EC PROJECT MANUAL

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Reprieve, P.O. Box 72054, London UK, EC3P 3BZ
020 7353 8140 **www.reprieve.org.uk**

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Foreword

There is perhaps no person in the world more powerless than someone facing execution, unless it is a foreign national facing execution. Foreign nationals on death row face a complex and confusing legal process, caught up in a culture, and often a language, that they don't understand. All this changes when their government intervenes. Suddenly they have the power of a nation on their side, and the entire dynamic of the case shifts.

There's a lot a foreign government can do: from talking to the District Attorney prosecuting the case, facilitating investigation in the home country, to filing *amicus* briefs and lobbying the various actors in the process. Simply ensuring that consular officials meet with defendants, reassuring them that they are not on their own, makes all the difference. Consular officials can attend court hearings, making the judge realize that a foreign state is genuinely interested in the fairness of the process. Foreign nationality issues can provide defense lawyers with material for a whole range of possible claims, from the denial of consular assistance to the ineffective assistance of counsel, and claims related to linguistic and cultural barriers. Exploring these issues can make the difference between life and death.

The obligation placed on a government to ensure fairness for a citizen is a fundamental one. For example, it is inscribed on every British passport:

> *Her Britannic Majesty's Secretary of State requests and requires in the name of Her Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford the bearer such assistance and protection as may be necessary.*

It is, however, an entirely positive duty, since consular intervention involves the enforcement of the basic human rights that reflect the decency of any society. I look forward to several more decades working with anyone who is committed to this goal.

Clive Stafford Smith OBE
Director of Reprieve

Introduction

Reprieve is a UK based legal action charity, set up by Clive Stafford Smith in 1999. Many people will be familiar with Clive and his work, but for those of you who are not, Clive has spent some thirty years representing indigent defendants facing the death penalty in America's Deep South and elsewhere in the world. There are now two main aspects to *Reprieve*'s work: assisting those facing the death penalty, and assisting people affected by the US 'War on Terror.'[1]

Reprieve has over ten years' experience working on the cases of primarily European nationals facing execution in the U.S. and around the world. For many years, *Reprieve* has helped to coordinate timely and effective intervention by different governments, which may include providing investigation and litigation assistance, direct intervention in the legal proceedings, or making high level diplomatic representations. In September 2009, with the help of the European Commission, *Reprieve* launched the EC Project, with the aim of expanding its work in the US to include nationals of more Council of Europe countries.

The European Union is, and has for some time been, opposed to the death penalty in all circumstances. It considers the death penalty cruel and inhuman punishment, with worldwide abolition remaining one of the key priorities of the EU's external human rights policy. All member states have ratified Protocol No. 6 to the European Convention on Human Rights (ECHR), which abolishes the death penalty in times of peace. All member states, apart from Poland, have also ratified Protocol No. 13, which prohibits the death penalty in all cases, including in wartime. The EU played a significant role in bringing about the UN General Assembly's Third Committee Resolution calling for a moratorium on the use of the death penalty (62/149).

In order to bring about worldwide abolition, the EU has launched various initiatives and programs. These fall into two main categories:1) diplomacy and cooperative assistance with third countries as regards the death penalty generally and in individual cases; and 2) the provision of funds via the European Instrument for Democracy and Human Rights (EIDHR) for projects and organizations that seek to raise awareness in retentionist countries, undertake research on whether minimum standards in relation to the death penalty are met,

[1] Further details available on *Reprieve*'s website: <http://www.reprieve.org.uk/>.

influence public opinion through outreach, and provide assistance to prisoners facing the death penalty.

Reprieve's EC Project has been funded by the European Commission through the EIDHR. *Reprieve* has had five research fellows based in New Orleans, with support from a number of staff in our London office. The fellows have undertaken a comprehensive survey of everyone on death row in the 33 US states that still retain the death penalty, as well as military and federal death rows. For those who have European nationality, or a claim to such nationality, *Reprieve* works closely with counsel of record, providing various forms of assistance. The degree and type of assistance will vary from case to case, but will always try to engage the country of nationality to intervene on the prisoner's behalf. More widely, *Reprieve* also looks at systemic issues affecting those on death row, with a view to litigating or raising public awareness.

Over the past three years, *Reprieve*'s EC Project has assisted in 78 cases, and continues to be actively involved in 51 cases of European prisoners, or those with ties to European countries, both pre-trial and post-conviction. *Reprieve* has helped to coordinate timely and effective intervention by European governments, which has included providing assistance from pre-trial to clemency, filing *amicus curiae* briefs, and making high-level diplomatic representations. *Reprieve* has also provided investigation and litigation assistance.

European nationality and strong links to European countries are significant factors in a capital case for many reasons. We focus here on a few key points.

Legal claims may arise if foreign nationals are not informed of their rights to consular notification and access, as required under Article 36 of the Vienna Convention on Consular Relations (VCCR). This is a contentious issue, which has been litigated in both domestic courts (most recently in the US Supreme Court in *Medellin v. Texas*), and international courts (including several times before the International Court of Justice (ICJ) in the *LaGrand* and *Avena* cases.

Foreign nationals facing criminal proceedings abroad are likely to encounter various cultural and linguistic barriers that hamper their ability to engage in the process effectively. Consular assistance can help bridge the cultural gap, and protect the rights of the defendant. Many European countries are vehemently anti-death penalty, and provide a whole range of assistance to any of their nationals facing capital punishment.

There is also a duty placed on the lawyer to engage the country of the prisoner's origin. For example, the ABA Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases (Rev. Ed. 2003) ("ABA Guidelines"), recognize that trial counsel incurs a professional obligation to determine whether the client may be a foreign national, to investigate any such issue vigorously, and to present evidence that might relate to foreign nationality.

Reprieve has worked for a number of years on the case of Linda Carty, a British national on death row in Texas. Linda was born on the Caribbean Island of St. Kitts to Anguillan parents, and subsequently holds a UK Dependent Territory passport. When she was 23 she moved to the US to study.

In 2001, she was charged with murder. After disastrous failures by her court-appointed lawyer, she was convicted of the same a year later, and sentenced to death. At no time from the point of arrest did the US authorities inform Linda of her right to consular access and notification, a right protected under both the VCCR and the US-UK Bilateral Consular Convention. The latter requires mandatory notification of the UK authorities whenever a national is arrested. The British government was only informed of Linda's predicament by a third party, after she had been sentenced to death.

The UK is strongly opposed to the death penalty. In capital cases involving British nationals it makes representations at whatever stage and level is deemed appropriate from the moment the death penalty becomes a possibility. Once the UK authorities became aware of Linda's case they worked closely with *Reprieve*, facilitating the referral of the case to US *pro bono* counsel, Baker Botts, who remain counsel of record to this day. Since then a lot has happened on Linda's case, including the gathering of compelling mitigating evidence from St. Kitts and the US – evidence that would have had a direct bearing on the jury that sentenced her to death. The British government itself describes what it could have done had it, and *Reprieve,* been involved earlier in its third *amicus curiae* brief in Linda's case, filed with the US Supreme Court in February 2010.[2]

The first stage of *Reprieve's* EC Project came to a close in September 2012. The purpose of the following chapters is to share our experience and demonstrate the types and level of assistance available to defense counsel representing European nationals and those with ties to Europe.

[2] The brief is included in the Appendix.

Chapter 1 provides advice on identifying European nationals on death row, and the information required to establish entitlement to assistance from European governments.

Chapter 2 discusses *Reprieve*'s experience of investigating clients' European backgrounds, including funding for such investigation, records collection, and trans-generational trauma from the major European conflicts that have affected a number of *Reprieve*'s clients.

Chapter 3 provides a summary of the various types of assistance available to European nationals accused of capital crimes, including diplomatic intervention and *amicus* briefs, and additionally provides case studies for each form of government intervention.

Chapter 4 discusses best practice regarding European government intervention in capital cases, and summarizes the policies of various European states regarding the death penalty and assisting their nationals on death row.

Chapter 6 describes the positions on the death penalty of the two major European institutions, namely the European Union and the Council of Europe.

Chapter 7 provides an overview of issues that can be litigated by counsel representing foreign nationals, including failure to provide interpreters or to adhere to the VCCR.

Chapter 8 covers the use of other international legal mechanisms available to prisoners on death row, including the Inter-American Court on Human Rights and the Special Rapporteurs on Torture and Extrajudicial, Summary and Arbitrary Executions.

Chapter 1: Identifying Nationality and Links to Europe

1.1 Foreign nationality may be a live issue in your case

Even if it is not immediately obvious, foreign nationality may still be a live issue in any capital case.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases recognize the importance of determining whether your client may be a foreign national. Guideline 10.6(A) states:

> Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.[3]

Many nationality laws are broader than one might think, and clients whose connection to a foreign country dates back more than one generation may be recognized as a national of that country. As the commentary concerning Guideline 10.6(A) makes clear, determining nationality is not always straightforward:

> … the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g. one grandparent of that nationality) that would not be apparent at first glance.[4]

European nationality laws can be surprisingly broad, meaning that even those with an apparently distant link to a country may be recognized as a national of that country. Some European countries recognize a person as one of their nationals even when the person and their parents were all born in the US. For example, Ireland often recognizes nationality where a person has a grandparent, or potentially even a great-grandparent, who was born in Ireland.

Irish law provides that nationality is acquired by descent if at the time of the child's birth one of the child's parents was Irish. Citizenship is automatic if at

[3] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (REV. ED. 2003), in 31 Hofstra L. Rev. 913 (2003) ["ABA Guidelines"]. The ABA Guidelines are also available online at: <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf> accessed May 22, 2012. The ABA Guidelines are considered by many to reflect the standard of representation required of defense teams in death penalty cases.

[4] ABA Guidelines.

least one parent was born on the island of Ireland, or is an Irish citizen working abroad for the Irish state. If this is not the case, the birth should be registered with the Irish government.

A person whose grandfather or grandmother was born in Ireland may be formally recognized as an Irish citizen by registering in the Foreign Births Register at an Irish Embassy or Consular Office or at the Department of Foreign Affairs. A person whose great-grandfather or great-grandmother was born in Ireland may register as an Irish citizen provided that their parents were registered in the Foreign Births Register at the time of the person's birth.

Other European countries have laws that are designed to right the wrongs of former repressive regimes. German law, for example, allows Germans who were deprived of their nationality on political, racial or religious grounds between 1933 and 1945, and their descendants, to have their German nationality recognized, as long as certain requirements are met.

Nationality laws in Europe can be complex. Counsel should be alert to potential nationality implications when undertaking their life history investigation, and should seek advice from relevant experts to help them determine whether another country may consider their client one of its nationals.

There are almost always complicated and unique aspects to nationality claims that make it vital to work closely with experts in the relevant nationality law. *Reprieve* has experienced cases where the nationality claim was based on law so obscure that only the most informed expert would be aware of it – yet the claim to nationality has been fully recognized by the relevant country, and the legal team has obtained strong political and legal backing for the case.

The case of Linda Carty illustrates the intensely fact-specific nature of nationality enquiries. Linda was born on the island of St Kitts in 1958. Her parents were born on Anguilla, a neighboring island. If her parents had been from St Kitts, she would have had no right to British nationality. But due to a quirk in British law – derived from the fact Anguilla remained a British protectorate when St. Kitts and Nevis became independent – Linda, as the child of an Anguillan, is British.

Reprieve has worked closely with a number of experts in European nationality law, and is willing to help facilitate *pro bono* expert assistance.

1.2 Identifying foreign nationality

Investigating your client's foreign ties will form part of a much broader inquiry into your client's life history.[5] To establish whether there might be a potential nationality claim or to establish more fully the strength and exact nature of your client's ties to foreign countries, counsel's enquiries should include, but not be limited to:

- the client's place of birth;
- the client's parents' places of birth and nationality;
- the client's grandparents' places of birth and nationality;
- the client's great-grandparents' places of birth and nationality;
- client's spouse's place of birth and nationality;
- time spent abroad by the client or their relatives; and
- any other links or affiliations with other countries.

Like much legislation, the laws governing a country's nationality often change over time. As such, dates of birth will be highly relevant for determining which version of a country's law should be applied in any given situation. In order to assess whether an individual has a potential nationality claim, one will normally have to determine which law was in force at the time of his or her birth.

The marital status of a person's parents at the time of his or her birth will also often be relevant. Some countries have laws, or formerly had laws, which treat married and unmarried parents differently. Sometimes those earlier rules are subject to legal challenge, so the fact that a discriminatory rule was changed on a particular date does not preclude a client from claiming the benefit of the new, equitable rule, even if the nationality issues arose before the change in the law. Thus, British law used to discriminate against the children born abroad to British mothers but not British fathers, but a legal challenge removed that distinction.

[5] See, for example, Guidelines 5.1(B), 10.11(B) and 10.11(B)(E)(2)(a), ABA SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677 (2008) ["ABA Supplementary Guidelines"]. These guidelines provide that the investigation of a client's life history should include a multi-generational family history.

Greece has a “blood law” in relation to nationality (*ius sanguini*). According to the provisions of the nationality law, an individual of Greek descent acquires Greek nationality at birth, irrespective of where they were born. An individual who was born in the United States, and who can trace his blood-line to a Greek national, may request the Minister of the Interior to formally recognize his or her Greek nationality. If a person is able to demonstrate that a grandparent or great-grandparent was born in Greece, she may be entitled to nationality.

There are strict and complicated procedural provisions that govern the process of demonstrating that an individual is of Greek ancestry. For example, in some instances, the individual will be required to demonstrate that their parents, grandparents, and so on were married in the Greek Orthodox Church. Counsel should therefore always seek the advice of an expert.

Reprieve has developed a brief questionnaire which we use to assess foreign ties. The questionnaire is included in Appendix I.5 and may be a useful tool to guide your enquiries.

1.3 Close links to European countries can often prove as important as nationality itself

Defense teams should take advantage of any link to a foreign country. Even in situations where your client is not entitled to recognition as a foreign national, possible assistance – legal, political, or humanitarian – from the relevant foreign country should be explored.

Many European countries are staunchly opposed to the death penalty and pride themselves on actively intervening at every opportunity. Legal and diplomatic intervention may be possible regardless of formal recognition of nationality, so long as there is an appropriate interest in the case. A recent example from March 2010 is the case of Texas death row prisoner Hank Skinner. While Mr. Skinner is a US national, he married a French woman while under a death sentence. As a result, France intervened strongly in his case, and the President of France, Nicolas Sarkozy, personally phoned the Governor of Texas in the lead up to Mr. Skinner’s execution in an effort to persuade the Governor to spare his life.

Likewise, Debra Milke, a US national with ties to Germany, has benefited from the efforts of supporters in Germany. Ms. Milke’s case has received national

attention in Germany, and a famous German actress campaigns strongly on her behalf.

Conclusion

Nationality laws can be complicated but, as will be detailed in the following chapters of this manual, the benefits of investing the energy in the necessary investigation are manifest.

Reprieve always stands ready and willing to help counsel with any issue relating to ties with any foreign country.

Chapter 2: Investigation in Europe

2.1 Introduction

Counsel has an obligation to conduct a full investigation of the defendant's life, which stretches beyond a narrow set of sources, such as records or psychiatrists' reports, to include a full social history.[6] In order to gather information of a delicate nature, it is necessary to conduct "in-person, face-to-face, one-on-one interviews with the client, the client's family and other witnesses who are familiar with the client's life history or family history who would support a sentence less than death."[7]

If your client has ties to a foreign country, it may be necessary for members of your legal team to travel to that country, ideally on multiple occasions to conduct investigation. Under the ABA guidelines, "a multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish and strengthen a diagnosis and underscore the hereditary nature of a particular impairment."[8] Even if your client was born in the US, it may be necessary to travel to the family's former home to fully understand how these experiences shaped your client's family and his life.

This chapter splits into two sections. First, we provide a brief historical background about Europe and discuss how this might have affected your client and their family members. The second half of the chapter gives practical advice to legal teams preparing to travel to Europe to conduct investigations.

2.2 Historically sensitive mitigation investigation

Many of the cases in which *Reprieve* has assisted involve clients born in the US to parents who left Europe during the First or Second World War, the Armenian genocide or the Yugoslav conflict. It is important for lawyers to understand the nature of these conflicts, the trauma that the client's family may have suffered, the reasons why they fled, their journey across war-torn Europe, and the effect of these familial experiences on their clients.

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[6] *Wiggins v. Smith*, 529 US 510, 523-524 (2003).
[7] Guidelines 10.11(C), ABA Supplementary Guidelines.
[8] Guideline 10.7, ABA Guidelines.

The section below is intended to provide legal teams with a very cursory historical backdrop to help you consider how this might affect the way you approach international investigation and your work with your client and their family members in the US.

2.3 Western Europe

Western Europe is a somewhat vague title for a collection of countries within Europe and is a term that has both a geographical and a political connotation. In its geographic sense, it refers to countries within the Western region of Europe. In its political sense, its definition was created during the Cold War and referred to those European nations that formed a 'non-communist' alliance and were allied with the United States.[9]

Without a doubt, the most important historical events that have affected the countries of Europe are the two World Wars.

Germany was deeply affected by the Second World War and accounts of the conflict and the later occupation will often feature in your conversations with witnesses that have lived through those times. Many witnesses may have lost loved ones in the war or witnessed the events of war at first-hand.

After the end of the war in 1945, German citizens lived through the occupation by Allied Forces and this was also a difficult time for many German people and their families. Again pre-trip research is the key to gaining a greater understanding of what the witnesses that you are trying to interview may have been through. While Germans are, of course, deeply aware of this history, it is often best to allow the witness to bring it up first.

Prior to the Second World War, Germany annexed Austria and Luxembourg, as well as territories in Czechoslovakia, Poland, France, Belgium, and the Baltic states. During the war, the Occupied Territories, whilst not officially part of the Reich, were governed by Nazi sympathizers. This included Norway, Denmark, the Netherlands, Belgium, France, Serbia, parts of northern Greece, central and Northern Italy, Slovakia, Hungary, Romania, Bulgaria, Slovakia, Finland, Croatia, and Vichy France.

[9] John Lewis Gaddis, *The Cold War* (Penguin, 2007).

The Holocaust is generally discussed in terms of the mass murder of some six million European Jews, but there were many other groups who were persecuted as well. Much of the mass killing occurred in the concentration camps of occupied Poland.[10]

In France, the Germans seized about 20% of the French food production, which caused severe disruption to the household economy of the French people and French farm production fell by half.[11] There was mass hunger in urban areas, malnourishment, black markets, and hostility to state management of the food supply. There were approximately 50 concentration camps in France during the occupation, the largest of them at Drancy. In the occupied zone, Jews were required to wear a yellow badge. On the Paris Métro, Jews were only allowed to ride in the last carriage. 13,152 Jews residing in the Paris region were victims of a mass arrest by pro-Nazi French authorities on 16 and 17 July 1942 – known as the d'Hiv Roundup – and transported to Auschwitz where most were killed.[12]

The travails of the Second World War reflect only the most recent in centuries of hostility that have spanned the continent. World War One took the lives of millions as well, and before that Europe was wracked with wars on an almost continual basis. To this history, we must add two thousand years of religious divides – between Catholic and Protestant, Christian and Jew, and so forth. It is important that you should be aware of all these tensions. Indeed, they will often be the essential facet of your investigation, explaining why your client, or his family, fled Europe, and underpinning an intergenerational history of persecution.

2.4 Southern and Eastern Europe

The borders of countries in this region have been in flux for more than a hundred years. People from older generations will have had a number of different nationalities during their lifetime and thus their perspective on authority figures

[10] David M. Szonyi, *The Holocaust: An Annotated Bibliography and Resource Guide* (KTAV Publishing House Inc. 1985).
[11] E. M. Collingham, *The Taste of War: World War Two and the Battle for Food* (Alan Lane, 2011).
[12] Michel Laffitte, "The Vélodrome d'hiver Round-up: July 16 and 17, 1942", *Online Encyclopedia of Mass Violence* (2008) <http://www.massviolence.org/The-Vel-d-Hiv-round-up> accessed May 22, 2012.

and the role that government plays in their life will be very different from that of someone who grew up in the US. This may make it difficult for your client and their family members to understand, for example, how a defense lawyer can be employed by the state, but have an ethical requirement to act in the best interest of their client. Building relationships with clients and family members will be a time-consuming process as you may have to overcome decades of persecution and abuse by authority figures.

The Balkans

The Balkans as an area have been subject to the continuous re-definition of national boundaries. Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Kosovo, Macedonia, Montenegro, Romania, Serbia and some of Slovenia are included within the region. For centuries, these countries were under the rule of the Ottoman Empire, until 1821 when the Greek War of Independence saw this start to shift.

During the Yugoslav wars of the 1990s, the breakup of Yugoslavia caused large population transfers, most of these involuntary. Because it was a conflict fuelled by ethnic nationalism, people of minority ethnicities generally fled towards regions where their ethnicity was in a majority. Since the Bosnians had no immediate refuge, they were arguably hardest hit by the ethnic violence. The United Nations tried to create safe areas for the Bosnian populations of eastern Bosnia but in cases such as the Srebrenica massacre, the peacekeeping troops (Dutch forces) failed to protect the safe areas, resulting in the massacre of thousands.[13]

During the Bosnian-Croat conflict, Bosnians were ethnically cleansed by Croats, and vice-versa in areas of Central Bosnia, and central and eastern Herzegovina (Mostar and Stolac). The war in Croatia started in 1991 when the Serbian population in Croatia sought to secede to form a Greater Serbia, along with other Serb territories in Bosnia and Herzegovina. Between 1991 and 1995 around 600,000 Serbs were ethnically cleansed from southern and eastern parts of the country. One notorious event was Operation Storm, where 250,000 people fled in just five days. The Serbs themselves also committed genocidal acts against other ethnic groups.

[13] Allan Little, Laura Silber and Aleksandar Ciric, *The Death of Yugoslavia* (Penguin, 1996).

The Dayton Accords nominally ended the current war in Bosnia and Herzegovina, fixing the borders between the two warring parties. However, great hatred remains.[14]

The USSR and its legacy

The following countries were formerly part of the Soviet Union (USSR-Union of Soviet Socialist Republics): Armenia, Azerbaijan, Georgia, Estonia, Latvia, Lithuania, Belarus, Moldova, Ukraine, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan and Russia.

The Soviet government employed many strategies to subjugate the people. For example, in 1943, the Soviet state sealed off the borders, collectivized the farms and forced crops to be turned over to the central government. Farmers who resisted were sent to prison. The famine was so severe that cannibalism was widely reported and over seven million Ukrainians reportedly died of starvation in two years.[15]

Dissent was punished severely by the notorious Soviet secret police, the KGB – which still exists in some forms, particularly in countries such as Belarus. By the time of Mikhail Gorbachev's rise to power in the 1980s, the USSR was in a situation of severe economic and political stagnation. Gorbachev introduced a two-tiered policy of reform; *Glasnost* (freedom of speech) and *Perestroika* (economic rebuilding), which provoked calls for political independence.[16]

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[14] "Balkans Special Report*", Washington Post*, (March 28 1999) <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/overview/overview.html> accessed May 22, 2012.

[15] Michael Ellman, "Stalin and the Soviet Famine of 1932 –33 Revisited*",* 59 *Europe-Asia Studies* (June 5, 2007) <http://www.paulbogdanor.com/left/soviet/famine/ellman1933.pdf> accessed May 22, 2012.

[16] Joseph S. Nye, "Gorbachev and the End of the Cold War" *New Straits Times* (April 5, 2006) <http://belfercenter.ksg.harvard.edu/publication/1531/gorbachev_and_the_end_of_the_cold_war.html> accessed May 22, 2012.

2.5 The transmission of trauma from parent to child

As discussed throughout this manual, just because your client was born in the US, he or she may still be deeply affected by traumatic events that occurred in Europe in the last fifty years or more. It is important to become well acquainted with the field of trans-generational trauma and the emerging research on epigenetics.

Trans-generational trauma focuses on how the effects of trauma can be passed from one generation to another and examines inheritance, transmission and genealogy. A variety of terms have been used to describe this phenomenon, including "secondary traumatization" (Rosenheck and Nathan, 1985), "traumatic countertransference" (Herman, 1992) or "vicarious traumatization" (McCann and Pearlman, 1990). Trans-generational trauma was first studied in the context of how children of survivors of the Holocaust were impacted by the stories and behaviors of their parents:[17]

> Children of traumatized parents, especially young ones, experience their parent … as not recognizing them as the children that they are, and only inconstantly tending to their needs. Rather, they experience them either screaming silently, untellably, incoherently, mysteriously, from their black holes, or exploding like gods of thunder and lightning in audible screams, and irrational symptoms. Children's own physiologies, sensations, feelings, behaviors and attitudes alternate between imbibing and rebelling against parents' over-silent or over-loud responses. In either case they are drawn into their parents' traumas, and are secondarily traumatized by them. They experience double trouble: not only are they required to adjust to their parents' alternating physiological circuits, emotions, behaviors and attitudes, but they must cope with their own automatic survival responses to their parents. They may not understand either. Their own stories may be in untellable fragments.

More recently this work has expanded to include parents who have suffered from domestic violence and abuse as children themselves. Australian researchers have connected historical events (such as epidemics, massacres and famines)

[17] Paul Valent, "Transmission of Transgenerational Trauma", (*Humiliation Studies,* June 12 2006) <http://www.humiliationstudies.org/documents/ValentTransgenerationalTraumaHolocaust_15.pdf > accessed May 22, 2012.

with a higher propensity to violence, child abuse and family breakdown.[18] Legal teams representing clients born in the US to parents or even grandparents who fled war torn countries may wish to rely on this literature to trace the transmission of the trauma to the client.

Epigenetics is a relatively new field of research, focusing on how environmental influences alter whether genes are activated and on long-lasting biological changes. The "epigenome" refers to a layer of biochemical reactions that turns genes on and off, and scientists are increasingly looking for epigenetic changes to help explain how factors like poor parenting and stress in early life affect physical and mental health later on. For example, scientists have studied the effect of famine in the Netherlands during the Second World War and have found that the offspring of survivors have an increased risk of cardiovascular disease, obesity, and respiratory disease. They are also more likely to develop antisocial personality disorder. The offspring of holocaust survivors who suffered from PTSD are also more likely to develop PTSD, depression and anxiety. Dr. Michael Meaney at McGill University is the leading researcher in epigenetics and is currently doing research into how the weight of the child at birth is a reliable indicator for overall health throughout life.[19]

2.6 Practical advice for an investigation trip to Europe

Before you travel

The legal team should start preparing for their trip well in advance. Conducting investigations in Europe is similar in many respects to conducting investigations in the US. However, there are a couple of things that you may need to think through before you travel, such as visas. For entry to Western, European Union countries, US citizens do not require a visa. There is a maximum stay of 90 days

[18] See Judy Atkinson, Jeff Nelson, and Caroline Atkinson, "Trauma, Transgenerational Transfer and Effects on Community Wellbeing," in N. Purdie, P. Dudgeon and R. Walker (eds.), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles And Practice,* (Australian Government Department of Health and Ageing, 2010). See also Melissa Pearrow and Lisa Cosgrove, "The Aftermath of Combat-Related PTSD: Toward an Understanding of Transgenerational Trauma" (2009), 30(2) Communication Disorders Quarterly < http://www.youngdiggers.com.au/sites/default/files/Aftermath%20of%20combat-related%20PTSD.pdf> accessed May 22, 2012.

[19] ,Michael Meaney, "Nature, Nurture and a Mother's Touch"(*Alberta Innovates – Health Solutions,* 2008) <http://www.aihealthsolutions.ca/researchnews/2008/spring/naturenurture/> accessed May 22, 2012.

in a 180-day period and travelling from one country to another does not reset the clock. If you are traveling outside the European Union, we recommend that you apply for a business visa, especially if you are traveling to Russia. If you travel on a tourist visa, you run the risk of being arrested and forcibly removed. Please contact *Reprieve* if you have any questions and we can advise you on local organizations that may be willing to sponsor your business visa.

When packing, consider the communities you will be interacting with and how you will need to dress in order to respect their religion and customs. If you plan on visiting Orthodox Christian places of worship, women should cover their heads and their shoulders. Much the same applies for female investigators/caseworkers if visiting a Mosque or a Muslim family, who should dress conservatively and wear loose fitting clothing that does not expose flesh.

How to finance your trip

Representing clients with ties to foreign countries undoubtedly drives up the costs of these cases. Legal teams may need to make multiple trips to foreign countries, and thus require funding for international travel and interpreters. It is our experience that a two-week investigation trip to Europe may cost as much as $10,000, depending on how many members of the legal team are going and whether the country is in Western or Eastern Europe.

In accordance with United States Supreme Court precedent, indigent capital defendants are entitled to adequate funding to prepare their case. If the legal duty to conduct a full investigation in the case of clients with international ties is to mean anything, legal teams must obviously receive funding for relevant international travel.[20]

Reprieve has worked with legal teams to help cut the costs of investigation in Europe. It may be possible to partner with local NGOs to assist you in gathering records and locating witnesses. Legal teams may also wish to request assistance

[20] *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985) (holding that denying funding to criminal defendants amounts to a violation of the Fourteenth Amendment's Equal Protection Clause and the Due Process Clause). See also *Douglas v. California*, 372 U.S. 352, 355 (1963) ("there can be no equal justice where the kind of appeal a man enjoys 'depends on the amount of money he had.'"); *Westbrook v. Zant*, 704 F.2d 1487, 1496 (11th Cir. 1983) (citations omitted) ("Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence [are] unavailable.... [T]he cost of protecting a constitutional right cannot justify its total denial.").

from the government of the country to which they are travelling. If your client is a citizen of a European country, they may provide financial assistance. *Reprieve* can work with your legal team to encourage European Governments to provide life-saving assistance, financial or otherwise.

Records Collection

You will need to conduct records collection for your client certainly, regardless of whether or not you travel to the country to conduct work on the ground or not. If you are planning to travel to Europe for investigation work then you should ensure that you make records requests well in advance of your trip so that:

1. You can follow up on the requests if they are still pending by the time you travel.

2. You can modify your investigation plan accordingly, based on any new information that you have obtained from the records.

When collecting records, you do not need to go into too much detail with regard to who you are or offer specific details about your client or his/her case. There does not need to be a narrative within your request. It will suffice to state that you are making the request as an authorized agent and that you have attached a signed authorization from your client or from any other individual connected to the case for whom you are making the records requests. Records requests (and the release itself, if possible) should be made in the official language of the country where the requests are being made. It is very helpful to have someone on your team who speaks the language and can follow up by phone with the records clerk, as applications by email, fax or post can sometimes go astray

If you have already, as we recommend in the chapters below, built up a relationship with the foreign government in question, it is always worth asking them to assist with records requests. This can range from providing you with a letter addressed to the records clerk requesting cooperation to conducting some searches themselves. The degree of cooperation will vary. For example, the Irish and British may even conduct document searches to gather evidence of nationality.

The records request process in Europe will most probably be a first step in working out what was discussed in the early part of this chapter and will help you to start compiling social histories for your clients and identifying whether there may be trauma that spans several generations based on the data in those

records. Records may well have family history information, geographical information or simple dates that point to your client and his/her family being caught up in significant historical events from which trauma could stem.

2.7 Once you arrive

Interpreters

Unless you are fluent in the language spoken in the European country where you are traveling to conduct investigations, you are going to need someone with you that is. This person is not only going to be an important member of your team in regards to making everyday life in the country easier when traveling around, ordering food, organizing accommodation and dealing with hotel staff but will be invaluable to your work with witnesses.

The best interpreter will be someone who knows the case well, speaks the language well and – last but by no means least – possesses good cultural knowledge of the country. Someone who has lived in the country will put witnesses at ease, since they will feel more comfortable speaking to someone who they feel is one of their own. And if accounts of traumatic events come up in witness interviews, the witness will probably feel more at ease with someone they feel understands country-specific events and history coming from or having a connection with the country themselves. If you are lucky enough to have a member of staff working on the case who speaks the language and has lived in the country or has some connection to the country, then in meetings with witnesses, this individual is going to be your team's star player. In our experience, having an interpreter of this caliber results in a less stilted interview as the interviewee will not have to stop every few sentences and wait for their words to be repeated. Of course, you will still need to guide this person into the subject areas that you wish to be covered in these interviews.

If you need to hire an interpreter it is advisable to seek out someone who operates within the country – and if possible around the local area where you will be working. Reach out to local NGOs or law firms sympathetic to the type of work that you do – they may be able to recommend an interpreter or even offer someone in their own organization who would be prepared to go along with you to conduct witness interviews.

Even if you believe that the witnesses speak good or even fluent English, it is still advisable to have someone there who speaks the native language fluently. There will undoubtedly be words or phrases that your witnesses do not understand and that will need to be explained in their native tongue. In particular, legal terminology may not be understood and need explanation in the native language. Witnesses may show you documents that are written in the native language that will need translation. Furthermore, there may be other peripheral witnesses, such as older family members or children who do not speak English, who can be put at ease during this invasion of their home by your native language speaker.

Witness Interviews

Having traveled across an ocean, the last thing you want is to have a door slammed in your face! When witnesses live in large tower blocks, you will have to convince a witness to speak with you using the intercom. Your interpreter will be particularly useful here in helping you to get past the front door, as they will seem more recognizable and approachable than a US mitigation specialist or attorney. You may want to print double-sided business cards with one side in the native language, which includes your local cell phone number on the card so they do not have to call an international number to contact you on.

In many European households it may be customary for refreshments to be served after the business of the interview has been conducted. Always allow extra time for this so as not to appear rude by rushing off at the end of the interview. Anyway, further information may be gleaned during this period. The householders may offer to connect you to other witnesses who may be useful and offer their contact information.

Cultural and Racial Sensitivity

Cultural sensitivity is very important within each of the countries in Western Europe and needs to be taken very seriously. A lack of cultural sensitivity could be the difference between a successful investigative trip and an unsuccessful one. Just as in the US, there are stark cultural differences.

In the UK, there are several large Black Caribbean and Black African communities, in addition to South Asian and East Indian communities. In France,

there is a large population of North African origin in addition to communities from Sub Saharan Africa, Indochina, Asia and the Pacific Islands. In Germany, there is a substantial population of Turkish descent. In Spain, there are immigrants from Latin America, Sub Saharan Africa, China and the Philippines whilst in Portugal there are Africans from Portuguese-speaking Africa, Brazilians and Indians. To avoid doors being swiftly slammed, conduct your investigation with religious sensitivity. Consider whether it is appropriate to visit witnesses during religious festivals or on the Sabbath or during Friday Prayers. When eating out with a witness, try not to order food that is forbidden by a relevant religion and make sure that the venue for any meetings does not cause offense.

Understanding your client's cultural history may also affect your choice of mental health expert. "Counsel should strive for the use of bicultural or culturally competent psychological evaluations and also be aware that many well trained, reputable experts are insensitive to these issues and often fail to consider race and culture."[21] Just having a basic grasp of the language may not be sufficient to conduct neuropsychological assessment and relying on "interpreters or translators [is] … problematic because it diminishes the validity and reliability of the results and the value of an expert's opinion."[22] Finding the right expert to evaluate your client may be a difficult task, but choosing an expert without fully understanding your client's culture may lead to an inaccurate or incomplete assessment.

As discussed earlier in this chapter, it is important to understand that within the incredibly diverse range of cultures and communities in Europe, there will undoubtedly be culture and community specific experiences and history which may be sources of trauma either for your client or for his family.

2.8 Conclusion

Conducting investigations in Europe can prove an invaluable part of the defense case of an individual sentenced to death or facing capital charges. In terms of mitigating facts, a veritable wealth of information can be obtained via family background investigation and extensive records collection in Europe. This can

[21] Ricardo Weinstein and Janet Weinstein, "Cultural Competent Criminal Forensic Psychological Evaluations," in Linda Friedman Ramirez,(ed),*Cultural Issues in Criminal Defense* (3rd edition, Juris Publishing, 2010).

[22] *Ibid.*

also prove a valuable tool for relationship building between counsel and client. In short there is no good reason for not conducting investigation in Europe: it adds depth to legal defense cases; and gives you invaluable family background and cultural information that can open up other avenues in terms of legal claims for your clients. *Reprieve* strongly recommends such investigation be carried out wherever possible.

Chapter 3: European Government Intervention in Proceedings

3.1 Pre-trial

A European government can act to preserve the prisoner's rights at every stage of proceedings. Before the prisoner is charged, representations may be made to the prosecutor's office requesting that the death penalty not be sought. If a case is surrounded by political controversy, a prosecutor or a judge may be more amenable to a plea bargain in order to avoid confrontation in the court of public opinion. Consular officers and other state officials (officials from the Ministry of Foreign Affairs, the ombudsman, diplomats, etc.) play an integral role in negotiations with the prosecutor and the court pre-trial.

Diplomatic intervention can be extremely effective when a person is facing capital charges. Respectful and measured representations from a foreign government (by way of letters, in-person representations, etc.) are an entirely appropriate course of action, and can substantially influence the outcome.

In the case of Neil Revill (a British national formerly facing capital charges in California), *Reprieve* worked closely with the British authorities to get diplomatic and political representations at the highest levels of government, including the Prime Minister, Gordon Brown. Among other efforts, this diplomatic intervention was successful in persuading the prosecution not to seek the death penalty before the case went to trial.

Government intervention is of great benefit in supporting certain pre-trial motions and arguments. Affidavits from consular officials can support, for example, motions for continuance in order to allow for further time to investigate abroad and collect records from the home country. They can also, of course, support a range of claims tied to violations of the VCCR.[23]

The Mexican government regularly makes legal representations in support of their nationals facing capital charges at the pre-trial stage. This is undertaken in conjunction with the Mexican Capital Legal Assistance Program (MCLAP), a body established by the Mexican government to support local US counsel who represent Mexican nationals facing the death penalty. MCLAP's success rate is impressive – in 95% of the cases where they have been involved, the death

[23] See Chapter 7 for further discussion of VCCR claims.

sentence has been avoided or reversed.[24] MCLAP stresses the need for early intervention in order to be most effective. In cases where MCLAP is involved from the outset, Mexican nationals are 3-5 times more likely to avoid the death penalty than others.[25] It is important to note that the most successful past interventions at this stage of the proceedings have gone hand-in-hand with persistent lobbying of the US State Department.

3.2 Conviction and appeals

Intervention and assistance can take various forms, including: attendance at court proceedings (in relation to oral arguments and evidential hearings); drafting affidavits outlining the nature of consular assistance, as well as cultural and historical issues relevant to the country of origin; facilitating culturally competent experts; filing an *amicus curiae* brief in state and federal US courts on points of law;[26] and using international legal mechanisms.[27]

In post-conviction proceedings, affidavits and testimony from consular officials may be essential in showing prejudice when arguing ineffective assistance of trial counsel for failing to seek or accept the assistance of the consulate, particularly when raising this issue for the first time.[28] As noted, they may also be important in supporting claims arising from violations of the VCCR.

Kenny Richey, a British national, was on death row for 21 years in Ohio for alleged involvement in a fatal fire. At trial, the state presented highly dubious forensic evidence that the fire was deliberately started. This evidence was subsequently condemned by forensic experts as based on unsound scientific principles. The British government submitted *amicus curiae* briefs in August 2004 and January 2007. In the latter brief, the government argued that the imposition of the death penalty for "felony murder" in Mr. Richey's case violated international treaties and customary international law that prohibit a sentence of death except for the "most serious crimes."

[24] G. Kuykendall et al., "Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client," (2008) 36, Hofstra Law Review. This article is included in Appendix I.
[25] *Ibid.*
[26] *Amicus curiae* briefs ('friends of the court') are a common way for states to intervene on behalf of nationals sentenced to death.
[27] See Chapter 8.
[28] Chapter 4 includes a number of examples where home state officials have filed affidavits and testified in court on behalf of the prisoner.

In August 2007, Mr. Richey's conviction was overturned on the basis that he had received inadequate legal representation at his trial, and he was transferred to the county jail, to await a retrial. There is no doubt that the government's submission of the brief in support of Mr. Richey's appeal contributed to his victory in Court. In December 2007, Mr. Richey reached an agreement with the prosecution which saw him released without facing retrial. He was eventually released in January 2008 because of medical problems. The deal saw him plead *nolo contendere* (no contest) to charges of attempted involuntary manslaughter, child endangerment and breaking and entering, and was exonerated of intentionally starting a fire. He was released shortly afterwards.

3.3 Clemency

The clemency process generally has less stringent evidential and procedural rules to those before the courts. As such, the process remains open to diplomatic representations being made orally at a clemency hearing, in writing, or behind closed doors. During clemency proceedings, foreign officials can appeal to the relevant parole board and Governor, asking for a commutation of the prisoner's sentence. It is important to bear in mind that an oral representation to the Governor in person is much more effective than a written one.

Clemency has been granted in a number of cases where governments have intervened on behalf of their nationals.[29] One such example is the case of Osbaldo Torres, a Mexican national sentenced to death in Oklahoma in 1993. Like many foreign nationals, Mr. Torres was not informed of his right to consular notification and access at the time of his arrest, as required under the VCCR. The Mexican government consistently lobbied the Governor for clemency, along with the US State Department, which urged the Governor to take into consideration the VCCR violation. In May 2004, Governor Brad Henry granted clemency to Mr. Torres, in line with a recommendation from the Pardon and Parole Board. This outcome was a direct result of Mexico's intervention. The press release issued by the Governor's office announcing the clemency decision contained the following:

[29] For a table of cases, see the Death Penalty Information Center's website: <http://www.deathpenaltyinfo.org/foreign-nationals-part-iii#clemency> accessed May 22, 2012.

> *"I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty," the Governor said. "In addition, the U.S. State Department contacted my office and urged us to give 'careful consideration' to that fact."*[30]

Because clemency is the prisoner's last hope, states with whom the prisoner has a significant tie may be willing to intervene even if the prisoner is not one of their nationals.

3.4 Amicus curiae briefs

Amicus briefs are the vehicle by which representatives of special interest groups, who are not party to a case, can nonetheless volunteer to offer information to assist a court in deciding a matter before it. They are filed in many US Courts (even lower state courts) during various stages of the proceedings. *Amicus* briefs enjoy a long history of support in the US legal system due to their unique value and of the voice they give to important legal and social interests. In recent years, a number of Governments have intervened in cases before the US Courts by way of an *amicus* brief. Over 60 countries have filed *amicus* briefs in US death penalty cases citing consular assistance concerns. As will be seen in the following section, the filing of an *amicus* brief has had a significant impact in the outcome of several cases.

Amicus briefs provide valuable information about legal arguments, or how a case might affect people other than the parties to the case. According to US Supreme Court Rule 37.1, the filing of *"an amicus curiae brief that brings to the attention of the Court a relevant matter not already brought to its attention by the parties may be of considerable help to the court"* in determining the importance of the case. Numerous organizations, including government officials, private attorneys, corporations, and non-profit organizations, file thousands of *amicus* briefs in all fields of litigation each year.[31]

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[30] Press release from the office of Governor Brad Henry, State Capitol - Oklahoma City OK 73105 405-521-2342, (May 13, 2004) <http://www.euintheus.org/what-we-do/policy-areas/democracy-and-human-rights/torture-and-capital-punishment/death-penalty/death-penalty-archive-2004/eu-policy-on-the-death-penal99/ > accessed May 22, 2012.

[31] S.F. Corbally and D.C Bross, *A Practical Guide for Filing Amicus Curiae Briefs in State Appellate Courts* (*National Association of Council for Children Web site,* 2001) <http://c.ymcdn.com/sites/www.naccchildlaw.org/resource/resmgr/amicus_curiae/amicuspracticalguide.pdf> accessed May 22, 2012.

There are numerous ways in which *amicus curiae* may be of assistance to the court:

1) It may be appropriate to use an *amicus curiae* brief to amplify or supplement the main legal and factual arguments presented in a party's brief. It may also present relevant extra-record facts and data that help the court make a more fully informed decision.

2) An *amicus* brief may focus on an alternative legal argument to the argument provided in either party's main brief.

3) It is appropriate to use an *amicus curiae* brief to appraise the court of the broad-based legal, social, and economic implications of a decision, or point out its unintended consequences for a group not before the court.

4) An *amicus* brief may provide information that allows the court to base its decision in the case on a larger, more comprehensive, and more accurate legal framework. In particular, *amicus* briefs from other Governments help the Court to consider and address wider issues of international law, issues that local US counsel often do not have the expertise to raise. This is particularly important in capital cases where legal resources are scarce.

In a burdened legal system, the importance of providing an effective and concise *amicus* brief is never overlooked by the judiciary. There is a positive correlation between the number of *amicus* briefs filed in support of an argument in a case, and the Court's decision to uphold that argument. In fact, one study has found that the filing of *amicus curiae* briefs in support of a Petition can significantly increase the probability of acceptance from the regular 8.5 percent chance to as high as 37 percent.[32] This means that filing an *amicus* brief in support of a petition can make it four times more likely to be accepted by the Court. The involvement of state bodies further increases the success rate. Another study shows that where the parties prepare briefs that fail to draw the attention of the court, the *amicus* brief can act as an effective substitute.[33]

[32] H.W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard University Press, 1994).
[33] S.M. Shapiro, "Amicus Briefs in the Supreme Court" (Appellate.net) <http://www.appellate.net/articles/amicusbriefs.asp> accessed May 22, 2012.

3.5 Conclusion

From the moment that someone is arrested to the moment of his execution there are myriad opportunities for concerned foreign governments to intervene. All of these opportunities and methods of intervention are appropriate, consistent with Europe's position on human rights, on the death penalty, and on consular protection, and can be hugely effective. When the massed strength of the US state and federal apparatus is arrayed against an under-resourced individual, the assistance of a European nation can mean the difference between life and death.

Chapter 4: Government Death Penalty Policy and Precedent of Intervention

Over the past few years, *Reprieve* has secured government intervention and assistance from several European countries. The purpose of this chapter is to outline the policies of some European governments that follow best practice, in order to demonstrate the level of assistance that may be obtained by defense counsel. *Reprieve*'s EC Project has tried to assist those European countries that have less experience in death penalty issues to encourage them to develop similar policies when they intervene on behalf of their nationals.

It is worth noting at the outset that abolition of capital punishment is a requirement for membership in the European Union and the Council of Europe. The abolition of the death penalty is enshrined in Protocols Nos. 6 and 13 to the European Convention on Human Rights ("the ECHR"). European countries believe the death penalty cannot be justified, ethically or legally, since it has no deterrent effect, has failed as an instrument of crime prevention, and cannot be corrected in cases of judicial errors. They believe that the abolition of the death penalty is an expression of human dignity and the right to life. Further, member states of the EU and the Council of Europe will refuse to extradite or deport individuals to countries where they could face the death penalty. These principles form the basis of the policies outlined below.

4.1 United Kingdom

The UK abolished the death penalty on December 18, 1969. On October 10, 2003, the UK deposited with the Council of Europe the instrument of ratification of Protocol No. 13 to the European Convention on Human Rights and Fundamental Freedoms ("the ECHR") banning the death penalty in all circumstances. The UK together with all other EU and Council of Europe member states voted in favor of all three UN General Assembly Resolutions on a Moratorium on the Use of the Death Penalty in 2007, 2008, and 2010.

In October 2011, the UK government launched its strategy on Global Abolition of the Death Penalty.[34] Its stated goals are:

i) to further increase the number of abolitionist countries, or countries with a moratorium on the use of the death penalty;

ii) further restrictions on the use of the death penalty in retentionist countries and reductions in the numbers of executions; and

iii) to ensure EU minimum standards are met in countries which retain the death penalty.

The government further states that it will continue to "continue to work hard to lobby governments … raise individual cases of British Nationals, use political dialogue" in order to further its objectives.

UK policy on assisting in individual cases where a British national is facing capital proceedings is sophisticated and has been developed through many years of experience and a close partnership with *Reprieve*. It includes close monitoring; facilitation of pro bono legal, investigative and medical experts; formal legal intervention; and high level lobbying of officials at appropriate stages of the case.[35]

The UK government regularly intervenes on behalf of its nationals at all stages of capital proceedings in the US. Notably, the UK has a long history of effectively intervening in cases by way of *amicus curiae:* in the last decade the government has filed at least eight briefs in support of British nationals sentenced to death in the US.. In addition to the case of Kenny Richey (detailed in Chapter 3), the government has intervened by way of *amicus curiae* in the cases of *Reprieve*-assisted prisoners Krishna Maharaj, Linda Carty, and Kenneth Gay.[36]

4.2 Germany

The death penalty was abolished in Germany in 1949 when the Basic Law (Grundgesetz – GG, the German constitution) came into force. Article 102 GG

[34] UK Foreign and Commonwealth Office, *HMG Strategy for Abolition of the Death Penalty 2010-2015* (October 15, 2011), <http://www.fco.gov.uk/resources/en/pdf/global-issues/human-rights/death-penalty-strategy-oct-11-15> accessed May 22, 2012.

[35] See the UK government's *amicus curiae* brief to the Supreme Court in the case of Linda Carty: <http://www.Reprieve.org.uk/static/downloads/2010_02_26_PUB_UK_Government_Linda_Carty_Supreme_Court_Amicus_Brief.pdf>. Also included in Appendix II.

[36] Copies of these briefs are included in Appendix II.

expressly provides for the abolition of the death penalty. Germany actively campaigns for the reduction and abolition of capital punishment worldwide. Foreign Minister Steinmeier emphasized in his speech before the United Nations' Council of Human Rights in March 2007 that the worldwide abolition of the death penalty has been a main concern of European human rights policy for years. Similar statements have been made by Minister of Justice Zypries, the Federal Government Commissioner for Human Rights, Nooke, and Chancellor Merkel.

The German Government provides financial and political support to NGOs in their activities for the reduction and abolition of the death penalty. Chancellor Merkel was the patron of the Third World Congress Against the Death Penalty, organized by the NGO, Ensemble Contre la Peine de Mort (ECPM), which took place in February 2007, in Paris.

Supporting German prisoners abroad is an important duty of German diplomatic representations. Pursuant to Article 7 of the German Consular Act 1974:

> Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons.

The German consul will fulfill his or her duty under Article 7, irrespective of the charges brought against the prisoner. Where a detainee is facing capital charges, all possible and necessary means will be resorted to in order to prevent a verdict imposing the death penalty.

The Federal Foreign Office will investigate whether the legal representation assigned by the prisoner’s country of residence is adequate and, should the individual be in need, provide the means to access qualified defense counsel. The Foreign Office will check in each individual case whether an assigned defense lawyer in the USA is doing enough to avert the death penalty. In cases of need, it may pay the costs of a defense counsel of the individual’s choosing. In recent years, defense counsel of choice has generally been considered more suitable than assigned counsel, given the often complex and protracted nature of proceedings involving the death penalty. The financial aid provided to pay for the assistance of counsel can come to several hundred thousand Euros.

Humanitarian aid will also be provided when necessary while the accused is incarcerated. Regular visits from consular officials and assistance in coping with harsh prison conditions are an important part of consular duties.

The German government has assisted a number of prisoners in the US by way of both diplomatic representations and intervention in the legal process. One prominent case was that of Karl and Walter LaGrand, who were executed in 1999 despite numerous strong diplomatic and legal representations by Germany. The assistance of the German government in this case included initiating legal action in the International Court of Justice alleging violations of the VCCR.[37]

Another important case is that of Dieter Riechmann, where the government intervened by way of *amicus curiae* in order to support petitions brought against the State of Florida. Dieter Riechmann was re-sentenced by the Circuit Court to life imprisonment on 19 March 2010.

Notably, a witness from the German consulate gave oral evidence in a post-conviction hearing in Ronnie Cauthern's case, a *Reprieve* assisted prisoner, at a time when he had still not been fully recognized as a German national.

The Deputy Consul General to the German Consulate in Atlanta testified, saying that there was a high degree of probability that Mr. Cauthern was entitled to German citizenship (which was recognized during the hearing itself) and also described the German Consul's reaction to death penalty cases. He testified that the Consul General will contact the arrested person and determine if the attorney on the case is adequately qualified or, whether a better one is needed, and that the German government will allocate defense funds and help with investigations. Germany has been steadfastly involved in assisting Mr. Cauthern's case ever since being notified of it.

4.3 The Netherlands

The Netherlands firmly opposes the death penalty. Capital punishment was abolished in 1870. The principle was enshrined in Article 114 of the Constitution in 1983, and applies even in wartime.

[37] *Case* (*Germany v. United States)*, 2001 I.C.J. 104 (Jun. 2001).

The Netherlands pursues a strategy of global abolition of the death penalty, partly through its bilateral foreign policy and, partly, through close cooperation with its EU partners. As part of this policy, the government supports specific activities in several countries, including building the capacity of NGOs that are working to achieve abolition.

The Dutch government will provide all levels of consular assistance when its nationals are detained abroad. Assistance will also typically include diplomatic representations, either by the local Embassy, the Ministry of Foreign Affairs, or Queen Beatrix. Since 2009, Dutch policy on the death penalty has included assisting nationals facing capital proceedings financially. The provision and level of assistance is decided on a case-by-case basis. The legal aid already provided by the country of detention, and the defendant's own financial means, will be taken into consideration when making this assessment.

There are currently several Dutch nationals facing execution overseas in Indonesia, all receiving legal aid from the Dutch government.

4.4 France

The last execution was carried out on September 10, 1977 and France formally abolished the death penalty in October 1981 after François Mitterrand was elected President. On February 19, 2007, at the behest of then President Jacques Chirac, the French Parliament meeting in congress at Versailles ensured that abolition of the death penalty would be irreversible by inserting a clause into the Constitution stating that, "No-one shall be sentenced to death."[38]

France advocates worldwide abolition of capital punishment in all the relevant international forums in close conjunction with its European partners, especially the United Nations. The government also supports NGOs campaigning for abolition.

The French consulate will offer protection and assistance whatever charges a prisoner is facing. In addition, the French government regularly makes diplomatic representations on behalf of its nationals facing the death penalty abroad.

[38] Article 66 – 1, Constitution du 4 octobre 1958 (JORF n° 0238 du 5 octobre 1958, page 9151) < http://www.legifrance.gouv.fr/Droit-francais/Constitution/Constitution-du-4-octobre-1958#ancre2178_0_8_71> accessed May 22, 2012.

A notable instance of French intervention, also mentioned in Chapter 1, is that of Hank Skinner. Mr. Skinner is not a French citizen although, since he was sentenced to death, he has married a French woman. Mr. Skinner was convicted of the murder of his girlfriend and her two sons in 1995. He has always maintained his innocence and has contended that additional DNA testing on items that were not examined during his trial would assist him in proving it. In March 2010, France intervened strongly in Mr. Skinner's case. President Nicolas Sarkozy and Foreign Minister Bernard Kouchner formally requested that Texas grant a stay of execution and called for a re-examination of the DNA evidence. The French Ambassador in Washington also made diplomatic representations to the Governor of Texas. The US Supreme Court issued a stay 35 minutes before Mr. Skinner was scheduled (for the second time) to be executed to consider the question of whether Mr Skinner could request the testing of DNA that his attorney chose not to have tested at his original trial in 1994. A third execution date for November 9, 2011 was ultimately also stayed by the Texas Court of Criminal Appeals on November 2011 so that a determination could be made about whether Texas law allowed for DNA evidence from the crime scene to be tested.

4.5 Italy

The use of capital punishment in Italy has in practice been banned since 1889, with the exception of the fascist dictatorship of Benito Mussolini between 1926 and 1947. The Italian Constitution, in force since January 1, 1948, abolished the death penalty for all common military and civil crimes during peacetime. The death penalty remained the maximum sentence in Italy's Military Penal Code for war crimes and for the offence of "high treachery against the Republic," although no execution ever took place. Law 589 / 94 of October 13, 1994 abolished the death penalty for these crimes as well, replacing it with the maximum penalty of life imprisonment. In 2007, a constitutional amendment was adopted removing the last reference to capital punishment from Article 27 of the Constitution.

Italy has played a fundamental role in promoting the campaign for a global moratorium on executions since 1994, when it raised the question at the UN General Assembly for the first time. Since 1999, the Coliseum has been bathed in light every time a death sentence is commuted anywhere in the world or a country abolishes capital punishment.

As well as maintaining a principled and vocal opposition to capital punishment in general, Italy has also taken direct steps to protect prisoners who were not Italian citizens, but who faced the death penalty in the US. In the case of Joseph O' Dell, who had no ties to Italy at all but who faced the death penalty in Virginia, the Italian President and Prime Minister appealed to the Governor for clemency. Members of the Italian Parliament campaigned to save his life and the Parliament passed a resolution demanding a stay of execution. The Mayor of Palermo, then a Member of the European Parliament, led a delegation to the Governor of Virginia's office to plead for his life. The Italian authorities paid for Mr. O'Dell's body to be flown back to Palermo, where he was given a funeral as an honorary citizen.

Rocco Barnabei was an American citizen of Italian origin who also faced the death penalty in Virginia. The Italian Parliament, the Minister of Justice and the Minister of Foreign Affairs launched an appeal to the Virginia Authorities to allow Barnabei to present more evidence of his innocence. Italian MEPs did the same. Italian MP, Fabrizio Vigni led a bipartisan delegation of MPs to the US.

A great success story amongst Italy's past humanitarian interventions against the US death penalty occurred in the case of Paula Cooper, who was sentenced to death for a crime committed when she was 15. In this case, it seems that the huge outcry from the Italian people and politicians helped to embarrass Indiana into commuting her sentence. The Italian Communist Party organized a petition with more than a million signatures pleading for clemency and an Italian delegation presented that petition to the UN Secretary General in an effort to obtain clemency. Seventy-eight members of the Italian parliament signed a letter to the US Ambassador asking for a commutation of her death sentence.

As is further detailed in Chapter 5, in 2011 the Italian government intervened in the case of *Reprieve* assisted prisoner Robert Rega, who has ties to Italy but is not a confirmed Italian national. The government's intervention included *inter alia* direct intervention in the post-conviction proceedings by way of a signed affidavit and testimony at the hearing.

4.6 Spain

Capital punishment in Spain was banned under the Spanish Constitution of 1978, which saw the restoration of democracy following the end of the Franco regime.

In 1995 Spain abolished the death penalty under all circumstances, including during wartime.[39]

During his dictatorship, Franco maintained his control through the implementation of severe measures, including the use of the death penalty to silence and deter his ideological enemies. The use of capital punishment as a fascist weapon has resulted in a staunch opposition to the death penalty by the Spanish public and post-Franco governments.

Spain has taken a strong – indeed, an increasingly vigorous – position in opposition to the death penalty and has supported regional and international abolitionist movements. Notably, in 2010 Spain established the International Commission against the Death Penalty ("ICDP") in Madrid. The Commission's mandate is to undertake actions complementary to those carried out by international and regional organizations, civil society and representatives of the political world, favoring the abolition of the death penalty.

In the summer of 2011, the ICDP assisted *Reprieve* in its efforts to prevent the execution of Manuel Valle, a prisoner on Florida's death row with strong Spanish ties. The ICDP wrote to Governor Rick Scott requesting that he grant Mr. Valle clemency, noting in particular that Mr. Valle's incarceration on death row for 33 years amounted to cruel and inhuman punishment under international human rights law. Despite these strong representations, Florida executed Mr. Valle on September 28, 2011. The ICDP publicly denounced the execution.

Spain will offer great assistance where its nationals are facing capital proceedings. In US cases, state and regional Spanish parliaments have provided financial assistance to legal defense teams. In addition: Spanish diplomats have attended court hearings; senior level interventions have been made, including by the King of Spain; and Spanish Senate delegations have visited the US. A prominent case is Joaquin Martinez, where the King of Spain made representations to the state authorities. The Spanish ambassador and several Spanish senators attended his re-trial and Martinez was acquitted in 2001, returning to Spain on his release.

Another notable case is that of Pablo Ibar, where the regional premier of Madrid interrupted an economics discussion with Florida Governor Jeb Bush to discuss

[39] Ley Orgánica 11/1995, de 27 de noviembre, de abolición de la pena de muerte en tiempo de Guerra <http://www.boe.es/buscar/doc.php?id=BOE-A-1995-25714> accessed May 22, 2012.

the case, while the latter was in Spain. In addition, in 2003, a delegation of six Spanish senators visited Mr Ibar in prison and also met with lawyers for Governor Bush. Ibar was born in Florida; his father is Spanish, his mother Cuban. It was only after his conviction in 2000 that he was recognized as a Spanish citizen.

4.7 Serbia

Serbia abolished the death penalty for all crimes in 2002 when it was still part of Yugoslavia. Since the end of the armed conflict in Yugoslavia, Serbia has been making efforts to improve its human rights record and correct past abuses.

There are recent examples of strong government intervention and assistance in the cases of Serbian nationals arrested and detained in the US.

In June 2010, the Serbian government actively assisted the case of a Serbian couple living and working in Illinois. The couple had been briefly arrested on suspicion of child pornography and related charges. The Serbian government provided funds for attorneys and hired psychoanalysts to offer testimony about cultural differences.

In 2011, Serbia intervened before a Nevada district court in the case of *Reprieve* assisted prisoner Avram Nika with an *amicus curiae* brief declaring that it would, if notified, have given Mr. Nika 'substantial assistance' including: acting as a cultural bridge; facilitating interviews with family members; obtaining official records; providing translation services.[40]

4.8 Poland

The last execution in Poland was carried out in 1988 and the death penalty was abolished for all offences in 1997. The Polish government intervened by way of diplomatic representations in the case of Gregory Madej. Mr. Madej, a Polish citizen, was sentenced to death in 1982 without having been advised of his right to contact the Polish Consulate for assistance, as required by Article 36 of the VCCR. The Polish authorities were not able to provide Mr. Madej with assistance within the legal time bar, because they did not learn about the detention until 1998. Following discussions in 1999 with the Polish Consul-General and

[40] The *amicus* brief is included in Appendix II.

attorneys from the Center for International Human Rights (Northwestern University), the District Attorney for Cook County, Illinois announced new procedures to ensure that foreign nationals facing charges are informed of their consular rights before their first court hearing. The case attracted further international interest. Serbia intervened by way of a joint *amicus* brief together with the Consulate General of the Federal Republic of Germany in Chicago and the Human Rights Committee of the Bar of England and Wales in 2000 in the Illinois Supreme Court arguing that the violation of the consular notification provisions in Mr. Madej's case must be remedied because of the severity and finality of the death sentence. In January 2003, Illinois Governor George Ryan granted blanket clemency to all 167 inmates in the state's death row. Mr. Madej's sentence was commuted to life.

Conclusion

Many European states have taken great strides in the protection of their nationals facing the death penalty over the past decade and as their intervention and protection becomes more sophisticated and more active they are able to prevent more executions. There is still progress to be made, and further training of consular officials in the importance of real engagement at every stage of a case could have a significant impact on the numbers of Europeans being sentenced to death and killed in the United States. An understanding of past precedent is essential in persuading European states to take action. If officials are reluctant to take what they perceive to be a bold or radical step, then showing them that it has been done before, whether by another European state or by Mexico, can greatly alleviate their fears. Moreover, many countries which pride themselves on their human rights record and on their protection of their own nationals will be anxious to do as much, if not more, than their neighbors.

Chapter 5: European Government Outreach

5.1 Overview

As outlined in the previous chapters, there are many benefits to working with and securing assistance from European governments when their nationals face capital charges or execution overseas. The key, of course, is to secure that assistance and develop a relationship with them as soon as possible, from the moment your client is at risk of facing capital charges. Indeed, timing is vital: *Reprieve's* experience has shown repeatedly that government intervention and assistance is likely to be most effective if secured during the early stages of criminal proceedings. That conclusion is underlined by research undertaken by the Mexican Capital Legal Assistance Program (MCLAP):

> Early intervention is essential – when MCLAP is involved from the outset, our research indicates that the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general.[41]

Of course, no two European governments are the same. There are, however, a number of trends and patterns within European state practice worth considering when approaching those governments to secure their assistance. The following paragraphs are not an exhaustive, mechanical check-list that should be followed in all cases and in all circumstances. Rather, they hopefully offer context and provide an overview of the key issues worth bearing in mind. Every case is different, and some governments have more experience and more prescriptive policies than others. Having liaised and developed relationships with numerous countries throughout Europe, *Reprieve* is well placed to work closely with you and the European government in question, to make sure your client gets all the possible assistance available from their country of origin.

5.2 How governments work

Typically, you will have a number of objectives for any government outreach in capital cases, from securing consular assistance, to having your client's

[41] G. Kuykendall et al, "Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client" (2008) 36, Hofstra Law Review. This article is included in Appendix I.

European nationality recognized. For all of these requests, it is likely that two or three sections of government will have a role to play: the state's nearest Consulate or Embassy within the US; the state's Ministry of Foreign Affairs; and in some cases the state's Ministry of Justice. Depending on the circumstances, other branches of the executive may also have a role, from the Cabinet to the Office of the Prime Minister or President. It is worth bearing in mind how each respective part of government fits into the picture, and their respective roles.

5.3 Terminology

A short note on terminology: Whilst there are several variations from country to country, the following glossary may be of some assistance in determining which office or individual should be contacted at which juncture of your client's proceedings.[42]

- **EMBASSY:** *"A diplomatic mission in the capital city of a foreign country headed by an Ambassador."* Embassies undertake a wide range of work, representing the interests of their country of origin. Work varies from the provision of consular assistance to promoting trade and diplomatic relations between the country of origin and the host country. These are often the first point of call for lawyers representing foreign nationals, although there may be a Consulate or Consulate-General responsible for providing assistance to your client, depending on their geographical location.

- **CONSULATE-GENERALS AND CONSULATES:** A foreign state's subsidiary offices to their Embassy, established in regional cities/locations of interest (often where there are a significant number of expatriates). These offices have a number of functions, including the provision of consular assistance to nationals from their country of origin, and supporting economic and political activities undertaken by their main Embassy. By way of example, the British government has nine Consulates scattered around the US.[43]

- **CONSUL-GENERAL:** Where applicable, the most senior diplomat working at a Consulate-General. Amongst other things, they may be responsible for

[42] The following definitions are from a glossary provided by New Zealand's Ministry of Foreign Affairs and Trade, available on its website: <http://www.mfat.govt.nz/Glossary/0-glossary.php#f> accessed May 22, 2012.

[43] For further details, see the UK government's UK in USA website: <http://ukinusa.fco.gov.uk/en/> accessed May 22, 2012.

issues of strategic importance between the country of origin and the host state, encouraging trade and investment between the two countries, and of course the provision of consular assistance.[44]

- **CONSUL:** Often the most senior diplomat dealing with consular issues at an Embassy or Consulate. Their role may be wider than this, depending on the state they represent

- **VICE-CONSUL:** A diplomat who works under the Consul. There can be more then one Vice-Consul within any diplomatic mission, and like the Consul, their roles can vary significantly from post to post. Typically concerned and involved with the provision of consular assistance.

- **HONORARY CONSUL:** A non-remunerated Consul position, undertaken on a voluntary basis. Typically a role undertaken by an expatriate of the country in question, geographically based in an area which lacks a nearby Embassy or Consulate.

5.4 Expectations and respective roles

The role of governments are of course significantly different to the role of local counsel. This is stating the obvious, but should be borne in mind when considering government outreach. Whilst both you and the government of your European client will want the same end – that your client should avoid a sentence of death or being executed – you will work in different ways to achieve that. Indeed, if the government you are dealing with has not assisted a national facing the death penalty before, they may be unsure as to the parameters of their role, and what they can and cannot appropriately do.

A familiar concern of many governments – experienced and inexperienced in capital cases – is the need to avoid any perception of interfering in the domestic proceedings of another state. Such concerns can easily be remedied by pointing to a long history of state practice by other states in capital cases, and emphasizing how intervention in such cases is an appropriate and normal function of any state.[45] Indeed, we need look no further that the US State

[44] For example, see the profile for the UK's Consul General in Atlanta on the UK in the USA website: <http://ukinusa.fco.gov.uk/en/about-us/other-locations/atlanta/our-consul-general/> accessed May 22, 2012.

[45] Examples of state best policy and practice are outlined in Chapter 4.

Department to see just how important and seriously the US takes its consular function in cases involving US nationals overseas.

There is scope for both parties to complement each other and work together in a collegiate way, bearing in mind their respective roles. It is therefore important to identify exactly what role a government can play in capital cases concerning their nationals, in order to frame any outreach to them in the most appropriate and compelling way possible. It will also help manage your client's expectations as to what their government can and can't do, and how their government's assistance may manifest itself in their particular case. This will naturally be determined through discussion and consultation with the government over a period of time. As such, it is also worth bearing in mind the time-frame by which you need certain forms of government assistance, and start outreach in good time; more substantive intervention can take a while to secure, with various officials at various levels needing to be consulted. The degree of experience a government has in providing assistance in capital cases can also speed up or slow down the process.

5.5 Nearest Consulate / Embassy

As mentioned above, one of the key functions of a government's Embassy or Consulate overseas is to provide assistance to their nationals in that country. It can be vital to preserving the right to a fair trial, due process, and legal representation.[46] For those arrested and detained or imprisoned overseas, consular assistance can be crucial and can help in ways a local lawyer may be unable to:

> Criminal defense attorneys are not equipped to provide the same services as a local consulate. Consular officials can eliminate false understandings and prevent actions which may result in prejudice to the defendant. Thus, consular access may very well make a difference to a foreign national, in a way that trial counsel is unable to provide.[47]

In a death penalty case, the assistance of the Consul, particularly at an early stage of the proceedings, can make the difference between the prisoner living or

[46] See the Inter American Court of Human Rights' decision, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion* OC-16/99, Inter-Am. Ct. H.R. (Ser. A) No. 16, ¶ 137 (Oct.1, 1999).

[47] *Ledezma v. State*, 626 N.W.2d 134 (Iowa, 2001).

dying. The ABA Guidelines underline the importance in capital cases of consular officers in providing a wide range of crucial services, such as:

> 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.[48]

The importance of consular assistance has long been recognized by the US and numerous other nations around the world. Indeed, the protection of US nationals abroad is taken very seriously and enormous amounts of time and resources are devoted to that end. According to the US State Department:

> One of the most important functions of consular officers is to protect and assist private U.S. citizens or nationals travelling 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.[49]

International law has long recognized that consular officers have the right to visit, communicate with and assist nationals who are detained abroad. These long-standing customs were codified in the Vienna Convention on Consular Relations ("VCCR") in 1963, a multilateral treaty ratified by 173 countries to date.[50] In addition to the VCCR, the US has similar bilateral agreements with 75 countries, from Albania to Zimbabwe.[51] The concept that all states are entitled to protect the interests of their nationals abroad is a basic principle of international law and diplomatic practice.

The VCCR is discussed in more detail in Chapter 7 but, suffice to say, it underlines the responsibilities of Consulates, Consulate-Generals, and Embassies for consular functions within a specified consular district or region. For example, the British government has no less than 9 Consulate-Generals

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[48] Commentary to Guideline 10.6, ABA Guidelines.

[49] US Dep't of State, *Foreign Affairs Manual* (7 FAM 412 POLICY, 2011) <http://www.state.gov/documents/organization/86604.pdf> accessed May 22, 2012.

[50] For a further discussion of the VCCR, please see Chapter 7.

[51] You should check whether the country relevant to your case has such a bilateral treaty, as that can significantly enhance your client's rights. For an up-to-date table of countries, see the US Department of State publication, *Consular Notification and Access* (Third Edition, September 2010). Available online: <http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf> accessed May 22, 2012. The resource is also reprinted in Appendix III.

throughout the USA, in addition to their Embassy in Washington DC. One is the Consulate-General in Atlanta, which covers six states where the death penalty is much used: Alabama, Georgia, Mississippi, North Carolina, South Carolina and Tennessee.[52]

Consular assistance in death penalty cases can take many forms. Consular officials from embassies have three essential roles:

1) A humanitarian role in facilitating communication between detainees and family and friends and ensuring they are provided with the necessary level of care.

2) A protective role in ensuring the detainee is not mistreated.

3) Providing some degree of legal assistance, particularly in advising the detainee of his or her basic legal rights and explaining, if necessary, criminal procedures in the US.

It is the consul's role to ensure that the detainee has all the means necessary to mount an effective defense. This includes, but is not limited to, providing the detainee with a list of reliable local lawyers available to defend him or her, and taking any necessary steps to ensure that he or she receives fair and equal treatment under US laws.

Consular officers provide vital assistance in helping to navigate their nationals through the complex process of a death penalty case. It is important to bear in mind that for some European nationals arrest and prosecution in the US will be a bewildering ordeal:

> Safeguards essential to the Anglo-American process of justice such as the right to remain silent and access to legal counsel may be largely meaningless to foreign detainees familiar only with the vastly different criminal justice systems of their homelands. Cultural traits or past experiences with the police in their home countries can produce an

[52] See the British Embassy in Washington DC website: <http://ukinusa.fco.gov.uk/en/about-us/other-locations/> accessed May 22, 2012.

unwarranted acquiescence to U.S. authority figures, resulting in disastrous waivers of legal rights or false confessions.[53]

In addition, linguistic, cultural and conceptual barriers can arise between a foreign detainee and his or her attorney. Counsel should seek the assistance of the consul in order to ensure that legal rights and options are explained in culturally-relevant terms to the detainee, and to bridge any gaps in the attorney-client relationship.

Consular officers can also be of fundamental assistance in capital cases in assisting with investigation, particularly as crucial mitigating evidence can often only be discovered in the home country. Consular officers can assist with those investigations in the home country, including records collection, contacting family and friends, and notarizing and conveying documents

A common form of consular assistance includes intervention on behalf of the detainee in the proceedings. As is detailed in Chapter 3, such intervention can range from interceding with prosecutors to persuading them not to seek the death penalty, to participating directly or indirectly in appellate review.

It has been *Reprieve*'s experience that in capital cases, European countries will often offer assistance on humanitarian grounds where an individual has strong ties to that country, even if they are not confirmed nationals. This is because European countries staunchly oppose the death penalty.[54]

In 2011, the Italian government intervened in the case of *Reprieve* assisted prisoner, Robert Rega, who has ties to Italy but is not a confirmed Italian national. On October 19, 2011 the Italian Consul General Luigi Scotto signed an affidavit stating that had the Italian government been aware of Mr. Rega's case at the time he was tried, they would have provided crucial assistance, which would have potentially altered the defense strategy mounted by trial counsel and increased their ability to conduct a thorough investigation. Consul General Scotto stated that the Italian government would have provided, *inter alia*: prison visits to

[53] Mark Warren 'Consular Resources and Litigation Strategies,' in Linda Friedman Ramirez (ed.) *Cultural Issues in Criminal Defense*, (3rd edition, Juris Publishing, 2010); reprinted in Appendix II.
[54] See Chapter 4 for summaries of the death penalty policy of the countries *Reprieve* has worked with.

Mr. Rega; a list of mental health specialists to support a diminished capacity defense; and funds to retain counsel and experts. [55]

On October 21, 2011 Consul General Scotto testified in person to the same effect. Judge Foradora denied relief in the Pennsylvania State Court but his comments on Mr. Rega's Italian citizenship and the assistance offered by the Italian government are significant. Judge Foradora presumed Mr. Rega was entitled to consular assistance under the Vienna Convention and would have received access to a variety of mental health and crime scene specialists. Furthermore, he was confident the Italian government would have liaised with Mr. Rega's Italian relatives throughout the case.[56]

When assisting a European national facing the death penalty, it is therefore important to identify and make contact with officials at the Embassy or Consulate responsible for the consular district your client falls under. Initial contact can be via written correspondence, starting with a letter that outlines the salient points of the case, procedural posture, case background, and any preliminary requests for assistance. It is often useful to follow the letter with a phone call to confirm receipt and ensure that it gets immediate attention.

If possible, *Reprieve* also strongly recommends local counsel secure a face-to-face meeting with the relevant officials within the Consulate or Embassy as soon as possible. This allows both parties to outline their respective roles and explore how they can best work together. It also helps to develop a good working relationship and identify a contact point for the case at the Embassy or Consulate.[57]

Prior to any correspondence or meeting it is worth considering exactly how your client's government may be able to assist. This will depend on various factors, not least the procedural posture and the individual circumstances of the case. Again, the type of assistance potentially available will vary, and is covered in some detail in Chapter 5.

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[55] Luigi Scotti's affidavit is included in Appendix II.

[56] *Pennsylvania v. Rega*, No. CR-26-2001/524-2001, (Ct. of Common Pleas of Jefferson County, Commw. of Penn., Criminal Division, October 27, 2011) (unpublished).

[57] Please also see the following resources: Anne James and Matthew Cross, "Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA" (3rd edition, International Justice Project, 2009; Mark Warren, 'Consular Resources and Litigation Strategies,' *supra* note 53; Mark Warren, 'Introducing the Case to the Consulate by Formal Letter' .These resources are included in Appendix II.

Reprieve has extensive experience in European government outreach, and would be happy to facilitate first contact between counsel and the nearest Embassy or Consulate, and any follow-up interaction with officials at the government's home state.

5.6 Ministry of Foreign Affairs

Consulates and Embassies are essentially an extension of a country's Ministry of Foreign Affairs (MFA). As such, it is standard practice for there to be open lines of communication between them. It is also common for strategy and policy in particular areas to be developed initially at the MFA, and to then be applied via Embassies and Consulates.

The degree of autonomy given to Embassies and Consulates will of course vary from country to country; it is nevertheless common practice for MFAs to be consulted at the very least as to the direction and general approach taken by the Embassy or Consulate in a particular case. Indeed, anecdotal evidence suggests Embassies and Consulates often operate cases under direct instructions from their MFA. There may be circumstances where you liaise directly with officials based in the home state's MFA, for example, if you visit the country to undertake mitigation investigation. Again, *Reprieve* has significant experience of this and has developed relationships with a number of European MFAs. From our London office, we are also geographically well placed to meet and liaise with them.

5.7 Ministry of Justice

Outreach to the Ministry of Justice (MOJ) can assist with processing the client's nationality application, ensuring that his or her European nationality is recognized without unnecessary delay. Where there are special circumstances for doing so, the MOJ can at times expedite the nationality recognition procedure. It is of course worth checking – in some jurisdictions nationality recognition is processed in a separate Ministry or MOJ department.

A number of MOJs also have departments that deal with international treaty interpretation and their applicability in domestic law. As such, there is often a cross-over with the work conducted by their MFA in respect of treaty and multilateral issues. This is particularly relevant where a request to file an amicus curiae brief raising treaty interpretation is sought in support of a national facing the death penalty.

In most European states, the MOJ is also mandated to negotiate and enter into Prisoner Transfer Agreements with other states. These allow prisoners to serve the remaining part of their sentence in their home state (the process is also known as repatriation). They will also be responsible for processing individual applications for transfer where there is such a signed Agreement between the detaining and home state. Again, *Reprieve* is experienced in conducting outreach to MOJ officials and has developed relationships with a number of MOJs in Europe.

5.8 Conclusion

The above is a brief overview of some of the issues worth bearing in mind when conducting government outreach. As mentioned, every government is different, as, of course, is every case. Nevertheless, the key questions to consider are always the same: who should be the focus of your outreach, taking into account the respective roles and standing each body and individual has; how should you reach out to them; and what type of assistance are you looking for? Again, as mentioned above, *Reprieve* has significant experience in conducting government outreach and working closely with European governments. We would be very happy to help.

Chapter 6: The European Union and the Council of Europe

6.1 The European Union

The EU considers the death penalty to be a cruel and inhumane punishment that violates basic human rights. Its position is that capital punishment debases the society that imposes it, and history counsels great caution in granting governments power over life and death. The EU opposes the death penalty in all cases, without exception. Abolition of capital punishment is a requirement for membership in the EU. Under the EU Charter on Fundamental Rights, no individual may be removed, expelled or extradited to a country where there is a serious risk of being subjected to the death penalty.

The EU works closely with civil society groups and non-governmental organizations supporting the movement to abolish capital punishment. Indeed, the EU is the leading institutional actor and largest donor to the fight against the death penalty. This commitment is outlined clearly in the EU Guidelines on the death penalty,[58] the first ever human rights guidelines adopted by the EU Council in 1998. The EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission has also indicated that abolishing capital punishment worldwide is a "personal priority."

The EU played a significant role in bringing about the UN's General Assembly Third Committee Resolution calling for a moratorium on the use of the death penalty (62/149). As well as being a strong advocate before the UN of a universal moratorium on executions, the EU expresses its views bilaterally to countries retaining capital punishment through both general representations, particularly where a country's use of the death penalty is likely to be ended or reintroduced, and in individual cases.

The EU communicates its views directly to US political leaders at the state and federal level and, when appropriate, petitions the judicial system. In recent years, the EU Presidency has made representations to US state governors and agencies when scheduled executions appear to violate international "minimum standards" (*inter alia,* capital punishment shall not be imposed on those under 18 at the time of a crime, pregnant women, or the mentally disabled) and when

[58] Available in the Appendix II.

states are on the verge of ending a moratorium on capital punishment, and certain other instances.

The EU has effectively intervened by way of *amicus curiae* in a number of capital cases in the US, which violated international norms in relation to capital punishment. A prominent example is the case of *Ernest Paul McCarver v. State of North Carolina*. Mr. McCarver suffers from serious mental health issues. His most recent IQ test measured his IQ at 67. The EU intervened by way of *amicus curiae* in June 2001 in the Supreme Court. The brief argued that there is a strong consensus in the practice of nations against the execution of mentally retarded defendants. In addition, international norms and standards establish the impropriety of the execution of persons with mental retardation. Shortly after the submission of this brief, in August 2001, North Carolina banned executions for convicts with mental retardation. Moreover the arguments in the brief were later directly cited in the landmark Supreme Court judgment in *Atkins v. Virginia*, where the Court held that the execution of offenders with mental retardation is unconstitutional, and prohibited by the Eighth Amendment to the US Constitution banning cruel and unusual punishment.

The EU has also intervened in capital cases concerning prisoners who were juveniles at the time of the offence. In the case of *Alexander Williams v. Frederick Head*, the EU filed an *amicus* brief in February 2002.[59] Mr. Williams was just 17 years old and mentally ill at the time of his offence. The *amicus* brief argued that there is an international consensus against the execution of a person who was at the time of his offence a child under the age of 18. Shortly after the submission of this brief, Mr. Williams was granted clemency by the Georgia Board of Pardons and Parole. His sentence was commuted to life imprisonment without the possibility of parole. Mr. Williams was a US citizen and had no particular ties to the EU.

In the landmark decision of *Roper v. Simmons* in 2005, the Supreme Court of the United States held that it is unconstitutional to impose capital punishment for crimes committed while under the age of 18. This case concerned Christopher Simmons, who had been sentenced to death for an offence he committed when he was 17. Like in *Williams* above, the EU and its member states intervened by way of *amicus curiae,* arguing once again that there is an international consensus against execution of persons below 18 years of age at the time of the

[59] The *amicus* brief can be read in full in Appendix II.

commission of the offense.[60] Canada, the Council of Europe, Iceland, Lichtenstein, Mexico, New Zealand, Norway, and Switzerland had explicitly expressed to the EU and its member states their shared interest as *amici* and their support for the arguments put forward in the brief. Many of these arguments were echoed in the Court's judgment.

More recently, the EU filed *amicus* briefs, together with other members of the international community, in the US Supreme Court in support of the petitioners' arguments in the cases of *Sanchez-Llamas* and *Medellin*.[61]

6.2 The Council of Europe

The Council of Europe is a broader grouping of countries than the EU. The Council has played a leading role in the battle for abolition in the region, believing that the death penalty has no place in democratic societies. All the Council of Europe's 47 member states have either abolished capital punishment or instituted a moratorium on executions. As noted in Chapter 4, the Council (like the EU) has made abolition of the death penalty a prerequisite for membership. As a result, no execution has taken place on the territory of the organization's member states since 1997.

The Council's determination to eradicate the death penalty was reflected in Protocol No.6 to the European Convention on Human Rights. It followed an initiative from the Parliamentary Assembly to abolish the death penalty in peacetime and was adopted in April 1983. In 2002, another important step was taken with the adoption of Protocol No. 13 on the abolition of capital punishment in all circumstances, even for acts committed in time of war.

The Parliamentary Assembly continues to monitor the capital punishment issue. Like the EU, the Council of Europe will make representations in individual cases that raise international law issues. Intervention can include legal representations by way of *amicus curiae* brief as demonstrated in the above section.

6.3 Conclusion

All nationals of EU countries are also citizens of the European Union. This is a legal status which is becoming clearer as the Union matures and means that the EU can play a powerful role in advocating for its nationals. The Council of Europe, as an older and much larger group of nations, also has the potential to

[60] The brief can be read in Appendix II.
[61] See Appendix III for summaries of the US Supreme Court judgments in these cases.

be a powerful voice on behalf of Europeans and others caught up in the US death penalty system. Both organizations have strong anti-death penalty positions and have been instrumental in creating much of the international law restricting and abolishing the use of capital punishment in their regions. They have intervened in US death penalty cases in the past, and counsel should make sure that both the EU and the Council of Europe are encouraged to play a part in cases where they could be of assistance.

Chapter 7: Litigating Foreign Nationality Issues

7.1 Introduction

This chapter offers a general guide to legal claims that may arise when representing a European national or an individual with ties to Europe. What follows below is only a very limited discussion of some of the issues involved in cases with foreign links. Obviously, counsel should not feel limited in any way by what is written: the key to winning any capital case is to seek out facts and issues that are unique to the individual on trial.

7.2 Pre-trial issues

Miranda Rights: The Supreme Court has accepted that foreign nationality is important in assessing the admissibility of statements made during police interrogation.[62] Statements have been held to be inadmissible where the police have interrogated individuals with a poor command of English, a limited knowledge of the US criminal justice system, or where there has been no assistance by an interpreter.[63] Every effort must be made to ensure that the defendant understands that he has the right to remain silent, that anything he says will be used against him in court; that he has the right to consult with an attorney and to have that attorney present during questioning, and that, if indigent, an attorney will be provided at no cost.[64]

Interpreters**:** Although the United States Supreme Court has not directly addressed the right to an interpreter in criminal cases as a constitutional issue, many state courts have identified the right to competent interpretation as a Sixth Amendment requirement in criminal proceedings.[65] A number of federal and state statutes also guarantee the right to an interpreter during court proceedings and interrogation.[66] Defendants may challenge the competence of the interpreters

[62] *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966).
[63] *United States* v. *Short*, 790 F.2d 464 (6th Cir. 1986); *United States* v. *Garibay*, 143 F.3d 534, 537 (9th Cir. 1998).
[64] *United States v. Bejar*, 1995 WL 548771 (N.D.Ill.1995); *United States* v. *Garibay*, 143 F.3d 534, 537 (9th Cir. 1998); *United States* v. *Fung*, 780 F. Supp. 115 (E.D.N.Y. 1992).
[65] *Chacon v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994); *United States v. Cirrincione*, 780 F.2d 620 (11th Cir. 1986).
[66] See for example, 8 U.S.C.A. §1827 (1996), Interpreters in Courts of the United States; CAL. CONST. art. I, §14; ALA. CODE 1975 § 15-1-3 (2000); ARK. CODE ANN. § 16-89-104 (2001).

provided at the interrogation and trial stage of proceedings.[67] A bilingual defense counsel is not a sufficient substitute for an interpreter.[68]

Foreign nationality or foreign links may have a significant impact on many other issues that are important to the case. For example, if the client comes from a particular foreign culture, or even a sub-culture in the foreign country, this may be crucial to the presentation of any defense, evidence in mitigation, or any mental health evaluation.

7.3 Vienna Convention on Consular Relations

Article 36 of the VCCR grants all foreign nationals arrested in the United States a right to communicate with their consulate, to have the consulate notified of their detention and to be informed of these rights without delay. Many countries also have bilateral agreements with the US that cover similar territory – sometimes, to the client's benefit. For example, many bilateral treaties speak of giving the detained foreign national access to consular officials *immediately* and regardless whether a request is made by the prisoner. Thus, counsel should look to determine whether the client may have more rights than those identified by the VCCR.

That said, even under the VCCR, consulates have the right to communicate and visit with detained foreign nationals, to arrange for their legal representation and to assist in preserving the rights and interests of the detainee.

The VCCR was signed by the US and several dozen other nations in 1963. The treaty codified long-standing customs regarding consular relations. In 1969, the US Senate unconditionally and unanimously consented to the treaty. Upon ratification, it became binding on all states under the Supremacy Clause of the US Constitution.

Despite efforts by the State Department and foreign consular services to improve compliance, violations of Article 36 of the VCCR remain commonplace across the United States. These breaches provide a variety of potential grounds for pre-trial motions and appeal. They also serve as a compelling justification for attorneys to work with the Consul and to seek material and legal assistance from the home government.

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[67] *Pérez Lastor v INS*, 208 F.3d 773 (9th Cir. 2000); *United States_v Martinez-Gaytan,* 213 F.3d 890 (5th Cir. 2000).
[68] *Giraldo-Rincón v Dugger*, 707 F Supp. 504 (M.D. Fla. 1989)**;** *State v Kounelis*, 258 N.J. Super 420 (1992).

It is important to note that the requirement for consular notification goes much further than merely telling the detained prisoner that he has the right to talk to a consular official. As a primary matter, there is the question whether the prisoner understands the benefits of admitting his foreign nationality. Very often, a foreign national who has been arrested will be as afraid that the Immigration and Naturalization Service (INS) will initiate deportation proceedings as he will be intimidated by the criminal charges against him. It will not readily appear to him that there is any reason to say he is a foreigner. Thus, the consular notification must include details of how the foreign consulate may assist the prisoner, in order to make any decision knowing, intelligent and voluntary.

Dual Nationals: Note that the State Department has taken the position that individuals arrested in the US who hold both US and foreign citizenship have no right to advisement or to consular notification under Article 36. Mexico adopted a similar position, withdrawing its assertion of a violation in a case of a prisoner who was discovered to possess dual Mexican and US nationality during the *Avena* proceedings. However, the ICJ has not yet been called on to determine the scope of any consular rights conferred under the VCCR on dual nationals detained in one of their countries of citizenship.

International Court of Justice decisions on VCCR issues

In the *LaGrand Case,* two German nationals were convicted of capital murder, but were not notified of their right to consular assistance. It was held that*:*

1) Article 36 created individual rights, which can be invoked by the national state of the detained person before the ICJ.

2) The US doctrine of procedural default may not be applied to prevent the judicial consideration of the treaty violation in such cases.

3) It was not necessary to prove whether the LaGrands would have sought consular assistance from Germany, whether such assistance would have been rendered, or whether a different verdict would have been rendered. It was sufficient that the Convention conferred these rights, and that the LaGrands were prevented by the breach of the United States from exercising them.

4) The USA must provide review and reconsideration of convictions and sentences where Article 36 was violated.

Avena and Other Mexican Nationals:[69] advisement of consular rights "without delay" means "a duty upon the arresting authorities to give that information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national.

US position on the VCCR

In *Medellin v. Texas,*[70] the U.S. Supreme Court has clarified that the ICJ's interpretation of the VCCR does not trump domestic procedural rules or the Court's own constitutional authority to construe treaty provisions. However, where the ICJ interpretation of Article 36 obligations does not conflict with domestic law, *Avena* should be presented as persuasive authority. Other federal and state cases have also subsequently accepted the ICJ's jurisprudence.[71]

Furthermore, the State Department has now largely accepted and adopted the ICJ's formulation regarding timely notification of consular rights in its own instructions to law enforcement agencies on Article 36 requirements. The ICJ's language should thus be cited as the authoritative interpretation of when the duty to inform a foreign national of Article 36 first arises.

The Supreme Court has also recognized that timely consular assistance can be beneficial to the defense of a foreign national and has stated that trial courts can make "appropriate accommodations" when Article 36 violations are brought to their attention.[72] The seminal case on VCCR issues is *Sanchez-Llamas v. Oregon*.

In *Sanchez-Llamas,* the Supreme Court was asked to address three issues:

1) Whether Article 36 creates rights that a defendant may invoke against detaining authorities in a criminal trial or in a post-conviction proceeding. The Court bypassed this (most basic) issue, assuming without deciding that Article 36 does confer individually-enforceable rights, but finding it "unnecessary to resolve the question" because the petitioners were not entitled to the requested relief.

[69] (*Mex*. v. *U.S*.), 2004 I.C.J. 128 (Mar. 31).
[70] 552 U.S. 491 (2008).
[71] *Jogi v. Voges*, 425 F.3d 367, 385 (7th Cir. 2005); *Madej v. Schomig*, No. 98-C-1866, 2002 WL 31386480; *Torres v. State*, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005); *State v. Miranda*, 622 N.W.2d 353 (Minn. App. 2001).
[72] *Sanchez-Llamas v. Oregon*, 584 U.S. 331, 350 (2006).

2) Whether a violation of Article 36 requires suppression of a defendant's statements to the police: the Court found that since "neither the Vienna Convention itself nor our precedents applying the exclusionary rule support suppression" on these grounds, the exclusion of evidence is not an available remedy for an Article 36 violation *per se*.

3) Whether a state, in a post-conviction proceeding, should treat a defendant's Article 36 claim as defaulted because he failed to raise the claim at trial. The Court held that "a State may apply its regular procedural default rules to Convention claims" (contradicting the ICJ's decision in *Avena*). The Court held that while the judgments of the ICJ are entitled to "respectful consideration," "nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U.S. courts."

However, the majority noted that an Article 36 violation *can* be relevant to determining the admissibility of a defendant's statements, and implied that courts were free to craft additional pre-trial remedies for VCCR violations: "suppression is not the only means of vindicating Vienna Convention rights. A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police. If he raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance."

Key Points:

1) Any violation of Article 36 obligations should now be included in the totality of the circumstances when assessing the involuntariness of statements and in determining whether a *Miranda* waiver was knowing, intelligent and voluntary. It is therefore essential to develop other grounds for suppression to which the treaty breach can then be connected in the totality of the circumstances. While there have been few appellate opinions on this issue to date, the general tendency of the lower courts has been to consider the question of voluntariness of statements as referring to the full range of voluntariness issues, including the sufficiency of Miranda waivers.[73]

2) In some circumstances, the treaty obligation to advise the detainee "without delay" must attach prior to or during interrogation: if the consular rights advisement could always be delayed until after a statement was obtained,

[73] *State v. Morales-Mulato*, 744 N.W.2d 679 (Minn. App. 2008); *State v. Banda*, 639 S.E.2d 36, n. 11 (S.C. 2006).

there would never be a viable Article 36 claim to introduce as a challenge to the voluntariness of those statements.

3) A foreign defendant has independent standing to raise the claim for the purpose of securing legal benefits at trial. Where a trial court arbitrarily refuses to grant a reasonable accommodation – such as a continuance – or trial counsel fails to raise a known violation, those issues could likely now be considered as grounds for an appeal.

4) *Sanchez-Llamas* does not preclude state court habeas relief for already-defaulted Article 36 claims: although a state court "may apply" its procedural default rules, nothing in the decision requires it to do so. Many state courts of final appeal possess the discretionary authority to set aside procedural barriers where the interests of fundamental justice so require, and might be persuaded to do so if presented with particularly egregious consequences arising from a denial of consular rights.[74] Furthermore, counsel should not accept the folly of applying a rule of procedural bar to a VCCR claim: the very purpose of the VCCR is to advise the prisoner of his right to consular access, so if he is not advised of this right, how can he be said to have waived it? Counsel should not therefore forego this claim, since the US Supreme Court is in conflict with the ICJ.

Most important, perhaps, is the interrelation between the VCCR and a claim of ineffective assistance of counsel. Trial counsel may clearly be ineffective for failing to raise a known Article 36 violation. The holding on procedural default and the reference to "appropriate accommodations" that trial courts may provide places the onus squarely on trial counsel to investigate, develop and preserve Article 36 violations.

Questions still unanswered by the Supreme Court include:

1) Does Article 36 confer privately enforceable rights on individual foreigners and, if so, what potential remedies – apart from exclusion of an incriminating statement – flow from a timely claim?

2) What is the precise meaning of consular information and notification "without delay" under Article 36?

[74] *Valdez v. State* 46 P.3d 703, 710 (Okla. Crim. App. 2002) court exercised "its power to grant relief when an error complained of has resulted in a miscarriage of justice," for a procedurally-defaulted claim of ineffective assistance stemming from trial counsel's prejudicial failure to seek consular assistance.

3) To what extent is an Article 36 violation relevant to other appellate issues, such as related claims of ineffective assistance of counsel?

4) To what degree should the other interpretations of the ICJ be treated as persuasive authority when construing the meaning of Article 36, either on ground of comity or "respectful consideration"?

Besides damaging statements and *Miranda* waivers, counsel should look at the other potentially harmful effects of the absence of consular assistance from the time of the defendant's initial detention up until the defendant learned of his VCCR rights. Contact with the Consul at the earliest opportunity is often vitally important in developing and presenting preliminary mitigating evidence for use in persuading the prosecution to waive the death penalty.

Depending on the stage of the proceedings and the supporting facts, counsel should file or supplement motions addressing a range of issues related to the delay in consular notification. Those motions include:

1) Requesting a continuance at any stage in the proceedings, to permit defense consultation with the consulate and the opportunity to obtain case-specific assistance;

2) Seeking a rehearing of previously denied claims, such as motions to suppress or competency determinations, where consular assistance would have provided additional support for the claim

3) Mental retardation or juvenile offender claims in capital cases, based on newly available medical, educational, or birth records obtained by the consulate

4) Addressing involuntary or unknowing waivers of other rights made in the absence of consular assistance, e.g. defendant refused a favorable plea arrangement, decided to represent himself, or submitted an invalid guilty plea

5) Motions to defer formal sentencing, based on consular assistance that would have mitigated a death sentence

Even where suppression is ultimately denied, the defense could request a jury instruction incorporating the Article 36 violation and the potential benefits of timely consular assistance into the jury's determination of involuntariness.

Pre-trial: possible claims and remedies based on the VCCR

1) Had the defendant known they had the right to communicate with consular officials, they would have refused to speak to the police until they had obtained the consulate's advice. The consulate, in turn, would have instructed the defendant not to speak to law enforcement officers unless advised to do so by an attorney.

2) In the totality of the circumstances, the failure to notify the consulate promptly of the detention contributed to the securing of the defendant's coerced statement.

3) The effective denial of consular assistance from the early stages of the case deprived the defendant of access to the fair application of prosecutorial discretion. Had the consulate intervened, there is a reasonable probability that the death penalty would not have been sought.

4) As a result of the violation, you have been hampered in preparing a defense, since the consulate would have provided critical assistance in gathering evidence/contacting witnesses in your client's home country.

As a result of these claims:

1) In conjunction with other stated grounds, statements should be suppressed.

2) The state should be barred from seeking the death penalty.

3) The Department of Justice should rescind its death authorization (particularly if consular officials were not given an opportunity to participate in meetings with the Justice Department).

4) The jury should be instructed that law enforcement officers violated the defendant's rights under an international treaty that protects American citizens who travel abroad, and that their conduct could jeopardize the safety of all Americans.

5) The Court should impose sanctions on the prosecution to deter future violations.

Post-trial claims and remedies under the VCCR

1) Consular assistance would have resulted in a far more extensive and compelling mitigation record at penalty phase.

2) Consular involvement would have resulted in a favorable plea bargain.

3) Consular involvement would have detected and remedied trial counsel's ineffectiveness.

4) Consular support would have included the provision of funds for expert witnesses and investigators.

5) Consular visits would have detected that the defendant suffers from extensive mental impairments, triggering the need for neuropsychological testing.

As a result of these claims, counsel can request that the court order:

1) A new trial.

2) A new sentencing proceeding.

3) An evidentiary hearing to "review and reconsider" the impact of the Article 36 violation.

4) Reinstatement of a plea bargain extended to the defendant (and rejected) at a time when the consulate had not been notified of your client's detention.

In post-trial proceedings, counsel should continue to argue that giving full effect to the individual rights conferred under the treaty requires the courts to fashion suitable remedies for violations of those rights, whenever it can be demonstrated that the absence of timely consular notification was prejudicial. In addition, the treaty violations should always be linked to other existing claims based on constitutional rights, such as arguing that trial counsel was ineffective for failing to seek the assistance of the consulate or for failing to accept offered consular assistance.

Article 36 & ineffective assistance of counsel claims:

Both before and after *Sanchez-Llamas*, a number of courts have recognized that trial counsel's failure to seek or accept available consular assistance on behalf of a foreign client or to raise an Article 36 violation at trial may constitute ineffective assistance. Where counsel's unprofessional error is demonstrably prejudicial, relief is available: [75]

- *Osagiede v. United States*:[76] found trial counsel was ineffective for failing to seek a remedy for an Article 36 violation and remanded non-capital habeas case for prejudice determination.

- *Marquez-Burrola v. State:*[77] modified death sentence to life imprisonment for trial counsel's failure to develop and present mitigating evidence despite pre-trial offers of consular assistance.

- *Deitz v. Money*:[78] Vacated the judgment of the district court and remanded for further proceedings, on a claim that the petitioner's counsel was ineffective for failing to file a direct appeal and that petitioner can show cause and prejudice for the failure.

Although reviewing courts have applied a variety of prejudice standards to Article 36 claims, the most widely-adopted by both state and federal courts is the 3-prong prejudice test cited in the American Law Reporter entry on VCCR claims.[79]

A foreign national has the burden of establishing that a violation of that foreign national's consular notification rights under the VCCR caused prejudice by producing evidence that:

> 1) the foreign national did not know of this right;
>
> 2) the foreign national would have availed himself or herself of the right had they known of it; and
>
> 3) there was a likelihood that contact with the Consul would have resulted in assistance to the foreign national.

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[75] *Sanchez-Llamas v. Oregon*, 584 U.S. 331, 350 (2006).
[76] 543 F.3d 399 (7th Cir. 2008).
[77] 157 P.3d 749 (Okla. Crim. App. 2007).
[78] 391 F.3d 804 (6th Cir. 2004).
[79] *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir.1980); *United States v. Villa-Fabela*, 882 F.2d 434, 440 (9th Cir.1989); Torres v. State, 120 P.3d 1184, 1187 (Okla. Crim. App. 2005); *People v. Preciado-Flores*, 66 P.3d 155, 161 (Colo. App. 2002).

Post-trial issues involving foreign links generally.

Perhaps the single most important question that will arise when counsel represents an individual with foreign links will be the effectiveness of trial counsel's investigation into those links. Regardless whether the client has actually lived abroad, the experiences of his family (and the culture that they imported to the US) will have had a relevant impact on the client. Cultural issues may play into his interaction with the police, his ability to waive rights, his reasonable assessment of self-defense, mental health issues, or any number of mitigating circumstances. It is highly likely that counsel will have to ensure that a full investigation takes place in the relevant country or countries. It is becoming increasingly clear that trial counsel will be deemed ineffective for failing to take this kind of evidence into account.

7.4 Conclusion

Both US and international courts have accepted that foreign nationals have particular needs due to their increased vulnerabilities. US courts and counsel have an obligation to identify and make special provision to accommodate these needs, and failure to do so provides grounds for a challenge to trial counsel's actions in a capital case.

Chapter 8: Accessing International Legal Mechanisms

8.1 Introduction

This chapter aims to provide a brief and practical introduction to two international enforcement mechanisms, namely the Inter American Commission on Human Rights and the UN Special Rapporteurs. The section is limited to those two partly because they are the most likely to be relevant and easily accessible to a capital defender. The chapter outlines the role of the international bodies in question and imparts brief practical advice on why, when and how to go about using them, distilled from *Reprieve*'s experience.

There is naturally some discussion of issues of international and domestic law, but it is important to emphasize that this is merely intended as an introduction and not as an exhaustive statement on either the international or US legal frameworks in question. Counsel should always read the primary sources referenced below, familiarize themselves with the relevant up to date case law and, if possible, consult with attorneys or organizations with experience in the field, such as *Reprieve*, before making a claim.[80]

These mechanisms are underused by US capital defense lawyers and many clients could benefit from them. There is no reason to be put off by their international nature. There are simple, practical procedures, easily accessible to a trained US attorney.

8.2 The Inter-American Commission on Human Rights and the American Declaration

On April 30, 1948, the Organization of American States ('OAS') came into being and in that same meeting those states, including the US, signed the American

[80] For answers to any procedural questions about Requests for Precautionary Measures or petitions before the Commission that cannot be easily answered elsewhere it is advisable to make direct contact with the Commission. The staff are extremely knowledgeable and are ready and willing to help anyone trying to navigate its rules. They cannot give any legal advice or assist you with the substantive merits of your petition, but will be very informative as to time limits, what information is needed at what stage, filing procedure etc. Contact details can be found on the Commission's website at <http://www.oas.org/en/iachr/default.asp> accessed May 22, 2012.

Declaration on the Rights and Duties of Man ("the American Declaration").[81] This was the world's first international human rights instrument, being signed seven months before the Universal Declaration of Human Rights ("the Universal Declaration"). The US has been a strong supporter of the civil and political rights laid out in this instrument and the Inter-American Commission on Human Rights ("the Commission"), the body monitoring and promoting adherence to the American Declaration is based in Washington DC.

The American Declaration is considered by both the Commission and the Inter-American Court of Human Rights to be a source of binding international obligations for the US as a member state of the OAS. Because insufficient pressure has been placed on the US to respect its obligations, US states may take the position that the Declaration is not a treaty under international law, so that the US is not legally obliged to respect Requests for Precautionary Measures issued by the IACHR. This will only change as counsel press the legal and political issues that arise out of IACHR litigation.

Notwithstanding the underdeveloped law in this area, it is clear that IACHR decisions can have a significant benefit for clients. Report No. 1/05 of the Commission is the merits report in *Moreno Ramos* Case 12.430. Here, a Texas court declined to set an execution date after the Commission issued a Request for Precautionary Measures.[82] Paragraph 89 of the report says as follows:

> The Commission wishes to note that, according to the most recent information available, an execution date has not yet been scheduled for Mr. Moreno Ramos. According to the Petitioners' submissions during the March 5, 2004 hearing before the Commission, this state of affairs resulted from a November 12, 2002 hearing before the 93rd District Court of Hidalgo, Texas, *where the presiding judge, with the concurrence of Mr. Moreno Ramos' attorneys and the assistant criminal district attorney, agreed to postpone setting an execution date in light of the petition before the Commission* and its March 7, 2002 request for precautionary measures.

Both the Commission and the Inter-American Court consider that the American Declaration creates binding obligations upon the US as an OAS member state.

[81] American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948.
[82] *Report No 1/05,* Roberto Moreno Ramos v. United States, (Merits), Case 12.430, January 28, 2005, para. 89.

This is a view that carries great authority as these are the two key bodies set up to monitor and govern the American system of human rights. The US has voluntarily signed up to the OAS, to the American Declaration and to ultimate authority of the Commission in interpreting the American Declaration.

The Commission is the only qualified human rights body with the capacity to consider arguments made regarding violations of the American Declaration in relation to US domestic proceedings. Domestic courts, whether they consider themselves bound by the decision or not, must take that decision into consideration in weighing the merits of any claims being made in the domestic proceedings. They are under a binding obligation to take no action that denies the petitioner his right to be heard before the Commission. Therefore they cannot allow the execution of a petitioner before a decision is made by the Commission and before they have considered that decision.[83]

'Heightened scrutiny': How the Commission approaches death penalty cases

It is common, in both international and domestic contexts, to take the view that 'death is different.' Most legal systems accept in theory, if not always in practice, that the irreversible and awful nature of the death penalty requires correspondingly greater safeguards in cases where death is on the table than might be required in a case where the punishment is not death.

The Inter-American Commission is no different. It has long applied a 'heightened scrutiny' test to all capital cases. In practice this means that claims brought by petitioners on issues like fair trials, prosecutorial misconduct, the incompetence of defense counsel etc. are more likely to be resolved in favor of the prisoner than would be possible in a domestic court. The Commission considers it has an enhanced obligation to ensure that there is strict compliance with the relevant human rights instruments and that there is a particularly stringent need for reliability in determining whether a person is responsible for the crime in death penalty cases.[84] Even without this heightened scrutiny, the international law standards are often more generous to the defense than the corresponding US standard.

[83] It is beyond the scope of this manual to make any concrete suggestions on how such claims ought to be formulated before domestic courts in the US. Much will depend on the jurisdiction and local precedents.

[84] *Report No 52/02,* Ramon Martinez Villareal v. United States, (Merits), Case 11.753, October 10, 2002, para. 51.

8.3 Why bother with the IACHR?

Some states have shown themselves willing to move forward with capital cases irrespective of any Request for Precautionary Measures or decision of the Commission. Despite this, there are a number of compelling reasons to petition the Commission even if the US is unlikely to heed the result. This is especially true when representing a European national. The *Moreno Ramos* case, where a Texas court was willing to hold off on setting an execution date on the basis of a Request for Precautionary Measures of the Commission, was discussed above. Here are some more reasons that it might be a good idea to petition the Commission.

1) There are a great many non-US decision-makers who need to be persuaded in this sort of case. These include the government of the country of origin, the EU, the Council of Europe, other European countries, international and European bar associations, international figures, the media, the people of European countries and prominent groups of European parliamentarians and legislators concerned with human rights. All of these people and bodies are likely to pay a great deal of attention to the Commission as a respected and authoritative body. A Request for Precautionary Measures or a favorable decision will weigh heavily when counsel asks one of those groups to act.

2) Such a decision would also add further weight and substance to any representations, formal or informal, that any such body was willing to make. It could mean the difference between a simple representation on fair trial issues, to an *amicus* brief urging a Federal Court to take into consideration its international obligations as defined by the Commission. These things have a tendency to reinforce each other and a growing body of international opinion centered around the observations of the Commission may be persuasive to a court or another domestic decision-maker.

3) There are many US judges in state and federal courts who do accept the role of international law and comparative jurisprudence in informing their own analyses of the issues at hand.

4) Even judges who do not subscribe to that view may be encouraged by the international attention on the case to consider an issue more carefully.

5) Sometimes a prosecutor or a clemency board may also be persuaded by the view of a respected international body.

6) Every decision of the Commission adds to a growing body of international law examining whether the US is or is not living up to its commitments. This forms a valuable resource for all capital defense lawyers.

8.4 When to turn to the IACHR

Requests for Precautionary Measures

Requests for Precautionary Measures are governed by Article 25 of the Rules of Procedure of the Inter-American Commission on Human Rights. This is an independent procedure used in serious and urgent situations where the state needs to take measures or to refrain from action to prevent 'irreparable harm to persons or to the subject matter of the proceedings', and even those not. This includes situations where no petition has yet been filed. In practice this means that you should apply for precautionary measures when an execution date has been set, or you know one is likely to be set in the next few months. This request would be one to ask the US to refrain from setting a date, or from executing a person before the Commission has had a chance to consider their case and transmit its decision to the US. There's no reason why this could not also be used in other circumstances where irreparable harm would be done. Examples might be in cases where medical care or the destruction of key evidence is at issue.

Petitions

The window of time in which one can make a petition is largely governed by the admissibility requirements of the Commission. These are detailed in the section on admissibility below. It may be helpful to give a rough timeline of the course of a petition through the Commission once it is submitted. The basis for this can be found in Articles 29, 30 and 37 of the Rules of Procedure of the Inter-American Commission on Human Rights. The consideration given below to the length of time required for the Commission to act (rather than the set time limits given to the petitioner and the state) are estimates. It is a good idea to ask the Commission itself what the likely time frame is, given the workload of the Commission and the dates on which the Commission is due to convene. In particularly urgent cases, the Commission will prioritize death penalty cases if execution is imminent.

1) The Executive Secretariat will process the petition and assign it a number. It will check that all the information required has been provided and, if it has not, may contact you to obtain it. It is essential that you make it abundantly clear

that this is a death penalty case and specify a likely time frame for the execution. The Commission will prioritize such cases and aim to complete this process within a week or two. If you do not, you could end up waiting months.[85]

2) The Commission will then forward it to the respondent state (in US cases it will go to the US State Department) for their response on admissibility. They will be given two months to respond. If they do not respond in two months they will be permitted up to one additional month. Here, if the matter is urgent or the life or personal integrity of the petitioner is at risk, you should ensure the Commission knows and they will attempt to expedite the procedure.

3) The Commission will go on to consider whether or not your petition is admissible. This can take a few months after the initial three month period has elapsed. For example in a petition that *Reprieve* submitted, the US was first asked for its comments on November 21st and the decision on admissibility came through in early April the following year.

4) After this, you have three months to submit any additional observations on the merits. You can apply for an extension of not more than one additional month and it is in the Commission's discretion to grant this, if the request is well founded.[86]

5) The state then has three months to formulate a response, with the same possibility of a one-month extension. In serious or urgent cases or when the life or personal integrity of the petitioner is at risk, the Commission has discretion to reduce the three-month window.

6) Once the state has responded, the Commission may invite the parties to submit additional written observations and, if necessary, it may convene an oral hearing. The rules for these are found in Chapter VI of the Rules of Procedure. It is open to parties to make a request for an oral hearing to the Commission, explaining why one might be necessary.

7) The Commission will then make a decision on the merits. There is no clear indication of how long this can take and it will again depend on the urgency of the matter. For a death penalty case, where the petitioner remains under imminent threat of execution, it is generally possible to ensure a decision

[85] Article 29.
[86] Article 37.

within one year of the initial submission, and this may be expedited as necessary.[87] Where the case is urgent, a Request for Precautionary Measures may be sought in a matter of days – see below.

8) It is possible to request in your original petition that the admissibility and merits phases of the petition be joined. This has the potential to speed up proceedings significantly as you theoretically only have to wait once for the state to respond. Such a request should be made clearly at the start of the petition, and also in the email or letter to which the petition is attached.

8.5 How to make an application?

There are excellent resources available to assist in the actual process of drafting a petition and ensuring it conforms to the requirements of the Commission. The documents listed below are included in the Appendix. These and others are, for the most part, freely available on the internet. We have provided links where practical, but most of this material can be found on the Commission's website at http://www.oas.org/en/iachr.

1) The informational brochure prepared by the Inter-American Commission on Human Rights on its Petition and Case System[88]. This is an excellent guide to all aspects of the system of submitting requests and petitions and should be the first point of call for anyone considering doing so.

2) The Rules of Procedure of the Inter-American Commission on Human Rights[89].

3) Past petitions and Requests for Precautionary Measures. Because these are not public documents they can be difficult to find online. We have, with the permission of the drafters, included a selection of these in the Appendix.

4) The jurisprudence of the Commission. Past decisions and reports are freely available on the Commission's website.

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[88] Petition and Case System, Informational Brochure <http://www.oas.org/es/cidh/docs/folleto/CIDHFolleto_eng.pdf> accessed May 22, 2012.

[89] Rules of Procedure of the Inter-American Commission on Human Rights <http://www.cidh.org/basicos/english/Basic18.RulesOfProcedureIACHR.htm> accessed May 22, 2012.

Submission

Requests for Precautionary Measures can be sent by email to CIDHPROTECCION@oas.org.

Petitions and their supporting documents can be attached to an email and sent to cidhdenuncias@oas.org.

It's a good idea to telephone to confirm receipt if you haven't heard anything within a few days.

Urgent cases: Requests for Precautionary Measures

This is an emergency procedure, and as such is designed to be as quick and as easy as possible. Requests can be made both in connection with a pending petition or case of the Commission, or independently of any pending petition. This means that you do not need to show that you have or that you intend to submit a petition to the Commission before asking that it make a Request for Precautionary Measures to the US.

You simply send an email to cidhproteccion@oas.org providing the information required and with any supporting documents you think necessary. Where the Request relates to an upcoming execution it's generally enough to provide any evidence (including news reports) that an execution has been scheduled and brief details of the problems with the process leading up to this event. If there is no scheduled execution but you know a date may be coming soon, it should be enough for you to make a statement (unsworn) as an attorney with knowledge of the process that this is happening and give your reasoning for your belief.

Petitions

The Commission is designed to be used by lay petitioners, who may be poorly educated and in prison with limited access to court filings, judgments of the court or the evidence against them. US attorneys working in capital defense will have little difficulty in ensuring that their petition provides all the information required by the rules and develops the relevant facts in a clear manner.

Admissibility

This is dealt with in Articles 30–34 of the Rules of Procedure. Admissibility can often be a simple matter. It ought to be easy to ensure that you have laid out colorable claims in your petition. This means that the Commission must be able

to see that the facts you have alleged in your petition, if assumed to be true, should tend to show that there have been violations of the American Declaration.

At some level, you are also required to show that you have exhausted local remedies and that you have submitted the petition within the six month window following the final decision of the relevant domestic court. However, the exhaustion standards are quite loose, reflecting the realities of US capital litigation. For example, in the petition submitted by *Reprieve* on behalf of Ivan Teleguz, the Commission had the following to say on exhaustion of local remedies (emphasis added):[90]

> 19. According to the information available, after the death sentence was upheld on direct appeal, the Supreme Court of Virginia denied a state habeas petition and the United States District Court for the Western District of Virginia denied a federal habeas petition. The petitioners indicate that Mr. Teleguz has only one more non-discretionary appeal and that he will likely be executed in the spring of 2012. They argue that the alleged victim should not be required to wait until that appeal is heard before the IACHR can consider the petition given that there is no effective right to appeal in US federal habeas proceedings and that delaying consideration of the petition would effectively deny Mr. Teleguz any realistic prospect of having the alleged violations considered while he is still alive.
>
> 20. *The requirement of exhaustion of domestic remedies does not mean that the alleged victims have the obligation to exhaust every possible remedy available to them. In this respect, the Inter-American Commission has maintained that "if the alleged victim endeavored to resolve the matter by making use of a valid, adequate alternative available in the domestic legal system and the State had an opportunity to remedy the issue within its jurisdiction, the purpose of the international legal precept is fulfilled."*[91] In the instant case, the State, through the direct appeal and the state and federal habeas petitions, had the opportunity to take cognizance of the alleged violations to the American Declaration.

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[90] *Report No. 16/12,* Ivan Teleguz v. United States, (Admissibility), Petition 528/11, March 20, 2012, paras. 19-20.

[91] *Report No. 70/04*, Jesús Manuel Naranjo Cárdenas and others v. Venezuela, (Admissibility), Petition 667/01, October 15, 2004, para. 52.

As you can see, the test employed by the Commission allows for flexibility.

Exhaustion of local remedies can be slightly more complex where, for example, certain issues have not been exhausted, or if you are seeking to show, under Article 31 (2) of the Rules of Procedure, that the requirement of exhaustion does not apply. It is always advisable to consult with experts if you have any concerns about admissibility.

Legal Argument

In looking at a case and deciding what issues you have that form cognizable claims before the IACHR, one of the best resources available is the Amnesty International Fair Trials Manual, which can be found online at http://www.amnesty.org/en/library/asset/ POL30/002/1998/en/81bf7626-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.pdf. As you will note, this was written in 1998 and standards will have evolved since then. However, it is a good basis for identifying possible violations, and further research will disclose the current position. Another good resource is the Amnesty International document, International Standards on the Death Penalty (ACT 50/001/2006), which can also be found online at http://www.amnesty.org/en/library/info/ACT50/001/2006. In particular you need to look at the references to the American Declaration on the Rights and Duties of Man with regard to any issue you think relevant as that is the key international instrument over which the Commission has jurisdiction in relation to the US.

Once you have identified the standards, which you think may have been violated, you can then look at the way in which previous Commission jurisprudence and international human rights norms deal with the issue and formulate your arguments accordingly.

EXAMPLE

For example, if you were seeking to make a claim, based on what in domestic law would be an Eighth Amendment claim of cruel and unusual punishment, you would look to Article I of the Declaration (right to life), which the Commission has found incorporates a right to not be subjected to torture or cruel, inhuman or degrading treatment. You could also point to Article XXV (right to protection from arbitrary arrest) which dictates that prisoners have a right to humane treatment whilst in custody, or to Article

XXVI (right to due process) which guarantees a right not to receive cruel, infamous or unusual punishment.

There are many experts and organizations who are able to give guidance on this to death penalty lawyers, including *Reprieve*, and even if we cannot help directly we are able to put you in touch with others who can. The sample petitions included on the disc will also give you an idea of how many common arguments, such as on incompetent counsel, or on the Vienna Convention on Consular Relations issues work in practice.

8.6 UN Special Rapporteurs

The United Nations Human Rights Council ("UNHRC") has established a number of mechanisms designated as 'Special Procedures' in relation to either specific countries or to address wider global issues. A Special Procedure can involve an individual called a Special Rapporteur who has an independent mandate over a specific issue or problem, such as torture, and undertakes a range of activities in order to research and address that problem.

The two main Special Rapporteurs most likely to be relevant to a death penalty case are the UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions.[92] However, in some circumstances other Rapporteurs may be useful. For example a lethal injections drugs issue may fall within the remit of the Rapporteur on Health, or a discriminatory application of the death penalty issue may fall under the remit of the Rapporteur on Racial Discrimination.

8.7 What can they do?

The three key things that these Rapporteurs do are as follows:

1) They can send urgent appeals to states (in the US this would be to the State Department) requesting that the state acts to protect the people in question.

[92] On May 3, 2012 the Special Rapporteur on Torture was Juan Mendez (<http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx>) and the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions was Christof Heyns (<http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>).

2) They undertake fact-finding visits to countries to investigate particular issues. This can be an extremely powerful tool if there is a widespread and significant problem. The Rapporteurs, if they do conduct an investigation, will be given extremely good access to sites and documents that might otherwise be restricted.

3) Every year they produce a public report to be submitted to the United Nations Commission on Human Rights and to the General Assembly of the United Nations on their activities, and their communications with governments during the year.

8.8 Complaints mechanisms

In most cases, you will want a Rapporteur to send an urgent appeal to the US requesting that they cease or refrain from activity that involves the torture, or arbitrary execution of a prisoner. This urgent appeal is similar to a Request for Precautionary Measures by the Inter-American Commission, but may carry more or less weight depending on whom you are trying to persuade.

The precise format of the complaints procedure will vary depending on the Rapporteur. For more precise information please go to the website in question:

1. The Rapporteur on Torture has a model questionnaire on his website detailing the information to be provided, if possible. Please see http://www.ohchr.org/EN/ Issues/Torture/SRTorture/Pages/model.aspx.

2. The Rapporteur on Extra-Judicial, Summary and Arbitrary Executions has a similar web page detailing what information needs to be provided before he can take action. In general this needs to relate to a past execution or an 'imminent' violation of the right to life. The details of what is required is provided at http://www.ohchr.org/EN/Issues/Executions/Pages/Information.aspx

8.9 Conclusion

The use of international mechanisms designed to protect and promote human rights is only one part of an effective defense strategy in a death penalty case. However, they can be an effective source of additional pressure at key stages in proceedings, particularly where there is already an international element owing to the nationality of the defendant. The relative generosity of international norms concerning fair trial rights, the less restrictive procedural bars and the human rights focus of these mechanisms can make them particularly attractive towards the end of the appeals process as domestic avenues are closed off. Indeed, many are only available at this stage, as you must often exhaust local remedies. Yet it is important to consider using them as early as possible, as it is often when domestic courts have the most latitude that they are most able to take into consideration the international position on issues when making a decision. These mechanisms are not complex – they are often designed to be used by lay petitioners - and organizations like *Reprieve* exist to advise and, in certain cases, to take a great deal of the burden from local lawyers. We hope that this will encourage you to think about how these mechanisms, of which the Commission and the Special Rapporteurs are by no means the only options, might be useful in your cases.

Appendices

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APPENDIX III: LITIGATING FOREIGN NATIONALITY ISSUES

1. "Vienna Convention on Consular Relations."
2. Excerpts from U.S. Bilateral Consular Conventions.
3. Canons of treaty construction as determined by the U.S. Supreme Court.
4. VCCR cases: "top ten list."
5. MCLAP Case Digest.
6. Aceves W, Summary and analysis of *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 *ASIL* (Mar. 31, 2004).
7. Warren M, Understanding the *Sanchez-Llamas* Decision.
8. McGuinness M, Summary and analysis of *Medellín v. Texas*.
9. U.S. Department of State, "Consular Notification and Access" 21 (3rd ed. 2010) [An instruction manual the U.S. Department of State gives federal, state, and local law enforcement regarding foreign nationals and consular assistance].
10. Buys C; Pollock S; Pellicer I , "Do Unto Others: The Importance of Better Compliance with Consular Notification Rights", 21 *Duke J. Comp. & Int'l L.* 101 (2011).
11. Rudenstine S, 'Appeal and Post Conviction Review', in Ramirez L (ed.) *Cultural Issues in Criminal Defense*, New York: Juris Publishing (3rd edition, 2010).

APPENDIX IV: ACCESSING INTERNATIONAL LEGAL MECHANISMS

1. Inter-American Commission on Human Rights, Petition and Case System: informational brochure.
2. Sample IACHR decisions addressing foreign nationals' capital cases.

3. Working Group on Arbitrary Detention: Information on Individual Complaints Procedure.

4. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Information on Urgent Appeals.

5. Online Resources for International Law and Human Rights Issues.

Acknowledgements

A special thanks to the following contributors, without whom completion of this manual would not have been possible:

Mark Warren for his contribution to the development and drafting of the manual, and compilation of the Appendix.

Hofstra Law Review, Juris Publishing and Linda Friedman Ramirez for the generous use of their materials.

Greg Kuykendall and Mexican Capital Legal Assistance Project for use of the MCLAP case digest.

Cindy Galway Buys, Scott Pollock, Ioana Navarette, and the *Duke Journal of Comparative and International Law* for use of their article 'Do Unto Others: The Importance of Better Compliance with Consular Notification Rights',

Anne James and the International Justice Project for use of their publication "Equal Protection: Consular Assistance and Criminal Justice Procedures in the USA. An Introductory Guide for Consulates," Second Edition, International Justice Project (3rd edition, 2009).

Professor William J. Aceves, Professor Margaret E. McGuinness, and The American Society of International Law, for use of articles from ASIL Insights.