

# The plight of foreign nationals on death row in Malaysia and Indonesia

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Article 14 of the International Covenant on Civil and Political Rights (1966) mandates that criminal sanctions can only be imposed against an individual who has been subject to due process of law. In order to make clear what international standards specifically entailed as far as those facing the death penalty were concerned, the Economic and Social Council in 1984 promulgated Safeguards Guaranteeing their rights, and in 1996 added a specific instruction to the international Safeguards, so as: to ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court. However, it is an empirical question as to whether or not the right to a fair trial is guaranteed in cases where foreign nationals are charged with capital offences around the world. This project will investigate whether this is the case in two Asian countries.

Article 36 (1b) of the Vienna Convention on Consular Relations 1963, ratified by 117 nations, provides that the competent authorities of a State in which a foreign national is 'arrested or committed to prison or to custody pending trial or is detained in any other manner' shall without delay inform the consular post of that person's State. This is because the consulate may be able to provide assistance with access to competent counsel, the investigation of the case,

including collating information for mental health defences or mitigation, and may intervene in trials when due process rights are breached. At the later stage, the consulate may also make representations to the governor or the clemency authority on behalf of the prisoner. Various UN documents have since reminded member states of their obligation and yet research suggests there is considerable variation in state practices as regards the assistance given. Furthermore, in many countries the death penalty is used disproportionately against foreign nationals, especially migrant workers, from poor and developing countries in Asia and Africa, and governments repeatedly express concerns about the executions of their own citizens abroad.

Research by the NGO Reprieve found that foreign nationals have been executed in the United States without ever being informed of their right to consular assistance, despite US ratification of the Vienna Convention in 1969, but, we know almost nothing about provisions for foreign nationals in other jurisdictions that have less developed due process of law. For the past few decades concerns have been raised about the high number of foreign workers executed without being informed of their Consular rights, particularly in Saudi Arabia. The beheading in 2011 of an Indonesian overseas domestic worker in Saudi Arabia, who had been tried without a defence lawyer, led

the Indonesian government to set up a taskforce to protect Indonesian migrant workers facing the death penalty abroad. Meanwhile, the majority of recent executions in Indonesia have been of foreign nationals. This creates an interesting situation whereby some retentionist jurisdictions make great efforts to save their own citizens from execution in other countries, while flagrantly disregarding the due process rights of foreign nationals on their own soil. As such, it provides potentially fertile ground for theoretical and empirical investigation of the influence of citizenship in delivering fair and equal justice in countries that sentence people to death. This study will focus its attention on Malaysia, where almost half of the over 1000 persons on death row are foreign nationals, the majority for drug offences, and where there is still a mandatory death penalty; and on Indonesia where the death penalty is discretionary but where attempts to deter potential drug traffickers are resulting in the widespread application of the death penalty to foreign nationals.

The research will seek to establish:

1. How many foreign nationals are on death row and have been executed in the last decade?
2. What consular rights, if any, have they received?
3. What efforts are being made by human rights organisations and civil society in both the host jurisdiction and in the foreign national's home country to provide assistance to foreign nationals on death row?

4. What efforts are the governments making in each jurisdiction to protect the rights of their own citizens when arrested for capital crimes in other retentionist jurisdictions?
5. How do those governments and their representatives explain their efforts to protect their own citizens abroad in light of their own treatment of foreign nationals at home?

### Research Methods

The Oxford team will work closely with NGOs in both jurisdictions under study. We will interview consulate staff, lawyers, NGOs, journalists and others involved in representing or assisting foreign nationals on death row. Elite interviews will be conducted with senior politicians and criminal justice policy makers in each country. In addition to these qualitative data, efforts will be made to secure accurate quantitative data about the nationality of all those on death row and all who have been executed in the past decade.

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