



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**ASSISTING
EUROPEAN CITIZENS
FACING EXECUTION
OUTSIDE
THE EUROPEAN UNION**

DROI

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

POLICY DEPARTMENT

BRIEFING PAPER

**ASSISTING EUROPEAN CITIZENS FACING EXECUTION
OUTSIDE THE EUROPEAN UNION**

Abstract

European Union has a well established policy aimed at global abolition of the death penalty. This workshop presentation discusses how EU could provide direct assistance to prisoners who are facing the death penalty, thereby raising the profile of injustice in a way that will accelerate the goal of abolition. European countries have adopted disparate approaches to helping their prisoners on death row abroad. Some provide funding for effective local lawyers; some provide legal aid for European lawyers to help on the cases; some encourage European experts to assist with the defence; some make direct representations to the prosecutors. Development of a consistent pan-European strategy on the basis of this experience and by learning from other countries' initiatives would be an important step in moving down the path to abolition.

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INTRODUCTION

Europe has a legal and moral policy aimed at global abolition of the death penalty. My focus today is to help enhance that admirable policy in a very practical way: by discussing how we can provide direct assistance to prisoners who are facing the death penalty, thereby raising the profile of injustice in a way that will accelerate the goal of abolition.

I have spent three decades working for charitable law offices in the US and the UK, focused on preventing the execution of those facing the death penalty. In addition to directly assisting in the cases of more than 300 prisoners in the US, at the trial level all the way through to the final moments before execution, in conjunction with the charity that I direct (*Reprieve*), I have also worked on capital cases all around the world – in China, the DRC, Laos, Malawi, Malaysia, Pakistan, the Philippines, Thailand, Vietnam, Yemen, and around the Caribbean, to mention just some of the countries.

There are various principles that have become very clear to me during my 30 years of work against the death penalty: First, it is a myth that there is a divide between the systematic opposition to the death penalty, and the direct representation of individuals. Quite the contrary: highlighting injustice in individual cases – putting a human face on the inexorable flaws that lead to a deeply flawed death sentence – is by far the best way to change public and political opinion.

Second, the death penalty is all about power: Sad to say, I sat in an execution chamber six times, watching people die who I had tried to save. They have died in the electric chair, in the gas chamber and on the lethal injection gurney. There is perhaps no greater imbalance of power in human society than the government's ritualistic execution process, in the dark of night, to deprive a person of life itself. Some of the details of this imbalance are little known even in putatively civilised countries. For example, as a matter of US constitutional law, a prisoner who has been sentenced to death has *no right* to legal aid for the decades of appeals that he must go through. See *Murray v. Giarratano*, 492 U.S. 1 (1989). Thus, many prisoners are dependent on volunteer lawyers who work on the cases without funding.

Third, the death penalty is all about discrimination, on the basis of poverty, mental disability, race and nationality. I have always worked for charity, and have never represented a prisoner who has paid me a fee. "Capital punishment," as they say, "is when those without the capital get the punishment."

Virtually all those facing execution have serious mental disabilities of one sort or another. A hugely disproportionate number of the condemned are from racial minorities, a prejudice compounded by foreign nationality. Over the years, I have prevented the death penalty in more than 98 percent of the cases where I have been involved. Yet a vastly disproportionate number of those who have been executed on my watch -- three of the six, or half -- have been European citizens, all executed in the US. In the past ten years, 728 Mexicans have faced the death penalty in the US; 61 currently face execution. What this highlights is the discrimination that a foreign national faces abroad, the bias that consular assistance is meant to combat.

Prejudice stems from ignorance, of course. Most Americans have been raised in an environment where nobody speaks out against the death penalty; it comes as a surprise to many to learn that Europeans are so strongly opposed. In other countries, the opportunity for change is even greater: I met with people in Yemen who had no idea that anyone could be against executions, and were intrigued at the idea.

For the solitary individual on death row, the intervention of his¹ country of origin brings unimaginable power to bear on his case, and may not only educate his potential executioners, but save his life. One person I represented, who I watched die, was Nicholas Ingram. He and I were born in the same hospital, in Cambridge, in England. I know, from my private conversation with the lawyer for the Pardon Board, that Nicky would have received clemency had the British government simply asked for it. This was many years ago, before the British adopted their more enlightened policy of intervention. Nicky is cold in his grave – after being cooked to death in the Electric Chair – because he did not have the meaningful support from his government.

Vigorous involvement by European governments, and by the EU itself, can directly save lives. More than this, intervention in individual cases can spill over to help hundreds of others. Litigation over the Vienna Convention on Consular Relations (VCCR), rigorously pursued by Germany in the *LeGrand* case and since carried forward by other countries, has had a broad impact in the US. Each favourable development in the US – from the elimination of the death penalty for juveniles to the exemption of those with low IQ's – has come in the context of individual cases taken to the Supreme Court. In other countries, highlighting flaws in the process in one case has benefited others.

Europe has the moral right to intervene against the death penalty in any case and has, indeed, done this in certain cases. However, we have a far greater locus where there is a direct link between the prisoner and a particular European country. Additionally, it is each countries' diplomatic *duty* to assist prisoners under these circumstances.

This is clearly recognized by the very countries that would execute our nationals. As the U.S. Department of State explains in its manual for U.S. foreign service officers:

Our most important function as consular officers is to protect and assist private U.S. citizens or nationals traveling or residing abroad. Few of our citizens need that assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail.

7 U.S. Dep't of State, Foreign Affairs Manual § 412 (Sept. 1, 2004).

The American Bar Association also underlines the importance of consular officers in "arrang[ing] for their nationals' legal representation and to provide a wide range of other services. These include ... enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (e.g., through amicus briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, arranging for contact with families and other supportive individuals."ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Commentary to Guideline 10.6, at 74 (rev. ed. 2003).

Recognizing our diplomatic obligation to those with European connections is important for another reason: a focused campaign is more effective. There are so many people facing the death penalty worldwide that it is impossible to intervene in every case. For example, few people recognize that the largest death row in the world, with more than 7,500 condemned prisoners, is in Pakistan. In the US, there are more than 3,200 people waiting to die, and more than 15,000 homicides each year, with no simple way to determine which might be prosecuted capitally. China's death row may not be quite as large as either Pakistan or the US, but that is simply because China executes its prisoners much faster, in faraway places.

¹ I use the male pronoun advisedly, since the overwhelming majority – more than 98 percent in the US – of those condemned to death are men.

Thus *Reprive* has long since adopted a policy of focusing first upon European citizens, simply because we can achieve much more that way – for those prisoners and, through the collateral impact of each case, on many others. Every now and then our partners around the world bring other cases to our attention where the impact might be massive, and we lend our assistance – just as the EU intervened in the US Supreme Court cases on juveniles and the learning disabled. But to avoid being swamped into ineffectiveness, our policy is to devote most of our resources to our clearly-defined goal.²

1 IDENTIFYING EUROPEAN PRISONERS FACING EXECUTION

Before we discuss the manner in which European countries, and the EU, can assist European citizens who face the death penalty, we must understand the need for accurate data. There are various systemic mechanisms in place – such as the VCCR – that are intended to ensure that each country knows when its nationals are in jeopardy. These documents are only as effective as their enforcement, and they are often more honoured in the breach than the observance. Thus, for example, we have identified European citizens who have been on death row in the US for two decades without their home governments ever being told. This is obviously a huge problem, and one where we must reinforce and develop systems for immediate notification.

2 IDENTIFYING AND ASSISTING EUROPEAN PRISONERS FACING EXECUTION – THE AMERICAN EXPERIENCE

In late 2009 *Reprive* launched a three-year project, *Engaging Europe in the Fight for US Abolition* (“US Project”), primarily funded by the European Commission. The main purpose of the project was to survey all 3,200 prisoners on US death row to identify and assist those with European links, to facilitate greater diplomatic influence against the death penalty in individual cases. This is, without more, an immense task: there are 38 states and federal jurisdictions that use the death penalty, and the survey is further complicated by many legal issues. However, rather than half-complete the job, *Reprive* chose to expand it. Devoting other funds, we have five personnel full time in the US, and others in London. We have not only searched for those with European links, but also all foreign ties. We have also tried to gather information concerning those who have not been sentenced to death yet, but who face capital charges. This is still more difficult, but perhaps more important: it is much easier to prevent a death sentence if the stable door is closed before the horse bolts out of it. When we identify the relevant prisoners, we face the still greater challenge of establishing links with the various European governments, conducting investigations across several countries, and ensuring that the proper assistance is given in each case.

² I should stress that *Reprive*’s current focus is on delivering assistance to prisoners around the world with European links. We are also trying to facilitate help for other prisoners. For example, while the European Commission funding for our US project is focused at Europeans, it makes no sense to survey more than 3,000 prisoners without identifying those from other countries. As we find these prisoners – many from Central and South America, but others from Asia and elsewhere – we are attempting to link them with their relevant government. Since the political and investigatory work for South American prisoners must be done in South America, for example, our longer term goal is to help establish an NGO similar to *Reprive* in each geo-political area. This kind of capacity building is important, and an area where the EU can hopefully play an important role.

The US project is only in its initial stages,³ but a great deal has been achieved already, and that experience teaches us what to expect in the rest of the world.

The project has already started assisting 30 relevant prisoners – 19 European citizens (i.e. from a country within the Council of Europe) on death row or facing capital charges in the US where nationality has been confirmed, with an additional 11 where it seems likely that nationality will ultimately be established. These prisoners have claims or confirmed nationality from countries including Armenia, Britain, Croatia, Czech Republic, Estonia, France, Germany, Lithuania, Netherlands, Norway, Poland, Russia, Serbia, Spain and Sweden. In California, the numbers are so large that we cannot yet make a sensible estimate, but it is clear that the total number of European prisoners will ultimately be far higher.

In this preliminary review *Reprive* has also uncovered various other cases concerning foreign nationals outside of Europe who have either been sentenced to death or are facing capital charges.

This project has only just begun, and it is a massive undertaking, looking at more than 3,200 people on death row, and many more who may be charged with capital offences each year.

Indeed, there are other prisoners who have close links to European countries. This can often prove as important as nationality itself. For example, in one recent case, Hank Skinner was married to a French woman. As a result, President Sarkozy made a personal intervention, and the French interest is generally deemed to have been influential, as the Supreme Court stayed his execution on March 24, 2010, just 35 minutes before he was to die, and granted a hearing scheduled for October 13, 2010. (Mr. Skinner's appointed trial lawyer, Harold Comer, had previously prosecuted him in cases that were used to justify the death penalty. He chose not to do DNA testing at trial, even though it could have exonerated his client. The Supreme Court must decide whether Mr. Skinner had a right to DNA testing before his execution.)

3 IDENTIFYING EUROPEAN PRISONERS FACING EXECUTION – THE REST OF THE WORLD

The *Reprive* project in the US only highlights both the need for information worldwide, and the difficulty of obtaining it. There are five confirmed British nationals facing the death penalty in the US;⁴ worldwide, *Reprive* currently assists 25 British nationals facing capital charges or sentenced to death. Thus, for every British person facing execution in the US, we already know of five facing death elsewhere. *Reprive* has been working on British cases for more than a decade, and consequently has a

³ Arizona (with a small percentage of the survey completed, the project is lending assistance in two European cases); Louisiana (with about a quarter of the survey done, one case); Mississippi (roughly 73% coverage, one case); Missouri (65% coverage, one case); Nevada (45% coverage, two cases); Oregon (85% coverage); Tennessee (66% coverage established, assisting on two cases, with the death penalty already prevented in one); Virginia (small percentage of the survey, two cases). While we have not done any systematic survey of Federal Death Row yet, we have identified two cases where we are assisting. We are about to begin serious work in a number of the states with large death rows, such as Arkansas, Florida, Georgia, Kentucky, Pennsylvania and Texas but we have already started assisting on four cases in these states. The largest death row is in California, where we have completed some very preliminary assessments, with 45 potential foreign national cases identified.

⁴ A sixth, Neil Revill, was facing execution, but the District Attorney recently dropped his request for death, in large part due to extensive intervention by both the British Government and *Reprive* lawyers and investigators.

much broader knowledge of British nationals facing death. If the same statistics carried over to other European countries, we could expect well over a hundred European citizens to be facing execution around the world.

While the US project is complicated, in many ways gathering evidence there is easier than in the other 57 countries worldwide that execute: we began with a complete list of all the prisoners on death row, and – in part from my own two decades of work there – we have contacts in most of the states.

Compare this to Pakistan, which has over 7,500 people on death row, more than twice as many as the US. Nobody – not even the Pakistan government – has a complete list of everyone under a sentence of death. The system is chaotic; the available allies for our work are few. Different problems are, again, posed by countries that do not enjoy democratic traditions: for example, in China and North Korea, any list of those on death row is a state secret. It is terrifying to face the death penalty in any country, it is all the more frightening if your family or your country does not know you are there.

Reprieve has begun to make an ad hoc assessment of European citizens on death row in countries other than the USA and has identified at least 42.⁵ However, this work has been very ad hoc, and there are no reliable numbers – nor, through no fault of the European states, can anyone be confident that anyone knows of who the European citizens are who currently face death abroad.

Thus, the first task ahead of us is to establish accurate and complete data. This may be done, initially, through contacts with the relevant European governments, and efforts are underway to accumulate such information as may be available. However, the lesson of the US project is that – due to the inadequate implementation of international agreements – the European states will not have complete data themselves. Thus, it is important that independent efforts should be made to seek additional information. This may be done most efficiently in many instances through establishing links with local NGOs; in some cases, such as Pakistan where the numbers are overwhelming, it will be important to replicate the US study.

4 EUROPEAN PRISONERS FACING EXECUTION – AN OPPORTUNITY

Once the data is collected, and a more efficient method is established for keeping the information up to date with pre-trial cases, we come to the actions that the European states can take.

The battle against the death penalty is gradually being won. In 1977, only 16 countries had abolished the death penalty for all crimes. As of December 2009 that figure stood at 95 and more than two thirds of the countries in the world have abolished the death penalty in law or practice. Europe has played a leading role in this process. However, there are at least 58 retentionist countries,⁶ more than 24,000 prisoners on death row around the world, and hundreds are executed each year.⁷

⁵ The following information is not intended to be exhaustive, and the data is kept at Reprieve's office. Outside the US, France has a prisoner facing death in China; the Netherlands has one in Singapore, and 3 in Indonesia; Norway has two in DRC and one in Pakistan; Portugal has an unknown number in Singapore; Russia has nationals facing death in Yemen, Uzbekistan and the UAE; Spain has one in Yemen; Ukraine has one each in Yemen, Belarus and the UAE; the UK has 30 prisoners in DRC, Pakistan, Thailand, Ghana, USA, Bangladesh, and Iraq

⁶ See <http://www.amnesty.org/en/death-penalty/numbers>.

⁷ See <http://users.xplornet.com/~mwarren/global.htm>

Sometimes, external intervention in capital cases can be seen as meddling. However, this is not so where the prisoner is a foreign national or someone with clear foreign connections, as this provides an undeniably appropriate locus. Terrible though it is that anybody should be facing execution, the presence of Europeans among their number should be seen as opportunity to press forward a strong policy against capital punishment.

European countries may readily learn from the experiences of each other – as well as from others. Indeed, the clear leader in the field is Mexico, which has established the Mexican Capital Legal Assistance Program (MCLAP). The office is funded entirely by the Government of Mexico to represent the interests of Mexicans in US capital cases. MCLAP attorneys refer defence counsel to competent experts and mitigation specialists, advise defence counsel regarding mitigation themes and investigations in Mexico, and provide sample briefs on a variety of legal issues. Depending on the case circumstances, MCLAP may also file amicus briefs on issues of international law, or provide other resources necessary to ensure Mexican nationals receive vigorous and effective representation.

Since its inception in 2000, the office has helped with 728 cases involving Mexican nationals. In 2009, the office worked on 61 prisoners who were already on death row, but an extraordinary 232 cases pending at trial. Over the years the numbers tell the story: a prisoner with MCLAP assistance is five times more likely to avoid the death penalty as one without. The office has raised systemically significant issues, like the *Avena* case, benefiting many other prisoners. And the numbers illustrate a vital point: if we can identify a certain number of prisoners who are already on death row, there are likely to be many more facing the death penalty at trial who need help, and where early assistance can be even more effective.

European countries have adopted disparate approaches to helping their prisoners on death row abroad. Some provide funding for effective local lawyers; some provide legal aid for European lawyers to help on the cases; some encourage European experts to assist with the defence; some make direct representations to the prosecutors who decide whether to seek death; some file *amicus* (friend-of-the-court) briefs on behalf of the prisoner; most welcome the assistance of experts from *Reprive* and other NGOs to decide what intervention will be most effective.

5 A CONSISTENT APPROACH TO INTERVENTIONS IN CAPITAL CASES

Reprive has started to develop a pan-European strategy to deal with capital cases. To be clear, this is complementary to but separate from *Reprive's* EC funded US project. It should be stressed that this is only a proposal for aiding in the delivery of consular assistance, and only to the extent that it is welcomed by the relevant European states. There is absolutely no intention of interfering with the rights of the individual states. Encouraging European states to adopt an effective approach in no way infringes upon their sovereignty; rather, it assists in making that sovereignty even more effective. A consistent approach would include the following steps:

Identifying the connection: The first step must be to identify the relevant connection to Europe. Each European country had unique laws that allow recognition of nationality. For example, under The *Spanish Memory law*, descendants of Spaniards who fled the country between 1936 and 1955 due to fear of economic hardship or political persecution can have their Spanish citizenship recognized. To date over 20,000 Cubans with Spanish ancestors have had their citizenship recognised. Under *Croatian nationality law*, the government will formally recognize the citizenship of descendants of Croatian citizens and those who consider themselves to be ethnic Croats. Descendants of Germans who were deprived of their citizenship on political, racial or religious grounds between 1933 and 1945 can have their German citizenship recognized. Many complex elements of British law allow for people from the

former colonies to be recognised as *British*. And so it continues, from one country to the next. Lawyers representing Europeans in foreign countries need legal help to ensure that the nationality of their clients is recognized. *Reprieve* has many years' experience in lending this kind of assistance.

Consider interventions for those with close links, falling short of citizenship: In addition to the Hank Skinner example mentioned above, in the case of one prisoner who was born in Germany but did not qualify for formal German citizenship, the city of Berlin adopted the defendant as a "Berlin citizen" and became heavily involved in the case; a German actress campaigned on the condemned prisoner's behalf.

Coordinate between the government and the legal team: understandably enough, some European governments have never had to face the prospect of a national being executed in a particular jurisdiction. Sharing the experiences of other states helps the task of making informed judgments on how to intervene effectively. The British, for example, have increasingly focused on the early stages of capital cases in the US, in recognition that this is when the issue of life or death is most readily resolved. Often, local counsel – appointed to an unpopular capital case – do not have the prisoner's true interests at heart. It is important to have independent experts who can ensure that the local lawyer is competent; for this, the expertise of organisations such as *Reprieve* is vital.⁸

Consider funding important aspects of the case: The German government has provided funds to the defence, in one case recognizing citizenship during post-conviction proceedings, contributing to the costs of the defence,⁹ and assisting with the investigation into the prisoner's childhood in Germany. The Spanish government has allocated funds in the national budget to aid the defense of those facing the death penalty, and has in the past provided funds to a Spanish organization set up to aid the defence of a case in Florida.

Identify the most effective interventions: Government interventions vary from the broadest to the most narrow. The current Spanish President, Jose Luis Rodriguez Zapatero, announced his intention to strive towards an effective global moratorium on executions in 2015. At the same time, consular officials may work towards improving day-to-day living conditions for the prisoner. Of course, the fact that one kind of intervention is used does not imply that there is anything wrong with applying another in the same case. Where life is at stake, the government should consider all possible actions.

In order to determine the most effective use of influence, however, it is vital to consult the experts who know what is most likely to have the maximum positive effect. Some principles are universal: early interventions are more effective than late; applications when the executive branch is able to make a discretionary decision (prior to trial) are more likely to be successful; bland statements of opposition to the death penalty carry less weight than interventions that focus on the unique nature of the case; assistance with the presentation of expert and mitigating evidence is crucial; and so forth.

The British have gradually moved their own interventions earlier in the process, and will now generally make an approach to the prosecuting attorney before trial where possible. Once that moment had

⁸ There are many other sensitivities where assistance from Reprieve and other European legal NGOs can be very important. For example, it is important that any information developed for, or received from, the defence team should be treated as legal work product that is strictly confidential.

⁹ Michael Remkes, Obertstes Gericht entscheidet Dieser Deutsche wird hingerichtet, www.bild.de/BTO/news/2007/04/15/usa-hinrichtung/deutscher-gefaengnis.html (Information drawn from: K:\AA United States - EC Project\Nationality and Policy\Germany\ 2010_08_23_INT Examples for Presentation Materials – Germany).

passed, the British have been very active, filing *amicus* briefs that focus on the issues that the legal team believe will carry the most weight, in addition to stating their general opposition to the death penalty.

Ensure that the interventions are timely: Even Amnesty International used to wait until the last minute to send out its urgent actions. However, while clemency is important, the odds of prevailing are very slim: While once the governor used to reduce a death sentence to life in one third of all cases, now it is very rare: in Texas, since 1976, there have been two grants of clemency and 463 executions, with a success rate of less than one-in-200 cases. Thus, Amnesty changed its policy many years ago, and governments have followed suit, making their interventions much earlier in the cases.

There are only two moments when the executive has total control over the case – before the trial, when the prosecuting attorney can unilaterally drop the demand for the death penalty, and clemency (when it is generally too late). The moment prior to trial therefore takes on a magnified importance, because once the prisoner is on death row, it is generally only the judiciary that can take him off it, and they should be swayed more by law than politics – although a government can greatly enhance a prisoner's chances of prevailing by providing him with resources and support.

Interventions must be timely in another sense: particularly in the US, there are deadlines that are immutable. Johnny Johnson, executed in Texas in February 2009, lost out on all of his federal appeals, because his lawyers missed a filing deadline by 24 hours. Indeed, nine men have lost all their federal appeals in Texas because their lawyers narrowly missed a deadline.¹⁰ Thus, when a European government receives a plea from a US lawyer – or their European allies at *Reprieve* – it is often important that the government act with great expedition, or any opportunity to assist will be gone.

6 CONCLUSION

There are many ways in which we can help broaden the coalition against the death penalty. Laying out an effective European approach is an important step in moving down the path to abolition.

¹⁰ <http://www.chron.com/disp/story.mpl/metropolitan/6328865.html>.

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