International Commission of Jurists

Administration of the Death Penalty in the United States

June 1996

International Commission of Jurists (ICJ)

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Cover photographs by World Council of Churches (WCC)
Geneva / Switzerland

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ISBN 92 9037 094 7

Printed in France, Imprimerie Abrax -Chenôve, France

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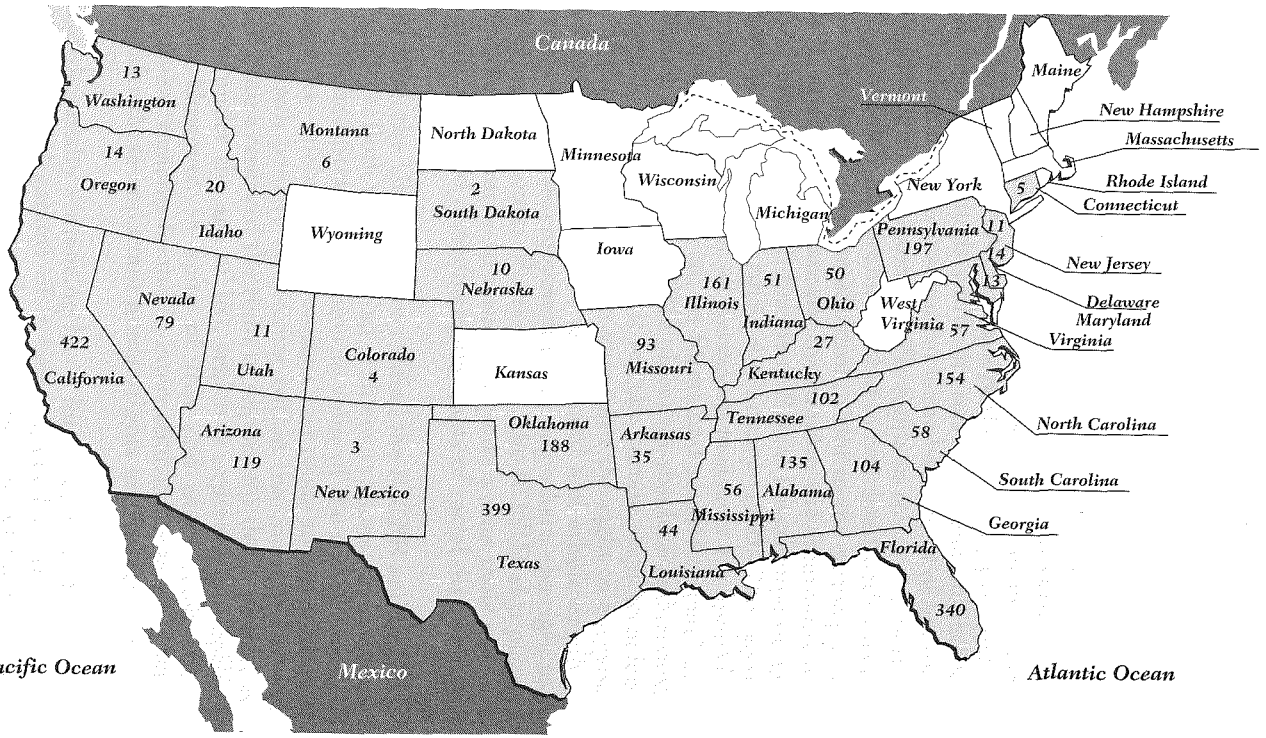

States without death penalty*

Death penalty states with no prisoners on death row

Death penalty states and the number of death row prisoners as of fall 1995

* Alaska and Hawaii (not shown), and the District of Columbia are jurisdictions without capital punishment statutes.

Preface

The International Covenant on Civil and Political Rights (ICCPR) is an international instrument that came into force on 23 March 1976 after the thirty fifth deposit by a country (State Party) of an instrument of ratification. The ICCPR defines and circumscribes a variety of basic human rights and freedoms, and imposes an absolute and immediate obligation on each of the countries that have ratified it to "respect and ensure" these rights "to all individuals within its territories and subject to its jurisdiction." Included in this instrument is the basic right of non-discrimination, the right to a fair trial and specific rights in respect of death penalty sentencing, which is not prohibited but is restricted with special safeguards and a view to its ultimate abolition. Prior to the coming into force of the ICCPR, another international instrument, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) had already been in force since 4 January 1969. The purpose of this Convention is to "adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations" in all fields of public life. Again, the ICERD places an absolute and immediate obligation on countries that ratify it to take certain steps to achieve this end. One of these obligations is to guarantee the right to everyone - without distinction as to race, colour, or national and ethnic origin - to equality before the law in the enjoyment of, among others, the right to equal treatment before the courts. Furthermore, the ICERD also places an obligation on these countries to assure everyone within their jurisdiction effective protection and remedies against acts of racial discrimination.

In 1992, the United States ratified the ICCPR and in 1994, it ratified the ICERD. Both were ratified with reservations, or qualifications made by the United States in relation to some of the rights contained in these instruments - included reservations that relate to the practise and procedure of death penalty sentencing within the country. For example, the United States reserved the right to impose the death penalty on juveniles (persons under the age of 18), which is expressly prohibited under the ICCPR. However, in spite of this and other reservations, the US Government remains bound in international law to meet various obligations under these important human rights instruments.

Death penalty sentencing has a long history in the United States of America and allegations of it being applied in an unfair and racially biased manner is not new. In 1972, a decision of the US Supreme Court stated that the application of the death penalty under the then existing laws of the States of Georgia and Texas were "arbitrary and capricious".

The effect of this decision was to hold in abeyance all death penalty laws, at state and federal levels - but several state legislatures soon revived the penalty by amending legislation. Others followed, and in 1988, so did the federal government. In recent years, with the increase in violent crimes, those jurisdictions within the US that provide for death penalty sentencing have also aggressively adopted a policy of increasing its imposition and implementation, even after the US Government ratification of the ICCPR and the ICERD. As a result of this policy, according to the NAACP Legal Defense Fund and Educational Fund Inc., as of 31 January 1996, there were 3,061 death row offenders throughout the United States and 318 executions had taken place since January 1973. The overwhelming majority of the current death row offenders are state offenders in state prisons. All executions have been of state offenders.

Today, United States federal law, United States military law and the law of 38 states within the United States of America provide for death penalty sentencing. However, the practices and procedures of death penalty sentencing in these jurisdictions, while having similarities, are not all the same. The reason for this variation is that each jurisdiction is free to make its own laws, with one overriding qualification, they must be compatible with the US Constitution, which confers basic rights upon all US citizens. These rights are thus minimum rights and the states are free to provide for greater protection. After the 1972 US Supreme Court decision, all jurisdictions that have re-introduced the death penalty have included in their legislation the following protections against the risk of an "arbitrary and capricious" application of the penalty:

- a bifurcated trial, where guilt and innocence is determined first, followed by a separate hearing for sentencing;
- the sentencer's discretion being guided through prescribed aggravating factors and unlimited mitigating factors;
- at the state level, automatic review of a death sentence to the superior state court.

After a conviction and a sentence of death has been confirmed, all offenders are able to bring *habeas corpus* applications for alleged violations of their constitutional rights. Federal offenders, who can only bring an application for breaches of federal constitutional rights, initiate their applications in the federal courts. State offenders can bring an application for breaches of state and federal constitutional rights and they are required to exhaust their *habeas* remedies in the state court before they can initiate a federal *habeas* claim in the federal courts. Through these post conviction appeals, offenders who allege that their conviction and/or sen-

tence was reached in violation of their constitutional due process rights, can challenge these allegations, and if proven, have their conviction and/or sentence set aside and an order for a new hearing made. In some cases proof of the alleged violation will also establish the offender's innocence, in others there will be a finding that there has not been a proper conviction and sentence for capital murder. A result of these necessary post conviction appeals has been that offenders sentenced to death are spending long periods in prison not knowing whether or not they will, in fact, be executed.

Despite protections from the most serious and irreversible criminal penalty, allegations of its racial and unfair application have continued. Support has also been given to these allegations by sophisticated empirical studies and specific cases where innocence has been established. There is no doubt that death penalty sentencing is a very emotive issue that has been very prominent on the political agenda at both state and federal levels within the United States. The penalty as such has been held to be constitutional, and state and federal legislatures and courts have endeavoured to take steps to address some of the identified injustices. However, in its application, almost no regard has been had to accepted international norms, specifically US obligations under the ICCPR and the ICERD.

In light of the increase in the number of death penalties being imposed and implemented, the continued allegations of its unjust application and the ratification by the US Government of the ICCPR and ICERD, the International Commission of Jurists (ICJ) decided to send a fact-finding mission to investigate federal and state practices and procedures in respect of capital punishment sentencing. In particular, the mission wished to examine whether such practices and procedures conformed to the international obligations undertaken by the United States. The ICJ does not have a policy on the death penalty and the task of the mission was to investigate and examine the country's implementation at the federal (excluding the military and *extra territoriae* jurisdictions under the control of the US Government) and state levels.

The mission consisted of Mr. Fali S. Nariman (Senior Advocate of the Supreme Court of India and Chairman of the ICJ Executive Committee), Justice Lennart Groll (retired Judge of the Stockholm Court of Appeals and an ICJ Vice-President), Justice Kayode Eso (retired Justice of the Supreme Court of Nigeria) and Mrs. Sigrid Higgins (Executive Secretary of the ICJ and a lawyer from Australia). With a view to gathering first hand information concerning the practices and procedures of capital punishment sentencing as it actually operates in the United States, the members of the mission visited Washington DC and the States of Pennsylvania, Georgia and Texas during the second half of January

1996, and personally conducted inquiries at both state and federal levels. These places were chosen as being illustrative of how death penalty sentencing operated throughout the United States. The mission met with a variety of people including:

- several federal and state judges;
- various federal and state prosecutors;
- defence attorneys;
- representatives of both federal and state attorney general's offices;
- representatives of bar associations (including the American Bar Association);
- government officials;
- professors of law and sociology; and
- members of civil rights and human rights organizations.

The mission's visit was made possible through the assistance of the ICJ affiliate in Washington DC, the International Human Rights Law Group, who made all the arrangements and provided valuable assistance and information both before and after the mission.

During its visit, the mission was also provided with useful data and documentation concerning the operation of capital sentencing and its implementation in the United States, as well as the intricate relation affecting such practices and procedures between the state and federal levels from all the individuals, bodies and organizations it met. The mission has also been assisted by one of its other affiliates in the United States, The American Association for the ICJ, Inc., in New York.

Under the Rule of Law, the application of the death penalty in an unjust and racially discriminatory manner is unacceptable. Alleged perpetrators of serious crimes should and must be brought to justice, however, they must also be dealt with in accordance to justice. This report of the ICJ mission provides a disturbing account of the difficulties involved - even for a country which is regarded by many as the world's leading democracy and protector of basic individual rights and freedoms - in ensuring that the implementation of the death penalty is in accordance

with accepted international norms and its obligations under ratified international human rights instruments. More needs to be done, and the ICJ urges the United States and other countries with death penalty sentencing - including India and Nigeria - to take the necessary steps to ensure that there is greater compliance with their international obligations.

Geneva,
June 1996

Adama Dieng
Secretary-General
International Commission of Jurists

Introduction

Any consideration regarding the proper administration of the death penalty in the United States must begin with the US Constitution,[1] and with a fair understanding of its provisions in this area. Particularly relevant to the issue of capital punishment are:

- the Sixth and Seventh Amendments, which preserve the right of trial by jury and guarantee that in criminal prosecutions, the accused shall have the right to assistance of Counsel and to a speedy and public trial by an impartial jury of the state and district where the crime has been committed;

- the Eighth Amendment, which guarantees that in criminal cases "cruel and unusual punishments" will not be inflicted;

- and the Fourteenth Amendment, which prohibits the State (including the states of the Union) from depriving any person of his/her life or liberty without due process of law, or from denying any person within the United States the equal protection of its laws.

But an understanding of the provisions of the US Constitution is not reached by a mere reading of its provisions. One must know and understand how the relevant provisions have been interpreted by the final judicial arbiter, the Supreme Court of the United States - whose nine Justices enjoy life-tenure, are greatly respected and sit *en banc*. Through its decisions of the compatibility of laws with the constitution, the US Supreme Court has acted as a monitor of the quality of justice and moulded the laws of capital punishment, particularly in respect of the various state criminal justice systems have primary responsibility for ordinary crimes and where the large majority of Criminal offences - including most of those that are punishable by death - are committed and prosecuted. The

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1 The United States of America is a federated republic of 50 states and the District of Columbia. The latter covering the area in which the city of Washington, the seat of the US Federal Government is located and in respect of which the US Federal Legislature has exclusive sovereignty. Each of the 50 states however, has a large measure of independence, having its own constitution, elected government and legislature, laws and court system. But their laws must also be compatible with the US Constitution, which confers basic rights upon all US citizens. The most important rights and liberties are those contained in the Amendments to the US Constitution, particularly those known as the Bill of Rights.

federal criminal justice system has equally been affected by the decisions of the US Supreme Court, however, far fewer criminal offences, including federal capital offences, are committed in violation of federal law and prosecuted in the federal courts.

Moreover, to understand and assess the scope of federal laws and the different laws of each of the states, including laws providing for capital punishment, it is not sufficient to know that such laws are not arbitrary or discriminatory *per se* and hence valid and constitutional. One must also remain informed as to how the laws are being applied, and whether in practice they are administered fairly, without discrimination and in accordance with international standards accepted by the United States.

The present Report consists of three parts:

Part I encapsulates the landmark decisions of the US Supreme Court in *Furman* (1972), *Gregg* (1976) and *McCleskey* (1987), and sets out the main features of two recent official studies (February 1990 and March 1994) on racial disparity in the charging and imposition of capital sentences. It goes on to analyse the broad features of the US ratification of two principal international human rights instruments, namely the International Covenant on Civil and Political Rights of 1966 (ICCPR, ratified in June 1992) and the International Convention on the Elimination of All Forms of Racial Discrimination of 1966 (ICERD, ratified in October 1994). The consequences of the ratification and its impact on capital sentencing are then recorded in the form of General Conclusions of the Mission. The thrust of these conclusions is that existing practices and procedures in capital punishment sentencing do not conform to international obligations undertaken by the US under the ICCPR and the ICERD, and that such procedures and practices are both "arbitrary" and "discriminatory", in the sense in which these expressions have come to be understood in international law. The Overall Concerns - General Conclusions - are followed by the Findings of the Mission based on what is stated in Part I and II.

Part II contains a more detailed analysis – with reference to extensive supporting documentation – of past and present practice and procedure of death penalty sentencing in the United States. Introductory chapters in support of this analysis trace the historical background of capital punishment in the US, marshal available statistics on the subject, and include a detailed study of the obligations undertaken and assumed by the United States under international law. Chapter 4 of Part II also provides a summary of the various stages of state and federal court proceedings in death penalty cases.

Part III contains the relevant basic international instruments referred to in the text, as well as the statistical and documentary appendices to the Report.

Part I

Chapter 1

The Laws of Capital Punishment

"What the Judges Say it Is"

Prior to 1972, every state in the US that authorised capital punishment had abandoned mandatory death penalties,permitting instead the sentencing authorities unguided and unrestrained discretion regarding its imposition in particular capital cases. Under state laws, no standards governed the selection of the penalty - convicted defendants lived or died depending on the whim of one person (the Judge) or of twelve (the Jury). But the constitutional status of discretionary sentencing in capital cases changed in June 1972. In the landmark case of *Furman* v. *Georgia* and in companion cases,[2] the momentous question raised in the country's highest court was whether the imposition and implementation of the death penalty under laws of the States of Texas and Georgia constituted "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments.

Two Justices (Brennan and Marshall) concluded that the Eighth Amendment prohibited the death penalty altogether, and voted on that ground to reverse individual judgments sustaining capital sentences. Three Justices (Douglas, Stewart and White) were unwilling to hold the death penalty unconstitutional *per se* under the Eighth and Fourteenth Amendments, but voted to reverse the judgments under appeal on other grounds. Specifically, in separate opinions the three Justices concluded that discretionary sentencing unguided by legislatively defined standards violated the Eighth Amendment because it was "pregnant with discrimination" (Douglas), because it permitted the death penalty to be imposed "wantonly" and "freakishly" (Stewart), and because "there was no meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not" (White). It was the opinion of these three Justices that became the governing *ratio* (or rule) in *Furman.* On this basis, death-sentences imposed under existing federal and state law (of which there were more than 24) were set aside.[3]

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2 408 US 238 (1972); 33 L.Ed. 2d 346 at page 357.

3 See *Moore* v. *Illinois* (1972) 408 US 786; 33 L.Ed. 2d. 706, rehearing denied 409 US 897; 34 L.Ed. 2d. 155; *Stewart* v. *Massachusetts* (1972) 408 US 845; 33 L.Ed. 2d. 744 and list of decisions in *Memorandum Cases,* 33 L.Ed. 2d. 745 to 765 setting out in brief the orders striking down death-sentences under death-penalty statutes of more than twenty-four states.

Furman v. *Georgia* (1972) was decided in an atmosphere suffused with concern regarding race bias in the administration of the death penalty, particularly in the southern states. Behind the condemnation of unguided discretion (by the plurality in *Furman*) lay the spectre of racial prejudice, a factor specially emphasised in the concurring opinion of Justice Douglas: "It is the poor, the sick, the ignorant, the powerless and the hated who are executed. One searches our chronicles in vain for the execution of any member of the affluent section of the society" (408 US 238, 251).

Following *Furman*, fourteen states and the District of Columbia abolished their death penalty laws. But since only two of the Justices in the plurality (Brennan and Marshall) had pronounced the death penalty invalid "in all circumstances",[4] those states wishing to reinstate the penalty concentrated upon drafting statutes that would accord with – and address – the various criticisms of current legislation expressed in the concurring opinions of Justices Douglas, Stewart and White. Thirty-five of these states reviewed and revised their capital punishment guidelines in the light of the opinions issued by these three Justices, primarily in an attempt to eliminate the influence of race from the death sentencing process.

But the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was permissible – or required – in imposing the death penalty in accordance with the Constitution. Some states responded to what they thought to be the dictate of *Furman* by adopting mandatory death penalties for a limited category of specific crimes, thus eliminating all discretion from the sentencing process in capital cases. Other states attempted to continue the practice of assessing the degree of culpability of each individual defendant convicted of a capital offense, while at the same time complying with *Furman* by providing standards to guide sentencing discretion.

These two divergent responses to *Furman* were best exemplified in new laws enacted by the States of North Carolina and Louisiana on the

4 When in *Gregg* v. *Georgia* (1976) the use of capital punishment was constitutionally upheld, Justice Marshall and his colleague Justice Brennan began their practice of henceforth dissenting in every case that upheld the death penalty. In a book which surveyed law and politics in the world's leading courts (*Judging the World* by Garry Strugess and Philip Chubb - Butterworths 1988), Justice Brennan was asked at what point he found precedent no longer binding. He replied:

> "In my own case I have steadfastly adhered to the view that the death penalty is a cruel and unusual punishment in violation of the 8th Amendment. I have expressed that view in every death penalty case in the last ten years and *I will go right on until after I am finished here.*" (*emphasis added*).

one hand and those of Georgia, Florida and Texas on the other. North Carolina and Louisiana completely eliminated all discretion by the sentencing body in a limited number of specific crimes, instead substituting a mandatory death penalty in such cases. Revised legislation in the States of Georgia, Florida and Texas attempted to furnish controlling guidelines to the sentencing body.

In January 1976, nearly four years after *Furman*, a Conference of Justices decided to review one case from each of the five states. In opinions handed down in these five cases (2 July 1976)[5], four of the Justices (Burger C.J., White, Blackmun and Rehnquist JJ) took the position that all of the reviewed statutes in each of the five states complied with the Constitution. Two Justices (Brennan and Marshall JJ) took the position that none of them so complied. As a result, the disposition of each case varied according to the votes of the three other Justices (Stewart, Powell and Stevens JJ) whose opinions determined the plurality in each of the cases. The plurality upheld the constitutionality of the statutes of Georgia, Florida and Texas, but declared the newly enacted laws of North Carolina and Louisiana to be unconstitutional. In this latter connection, the joint opinions (of Stewart, Powell and Stevens JJ) reasoned that to comply with *Furman*, sentencing procedures should not create "a substantial *risk* that the death penalty will be inflicted in an arbitrary and capricious manner." (*emphasis added*)

It was, thus, in connection with this group of cases that the Supreme Court first reached the conclusion that capital punishment, *per se*, was not unconstitutional.[6] At the same time, however, *Gregg* v. *Georgia* (1976) also held that a constitutional violation would be established whenever a plaintiff demonstrated a "pattern of arbitrary and capricious sentencing". As Justice Stewart said in the judgment of the Court:

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5 *Gregg* v. *Georgia* 428 US 153 (1976); *Profitt* v. *Florida*, 428 US 242 (1976); *Jurak* v. *Texas*, 428 US 262 (1976); *Woodson* v. *North Carolina*, 428 US 280 (1976) and *Roberts* v. *Louisiana*, 428 US 325 (1976). It was in *Woodson* v. *North Carolina* that the Court emphasised the requirement of the Eighth Amendment that state and federal courts strike a "special balance" in the context of capital sentencing (at page 305):

> "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

6 The judgment of the Court delivered by Justice Stewart said: (428 US 153, 187). "We hold that the death penalty is not a form of punishment that may never be imposed regardless of the circumstances of the offense, regardless of the character of the offender and regardless of the procedure followed in reaching the decision to impose it."

> "A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries, with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." (420 US 153, 195, footnote 46)

Four years after *Gregg*, in *Godfrey* v. *Georgia* 446 US 420 (1980) the Court held (in a 6 to 3 decision, 6:3) that a state that authorised capital punishment had a constitutional responsibility to tailor and apply its laws in such a way as to avoid arbitrary and capricious infliction of the death penalty. In the words of the judgment: "standardless sentencing discretion must be obviated". In a concurring opinion by Justice Marshall (to which Justice Brennan subscribed) it was recorded that state appellate courts were incapable of guaranteeing the kind of objectivity and even-handedness that the Court had contemplated and hoped for in *Gregg*. Further,

> "the disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences (446 US 420, 439).... The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system - and perhaps any criminal justice system - is unable to perform. In short, it is now apparent that the defects that led my Brothers Douglas, Steward and White to concur in the Judgment in *Furman* are present as well in the statutory schemes under which defendants are currently sentenced to death" (446 US 420, 440).

In 1982, in *Eddings* v. *Oklahoma* 455 US 104, 112 (1982), the Court indicated it was more concerned with the risk of imposition of an arbitrary sentence than the proven fact of such imposition, asserting that capital punishment must be "imposed fairly and with reasonable consistency or not at all".

Chapter 2

Racial Discrimination and the McCleskey Case

The Supreme Court thus ruled decisively on the unconstitutionality of arbitrary capital sentencing. But when five years later a pattern of arbitrary sentencing outcome was factually identified,[7] the Court held by a narrow majority (5:4) that statistical evidence could not support an inference of proven discrimination against the accused, as was allowable in Title VII cases.[8] In capital cases, studies that indicated "a discrepancy that appears to correlate with race" were insufficient to justify a constitutional challenge.

In *McCleskey* v. *Kemp*, 481 US 279 (1987), the Supreme Court of the United States rejected an equal protection challenge to the Georgia capital sentencing process. The challenge, brought by a black man convicted of murdering a white victim, alleged racial discrimination in the administration of the sentencing process. A statistical study (the Baldus Study) had revealed significant disparities in the imposition of the death sentence based on the race of the victim. According to the study defendants of either race who killed white victims were more than four times as likely to receive the death penalty as were defendants whose victims were black. Moreover, black defendants convicted of killing white victims had the greatest likelihood of being sentenced to death.

In an opinion by Justice Powell, (joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia), it was observed that a basic principle of US constitutional law held that a defendant who alleged an

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7 Soon after the death penalty was revived by the decisions in *Gregg* v. *Georgia* (1976), efforts had begun to document racial bias in the administration of the death penalty. The most sophisticated and persuasive of these documents was the Baldus Study, a legal and empirical analysis of the levels of arbitrariness and discrimination in the various stages of Georgia's capital sentencing system, post-*Furman*. This study finally reached the Supreme Court in the case of *McCleskey* in Justice Powell's last year on the Court.

8 As explained in Chapter 1 of Part II, in the 1960s, the US Congress enacted three comprehensive civil rights laws, one of which was the Civil Rights Act of 1964. Title VII of that Act related to employment discrimination and provided for civil remedies where there was proof of discrimination. In cases dealing with Title VII, the Supreme Court had accepted statistics in the form of multiple regression analysis to prove statutory violations, (see *Bazemore* v. *Friday* 478 US 385, 400-401. Opinion of Justice Brennan). But in criminal capital cases, the view of the majority of the judges was that each case had to be decided on its own merit, that each jury was unique in its composition, and that the decision rested on the specifics of each case, which would vary according to the characteristics of the particular individual defendant and the facts of the particular capital offence.

equal protection violation had the burden of proving "the existence of purposeful discrimination", and that a corollary to this principle was that "a criminal defendant must prove that the purposeful discrimination had a discriminatory effect on him".Thus, to prevail under the Equal Protection Clause, the Court said,

> "*McCleskey* must prove that the decision-makers in his case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence. Instead, he relies solely on the Baldus study. *McCleskey* argues that the Baldus study compels an inference that his sentence rests on purposeful discrimination. *McCleskey*'s claim that these statistics are sufficient proof of discrimination, without regard to the facts of a particular case, would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."

In his dissenting opinion, Justice Brennan (joined by Justices Marshall, Blackmun and Stevens) asserted that McCleskey's inability to prove the influence of race on any particular sentencing decision was irrelevant in evaluating his Eighth Amendment claim. Since *Furman,* had not the Court been more concerned with the risk of the imposition of an arbitrary sentence rather than the proven fact of one? Justice Brennan then illustrated the "risk" faced by Warren McCleskey in homely prose:

> "At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell *McCleskey* that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence: 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victims had been black, while, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been black. Finally, the assessment would not be complete without the

> information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line; *there was a significant chance that race would play a prominent role in determining if he lived or died.*
>
> The Court today holds that Warren McCleskey's sentence was constitutionally imposed. It finds no fault in a system in which lawyers must tell their clients that race casts a large shadow on the capital sentencing process... (481 US 279 at 321)..... Concern for arbitrariness focuses on the rationality of the system as a whole, and a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational." (481 US 279 at 323) (*emphasis added*).

Mr. Anthony Lewis had criticized Justice Powell's plurality opinion in *McCleskey* as "effectively condoning the decision of racism in a profound aspect of our law". Justice Powell did not take the same view. In fact, a month before he retired, he joined with Justices Brennan, Marshall, Blackman and Stevens to constitutionally outlaw victim-impact statements. "It creates an impermissible risk", said Powell in an opinion of the Court "that the capital sentencing decision will be made in an arbitrary manner". The appropriate focus in sentencing, he said, is the character and culpability of the defendant, not the character of the victim or the emotional distress caused to the victim's family [*Booth* v. *Maryland*, 482 US 496, 503-(1987)].[9]

Later, following his retirement, in an article published in the *Harvard Law Review* (102 *Harv. L.R.* p. 1035), Justice Powell surveyed the problems posed by "excessively repetitious litigation" in capital cases. The closing sentence of the article provides some hint of his growing doubts about the death penalty: "If capital punishment cannot be enforced even where innocence is not an issue, and the fairness of the trial is not seriously questioned, perhaps Congress and the state legislatures should take a serious

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9 But *Booth* v. *Maryland* was overruled by a strongly divided Court only four years after Powell's decision. In *Person's Payne v. Tennessee,* 115 L Ed. 2nd 720-(1991), plurality held that victim impact evidence may be tendered by the state before a capital sentencing jury and be considered by the jury prior to sentencing. According to the decision, there is nothing unconstitutional about presentation of victim impact evidence.

look at whether the retention of a punishment that is being enforced only haphazardly is in the public interest."[10]

10 Two years later, in a conversation with his biographer John C. Jefferies, the result of which has been published in the *Biography of Justice Lewis F. Powell Jr.* in 1994, Powell was asked whether he would wish to change his vote in any specific case. The conversation as recorded is significant:

"Yes. *McCleskey* v. *Kemp.*"

"Do you mean you would now accept the argument from statistics?"

"No. I would vote the other way in any capital case."

"In any capital case?"

"Yes."

"Even in *Furman* v. *Georgia*?"

"Yes, I have come to think that capital punishment should be abolished."

"Capital punishment," Powell then added, "serves no useful purpose." The United States was unique among the industrialised nations of the West in maintaining the death penalty, "and it was enforced so rarely that it could not deter." Most important, "the haggling and delay and seemingly endless litigation in every capital case brought the Law itself into disrepute."

Chapter 3

Post McCleskey - Official Studies: Racial Disparity in Charging, Sentencing and Imposition of Death Sentences

A year after the *McCleskey* judgment was handed down, Congress in enacting new drug legislation re-introduced the federal death penalty by including provision for the application of capital punishment for certain federal offenses (e.g. murders committed in connection with narcotics violations). This law – the Anti-Drug Abuse Act of 1988 (PL-100-690) – also required the Comptroller General to conduct a study of the various procedures used by states for determining whether or not to impose the death penalty in specific cases. The Comptroller General was to report to Congress on whether any or all of the various procedures had created "a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death" (Section 848 (O) (2) of 21 USC. *Right of Defendant to Justice without Discrimination*). In conducting the study, the General Accounting Office was required to:

> "(a) use ordinary methods of statistical analysis, including methods comparable to those ruled admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964;[11]
>
> (b) study only crimes occurring after 1 January 1976, and
>
> (c) determine what, if any, other factors may account for any evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death..."

To fulfil the mandate of enacted law, the US General Accounting Office undertook an evaluation synthesis – i.e. a review and critique of the existing research on the subject. It subsequently submitted a report to the Senate and House Committee on the Judiciary in February 1990 con-

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11 And this requirement, despite the fact that in *McCleskey*'s case methods of statistical analysis in race discrimination cases (under Title VII of the Civil Rights Act) had been held to be inapplicable to capital-sentencing cases.

cerning the administration of death penalty sentencing in the individual states. The report concluded that there was a "pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty after the *Furman* decision." In eighty-two percent of the studies considered in the report, the race of the victim was found to have influenced the likelihood of the defendant being subjected to a prosecutorial decision to charge for a capital offence. It was also found that those who murdered whites were more likely to receive the death penalty than defendants convicted of murdering blacks. Moreover, the finding was remarkably consistent among all the states of the Union having capital punishment statutes.[12] The report concluded that strong "race-of-victim-influence" permeated all stages of the criminal justice system.[13]

In March 1994, the Sub-Committee on Civil and Constitutional Rights established by the Committee on the Judiciary (of the 103rd Congress) submitted its report on *Racial Disparities in Federal Death Penalty Prosecutions* for the period 1988 to 1994. Its findings did not reveal any race-of-victim bias, but did disclose that an analysis of prosecutions under the federal death penalty provisions of the Anti-Drug Abuse Act, 1988 showed eighty-nine per cent of the defendants "selected" for capital prosecution to be either African-American or Mexican-American. The Sub-Committee recorded that the number of prosecutions under the 1988 Act had been increasing since 1991, with no decline in racial disparity, and that all ten of the then approved federal capital prosecutions had been against defendants of African-American origin. The report of the Sub-Committee concluded:

> "... this pattern of inequality adds to the mounting evidence that race continues to play an unacceptable part in the application of Capital punishment in America today. It confirms

12 Jurisdictions with capital punishment statutes after *Furman* are set out in Part II Chapter 2 at table 2.

13 On 25 January 1996, during a meeting with the Deputy Assistant Attorney General, Criminal Division, of the US Department of Justice, the Mission was informed that the Department had prepared and submitted a report to the House Sub-Committee commenting on the General Accounting Office Report, and stating that the weight of reliable empirical evidence was that the primary determining factors in death penalty sentencing were relevant legal factors and not racial factors. The Mission was also told that the Department had formed the view that the statistical studies referred to in the GAO Report could not be used as an indicator of the factors taken into account by decision-makers during the legal process leading to a possible capital sentence. At the meeting the Deputy Assistant Attorney General agreed to provide, that evening, a copy of the Department's Report. To date, no copy has been provided, despite several telephone requests immediately after the meeting and a written request on 8 February 1996.

Justice Blackmun's recent conclusion – 'that the death penalty experiment has failed."[14]

14 The reference in the report (*Racial Disparities in Federal Death Penalty Prosecution: 1988-1994*) to Justice Blackmun's observations is taken from that Justice's or his reasoned dissent in *Callins* v. *Collins* (22 February 1994) 114 S.C. 1127, where the majority of the Court denied *certiorari* to the petitioner under sentence of death. In his dissent, Justice Blackmun had written:

> "The arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race. Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards. No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, Furman's promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate..."

Justice Blackmun had joined, twenty-two years before, the dissenting opinions in *Furman* (1972), refusing to strike down the death-penalties imposed under the statutes of Texas and Georgia. ("I fear the Court has overstepped...")

Chapter 4

US Ratification of International Human Rights Instruments

In June 1992, the United States ratified one of the basic international human rights instruments: the International Covenant on Civil and Political Rights of 1966 (ICCPR, or "the Political Covenant"). Subsequently, in October 1994, the United States also ratified the International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (ICERD, or "the Race Convention"). Both of these instruments contain provisions directly relevant to capital punishment sentencing and implementation.

Ratification / Reservation

The accession to the first of these instruments (the Political Covenant) was accompanied by several "reservations", "understandings" and "declarations". In this context, it should be noted that the function of the institution of "ratification" has undergone considerable changes during the last three centuries. Its present function is to express a State's consent to be bound by a treaty (or convention). Until it has been ratified, a treaty requiring ratification is not binding upon the State concerned, despite prior signature of the treaty on its behalf. Even where a treaty is subject to ratification, governments act as a rule on the basis that a treaty exists from the time of signature.

It, thus, follows from the nature of ratification – as an expression of consent to be bound by a treaty – that ratification must be either wholly given or refused, no conditional or partial ratification being possible. But a State that has made a permissible reservation against certain articles of a treaty may exclude these from its ratification; this is not regarded as an instance of partial ratification. Moreover, rules similar to those which apply to ratification also apply to the exchange or deposit of instruments of accession.

What exactly constitutes permissible reservations however remains unclear. "Reservations" are not permissible in all circumstances or in respect of all provisions of a treaty. As a matter of customary interna-

tional law, this was made clear by the International Court in its Advisory Opinion in 1951 on the Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide. In the absence of a provision to the contrary, it would now appear that reservations to multilateral treaties are permissible only to the extent they do not conflict with "the object and purpose of the treaty."[15] However, the question of where the authority lies to determine the existence or absence of such conflict remains a subject of controversy.

As concerns "understandings"; it has been asserted that a State's wish to secure a certain interpretation for specific terms and clauses of a treaty – i.e. to ratify the treaty as a whole upon the "understanding" that such terms and clauses bear a particular interpretation – is completely legitimate. In such cases (according to that view) ratification under condition of "understanding" does not introduce an amendment or an alteration of the treaty but only fixes the meaning of otherwise doubtful terms and clauses. However, for such interpretation to be binding upon other parties, their assent must be secured, "otherwise it might be possible for a contracting party to modify substantially its obligations by means of its own interpretation of the provisions of the treaty".

Thus, for instance, in 1938, when the United States signed a number of international labour conventions subject to "understandings" that were made a part of the ratification, it was stated by the US Government that these understandings "are deemed not to be 'reservations' which would require acceptance of other governments but merely clarifications of definitions to show that the definitions accepted by the United States of America are in fact those that were intended by the Conference". (Oppenheim, *International Law*, Vol. I, para. 607).

Some unilateral declarations issued by party States at the time of ratification are regarded as having "domestic" as opposed to "international" significance, for example the fifth "understanding" of the US Government to its ratification of the ICCPR, which is designed to take account of the division of competence between the US federal and state governments. Australia had made a similar reservation to this effect in its ratification of the ICCPR in 1980, and Sir Robert Jennings cites this as an example of a unilateral statement not having the effect of excluding or modifying the legal effect of the treaty provisions because it is primarily of "political" (rather than international) significance. (See Oppenheim, para. 614).

15 See Part II, Chapter 3 for further details.

Following the action of the United States in depositing various reservations, declarations and "understandings" together with its instrument of ratification to the ICCPR, eleven European States who are parties to the Covenant filed objections condemning some of the US reservations as being incompatible with the intent and purpose of the Covenant (see Chapter 3 of Part II).

US Commitments under the ICCPR and ICERD

According to the provisions of the Political Covenant[16] as finally accepted and ratified by the United States (and even after taking into account the five express reservations, the four interpretative "declarations" and five "understandings" deposited with the ratification), several commitments on the part of the US are clear:

(i) The US Government has recognized and accepted that every human being has the inherent right to life, and undertakes to protect this right by law. It has further recognized that "no one shall be *arbitrarily* deprived of his life" (ICCPR, Article 6(1)). There is no specific or implied reservation taken to Article 6(1) nor any "understanding" that "arbitrarily" means only "illegally."[17]

(ii) The US Government has not articulated any reservations to Article 6 (Capital Punishment), other than to Article 6 (2) – death penalty only for the most serious crimes – and Article 6 (5) – prohibition of death penalty for crimes committed by minors under eighteen years of age. (Both reservations have been pronounced to be "incompatible with the object and purpose of the Covenant" by the UN Human Rights Committee; March - April 1995. Eleven State Parties to the Convenant have also made an objection to this effect in respect of the reservation to Article 6 (5)).

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16 See full text of International Covenant on Civil and Political Rights (ICCPR) in Basic Text 1.

17 In the opinion of the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities the reason for the use of the words "arbitrary" or "arbitrarily" in the Universal Declaration of Human Rights and ICCPR was to protect individuals from both "illegal" and "unjust" acts. See *Freedom of the Individual under Law - A UN Study*, (1990) paras. 152 to 180 - pages 115 to 117.

The US reservation to Article 6 has to be read in the context of the Bush Administration's "explanation" to that reservation submitted to the Senate Committee on Foreign Relations.[18]

(iii) The US Government has recognized and accepted (as provided in Article 7) that no one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. However it has qualified that acceptance by clarifying that it considers itself bound by Article 7 only to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel or unusual treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the US.

It is doubtful whether such a "reservation", or even "understanding", is permissible under international law. In the opinion of the Human Rights Committee (HRC) of the United Nations, it is not. In its comments concerning the United States report (March-April 1995) under Article 40 of the Covenant, the HRC has stated that it believes the reservation to Article 7 "to be incompatible with the object and purpose of the Covenant." It appears from the Explanation submitted by the Bush Administration to the Senate Foreign Relations Committee that this purported "reservation" (Reservation N° 3) was deliberately adopted in the context of capital punishment only in order

18 See Report from the Committee on Foreign Relations to the Senate, on the *International Covenant on Civil and Political Rights*, EXEC. Rep. V. 102 - 23, at page 11, which states:

"Article 6 (Capital Punishment) - paragraph 5 of the Covenant prohibits imposition of the death sentence for crimes committed by persons below 18 years of age and on pregnant women. In 1978, a broad reservation to this Article was proposed in order to retain the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment. The Administration is now prepared to accept the prohibition against execution of pregnant women. However, in light of the recent reaffirmation of US Policy towards capital punishment generally, and in particular the Supreme Court's decisions upholding state laws permitting the death penalty for crimes committed by juveniles aged 16, and 17, the prohibition against imposition of capital punishment for crimes committed by minors is not acceptable. Given the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes "serious crimes" under Article 6 (2)), it is advisable to state our position clearly.

Accordingly we recommend the following reservation to Article 6:

"The United States reserves the right, subject to its constitutional constraints to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment including punishment for crimes committed by persons below eighteen years of age."

to preempt the argument that "prolonged judicial proceedings" in death penalty cases ("the Death Row Syndrome") could in certain circumstances constitute "cruel, inhuman or degrading treatment" under Article 7.[19]

(iv) The US Government has recognized and accepted that all persons are equal before courts and tribunals, and that in the determination of any criminal charge against an individual, everyone is entitled to *a fair and public hearing by a competent, independent and impartial tribunal established by law.* It further accepts that in the determination of such criminal charge an individual is entitled:

- to defend himself/herself in person or through legal assistance of his/her own choosing; and
- to have legal assistance assigned to him/her in any case where the interest of justice so requires, and without payment by him/her if he/she does not have sufficient means to cover the costs of such assistance ICCPR Article 14.

The right of choice of counsel by an indigent accused is also guaranteed by Article 14(3)(d), but this is not accepted or recognised by the US Government (see "understanding" n° 4).[20]

(v) The US Government has recognized and accepted that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and further, that its laws would prohibit discrimination and would guarantee to all persons equal and effective protection against discrimination

19 *Id* at page 12, which states:

> "... Because the Bill of Rights already contains substantively equivalent protections, and because the Human Rights Committee (like the European Court of Human Rights) has adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute such treatment, US ratification of the Covenant should be conditional upon a reservation limiting our undertakings in this respect to the prohibitions of the Fifth, Eighth and/or Fourteenth Amendments. This would also have the effect of excluding such other practices as corporal punishment and solitary confinement, both of which the Committee has indicated might, depending on the circumstances, be considered contrary to Article 7..."

20 The "Understanding" of Article 14 (material part) reads:

> "The United States understands that sub-paragraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with Court-appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel or when imprisonment is not imposed."

on any ground, including race, colour, social origin, birth or other status ICCPR Article 26. The "First Understanding" - in respect of Article 26 - is only a reiteration of the stand of the US Government that distinctions not legitimate under the Covenant would not be permitted in US practice.[21]

(vi) Where not already provided for by existing legislative or other measures, the US Government has committed itself to take all necessary steps and to adopt such legislative or other measures as are necessary to give effect to the rights recognized in the Covenant, including those of Article 26. (see Article 2 (2) - ICCPR). There are no "reservations", "understandings" or "declarations" by the United States as to this article.

Nevertheless, the final clause of the Resolution of Ratification by the Senate reads: "Nothing in this Covenant requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States". This clause is only of "domestic", as opposed to "international" significance. It is not supported by any of the reservations, declarations or understandings subject to which ratification has been made. For these reasons, the resolution quoted above does not have the effect of excluding or modifying any provisions of the Covenant (See Oppenheim, para. 614).

(vii) The US Government (as a State party to the Political Covenant) has undertaken:

(a) to respect and ensure for all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant ICCPR Article 2; and

(b) to submit reports to the Human Rights Committee at periodic intervals concerning the measures which it has adopted to give effect to the "rights recognized in the

21 The Human Rights Committee has understood it in the following way:

"The Committee notes with satisfaction that the First Understanding made at the time of ratification in relation to the principle of non-discrimination is construed by the Government (of the US) as not permitting distinctions which would not be legitimate under the Covenant."

Covenant", and on the progress made in the enjoyment of those rights ICCPR Article 40.[22]

Again, there are no "reservations", "understandings" or "declarations" as to (a) or (b) above.

(viii) The US Government has acknowledged to the Human Rights Committee that its Understanding N° 5 ("this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over matters covered therein...") – i.e. the Federal System Clause - is not a reservation, and is not intended to affect the International obligations of the US (as noted by the Human Rights Committee in its Comments on the US Report under Article 40 - para 12).

Under the Race Convention (ICERD)[23] as finally ratified by the United States, similar commitments have been made:

(i) The US Government has undertaken to adopt effective measures to review governmental, national and local policies, and to amend, rescind or nullify any law or regulation which has the

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22 One matter that has been subjected to scrupulously close and punishing analysis by the Human Rights Committee has been the use of the death penalty. Members of the Committee have comprehensively dealt with all facets of this matter, including the six express limitations on the imposition and implementation of a sentence of death. Such a sentence (a) may only be imposed for the most serious crimes; (b) must be in accordance with the law in force at the time of the commission of the crime; (c) must not be contrary to the other provisions of the Covenant or the Genocide Convention; (d) can only be carried out pursuant to a final judgment rendered by a competent court; (e) shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women; and (f) any person sentenced to death shall have the right to seek pardon or commutation of the sentence.

The notably consistent approach of the HRC to the death penalty, stems largely from the clearly perceived abolitionist philosophy behind the provisions of paragraphs (2) and (6) of Article 6. In its General Comment (Doc A/37/40) - the HRC stated that:

"While it follows from Article 6(2) and (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, to restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest (paras. (2) and (6) that abolition is desirable". See Human Rights Committee, *Oxford Monographs in International Law* (1994) page 332.

23 See full text of the International Convention on the Elimination of all Forms of Racial Discrimination in Basic Text 4.

effect of creating or perpetuating racial discrimination "wherever it exists." ICERD Article 2(1).

The United States did not articulate a "reservation" or "understanding" on this point, but stated (during proceedings in the Senate) that it was the belief of the US Administration that Article 2(1)(c) of the Convention "is best interpreted as not imposing obligations that are contrary to US Law." Nevertheless, this "belief" of the US administration was not recorded in any of the reservations, understandings or declarations issued by the government when depositing its instruments of ratification. It, therefore, has no effect on the unequivocal ratification of Article 2(1) (c) without such "reservation", "understanding" or "declaration".

(ii) In compliance with the fundamental obligations laid down in Article 2 of the ICERD, the US Government has undertaken to prohibit and to eliminate racial discrimination in all its forms, and to guarantee the right of every one, without distinction as to race, color, or national or ethnic origin, to equality before the law — notably in the enjoyment of the right to equal treatment before tribunals and all other organs administering justice ICERD Article 5(a). There is no "reservation", "understanding" or "declaration" to this undertaking.

Chapter 5

Overall Concerns - General Conclusions

The investigation conducted by the Mission into the practice of capital sentencing in the United States has involved extensive gathering of information through personal interviews, on-site visits and processing of primary and secondary documentation on the issue. Some of this information is set out above, some of it is synthesized in the historical and procedural reviews offered in Part II.

After careful consideration of all that they have seen, heard and read during the course of their inquiry, the Members of the Mission have agreed (unanimously) on certain broad conclusions. These are set out below as follows:

(i) *Lack of Awareness in the US of the Political Covenant and the Race Convention*

The Mission found a general lack of awareness on the part of State officials – and even amongst judges, lawyers and teachers – of the obligations undertaken by the US Government under international instruments that the country has ratified. This is particularly the case concerning commitments under the International Covenant for Civil and Political Rights 1966 (the Political Covenant) and the International Convention on the Elimination of Racial Discrimination 1965 (the Race Convention).

The ICCPR (the Political Covenant) came into force as an international human rights instrument in March 1976. Though a signatory to the Covenant since October 1977, the US became a party to it only on ratification in June 1992.[24]

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24 The tortuous process of ratification of the ICCPR by the United States began with the US Chairmanship of the United Nations Commission on Human Rights, Mrs Eleonor Roosevelt filling that position from 1946 to 1951. It was under her Chairmanship that the Universal Declaration on Human Rights (UDHR) was drafted, and completed. For two years following upon the United Nations acceptance of the Universal Declaration on Human Rights (1948), Mrs Roosevelt worked on the proposed Covenant (later the ICCPR 1966) that would bind all member nations to legally binding norms that were based on the Universal Declaration on Human Rights. But Mrs Roosevelt was replaced on the Commission in 1952 following the election of a Republican administration, and Secretary of State John Dulles announced in 1953, at a Congressional hearing, that the US Government had no intention of ratifying the Covenant when drafted.

It was only with the return of a Democratic administration that steps were undertaken

The ICERD (the Race Convention) came into force with effect from January 1969. Although the US Government signed the instrument in September 1966, it became binding on the United States only after the country officially became a party to the Convention upon ratification in October 1994.

The important feature of both the ICCPR and the ICERD is that they are as universal instruments containing binding legal obligations for the States who become parties to them. The rights and obligations articulated in these instruments represent the basic minimum standards recognized by the world community in the spheres of conduct covered.

Following ratification of the ICCPR and the ICERD, much wider dissemination and understanding of their provisions was required in the United States – especially in institutions of law and learning. The broader the circulation of reflection and information about these instruments, the greater will be the impact on national opinion in the United States. There is currently a considerable lack of awareness in the US about the commitments and objectives contained in these agreements.

Human rights instruments signed and ratified by a country (even when declared to be "non self-executing") can exercise considerable influence on court decisions in that country. For example, in 1995 the High Court of Australia in *Minister for Immigration v. Teoh* - (128 ALR 353) held that the provisions of an international convention – in that particular case, the Convention on the Rights of the Child, to which Australia was a party – could be used by Australian courts as a legitimate guide in developing the country's own body of law (the common law). The fact that the Convention was ratified by Australia but not incorporated in Australian municipal law did not mean that the ratification had no significance.

The ratification of a Convention (said Chief Justice Mason) was a positive statement by the Executive Government of the ratifying country to the world and to its own people that the Executive Government and its agencies would act in accordance with the Convention. That positive

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to secure US adherence to the treaty. President Carter submitted the Covenant to the Senate in January 1978 for its "advice and consent" in accordance with the provisions of the US Constitution. But the matter was not thereafter pursued under the successor Reagan Administration. In late 1991, President Bush re-submitted the treaty (the ICCPR 1966) to the Senate, accompanied by the controversial and manifold reservations discussed above. On 2 April 1992 the US Senate gave its consent to to ratification, subject to the enumeratied reservations, declarations and understandings. The instrument of ratification was delivered on 8 June 1992 and came into effect on 8 September 1992.

statement was also an adequate foundation for a legitimate expectation on the part of the inhabitants of the country that administrative decision-makers would act in conformity with the Convention.

It is heartening to see a similar sentiment reflected in the position taken by the US delegation which attended the session of the Human Rights Committee of the UN in March-April 1995 at which the Committee considered the US report submitted to it under Article 40 of the Covenant.[25]

(ii) Public Attitude to Capital Punishment

In the United States of America public support for capital punishment has hardened over the years. The debate over its morality has almost ceased.[26] Arguments continue however concerning the constitutionality of the death penalty, which is determined principally on the touchstone of the Eighth Amendment to the US Constitution.

In this regard, it should be noted that the scope of the Eighth Amendment is not static. As the US Supreme Court has said (through its Chief Justice Earl Warren in *Trop* v. *Dulles* 356 US 86, 101 1958), "The Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society", a quotation repeatedly relied upon in subsequent cases, including *Gregg*. The US ratification of the ICCPR and ICERD represents an important milestone in the progress of a maturing US society, and as such, this act of ratification warrants a fresh look at what constitutes "standards of decency" today.

Although legislative measures adopted by the people's chosen repre-

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25 See The Human Rights Committee's comment at para 11 stating: "The Committee takes note of the position expressed by the delegation that, notwithstanding the non-self executing declaration of the United States, American Courts are not prevented from seeking guidance from the Covenant in interpreting American Law." In *Filartige* v. *Penna-Irala*, the US Court of Appeals for the Second Circuit not only derived "guidance" from the Universal Declaration of Human Rights 1948 but granted relief on that basis - See 630 F. 2d. 876 (2nd Circ. 1980), where it was held (long before US ratification of the UN Torture Convention) that the right to be free from torture had become a part of customary international law as evidenced and defined in the UDHR 1948.

26 See *Harris* v. *Alabama* 115 S.Ct. 1031 (1995). Ten years after the reinstatement of capital punishment in the US, more than 2,600 people had been sentenced to death, over 65 had actually been executed, about 1,700 were awaiting execution and "public protests were subsiding"; See Encyclopedia Britannica; *Book of the Year 1987,* page 163.

sentatives provide an important means of ascertaining contemporary values, legislative judgments alone are never determinative of Eighth Amendment standards, since that Amendment itself was intended to safeguard individuals from the abuse of legislative power.[27] The basic concept underlying the Eighth Amendment is "nothing less than the dignity of man". And as Justice Brennan said in a 1985 address at Georgetown University "the demands of human dignity will never cease to evolve".

In *Trop* v. *Dulles* 356 US 86, 100, Chief Justice Warren, speaking for the plurality, took as his guide for assessing Eighth Amendment transgressions the standards set by "the civilized nations of the world". ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed by a punishment of crime" (356 US at 102)).

With ratification of the ICCPR and ICERD, "standards of decency" and "concepts of human dignity" must no longer be confined to interpretation within national frontiers, but rather must reach out to encompass standards set by the civilized nations of the world – especially as articulated in international human rights instruments.

According to its reservation to Article 7 of the ICCPR, the US only considers itself bound by the Article to the extent that the "cruel, inhuman or degrading treatment or punishment" referred to in the Covenant means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution of the US - or more specifically, according to the interpretation given these clauses by the country's highest Court.

Ever since 1958, the Supreme Court has recognised the relevance of views expressed by the international community in determining whether a punishment was by nature "cruel and unusual". Particularly illustrative of this recognition are the cases of *Trop* v. *Dulles* 356 US 86, 102 (1958), and *Coker* v. *Georgia* 433 US 584 at page 596 (1977). A few years later, in *Emmanuel* v. *Florida* 458 US 782 (July 1982), it was held by a plurality of the Court that the Eighth and Fourteenth Amendments were violated by the imposition of the death penalty on a person who aided and abetted a felony in the course of which a murder was committed by others, but who did not himself kill, attempt to kill, intend to kill or contemplate that life would be taken. Justice White, who delivered the opinion of the Court,

27 See *Seems* v. *US* 217 US 349, 371-373 cited with approval in *Gregg* v. *Georgia* 428 US 153, 174.

cited reliance on laws and practices in other parts of the world (458 US at page 796):

> "[T]he climate of international opinion concerning the acceptability of a particular punishment is an additional consideration which is 'not irrelevant.' *Coker* v. *Georgia*, 433 US 584, 596 (1977). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."

Subsequently, *Thomson* v. *Oklahoma* 487 US 815, 865-869 (1988)) addressed the question of whether the implementation of a death sentence on a person who was 15 years of age when the offence was committed would violate the Eighth Amendment. In holding that the execution of any person less than 16 years old at the time of the offense would violate Eighth Amendment guarantees, the Court (5:3) interpreted "evolving standards of decency" *via* reference to sentencing practices of other nations that shared the Anglo-American heritage, including those of the European Community (Justice Scalia dissented). However, a year later, in *Stanford* v. *Kentucky* (492 US 361 - 1989), another death-sentence case, Justice Scalia, writing on this occasion for the plurality (5:4), opined that sentencing practices of foreign countries, if they did not reflect American conceptions of decency, were irrelevant:

> "We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant. While [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," *Thomson* v. *Oklahoma*, 487 US 815, 868-869 (1989) (Scalia, J., dissenting) - they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."

However, since 1988 a significant change of direct relevance to this question has been introduced, namely that the United States has become a State Party to the Political Covenant (ICCPR). Article 6 (1) of the Covenant unequivocally states that "every human being has the inherent right to life", an explicit articulated commitment to the inherent dignity of

the human person. In ratifying the Covenant, the United States entered no "reservation", "declaration" or "understanding" to Article 6 (1), nor could it have. Both in *Furman* (1972) and in *Woodson* (1976) the Supreme Court of the United States emphasised that fundamental respect for humanity and human dignity was at the heart of the Eighth Amendment.

The Human Rights Committee established under the Covenant has determined that "all measures of abolition (of the death-penalty) should be considered as progress in the enjoyment of the Right to Life within the meaning of Article 40, and should as such be reported to the Committee". Article 40 (1) of the Covenant stipulates that all State Parties to the agreement must submit reports within one year of ratification detailing the measures taken to "give effect to the rights recognized herein." After considering a substantial number of these reports, the Committee expressed its regret that progress made towards abolishing or limiting the use of the death penalty was shown by the reports to be "quite inadequate.[28]

The "reservation" introduced by the United States to Article 7 stipulates that the US will interpret "cruel, inhuman or degrading treatment or punishment" according to the definition of such terms in the Fifth, Eighth and Fourteenth Amendments to the US Constitution. Even assuming that this "reservation" is permissible (the UN Human Rights Committee has stated that it believes it may not be), the Mission is of the view that at least a positive obligation exists on domestic courts in the United States to interpret the US Constitution in the light of international standard-setting instruments which have been duly ratified by the United States.

(iii) Exercise of Prosecutorial Discretion

Whilst upholding the validity of death penalty statutes, the US Supreme Court has recognized that because it is irreversible, the imposition of death constitutes a unique form of punishment, and that laws (both state and federal) must ensure that capital punishment is administered with fairness and reliability. Despite the present system of multi-layered State and federal appeals, and the ample collateral reviews afforded by the US criminal justice system, capital sentencing procedures as they operate in the states do not ensure equal justice before the law to a large majority of defendants charged with and sentenced to death for cap-

28 See the "Oxford Monographs in International Law", edited by Ian Brownlie, *The Human Rights Committee;* Clarendon Press, 1994 p. 334.

ital crimes. This is not only because such defendants are usually poor and indigent, receiving inadequate legal assistance at state-trial and state-appellate stages – and even less assistance at state *habeas corpus* levels[29] – but more particularly because there is no judicial or administrative control over the prosecutorial discretion of District Attorneys[30] empowered to seek the death penalty in "death-qualified" crimes. Decisions concerning which defendants shall live and which shall die continue to be left (even after *Furman*) to the uncontrolled and unbridled discretion of individual prosecutor for each district or county in the capital-sentencing states.[31]

Following *Furman* there has been a proliferation of sophisticated studies on both pre-sentencing and post-sentencing practices in one or more death penalty states, with many of the studies claiming to document patterns of discrimination in capital sentencing on the basis of the victim's race or on offender-victim racial combinations.[32] But ever since *McCleskey*, testing the reliability of these studies through the Court process is precluded, despite the fact that it was in *McCleskey* that the Court identified establishment of guidelines for District Attorneys as the appropriate and most consistent basis for exercising discretion at the various stages of prosecution of a case. *McCleskey* also specified that there exist no procedural safeguards whatsoever "during the criminal process of the trial" (481 US 279 at page 365). The death penalty being sought in only a very small percentage of death penalty eligible cases and it being the prosecutor who decides this, he or she, unlike the sentencer (jury or judge) has no guidelines or control over the exercise of the discretion. In

29 Twenty Death Penalty Resource Centres throughout the United States funded under Federal Law and affording considerable assistance to counsel appointed by the states' courts for poor and indigent defendants charged with capital crimes have now stopped functioning because of Congressional denial of future funding for their operation as from 1 April 1996.

30 In some states the prosecutor is called the State Attorney and the federal prosecutor is called the US Attorney. See Chapter 4 of Part II for further details.

31 For instance in Texas, the Acts of 1991 (Ch.12.31) emphasize the importance of the role of the District Attorney as representing the state: "In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony." Cases for which the District Attorney should (or should not) "seek the death penalty" are not provided for by statute or even administrative instructions.

32 See for instance the studies listed in the Article by Jonathan Sorensen and James Marquat "Prosecutional and Jury Decision Making in Post-Furman Texas Capital Case", 18 *Review of Social Law and Change*. (1990 - 1991), 743.

Maynard v. *Cartwright* (486 US 356, 362 (1988)) the US Supreme Court again pointed out the need for limiting or controlling the sentencer's discretion when it stated that since *Furman* "our cases have insisted that the channelling and limiting of a sentencer's discretion in imposing the death penalty is a fundamental requirement for minimising the risk of wholly arbitrary and capricious action".

The Mission has found that the same risk of arbitrariness exists in the prosecutors "unchannelled" discretion on deciding in which case the death penalty will be sought and in which case it will not. For example, in *D.C. Garma* v. *Texas* 474 US 973 (1989) a prosecutor in the State of Texas charged the defendant with capital murder but offered the defendant's accomplice probation in return for the latter's testimony against the defendant. The Supreme Court declined *certiorari*, but Justices Brennan and Marshall, dissenting from the Court's decision not to review the case, observed: "the selection process of imposition of the death penalty does not begin at trial; it begins at the Prosecutor's Office. His decision whether or not to seek capital punishment is no less important than the jury's. ... The decision whether to prosecute, what offence to prosecute, whether to plea bargain, or not to negotiate at all, are made at the unbridled discretion of the individual prosecutor."

The Mission finds that this problem is further compounded in many of the states where District Attorneys are elected officials – indeed elected quite often on the basis of their performance or promise of rigorously seeking out the death penalty in "death-qualified "crimes. The Mission was told by some District Attorneys, e.g. in Texas, that the opinion of the victim's relatives has an important influence on the prosecutor's decision whether or not to seek the death penalty in the given case. The plight of the victims is, of course, important in a criminal trial from many standpoints, as is provision of adequate compensation to the dependants. But it is alien to accepted conceptions of criminal justice that sentencing should be influenced by opinions about appropriate punishment (particularly that of death) expressed by persons other than those entrusted by law with the task and responsibility of meting out punishment. It is especially inappropriate that decisions concerning the life and death of a convicted person could become dependant on beliefs held about the death penalty by the victims' relatives. This latter factor, which avowedly influences prosecutorial discretion, is one incapable of being controlled or guided, and which thus renders the prosecutor's discretion manifestly "arbitrary".

Moreover, since 1991, this practice has in effect been endorsed after the US Supreme Court held that victim-impact evidence was admissible for consideration by the jury in determining the appropriate sentence (*Payne* v. *Tennessee* (1991)). This decision overruled an earlier decision of

the Court (*Booth* v. *Maryland* 1987)[33] which excluded victim-impact evidence and where Justice Powell had warned that admission of such evidence would "create an impermissible risk that the capital sentencing decision will be made in an arbitrary manner". A similar impermissible risk applies to the prosecutor's decision on whether or not to seek the death penalty.

The Mission observed that control of prosecutorial discretion in federal (as opposed to state) cases is now structured through a screening process initiated in January 1995 by the present Attorney General of the United States. It is too early to say how effectively this process works, but here too the extent of the influence exercised by the victim's relatives – who, prosecutors admit, are usually consulted – does exist, however indeterminate. Together with victim-impact evidence, such influence substantially increases the risk of arbitrariness as well as the possibility of discrimination in the entire sentencing process.[34]

(iv) Selection of the Jury

Article 14 of the International Covenant of Civil and Political Rights provides that anyone accused of a criminal offence shall be entitled to a fair hearing by an independent and impartial tribunal established by law. Article 6 of the same Covenant stipulates that no one can be "arbitrarily deprived of his life." By ratifying the Political Covenant, the United States has undertaken to adopt such legislative or other measures as are necessary to give effect to the rights recognised therein (Article 2). However, under laws as they currently exist in the states, a trial by jury for capital crimes does not guarantee a fair and impartial tribunal in death-sentence cases, and as a result the prospect of an arbitrary imposition of the death sentence is real. In addition to the factors detailed in Conclusion (iii) above, there are a number of reasons for this:

In *McCleskey* v. *Kemp*, Justice Powell (plurality opinion) stated that because of the risk that the factor of race may enter the criminal justice process, the US Constitution – by the Seventh Amendment – had recognized the "inestimable privilege" of trial by jury. It was, he said, a vital

33 See *supra* note 9.

34 Under the Federal Attorney General's guidelines the evaluation report presented to the Attorney General does not contain details about the views of the victim's family, nor details of the race of the accused or of the victim. This does not mean however that these details are not known; in fact they are, and therefore constitute a potentially strong influencing factor.

principle underlying the whole administration of criminal justice in the United States (481 US 279 at 309). The jury is "a criminal defendant's fundamental protection of life and liberty against race or colour prejudice"– particularly a capital sentencing jury, which is representative of the defendants' community and assures a "defused impartiality." In supporting this judgment Justice Powell relied on *Witherspoon* v. *Illinois* (391 US 510 - 1968), a leading case at the time, which laid down strict standards for death penalty qualification for jurors. It was in this case that the Court had first set out the principles for "striking a juror" in capital cases where the death penalty had been demanded by the District Attorney.[35]

35 In *Witherspoon* v. *Illinois* (391 US 510) the plurality held that:

> "In determining the qualification of a juror in a capital case, it cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty except 'in a proper case' thereby affirms that he could never vote in favour of it or that he would not consider doing so in the case before him; the critical question is not how the phrases employed in this area have been construed by courts and commentators, but how they might be understood - or misunderstood - by prospective jurors, and unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."

What happened in that case was stated by Justice Stewart, who delivered the Opinion of Court:

> "In the present case the tone was set when the trial Judge said early in the *voir dire*, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen (or prospective jurors) were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not 'believe in the death penalty' and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having 'conscientious or religious scruples against the infliction of the death penalty' or against the infliction 'in a proper case' and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment."

The Court held that:

> "..... a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. .... Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution....."

Note: The compendious expression "striking a juror" is used to describe the process of selecting a jury (of 12) out of the whole number returned as prospective jurors (or "veniremen") on the panel (or Jury-pool).

However, the salutary safeguards set out in *Witherspoon* (1968) are no longer observed. What actually operates in practice is a system not merely of "death-qualified" juries but of "death-determining" juries.

In all capital sentencing states both the prosecutor and the defendant are entitled to a specified number of "strikes", or objections, against prospective jurors in the jury pool ("veniremen") before the jury is empanelled. The number of such strikes "without cause" in some states is greater in capital cases than in other criminal cases, while strikes "for cause" are unlimited and require considerable time and skill on the part of the opposing attorneys. In proceedings known as the *voire dire*, individual jurors in capital cases are closely questioned and cross-examined concerning their belief in, or prejudices against, the death-penalty.

The Supreme Court of the United States has grappled with the question of a "fair" jury-selection-process in capital cases by laying down basic guidelines for such selection. First, in *Witherspoon* (1968) (relied upon in *McCleskey* v. *Kemp*), next in *Adams* v. *Texas* 448 US 38 (1980) and then in *Wainwright* v. *Witt* 469 US 467 (1985)[36] guidelines were outlined concerning how inferences are to be drawn by the trial Judge from the questioning of individual jurors, so as to ensure the empanelment of twelve "death qualified jurors" while excluding jurors who will not under any circumstances award the death penalty, even where guilt is proved. By reason of the *ratio* of the plurality in *Wainwright*, even jurors who are merely averse to, but otherwise have no religious or moral objection

36 In *Wainwright* v. *Witt* (1985), the rule in *Witherspoon* was explained and altered (by the Plurality), Justices Brennan and Marshall dissenting. The latter said that the majority opinion would exclude from the jury those opposed to capital punishment, thus keeping an identifiable class of people off the jury in capital cases and likely leading systemically to biased juries. Such juries would be unlikely to represent a fair cross section of the community, or their verdicts to reflect fairly the community's judgment whether a particular defendant has been shown beyond a reasonable doubt to be guilty and deserving of death. The dissenting Judges regretted that the Court had not maintained *Witherspoon's* strict standards for death qualification for jurors and then said:

> "The risk of the 'overzealous prosecutor and..... the compliant, biased or eccentric judge,' *Duncan* v. *Louisiana*, *supra*, at 156, 20 L Ed 2d 491, 88 S Ct 1444, 45 Ohio Ops 2d 198, is particularly acute in the context of a capital case. Passions, as we all know, can run to the extreme when the state tries one accused of a barbaric act against society, or one accused of a crime that - for whatever reason - inflames the community. Pressures on the government to secure a conviction, to 'do something,' can overwhelm even those of good conscience. See *Patton* v. *Yount*, 467 US, at 1053, 81 L Ed 2d 847, 104 S.Ct 2885 (Stevens, J., dissenting). When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous. Cf. *Spaziano* v. *Florida*, 468 US 447, 467~82 L Ed 2d 340, 104 S.Ct 3154 (1984) (Stevens, J., concurring in part and dissenting in part). With such pressures invariably being brought to bear, strict controls on the death-qualification process are imperative."

against, imposing the death penalty can be objected to "for cause", and (in practice) are not empanelled.

Death-qualification has worked to the advantage only of the prosecutor; it is not carefully controlled, and is a useful tool with which the prosecutor can create a jury perhaps predisposed to convict and certainly predisposed to impose the ultimate sanction. In the opinion of several knowledgeable and experienced trial lawyers (and some Judges) this has greatly diminished the chances of a jury being fairly selected, and has jeopardised the prospect of the defendant receiving a fair trial.

The Mission finds that the requirement of "death-qualified" juries (especially as that expression has been understood since 1985) introduces an element of unfairness in the death sentencing process. In capital sentencing cases, the jury, which ideally is supposed to represent a cross section of the community, in effect represents (especially after *Wainwright*) only a cross section of those who would impose the death penalty without compunction whenever the necessary ingredients of a capital crime have been proven. The risk posed by empanelling a juror who would be unperturbed by the prospect of sending a defendant to his death is that he (or she) might also be the kind of juror who may fail to understand the significance of the presumption of a defendant's innocence and would easily accept the prosecutor's version of the facts and return a verdict of guilt. A jury comprised of such persons, in its role as arbiter of the punishment to be imposed, would fall woefully short of the impartiality required of a fair sentencer.

Whatever the legal refinements of the rule in the *Witherspoon* case, (as later elaborated and altered in *Adams* and *Wainwright*) the present requirement of a "death qualified" jury in US law comes perilously close, in practice, to creating a "hanging jury". As long as death is not the mandatory punishment for a capital crime (in the US it is not, and cannot be, since 1976) the empanelling of a "death-qualified jury" in a capital case almost guarantees that the death penalty will be the inevitable and inexorable consequence once guilt has been established.[37]

37 The Mission was informed that in some states the jury cannot be told that the alternative available penalty, that of imprisonment for life, means imprisonment for a specified period (eg 30 years) or in some cases the entire duration of the defendant's life without the possibility of parole. The empanelling of a jury and its role at the guilt and innocence stage and the sentencing stage is more fully discussed in Chapter 4 of Part II.

(v) Legal Assistance in Jury Selection

"Striking a juror" constitutes one of the most important elements of the trial in capital sentencing cases. Legal skills of a very high order are required to unravel hidden biases and prejudices among potential jurors. Hiring such skills is beyond the means available to most poor and indigent defendants, against whom the death penalty is invariably demanded (by the District Attorney) and imposed (by juries or Judges).[38] Already in itself this circumstance weighs heavily against most defendants in capital cases, and gravely jeopardises rights guaranteed under Clause 3(d) of Article 14 the ICCPR. Such rights seek to provide minimum guarantees of an adequate defense for the accused, stipulating that legal assistance be assigned to defendants who cannot afford counsel of their choice. The provisions further postulate that such assistance be both adequate and competent, which has special implications for the difficult task of defending a person charged with a capital crime.[39] Faced with the important task of "striking a juror" in a capital sentence – or "death-qualified" – case, the usually indigent defendants find themselves at a great disadvantage, given the absence of a competent public defender system in the majority of the states which allow capital punishment.

(vi) Influence of Class and Racial Disparities

Since the US Supreme Court declared in 1972 (*Furman*) that the death penalty should be imposed fairly and with reasonable consistency or not be imposed at all, thirty-eight of the fifty states of the Union have enacted or re-shaped laws allowing for application of the death penalty to a series of specified crimes. No uniformity exists however among the categories of crimes for which the death penalty may be sought under these

38 The Mission was informed by District Attorneys it met that the overwhelming majority of defendants against whom the death penalty had been sought were indigent. This was supported by other studies and State Commissions of Enquiry. These are all further discussed in Chapter 4 of Part II.

39 The UN Human Rights Committee has held that under the ICCPR, a person accused in a capital case has the right to legal representation and to choose his own legal representation at both trial and appellate levels. See Report prepared by Stanislav Chernichenko and William Treat on the "Administration of Justice and Human Rights of Detainees" - UN - ECOSOC - E/CN.4/SUT 2/1991: 5th July, 1991.

various state statutes,[40] nor the authority in whom the power to visit them is vested. Such provisions vary significantly.[41] Moreover, despite the existence of legislative safeguards and prescribed procedures, the Mission has found that, in practice, overwhelming evidence exists in the large majority of cases indicating class and/or racial disparity in the charging, sentencing and imposition of the death penalty – the decisions incorporated in *Furman* notwithstanding. As one knowledgeable elder statesman pithily remarked "If you're poor and black, you die". Others, including Judges, stated that capital sentencing was unequal even amongst whites, and that in their experience, where the social status of the defendant corresponded to that of the members of the jury invariably the death sentence was not imposed.

The Mission encountered no serious refutation of the fact that demand for the death penalty by District Attorneys – and imposition of the death sentence by juries or judges – on African-Americans and other minorities was disproportionate to their percentage among the general population. The argument was advanced however that because of poverty and disadvantaged circumstances, members of these groups in fact committed more capital crimes than others. The perception of the majority community has been, and remains, that minority communities in the US are principally responsible for the high incidence of crime. This perception has had a discriminating effect of tidal wave proportions on public opinion, and thus on juries as well as on elected District Attorneys and Judges.[42]

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40 The only thread of uniformity is that the crimes designated must involve a murder. However the categories of crime expand or contract depending upon differences between the state statutes as to what constitutes "an aggravating circumstance". The Human Rights Committee in its written comments on the US Report (March-April, 1995) submitted under Article 40 of the Covenant has expressed concern about "the excessive number of offenses punishable by the death penalty in a number of states" (para 16).

41 In thirty-three of the thirty-eight states with capital punishment statutes, sentencing power is vested in juries, i.e. the jury is authorised to participate in the sentencing decision. And in twenty-nine of these thirty-three states, the jury's decision is final, though in four of them (Alabama, Delaware, Florida and Indiana) the Judge has power to override the jury's decision. Alabama's capital sentencing statute is unique. In Alabama, unlike any other state in the Union, the trial judge has unbridled discretion to sentence the defendant to death — even though a jury has determined that death is an inappropriate penalty and though no basis exists for believing that any other reasonable, properly instructed jury would impose a death sentence. Last year Colorado converted from a jury capital-sentencing determination to capital sentencing by a three-Judge panel. The National Association of Criminal Defense Lawyers offered the following comment: "The public's political scrutiny of the (elected) Judges will result in more death sentences"!

42 In most of the capital sentencing states, Judges (state Judges at trial and at appellate levels) are directly elected. Practices vary from state to state as to whether such elections are conducted on a partisan, political party or non-partisan basis.

(vii) The Judiciary in the States

In most US states judges are elected rather than appointed.[43] They run for office on the basis of a regular political platform, and in many states must declare party affiliation – i.e. stand as Democrats or Republicans. Beyond the United States, the concept of elected judges is almost unknown in Western and western-style democracies. But the elective principle has an extended history in the US. Unknown during the colonial period, the principle took hold shortly after independence, becoming a marked trend in the constitution of the judiciary during the first half of the nineteenth century. Lower court judges were elected in Vermont from as far back as 1777, in Georgia from 1812, in Mississippi from 1832, and in New York from 1846.

Essentially, the election of judges is based on the same civic theory justifying the election of governors or congressmen – that of making such officials responsive to the will of the public.[44] This poses no problems for executive or legislative politicians, but requiring judges to answer to the vagaries of public opinion detracts from the independence of the judiciary and public confidence in that independence. One of the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly (29 November 1985) stipulates that:

> "The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter of for any reason."[45]

While the Basic Principles make no mention of how judges should be selected for office, they do imply that judges can be either appointed or elected to their positions. However, the thrust of the Basic Principles is

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43 See Chapter 3 of Part II for details.

44 But in recent years, a growing number of states have begun to retreat from the purely elective principle. Some states have adopted the so-called "Missouri Plan", under which scheme the Governor of the state appoints judges, though his choice is restricted. A commission made up of lawyers and citizens draws up a list of names and submits it to the Governor, who is required to choose from among the names contained on the list. The appointed judge serves until the next election, then runs for re-election on the basis of his record – i.e. is returned by referendum rather than by contest with an electoral opponent: the public is simply asked to vote yes or no. As Lawrence Friedman says in his guide to *American Law*, - "since you cannot fight somebody with nobody, the sitting judges almost never lose."

45 See Article 2 of the Basic Principles. This is further discussed in Chapter 3 of Part II.

that their appointment or election should not affect their independence or impartiality when exercising their judicial functions.

In the United States the requirement of election means that financial contributions to a Judge's election campaign come from lawyers and the public, i.e. from potential or actual litigants. Shirley Abhrahamson, a Judge of the Supreme Court of Wisconsin has gone on record to state that in her election to Judicial office - "half of the contributions came from lawyers and half from non-lawyers... So I debate with myself: which is more discomforting, or which makes me more uncomfortable – litigants or lawyers?"[46]

Discomfort however is only a minor side-effect. A major consequence of the practice of electing judges is the temptation generated to pander to public opinion; and since public opinion has a major effect on the administration of the death penalty in the United States, elected judges are often seen as compliant adjuncts in that administration. The risk of a compliant (or biased) judge is particularly acute in the context of a capital case (See *Duncan* v. *Louisiana* 20 L.Ed. 2d. 491).[47]

The UN Human Rights Committee, commenting on the report submitted by the United States under Article 40 of the Political Covenant (March-April, 1995), made the following observation:

> "The Committee is concerned about the impact which the system of election of Judges may, in a few states, have on the implementation of the rights provided under Article 14 of the Covenant" (i.e. right to an independent and impartial tribunal).

The Committee welcomed efforts by a number of states to adopt a merit-selection system in place of direct elections, but recommended that such selection be undertaken by "an independent body".

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46 Garry Sturgess and Philip Chubb - *Judging the World - Law and Politics in the World's Leading Courts* - at page 336.

47 In expressing the views of seven members of the Court, Justice White wrote:

> "Providing an accused with the right to be tried by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge..., the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."

An article on "Capital Punishment" in the *Oxford Companion to the Supreme Court of the United States* (Oxford University Press 1992 page 126) criticises the judgments on the death penalty by the US Supreme Court, and comments on their impact in the following words:

> "A conservative Court majority now seems determined to turn over the development of capital punishment policies and procedures to state legislatures and courts. Since many state judges face at least potential electoral challenges, conventional political processes seem likely to play the major role in shaping future death penalty policies."

In other words, "conventional politics" enter the courtroom with elected judges - especially those elected on party lines.

The Mission has found that among elected judges, those who covet higher office – or those who merely wish to retain their status as judges – must constantly profess their fealty to the death penalty. In most of the states permitting capital punishment, both trial appellate judges face periodic and in most cases partisan elections through which they are exposed to the "Voice of Higher Authority".

One Judge in the country's Highest Court, Justice Stevens (at present its most Senior Member after the Chief Justice) is a consistent critic of the system of elected judges, particularly where such judges preside in capital sentence cases. In *Walton* v. *Arizona* (1990) 497 US 639 at 713 he appended to his opinion a footnote (f.n.4) in which he stated:

> "Although the 18th-century English ruler no longer bears upon our judges, today the "voice of higher authority" to which elected Judges too often appear to listen is that of the many voters who generally favour capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected Judges to impose death sentence time after time notwithstanding a jury's recommendation of life? I have been advised that in Florida, where the jury provides an advisory sentence before the Judge imposes sentence in a capital case, (Fla State Section 921.141 (1989)), Judges imposed death over a jury recommendation of life in 125 of the 617 death sentences entered between December 1972 and December 1989."

More recently in *Harris* v. *Alabama* (1995) 130 L. Ed 2d 1004, Justice Stevens has described the political pressures of public opinion on elected judges "as similar to those that had confronted judges beholden to King George III".

(viii) Effect-Based Discrimination

The Mission found no clear evidence of *intent-based* racial discrimination, systemic or state-wise - this remained in the realm of assertions and counter-assertions. However evidence of *effects-based* discrimination was more reliable and much more apparent (as for instance in the findings and conclusions recorded in official documents, and in the published pronouncements of experienced Justices).

The Supreme Court of the United States has held that (a) racial discrimination violative of the Equal Protection Clause exists only where such action is a product of a discriminatory purpose; and (b) that while a showing of disproportionate racial impact is a factor in ascertaining intent, it can never by itself be sufficient to prove discriminatory intent.

In the opinion of the Court, statistical evidence must be bolstered with other proof of "discriminatory purpose" to establish a racial categorization in the creation or application of a law that is otherwise neutral on its face. This view reflects the current interpretation of the Equal Protection Clause of the US Constitution.

The Mission finds that the Race Convention's prescription of effects-based discrimination (Article 2 (c) of the ICERD)) extends to areas of disparate impact-discrimination not currently proscribed under US law[48] in the US.

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48 US Constitution Article VI Clause 2 provides:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States shall be the Supreme Law of the Land.
>
> In *Sale* v. *Haitian Centres Council* (1993) 125 L Ed 2d. 128 - the Supreme Court of the United States had to consider whether the interception (under orders of the President) of vessels illegally transporting persons from Haiti to the US, and the forcible return of such persons to Haiti without prior determination of whether they qualified as refugees, violated US Law or Article 33 of the UN Protocol Relating to the Status of Regugees (ratified by the US Government in January 1967 - 19 US Treaty 6223). The Court held that it did not because, according to the plurality, both under US law and under Article 33 the persons protected from forcible return were aliens actually residing (though illegally) in the United States – not persons of foreign origin on the high seas. However if the

In *McCleskey* (1987), effect-based discrimination in the matter of capital sentencing was held insufficient to overturn the death sentence in any particular case. The Supreme Court's decision in *McCleskey* effectively put an end to statistical challenges to the administration of the death penalty for the foreseeable future. But the *McCleskey* opinion expressly left room for Congress (exercising its enforcement power under Section 5 of the Fourteenth Amendment) to regulate State death penalty procedures which – whether intentionally or not, whether consciously or unconsciously – discriminated against the black murderers of white victims and the black victims of white murderers.

As a result, the Racial Justice Act was first introduced in the US Congress in 1988. It sought to give condemned prisoners a federal right (analogous to Title VII rights in the context of employment) to challenge any death sentence that "furthers a racially discriminatory pattern" based on the race of either the defendant or the victim. Furthermore, condemned prisoners would have the right to support such challenges by methods of statistical proof and without the necessity of showing discriminatory intent motive or purpose on the part of the individual or the institution. Though the Racial Justice Act has undergone several changes it is not yet enacted into law. A failure to do so would constitute a breach of the US Government's express ratification of the ICCPR and the ICERD – particularly of Articles 6 (1), 6 (2) and Article 26 read with Article 2 (2) of the Political Covenant (ICCPR), and of Articles 2 (1) and 5 (a) of the Race Convention. (ICERD).

The Mission is conscious of the final reservation taken to the Covenant and to the Race Convention, namely that their provisions are "not self-executing".[49] But this reservation touches upon the non-enforce-

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Protocol (Article 33) had on its true construction protected aliens not yet in the United States, then the Court said that under "the Supremacy Clause, the broader treaty obligation (under the Protocol) would have provided the controlling rule of law". (at page 149).

49 The opinion of Mr.Thomas Buergenthal, US Member on the UN Human Rights Committee, and former Judge of the Inter-American Court of Human Rights, is illuminating. In the second edition (1995) of his treatise *International Human Rights In a Nut-Shell,* he states:

"It may well be that the recent ratification by the US of a number of major human rights treaties may in time make US courts less reluctant to apply customary international human rights norms. For even if the Courts give effect to the Senate's declarations determining these treaties to be non-self-executing, this would not prevent them from concluding that at least some of these treaty provisions are declaratory of customary international law and apply them as such. They should now be more willing to do so than in the past, because the doubts the Courts might have had before concerning the specific content of a

ability of international instruments under domestic law, and does not effect a conclusion based upon non-implementation of the provisions of the Political Covenant (ICCPR) and of the Race Convention (ICERD).

The Mission is of the considered opinion that in the absence of a nation-wide law framed on the pattern of the Racial Justice Act, the administration of capital punishment in the United States will continue to be "arbitrary", and definitely not in consonance with Articles 6 and 40 of the Covenant.[50]

(ix) Right to Counsel

Capital litigation in the United States is extremely complex. In apparent recognition of this fact, federal law requires that when a Court appoints counsel in capital post-conviction proceedings (for federal offences), at least one attorney must have been a member of the bar for at least five years, and have at least three years' felony litigation experience (Section 7001 (b) of the Anti-Drug Abuse Act of 1988, Pub L 100 -690).

At the same time, Congress has declared through its enactment of 28 USC 2254 (d) that a federal *habeas* Court should give a presumption of correctness to factual determinations made by State Courts, and in *Gregg* v. *Georgia* (1976) the Supreme Court held that meaningful State appellate review in capital cases serves as a check against the random and arbitrary imposition of the death penalty.

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customary rule could be resolved by reference to the text of the particular treaty provision. The fact that the US ratified these treaties and was bound by them internationally should make it easier for US Courts to adopt this approach with regard to treaty provisions that can be shown to be declaratory of customary international law. Of course, while customary international law will not supersede a federal statute, it is federal law, and as such that takes precedence over all state law in conflict with it. See Banco *Nacional de Cuba* v. *Sabbatino*, 376 US 398 (1964)".

50 Passing Amendments to the Habeas Corpus Act without reference to the Racial Justice Act will only make racially discriminatory patterns even more pronounced than at present. This constitutes a matter of grave concern for a democracy professed to be governed by the Rule of Law. Four former Attorney Generals of the United States (Benjamin R. Civiletti, Jr., Nicholas dB. Katzenbach, Edward H. Levi, and Elliot L. Richardson) – appointed during both Republican and Democratic Administrations – wrote to the President of the United States on 8 December 1995, requesting him to preserve independent federal review – a matter "so vital to the future of the Republic and the liberties we all hold dear." (The entire letter is reproduced in the Appendix 3).

In practice, however, the totally inadequate assistance provided by court-appointed counsel at state trial and state appellate levels has undermined the safeguards assumed in legislative and judicial rulings.

Indeed, the American Bar Association has found that the inadequacy – and inadequate compensation – of counsel at trial has constituted the principal failing of the capital punishment system (ABA, August 1990: *"Towards a More Just and Effective System of Review in State Death Penalty Cases"*). In a Study of Representation of Capital Cases in Texas (commissioned in 1990 by the State Bar of Texas) the following finding was recorded:

> "We believe in the strongest terms possible that Texas has already reached the crisis stage in capital representation, and that the problem is substantially worse than that faced by any other state with the death penalty". (The Spangenber Group Report).

Texas is a major capital sentencing State, has 254 counties (more numerous than any other state), and maintains no full-time experienced public defender system for capital cases.

In 1989, the Supreme Court of the United States itself had noted (notwithstanding the presumption in the enactment by Congress of 28 USC-U22551 [d]) that collateral relief proceedings, by way of state *habeas corpus* and federal *habeas corpus*, constitute "a central part of the review process" for prisoners sentenced to death. It further drew attention to the fact that the success rate under federal *habeas corpus* proceedings in capital cases (after all state remedies have been exhausted) ranged from 60 to 70 per cent.[51]

So long as federal *habeas* remains "cribbed, cabined and confined", as it has been in recent years, the death penalty will continue to be operated "wantonly", "freakishly" and "haphazardly" as was the case before *Furman*. Presided over as they are by directly elected judges, and employing juries that have been selected through virtually one-sided *voire dire* processes (due to the lack of opportunity of indigent accused to afford adequate legal representation), state courts have not proved to offer sufficient guarantees against arbitrariness in the administration of the death penalty.

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51 See *Murray* v. *Giarratano* (1989) 492 US 1, 14, 106 L.Ed. 2d. 1, at p.63-134 (concurring judgment of Justice O'Conner and Kennedy). The success-rate statistic is found in the judgment of Justice Stevens (with whom Justices Brennan, Marshall and Blackmun joined, dissenting): 492 US 1 at p. 24, 106 L. Ed. 2d. 1 at p. 20.

(x) Excessive Number of Offences

The Mission is concerned about the excessive number of offences punishable by the death penalty in a large number of states,[52] and by the increasing frequency with which the death penalty is demanded by state prosecutors and imposed by juries or judges. There has also been an unprecedented expansion of federal capital sentencing following the Death Penalty Act, 1994, introduced by the present US administration. All of this stands plainly in violation of Article 6 (2) of the Covenant (death penalty "only for the most serious crimes"), and though a "reservation" has been taken by the United States to Article 6 (2), the Human Rights Committee has recommended (in March-April, 1995) that it be withdrawn. It has urged the US Government to revise federal and state legislation "with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with Article 6 of the Covenant and with a view to eventually abolishing it."

(xi) The Death-Row Phenomenon

The Mission is disturbed by the distressing spectacle of what has been described in other jurisdictions as the "Death-Row-Phenomenon", a macabre but apt expression reflecting the response of international public opinion to the long sojourns of condemned prisoners on death row.[53] Though an embarrassing and disquieting display, not yet ripe for a constitutional Eighth Amendment challenge,[54] the "Death Row

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52 See Appendix 7 and 8. In 1994 alone, 14 states revised their statutory provisions, with most adding additional aggravating circumstances and additional categories of victims.

53 See for instance the decision of the Privy Council in *Pratt* v. *Attorney General for Jamaica* reported in 1994 3 All E.R. 769 (P.C.) and the decision of the European Court of Human Rights in *Soreing* v. *United Kingdom* 161 Eur. Ct. H.R. (ser. A)(1989).

54 Because of its "potential for far reaching consequences" - in *Clarence Lackey* v. *Texas*, decided on 27 March 1995 – the Supreme Court of the United States denied a petition for Writ of Certiorari to the Court of Criminal Appeals of Texas. The Petitioner had raised the question whether executing a prisoner who has already spent 17 years on death-row violated the Eighth Amendment's prohibition against cruel and unusual punishment. Justice Stevens (with whom Justice Bryer agreed) filed a memorandum "respecting denial of *certiorari*" stating that - "though the importance and novelty of the question presented by this *certiorari* petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. See, e.g., *McCray* v. *New York*, 461 US 961 (1983) (Stevens, J., respecting denial of *certiorari*). Though novel, petitioner's claim is not without foundation. ..... As I have pointed out on past occasions, the court's denial of *certiorari* does not constitute a ruling on the merits. Often, a denial of *certiorari* on a novel issue will permit the

Phenomenon" is proof that traditional multilateral and collateral State and federal appellate procedures – mandated by the due process requirements of the US Constitution (and designed to ensure punishment only of the guilty and not of the innocent and to ensure that those convicted of capital murder have been properly so convicted) – are simply "not compatible" with the continued retention of capital punishment as a penalty for crimes, however heinous.[55]

In accordance with its traditions, every country establishes procedures designed to ensure fairness and justness in its criminal justice system. Unlike many other countries, the United States has put in place a regular system of post-conviction reviews, via suits or petitions for *habeas corpus* entered first through State courts and then through federal courts. *Habeas Corpus* has proved effective in correcting manifest injustices. An analysis of the cases decided by the US federal courts show that a substantial percentage of death penalties obtained in State courts (and sustained on review in State Supreme Courts) have been set aside subsequently only because of the availability of *habeas corpus* in federal courts. The recently enacted amendments[56] to the traditional available remedies

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state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York,* at 963. Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study."

55 In *Pratt* v. *A.G. for Jamaica* (1994 3 All E. R. at p.786) the Privy Council said that: "Appellate procedures that echo down the years are not compatible with capital punishment," and added, "the death row phenomenon must not become established as a part of our jurisprudence." But like it or not, it is, and has become, an established part of the jurisprudence of the US. It cannot be wished away or even legislated upon without infringing Eighth and Fourtheenth Amendment guarantees.

In the case of *Soering* v. *The United Kingdom* the European Court of Human Rights upheld the applicant's submission that the decision to extradite him from the United Kingdom to the United States of America to face capital murder charges in the State of Virginia "would expose him to a real risk of treatment going beyond the threshold of Article 3" of the European Convention on Human Rights". This Article prohibits persons from being subjected to "torture or to inhuman and degrading treatment or punishment" and the Court made its findings "... having regard to the very long period of time spent on death row in such extreme conditions, with the ever present mounting anguish of awaiting execution of the death penalty and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence ..." The Court made this decision in light of also having decided on the evidence before it that on the whole the practice and procedure of death penalty sentencing in the State of Virginia was fair.

56 See Chapter 4 of Part II for a discussion of the recent amendment to the federal *habeas corpus* provisions. These amendments limit federal *habeas* appeals by setting a one-year time limit on appeal applications, and federal courts must also as a matter of legal compulsion defer to state court decisions.

(already constricted by judicial decisions)[57] will now render more arbitrary the imposition and execution of death sentences by state courts. The fact that over the past twenty years a large number of persons awaiting execution on death row have ultimately been set free because they were proven to be innocent[58] justifies the need for retaining the ample system of judicial review (in capital cases), and underscores the danger of what Justice Blackmun called "tinkering with the machinery of death."[59]

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57 The ever-shrinking authority of federal courts to reach and redress constitutional errors has affected the legitimacy of the death penalty itself. In the last five years the US Supreme Court has greatly constricted the jurisdiction of federal courts through narrowing, by judicial dicta, of federal *habeas* review, e.g *Teague* v. *Lane*, 489 US 288. Added to this is the new legislative amendments, which changed the existing *habeas corpus* regime in two important ways: first, by statutorily imposing a rule of deference to state courts' fact-finding with a presumption of correctness. See Chapter 4 of Part II for more details.

The US Supreme Court has also in effect restricted the appellate direct review of death sentences in some states. For example, the law in the State of Georgia, requires that the Supreme Court of Georgia determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant" (*Gregg* v. *Georgia* 428 US 153, 166-168 - 1976). Pursuant to this mandate the Supreme Court of Georgia vacated several death sentences because they were disproportionate. This was the experience in other death sentencing states as well. But in *Pullan* v. *Harris* 465 US 37 (1984) the Supreme Court held (plurality of opinion) that proportionality of review of a death sentence was "constitutionally unnecessary." Dissenting Justices Brennan and Marshall however observed: "this form of Appellate Review serves to eliminate some, if only a small part, of the irrationality that infects the imposition of death sentences throughout various states." Since *Pullan* v. *Harris*, state appellate reviews of death sentences by trial Courts tend to be perfunctory. See Chapter 4 of Part II for further details.

58 At least forty-eight persons have been released from death-row since 1973 following evidence of their innocence. According to the findings in a Staff Report issued on 21 October 1993 by the Subcommittee on Civil and Constitutional Rights (Committee on the Judiciary One Hundred and Third Congress, First Session): "the most conclusive evidence that innocent people are condemned to death under modern death sentencing procedures comes from the surprisingly large number of people whose convictions have been overturned and who have been freed from death row ..... At least 48 people have been released from prison after serving time on death row since 1973 with significant evidence of their innocence. In 43 of these cases, the defendant was subsequently acquitted, pardoned, or charges were dropped. In three of the cases, a compromise was reached and the defendants were immediately released upon pleading to a lesser offense. In the remaining two cases, one defendant was released when the parole board became convinced of his innocence, and the other was acquitted at a retrial of the capital charge but convicted to lesser released charges."

59 It was in *Callins* v. *Collins* (February 1994) that Justice Blackmun took his final leave from the Court, where he had sat since 1970, with a powerful dissenting opinion in which he said:

> "Twenty years of tinkering with the machinery of death has failed to achieve the constitutional goal of eliminating arbitrariness and discrimination from the administration of death."

Chapter 6

Findings of the Mission

Based on what is stated in Part I and II, the Mission finds:

(i) A general lack of awareness amongst State officials, and even amongst judges, lawyers and teachers, of the obligations undertaken by the US Government under international instruments that the country has ratified. This is particularly the case concerning commitments under the International Covenant for Civil and Political Rights 1966 (the Political Covenant) and the International Convention on the Elimination of Racial Discrimination 1965 (the Race Convention).

Following ratification of the ICCPR and the ICERD, much wider dissemination and understanding of their provisions is required in the United States – especially in institutions of law and learning. The broader the circulation of reflection and information about these instruments, the greater will be the impact on national opinion in the United States.

(ii) The Supreme Court of the United States has repeatedly held since *Furman* that the touchstone for determining whether punishment is "cruel and unusual" – and therefore violative of the Eighth Amendment – depends upon objective indicators of society's "evolving standards of decency" — principally legislative enactments and responses of juries in capital cases.

With the ratification of the Political Covenant and the Race Convention, "standards of decency" in the US must no longer conform solely to national criteria and views, but must also reflect and take into account global standards as set out in these human rights instruments. By ratifying the Political Covenant and the Race Convention, the United States has accepted to submit its system of punishment for criminal offenses to the judgment of international opinion; and opinion in the Western democracies is unanimous that the death penalty offends civilised standards of decency.

(iii) Capital sentencing as it actually operates in the states is inconsistent with the obligations undertaken by the United States under the Political Covenant and the Race Convention because:

(a) There is no uniformity among the categories of crimes for which the death penalty may be sought under state statutes. These vary significantly and are not in conformity with the limiting restrictions in Article 6 (2) (ICCPR). Moreover, there is insufficient awareness amongst legislators, lawyers and judges of the requirement stipulated in the Covenant that in countries where the death penalty has not been abolished the sentence of death may be imposed "only for the most serious crimes ....."

(b) No statutory provisions exist in the states limiting or controlling "prosecutorial discretion" in seeking the death penalty. Even after *Furman,* this is still left to the unguided discretion of the individual District Attorney in each county and district. Decisions on whether to prosecute, what offence to prosecute, whether or not to ask for the death sentence in a death-qualified crime or whether to plea-bargain are all made at the unbridled discretion of the prosecutor.

(c) Prosecutorial discretion on whether or not to seek the death penalty in a particular capital case is avowedly influenced by external factors, such as expressions of public outrage and the views of relatives of victims.

(d) The criminal justice systems in states allowing for capital punishment are beset with skewed theoretical assumptions, many of them hypocritical. Twin premises underlie the functioning of these systems: (a) that a capital sentencing jury is representative of the criminal defendant's community and thus assures a "defused impartiality"; and (b) that a jury is a criminal defendant's fundamental protector of life and liberty against race or color prejudice. Neither of these assumptions is factually accurate, and they rarely operate in practice to assure a "defused impartiality" in the verdict or to protect a defendant's life and liberty against racial prejudice.

Various principles have been prescribed in recent judicial decisions concerning the process of "striking a juror" in capital cases where the death penalty has been demanded by the District Attorney. What actually operates in practice in many capital punishment states is a system not of "death-qualified" juries but of "death-determining" juries. In five of the thirty-six states in which the death penalty is permitted – Alabama, Florida, Delaware, Indiana, and now Colorado – when a jury in a capital crime case attempts to exercise "defused impartiality" by not recommending a death sentence but only one of life-

imprisonment, state law empowers the judge to override the verdict or recommendation of these "representatives of the criminal defendant's community." Judges frequently do so, imposing a binding capital sentence!

(e) The jury selection system, which involves a complex process of "death-qualification" measures, has worked only to the advantage of prosecutors in such cases and not to the advantage of capital defendants. The requirement of a "death qualified" jury (especially as that expression has been judicially defined and understood since 1985) has introduced elements of unfairness in the death sentencing process.

In addition, the admissibility of victim-impact statements at trials in capital sentencing cases (a practice permitted following the decision in *Payne* v. *Tennessee* in 1991) has created an "impermissible risk" of sentencing decisions being made in an arbitrary manner. In general, fair jury selection procedures are absent in most capital cases, greatly jeopardizing the prospects for a fair trial. Indeed, the present requirement in US law of composing a "death qualified" jury comes perilously close, in practice, to imposing a "hanging jury".

(f) Under Clause 3 (d) of Article 14 of the Political Covenant, the accused has the right to have legal assistance assigned to him where he cannot afford a counsel of his choice. "Striking a juror", an important component of the trial in capital sentencing cases, requires legal skills of a very high order. Hiring such skills is beyond the means available to most poor and indigent defendants, against whom the death penalty is invariably demanded (by the District Attorney) and imposed (by juries or Judges). In the absence of a competent public defender system, the prospect of a person accused of a capital crime receiving a fair hearing is jeopardised.

(g) Under Article 14 of the Political Covenant, every person accused of a criminal offense is entitled to a fair hearing by an independent and impartial tribunal established by law. Article 6 of the Covenant stipulates that no one can be arbitrarily deprived of his life or liberty. Similarly, the Race Convention obliges signatories to prohibit and eliminate racial discrimination in all its forms and to guarantee to everyone equal treatment before tribunals and organs administering justice.

By ratifying the Covenant, the US Government has committed itself to take all necessary steps and to adopt such legislative or other measures as are necessary to give effect to the rights recognized therein (Article 2). But under existing laws in the states, trial by jury of capital crimes does not guarantee a fair and impartial tribunal in death sentence cases, and indeed the prospect of arbitrary imposition of the death sentence remains real.

(iv) The Mission finds that the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of "fair and impartial" tribunals. In fact, many elected Judges have been, and continue to be, fair and impartial in adjudicating cases before them (including cases involving the death penalty), but this is not because of it. The Mission believes that Judges that are required to answer to the vagaries of public opinion place their independence and impartiality at risk, both of which are a pre-requisite under Article 14 of the Political Covenant and a requirement under the UN Basic Principles on the Independence of the Judiciary endorsed in the resolution of the UN General Assembly (29 November 1985).

(v) (a) The Mission found no clear evidence of intent-based racial discrimination, systemic or state-wise. But evidence of effects-based discrimination is more reliable and much more apparent.

(b) The Mission is of the opinion that the Race Convention's prescription of effects-based discrimination (Article 2 (c) of the ICERD)) extends to areas of disparate impact-discrimination not currently proscribed under US law. Change in US law is, therefore, mandated by the provisions of Article 2(c) of the Convention (ICERD), which was ratified by the United States in 1994 without any reservation being taken on this provision.

(c) Even in the absence of such change, the Mission submits that by virtue of the Supremacy Clause in the US Constitution (Article VI Clause 2) broader treaty obligations under the Race Convention would furnish "the Controlling Rule of the Law" in the United States.

(vi) The Mission is of the opinion that in the absence of a nation-wide law framed on the pattern of the Racial Justice Act, the administration of capital punishment in the United States continues to be discriminatory and unjust – and hence "arbitrary" –, and thus not in consonance with Articles 6 and 14 of the Political Covenant and Article 2(c) of the Race Convention. The "death row phenomenon"

offers strong evidence that traditional and necessary multilateral and collateral state and federal appellate procedures – designed to ensure punishment only of the guilty and not of the innocent – are simply "not compatible" with the continued retention of capital punishment as a penalty for crimes, however heinous.

(vii) The Mission is of the view that judicial assumptions of finality attaching to conviction and sentencing in capital cases in state courts are misplaced. The protections assumed do not sufficiently safeguard against miscarriages of justice, principally because of the invariably inadequate and ineffective assistance provided by court-appointed counsel at state trial and state appellate levels.

The holding in *Gregg* v. *Georgia* (1976) that meaningful state appellate review in capital cases serves as a check against the random or arbitrary imposition of the death penalty was first cast into doubt in *Godfrey* v. *Georgia* (1980), and has since been proven erroneous in practice.

Despite the present system of multi-layered state and federal appeal mechanisms, and ample collateral reviews afforded by the US criminal justice system, capital sentencing procedures as they operate in the United States do not ensure equal justice before the law to a large majority of poor and indigent defendants charged with, and sentenced to death for, capital crimes.

(viii) In accordance with its traditions, every country establishes procedures designed to ensure fairness and justness in its criminal justice system. Unlike many other countries, the United States has put in place a regular system of post-conviction reviews, *via* suits or petitions for *habeas corpus* entered first through State courts and then through federal courts. *Habeas corpus* has proved effective in correcting manifest injustices. But the ever-shrinking authority of federal courts to control and address constitutional errors committed in state courts has gravely undermined the legitimacy of the death penalty as a punishment for crimes.

Part II

Chapter 1
Historical Background

a. Introduction

The earliest recorded legal execution on American territory occurred in the former Colony of Virginia, in 1622.[60] The offender was executed for the crime of theft. It has been estimated that since that time a total of 36,000 – 40,000 offenders in the former colonies and the United States of America have been convicted of a capital crime and sentenced to death.[61] However, only half of this number of capital offenders have in fact been executed. In past centuries, in addition to these judicially authorised executions, there was also a considerable number of extra-judicial executions in the form of lynchings.

It is accurate to say that capital punishment has long been firmly entrenched in the American criminal punishment system, and unlike other Western countries who in recent years have abolished capital punishment,[62] the United States of America at both the federal and state levels has re-introduced and expanded the use of the death penalty for capital crimes.

This does not mean that the abolitionist movement so evident today did not exist previously. Indeed the practise of capital punishment has undergone various changes over the centuries, due to the ever-present struggle between those wishing to retain the death penalty for biblical, retributive, or other reasons, and those wanting to see it abolished on fundamental humanitarian grounds. The most significant changes however have occurred during this century. To understand these changes, it is important to look back at some of the earlier developments in the practice of capital punishment both in the former colonies and in the subsequent history of the United States of America. As the ICJ Mission only examined the practice and procedure of the imposition of the death penalty, and did not examine the way in which executions are undertaken, the

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60 Hugo Adam Bedau, *The Death Penalty in America*, Third edition, Oxford University Press, 1982, p.3.

61 *Id.*

62 See Appendix 1, which lists all countries that have abolished the death penalty and those that have retained it.

following discussion does not consider developments aimed at securing ways in which to inflict the penalty more humanely.

b. *Capital Offences*

Early American criminal law was primarily influenced by sixteenth and seventeenth century English law, as this was the legal framework with which the colonists were most familiar. At the end of the fifteenth century, English law prescribed the death penalty for eight major capital crimes, including treason, petty treason (killing of a husband by his wife), murder (killing a person with "malice"), larceny, burglary, rape and arson.[63] While the number of crimes punishable by death increased significantly in England under the reigns of the Tudors, Stuarts, and early Hannovarians (George I, II and III), the American colonies took a varied approach,[64] some following the English models, others not.

Following independence in 1774, the adoption of the American Bill of Rights placed real limitations on the death penalty as it had existed in many of the former colonies. Under this Bill, ratified in 1789 to provide protection to individuals against abuses by the federal government, the Eighth Amendment[65] provided an argument against the death penalty, whereas the Fifth Amendment arguably acknowledged its validity.[66] However, these constitutional restraints did not restrict the states and the federal government in specifying the offences for which the death penalty could be prescribed.

Consequently, until the 1970's the federal penal code and those of the various States contained more than a dozen different offences punishable by death. These included murder (usually various categories including

63 See *supra* note 60 at p.6.

64 *Id.* at p. 6 and 7. Bedau describes the early capital offences in Massachusetts, South Jersey and Pennsylvania. This should be contrasted with Virginia which in 1773 listed over seventy crimes as punishable by death.

65 See Appendix 2 (for an extract of the Eighth Amendment which *inter alia*, prohibits the infliction of cruel and unusual punishment). In early modern English Law, the death penalty was imposed for a wide range of offences, some of them quite petty. In 1957, the United Kingdom restricted it to treason and capital murder as defined by statute. Today it can only be imposed for the offence of treason and piracy with violence. See *Oxford Companion to Law* "Capital Punishment" at page 184 and Halsbury Laws of England, 4th. Ed, Vol 11(1) at para. 432.

66 See Appendix 2 (for an extract of the Fifth Amendment which provides for capital punishment on the presentment of an indictment and pursuant to due process of law).

non-aggravated murder), kidnapping, treason, rape, carnal knowledge, robbery, perjury in a capital case, bombing, assault by a life-term prisoner, burglary, arson, train wrecking, train robbery and espionage.[67] Because there was generally no classification under which murders, rapes, etc., would attract the death penalty, any offender who committed one of these offences, no matter how serious, was potentially liable for the death penalty if convicted of the crime.

c. *Degrees of Murder and Felony Murder Doctrine*

Traditionally, under English law, death penalties were mandatory, which meant that once a jury had found the defendant guilty of a capital offence, the only sentence the court could impose was death. Where a jury felt the defendant's conduct while unlawful warranted some pity, their only alternative was to acquit the defendant of the capital crime and find him or her guilty of a lesser offence not punishable by death. To avoid this threat of "jury nullification", many American colonies rejected the English system of mandatory death penalty in favour of a new practice of dividing murder into degrees of seriousness and granting juries some sentencing discretion in capital cases.[68]

In the United States, the division of murder into degrees was first proposed in 1793 by the then Attorney General of Pennsylvania, who stipulated that only first degree murder should be punishable by death.[69] The purpose of this division was to restrict the mandatory death penalty to the more serious and culpable types of murders. However, the Pennsylvania legislation not only introduced the notion of degrees of murder, but went beyond the English common law definition of this term and included in the category of "first degree murder" all homicides committed "in the preparation or attempt to perpetrate arson, rape, robbery, or burglary." This notion has been referred to as the *felony murder rule*,

67 See *supra* note 60 at p. 8 and 9.

68 *Id.* at p. 10. Maryland introduced jury sentencing discretion in 1809 for treason, rape and arson, but not for homicide. Between 1860 and 1900, twenty states and the federal government had adopted similar practices, and by 1926 these applied in thirty-three jurisdictions, increasing to a further seven by 1963.

69 *Id.* at p. 4. William Bradford, the Attorney General in Pennsylvania stated "all murder, which shall be perpetrated by means of poison, or by lying in wait or by any other kinds of wilful, deliberate and premeditated killing, or which shall be committed in the preparation or attempt to perpetrate arson, rape, robbery or burglary shall be deemed murder of the first degree". All other murders were deemed murders of the second degree.

which is based on the concept that a person should be punished not only for what he or she intends to do but also for any harm that results from his/her action. In such cases, the prosecutor only needed to prove the intent to commit the underlying felony - arson, rape, robbery, or burglary. This meant that an offender who killed, even accidentally, during the commission (or attempted commission) of another felony could also be found guilty of first degree murder. It also meant that an offender (accomplice), whose co-offender in the commission of the felony killed someone, could also be convicted of first degree murder even though he had only participated in a minor way in the actual felony. Today, following a ruling of the US Supreme Court, accomplices to a felony-murder can only be sentenced to death where it can be proven that the accomplice actually killed or attempted to do it, or intended that the killing take place or that lethal force be employed.[70]

Many states adopted legislation along the lines of the Pennsylvania statute, however today very few have retained this traditional notion of degrees of murder.[71] What has been retained is the *felony murder rule*. Indeed, over the years this has been broadened to include any type of felony,[72] so that an offender arrested in the course of assisting others to commit a robbery, could be punished as a capital murderer for a homicide committed by a co-felon even if he/she was not present at the time.

d. Jury Sentencing-Discretion

It has been said that in some states the development of jury sentencing-discretion in capital cases was seen as an effective compromise with those who pressed for abolition or argued against its re-introduction.[73] However, research has shown that in the *Old South*, where the number of capital offences increased dramatically, discretionary rather than mandatory sentencing was accepted on the basis of a very different motivation. This occurred at a time when African-Americans had recently been freed from slavery but were still excluded from testifying against whites, were

70 See *Edmund v. Florida* 458 US 782(1982) US Supreme Court.

71 See *supra* note 60 at p. 4 and 5. Today most jurisdictions separate capital murder from murder *per se* through specified aggravating circumstances.

72 At common law, traditionally, every crime for which the offender, if convicted, was liable for forfeiture of his land and goods and for which the penalty was death, was classified as a felony. The 1870 Forfeiture Act (UK) abolished the harsh effects of forfeiture, and other statutes classified the more serious offences, punishable by imprisonment or death, as felonies. Other minor offences were classified as misdemeanours.

73 See *supra* note 60 at p. 11.

legally unable to serve as jurors and suffered from a lack of trained counsel of their own race to represent them. Consequently, the dominant white class felt comfortable in placing their trust in white judges and juries to administer discretion in an appropriate way.[74]

In all cases, the discretion vested in juries was an unguided one and proved to be an irresistible opportunity for arbitrary and discriminatory results. Such abuse became so widespread and systematic that in 1972 the US Supreme Court in *Furman*[75] put an end to the practice of "unguided" discretion in capital sentencing on the basis that it contravened the Eighth and Fourteenth Amendments of the US Constitution.

As stated in Chapter 1 of Part I, the dictate of the US Supreme Court was that valid death penalty legislation must avoid "unguided discretion" or the total absence of discretion. Some observers have argued – and later cases have shown – that this is an impossible and irreconcilable task.

e. *Appeals*

Traditionally, offenders sentenced to death had no greater right to appeal than any other convicted defendants. Consequently, appeals could only be based on questions of law and not on issues of fact, and appellate courts always deferred to the legislature on the punishment that had been prescribed for a particular offence. This meant that an offender sentenced to death had no means of inducing an appellate court to review the justice of his/her sentence. The appellate court would only examine errors of law that arose during the procedure leading to his/her conviction.

Outside this traditional appellate process, the American colonies had also recognised the English common law writ of *habeas corpus*, a writ regarded as a fundamental protection of liberty since it enabled prisoners to challenge arbitrary confinement before the court. Each of the states have continued to retain the writ for alleged violations of State constitutional rights. Following independence, the United States Constitution also incorporated this protection in Article 1, section 9, clause 2, which states:

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74 *Id.*

75 See *supra* note 2.

> "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

At the same time, federal prisoners were given a right to seek *habeas corpus* in the federal courts under the Judiciary Act 1789 - the required basis of the writ being an alleged violation of the prisoner's federal constitutional rights. After the civil war, the federal government enacted the Habeas Corpus Act 1867, which extended the right to seek federal *habeas corpus* to state prisoners, thereby permitting collateral review, or a further post-conviction appeal, of a state conviction.[76] However, the legislation also required state prisoners to initiate and exhaust their *habeas* claims in the state court system, before commence proceedings in the federal courts. Furthermore they could only initiate proceedings in the federal courts in respect of their alleged violation of a federal constitutional right.

During this century there has been a continual increase in the number of post-conviction appeals. However, in terms of the history of the practice of death penalty sentencing, the use of the appellate process is relatively new. The first appeal to a federal court by a state offender occurred in 1936.[77] By 1946, only two out of 200 offenders sentenced to death sought relief in both state and federal courts. It has now become common practice.

f. Race discrimination

Racism in the United States is an extremely complex issue and is manifested in multiple ways.[78] In 1990 the US Bureau of the Census recorded that 248,709,873 people lived in the United States of America. Of these, 80.3% were white and 12.1% black,[79] with the next largest minority group being that of Hispanic origin, at 9%.

Racism has extensive historical roots in the United States, which was founded in part on the black slave trade and slavery, and involved the col-

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76 The 1867 Act has now been codified in 28 U.S.C. § 2254.

77 See *supra* note 60, at p. 20.

78 See the Report of the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance's, on his mission to the United States of America from 9 to 22 October 1994, E/CN. 4/1995/78/Add. 1. See Chapter 3 of Part II for comments made by the Special Rapporteur on death penalty sentencing in the United States.

79 See Table 2 for a break-up of the population of states with death row offenders on a state by state basis.

onization and genocide of native American tribes. The first African slave was brought to the newly founded British colony of Jamestown in 1619. With the ever-increasing number of colonists settling on American territory, so too increased the number of Africans brought over as slaves. By the end of the seventeenth century a fully-established slave system existed amongst colonial plantation owners in the South, with enslaved Africans serving as the primary source of labour and profit. At the same time a racist social structure was also established, with African slaves placed firmly at the bottom and their numbers continually swollen through the action of northern trading and shipping firms.

Upon independence, these well-established patterns of racial subordination and discrimination were formally condoned by law. Article 1(3) of the US Constitution made a distinction at that time between white males on the one hand, whether propertied or poor, and African slaves and Indians on the other. The former were viewed as full human beings and citizens, the latter as only equalling 3/5 of a person.

It was not until 1865, with the end of the Civil War, that slavery was formally abolished through the Thirteenth Amendment to the US Constitution.[80] Despite this formal abolition, all of the southern states and many of the others passed "Black Codes" (commonly referred to as "Jim Crow laws") mandating racial segregation in most areas of public life and providing for different treatment of races in both private and public affairs. The effect of these codes was to again legalise and legislate white supremacy and white domination throughout society. In 1896 the US Supreme Court codified the racially-based segregated society in *Plessy* v. *Ferguson*[81] through its policy of separate but equal treatment. At the same time, racist organizations such as the Ku Klux Klan and various "white citizens' councils" sprang up and engaged in random acts of racist violence.[82]

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80 This Amendment provides:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation."

81 163 US 537 (1896).

82 See *supra* note 60, at page 10, where it is stated that by the early years of the Twentieth Century more than 5,000 African-Americans had been lynched by these groups. In addition to lynchings, wholesale destruction of African-American property was a normal feature of the activities of these groups.

The "separate but equal" doctrine was successfully challenged in 1954 by civil rights groups objecting to segregation in the schools.[83] This initiative set in motion a series of further challenges to discrimination which resulted in sweeping civil rights legislation in the 1960's in the areas of public accommodation,[84] equal education,[85] employment,[86] voting rights,[87] fair housing[88] and credit.[89]

Despite these changes, racism remains an important factor in various sectors of US society, including the criminal justice system. Previously, criminal offences and the penalties applied to them varied depending on the race of the offender and, in some circumstances, the race of the victim. If an African-American raped a white woman, he was liable to receive the mandatory penalty of death. But if the rapist was white and the victim black, there was discretionary penalty of a fine and /or imprisonment.

Such practices are no longer encoded in law, but patterns of discrimination persist. Today, the figures speak for themselves in relation to racial factors affecting the judicial process. For example, 44% of male prison inmates are black, although African-Americans make up only 6% of the population.[90] In relation to offences involving drug abuse, the disparity is even more alarming. According to the US National Institute of Drug Abuse, 80% of drug users are white, though they make up only 7% of those arrested on drug charges (African-Americans account for 28% of such arrests).[91] Disparities also occur in the numbers of persons tried and

83 *Brown v. Board of Education*, 347 US. 483 (1954). Had the Supreme Court in 1954 declined the opportunity to revive its 1896 doctrine of separate but equal treatment, enunciated in *Plessy v. Ferguson*, it might have taken many years before Congress enacted a desegregation law, given the resistance of southern pressure groups.

84 See Title II, Civil Rights Act 1964.

85 See Titles IV and VI, Civil Rights Act 1964.

86 See Title VII, Civil Rights Act 1964.

87 See Voting Rights Act 1965,

88 See Title VIII, Housing Act 1968.

89 See Equal Credit Opportunity Act.

90 See *supra* note 78 at page 17.

91 *Id.* and also see Marc Mauer *The Drug War's Unequal Justice*, 28 Drug Policy Letter (1996) 11 at page 12 where Mauer cites the following statistics from The Sentencing Project Report:
African-Americans represent:
- 12% of the US. population
- 13% of drug users
- 35% of arrests for drug possession
- 55% of convictions for drug possession
- 74% of prison sentences for drug possession

sentenced. Even the sentences vary, with African-Americans and other racial minorities generally receiving sentences two to three times hasher than those of whites.

The most graphically demonstrated race-based disparity in the criminal justice system involves discrepancies among penalties issued for offences involving "crack" and "powder" cocaine.[92] The basic ingredient of both drugs is the same. The users however differ, "crack" being consumed chiefly by inner city blacks and "powder" by suburban whites. Yet the penalty for the sale or use of "crack" is 100 times greater than that involving the same amount of "powder". Furthermore, not only are the penalties disproportionate, but enforcement of the two offences varies greatly, with inner city blacks being pursued, charged and sentenced more often than whites.

Despite the US Sentencing Commission's unanimous and strong recommendation that such discrepancies be corrected by reducing the penalties for "crack" to those applied to "powder" offences, the US Congress has refused to take action.

It should be noted that the Sentencing Project Report also identified a gender / race disparity, where an African-American woman was 8 times more likely to go to prison than a white woman.

92 Jefferson Morely *White Grams' Burden*, 28 Drug Policy Letter (1996) at page 17.

Chapter 2

Statistics

At the time the US Supreme Court handed down its 1972 decision of *Furman* there were 600 death row prisoners, all of whom had their death sentences commuted to life imprisonment. Since its re-instatement the numbers have significantly increased.

However, comprehensive data, particularly on the earlier stages of the state and federal judicial process in death penalty sentencing, is not readily available. One of the main reasons for this is that there is no obligation on states to record comprehensive information on all death penalty eligible cases from the time of arrest. The US Justice Department collects and publishes a certain amount of data, but responsibility for gathering and widely disseminating regular information has been taken up by organizations such as the NAACP Legal Defence and Educational Fund Inc. (NAACP LDF).

To date, even though significant evidence exists suggesting a link between racial disparities and poverty, to the knowledge of the Mission no empirical study has been conducted examining the possible influence of poverty on the practise and procedure of death penalty sentencing.

Nevertheless, various statistics are available. According to information documented:

- During the eighteen-year period from 1 January 1977 to 31 December 1994, a total 4,557 persons entered state and federal prisons under a sentence of death. Of these, 51% were white, 40% African-American and 7% Hispanic.[93] As shown in **Table 1**, the overall number of persons entering the prison system under a sentence of death has significantly increased since the early 1980s.

- During the same eighteen-year period, a total of 257 executions took place in 24 states. Of the persons executed, 140 were white, 98 African-American, 17 Hispanic and two Native American.[94]

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93 US Department of Justice, Bureau of Justice Statistics Bulletin, *Capital Punishment* 1994, February 1996, at page 2.

94 *Id.* at page 2.

Persons under Sentence of Death 1954 - 94

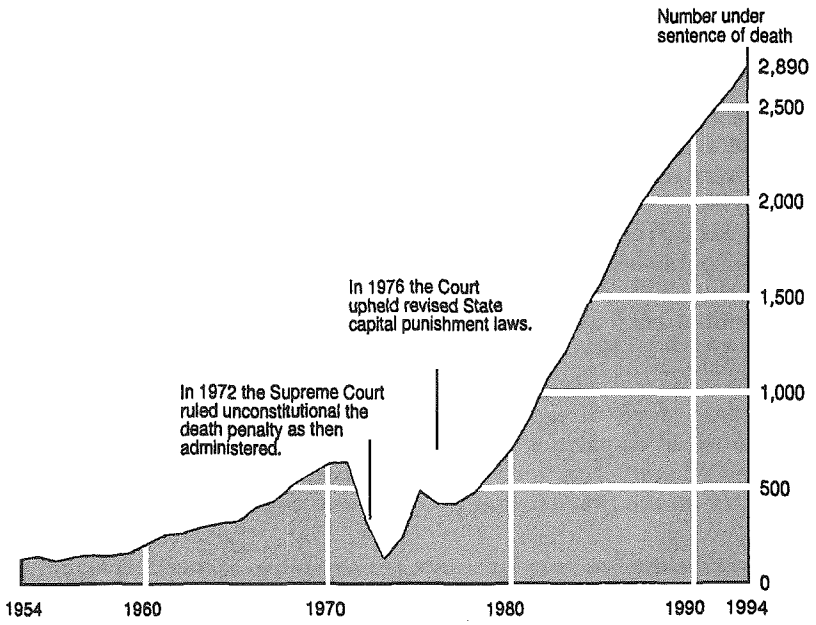

Table 1

Source: Bureau of Justice Statistics Bulletin *Capital Punishement 1994* at page 11.

- From 1973 to 1994, a total of 5,280 offenders were sentenced to death. Of these 4.9% (257) were executed, 2.4% (125) died while awaiting execution, 35.1% (1,851) had their sentence or conviction overturned, 2.4% (128) had their sentence commuted and 0.5% (29) were removed from a sentence of death for other reasons.[95] Thus during this 21-year period, 54.7% (2,890) of those sentenced to death remained death row prisoners awaiting execution.

- According to statistics kept by the NAACP LDF, as of August 1995,[96] a total of 3,046 offenders were on death row throughout the United States. **Table 2** provides a state-by-state and federal breakdown of these figures, demonstrating that California and Texas have the largest number of death row prisoners, at 422 and 399 respectively.

- The same NAACP LDF statistics show that 302 offenders were executed between January 1973 and August 1995. Texas again figures prominently as the state which executed the largest number of offenders – 100 persons – during this period. Of the total offenders executed, 166 were white, 119 African-American, 16 Hispanics (Latina/o) and 1 Native American. Of the total number of persons executed, only one was a woman and nine were juveniles. The race of the victims in these cases was as follows:

337	(82.6%)	white,
52	(12.74%)	African-American,
14	(3.43%)	Hispanics (Latina/o),
5	(1.22%)	Asian.

- The race of the victims seems to have had an influence on the incidence of executions. During the same January 1973 – August 1995 period, statistics show the following offender/victim race disparities:

158	white offender / white victim
83	black offender / white victim
31	black offender / black victim
3	white offender / black victim

95 *Id.* at page 14.

96 *Death Row*, USA., Fall 1995.

Capital Punishment Jurisdictions and Number of Death Row Inmates

State	Prisoners[1]	W[1]	AA[1]	W/V[2]	AA/V[2]	%W[3]	%AA[3]
Alabama	135	78	54	127	23	73.6	25.2
Arizona	119	79	15			80.8	3
Arkansas	35	20	14	46	5	82.7	15.9
California	422	179	158	473	104	69	7.4
Colorado	4	2	1	5	0	88.2	4
Connecticut	5	3	2	3	0	87	8.3
Delaware	14	7	7	14	6	80.3	16.9
Florida	340	183	120	342	102	83	13.6
Georgia	104	59	45	106	17	71	27
Idaho	20	19	0	22	0	94.4	0.3
Illinois	161	53	100	116	86	78.3	14.8
Indiana	51	33	17	54	13	90.6	7.8
Kentucky	27	21	6	44	0	92	7.1
Louisiana	44	12	26	37	18	67.3	30.8
Maryland	13	2	11	17	0	71	24.9
Mississippi	56	21	35	45	19	63.5	35.6
Missouri	93	50	36	78	27	87.7	10.7
Montana	6	5	0	9	0	93	0.3
Nebraska	10	7	2	8	1	93.8	3.6
Nevada	79	40	28			84.3	6.5
New-Jersey	11	4	6	7	3	79.3	13.4
New Mexico	3	1	0	1	0	75.6	2
North-Carolina	154	73	74	133	35	75.6	22
Ohio	150	70	74	131	58	87.8	10.6
Oklahoma	138	81	36			82.2	7.4
Oregon	14	12	0			92.8	1.6
Pennsylvania	197	65	120			88.5	9.2
South-Carolina	58	29	28	66	14	69	29.8
South-Dakota	2	2	0	2	0	91.6	0.5
Tennessee	102	66	32	81	19	83	15.9
Texas	399	163	149			75	11.9
Utah	11	8	2	10	0	93.8	0.7
Virginia	57	27	29	57	14	77.4	18.8
Washington	13	10	2	14	0	88.5	3
US Government	6	2	3			80	12
US Military	8	1	6				

Other Jurisdictions with capital punishment and who as of September 1995 had no sentences imposed are; Kansas, New Hampshire, New York, Wyoming.

Key

W: White Prisoner; **AA:** African American Prisoner; **W/V:** White Victim; **AA/V:** African American Victim; **% W:** Percentage of Population that is White; **% AA:** Percentage of Population that is African American.

1 Source: NAACP Legal Defense and Education Fund. Inc. Death Row USA Fall 1995.

2 Source: NAACP Legal Defense and Education Fund. Inc. Figures for all states and the US government and military were not available.

Federal Capital Offenders

In a report issued in March 1994, the Senate Sub-Committee on Civil and Constitutional Rights[97] reported 37 approved capital prosecutions under the 1988 federal "king-pin" drug law. In 29 (78%) of these cases, the accused was African-American, with four cases (11%) involving whites and four (11%) Hispanics. The report only examined prosecutions up to the end of 1993. NAACP LDF statistics of 31 October 1995, meanwhile, list a total of 8 federal death row offenders, 6 of whom are black and 1 white.

The Sub-Committee also reported that the racial breakdown of offenders in federal death penalty cases contrasted sharply with that of other federal offenders sentenced to prison. Thus during the 1980's, 75% of all federal prisoners were white and only 21% to 27 % African-American.[98] Similarly, 85% of all persons executed under federal law between 1930 and 1972 were white and 9% African-American.

Pointing to the great disparity between these figures and current federal death penalty statistics, the Sub-Committee concluded that "the dramatic racial turn around under the drug kingpin law clearly requires remedial action." To date no such action has been undertaken.

The Mission has been unable to obtain any further statistics, based on race, of federal prosecutions under the 1988 and subsequent 1994 federal laws.

Elapsed Time since Sentencing

According to the Bureau of Justice Statistics, the median time elapsing between the imposition of a death sentence and the end of 1994 – i.e. the time already spent in custody – was 69 months (5.75 years). The mean time of such custody is listed as 76 months (6.3 years).[99] The same statistics indicate that between 1977 and 1994, the average time spent between the imposition of the most recent sentence received and execution was slightly more than 8 years.

97 See Chapter 3 of Part I and note 14.

98 *Id.* at page 4.

99 See *supra* note 93 at page 11.

Chapter 3

US Obligations under International Law

a. Introduction

Several international instruments contain provisions relevant to death penalty sentencing. These are:

- the Universal Declaration of Human Rights[100];
- the International Covenant on Civil and Political Rights (ICCPR)[101];
- the Second Optional Protocol to the International Covenant on Civil and Political Rights (Second Optional Protocol)[102];
- the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)[103]; and
- safeguards guaranteeing protection of the rights of those facing the death penalty (UN Safeguards)[104].

In addition to these, the American Convention on Human Rights and the Protocol to this Convention that provides for the abolition of the death penalty serves as a regional instrument for the Americas.[105]

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100 Adopted and proclaimed by the UN General Assembly Resolution 217 (III) of December 1948. The relevant Articles are Articles 3,7,8,9,10 and 11.

101 Adopted and proclaimed by the UN General Assembly Resolution 2200 A (XXI) of 16 December 1966 and extracts of which are set out in BASIC TEXT 1.

102 Adopted and proclaimed by the UN General Assembly Resolution 44/128 of 15 December 1989 and set out in BASIC TEXT 2.

103 Adopted and proclaimed by the UN General Assembly Resolution 2106 A (XX) of 21 December 1965 and extracts of which are set out in BASIC TEXT 4.

104 Adopted and proclaimed by the UN General Assembly in Resolution 44/128 of 15 December 1989 and set out in BASIC TEXT 3.

105 The American Convention on Human Rights was approved in 1969 and came into effect on 18 July 1978, through the required eleventh deposit of an instrument of ratification. The United States Government signed this Convention on 1 June 1977, but has not yet ratified it. The Optional Protocol was approved on 8 June 1990.

The United States is bound by these instruments only to the extent that it has ratified or adopted them or that the provisions contained therein constitute customary international law. Otherwise it is not required to respect the terms of those it has not ratified or which have not become customary international law.

As mentioned in Chapter 4 of Part I, the United States ratified the ICCPR in June 1992 and the ICERD in 1994.[106] Its ratification of both instruments was qualified through the introduction of a series of "reservations", "understandings" and "declarations" concerning individual provisions of these accords.[107]

Although the US has not recognised the individual petition mechanisms set out in the first Optional Protocol to the ICCPR, or under Article 14 of the ICERD, it has accepted the obligation under both instruments to submit periodic reports to the respective Committees established under these instruments, namely the Human Rights Committee[108] and the Committee on the Elimination of Racial Discrimination.[109] To date, the United States has submitted a report only to the Human Rights Committee.[110] In response to this report, the Committee has made strong comments about the US reservations and questioned whether they are permissible.

A "reservation" to the provisions of an international agreement is defined in Article 2(1)(d) of the Vienna Convention on the Law of Treaties (Vienna Convention) as a:

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106 The United States signed the ICCPR on 5 October 1977, having previously signed the ICERD in 1966. It was not until 1979 that hearings were held on both Covenants before the Senate Foreign Relations Committee. Ratification of the two instruments lay dormant until 1992 when the Committee reported to the Senate on the ICCPR. It subsequently reported on the ICERD in 1994.

107 The ICCPR had 5 reservations, 5 understandings and 3 declarations and the ICERD had 3 reservations, 1 understanding and 1 declaration. The reservations are set out in Appendix 3 and 4.

108 The Human Rights Committee is established under Article 28 of the ICCPR and the reporting requirement is contained in Article 40. In ratifying the Covenant, the United States also declared that it accepted the competence of the Committee to receive and consider complaints, under Article 40, from a State Party about compliance by another State Party.

109 The Committee on the Elimination of Racial Discrimination is established under Article 8 of the ICERD and the reporting requirement is contained in Article 9. Article 11 provides for State Parties to submit complaints to the Committee about another State Party. Unlike the ICCPR there is no prerequisite of a State Party having to make a declaration that it accepts the competence of the Committee to accept such complaints.

110 CCPR/C/81/Add.4 and HRI/CORE/Add.49.

> "Unilateral statement made by a State when signing, ratifying, accepting, approving or acceding to an international agreement, whereby it purports to exclude or modify the legal effect of certain provisions of that agreement in the application to that State. "[111]

The above definition also covers interpretative declarations or understandings by a State Party where these express its understanding of how a particular provision of the treaty will be applied and have the effect of narrowing the operation of that provision in the treaty.[112]

Under the Vienna Convention, States may enter a reservation to a multilateral international agreement so long as the reservation is not prohibited under the agreement and, comes within the terms of specified limited reservations permitted in the agreement or does not conflict with the "object and purpose" of the agreement.[113] In addition to these prohibitions, reservations by State Parties to norms of customary international law are simply not permissible under international law.

While States becoming a party to an international treaty are able to do so with reservations, States already a party to the treaty are also permitted to enter objections to these reservations.[114] In the case of the reservations taken by the United States to the ICCPR, 11 States have lodged specific objections.[115] The State Parties that lodged objections to the US reservations, declarations or understandings all stated that their objections did not constitute an obstacle to the United States becoming a Party

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111 UN Doc. A/CONF. 39/27 (1969). It should be noted that the United States is not a signatory to the Vienna Convention, but, many of its provisions are a codification of customary international law.

112 Paul Sieghart *The International Law of Human Rights*, Oxford University Press Inc., New York 1995, at p. 37.

113 See Article 19 of the Vienna Convention. The restriction of reservations which are incompatible with the "object and purpose of the treaty" was inserted into the Vienna Convention (Article 19(c)) to reflect the 1951 opinion of the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951, ICJ, 15 (May 28)). Articles 20, 21, 22 and 23 of the Vienna Convention relate to objections to reservations and their legal effect as well as the withdrawal of reservations.

114 See Articles 20 and 21 of the Vienna Convention. Article 20(5) of the Vienna Convention also provides that a reservation is considered to have been accepted by another State Party unless it raises objection to the reservation within 12 months after the notification of the reservation or by the date when it expresses its consent to be bound, whichever is the latter.

115 See United Nations, *Multilateral Treaties Deposited with the Secretary-General as at 31 December 1994*, ST/LEG/SER/E/13, for the full text of these objections.

to the Covenant. All the objecting State Parties objected to the US reservation to Article 6(5) relating to the imposition of the death penalty for crimes committed by persons below 18 years of age on the basis that the reservation was incompatible with the purpose and intent of this Article. The State Parties that have lodged objections are,

Belgium Objected to the reservation to article 6(5) only.

Denmark also objected to the reservations to Article 7 and based its objection on the grounds that "Articles 6 and 7 are protecting two of the most basic rights contained in the Covenant" and which were expressly stated to be non derogable rights. Others made similar comments.

Finland also objected to the reservation to Article 7 and the understandings made by the US in respect of Article 2 and 26.

France Objected to the reservation to article 6(5) only.

Germany In its objection it also stated that it interpreted the reservation to Article 7 "as a reference to Article 2 of the Covenant, thus not in any way affecting the obligations" of the US under the treaty.

Italy in its objection to the reservation to Article 6(5) it also stated that the reservation was "null and void". It also made a similar comment to that which Germany made in respect of the reservation to Article 7.

Netherlands also objected to the reservations to Article 7 on a similar basis to Denmark. In respect of the declarations and understandings it stated that it understood that these did "not exclude or modify the legal effect of provisions to the Covenant in their application to the United States, and do not in any way limit the competence of the Human Rights Committee to interpret these provisions in their application to the United States."

Norway also objected to the reservations to Article 7.

Portugal also stated that it considered that the reservation to Article 7 in which "a State limits its responsibility under the Covenant by invoking general principles of National Law may create doubts on the commitments of the Reserving State to the object and purpose of the

Covenant and, moreover, contribute to undermining the basis of International Law."

Spain also objected to the reservations to Article 7.

Sweden also objected to the reservations to Article 7 and 15 and the understandings to Article 2, 4 and 24. It stated that it was of the view that these understandings also amounted to a reservations. It also stated; "[A] reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under the treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant."

On the other hand, no objections have been lodged with respect to the US reservations to the ICERD.

As stated in Chapter 4 of Part I, the adjudication of objections to reservations to a multilateral treaty is not clear. In some cases the terms of the treaty in question will provide the necessary mechanism. For example, under Article 20(3) of the ICERD, a reservation is deemed to be "incompatible or inhibitive if at least two thirds of the States Parties" to the Convention object to it. The ICCPR has no equivalent provision. However, in international jurisprudence there is some support for the view that in the case of a human rights treaty which creates a body to examine and control the obligations of State Parties under the treaty, that body is entitled to determine whether a particular reservation is permissible or not.[116] In the case of the ICCPR this would be the Human Rights Committee. In November 1994, the Committee issued a general comment to this effect concerning reservations, however the comment was expressly rejected by the United States Government. The United Kingdom also objected to the position taken by the Committee, stating that pronouncements by the Committee were not legally binding though they commanded great respect.[117]

A State Party that has made a reservation in its ratification of a treaty can also withdraw that reservation at any time, so long as there is no

116 William A. Schabas, "Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States still a Party ?", 21 *Brooklyn Journal of International Law, 277.*

117 See CCPR/C/21 Rev.1/Add.6 and A/50/40 at 124 and 131.

express contrary provision in the actual treaty.[118] There is no need to obtain the consent of the State Parties who have accepted the reservation. Similarly, a State Party that has lodged an objection to a reservation, is able to withdraw that objection at any time.

In accordance with usual practise the reservations, declarations and understandings entered into by the United States in respect of the ICCPR and the ICERD were those requested by the US Senate. Under US law, the President, if he/she enters a treaty on behalf of the United Sates, is required to include the Senate's requested reservations.[119] Even if the President had wished to make reservations on his own initiative, this would have required the prior consent of the US Senate.

In ratifying both the ICCPR and the ICERD, the United States made two general interpretative statements. The first was an understanding that the provisions of the respective treaties would be implemented "by the federal government to the extent that it exercises legislative and judicial jurisdiction over matters covered therein, and otherwise by the state and local governments". As explained in Chapter 4 of Part I, this understanding is not a reservation and is regarded as having domestic and not international significance.

The second general statement in the ratification of both treaties is a clarifying declaration that guarantees provided in the treaties are "not self-executing." Again this is not a reservation and is of domestic significance. It as an indication of what the President or the Senate ascribes to a particular meaning of the treaty for the purpose of the interpretation of the treaty by a US Court in a similar way that legislative history of a domestic statute is relevant to its interpretation.[120] However, as with all such interpretations it is for the court and not the President or the Senate to be the final arbiter and interpreter of these provisions.

Although the United States has taken the view that with the stated reservations US law complies sufficiently with the provisions of both treaties and, therefore, the implementation of new legislation was and is not necessary. However, as mentioned in Chapter 4 of Part I, by becoming a Party to these instruments, the US has accepted a new body of

118 See Article 22 of the Vienna Convention.

119 See § 314 in *Restatement of the Law: The Foreign Relations Law of the United States*, at page 186.

120 *Id.* at page 188.

jurisprudence which, to date, has been virtually ignored by the courts, the legislature, administrators and the legal profession.[121]

b. International Convention on the Elimination of all Forms of Racial Discrimination

As stated above, no State Party has lodged any objections to the United States reservations to the ICERD. However, when the Committee on the Elimination of all Forms of Racial Discrimination receives the United States first report under Article 9 of the Convention some comments may arise seeking clarification and comment.

Article 1 (1) of the Convention defines "racial discrimination", as;

> "... any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, and cultural or any other field of public life ..."

On 16 March 1993 the Committee on the Elimination of all Forms of Racial Discrimination made the following recommendation on this Article:

> "1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights. The Committee wishes to draw the attention of States Parties to certain features of the definition of racial discrimination in Article 1, paragraph 1, of the International Convention on the Elimination of all Forms of Racial Discrimination. It is of the opinion that the words "based on" do not bear any meaning different from "on the grounds of" in preambular paragraph 7. *A Distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms.* This is confirmed by

121 See also the Human Rights Committee, *Comments on the US Report,* CCPR/C/79/Add. 50 at p. 8, where it recommends that measures be taken to ensure greater awareness of the provision in the ICCPR by judicial administrative authorities as well as lawyers and the general public.

the obligation placed upon States parties by Article 2, paragraph 1 (c), to nullify any law or practice which has the effect of creating or perpetuating racial discrimination.

2. The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of Article 1, paragraph 4, of the Convention. In considering the criteria that may have been employed, the Committee will acknowledge that particular actions may have varied purposes. *In seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether an action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin.*

3. Article 1, paragraph 1, of the Convention also refers to the political, economic, social and cultural fields; the related rights and freedoms are set up in Article 5."

(emphasis added)

The Convention *inter alia*, places an obligation on State Parties to condemn racial discrimination, not to engage in an act or practice of racial discrimination, and to review and amend laws and policies that have the effect of creating or perpetuating racial discrimination.[122] Article 5(a) also expressly places an obligation on State Parties to prohibit and eliminate racial discrimination in all its forms and to guarantee "the right to equal treatment before tribunals and all other organs administering justice."

122 Article 2; see Basic Text 4.

c. *International Covenant on Civil and Political Rights*

Article 6 - The Inherent Right to Life
- Imposition of the Death Penalty
Article 7 - Cruel, Inhuman or Degrading Punishment

The ICCPR places an obligation on State Parties to protect and promote the fundamental rights and freedoms of individuals incorporated in the democratic tradition. Articles 6 and 7 of the Covenant specifically provide for an inherent right to life, while at the same time permitting capital punishment under certain circumstances.

Article 6 provides as follows:

"1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Article 7 of the ICCPR provides:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 4(2) of the Covenant also provides that the rights specified in Articles 6 and 7 are non-derogable rights, meaning that there are no circumstances in which a State Party can amend or in any way detract from the rights set out in these provisions.

It has been generally accepted that the overall objective and purpose of Article 6 is the immediate restriction of the death penalty to the most serious of crimes and the ultimate abolition of capital punishment. While not stated expressly, it has also been accepted that Article 6 prohibits State Parties who have abolished the death penalty from re-introducing it.[123] The main objective and purpose of Article 6 was reaffirmed in 1977 by the United Nations General Assembly[124] and by subsequent meetings of the United Nations Economic and Social Council[125] and the United Nations Congress on the Prevention of Crime and the Treatment of Offenders.[126] The Second Optional Protocol to the ICCPR expressly aims at the abolition of the death penalty, however the United States is not a signatory to this instrument.

123 Unlike Article 4 of the American Convention on Human Rights (set out in Appendix 6), the ICCPR has no specific provision prohibiting the re-establishment of capital punishment in a State Party that has previously abolished it.

124 Resolution 32/61 of 8 December 1977. The resolution stated "..., The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment."

125 Resolution 1984/50 of 25 May 1984 and 1986/10, where the resolutions of the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders were adopted.

126 Resolution 1985/15.

(i) Juveniles

Article 6 of the ICCPR expressly prohibits the death sentence being imposed on persons who at the time the offence was committed were under the age of 18, as well as the implementation of the penalty on pregnant women. Subsequent UN Safeguards have extended these prohibitions to forbid a death penalty from being carried out on a new mother or on those who have become insane.[127]

As explained in Chapter 4 of Part I, in ratifying the ICCPR the United States made a specific reservation permitting the continued imposition of capital punishment on juveniles despite the fact that the Covenant expressly provides that this protection is a non-derogable right. The intention of the United States was to preserve existing US state laws and ensure that these be not limited in any way by the terms of the Covenant. At the time the reservation was introduced, several states had provisions for the imposition of the death penalty on persons under 18, and there were several death row prisoners in this category awaiting execution.[128]

It has been held by the Inter-American Commission on Human Rights that a customary international norm exists prohibiting the execution of children.[129] However, the Commission provided no age specification as to what constitutes a "child". A provision identifying a child as a person under the age of 18 is however provided in the International Covenant on the Rights of the Child,[130] an international treaty the United States is currently considering for ratification.

On 2 August 1955, the United States ratified (with reservations and declarations) the Geneva Convention relative to the Protection of Civilian Persons in Time of War,[131] Article 68 of which provides that "...the death

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127 See Basic Text 3, Article 3.

128 See *supra* note 18 and Appendix 3 for the terms of the reservation. It should be noted that the fifth reservation of the US also reserves the right to treat juveniles as adults notwithstanding Articles 10(2)(b), 10(3) and 14 of the ICCPR -

Previously only 2 State Parties made reservations to Article 6; Norway and Ireland. Norway subsequently withdrew its reservation and Ireland's reservation is of no effect as it has abolished the death penalty. See *supra*, note W. A.. Schabas at p. 289, 291. Other countries whose legislation provides for the execution of juveniles include Bangladesh, Iran, Iraq, Pakistan and Yemen.

129 Inter-American C.H.R., 61 OEA/Ser.L/V/II.71,9 rev. 1 (1987) and see *supra* note 116 at page 296.

130 UN Doc. A/44/736 (1989), Article 1.

131 This Convention is commonly referred to as the fourth Geneva Convention.

penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence." This Convention, as well as the other three Geneva Conventions, embody international principles of humanitarian law and apply in circumstances of declared war or other armed conflict between State Parties. The purpose of the fourth Geneva Convention is to set out minimum protections for civilians ("protected persons") of a State Party under siege. The US in its ratification of the Convention made a reservation in respect of Article 68, but not in relation to the above mentioned paragraph. Accordingly, by its ratification of this Convention, the United States has agreed to protect civilian juveniles in occupied foreign countries from being subject to the death penalty, when no similar protection is granted to juveniles within the United States.

(ii) The Most Serious Crimes

Through its reservations, the United States has also reserved the right to retain existing US state and federal death penalty provisions, as well as the right to create new offences for which the penalty can be imposed. Since ratification, both at the federal and the state levels there has been a re-introduction of the death penalty *per se*[132] or new offences have been created for which a possible penalty is death.[133] Additionally, in some states existing offences punishable by death have been amended by including new circumstances for which the sentence of death can be imposed. In two advisory opinions, the Inter-American Court on Human Rights the Court held that under the provisions of the American Convention on Human Rights any expansion, including new circumstances, of the application and imposition of the death penalty was not permissible.[134] Arguably the same applies to Article 6 of the ICCPR.

(iii) Clemency

Article 6(4) makes express reference to the right to seek clemency when convicted and sentenced to death. In his report to the 52nd session

132 For example, New York where in 1995 amending legislation re-introduced the death penalty for murder in the first degree.

133 For example, in 1994 the US Congress not only re-introduced the penalty for existing offences but the legislation also created new offences which were punishable by death.

134 See I/A Court H.R, Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; and I/A Court H.R., International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No 14.

of the Commission on Human Rights the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Bacre Waly Ndiaye stressed that in all cases this right must be ensured and not used to hasten executions.[135]

(iv) Cruel, inhuman or degrading punishment

In ratifying the ICCPR, the United States made the following reservation in respect of Article 7;

> "That the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[136]

As mentioned in Chapter 4 of Part I, the United States formulated a reservation to Article 7 because they were concerned about decisions of the UN Human Rights Committee and the European Court of Human Rights which had adopted a view that prolonged judicial proceedings involving capital punishment could constitute "cruel, inhuman or degrading treatment or punishment." Similar arguments have been raised before US courts - that is, long incarceration in death row conditions violates US Constitutional guarantees. As discussed in Part I, this argument, to date, has been rejected as a basis for a possible constitutional challenge. Currently, United States death row prisoners spend, on average, more than 6.3 years in prison following confirmation of their conviction and sentencing. The availability of the necessary collateral *habeas corpus* appeals have been seen as the main contributing factor to this delay in the implementation of the sentence of death.

(v) The UN Human Rights Committee

The Human Rights Committee considered the initial report submitted to it by the United States under Article 40 of the ICCPR, on 29 and 31 March 1995. It then adopted various comments and recommendations concerning the report on 6 April 1995.[137]

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135 See E/CN.4/1996/4 at page 130. In his comment, he made reference to a reported case in Indonesia where clemency had been sought without the consent of the offender.

136 To date, no other State Party has made a reservation in respect of this Article.

137 See CCPR/C/79/Add.50 extracts of which are contained in Appendix 5.

As mentioned in Part I with regard to the general question of the permissibility of the US reservations to Article 6(5) and 7 of the ICCRP, the Committee stated that it believed these reservations to be incompatible with the object and purpose of the Covenant.[138] It went on to express concern about the number of offences punishable by death, as well as the number of death sentences being handed down by US state and federal courts, and specifically deplored a number of developments which it believed ran counter to the intent of the Covenant. These included the 1994 expansion of the death penalty under federal law, the re-introduction of the penalty in a number of US states, the imposition and implementation of the death penalty against persons who were under the age of 18 when they committed the offence, and the lack of protection against the death penalty for mentally retarded offenders. It also expressed grave concern about "the long stay on death row, which, in specific instances, may amount to a breach of Article 7 of the Covenant".[139]

Beyond these criticisms of the US report, the Committee recommended[140] *inter alia* that:

- the United States review and consider withdrawing its reservation, declarations and understandings, particularly those in respect of Articles 6(5) and 7;
- federal and state legislation be amended to restrict the number of offences punishable by death to the most serious crimes, with a view to ultimately abolishing the death penalty;
- the United States take the necessary steps to ensure that persons not be sentenced to death for crimes committed before they were 18 years of age.

d. Fair Trial

As has already been explained in Chapter 4 of Part I, in ratifying the ICCPR, the United States is also bound by international law to ensure that procedural guarantees of a fair trial, as provided for in Article 14 of the Covenant, are complied with.[141] These provisions contain interna-

138 *Id.* at page 4.

139 *Id.*

140 *Id.* at page 6 and 7.

141 See Basic Text 1 for the full text of Article 14.

tionally accepted minimum guarantees, and apply generally to all criminal matters. However the Human Rights Committee, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and others have stressed the need for State Parties to observe rigorously all such guarantees in death penalty cases.[142] Procedural guarantees for persons charged with an offence include:

- equality before the courts;
- trial before an independent and impartial tribunal established by law;
- presumption of innocence until proven guilty;
- adequate time and facilities for the preparation of a defence;
- right to legal counsel of his/her own choosing;
- right to be tried without undue delay;
- right to be tried in his/her presence with the assistance of legal counsel and – where in the interest of justice – at no cost to the person charged (e.g., legal aid);
- right not to be compelled to testify against him/herself or to enter a plea of guilty;
- right of review of his/her conviction and sentence by a higher tribunal;
- right to a remedy where there has been a violation of these rights - e.g., *habeas corpus* under Article 3 and 9(4).

Some of these guarantees have been enhanced by other international instruments, and a considerable body of international law has been developed describing the extent and operation of these guarantees. The Covenant provides for the derogation of these provisions, but only in situations of State emergency and then only to the extent strictly required by the exigencies of the situation.[143] No such situation exists in the United States of America.

142 For example, see *supra* note 135 at page 129.

143 See Article 4(1).

(i) Equality before the Courts

Article 2(1) of the ICCPR requires State Parties to respect and ensure that the rights provided in the Covenant are recognised without distinction of any kind, including race, colour, sex, language, religion, political or other opinion, etc.

Article 26 of the same Covenant provides for equal protection before the law, and toward this end requires State Parties to enact laws that prohibit discrimination and guarantee equal and effective protection against discrimination to all persons. Articles 2, 5 and 6 of the ICERD provide for similar non-discriminatory protections. As discussed above "race discrimination" in this context is not limited to intentional and purposeful discrimination, but also includes practices and procedures which have a discriminatory effect, regardless of intent.

Despite legislative elimination of racial segregation and anti-discrimination laws, racism remains a major factor within the United States today. It is most pronounced, with serious consequences, in the criminal justice system. In his report of a Mission to the United States in October 1994, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance stated:

> "Racial factors affect the judicial process, from the moment of arrest right through to the trial. Here again, the figures speak for themselves. For example, although men of African-American origin make up 6 per cent of the United States population, they represent 44 per cent of prison inmates. It is common knowledge that one out of four black males aged 20 to 29 is either in prison, on parole or on probation."[144]

The Special Rapporteur also noted the various studies and reports which confirmed that racism plays a significant role in death penalty sentencing. In his conclusions, he recommended that the death penalty should be abolished, and failing that, discriminatory application of the death penalty should be eliminated.[145]

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144 E/CN.4/1995/78/Add. 1 at page 17.

145 *Id.* at 18. The Rapporteur states: "Measures should be taken to abolish the death penalty, or failing that, to eliminate discriminatory application of the penalty."

(ii) Independent and Impartial Tribunal

While the ICCPR provides for the right to a fair trial by a competent, independent and impartial tribunal, what constitutes such a tribunal is not specified. In 1985 the seventh UN Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, which were subsequently endorsed by the UN General Assembly.[146] These principles are of general application and set out minimum guidelines for judicial independence and impartiality. As stated in Chapter 5 of Part I, regardless of how judges are chosen for office, once so chosen they must act impartially and independently when exercising their judicial function. However, where the method of their appointment does in fact effect their impartiality or independence then there is a breach of the Basic Principles and Article 14 of the ICCPR.

In the United States at the federal level, judges are appointed for life by the President and approved by the US Senate. At the state level, the appointment of judges varies. Of the 38 states that permit death penalty sentencing, 32 also elect their judges. The states of Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Tennessee, Texas and West Virginia elect their judges on the basis of political party affiliations.[147] In six states – Connecticut, Delaware, New Hampshire, New Jersey, South Carolina and Virginia – judges are appointed for life by the state governor.[148] The remainder of the states with death penalty sentencing maintain either an electoral system on a non-political party affiliation basis, or a system involving retention elections in which standing candidates run unopposed.[149] Those states that provide for election of judges on a political party affiliation basis have been the subject of comment in relation to the independence of the impartiality and independence of the judiciary in the United States.[150]

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146 UN Basic Principles on the Independence of the Judiciary at Art. 1, G.A. Res. 146. UN 1, GAOR, 40th Sess. (1985), reprinted in (1990), 25 - 26 *CIJL Bulletin* 14.

147 Stephen Bright "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases" 75 *Boston Law Review*, (1995) 759 at p. 779.

148 *Id.* at page 778 and 779.

149 *Id.* at page. 778. The retention system is referred to as "the Missouri system".

150 See Chapter 5 of Part I and Appendix 5 containing the comments of the Human Rights Committee. The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions also expressed concern about the bias of judges and the prosecution in the administration of the death penalty in the United States. See *supra* note 134 at page 123.

(iii) Right to Counsel

Articles 14 (3) (b) and (d) of the ICCPR provide that a person charged with an offence is entitled to communicate and be represented by a lawyer of his/her own choosing. Article 14(d) also provides that, where the interests of justice require, indigent defendants should be provided with a lawyer at no cost to themselves. The Human Rights Committee in its consideration of these provisions has held that cases involving a death sentence clearly require a lawyer in the interests of justice, and that such a lawyer must be competent to represent the interests of the accused and be available for the trial and all subsequent appeals.[151]

As stated in Chapter 5 of Part I, in its ratification of the ICCPR the United States included an understanding in respect of these paragraphs of Article 14.[152] As mentioned above this understanding, like other understandings made by the United States, is of domestic significance as existing US law did not as a general rule entitle a defendant to a lawyer of his/her own choice when he/she was indigent, nor did federal law provide for a right to counsel where an offence was not punishable by death.[153] The Human Rights Committee, in its comments on the United States report, made no specific comments or recommendations in respect of this understanding.

151 *Robinson v. Jamaica* Report, Forty-fourth Session (A/44/40), Annex X. H. and *Pinto* v *Trinidad and Tobago* Report, Forty-fifth Session (A/45/40), Vol. II, Annex IX. H.

152 See Appendix 3, Understanding (3).

153 See *supra* note 18 at page 17.

Chapter 4

Practice and Procedure of Death Penalty Sentencing in the US Today

a. Summary of Judicial Process in Death Penalty Sentencing

The United States of America has both state and federal criminal justice systems. In the case of death penalty sentencing, the vast majority of capital offenders are state capital offenders, in that they have committed an offence against state law and are charged, tried and sentenced under state law. Appeals at first instance lie in the state courts and subsequently proceed to the federal court system. State law and its practice and procedure must comply with the provisions of the US Constitution. However the US Supreme Court has stressed that it is for each state to decide how to administer its own criminal justice system. The Court will only examine the system to determine the extent that it breaches – or does not breach – the US Constitution.[154]

Federal capital offenders are charged, tried and sentenced under federal law. As a general rule, the judicial process for death penalty sentencing is the same at the state and federal levels, with state offenders having the added ability to seek post-conviction appeals in the federal courts after exhausting their state remedies. The various stages of the judicial process are set out in **Tables 3** and **4.**

As can be seen from these tables, two distinct processes exist: the trial and direct appeal mechanism and the system of post-conviction appeals. The whole operation is initiated when the prosecutor decides that a particular case is one for which the state will seek the death penalty (a capital penalty case). In summary, the 5 main steps in the process are as follows:

Step 1-Prosecutorial Decision to Seek Death

At the state level it is primarily the prosecutor of the county, circuit or district who decides if a particular death penalty eligible case will be

154 For example, see *Harris v. Alabama* 115 S.Ct. 1031 (1995).

Judicial Process for State Offenders

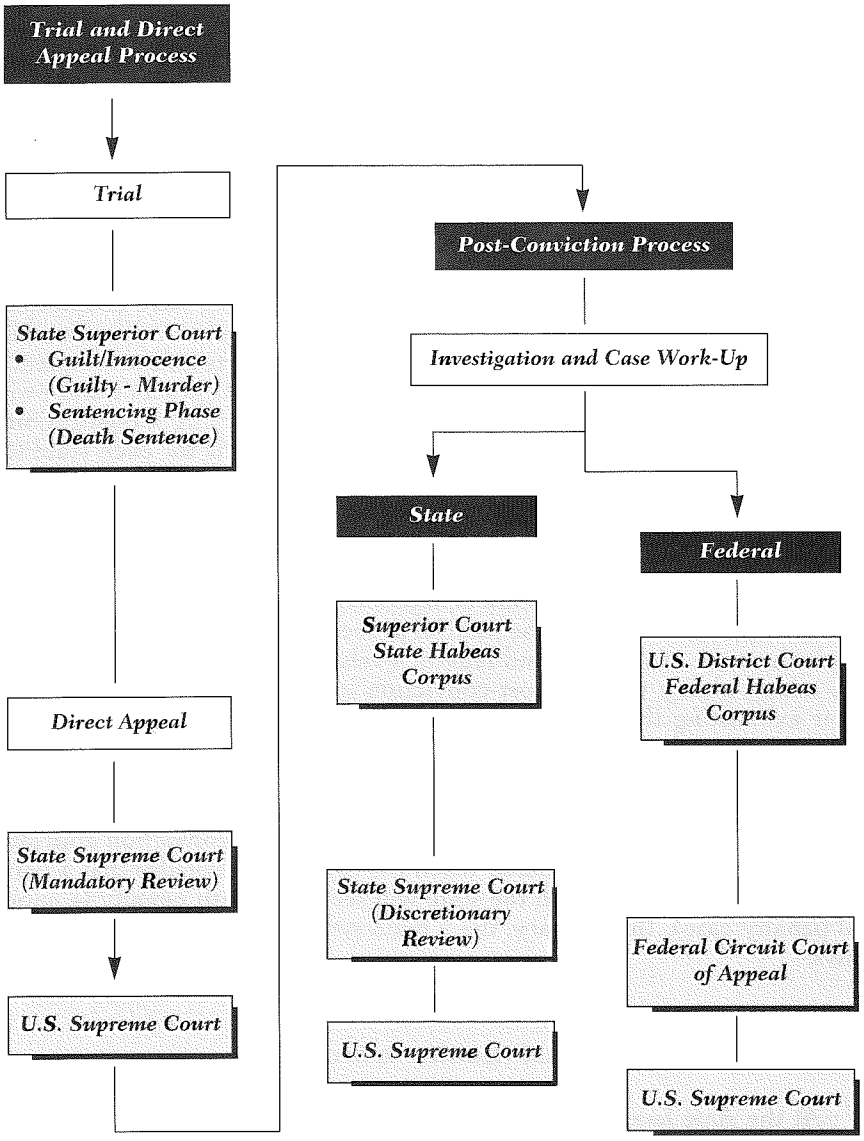

Table 3

Judicial Process for Federal Offenders

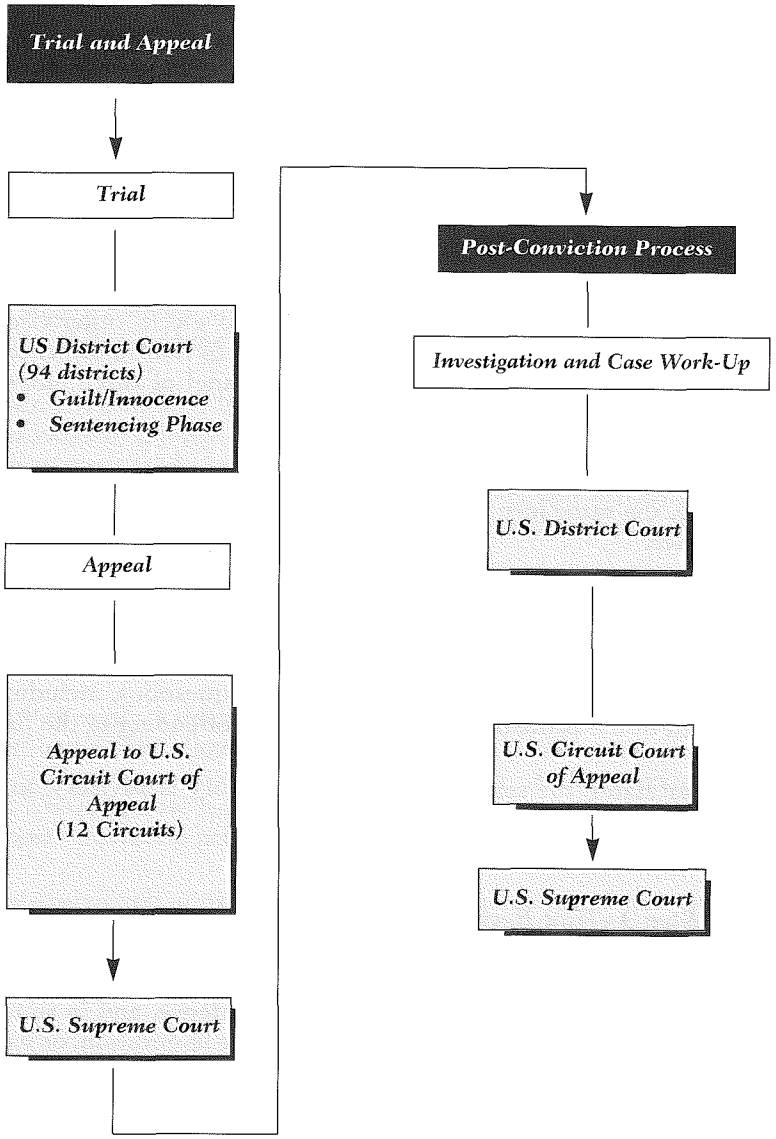

Table 4

treated as such. At the federal level, it is the US Attorney General who makes this decision on advice from the prosecutor and a small committee. In all cases, this decision is made before trial and the accused is advised accordingly.

The accused who are indigent are provided with legal counsel. The appointment of such counsel varies from state to state. Some have a public defender system others have a system of court appointed counsel or some other system.

Step 2 -Trial

Following *Gregg,*[155] all jurisdictions have bifurcated trials: first, the determination of guilt or innocence, followed by a second separate hearing devoted to sentencing. Unless an accused elects otherwise, both stages of the trial will be determined by a jury. In five states, there is an exception to this in that it is the judge or a panel of three judges who determine the sentence.

The jury is empanelled at the commencement of the trial and where applicable, the same jury determines both guilt and innocence as well as the sentence.

The onus of proof at both stages of the trial rests with the prosecution and the sentencer's discretion is guided through specified aggravating and any mitigating circumstances. An exception to this rule is Texas, where the jury is also charged with answering specific questions, including their assessment of the probability of the accused re-offending in the future.

In four states, the sentence decision of the jury is advisory only with the final decision resting with the judge.

Step 3 -Trial-Review (Direct Appeal)

Where an accused is convicted and sentenced to death, all state jurisdictions provide for automatic review of the sentence, and in some cases the conviction, by the Supreme Court of the state in question, or its equivalent. The basis of the review is to correct trial errors as they appear from

155 428 US 153 (1976).

the record of the trial and to affirm or vacate the sentence of death. In some states the court also considers whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases.

Indigent accused are provided with legal counsel. The onus of establishing the alleged errors rest on the offender.

In some states there can be a delay of several years before there is a hearing on the review.

If the state supreme court confirms the conviction and sentence, the offender can appeal to the US Supreme Court on the basis of errors of law, but such appeals are not granted by right and are usually denied. Even where leave to appeal is granted, the US Supreme Court can not go beyond what is included in the record of the case, and indeed has always shown strong deference to the findings of the state court with regard to questions of fact and the exercise of discretion.

Upon confirmation by a state supreme court of a sentence of death, the trial judge or a judge of the same judicial circuit is empowered to sign a death warrant.[156] In recent years it has been the practice of judges not to delay in signing such warrants. Once an execution warrant has been issued, any further appeal first requires the prisoner to seek a stay of execution for the date specified in the warrant.[157]

Step 4 -Post-Conviction Appeals (Habeas Corpus Writ)

Until recently, a death row offender would commence proceedings in the post-conviction stage of the process once a death warrant had been signed, following a confirmation of the death sentence on automatic review. There is now federal and state legislation placing time limits on when post-conviction proceedings can be initiated.

Post-conviction appeals relate to alleged violations of state or federal constitutional procedural rights. The onus of proof of these allegations rests on the offender. A state offender is able to make applications in respect of state and federal alleged breaches of constitutional rights.

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156 In some states (e.g. Florida) the state governor signs the execution warrant.

157 When issuing a death warrant there is a time limit within which the judge or governor can nominate the execution date. This time limit varies from state to state. For example, in Georgia a warrant of execution may be issued from 10 to 20 days in advance, while in California the minimum is 60 and the maximum not more than 90 days.

However, the offender can not commence proceedings in the federal courts until he/she has exhausted his/her remedies in the state courts. Traditionally, states have not provided indigent offenders with a right to counsel at this stage of the process, and many such persons have proceeded without representation or representation through lawyers who provided their services *pro bono*. In 1988, with an increase in the number of persons on death row for whom warrants of execution had already been signed, the federal government initiated a funding mechanism for State post-conviction proceedings. During 1995, however, Congress decided that this funding should not be renewed as of 1 April 1996, despite the continuing increase in the number of death row defendants.

Federal offenders will seek their post conviction applications in the federal courts. Federal legislation provides for legal assistance to indigent accused.

It is at the federal level that many state offenders have had their conviction or sentence overruled, resulting in a retrial, and in such cases, if the prisoner is again convicted or sentenced to death, the entire process can begin again.

Step 5 -Clemency

Most states provide for clemency in some form. The Mission did not examine this aspect of the process but was advised that today clemency is very rarely granted.[158]

b. Range of Offences for which Death is a Possible Sentence Sentencing of Juveniles Mentally Ill

(i) State and Federal Capital Offences

There exists a wide range of state and federal offences to which the death penalty may be applied. These are briefly set out in Appendix 7.

158 In a footnote to his opinion *Herrera v. Collins*, January 1993, Justice Blackmun cited what he described as "an impressive study" (By Bedau and Radelet: Vol. 40 *Stan L. Rev.* 21 at 36) which had concluded that 23 innocent people had been executed in the United States in the Twentieth Century, including as recently as 1984. The majority (in *Herrera*) had cited this study to show that clemency had been exercised frequently in capital cases when showings of actual innocence had been made. Justice Blackmun was not convinced. "But the study also shows", he noted in his dissent, "that requests for clemency by persons the authors believe were innocent have been refused."

Common to all of these offences is the commission of murder — either first degree murder, aggravated murder or murder of a specified person or in specified circumstances. Some states also include treason,[159] train wrecking,[160] drug trafficking,[161] aggravated kidnapping and rape of a child under 14 by a person 18 years or older.[162] While states have ceased to designate new capital offences, they continue to enlarge the conditions under which the death penalty can be sought, by attaching additional aggravating circumstances to their existing capital murder offences.[163] The effect is the same as creating new offences to which the penalty may be applied.

In 1988, the Bush administration enacted the first modern federal death penalty statute, the Anti-Drug Abuse Act[164] which amended sections 841 and 848 of Title 21 in the United States Code by making provision for the imposition of the death penalty for convicted drug "kingpins."[165]

In 1994, the Clinton administration went even further by passing the 1994 Death Penalty Act,[166] which has been described as an "unprecedented expansion of the federal death penalty - an effective rationalisation of capital punishment." The Act revived all the pre-Furman federal offences punishable by death, in addition to creating various new capital offences.

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159 These states are: California, Georgia and, Louisiana. However, while on the statute books the Mission was advised that it had not been used as some doubt had been expressed about its constitutionality.

160 *Id.*

161 For example, Florida. The Mission has also been advised that no death penalty has been sought in respect of this offence.

162 For example, Mississippi. Again, the Mission has been advised that no death penalty had been sought in respect of this offence.

163 US Department of Justice *"Bureau of Justice Statistics Bulletin: Capital Punishment 1994"* Feb. 1996, NCJ - 158023 at page 2 - 3 where it is stated that in 1994, 14 states revised their statutory provisions, with most adding additional aggravating circumstances and additional categories of victims.

164 The newly created offences under this Act are described in Appendix 7.

165 It should be noted that the amendments were consistent with *Gregg* in that provision was made for a bifurcated trial and the allowance of guided sentencing discretion.

166 The newly listed offences are described in Appendix 7.

(ii) Juveniles

As of 12 December 1995, nine juveniles (persons under the age of 18 at the time the capital offence was committed) had been executed in the ten-year period since 1985. This was the date of the first juvenile execution following reinstatement of capital punishment in 1976.[167] In August 1995, a total of 39 death row offenders in 14 states were juveniles.[168]

Federal law and state law in 13 capital punishment states prohibits imposition of the death penalty on juvenile offenders.[169] However, in 16 states, the age eligibility ranges between 14 and 17 years, and eight other states have designated no specific minimum age. **Table 5** identifies the states in all of these mentioned categories.[170]

The age of the offender at the time the capital offence was committed is always regarded as a possible mitigating factor. In those states providing for imposition of the death penalty on persons under the age of 18, all have similar procedures for dealing with such offenders. For example, in Pennsylvania there is a separate criminal justice system which brings offenders before a juvenile court; this court having jurisdiction to deal with specified offences committed by persons under the age of 18 years. However, a juvenile charged with a capital offence is not subject to the jurisdiction of that court unless a judge of the Court of Common Pleas (adult court) remits the case to the juvenile court for its determination. If a case is so remitted, the juvenile court has no jurisdiction to impose the death penalty. The basis of remitting a case to the juvenile court is entirely discretionary and is often based on the juvenile's age, the nature of the alleged offence, the juvenile's alleged culpability and prior criminal history. Not all cases are successfully remitted, and as of 29 December 1995,

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167 See NAACP LDF *Death Row USA*, winter 1995, execution update statistics.

168 See NAACP *Death Row USA* statistics for Fall 1995. The break-up of the juvenile offenders on death row are as follows: 5 in Alabama, 2 in Arizona, 3 in Florida, 2 in Georgia, 1 in Kentucky, 3 in Mississippi, 2 in Missouri, 1 in Nevada, 1 in Oklahoma, 2 in Pennsylvania (note: the LDF has recorded only 2, whereas the Defender Association of Philadelphia being compiled later has recorded 3), 2 in North Carolina, 7 in Tennessee, 7 in Texas and 1 in Virginia.

169 See *supra* note 163 at page 5. Section 848 (l) of Title 21 and Section 3591 (a) of Title 18 prohibit the imposition of the death penalty for a federal offence where the offender was 18 years of age at the time the offence was committed. The States which prohibit the death penalty being imposed on persons under the age of 18 are: California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Tennessee and Washington.

170 *Id.*

Minimum age authorized for capital punishment, 1994

Age less than 18	*None specified*
Alabama (16)	Arizona
Arkansas (14)	Idaho
Delaware (16)	Montana
Georgia (17)	Louisiana
Indiana (16)	Pennsylvania
Kentucky (16)	South Carolina
Mississippi (16)	South Dakota
Missouri (16)	Utah
Nevada (16)	
New Hampshire (17)	
North Carolina (17)	
Oklahoma (16)	
Texas (17)	
Virginia (15)	
Wyoming (16)	
Florida(16)	

In Mississippi, the minimum age defined by status is 13 but effective age is 16 based on an interpretation of US Supreme Court decisions by the state attorney general's office.

In North Carolina, the age required is 17 unless the murderer was incarcerated for murder when a subsequent murder occurred; the age then may be 14.

Table 5

Source: Bureau of Justice Statistics Bulletin *Capital Punishment 1994,* at page 5.

there were three juvenile offenders on death row in Pennsylvania. All were black and all were sentenced in Philadelphia.[171]

The constitutionality of sentencing to death and executing a juvenile was considered by the US Supreme Court in *Thompson* v. *Oklahoma*,[172] where the plurality held that it was unconstitutional to impose the death penalty on a person who was 15 years of age when the offence was committed. Subsequently, in *Stanford* v. *Kentucky*[173] the Court upheld as constitutional the imposition of the death penalty on an offender who was 16 years of age at the time he committed the offence. In the latter case, four of the nine Justices dissented, and held that the execution of an offender under 18 years of age was disproportionate and unconstitutional.

The American Bar Association (ABA), an organization that has not taken a formal position on the death penalty in general, as early as 1983 adopted a resolution calling for the abolition of the imposition of the death penalty on juveniles.[174] Despite this call for its abolition, the practice has continued, and as recently as February-March 1996, the legislature of Georgia was considering legislation that would reduce the minimum age in that state from its current level of 17 to 16 years of age.[175]

(iii) Mentally Ill

Insanity is a defence to capital murder in the same way that it is a defence to any intentional crime. However, insanity will not be established through showing mental illness or mental retardation. At the state and the federal levels, there are various tests for insanity. Some of these build on the English common law test which provides that to escape criminal responsibility it must be proven, by the offender, that at the time of committing the offence he/she was labouring under such a defect of reason from disease of the mind as not to know the nature or quality of the act he/she was doing, or even if he/she did know it, that he/she did not know that it was wrong.[176] If an offender is not found to be insane at the time of committing the offence and is subsequently convicted and sen-

171 Statistics were received by the Mission from the Defender Association of Philadelphia.

172 487 US 815 (1988).

173 492 US 361 (1989).

174 The resolution was adopted at the ABA's Annual General Meeting in Atlanta in August 1983.

175 *The Atlanta Journal,* Editorial, Sunday March 3, 1996.

176 This test is the that formulated by the House of Lords in an advisory opinion in *McNaughten,* 10 Cl. & F. 200, 8 Eng.Rep. 718 (H.L. 1843). See Peter W Low *Criminal Law* 1990 for a full discussion on the current laws in respect of insanity and on whom the onus of proof rests.

tenced to death, then should the offender become insane the US Supreme Court has held that it would be unconstitutional to execute such a person.[177]

In contrast to its treatment of insanity, the US Supreme Court has held that the execution of mentally retarded offender does not violate the US Constitution.[178] Mental illness and mental retardation are factors that the sentencer can take into account when deciding whether the death penalty is appropriate in the case before him/her. However, the statutes of a number of states expressly prohibit mentally retarded offenders from being sentenced to death. These states include: Arkansas, Colorado, Georgia, Indiana, Maryland, Kansas, Kentucky, New Mexico, New York, Tennessee and Washington; similarly, the US Government.[179] Other states have no such provisions, and the Mission was informed that in many instances the death penalty had been sought and imposed on persons who were either mentally ill or retarded.

c. *Prosecutorial Discretion*

(i) State Prosecutors

For all state offences, the decision of whether a particular homicide case should proceed as a capital charge, and whether the state should seek the death penalty, rests with the District Attorney or State Attorney (hereafter included in the term District Attorney) of the judicial circuit, county or district where the offence occurred.[180] With the exception of New Jersey, all states which have the death penalty also provide for the

177 See *Ford v. Wainwright* 477 US 399 (1986).

178 See *Penry v. Lynaugh* 492 US 302 (1989).

179 For example, Section 17-7-131(j) of the Georgia Criminal Code and Section 17-7-131(a)(3) defines "mentally retarded" as "having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behaviour which manifested during the developmental period". Under Section 17-10-61, the Code also prohibits the execution of a person who is "mentally incompetent", this term being defined in Section 17-10-60 to mean that the person is "of a mental condition" where he/she is "unable to know why he or she is being punished and understand the nature of the punishment."

180 For example, Alabama is divided into 40 judicial circuits, each circuit consisting of 1 to 5 counties, with a District Attorney assigned to each circuit. Georgia is divided into 45 judicial circuits, with each circuit having 1 to 8 counties. Pennsylvania is divided into 67 counties and Texas has 235 judicial districts encompassing 1 to 5 counties. In Texas, some of the judicial districts do not have a District Attorney as the smaller districts have amalgamated the position of District Attorney and County Attorney.

election of their district attorneys or state attorneys, some on political party lines.

While legislation provides for guidance on when the death penalty can be imposed by the sentencer there is no statutory guidance for the prosecutor to choose which of the alleged offenders whose conduct falls within these statutory guidelines shall be subject to a possible death penalty. Neither to the knowledge of the Mission had any district attorney formulated guidelines or policies on this issue.[181] Consequently, practices vary from one district attorney to another.[182] Some counties have few or no capital penalty cases, others many. The strength of the evidence and the likelihood that a jury would convict and impose the death penalty are no doubt the main parameters in which prosecutors exercise their discretion. However, as a possible explanation for these disparities the Mission found that each district attorney is influenced not only by the strength of the evidence in the case but also by one or more of the following factors:

- public opinion;
- victim impact evidence;
- an effectively unfettered discretion to plea bargain;
- costs, both in terms of money and manpower.

In *Gregg* (1976), in response to an argument that prosecutors exercise their discretion in an arbitrary manner, Justices White, Burger and Rehnquist stated:[183]

> "Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital

181 The District Attorney of Montgomery County, Maryland, frustrated about the absence of guidelines, sought guidance in an article in his state's Bar Journal. Sonner, "Prosecutorial Discretion and the Death Penalty", *Md. B.J.*, Mar. 1985, at page 6.

182 Tina Rosenberg, "The Deadliest D.A." *The New York Times Magazine*, July 16, 1995, page 21. Rosenberg describes the practices of the District Attorney for Philadelphia who seeks the death penalty in almost all capital eligible cases. Consequently, Philadelphia county's death-row population of 105 is the third largest of any county in the nation even though there are many more populous and murderous counties. It also has 55% of the state's death row population. By comparison, in the same state, the District Attorney of Pittsburgh seeks the penalty only rarely. A similar disparity exists in the State of Georgia where between 1973 and 1990 in the District of Chattahoochee there had been 75% more death penalties imposed than those imposed in the District of Atlanta, which had nearly three times the population.

183 See *supra* note 155 at page at 226.

> felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies, they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts."

Four years after *Gregg,* in *Godfrey* v *Georgia*[184] the plurality took into account events that had occurred since the earlier ruling and, not liking what they saw, concluded that:

- the sentencing proceedings (even after changes in the law) allowed undue discretion, producing the danger of arbitrariness in violation of Gregg. There was no principled way to distinguish the case in hand, "in which the death penalty was imposed, from the many cases in which it was not";[185]

- objective standards for the imposition of the death penalty had not been achieved and in fact were probably impossible to achieve;[186]

- the disgraceful distorting effects of racial discrimination continued to be painfully visible in the imposition of death sentences;[187]

- "the task of selecting in some objective way those persons who should be condemned to die remains beyond the capacities of the criminal justice system."[188]

It is important to remember that the death penalty can only be imposed if sought by the prosecutor, and the prosecutor's decision of whether a particular case should proceed as a capital charge and the death penalty be sought, must be made early in the criminal judicial process (usually prior to indictment). This requires the district attorney

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184 446 US 420, 1980.

185 *Id.* at page 433, Justices Stewart, Blackman, Powell and Stevens.

186 *Id.* at page 439, Justices Marshall and Brennan concurring with the plurality.

187 *Id.* at page 439, Justice Brennan concurring with the plurality.

188 *Id.* at page 442, Justices Marshall and Brennan concurring with the plurality. In this case Justices White, Burger and Rehnquist were relegated to the minority ("the majority today endorses the argument that I thought we had rejected in *Gregg.* at 456.").

to act on what evidence and information is available at the time. A decision to reverse the original decision to seek the death penalty can be made at any time during the course of the legal proceedings, however the converse is not possible.[189]

As mentioned above, costs – both in financial as well as general resource terms – are an important consideration for the District Attorney.[190] The Mission was told that many smaller counties throughout the United States, who must fund not only the enforcement of the law in their jurisdiction but all other services provided by the county, generally have insufficient revenue to allocate to capital punishment proceedings, due to the high investigative and legal costs involved. In these counties scarce resources are often allocated to more pressing needs of the community. On the other hand, the reasonably well resourced District Attorney's Offices are also driven by various cost factors, given that such offices are continually faced with heavy workloads requiring both financial and operational prioritising. Accordingly, when exercising discretion in capital sentencing cases, they are also deciding on how they will allocate their resources, "so as to maximise the ratio of convictions (and sometimes harsh sentences) to manpower invested."[191]

Although the decision by the district attorney in theory is purely legal, bureaucratic and political, variables cannot be ignored where discretion is largely unsupervised or guided.

The ability to plea bargain, although supervised by the court, is a powerful tool available to the prosecutor to achieve his/her objective of maximising the conviction ratio, particularly where the accused is indigent and has inexperienced legal counsel. Many criticise this system as leading to unequal sentences being imposed on offenders who have committed crimes of similar nature and seriousness, thereby contravening the principle of equal justice. It is also alleged that the system is abused by prosecutors in that they "indict high" to "force" a plea of guilty to a lesser offence. In this regard, capital cases lend an additional dimension to the prosecutors ability to plea bargain - the ability to wield the most severe

189 However, the Mission was informed on several occasions by district attorneys or their representatives that once they had decided to seek the death penalty they had a policy of not changing their minds.

190 *Id.* at page 22, where it is estimated that the cost of a capital trial and appeals is about $3 million. One district attorney told the Mission that each capital trial took up the resources of 25 persons for four months at a cost of $1 million or more.

191 Michael L. Radelet and Glenn L. Pierce, "Race and Prosecutorial Discretion in Homicide Cases" 19 *Law and Society Review*, p. 587 (1985) at 616 where Radelet quotes from a 1979 Study by Martha A. Meyers and John Hagen, "Private and Public Trouble: Prosecutors and the Allocation of Court Resources", 26 *Social Problems* 439.

and ultimately irreversible sentence of all, death.[192] The Mission was informed by one district attorney that the practice in his county was to plea bargain 50 to 60% of all possible capital punishment cases.[193]

This means that plea bargaining removes a large percentage of offenders from the death penalty criminal process, either because they agree to plead to a capital offence for which no death penalty will be sought, or because they plead to a lesser crime. In the case of multiple offenders, prosecutors often successfully obtain the agreement of one offender to plead guilty to the crime, on the understanding that the prosecution will not seek the death penalty if the offender gives evidence against his/her co-offender.

The other possible influencing factor on the exercise of the district attorney's discretion is public opinion, a sizeable percentage of which supports the death penalty according to decision-makers.[194]

The influence of public opinion is greatest in those states where district attorneys are elected, some on a party allegiance basis.[195] For example, the District Attorney of Philadelphia, who is a directly-elected official, has been reported as stating that she supports the death penalty

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192 Two examples of where the prosecutor offered a plea bargain are the cases of *Spenkellink v. Wainwright* 578 F.2d 582 (5th Cir. Fla. 1978), 440 US 976, 99 S.Ct. 1548 and *McMillian v. State* 616 So.2d 933 (Ala. Crim. App. 1993). In both cases the defendants refused the plea on the basis that they were innocent. McMillian successfully established his innocence after being convicted and sentenced to death on fabricated evidence (to the knowledge of the prosecutor).

193 The US. Justice Department conducted an analysis of the 1988 murder defendants in 75 of the most populous counties in the United States. Their conclusions were that of every 100 murder arrests by police, 81 proceeded to trial, of which 39 pleaded guilty and 42 were tried (8 of which were acquitted). The same analysis found that of those accused of murder, 19% were charged with first degree murder but only 1% were sentenced to death - See "Murder in Large Urban Counties" 1988 *BJS Bulletin*, May 1993. What is not known is the percentage of those charged with capital murder: how many of the 19% pleaded guilty to capital murder on the basis that death would not be sought?

194 Supporters of the death penalty generally state that their views are consistent with the views of the public. The Mission was told by many that retribution was an ingrained part of American culture regardless of race. Consequently, an uninformed public will always respond positively to the question of "do you support the death penalty?" However, the Mission was informed that other surveys providing for an alternative to the death penalty – long-term imprisonment – gave a contrary conclusion. A poll conducted in April 1993 by the Death Penalty Information Centre found that 77% of the populace surveyed, supported the death penalty but, that this number fell to 56% if the alternative was imprisonment for life, with no parole available before 25 years. Further, almost 60% of those questioned stated that the possibility of executing innocent people caused them to have doubts about the death penalty. See Encyclopaedia Britannica, *Book of the Year 1994*, at page 120.

195 See Chapter 5 of Part I where the same factors influencing elected judges is also discussed.

because her constituents do. She herself does not believe the penalty is a deterrent: it gives the feeling of achieving control over crime though in fact it does not produce this result.[196]

However, she is further quoted as saying;

> "I've looked at all those sentenced to be executed. No one will shed a tear. Prison is too good for them. They don't deserve to live. I represent the victim and the family. I don't care about killers. All of our cases now are multiple gunshot executions, houses set on fire and six children burned to death. This is Bosnia."[197]

By way of contrast, recently the elected Bronx District Attorney made the following comments in responding to pressure from the Governor of New York to indicate whether there were any circumstances under which he would seek the death penalty:[198]

> "... let's be clear that the death penalty is no more the law of New York than is the penalty of life imprisonment without parole. The statute in no way suggests that a sentence of death is the "better" or "presumptive" choice.
>
> ... The imposition of the death penalty in any case is uncertain; the process is lengthy, costly and complex; the penalty has not been shown to be a deterrent in states where it exists; its application has been subject to political pressure; its utilisation has been tied to race; and of course the penalty is irreversible despite the possibility of mistake. In my view, these concerns must factor into every District Attorney's decision in every case involving murder in the first degree. Anything less is irresponsible. ..."

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196 See *supra* note 182 at page 23.

197 *Id.*

198 See *New York Times*, March 21, 1996 and *Newsday* March 24,1996. The death penalty was reinstituted in New York during 1995. The Bronx District Attorney had already expressed some reservations about the death penalty prior to his election. In December 1995, he clashed with the Governor when he declined to seek the death penalty for a gunman who killed 5 people in a shoe store. The March 1996 clash arose after he had failed to indicate whether he would be seeking the death penalty for the slaying of a police officer earlier in the month. Following his refusal to give a clear indication, the Governor had him removed from the case. At the time of reporting, litigation was being considered in respect of this removal.

Comments received by the Mission from district attorneys emphasised that the US Supreme Court had upheld the death penalty as constitutional, state law provided for its imposition and application, and the general public was increasingly demanding that district attorneys seek the penalty and ensure its implementation. All agreed that discretion in deciding which cases to treat as capital penalty cases involved a measure of subjectivity once the prosecutor was satisfied that sufficient evidence existed to convict the offender and have the sentence of death imposed.

For elected district attorneys, their position as prosecutors is usually a stepping stone to the state trial bench, again through an election process in which success is often dependent on public perception of the district attorney's performance during his/her term of office.[199] Successfully prosecuting capital cases, which attract considerable public attention, is a method of securing the electoral support of a public concerned about violent crime.[200]

The election process for district attorneys occurs at the same time as that for all state officials and government members.[201] In this connection, the Mission was informed that according to accepted practice, state officials not wishing to stand for re-election retire approximately one year before the next election date, enabling the governor to nominate another person to the position during the interim. This gives the nominated candidate the advantage of having served in the position for some time before the election and thus not facing the electorate as a relative unknown. Nominees for the position of district attorney also often come from within the District Attorney's Office itself.

If a district attorney has aspirations to higher political office (i.e. an elected state position on the court or otherwise), he/she while in office as district attorney cannot afford to ignore public demands. Professional standards make it unethical and improper for prosecutors to campaign on promises to seek the death penalty.[202] However, in recent years, election campaigns have been fought primarily on two main issues, crime and commerce. *Vis-à-vis* crime, the focus has been on tougher custodial sentences and imposition of the death penalty. Where a prosecutor continually faces re-election, it is difficult to imagine decisions on whether to seek

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199 Stephen Bright, "Judges and the Politics of Death", 75 *Boston University Law Review* (1995) 759 at page 781.

200 *Id.* at page 781, where examples are cited.

201 The States of Georgia and Texas have elections every 6 years, with the next election at the end of 1996.

202 See *supra* note 199 at page 784.

the death penalty in particular cases not being influenced by the pressure of public opinion.[203]

The Mission was also informed that in exercising their discretion, district attorneys normally seek the views of the victim's family. It was stressed that in such cases the family's view is not conclusive but is one of many factors that are taken into account.[204] Critics of this practice explained that district attorneys are often selective in which families they speak to, favouring the relatives of white victims over those where the victim is black. The US Supreme Court has held that "family impact" evidence during the sentencing phase of the trial is lawful, as long it does not violate guarantees of fundamental fairness.[205] The danger cited here is that the practice potentially creates two classes of offenders: those who kill what are perceived as the most worthy members of society, and those whose victims are judged to have less societal value.

Mitigating factors are also taken into account, however no enquiries are conducted beyond a review of what can be found in official criminal records and the information and evidence obtained from the investigation at hand. In law, the onus for producing evidence of mitigating factors rests with the accused, and there is no requirement on the accused to cooperate with the police or district attorney. For these reasons, district attorneys normally make no further enquiries into the cases they handle, and rely on the accused themselves to come forward with any mitigating evidence which may influence their decision. This is a difficult area, as the decision to seek death is made so early in the process, and a disclosure of relevant mitigating circumstances at this stage may jeopardise the position of the accused in respect of his right not to incriminate himself. Highlighting a mitigating circumstance can amount to a direct or indirect admission of guilt.

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203 Comments relating to the position of elected judges equally apply to elected district attorneys. For example, see the Statement of George Kendall, Assistant Counsel NAACP Legal Defense & Educational Fund, before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the United States House of Representatives concerning Reform of the *Habeas Corpus* Review Process, October 22, 1993, at page 11 footnote 33, where an example is given of the enormous public response to the decision of the US Court of Appeals for the Eleventh Circuit to overturn the convictions and death sentences of three offenders convicted of killing 6 members of a farming family in Georgia. Had these judges been elected, it would have been very difficult for them to ignore such a response. Another example given is that of the Governor of California, who assured voters in 1986 that he would appoint judges to the State Supreme Court who would affirm the death penalty. That court now has the highest affirmation rate of any equivalent state court.

204 See *supra* note 199 at page 782, where he cites an example in which a victim's father, who supported the death penalty being sought, subsequently contributed $ 5000 to the district attorney's election campaign for a judicial position.

205 *Payne* v. *Tennessee* 111 S.Ct. 2597, 115 L.Ed. 2d. 720 (1991).

The Mission was also informed that the issue of proportionality – i.e. whether the case in question is of similar seriousness to other cases in which the death penalty has been sought – is not a matter that district attorneys take into consideration when exercising their discretion.[206]

The Mission's enquiries did not encounter any examples where a district attorney admitted to exercising discretion consciously and deliberately on a racial basis. In larger offices, where the district attorney acts on advice contained in a report from his/her officers, the Mission was informed that such reports made no mention of the race of the victim or the accused. This may be the case, but it is difficult to imagine, given the high profile such cases receive, that this is not a subject of common knowledge anyway. In any case, as noted in Part I, several studies have demonstrated the discriminatory effect of the process of death penalty sentencing. For example, the Baldus Study of 2,000 murder cases that occurred in Georgia during the 1970's showed that the prosecutor had sought the death penalty in 70% of the cases involving black defendants and white victims, 32% of cases involving white defendants and white victims, 19% of cases involving black defendants and black victims and 15% of cases involving white defendants and black victims.[207] The report concluded that the principal source of race disparity in the capital sentencing system was at this prosecutorial level.

On the whole, the Mission found that the state district attorney enjoys broad unsupervised and unguided discretion in deciding who will be subjected to a possible death penalty. This discretion is increasingly being widened by the extensive number of circumstances in which the penalty can now be sought, a situation which contributes to the danger of arbitrariness. Where the district attorney is also directly elected, the risks of such arbitrariness are even greater.

(i) Federal Prosecutors

At the federal level, there are a total of 93 US Attorney Offices throughout the country, with the head of each office being responsible for prosecuting alleged federal offences in his/her respective jurisdiction. Recently, the US Federal Attorney General introduced a policy (proto-

206 The Mission was informed by experienced jurists and lawyers that they had seen cases which warranted death and yet where none had been sought. An example was given of two similar factual cases in Texas of the murder of a child by a baby sitter - one child was white and the other black. In the case involving the white child, death was sought, in the other, the offender was prosecuted for a minor offence.

207 *McCleskey* v. *Kemp* 481 US 279, 95 L Ed 2d 262 at page 275.

col) on procedures and criteria to be applied in determining when a death penalty would be sought for a federal capital offence.[208] The Mission was informed that this protocol reflected a similar policy the Attorney General had introduced in Florida when she was Attorney General in that state.

Under this policy, the death penalty can only be sought with the written authorization of the Attorney General. It prohibits the use of the death penalty for the purposes of strengthening the US attorney's position in plea bargaining, but it allows the US attorney to plea bargain a capital charge without the approval of the Attorney General. Required procedure in issuing capital federal offence charges is as follows:

- The US attorney must prepare a "Death Penalty Evaluation" setting out all the relevant facts including aggravating and mitigating circumstances. In the Evaluation the US Attorney is also required to indicate whether he/she does or does not recommend that a death sentence be sought.

- The US attorney's evaluation is forwarded to the Federal Department of Justice where there is a further Evaluation by a Committee appointed by the Attorney General.[209] The Committee is also provided with a fact sheet detailing the race of the accused and the victim(s). The sheet is headed "Non-Decision Case Identification Information" and states that the information contained therein will not be given to the Attorney General.

- In its evaluation the Committee is required to consider all evidence presented to it, including any evidence of racial bias, and any evidence received from the accused. The evaluation, including a recommendation, is then forwarded to the Attorney General who makes the final decision.

No provision exists in the policy for taking into account the views of the victim's family, but the US attorney is required to inform them of all final decisions relating to the death penalty. Again, although the procedure seeks to ensure the elimination of any purpose-based racial bias in determining capital prosecution, the continued existence of effect-based bias was acknowledged in the Staff Report by the Sub-Committee on Civil and Constitutional Rights on Racial Disparities in Federal Death

208 Memorandum from Janet Reno - US Attorney General - *Federal Prosecutions in which the Death Penalty May Be Sought,* January 27, 1995.

209 *Id.* The Committee includes the Deputy Attorney General and the Assistant Attorney General of the Criminal Division or their respective designees. (See Part D of the Policy).

Penalty Prosecutions 1988-1994, relating to drug "king-pin" prosecutions (See Chapter 2 of this Part).

The Mission was informed by Department of Justice officials that since the policy came into operation, the cases of 39 defendants had been considered in accordance with its procedures. In 20 of these cases, the Attorney General had approved the death penalty being sought, with the remaining 19 not proceeding as capital penalty cases.[210] Views expressed to the Mission by defense lawyers held that the new procedures introduced by the Attorney General had indeed improved transparency in the decision-making process on whether to seek death in a particular case. However, all felt that representations on behalf of the accused were ultimately futile as no response to their submissions had ever been given and it was suggested that transparency could be improved by the Attorney General giving reasons for the decision.

d. Appointment of Counsel

Almost all accused charged with a capital offence, at both the state and federal levels, are indigent as well as often illiterate or uneducated.[211] The Sixth Amendment of the US Constitution guarantees all those accused of an offence the right to legal assistance at trial,[212] and the US Supreme Court decision in *Gideon* v *Wainwright*[213] recognised that an indigent defendant in a capital penalty case cannot be guaranteed a fair trial unless he/she is provided with counsel.

At the federal level, Section 3005 of Title 18 and Section 848 (q)(4)(A) of Title 21 of the United States Code require the court to appoint two attorneys, one of whom must be experienced in the law applicable to capital cases and readily available to pursue the case. The Section also makes provision for the court to approve other services, such

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210 The Mission was informed by other groups that with one exception, the Committee and Attorney General had only rubber-stamped the recommendations provided by US Attorneys in their Evaluations. The exception was a case in which the victim was a police officer and the US Attorney had not recommended death. This was overturned by the Attorney General in favour a decision to seek the death penalty.

211 The Mission was informed during its meetings with prosecutors and other administrators of justice that this was the case. This was also supported by the various studies and enquiries that had been undertaken on the issue at a state level and also by the American Bar Association.

212 See Appendix 2.

213 372 US 335 (1963). In federal law, and in the majority of states, there is now legislative provision for the right to counsel in a capital case.

as investigators and experts, deemed reasonably necessary for the defendant to prepare his/her defence. Section 2254 of Title 28 of the United States Code also provides for legal assistance in federal court post-conviction proceedings.

Only a small proportion of capital/death cases are dealt with at the federal level, and issues of competency of counsel do not appear to have arisen there. At the state level, where the greatest number of cases are dealt with, the competence of counsel in the trial process, and the unavailability of the right to legal representation at the state post-conviction stage of the process, have long been areas of significant concern. Representing an accused charged with a capital offence for which the state will be seeking a penalty of death was likened by one respondent to performing delicate brain surgery: it is complex, costly, extremely time consuming, requires a high level of skill and experience and can be irreversibly damaging if not carried out correctly.

Death penalty sentencing cases are unique. A small proportion of such cases involve issues of guilt or innocence, however the majority relate to the application of the penalty only. Where a case turns around the question of the guilt or innocence of the accused, the most serious criminal offence is involved and the decision-maker, the jury, has already been "death qualified" prior to hearing the evidence and giving its verdict. In these circumstances it is imperative that the accused be given every opportunity to mount an adequate defence to the charges. Even where the case is one involving determination of the penalty only, the decision facing the jury is not one between a custodial or non-custodial sentence – and if custodial, for how long – it is a decision between life imprisonment and death. The fact that an offender has pleaded or been found guilty of the most serious criminal offence does not mean that he or she should be given any lesser protection under the Rule of Law. Indeed the reverse should be the case to ensure against arbitrary deprivation of life.

The United States criminal justice system involves an adversarial process in which permanent prosecuting offices resourced by the state (or in some cases by the county) act for the state in criminal matters. The onus on the prosecutor is high in that he or she must prove the case against the accused beyond a reasonable doubt. However, in this adversarial system the accused also has the role of contesting the evidence presented by the prosecution and challenging any procedural errors or the introduction of inadmissible evidence. A failure to pose such challenges at the trial itself will prohibit the accused from raising these issues on appeal, as it is assumed that the accused agrees with procedures and evidence admitted without challenge during the prosecution of his case.

Constitutional errors can be raised on post-conviction appeal; however the accused bears a greater burden at this stage of the process in that he must not only prove the "error" but also demonstrate that it caused prejudice to his defence.[214] As stated above, given the severity and irreversibility of the death penalty, accused defendants – whether indigent or not – need to benefit from experienced competent legal assistance as well as having the necessary resources to conduct investigations and obtain expert assistance.[215]

Representation at Trial and Automatic Review

The incompetence of counsel has been a constitutional issue raised by convicted defendants since the late 1970's[216] and the US Supreme Court has stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[217] The Court went on to state that "[a] Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[218]

Each state maintains its own system of appointed counsel, as no nation-wide legal aid system exists. Throughout the United States, three basic types of systems function to provide indigent accused with legal representation in capital cases. These include public defender programmes, private assigned counsel programmes and contracts with the private Bar[219] All states except Texas have some form of public defender system. This is either in the form of a state-wide, circuit or county-based system.[220] However, in all cases, public defender programmes provide only

214 *Strickland* v *Washington*, 466 US 668 (1984) at 687.

215 See *supra* note 192, *Mc Millian*, where the accused had his own legal representation at trial, paid by his family, but who was inexperienced in dealing with death penalty cases. The recent highly publicised O.J. Simpson case is also an example of what experience and a large amount of resources is able to achieve. In this case, the prosecutor did not seek the death penalty case and Simpson successfully defended the charges through extensive investigation and expertise.

216 See *supra* note 192, *Spenkellink*.

217 See *supra* note 214 at page 685 - 86.

218 *Id.* at page 689.

219 The Spangenberg Group, *A Study of Representation in Capital Cases in Texas*, March 1993. Their graphs of the various state systems for representation of indigent accused are reproduced in Appendix 9.

220 *Id.* at pages 120 - 123.

part of the representation. The other part is furnished by private assigned counsel programmes, commonly referred to as the court-appointed lawyer system.[221] In some states (e.g. Texas) this system is the primary method of trial representation. Finally, 17 states use the system of private Bar contracts as a complement to one or more of the other methods of representation.

In Philadelphia, for example, there exists a county public defender system[222] which provides 20% of the legal representation for indigent accused charged with capital/death penalty offences. The majority of legal representation is provided through the court appointed system. Under this framework, each judge of the Court of Common Pleas maintains his/her own list of names of lawyers who have indicated their willingness to be appointed as legal representative of an indigent accused.[223] To be placed on the list, the lawyer must receive certification from the Philadelphia Bar Association of legal qualifications necessary for appearing before the court. Upon receiving an application from an indigent defendant for appointment of counsel, the judge resorts to his/her list and makes the appointment, usually after consulting the lawyer concerned. The same judge also decides what fee – often within a specific limited range – the appointed lawyer will be paid and how much will be available for investigative costs.[224]

The problem and extent of incompetent counsel for indigent accused was articulated as recently as 1994 in an opinion filed by Justice Blackmun[225] in which he stated:

> "... the unique, bifurcated nature of capital trials and the special investigation into the defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials, yet the attorneys assigned to repre-

221 See Appendix.11.

222 The Defender Association of Philadelphia established a unit to defend capital offenders in 1993, and under an agreement with the state they defend one in every five offenders charged with a capital offence. The Association has however, always provided legal assistance to indigent offenders charged with non-death penalty capital offences.

223 The Mission was informed that private lawyers write to the judges requesting that their name be put on the list. The judge will then generally include that person's name if the lawyer in question has the appropriate Bar certification.

224 See *supra*, note 219 at pages 103-105 for payments made by judges in Texas. The report also cites examples where counsel received no payment.

225 *McFarland* v *Scott* 114 S.Ct. 2568.

> sent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases"[226]

Justice Blackmun went on to describe the low compensation for Court-appointed lawyers. For example, in Mississippi such lawyers in effect provide their services for $11.75 an hour, and the maximum a lawyer could be paid in Kentucky is $2,500.[227] He also cited examples of reported cases in which people sentenced to death were represented by lawyers who had not read the state's death penalty statute, who slept through the trial, were addicted to drugs, or presented no defense of the accused whatsoever.[228]

Because payment to represent an indigent accused is so low and the demands in providing proper assistance are so time-consuming and costly, with a few notable exceptions,[229] those willing to represent the accused do so in order to receive a brief, and are either insufficiently experienced to appreciate what is required or only provide the level of service for which they are paid. Either way the accused receives inadequate legal representation.

Providing inadequately experienced and resourced legal representation for indigent defendants is not only a denial of the accused's rights but also reflects negatively on the entire criminal justice system in terms of extensive appeals, costs and loss of public confidence. This has been aptly described in a memorandum, dated 1 October 1991, by the Chairman of the Board of Directors of the Georgia Appellate Practice and Educational Resource Centre, Inc. to the Supreme Court of Georgia:

> "Since the enactment of Georgia's post-Furman death penalty statute in 1973, two-hundred-ninety-two (292) people

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226 *Id.*

227 *Id.* at page 2786.

228 *Id. at* page 2787 - Justice Blackmun also cited extensively from an article by Stephen Bright, "Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer", 103 *Yale L.J.* 1835 (1994). In some cases the appointed lawyer is imbued with racial bias. For example, *Ross* v *Kemp* 260 Ga. 213, 393 S:E:2d 244 (1990), where the defendant, an African-American, was represented by an attorney who had been the Imperial Wizard of the Ku Klux Klan. This attorney filed no pre-trial motions, fell asleep during the discovery conference, missed court dates and urged the accused to testify without any preparation. The same attorney referred to the accused as a "nigger".

229 Some of the larger legal firms in the various states provide *pro bono* assistance to a very small percentage of indigent accused through this system. However, the Mission was informed that with onset of economic constraints this was happening less and less frequently. Some argue that it is a lawyer's responsibility to provide some degree of legal counsel free to indigent defendants. This however is an unrealistic view concerning the handling of such serious charges involving considerable time and costs.

> have been sentenced to death in Georgia. Currently, there are eighty-two (82) inmates on Georgia's death row, and fifteen (15) people have been executed. This means that at least one-hundred-ninety-five (195) death sentences imposed in this state have been reversed by the appellate courts. If adequate counsel were provided for the trial of capital cases, many of the problems which appellate courts have been forced to rectify during the appeals process would instead be corrected at the outset, before or during trial proceedings. Thus, with provision of adequate trial counsel, more cases would be resolved properly at the trial stage, and the need for post-conviction representation of capital inmates would decrease, both because fewer people would be sentenced to death when their cases call for a lesser punishment, and because fewer trial errors would occur in those cases in which the death penalty was ultimately imposed."

As a result of the dramatic increase in the number of capital trials and the number of these being appealed on the basis of inadequate legal assistance, in February 1989 the American Bar Association adopted comprehensive guidelines for the appointment and performance of counsel in death penalty cases.[230] These are not binding, however, on the autonomous state Bar Associations and, therefore, have not been universally accepted. Adoption of the guidelines is, of course, meaningless if there is insufficient state funding available to implement them.

To date, little has been done to address the issue of ensuring that each indigent person accused of a capital offence is afforded sufficiently experienced and qualified counsel and that his/her defence is adequately resourced. District Attorneys and state appellate lawyers (officers of the State Attorney General Departments) did not agree that this was a serious issue overall, particularly as most accused pleaded guilty in capital cases. This comment ignores the importance of the sentencing stage of the process. Case law and the experience of those representing accused in post-conviction appeals, also provide overwhelming support for a wholly contrary view.

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230 American Bar Association, (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Dec. 1988) (Approved by ABA House of Delegates, Resolution 122, Feb. 1989).

States that have adopted certain standards have stipulated that appointed legal counsel must have a specified period of experience. For example, Section 13A-5-54 of the Alabama Code provides that counsel must have no less than 15 years' experience in criminal law. Although the required number of years of criminal law experience is high, this standard is well below that of the ABA which stipulates specific experience in death penalty cases.

State Post-Conviction Appeals

Until 1988 almost no state provided indigent defendants with any legal representation at the state post-conviction stage of the process.[231] Here again, due to a rise in the number of capital convictions, and to the states' commitment to implement death sentences, there was an ever increasing number of post-conviction appeals, both at the state and (subsequently) federal levels. Because of the lack of public defender programmes for State post-conviction appeals, organizations such as the American Civil Liberties Union (ACLU) or the New York based NAACP Legal Defense Fund (LDF) acted on behalf of these defendants or recruited others to do so on a *pro bono* basis.[232] However, by the late 1980s the number of defendants requiring representation had increased to such a level that many remained unrepresented. The ACLU and LDF were unable to secure enough lawyers or sufficient resources to provide representation to all the offenders suddenly liable for execution due to the increase in the number of death warrants being signed. In response, the Federal Government, through the Administrative Office of the US Courts, in 1988 began providing funds to legal aid centres known as PCDOs (Post-Conviction Defenders Organizations). One of the earliest PCDOs was the Texas Resource Centre.[233] Similar centres were also established over time in Alabama, Georgia, Illinois, Kentucky, Ohio, Oklahoma, Virginia, and South Carolina.[234] In many instances the states matched the federal funding, and the resource centres operated in a manner similar to the ACLU and the LDF, serving as sources of assistance on death penalty sentencing cases and providing legal representation for post-conviction appeals. Available resources were never sufficient to provide lawyers for the initial trial and sentencing stage of the process. However, where a successful post-conviction appeal led to the ordering of a new trial or sentencing hearing, the accused would seek to have the lawyer who represented him/her at the appeal also provide representation at the re-trial.

In some states there is evidence of resistance by judges to agreeing to the accused's request that a lawyer from one of these centres be appointed to serve as his/her legal representative.[235] Judges have sought to rely

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231 The decision of *Murray* v *Giarratano*, 492 US 1, 109 S Ct. 2765, 106 L. Ed. 2d 1 (1989) held that there was no constitutional right to legal assistance for post-conviction appeals.

232 See David von Drehle, *Among the Lowest of the Dead: The Culture of Death Row*, Times Books 1995.

233 See *supra* note 219 at page 7-8.

234 *The National Law Journal*, Monday, January 15, 1996.

235 See *Amadeo* v *State*, 384 S.E:2d 181 (Ga. 1989) where the trial court refused to appoint two experienced counsel who had provided the defendant with 154 collective years of *pro*

on decisions such as *Williams* v *State*,[236] which held that the appointment of counsel was a matter for the discretion of the judge. This decision has not been overruled, and concerns have been expressed that in states where judges are elected, they will continue to exercise their discretion in a biased fashion to ensure that a sentence of death is maintained. The bias arises from the perceived public demand to have the death penalty imposed and implemented.

The resource centres operated very effectively, however additional delays were created in the system as more and more death row offenders secured access to counsel. Criticism of these delays and the resulting drain on the judicial system was once again mounted, with the newly established resource centres increasingly being targeted as the cause of the delays. Others on the contrary have argued that the slowing of the system was partially due to the unavailability of sufficient defense counsel from these centres. In any event, towards the end of 1995 Congress responded by voting to discontinue funding for the PCOD's as of February 1996.[237] At the time of the ICJ Mission, many of these centres had reduced to a skeleton staff and were seeking alternative funding in order to be able to continue to operate. At the same time as cutting its funding to the resource centres, the federal government was also in the process of considering amendments to the *habeas corpus* legislation as an additional step to addressing the perceived causes of delay.

e. *Jury Selection and Role of the Jury*

As discussed in Chapter 5 of Part I, persons accused of a capital offence have the right to be tried before an independent jury, in principle an impartial representative body of the accused's community.[238] The traditional role of the American jury has been to determine the facts necessary to prove the criminal charge against the accused. In death penalty

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bono representation, and who had successfully represented the defendant before the US Supreme Court. Instead the court appointed two local attorneys who had never tried or participated in a capital case. Other examples are, *Brit* v. *State*, 387 S.E.2d 879 (Ga. 1990) and *Davis* v. *State*, 261 Ga. 221, 403 S.E.2d 800 (1991).

236 157 Ga.App. 494 (2) (277 SE2d 781) (1981).

237 See *supra* note 234.

238 For a discussion of the cases see Chapter 5 of Part I. State and federal legislation also allows the accused to elect to be tried before a judge alone without a jury. In some cases, this also requires the consent of the prosecutor.

cases, in 33 of the 38 capital punishment states and at the federal level,[239] the jury performs the additional function of determining facts relevant to the imposition of either the death penalty or life imprisonment for capital crimes. No other alternatives are available for consideration. Because of this unique role of the jury in death penalty cases, and the emotive issues it involves, the US Supreme Court has grappled with the question of what constitutes a "fair" jury selection process for these cases.

Concerns were expressed to the Mission that the selection of persons to constitute a panel of potential jurors continued to be biased in that an insufficient number of African-Americans were involved. It was acknowledged however that this situation had improved, and that there were inherent difficulties in making a representative selection because many African-Americans are either not eligible to be selected or are unable to attend for financial reasons.[240]

(i) Empanelling of the Jury

Empanelling a jury for a capital case under state law requires specialised legal skills and financial resources. The same conditions do not appear to have arisen under federal law with regard to federal capital cases, as it is the judge – not the prosecutor and accused – who is responsible for questioning prospective jurors on their suitability to serve on the jury.

As explained in Chapter 5 of Part I, a jury of 12 persons[241] is select-

239 State legislations in Arizona, Idaho, Montana, Nebraska and Colorado have retained the traditional position, with the judge being the one who determines the sentence. Oklahoma also provides for the jury to determine sentence in other serious criminal cases. It should also be noted that in the states of Florida, Alabama, Indiana and Delaware the jury only gives an advisory opinion which can be overruled by the judge.

240 Following the Supreme Court decision in *Batson* v. *Kentucky*, 476 US 79 (1986), neither party to litigation is able to exclude a prospective juror on the basis of that persons race. If a *prima facie* case of discrimination can be established then the onus is on the party seeking to exclude the prospective juror that this is not on the basis of racial discrimination. Even with this decision the Mission was informed that there were some very practical reasons why few juries contained African-Americans. In Georgia, for example, 1/3 of the African-American population were already involved in the criminal justice system and therefore excluded from jury service. Reasons for inability to attend included refusal by the employer to grant leave for the trial and potential financial in that even if the employer agreed the prospective juror would not be paid his or her salary while serving on the jury. This the vast majority could not afford to do.

241 Legislation also provides for the selection of an additional one or two person as alternative jurors in the event one or more of those selected for the jury need to be excused, for one reason or another, from the jury during the course of the trial and sentence hearing.

ed from a larger pool of prospective jurors (venirement).[242] Prior to the empanelling of the jury both the prosecutor and the accused are provided details concerning those persons selected for the venirement. It is then common practice for the prosecution and the defence to forward a questionnaire to those named on the list. What specific questions are included in the questionnaire is a matter for the prosecutor or the accused to determine, as long as the questions posed are relevant to the purpose of determining the person's suitability as a juror in the case in question. A prospective juror is also obliged to complete the questionnaire to the best of his/her knowledge.

It is on the basis of the responses to these questionnaires that the prosecution and the accused will frame their questions to each prospective juror when these "veniremen" are individually sworn before the trial judge to determine their suitability for the jury. This process of screening is called the *voire dire*. The selection of the jury from the larger pool of venirement, is thus carried out through a process of calling these persons one by one and allowing the prosecution or the accused either to accept or eliminate each person as they are called.

Such elimination can be "for cause", or "no cause". Once the required number of jurors has been reached, the empanelling process is completed. The "no cause" elimination is commonly referred to as pre-emptory strikes, the number of which are limited by statute.[243] If a juror is to be eliminated "for cause" reasons must be given for the person's exclusion. Bias is one such reason. The Mission was informed that extensive questioning is posed concerning the prospective juror's view on death penalty sentencing, along the lines set out in Part I. The questions are not direct and are skilfully framed by the prosecutor. Concern was also expressed that the courts too readily allowed the prosecution to eliminate a prospective juror for cause, without having adequately established a proper legal basis for doing so.

The Mission was also informed that in some cases prosecutors, wishing to secure a jury that identifies with the victim (primarily white), will

242 As explained in Chapter 5 of Part I, this group is selected by an independent body, usually attached to the Court, whose responsibility is to make a random and representative selection of persons who are be eligible for jury service. The Mission was informed that this group can vary in size from 40 to 200 persons. The Mission was told of one example where 500 persons were on the venirement. In most state jurisdictions the selection of prospective jurors is made from a merged list of registered voters and licensed drivers. Twelve states and the federal courts only use voter lists and six states only use drivers lists.

243 In Georgia, the prosecution has 10 peremptory strikes and the accused 20. In Pennsylvania, both accused and prosecution have 20 peremptory strikes and in Texas both have 15.

sometimes use peremptory strikes to exclude from the jury those African-Americans who have been selected for the venirement.[244]

This adversarial system of justice means that both the prosecution and the accused will seek to have a jury empanelled that will support their respective case. The Mission was told that the objective of the prosecution was to have a jury that sympathises and identifies with the victim, whereas the accused seeks to obtain a jury which is representative of his/her community. In many states great emphasis is placed on this part of the process, and it can take up to one to two months to empanel a jury, with the actual trial and sentencing process lasting only three to four days.[245] For the reasons set out in the previous sub-chapter, the legal representative of an indigent accused seldom has the skills or resources to match those of the prosecution in this jury selection process, resulting in a jury that is more likely to favour the case presented by the prosecutor and convict and sentence the accused to death.

(ii) Role of Jury at Sentencing Phase

Due to the severity and irreversibility of a sentence of death, the US Supreme Court has held that a high degree of reliability must be maintained in the sentencing procedure to ensure that the penalty in each case is appropriate.[246] This is achieved through the application of guidelines designed to aid the sentencer in deciding whether or not to impose the death penalty. Specifically such guidelines take the form of statutory identification of aggravating and mitigating circumstances,[247] the former

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244 See Death Penalty Information Centre, *Chattachoochee Judicial District. The Buckle of the Death Belt* 1991, figure 6 of the report, which lists the number of peremptory strikes exercised by the District Attorney against white and African-American venirement members in 10 capital cases in the district up to in 1990. In six cases the jury of 12 contained no African-Americans, in two cases there was one African-American juror, and in more recent cases 3 and 4 jurors respectively. In all cases the prosecutor exercised his 10 peremptory strikes primarily against African-American prospective jurors.

245 The Mission was informed that in Texas, on average, a jury takes one month to empanel a jury for a death penalty case and prosecutors send extensive questionnaires to all prospective jurors.

246 *Mills* v *Maryland,* 486 US. 367 (1988) See also Gary Joseph Vyneman "Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes" 13 *Whittier Law Review* 763 (1992), for an analysis of the US Supreme Court decision in *Blystone* v *Pennsylvania* 110 S. Ct. 1078, 1080 (1990) and those that preceded it.

247 See Appendix 9 and 10 for an example of the mitigating and aggravating circumstances that are provided for in state and federal statues. A few states, such as Texas, have incorporated specified aggravating circumstances as an element of the offence for which the penalty can be imposed. However, during the sentencing phase the jury is still required to consider specific issues relating to deliberateness and possibility of re-offending.

contributing to a decision to impose death, the latter arguing against such a decision. The Court has also held that while aggravating factors must be clearly limited and prescribed, mitigating circumstances must be open-ended to respect the requirement of individualised sentencing as set out in the Eighth Amendment.[248] Many observers have argued that the contrasting principles of closely defining the sentencer's discretion to impose death and leaving the sentencer unlimited discretion to choose not to impose the capital penalty are fundamentally irreconcilable.[249]

The onus is on the prosecution to prove beyond reasonable doubt one or more of the prescribed aggravating factors.[250] This leads in turn to an evidential onus on the accused to raise mitigating factors which must be disproved by the prosecution if the sentencer is not to take them into account in exercising discretion.

In each of the states and at the federal level a prescribed limited list of aggravating factors has been determined. In direct contrast, mitigating circumstances, even if prescribed, are considered unlimited following the decision of the US Supreme Court in *Lockett v Ohio*.[251] In this case the Court held that a restriction on mitigating factors was unconstitutional in that it breached the Eighth Amendment provision for individualised sentencing. Accordingly, any aspect of the defendant's character or record, and any circumstance of the offence advanced by the defendant as the basis for a sentence less than death, must be considered.

There are a number of variations in the legislative requirements guiding the manner in which the sentencer's discretion should be exercised. All of these variations have been upheld as constitutional, and can be divided roughly into three categories as follows:

- consideration of proven aggravating factor(s) and established mitigating factors (non weighing);
- a weighing of aggravating factors and mitigating factors;
- a special finding.

248 *Lockett v Ohio*, 428 US 586 (1978).

249 *Callins v Collins* 114,. S. Ct. (1994) 1127. See also Gary Joseph Vyneman "Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes", 13 *Whittier Law Review* 736 (1992).

250 In Texas, proof of an aggravating factor is an element of the offence and must be established in order to return a verdict of guilty. See Texas Criminal Code Section 19.03. While other jurisdictions do not make it an element of the offence, many of the statutory aggravating factors will be proved during the guilt/innocence phase.

251 438 US 586, 985 Ct. 2954, 57 L.Ed. 2d 27 (1986).

Georgia's legislation is an example of the first category. It provides that a jury is to consider all the proven aggravating circumstances and the established mitigating circumstances. It is not instructed to weigh the aggravating and mitigating circumstances against one another, but rather "to designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond reasonable doubt"[252] where it makes a recommendation of death.

An example of the second category is legislation enacted in Mississippi and Pennsylvania, whereby the jury is instructed to weigh all aggravating and mitigating circumstances and can only impose the death penalty where the former is not outweighed by the latter.[253]

In both categories, where the jury finds that one or more aggravating factor has been proven and no established mitigating circumstances are present, the jury is required to return a verdict of death. The difference however between the two categories is that where on appeal an accused is successful in establishing that one or more of the aggravating factors relied on by the jury was erroneous, in the second category the sentence will be vacated and a new sentencing hearing will be ordered. In the first category if the jury identified other aggravating factors the sentence will remain confirmed.[254]

In both these categories, a unanimous decision of the jury is required for imposition of the death penalty.

An example of the third category is illustrated by the legislation of Texas, whereby aggravating circumstances are considered elements of the offence and at the end of the sentencing phase the jury is asked to answer specific questions.[255] The first of these questions inquire:

> "(1) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant

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252 Georgia Criminal Code Section 17-10-30. This legislative scheme was upheld as being constitutional and complying with *Gregg* by the US Supreme Court in *Zant* v *Stephens*, 462 US 862, 872,77 LED 2d 235, 103 S Ct. 2733 (1983).

253 In Pennsylvania the relevant section of their criminal code is Section 9711 (42 Pa.C.S.A).

254 See *James v Stringer* 117 LED 2d 367.

255 Texas Code of Criminal Procedure, Article 37.071.

> guilty as a party under Sections 7.01 and 7.02; Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."

The first question concerns the danger the defendant might pose for the community in the future, i.e. the probability that he/she will commit offences again. The second question relates to co-defendants in a trial who did not commit the "acts and omission" that actually killed the victim(s), i.e. were not persons who "pulled the trigger."

The onus is on the prosecution to prove the issues contained in each question beyond reasonable doubt, and in making their determination the jury is required to consider the evidence admitted at the trial and the sentencing stage as well as any mitigating circumstances.[256] The Mission was informed that the prosecution usually adduces expert psychiatric and psychological evidence on the issue and on the offender's previous criminal record. However, concern was expressed to the Mission that studies have shown it is not possible to make reliable predictions about future danger posed by offenders,[257] particularly in death penalty cases, where no mention is made of how far into the future this determination needs to be projected.

If the jury unanimously answers "yes" to question one and – where applicable – to question two, then a further question is posed as follows:

> "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed."[258]

256 *Id.* Article 37.071 (c) and (d)(1).

257 James W Marquart and Jonathan Sorensen, "Institutional and Post-Release Behavior of the Texas" Furman *Commuted Inmates*, 26/4 *Criminology* 677, where the study monitored 100 Texan prisoners removed from death row to life imprisonment since 1970. Of these, two had re-offended.

258 See *supra* note 255, Article 37.071(e).

The difficulty for the jury in answering this question is that in Texas, as in some other jurisdictions,[259] the jury is prohibited from being informed of what in fact a term of life imprisonment entails – i.e. how many years of incarceration are involved. In Texas this can be as much as 40 years. In having answered "yes" to question 1, the jury has already determined that the defendant remains a danger to the community, yet the jurors cannot adequately assess that danger in the context of the likely term of imprisonment that would be imposed. Many jurors' only knowledge of the criminal justice system is what they hear and see through the popular media, which tends to highlight one or two criminal cases in which offenders have been released on parole and have subsequently committed another offense. This, together with a mistrust of parole boards, some of whom have come under public scrutiny for corrupt practices, means that the jury does not reach a decision on a fully informed basis. What the jurors have before them is a proven case of aggravated murder, and by their selection as a "death qualified" jury they are often heavily pre-disposed towards imposing the death penalty for this crime.

If the jury unanimously answers "no" to the third question (i.e. indicates that there are not sufficient mitigating factors to warrant the alternative penalty of life imprisonment) the legislation requires the Court to sentence the defendant to death.[260] At neither stage of the questioning is the jury required to identify the basis on which it has made its decision.

As stated above the failure to inform a jury about what life imprisonment entails is not unique to Texas, though many jurisdictions have amended their law to require this information to be given. Others have changed their statute by making life imprisonment to mean specifically the natural life of the offender, without possibility of parole. However, in some jurisdictions the possibility of no parole can be commuted. In some states the jury is also informed of this possibility.

(iii) Judge Override

In four States – Florida, Alabama, Indiana and Delaware – the decision of the jury is advisory only, with the ultimate decision of whether the

259 See *Simmons v South Carolina* 114 S.Ct. 2187 (1994) where the US Supreme Court held that if the prosecution seeks the death penalty on grounds including the defendant's future "dangerousness", then under the due process clause of the Fourteenth Amendment the defendant is allowed to present information to the jury concerning parole ineligibility. Subsequent decisions of the federal court have interpreted this decision very narrowly - See *Townes* v *Murray* 68 F. 3d 840 (4th Cir. 1995).

260 See *supra* note 255, Article 37.071(g). A response of "no" to this question by 10 jurors will result in a sentence of life imprisonment.

death sentence should be imposed resting with the judge. As an example, the sentencing phase of the Alabama legislation provides the following structure:

- **a sentence hearing before the jury**[261] where the jury must weigh the aggravating and mitigating circumstances, and if it unanimously finds that the former outweighs the latter, must return an advisory verdict recommending that the penalty be death. To return an advisory verdict of life imprisonment without parole, a majority of 10 jurors must find that the mitigating circumstances outweigh the aggravating circumstances or that there are no aggravating circumstances at all. If the jury is unable to give an advisory verdict on either basis, a new jury is empanelled and a new sentence hearing is conducted.

- **a sentence hearing before the judge**[262], where the prosecution and the accused are free to present additional arguments the Judge is required to consider the evidence presented at trial, the evidence presented during the sentence hearing before the jury and the pre-sentence investigation report, and make a determination (weighing the aggravating and mitigating circumstances). In making the sentencing decision the judge is required to give consideration to the advisory verdict by the jury but he/she is not bound by it.

Alabama's legislative scheme was considered by the US Supreme Court in *Harris* v *Alabama*.[263] In this case the defendant was convicted of a capital murder offence, and the jury returned an advisory sentence of life imprisonment. The judge however rejected the jury verdict and sentenced the defendant to death. The defendant then sought *certiorari* review on the basis that there had been a violation of the Eighth Amendment by the sentencing judge's failure to give adequate weight[264] to the jury's advisory opinion. The plurality rejected the defendant's petition, and upheld as constitutional the Alabama legislative provision, judging that

261 Alabama Code Section 13A -5-46(a)-(e).

262 Alabama Code Section 13A - 5-47.

263 115 S.Ct. 1031 (1995). The facts of this case were that the defendant, married to the victim, a deputy sheriff, had arranged for McC to find someone to kill her husband. She paid $100 for this task with a promise of more once her husband had been killed. Her husband was killed by McC., H. and S. with S. pulling the trigger. Later McC agreed to give evidence for the prosecution on the basis that the prosecution would not seek the death penalty in his case. McC and H. received life imprisonment without parole. In the case of S. the jury also returned an advisory sentence of life imprisonment which was rejected by the judge who imposed the death penalty.

264 This is a legislative requirement under the Texas statute.

the legislation adequately channelled the sentencer's discretion. The Court also held that it was for the state to determine what particular weight the judge should place on the jury's advisory verdict.[265] However, it also noted that the Alabama sentencing scheme "has yielded some ostensibly surprising statistics" in that there had been only 5 cases in which the judge had rejected an advisory verdict of death compared to 47 cases where the judge imposed death over a jury recommendation of life.[266] The Court went on to question the inference that could be drawn from these figures, as it was not known in how many of the cases where the jury returned a recommendation of life, they would have instead returned a sentence of death had they known there would be no further determination on the issue. This reasoning of course suggests that the jury did not make a determination in accordance with the law in the first place.

Justice Stevens in his dissenting judgment held that the Alabama legislation was constitutionally unacceptable as it placed total reliance on the judge to pronounce the death sentence.[267] In his opinion, "a capital sentence expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity," and "an expression of community outrage carries the legitimacy of law only if it rests on fair and careful consideration, as free as possible from passion and prejudice."[268] He went on to state that the jury system provided the most reliable insulation against passion, prejudice and politics. Of judges he stated:

> "Community participation is as critical in life-or-death sentencing decisions as in those decisions explicitly governed by the constitutional guarantee of a jury trial. The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office-or who merely wish to remain judges-must constantly profess their fealty to the death penalty. Alabama trial judges face partisan election every six years... The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III."

In 1991, the Report and Recommendation of the Florida Supreme Court Racial and Ethnic Bias Study Commission stated that between

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265 See *supra* note 263 at page 1035.

266 *Id.* at page 1036.

267 *Id.* at page 1039.

268 *Id.* at page 1038.

1972 and July 1991, jury recommendations of life imprisonment had been overridden by judges on 128 occasions.[269] In 80% of these cases the victim was white, and in the majority of the cases the judge's override was overturned on direct appeal to the Florida Supreme Court. The report went on to recommend that the Florida statute be amended to prohibit judges from imposing death where a jury had recommended life imprisonment. If the judicial override was to be retained, it should only be retained to "temper an inflamed jury's recommendation of death."

What is of course assumed in the dissenting opinion of Stevens and by the Florida Racial and Ethnic Bias Commission is that the jury offers a true representation of the community.

Federal Law

Under the federal statutes (Section 3593 (f) of Title 18 and Section 848 (o) of Title 21), the sentencing court is required to give the jury a special instruction, indicating that in their consideration of whether a sentence of death is justified, they are not to consider the race, colour, religious beliefs, national origin, or sex of the defendant or the victim. Furthermore, where a sentence of death is returned, the provision requires the jury to provide the court with a certificate signed by each juror confirming that the above-mentioned discriminatory factors were not involved in reaching that decision.

f. Automatic Review

All states that have capital punishment statutes, with the exception of Arkansas, provide for automatic review of all death sentences, regardless of the defendant's wishes.[270] No such review is provided for under the federal capital punishment statute, however the defendant is entitled to file an appeal, and on appeal the court is given jurisdiction to review the sentence along similar lines to that which is provided for in the states. All appeals, whether for sentence or conviction, at the state level or the federal, are based on the record of the trial court. There is no opportunity for adducing fresh evidence or raising new issues.

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269 Florida Supreme Court Racial and Ethnic Bias Study Commission. *Where the Injured Fly for Justice,* December 19, 1991, page 47. The Mission was told that this number had increased to 147.

270 All state statutes – other than Georgia, Idaho, Indiana, Montana, Oklahoma and Tennessee – provide for automatic review of sentence and conviction.

An example of state provisions relating to automatic review of a death sentence is found in sections 17-10-35 and 17-10-37 of the Georgia Annotated Code.[271] Section 17-10-35 (f) of that Act also provides that where the defendant has lodged an appeal against conviction, the sentence review and the direct appeal should be consolidated and heard together. In relation to the sentence review, the Court is required to determine three particulars:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection (b) of Code Section 17-10-30; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

The third requirement, of proportionality, is not a feature of the federal sentencing review process and many states also do not have this requirement.

Under the Georgia statute, for the purpose of making the proportionality determination under Section 17-10-35 (f)(3), the Court is also required to maintain all records, as of 1970, of every case in which the death penalty is imposed.[272] When making its determination on proportionality, the Court is also required to specify which cases it has taken into consideration. In 1984, in *Pully* v *Harris*,[273] the US Supreme Court considered the constitutionality of a proportionality requirement in the automatic review process. It held that proportionality review was not an indispensable part of a constitutional sentencing scheme. It served as an additional safeguard but was not a mandatory requirement of a valid death

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271 Similar provisions are found in Section 13A-5-53 of the Alabama Code, Section 9711 (h) of the Pennsylvania Code and Article 37.071 (h) of the Texas Code of Criminal Procedure.

272 A similar system is maintained in Pennsylvania where the sentencing Judge of the Court of Common Pleas is required to complete a "Review Form" at the conclusion of all capital eligible trials, even those where no death penalty is sought. "Review Form" requires the trial judge to give details about the defendant and the victim (including race), and the aggravating and the mitigating circumstances, whether raised by counsel or from the evidence.

273 465 US 37, 104 Sct. 871, 79 L.ED .2d 29 (1984).

penalty scheme under the Eighth Amendment. Consequently, state Supreme Courts, or their equivalent, who are required to make a proportionality assessment have tended not to take this determination seriously.

After reaching its determination on the issues set out above, the reviewing court can either confirm the sentence, or set the sentence aside and remand the defendant's case for re-sentencing. If the defendant is unsuccessful in his/her review of sentence or conviction, he/she can appeal to the US Supreme Court by way of a writ of *certiorari*. Such an appeal is not by way of right and is usually refused.

Defense lawyers criticized this automatic review stage of the process, asserting that the state Superior Courts as a general rule merely rubber stamp the findings of the trial judge and/or jury. It was argued that this was due partially to elected judges being reluctant to enforce the US Constitution and overturn the sentence imposed by a judge or jury. In support of this contention it was pointed out that by 1983, over 70% of capital cases reviewed by federal *habeas* courts were reversed for harmful violations of the constitution.[274] Since the reintroduction of the death penalty in 1976 through to May 1991, the federal courts had granted relief to remedy violations of the Bill of Rights in more than 40% of the cases brought before them.[275] Had the state courts operated effectively, a majority of these errors would have been corrected at the state level.

g. *Post-Conviction Appeals*

As mentioned above and in Part I, the post-conviction proceedings, particularly at the federal courts level, have served as an important mechanism in correcting constitutional errors that occur during the state trial and direct appeal process. At the post-conviction stage of the process, however, the offender can no longer rely on the presumption of innocence. Indeed there is a strong presumption of guilt and that the sentence of death was properly imposed. For such applications the offender is not restricted to the record of the trial and is able to adduce fresh evidence. To obtain such evidence also usually requires considerable investigation after the conviction and sentence have been confirmed.

A death row offender convicted and sentenced to death under federal law may initiate post-conviction proceedings in the federal District Court, and if indigent will be provided with legal assistance.

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274 See *supra* note. 203 at page 9.

275 *Id.*

A state death row offender is able to initiate both state and federal **habeas corpus** proceedings. However, to bring a federal *habeas corpus* application in the federal courts, the state death row offender must:

(i) Initiate and exhaust the remedy in the state courts before commencing proceedings in the federal courts.[276]

(ii) Where the application is based on a constitutional claim defaulted during the trial process, show "cause and prejudice".[277] The federal courts have accepted various factual circumstances to satisfy the showing of "cause". For example, where the prisoner is able to overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, ineffective counsel.[278] In the second phase of the test the offender must show that the errors at trial probably – and not merely possibly – caused prejudice, infecting the trial with error of constitutional dimension.

(iii) Where the application is based on "innocence" due to new-found evidence, the offender must show that it is more likely than not that no reasonable juror would have convicted the prisoner in light of the new evidence.[279]

An offender is also able to file subsequent *habeas corpus* petitions, even on the same issues, and in this case each time the "cause and prejudice" test must be satisfied.

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276 See 28 U.S.C. 2254(b). A *habeas corpus* claim is generally considered as exhausted when the claim has been "fairly presented" to the highest state court. Even if the state Superior Court does not fully consider the claim, the exhaustion requirement will still be satisfied. See *Picard* v. *Carnor*, 404 US 270. There are some exceptions to the exhaustion requirements. For example, where the respondent agrees to waive this requirement, there is an absence of a state corrective process, or the circumstances are such that the state corrective processes are ineffective to protect the rights of the prisoner.

277 See *Wainwright* v. *Sykes*, 433 US 72, 53L.ED.2d 594, 975 Ct. 2497 (1977).

278 *Smith* v. *Murray* 477 US. 527 (1986) In *Coleman* v. *Thompson* 500 US 722, 111 S. Ct. 2546 (1991) the US Supreme Court held that the prisoner must show that counsel's performance was so lacking that it amounted to a violation of the Sixth Amendment of a right to counsel.

Another example is *Amadeo* v. *Zamt* 486 US 214 100 L ED 2d 249, 108 S Ct 1771, where the discovery of a secret prosecutorial memorandum after trial was held to satisfy the "cause" requirement.

279 See *Schlup* v. *Delo* 513 US ....., 130 L. Ed.2d 808 115 S Ct (1995) where the plurality rejected the *Sawyer* v. *Whitley* 505 US. 333 (1992) text of "clear and convincing evidence" of innocence and restored the *Murray* v. *Carrier* 477 US. 478 (1986) text.

A substantive barrier to *habeas corpus* petitions was created by the US Supreme Court in 1987 through its retroactive doctrine, which prohibited relief where the petition was sought on the basis of "new rules" articulated by the Court after the petitioners' conviction and sentence had become final on direct appeal.[280]

It is has primarily been through the federal appeal process and not the state appeal process that several prisoners have had their convictions set aside and many more have had their sentence commuted to life imprisonment.[281] As pointed out by the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary in its Staff Report entitled Innocence and the Death Penalty, the reversals of these convictions "illustrate the inherent fallibility of the criminal justice system" and "convey a reassuring impression that, although mistakes are made, the system of appeals and reviews will ferret out such cases prior to execution." However, the report goes on to state, "there is another sense in which these cases illustrate the inadequacies of the system. These men were found innocent despite the system and only as a result of extraordinary efforts not generally available to death row defendants."[282] In a few cases innocence was found as a result of "sheer luck".

Prior to the release of the above-mentioned report, in June 1988, following continued concern about delays in the finality of death penalty sentencing and the strain on the federal court system from the increasing number of *habeas corpus* petitions, the Chief Justice of the US Supreme Court, William H. Rehnquist, charged an Ad Hoc Committee with examining and reporting on federal *habeas corpus* in capital cases. The Committee was chaired by Justice Lewis F. Powell Jr. and reported to the Judicial Conference of the United States in September 1989. In its report the Committee identified what it regarded as three serious problems in the system of post-conviction review:

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280 See *Teague* v. *Lane*, 489 US 288, 109 S.Ct. 1060, 104 L.Ed. 2d. 334 (1989). Following this decision a *habeas* court can only review a conviction by reference to the law that applied at the time the petitioners conviction became final, i.e. when the opportunity for direct review, including petition for *certiorari*, was exhausted. The Court, however, provided for two exceptions to the doctrine of non-retroactivity: new rules that place conduct beyond the power of the states to proscribe (e.g. the new rule established that the criminal offence itself was unconstitutional) and those involving procedures "implicit in the concept of ordered liberty" (i.e. where the application of the new rule implicates fundamental fairness by mandating a procedure "central to an accurate determination of innocence or guilt."

281 See Staf Report by the Subcommittee on Civil and Constitutional Rights Committee on the Judiciary *Innocence and the Death Penalty, Assessing the Danger of Mistaken Executions* One Hundred Third Congress, First Session, issued on October 21, 1993.

282 *Id.* at page 11.

- **Unnecessary delay and repetition** due to the lack of incentive for prisoners to initiate post-conviction proceedings until an execution date had been set, and due to the availability of successive review petitions.[283]

- **Lack of qualified counsel** to represent prisoners in collateral review, particularly at the state level where a prisoner's constitutional challenges are rarely promptly or properly exhausted, causing delayed and ineffective federal collateral procedures.[284]

- **Last-minute *habeas corpus* petitions** upon the setting of an execution date, placing extra strains on the judicial system as the prisoner must first seek a stay of execution before the petition can be heard. The last-minute applications being due to the unavailability of a lawyer at an earlier time or the intentional delay by the prisoner's lawyer for tactical reasons.

The Committee in its report also recommended legislative changes which proposed that "capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from time pressure of impending execution and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end."[285]

Since the Committee reported, several proposals have been advanced for legislative reform of the *habeas corpus* statute. All proposals have been criticized by the American Bar Association,[286] defence lawyers and legal defender organizations,[287] the main criticism being that the proposed legislative changes only further compound the injustices, while state practice

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283 Committee Report and Proposal: *Ad hoc Committee on Federal Habeas Corpus in Capital Cases*, August 23, 1989 at pages 2 and 3.

284 *Id.* at page 4.

285 *Id.* at page 6

286 On 13 February 1990, the American Bar Association House of Delegates made detailed recommendations on the litigation of death penalty cases. The thrust of their recommendations was for state and federal governments to provide competent and adequately compensated counsel at trial and a failure by a state to provide for this should allow the offender to seek federal *habeas* without any barriers. Only with a proper legal defense system at the state post–conviction level should there be any restrictions on the federal *habeas corpus* proceedings.

287 See statement of October 22, 1993 of George Kendall, Assistant-Counsel NAACP Legal Defense and Educational Fund, Inc. before the Sub-Committee on Civil and Constitutional Rights of the Committee on the Judiciary of the United States House of Representatives concerning *Reform of the Habeas Corpus* Review Process.

and procedure – the fundamental cause of the constitutional errors – remains unchallenged.

On 23 April 1996, President Clinton signed into law the "anti-terrorism" Bill, which also contained substantial reforms to the federal *habeas corpus* provisions in Section 2244 to 2255 of Title 28 of the US Code.[288] This new legislation goes well beyond the procedural changes previously proposed. It amends the existing provisions which have a general application to all offenders in custody, and inserts a new Chapter relating to death row offenders. The main change to the general provision is a requirement that a federal court defer to a previous state court decision on the merits of a federal constitutional claim (new Section 2254(d)). Two exceptions to the deference rule are provided for:

- Where the previous state court decision was "contrary to, or involved unreasonable application of" constitutional law as clearly established in US Supreme Court precedents.

- Where the previous state court decision constitutes "an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."

Each exception is not mutually exclusive, and the standards of "unreasonableness" give the exceptions an extremely limited operation. The offender is also placed under an additional burden in that new section 2254(e) (i) also contains a presumption that any factual issue made by a state court is correct and places the onus on the offender to rebut the presumption by clear and convincing evidence.

For those applications which are based on freshly discovered facts the offender must show that:

- the facts could not have been discovered previously through due diligence; and

- the facts, if proven, would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable jury/judge would have found the offender guilty of the offence. (See proposed new Section 2254 (e) (2)).

Critics have argued that given the current status of state practice and procedure in death penalty sentencing, this is not a reform but rather an

288 The reforms are contained in Bill H.R. 2703, which had passed both the Senate and the House and the Senate-House Conference Committee during 1995 and early 1996.

abrogation of the federal courts' duties to determine a prisoner's claim on its merits, independently and fully.

The legislation also contains various procedural reforms placing strict deadlines on the filing and determination of petitions (new Sections 2244 and 2255), restrictions on appeals (new Section 2253(b) which prohibits an appeal as of right) and limits on successive federal *habeas* petitions (new Sections 2244 and 2255). Second or successive *habeas* applications by an offender who has previously presented the application under the Act is prohibited. This leaves a second or successive *habeas* application that was not presented in a prior application under the Act, however, such an application can only be heard if the offender shows:

- the application relies on a new rule of constitutional law,made retroactive by the decision of the US Supreme Court; or

- the factual basis of the claim could not have been discovered earlier through the exercise of due diligence and that these facts if proven would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder (judge or jury) would have found the offender guilty of the offence.

Under new Section 2244 (b)(3), authorisation for the hearing of a second or successive application is determined by a three judge panel of the federal Court of Appeals. It is this panel which decides whether the federal District Court where the application was filed should hear the case. The Section also provides that the decision of the federal Court of Appeals is not appealable nor can the decision be the subject of a petition for a rehearing or for a writ of *certiorari.* The latter restriction on a writ of certiorari ousts the jurisdiction of the US Supreme Court. Whether this is permissible may become an issue for the Court to determine.

The new Chapter 154, inserted into Title 28 and containing special procedural restrictions for capital cases, only applies where States adopt a legal defender system on behalf of indigent offenders for post-conviction State court proceeding. This "opt-in" provision is similar to the recommendations made by the Ad Hoc Committee, chaired by Justice Powell. Where a state does "opt-in", there are further procedural restrictions placed on the offender filing a petition: namely shorter filing deadlines, further limits on successive petitions and time limits on federal court action. The Mission was informed that the new procedural limitations was unlikely to provide any incentive for the states to provide the much-needed adequately resourced and funded permanent capital defender system. Again the major criticism of these procedural reforms is that they

completely ignore the real problem of ensuring competent and adequately compensated counsel at trial.

h. Racial Justice Act

Although the US Supreme Court's decision in *McCleskey* prevented[289] judicial discussion of statistical analysis as proof of race discrimination in death penalty sentencing cases at the federal level, it did not prevent Congress from considering the issue. Indeed, even though the Court rejected McCleskey's claim, it stressed that his arguments were most appropriately addressed to the legislative bodies, who were in a better position to take action in light of sophisticated studies such as those of Professor Baldus on the race of the victim effects in death penalty sentencing.[290]

Following *McCleskey,* Congress has taken steps to consider the issue, but with no positive result. The first step came in 1988, when Congress directed the General Accounting Office (GAO) to study the issue and to determine if race of victim or race of defendant discrimination influenced the likelihood that defendants will be sentenced to death.[291] The results of the GAO report substantiated as valid concerns that the administration of death penalty sentencing throughout the United States was racially discriminatory, particularly with respect to the race of the victim.

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289 State courts are not bound by *McCleskey* and are free to entertain claims of racial discrimination under their state constitutions. However, with a few exceptions, where the issue has arisen, all state courts have adopted a similar approach to that adopted by the US Supreme Court. The exceptions have been New Jersey and Florida where the state Supreme Courts ruled that under the equal protection clause of their respective state constitutions, claims of race of victim and race of defendant discrimination were cognizable. In both cases where this was raised, however, the prisoner was unsuccessful in his claim. See David Baldus, George Woodworth and Charles Pulaski, "Reflections on the Inevitability of Racial Discrimination in Capital Sentencing and the Impossibility of its Prevention, Detection, and Correction", 51 *Washington and Lee Law Review,* 359 (1994) at 375, and 405 to 417 for a detailed discussion of the approach taken in these jurisdictions.

290 See supra note 207. The Baldus Study only examined defendants indicted for murder in the state of Georgia, and although there have been similar empirical studies for other states, the call by the US Supreme Court in *McCleskey* was for possible legislative reform at the federal level that would apply throughout the United States. Such an approach was consistent with the Court's previous decisions relating to the Voting Rights Act - see *Oregon* v *Mitchell,* 400 US 112 (1970) and subsequent decisions. The Court has also upheld such remedial legislation as being a valid exercise of Congress' power to make laws with respect to ensuring equal protection under Section 5 of the Fourteenth Amendment. Whether the Court would uphold remedial legislation enacted by Congress in respect of racial discrimination in death penalty sentencing is however not entirely clear from doubt.

291 See Chapter 2 and 3 of Part I.

The response to the GAO report was the introduction of the Racial Justice Act of 1988 into the second session of the 100th Congress.[292] This proposed piece of legislation was formulated along similar lines to that which applied in the area of federal employment and public housing, granting individuals claiming discrimination the right of redress.[293] The Racial Justice Act is of general application to state and federal death row prisoners and has a retroactive effect that would enable all those prisoners currently on death row with a justified claim to challenge their sentences. The proposed legislation is a risk-based model prohibiting the imposition or execution of the death penalty where there is an unacceptable risk of a sentencing error of racial discrimination.

Under the proposed Act a prisoner sentenced to death is able to challenge that sentence if it can be shown that the sentence "furthers a racially discriminatory pattern" of death sentencing in the offender's jurisdiction. The prisoner is only required to establish a *prima facie* showing of a "racially discriminatory pattern", and if successful, the onus then shifts to the prosecution "to establish by clear and convincing evidence that identifiable and pertinent non-racial factors persuasively explain the observable racial disparities comprising that pattern". A failure to rebut the *prima facie* evidence entitles the prisoner to relief. Although the provisions of the proposed act are framed in terms of being applicable only after a sentence of death has been imposed, they can be used to formulate a pretrial motion challenging the prosecutor's decision to proceed with his/her case as a death penalty case.

In establishing a "racially discriminatory pattern", the prisoner is able to rely on ordinary methods of statistical proof and is not required to prove a discriminatory "motive, intent or purpose". To assist the presentation and defence of claims under the proposed Act, the legislation imposes an obligation on states to obtain and retain data on all potential death penalty cases. The Act also makes express provision for legal assistance, and investigative and expert witness costs for indigent prisoners.

The Racial Justice Act of 1988 failed to be enacted during the 100th Congress and was again introduced in the 101st Congress where for a second time it failed to gain sufficient support. However, during the second session of the same Congress another similar act was introduced, the

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292 See *supra* note 289 at page 430. The Baldus *et al* article sets out the history of this and similar legislation. Legislation along these lines was at the same time also called for and supported by the American Bar Association.

293 *Id.* at page 377. The relevant provisions are 42 USC; § 2000 (e) to (e)-17 and 42 U:S:C: § 3601-3619. The most recent version of the Racial Justice Act is at Appendix 13.

Fairness in Death Sentencing Act 1990.[294] This act was initially passed by the House of Representatives but was dropped in conference. This second act differs from the Racial Justice Act in that it did not place an obligation on the states to collect relevant data, and is also more specific as to the requirements for proving a *prima facie* case.

Both acts were again introduced and failed to be enacted during the 102nd and 103rd Congress. During the second session of the 103d Congress, another law substantially similar to the Fairness in Death Sentencing Act – the Racially Discriminatory Capital Sentencing Act – was introduced into the House of Representatives, following approval by the House Judiciary Committee.[295] However, the act failed to be passed by the Senate House Conference Committee.

During the 103rd Congress, in March 1994, the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary submitted its staff report which also highlighted significant empirical evidence of racial disparities in federal death penalty prosecutions during the period of 1988 – 1994.[296]

Despite this report, no further proposals have been placed before the Congress that address the issue of racial discrimination in the administration of the death penalty throughout the United States. Introduction of amendments to the federal habeas legislation has been given attention, for example: placing time restrictions on applications, limiting the treatment of subsequent applications and curtailing the jurisdiction of federal courts to hear applications, through deference to state court decisions.

Although the principle that administration of the death penalty in a racially discriminatory way is unacceptable is not disputed, various arguments have been raised in objection to legislation – common in other areas – which would enable a prisoner to seek redress for an effects-based racially discriminatory application of justice. Some of these objections have been advanced along the following lines:[297]

- No reliable evidence exists that racial discrimination is a problem in the administration of the death penalty in the United States. What evidence is available suggests that white

294 See Appendix 13 for the relevant provisions.

295 See *supra* note 289 at page 427.

296 See *supra* note 96 and Chapter 3 of Part I.

297 *Id* at pages 379-404.

Americans are at greater risk from the penalty than African-Americans.

- The statistical evidence of victim-based racial discrimination is explained by non-racial factors, as the cases of white victims are more likely to involve premeditated and predatory murders.
- The adoption of such legislation would constitute a de facto abolition of the death penalty.
- Such legislation would alter the strong tradition of the United States criminal justice system that preserves maximum discretion for jurors and prosecutors, and would result in a quota system.
- The issued addressed is a problem that should be solved individually by the states.
- The approach of such legislation is bad in policy terms, in that it does not seek to prevent future discrimination but only focuses on remedying discrimination in the past.
- Such measures would add complexity, expense and delay to an already overburdened state and federal criminal justice system.

Answers to each of these objections have also been provided, stressing that:

- the empirical studies have been upheld as being reliable;
- remedial legislation would only entitle prisoners who can establish a racially discriminatory pattern the right to redress;
- the *Furman* and *Gregg* decisions have already highlighted the need to limit and guide the discretion of prosecutors and the jury in order to avoid the risk of an arbitrary exercise of that discretion in death penalty sentencing;
- a quota system would equally be an arbitrary exercise of this discretion;
- it is a problem that is not unique to the States and should be dealt with uniformly; and

- it would not increase but decrease costs, since cases that would demonstrate a furtherance of racially discriminatory patterns would no longer be brought.

To date, despite the very recent enactment of the reforms of the federal habeas corpus legislation, no legislation along the lines of the Racial Justice Act has been enacted, and indeed would appear to have been indefinitely abandoned.

Postscript

The Argument of this Report has been that:

Without prosecutorial discretion being controlled and channelled;

Without the system of jury-selection and jury-determination being freed of racial and class bias;

Without meaningful and adequate means of legal representation being ensured to those indicted for capital crimes; and

Without opportunity being provided through judicial processes to substantiate the impact of effect-based racial discrimination,

the administration of the death-penalty in the United States will remain arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot (and will not) be assured.

Furthermore, so long as trial and appellate courts are presided over by judges whose term of office depends on periodic and partisan elections, the tendency and temptation to respond to and assuage public opinion will continue to influence the handling of capital cases. Given that public opinion at present is avowedly in favour of the death penalty, the guarantee of a trial by an independent tribunal is at risk.

The international obligations undertaken by the United States upon ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) remain substantially unfulfilled.

As this report was being drafted, Anti-Terrorist legislation incorporating provisions described as habeas corpus "reforms" (including special *habeas corpus* procedures in capital cases) passed into law in the United States. Yet the "Racial Justice Act" has not yet been enacted - an apparent omission suggesting that law makers in the US have deliberately turned their attention from the abuses it was meant to address. In his forceful dissent from the decision in *McCleskey*, Justice Brennan protested the Court's decision to ignore evidence of racism in the administration of the death penalty. "We remain imprisoned by the past", he said, "as long as we deny its influence in the present". Without passage of the Racial Justice Act the US remains imprisoned in the past.

It has been claimed that the April 1996 amendments to federal *habeas* provisions strengthen the value placed on human life by ensuring swift implementation of the death penalty for capital crimes. But the prospect of speedy executions is merely a kind of populist placebo offered to a fearful American public wanting something "drastic" to be done about crime.

With the *habeas corpus* "reforms" in place – and without the Racial Justice Act being passed into law – the racial bias of the new legislation is now almost pathetically apparent, because the clear pattern of capital sentencing in the United States has been – and remains – that the overwhelming number of those who receive a sentence of death are poor, and almost always convicted of killing whites.

The recent statutory restrictions on federal habeas, including strict non-extendible time limits and compulsory deference to state court decisions, recall a statement by Justice Blackmum in his concurring opinion in *Sawyer* v. *Whitey* (June 1992). In the document, the Justice referred to his long experience in death penalty administration as a judge of the US Court of Appeals, and dwelt on the underlying premise of his acceptance of the death penalty in *Furman* (1972), namely the power of the federal judiciary to reach out and correct constitutional errors on federal *habeas corpus*. In an agonizing personal statement of one enriched (but also disillusioned) by long years of judicial experience, Justice Blackman said: (1992 L.Ed. 2d 269 at pages 291 - 293.)

> "When I was on the United States Court of Appeals for the Eighth Circuit. I once observed, in the course of reviewing a death sentence on a writ of habeas corpus, that the decisional process in a capital case is 'particularly excruciating' for someone "who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent! Maxwell v. Bishop, 398 F 2d 138, 153 - 154 (1968). At the same time, however, I stated my then belief that "the advisability of capital punishment is a policy matter ordinarily to be resolved by the Legislature" *Id.*, at 154. Four years later, as a member of the Court, I echoed those sentiments in my separate dissenting opinion in *Furman* v. *Georgia* - 408 US 238, 405 (1972). Although I reiterated my personal distaste for the death penalty and my doubt that it performs any meaningful deterrent function, I declined to join my Brethren in declaring the State Statutes at issue in those cases unconstitutional.
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> My ability, in *Maxwell, Furman* and the many other capital cases I have reviewed during my tenure on the Federal

> Bench, to enforce, notwithstanding my own deep moral reservations, a legislature's considered judgment that capital punishment is an appropriate sanction, has always rested on an understanding that certain procedural safeguards, chief among them the Federal Judiciary's power to reach and correct claims of constitutional error on federal habeas review, would ensure that death sentences are fairly imposed. Today more than twenty years later, I wonder what is left of that premise underlying my acceptance of the death penalty....
>
> The more the ...constraints on the Federal Court's power to reach the constitutional claims of those sentenced to death, the more (we) undermine the very legitimacy of capital punishment itself."

Part III

Basic Text 1

International Covenant on Civil and Political Rights

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognising that these rights derive from the inherent dignity of the human person,

Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant,

Agree upon the following articles:

Part I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Part II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.

Part III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude;

3. (a) No one shall be required to perform forced or compulsory-labour;

   (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

   (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

      (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

      (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors;

      (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

      (iv) Any work or service which forms part of normal civil

obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

   (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country .

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

   (c) To be tried without undue delay;

   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore

be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognised.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the

distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Part IV

Article 28

1. There shall be established a Human Rights Committee (here after referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions here-

inafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognised competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary-General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilisation and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

   (a) Twelve members shall constitute a quorum;

   (b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognised herein and on the progress made in the enjoyment of those rights:

   (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialised agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State parties is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognising in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall

afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognised principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognised in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not

reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies there of to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by an State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Parties concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

   (a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

   (b) If an amicable solution to the matter on the basis of respect for human rights as recognised in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

   (c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

   (d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Article 43

The members of the Committee, and of the *ad hoc* conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialised agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

Part V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialised agencies which define the respective responsibilities of the various organs of the United Nations and of the specialised agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.

Part VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States

which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favours conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

Basic Text 2

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that pro-

vides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

(a) Reservations, communications and notifications under article 2 of the present Protocol;

(b) Statements made under articles 4 or 5 of the present Protocol;

(c) Signatures, ratifications and accessions under article 7 of the present Protocol;

(d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

Basic Text 3

Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty

In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

Basic Text 4

International Convention on the Elimination of All Forms of Racial Discrimination

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organisation, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation scientifically false, morally condemn able, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organisation in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

Part I

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

   (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

   (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organisations;

   (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

   (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or Organisation;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organisations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and

incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association; (e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to

promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Part II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilisation as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected

at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognised principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the

Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies there of to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-

General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1 S 14 (XV) of 14 December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialised agencies.

2. (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

   (b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in

the constituent instruments of, or conventions adopted by, the United Nations and its specialised agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Part III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thir-

tieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

(a) Signatures, ratifications and accessions under articles 17 and 18;

(b) The date of entry into force of this Convention under article 19;

(c) Communications and declarations received under articles 14, 20,

(d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

Appendices

Appendix 1

Abolitionist for all Crimes[1]

Countries and territories whose laws do not provide for the death penalty for any crime

Country	Date of Abolition	Date of Abolition for Ordinary Crimes
ANDORRA	1990	
ANGOLA	1992	
AUSTRALIA	1985	1984
AUSTRIA	1968	1950
CAMBODIA	1989	
CAPE VERDE	1981	
COLOMBIA	1910	
COSTA RICA	1877	
CROATIA	1990	
CZECH REPUBLIC	1990	
DENMARK	1978	1933
DOMINICAN REPUBLIC	1966	
ECUADOR	1906	
FINLAND	1972	1949
FRANCE	1981	
GERMANY	1949/1987**	
GREECE	1993	
GUINEA-BISSAU	1993	
HAITI	1987	
HONDURAS	1956	
HONG KONG	1993	
HUNGARY	1990	
ICELAND	1928	
IRELAND	1990	
ITALY	1994	1947
KIRIBATI		
LIECHTENSTEIN	1987	
LUXEMBOURG	1979	
MACEDONIA		
MARSHALL ISLANDS		
MAURITIUS	1995	
MICRONESIA (Federated States)		
MOLDOVA	1995	
MONACO	1962	

1 *Source: Amnesty International List of Abolitionist and Retentionist Countries as* of March 1996.

** The death penalty was abolished in the Federal Republic of Germany (FRG) in 1949 and in the German Democratic Republic (GDR) in 1987. The last execution in the FRG was in 1949.

MOZAMBIQUE	1990	
NAMIBIA	1990	
NETHERLANDS	1982	1870
NEW ZEALAND	1989	1961
NICARAGUA	1979	
NORWAY	1979	1905
PALAU		
PANAMA		
PORTUGAL	1976	1867
ROMANIA	1989	
SAN MARINO	1865	1848
SAO TOME AND PRINCIPE	1990	
SLOVAK REPUBLIC	1990	
SLOVENIA	1989	
SOLOMON ISLANDS		1966
SPAIN	1995	1978
SWEDEN	1972	1921
SWITZERLAND	1992	1942
TUVALU		
URUGUAY	1907	
VANUATU		
VATICAN CITY STATE	1969	
VENEZUELA	1863	

TOTAL 57 COUNTRIES

Abolitionist for Ordinary Crimes Only

Countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime

Country	Date of Abolition
ARGENTINA	1984
BRAZIL	1979
CANADA	1976
CYPRUS	1983
EL SALVADOR	1983
FIJI	1979
ISRAEL	1954
MALTA	1871
MEXICO	1990
NEPAL	1992
PARAGUAY	1979
PERU	1995
SEYCHELLES	1965/73 (abolished 1973 in Northern Ireland)
SOUTH AFRICA	
UNITED KINGDOM	

TOTAL 15 COUNTRIES

Abolitionist De Facto

Countries and territories which retain the death penalty for ordinary crimes but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years or more, or in that they have made an international commitment not to carry out executions

Country	Date of last execution
ALBANIA*	
BELGIUM	1950
BERMUDA	1977
BHUTAN	1964**
BOLIVIA	1974
BRUNEI DARUSSALAM	1957
BURUNDI	1982
CENTRAL AFRICAN REPUBLIC	1881
CONGO	1982

COMOROS	***
COTE D'IVOIRE	
DJIBOUTI	***
GAMBIA	1981
MADAGASCAR	1958**
MALDIVES	1952**
MALI	1980
NAURU	***
NIGER	1976**
PAPUA NEW GUINEA	1950
PHILIPPINES	1976
RWANDA	1982
SENEGAL	1967
SRI LANKA	1976
SURINAME	1982
TOGO	
TONGA	1982
TURKEY	1984
WESTERN SAMOA	***
TOTAL 28 COUNTRIES	

* Preparatory to Albania's joining the Council of Europe, in a declaration signed on 29 June, PjeteArbnori, President of the Albanian Parliament, said he was willing to commit his country "to put into place a moratorium on executions until [the] total abolition of capital punishment".

** Date of last know execution

***No execution since independence

Retentionist

*Countries which retain and use the death penalty for ordinary crimes**

Country

Afghanistan
Algeria
Antigua and Barbuda
Armenia
Azerbaydzhan

Bahamas
Bahrain
Bangladesh
Barbados
Belarus

Belize
Benin
Bosnia-Herzegovina
Botswana

Bulgaria
Burkina Faso
Cameroon
Chad
Chile
China (People's Republic)
Cuba
Dominica
Egypt
Equatorial Guinea
Eritrea
Estonia
Ethiopia
Gabon
Georgia

Ghana
Grenada
Guatemala
Guinea
Guyana

India
Indonesia
Iran
Iraq
Jamaica

Japan
Jordan
Kazakhstan
Kenya
Korea
(Democratic People's Republic)
Korea (Republic)
Kuwait
Kyrgyzstan
Laos

Latvia
Lebanon
Lesotho
Liberia
Libya
Lithuania
Malawi
Malaysia
Mauritania
Mongolia
Morocco
Myanmar

Nigeria

Oman
Pakistan
Poland
Qatar

Russiia
Saint Christopher and Nevis
Saint Lucia
Saint Vincent and The Grenadies
Saudi Arabia
Sierra Leone
Singapore
Somalia
Sudan

Swaziland
Syria
Tadzhikistan
Taiwan
(Republic Of China)
Tanzania
Thailand
Trinidad And Tobago
Tunisia
Turkmenistan
Uganda
Ukraine
United Arab Emirates
United States of America
Uzbekistan
Viet Nam
Yemen

Yugoslavia
(Federal Republic of)
Zaire
Zambia
Zimbabwe

TOTAL 94 COUNTRIES

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* Most of these countries and territories are known to have carried out executions during the past 10 years.

Appendix 2

The US Constitution
Extracts

Amendment [V] [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI] [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour and to have the assistance of counsel for his defence.

Amendment [VIII] [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment [XIV] [1868]

Section 1. All persons born or naturalised in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix 3

US Ratification of the International Covenant on Civil and Political Rights

(1) Resolved, (*two thirds of the Senators present concurring therein*); That the Senate advise and consent to the ratification of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 5 October 1977, (Executive E, 95 - 2), subject to the following Reservations, Understandings, Declarations and Proviso:

I. ***The Senate's advice and consent is subject to the following reservations:***

(1) That Article 20 does not authorise or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

(2) That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

(3) That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(4) That because U.S. law generally applies to an offender the penalty in force at the time the offence was committed, the United States does not adhere to the third clause of paragraph 1 of article 15.

(5) That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14. The

United States further reserves to these provisions with respect to States with respect to individuals who volunteer for military service prior to age 18.

II. ***The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Covenant:***

(1) That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status—as those terms are used in article 2, paragraph 1 and article 26—to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective. The United States further understands the prohibition in paragraph 1 of article 4 upon discrimination, in time of public emergency, based 'solely' on the status of race, colour, sex, language, religion or social origin, not to bar distinctions that may have a disproportionate effect upon persons of a particular status.

(2) That the United States understands the right to compensation referred to in Article 9 (5) and 14 (6) to require the provision of effective and enforceable mechanisms by which a victim of an unlawful arrest or detention or a miscarriage of justice may seek and, where justified, obtain compensation from either the responsible individual or the appropriate governmental entity. Entitlement to compensation may be subject to the reasonable requirements of domestic law.

(3) That the United States understands the reference to "exceptional circumstances" in paragraph 2 (a) of Article 10 to permit the imprisonment of an accused person with convicted persons where appropriate in light of an individual's overall dangerousness, and to permit accused persons to waive their right to segregation from convicted persons. The United States further understands that paragraph 3 of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.

(4) That the United States understands that subparagraphs 3 (b) and (d) of article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-

appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel or when imprisonment is not imposed. The United States further understands that paragraph 3 (e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defence. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgement of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit as is seeking a new trial for the same cause.

(5) That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfilment of the Covenant."

III. ***The Senate's advice and consent is subject to the following declarations:***

(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

(2) That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognised and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant. For the United States, article 5, paragraph 2, which provides that fundamental human rights existing in any State Party may not be diminished on the pretext that the Covenant recognises them to a lesser extent, has particular relevance to article 19, paragraph 3 which would permit certain restrictions on the freedom of expression. The United States declares that it will continue to adhere to the requirements and constraints of its Constitution in respect to all such restrictions and limitations.

(3) That the United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims that another

State Party is not fulfilling its obligations under the Covenant.

(4) That the United States declares that the right referred to in article 47 may be exercised only in accordance with international law.

IV. ***The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:***

Nothing in this Covenant requires or authorises legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

(Emphasis Added)

Appendix 4

US Ratification of the International Convention on the Eleminations of all Forms of Racial Descrimination

Upon signature:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorise legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.

I. *The Senate's advice and consent is subject to the following reservations:*

(1) That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

(2) That the Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognised as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of article 2, subparagraphs (1) (c) and(d) of article 2, article 3 and article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

(3) That with reference to article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

II. ***The Senate's advice and consent is subject to the following understanding, which shall apply to the obligations of the United States under this Convention:***

That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments, to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfilment of this Convention.

III. ***The Senate's advice and consent is subject to the following declaration:***

That the United States declares that the provisions of the Convention are not self-executing.

(Emphasis Added)

Appendix 5

Human Rights Committee
Comments on the Report Submitted By
The United States of America
Under Article 40 of the ICCPR
Extracts
(See CCPR/C/79/Add 50)

D. Principal Subjects of Concern

14. The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.

15. The Committee regrets that members of the Judiciary both at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion on its implementation. Whether or not courts of the United States eventually declare the Covenant to be non-self-executing, information about its provisions should be provided to the judiciary.

16. The Committee is concerned about the excessive number of offences punishable by the death penalty in a number of States, the number of death sentences handed down by courts, and the long stay on death row which, in specific instances, may amount to a breach of article 7 of the Covenant. It deplores the recent expansion of the death penalty under federal law and the re-establishment of the death penalty in certain States. It also deplores provisions in the legislation of a number of States which allow the death penalty to be pronounced for crimes committed by persons under 18 and the actual instances where such sentences have been pronounced and executed. It also regrets that, in some cases, there appears to have been lack of protection from the death penalty of those mentally retarded.

23. The Committee is concerned about the impact which the current system of election of judges may, in a few states, have on the imple-

mentation of the rights provided under article 14 of the Covenant and welcomes the efforts of a number of states in the adoption of a merit-selection system. It is also concerned about the fact that in many rural areas justice is administered by unqualified and untrained persons. The Committee also notes the lack of effective measures to ensure that indigent defendants in serious criminal proceedings, particularly in state courts, are represented by competent counsel.

26. The Committee notes with concern that information provided in the core document reveals that disproportionate numbers of Native Americans, African Americans, Hispanics and single parent families headed by women live below the poverty line and that one in four children under 6 live in poverty. It is concerned that poverty and lack of access to education adversely affect persons belonging to these groups in their ability to enjoy rights under the Covenant on the basis of equality.

E. Suggestions and Recommendations

27. The Committee recommends that the State party review its reservations, declarations and understandings with a view to withdrawing them, in particular reservations to article 6, paragraph 5, and article 7 of the Covenant.

28. The Committee hopes that the Government of the United States will consider becoming a party to the first Optional Protocol to the Covenant.

29. The Committee recommends that appropriate inter-federal and state institutional mechanisms to established for the review of existing as well as proposed legislation and other measures with a view to achieving full implementation of the Covenant, including its reporting obligations.

30. The Committee emphasises the need for the government to increase its efforts to prevent and eliminate persisting discriminatory attitudes and prejudices against persons belonging to minority groups and women including, where appropriate, through the adoption of affirmative action. State legislation which is not yet in full compliance with the non-discrimination articles of the Covenant should be brought systematically into line with them as soon as possible.

31. The Committee urges the State party to revise the federal and state legislation with a view to restricting the number of offences carrying the death penalty strictly to the most serious crimes, in conformity with article 6 of the Covenant and with a view eventually to abolishing it. It exhorts the authorities to take appropriate steps to ensure that persons are not sentenced to death for crimes committed before they were 18. The Committee considers that the determination of methods of execution must take into account the prohibition against causing avoidable pain and recommends the State party to take all necessary steps to ensure respect of article 7 of the Covenant.

36. The Committee recommends that the current system in a few states in the appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body.

39. The Committee recommends that measures be taken to ensure greater public awareness of the provisions of the Covenant and that the legal profession as well as judicial and administrative authorities at federal and State levels be made familiar with these provisions in order to ensure their effective application.

Appendix 6

The American Convention on Human Rights

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, this may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court in accordance with a law establishing such punishment, enacted prior to the commission of the crime. Its application shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be re-established in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offences or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such petition is pending a decision by the competent authority.

Appendix 7

Federal Capital Offences in the United States of America[1]

Below are listed the relevant sections that create a capital offence under U.S. federal law, followed by a brief description of its term.

8 U.S.C. 1342 - Murder related to the smuggling of aliens.

10 U.S.C. 906(a) - Espionage by a member of the Armed Forces: communication of information to a foreign government relating to nuclear weaponry, military spacecraft or satellites, early warning systems, war plans, communications intelligence or cryptographic information, or any other major weapons or defence strategy.

10 U.S.C. 918 - Murder while a member of the Armed Forces.

18 U.S.C. 32-34 - Destruction of aircraft, motor vehicles, or related facilities resulting in death.

18 U.S.C. 36 - Murder committed during a drug related drive-by shooting.

18 U.S.C. 37 - Murder committed at an airport serving international civil aviation.

18 U.S.C. 115(b)(3)[by cross-reference to 18 U.S.C. 1111] - Retaliatory murder of a member of the immediate family of law enforcement officials.

18 U.S.C. 241,242, 245, 247 - Civil rights offences resulting in death.

18 U.S.C. 351 [by cross-reference to 18 U.S.C. 1111] - Murder of a member of Congress, an important executive official, or a Supreme Court Justice.

18 U.S.C. 794 - Espionage

18 U.S.C. 844(d), (f), (i) - Death resulting from offences involving transportation of explosives, destruction of government property, or the destruction of property related to foreign or interstate commerce.

18 U.S.C. 924(1) - Murder committed by the use of a firearm during a crime of violence or a drug trafficking crime.

18 U.S.C 930 - Murder committed in a Federal Government facility.

18 U.S.C. 1091 - Genocide.

18 U.S.C. 1111 - First-degree murder.

18 U.S.C. 1114 - Murder of a Federal judge or law enforcement official.

18 U.S.C.1116 - Murder of a foreign official.

18 U.S.C.1118 - Murder by a Federal prisoner.

18 U.S.C.1119 - Murder of a U.S. national in a foreign country.

18 U.S.C.1120 - Murder by an escaped Federal prisoner already sentence to life imprisonment.

18 U.S.C.1121 - Murder of a State or local law enforcement official or other person aiding in a Federal investigation; murder of a State correctional officer.

18 U.S.C.1203 - Murder during a hostage-taking.

18 U.S.C.1503 - Murder of a court officer or juror.

18 U.S.C.1512 - Murder with the intent of preventing testimony by a witness, victim, or informant.

18 U.S.C.1513 - Retaliatory murder of a witness, victim or informant.

18 U.S.C.1716 - Mailing of injurious articles with intent to kill or resulting in death.

18 U.S.C.1751 [by cross-reference to 18 U.S.C.1111] -Assassination or kidnapping resulting in the death of the President or Vice President.

18 U.S.C.1958 - Murder for hire.

18 U.S.C. 1959 - Murder involved in a racketeering offence.

18 U.S.C. 1992 - Willful wrecking of a train resulting in death.

18 U.S.C. 2113 Bank-robbery-related murder or kidnapping.

18 U.S.C. 2119 - Murder related to a carjacking.

18 U.S.C. 2245 - Murder related to rape or child molestation.

18 U.S.C. 2251 - Murder related to sexual exploitation of children.

18 U.S.C. 2280 - Murder committed during an offence against maritime navigation.

18 U.S.C. 2281 - Murder committed during an offence against a maritime fixed platform.

18 U.S.C.2332 - Terrorist murder of a U.S. national in another country.

18 U.S.C. 2332a - Murder by the use of a weapon of mass destruction.

18 U.S.C.2340 - Murder involving torture.

18 U.S.C. 2381 - Treason.

21 U.S.C. 841 (b)(A) or section 960(b)(1); and 21 U.S.C. 848(e) - Any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offence punishable under section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and (B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosecution or service of a prison sentence for, a felony violation of this subchapter or subchapter 11 of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be a sentence to death.

Appendix 8

State Capital Offences in the United States of America

Below is a narrative description of the death penalty offences 37 states as they applied by the end of 1994. In 1995 New York reintroduced the death penalty for first degree murder with special circumstances.

Alabama. Murder during kidnapping, robbery, rape, sodomy, burglary, sexual assault, or arson; murder of a peace officer, correctional officer, or public official; murder while under a life sentence; murder for pecuniary gain or contract; aircraft piracy; murder by a defendant with a previous murder conviction; murder of a witness to a crime; murder when a victim is subpoenaed in a criminal proceeding, when the murder is related to the role of the victim as a witness; murder when a victim is less than 14 years old; murder in which a victim is killed while in a dwelling by a deadly weapon fired or otherwise used from outside the dwelling; murder in which a victim is killed while in a motor vehicle by a deadly weapon; murder in which a victim is killed by a deadly weapon fired or otherwise used in or from a motor vehicle (13A-5-40).

Arizona. First-degree murder accompanied by at least 1 of 10 aggravating factors.

Arkansas. Capital murder as defined by Arkansas statute (5-10-101). Felony murder; arson causing death; intentional murder of a law enforcement officer, teacher or school employee; murder of prison, jail, court, or correctional personnel or of military personnel acting in the line of duty; multiple murders; intentional murder of a public officeholder or candidate; intentional murder while under life sentence; contract murder.

California. Treason; homicide by a prisoner serving a life term; first-degree murder with special circumstances; train wrecking; perjury causing execution.

Colorado. First-degree murder; felony murder; intentionally killing a peace officer, fire-fighter, judge, referee, elected State, county, or municipal official, Federal law enforcement officer or agent; person kidnapped or being held hostage by the defendant or an associate of the defendant;

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1 Source: U.S. Department of Justice, Bureau of Justice Statistics, Bulletin, Capital Punishment 1994, February 1996, Pages 11, 12, 3 and 4.

being party to an agreement to kill another person; murder committed while lying in wait, from ambush, or by use of an explosive or incendiary device; murder for pecuniary gain; murder in an especially heinous, cruel, or depraved manner; murder for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody, including the intentional killing of a witness to a criminal offence; killing 2 or more persons during the same incident and murder of a child less than 12 years old; treason. Capital sentencing excludes persons determined to be mentally retarded.

Connecticut. Murder of a public safety or correctional officer; murder for pecuniary gain; murder in the course of a felony; murder by a defendant with a previous conviction for intentional murder; murder while under a life sentence; murder during a kidnapping; illegal sale of cocaine, methadone, or heroin to a person who dies from using these drugs; murder during first-degree sexual assault; multiple murders; the defendant committed the offence(s) with an assault weapon.

Delaware. First-degree murder with aggravating circumstances, including murder of a child victim 14 years of age or younger by an individual who was at least 4 years older than the victim; killing of a non governmental informant who provides an investigative, law enforcement or police agency with information concerning criminal activity; and premeditated murder resulting from substantial planning.

Florida. Felony murder; first-degree murder; sexual battery on a child under age 12; destructive devices (unlawful use resulting in death). Capital drug trafficking.

Georgia. Murder; kidnapping with bodily injury when the victim dies; aircraft hijacking; treason; kidnapping for ransom when the victim dies.

Idaho. First-degree murder; aggravated kidnapping.

Illinois. First-degree murder accompanied by at least 1 of 14 aggravating factors.

Indiana. Murder with 14 aggravating circumstances.

Kansas. Capital murder, including intentional and premeditated killing of any person in the commission of kidnapping; contract murder; intentional and premeditated killing by a jail or prison inmate; intentional and premeditated killing in the commission of rape or sodomy; intentional and premeditated killing of a law enforcement officer; and intentional and

premeditated killing of a child under the age of 14 in the commission of kidnapping. Killing 2 or more persons during the same incident.

Kentucky. Murder with aggravating factor; kidnapping with aggravating factor.

Louisiana. First-degree murder; treason (La. R.S. 14:30 and 14:113).

Maryland. First-degree murder, either premeditated or during the commission of a felony, provided that certain death eligibility requirements are satisfied.

Mississippi. Capital murder includes murder of a peace officer or correctional officer, murder while under a life sentence, murder by bomb or explosive, contract murder, murder committed during specific felonies (rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with a child, nonconsensual unnatural intercourse), and murder of an elected official. Capital rape is the forcible rape of a child under 14 years old by a person 18 years or older. Aircraft piracy.

Missouri. First-degree murder (565.020 RSMO).

Montana. Deliberate homicide; aggravated kidnapping when victim or rescuer dies; attempted deliberate kidnapping by a State prison inmate who has a prior conviction for deliberate homicide or who has been previously declared a persistent felony offender (46-18-303 MCA).

Nebraska. First-degree murder.

Nevada. First-degree murder with 9 aggravating circumstances.

New Hampshire. Capital murder, including contract murder; murder of a law enforcement officer; murder of a kidnapping victim; killing another after being sentenced to life imprisonment without parole.

New Jersey. Purposeful or knowing murder; contract murder.

New Mexico. First-degree murder; felony murder with aggravating circumstances.

North Carolina. First-degree murder (N.G.G.S. 14-17).

Ohio. Aggravated murder, including assassination; contract murder; murder during escape; murder while In a correctional facility; murder

after conviction for a prior purposeful killing or prior attempted murder; murder of a peace officer; murder arising from specified felonies (rape, kidnapping, arson, robbery, burglary); murder of a witness to prevent testimony in a criminal proceeding or In retaliation (O.R.C. secs. 2929.02, 2903.01, 2929.04).

Oklahoma. First-degree murder, including murder with malice aforethought; murder arising from specified felonies (forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first-degree burglary, arson); murder when the victim is a child who has been injured, tortured, or maimed.

Oregon. Aggravated murder.

Pennsylvania. First-degree murder.

South Carolina. Murder with a statutory aggravating circumstance.

South Dakota. First-degree murder; kidnapping with gross permanent physical injury inflicted on the victim; felony murder.

Tennessee. First-degree murder.

Texas. Murder of a public safety officer, fireman, or correctional employee; murder during the commission of specified felonies (kidnapping, burglary, robbery, aggravated rape, arson); murder for remuneration; multiple murders; murder during prison escape; murder of a correctional officer; murder by a State prison Inmate who is serving a life sentence for any of five offences; murder of an individual under 6 years of age.

Utah. Aggravated murder. Aggravated assault by a prisoner serving a life sentence if serious bodily injury is intentionally caused (76-5-202, Utah Code annotated).

Virginia. Murder during the commission or attempts to commit specified felonies (abduction, armed robbery, rape, forcible sodomy); contract murder; murder by a prisoner while in custody; murder of a law enforcement officer; multiple murders; murder of a child under 12 years during an abduction; murder arising from drug violations (18.2-31, Virginia Code as amended).

Washington. Aggravated first-degree premeditated murder.

Wyoming. Premeditated murder; felony murder in the perpetration (or attempts) of sexual assault, arson, robbery, burglary escape, resisting arrest, kidnapping, or abuse of a child under 16 years of age.

Appendix 9

Examples of Statutory Aggravating Factors for Capital Offenses

A: *Federal Law*

Section 848 (n) of Title 21 U.S.C . provides the following aggravating factors.

> "If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant-

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which-

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the

infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 845 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim. "

A similar provision is contained in Section 3591 of title 18.

B: State Law

Below are the statutory aggravating circumstance that apply in Alabama, Georgia and Pennsylvania.

Code of Alabama
Section 13A - 5 - 49

"Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offences. "

Georgia Criminal Code
Section 17 - 10 - 30 (b)

"(b) In all cases of other offenses for which the death penalty may be authorised, the judge shall consider, or

he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorised by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravating battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives or more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. "

Pennsylvania Criminal Code
Section 9711

"(d) Aggravating Circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offence the defendant knowingly created a grave risk of death to another person in addition to the victim of the offence.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

(10) The defendant has been convicted of another Federal or State

offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense. "

Appendix 10

Examples of Statutory Mitigating Factors for Capital Offenses

A: *Federal Law*

Section 848 (m) of title 21 U.S.C. provides

"In determining whether a sentence of death is to be imposed on a defendant, the

finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of itle 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a fedense to the charge.

(4) The defendant could not reasonable have foreseen that the defendant'sconduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence. "

A similar provision is contained in Section 3592 of title 18.

B: State Law

Below are the statutory mitigating provisions in the legislation of Alabama, Georgia and Pennsylvania.

Code of Alabama
Section 13 A - 5 - 51

"Mitigating circumstances shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to it;

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime."

Criminal Code of Georgia

There are no specified legislative mitigating circumstances.

Pennsylvania Criminal Code
Section 9711 (e)

"Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offence. "

Appendix 11

System for Representation of Indigent Defendants

In State Capital Trials

State	Public Defender(PD)	Private Assigned Counsel (Court Appointed)	Private Bar Contract
Alabama	S	P	S
Arizona	P	S	S
Arkansas	P	P	S
California	P	S	S
Colorado	P	S	-
Connecticut	P	S	-
Delaware	P	S	-
Florida	P	S	S
Georgia	P	P	S
Idaho	P	S	P
Illinois	P	S	-
Indiana	P	P	S
Kentucky	P	S	P
Louisiana	P	S	-
Maryland	P	S	-
Mississippi	S	P	S
Missouri	P	S	-
Montana	P	P	S
Nebraska	P	P	S
Nevada	P	S	-
New HamphireP	S	-	
New Jersey	P	S	-
New Mexico	P	S	S
North Carolina P	P	-	
Ohio	P	S	-
Oklahoma	P	P	S
Oregon	P	P	P
Pennsylvania	P	S	-
South Carolina P	S	-	
South Dakota	P	P	S
Tennessee	P	S	-
Texas	-	P	-
Utah	P	P	-
Virginia	P	P	-
Washington	P	P	P
Wyoming	P	S	-

Key

P: Primary System of Representation
S: Secondary System of Representation
Source of Tables in this Appendix are from the Spangenberg Group "A Study of Representation in Capital Cases in Texas", March 1993, pages 121 - 122, 124 - 125, 127 - 128.

System for Representation of Indigent Defendants

On State Direct Appeal

State	CPD	PDA	PDP	BAC	BA
Alabama	P			P	
Arizona	P			P	S
Arkansas	P			P	P
California			P	P	
Colorado		P		S	
Connecticut		P		S	
Delaware		P		S	
Florida			P*	S	
Georgia	P			P	
Idaho	P			P	
Illinois	P		P	S	
Indiana	P			P	
Kentucky	S	P		S	
Louisiana	P			P	
Maryland		P		S	
Mississippi	P			P	
Missouri		P		S	
Montana	P			P	P
Nebraska	P			P	
Nevada	P	P		S	
New Hamphire		P		S	
New Jersey		P		S	
New Mexico		P		S	S
North Carolina			P	S	
Ohio	P		P	S	
Oklahoma	P		P	S	S
Oregon			P	S	S
Pennsylvania	P			S	
South Carolina	P		P	S	
South Dakota	P			P	
Tennessee	P			S	
Texas				P	
Utah	P			P	
Virginia	P			P	
Washington	P			S	
Wyoming		P		S	

Key

BA: Contract with Private Bar
BAC: Private Bar Assigned Counsel
CPD: County Public Defender
PDA: Statewide Public Defender within a state Appellate Unit
PDP: A State Appellate Public Defender Programme

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* Florida does not have an independent state appellate public defender system, but the state is divided into separate appellate public defender circuits.

System for Representation of Indigent Defendants

In State Post-Conviction Capital Cases

State	TPD	App.PD	App.D	Ass.C	VC
Alabama	P			P	
Arizona	P			P	S
Arkansas	P			P	S
California		P		P	S
Colorado			P	S	
Connecticut			P	S	
Delaware			P	S	
Florida		P		S	
Georgia	P			P	S
Idaho	P			P	S
Illinois	P	P		P	
Indiana		P		P	
Kentucky			P	P	
Louisiana	P			S	
Maryland			P	S	
Mississippi	P			P	S
Missouri			P	S	
Montana	P			P	S
Nebraska	P			P	
Nevada	P		P	S	
New Hamphire			P	S	
New Jersey			P	S	
New Mexico			P	S	
North Carolina		P		P	
Ohio		P		P	
Oklahoma			P	S	
Oregon		P		S	
Pennsylvania	P			P	
South Carolina	P	P		S	
South Dakota	P			P	S
Tennessee	P			S	
Texas				S*	P
Utah	P			P	
Virginia	P			S	
Washington		P		S	
Wyoming		P		S	

* While there are instances in which counsel is appointed and compensated in Texas in state post-conviction capital cases, these exceptions hardly constitute an assigned counsel system. The results of the surveys for the study showed, however, that there are a small number of cases in which attorneys are appointed and compensated.

Key

App.D: Statewide Public Defender System within the State Appeals Divisions
App.PD: State Appellate Public Defender System
Ass.C: Private Assigned Counsel by Offender
TPD: Trial Public Defender System
VC: Volunter Counsel

Appendix 12

Letter to President Clinton from Four Former US Attorney-Generals

December 8, 1995

The Honourable William J. Clinton
The White House
Washington, D.C. 20500

Dear Mr. President,

The *Habeas* corpus provisions in the Senate terrorism bill, which the House will soon take up, are unconstitutional. Though intended in large part to expedite the death penalty review process, the litigation and constitutional rulings will in fact delay and frustrate the imposition of the death penalty. We strongly urge you to communicate to the Congress your resolve, and your duty under the Constitution, to prevent the enactment of such unconstitutional legislation and the consequent disruption of so critical a part of our criminal punishment system.

The constitutional infirmities reside in three provisions of the legislation: one requiring federal courts to defer to erroneous state court rulings on federal constitutional matters, one imposing time limits which could operate to completely bar any federal habeas corpus review at all, and one preventing the federal courts from hearing the evidence necessary to decide a federal constitutional question. They violate the *Habeas Corpus* Suspension Clause, the judicial powers of Article III, and due process. None of these provisions appeared in the bill that you and Senator Biden worked out in the last Congress together with representatives of prosecutors' organizations.

The deference requirement would bar any federal court from granting habeas corpus relief where a state court has misapplied the United States Constitution, unless the constitutional error rose to a level of "unreasonableness." The time-limits provisions set a single period for the filing of both state and federal post-conviction petitions (six months in a capital case and one year in these provisions, the entire period could be consumed in the state process, through no fault of the prisoner or counsel, thus creating an absolute bar to the filing of a federal habeas corpus petition. Indeed, the period could be consumed before counsel had even

been appointed in the state process, so that the inmate would have no notice of the time limit or the fatal consequences of consuming all of it before filing a state petition.

Both of these provisions, by flatly barring federal habeas corpus review under certain circumstances, violate the Constitution's Suspension Clause, which provides: "The privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in the cases of rebellion or invasion the public safety may require it" (Art. I, §9, CL. 2). Any doubt as to whether this guarantee applies to persons held in state as well as federal custody was removed by the passage of the Fourtheenth Amendment and by the amendment's framers' frequent mention of habeas corpus as one of the privileges and immunities so protected.

The preclusion of access to habeas corpus also violates Due Process. A measure is subject to proscription under the due process clause if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be marked as fundamental," as viewed by "historical practice." Medina v. California 112 S.Ct. 2572, 2577 (1992). Independent federal court review of the constitutionality of state criminal judgments has existed since the founding of the nation, first by writ of error, and since 1867 by writ of habeas corpus. Nothing else is more deeply rooted in America's legal traditions and conscience. There is no case in which "a state court's incorrect legal determination has ever been allowed to stand because it was reasonable," Justice O'Connor found in Wright v. West, 112 S. Ct. 2482, 2497; "We have always held that federal courts, even on habeas, have an independent obligation to say what the law is." Indeed, Alexander Hamilton argued, in The Federalist N° 84, that the existence of just two protections - habeas corpus and the prohibition against ex post facto laws - obviated the need to add a Bill of Rights to the Constitution.

The defence requirement may also violate the powers granted to the judiciary under Article III. By stripping the federal courts of authority to exercise independent judgment and forcing them to defer to previous judgments made by state courts, this provision runs afoul of the oldest constitutional mission of the federal courts: "the duty... to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Although Congress is free to alter the federal court's jurisdiction, it cannot order them how to interpret the Constitution, or dictate any outcome on the merits. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). Earlier this year, the Supreme Court reiterated that Congress has no power to assign "rubber stamp work" to an Article III court. "Congress may be free to establish a ... scheme that operates without court participation," the Court said, "but that is a matter quite different from instructing a court automatically to enter a judgment pursuant to a decision the

court has not authority to evaluate." Gutierrez de Martinez v. Lamagno, 115 S.Ct. 227, 2334.

Finally, in prohibiting evidentiary hearings where the constitutional issue raised does not go to guilt or innocence, the legislation again violates Due Process. A violation of constitutional rights cannot be judged in a vacuum. The determination of the facts assumes "an importance fully as great as the validity of the substantive rule of law to be applied." Wingo v. Wedding, 418 U.S. 461, 474 (1974).

The last time habeas corpus legislation was debated at length in constitutional terms was in 1968. A bill substantially eliminating federal habeas corpus review for state prisoners was defeated because, as Republican Senator Hugh Scott put it at the end of debate, "if Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell."

In more recent years, the habeas reform debate has been viewed as a mere adjunct of the debate over the death penalty. But when the senate took up the terrorism bill this year, Senator Moynihan sought to reconnect with the larger framework of constitutional liberties: "If had to live in a country which had habeas corpus but no free elections," he said, "I would take habeas corpus every time." Senator Chafee noted that his uncle, a Harvard law scholar, has called habeas corpus "the most important human rights provision in the Constitution." With the debate back on constitutional grounds, Senator Biden's amendment to delete the defence requirement nearly passed, with 46 votes.

We respectfully ask that you insist, first and foremost, on the preservation of independent federal review, i.e. on the rejection of any requirement that federal courts defer to state court judgements on federal constitutional questions. We also urge that separate time limits be set for filing federal and state habeas corpus petitions - a modest change which need not interfere with the setting of strict time limits - and that they begin to run only upon the appointment of competent counsel. And we urge that evidentiary hearings be permitted wherever the factual record is deficient on an important constitutional issue.

Congress can either fix the constitutional flaws now, or wait through several years of litigation and confusion before sent back to the drawing board. Ultimately, it is the public's interest in the prompt and fair disposition of criminal cases which will suffer. The passage of an unconstitutional bill helps no one.

We respectfully urge you, as both president and a former professor of constitutional law, to call upon Congress to remedy these flaws before sending the terrorism bill to your desk. We request an opportunity to meet with you personally to discuss this matter so vital to the future of the Republic and the liberties we all hold dear.

Sincerely,

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Appendix 13

Racial Justice Act
H.R. 3315

103D Congress 1st Session

"CHAPTER 177 - RACIALLY DISCRIMINATORY CAPITAL SENTENCING

"2921. Definitions

"For purposes of this chapter-

"(1) the term 'a racially discriminatory pattern' means a situation in which sentences of death are imposed more frequently-

"(A) upon persons of one race than upon persons of another race; or

"(B) as punishment for crimes against persons of one race than as punishment for crimes against persons of another race,

and the greater frequency is not explained by pertinent nonracial circumstances;

"(2) the term 'death-eligible crime' means a crime for which death is a punishment that is authorized by law to be imposed under any circumstances upon a conviction of that crime;

"(3) the term 'case of death-eligible crime' means a case in which the complaint, indictment, information, or any other initial or subsequent charging paper charges any person with a death-eligible crime; and

"(4) the term 'Federal or State entity' means any State, the District of Columbia, the United States, any territory thereof, and any subdivision or authority of any of these entities that is empowered to provide by law that death be imposed as punishment for crime.

"2922. Prohibition on the imposition or execution of the death penalty in a rscially discriminatory pattern

"(a) PROHIBITION.- It is unlawful to impose or execute sentences of death under color of State or Federal law in a racially discriminatory pattern.

No person shall be put to death in the execution of a sentence imposed pursuant to any law if that person's death sentence furthers a racially discriminatory pattern.

"(b) ESTABLISHMENT OF A PATTERN.- To establish that a racially discriminatory pattern exists for purposes of this chapter-

"(1) ordinary methods of statistical proof shall suffice; and

"(2) it shall not be necessary to show discriminatory motive, intent, or purpose on the part of any individual or institution.

"(C) PRIMA FACIE SHOWING.- (1) To establish a prima facie showing of a racially discriminatory pattern for purposes of this chapter, it shall suffice that death sentences are being imposed or executed-

"(A) upon persons of one race with a frequency that is disproportionate to their representation among the numbers of persons arrested for, charged with, or convicted of, death-eligible crimes; or

"(B) as punishment for crimes against persons of one race with a frequency that is disproportionate to their representation among persons against whom death-eligible crimes have been committed.

"(2) To rebut a prima facie showing of a racially discriminatory pattern, a State or Federal entity must establish by clear and convincing evidence that identifiable and pertinent nonracial factors persuasively explain the observable racial disparities comprising the pattern.

"2923. Data on death penalty cases

"(a) DESIGNATION OF AGENCY- Any State or Federal entity that provides by law for death to be imposed as a punishment for any crime shall designate a central agency to collect and maintain pertinent data on the charging, disposition, and sentencing patterns for all cases of death-eligible crimes.

(b) RESPONSIBILITIES OF CENTRAL AGENCY- Each central agency designated pursuant to subsection (a) shall -

"(1) affirmatively monitor compliance with this chapter by local officials and agencies;

"(2) devise and distribute to every local official or agency responsible for the investigation or prosecution of death-eligible crimes a standard form to collect pertinent data;

"(3) maintain all standard forms, compile and index all information contained in the forms, and make both the forms and the compiled information publicly available;

"(4) maintain a centralized, alphabetically indexed file of all police and investigative reports transmitted to it by local officials or agencies in every case of death-eligible crime; and

"(5) allow access to its file of police and investigative reports to the counsel of record for any person charged with any death-eligible crime or sentenced to death who has made or intends to make a claim under section 2922 and it may also allow access to this file to other persons.

"(C) RESPONSIBILITY OF LOCAL OFFICIAL- (1) Each local official responsible for the investigation or prosecution of death-eligible crimes shall-

"(A) complete the standard form developed pursuant to subsection (b)(2) on every case of death-eligible crime; and

"(B) transmit the standard form to the central agency no later than 3 months after the disposition of each such case whether that disposition is by dismissal of charges, reduction of charges, acceptance of a plea of guilty to the death-eligible crime or to another crime, acquittal, conviction, or any decision not to proceed with prosecution.

"(2) In addition to the standard form, the local official or agency shall transmit to the central agency one copy of all police and investigative reports made in connection with each case of death-eligible crime.

"(d) PERTINENT DATA- The pertinent data required in the standard form shall be designated by the central agency but shall include, at a minimum, the following information:

"(1) Pertinent demographic information on all persons charged with the crime and all victims (including race, sex, age, and national origin).

"(2) Information on the principal features of the crime.

"(3) Information on the aggravating and mitigating factors of the crime, including the background and character of every person charged with the crime.

"(4) A narrative summary of the crime.

"2924. Enforcement of the chapter

"(a) ACTION UNDER SECTIONS 2241, 2254, OR 2255 OF THIS TITLE- In any action brought in a court of the United States within the jurisdiction conferred by sections 2241, 2254, or 2255, in which any person raises a claim under section 2922-

"(1) the court shall appoint counsel for any such person who is financially unable to retain counsel; and

"(2) the court shall furnish investigative, expert or other services necessary for the adequate development of the claim to any such person who is financially unable to obtain such services.

"(b) DETERMIlNATION BY A STATE COURT- Notwithstanding section 2254, no determination on the merits of a factual issue made by a State court pertinent to any claim under section 2922 shall be presumed to be correct unless-

"(1) the State is in compliance with section 2923;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim which were substantially equivalent to those provided by subsection (a); and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criteria specified in section 2254."

Fairness in Death Sentencing Act
H.R. 4092

103D Congress 2D Session

"CHAPTER 177 - RACIALLY DISCRIMINATORY CAPITAL SENTENCING

"§ 2921. Prohibition against the execution of a sentence of death imposed on the basis of race

(a) IN GENERAL- No person shall be put to death under color of State or Federal law in the execution of a sentence that was imposed based on race.

(b) INFERENCE OF RACE AS THE BASIS OF DEATH SENTENCE- An inference that race was the basis of a death sentence is established if valid evidence is presented demonstrating that, at the time the death sentence was imposed, race was a statistically significant factor in decisions to seek or to impose the sentence of death in the jurisdiction in question.

(c) RELEVANT EVIDENCE- Evidence relevant to establish an inference that race was the basis of a death sentence may include evidence that death sentences were, at the time pertinent under subsection (b), being imposed significantly more frequently in the jurisdiction in question-

"(1) upon persons of one race than upon persons of another race; or

"(2) as punishment for capital offenses against persons of one race than as punishment for capilal offenses against persons of another race.

(d) VALIDITY OF EVIDENCE PRESENTED TO ESTABLISH AN INFERENCE- If statistical evidence is presented to establish an inference that race was the basis of a sentence of death, the court shall determine the validity of the evidence and if it provides a basis for the inference. Such evidence must take

into account, to the extent it is compiled and publicly made available, evidence of the statutory aggravating factors of the crimes involved, and shall include comparisons of similar cases involving persons of different races.

"(e) REBUTTAL- If an inference that race was the basis of a death sentence is established under subsection (b), the death sentence may not be carried out unless the government rebuts the inference by a preponderance of the evidence. Unless it can show that the death penalty was sought in all cases fitting the statutory criteria for imposition of the death penalty, the government cannot rely on mere assertions that it did not intend to discriminate or that the cases in which death was imposed fit the statutory criteria for imposition of the death penalty.

§ 2922. *Access to data on death eligible cases*

"Data collected by public officials concerning factors relevant to the imposition of the death sentence shall be made publicly available.

§ 2923. *Enforcement of the chapter*

"In any proceeding brought under section 2254, the evidence supporting a claim under this chapter may be presented in an evidentiary hearing and need not be set forth in the petition. Notwithstanding section 2254, no deterrnination on the merits of a factual issue made by a State court pertinent to any claim under section 2921 shall be presumed to be correct unless-

"(1) the State is in compliance with section 2922;

"(2) the determination was made in a proceeding in a State court in which the person asserting the claim was afforded rights to the appointment of counsel and to the furnishing of investigative, expert and other services necessary for the adequate development of the claim; and

"(3) the determination is one which is otherwise entitled to be presumed to be correct under the criteria specified in section 2254."

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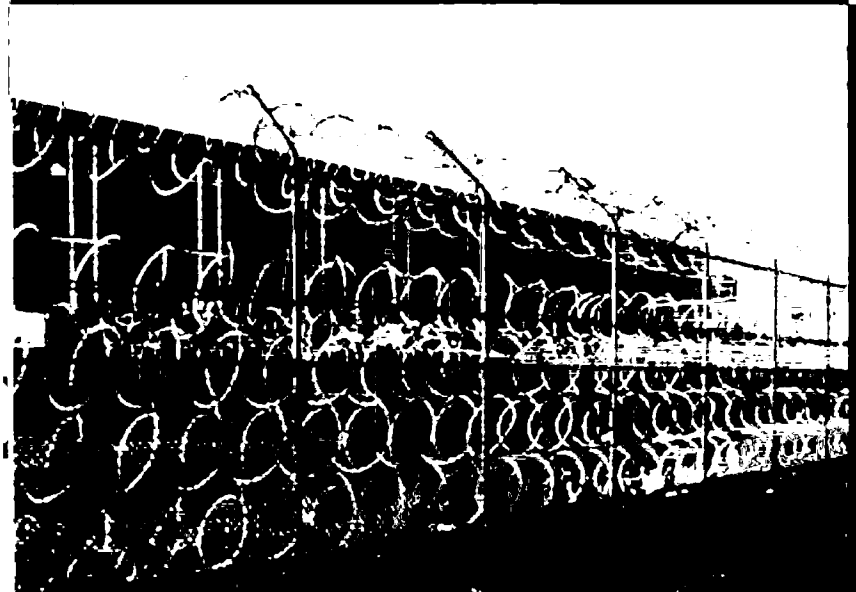

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