |
| Indiana v. Bill Benefiel (mental disorder) | OSCE statement and letters to governor of Indiana and Indiana pardon board arguing international law against death penalty for persons with mental disorders (2005) | Persuasion | Executed April 21, 2005 | nil |
| Indiana v. Alan Matheney (mental disorder) | Letter to Indiana pardon board arguing international law against death penalty for persons with mental disorders (2005) | Persuasion | Executed September 28, 2005 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|---------------------------------------|---------------|
| Texas v. Steven Staley (mental disorder) | OSCE statement and letters to governor of Texas and Texas pardon board arguing international law against death penalty for persons with mental disorders (2006) | Persuasion | Sentence reduced through court system | nil |
| Tennessee v. Sedley Alley (moratorium) | OSCE statement making general arguments against the US death penalty and for a continued moratorium on executions (2006) | Persuasion | Executed June 28, 2006 | nil |
| Texas v. Angel Resendiz (mental disorder) | OSCE statement and letters to governor of Texas and Texas pardon board arguing international law against death penalty for persons with mental disorders (2006) | Persuasion | Executed June 27, 2006 | nil |
| Tennessee v. Paul Reid (mental disorder) | OSCE statement and letters to governor of Tennessee and Tennessee pardon board arguing international law against death penalty for persons with mental disorders (2006) | Persuasion | Died from illness | nil |
| Montana v. David Dawson (moratorium) | OSCE statement and letters to governor of Montana and Montana pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2006) | Persuasion | Executed August 11, 2006 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|--|----------------------------|--|---------------|
| South Dakota v. Elijah Page (moratorium) | OSCE statements and letters to governor of South Dakota and South Dakota pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2006-2007) | Persuasion | Executed July 11, 2007 | nil |
| Indiana v. Norman Timberlake (mental disorder) | Letters to governor of Indiana and Indiana pardon board arguing international law against death penalty for persons with mental disorders (2007) | Persuasion | Execution stayed by courts, died in prison of natural causes | nil |
| Texas v. James Clark (mental disorder) | Letter to Texas pardons board arguing international law against death penalty for persons with mental disorders (2007) | Persuasion | Executed April 11, 2007 | nil |
| Nebraska v. Carey Moore (moratorium) | OSCE statement and letter to governor of Nebraska making general arguments against the US death penalty and for a continued moratorium on executions (2007) | Persuasion | Execution stayed through courts | nil |
| Arizona v. Robert Comer (moratorium) | OSCE statement and letters to governor of Arizona and Arizona pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2007) | Persuasion | Executed May 22, 2007 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|---|----------------------------|---|---------------|
| Texas v. Kenneth Foster (seriousness of crime) | Letter to Texas pardon board arguing capital punishment limited to most serious crimes under international law (2007) | Persuasion | Sentence commuted for procedural reasons | nil |
| Kentucky v. Ralph Baze (moratorium) | Declaration and letter to governor of Kentucky making general arguments against the US death penalty and for a continued moratorium on executions (2007-2008) | Persuasion | Stayed execution through courts, still on death row | nil |
| Georgia v. William Lynd (moratorium) | Letter to Georgia pardon board making general arguments against the US death penalty and for a continued moratorium on executions (2008) | Persuasion | Executed May 6, 2008 | nil |
| Mississippi v. Earl Berry (mental disorder) | Letter to governor of Mississippi arguing international law against death penalty for persons with mental disorders (2008) | Persuasion | Executed May 21, 2008 | nil |
| Virginia v. Kevin Green (mental disorder) | Letter to governor of Virginia arguing international law against death penalty for persons with mental disorders (2008) | Persuasion | Executed May 27, 2008 | nil |
| Alabama v. Thomas Arthur (moratorium) | Letter to governor of Alabama making general arguments against the US death penalty and for a continued moratorium on executions (2008) | Persuasion | Execution stayed by courts for other reasons | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|-----------------------------|---------------|
| Georgia v. Jack Alderman (possible innocence) | Letter to Georgia pardon board arguing possible innocence (2008) | Persuasion | Executed September 16, 2008 | nil |
| Ohio v. Richard Coe (moratorium) | Letter to governor of Ohio making general arguments against the US death penalty and for a continued moratorium on executions (2008) | Persuasion | Executed October 14, 2008 | nil |
| Georgia v. Troy Davis (possible innocence) | Declarations, OSCE statements, letters to governor of Georgia and Georgia pardon board, European Parliament President statement, European Parliament resolution, and letter from European Parliament to governor of Georgia arguing possible innocence (2008-2009) | Persuasion | Executed September 21, 2011 | nil |
| Texas v. Elkie Taylor (mental disorder) | Letter to governor of Texas arguing international law against death penalty for persons with mental disorders (2008) | Persuasion | Executed November 6, 2008 | nil |
| Texas v. Curtis Moore (mental disorder) | Letter to governor of Texas arguing international law against death penalty for persons with mental disorders (2008) | Persuasion | Executed January 14, 2009 | nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--|---|----------------------------|-----------------------------|---------------|
| Virginia v. Edward Bell (VCCR; mental disorder) | Letter to governor of Virginia arguing violations of VCCR and international law against death penalty for persons with mental disorders (2009) | Persuasion | Executed February 19, 2009 | nil |
| Washington v. Cal Brown (moratorium) | Letters to governor of Washington making general arguments against the US death penalty and for a continued moratorium on executions (2009-2010) | Persuasion | Executed September 10, 2010 | nil |
| Missouri v. Dennis Skillicorn (moratorium; seriousness of crime) | Letters to governor of Missouri and Missouri pardon board making general arguments against the US death penalty, for a continued moratorium on executions, and arguing capital punishment limited to most serious crimes under international law (2009) | Persuasion | Executed May 20, 2009 | nil |
| Ohio v. Romell Broom (problems with first execution attempt) | OSCE statement and letter to governor of Ohio arguing second execution attempt would be cruel and inhuman treatment (2009) | Persuasion | On death row | nil |
| Louisiana v. Gerald Bordelon (moratorium) | OSCE statement and letter to governor of Louisiana making general arguments against the US death penalty and for a continued moratorium on executions (2009) | Persuasion | Executed January 7, 2010 | nil |

3.6 The European Union's Impact on Consular Access Rights

Although consular access rights under the Vienna Convention on Consular Relations⁴⁷⁶ (VCCR) are not limited to foreign nationals accused of capital crimes, these rights have been of particular concern when the death penalty, as the most severe form of punishment in the United States, is at issue. Indeed, the “Death Penalty” section on the website of the European Union’s delegation to the United States specifically includes briefs and documents involving consular access rights under the VCCR as part of the European Union’s advocacy against the death penalty. The European Union’s focus on consular access rights in its death penalty advocacy is understandable given the (at a minimum) 135 foreign nationals representing 37 different nationalities, including six EU nationals from six different member states, under sentence of death in the US as of July 2012.⁴⁷⁷

Germany, Paraguay, and Mexico each initiated separate cases before the International Court of Justice (ICJ) involving violations of the VCCR for persons sentenced to death in the United States.⁴⁷⁸ These cases generally revolve around VCCR Article 36, which provides detained or arrested foreign nationals with the right to contact the sending state consul and to be informed of their consular rights. VCCR Article 36(1) states:

“(a) consular officers 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 communications with and access to consular officers of the sending State;

⁴⁷⁶ United Nations (1963), Vienna Convention on Consular Relations. Retrieved from http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

⁴⁷⁷ Warren, M. (2012). Foreign Nationals and the Death Penalty in the US. *Death Penalty Information Center*. Retrieved from <http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us#background>.

⁴⁷⁸ Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 I.C.J. 248 (9 April 1998); LaGrand Case (Germany v. U.S.), 2001 I.C.J. 466 (27 June 2001); Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (31 March 2004).

(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 be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers 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 judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”⁴⁷⁹

Article I of the Optional Protocol provides the ICJ with jurisdiction over disputes concerning the interpretation or application of the VCCR. The first case was brought by Paraguay in April 1998, which was withdrawn after the individual involved was executed despite a provisional measure from the ICJ for the United States to take all measures available to ensure that the execution did not occur until after a final decision by the ICJ.⁴⁸⁰

The second case was initiated by Germany in March 1999 regarding two brothers named LaGrand. At the time of Germany’s application, one of the brothers had already

⁴⁷⁹ United Nations (1963), Vienna Convention on Consular Relations. Retrieved from http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

⁴⁸⁰ Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 I.C.J. 248, 258 (9 April 1998).

been executed and the other brother's execution was approaching.⁴⁸¹ As happened with Paraguay, despite a provisional measure by the ICJ to delay the execution until after a ruling by the ICJ, the other LaGrand brother was also executed.⁴⁸² Germany, however, continued its case. The ICJ concluded that the United States had breached its obligations under the VCCR and that, when German nationals are "sentenced to severe penalties" and the United States has failed to comply with Article 36, the United States is obligated to provide review and reconsideration of the conviction and sentence by taking account of the VCCR violation.⁴⁸³

In the Case Concerning Avena and Other Mexican Nationals, Mexico contended that the United States failed to inform 54 Mexican nationals on death row of their consular rights in violation of Article 36 of the VCCR, that the United States had failed to provide meaningful review and reconsideration of the convictions and sentences due to the VCCR violations, and that judicial procedural default rules should not be applied to prevent review and reconsideration by the United States.⁴⁸⁴ Responding to Mexico's allegations, the United States conceded that, except for two individuals, none of the Mexican nationals had been informed of their consular rights, but that review of the convictions and sentences based on the VCCR violations could occur during the executive clemency process when procedural default rules prevent review through judicial proceedings. On March 31, 2004, the ICJ ruled that, although the *LaGrand* case left the means of review and reconsideration up to the United States, the judicial process is the suitable forum for review and reconsideration of the convictions and sentences and that the clemency process by itself is not sufficient.⁴⁸⁵

On February 28, 2005, President George W. Bush issued a Memorandum to the Attorney General indicating that the international obligations under the ICJ's *Avena*

⁴⁸¹ Quigley, J. (2009). The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences. *Duke Journal of Comparative & International Law*. 19, p. 269.

⁴⁸² Ibid. p. 269-270.

⁴⁸³ *LaGrand Case* (Germany v. U.S.), 2001 I.C.J. 515-16 (27 June 2001).

⁴⁸⁴ *Case Concerning Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12, 19, 55 (31 March 2004).

⁴⁸⁵ *Case Concerning Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12, 66 (31 March 2004).

judgment would be discharged “by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision”.⁴⁸⁶

These ICJ cases ultimately led to the United States withdrawal from the Optional Protocol.⁴⁸⁷ Reisman and Arsanjani suggest that the United States withdrawal from the Optional Protocol is linked to a concern that the VCCR was being used as a method for seeking abolition of the death penalty.⁴⁸⁸ Reisman and Arsanjani explained:

“[T]he essential objective of VCCR Article 36 was fulfilled; exercises of jurisdiction could not likely achieve much more and, if initiated, would probably be covert efforts at securing abolition of the death penalty. It appears likely that the United States felt that states and, increasingly, non-governmental organizations committed to abolitionism, would be able to continue to bring cases allegedly arising under Article 36 of the VCCR to an international tribunal and could well prove to be increasingly abolitionist in its orientation. Given the federal structure of the American system, the proliferation of these cases could have presented serious, if not insoluble domestic legal and political problems for any US government. Hence the decision to preempt the problem by denouncing the Optional Protocol.⁴⁸⁹

⁴⁸⁶ Death Penalty Information Center (2005). President Bush Orders Courts to Give Foreign Nationals on Death Row Further Review. Retrieved from <http://www.deathpenaltyinfo.org/node/799>.

⁴⁸⁷ Quigley, J. (2009). The United States' Withdrawal from International Court of Justice Jurisdiction in Consular Cases: Reasons and Consequences. *Duke Journal of Comparative & International Law*. 19, p. 288; Reisman, M. and Arsanjani, M. (2007). No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations. In M. Kohen (Ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law*. Leiden: Liber Amicorum Lucius Caflisch. Reisman et al., 2007, p. 925).

⁴⁸⁸ Reisman, M. and Arsanjani, M. (2007). No Exit? A Preliminary Examination of the Legal Consequences of United States' Notification of Withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations. In M. Kohen (Ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law*. Leiden: Liber Amicorum Lucius Caflisch. Reisman et al., 2007, p. 925).

⁴⁸⁹ Ibid.

More negative ICJ rulings could pose difficult legal and political problems for the United States government due to its federal structure and separation of powers, with the federal government potentially needing the cooperation of judiciaries and state governments, which have their own limitations and views on how to proceed. Indeed, despite President Bush's memorandum placing the burden on state courts to give effect to the ICJ *Avena* judgment, the burden of compliance with that judgment has shifted amongst the branches and levels of government. The European Union's death penalty advocacy concerning consular access rights has correspondingly been directed at different branches and levels of government, including United States courts through amicus curiae briefs.

Although the European Union had no impact on United States court decisions on this issue (as discussed later in Chapter 5), the European Union has nonetheless had a marginal impact on US interests. Based in part on pressure from the European Union, President Barack Obama's administration expressed its support for the Consular Notification Compliance Act of 2011 (CNCA), which was proposed federal legislation that sought to comply with VCCR Article 36 and provided federal courts with jurisdiction to review claims of Article 36 violations in capital cases.⁴⁹⁰

Likewise, in the US amicus curiae brief in *Leal Garcia v. Texas*, involving another individual named in the ICJ's *Avena* judgment, the United States Solicitor General supported a stay of Leal Garcia's execution due to the then pending CNCA. The Solicitor General explained, among other reasons, that Leal Garcia's execution without complying with the United States' international obligations "would also harm relations between the United States and other countries and regional and multilateral institutions," citing as support the European Union's and other nations "repeated inquiries" and letters to the United States and former Texas Governor Rick Perry.⁴⁹¹ While the European Union's efforts were enough to help garner some support in the federal executive branch, the efforts did not result in changes to the way in which VCCR violations in capital cases

⁴⁹⁰ Brief for the United States as Amicus Curiae in Support of Application for a Stay. Appendix p. 11a. Retrieved from <http://www.humbertoleal.org>; Consular Notification Compliance Act of 2011, S.1194, 112th Cong.

⁴⁹¹ Brief for the United States as Amicus Curiae in Support of Application for a Stay. p. 28-29. Retrieved from <http://www.humbertoleal.org>.

were handled. The CNCA was not passed, the United States Supreme Court denied the application for stay based on the then pending legislation,⁴⁹² and Leal Garcia was executed on July 7, 2011.

3.7 Overall Results and Conclusion

In the European Union’s advocacy against the death penalty directed towards the United States federal and state executive and legislative branches, the European Union has had a significant impact on US lethal injections and extraditions and a marginal impact on abolition of the death penalty in individual states consular access rights, and United Nations resolutions calling for a moratorium on the death penalty. In addition, the European Union has had a considerable impact with regard to its combined efforts in individual death penalty cases. The European Union’s impact on the US federal and state executive and legislative branches is summarized in the following table.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--------------------|--|----------------------------|---|---------------|
| Lethal injection | EU restricts export of drugs used in lethal injection | Coercion | US states change lethal injection protocols, seek alternative drugs, and delay executions | Significant |
| Extradition | Extradition where there is a risk of death penalty banned under ECtHR case law and EU Charter of Fundamental Rights; EU seeks provision in EU-US extradition treaty requiring non-application of death penalty | Persuasion; Coercion | US and EU enter extradition treaty with provision requiring assurances regarding non-application of death penalty | Significant |

⁴⁹² *Leal Garcia v. Texas*, 131 S.Ct. 2866, 2868 (2011).

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|----------------------------|---|-------------------------------|--|---------------|
| US death penalty generally | Death penalty abolished throughout EU | Setting an example | US increasingly isolated on world stage; confirming role in abolition of death penalty in individual US states | Marginal |
| Consular access rights | EU seeks enforcement of consular access rights in US death penalty cases | Persuasion | US federal administration supportive of (failed) attempts to comply with VCCR obligations | Marginal |
| US death penalty generally | EU's combined repeated pressure on US to abolish the death penalty ⁴⁹³ | Persuasion | Federal diplomats consumed with responding to repeated challenges to death penalty | Considerable |
| Death penalty world-wide | EU sponsors UN resolutions calling for world-wide moratorium on the death penalty | Persuasion (of third nations) | Passage of resolutions in UN, increasing isolation of US on world stage. | Marginal |

Although the European Union does not often use coercion in its relations with the United States,⁴⁹⁴ when the European Union has used coercion in its death penalty advocacy it has had a significant impact. By refusing to extradite persons without assurances of non-application of the death penalty, the United States is forced to make such assurances or forego extradition of persons, as now memorialized in an extradition treaty with the European Union. By prohibiting the export of drugs used in lethal

⁴⁹³ For separate impact in individual cases, see Specific Cases Table.

⁴⁹⁴ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 314.

injections in the United States, states have had to delay executions due to diminishing supplies of drugs used in their lethal injection cocktails, alter their lethal injection protocols, and seek alternative drugs that are not almost exclusively available within the European Union. These results were primarily achieved through European Commission regulations, bilateral treaties, as well as the signing of the European Union Charter of Fundamental Rights.

The European Union's example has also had a marginal impact on the abolition of the death penalty in individual states as well as isolation of the United States in the world on the issue. While previous scholarship has recognized some broadly similar trends between Europe and the United States with regard to the death penalty,⁴⁹⁵ this research has found strong evidentiary support, particularly from the governors and legislators making the decisions to abolish the death penalty, that the European Union's example has only played a marginal role in the abolition of the death penalty in individual states.

Persuasion, when taken by itself in separate specific cases, often resulted in the lowest levels of impact in the European Union's advocacy towards the United States. While the European Union helped persuade enough countries to support United Nations resolutions calling for a moratorium on the death penalty, the passage of the resolutions did not affect the US position on the matter, although it does add to the isolation of the United States on the death penalty. With regard to VCCR violations in death penalty cases, the European Union was able to help convince some United States officials to attempt to comply with the VCCR, but those official's efforts failed. The European Union's repeated advocacy has consumed United States diplomats' time, requiring them to continually focus on the United States position on the death penalty. Finally, the European Union's advocacy for commutation of sentences in specific cases has frequently resulted in nil impact, with only a handful of cases in which the European Union had a marginal impact. The European Union's instruments on these issues have primarily included sponsorship of United Nations resolutions, public statements and declarations, as well as direct communications with United States officials.

⁴⁹⁵ Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55.

In sum, while the European Union has made numerous efforts at persuading the United States to join the world in abolishing the death penalty and provided its own example, these efforts have often had the least levels of impact. In contrast, the European Union's uses of coercion have had a significant impact on the United States executive and legislative branches with regard to the death penalty. The European Union has also had the most impact through instruments that require internal changes, commission regulations restricting the export of goods from the European Union, and the signing of the extradition treaties and European Union Charter of Fundamental Rights.

4. THE EUROPEAN UNION'S IMPACT ON THE WAR ON TERROR IN THE EXECUTIVE AND LEGISLATIVE BRANCHES

With regard to the War on Terror, the European Union has presented much less of a consistent united front against the United States with regard to human rights issues than with the death penalty. During the War on Terror, the United States has engaged in programs and activities that have been problematic from a human rights perspective. For example, the United States has been criticized by human rights groups for arbitrary detention of persons at Guantanamo Bay and secret black sites, in which the detainees have often been denied due process of law and access to courts for an indefinite period of detention at such facilities. The United States has also been criticized for the torture and ill treatment of suspects in the War on Terror, which not only includes some of the prisoner abuse scandals such as those at Baghram, Abu Ghraib, and Guantanamo Bay, but also a policy in which the CIA was utilizing “highly coercive interrogation techniques” sanctioned by some of the highest levels under the Bush administration, including sleep deprivation, forced nudity, and water boarding.⁴⁹⁶

The CIA's extraordinary rendition program combines some of these human rights problems into a single program while taking it a step further by adding secret abductions of terrorist suspects in which the persons were deprived of any contact with the outside world, including family, attorneys, and human rights organizations. Under the extraordinary rendition program, terrorist suspects in another country would be arrested or abducted by the CIA, often forcefully or violently, and transferred to places where they were often subject to torture for the purpose of obtaining information about potential terrorist activities.⁴⁹⁷ In addition to these practices, the United States has been criticized

⁴⁹⁶ Bradbury, S. (2005). Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency. U.S. Department of Justice. Retrieved from [http://www.therenditionproject.org.uk/pdf/PDF%2016%20\[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2016%20[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf); Mazzetti, M. (2009). Interrogation Memos Detail Harsh Tactics by the C.I.A. *The New York Times*. Retrieved from http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all&_r=0.

⁴⁹⁷ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html; Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30; Fava, P. (2007), European Parliament, Report

for using drones to arbitrarily kill terrorist suspects away from the battlefield, thus, in addition to potential state sovereignty issues, depriving those persons of any legal protections before being killed outside the zone of battle.

This chapter examines the European Union's impact on these human rights issues within the War on Terror in the United States, specifically with regard to the political branches of the United States government. With regard to the War on Terror, the United States federal administration has been the focal point for European Union foreign policy activity, but the United States Congress has also been relevant in some regards. The European Union's impact on the War on Terror in United States courts is discussed separately in Chapter 6.

4.1 The European Union's Impact Through Setting an Example

Unlike the clear and consistent example provided by the European Union with regard to the death penalty, the example of the European Union and its member states with regard to the War on Terror has been much less coherent. Often the United States has taken the lead in this area, and as a result the European Union's actions in this area could to some degree be characterized as more of a lack of an example. In some instances the United States sought and obtained support from within Europe, whether in the form of intelligence or more direct involvement in supporting United States counter-terrorism programs, allowing the United States to conduct problematic activities such as extraordinary renditions, operation of black sites, drone strikes, and the capture of alleged terrorist suspects that were subject to harsh interrogation techniques and transferred to Guantanamo Bay and other sites where they were deprived of due process and other legal protections. As explained by Dworkin, "So far, Europe has tended to let the United

(on Extraordinary Rendition), A6-0020/2007; Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006.

States take the initiative, criticizing American actions without offering a detailed alternative of its own.”⁴⁹⁸

Unlike with the death penalty, the United States often took the lead in providing an example with regard to human rights in the War on Terror. Less than a year after the September 11, 2001 attacks with the enactment of Council Framework Decision of 13 June 2002 on combating terrorism, the European Union did provide for a relatively broad definition of terrorism for member states to include in their national legislation.⁴⁹⁹ It was, however, the United States that pressured the European Union to create a framework law on terrorism reflective of some anti-terrorism legislation in the United States.⁵⁰⁰

This framework decision only broadly provided that “Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.”⁵⁰¹ It also provided that “This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles”.⁵⁰²

Some of the resulting themes of anti-terrorism laws in European Union member states reflected some of those in the United States.⁵⁰³ For example, the Anti-Terrorism, Crime and Security Act 2001 passed by the United Kingdom allowed for indefinite detention of terrorist suspects under some circumstances.⁵⁰⁴ The United Kingdom’s system of indefinitely detaining terrorist suspects was overturned by its courts.⁵⁰⁵ Italy,

⁴⁹⁸ Dworkin, A. (2009). End of the War on Terror?: What Next? European Council on Foreign Relations. Retrieved from http://www.ecfr.eu/article/commentary_counter_terrorism_guantanamo_eu_us_dworkin.

⁴⁹⁹ Official Journal L 164 , 22/06/2002 P. 0003 – 0007; Cohn, M. (2004). Spain, EU and US: War on Terror or War on Liberties. *Jurist*. Retrieved from jurist.org/forum/cohn2.php.

⁵⁰⁰ Official Journal L 164 , 22/06/2002 P. 0003 – 0007.

⁵⁰¹ Ibid.

⁵⁰² Ibid.

⁵⁰³ Cohn, M. (2004). Spain, EU and US: War on Terror or War on Liberties. *Jurist*. Retrieved from jurist.org/forum/cohn2.php.

⁵⁰⁴ Ibid.; Anti-Terrorism, Crime and Security Act 2001. Chapter 24. Retrieved from http://www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga_20010024_en.pdf.

⁵⁰⁵ Dworkin, A. (2009). Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 3.

Germany, and Belgium also passed anti-terrorism legislation.⁵⁰⁶ In protest, hundreds of lawyers signed a statement claiming “that the European framework decision threatens democratic rights.”⁵⁰⁷

However, there was still some distinction in the way the United States and the European Union defined terrorism, with the European Union defining it as a crime and the United States viewing terrorism “as an act of war” during the 2000s.⁵⁰⁸ The previous experience with internal domestic terrorists have allowed some European Union member states to deal with suspected terrorists through their regular criminal justice systems.⁵⁰⁹ As such, it was not always viewed as necessary to resort to military models for dealing with terrorists as the United States has done.⁵¹⁰

One of the main differences between the War on Terror under the Bush administration in the United States and counterterrorism within European Union member states was the US view that fighting terrorism requires the government to put aside normal rules with the War on Terror taking place “outside the conventional rules and relationships that define international and domestic society.”⁵¹¹ This led to claims that the United States was responsible for arbitrary detention, extraordinary rendition, and torture and ill treatment of detainees.⁵¹² During the 2000s, “While President George W. Bush has framed the conflict as a ‘war,’ a designation which has been used to justify the indefinite detention of suspected enemies, Europe prefers to see the conflict in terms of a criminal matter.”⁵¹³ These somewhat different approaches to dealing with terrorism

⁵⁰⁶ Cohn, M. (2004). Spain, EU and US: War on Terror or War on Liberties. *Jurist*. Retrieved from jurist.org/forum/cohn2.php.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Dworkin, A. (2009). Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 4.

⁵¹⁰ Ibid.

⁵¹¹ Ibid. p. 3; Rice, C. (2005). Full Text: Rice Defends US Policy. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/4500630.stm>.

⁵¹² Dworkin, A. (2009). Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 3;

⁵¹³ O’Neill, J. (2007). America and its European Allies in the War on Terror. Columbia Law School. Retrieved from https://www.law.columbia.edu/media_inquiries/news_events/2007/October07/waxman; see Bush, G.W. (2001). President Bush Addresses the Nation. Retrieved from http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html.

reflects the United States experiences with hostilities, where in the past the United States has sometimes emerged stronger afterwards, and that the United States was in some ways more willing to take on a global war than Europe during the 2000s.⁵¹⁴

At least initially, Spain was one of the handful of European Union member states that supported the United States in the Iraq war and War on Terror.⁵¹⁵ Spain's motivation in doing so may be related to a desire to place its fight against ETA within the framework of the War on Terror.⁵¹⁶ While there was some support for the United States War on Terror in earlier years, after terrorist attacks in Spain there was a feeling that further supporting the United States War on Terror would make things worse because Al Qaeda claimed that the attacks were a response to Spain's collaboration with the United States.⁵¹⁷

Nonetheless, after the Madrid bombings, the United States and the European Union jointly issued the EU-US Declaration on Combating Terrorism, which only briefly referred to the importance of respecting human rights and the rule of law and focused more on enhanced practical cooperation.⁵¹⁸ This joint declaration to some degree reflects the European Union's own struggle with dealing with terrorism, the United States, and concerns for human rights.

Overtime, there has been increasing evidence that, despite the claimed values within Europe, European Union member states have cooperated with United States counter-terrorism efforts that conflict with such values, suggesting that there is "a gap between official rhetoric and covert practice."⁵¹⁹ After the September 11, 2001 attacks, there was a strong intelligence sharing relationship between the European Union and

⁵¹⁴ O'Neill, J. (2007). America and its European Allies in the War on Terror. Columbia Law School. Retrieved from https://www.law.columbia.edu/media_inquiries/news_events/2007/October07/waxman.

⁵¹⁵ Cohn, M. (2004). Spain, EU and US: War on Terror or War on Liberties. *Jurist*. Retrieved from jurist.org/forum/cohn2.php.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Council of the European Union (2004). EU-U.S. Declaration on Combating Terrorism. 10760/04. Retrieved from http://www.consilium.europa.eu/uedocs/cmsUpload/10760EU_US26.06.04.pdf; Dworkin, A. (2009). Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 10.

⁵¹⁹ Dworkin, A. (2009). Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 2.

United States.⁵²⁰ Investigations have revealed that some European Union member states cooperated to varying degrees with the United States extraordinary rendition program, including by the United Kingdom and Spain.⁵²¹

In some instances, the United States did not necessarily make clear all the circumstances under which interrogation and detention was taking place with the European governments.⁵²² Nonetheless, involvement by officials in European governments, including intelligence sharing, joint interrogations, and granting of overflight rights have been controversial because of the legal and moral issues raised with regard to human rights issues in the United States extraordinary rendition program.⁵²³ To some degree, the support received by some European Union member states “can be understood as implicitly condoning such practices.”⁵²⁴

At the request of the United States, European states helped the CIA carry out its extraordinary rendition programs through help with the kidnappings/abductions and hosting CIA black sites where interrogations involved the torture or ill treatment of detainees.⁵²⁵ The CIA needed this support so that it could secretly abduct terrorist suspects, utilize European airports for the extraordinary rendition flights, and utilize the secret facilities for interrogation.⁵²⁶

It was the active participation by multiple foreign governments, including candidate and member states of the European Union, that made the CIA’s extraordinary rendition and interrogation programs possible.⁵²⁷ As many as 17 candidate or member states of the European Union out of at least 54 governments world-wide cooperated in

⁵²⁰ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

⁵²¹ Dworkin, A. (2009). Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 3.

⁵²² Ibid.

⁵²³ Ibid.

⁵²⁴ Ibid.

⁵²⁵ Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006; Nougayrede, N. (2014). CIA Torture Report: Europe Must Come Clean About Its Own Complicity. *The Guardian*. Retrieved from <http://www.theguardian.com/commentisfree/2014/dec/09/cia-torture-report-europe-complicity-britain>.

⁵²⁶ Ibid.

⁵²⁷ Ibid.

some way with the CIA in its operations.⁵²⁸ It was with the help of other countries that the CIA was able to place detainees outside of the reach of the law.⁵²⁹

A Council of Europe report concluded that there was sufficient evidence that secret prisons existed in Poland and Romania, calling the “illegal deportation of suspects by CIA kidnapping teams in Europe . . . a massive and systematic violation of human rights.”⁵³⁰ Lithuania, the United Kingdom, Germany, Spain, Portugal, Belgium, Denmark, Finland, Austria, the Czech Republic, Greece, Cyprus, and Croatia have been listed as some of the countries that helped to varying degrees the CIA in its renditions and other activities, with or without knowledge of details of those activities by the United States.⁵³¹

When Barack Obama took over as United States president, American and European views on the fight against terrorism narrowed to some degree, with President Obama attempting to end some of the United States policies that were problematic from a European perspective.⁵³² Nonetheless, there was still not uniform agreement with the United States under the Obama administration, as Obama continued “to assert that the United States is engaged in a global armed conflict with al-Qaeda that includes some legal right to detain or kill enemy suspects worldwide, and to try them before military tribunals in some cases.”⁵³³

In sum, compared to the death penalty, European Union member states have not together provided a clear and consistent approach towards combating terrorism from abroad, allowing the United States to largely take the lead.⁵³⁴ The example (or lack thereof) of the European Union at times came into conflict with its rhetoric. This can be

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006; Nougayrede, N. (2014). CIA Torture Report: Europe Must Come Clean About Its Own Complicity. *The Guardian*. Retrieved from <http://www.theguardian.com/commentisfree/2014/dec/09/cia-torture-report-europe-complicity-britain>.

⁵³¹ Ibid.

⁵³² Dworkin, A. (2009). Beyond the “War on Terror”: Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 2.

⁵³³ Ibid.

⁵³⁴ Ibid.

considered problematic if the European Union wants to have a large degree of influence on the United States in this area.

The European Union's internal division to a large extent allowed the United States to take the lead, rather than the other way around. European Union member states have often struggled to provide a consistent message when it comes to balancing human rights and the fight against terrorism, with European officials often acknowledging that the threat of terrorism presents complex questions without easy answers.⁵³⁵ The general lack of a clear and consistent example by the European Union as a whole, in a context in which some European Union member states criticized the United States while other member states separately provided support to United States counter-terrorism efforts despite questionable practices such as extraordinary rendition, arbitrary detention, drone strikes, and torture and ill treatment, did not have an effect on the United States' interests, laws, policies, or behaviors. Instead, the United States continued its problematic human rights activities while sometimes seeking and obtaining separate support from individual European Union member states. As a result the European Union as a whole's mixed example (or lack thereof) had nil impact on the United States.

4.2 The European Union's Impact on Arbitrary Detention by the United States

The United States has been criticized for arbitrary detention of persons suspected of terrorism, both at Guantanamo Bay and at secret black sites operated by the CIA. While the secretive nature of the black sites means that there is limited information about them, some information has since been acknowledged or exposed. One example of a black site is the one purchased by the CIA from the Polish intelligence service for \$15 million in 2003. Poland did not acknowledge that the black site, nicknamed Quartz, existed until 2012.⁵³⁶ The CIA used the black site to conduct interrogations without

⁵³⁵ Ibid. p. 4.

⁵³⁶ Wiener-Bronner, D. (2014). Inside the CIA's Secret Polish Torture Site. *The Wire*. Retrieved from (<http://www.thewire.com/national/2014/01/poland-cia-secret-prison-black-site/357344/>).

providing access to lawyers and family members, and where a mock execution, waterboarding, and other highly questionable interrogation techniques were used.⁵³⁷

The most notorious example of arbitrary detention has been the United States use of the facilities at Guantanamo Bay on Cuba. The first detainees arrived at Guantanamo Bay on January 11, 2002. Guantanamo was chosen because of the belief that the detainees there would be outside of the reach of United States courts, which, as discussed in Chapter 6, afterwards proved to be untrue.⁵³⁸ Over the years, the United States continued to bring hundreds of people labeled “enemy combatants” to the Guantanamo Bay detention center.⁵³⁹ In the War on Terror, the United States initially held the position that these enemy combatants were not protected by the Geneva Convention(s).⁵⁴⁰

For years, the United States held the detainees at Guantanamo Bay in what has been often described as a “legal black hole,” in which the detainees were generally denied access to lawyers or family members and often deprived of (meaningful) due process protections with regard to their detention.⁵⁴¹ Some of these detainees were claimed to be associated with al Qaeda or the Taliban in Afghanistan.⁵⁴²

The European Union, as well as other international organisations, such as the United Nations and the Council of Europe, other governments, NGOs, media, and scholars, criticized the United States for the arbitrary detention of prisoners, in which detainees were denied rights and protections under the Geneva Conventions and subject to indefinite detention without due process. The European Parliament in particular was critical of the United States in this regard.⁵⁴³ For example, after hearing testimony from legal representatives and family members of European Union citizens being held at

⁵³⁷ Ibid.

⁵³⁸ Daskal, J. (2008). European Parliament: Joint Public Hearing on Guantanamo Bay. Human Rights Watch. Retrieved from <http://www.hrw.org/news/2008/02/28/european-parliament-joint-public-hearing-guantanamo-bay>.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ See, e.g. European Parliament Resolution on the Situation of Prisoners at Guantanamo, P6_TA(2006)0254, 13 June 2006; European Parliament Resolution on the Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners, P6_TA(2006)0316, 6 July 2006.

Guantanamo Bay, in 2003 a group of European Parliamentarians called on the European Union to pressure the United States for better treatment of the prisoners at Guantanamo Bay, including 20 European Union citizens from the United Kingdom, France, and Germany.⁵⁴⁴ The European Parliamentarians wanted to push the United States to provide a jury trial or release the European Union citizens.⁵⁴⁵ They criticized the general silence from the European Union as a whole on the matter.⁵⁴⁶

The European Parliamentarians called for a common front against the United States to try to ensure a fair trial for Guantanamo detainees, with European Parliamentarian Monica Frassoni noting that agreements with the United States on legal cooperation and extradition should be suspended until the United States does so.⁵⁴⁷ Frassoni stated, “The EU has taken similar measures against other countries. Why not against the United States?”⁵⁴⁸ Similarly, in 2006, Elmar Brok, then head of the European Parliament’s Foreign Affairs Committee, called on the United States to close the Guantanamo Bay detention center and replace it with an international tribunal.⁵⁴⁹

The European Parliament has utilized resolutions to condemn the United States for its treatment of detainees at Guantanamo Bay.⁵⁵⁰ In resolutions, the European Parliament has specifically called on the United States federal administration to close Guantanamo Bay, to follow international humanitarian law in the treatment of prisoners, and to provide prisoners with a “fair and public hearing by a competent, independent, impartial tribunal” without delay.⁵⁵¹ The European Parliament was concerned with the deprivation of the right to have their habeas corpus cases heard in regular United States courts as well as United States military regulations allowing prisoners to be sentenced to

⁵⁴⁴ DW (2003). Europe Criticizes Treatment of Prisoners in Guantanamo Bay. *DW*. Retrieved from <http://www.dw.de/europe-criticizes-treatment-of-prisoners-in-guantanamo-bay/a-983486>.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ DW staff (2006). EU Parliamentarians Call for Tribunal to Replace Guantanamo. *DW*. Retrieved from <http://www.dw.de/eu-parliamentarians-call-for-tribunal-to-replace-guantanamo/a-2056535>.

⁵⁵⁰ See, e.g. European Parliament Resolution on the Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners, P6_TA(2006)0316, 6 July 2006; European Parliament Resolution on the Situation of Prisoners at Guantanamo, P6_TA(2006)0254, 13 June 2006.

⁵⁵¹ Ibid.

death by courts-martial at detention centers.⁵⁵² The European Parliament further recognized the need to address terrorism, but expressed that doing so successfully requires respecting human rights and civil liberties.⁵⁵³ The failure to respect human rights and civil liberties could provide additional strength for terrorist organizations to recruit more members.

The European Parliament was not alone in criticizing arbitrary detention at Guantanamo Bay. Under the Bush and Obama Administrations in the United States, there were also dialogues with a variety of international organisations, governments and non-governmental organizations on counterterrorism issues, including regular meetings with foreign ministry legal advisors from the various European Union member states regarding Guantanamo Bay and the application of the Geneva Conventions.⁵⁵⁴ The United States Administration also specifically had bilateral meetings with government officials from the European Union.⁵⁵⁵ The European Union has called on the United States to treat suspected al-Qaeda and Taliban fighters held at Guantanamo Bay as prisoners of war under the Geneva Convention because of the potential human rights problems at Guantanamo Bay.⁵⁵⁶ Former High Representative for Common Foreign and Security Policy Javier Solana, for example, stated, “The Geneva Convention must be applied to everyone who is detained in similar circumstances.”⁵⁵⁷

As mentioned earlier, these criticisms may in part derive from previous experiences within European Union member states. Some member states already had experiences with domestic terrorism and had been able to deal with domestic terrorists through domestic criminal law.⁵⁵⁸ With these experiences, the United States War on

⁵⁵² Ibid.

⁵⁵³ Ibid.

⁵⁵⁴ Bellinger, J. *The War on Terror at Ten Years: Continuity and Insufficiency*. p. 2-3.

⁵⁵⁵ Ibid.

⁵⁵⁶ BBC News (2002). *EU Presses US on Prisoner Rights*. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/1774237.stm>.

⁵⁵⁷ Ibid.

⁵⁵⁸ Bellinger, J. *The War on Terror at Ten Years: Continuity and Insufficiency*. p. 2-3.

Terror was sometimes viewed as excessive as it was not being conducted under the rule of law⁵⁵⁹ and did not provide due process protections.⁵⁶⁰

The United States was thus under pressure from the European Union and multiple other groups to address the problems at Guantanamo Bay.⁵⁶¹ Under former President Bush, the United States generally rejected such criticism and claimed that the detainees were being treated humanely.”⁵⁶² The United States position was that the detainees at Guantanamo were not prisoners of war covered by the Geneva Convention but instead illegal enemy combatants.⁵⁶³ The response under President Obama, however, has been somewhat more receptive. In January 2009 before taking office, Obama stated that closing Guantanamo Bay is important for sending “a message to the world that we are serious about our values.”⁵⁶⁴ Similarly, on May 21, 2009, President Obama expressed disagreement with the Bush administration’s practices during the War on Terror, stating that “they alienate us in the world” and stating that “there is also no question that Guantanamo set back the moral authority that is America’s strongest currency in the world.”⁵⁶⁵ Following President Obama’s May 21, 2009 speech, former Vice President Dick Cheney criticized Obama’s concern for world opinion, stating that Obama’s “administration has found that it’s easy to receive applause in Europe for closing Guantanamo.”⁵⁶⁶

After taking office Obama signed an executive order promising to close the Guantanamo Bay detention facility by January 2010, a goal which has not yet been

⁵⁵⁹ Ibid.

⁵⁶⁰ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html

⁵⁶¹ DW staff (2006). EU Parliamentarians Call for Tribunal to Replace Guantanamo. *DW*. Retrieved from <http://www.dw.de/eu-parliamentarians-call-for-tribunal-to-replace-guantanamo/a-2056535>.

⁵⁶² BBC News (2002). EU Presses US on Prisoner Rights. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/1774237.stm>.

⁵⁶³ Ibid.

⁵⁶⁴ Joyner, J. (2009). Obama to Close Guantanamo Prison, Eventually. Atlantic Council. Retrieved from <http://www.atlanticcouncil.org/blogs/new-atlanticist/obama-to-close-guantanamo-prison-eventually>.

⁵⁶⁵ The White House (2009). Remarks by the President on National Security. Retrieved from <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

⁵⁶⁶ Cheney, R. (2009). Remarks by Richard B. Cheney. American Enterprise Institute. Retrieved from <http://www.aei.org/publication/remarks-by-richard-b-cheney/>; Dworkin, A. (2009). End of the War on Terror?: What Next? European Council on Foreign Relations. Retrieved from http://www.ecfr.eu/article/commentary_counter_terrorism_guantanamo_eu_us_dworkin.

accomplished although plans to do so continue to be in place. This presented an opportunity for the European Union and its member states to help in its closure or at least help reduce the number of detainees held at the facility. In order to close the Guantanamo Bay facilities, it would be necessary to either transfer the detainees or clear them for release.

However, the detainees from countries like Algeria, China, Egypt, Libya, and Uzbekistan could not be returned to those countries even if they were cleared for release from Guantanamo Bay facilities because of the real possibility of torture or persecution in their home countries.⁵⁶⁷ The problem also exists for stateless detainees without a country to return them to.⁵⁶⁸ Many of the detainees have remained at Guantanamo for more than a decade without charge and nearly half of them have been cleared for release since their release has been found not to pose a security threat.⁵⁶⁹

While the United States does not dispute that primary responsibility lies with the United States government for the release of detainees from the Guantanamo Bay facilities, practically speaking the United States needs the help of other governments in order to eventually close the detention center at Guantanamo Bay.⁵⁷⁰ While in theory the United States could resettle all of the Guantanamo detainees cleared for release within the United States if they could not be returned to their home countries due to possible torture or persecution, resettling all the cleared detainees within the United States has been impractical because of internal political opposition as well as the possibility that detainees released into the United States might face official or unofficial harassment or abuse.⁵⁷¹

The US Congress, for example, has previously prevented Obama from moving Guantanamo detainees to the United States regardless of whether the purpose is trial,

⁵⁶⁷ Human Rights Watch (2009). Resettlement of Guantanamo Bay Detainees. Retrieved from <http://www.hrw.org/news/2009/02/23/q-resettlement-guantanamo-bay-detainees>.

⁵⁶⁸ Ibid.

⁵⁶⁹ Pitter, L. (2015). An Example to Set: Resettle Guantanamo Detainees in the Netherlands. Human Rights Watch. Retrieved from <http://www.hrw.org/news/2015/05/28/example-set-resettle-guantanamo-detainees-netherlands>.

⁵⁷⁰ Human Rights Watch (2009). Resettlement of Guantanamo Bay Detainees. Retrieved from <http://www.hrw.org/news/2009/02/23/q-resettlement-guantanamo-bay-detainees>.

⁵⁷¹ Ibid.

detention, or resettlement.⁵⁷² It was not until December 2013 that Congress lightened the restrictions on transferring prisoners, although there remains substantial resistance within Congress.⁵⁷³ Practically speaking, it has thus been necessary for other governments to accept Guantanamo detainees if they wanted to see the facility closed.⁵⁷⁴

As such, European Union member states have had an opportunity to assist in the closure of Guantanamo Bay or at least reduce the detainees held there by resettling the detainees in their own countries.⁵⁷⁵ Some of the Guantanamo detainees already had connections in Europe that would potentially facilitate their reintegration, such as family ties and language skills.⁵⁷⁶

Dozens of Guantanamo detainees faced no criminal charges but were not cleared for release from Guantanamo Bay because they claimed that they may be tortured or persecuted if returned to their home countries.⁵⁷⁷ Some of these detainees were turned over to the United States by bounty hunters in Pakistan and Afghanistan because of promises of monetary awards for bringing in suspicious people, and some of the detainees were relatives or acquaintances of persons suspected of terrorist activities.⁵⁷⁸ For example, Chinese Uighurs were living in a village in Afghanistan that was being bombed in 2001, and some of them fled into the mountains.⁵⁷⁹ They were turned over to Pakistani authorities that reportedly turned them over to the United States for rewards.⁵⁸⁰

⁵⁷² Pitter, L. (2015). An Example to Set: Resettle Guantanamo Detainees in the Netherlands. Human Rights Watch. Retrieved from <http://www.hrw.org/news/2015/05/28/example-set-resettle-guantanamo-detainees-netherlands>.

⁵⁷³ The New York Times (2015). Lost Amid Rhetoric: Progress Toward Closing Guantanamo. *The New York Times*. Retrieved from http://www.nytimes.com/aponline/2015/02/23/world/americas/ap-cb-guantanamo-fewer-prisoners.html?_r=1.

⁵⁷⁴ Pitter, L. (2015). An Example to Set: Resettle Guantanamo Detainees in the Netherlands. Human Rights Watch. Retrieved from <http://www.hrw.org/news/2015/05/28/example-set-resettle-guantanamo-detainees-netherlands>.

⁵⁷⁵ Human Rights Watch (2009). Resettlement of Guantanamo Bay Detainees. Retrieved from <http://www.hrw.org/news/2009/02/23/q-resettlement-guantanamo-bay-detainees>.

⁵⁷⁶ Ibid.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid.

Most of this group was cleared to be released by 2004, but there were fears that they would be tortured by China if returned there.⁵⁸¹

European Union member states have recognized the need for their help in closing the facility and some have actually done so.⁵⁸² Despite pressure to close Guantanamo Bay, the European Union was initially hesitant to help close Guantanamo Bay by resettling detainees.⁵⁸³ In 2009 though, the European Union and its member states and the United States issued a Joint Statement on Closure of Guantanamo Bay and Future Counterterrorism Operation.⁵⁸⁴

The Joint Statement began by recognizing shared values, including “freedom, democracy, and respect for international law, the rule of law and human rights,” and stated that “efforts to combat terrorism should be conducted in a manner that comports with the rule of law, respects our common values, and complies with our respective obligations under international law, in particular international human rights law, refugee law, and humanitarian law.”⁵⁸⁵ While the Joint Statement provided “that the primary responsibility for closing Guantanamo and finding residence for the former detainees rests with the United States,” it also recognized that some of the detainees could not return to their home countries.⁵⁸⁶

With this background, the Joint Statement explained that “the EU and its Member States wish to help the US turn the page” and that some European Union member states were willing to accept former Guantanamo detainees on a case-by-case basis.⁵⁸⁷ Under the Joint Statement, when considering the transfer of a specific detainee to a European Union member state the United States is required to “share with that Member State all available (confidential and other) intelligence and information concerning that person

⁵⁸¹ Ibid.

⁵⁸² Ibid.

⁵⁸³ Dworkin, A. (2009). End of the War on Terror?: What Next? European Council on Foreign Relations. Retrieved from http://www.ecfr.eu/article/commentary_counter_terrorism_guantanamo_eu_us_dworkin.

⁵⁸⁴ United States Department of State (2009). U.S.-E.U. Joint Statement on Closure of Guantanamo Bay and Future Counterterrorism Cooperation. Retrieved from <http://www.state.gov/r/pa/prs/ps/2009/06a/124796.htm>.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid.

relevant in order to allow it to take an informed decision and conduct a proper security assessment.”⁵⁸⁸

The Conclusions of the Council and of the Representatives of the Governments of the Member States on the Closure of the Guantanamo Bay Detention Centre of June 2009 provided a framework for European Union member states accepting former Guantanamo Bay detainees.⁵⁸⁹ This framework generally left the decision and responsibility to the individual European Union member state involved, but also promoted cooperation between member states because of the lack of controls within internal borders of the European Union, especially with regard to information sharing.⁵⁹⁰ Dozens of former Guantanamo Bay detainees have been released to European Union member states, including Belgium, Denmark, France, Germany, Spain, Sweden, and the United Kingdom, among others.⁵⁹¹ These former detainees were often citizens or former residents of these European Union member states.⁵⁹²

Most of the former Guantanamo detainees in Europe have reintegrated without significant problems, but some have been prosecuted for criminal activity, primarily for alleged crimes that occurred before their time at Guantanamo Bay.⁵⁹³ Two former Guantanamo Bay detainees have also been arrested in Belgium in 2015 for allegedly participating in a recruiting network for al Qaeda and Syria,⁵⁹⁴ which could present a challenge for the United States federal administration in seeking to close Guantanamo

⁵⁸⁸ Ibid.

⁵⁸⁹ Council of the European Union (2009). Conclusions of the Council and of the Representatives of the Governments of the Member States on the Closure of the Guantanamo Bay Detention Centre. Retrieved from <http://www.consilium.europa.eu/uedocs/cmsUpload/108299.pdf>.

⁵⁹⁰ United States Department of State (2009). U.S.-E.U. Joint Statement on Closure of Guantanamo Bay and Future Counterterrorism Cooperation. Retrieved from <http://www.state.gov/r/pa/prs/ps/2009/06a/124796.htm>.

⁵⁹¹ Richards, P. (2013). Guantanamo Bay Detainees Who Were ‘Never’ Terrorism Suspects Get New Lives in Slovakia. *NBC News*. Retrieved from http://worldnews.nbcnews.com/_news/2013/12/31/22122273-guantanamo-bay-detainees-who-were-never-terrorism-suspects-get-new-lives-in-slovakia?lite; Human Rights Watch (2009). Resettlement of Guantanamo Bay Detainees. Retrieved from <http://www.hrw.org/news/2009/02/23/q-resettlement-guantanamo-bay-detainees>.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Cruickshank, P. (2015). Official: Two Former Guantanamo Detainees Arrested in Belgium. *CNN*. Retrieved from <http://www.cnn.com/2015/07/24/politics/former-guantanamo-detainees-arrested-belgium/>.

Bay in the future. President Obama has continued to try to convince⁵⁹⁵ other countries to accept and resettle detainees at Guantanamo Bay so that the prison can eventually close.⁵⁹⁶

Although there has been some resistance from Congress, there has been progress towards closing the Guantanamo Bay detention center.⁵⁹⁷ The most detainees were held at Guantanamo Bay in June 2003, numbering nearly 700 at that time. More than 500 detainees were released during the time that Bush was president. By April 2016, the number of Guantanamo Bay detainees had been reduced to 80,⁵⁹⁸ which is less than half the number of detainees at Guantanamo at the time when Obama took office as president and the least detainees since less than 2 weeks after the detention center started being used to detain terrorist suspects on January 11, 2002.⁵⁹⁹

This reduction in the number of detainees at Guantanamo Bay has made the facility quieter and more manageable, with many of the remaining detainees allowed to spend much of their time in “communal conditions” in which “they are free to eat together, pray, play soccer and computer games and watch satellite TV.”⁶⁰⁰ Some advocates for closing Guantanamo Bay believe that the reduction in detainees at Guantanamo Bay also may make it easier to eventually close the facility, with fewer detainees potentially meaning it would be more manageable to close.⁶⁰¹ The prisoners

⁵⁹⁵ In some situations, external impact can potentially be multi-directional. In the case of resettling Guantanamo detainees in other countries, the United States may have an external impact in persuading other countries to accept the detainees and the countries that decide to accept the detainees, such as European Union member states, in turn may have an external impact on the United States efforts to close Guantanamo Bay.

⁵⁹⁶ Pitter, L. (2015). An Example to Set: Resettle Guantanamo Detainees in the Netherlands. Human Rights Watch. Retrieved from <http://www.hrw.org/news/2015/05/28/example-set-resettle-guantanamo-detainees-netherlands>.

⁵⁹⁷ The Associated Press (2015). Lost Amid Fiery Rhetoric: Progress Toward Closing Guantanamo. *The New York Times*. Retrieved from http://www.nytimes.com/aponline/2015/02/23/world/americas/ap-cb-guantanamo-fewer-prisoners.html?_r=0.

⁵⁹⁸ *The New York Times* (2016). The Guantanamo Docket. Retrieved from <http://projects.nytimes.com/guantanamo>.

⁵⁹⁹ The Associated Press (2015). Lost Amid Fiery Rhetoric: Progress Toward Closing Guantanamo. *The New York Times*. Retrieved from http://www.nytimes.com/aponline/2015/02/23/world/americas/ap-cb-guantanamo-fewer-prisoners.html?_r=0.

⁶⁰⁰ Ibid.

⁶⁰¹ Ibid.

not yet cleared for release still face trial by military commission, may face charges in the future, or are considered too dangerous to release.⁶⁰²

Early in his presidency, Obama supported using domestic courts to try terrorist suspects when feasible and using military tribunals to charge suspects with violating the laws of war in other cases.⁶⁰³ President Obama announced reforms to the military tribunals in May 2009, including banning evidence obtained through cruel, inhuman or degrading treatment and restricting hearsay evidence.⁶⁰⁴ In 2009, Obama also ordered the closing of the CIA's secret prisons.⁶⁰⁵

However, the order for the closure of the secret prisons overseas does not limit the use of facilities by the United States to hold terrorist suspects on a short-term, transitory basis.⁶⁰⁶ Although President Obama has moved closer to closing Guantanamo Bay and ending the use of black sites, the Obama administration has also moved toward "questioning terrorists for as long as it takes aboard U.S. naval vessels" while maintaining the ability for the United States government to prosecute the terrorist suspects in civilian courts.⁶⁰⁷

The use of secret prisons allowed the CIA to conduct long harsh interrogations without giving the terrorist suspects access to lawyers.⁶⁰⁸ President Obama promised to end these prior practices, but did not have a ready replacement that would allow for intelligence gathering before sending the suspect to court.⁶⁰⁹ Conducting the interrogations on warships has sometimes been utilized as the answer to this issue, where persons have been detained "in military custody under the laws of war, which means a person can be captured and held indefinitely as an enemy combatant" according to United

⁶⁰² Ibid.

⁶⁰³ Dworkin, A. (2009). Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 8.

⁶⁰⁴ Ibid.

⁶⁰⁵ Johnston, D. (2009). U.S. Says Rendition to Continue, But With More Oversight. *The New York Times*. Retrieved from <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

⁶⁰⁶ Miller, G. (2009). Obama Preserves Renditions as Counter-Terrorism Tool. *Los Angeles Times*. Retrieved from <http://articles.latimes.com/2009/feb/01/nation/na-rendition1>.

⁶⁰⁷ Sullivan, E. (2013). Did Obama Swap 'Black' Detention Sites for Ships? *Yahoo News*. Retrieved from <http://news.yahoo.com/did-obama-swap-black-detention-sites-ships-070850206--politics.html>.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

States officials.⁶¹⁰ These interrogations occur before giving the suspects their Miranda rights so that the intelligence gathered can be used for military or CIA actions but would not be admissible evidence in court.⁶¹¹

This is arguably some improvement over prior policy as (at least some of) these people are not being held secretly, although they are not being provided a speedy trial or counsel during that time.⁶¹² According to Robert Chesney, a professor at the University of Texas School of Law, “This situation... is a hybrid model in which military detention under the laws of war is used to facilitate short-term interrogation, and then combined with civilian criminal prosecution in order to take the person off the streets for the long term.”⁶¹³

In sum, the European Union’s criticisms of Guantanamo Bay and black sites and the framework provided by the European Union had a considerable impact, as it facilitated the relocation of former detainees and thus contributed, in conjunction with other countries accepting detainees, to reducing the number of detainees at Guantanamo Bay. This has made the facilities there more manageable and may, in the future, help in the final closure of Guantanamo Bay. The European Union’s impact on arbitrary detention included persuasion and coercion, by presenting criticisms for ending the arbitrary detention of suspected terrorists and forming agreement with the United States and by facilitating the transfer and settlement of detainees within European Union member states.⁶¹⁴

⁶¹⁰ Ibid.

⁶¹¹ Ibid.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Again, in some situations, external impact can potentially be multi-directional. In the case of resettling Guantanamo detainees in other countries, the United States may have an external impact in persuading other countries to accept the detainees and the countries that decide to accept the detainees, such as European Union member states, in turn may have an external impact on the United States efforts to close Guantanamo Bay.

4.3 The European Union's Impact on Extraordinary Rendition

Under the extraordinary rendition program during the War on Terror, the CIA arrested or abducted suspected terrorists, often through force or violence, in another country and transferred them to places where torture might be used, particularly during interrogations for information.⁶¹⁵ During this process, the individual generally was not allowed to contact family members, attorneys, human rights workers, or others regarding their circumstances.⁶¹⁶ As explained earlier, renditions are not new and were regularly used under former President Clinton.⁶¹⁷ Renditions were, however, expanded under former President Bush after September 11, 2001, generally to avoid some of the legal issues with bringing suspects to the United States.⁶¹⁸

One difference between previous uses of the rendition process and how it was used under President Bush during the War on Terror is that Bush's use of renditions were often for purposes of bringing suspects for interrogation rather than to face legal process.⁶¹⁹ The extraordinary rendition program under Bush has also often been criticized because of the transfer of individuals to places that are known for torture.⁶²⁰ While cooperation between different countries' law enforcement entities are ordinarily based on treaties, such as within the context of the extradition treaty entered into between the European Union and United States discussed earlier, the extraordinary rendition program conducted by the CIA sought to avoid the potentially time consuming legal and

⁶¹⁵ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html; Winkler, M. (2008). When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30; Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006.

⁶¹⁶ Winkler, M. (2008). When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 43.

⁶¹⁷ Johnston, D. (2009). U.S. Says Rendition to Continue, But With More Oversight. *The New York Times*. Retrieved from <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>; see Presidential Decision Directive 39 (1995). Retrieved from <http://www.fas.org/irp/offdocs/pdd39.htm>.

⁶¹⁸ Ibid.

⁶¹⁹ Dworkin, A. (2009). Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 8.

⁶²⁰ Ibid.

political hurdles in favor of arguably quicker and more effective intelligence gathering outside of such legal constraints.⁶²¹ The extraordinary rendition program did not always run smoothly, with some botched operations, mistaken identities, and prisoners taken to countries where they were subjected to torture.⁶²²

In conducting its extraordinary rendition program, the United States utilized the help of other countries, including some European Union member states and (then) candidate countries. Reports indicate that airports in Finland, Germany, Hungary, Italy, Poland, Portugal, and Spain have been used by the CIA when transporting terrorist suspects and detainees via aircraft.⁶²³ Due to the secrecy of the operations, it is not clear whether local intelligence agencies were aware of each of the CIA operations, but at least in some circumstances local intelligence agencies were involved.⁶²⁴ In 2003 for example, the United States CIA provided millions of dollars to Polish intelligence for their help in the program.⁶²⁵ More specifically, the Polish intelligence provided a secret prison in Poland, one of the CIA's black sites, for the CIA to utilize in its extraordinary rendition and interrogation program.⁶²⁶

The CIA prison in Poland was particularly important in the US War on Terror because it was the first to be used to detain September 11 conspirators, including Khalid Sheik Mohammed, who was “the self-declared mastermind of the attacks.”⁶²⁷ Khalid Sheik Mohammed was waterboarded 183 times at the CIA prison in Poland.⁶²⁸ In July 2014, the European Court of Human Rights ruled that Poland had violated the rights of

⁶²¹ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 40.

⁶²² Associated Press (2005). Rice: War on Terror Has Saved European Lives. *Fox News*. Retrieved from <http://www.foxnews.com/story/2005/12/05/rice-war-on-terror-has-saved-european-lives.html#>.

⁶²³ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html; Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006.

⁶²⁴ Ibid.

⁶²⁵ Goldman, A. (2014). The Hidden History of the CIA's Prison in Poland. *The Washington Post*. Retrieved from http://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

⁶²⁸ Ibid.

terrorism suspects because of the transfer to its black site.⁶²⁹ After the black site in Poland was emptied in late 2003, detainees were placed in sites in other countries like Romania, Morocco, and Lithuania.⁶³⁰ The Romanian and Lithuanian facilities were closed in 2006.⁶³¹

One of the largest difficulties for researchers and organizations advocating for human rights in opposition to the extraordinary rendition program is the secrecy involved, as the United States government has classified much information, including about the black site destinations.⁶³² Overtime, however, some information has been released (but often heavily redacted), leaked, or investigated. The United States Senate Intelligence Committee, for example, released a report in December 2014 on the CIA's detention and interrogation program.⁶³³

The Council of Europe and the European Union and its member states have also performed investigations into the secret prisons and other help from within their countries in connection with the United States extraordinary rendition program.⁶³⁴ Poland, for example, issued arrest warrants for CIA officials involved with the black site formerly in their country.⁶³⁵ An Italian court also issued an arrest warrant for 22 CIA agents

⁶²⁹ Lyman, R. (2014). Poland Appeals European Court of Human Rights Ruling on C.I.A. 'Black Site.' *The New York Times*. Retrieved from http://www.nytimes.com/2014/10/25/world/europe/extraordinary-rendition-ruling-appealed-by-poland.html?_r=0; *Al Nashiri v. Poland*, 28761/11, Council of Europe: European Court of Human Rights, 24 July 2014. Retrieved from [http://hudoc.echr.coe.int/eng?i=001-146044#{"itemid":\["001-146044"\]}](http://hudoc.echr.coe.int/eng?i=001-146044#{); *Husayn (Abu Zubaydah) v. Poland*, 7511/13, Council of Europe: European Court of Human Rights, 24 July 2014. Retrieved from [http://hudoc.echr.coe.int/eng?i=001-146047#{"itemid":\["001-146047"\]}](http://hudoc.echr.coe.int/eng?i=001-146047#{).

⁶³⁰ Goldman, A. (2014). The Hidden History of the CIA's Prison in Poland. *The Washington Post*. Retrieved from http://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html.

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Feinstein, D. Senate Intelligence Committee Study on CIA Detention and Interrogation Program. Retrieved from <http://www.feinstein.senate.gov/public/index.cfm/senate-intelligence-committee-study-on-cia-detention-and-interrogation-program>.

⁶³⁴ Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006; Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

⁶³⁵ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

suspected of helping abduct Osama Mustafa Hassan in Italy without permission.⁶³⁶ Hassan claimed that he was abducted in Italy, flown to Egypt, and tortured with electric shocks while detained.⁶³⁷ Such warrants are valid for detaining the CIA officials anywhere in the European Union.⁶³⁸ The efforts of NGOs, the media, the Council of Europe,⁶³⁹ and the European Parliament⁶⁴⁰ were essential to revealing some of the known facts about the generally secretive programs conducted by the CIA.⁶⁴¹

Particularly, a committee was formed by the Parliamentary Assembly of the Council of Europe to investigate the European involvement in the extraordinary rendition program.⁶⁴² Swiss Senator Dick Marty was the lead investigator for the Council of Europe's investigation into European cooperation with the United States.⁶⁴³ Relevantly, the European Union aided in the Council of Europe's investigation, with the Commission providing support in obtaining information from the European Union Satellite Centre and Eurocontrol.⁶⁴⁴ In 2006, the Council of Europe's investigative committee issued its first report, stating:

“the CIA ‘rendition’ programme has revealed a network that resembles a ‘spider’s web’ spun across the globe. . . . Analysis of the network's

⁶³⁶ BBC News (2005). EU-Wide Warrant Over ‘CIA Kidnap.’ *BBC News*. Retrieved from <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4555660.stm>.

⁶³⁷ Ibid.

⁶³⁸ Ibid.

⁶³⁹ See Marty, D. Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States. Parliamentary Assembly Doc. 10957. Retrieved from <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=11527&lang=en>; *El Masri v. Macedonia*, 39630/09, Council of Europe: European Court of Human Rights, 24 July 2014. Retrieved from <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-115621&filename=001-115621.pdf&TID=pgwvadfciX>.

⁶⁴⁰ Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007.

⁶⁴¹ Nougayrede, N. (2014). CIA Torture Report: Europe Must Come Clean About Its Own Complicity. *The Guardian*. Retrieved from <http://www.theguardian.com/commentisfree/2014/dec/09/cia-torture-report-europe-complicity-britain>.

⁶⁴² Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 64.

⁶⁴³ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

⁶⁴⁴ Council of Europe, Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States, Doc. 10957, 12 June 2006: 10.

functioning . . . allows us to make a number of conclusions both about human rights violations - some of which continue - and about the responsibilities of some [COE] Member states [I]t is only through the intentional or grossly negligent collusion of the European partners that this ‘web’ was able to spread also over Europe. . . . across the world, the United States has progressively woven a clandestine ‘spider’s web’ of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organisation.”⁶⁴⁵

Similarly, on January 31, 2007, the European Parliament’s Temporary Committee on the Alleged Use of European Countries by the CIA for Illegal Activities, which was selected in 2005, also issued a report on European Union member state involvement in the CIA’s extraordinary rendition program.⁶⁴⁶ The European Parliament’s report found that the extraordinary rendition program has been conducted in violation of international law and is counterproductive to its intended purpose of combating terrorism.⁶⁴⁷ The report adopted by the European Parliament condemned extraordinary rendition, participants in that process, and the secrecy involved with the program. The European Parliament’s final report stated that it

“Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the

⁶⁴⁵ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 66; Marty, D. Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States. Parliamentary Assembly Doc. 10957. Retrieved from <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=11527&lang=en>.

⁶⁴⁶ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 72.

⁶⁴⁷ Winkler, M. (2008). When “Extraordinary” Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 73.

acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries.

Condemns any participation in the interrogation of individuals who are victims of extraordinary rendition, because it represents a deplorable legitimisation of that type of illegal procedure, even where those participating in the interrogation do not bear direct responsibility for the kidnapping, detention, torture or ill-treatment of the victims.”⁶⁴⁸

The European Parliament also explained that it did not receive sufficient cooperation from European Union member states and institutions in its investigation of European involvement.⁶⁴⁹ The report stated that cooperation from European Union member states and institutions “has fallen far below the standard that Parliament is entitled to expect” and encouraged review of the state secrets defense with regard to disclosure of information, although it also approved of the actions of some judicial authorities in European Union member states.⁶⁵⁰

Members of the European Parliament also briefed members of the United States House of Representatives on their findings for Congressional hearings on the renditions.⁶⁵¹ The author of the European Parliament report, Carlo Fava, explained to members of the United States Congress that the European Parliament believes the extraordinary rendition program was “an illegal instrument used by the United States in the fight against terrorism.”⁶⁵² The United States federal administration, on the other hand, claimed that it acted lawfully in the renditions.⁶⁵³

⁶⁴⁸ European Parliament (2007). Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners. A6-0020/2007. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0020+0+DOC+PDF+V0//EN>.

⁶⁴⁹ Ibid. p. 7-8.

⁶⁵⁰ Ibid.

⁶⁵¹ Butler, D. (2007). European Parliamentarians Tell Congress CIA Rendition Program is Illegal. *U-T San Diego*. Retrieved from <http://legacy.utsandiego.com/news/nation/terror/20070417-1432-europeanunion-cia.html>.

⁶⁵² Ibid.

⁶⁵³ Ibid.

In the context of the United States policy of general secrecy regarding these CIA operations conducted under the extraordinary rendition program, the European Union's involvement in exposing details about the program is important. In addition though, the European Union was able to obtain public acknowledgements of the existence of the program from the United States.

More specifically, in 2005, the European Union sought a response from the Bush administration about reports of secret prisons in Europe used for the extraordinary rendition program.⁶⁵⁴ Britain, then holding the presidency of the European Union, demanded information from the United States regarding reports that the CIA interrogated and detained prisoners in secret prisons.⁶⁵⁵ Specifically, British Foreign Minister Jack Straw on behalf of the European Union requested clarification on the extraordinary rendition program, including the use of covert prisons and airplane stopovers in Europe for carrying out the program.⁶⁵⁶

On December 5, 2005, former United States Secretary of State Condoleezza Rice publicly responded to the European Union's request for clarification in a briefing to journalists.⁶⁵⁷ Secretary Rice began her speech by explicitly referencing inquiries regarding the United States conduct in the War on Terror that were received from the European Union and stating that her speech was intended to respond to those inquiries as she was leaving for a tour of Europe that day.⁶⁵⁸ Secretary Rice stated that her speech "will essentially form the text of the letter that I will send to [British Foreign] Secretary [Jack] Straw, who wrote on behalf of the European Union as the European Union president."⁶⁵⁹

In her speech, Secretary Rice explained that the War on Terror takes the form of conventional military operations such as in Afghanistan and Iraq, a war of ideas, as well

⁶⁵⁴ Associated Press (2005). Rice: War on Terror Has Saved European Lives. *Fox News*. Retrieved from <http://www.foxnews.com/story/2005/12/05/rice-war-on-terror-has-saved-european-lives.html#>.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

⁶⁵⁸ Rice, C. (2005). Full Text: Rice Defends US Policy. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/4500630.stm>.

⁶⁵⁹ Ibid.

as a “struggle waged also by our law enforcement agencies” in which cooperation of United States and foreign intelligence services takes place.⁶⁶⁰ Rice further explained:

“We must track down terrorists who seek refuge in areas . . . where the terrorists cannot in practice be reached by the ordinary processes of law. . . . The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt.”⁶⁶¹

Essentially, Rice argued that a difficult issue is how to handle captured suspected terrorists, where traditional systems of criminal or military justice do not meet the current needs.⁶⁶²

Secretary Rice claimed that captured members of al-Qaeda are unlawful combatants that can be held in accordance with the law of war.⁶⁶³ Rice also explained that renditions have been used by the United States and other countries for decades, and that, while sometimes traditional judicial procedures can be utilized, some situations do not allow for “traditional extradition”.⁶⁶⁴ She claimed that it was appropriate in those cases for the local government to cooperate with the rendition, which in her perspective is “a vital tool in combating transnational terrorism.”⁶⁶⁵ She further claimed that it is United States policy to comply with treaty obligations, including the Convention Against Torture, when conducting renditions.⁶⁶⁶ Although Rice did not mention the secret prisons in Europe, Rice did finally and importantly acknowledge the rendition program, calling it a “lawful weapon” that has been used to “save European lives.”⁶⁶⁷ The Bush

⁶⁶⁰ Ibid.

⁶⁶¹ Ibid.

⁶⁶² Ibid.

⁶⁶³ Ibid.

⁶⁶⁴ Ibid.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.; Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

administration has claimed that its tactics in the War on Terror have prevented hijackings of planes in the United States and bombings in Europe.⁶⁶⁸

Both the United States and some countries in Europe have strongly defended their general secrecy and involvement in the CIA's extraordinary rendition program based on reasons of national security in such matters.⁶⁶⁹ For human rights advocates, this can be particularly problematic because in order to adequately address a potential human rights violation one must have knowledge that a human rights violation exists and the nature and extent of the violation. The extraordinary rendition program has resulted "in a trend of concealment of some aspects of international relations from democratic scrutiny, and, more generally, a lack of accountability."⁶⁷⁰

The European Union's involvement has helped push the door open exposing the CIA's extraordinary rendition program. The European Union accomplished this through persuasion in its efforts to expose information about the program, through pressure on the United States to acknowledge the program, helping with the Council of Europe's investigation, and in the European Parliament's own investigation. The European Union's inquiries in particular were directly and primarily responsible for the United States reducing its policy of nearly complete secrecy about the program, secrecy which the United States has contended is essential to its national security. As such, the European Union has had a significant impact on the United States with regard to extraordinary rendition.

With greater exposure of the CIA's extraordinary rendition programs, political discussions in the public sphere have become possible. In 2007, President Obama had written that building a better, freer world "means ending the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands without charge or trial, of maintaining a network of secret prisons to jail people beyond

⁶⁶⁸ Ibid.; Associated Press (2005). Rice: War on Terror Has Saved European Lives. *Fox News*. Retrieved from <http://www.foxnews.com/story/2005/12/05/rice-war-on-terror-has-saved-european-lives.html#>.

⁶⁶⁹ Winkler, M. (2008). When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30, p. 63.

⁶⁷⁰ Ibid.

the reach of the law”.⁶⁷¹ Like the Bush administration, however, President Obama has continued the policy of sending terrorist suspects to other countries for purposes of interrogation and detention, but with more monitoring to ensure that they are not tortured.⁶⁷² This decision was announced in 2009 by Obama’s Interrogation and Transfer Policy Task Force, despite earlier mixed messages from Obama under which some hoped he might end the practice of renditions entirely.⁶⁷³

4.4 The European Union’s Impact on Torture and Ill Treatment

There is significant overlap between the United States extraordinary rendition program and the torture and ill treatment of prisoners. In addition to the prisoner-abuse scandals at Baghram, Abu Ghraib, and Guantanamo Bay, the release of the “torture memos”, written between 2002 and 2005 by United States legal officials, attempt to provide legal justification for and describe “brutal interrogation techniques used by the CIA,” indicating that mistreatment of prisoners was at least sometimes sanctioned at some of the highest levels under the Bush administration.⁶⁷⁴ The interrogation techniques described in the torture memos “were among the Bush administration’s most closely guarded secrets.”⁶⁷⁵ The memos were released because of a lawsuit filed by the American Civil Liberties Union for the release of the documents.⁶⁷⁶

Some of the methods approved by the Bush administration through legal arguments for interrogating al Qaeda and terrorist suspects included sleep deprivation,

⁶⁷¹ Johnston, D. (2009). U.S. Says Rendition to Continue, But With More Oversight. *The New York Times*. Retrieved from <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Mazzetti, M. and Shane, S. (2009). Interrogation Memos Detail Harsh Tactics by the C.I.A. *The New York Times*. Retrieved from http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all&_r=0.

⁶⁷⁵ Ibid.

⁶⁷⁶ Ibid.

forced nudity, and waterboarding, among others.⁶⁷⁷ Waterboarding entailed strapping the person to an inclined gurney and pouring water on a cloth that covered the person's nose and mouth, which gives the feeling of drowning, for up to 40 seconds at a time.⁶⁷⁸ Even these rules were not always followed when waterboarding suspects.⁶⁷⁹

Not only were these methods approved in the torture memos, but they were also put into practice by the CIA. Officials at a black site in Poland were briefed on enhanced interrogation techniques, including slapping, sleep deprivation, and waterboarding.⁶⁸⁰ In a more extreme example, Abd al-Rahim al-Nashiri had a drill put to his blindfolded head in a mock execution at a black site in Poland.⁶⁸¹ As already mentioned, Khalid Sheik Mohammed was also waterboarded 183 times as well as deprived of sleep at the CIA prison in Poland.⁶⁸² Some United States officials claimed that these techniques provided important results in gathering intelligence, although the value and reliability of the information has been questioned by others.⁶⁸³

The Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, originally adopted in 2001, aim to “work towards the prevention and eradication of torture and ill-treatment within the EU and world-wide” through political dialogue, demarches, and bilateral and multi-lateral cooperation.⁶⁸⁴ Along these lines, the European Parliament and other European Union officials have criticized the treatment of terrorist suspects by the United States

⁶⁷⁷ Ibid.; Bradbury, S. (2005). Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency. U.S. Department of Justice. Retrieved from [http://www.therenditionproject.org.uk/pdf/PDF%2016%20\[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf](http://www.therenditionproject.org.uk/pdf/PDF%2016%20[Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf).

⁶⁷⁸ Ibid.; Mazzetti, M. and Shane, S. (2009). Interrogation Memos Detail Harsh Tactics by the C.I.A. *The New York Times*. Retrieved from http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all&_r=0.

⁶⁷⁹ Ibid.

⁶⁸⁰ Goldman, A. (2014). The Hidden History of the CIA's Prison in Poland. *The Washington Post*. Retrieved from http://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html.

⁶⁸¹ Ibid.

⁶⁸² Ibid.

⁶⁸³ Ibid.

⁶⁸⁴ Council of the European Union (2001). Guidelines to EU Policy Towards Third Countries on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

with the general view in Europe being that the CIA's interrogation methods are torture.⁶⁸⁵ In resolutions, the European Parliament has condemned the use of torture and ill-treatment in the War on Terror by the United States.⁶⁸⁶ In 2006, for example, the European Parliament issued a resolution calling to end "special interrogation techniques" such as sexual humiliation, short shackling, and the use of dogs to create fear.⁶⁸⁷ European officials have also criticized the prisoner-abuse scandals at Baghram, Abu Ghraib, and Guantanamo Bay.⁶⁸⁸

The Bush administration largely ignored or denied such criticisms from the European Union. After former Secretary of State Rice returned from a trip from Europe in 2005, John Bellinger, a former United States State Department senior legal advisor, denied that terrorist suspects were sent to other countries to be tortured, stating that the administration sought reassurances that the suspects would not be subject to torture.⁶⁸⁹ John Bellinger acknowledged, however, that some terror suspects were questioned in other countries under the United States rendition program and claimed that transferring prisoners to countries criticized for human rights violations was not against international law.⁶⁹⁰ While Mr. Bellinger denied that the United States had practiced or supported torture in other countries, he also did not comment on the enhanced interrogation techniques approved in the torture memos.⁶⁹¹

In Secretary Rice's December 5, 2005 speech responding to inquiries from the European Union, Rice rejected the idea that the United States has used torture, stating:

⁶⁸⁵ Dworkin, A. (2009). Beyond the "War on Terror": Towards a New Transatlantic Framework for Counterterrorism. *European Council on Foreign Relations Policy Brief*. 13, p. 7.

⁶⁸⁶ See, e.g. European Parliament (2006). European Parliament Resolution on the Situation of Prisoners at Guantanamo Bay. P6_TA(2006)0254. Retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0254&language=EN>.

⁶⁸⁷ DW staff (2006). EU Parliamentarians Call for Tribunal to Replace Guantanamo. *DW*. Retrieved from <http://www.dw.de/eu-parliamentarians-call-for-tribunal-to-replace-guantanamo/a-2056535>.

⁶⁸⁸ Crane, M. EU-U.S. Relations and the War on Terror. *The New York Times*. Retrieved from http://www.nytimes.com/cfr/international/slot2_120705.html.

⁶⁸⁹ BBC News (2005). US Defends Prisoners' Transfers. *BBC News*. Retrieved from <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/4515950.stm>.

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

“In accordance with the policy of this administration... the United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture[,], the United States does not use the airspace or the airports of any country for the purpose of transporting a detainee to a country where he or she will be tortured[, and] the United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.”⁶⁹²

Rice also explained that abuse of detainees by United States officials, such as at Abu Ghraib, are investigated, prosecuted, and punished, such as by prison, demotion, or reprimand, in the United States.⁶⁹³ Rice denied that the policy of the United States allowed torture, and claimed that United States policy for interrogations will be consistent with domestic law and treaty obligations, including the Convention Against Torture.⁶⁹⁴ In the background of these claims and denials by United States officials, however, is that the torture memos provided legal justification for the United States practices that were considered by others, including some in the European Union, to be torture and ill treatment.

President Obama’s administration, on the other hand, called some of the previously approved interrogation techniques, such as waterboarding, torture.⁶⁹⁵ Obama called the use of these interrogation techniques a “dark and painful chapter in our history” and stated that the United States would no longer use such methods.⁶⁹⁶ President Obama revoked the previous legal opinions on interrogation techniques his second day after

⁶⁹² Rice, C. (2005). Full Text: Rice Defends US Policy. *BBC News*. Retrieved from <http://news.bbc.co.uk/2/hi/americas/4500630.stm>.

⁶⁹³ Ibid.

⁶⁹⁴ Ibid.

⁶⁹⁵ Mazzetti, M. (2009). Interrogation Memos Detail Harsh Tactics by the C.I.A. *The New York Times*. Retrieved from http://www.nytimes.com/2009/04/17/us/politics/17detain.html?pagewanted=all&_r=0.

⁶⁹⁶ Ibid.

taking office and ended the interrogation program in 2009.⁶⁹⁷ Obama approved a multiagency interrogation unit within the Federal Bureau of Investigation, called the High Value Interrogation Group, that would conduct oversight of the interrogations of terrorism suspects, which was previously the role of the CIA, to ensure that only noncoercive interrogation techniques approved by the administration were used.⁶⁹⁸ The Interrogation techniques would have to comply with the Army Field Manual guidelines.⁶⁹⁹ Human Rights Watch considered this change a significant step toward more humane treatment.⁷⁰⁰

From the Obama administration's perspective, the use of highly coercive interrogation techniques harmed the United States reputation in the world, such as with its traditional allies in the European Union and its member states.⁷⁰¹ As explained by Con Coughlin:

“America may remain the world's leading military power, but the lesson of the past seven years is that it cannot overcome the many challenges it faces on its own. To make the world a better and safer place America needs all the friends it can get, a fact the new Obama national security team appear to grasp.”⁷⁰²

Obama sought to repair the United States reputation with the world, including by casting aside some of the questionable policies utilized during the War on Terror under the Bush administration.⁷⁰³ Thus, while the European Union's persuasive efforts regarding the United States treatment of terrorist suspects as torture were largely ignored or denied

⁶⁹⁷ Ibid.

⁶⁹⁸ Johnston, D. (2009). U.S. Says Rendition to Continue, But With More Oversight. *The New York Times*. Retrieved from <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>.

⁶⁹⁹ Ibid.

⁷⁰⁰ Ibid.

⁷⁰¹ Coughlin, C. (2008). Barack Obama's Team Will Repair America's International Standing. *The Telegraph*. Retrieved from http://blogs.telegraph.co.uk/news/concoughlin/5870967/Barack_Obamas_team_will_repair_Americas_international_standing/.

⁷⁰² Ibid.

⁷⁰³ Ibid.

under the Bush administration, they were a concern for the Obama administration.⁷⁰⁴ It is likely, however, that the change under the Obama administration would have occurred regardless of the European Union's condemnations of United States' practices in this area. Obama's position on the highly coercive interrogation techniques such as waterboarding was that they are "never acceptable" and emphasized that he has "consistently opposed" such practices, which suggests that Obama's position was likely not changed because of the European Union's actions.⁷⁰⁵ The European Union's position in this regard only provided additional support for Obama's existing position on the matter, so the European Union's impact was only marginal and not considerable or significant.

4.5 The European Union's Impact on Drone Killings by the United States

Drones are unmanned aerial vehicles that allow the United States to track and kill terrorist suspects with precision without jeopardizing lives of US military forces and at a lower cost than other methods.⁷⁰⁶ The United States first utilized drones for targeted killings in Afghanistan in 2001.⁷⁰⁷ Drones have become a choice weapon for the United States to combat suspected al-Qaeda terrorists.⁷⁰⁸

After entering office, President Obama increased the use of drones for killing alleged terrorists.⁷⁰⁹ Obama's former press secretary Robert Gibbs explained that he was instructed not to acknowledge the existence of the drone program in the United States, and, even though there is more transparency about it today,⁷¹⁰ some parts of the program

⁷⁰⁴ Ibid.; Exec. Order No. 13491, 3 C.F.R.

⁷⁰⁵ Egelko, B. (2008). Obama Says Clinton has Wavered on Torture. *SFGate*. Retrieved from <http://www.sfgate.com/news/article/Obama-says-Clinton-has-wavered-on-torture-3291776.php>.

⁷⁰⁶ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

⁷⁰⁷ Ibid.

⁷⁰⁸ Ibid.

⁷⁰⁹ Ibid. p. 2.

⁷¹⁰ See, e.g., United Nations (2013). Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. A/68/389. Retrieved from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/478/77/PDF/N1347877.pdf?OpenElement>; United Nations (2013).

are probably going to remain secret.⁷¹¹ Other countries have also used drones for targeted killings, including the United Kingdom and Israel.⁷¹² Similar to the United States, the United Kingdom discloses very little information on the specifics of drone utilization.⁷¹³

The use of drones for targeted killings, however, has been criticized for undermining the international rule of law as they may take place away from the zones where conventional hostilities are taking place.⁷¹⁴ The European Parliament in particular has criticized the use of drone strikes as human rights law prohibits arbitrary killings, and has called for the European Union to adopt a common position concerning the use of armed drones.⁷¹⁵

Although an opinion poll indicated that many in Europe are opposed to the use of drones to kill terrorist suspects not on the battlefield, European leaders, other than in the European Parliament, have generally responded to the United States use of “drone strikes in a muted and largely passive way.”⁷¹⁶ “It is not only the EU institutions that have failed to make their voice heard on the issue of drone strikes. The member states have generally followed a similar pattern.”⁷¹⁷

Although there has been a general silence during the 2000s, some European officials, including from Germany, Austria, and some Nordic countries, have expressed disagreement with the United States on the matter in closed-door dialogues and bilateral

Extrajudicial, Summary or Arbitrary Executions. A/68/382. Retrieved from http://www.un.org/ga/search/view_doc.asp?symbol=A/68/382.

⁷¹¹ Stableford, D. (2013). Gibbs: I Was Told Not to Acknowledge Existence of Drone Program. *Yahoo News*. Retrieved from http://news.yahoo.com/blogs/ticket/gibbs-drones-obama-talk-fight-club-174044860--politics.html;_ylt=A0LEVxNob2dViasA3bNXNyOA;_ylu=X3oDMTByOHZyb21tBGNvbG8DYmYxBHBvcwMxBH0aWQDBHNIYwNzcg--.

⁷¹² Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

⁷¹³ Cole, C. (2012). Europe’s Silence on US Drone Targeted Killings. *Drone Wars UK*. Retrieved from <http://dronewars.net/2012/03/23/europes-silence-on-us-drone-targeted-killings-2/>.

⁷¹⁴ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 1. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

⁷¹⁵ European Parliament (2014). European Parliament Resolution of 27 February 2014 on the Use of Armed Drones. P7_TA-PROV(2014)0172.

⁷¹⁶ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 2. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

⁷¹⁷ Cole, C. (2012). Europe’s Silence on US Drone Targeted Killings. *Drone Wars UK*. Retrieved from <http://dronewars.net/2012/03/23/europes-silence-on-us-drone-targeted-killings-2/>.

meetings.⁷¹⁸ However, European officials have rarely expressed public disagreement on the issue, and the European Union as a whole has not provided its own vision on when it is appropriate to use lethal drone strikes against particular individuals.⁷¹⁹ European states have not “made a serious effort to influence the development of US policy or to begin discussions on formulating common standards for the kinds of military operations that [drones] facilitate.”⁷²⁰

The European Union’s general inaction has nonetheless had a marginal impact on United States interests with regard to the use of drone strikes. Harold Koh, a former State Department legal advisor, stated that the United States federal administration “should be more willing to discuss international legal standards for use of drones, so that our actions do not inadvertently empower other nations and actors who would use drones inconsistent with the law.”⁷²¹ Another former administration official explained that the reaction by allies to the United States on drone use is “the main test and constraint for the administration ... if other states don’t object, the conclusion is that they are not concerned.”⁷²² As a result, Anthony Dworkin concludes that “EU member states are in a position to use their influence to support those groups within the administration who are pushing for improved standards and greater internationalization” concerning the use of drone strikes.⁷²³ In this context, the European Union’s general inaction suggests to the United States that the use of drones to kill suspected terrorists, including outside of the battlefield, is generally permissible.

⁷¹⁸ Dworkin, A. (2013). Drones and Targeted Killing: Defining a European Position. European Council on Foreign Relations. p. 2. Retrieved from http://www.ecfr.eu/page/-/ECFR84_DRONES_BRIEF.pdf.

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

⁷²¹ Ibid. p. 4.

⁷²² Ibid.

⁷²³ Ibid.

4.6 Overall Results and Conclusion

The European Union's internal example has been relatively inconsistent with regard to balancing security and human rights concerns in the War on Terror, with some European Union member states helping or participating in similar practices to the United States and others utilizing rhetoric condemning the United States for human rights violations. Without a clear example to follow, the European Union had nil impact in this regard. Nonetheless, the European Union was able to have an impact on the United States with regard to arbitrary detention, extraordinary rendition, torture and ill treatment, and drone killings. The European Union had a considerable impact on arbitrary detention, particularly by pressuring the United States to close Guantanamo Bay and by facilitating the reduction of prisoners subject to detention there. The European Union also had a significant impact on extraordinary rendition, with the European Union helping to expose the program and its inquiries being crucial to the United States admitting the existence of the program. The European Union's criticism of the treatment of terrorist suspects had only a marginal impact on the United States, only confirming the Obama administration's rejection of the interrogation methods utilized during the Bush administration. The European Union's general silence with regard to the United States use of drones for targeted killings outside of the battlefield also only had a marginal impact on the United States by indicating that the United States policies in this area were permissible. The European Union's impact on human rights issues in the War on Terror on the United States political branches is summarized in the following table.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--------------------------|-------------------------|----------------------------|----------------|---------------|
| War on Terror, generally | Inconsistency within EU | Setting an example | None | Nil |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---------------------------|--|-----------------------------------|--|---------------|
| Arbitrary detention | EU seeks closure of Guantanamo Bay and legal protections for detainees by European Parliament resolutions and communications with US and public | Persuasion | Obama administration seeks closure of black sites and Guantanamo Bay and reduces number of persons detained | Considerable |
| Arbitrary detention | Creation of framework for transfer of Guantanamo detainees to EU member states | Persuasion; coercion | Dozens of detainees transferred and settled in EU member states, reducing detainees at Guantanamo Bay | Considerable |
| Extraordinary rendition | EU investigates, reports, and criticizes extraordinary rendition program through communications with US, supporting Council of Europe's investigation, and European Parliament's investigation | Persuasion | US acknowledges extraordinary rendition program and information about program exposed, thus reducing policy of secrecy about program | Significant |
| Torture and ill treatment | EU criticizes US treatment of terrorist suspects in communications and European Parliament resolutions | Persuasion | Bush administration ignores and rejects criticisms; Obama continues to disapprove of interrogation methods used under Bush | Marginal |
| Drone killings | General inaction from EU, but some criticism from European Parliament and other officials | General inaction, some persuasion | US continues drone program with little resistance | Marginal |

The European Union achieved these results through persuasion, coercion, and (lack of) setting an example. Within the European Union, individual member states did not always act uniformly in their approach to terrorism, with some member states following the United States lead rather than the other way around. Persuasion was utilized by the European Union in criticizing United States policies and actions with regard to arbitrary detention, extraordinary rendition, and torture and ill treatment. To a lesser extent, the European Union utilized persuasion to address the issue of targeted drone killings, although the European Union was relatively silent in this area. To some extent, there were elements of coercion with regard to the European Union's efforts to end the United States' arbitrary detention of prisoners, as the European Union provided a framework for the transfer and relocation of former detainees to European Union member states.

Accordingly, setting an example had the least impact, nil, on the United States political branches on human rights issues involved in the War on Terror. Persuasion was present for significant impact on extraordinary rendition, considerable impact on arbitrary detention, and marginal impact for torture and ill treatment and drone killings, although it was the general inaction that was particularly relevant for the latter. Coercion again was not frequently used, but when it was used on the issue of arbitrary detention it also contributed to the European Union's considerable impact. In sum, despite the European Union's inconsistency in its approach to the War on Terror, the European Union's impact in at least some of these cases against the United States on vital issues affecting policies aimed at national security in the War on Terror suggests that the European Union is a major force even in its relations with a world power.

5. THE EUROPEAN UNION'S IMPACT ON UNITED STATES COURTS IN DEATH PENALTY CASES

In the European Union's multifaceted advocacy against the death penalty in the United States, the European Union has chosen to directly target United States federal courts, rather than solely rely on traditional diplomatic or other channels, in death penalty cases, which makes strategic sense given the popular support for the death penalty and related support by some elected politicians in the United States. The challenges faced by the European Union are illustrated by the September 7, 2011 Republican presidential debate, where the crowd applauded for former Texas Governor Rick Perry's 234 executions during his tenure as governor, "more than any other governor in modern times."⁷²⁴ Although that audience may represent a limited segment of society, Gallup polls also indicate that a majority in the United States continue to support capital punishment.⁷²⁵ Governor Perry's response to questioning during that debate about executions in Texas also expressed his belief that there is popular support for the death penalty:

"I think Americans understand justice. I think Americans are clearly, in the vast majority of -- of cases, supportive of capital punishment. When you have committed heinous crimes against our citizens -- and it's a state-by-state issue, but in the state of Texas, our citizens have made that decision, and they made it clear, and they don't want you to commit those crimes against our citizens. And if you do, you will face the ultimate justice."⁷²⁶

⁷²⁴ *New York Times* (2011). The Republican Debate at the Reagan Library. Retrieved from http://www.nytimes.com/2011/09/08/us/politics/08republican-debate-text.html?_r=2&pagewanted=all.

⁷²⁵ Newport, F. (2010). In U.S., 64% Support Death Penalty in Cases of Murder. *Gallup*. Retrieved from <http://www.gallup.com/poll/144284/Support-Death-Penalty-Cases-Murder.aspx>.

⁷²⁶ *New York Times* (2011). The Republican Debate at the Reagan Library. Retrieved from http://www.nytimes.com/2011/09/08/us/politics/08republican-debate-text.html?_r=2&pagewanted=all.

Given the number of executions in Texas, the European Union has sent multiple letters to Governor Perry regarding specific death penalty cases. However, considering Governor Perry's general views on the death penalty and the popular support for the death penalty, it is less of a surprise that the European Union has also turned to United States courts on the issue. While the federal structure and separation of powers in the United States government can make it more complicated to advocate for and achieve results in abolishing the death penalty, it also presents alternative routes for influencing United States laws, policies, behavior, and interests. United States courts, of course, play a central role in interpreting and applying laws associated with the death penalty. When elected politicians are unwilling or unable to make changes concerning individual or minority rights, the courts are often the prudent alternative, particularly when it concerns criminal sentences and interpreting rights under the Eighth and Fourteenth Amendments of the United States Constitution.⁷²⁷

This chapter examines the European Union's impact in United States courts on the death penalty utilizing the modified Ginsberg framework set forth earlier. Some of the modifications to that framework are especially worth re-emphasizing due to their particular relevance to this chapter and the next chapter concerning human rights and the War on Terror.

First, this dissertation expands Ginsberg's notion of external impact from covering changes or modifications in the policies, interests, and behavior of the United States to also include changes or modifications in the laws of the United States. This explicit extension of the framework to cover changes and modifications in laws (including their interpretation) is necessary to reflect the overlap and often inextricable link between law and policy – the former sometimes being the formalization of the latter by the government. It also accounts for the fact that human rights foreign policy is often not only aimed at stopping human rights violations themselves in the short-term, but also towards embodying long-term human rights protections in laws within a system in which the rule of law is observed. In human rights, as in many areas, form and practice often go hand in hand and are both essential.

⁷²⁷ Constitution of the United States (1787). Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>.

Relevantly, the European Union advocates for abolition of the death penalty worldwide in law, policy, and practice. If the rule of law is followed, laws should and often do also directly and indirectly apply to and limit government policy, interests, and behavior, particularly when considering human rights violations perpetrated within or sanctioned by the government. This is particularly true with regard to due process protections and the prohibition on cruel and unusual punishments defined in the United States Constitution and other United States laws designed to limit the political and judicial branches of government. With regard to capital punishment in the United States, for example, the Eighth Amendment of the United States Constitution⁷²⁸ places limits on members of the federal and state executive branches from seeking and judiciaries from imposing the death penalty.

In the United States system of checks and balances and separation of powers, it is the judiciary itself which interprets and defines such limits, leading to another extension of Ginsberg's framework. Ginsberg primarily applies his analytical framework to the external impact on the United States federal administration. There is, however, good reason to explicitly include the European Union's impact on the United States judiciary. First, in the United States system, the judiciary is often considered a co-equal branch of government with the executive and legislative branches. Given the common law legal system in the United States, the general provisions of the United States Constitution, diverse and complicated facts arising in different cases, and changing conditions in the United States and elsewhere, judges' interpretations and applications of the law have on many occasions been criticized for crossing the line into creation of new laws. While many judges may wish to exercise judicial restraint, both judges and politicians have pointed out that (at least some) judges do in fact also act like legislators in (at least some) cases.⁷²⁹ Judicial decisions often define the parameters of the rights of capital defendants and suspected terrorists as well as how those rights will be applied in practice.

⁷²⁸ Constitution of the United States (1787). Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>.

⁷²⁹ See Kmiec, K. (2004). The Origin and Current Meaning of "Judicial Activism." *California Law Review*. 92(5), p. 1471-1473.

Not only is it important to consider the European Union's impact on courts when examining its relations with the United States, it is particularly imperative in the context of the human rights cases examined. Importantly, the United States Supreme Court's decisions concerning Constitutional due process protections and the prohibition on cruel and unusual punishments⁷³⁰ that govern the death penalty and human rights abuses involved in the War on Terror are generally followed by the other branches of government. As such, the courts are an important alternative route for the European Union to seek changes in human rights in the United States. The European Union's death penalty advocacy potentially affecting United States courts has included amicus curiae briefs, funding of external organizations, setting its own example, as well as the combination of instruments it has used in its world-wide advocacy against the death penalty which, where successful, may provide an example of abolition in the world generally.

The following sections apply the modified Ginsberg framework to three specific issues within United States death penalty jurisprudence: the application of the death penalty to mentally retarded persons, the juvenile death penalty, and consular access rights of foreign nationals subject to the death penalty. These three issues cover the death penalty cases in which the European Union has directly filed amicus curiae briefs in United States courts. Capital sentencing determinations is also examined in Chapter 7 as an issue in which the European Union did not directly involve itself but, nonetheless, had an impact in United States courts through its funding of non-governmental organizations. In addition to the examination of these specific death penalty issues, this chapter examines the European Union's general impact on the death penalty in other United States court cases.

⁷³⁰ Constitution of the United States (1787). Retrieved from <http://www.archives.gov/exhibits/charters/constitution.html>.

5.1 The European Union's Impact on the Execution of Persons with Mental Retardation

In 1989, the United States Supreme Court held in *Penry v. Lynaugh*⁷³¹ that, although mental retardation was a mitigating factor when deciding whether to impose the death penalty, the execution of mentally retarded persons was permissible under the Constitution's Eighth Amendment prohibition against cruel and unusual punishments. In 2002, the constitutionality of executing mentally retarded persons was again before the Supreme Court in *Atkins v. Virginia*,⁷³² in which the European Union advocated against the execution of mentally retarded persons in an amicus curiae brief.⁷³³

In its brief, the European Union argued that “there is a growing international consensus against the execution of persons with mental retardation” and the “practice of executing the mentally retarded contravenes international standards and norms.”⁷³⁴ The European Union's brief points out that the Supreme Court has previously “recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”⁷³⁵ The European Union contended that the “propriety of that which is cruel and unusual in this country should, at least in part, be informed by considerations of international law, practice and morals.”⁷³⁶ The majority of the Supreme Court agreed with the European Union on these points and cited the European Union's brief in its decision.

The specific issue at stake in *Atkins v. Virginia* was whether the application of the death penalty to the mentally retarded violates the Constitution's Eighth Amendment prohibition against “cruel and unusual punishments.” As explained by the majority opinion, the meaning of this Eighth Amendment prohibition is based upon “nothing less

⁷³¹ 492 U.S. 302, 340 (1989).

⁷³² 536 U.S. 304 (2002).

⁷³³ The EU's brief was originally filed in *McCarver v. North Carolina*, 533 U.S. 975 (2001), which was dismissed by the Supreme Court after North Carolina passed legislation banning the execution of mentally retarded persons. In *Atkins v. Virginia*, the EU requested that the Supreme Court consider its brief from *McCarver v. North Carolina*.

⁷³⁴ Brief of Amicus Curiae the European Union in Support of the Petitioner, 2001 WL 648609 p. 2.

⁷³⁵ *Ibid.* p. 4 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988)).

⁷³⁶ *Ibid.* p. 18.

than the dignity of man.... [and] draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷³⁷ The majority explained that legislation is the “most reliable objective evidence of contemporary values” and that the Court’s own judgment also plays a part in the Eighth Amendment determination.⁷³⁸

After concluding that a national legislative consensus in the US has developed in a direction against the application of the death penalty to mentally retarded persons, the majority opinion footnoted that this “legislative judgment” is consistent with a larger social and professional consensus, including among Americans, organizations, and other nations.⁷³⁹ Notably, the majority opinion explained that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved,” citing the European Union’s brief for support of this conclusion.⁷⁴⁰

The majority also explained two other reasons that the execution of mentally retarded persons is prohibited by the Eighth Amendment. First, the Court elaborated that the social purposes served by the death penalty are inapplicable to mentally retarded persons because their culpability is diminished for retribution purposes and deterrence is inapplicable due to their reduced capacities.⁷⁴¹ Second, the majority explained that mentally retarded persons face a special risk of wrongful execution because of the possibility of false confessions, inability to provide meaningful assistance to counsel, they are often poor witnesses, their demeanor may falsely provide an impression of lack of remorse for their conduct, and that mental retardation could enhance the chances that a jury will conclude that the aggravating factor of future dangerousness exists.⁷⁴²

Although the majority opinion’s reference to the disapproval in the world community of executing mentally retarded persons is only mentioned in a footnote as “further support to [their] conclusion” and not dispositive of the issue,⁷⁴³ Justice

⁷³⁷ 536 U.S. 304, 311-12 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, at 100–01, (1958)).

⁷³⁸ *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

⁷³⁹ *Ibid.* p. 316 n.21.

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.* p. 318-20.

⁷⁴² *Ibid.* p. 320-21.

⁷⁴³ *Ibid.* p. 316 n.21.

Rehnquist's dissent disapproved of any reliance on foreign opinion, among other areas of disagreement. Justice Rehnquist explained that legislation is the best evidence of contemporary values as legislatures, rather than courts, respond to the will and the moral values of the people in a democratic society.⁷⁴⁴

Justice Rehnquist thus criticized the majority opinion for its reliance on foreign laws since they do not establish whether a practice is accepted among people in the US. Justice Rehnquist explained that "if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant."⁷⁴⁵ Justice Scalia's dissent echoed this point, stating:

"[I]rrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."⁷⁴⁶

The dissenters' disapproval of the majority mentioning the views of other nations in a footnote is particularly interesting given that in oral argument even counsel for the state of Virginia acknowledged that, although the opinions of foreign nations are not relevant in the initial step for determining whether execution of the mentally retarded violates the Eighth Amendment, the views of other nations are relevant to determining whether a practice is the product of historical accident.⁷⁴⁷ In line with this concession, the majority opinion's conclusion first relies on legislative consensus in the United States

⁷⁴⁴ Ibid. p. 322-23.

⁷⁴⁵ Ibid. p. 325.

⁷⁴⁶ Ibid. p. 347-48 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-869, n.4 (1988)); see Dorsen, N. (2005). The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer. *International Journal of Constitutional Law*. 3(4). p. 519-541.

⁷⁴⁷ *Atkins v. Virginia*, 2002 WL 341765, at 47-48 (transcript of oral argument).

before relegating to a footnote that this conclusion is consistent with the larger social and professional context. As explained by Justice Stevens, although the views of organizations and other nations “are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”⁷⁴⁸

The larger context in which a practice such as executing mentally retarded persons takes place and confirmation that the consensus in the United States is not merely a historical accident is important given the relative permanency of a determination by the Supreme Court that such executions are unconstitutional under the Eighth Amendment. Once that determination of a consensus is made, it is unlikely that such a determination would be overruled in another case because a ruling by the United States Supreme Court that a practice is unconstitutional, as it amounts to cruel and unusual punishment, would ordinarily be complied with by state and national legislatures. The likelihood of a long term impact of such a determination was aptly explained by the Court during oral argument: “Because the evidence of the consensus is supposed to be legislation, and once we've decided that you cannot legislate the execution of the mentally retarded, there can't be any legislation that enables us to go back.”⁷⁴⁹ Thus, the impact of the European Union on the outcome of this case is likely to be long-term.

In this case, the European Union’s impact was only marginal, as the majority of the United States Supreme Court only relied on the European Union’s brief and world opinion to confirm their view on the legislative consensus within the United States against allowing the death penalty for mentally retarded persons. If the European Union did not file an amicus curiae brief in the case, the majority of the court would likely have come to a similar decision. As discussed above, the justices did not consider the views of organizations and other nations as dispositive, as a primary consideration was the existence of a legislative consensus internally to the United States. In addition, the legislative consensus in the United States was confirmed as more than just a historical accident by entities other than the European Union. Specifically, the majority opinion

⁷⁴⁸ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁷⁴⁹ *Atkins v. Virginia*, 2002 WL 341765, at 9 (transcript of oral argument).

also noted that their determination regarding the existence of a legislative consensus “reflects a much broader social and professional consensus” against “imposition of the death penalty upon a mentally retarded person,” citing the amicus curiae brief of the American Psychological Association, the amicus curiae brief of the American Association of Intellectual and Developmental Disabilities, and an amicus curiae brief filed together by groups of various religions.⁷⁵⁰ The majority opinion also pointed out that public opinion polls in the United States oppose executing mentally retarded persons.⁷⁵¹ As such, not only did the European Union’s brief and world opinion play a confirmatory role mentioned in a footnote that was not dispositive of the case but it was not alone in this regard.⁷⁵²

5.2 The European Union’s Impact on the Execution of Juveniles

In 1988, the US Supreme Court held that the Eighth Amendment prohibited the execution of persons under the age of 16 years old at the time of the crime in *Thompson v. Oklahoma*.⁷⁵³ The following year in *Stanford v. Kentucky*, on the same day that *Penry v. Lynaugh* allowed for the execution of mentally retarded persons, the Supreme Court concluded that the execution of individuals over 15 and under 18 years old at the time of the crime does not violate the Constitution.⁷⁵⁴ As already discussed, in 2002 the United States Supreme Court overruled *Penry v. Lynaugh* in *Atkins v. Virginia*. Only a few years later in *Roper v. Simmons*, Christopher Simmons argued that the reasoning of *Atkins v. Virginia* also applies to people under 18 years old at the time of the crime such that execution of such persons should now be considered cruel and unusual punishment under the Eighth Amendment.⁷⁵⁵ The European Union filed an amicus curiae brief in support of Simmons, arguing that there is an international consensus against the juvenile death

⁷⁵⁰ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁷⁵¹ *Ibid.*

⁷⁵² *Ibid.*

⁷⁵³ 487 U.S. 815 (1988).

⁷⁵⁴ 492 U.S. 361 (1989).

⁷⁵⁵ 543 U.S. 551, 559 (2005).

penalty based upon the practice of other nations, international law, and the norms and standards embraced by international organizations and bodies.⁷⁵⁶

As in *Atkins v. Virginia*, the majority opinion interpreted the Eighth Amendment as based upon “the evolving standards of decency that mark the progress of a maturing society.”⁷⁵⁷ At the time of the *Roper v. Simmons* decision, twelve states prohibited the death penalty entirely and an additional eighteen states had the death penalty but excluded juveniles from the punishment – making thirty states that prohibit the death penalty for persons under 18 years of age.⁷⁵⁸ In the ten years prior to the Court’s decision in *Roper v. Simmons*, only three states – Texas, Oklahoma, and Virginia – had carried out executions of juvenile prisoners.⁷⁵⁹

The majority of the Court found that the consistent direction of change against the execution of juveniles demonstrated a national consensus.⁷⁶⁰ The majority also explained that juveniles are less culpable for their conduct due to their immaturity and that the value of the death penalty as a deterrent to juveniles may be limited because juveniles are less likely to make the cost-benefit analysis involved.⁷⁶¹

As in *Atkins v. Virginia*, the majority again turned to the international context for confirmation of their conclusions regarding the impermissibility of executing juveniles.⁷⁶² Unlike the relegation of this confirmation to a footnote in *Atkins v. Virginia*, however, the majority opinion in *Roper v. Simmons* devoted an entire section – out of four sections – to the discussion of the international context. In this section, the majority noted:

- The US is the only country that officially sanctions the death penalty for juveniles.
- International covenants contain provisions expressly prohibiting capital punishment for crimes committed by persons under 18 years old, including

⁷⁵⁶ Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, 2004 WL 1619203.

⁷⁵⁷ *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

⁷⁵⁸ *Ibid.* p. 564.

⁷⁵⁹ *Ibid.* p. 565.

⁷⁶⁰ *Ibid.* p. 566.

⁷⁶¹ *Ibid.* p. 571-72.

⁷⁶² *Ibid.* p. 575-78.

Article 37 of the United Nations Convention on the Rights of the Child, ratified by every country except the US and Somalia.

- Since 1990, only seven other countries have executed juveniles, each of which later abolished or disavowed the practice of executing juveniles.⁷⁶³

The Court summarized the international context stating, “It is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”⁷⁶⁴ The majority opinion attributed particular relevance to the experience of the United Kingdom because of its shared history with the United States and the origins of the Eighth Amendment.⁷⁶⁵

Justice Kennedy’s questioning during oral argument demonstrated his interest in the views of the European Union and the world generally, inquiring into the concept of *unusual* punishment within the large context of these views with his questions to counsel:

“We’ve seen very substantial demonstration that world opinion is--is against this, at least as interpreted by the leaders of the European Union. Does that have a bearing on what’s unusual? Suppose it were shown that the United States were one of the very, very few countries that executed juveniles, and that’s true. Does that have a bearing on whether or not it’s unusual?”⁷⁶⁶

As in *Atkins v. Virginia*, this decision is likely to have a long-term effect on United States death penalty laws because determinations of cruel and unusual punishment are based in part on a legislative national consensus, and legislatures are unlikely to pass new laws that would violate the Constitution under Supreme Court decisions.⁷⁶⁷ The Court’s continued reliance on the international context for confirmation of its decisions is

⁷⁶³ Ibid. p. 575-77.

⁷⁶⁴ Ibid. p. 577.

⁷⁶⁵ Ibid.

⁷⁶⁶ *Roper v. Simmons*, 2004 WL 2387647, at 11 (transcript of oral argument).

⁷⁶⁷ Ibid. p. 18-19.

also building precedent for potential future reliance on and impact by the European Union.

On the other hand, it is not impossible for case law to change course, and the United States Supreme Court's reliance on the views of the European Union and other nations was highly controversial. Indeed, a justice of the Supreme Court of Alabama was so displeased with the five United States Supreme Court justices' reliance on contemporary "foreign law" and "that the *Roper* Court received and specifically cited amici curiae briefs from the European Union and from the Human Rights Committee of the Bar of England and Wales" that he advocated that, with two different Justices now on the United States Supreme Court, the Supreme Court of Alabama should decline to follow the *Roper* decision to give the now differently composed United States Supreme Court the chance to overrule the *Roper* decision.⁷⁶⁸ Thus, not only is the death penalty and its specific application a contentious topic, but the mere idea of following the example of or citing the brief of foreign authorities like the European Union is unacceptable even among some high level judges in the United States.

Justice Scalia's dissenting opinion in *Roper v. Simmons* (joined by Justices Thomas and Rehnquist) also strongly disapproved of the majority opinion's extensive discussion of the international context. The dissent explained that foreign nations' views are not relevant because they do not have the particular legal system of protections, such as juries and consideration of mitigating circumstances for the death penalty, that the United States has in place.⁷⁶⁹ The dissent also pointed out that the United States has either not ratified or made specific reservations to the treaties prohibiting the death penalty for juveniles discussed by the majority opinion.⁷⁷⁰

Unlike the majority, the dissent focused on the differences between the United States' legal, political, and social cultures and those of other countries, including the United Kingdom. As explained by Justice Scalia, the United Kingdom has changed "in the centuries since the Revolutionary War" was fought by the United States with its "recent submission to the jurisprudence of European courts dominated by continental

⁷⁶⁸ *Ex Parte Walker*, 972 So.2d 737, 763-64 (Ala. 2007).

⁷⁶⁹ *Roper v. Simmons*, 543 U.S. 551, 622-24 (2005).

⁷⁷⁰ *Ibid.*

jurists” such that the United Kingdom has developed “a legal, political, and social culture quite different from” that of the United States.⁷⁷¹ As such, Justice Scalia rejected the idea that laws in the United States should “conform to the laws of the rest of the world”.⁷⁷²

Despite the dissent’s vigorous disapproval, the European Union had a marginal impact on the majority opinion in this case – again by confirming the decision of the court regarding the impermissibility of imposition of the death penalty for persons over 15 and under 18 years of age. As in *Atkins v. Virginia*, the European Union’s brief and the international context only played a confirmatory role in the majority opinion and likely did not create a tangible change in the decision. Tellingly, Justice O’Conner joined the majority opinion in *Atkins v. Virginia*, but in her dissent in *Roper v. Simmons* she briefly reasoned with regard to the international context that, since in her view there was no “domestic consensus” against executing persons over 15 and under 18 years of age, “the recent emergence of an otherwise global consensus does not alter that basic fact.”⁷⁷³ Somewhat similarly, the majority in *Roper v. Simmons* pointed out that “the opinion of the world community” was “not controlling our outcome” but “does provide respected and significant confirmation for our own conclusions.”⁷⁷⁴

5.3 The European Union’s Impact on Consular Access Rights

As explained in Chapter 3, the European Union has also focused on consular access rights under the VCCR in its death penalty advocacy. As discussed in that chapter, the European Union has had a marginal impact on the federal executive branch on this issue. The European Union has not, however, had an impact on consular access rights through its *amicus curiae* briefs in United States courts.

⁷⁷¹ Ibid. p. 626-27.

⁷⁷² Ibid. p. 624.

⁷⁷³ Ibid. p. 605.

⁷⁷⁴ Ibid. p. 578.

The European Union has filed similar briefs in various cases concerning alleged violations of the VCCR, including in support of the petitions of Jose Ernesto Medellin, an individual named in the ICJ's *Avena* case. In its briefs, the European Union argues:

- for the importance of the right to consular access under the VCCR;
- that the VCCR confers an individual right to consular assistance to foreign nationals after arrest;
- that violation of Article 36 requires judicial review and reconsideration of a conviction and sentence, regardless of whether there has been a showing that a different result would have been reached with the help of consul;
- that procedural default rules should not be applied to Article 36 violations; and
- that consular access is a right pursuant to customary international law.⁷⁷⁵

Although the justices did not necessarily reject all of the European Union's arguments, the United States Supreme Court neither cited nor relied upon the European Union's views in its holding for each case. In *Medellin v. Dretke*, the Supreme Court dismissed the case based on several threshold issues, including that Medellin had not yet exhausted his state court remedies because he had a new pending state application for a writ of habeas corpus in Texas filed after the issuance of President Bush's memorandum.⁷⁷⁶

Relying on the ICJ's decision in *Avena* and President Bush's Memorandum that called on state courts to give effect to that decision, Medellin's new application for a writ of habeas corpus was dismissed by the Texas Court of Criminal Appeals for failing to timely raise the VCCR claim pursuant to Texas state law.⁷⁷⁷ The United States Supreme Court again granted certiorari to decide whether the ICJ's ruling in *Avena* is directly enforceable in a state court and whether "the President's Memorandum independently require[s] the States to provide review and reconsideration of the claims of the 51

⁷⁷⁵ Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, 2007 WL 1874804; Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, 2004 WL 2381132.

⁷⁷⁶ *Medellin v. Dretke*, 544 U.S. 660, 666 (2005).

⁷⁷⁷ *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

Mexican nationals named in *Avena* without regard to state procedural default rules.”⁷⁷⁸ The United States Supreme Court affirmed the Texas court’s dismissal of Medellin’s application, holding that “neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.”⁷⁷⁹ The European Union’s arguments in its amicus curiae briefs had no impact on these court decisions regarding consular access rights in capital cases.

5.4 The European Union’s Impact in Other Death Penalty Cases Generally

The issues discussed above represent the specific death penalty issues in which the European Union has filed amicus curiae briefs in United States courts. In other cases, although the outcome of the decision was not affected by the abolition of the death penalty in the European Union and elsewhere, judges have similarly expressed concern regarding the increasingly isolated position in the world of the United States in its continued use of the death penalty but were not part of the majority, viewed it as a concern for legislators rather than judges, or felt otherwise constrained by additional factors.⁷⁸⁰

Justice Harrison of the Illinois Supreme Court, for example, expressed in a dissenting opinion the isolated position of the United States on the death penalty:

“With the exception of Japan, the United States is now the only well-established democracy that has not abolished the death penalty expressly or in practice. Western Europe is free of capital punishment, as are most countries in our hemisphere. Even in the United States, 12 states and the District of Columbia presently have no death penalty for any offense, no matter how severe.

⁷⁷⁸ Ibid.

⁷⁷⁹ Ibid. p. 498-99.

⁷⁸⁰ See, e.g., *U.S. v. Church*, 217 F.Supp.2d 700, 702 (W.D.Va. 2002); *People v. Bull*, 185 Ill.2d 179, 225 (Ill. 1998).

I do not know enough about international law to judge whether the nations who have abolished capital punishment are, in fact, less protective of individual human rights than the courts in the United States. I do know, however, that the abolitionist nations have at least insured that no one will pay the ultimate price for their fallibility. That is decidedly not the case in those United States jurisdictions retaining the death penalty, including Illinois.”⁷⁸¹

This is not to suggest, however, that every judge and court decision on the death penalty favorably considers the views of the EU and the world generally, as illustrated by the dissents in *Atkins v. Virginia* and *Roper v. Simmons*, discussed earlier. In multiple federal and state cases in which the European Union did not file an amicus curiae brief, United States courts have denied relief to defendants based on arguments that the death penalty is generally impermissible based upon the abolition of capital punishment in Europe and other nations and international law and norms.⁷⁸²

Although the European Union did not have a tangible impact on the outcome of these cases, the European Union and world example have nonetheless entered the arguments of defense lawyers and other legal advocates and have been of serious concern in the deliberated decisions of at least some judges. The European Union’s example, as well as the world example partially created by the European Union’s efforts, has led to a shift in United States interests – making some judges question capital punishment in a world where the United States is increasingly isolated on the matter. As a result, even in some cases in which the European Union has not directly involved itself, the European Union has nevertheless had a marginal impact on the United States death penalty for what

⁷⁸¹ *People v. Bull*, 185 Ill.2d 179, 225 (Ill. 1998) (citing Wyman, Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law, 6 J. Transnat'l L. & Pol'y 543, 544 (1997) and A. Phillips, Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing, 35 Am.Crim. L.Rev. 93, 99 n. 54 (1997)).

⁷⁸² See, e.g., *U.S. v. Church*, 217 F.Supp.2d 700, 702 (W.D.Va. 2002); *People v. Vines*, 51 Cal.4th 830, 891-92 (Cal. 2011); *People v. Taylor*, 48 Cal.4th 574, 663 (Cal. 2010); *People v. Carrington*, 47 Cal.4th 145, 198 (Cal. 2009); *People v. Lewis*, 46 Cal.4th 1255, 1320 (Cal. 2009); *People v. Salcido*, 44 Cal.4th 93, 168 (Cal. 2008); *People v. Brasure*, 42 Cal.4th 1037, 1071-72 (Cal. 2008); *People v. Morgan*, 42 Cal.4th 593, 627-28 (Cal. 2007); *People v. Hoyos*, 41 Cal.4th 872, 927 (Cal. 2007); *People v. Abilez*, 41 Cal.4th 472, 535 (Cal. 2007); *People v. Moon* 37 Cal.4th 1, 47 (Cal. 2005).

it is as well as what it has accomplished in its world advocacy. It is of course possible, although not certain, that in the years or decades to come this shift in United States interests will continue until greater overall change occurs.

5.5 Overall Results and Conclusion

Although the European Union faced resistance from some judges to having an impact in United States courts on death penalty issues, the European Union has nonetheless had a marginal impact through some of its efforts, summarized in the following table:

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|---|---|--------------------------------|--|---------------|
| Death Penalty for Mentally Retarded Persons | EU files amicus curiae briefs in US Supreme Court cases | Persuasion; setting an example | US Supreme Court majority opinion relies on EU brief and EU & world example to confirm ruling that death penalty for mentally retarded persons is unconstitutional | Marginal |
| Death Penalty for Juveniles | EU files amicus curiae briefs in US Supreme Court cases | Persuasion; setting an example | US Supreme Court majority opinion relies on EU brief and EU & world example to confirm ruling that juvenile death penalty is unconstitutional | Marginal |
| Consular Access Rights | EU files amicus curiae briefs in US Supreme Court cases | (Persuasion attempted) | US Supreme Court does not rely on EU for its decisions | Nil |

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|---|--|-----------------------------|--|---------------|
| Death Penalty Generally (other cases ⁷⁸³) | Death penalty abolished throughout EU; EU advocates for world-wide abolition | Setting an example | Some US judges express concern over isolated position of US on death penalty | Marginal |

The European Union had a marginal impact on the death penalty for juveniles and mentally retarded persons through persuasion and setting an example, as well as a marginal impact on other death penalty cases through its own example and world advocacy. Even for the issue of consular access rights for which the European Union failed to have an impact on the decisions of the United States Supreme Court, the European Union nevertheless had a marginal impact on United States interests through other foreign policy advocacy as discussed in Chapter 3. As demonstrated in Chapter 7, the European Union has also had an impact specifically in United States courts on capital sentencing through (indirect) persuasion via funding of the ABA’s Moratorium Project.

In a 2006 article, Krista Patterson minimizes the role of persuasion in cases like *Atkins v. Virginia* and *Roper v. Simmons* because the United States Supreme Court did not assign “persuasive or precedential value to foreign or international practices” and that the dissenting justices had a “strong reaction . . . against the use of foreign or international law as persuasive precedent.”⁷⁸⁴ However, while it would be accurate to say that the justices of the United States Supreme Court did not look to French law, German law, European Union law, or other foreign law as singularly determinative of the outcome in the case without regard to the situation within the states in the United States, the majority of justices were nonetheless persuaded about the existence of an

⁷⁸³ In combination with amicus curiae briefs filed in cases involving mentally retarded persons and juveniles, the European Union example also contributed to elimination of the death penalty for those persons in the United States.

⁷⁸⁴ Patterson, K (2006). Acculturation and the Development of Death Penalty Doctrine in the United States. *Duke Law Journal*. 55, p. 1240.

international consensus against the death penalty and that the existence of this consensus was relevant to confirming the Court's determination.

Speaking more generally on the reliance on foreign law, Justice Breyer has explained a similar idea:

I read briefs. Those briefs frequently explain law with which I was not previously familiar.... Those briefs will have to explain foreign law too, and ever more so. That is because foreign law comes before us ever more frequently in discovery cases, antitrust cases, EPA14 cases, NAFTA cases. We shall have to learn something about foreign law to decide those cases properly. And the lawyers will have to explain it, separating the more important from the less important information. If there are important, interesting, and relevant matters of foreign law, the lawyers will point them out.⁷⁸⁵

Breyer later continued, "If the foreign materials have had a significant impact on my thinking, they may belong in the opinion because an opinion should be transparent. It should reflect my actual thinking."⁷⁸⁶ While it is also true that some dissenting justices were not so persuaded, the justices joining the majority opinions in these cases were persuaded by some of the European Union's arguments, and it is the majority opinion that sets the most binding precedent for other United States courts that deal with issues of capital punishment.

Nonetheless, persuasion was not the only diffusion mechanism at work here, and the European Union's impact on the death penalty for juveniles and mentally retarded persons was also accomplished through its own example and the example created through its world-wide advocacy. In both *Atkins v. Virginia* and *Roper v. Simmons*, the United States Supreme Court considered the death penalty practices of other nations in confirming its decisions, demonstrating that successes in the European Union's world-

⁷⁸⁵ Dorsen, N. (2005). The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer. *International Journal of Constitutional Law*. 3(4). p. 523, 536.

⁷⁸⁶ Ibid. p. 540.

wide efforts at abolishing the death penalty and its own example played such a confirmatory role in the decisions.

In other cases in which the European Union did not specifically involve itself, judges have similarly expressed concern regarding the increasingly isolated position of the United States in its continued use of the death penalty but were either not part of the majority, viewed it as a concern for legislators rather than judges, or faced other constraints.⁷⁸⁷ Despite such concerns, in multiple cases in which the European Union did not file a brief, United States courts have not yet accepted legal arguments that the death penalty is generally impermissible based upon the abolition of capital punishment in the European Union and elsewhere in the world.⁷⁸⁸

⁷⁸⁷ See, e.g., *United States v. Church*, 217 F. Supp. 2d 700, 702 (W.D.Va. 2002); *People v. Bull*, 185 Ill.2d 179, 225 (Ill. 1998).

⁷⁸⁸ See, e.g., *U.S. v. Church*, 217 F.Supp.2d 700, 702 (W.D.Va. 2002); *People v. Vines*, 51 Cal.4th 830, 891-92 (Cal. 2011); *People v. Taylor*, 48 Cal.4th 574, 663 (Cal. 2010); *People v. Carrington*, 47 Cal.4th 145, 198 (Cal. 2009); *People v. Lewis*, 46 Cal.4th 1255, 1320 (Cal. 2009); *People v. Salcido*, 44 Cal.4th 93, 168 (Cal. 2008); *People v. Brasure*, 42 Cal.4th 1037, 1071-72 (Cal. 2008); *People v. Morgan*, 42 Cal.4th 593, 627-28 (Cal. 2007); *People v. Hoyos*, 41 Cal.4th 872, 927 (Cal. 2007); *People v. Abilez*, 41 Cal.4th 472, 535 (Cal. 2007); *People v. Moon* 37 Cal.4th 1, 47 (Cal. 2005).

6. THE EUROPEAN UNION'S IMPACT ON UNITED STATES COURTS IN THE WAR ON TERROR

As previously discussed, in its specific relations with the United States, the European Union has made human rights a priority, but more so with the United States death penalty than the War on Terror. The European Parliament has been particularly active on human rights issues in the US War on Terror. In addition to the European Parliament's investigation and 2007 Report on extraordinary rendition and the European Parliament's resolutions calling for the closure of the prison at Guantanamo Bay, condemning the treatment of prisoners at Guantanamo Bay, and condemning extraordinary renditions,⁷⁸⁹ many European Parliamentarians have also joined in amicus curiae briefs filed in United States court cases involving Guantanamo Bay detainees.

Notably, these amicus curiae briefs were not filed on behalf of the European Union as a whole, even though, as Sarah Ludford, justice spokeswoman for the European Liberal Democrats in the European Parliament, stated:

“The submission of European views would be much strengthened if the EU Council of Ministers did it on behalf of the European Union as a whole . . . The EU has a duty to speak up for all the prisoners, including the non-Europeans. Otherwise its claims to pursue a human rights policy will be severely dented.”⁷⁹⁰

In contrast to the individual European Parliamentarians taking part in these Guantanamo Bay detainee cases, the European Union as a whole is represented as amicus curiae in some death penalty court cases.

In a variety of ways, such litigation could potentially serve as an important instrument for protecting human rights and addressing human rights violations,

⁷⁸⁹ European Parliament Resolution on the Situation of Prisoners at Guantanamo, P6_TA(2006)0254, 13 June 2006; European Parliament Resolution on the Alleged Use of European countries by the CIA for the Transportation and Illegal Detention of Prisoners, P6_TA(2006)0316, 6 July 2006.

⁷⁹⁰ Ludford, S. (2003). Guantanamo Bay – European Parliament Action. Retrieved from <http://mx1.sarahludfordmep.org.uk/node/1656>.

particularly in the context of the War on Terror. First, human rights litigation helps in framing issues as a matter of law rather than only politics.⁷⁹¹ This is particularly important in the War on Terror with the political discourse often revolving around terrorism and security instead of legality and the rule of law.⁷⁹² Second, human rights litigation can lead to changes in law or practice, whether by exposing policies, practices, and their consequences in the course of litigation or through clarification of the law by courts themselves.⁷⁹³ Third, litigation offers victims of human rights violations a chance to tell their stories and, if successful, judgments that validate those stories.⁷⁹⁴

Importantly, human rights litigation exposes courts to possible influence from international and foreign actors, particularly through amicus curiae briefs.⁷⁹⁵ United States courts play a central role in the interpretation and application of the various legal issues surrounding human rights violations in the United States War on Terror, from habeas corpus and procedural rights protecting against the arbitrary detention of Guantanamo prisoners to civil suits against alleged participants in extraordinary renditions. In the United States system, the judiciary often acts as a check on executive power, as well as the legislature, in interpreting such human rights issues.

This chapter examines the impact of the European Union in United States courts on human rights issues in the War on Terror, focusing on the issues of arbitrary detention and extraordinary rendition. These two issues represent the cases in which European Union actors or actions have been involved in some manner in United States court cases involving alleged human rights violations in the War on Terror.

⁷⁹¹ Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90, p. 595.

⁷⁹² Ibid. p. 595-596.

⁷⁹³ Ibid.

⁷⁹⁴ Ibid. p. 595.

⁷⁹⁵ Ibid. p. 595-596.

6.1 Arbitrary Detention

The most well-known human rights litigation relating to the United States War on Terror concerns arbitrary detention of prisoners at Guantanamo Bay. This litigation generally revolves around the right to habeas corpus and the legality of trial by military commission.⁷⁹⁶ Habeas corpus is a “writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal.”⁷⁹⁷ Although historically habeas corpus has served different purposes, today it can act as an important check on (the abuse of) executive power, calling into account the executive to demonstrate the legality of imprisoning an individual.

Similarly, trial by military commission has also raised concerns regarding excessive executive power in the context of the War on Terror. Combined with a denial of the right to habeas corpus, military commissions with their specially set-up procedures can be used by the executive as a method of avoiding the rights and protections ordinarily provided in existing judicial systems. Serious problems arise concerning indefinite or lengthy detention without trial and, if and when proceedings do take place, whether appropriate and fair procedures are in place to ensure that impartial determinations are made with impartial judicial bodies, defendants have the ability to defend themselves through access to evidence used against them, and that procedures are in place to prevent the use of inappropriate and unreliable evidence, particularly hearsay evidence obtained through torture.

Of course, such human rights problems did not arise in a vacuum. The United States executive and legislative branches set-up such procedures (or did not establish such procedures, as the case may be) based upon national security concerns over terrorism, and they did not simply back away from such concerns when confronted by litigation and adverse court decisions.⁷⁹⁸

⁷⁹⁶ Ibid. p. 575.

⁷⁹⁷ *Boumediene v. Bush*, 553 US 723, 737 (2008) (quoting Black’s Law Dictionary 728 (8th ed. 2004)).

⁷⁹⁸ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 575-579.

With courts exercising a degree of judicial restraint, it took multiple court cases and six years before the US Supreme Court decided that Guantanamo Bay detainees had the constitutional privilege of habeas corpus.⁷⁹⁹ In reaction to early set-backs in court cases, the political branches responded to the holdings of the Supreme Court through minimal interpretations of the decisions and revising legislation upon which the decisions were based, eliminating the rights the previous legislation provided.⁸⁰⁰ This “curious game of legal ping-pong” “played out between the judicial and political branches” demonstrates the resistance that existed in the political branches to addressing the human rights issues at hand.⁸⁰¹ It also suggests that the European Union’s, or more specifically European Parliamentarians’, attempts to directly have an impact on United States courts is potentially an important, perhaps slow, method for affecting changes in United States laws and policies relating to human rights.

The members of the European Parliament did not file amicus curiae briefs in the first cases involving the rights of detainees. In 2004, a plurality of the United States Supreme Court in *Hamdi v. Rumsfeld* held that a United States citizen being held on US soil as an enemy combatant was entitled to certain constitutional due process protections, including “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”⁸⁰² On the same day, the Supreme Court decided *Rasul v. Bush*, involving prisoners without American nationality detained outside the United States at Guantanamo Bay. In *Rasul*, the majority held that federal courts had *statutory* habeas corpus jurisdiction over the Guantanamo detainees’ cases but did not resolve whether a *constitutional* right to habeas corpus exists in such cases.⁸⁰³

In response to the *Hamdi* decision, the United States government released one US national and transferred another to regular courts.⁸⁰⁴ In response to the *Rasul* decision, the executive branch created Combatant Status Review Tribunals and Administrative

⁷⁹⁹ Ibid.

⁸⁰⁰ Ibid.

⁸⁰¹ Ibid. p. 575.

⁸⁰² *Hamdi v. Rumsfeld*, 542 US 507, 509 (2004).

⁸⁰³ *Rasul v. Bush*, 542 US 466, 484 (2004).

⁸⁰⁴ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 576.

Review Boards as a substitute for habeas corpus, and Congress passed the Detainee Treatment Act 2005 (DTA) providing that Guantanamo detainees do not have the right of habeas corpus.⁸⁰⁵

With the United States Supreme Court not resolving the constitutional issue regarding non-national Guantanamo detainee habeas corpus rights, the political branches reacted by instituting alternative procedures based in new legislation. Further litigation resulted, now with direct involvement through amicus curiae briefs by European Parliamentarians in *Hamdan v. Rumsfeld* and *Boumediene v. Bush*.

6.1.1 *Hamdan v. Rumsfeld*

In *Hamdan v. Rumsfeld*, Salim Ahmed Hamdan filed a habeas petition challenging the executive branch's use of a military commission to prosecute him for conspiracy to commit terrorism. He contended that the military commission convened by the president lacks authority to try him for the crime of conspiracy and that the procedures adopted for his trial violate military and international law, including that a defendant is allowed to see and hear evidence used against him.⁸⁰⁶

A large group of current and former European and United Kingdom parliamentarians filed briefs in support of Hamdan at various stages of the case. By the time the case reached the United States Supreme Court, 422 such persons had joined this amicus group, including 112 current and former members of the European Parliament, a former European Commissioner, a Vice President of the European Parliament, and a former Vice President of the European Commission.⁸⁰⁷ Although many of these people had diverse political views, they participated in the case because

⁸⁰⁵ Ibid.

⁸⁰⁶ *Hamdan v. Rumsfeld*, 548 US 557, 567 (2006).

⁸⁰⁷ Amicus Curiae Brief of 422 Current and Former Members of the United Kingdom and European Union Parliaments in Support of Petitioner, 2006 WL 42097, at 1.

“they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, the United States comply with the standards set by international humanitarian law and human rights law. Amici have taken part in these proceedings to urge the courts to ensure that the treatment accorded to prisoners such as Hamdan - be they terrorists or not - meets these standards.”⁸⁰⁸

Based on this common view, the parliamentarians argued that Europe and the United States share a common heritage respecting human rights and the rule of law as reflected in human rights treaties and customary international law, that human rights treaties and customary international law apply to the United States prosecution of the war on terror, and that the military commission process being applied to Hamdan did not meet the standards imposed by human rights treaties and customary international law.⁸⁰⁹ In particular, the brief argued that the military commission process to try Hamdan

“(a) fails to ensure an impartial determination of prisoners' guilt or innocence;
(b) does not provide for appeal to an independent judicial body;
(c) occasions detention without trial for periods in excess of three years;
and
(d) does not prevent the admission of evidence obtained through torture.”⁸¹⁰

Although the brief acknowledged that detailed arguments regarding United States constitutional and statutory interpretation and the Third Geneva Convention were made in the submissions of others, the brief's more general concern was that “the war on terror is not conducted in a legal ‘black hole,’” but instead is conducted in accordance with the

⁸⁰⁸ Ibid. p. 1-2.

⁸⁰⁹ Ibid.

⁸¹⁰ Ibid. p. 4.

rule of law and governed by international human rights treaties and customary international law.⁸¹¹

Despite the United States federal administration's argument that the DTA denied habeas corpus jurisdiction over Hamdan's case, the majority of the Supreme Court again did not address whether Guantanamo detainees had a right of habeas corpus under the Constitution since Hamdan's case was initiated before adoption of the DTA.⁸¹² The majority did find, however, that Hamdan was entitled to a number of due process protections. More specifically, the Supreme Court held that "the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ [Uniform Code of Military Justice] and the Geneva Conventions", with the Geneva Conventions application based upon provisions in the UCMJ.⁸¹³

A plurality of justices found that "international sources confirm that the crime charged here is not a recognized violation of the law of war" and that neither the Geneva Conventions nor the Hague Conventions identify conspiracy as a violation of the law of war.⁸¹⁴ The majority further disagreed with the Court of Appeals that the Geneva Conventions did not apply to the war with al Qaeda. The majority found that Common Article 3 applies to Hamdan's case and provides minimum protections to "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by ... detention" and "requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'"⁸¹⁵ Last, a plurality of the judges explained that these judicial guarantees include trial protections recognized by customary international law, including those found in Article 75 of Protocol I to the Geneva Conventions of 1949.⁸¹⁶

⁸¹¹ *Ibid.*

⁸¹² *Hamdan v. Rumsfeld*, 548 US 557, 574-75 (2006); Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90, p. 576.

⁸¹³ *Hamdan v. Rumsfeld*, 548 US 557, 567, 613 (2006).

⁸¹⁴ *Ibid.* p. 610.

⁸¹⁵ *Ibid.* p. 629-30.

⁸¹⁶ *Ibid.* p. 633.

While the parliamentarians' brief was not cited in the Supreme Court's discussion of specific legal issues, the broader theme of the majority decision reflected the parliamentarians' emphasis on the rule of law and the applicability of international law in the United States. Indeed, the majority of the United States Supreme Court ended its opinion explicitly emphasizing the rule of law, concluding that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction."⁸¹⁷

David Scheffer, a former US Ambassador at Large for War Crimes Issues and law professor at Northwestern University School of Law, suggested that when the court found that the "rule of law prevails in this jurisdiction," they did so with the rule of international law foremost in their deliberations."⁸¹⁸ Indeed, the justices made multiple references to international law or the rule of law in *Hamdan v. Rumsfeld*.⁸¹⁹ With multiple briefs filed by various groups emphasizing the importance of the rule of law and the applicability of international law, it is not surprising that the majority of the Supreme Court also adopted this theme in their opinion.

The group of United Kingdom and European Parliamentarians, however, only had a marginal impact in this case. If they had not filed amicus curiae briefs in *Hamdan v. Rumsfeld*, the plurality opinion of the United States Supreme Court would likely have been the same. The United States Supreme Court justices did not cite the Parliamentarians briefs, and in Hamdan's own arguments, as well as those of other amicus curiae, international law and the rule of law were already emphasized.⁸²⁰ The European Parliamentarians were just one of the groups of voices helping to ensure that the Supreme Court recognized these greater issues in the context of the more concrete legal arguments.

⁸¹⁷ Ibid. p. 635.

⁸¹⁸ Scheffer, D. (2006). *Hamdan v. Rumsfeld: The Supreme Court Affirms International Law. Jurist*. Retrieved from <http://jurist.org/forum/2006/06/hamdan-v-rumsfeld-supreme-court.php>.

⁸¹⁹ *Hamdan v. Rumsfeld*, 548 US 557, 567, 603, 611, 620, 631, 633, 634, 635, 641 (2006).

⁸²⁰ See, e.g., Reply Brief for the Petitioner, *Hamdan v. Rumsfeld*. p. 11, 14, 20. Retrieved from http://cja.org/downloads/Hamdan_Reply_Brief.pdf; Brief of *Amici Curiae* Madeleine K. Albright and 21 Former Senior U.S. Diplomats in Support of Petitioner Salim Ahmed Hamdan, *Hamdan v. Rumsfeld*. Retrieved from http://cja.org/downloads/Hamdan_Amicus_Brief_Albright.pdf.

Nonetheless, as the Supreme Court largely relied upon legislation, particularly the DTA and UCMJ, rather than the United States Constitution, as the legal basis for finding habeas jurisdiction and rights under the Geneva Conventions, the political branches again took the opportunity to pass new legislation to largely circumvent the court's decision. Addressing the Supreme Court's application of the Geneva Conventions through the UCMJ, Congress passed the Military Commissions Act of 2006 (MCA) prohibiting invocation of "the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding" against United States agents "as a source of rights" in United States courts.⁸²¹ The MCA also extended the DTA's elimination of habeas corpus jurisdiction to all persons detained as enemy combatants or awaiting such determination, including to pending cases at the time of the MCA's enactment.⁸²²

6.1.2 *Boumediene v. Bush*

It was not until *Boumediene v. Bush* in 2008 that the United States Supreme Court addressed the constitutional due process and habeas corpus protections of non-nationals held at Guantanamo Bay.⁸²³ Through the DTA and MCA, Congress provided alternative procedures for review of the status of detainees and denied federal courts jurisdiction over habeas corpus actions.⁸²⁴ A group of 383 current and former United Kingdom parliamentarians and members of the European Parliament filed an amicus curiae brief in the Supreme Court on the matter. Similar to the arguments made in *Hamdan v. Rumsfeld*, the parliamentarians argued that Europe and the United States share a common heritage respecting human rights and the rule of law, that human rights treaties and customary international law apply to the United States prosecution of the war on terror, and that the

⁸²¹ Military Commissions Act of 2006, 120 Stat. 2600, sec. 5.

⁸²² Military Commissions Act of 2006, 120 Stat. 2600, sec. 7.

⁸²³ *Boumediene v. Bush*, 553 US 723, 732 (2008); Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90, p. 577.

⁸²⁴ *Boumediene v. Bush*, 553 US 723, 732-39 (2008).

Combatant Status Review Tribunal process applied to the Guantanamo detainees did not meet human rights standards imposed by treaties and customary international law.⁸²⁵

Like in *Hamdan v. Rumsfeld*, the United States Supreme Court did not specifically cite the parliamentarians' brief, and the importance of the rule of law, despite the War on Terror and security threats from international terrorism, was once again an important underlying theme in the court's decision. Relying primarily on the history of habeas corpus and United States domestic law, the majority of the Supreme Court held that the petitioners do have the constitutional privilege of habeas corpus, that the alternate procedures established by Congress "are not an adequate and effective substitute for habeas corpus," and that § 7 of the MCA "operates as an unconstitutional suspension of the writ [of habeas corpus]."⁸²⁶ Underscoring the importance of the rule of law, the majority opinion concluded:

"We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."⁸²⁷

Once again, the United Kingdom and European Parliamentarians amicus curiae brief had a marginal impact on the overall decision of the United States Supreme Court in this case. Had they not filed an amicus curiae brief in the case, the majority of the court would likely have made the same decision. As with *Hamdan*, the court did not specifically reference the Parliamentarians brief, and petitioners and other amicus curiae already

⁸²⁵ Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, 2007 WL 2441594.

⁸²⁶ *Boumediene v. Bush*, 553 US 723, 732-33 (2008).

⁸²⁷ *Ibid.* p. 798.

emphasized the rule of law as an overarching principle in addition to their more specific legal arguments.⁸²⁸

6.2 Extraordinary Rendition

The practice of extraordinary rendition has also been a source of litigation in the United States. The European Parliament's report describes the CIA's extraordinary rendition program as

“an extra-judicial practice . . . whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves *incommunicado* detention and torture.”⁸²⁹

As previously discussed, extraordinary rendition can entail a variety of important human rights concerns. The European Parliament and the Council of Europe have both conducted investigations into this appalling practice, with the European Parliament

⁸²⁸ See, e.g., Petition for a Writ of Certiorari, *Boumediene v. Bush*, p. 11, 28. Retrieved from https://ccrjustice.org/sites/default/files/attach/2015/05/2007-03_SCOTUSBoumedieneCertPetition.pdf; Petition for Writ of Certiorari, *Odah v. United States of America*, p. 24. Retrieved from https://ccrjustice.org/sites/default/files/attach/2015/05/2007-03-05_SCOTUSA1%20OdahCertPetition.pdf; Brief for the Boumediene Petitioners, *Boumediene v. Bush*, p. 49-50. Retrieved from <https://ccrjustice.org/sites/default/files/assets/Brief%20for%20the%20Boumediene%20Petitioners.pdf>; Brief for Petitioners Al Odah, et al. *Odah v. United States of America*, p. 2, 44. Retrieved from <https://ccrjustice.org/sites/default/files/assets/Brief%20for%20Petitioners%20Al%20Odah%2C%20et%20a%20l.pdf>; Reply Brief for the Boumediene Petitioners, *Boumediene v. Bush*, p. 6, 25. Retrieved from <https://ccrjustice.org/sites/default/files/assets/reply%20brief%20boumediene.pdf>; Brief Amicus Curiae of Retired Military Officers in Support of Petitioners, *Boumediene v. Bush*, p. 1, 14, 19, 22, 30. Retrieved from <https://ccrjustice.org/sites/default/files/assets/Brief%20Amicus%20Curiae%20of%20Retired%20Military%20Officers%20in%20Support%20of%20Petitioners.pdf>; Brief Amicus Curiae of the American Bar Association in Support of Petitioners, *Boumediene v. Bush*. Retrieved from <https://ccrjustice.org/sites/default/files/assets/Brief%20Amicus%20Curiae%20of%20the%20American%20Bar%20Association%20In%20Support%20of%20Petitioners.pdf>.

⁸²⁹ European Parliament (2006). Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI)). p. 11.

calling it “enforced disappearance” when it leads to secret detention, such that the persons abducted do not receive protection of law nor information for themselves or their families.⁸³⁰ As enumerated by the European Parliament’s 2007 Report, extraordinary rendition involves several human rights violations, “in particular violations of the right to liberty and security, the freedom from torture and cruel, inhuman or degrading treatment, the right to an effective remedy, and, in extreme cases, the right to life.”⁸³¹

Again, Dick Marty, rapporteur for the Council of Europe, described the CIA’s extraordinary rendition program as a “spider’s web” involving collaboration or tolerance of many countries, including in Europe, in which terrorist suspects are apprehended and flown between States on civilian aircraft, often to states known for torture and other degrading treatment or to Guantanamo Bay and other detention centers.⁸³² The European Union aided in the Council of Europe’s investigation, with the Commission providing support in obtaining information from the European Union Satellite Centre and Eurocontrol.⁸³³

6.2.1 *El-Masri v. United States*

Although the European Union did not file amicus curiae briefs in United States cases involving extraordinary rendition, the European Parliament and the Council of Europe Parliamentary Assembly’s (with the help of the European Commission) investigations played a central role in a case involving Khaled El-Masri. In his civil lawsuit against various CIA and private parties involved in his rendition, El-Masri, a German citizen of Lebanese descent that shares the same name as a member of al-

⁸³⁰ Ibid. p. 4; Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 588.

⁸³¹ European Parliament (2006). Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (2006/2200(INI). p. 4.

⁸³² Council of Europe (2006). Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States, Doc. 10957, 12 June 2006. p. 2.

⁸³³ Ibid. p. 10.

Qaeda,⁸³⁴ claimed he was detained by Macedonian law enforcement officials and then given to CIA operatives, who took him to a detention facility in Afghanistan before releasing him in Albania.⁸³⁵ He claimed that during his extraordinary rendition he was mistreated in violation of international and United States laws, “including being beaten, drugged, bound, and blindfolded during transport; confined in a small, unsanitary cell; interrogated several times; and consistently prevented from communicating with anyone outside the detention facility, including his family or the German government.”⁸³⁶

The US government intervened in the court case and argued for dismissal under the state secrets privilege because litigating the case would entail disclosure of information that would be detrimental to national security.⁸³⁷ El-Masri countered that, although special procedures may be needed to protect sensitive information, dismissal was not required because the CIA’s rendition practices had already been made public, including through investigations by the European Parliament, Council of Europe, as well as individual European countries.⁸³⁸ In fact, the European Parliament and Council of Europe reports each discussed El-Masri’s rendition specifically.

Despite El Masri’s arguments regarding the public availability of some of the information, the Fourth Circuit Court of Appeals upheld the district court’s dismissal of the entire case because fairly litigating and defending the action would require disclosure of sensitive information not available to the public.⁸³⁹ The United States Supreme Court later declined to review the case. As discussed in Chapter 4, the European Union’s efforts were crucial to United States admissions about the existence of the extraordinary rendition program and in exposing information about the program. Despite these general admissions and revelations, the United States has not completely disclosed all the specific details of its CIA operations in the War on Terror. While the European investigations into the United States rendition operations helped uncover information providing fodder

⁸³⁴ Duffy, H. (2008). Human Rights Litigation and the ‘War on Terror’. *International Review of the Red Cross*. 90, p. 588.

⁸³⁵ *El-Masri v. United States*, 479 F.3d 296, 300 (4th Cir. 2007).

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.* p. 301.

⁸³⁸ *Ibid.* p. 301, 308.

⁸³⁹ *Ibid.* p. 309.

for El-Masri's legal arguments, they were insufficient to prevent dismissal of his civil lawsuit and had nil impact on the decision of the Court of Appeals.

6.3 Overall Results and Conclusion

Although the European Union, through its cooperation with the Council of Europe and the European Parliamentarians' efforts, did not have an impact on United States court decisions on extraordinary rendition, the European Union did have a marginal impact on United States Supreme Court decisions protecting the rights of individuals against arbitrary detention and corresponding rights to access to courts and due process protections. Despite resistance by the US political branches based upon serious national security concerns, members of the European Parliament joined the group of voices in the United States Supreme Court arguing that the War on Terror does not create a legal "black hole" and demanding that the rule of law and basic human rights principles apply even during extraordinary circumstances. The attempts by the United States political branches to circumvent the early Supreme Court decisions demonstrates the resolve of at least some in the United States government to continue with policies that potentially violate the human rights of detainees in the name of national security as well as the necessity of seeking recourse in the judicial branch for change.

Under Ginsberg's framework for categorizing impact, through persuasion the United Kingdom and European Parliamentarians had a marginal, although short-term, impact in the Supreme Court's decision in *Hamdan v. Rumsfeld* confirming certain due process protections for Guantanamo detainees. Similarly, the parliamentarians had a marginal impact through persuasion in *Boumediene v. Bush*, which finally confirmed the constitutional privilege of habeas corpus for Guantanamo detainees, including non United States nationals, and that the rule of law applies even during the extraordinary times of the War on Terror. The European Union, through the investigations and reports into the CIA's operations, helped spread information on the secretive extraordinary rendition program. This additional information was not, however, enough to persuade the Fourth Circuit Court of Appeals and did not have an impact on their decision in *El-Masri v.*

United States concerning extraordinary renditions. These overall results are summarized in the following table.

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|---|---|-----------------------------|--|---------------|
| <i>Hamdan v. Rumsfeld</i> petition addressing arbitrary detention at Guantanamo Bay | Group of European and UK parliamentarians file amicus curiae briefs | Persuasion | US Supreme Court finds habeas jurisdiction and procedural rights under the Geneva Conventions; MCA passed undercutting statutory basis of court decision | Marginal |
| <i>Boumediene v. Bush</i> petition addressing arbitrary detention at Guantanamo Bay | Group of European and UK parliamentarians file amicus curiae briefs | Persuasion | US Supreme Court holds detainees have constitutional privilege of habeas corpus | Marginal |

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|-------------------------|---|-----------------------------|---|---------------|
| Extraordinary Rendition | European Parliament and Council of Europe (with European Commission help) investigate and report on US extraordinary renditions | (Persuasion attempted) | In lawsuit, El-Masri relies on European investigations to avoid dismissal; Court of Appeals dismisses case under state secrets doctrine | Nil |

7. THE EUROPEAN UNION'S IMPACT THROUGH FUNDING OF NGOs

The European Union's human rights advocacy in the United States has often been directed toward the political and judicial arms of the government, directly addressing the official makers, enforcers, and interpreters of United States federal and state law and policy. While these are important channels for affecting change in United States human rights law, policy, behavior, and interests, the European Union has not overlooked the importance of non-governmental channels for pursuing their foreign policy goals. As explained by Robert Whiteman, Senior Advisor in the Delegation of the European Union to the United States, the United States is not always receptive to listening to foreigners regarding the death penalty, so the European Union has provided funding to NGO's working within the United States that advocate against the death penalty.⁸⁴⁰ Legislators are often more willing to listen to these NGO's, whose members sometimes include knowledgeable and respected persons in the United States, than the European Union across the Atlantic.⁸⁴¹

The Death Penalty Information Center, for example, has become a trustworthy source of information for legislators and death penalty advocates, in part with the help of the European Union's funding. Likewise, members of Witness to Innocence, also funded by the European Union, are cited by legislators when repealing the death penalty. Although NGO's are not the direct makers of human rights laws and policies in the United States, support of their advocacy can nonetheless provide the European Union with additional indirect influence over the laws, policies, behavior, and interests of the United States. Unlike the human rights issues involved in the United States War on Terror, the European Union has provided financial support to multiple NGOs working specifically on death penalty issues in the United States, warranting a separate examination of the European Union's impact on the United States death penalty through NGOs.

⁸⁴⁰ Whiteman, R. (2013). Personal Communications. June 24, 2013.

⁸⁴¹ Ibid.

In general, advocacy groups provide support to human rights victims, make information available to elites as well as the public, frame issues in human rights terms to help shape public opinion and policy options, advocate human rights in courts, and help push human rights issues onto the agenda for eventual passage into law or policy.⁸⁴² An NGO's capacity to conduct such activities can vary based upon their size, resources, geographical scope of operations, political opportunity structure, and nature of issues addressed.⁸⁴³

In its human rights advocacy, the European Union has sought to help bolster the economic resources of particular NGOs through grants for approved projects. At the same time, the European Union's selection of NGO projects for support takes into account the potential for influence on human rights. If the European Union (indirectly) has an impact on United States human rights through the funding of NGO's, then that adds legitimacy to the European Union spending in this area and provides the possibility of further support for human rights NGO's that operate in the United States in the future. On the other hand, a lack of any impact could be viewed as wasteful spending providing fodder for critics of the European Union, particularly during difficult economic times.

As the impact of the European Union through NGO's is indirect, the highest level of impact under Ginsberg's analytical framework will not be applicable because significant impact occurs only if the European Union directly influenced the United States. With NGO's acting as an intermediary that, with European Union funding, in turn influences the United States, this criterion is not met with such funding alone.

A distinction must be made here between an NGO receiving funding to conduct its own activities and the European Union paying an organization to perform activities on the European Union's behalf. In the former case, the NGOs actions cannot be equated with the actions of the European Union and are only financially supported by the European Union, and hence the European Union may only have an indirect impact. In

⁸⁴² Mertus, J. (2004). Raising Expectations? Civil Society's Influence on Human Rights and US Foreign Policy. *Journal of Human Rights*. 3(1), p. 21.

⁸⁴³ Ahmed, S. (2011). The Impact of NGOs on International Organizations: Complexities and Considerations. *Brooklyn Journal of International Law*. 36, p.822.

the latter case, the organization, although technically private, is in essence an extension of the European Union.

For example, many NGO's participate in court cases as part of their human rights advocacy. Receiving funding alone does not make those NGO's an extension of the European Union. Any statements made by NGO's that have received European Union funding are not necessarily the views of the European Union, although one would expect that the European Union would not provide funding to NGO's with opposite views. On the other hand, if the European Union hires private human rights attorneys to write and file amicus curiae briefs on the European Union's behalf, those attorneys, at least during the case, are representing the European Union itself. Although the European Union approved the funding for the NGOs proposals and sometimes provided feedback on the projects examined in this chapter, the NGO's receiving funding for their advocacy against the death penalty were not under the control of the European Union and were not acting on the European Union's behalf.⁸⁴⁴

The European Union "generally prefers to adopt a 'positive approach' in promoting democracy and human rights," and a key instrument in this regard is the European Union's funding of specific projects in third countries through NGOs.⁸⁴⁵ Funding specifically for NGOs advocating against the United States death penalty has come from the European Instrument/Initiative for Democracy and Human Rights (EIDHR). As explained by Keukeleire and MacNaughtan, "The EIDHR budget line, created in 1994 on the European Parliament's initiative, has provided more flexibility by allowing the EC to bypass governments and work directly with other partners (such as NGOs and international organizations)."⁸⁴⁶

In the 2000s, the European Union funded approximately fifty death penalty projects around the world with an overall budget of over 23 million Euros through the

⁸⁴⁴ Lowenstein, K. Personal Communications. February 7, 2013; Spillman, K. Personal Communications. June 20, 2013.

⁸⁴⁵ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 226.

⁸⁴⁶ Ibid.

EIDHR.⁸⁴⁷ The European Union allocated €1,306,451 in 2003 and another €2,624,395 in 2009 under the EIDHR to organizations for purposes of abolishing the death penalty specifically in the United States.⁸⁴⁸ The objectives of the various funded death penalty projects range from influencing public opinion and strengthening abolitionist groups to improving legal assistance, reforming the death penalty system, and implementing a nationwide moratorium on the death penalty.⁸⁴⁹ The following sections discuss the European Union's impact through the funding of NGO's advocating against the death penalty in the United States.

7.1 The European Union's Impact Through Funding Murder Victim's Families for Human Rights

Murder Victims' Families for Human Rights (MVFHR) is an international NGO based in Boston, MA whose members both oppose the death penalty and are relatives of murder victims or persons executed for crimes. In 2009, MVFHR was awarded a grant of 495,000 euros from the EIDHR for their 30 month project "Voices of Victims Against the Death Penalty," which sought to end or reduce the death penalty internationally, including in the US, through amplifying the voices of victims (families) that are against the death penalty.⁸⁵⁰ The European Union's contribution represented 71% of the funding for the project,⁸⁵¹ and the European Union's contribution was essential to the work done on the project.⁸⁵²

⁸⁴⁷ European Union (2010). Compendium 2007-2010. p. 2. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁸⁴⁸ Ibid.; European Union (2009). Promoting Democracy & Human Rights Worldwide. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; Gardiner, N. (2011). The European Union Gives Millions in Taxpayers' Money to Anti-Death Penalty Groups in America. *The Telegraph*. Retrieved from <http://blogs.telegraph.co.uk/news/nilegardiner/100078360/the-european-union-gives-millions-in-taxpayers%E2%80%99-money-to-anti-death-penalty-groups-in-america/>.

⁸⁴⁹ European Union (2010). Compendium 2007-2010. p. 2. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

⁸⁵² Lowenstein, K. Personal Communications. February 7, 2013.

Generally, MVFHR provides a platform for presenting the stories of the survivors of murder victims that are opposed to the death penalty, providing a real face to such family members in order to challenge the common assumption that persons who have lost a family member to murder support capital punishment.⁸⁵³ Such stories are aimed at reframing the debate on capital punishment towards a recognition of the death penalty as a violation of human rights and countering proponents of the death penalty that claim the death penalty is required for justice, retribution, or closure for victims' families.⁸⁵⁴ MVFHR members' statements seek to "challenge the assumption that victims' families universally support the death penalty..., challenge the offender-focus that the death penalty engenders..., and call for a deeper analysis of crime and its prevention."⁸⁵⁵

The overall objectives of the European Union funded project were to reduce the number of death sentences and eventual moratoria and abolition of the death penalty through "amplification of victims' voices against the death penalty."⁸⁵⁶ MVFHR aimed to achieve these objectives by seeking to

- "(1) ensure that victims' voices of opposition to the death penalty are heard within the national and international death penalty debate;
- (2) raise awareness of the ways in which the death penalty harms victims' families and the ways in which it creates a new group of victims in the families of the executed; [and]
- (3) draw attention to the needs of victims, including the need to prevent or reduce future violence, thereby simultaneously benefiting victims themselves and formulating a mutual agenda through which to unite with pro-death penalty victims' groups."⁸⁵⁷

⁸⁵³ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁸⁵⁴ Cushing, R. (2005). 2005 Annual Report. Retrieved from <http://www.mvfhr.org/sites/default/files/pdf/MVFHRAAnnualReport2005.pdf>.

⁸⁵⁵ Cushing, R. (2008). Proposal of Murder Victim's Families for Human Rights. p.3-4.

⁸⁵⁶ Ibid. p. 1.

⁸⁵⁷ Ibid.

During their project, MVFHR conducted a variety of educational, organization, and outreach activities.⁸⁵⁸ They trained new speakers, strengthened members' sense of affiliation with MVFHR, developed alliances with other groups, and disseminated information regarding victims' against the death penalty, among other activities.⁸⁵⁹ MVFHR and its members have been quoted or featured in multiple news media, including CNN, Kentucky State Journal, Los Angeles Times, Associated Press, Mike Huckabee Radio Show, NBC News, Democracy Now, U.S. Reuters, Boston Globe, and Time magazine, among others.⁸⁶⁰

While these efforts help strengthen the general movement against the death penalty, MVFHR has also specifically engaged lawmakers and public officials on the death penalty. MVFHR gave testimony to lawmakers and public officials in Connecticut, New Hampshire, Kansas, Washington, California, and Maryland and distributed materials in multiple states,⁸⁶¹ and during MVFHR's project individual lawmakers in different states altered their positions from in favor of the death penalty to against it.⁸⁶²

MVFHR played a particularly important leadership role in the repeal of the death penalty in Connecticut.⁸⁶³ Several members of MVFHR were actively involved in the campaign to repeal the death penalty in Connecticut and attended Governor Malloy's signing ceremony for the repeal bill.⁸⁶⁴ At that ceremony, Governor Malloy explained the important role of MVFHR's members in repealing the death penalty in Connecticut:

“As in past years, the campaign to abolish the death penalty in Connecticut has been led by dozens of family members of murder victims, and some of them were present as I signed this legislation today. In the

⁸⁵⁸ Murder Victims' Families for Human Rights (2012). Final Narrative Report. p. 1.

⁸⁵⁹ Ibid. p. 1-2.

⁸⁶⁰ Ibid. p. 2; Murder Victims' Families for Human Rights (2010). Interim Narrative Report. p. 3.

⁸⁶¹ Murder Victims' Families for Human Rights (2012). Final Narrative Report. p. 4; Murder Victims' Families for Human Rights (2010). Interim Narrative Report. p. 2.

⁸⁶² Murder Victims' Families for Human Rights (2010). Interim Narrative Report. p. 4.

⁸⁶³ Lowenstein, K. Personal Communications. February 7, 2013; Malloy, D. (2012); Governor Malloy Statement on Final Passage of Capital Punishment Repeal Legislation. Retrieved from <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

⁸⁶⁴ Murder Victims' Families for Human Rights (2012). Final Narrative Report. p. 4.

words of one such survivor: ‘Now is the time to start the process of healing, a process that could have been started decades earlier with the finality of a life sentence. We cannot afford to put on hold the lives of these secondary victims. We need to allow them to find a way as early as possible to begin to live again.’ Perhaps that is the most compelling message of all.”⁸⁶⁵

While the abolition of the death penalty in Connecticut is an important accomplishment, it is important to note some of the repeal’s limitations. The repeal law is only forward looking, and did not apply to the 11 persons already on death row.⁸⁶⁶ Further, Connecticut has not been a major executioner. In the 52 years before abolition, only 2 death sentences were actually carried out in Connecticut, although more have been sentenced to death.⁸⁶⁷ As Governor Malloy explained, with “appeal after appeal,” the people on Connecticut’s death row may be “far more likely to die of old age than they are to be put to death.”⁸⁶⁸

Nonetheless, the *de jure* abolition of the death penalty is a major beneficial effect of MVFHR’s European Union funded project. An earlier attempt to abolish the death penalty in 2009 had failed in large part due to recent horrific murders of a mother and two daughters in a home invasion in Cheshire, CT, which then Governor Jodi Rell cited as a reason for not supporting repeal of the death penalty.⁸⁶⁹ Thus, while the death penalty was not frequently carried out in Connecticut, maintaining the death penalty as an available sentence in law was nonetheless a controversial issue in the state. With one of

⁸⁶⁵ Governor Malloy Statement on Final Passage of Capital Punishment Repeal Legislation. Retrieved from <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

⁸⁶⁶ Logiurato, B. (2012). Connecticut Abolishes the Death Penalty, Not That It Actually Ever Had One. *Business Insider*. Retrieved from <http://www.businessinsider.com/connecticut-abolishes-death-penalty-not-that-it-actually-ever-had-one-2012-4>.

⁸⁶⁷ Governor Malloy Statement on Final Passage of Capital Punishment Repeal Legislation. Retrieved from <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

⁸⁶⁸ Ibid.

⁸⁶⁹ Logiurato, B. (2012). Connecticut Abolishes the Death Penalty, Not That It Actually Ever Had One. *Business Insider*. Retrieved from <http://www.businessinsider.com/connecticut-abolishes-death-penalty-not-that-it-actually-ever-had-one-2012-4>.

the assailants not sentenced (to death) until early 2012, the Cheshire Murders still presented a hurdle for efforts to repeal the death penalty.⁸⁷⁰

In this regard, MVFHR's efforts were crucial in countering arguments of proponents of the death penalty that victim's families are universally in favor of the death penalty.⁸⁷¹ As explained by former Governor Malloy during the repeal bill signing ceremony, instead of allowing victim's families the opportunity to heal with the finality of a life sentence, defendants' repeated death penalty legal appeals give "them a platform of public attention they don't deserve," a "sordid attention that rips open never-quite-healed wounds."⁸⁷²

Although there were multiple reasons to abolish the death penalty in Connecticut, it is unlikely that Connecticut would have abolished the death penalty absent MVFHR's efforts, which were funded in large part by the European Union.⁸⁷³ Specifically, in Governor Malloy's statement on signing the bill repealing the death penalty in Connecticut, he explained that the death penalty in Connecticut had "a moral component" and issues with mistakes, discrimination, cost, and international trends, but Governor Malloy also concluded that it was "family members of murder victims" that led the campaign against the capital punishment in Connecticut" and that their message was "the most compelling message of all."⁸⁷⁴

The European Union, through its funding of MVFHR, thus indirectly had a tangible influence on the death penalty in the United States. While much of MVFHR's work was directed at strengthening the abolition movement generally, in Connecticut there was the major beneficial effect of *de jure* abolition of the death penalty in large part due to the persuasive efforts of MVFHR. As such, the European Union's impact through their funding of MVFHR, particularly in Connecticut, has been considerable.

⁸⁷⁰ Lowenstein, K. Personal Communications. February 7, 2013.

⁸⁷¹ Ibid.

⁸⁷² Governor Malloy Statement on Final Passage of Capital Punishment Repeal Legislation. Retrieved from <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

⁸⁷³ European Union (2010). Compendium 2007-2010. p. 2. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; Lowenstein, K. Personal Communications. February 7, 2013.

⁸⁷⁴ Governor Malloy Statement on Final Passage of Capital Punishment Repeal Legislation. Retrieved from <http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122>.

7.2 The European Union's Impact Through Funding Reprieve

Reprieve was awarded 526,816 euros beginning 2009 for its three year project, "Engaging Europe in the Fight for US Abolition," also referred to as Reprieve's "EC Project."⁸⁷⁵⁸⁷⁶ For more than a decade, Reprieve has assisted British nationals facing death sentences in the United States and the world, helping coordinate intervention by the British government.⁸⁷⁷ Expanding on this experience, the project, based both in the United Kingdom and United States branches of Reprieve, was aimed at identifying all European nationals facing the death penalty in the United States and improving legal assistance to European nationals facing the death penalty in the United States by facilitating greater diplomatic assistance and influence by their home countries.⁸⁷⁸ It was an extensive project considering that there were 38 state and federal jurisdictions using the death penalty and 3,200 prisoners on death row presenting various legal issues.⁸⁷⁹ Although the project's focus was on persons with European ties, Reprieve's work on the EC Project also allowed them to identify and link other foreign nationals with their governments.⁸⁸⁰

The EC Project was aimed at foreign nationals because they are particularly disadvantaged when facing the complexities of the United States criminal justice system, especially when confronted with capital charges.⁸⁸¹ Differences in culture and language

⁸⁷⁵ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁸⁷⁶ In 2012, Reprieve started "EC Project 2", which is also funded by the European Commission and works to identify and assist European nationals facing the death penalty in the US as well as elsewhere in the world, building on the first EC Project (<http://www.reprieve.org.uk/investigations/ecproject/history/>).

⁸⁷⁷ Reprieve. The EC Project. Retrieved from <http://reprieve.webfactional.com/investigations/ecproject/>.

⁸⁷⁸ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; Reprieve (2009). Annual Report 2009. p. 7. Retrieved from http://reprieve.webfactional.com/static/downloads/2010_07_30_EXT_2009_Report_web.pdf; Smith, S. (2010). Assisting European Citizens Facing Executions Outside the European Union. European Parliament Briefing Paper. p. 6.

⁸⁷⁹ Smith, S. (2010). Assisting European Citizens Facing Executions Outside the European Union. European Parliament Briefing Paper. p. 6.

⁸⁸⁰ Ibid.

⁸⁸¹ Reprieve (2012). Delivering Effective Assistance to Prisoners with Foreign Ties on Death Row in the United States. Retrieved from www.reprieve.org/uk.

difficulties can weaken a foreign national's ability to navigate through the judicial process, and the home country can provide assistance in bridging these language and cultural gaps.⁸⁸² As explained by Reprieve:

“Consular officials perform several critical functions in a foreign national's capital case, including visiting the detainee, providing welfare and financial assistance, making diplomatic representations, intervening with *amicus curiae* briefs, arranging translators and interpreters, attending Court Hearings, arranging legal representation, assisting with investigation and record collection in the country of origin, and where execution is imminent making interventions to the clemency authority.”⁸⁸³

Article 36 of the VCCR provides detained or arrested foreign nationals with the right to contact their state consul and to be informed of their consular rights by the United States government. However, while under the VCCR foreign nationals formally have certain consular notification rights upon their arrest or detention in the United States, in practice the foreign governments are not always informed of their nationals status, as demonstrated by Reprieve's identification of European citizens on death row for decades without their home governments being informed,⁸⁸⁴ as well as the ICJ cases against the United States for violations of the VCCR, discussed in Chapters 3 and 5. In addition to identifying persons already sentenced to death, Reprieve also obtained information on persons facing capital charges, as it is easier to prevent a death sentence if assistance is given from an earlier stage.⁸⁸⁵

In their EC Project, Reprieve placed five research fellows in New Orleans, with support from their London office, to perform a comprehensive survey of all death row inmates in the United States to identify persons with foreign nationality or ties, work with

⁸⁸² Ibid. p. 1.

⁸⁸³ Ibid.

⁸⁸⁴ Smith, S. (2010). *Assisting European Citizens Facing Executions Outside the European Union*. European Parliament Briefing Paper. p. 6.

⁸⁸⁵ Smith, S. (2010). *Assisting European Citizens Facing Executions Outside the European Union*. European Parliament Briefing Paper. p. 6.

counsel of record, and facilitate ties with the inmates' home countries.⁸⁸⁶ The EC Project identified 161 people with foreign nationality already on death row, including 19 Europeans.⁸⁸⁷ When foreign nationals were identified, Reprieve has assisted the foreign nationals in investigation and litigation and helped coordinate intervention by European governments that have provided pre-trial, investigation, litigation, and clemency assistance, filed amicus curiae briefs, and made diplomatic representations in death penalty cases.⁸⁸⁸ In total, Reprieve's EC Project provided assistance in 78 cases involving the death penalty in the pre-trial or post-conviction stages.⁸⁸⁹

Foreign governments have involved themselves in the capital cases of their nationals in various ways at all stages of cases. For example, Germany and its officials have previously provided funds for defense, appeared before a clemency board, recognized citizenship during post-conviction proceedings, and helped investigate a defendant's background in Germany.⁸⁹⁰ The British government has written letters to relevant authorities and filed amicus curiae briefs in capital cases involving British nationals.⁸⁹¹ In addition, the Spanish government has allocated amounts from its national budget to help support the defense of its nationals facing the death penalty in other countries.⁸⁹²

Reprieve has helped ensure that governments have had an opportunity to offer such help to their nationals in the United States. For example, Neil Reville, a British citizen charged with a double murder in California, potentially faced the death penalty for his alleged crimes. Reprieve successfully worked with his defense lawyers and the United Kingdom government to obtain an agreement from the prosecution not to seek the death penalty.⁸⁹³

⁸⁸⁶ Reprieve (2012). EC Project Manual. p. 6.

⁸⁸⁷ Reprieve (2012). Delivering Effective Assistance to Prisoners with Foreign Ties on Death Row in the United States. p. 4. Retrieved from www.reprieve.org/uk.

⁸⁸⁸ Reprieve (2012). EC Project Manual. p. 6.

⁸⁸⁹ Ibid.

⁸⁹⁰ Reprieve. The EC Project. Retrieved from <http://reprieve.webfactional.com/investigations/ecproject/>.

⁸⁹¹ Ibid.

⁸⁹² Ibid.

⁸⁹³ Reprieve (2012). EC Project Manual. p. 27.

Although Reprieve’s EC Project has sometimes helped their clients avoid the death penalty,⁸⁹⁴ Reprieve’s assistance coordinating the involvement of foreign governments in their nationals’ capital cases has not always prevented the execution of the individuals involved.⁸⁹⁵ Obtaining redress late in a case or after sentencing poses particular challenges. As discussed in Chapter 5, legal challenges to undisputed VCCR violations have sometimes proven difficult or ineffective (particularly when raised late in the case), making Reprieve’s EC Project all the more crucial in ensuring foreign nationals facing the death penalty obtain help from their home governments at the earliest point possible. As explained by Reprieve, “timing is vital. . . [foreign] government intervention and assistance is likely to be most effective if secured during the early stages of criminal proceedings.”⁸⁹⁶

Although many of Reprieve’s EC Project cases are ongoing, Reprieve has already helped some clients avoid the death penalty in the United States through the persuasive efforts of their home countries.⁸⁹⁷ Reprieve, through the funding of the European Union, has thus had (and is continuing to have) a tangible effect on United States behavior by helping to prevent executions and death sentences of persons with foreign ties. As such, the European Union has (indirectly) had a considerable impact on the United States via its EIDHR funding of Reprieve.

7.3 The European Union’s Impact Through Funding the Death Penalty Information Center

Death Penalty Information Center (DPIC), a Washington, D.C. non-profit organization founded in 1990, was awarded two grants from the EIDHR. For 2003 to

⁸⁹⁴ Ibid.; Reprieve (2010). Reprieve 2010: A Year of Secrets Revealed. p. 4. Retrieved from http://reprieve.webfactional.com/static/downloads/Reprieve_2010_Annual_Report.pdf.

⁸⁹⁵ Hardwicke (2011). The Reprieve EC Project – Part Two. Retrieved from <http://www.hardwicke.co.uk/insights/articles/the-reprieve-ec-project-part-two>.

⁸⁹⁶ Reprieve (2012). EC Project Manual. p. 43.

⁸⁹⁷ Ibid.; Reprieve (2010). Reprieve 2010: A Year of Secrets Revealed. p. 4. Retrieved from http://reprieve.webfactional.com/static/downloads/Reprieve_2010_Annual_Report.pdf.

2006, DPIC was awarded 449,888 euros for a project entitled “Laying the Groundwork for Change: a three-year programme of intensive public education, outreach to the media, and assistance to death penalty organisations in the USA.”⁸⁹⁸ In 2009, DPIC was again awarded 193,443 euros for their project, “Changing the Course of the Death Penalty Debate: A Proposal for Public Opinion Research, Message Development, and Communications on Capital Punishment in the US.” Such funding by the European Union was important for DPIC’s success on these projects, representing nearly half of the funding for the first project and 75 percent of the funding for the second project.⁸⁹⁹

Through the EIDHR funding, DPIC sought to campaign for media coverage of death penalty issues, encourage debate in education curricula about the death penalty, and provide advice and training to groups working on the death penalty.⁹⁰⁰ DPIC was involved in multiple activities, including creation of high school educational material, message development and media training workshops, assessments of states with the death penalty, and preparing reports on various death penalty topics such as innocence, deterrence, federal crimes, arbitrariness, and cost.⁹⁰¹

DPIC is often considered as an objective source of information about the death penalty in the United States.⁹⁰² DPIC does not formally maintain to be against the death penalty, as doing so might alienate some in its target audience that are in favor of or ambivalent about the death penalty, but widely disseminates information regarding the use and shortcomings of the death penalty.⁹⁰³ DPIC specifically provides its research and information to state legislatures and to educational institutions as well as to the general

⁸⁹⁸ European Union (2009). Promoting Democracy & Human Rights Worldwide. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁸⁹⁹ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; European Union. EIDHR: European Initiative for Democracy and Human Rights 2000-2006. p. 4-5. Retrieved from https://ec.europa.eu/europeaid/sites/devco/files/publication-compendium-promoting-human-rights-worldwide-2000-2006_en_0.pdf; Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81; Dieter, R. Personal Communications. April 29, 2013.

⁹⁰⁰ Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 80.

⁹⁰¹ Ibid. p. 80-81; Dieter, R. Personal Communications. April 29, 2013.

⁹⁰² Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81.

⁹⁰³ Ibid. p. 46, 81.

public. DPIC is often a first or early result in internet searches on the death penalty, and each year DPIC's information and research are cited and discussed numerous times in the televised and printed news media.⁹⁰⁴

DPIC's website of information, reports, and testimony have been cited by death penalty studies commissioned by legislatures to make findings and recommendations regarding the death penalty in their states.⁹⁰⁵ For example, following the decision in *People v. LaValle* that struck down New York's death penalty statute, the Assembly Committees on Codes, Judiciary and Correction conducted a series of hearings to determine what action to take on New York's death penalty statute, as discussed in Chapter 3.⁹⁰⁶ DPIC provided a variety of information to respond to the Assembly Committees inquiries, including on the higher costs associated with maintaining the death penalty,⁹⁰⁷ the unreliability of capital trials,⁹⁰⁸ and racial prejudice in capital punishment.⁹⁰⁹ After obtaining this information from DPIC and other actors through five days of hearings, the New York Assembly Codes Committee voted 11 to 7 against legislation reinstating the New York death penalty.⁹¹⁰

The New Jersey legislature also established the New Jersey Death Penalty Study Commission to "study all aspects of the death penalty as currently administered in the State of New Jersey."⁹¹¹ The New Jersey Death Penalty Study Commission conducted five public hearings and reviewed written materials from various sources before submitting its report in January of 2007.⁹¹² In their report, the Commission recommended abolition of the death penalty in New Jersey and replacing it with life

⁹⁰⁴ See, e.g., Death Penalty Information Center (2011). DPIC's 2011 Year End Report Media Coverage Summary. Retrieved from <http://deathpenaltyinfo.org/documents/2011YearEndPressCoverage.pdf>.

⁹⁰⁵ See, e.g., Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey; Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>.

⁹⁰⁶ Ibid. p. 4.

⁹⁰⁷ Ibid. p. 7, 28.

⁹⁰⁸ Ibid. p. 25.

⁹⁰⁹ Ibid. p. 38.

⁹¹⁰ Death Penalty Information Center (2007). Legislative Activity – New York. Retrieved from <http://www.deathpenaltyinfo.org/legislative-activity-new-york>.

⁹¹¹ New Jersey P.L. 2005, Ch. 321.

⁹¹² Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey p. 5.

imprisonment without the possibility of parole.⁹¹³ This recommendation was based on its findings that:

“(1) There is no compelling evidence that the New Jersey death penalty rationally serves a legitimate penological intent.

(2) The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.

(3) There is increasing evidence that the death penalty is inconsistent with evolving standards of decency.

(4) The available data do not support a finding of invidious racial bias in the application of the death penalty in New Jersey.

(5) Abolition of the death penalty will eliminate the risk of disproportionality in capital sentencing.

(6) The penological interest in executing a small number of persons guilty of murder is not sufficiently compelling to justify the risk of making an irreversible mistake.

(7) The alternative of life imprisonment in a maximum security institution without the possibility of parole would sufficiently ensure public safety and address other legitimate social and penological interests, including the interests of the families of murder victims.

(8) Sufficient funds should be dedicated to ensure adequate services and advocacy for the families of murder victims.”⁹¹⁴

In this case, it was DPIC’s information in conjunction with the efforts of others opposed to the death penalty,⁹¹⁵ that provided the basis for the findings of the Commission.⁹¹⁶ Although it is a close case given the extensive information provided to

⁹¹³ Ibid. p. 2.

⁹¹⁴ Ibid. p. 1.

⁹¹⁵ The Commission’s report has approximately thirteen pages of sources it relied upon.

⁹¹⁶ Ibid. p. 98-111.

the Commission, it is unlikely that the Commission would have made its findings without the information provided by DPIC in conjunction⁹¹⁷ with the plethora of other sources.⁹¹⁸ Specifically, in discussing how they reached these findings, the Commission repeatedly relied on information from DPIC, including for the lack of deterrent effect of the death penalty ((1) above),⁹¹⁹ the greater financial cost of having the death penalty system in place ((2) above),⁹²⁰ and national trends against the death penalty ((3) above).⁹²¹ Not only was DPIC frequently cited on its own by the Commission as its source for such information, but other testimony was supported and expanded on by the Commission based on information from DPIC.⁹²² Of the findings by the Commission, the financial cost of having the death penalty system in place was particularly important for abolition in New Jersey, and on this issue DPIC's information was the only information relied upon other than New Jersey's government departments and offices (the Office of the Public Defender, the Department of Corrections, the Administrative Office of the Courts, and the Office of Attorney General) which could not provide complete data that could lead to a precise conclusion on cost.⁹²³ Following the Commission's recommendation, legislation abolishing the death penalty and replacing it with life imprisonment without the possibility of parole was adopted on December 17, 2007.⁹²⁴ When Governor Corzine

⁹¹⁷ See Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 54.

⁹¹⁸ Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey.

⁹¹⁹ Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey, p. 25-26.

⁹²⁰ *Ibid.* p. 33.

⁹²¹ *Ibid.* p. 40.

⁹²² See, e.g., Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey, p. 25, 26, 33, 40, 98, 99, 102, 106, 112.

⁹²³ Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey, p. 31-33; p. 31-33; Solomon, N. (2006). New Jersey's Death Penalty Moratorium. *NPR*. Retrieved from www.npr.org/templates/story/story.php?storyID=5158551; Richburg, K. (2007). N.J. Approves Abolition of Death Penalty; Corzine to Sign. *Washington Post*. Retrieved from www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html; Mears, B. (2007). New Jersey Lawmakers Vote to Abolish the Death Penalty. *CNN*. Retrieved from www.cnn.com/2007/POLITICS/12/13/nj.death.penalty/index/html; Corzine, J. (2007). Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey. Death Penalty Information Center. Retrieved from <http://www.deathpenaltyinfo.org/node/2236>.

⁹²⁴ Death Penalty Information Center (2007). New Jersey Abolishes the Death Penalty. Retrieved from <http://www.deathpenaltyinfo.org/node/2231>; ; Richburg, K. (2007). N.J. Approves Abolition of Death Penalty; Corzine to Sign. *Washington Post*. Retrieved from www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html; Mears, B. (2007). New Jersey Lawmakers Vote

signed the bill, he recognized the Death Penalty Study Commission's important role in New Jersey's abolition of the death penalty.⁹²⁵

In practice, however, New Jersey was by no means a major executioner in the United States. New Jersey reinstated the death penalty in 1982 based on *Gregg v. Georgia*.⁹²⁶ Despite 228 capital murder trials and 60 death sentences since reinstatement of the death penalty in New Jersey, most of those death sentences were overturned by the courts and no executions have occurred in New Jersey since 1963.⁹²⁷ The *de jure* abolition of the death penalty was nonetheless important, as New Jersey became the first state in the United States to abolish capital punishment through legislation since the *Gregg v. Georgia* decision in 1976.⁹²⁸

The European Union's funding of DPIC has had a considerable impact on the United States through persuasion. Specifically, the EIDHR funding helped DPIC to develop information and reports for legislatures and other audiences and has helped DPIC strengthen its reputation as an informational resource on the death penalty.⁹²⁹ The projects have contributed to the prominence of the debate over the death penalty and provided credible research and information for its opponents.⁹³⁰ Such information, such

to Abolish the Death Penalty. *CNN*. Retrieved from www.cnn.com/2007/POLITICS/12/13/nj.death.penalty/index/html.

⁹²⁵ Corzine, J. (2007). Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey. Death Penalty Information Center. Retrieved from <http://www.deathpenaltyinfo.org/node/2236>.

⁹²⁶ 428 U.S. 153 (1976); Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey. p. 6.

⁹²⁷ Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey. p. 5, 7.

⁹²⁸ Corzine, J. (2007). Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey. Death Penalty Information Center. Retrieved from <http://www.deathpenaltyinfo.org/node/2236>.

⁹²⁹ Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81; *see, e.g.*, Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey; Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>; Corzine, J. (2007). Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey. Death Penalty Information Center. Retrieved from <http://www.deathpenaltyinfo.org/node/2236>; Death Penalty Information Center (2011). DPIC's 2011 Year End Report Media Coverage Summary. Retrieved from <http://deathpenaltyinfo.org/documents/2011YearEndPressCoverage.pdf>.

⁹³⁰ Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81; *see, e.g.*, Howard, W. (2007). New Jersey Death Penalty Study Commission Report. State of New Jersey; Lentol, J. et al. (2005). The Death Penalty in New York. New York State Assembly. Retrieved from <http://assembly.state.ny.us/comm/Codes/20050403/deathpenalty.pdf>; Corzine, J. (2007). Governor

as on the financial costs and lack of deterrent effects of the death penalty, have been important in the decisions by legislators and governors deciding whether to repeal the death penalty. In essence, such information has helped persuade lawmakers that the death penalty should be abolished in their states.

7.4 The European Union's Impact Through Funding the American Bar Association

The European Union has also funded the American Bar Association's (ABA) Death Penalty Moratorium Implementation Project ("Moratorium Project") (later renamed the Death Penalty Due Process Review Project). Calling itself "the largest voluntary professional organization in the world" with almost 400,000 members, the ABA plays an important role in the United States legal community, accrediting law schools, providing continuing legal education, and engaging in various programs and initiatives to assist lawyers and judges and improve the legal system.⁹³¹

The ABA initiated its Moratorium Project in 2001 with the goal of achieving a nationwide moratorium on the death penalty "unless and until problems within the administration of capital punishment are rectified."⁹³² In 2003, the European Commission awarded the ABA with a two year grant from the EIDHR for 856,563 euros, supporting the Moratorium Project in carrying out assessments of the extent to which death penalty systems in United States jurisdictions that retain capital punishment "comport with minimum standards of fairness and due process."⁹³³ In 2009, the ABA was awarded a second grant of 708,162 euros from the EIDHR to carry out up to six

Corzine's Remarks on Eliminating Death Penalty in New Jersey. Death Penalty Information Center. Retrieved from <http://www.deathpenaltyinfo.org/node/2236>; Death Penalty Information Center (2011). DPIC's 2011 Year End Report Media Coverage Summary. Retrieved from <http://deathpenaltyinfo.org/documents/2011YearEndPressCoverage.pdf>.

⁹³¹ American Bar Association. Death Penalty Due Process Review Project. Retrieved from http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html.

⁹³² Ibid.

⁹³³ Ibid.; European Union (2009). Promoting Democracy & Human Rights Worldwide. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

assessments of states' death penalty systems that were not examined in the previous time period.⁹³⁴

The European Union's financial support for the Moratorium Project does not give it control over how the research is conducted or its findings and conclusions.⁹³⁵ In addition, the ABA does not take a position on the death penalty *per se* nor call for its abolition as does the European Union. The ABA does, however, seek a moratorium on executions until the flaws in the system are remedied so that the death penalty is administered fairly and accurately.⁹³⁶

While the ABA does not share the European Union's ultimate goal of abolition, the Moratorium Project does generally promote objectives enumerated in the European Union Guidelines on the Death Penalty, including the progressive restriction of the use of the death penalty, that the death penalty is carried out according to particular minimum standards, and the establishment of a moratorium on the exercise of the death penalty. As such, the Moratorium Project's aims coincide to some extent with the objectives of the European Union despite the neutral position of the ABA with regard to the death penalty itself.

The Moratorium Project's findings and reports have been discussed in multiple United States court cases. Attorneys have argued their capital cases relying on the deficiencies of capital punishment elaborated on in the ABA's state reports.⁹³⁷ In *Maples v. Thomas*, although not a turning point for the decision, the United States Supreme Court also extensively discussed Alabama's low standards for attorney representation of capital defendants, relying primarily on the report on Alabama by the ABA.⁹³⁸ Likewise, in *Hutchinson v. Florida*, Judge Barkett of the United States Eleventh Circuit Court of Appeals cited in his concurring opinion the ABA's reports on Alabama, Georgia, and

⁹³⁴ American Bar Association. Death Penalty Due Process Review Project. Retrieved from http://www.americanbar.org/groups/individual_rights/projects/death_penalty_due_process_review_project.html.

⁹³⁵ Ibid.

⁹³⁶ Ibid.

⁹³⁷ See, e.g., *McCray v. State*, 71 So.3d 848, 879 (Fla. 2011); *Thomas v. State*, 2011 WL 675936, 42 (Tenn.Crim.App.,2011); *Seibert v. State*, 64 So.3d 67, 83 -84 (Fla. 2010); *Raleigh v. State*, 2010 WL 832388, 1 (Fla. 2010); *Austin v. Wilkinson*, L 697679, 8 -9 (N.D. Ohio 2008).

⁹³⁸ 586 F. 3d 879 (2012).

Florida for the proposition that capital defendants often receive inadequate legal representation, although the reports did not affect the outcome of the case.⁹³⁹ *Wiles v. Bagley*,⁹⁴⁰ in a concurring opinion also not affecting the outcome of the case, cited the ABA reports for the proposition that capital defense services are underfunded, which disadvantages capital defendants.

The Moratorium Project has affected the administration of the death penalty in Florida in particular, which entails that the European Union has had a corresponding indirect impact through its financial support of the project. In the ABA's assessment of Florida's death penalty system, the ABA found significant confusion by jurors in capital cases when deciding whether the death sentence is appropriate and recommended redrafting of Florida's jury instructions for capital punishment sentencing:

“Significant Capital Juror Confusion ...Death sentences resulting from juror confusion or mistake are not tolerable, but research establishes that many Florida capital jurors do not understand their role and responsibilities when deciding whether to impose a death sentence. In one study, over 35 percent of interviewed Florida capital jurors did not understand that they could consider any evidence in mitigation and 48.7 percent believed that the defense had to prove mitigating factors beyond a reasonable doubt. The same study also found that over 36 percent of interviewed Florida capital jurors incorrectly believed that they were required to sentence the defendant to death if they found the defendant's conduct to be ‘heinous, vile, or depraved’ beyond a reasonable doubt, and 25.2 percent believed that if they found the defendant to be a future danger to society, they were required by law to sentence him/her to death, despite the fact that future dangerousness is not a legitimate aggravating circumstance under Florida law.⁹⁴¹

⁹³⁹ 677 F.3d 1097 (2012).

⁹⁴⁰ 561 F.3d 636, 645 n.15 (C.A.6 2009).

⁹⁴¹ American Bar Association (2006). *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*. p. vi. Retrieved from

In approving amended jury instructions for capital sentencing, the Supreme Court of Florida was persuaded by the ABA's findings and used it as support for some of the changes, including to address appropriate consideration of mitigating evidence, the belief by some jurors that they were required to recommend death for heinous, vile, or depraved conduct or if the defendant was found to be a future danger to society, and racial and ethnic bias.⁹⁴² The approval of these amendments does not address Florida law itself⁹⁴³ so much as provide a guide for lawyers and judges and, when used, the capital sentence determinations of jurors.

Nonetheless, standard jury instructions are frequently proposed by lawyers and accepted by trial judges, or at least used as a starting point in drafting the actual jury instructions tailored to individual cases. In this way, amendments to standard jury instructions for capital cases are important to the actual practice of lawyers and judges and jury sentencing. The European Union has thus had a considerable impact on capital sentencing through its funding of the ABA's Moratorium Project.

7.5 The European Union's Impact Through Funding Witness to Innocence

Witness to Innocence, a Philadelphia based organization, received 395,000 euros for their 2010 to 2012 project, "American Dream Campaign."⁹⁴⁴ Focusing on the United States, the project sought to shift public opinion against the death penalty and reform, restrict, or repeal the death penalty in individual states, including Texas in particular.⁹⁴⁵ Witness to Innocence provides a voice to persons exonerated from death row and advocates against the death penalty through public speaking, legislative testimony, and

<http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/florida/report.authcheckdam.pdf>.

⁹⁴² *In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2*, 22 So.3d 17 (2009).

⁹⁴³ *Ibid.* p. 23.

⁹⁴⁴ European Union (2010). *Compendium 2007-2010*. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

⁹⁴⁵ *Ibid.*

media work aimed at enlightening the public about wrongful convictions.⁹⁴⁶ According to Witness to Innocence, 142 people were released from death row based on evidence of innocence since 1973.⁹⁴⁷ Witness to Innocence contends that:

“As long as the death penalty remains a part of the American justice system, innocent people will continue to be sentenced to death. Some will be executed. It is inevitable. Ultimately, the abolition of the death penalty is the only guaranteed protection against such tragic mistakes.”⁹⁴⁸

The EIDHR grant covered a variety of administrative and programmatic activities at Witness to Innocence, including staff salaries, media consultancy, outreach activities, and specific programs, particularly in the South where they provided speakers to other organizations for public events and legislative work on the death penalty.⁹⁴⁹ The EIDHR funding allowed Witness to Innocence “to greatly expand” its work, helping exonerees play an important role in successful repeals in Illinois and Maryland as well as media coverage, public speaking, and legislative testimony in other states.⁹⁵⁰

The EIDHR funding helped Witness to Innocence members bring greater attention to the issue of innocence in death penalty debates, and the possibility of innocence is one of the reasons for the passage of legislation abolishing the death penalty in individual states, particularly in Illinois as discussed in Chapter 3 and Maryland.⁹⁵¹

For example, in Illinois legislative debates, Senator Kwame Raoul and House Representative Karen Yarbrough, both sponsors of the legislation that abolished the death penalty in Illinois, pointed to Randy Steidl, an exoneree and member of Witness to

⁹⁴⁶ Witness to Innocence. About Us. Retrieved from <http://witness-to-innocence.org/about-us.html>.

⁹⁴⁷ Witness to Innocence. About Innocence. Retrieved from <http://witness-to-innocence.org/about-innocence.html>.

⁹⁴⁸ Ibid.

⁹⁴⁹ Spillman, K. Personal Communications. June 20, 2013.

⁹⁵⁰ Ibid.

⁹⁵¹ Ibid.; O'Malley, M. (2013). Statement from Governor Martin O'Malley on Passage of Death Penalty Repeal in Maryland. Retrieved from <http://governor.maryland.gov/>; Clutter, B. (2011). From Death Row to Hero: How Randy Steidl Became the Face of Capital Punishment Repeal. *Illinois Times*. Retrieved from <http://illinoistimes.com/article-8263-from-death-row-to-hero.html>.

Innocence that spoke out against capital punishment at rallies and legislative hearings.⁹⁵² Senator Raoul even closed his comments before the Illinois Senate vote by telling his colleagues that “before you push the button [to vote], I want you to look up in the gallery at Mr. Steidl’s eyes and let me know if you would have been able to be the person to inject him.”⁹⁵³ The media in Illinois referred to Steidl as the “face of [a] broken system” because of his role in the debate.⁹⁵⁴ Likewise, in Maryland’s repeal of the death penalty, Kirk Bloodsworth, the first person on death row to be exonerated by DNA evidence in the United States and a member of Witness to Innocence, was referred to as “the public face of the flaws of the criminal justice system” and was mentioned by name repeatedly during Maryland’s legislative debate.⁹⁵⁵

The EIDHR funding allowed Witness to Innocence to expand its work and make innocence a main issue that helped persuade lawmakers to repeal the death penalty in Maryland and Illinois.⁹⁵⁶ As such, the European Union has had a considerable impact through its funding of Witness to Innocence.

7.6 The European Union’s Impact Through Funding The National Coalition to Abolish the Death Penalty

The National Coalition to Abolish the Death Penalty (NCADP), based in Washington, D.C., received 305,974 euros for their Intensive Assistance Program beginning 2009.⁹⁵⁷ Focusing on the United States, the NCADP’s Intensive Assistance

⁹⁵² Ibid.

⁹⁵³ Ibid.

⁹⁵⁴ Ibid.; Spillman, K. Personal Communications. June 20, 2013.

⁹⁵⁵ Wagner, J. (2013). As Maryland Votes on Death Penalty Repeal, Exonerated Man Becomes a Living Reminder. *Washington Post*. Retrieved from http://www.washingtonpost.com/local/md-politics/as-maryland-votes-on-death-penalty-repeal-exonerated-man-becomes-a-living-reminder/2013/03/14/8fb87e84-8ca8-11e2-9838-d62f083ba93f_story.html; Dresser, M. and Cox, E. (2013). House Votes to Repeal Death Penalty. *The Baltimore Sun*. Retrieved from http://articles.baltimoresun.com/2013-03-16/news/bs-ms-death-repeal-vote-20130315_1_death-penalty-house-votes-capital-punishment.

⁹⁵⁶ Ibid.; Spillman, K. Personal Communications. June 20, 2013.

⁹⁵⁷ European Union (2010). Compendium 2007-2010. p. 8. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm.

Program's aim was to help strengthen groups in "key" states (states with high rates of executions) that were working to abolish the death penalty.⁹⁵⁸ The European Union contribution represented sixty percent of the Intensive Assistance Program's funding for two years.

With the help of the European Union, the NCADP was able to hire two additional full-time organizers to focus on some of the states, such as Texas and Virginia that have executed the most people since the death penalty was reinstated in the United States in 1976.⁹⁵⁹ With the European Union's funding, the NCADP provided assistance to other organizations in order to try to expand their capacity and membership bases.⁹⁶⁰ NCADP's Intensive Assistance Program provided its affiliated abolitionist organizations "organizing assistance, helps to schedule and staff letter writing events and phone banks, advises on how best to evaluate their staffing needs, assists them in targeting new constituencies and helps them build their core organizational structure"⁹⁶¹ In Virginia, for example, NCADP provided support to such organizations through fundraising efforts, purchasing new software that allowed for targeted alerts, newsletters, and meeting invitations to be sent to (potential) supporters of abolition of the death penalty, upgrading websites, and a multimedia project of video testimonies of persons opposed to the death penalty, including religious leaders and murder victim's family members.⁹⁶²

While the NCADP has had some success in its other projects focusing on states with lower execution rates, the NCADP's Intensive Assistance Project's focus on "key" states has not yet been able to affect those major executioners' laws, policies, interests, or behavior, including in abolition, stays of executions, or clemencies.⁹⁶³ In those states, NCADP and its support for its affiliates has "not yet reached the critical tipping point" in

⁹⁵⁸ Ibid.

⁹⁵⁹ Stone, M. (2012). Building Capacity and Expanding Our Base. Catholic Mobilizing Network. Retrieved from <http://catholicmobilizing.org/5163/building-capacity-and-expanding-our-base/>.

⁹⁶⁰ Ibid.

⁹⁶¹ National Coalition to Abolish the Death Penalty (2015). General Information. Guidestar. Retrieved from <http://www.guidestar.org/PartnerReport.aspx?partner=generic&ein=23-2290483>.

⁹⁶² Stone, M. (2012). Building Capacity and Expanding Our Base. Catholic Mobilizing Network. Retrieved from <http://catholicmobilizing.org/5163/building-capacity-and-expanding-our-base/>.

⁹⁶³ National Coalition to Abolish the Death Penalty (2015). GuideStar Exchange Charting Impact Report. Guidestar. p. 3-4. Retrieved from <http://www.guidestar.org/report/chartingimpact/520053904/national-coalition-abolish-death-penalty.pdf>.

terms of creating a “groundswell of support for abolition.”⁹⁶⁴ As a result, the European Union has had nil impact on the United States with regard to its funding of NCADP.

7.7 Overall Results and Conclusion

Except for the funding of NCADP, a particularly challenging project focusing on major executioners, the European Union’s impact through its EIDHR funding of NGO’s has consistently resulted in a considerable impact on the United States with regard to the death penalty. With regard to the funding of NCADP, Keukeleire and MacNaughtan’s comments on funding by the European Union may be relevant:

“Adopting such a ‘grass-roots’ approach has been understood as valuable in terms of strengthening an indigenous basis for democracy and human rights promotion in third countries. However, given that the scope of projects has generally been too limited to strengthen the grass-roots momentum for change in the countries concerned, this approach has at times made EU policy look more symbolic than substantive and more aimed at identity objectives than external objectives.”⁹⁶⁵

Despite these concerns, with regard to the United States, other NGOs have played a major role in abolishing the death penalty, and they were able to do so in part because of the funding received by the European Union.⁹⁶⁶

⁹⁶⁴ Ibid. p. 4.

⁹⁶⁵ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 226-227.

⁹⁶⁶ Lowenstein, K. Personal Communications. February 7, 2013.

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|---|--|-----------------------------|--|---------------|
| US views that victim's families support death penalty | EIDHR funding of Murder Victims' Families for Human Rights | Persuasion | General strengthening of US abolitionist movement; Connecticut abolished death penalty | Considerable |
| European nationals facing US death penalty | EIDHR funding of Reprieve | Persuasion | Reduction of persons sentenced to death penalty | Considerable |
| Availability of research/information regarding US death penalty | EIDHR funding of Death Penalty Information Center | Persuasion | Individual states abolish death penalty relying on DPIC information/research | Considerable |
| Fairness and due process in US death penalty | EIDHR funding of American Bar Association | Persuasion | Judges concerned with ABA findings; Florida jury instructions changed | Considerable |
| Innocence | EIDHR funding of Witness to Innocence | Persuasion | Individual states abolish death penalty | Considerable |

| Input/Issue | Output | Diffusion Mechanisms | Outcome | Impact |
|----------------------------------|--|-----------------------------|---|---------------|
| States with high execution rates | EIDHR funding of National Coalition to Abolish the Death Penalty | (Persuasion attempted) | Insufficient support remains in high execution states | Nil |

With regard to the United States specifically, the financial support from the EIDHR has provided NGO's with the ability to expand their work and persuade legislators, governors, judges, and other officials in the United States in individual cases as well as statewide repeals of the death penalty. Interviews with the NGO representatives have confirmed the great importance of the European Union funding to their work. Some of the European Union funded NGO's have focused their advocacy on specific issues or areas, such as potential innocence (Witness to Innocence), problems in the legal and judicial process (ABA and Reprieve), and considerations involving victim's families (MVFHR), while DPIC and NCADP have taken a broader approach. By addressing all of these issues, the separately funded projects complement each other, particularly considering that when legislators, governors, and judges have made decisions regarding the United States death penalty those decisions were often based on a variety of death penalty problems and issues.

As a whole, the NGO projects funded by the European Union have helped bring the issue of the death penalty to the forefront and created a more informed debate on the death penalty in the political and judicial branches of government in the United States.⁹⁶⁷ For each of the NGO projects the European Union's financial support was very important to their success, with a substantial portion of the funding for the projects coming from the

⁹⁶⁷ Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 21.

European Union, ranging from nearly half of the funding to 80 percent of the funding, and representatives from the NGO's emphasizing the importance of the European Union's support.⁹⁶⁸ The impact of each of the funded projects was accomplished through persuasion, whether by changing the rhetoric on death penalty issues, argumentation against the death penalty, or spreading information on the death penalty that convinced lawmakers, judges, or other officials.

⁹⁶⁸ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; European Union. EIDHR: European Initiative for Democracy and Human Rights 2000-2006. p. 4-5. Retrieved from https://ec.europa.eu/europeaid/sites/devco/files/publication-compendium-promoting-human-rights-worldwide-2000-2006_en_0.pdf; Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81; Lowenstein, K. Personal Communications. February 7, 2013; Spillman, K. Personal Communications. June 20, 2013.

8. OVERALL FINDINGS AND CONCLUSIONS

This research has sought to answer the following question: To what extent does the European Union have impact on the United States on human rights issues? Based on the 23 examples summarized in the overall results chart below, the European Union has had largely mixed results, with the caveat that the European Union's efforts in individual cases of commutation have been combined based on their combined impact.

Some of the results from previous chapters have also been combined when appropriate in the chart below. Sometimes a European Union output had an impact on more than one actor within the United States. For instance, the impact of the abolition of the death penalty in EU member States was separated in the discussions of the political branches and United States judiciary, but the impact on these separate branches relates back to the same European Union output, and thus have been combined in the summary chart. Likewise, the European Union's impact on individual death penalty commutations, as summarized in the Specific Cases Table in Chapter 3, has been combined as this repeated effort has a combined outcome of reducing the number of persons sentenced to death and consuming federal diplomats' time responding to the repeated challenges.

The European Union had the highest level of impact on only three instances. Two of these instances of significant (but temporary) impact involved the death penalty, particularly with the European Union limiting the export of drugs used in lethal injection and in securing an extradition treaty requiring assurances regarding non-application of the death penalty. The European Union also had a significant impact on the general policy of secrecy for the CIA's extraordinary rendition program. While total disclosure has not occurred, some information has been exposed and the United States has acknowledged the existence of the program because of the European Union's efforts.

In several cases, the European Union has had a considerable impact on the United States. The European Union had a considerable impact in eight out of the 23 instances summarized below. The European Union could not be considered to have had a significant impact in those cases as its influence was in conjunction with several other actors or was not directly and primarily responsible for changes in United States policies, laws, interests, or behavior. Most of the instances of considerable impact involved the

European Union’s funding of different NGO’s that promoted abolition by pointing to different problems with the practice, from innocence to financial cost to lack of support from murder victim’s families. As discussed in Chapter 7, the European Union’s financial support was very important to the projects for each of the NGO’s, with a substantial portion of the funding for the projects coming from the European Union.⁹⁶⁹

In twelve of the instances summarized below the European Union had only marginal or nil impact. Again, the instances of marginal and nil impact occurred both with regard to the death penalty and the human rights issues involved in the War on Terror. The relative infrequency at which the European Union had nil impact is particularly noteworthy. Despite some doubts amongst scholars regarding whether the European Union could meaningfully challenge the United States on such controversial issues, the European Union has demonstrated that it matters in many instances. The overall results of the extent of the European Union’s impact on the United States with regard to the death penalty and human rights issues in the War on Terror are as follows:

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|--------------------|---|----------------------------|---|---------------|
| Lethal injection | EU restricts export of drugs used in lethal injection | Coercion | US states change lethal injection protocols, seek alternative drugs, and delay executions | Significant |

⁹⁶⁹ European Union (2010). Compendium 2007-2010. Retrieved from http://ec.europa.eu/europeaid/what/human-rights/index_en.htm; European Union. EIDHR: European Initiative for Democracy and Human Rights 2000-2006. p. 4-5. Retrieved from https://ec.europa.eu/europeaid/sites/devco/files/publication-compendium-promoting-human-rights-worldwide-2000-2006_en_0.pdf; Robert, P. and Alberman, D. (2007). European Initiative for Democracy and Human Rights Evaluation on the Abolition of Death Penalty Projects. EUROPAID/ 116548/C/SV. p. 81; Lowenstein, K. Personal Communications. February 7, 2013; Spillman, K. Personal Communications. June 20, 2013.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|----------------------------|---|---------------|
| Extradition | Extradition where there is a risk of death penalty banned under Charter of Fundamental Rights; EU seeks provision in EU-US extradition treaty requiring non-application of death penalty | Persuasion; Coercion | US and EU enter extradition treaty with provision requiring assurances regarding non-application of death penalty | Significant |
| Extraordinary rendition | EU investigates, reports, and criticizes extraordinary rendition program through communications with US, supporting Council of Europe's investigation, and European Parliament's investigation | Persuasion | US acknowledges extraordinary rendition program and information about program exposed, thus reducing policy of secrecy about program; Court of Appeals dismisses El-Masri case under state secrets doctrine | Significant |
| US death penalty generally | EU's combined repeated pressure on US to abolish the death penalty ⁹⁷⁰ | Persuasion | Federal diplomats consumed with responding to repeated challenges to death penalty; some sentences commuted | Considerable |
| US views that victim's families support death penalty | EIDHR funding of Murder Victims' Families for Human Rights | Persuasion | General strengthening of US abolitionist movement; Connecticut abolished death penalty | Considerable |
| European nationals facing US death penalty | EIDHR funding of Reprieve | Persuasion | Reduction of persons sentenced to death penalty | Considerable |

⁹⁷⁰ For separate impact in individual cases, see Specific Cases Table.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|---|----------------------------|---|---------------|
| Availability of research/information regarding US death penalty | EIDHR funding of Death Penalty Information Center | Persuasion | Individual states abolish death penalty relying on DPIC information/research | Considerable |
| Fairness and due process in US death penalty | EIDHR funding of American Bar Association | Persuasion | Judges concerned with ABA findings; Florida jury instructions changed | Considerable |
| Innocence | EIDHR funding of Witness to Innocence | Persuasion | Individual states abolish death penalty | Considerable |
| Arbitrary detention | Creation of framework for transfer of Guantanamo detainees to EU member states | Persuasion; coercion | Dozens of detainees transferred and settled in EU member states, reducing detainees at Guantanamo Bay | Considerable |
| Arbitrary detention | EU seeks closure of Guantanamo Bay and legal protections for detainees by European Parliament resolutions and communications with US and public | Persuasion | Obama administration seeks closure of black sites and Guantanamo Bay and reduces number of persons detained | Considerable |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|---|--------------------------------|--|---------------|
| US death penalty generally | Death penalty abolished throughout EU; EU seeks worldwide abolition | Setting an example | US increasingly isolated on world stage; Confirming role in abolition of death penalty in individual US states and concern by judges ⁹⁷¹ | Marginal |
| Death Penalty for Mentally Retarded Persons | EU files amicus curiae briefs in US Supreme Court cases | Persuasion; setting an example | US Supreme Court majority opinion relies on EU brief and EU & world example to confirm ruling that death penalty for mentally retarded persons is unconstitutional | Marginal |
| Death Penalty for Juveniles | EU files amicus curiae briefs in US Supreme Court cases | Persuasion; setting an example | US Supreme Court majority opinion relies on EU brief and EU & world example to confirm ruling that juvenile death penalty is unconstitutional | Marginal |

⁹⁷¹ In combination with amicus curiae briefs filed in cases involving mentally retarded persons and juveniles, the European Union example also played a confirming role in elimination of the death penalty for those persons in the United States.

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|---|--|-------------------------------|--|---------------|
| <i>Hamdan v. Rumsfeld</i> petition addressing arbitrary detention at Guantanamo Bay | Group of European and UK parliamentarians file amicus curiae briefs | Persuasion | US Supreme Court finds habeas jurisdiction and procedural rights under the Geneva Conventions; MCA passed undercutting statutory basis of court decision | Marginal |
| <i>Boumediene v. Bush</i> petition addressing arbitrary detention at Guantanamo Bay | Group of European and UK parliamentarians file amicus curiae briefs | Persuasion | US Supreme Court holds detainees have constitutional privilege of habeas corpus | Marginal |
| Torture and ill treatment | EU criticizes US treatment of terrorist suspects in communications and European Parliament resolutions | Persuasion | Bush administration ignores and rejects criticisms; Obama administration disapproves of interrogation methods used under Bush | Marginal |
| Consular access rights | EU pressures US executives for enforcement of consular access rights in US death penalty cases | Persuasion | US federal administration supportive of (failed) attempts to comply with VCCR obligations | Marginal |
| Death penalty world-wide | EU sponsors UN resolutions calling for world-wide moratorium on the death penalty | Persuasion (of third nations) | Passage of resolutions in UN, increasing isolation of US on world stage. | Marginal |

| Input/Issue | Output | Diffusion Mechanism | Outcome | Impact |
|----------------------------------|---|-----------------------------------|--|---------------|
| Drone killings | General inaction from EU, but some criticism from European Parliament and other officials | General inaction, some persuasion | US continues drone program with little resistance | Marginal |
| Consular Access Rights | EU files amicus curiae briefs in US Supreme Court cases | (Persuasion attempted) | US Supreme Court does not rely on EU for its decisions | Nil |
| War on Terror, generally | Inconsistency within EU | Setting an example | None | Nil |
| States with high execution rates | EIDHR funding of National Coalition to Abolish the Death Penalty | (Persuasion attempted) | Insufficient support remains in high execution states | Nil |

The examination of the European Union’s impact in the United States has revealed some major obstacles confronted by the European Union, including internalization and acceptance of norms by the United States, conflicts between democracy and human rights, and problems involving the structure of government in the United States. First, the internalization of norms promoted by the European Union is important to their acceptance by the United States. As discussed in Chapter 3, former Texas Governor Rick Perry rejected the relevance of European viewpoints on the death penalty. Similarly, in the dissents in *Atkins v. Virginia* and *Roper v. Simmons*, Justices Scalia and Rehnquist rejected the notion that foreign views were relevant to the meaning of the Eighth Amendment of the United States Constitution.

Although politicians and judges have not in every instance been completely receptive to the external views of the European Union, it has had an impact where the views are linked to American values, whether through the funding of important

organizations within the United States with overlapping agenda's, such as with the ABA discussed in Chapter 7, or through affirmation of shared values.

Illustrating the latter, the United States Supreme Court's majority opinion in *Roper v. Simmons* explained:

“Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people. The document sets forth, and rests upon, *innovative principles original to the American experience*, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are *central to the American experience and remain essential to our present-day self-definition and national identity*. Not the least of the reasons we honor the Constitution, then, is because *we know it to be our own*. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that *the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.*”⁹⁷²

The United States Supreme Court clearly struggles with the very notion of consulting foreign views in making its decisions. Linking these foreign views with the traditions and norms already a part of the United States is important to the internalization and ultimate acceptance of those foreign views.

The European Union has often emphasized its shared values with the United States in its advocacy with regard to the death penalty and the War on Terror. Such emphasis has, for example, played out in the majority of the United States Supreme Court with regard to the international context and its relation to the traditions and norms in the

⁹⁷² *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (emphasis added) (citing The Federalist No. 49, p. 314 (C. Rossiter ed.1961)).

United States and the long-term change in the elimination of the death penalty for juveniles and mentally retarded persons as well as the issue of arbitrary detention in the War on Terror.

Another obstacle faced by the European Union has been persuading United States politicians and judges that the death penalty is primarily a human rights issue rather than a democracy issue. The federal administration often responded to the European Union's efforts by noting that the death penalty in the United States was the result of democratic processes. The European Union promotes both human rights and democracy, and opens its *amicus curiae* briefs in death penalty and Guantanamo Bay court cases with a statement of its commitment to principles such as "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."⁹⁷³

While an ideal democracy may also protect individual and human rights, the will of the majority and democratic institutions do not always produce such results. As a result, the conflict between human rights and democracy presents problems for the European Union in its opposition to the United States. The European Union is an external entity attempting to persuade the United States to change its laws, policies, and behavior including in instances where they resulted from democratic processes in the promotion of human rights.

Adding insult to injury, the European Union's abolition of the death penalty within its own borders is perceived as inconsistent with democratic principles. In both *Roper v. Simmons* and *Kansas v. Marsh*, Justice Scalia has emphasized that the European Union did not abolish the death penalty by popular vote and that some public opinion polls in Europe indicate support for the death penalty.⁹⁷⁴ Justice Scalia explained:

"It is commonly recognized that '[m]any European countries ... abolished the death penalty in spite of public opinion rather than because of it.' Abolishing the death penalty has been made a condition of joining the

⁹⁷³ Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent, 2004 WL 1619203 p. 1; Brief of Amicus Curiae the European Union in Support of the Petitioner, 2001 WL 648609 p. 1.

⁹⁷⁴ *Roper v. Simmons*, 2004 WL 2387647 p. 11-12 (transcript of oral argument); *Kansas v. Marsh*, 548 U.S. 163, 187 n.3 (2006).

Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union.”⁹⁷⁵

Despite Justice Scalia’s dissenting views, in *Roper v. Simmons* and *Atkins v. Virginia* this democracy issue was circumvented by the majority of the Supreme Court by placing a confirmatory role on the views and practices of the European Union and the world. The democracy issue, at least insofar as it is based on resistance to direct persuasion by a foreign entity, is also avoided with the European Union’s funding of various NGOs, including the Moratorium Project, with the ABA being an important United States legal organization persuading courts.

A third obstacle faced by the European Union is the federal structure of government and separation of powers in the United States, as well as the corresponding (perceived) roles of judges in the United States system. In *Roper v. Simmons*, for example, Justice O’Connor agreed with the majority opinion that foreign and international law are relevant but did not give the international context a confirmatory role because she did not agree that there was a national consensus against the juvenile death penalty nor that the majority’s categorical rule against the juvenile death penalty was otherwise justified by the Court.⁹⁷⁶

This was not a personal disagreement with the majority about the acceptability of the juvenile death penalty, but rather it was based upon Justice O’Connor’s views about her role as a judge and not a legislator. Justice O’Connor made it explicit that if she was “a legislator, rather than a judge, then [she], too, would be inclined to support legislation setting a minimum age of 18” for the death penalty.⁹⁷⁷ In essence, even if judges are persuaded by the European Union that the death penalty is inappropriate in particular

⁹⁷⁵ *Kansas v. Marsh*, 548 U.S. 163, 187 n.3 (2006) (citing Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U.L.Rev. 911, 931–932 (2006), Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487, 525 (2005), and Demleitner, Is There a Future for Leniency in the U.S. Criminal Justice System? 103 Mich. L.Rev. 1231, 1256, and n. 88 (2005)).

⁹⁷⁶ *Roper v. Simmons*, 543 U.S. 551, 604 (2005).

⁹⁷⁷ *Roper v. Simmons*, 543 U.S. 551, 607 (2005).

circumstances, judges must also be persuaded that there is a legal basis and it is within their appropriate exercise of power as judges for making a change.

Similarly, The Connecticut Board of Pardons and Paroles responded to the European Union's requests for commutations by redirecting the European Union "to any public debate which may occur in Connecticut's legislative body, the General Assembly."⁹⁷⁸ With regard to Connecticut, the European Union did influence the passage of legislation abolishing the death penalty through the funding of NGOs, as discussed in Chapters 7.

The separation of powers and federal structure of government was particularly prevalent for the issue of consular access rights of capital defendants, which involved international treaties violated by officials from state governments leading to international, federal, and state court cases, and requests for and attempts at compliance in different branches of government at the state and federal level. In this context, although the European Union had a marginal impact on the federal administration, the European Union also needed but failed to persuade the United States Supreme Court not only of the appropriate remedy for consular access violations, but also that the United States Supreme Court was the appropriate level and branch of government to create that remedy.

The European Union has also faced both internal and external challenges to having an impact on human rights in the United States. Internally, the European Union has not provided a clear, consistent example on the human rights issues involved in combating terrorism. While United States human rights practices have been condemned at various times within the European Union, the separate approaches to combating terrorism taken by member states have sometimes followed the United States problematic human rights practices.

The European Parliament's condemnation of the involvement of officials from European Union member states in CIA extraordinary renditions is a glaring example already discussed. While some member states condemned United States human rights

⁹⁷⁸ Everett, G. (2004). Connecticut Board of Pardon and Parole Response. Retrieved from <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2004/>.

practices, the United Kingdom was itself carrying out similar practices of detaining suspects without an opportunity to effectively challenge that detention, which the European Court of Human Rights found to be in violation of Article 5 of the European Convention on Human Rights.⁹⁷⁹ Comparatively, the European Union has presented a relatively united front against the death penalty in the United States, with every European Union member state abolishing the practice. Internal differences make it more difficult for the European Union to lead by setting an example on the War on Terror issues and may explain why individual United Kingdom and European parliamentarians, rather than the European Union as a whole, joined in *amicus curiae* briefs in United States arbitrary detention cases.

Externally, the United States government was resistant to changing its human rights practices, as demonstrated by the government's passing of new legislation in light of adverse court decisions concerning Guantanamo Bay. Taking the matter to court is an alternative method for affecting change. Due in part to judicial restraint, it took six years before the United States Supreme Court decided whether the constitutional privilege of habeas corpus applied to Guantanamo detainees.⁹⁸⁰ Addressing this problem, the parliamentarians' briefs in *Hamdan* and *Boumediene* were careful to discuss the common heritage of Europe and the US in respecting human rights and the rule of law.

The European Union's ability to have an impact in multiple instances despite these various obstacles is not inconsequential. In the face of multiple serious challenges, the European Union has at least sometimes been able to confront a world power involving vital issues of human rights, democracy, justice, and national security.

8.1 The European Union's Outputs and Diffusion Mechanisms

This research has also revealed the instances where the European Union has had the most impact on the United States, particularly with regard to the outputs and diffusion

⁹⁷⁹ *A and Others v. United Kingdom*, 49 Eur. H.R. Rep. 29 (2009).

⁹⁸⁰ Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90.

mechanisms used towards the United States and the level of their impact. Probably the most consistent with previous views about the European Union's influence, economic restrictions were only used by the European Union in one of the instances examined, export restrictions on drugs used in lethal injections, and had a significant impact.

Of the different outputs of the European Union, some sorts of outputs produced fairly consistent results. The funding of NGOs, which in turn were working in the United States towards abolition of the death penalty through argumentation and spreading of information regarding issues and problems with the practice, consistently produced a considerable impact in all but one case. Likewise, amicus curiae briefs filed in United States courts by the European Union resulted in a marginal impact the majority of the time for both the death penalty and War on Terror issues, with four out of five situations having a marginal impact. United States judges are sometimes recognizing these "friend of the court" briefs filed by the European Union in cases related to human rights issues. This also highlights the importance of expanding Ginsberg's analytical approach to include laws and other branches of government. The European Union has specifically aimed to change the laws and their application in the United States, including in the United States judiciary. With this expansion, a more complete understanding of the European Union's impact on the United States has been possible.

Demarches, public statements, European Parliament resolutions, and other communications with the United States had somewhat varying results. With regard to separate individual cases in which the European Union sought commutations of an individual sentenced to death in the United States, the European Union had nil impact the majority of the time. Combined, however, these statements and communications in individual cases nonetheless had a considerable impact. Aside from these examples, the European Union's impact using such outputs ranged from significant to marginal for the death penalty and War on Terror human rights issues. The European Union's sponsorship of UN resolutions also had a marginal impact.

With regard to diffusion mechanisms, coercion, persuasion, and setting an example were all utilized by the European Union for the death penalty and in advocacy concerning human rights issues in the United States War on Terror. Not surprisingly, coercion was more rarely used in the European Union's efforts to influence the United

States on the human rights issues involved in the War on Terror and the death penalty. Despite its relatively less frequent use, coercion consistently produced the highest levels of impact by the European Union, including two instances of significant impact and one instance of considerable impact. The European Union's restrictions to the United States on the export of drugs used in lethal injections and the extraditions of persons potentially subject to the death penalty in the United States as well as facilitating the transfer and resettlement of Guantanamo Bay detainees each involved coercion as the diffusion mechanism. These results suggest that, when desired or necessary, coercion is a potential option for the European Union to achieve an impact on the United States, although if used too frequently the European Union may need to be careful not to damage its general relations with the United States.

By far, persuasion was the most frequent diffusion mechanisms for the European Union's impact on the United States in the 2000s, with twenty instances involving persuasion to some degree. Persuasion involved somewhat mixed results. All except two of these instances, the attempts to persuade the United States Supreme Court regarding consular access rights of capital defendants and the funding of NCADP, had at least some impact on the United States. Two out of three of the instances of significant impact involved persuasion as a relevant diffusion mechanism.

Otherwise, persuasion consistently provided either a considerable or marginal impact by the European Union on the United States for the death penalty and the War on Terror. While this persuasion often took the form of arguments directly made by the European Union for ending practices or policies connected with the death penalty and War on Terror, it also occurred indirectly through the funding of NGOs operating in the United States in these areas. With the support of the European Union's EIDHR funding, NGOs have helped persuade lawmakers in the United States to abolish the death penalty, through arguments and the distribution of information and research. All but one case of the European Union's NGO funding examined involved persuasion as the diffusion mechanism and resulted in a considerable impact, as the European Union's efforts in this regard were indirect and were generally part of broader efforts by multiple actors.

For the European Union, setting an example with regard to the death penalty led to a marginal impact on the United States in three instances, but setting an example (or

lack thereof) had nil impact on the United States with regard to the War on Terror. With regard to the death penalty, the European Union's example was clear and consistent: the European Union and its member states abolished the death penalty and the European Union and its member states were actively seeking to end or reduce the death penalty worldwide. The isolation of the United States in continuing the death penalty generally played a confirmatory role in individual states' decisions to abolish the death penalty. In addition, the United States Supreme Court looked to the example set by the European Union and the world in confirming its decisions ending the death penalty for juveniles and mentally retarded persons in the United States.

With regard to human rights and the War on Terror, the European Union and its member states have struggled more to have the same degree of consistency as with the death penalty. Some European Union member states helped the United States in its questionable policies while others condemned the United States. This example (or lack thereof) did not lead to a change in United States laws, policies or behavior and had nil impact on the United States.

8.2 Conclusion

The European Union has had mixed results with regard to its impact on the United States, generally indicating that (at least sometimes) it matters even when confronting the United States on the death penalty and War on Terror human rights issues, issues which are contentious and controversial for the United States, a world power. The European Union's demonstrated ability in several cases to have high levels (significant or considerable) of impact under such circumstances indicates that it is important to or taken seriously by the different branches and levels of government in the United States at least some of the time.

This research has found that all three diffusion mechanisms are relevant and can be useful in the European Union's relations with the United States, but coercion produced the highest impact. Coercion as a diffusion mechanism, although producing the highest levels of impact, was only infrequently used. Persuasion was frequently used and had

varying degrees of impact for both the death penalty and War on Terror. Setting an example generally produced a marginal impact for the death penalty but nil impact with regard to the War on Terror.

European Union foreign policy outputs such as the funding of NGO's working towards abolition of the death penalty in the United States generally led to a considerable impact on the United States while filing amicus curiae briefs in United States court cases involving the death penalty or War on Terror human rights issues generally led to a marginal impact on the United States. European Union foreign policy outputs such as demarches, European Parliament resolutions, public statements, and other communications with the United States produced more varied results. Lending support to the idea that the European Union is an economic power, the European Union's export restrictions on drugs used in lethal injections in the United States produced one of the three examples of significant impact by the European Union.

At its beginning, this research sought to examine some important questions regarding the European Union's efforts to influence the United States. Focusing on human rights issues within the War on Terror and the death penalty within the United States, this research endeavored to examine the following issues: Does the United States take the European Union seriously in its human rights policy? Is the European Union able to have significant impact on a world power like the United States? To what extent has the European Union had impact on the United States on human rights issues?

As explained in Chapter 1, while scholars have debated the European Union in the world, disagreement has remained over the European Union's ability to influence a world power such as the United States in particular. This has been particularly true with regard to the human rights issues relating to the death penalty and War on Terror. Previous scholarship mentioning the European Union's influence on the United States with regard to the death penalty has varied from raising doubts regarding the European Union's potential success in this regard⁹⁸¹ to greater optimism regarding the potential of the European Union to influence the United States.⁹⁸²

⁹⁸¹ See, e.g., Ginsberg, H. (2001). *The European Union in International Politics: Baptism by Fire*. Lanham: Rowman & Littlefield Publishers, Inc. p. 255; Manners, I. (2002). *Normative Power Europe: A*

This research has made clear that, while the European Union has not had an impact in every instance, the European Union's efforts with regard to the death penalty have resulted in significant or considerable impact on multiple occasions. While certainly not a perfect track record, these results demonstrate that at least sometimes the United States has taken the European Union seriously in its human rights policy and that the European Union is not only capable but in some instances actually has had a significant impact on the United States in this area. This can be particularly important for encouraging further European Union foreign policy activity given the priority the European Union has given toward abolishing the death penalty worldwide, especially in the United States.

The European Union has not provided the same clear, united front against the United States with regard to human rights and the War on Terror as it has for the death penalty. With this background, scholarly articles have generally focused more on how the European Union and its member states have or should react to the War on Terror than on the resulting degree of influence on the United States.⁹⁸³ This research has demonstrated that, although the European Union and its member states were themselves struggling with the balance between security and human rights protections, the European Union has had a significant or considerable impact in some instances. As with the death penalty, with mixed results, this research again has demonstrated that the United States has taken the European Union seriously and that even on vital issues affecting national security and human rights the European Union has been able to have a significant or considerable impact in some instances.

Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 248; Dieter, R. (2003). International Influence on the Death Penalty in the U.S. *Foreign Service Journal*. October 2003, p. 31, 38.

⁹⁸² See, e.g., Demleitner, N. (2002). The Death Penalty in the United States: Following the European Lead? *Oregon Law Review*. 81, p. 131; Trail, R. (2002). The Future of Capital Punishment in the United States: Effects of the International Trend Towards Abolition of the Death Penalty. *Suffolk Transnational Law Review*. 26, p. 125-126.

⁹⁸³ See, e.g., Duffy, H. (2008). Human Rights Litigation and the 'War on Terror'. *International Review of the Red Cross*. 90; Winkler, M. (2008). When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program. *Loyola of Los Angeles International and Comparative Law Review*. 30; Fava, P. (2007), European Parliament, Report (on Extraordinary Rendition), A6-0020/2007; Manners, I. (2006): European Union 'Normative Power' and the Security Challenge. *European Security*. 15(4); Marty, D. (2006). Council of Europe, Parliamentary Assembly, report on secret detentions and extraordinary renditions, Doc. 10957, 2006.

These results are important, as there were not only early doubts among some scholars but some United States officials have rejected the idea that the European Union should matter for the policies within the United States. Former Texas Governor Rick Perry's response to the European Union's efforts concerning the death penalty illustrate this point, in which he pointed out that "our forefathers fought a war to throw off the yoke of a European monarch" and that "Texans are doing just fine governing Texas."⁹⁸⁴ As explained by McCormick, the majority view has been that the European Union is not able to challenge the United States on anything but economic matters.⁹⁸⁵

This research has thus contributed to a better understanding in several ways important to both scholars and practitioners involved in the areas of human rights, foreign policy, international relations, political science, and law generally and European Union-United States relations, the death penalty, and the War on Terror specifically. First, this research has expanded upon Ginsberg's analytical framework to explicitly include examination of different branches and levels of government in the receiving country, the United States, and demonstrated that the European Union's efforts have had an impact beyond the United States federal administration as the ordinary recipient of the European Union's foreign policy. Second, this research has explicitly included diffusion mechanisms in the analysis of the European Union's impact on the United States, which has provided a more complete understanding of the means by which the European Union has achieved its impact. Third, the European Union's impact on laws, including their interpretation, has been explicitly included, reflecting the reality that the political efforts of the European Union extend to them, especially in the area of human rights.

Fourth, this research has provided an empirically based foundation for the continuing debates regarding the European Union in the world. As explained in Chapter 1, scholars such as Schunz, Smith, and Neimann and Bretherton have indicated concerns that at times this debate has been "insufficiently grounded in empirical findings,"⁹⁸⁶

⁹⁸⁴ Rosen-Molina, M. (2007). Texas Governor Rejects EU Request to End Use of Death Penalty. *Jurist*. Retrieved from <http://jurist.org/paperchase/2007/08/texas-governor-rejects-eu-request-to.php>.

⁹⁸⁵ McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York. p. 2.

⁹⁸⁶ Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 24.

sometimes insufficiently addresses the effects of the European Union's actions,⁹⁸⁷ and is still "in the process of attaining a more systematic empirical focus."⁹⁸⁸ Although practical concerns limit the scope of any research endeavor, the modified Ginsburg framework could potentially be applied to other policy areas and other receiving countries. The empirical results of this research (and similar research relating to other policy areas and countries) could, for example, possibly be a useful basis for further research exploring various conceptions of the European Union's power (e.g. civilian power,⁹⁸⁹ normative power,⁹⁹⁰ structural power,⁹⁹¹ superpower,⁹⁹² and small power,⁹⁹³ among others). The modified Ginsburg framework could also potentially be applied to other countries or entities, such as the Council of Europe, to examine their impact in the same or other policy areas.⁹⁹⁴ Such further research could also provide interesting points for comparison or contrast.

Last and importantly, the results of this research demonstrate that not only can the European Union sometimes have the highest levels (significant or considerable) of impact on the United States but it can do so in areas involving human rights and challenges to United States views on national security, democracy, and justice. In using the modified Ginsburg framework, this research focused on the external impact on the United States rather than goal achievement of the European Union, a departure from what

⁹⁸⁷ Smith, K. (2007). The EU in the World: Future Research Agendas. European Foreign and Security Policy Studies Programme, p. 13. Retrieved from <http://iep-berlin.de/wp-content/uploads/2014/07/Vortrag-von-Dr.-Karen-E.-Smith.pdf>.

⁹⁸⁸ Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 264.

⁹⁸⁹ Duchêne, F. (1972). Europe's Role in World Peace, in R. Mayne (ed.) *Europe Tomorrow: Sixteen Europeans Look Ahead*. London: Fontana.

⁹⁹⁰ Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies*. 40(2), p. 235-258.

⁹⁹¹ Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan.

⁹⁹² McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York.

⁹⁹³ Toje, A. (2008). The European Union as a Small Power. *Journal of Common Market Studies*. 49(1).

⁹⁹⁴ As explained in Section 2.2, however, the European Union is unique in character, so any application of Ginsburg's (modified) framework may need to account for differences between the sending entities.

Jorgensen, Oberthur, and Shahin suggest many studies of the European Union often have done,⁹⁹⁵ as described in Chapter 1.

The results of this research suggest that the European Union's importance, even in relations with the United States, should not be underestimated. As discussed in Chapter 1, the European Union faced particular challenges in confronting the United States in the context of the War on Terror, including with regard to the United States approach and internal division within the European Union.⁹⁹⁶ As already mentioned, the demands and challenges placed by the United States and the Islamic world have to some degree made it more difficult for the development of consensus within the European Union and its

⁹⁹⁵ Jorgensen, K., et al. (2011). Assessing the EU's Performance in International Institutions – Conceptual Framework and Core Findings. *Journal of European Integration*. 33(6), p. 603-604; see, e.g., Baroncelli, E. (2011). The EU at the World Bank: Institutional and Policy Performance. *Journal of European Integration*. 33(6), p. 637-650; Kissack, R. (2011). The Performance of the European Union in the International Labour Organization. *Journal of European Integration*. 33(6), p. 652; Oberthur, S. (2011). The European Union's Performance in the International Climate Change Regime. *Journal of European Integration*. 33(6), p. 667; Schaik, L. (2011). The EU's Performance in the World Health Organization: Internal Cramps after the 'Lisbon Cure.' *Journal of European Integration*. 33(6), p. 700, 702; Graeger, N. & Haugevik, K. (2011). The EU's Performance with and within NATO: Assessing Objectives, Outcomes and Organisational Practices. *Journal of European Integration*. 33(6), p. 744, 754; Thomas, D. (2012). Still Punching Below Its Weight? Coherence and Effectiveness in European Union Foreign Policy. *Journal of Common Market Studies*. 50(3), p. 458, 460; Niemann, A. & Bretherton, C. (2013). EU External Policy at the Crossroads: The Challenge of Actorness and Effectiveness. *International Relations*, 27(3), p. 267; Schaik, L. (2013). The EU's Growing Pains in Negotiating International Food Standards. *International Relations*, 27(3), p. 294; Groen, L. & Niemann, A. (2013). The European Union at the Copenhagen Climate Negotiations: A Case of Contested EU Actorness and Effectiveness. *International Relations*, 27(3), p. 311; Elsig, M. (2013). The EU as an Effective Trade Power? Strategic Choice of Judicial Candidates in the Context of the World Trade Organization. *International Relations*, 27(3), p. 328; Carbone, M. (2013). Between EU Actorness and Aid Effectiveness: The Logics of EU Aid to Sub-Saharan Africa. *International Relations*, 27(3), p. 343; Brattberg, E. (2013). Actorness and Effectiveness in International Disaster Relief: The European Union and United States in Comparative Perspective. *International Relations*, 27(3), p. 359; Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 113-137; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*, 17(2), p. 224-241; Quaglia, L. (2014). The Sources of European Union Influence in International Financial Regulatory Fora. *Journal of European Public Policy*, 21(3), p. 328; Schunz, S. (2010). How to Assess the European Union's Influence in International Affairs: Addressing a Major Conceptual Challenge for EU Foreign Policy Analysis', *Journal of Contemporary European Research*. 6(1), p. 27; Basu, S. et al. (2012). The European Union's Participation in United Nation's Human Rights and Environmental Governance: Key Concepts and Major Challenges. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 6.

⁹⁹⁶ See Smith, M. (2004). Between Two Worlds? The European Union, the United States and World Order. *International Politics*, 41, p. 101; Smith, M. (2009). Between 'Soft Power' and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 608.

member states,⁹⁹⁷ and the reaction to the September 11, 2001 terrorist attacks could be considered a continuation of the debate within the European Union and its member states with regard to aligning with or separating further from the United States' positions.⁹⁹⁸

More broadly, scholars have previously disagreed on the extent to which the European Union can challenge the United States in the world, particularly outside of the economic arena.⁹⁹⁹ With regard to human rights in particular, the European Union has been criticized by some “that it promotes [human rights] when it is easy or cost free, but is far less willing and/or able to do so when faced with powerful states that have the potential to impose high costs on the EU.”¹⁰⁰⁰

Generally in line with the combined literature of other studies of the European Union's human rights efforts,¹⁰⁰¹ this research found mixed results of the European Union's external impact on the United States. Nonetheless, the European Union's sometimes high levels of impact in these areas suggests that the European Union is not always the weaker partner or a follower in European Union-United States relations, but

⁹⁹⁷ Smith, M. (2009). Between ‘Soft Power’ and a Hard Place: European Union Foreign and Security Policy Between the Islamic World and the United States. *International Politics*, 46(5), p. 608.

⁹⁹⁸ *Ibid.*, p. 605.

⁹⁹⁹ See, e.g., McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York. p. 2; Howorth, J. & Menon, A. (2009). Still Not Pushing Back: Why the European Union is not Balancing the United States. *Journal of Conflict Resolution*, 53(5), p. 727-728; McCormick, J. (2007). *The European Super Power*. Palgrave Macmillan, New York. p. 2; Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 826; Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184; Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 224-225; Allen, D. & Smith, M. (2011). Relations with the Rest of the World. *Journal of Common Market Studies*, 49, p. 224-225.

¹⁰⁰⁰ Kissack, R. (2015). The EU and Human-Rights Promotion. in Jorgensen, K. et al. (eds.). *The Sage Handbook of European Foreign Policy*. Sage. p. 826; Keukeleire, S., & MacNaughtan, J. (2008). *The Foreign Policy of the European Union*. Basingstoke: Palgrave Macmillan. p. 314; see Keukeleire, S. & Delreux, T. (2014). *The Foreign Policy of the European Union*. Palgrave Macmillan. p. 275; Smith, K. (2010). The European Union at the Human Rights Council: Speaking with One Voice but Having Little Influence. *Journal of European Public Policy*. 17(2), p. 235-236 (in the United Nation's Human Rights Council, “The EU is not keen to discuss the human rights records of friends or allies”)

¹⁰⁰¹ See, e.g., Smith, K. (2006). Speaking with One Voice? European Union Co-ordination on Human Rights Issues at the United Nations. *Journal of Common Market Studies*, 44(1), p. 132-133; see also Kissack, R. (2012). The EU in the Negotiations of a UN General Assembly Resolution on a Moratorium on the Use of the Death Penalty. in Wouters, J. et al. (eds.). *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*. Palgrave Macmillan. p. 115-117; Mattlin, M. (2012). Dead on Arrival: Normative EU Policy Towards China. *Asia Europe Journal*, 10, p. 184; see, e.g., Maas, M. (2012). The European Union, Vietnam, and Human Rights as Law: the Case of the 1995 EU—Vietnam Framework Agreement and its Human Rights Clause. *Asia Europe Journal*, 10, p. 215-231.

has the demonstrated ability to influence the United States on human rights issues at least some of the time. Although there generally was variation in the levels of impact for the European Union's efforts, some outputs and diffusion mechanisms produced somewhat consistent results. Specifically, the cases in which the European Union funded NGO's efforts in the United States and the cases involving coercion often provided the highest levels (considerable or significant) of impact. On the other hand, the European Union's use of amicus curiae briefs and setting an example often resulted in the lowest levels (marginal or nil) of impact. Future research into the European Union's external impact on the United States in other policy areas could be useful in confirming (or not confirming) these tendencies. In sum, this research suggests that even on some of the most contentious and controversial issues against a world power such as the United States, the European Union can at least sometimes matter greatly.