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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Extrajudicial, summary or arbitrary executions

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission resolution 1997/61

Addendum

Mission to the United States of America

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Introduction

1. The Special Rapporteur on extrajudicial, summary or arbitrary executions visited the United States of America from 21 September to 8 October 1997. The visit took place following several requests by the Special Rapporteur to the United States Government for an invitation. By letter dated 23 September 1994, the Special Rapporteur inquired whether the Government of the United States would consider inviting him to carry out a visit. By letter dated 25 September 1995, the Special Rapporteur reiterated his request. By letter dated 2 September 1996, the Special Rapporteur expressed concern that no reply had yet been received to his previous communications of 1994 and 1995 and reiterated his interest in conducting a mission to the United States. The invitation to visit the country was given orally to the Special Rapporteur on 8 October 1996 during a meeting held in Geneva with representatives of the Permanent Mission of the United States. The invitation was confirmed in writing by letter dated 17 October 1996.

2. The request for a visit to the United States was based on persistent reports suggesting that the guarantees and safeguards set forth in international instruments relating to fair trial procedures and specific restrictions on the death penalty were not being fully observed. Since his appointment in 1992, the Special Rapporteur has received information concerning a discriminatory and arbitrary use of the death penalty and a lack of adequate defence during trial and appeal procedures in the United States. Executions of juveniles and mentally retarded persons have also been a constant concern for the Special Rapporteur. In addition, information concerning the extension of the scope and the reintroduction of death penalty statutes in several states prompted the Special Rapporteur to request a visit to the United States.

3. The basis for the Special Rapporteur's work in the field of capital punishment lies in several resolutions of the Commission on Human Rights 1/ in which the Commission requested the Special Rapporteur "to continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of the death penalty, bearing in mind the comments made by the Human Rights Committee in its interpretation of article 6 of the International Covenant on Civil and Political Rights, as well as the Second Optional Protocol thereto"

4. Although the main concern of the Special Rapporteur in requesting a visit to the United States was the application of the death penalty, other aspects of his mandate could not be ignored, in particular because reports of deaths in custody and deaths due to excessive use of force by law enforcement officials in the United States were also received by the Special Rapporteur.

5. From 21 September to 8 October 1997, in addition to Washington, D.C., the Special Rapporteur visited the States of New York, Florida, Texas and California. During his visit he met with federal and state authorities. In Washington, D.C. he met with the Deputy Assistant Secretary for Human Rights and other representatives of the Department of State, as well as with representatives from the Department of Justice, and several members of Congress. In New York, he met with the Chief Judge of the New York State Court of Appeals, the District Attorney for Bronx County, the Deputy Police

Commissioner on Legal Matters and Representatives of the New York Capital Defenders Office. In addition, he also met with the former Governor of New York State, Mario Cuomo. In Florida, he met with the State Attorney, representatives of the Office of the Public Defender and the Chief of Police of Miami. During his stay in Texas, he held meetings with the Governor and his assistant on legal matters, representatives of the Office of the Attorney General in Austin and representatives of the Office of the District Attorney in Houston. He also met with the Consul of Mexico in Houston. In California, he met with the Court Administrator of the California Supreme Court, the San Francisco Assistant Chief of Police, as well as with the Chief of Police of Los Angeles. The Special Rapporteur wishes to thank state authorities, and particularly former Governor Cuomo and Governor Bush, for their availability and cooperation with his visit.

6. The Special Rapporteur met with prison authorities in Huntsville, Texas, and in San Quentin, California. He had full access to the Ellis Death Row Unit in Huntsville and was able to meet with all the death row inmates he had requested to meet. In San Quentin, prison authorities offered the Special Rapporteur the possibility of meeting with three death row inmates other than those he had requested to see. The Special Rapporteur did not consider those conditions acceptable and therefore declined the offer. He nevertheless visited the premises of the prison. His repeated requests to visit women on death row in Broward Correctional Institution, Florida, remained unanswered.

7. In addition, the Special Rapporteur had the opportunity to meet with many non-governmental sources, including lawyers representing persons on death row, victims' families, experts on death penalty issues, specialists on juvenile justice and mental retardation, university professors and criminologists. He also met with representatives of non-governmental organizations such as the American Civil Liberties Union, the American Friends Service Committee, the Anthony Baez Foundation, Amnesty International-United States Section, the Death Penalty Information Center, the December 12th Movement, the California Appellate Project, the Ella Baker Center for Human Rights, Human Rights Watch, the International Human Rights Law Group, the International Association against Torture, the National Coalition to Abolish the Death Penalty, the NACCP Legal Defense Fund, New York Lawyers Against the Death Penalty, Parents Against Police Brutality, the Southern Region Rainbow Coalition, the Texas Coalition to Abolish the Death Penalty and the Texas Defender Service.

8. The Special Rapporteur wishes to thank the International Human Rights Law Group in Washington, D.C. for the assistance provided during his mission. Further, he would like to express his gratitude to Human Rights Watch, whose assistance in the organization of appointments at a non-governmental level was highly appreciated. He also wishes to thank the December 12th Movement for organizing public hearings on police violence in New York, as well as those NGOs and individuals who publicly testified during the hearing.

9. Despite the official invitation from the United States Government and its agreement on the dates, many difficulties arose in the organization of official meetings for the mission. The Department of State was only willing to provide assistance in arranging meetings at the federal level, but maintained it had no authority to facilitate the visit at state level. The

Special Rapporteur regrets that none of the high-level meetings he requested at the federal level were arranged. In view of the above, he transmitted a letter dated 18 September 1997 to the United Nations High Commissioner for Human Rights expressing his concern at the obstacles his mission was facing. Official meetings at the state level were organized by the Office of the High Commissioner for Human Rights in Geneva and New York as well as by the United Nations Information Center (UNIC) in Washington, D.C.

10. The Special Rapporteur wishes to thank the Department of State for its efforts in trying to facilitate access for him to state prisons. Thus, by letters dated 22 September 1997, the Department of State requested prison authorities at Broward Correctional Institution in Florida, Huntsville in Texas, and San Quentin in California to cooperate with the visit of the Special Rapporteur.

I. THE RIGHT TO LIFE IN INTERNATIONAL LAW

11. The right to life is the supreme right, because without it, no other rights can be enjoyed. International law recognizes the right to life as a fundamental and non-derogable right. The death penalty is an exception to the right to life and, like any exception, it must be interpreted restrictively and carried out with the most scrupulous attention to fundamental principles of non-discrimination, fair trial standards and equal protection before the law. There is no right to capital punishment, and while Governments have the right to enact penal laws, these laws must conform to basic principles of international human rights law.

12. The supremacy of the right to life and the exceptional character of the death penalty are enshrined in several international instruments. Article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights (ICCPR) provide that every individual has the right to life and security of the person, that this right shall be protected by law and that no one shall be arbitrarily deprived of his or her life.

13. Although the death penalty is not yet prohibited under international law, the desirability of its abolition has been strongly reaffirmed on different occasions by United Nations organs and bodies in the field of human rights, inter alia by the Security Council, 2/ the Human Rights Committee, 3/ the General Assembly 4/ and the Economic and Social Council. 5/

14. Another recent indication of the increasing trend towards abolition of the death penalty can be seen in Commission on Human Rights resolution 1997/12 on the question of the death penalty. For the first time, the Commission on Human Rights adopted a resolution on capital punishment in which it called upon all States “that have not yet abolished the death penalty progressively to restrict the number of offences for which the death penalty may be imposed”. It further called on States to consider suspending executions, with a view to abolishing the death penalty.

15. The gradual move within the United Nations to a position favouring the abolition of the death penalty was already observed in the reports on United Nations norms and guidelines in criminal justice: from

standard-setting to implementation (A/CONF.87/8) and on capital punishment (A/CONF.87/9) presented to the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1980. The reports noted that the United Nations had gradually shifted from the position of a neutral observer, concerned about but not committed on the question of the death penalty, to a position favouring the eventual abolition of the death penalty.

16. Three treaties aiming at the abolition of the death penalty further confirm the tendency of the international community towards abolishing the death penalty: the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; and the Protocol No. 6 to the European Convention on Human Rights.

A. The International Covenant on Civil and Political Rights: limitations on the imposition of the death penalty

17. The International Covenant on Civil and Political Rights and its first Optional Protocol, 6/ were adopted in 1966 by the General Assembly. The ICCPR came into force 10 years later, on 23 March 1976. By ratifying the ICCPR, a State accepts the obligation to give the force of law to the rights proclaimed by the Covenant. Civil and political rights enshrined in the International Covenant include, inter alia, the right to non-discrimination, the right to be treated equally before the law, the right to a fair trial, the right not to be submitted to torture, and the right to life. The object of the Covenant is the creation of minimum legally binding standards for human rights which, according to article 50 of the Covenant, shall extend to all parts of federal States without any limitation or exception. The United States of America ratified the ICCPR on 8 June 1992, with a package of reservations, declarations and understandings. On 8 September 1992, the treaty came into force for the United States.

18. Article 6 (1) of the ICCPR states that the right to life is an inherent right. The term “inherent right” was understood, during the drafting of the Covenant, as a right which is not conferred on a person by society but “rather that society is obliged to protect the right to life of an individual”. 7/ It further stipulates that no one shall be arbitrarily deprived of his life. The concept of arbitrariness cannot be equated to “against the law”, but has to be interpreted more broadly, to include the notion of inappropriateness and injustice. 8/ While the United States entered general reservations to article 6, no specific reservation was entered to article 6 (1) of the ICCPR (see paras. 27-35 below).

19. After setting out the general protection of the right to life, article 6 (2) indicates the conditions, in those countries where it has not been abolished, for imposing the death penalty. Article 6 (2), as an exception to the inherent right to life, should not be interpreted as authorizing the imposition of the death penalty in general, but only for those countries where it has not yet been abolished. It is the opinion of the Special Rapporteur that the negative wording of the article does not allow for the reinstatement of the death penalty after it has been abolished. The intent of this provision does not allow for the expansion of the scope of the

death penalty. In this context, the Human Rights Committee has expressed the view that the extension of the scope of application of the death penalty raised questions as to the compatibility with article 6. 9/

20. Other limitations imposed by article 6 of the ICCPR are the following.

21. A sentence of death can only be imposed for the most serious crimes. The Human Rights Committee considers that this expression "must be read restrictively to mean that the death penalty should be a quite exceptional measure". 10/ The notion of most serious crimes was later developed in the Safeguards guaranteeing protection of the rights of those facing the death penalty, according to which the most serious crimes are those "intentional crimes with lethal or other extremely grave consequences". The Special Rapporteur considers that the term "intentional" should be equated to premeditation and should be understood as deliberate intention to kill.

22. A sentence of death can only be imposed following the strictest observance of the highest procedural safeguards. An indisputable characteristic of the death penalty is its irreversibility. The Special Rapporteur, therefore, believes that the highest fair trial guarantees must be fully observed in trials leading to its imposition. He holds the opinion that all safeguards and due process guarantees must be fully respected, both during the pre-trial and trial, as provided for by the ICCPR and various other international instruments. 11/ Article 6 (2) clearly states that the penalty of death can only be carried out pursuant to a final judgement rendered by a competent court. Article 6 (4) provides for the right to seek pardon or commutation.

23. Article 14 of the Covenant, which sets the basic fair trial standards, includes the right to equality before the courts, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, the right to the presumption of innocence, the right to appeal and the right to be compensated in case of miscarriage of justice. Article 14 (3) lists the minimum fair trial guarantees, which include the right to be informed promptly of the nature and cause of the charge, the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing. The Committee has expressed the view that the "requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing ...". 12/ In addition, the Human Rights Committee considers that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, and which could no longer be remedied by appeal, constitutes a violation of article 6 of the Covenant". 13/

24. A sentence of death cannot be imposed on minors and cannot be carried out on pregnant women. International law prohibits the imposition of the death penalty on juvenile offenders. Article 6 (5) of the ICCPR provides that the death penalty shall not be imposed for crimes committed by persons below 18 years of age. This principle has been repeated in article 37 (a) of the Convention on the Rights of the Child, rule 17.2 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") and paragraph 3 of the Safeguards guaranteeing protection of

the rights of those facing the death penalty. Also, article 6 (4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), stipulates that the death penalty shall not be pronounced on persons who were under 18 years of age at the time they committed the offence.

25. In addition to the ICCPR, other international instruments ratified by the United States include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Elimination of All Forms of Racial Discrimination. The United States has also signed, but not ratified, the Convention on the Rights of the Child. The Convention on the Rights of the Child has been universally ratified, except by two countries: the United States of America and Somalia.

26. Further, the United States has signed, but not ratified, the American Convention on Human Rights, which also forbids the imposition of the death penalty on juvenile offenders.

B. Reservations by the United States to the ICCPR and the position of the Human Rights Committee

27. At the time of ratification of the ICCPR, the United States entered reservations concerning certain rights contained in the Covenant. By entering a reservation, a State purports to exclude or modify the legal effect of a particular provision of the treaty in its application to that State. According to the Vienna Convention on the Law of Treaties, reservations to multilateral treaties are allowed, providing that the reservation is compatible with the object and purpose of the treaty itself. One of the reservations entered by the United States makes particular reference to the death penalty provision of article 6.

28. According to this reservation, “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 18 years of age”. 14/

29. In its concluding observations to the initial report of the United States of America (CCPR/81/Add.4), the Human Rights Committee expressed concern at this reservation which it believes to be incompatible with the object and purpose of the ICCPR. 15/

30. It is the view of the Special Rapporteur that this reservation leaves open the possibility of executing persons with mental retardation. Further, he is of the opinion that the term “future”, under the notion of “existing or future laws permitting the imposition of capital punishment” is not compatible with the restrictive spirit of article 6 of the ICCPR. 16/

31. Eleven States parties to the ICCPR objected to the reservation entered by the United States. 17/ The Human Rights Committee states that the content and scope of reservations may “undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States

parties". 18/ It also states that the absence of a prohibition on reservations (reservations are not prohibited by the Covenant) "does not mean that any reservation is permitted". 19/

32. Further, according to the Committee, "The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation. 20/ In addition, as article 4 of the Covenant declares article 6 to be a non-derogable right, a State which makes a reservation to such a right is under a "heavy onus". 21/

33. The United States also entered an understanding, according to which the 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". The Special Rapporteur considers that nothing in this understanding precludes Federal and State Governments from making the necessary efforts to implement the Covenant throughout the country. Further, he is of the opinion that the federal structure should not be an obstacle to the implementation of the Covenant.

34. The United States also made several declarations. It declared "that the provisions of articles 1 through 27 of the Covenant are not self-executing". In its initial report to the Human Rights Committee, the United States explained that this declaration does not limit the international obligations of the United States; rather, it meant that, as a matter of domestic law, the Covenant did not, by itself, create private rights directly enforceable in United States courts. Further, according to the United States report, fundamental rights and freedoms protected by the ICCPR are already guaranteed in United States law, either by virtue of constitutional protections or enacted statutes, and can be effectively asserted and enforced by individuals in the judicial system on those bases. For those reasons, it was not considered necessary to adopt special implementing legislation to give effect to the provisions of the ICCPR in domestic law.

35. In its concluding observations on the initial report of the United States of America, the Human Rights Committee regretted the extent of the reservations, declarations and understandings to the Covenant as, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States.

C. Other restrictions imposed by international law

36. Imposition of the death penalty on mentally retarded or insane persons is also prohibited. Paragraph 6 of the Declaration of the Rights of Mentally Retarded Persons, 22/ provides that, if prosecuted for any offence, a mentally retarded person shall have the right to due process of law with full recognition of his degree of mental responsibility. Further, paragraph 3 of the Safeguards guaranteeing protection of the rights of those facing the death penalty stipulates that the death penalty shall not be carried out on persons who have become insane. In addition, in paragraph 1 (d) of resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, the Economic and Social Council recommended

that States strengthen further the protection of the rights of those facing the death penalty by eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.

II. THE GENERAL CONTEXT OF THE DEATH PENALTY IN THE UNITED STATES

37. Currently, 40 jurisdictions in the United States of America have death penalty statutes. 23/ Thirteen other jurisdictions do not. 24/ According to the information received, 3,269 persons are on death row, 25/ of whom 47.05 per cent are White, 40.99 per cent are Black, 6.94 per cent are Hispanic, 1.41 per cent are Native American, and 0.70 per cent are Asian. Of the total death row population, more than 98 per cent are male.

38. Since the death penalty was reinstated in 1976, 403 persons have been executed. 26/ There have been no federal executions since 1963. Out of these 403 executions, only 6 white persons have reportedly been executed for the murder of a black person. 27/ Texas has been responsible for more than 30 per cent of the executions, followed by Virginia (10.17 per cent) and Florida (9.68 per cent). It is reported that since the reinstatement of death penalty statutes, more than 47 persons have been released from death row because of later evidence of their innocence (see paras. 115-116 below).

39. One hundred and fourteen women have reportedly been sentenced to death from 1973 to June 1997. Of them 47 are on death row and 66 had their sentences either reversed or commuted to life imprisonment. Florida, North Carolina and Texas account for the highest imposition of female death sentences. 28/ Female executions have been rare. The last woman executed was in 1984 in North Carolina.

40. Nine juvenile offenders, individuals aged less than 18 at the time they committed the crime for which they were convicted, have been executed. 29/

41. In 1972, the Supreme Court found the application of the death penalty unconstitutional and invalidated both federal and state-level death penalty statutes. In Furman v. Georgia (1972), the United States Supreme Court ruled that the existing death penalty laws were being applied in an arbitrary and capricious manner, which violated the Constitution. Justice White, in his concurring opinion in the Furman case, stated that with respect to the death penalty “there was no meaningful basis for distinguishing the few cases in which it was imposed from the many cases in which it was not”. In Gregg v. Georgia (1976), the Supreme Court ruled that the death penalty did not violate the Constitution if it was administered in a manner designed to protect against arbitrariness and discrimination. This ruling was used by the states, and eventually the Federal Government, to reintroduce the death penalty in accordance with certain guidelines and provisions aimed at eliminating arbitrariness.

42. However, information brought to the attention of the Special Rapporteur indicates that a significant degree of unfairness and arbitrariness in the administration of the death penalty 25 years after Furman appears to still prevail. In this context, in February 1997, the American Bar Association (ABA) called for a moratorium on executions in the United States until

jurisdictions implement procedures and policies intended to ensure that death penalty cases are administered fairly and impartially, in accordance with due process. 30/

43. It was brought to the Special Rapporteur's attention that the guarantee of due process in capital cases has been seriously jeopardized following the adoption of the federal 1996 Anti-Terrorism and Effective Death Penalty Act. This law severely limits federal review of state court convictions and curtails the availability of habeas corpus at the federal level. In addition, the withdrawal of funding for post-conviction defender organizations, which were handling capital punishment cases at the post-conviction level and helping attorneys involved in death penalty cases, seriously limits the extent to which fair trial standards are fully available during the process leading to the imposition of a death sentence.

III. FINDINGS OF THE SPECIAL RAPPORTEUR

A. Current practices in the application of the death penalty

1. Reintroduction of death penalty statutes and extension of the scope

44. The Special Rapporteur has observed a tendency to increase the application of the death penalty both at the state level, either by reinstating the death penalty or by increasing the number of aggravating circumstances, and at the federal level, where the scope of this punishment has recently been dramatically extended.

45. The States of Kansas and New York reinstated the death penalty in 1994 and 1995, respectively. On 7 March 1995, New York became the thirty-eighth state to reinstate the death penalty. The bill, signed by Governor Pataki of New York, came into force on 1 September 1995. According to information received, Governor Pataki reportedly referred to the prevention of violent crime as a justification for the new law. However, during a meeting with the Bronx District Attorney, the Special Rapporteur was informed that from 663 homicides committed in the Bronx in 1990, the figure had gradually lowered in subsequent years, to reach 249 in 1996. Since the reinstatement of the death penalty in New York, 15 persons are said to have been charged with capital murder.

46. The Special Rapporteur has recently been informed that a proposal to reinstate the death penalty in Washington, D.C. for those convicted of killing law enforcement officials is expected to be considered by the Senate at the beginning of 1998.

47. In the past several years, a number of States, including Alabama, Colorado, Delaware, Georgia, Indiana, New Hampshire, North Carolina and Tennessee, have enacted laws which increased the number of aggravating circumstances which qualify a murder as a capital case. 31/ In Florida, the legislature has, since 1972, expanded the number of aggravating circumstances from 8 to 14. By increasing the number of aggravating circumstances states are widening the scope of the death penalty.

48. Similarly, at the federal level, several legislative developments have led to an expansion of the scope of the death penalty. Following the reintroduction of the federal death penalty in 1988 through the Anti-Drug Abuse Act, another law, the Federal Death Penalty Act, was signed into law by the President on 13 September 1994. This new law expanded the federal death penalty to more than 50 new offences. The law provides for the death penalty in a range of crimes involving murder of federal officials. The death penalty could also be applied for non-homicidal offences such as attempted assassination of the President, treason, espionage and major drug-trafficking. 32/

2. Execution of juveniles

49. International law prohibits the imposition of a death sentence on juvenile offenders (those who committed the crime while under 18 years of age). The consensus of the international community in this respect is reflected in the wide range of international legal instruments (see para. 24 above). On 27 March 1987, the Inter-American Commission on Human Rights declared that the United States had violated provisions of the American Convention on Human Rights by permitting the execution of two juvenile offenders, even though, having signed the Convention, it had not ratified it. The Commission recognized the existence among the member States of the Organization of American States of a regional jus cogens norm prohibiting the execution of juvenile offenders and referred to the emergence of a norm of customary international law establishing 18 as the minimum age for imposition of the death penalty.

50. Despite this clear recognition of the prohibition of executing juvenile offenders, the United States of America is one of the few countries whose legislation allows for the imposition of the death penalty on and execution of juveniles. In a letter sent by the United States Government to the Special Rapporteur on 22 September 1993, the Government acknowledged a difference between United States law and international law: "The United States Government realizes that its law differs from the International Covenant on Civil and Political Rights on this point. This difference in law was the basis for a reservation to the United States ratification of the Covenant."

51. Out of the 38 states with death penalty statutes, 14 provide that 18 is the minimum age for execution. In 4 states, 17 is the minimum age, while in 21 other states, 16 is the minimum age. According to the information received, 47 offenders who committed the crimes before the age of 18 are currently on death row. At the federal level, the imposition of the death penalty on juvenile offenders is not permitted.

52. In Thompson v. Oklahoma (1988), the Supreme Court ruled that it was unconstitutional to impose the death penalty on a person who was under 16 years of age at the time of commission of the crime. In Stanford v. Kentucky, the Supreme Court ruled that it was constitutional to impose the death penalty on an offender who was aged 16 at the time of commission of the crime.

53. Although the United States of America has not executed any juvenile offenders while still under 18, it is one of the few countries, together with

the Islamic Republic of Iran, Pakistan, Saudi Arabia and Yemen, to execute persons who were under 18 years of age at the time they committed the crime. Charles Rumbaugh was the first juvenile offender executed in the United States since the reinstatement of the death penalty in 1976. He was executed in Texas in September 1985. The last one, Christopher Burger, was executed in Georgia in December 1993.

54. In a capital case, age should be regarded as a mitigating factor. In Eddings v. Oklahoma (1982), the Supreme Court ruled that the "chronological age of a minor is itself a relevant mitigating factor of great weight". However, the Special Rapporteur was informed that in some capital cases concerning juvenile offenders, age was not presented as a mitigating factor at the sentencing phase of the trial. In this context, he was informed that during the trial in Texas of Robert Anthony Carter, an African-American juvenile offender charged with murder and with no prior criminal record, the jury was not invited to consider his age as mitigating evidence. By letter dated 8 February 1993, the United States Government informed the Special Rapporteur that the death penalty is available in juvenile cases "only when the court has determined to try the defendants as adults". However, the Special Rapporteur was informed that in practice in some states whose laws allow for persons under 18 to face the death penalty, minors charged with aggravated murder are very often tried in adult courts.

55. The Special Rapporteur wishes to emphasize that international law clearly indicates a prohibition of imposing a death sentence on juvenile offenders. Therefore, it is not only the execution of a juvenile offender which constitutes a violation of international law, but also the imposition of a sentence of death on a juvenile offender by itself. Accordingly, the Criminal Justice Section of the ABA, in August 1983, adopted a resolution calling for the abolition of the imposition of the death penalty for juveniles.

56. Since his appointment, the Special Rapporteur has intervened on behalf of the following juvenile offenders: Johnny Franck Garrett, executed in Texas in February 1992; Christopher Burger, executed in Georgia in December 1993; and Azikiwe Kambule, a 17-year-old South African national reportedly facing charges of first-degree murder in Mississippi. The Special Rapporteur was informed that on June 1997 Azikiwe Kambule was sentenced to a term of 35 years in prison on charges of "car jacking and accessory after the fact of murder".

3. Executions of persons with mental retardation

57. According to information received from non-governmental sources, at least 29 persons with severe mental disabilities have been executed in the United States since the death penalty was reinstated in 1976. 33/ Twenty-eight capital jurisdictions are said to permit the execution of mentally retarded defendants. Eleven death penalty states, 34/ and the Federal Government, prohibit the execution of mentally retarded persons.

58. Because of the nature of mental retardation, mentally retarded persons are much more vulnerable to manipulation during arrest, interrogation and confession. Moreover, mental retardation appears not to be compatible with

the principle of full criminal responsibility. The Special Rapporteur believes that mental retardation should at least be considered as a mitigating circumstance.

59. On 7 February 1989, the ABA adopted a resolution urging that no person with mental retardation, as defined by the American Association on Mental Retardation, 35/ should be sentenced to death and executed. It further resolved that the ABA supports enactment of legislation barring the execution of those individuals with mental retardation.

60. The Special Rapporteur has intervened, inter alia, on behalf of Emile Duhamel, reportedly suffering from severe mental retardation and unable to understand the nature of the proceedings against him. The Special Rapporteur met Emile Duhamel while visiting death row inmates in Huntsville, Texas.

B. The administration of the death penalty

61. A death sentence may be imposed both at the federal and state levels. The majority of death penalty sentences are imposed at the state level. Each capital punishment state has its own statute and each state determines how the death penalty will be administrated within the state. However, only a very small proportion of murders result in a sentence of death.

62. It is to be noted that the small percentage of defendants who receive a death sentence are not necessarily those who committed the most heinous crimes. Many factors, other than the crime itself, appear to influence the imposition of a death sentence. Class, race and economic status, both of the victim and the defendant, are said to be key elements. It is alleged that those who are able to afford good legal representation have less chance of being sentenced to death. The influence of public opinion and political pressure cannot be disregarded either. In addition, racial attitudes of lawyers, prosecutors, juries and judges, although not necessarily conscious, are also believed to play a role in determining who will, or who will not, receive a death sentence. Supreme Court Justice Blackmun, in his dissenting opinion in Callins v. Collins (1994) made reference to this problem stating that “(...) the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake”. He also stated that “Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die”.

63. Allegations of racial discrimination in the imposition of death sentences are particularly serious in southern states, such as Alabama, Florida, Louisiana, Mississippi, Georgia and Texas, known as the “death penalty belt”. The Special Rapporteur was informed that a discriminatory imposition of capital sentences may be favoured by the composition of the judiciary: in Alabama, only 1 of the 67 elected district attorneys is said to be black, and none of Georgia’s 159 counties is reported to have a black district attorney. The majority of judges in these states are also reported to be white. 36/

64. In one of the most prominent related rulings, McCleskey v. Kemp (1987), the Supreme Court considered racial disparities as “an inevitable part of our

criminal justice system". In this case, evidence of racial discrimination was based on a study, known as the Baldus Study, which showed that in Georgia, defendants who killed white victims were more than four times as likely to get the death penalty than those who killed Blacks. The Court held that studies demonstrating statistically that the death penalty was racially discriminatory were not sufficient, and that each defendant had to prove the existence of racial bias in his case and present "exceptionally clear proof" that "the decision makers in his case acted with discriminatory purpose".

65. This ruling has had the effect of allowing the courts to tolerate racial bias because of the great difficulties defendants face in proving individual acts of discrimination in their cases. The Supreme Court has maintained that direct, purposeful discrimination may always support a challenge to a capital conviction, but that statistical evidence alone demonstrating indirect discrimination may not, in itself, be sufficient grounds for a constitutional challenge. Doubts are raised about the compatibility of this ruling with obligations undertaken under the International Convention on the Elimination of All Forms of Racial Discrimination, which requires States parties to take appropriate steps to eliminate both direct and undirect discrimination.

66. Some reports have reached the conclusion that a pattern of racial discrimination exists in the United States justice system. 37/ In his report on his mission to the United States (E/CN.4/1995/78/Add.1), the United Nations Special Rapporteur on contemporary forms of racism, Maurice Glèlè Ahanhanzo, stated that "Racial factors affect the judicial process, from the moment of arrest right through to the trial" (para. 60). He concluded that for similar offences or crimes, ethnic minorities are more likely to receive a harsher penalty than a white. According to the Special Rapporteur, "this imbalance is also the result of the inadequate representation of ethnic minorities on juries".

67. The Racial Justice Act was passed by the House of Representatives as an amendment to the 1994 Crime Bill, but was rejected in the Senate. The Act would have allowed the defendant to introduce evidence of racism by the use of statistics and would have removed the need to prove discriminatory intent on the part of any specific individual or institutions. Thus, it would have set in place a system for challenging racially discriminatory sentences. Without the Racial Justice Act, defendants have a very high burden of proving intentional discrimination in their case in order to succeed on appeal.

68. Other elements which may have a direct or indirect influence in the determination and imposition of a death sentence are discussed below.

1. The judiciary

69. Federal judges are appointed for life. At the state level, in only 6 of the 38 death penalty states are judges appointed for life by the state governor. 38/ In the other 32 states, judges are subject to election.

70. The possibility of elected or appointed judges is recognized in principle 12 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985 and endorsed by the General Assembly in

resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. No matter what system is being used, the judiciary shall decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect (principle 2).

71. Many sources have expressed concern as to whether the election of judges puts their independence at risk. In its concluding observations to the United States report, the Human Rights Committee expressed its concern about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the ICCPR.

72. During his mission, the Special Rapporteur held meetings with several lawyers and members of the bar in different states who acknowledged having received letters from judges requesting financial contributions for their campaigns for re-election. It is difficult to determine the influence that the electorate and a financial contribution to an election campaign may have on a judge. While in most cases it will depend on the degree of integrity of the individual judge, it is certain that this situation exposes the judge to a higher level of pressure than those who, like federal judges, hold life tenures, do not have to run for re-election and are not accountable to volatile public opinion. The situation has become of serious concern in death penalty cases, particularly because state judges, in view of the recent legislative developments which minimize federal review of state court decisions, are making decisions with considerably less opportunities for review.

73. The concern becomes even more significant in those states where judges have the possibility of overriding the decision of a jury, such as in Alabama, Delaware, Florida and Indiana. It is alleged that because of public support for the death penalty, some judges may not dare to override or overturn a death sentence in fear of the repercussions this may have on his/her professional career. According to the information received, in Alabama, about 25 per cent of persons on death row were said to have been recommended for life sentences by their juries but the judge overrode the decision. 39/ In Florida, Alabama and Indiana, judges are alleged to have imposed death sentences in a total of 189 cases in which the jury recommended life imprisonment, death recommendations were said to have been reversed in 60 cases. 40/

74. According to information brought to the attention of the Special Rapporteur, it is very difficult for a judge who has reservations regarding the death penalty to be re-elected. In state judicial elections, judges have been attacked for their decisions in death penalty cases. Mississippi Supreme Court Justice James Robertson was defeated in his 1992 campaign allegedly for having overturned death sentences. He was said to have been aggressively attacked in this respect by prosecutors and victims rights groups. Justice Penny White, of Tennessee's Supreme Court, was not re-elected for having voted for the overturning of a death sentence, allegedly after finding insufficient evidence to uphold the sentence. Reportedly, she was attacked during the judicial elections in August 1996 for her opposition to the death penalty. In 1994, Judge Charles Campbell was reportedly voted off the Texas Court of Criminal Appeals after a reversal in a capital case.

In 1992, Judge Norman Lanford was also voted off the State District Court in Texas following his recommendation that a death sentence be overturned due to prosecutorial misconduct. 41/

75. The Special Rapporteur wishes to emphasize that the election of judges does not necessarily influence the outcome of judicial decisions. However, the lack of financial transparency during election campaigns and the short duration of terms make judges more exposed to pressure, which may jeopardize their independence or impartiality. Increasing the length of judicial terms, as well as strict public control on fund-raising in judicial elections, would reduce the risk of unduly influencing judges.

2. Prosecutorial discretion

76. Prosecutors have great discretionary powers in determining in which cases to seek the death penalty. In all murder cases in which the death penalty may be sought (because the case appears to meet the aggravated factors set out in the state statutes as sufficient for capital murder), the prosecutor has the unreviewable discretion to decide to proceed with a capital charge or not. No state sets out additional guidance as to when the prosecutor should seek death. In some statutes, like that in Florida, aggravating factors making a murder eligible for capital murder may be as vague as “especially heinous”. Because of this discretion, some prosecutors will seek the death penalty almost all the time while others, in similar cases, will not.

77. The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, make specific reference to the discretionary powers of the prosecutor. Guideline 17 provides that when prosecutors are vested with discretion, the law shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process.

78. The fact that a death sentence is not mandatorily sought by the prosecutor, and that he/she exercises discretion in deciding whether to seek it or not, may mean that, in fact, the death penalty is sought less often. However, on the other hand, this same discretion allows that for similar cases the decision of the prosecutor can be different, therefore increasing the risk of arbitrariness and bringing a sense of unfairness to those who are “picked out” to be prosecuted as death penalty cases. The question to be raised here is: Where is the borderline between life and death?

79. An example of arbitrariness caused by this discretion can be seen by analysing the death row population in Texas. As of June 1997, the sentences of 136 persons on death row originated from Harris County, followed by 32 from Dallas County, 28 from Tarrant County and 27 from Bexar County. 42/ The Special Rapporteur is of the opinion that this statistical difference may be partly explained by the discretionary powers of the prosecutors.

80. Another important aspect of prosecutorial discretion is that the prosecutors have the ability to plea bargain. In many cases, the prosecutor will offer the option of not seeking the death penalty if the defendant agrees

to plead guilty to a lesser offence. In cases with several defendants, plea bargains will be offered in return for one of the defendants testifying against his/her co-defendant(s).

81. An additional aspect of the prosecutors' role is that they may seek the opinion of the family of the victim. The Special Rapporteur was informed by several District Attorney's Offices that the view of the family is taken into consideration as long as their request is compatible with the gravity of the offence. Non-governmental sources report that there may be excessive discretion in the selection of which families the office of the prosecutor will or will not approach. According to the information received, the selection of which families the prosecutor approaches has often been alleged to be influenced by race and class. The Special Rapporteur met with victims' families who had been approached by the local prosecutor, but once they informed the prosecutor that they did not wish the death penalty to be sought, the prosecutor stopped cooperating with them. The discretion in selecting which families the office of the prosecutor approaches may indeed increase the risk of arbitrariness in imposing a sentence of death. 43/

82. The Special Rapporteur explained to prosecutors with whom he met that allegations of racial discrimination in deciding when to seek the death penalty were being received at his office. He was informed by District Attorneys in some states that when the decision whether to seek the death penalty is made, no particular information concerning the race of the defendant or the victim is brought to the attention of the District Attorney. However, due to the fact that this information is contained in police files, it is difficult to imagine that this information is not available to the prosecutor.

83. Politics may also interfere in the discretionary power of the prosecutors. In March 1996, New York Governor George Pataki decided to supersede the authority of Bronx District Attorney Robert T. Johnson in the murder case of a police officer. Mr. Johnson had previously expressed his intention to exercise his discretion to pursue life without parole in every appropriate case. The Governor referred the case to the State Attorney-General, Dennis Vacco, who announced he would seek the death penalty. 44/ The Special Rapporteur was also informed that the Manhattan District Attorney, Mr. Robert M. Morgenthau, was under pressure from the Governor of the State of New York as well as the Mayor of New York City to seek the death penalty for a defendant accused of killing a police officer. 45/ Reportedly the New York Court of Appeals recently ruled that the State Attorney-General of New York may take over a death penalty case if a District Attorney decides as a matter of discretion not to pursue the death penalty. While the discretion of the prosecutor is virtually unreviewable, it is not insulated in practice from pressures which can affect the prosecutor's decisions in ways that may increase arbitrariness.

84. At the federal level, more processes have been put in place to restrict or guide the discretion of the federal prosecutors. For example, the death penalty may only be sought with the written authorization of the Attorney-General. Federal attorneys prepare Death Penalty Evaluations in which they identify aggravating and mitigating circumstances, indicating why

a capital sentence is recommended. A committee at the Department of Justice will further evaluate the case and forward its recommendation to the Attorney-General, who will make the final decision.

3. Jury selection process

85. In 28 states of the 38 with death penalty statutes, the sentencing decision is in the hands of the jury. In four states, Alabama, Delaware, Florida and Indiana, the jury makes a recommendation concerning sentencing which can be overridden by the judge. In other states, including Arizona, Colorado, Idaho, Montana and Nebraska, the decision is made by the judge.

86. In the United States a person charged with a capital offence has the right to be tried before a jury. A jury of 12 persons is selected from the community. Juries are selected from panels drawn randomly from local residents, generally through lists of persons with a driver's licence or registered to vote. Prospective jurors will be questioned to find out if they have any biases which will keep them from serving as a member of the jury charged to carry out the law impartially. During the jury selection process, both the prosecutor and the defence lawyer have a right to exclude certain people from the jury, either for a stated reason, or without giving a reason. Exclusion for no explained reason is known as peremptory challenge. The prosecutor and the defence lawyer have the power to use a limited number of peremptory challenges and an unlimited number of challenges for cause. In Batson v. Kentucky, the Supreme Court noted that peremptory challenges on invalid racial grounds are not acceptable. However, in practice it is impossible to acknowledge that the system does not tolerate the use of peremptory challenges along racial lines. As a result, it has not been uncommon that black defendants are tried before a totally or almost all-white jury.

87. In this regard, the Special Rapporteur has intervened, inter alia, on behalf of: (a) Johnny Watkins, black, who was sentenced to death by an all-white jury in Danville, Virginia, and executed on 3 March 1994. The prosecutor had allegedly eliminated all prospective black jurors from the jury through peremptory challenges; and (b) Hernando Williams, black, executed in Illinois in March 1995, after having been convicted and sentenced to death by an all-white jury in Cook County, Illinois, after the prosecutor had excluded all 26 black jurors from jury service. In both cases their victims were reportedly white.

88. During a jury selection for a capital trial, potential jurors will be asked if they are opposed to the death penalty. Those who are oppossed to the death penalty are likely to be taken off the panel of prospective jurors. Many members of minority groups are opposed to the death penalty because it has been disproportionately used against members of their respective communities. Even if a potential juror says that he is against the death penalty but that he may consider imposing it, his exclusion can be justified.

89. It is the Special Rapporteur’s view that while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors.

90. Two phases can be differentiated in capital cases. In the initial phase, the jury determines whether the defendant is guilty or innocent. If he/she is found guilty, the second phase of the trial consists in determining the penalty. The possible choices may be death, life imprisonment and, in some states, life imprisonment without possibility of parole. Generally, in the second phase of the trial the jury has to find, in order to impose a death sentence, that there are statutory aggravating circumstances (most states have between 7 and 10 in their statutes). At least one aggravating circumstance has to be found in order to impose a death penalty. Consideration has to be given, however, to mitigating circumstances (whatever information the defendant offers in order to convince the jury to spare his life). The jury is instructed to balance aggravating and mitigating circumstances before coming to a verdict. If they find at least one aggravating circumstance that outweighs mitigating circumstances, the result can be a death sentence (see para. 119 below).

91. In this second phase of the trial, when the jury has to determine the penalty, the guidance that the jury receives may inappropriately influence the penalty. Thus, according to information received, the information the juries receive concerning the meaning of the sentencing options varies according to the state. For example, in Texas, the jury cannot be instructed on the meaning of “life imprisonment”. This situation gives rise to strong concerns because in many cases jurors are said to believe that by choosing life imprisonment the defendant may shortly be released from prison. However, different surveys (see paras. 103-104) show that when a person is informed about the meaning of life imprisonment, if given the option of choosing between the death penalty or life imprisonment, they tend to choose the second option.

4. The right to counsel: impact of de-funding resource centres and the 1996 Anti-Terrorism and Effective Death Penalty Act

92. Federal and state criminal procedures ensure the right to counsel for trial and direct appeal in death penalty cases. There is no guarantee of counsel at post-conviction review. However, this constitutional right to counsel does not always ensure adequate or effective counsel. The importance of adequate legal representation, particularly in capital punishment cases, is essential because ineffective counsel may result in death.

93. When a person is arrested and charged with a capital offence, there are several options concerning counsel. If the defendant has enough financial resources he/she may get a private lawyer. If the defendant cannot afford a private lawyer, the state, in those states where there is an institutionalized public defender system, such as in Florida, or a capital defenders office, as in New York, will provide counsel for indigent defendants. If the state does not have a public defender system, such as Texas, and the defendant is indigent, the defendant has a right to a court-appointed lawyer.

94. The competence of the initial lawyer is fundamental, as many issues, including factual and legal issues which are not raised at the trial stage, are barred from being introduced in the appeal phase. Allegations concerning lack of adequate and effective counsel are of particular concern in those

states where the constitutional right to counsel is provided through a court-appointed lawyer. The particularities and the complexity of a capital case make standard professional qualifications inadequate to represent a defendant facing capital punishment. However, when a judge appoints a lawyer to represent a capital defendant, he/she does not necessarily consider the qualifications of the appointed lawyer. There are no specific criteria which a judge must use to appoint a lawyer. It depends entirely on the judge's decision. An additional difficulty is that court-appointed lawyers are reportedly not allocated sufficient resources to conduct investigations and develop evidence in favour of their clients. Negative racial attitudes of some court-appointed lawyers against their clients have also been documented. Furthermore, the lawyer is appointed by a judge who, in some states, is an elected official. Reportedly, judges are on many occassions elected for their strong position in favour of the death penalty. These factors may reportedly lead to the selection of pro-death penalty lawyers to defend capital cases.

95. Allegations of ineffective counsel in death penalty cases have been brought to the attention of the Special Rapporteur on several occasions. The Special Rapporteur intervened on behalf of Mumia Abu-Jamal, black, sentenced to death in Pennsylvania for the murder of a white police officer, after concerns about the competence of his trial counsel, the inadequate funding provided to the defence to investigate the case and doubts about the evidence collected against him were brought to his attention. He also intervened on behalf of Calvin Burdine, a homosexual, sentenced to death in Texas. According to the information received, his lawyer fell asleep on several occasions during the trial. The lawyer was said to have accepted three jurors onto the jury who were said to have prejudice against homosexuals. Further, the Special Rapporteur was informed that the lawyer failed to object to the statement made by the prosecutor during the sentencing phase of the trial, according to which being sent to the penitentiary was not a very bad punishment for a homosexual. 46/ The Texas Court of Criminal Appeals reportedly ruled that his lawyer's failure to stay awake did not affect the outcome of the case. However, the federal court gave Burdine a stay of execution and ruled that another hearing was necessary to establish if his trial had been prejudiced.

96. The importance of the initial defence counsel is also crucial because in some states it is very difficult to obtain relief on the basis of ineffective counsel. According to the information received, in several cases in Texas, despite strong evidence suggesting ineffective counsel, the Court of Criminal Appeals rejected findings and denied relief without a written opinion explaining why they rejected the findings. A similar disregard for appeals on claims of ineffective counsel is reported in the federal court system. In particular, two federal courts, the Fifth Circuit Court of Appeals, which covers Texas, Mississippi and Louisiana, and the Fourth Circuit Court of Appeals, which covers North Carolina, South Carolina, Virginia, West Virginia and Maryland, are reportedly very unlikely to grant relief on ineffective counsel claims.

97. Even though there is no constitutional right to counsel at a post-conviction level, many states and the Federal Government had previously funded post-conviction defender organizations (PCDOs), also known as resource

centres, which represented persons at this stage of the proceedings or provided help to lawyers representing them. They also helped by trying to locate counsel for death row prisoners.

98. The already difficult situation concerning adequate counsel has been worsened by the severe cuts in funding for PCDOs in 1995, and by the enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act.

De-funding of PCDOs

99. Created in 1988, the PCDOs helped to raise the quality of representation at post-conviction and habeas corpus proceedings. In 1995, Congress stopped funding for PCDOs. The absence of PCDOs creates a grave difficulty for defendants at the post-conviction level, particularly in those states such as Texas which do not have a formally constituted agency or institution providing specialized court-appointed lawyers for capital defendants. While the judge is obliged to appoint a lawyer for trial and direct appeal, representation is not assured at the post-conviction level. The result is that many death row inmates do not have legal representation at post-conviction level. In some states, like California, the state has provided some money to continue supporting post-conviction representation. However, the Special Rapporteur was informed that 170 death row inmates in California currently have no legal counsel.

Enactment of the 1996 Anti-Terrorism and Effective Death Penalty Act

100. In April 1996, the President of the United States signed into law the Anti-Terrorism and Effective Death Penalty Act. The law was designed to shorten the time for the appeals process for convicts on death row. The law establishes limits on the number of habeas corpus appeals which may be made and sets time limits for federal courts to review decisions by state courts. This law will cause capital cases to proceed more quickly from state court to federal court and most substantive decisions will be made by state court judges. A further effect of this law is that the role of the federal judge in state capital punishment cases is substantially reduced. Under the new law, there is a narrower scope of review, so more aspects of the trial are unreviewable and justice depends more on the actions of the lower court judges. A movement to speed up executions in state law has also been reported. In some states, laws requiring capital defendants to raise all their claims at a single appeal have been enacted. The Special Rapporteur fears that this may lead to the legal impossibility of taking into account new evidence which becomes known at a later stage and to redress inadequacies caused by incompetent counsel.

101. In addition, in some states, such as Texas, where no public defender system exists, there is no institutional experience in defending death penalty cases. In addition, most of the judges are former prosecutors. Over the years, this creates a climate far more favourable to the prosecution than to the defence.

5. The right to seek pardon or commutation

102. Article 6 (4) of the ICCPR provides for the right to seek pardon or commutation of the sentence. The procedure for pardons or commutation differs from state to state. The Special Rapporteur was informed that in several states members of the board of pardons and paroles are appointed by the governor of the state. This may lead to politicization of the pardon or commutation. Pardon or commutation generally has limited fair-procedure safeguards and are unreviewable. The final decision is made in most cases by the governor and by the President in the federal system. In several states members of the parole boards meet and have granted or recommended pardon on several occasions. However, the Special Rapporteur was appalled to find out that in Texas, the members never meet, do not discuss the cases brought to their attention together and provide their individual votes by phone. Not surprisingly, the board has never recommended pardon in a capital case.

6. The role of public opinion

103. During his mission, the Special Rapporteur was repeatedly told that the death penalty is applied because that is what the people want. However, the Special Rapporteur emphasizes that a thorough analysis of the will of the people may change this assumption considerably. Recent studies in the United States show that people are not simply “in favour of” or “opposed to” the death penalty. According to criminologist Dennis Longmire, in his study on attitudes on capital punishment, positions on the death penalty are not so clear, and 73 per cent of the people have inconsistent attitudes towards this punishment. In his study, he concluded that “people tend to be quick to stand in support of this sanction, but they are just as quick to back off their support when given specific information about its administration”. 47/ Further, as stated in the Secretary-General’s fourth quinquennial report on capital punishment (E/1990/38/Rev.1 and Corr.1 and Add.1), there is a need to differentiate between sporadic popular support of capital punishment and well-informed opinion.

104. According to a 1997 poll conducted by Sam Houston State University, the number of Texans favouring the death penalty has slightly decreased. In 1977, 80 per cent of Texans reportedly supported capital punishment, while in 1997 the number dropped to 76 per cent. Despite this initial high figure, however, 48 per cent of the respondents to the survey who initially reported that they were uncertain about their position became opposed to the death penalty when offered the possibility of a life sentence option. Similar conclusions have been reached by other studies. Thus, William Bowers, in his New York study, found that 71 per cent of the respondents supported the death penalty. However, this figure was reduced to 19 per cent when the alternative of life imprisonment without parole was offered. 48/

C. Lack of awareness of United States international obligations

105. Government officials and members of the judiciary at the federal and state levels with whom the Special Rapporteur held meetings (with the exception of officials in the Department of State) had little awareness of the International Covenant on Civil and Political Rights and international legal

obligations of the United States regarding the death penalty. Few knew that the United States had ratified this treaty and that, therefore, the country was bound by its provisions. It was brought to the attention of the Special Rapporteur that state authorities had not been informed by the Federal Government about the existence and/or ratification of this treaty, and were consequently not aware of it. No efforts appeared to have been undertaken by the Federal Government to disseminate the ICCPR.

106. In several cases, relevant state judicial authorities told the Special Rapporteur that, should a claim be brought before them on the basis of a violation of the ICCPR, they would consider and analyse its implications. However, many others told him that the ICCPR was not a state law and therefore was not applicable.

107. In view of this disturbing finding, at the end of his mission to the United States, the Special Rapporteur sent a fax, dated 8 October 1997, to the Department of State, Human Rights Division, requesting information on the efforts undertaken to disseminate the provisions of the ICCPR following its ratification. At the time of finalization of this report, almost three months later, no answer to his communication had yet been received.

108. There seems to be a serious gap in the relations between federal and state governments, particularly when it comes to international obligations undertaken by the United States Government. The fact that the rights proclaimed in international treaties are already said to be a part of domestic legislation does not exempt the Federal Government from disseminating their provisions. Domestic laws appear de facto to prevail over international law, even if they could contradict the international obligations of the United States.

109. The Special Rapporteur has also found that there is a generalized perception that human rights are a prerogative of international affairs, and not a domestic issue. The fact that only the Department of State has a Human Rights Division, as well as the low level of awareness of international human rights standards within the Department of Justice, are clear indications of this phenomenon. While the Special Rapporteur recognizes the important role that the United States is playing in the establishment and monitoring of human rights standards in many countries of the world, he is compelled to note that human rights seem not to be taken seriously enough in the domestic arena.

110. The Special Rapporteur notes that both the Department of Justice and the Department of State are branches of the Federal Government and it is critical that they work together to ensure that obligations undertaken internationally by the United States are implemented domestically. Domestic implementation is the responsibility of all branches of the Government, executive, judicial and legislative. Within the executive branch, the Justice Department is one of the primary players in enforcing human rights domestically. Thus, it must work cooperatively to educate, disseminate and enforce the human rights obligations undertaken by the United States.

D. Other issues of concern

1. Participation of victims in the justice system

111. The term “victim of crime” is defined, in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly by its resolution 40/34 of 29 November 1985, as a person who has suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his/her fundamental rights, through acts or omissions that are in violation of criminal laws (para. 1). According to this Declaration, victims (who are to be understood as including immediate family or dependants) of crimes are entitled to respect and compassion, as well as, inter alia, to access to mechanisms of justice, proper assistance throughout the legal process and prompt redress. Victims have no right to retaliation.

112. During his mission, the Special Rapporteur observed the existence of a very strong movement for victims’ rights. 49/ According to the information received, 29 states have amended their constitutions to include specific rights for victims of crime. The Special Rapporteur is concerned by the fact that victims’ rights as provided by law in some states may undermine the rights of the accused. Thus, in the Constitution of the State of Florida, section 16, it is stated that: “In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation”. Further, it also states that, “Victims of crime ... are entitled to the right to be informed ...”.

113. The impact of the victims' rights movement led the President, in his State of the Union Address on 4 February 1997, to announce his support for passage of a victims' rights amendment to the Constitution. According to the information received, a proposal to amend the United States Constitution to recognize victims' rights in the criminal justice system is to be considered by Congress. The rights proposed for victims include, among others, the right to notice of all public proceedings concerning the crime and the right not to be excluded from them, the right to a final disposition free from unreasonable delay, and the right to have the victims' safety considered with regard to the release from custody of the defendant.

114. Several aspects of this constitutional amendment, in particular the right to a final disposition free from unreasonable delay, appear to undermine the rights of the accused. This right seems to be intended to speed up prosecutions and limit appeals. There are fears that this right may interfere with the defendant's right to counsel. For example, if the defence would need more time to prepare the case, a victim could claim his constitutional right to have the process concluded, on the basis of which a request for continuance could be denied. Considering that habeas corpus proceedings may take place long after the trial, habeas proceedings already limited by the enactment of the Anti-Terrorism and Effective Death Penalty Act could be further undermined by the amendment as it could lead to shortening time periods.

2. The risk of executing the innocent

115. The Special Rapporteur holds the opinion that there is no such thing as an infallible legal system or one in which mistakes do not occur; to the contrary, mistakes do occur. However, acknowledging a mistake once a person has been executed is meaningless. The Special Rapporteur is concerned that in the United States innocent people may be sentenced to death and even executed. In Furman v. Georgia (1972), Justice Marshall referred to this problem stating that "No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some". A report issued on 21 October 1993 by the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary listed 48 persons who had been released from death row from 1973 to 1993 because evidence of their innocence had emerged.

116. The Special Rapporteur intervened on behalf of Ricardo Aldape Guerra, convicted and sentenced to death in 1982 for the killing of a police officer in Houston. A federal judge ruled in 1994 that he should be released or retried, as the police and prosecutors in the case had acted in bad faith. The ruling was upheld by the United States Court of Appeals. A new trial was granted, but the Houston District Attorney dropped the charges. Ricardo Aldape Guerra, who had always denied that he shot the officer, was released in 1997.

3. Executions of foreign nationals

117. The United States ratified the Vienna Convention on Consular Relations in November 1969. By ratifying the Convention, the United States is obliged to comply with the requirements of its provisions. Article 36 provides for foreign nationals arrested in another country to be informed without undue delay of their right to contact their consulate for assistance.

118. Information received suggests that many of the foreigners who are currently sentenced to death in the United States were never informed of their rights under the Vienna Convention on Consular Relations. It is alleged that some 60 foreigners were sentenced to death without having had the assistance of their consulate. Some of them, like Mexican Irineo Tristan Montoya, sentenced to death in Texas, were executed. On 9 July 1997, in an apology issued by the Department of State on his case, it was stated that, "The Department of State extends, on behalf of the United States, its most profound apology for the apparent failure of the competent authorities to inform Mr. Tristan Montoya that he could have a Mexican consular officer notified of his detention".

119. Although information received makes it clear that the State Department has, on several occasions, informed officials of various states, including governors and attorneys-general, of their duties under article 36, it appears that the periodic advisories given by the Department receive no consideration. It is of concern that reportedly no courts in any death penalty case have found that the preclusion of notification of the right to contact their consulate for assistance is sufficient to warrant relief. In the case of Joseph Standley Faulder, a Canadian national, the Fifth Circuit Court of

Appeals called Texas's violation of the Convention a harmless error. Patrick Jeffries, also a Canadian citizen, sentenced to death in 1983 in Washington State, was never informed about his right under the Vienna Convention to contact the Canadian consulate for assistance. Allegedly, because of the omission, he was not able to obtain adequate legal representation and mitigating factors were not introduced in the sentencing phase of his trial, therefore leaving the jury no alternative but to sentence him to death.

120. Further, the lack of awareness on the part of judicial authorities about the Vienna Convention makes it difficult for lawyers to raise violations of this treaty. During the trial of Virginio Maldonado, a 31-year-old Mexican national, the defence lawyer claimed a violation of the rights of his client under this treaty. According to the information received, the trial judge stated, referring to the Vienna Convention on Consular Relations: "I don't know that it exists ... I am not an international law expert". Further, the prosecutor in the case argued the law was irrelevant because it was not a Texas law. 50/.

121. The Special Rapporteur is of the view that not informing the defendant of the right to contact his/her consulate for assistance may curtail the right to an adequate defence, as provided for by the ICCPR.

IV. DEATH AS A RESULT OF EXCESSIVE USE OF FORCE BY LAW ENFORCEMENT OFFICIALS

122. During his visit to the United States, the Special Rapporteur devoted a small proportion of his time to collecting information about other types of violations of the right to life, particularly those caused by excessive use of force.

123. According to the information received, deadly force nationwide is more likely to be disproportionately used on racial minorities. Cases of persons killed by police brought to the attention of the Special Rapporteur all concerned members of ethnic minorities, mainly African-Americans and Hispanics. Young African-Americans are said to be looked upon as potential criminal suspects. The Special Rapporteur was informed that according to a recent study conducted in the Washington, D.C. area on who is stopped for traffic violations, only 14 per cent of drivers were white while 73 per cent were African-American. According to the information received, of the complaints filed with the New York City Civilian Complaint Review Board (CCRB) from January to June 1996, 75 per cent were filed by African-Americans or Hispanics. In 65 per cent of the cases, the police officers involved were white.

124. Many police departments are trying to have a more balanced ethnic representation among their personnel in an effort to make them more representative of the local population. The Special Rapporteur was informed that in Miami, 50 per cent of the police officers are Hispanic, 25 per cent are African-American and 25 per cent white. In New York, 72.2 per cent of the officers are white, 15.2 per cent are Hispanic and 11.5 per cent are

African-American. 51/ Balancing the composition of police departments according to the ethnic distribution of the local population may also have a positive impact in reducing allegations of racial bias.

125. During public hearings he held in New York, the Special Rapporteur was informed, inter alia, that the following persons had been killed by police officers: 52/

(a) José Antonio Sánchez, Dominican, killed on 22 February 1997 by a police officer during a raid on the El Caribe restaurant in Queens where he worked as a cook. Police claimed Sánchez attacked them with a knife;

(b) Frankie Arzuega, aged 15, Puerto Rican, killed on 12 January 1996 after being shot in the back of the head as he sat in the back seat of a car stopped by police officers of the 90th Precinct in Brooklyn. Police claimed the driver of the car tried to drive off while being questioned by one of the police officers. No weapons were found. Officers did not report the case for three days, and were not disciplined;

(c) Yong Xin Huang, aged 16, Chinese, shot on 24 March 1995 by a Brooklyn police officer investigating reports of a child with a gun. He was shot at close range behind the ear. He was playing with a pellet gun;

(d) Anibal Carrasquillo, aged 21, Puerto Rican, shot dead by a police officer in Brooklyn on 22 January 1995. Police reportedly claimed he was acting in a suspicious manner. No weapon was found and an autopsy revealed that he was shot in the back;

(e) Aswon Watson, aged 23, African-American, killed on 13 June 1996 in Brooklyn. Reportedly shot 18 times by officers of the 67th Precinct while sitting in a stolen car. No arms were found. A grand jury chose not to indict the officers;

(f) Anthony Rosario, aged 18, and Hilton Vega, aged 21, both Puerto Rican, shot on 22 January 1995 by police from the 46th Precinct in the Bronx while trying to rob an apartment. Rosario was shot 14 times in the back and side. In March 1995 a grand jury voted not to bring criminal charges against the police officers. The CCRB supported the family claims, agreeing that excessive force was used and recommended that formal charges be brought against the officers. The CCRB sent its report to the Police Commissioner, who was said to have criticized the Board.

126. In addition, Anthony Baez, aged 29, Puerto Rican, was killed on 22 December 1994 by a police officer of the 46th Precinct in the Bronx who applied a chokehold on him. The officer who killed him had previously had 14 complaints of brutality lodged against him. According to the information received, the use of chokeholds was banned in 1993 by the New York Police Department (NYPD). Other police departments, such as those in San Francisco and Los Angeles, are said to continue using it if necessary to protect the lives of officers.

127. The Special Rapporteur was also informed about deaths committed as a result of the use of pepper spray. Pepper spray is a weapon that attacks

the respiratory system. While it is meritorious that police look for strategies and weapons that do not cause injuries, pepper spray has raised concerns because several persons are said to have died due to its use. At least two individuals died in San Francisco after pepper spray was used. Aaron William, an African-American, reportedly died in police custody after being beaten and pepper-sprayed by police officers. The Special Rapporteur was particularly shocked at the death of Sammy Marshall in San Quentin prison in California. Marshall, a 51-year-old man, was on death row for murder. On 27 February 1997, the California Supreme Court reversed his death sentence. According to the information received, he was never informed about it. On 15 June, several guards allegedly entered his cell and asked him to come out. When he refused, pepper spray was used, which reportedly caused his death.

128. The Special Rapporteur was informed about the existence of a special unit in the Los Angeles Police Department, known as the Special Investigation Section (SIS), created in 1965 and composed of a group of about 20 officers who are known to conduct controversial operations which have on many occasions resulted in deaths. According to the information received, on 12 February 1990 a McDonald's restaurant in the Sunland area of Los Angeles was robbed by four individuals while SIS members monitored the incident without intervening. Allegedly, once the four individuals had left the SIS agents opened fire as they were trying to leave in a car. Three of the robbers were killed and one was seriously injured. None of them was said to have fired any shots at the officers.

129. The existence of an independent civilian review system through which persons may file complaints of police misconduct offers the possibility of more impartiality. In New York, the CCRB was established in 1993. It is composed of 13 members appointed by the mayor, five of whom are chosen by the mayor, five by the City Council and three by the Police Commissioner. The Board is an independent, non-police agency with the power to investigate allegations of misconduct filed by citizens against NYPD officers. It has the power to receive, investigate, hear, make findings and recommend action on complaints concerning New York City police officers involving excessive or unnecessary use of force, abuse of authority and discourtesy or offensive language. Once a case has been investigated, the Board may recommend any of the following dispositions with regard to the complaint: substantiated (the officer actually committed the alleged act), unsubstantiated (not enough evidence), exonerated (the incident occurred but the actions of the officer were lawful), or unfounded (acts did not occur). In cases of killings, the CCRB can carry out an investigation even if Internal Affairs is also doing it. The CCRB reports its findings to the Police Commissioner, but it has no authority to guarantee that disciplinary action will be taken. This will be decided by the police department while the officer under investigation may continue to work.

130. All sources consulted have agreed that police departments in the United States have high written standards in regard to training and guidelines on the use of force. Principles reflected in the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979), as well as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990,

are reportedly fully reflected in police regulations. This is despite the fact that there is little, if any, awareness of the existence of these international standards. The Special Rapporteur is of the opinion that there is a need for federal authorities to take concrete measures to ensure that all levels of armed officials are trained and meet those standards.

131. It was difficult for the Special Rapporteur to obtain information concerning killings committed by the police in the United States. National data seemed not to be available. The Special Rapporteur was informed that there have been some attempts to collect national figures on police violence. The introduction in Congress of a bill called the Police Stop Statistics Act, which would require each individual police department to collect data on police stops, including whether a search was conducted or if violence was used, is an example.

132. The Special Rapporteur is aware of the dangerous situations that police officers face, and that the majority of confrontations which require use of force do not result in death, testimony to the degree of professionalism which exists in United States police departments. However, in many of the cases brought to his attention, the use of lethal force was said not to have been justified.

133. The low rate of criminal prosecution in cases of police brutality remains the principal cause for the perpetuation of violations of human rights by the police, in particular violations of the right to life. The manner in which a Government reacts to human rights violations committed by its agents, through action or omission, clearly shows the degree of its willingness to ensure effective protection of human rights. States have the obligation to conduct exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish the perpetrators, to grant adequate compensation to the victims or their families, and to take effective measures to avoid the recurrence of such violations. 53/

134. The fact that few police officers are subject to criminal prosecution for abuse of force resulting in death has been attributed to several factors, as described below:

135. Lack of proper investigations. On many occasions police misconduct - including killings caused by police - is investigated by an Internal Affairs Department (internal system for dealing with complaints and allegations of misconduct) within the police. According to the information received, they do not have independent subpoena power to call witnesses and compel their participation in proceedings. The District Attorney's Office generally receives notice of every shooting, but it does not necessarily get involved. The fact that it is the police department that investigates a shooting in which police officers were involved creates a conflict of interest. In most cases, police officers are not permanently assigned to the Internal Affairs Department; they work there for some years and then go back to the regular police force. It would be unrealistic to expect impartiality from those who conduct investigations against colleagues, particularly when their positions may later be reversed. Unless there is an independent oversight, these cases will not be properly investigated. This is why it is very important to have an independent body to investigate complaints against the police.

136. Compensation for damages does not generally come from the Police Department. The fact that money paid for damages normally does not come from police departments but from the municipality does not act as an incentive for the police department and allows the situation to be perpetuated. The Special Rapporteur was informed that in some police departments, such as in San Francisco, the situation has changed and that money comes from the police department itself. Consultations in this direction are also said to be under way in New York city.

137. Political influence of police in the country. Police unions in the United States are reported to be an important political entity. Not only do they represent their members, but they also make political endorsements. Politicians, when running for election, including for president, are particularly interested in receiving support from police unions because they are perceived as being "tough" on crime. In the context of misconduct, police are likely to benefit from political protection. At the federal level, there has reportedly been a lack of interest in investigating police misconduct. Criminal prosecution is rare for similar political reasons: local district attorneys who run for office need support from police unions. In addition, the district attorney depends on the police department to conduct investigations. Unlike in many countries, the police in the United States are structurally independent of the judge as well as of the prosecutor's office. Therefore, prosecutors must always be aware, even as they seek to prosecute abusive police, that they will require the cooperation of these same police in all future criminal investigations and prosecutions. Therefore, it is allegedly difficult for a district attorney to decide to bring charges against a police officer. The district attorney must decide whether there is sufficient evidence to bring the case before a grand jury, which makes the decision whether or not the evidence justifies bringing an indictment.

138. It has also been brought to the attention of the Special Rapporteur that the standards of criminal liability for police are very high. Hence, not only does it have to be proven whether the officer used unreasonable force, but also whether he intended to use it. In many cases, the intention to use excessive force is difficult to prove.

139. The Special Rapporteur has further been informed that the Justice Department has the power to investigate entire police departments for patterns and practices of misconduct and can require certain practices to be changed. In New York City, the Justice Department intervened only after the Abner Louima case. 54/

V. CONCLUSIONS AND RECOMMENDATIONS

> "Where, after all, do universal rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world ... . Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world." - Eleanor Roosevelt

A. Concerning the use of the death penalty

140. The Special Rapporteur shares the view of the Human Rights Committee and considers that the extent of the reservations, declarations and understandings entered by the United States at the time of ratification of the ICCPR are intended to ensure that the United States has only accepted what is already the law of the United States. He is of the opinion that the reservation entered by the United States on the death penalty provision is incompatible with the object and purpose of the treaty and should therefore be considered void.

141. Not only do the reservations entered by the United States seriously reduce the impact of the ICCPR, but its effectiveness nationwide is further undermined by the absence of active enforcement mechanisms to ensure its implementation at state level.

142. The Special Rapporteur is of the view that a serious gap exists between federal and state governments, concerning implementation of international obligations undertaken by the United States Government. He notes with concern that the ICCPR appears not to have been disseminated to state authorities and that knowledge of the country's international obligations is almost non-existent at state level. Further, he is of the opinion that the Federal Government cannot claim to represent the states at the international level and at the same time fail to take steps to implement international obligations accepted on their behalf.

143. The Special Rapporteur is aware of the implications of the United States system of federalism as set out in the Constitution and the impact that it has on the laws and practices of the United States. At the same time, it is clear that the Federal Government in undertaking international obligations also undertakes to use all of its constitutionally mandated powers to ensure that the human rights obligations are fulfilled at all levels.

144. The Special Rapporteur questions the overall commitment of the Federal Government to enforce international obligations at home if it claimed not to be in a position to ensure the access of United Nations experts such as special rapporteurs to authorities at state level. He is concerned that his visit revealed little evidence of such a commitment at the highest levels of the Federal Government.

145. The Special Rapporteur believes that the current practice of imposing death sentences and executions of juveniles in the United States violates international law. He further believes that the reintroduction of the death penalty and the extension of its scope, both at federal and at state level, contravene the spirit and purpose of article 6 of the ICCPR, as well as the international trend towards the progressive restriction of the number of offences for which the death penalty may be imposed. He is further concerned about the execution of mentally retarded and insane persons which he considers to be in contravention of relevant international standards.

146. The Special Rapporteur deplores these practices and considers that they constitute a step backwards in the promotion and protection of the right to life.

147. Because of the definitive nature of a death sentence, a process leading to its imposition must comply fully with the highest safeguards and fair trial standards, and must be in accordance with restrictions imposed by international law. The Special Rapporteur notes with concern that in the United States, guarantees and safeguards, as well as specific restrictions on capital punishment, are not being fully respected. Lack of adequate counsel and legal representation for many capital defendants is disturbing. The enactment of the 1996 Anti-terrorism and Effective Death Penalty Act and the lack of funding of PCDOs have further jeopardized the implementation of the right to a fair trial as provided for in the ICCPR and other international instruments.

148. Despite the excellent reputation of the United States judiciary, the Special Rapporteur observes that the imposition of death sentences in the United States seems to continue to be marked by arbitrariness. Race, ethnic origin and economic status appear to be key determinants of who will, and who will not, receive a sentence of death. As Justice Marshall stated in Godfrey v. Georgia, "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".

149. The politics behind the death penalty, particularly during election campaigns, raises doubts as to the objectivity of its imposition. The Special Rapporteur believes that the system of election of judges to relatively short terms of office, and the practice of requesting financial contributions particularly from members of the bar and the public, may risk interfering with the independence and impartiality of the judiciary. Further, the discretionary power of the prosecutor as to whether or not to seek the death penalty raises serious concern regarding the fairness of its administration.

150. The process of jury selection may also be tainted by racial factors and unfairness. The Special Rapporteur notes with concern that people who are opposed to or have hesitations about the death penalty are unlikely to sit as jurors and believes that a "death qualified" jury will be predisposed to apply the harshest sentence. He fears that the right to a fair trial before an impartial tribunal may be jeopardized by such juries. Moreover, he is convinced that a "death qualified" jury does not represent the community conscience as a whole, but only the conscience of that part of the community which favours capital punishment.

151. The high level of support for the death penalty, even if studies have shown that it is not as deep as is claimed, cannot justify the lack of respect for the restrictions and safeguards surrounding its use. In many countries, mob killings and lynchings enjoy public support as a way to deal with violent crime and are often portrayed as "popular justice". Yet they are not acceptable in any civilized society.

152. While acknowledging the difficulties that authorities face in fighting violent crime, he believes that solutions other than the increasing use of the death penalty need to be sought. Moreover, the inherent cruelty of executions might only lead to the perpetuation of a culture of violence.

153. The Special Rapporteur is particularly concerned by the current approach to victims' rights. He considers that while victims are entitled to respect and compassion, access to justice and prompt redress, these rights should not be implemented at the expenses of those of the accused. Courts should not become a forum for retaliation. The duty of the State to provide justice should not be privatized and brought back to victims, as it was before the emergence of modern States.

154. While the Special Rapporteur would hope that the United States would join the movement of the international community towards progressively restricting the use of the death penalty as a way to strengthen the protection of the right to life, he is concerned that, to the contrary, the United States is carrying out an increasing number of executions, including of juveniles and mentally retarded persons. He also fears that executions of women will resume if this trend is not reversed.

155. The Special Rapporteur wishes to emphasize that the use of the death penalty in violation of international standards will not help to resolve social problems and build a more harmonious society but, on the contrary, will contribute to exacerbated tensions between races and classes, particularly at a moment when the United States is proclaiming its intention to combat racism more vigorously.

156. In view of the above, the Special Rapporteur recommends the following to the Government of the United States:

(a) To establish a moratorium on executions in accordance with the recommendations made by the American Bar Association and resolution 1997/12 of the Commission on Human Rights;

(b) To discontinue the practice of imposing death sentences on juvenile offenders and mentally retarded persons and to amend national legislation in this respect to bring it into conformity with international standards;

(c) Not to resume executions of women and respect the de facto moratorium in existence since 1984;

(d) To review legislation, both at federal and state levels, so as to restrict the number of offences punishable by death. In particular, the growing tendency to reinstate death penalty statutes and the increase in the number of aggravating circumstances both at state and federal levels should be addressed in order not to contravene the spirit and purpose of article 6 of the ICCPR and the goal expressed by the international community to progressively restrict the number of offences for which the death penalty is applied;

(e) To encourage the development of public defender systems so as to ensure the right to adequate legal representation for indigent defendants; to reinstate funding for legal resource centres in order to guarantee a more appropriate representation of death row inmates, particularly in those states where a public defender system does not exist. This would also help to diminish the risk of executing innocent persons;

(f) To take steps to disseminate and educate government officials at all levels as well as to develop monitoring and appropriate enforcement mechanisms to achieve full implementation of the provisions of the ICCPR, as well as other international treaties, at state level;

(g) To include a human rights component in training programmes for members of the judiciary. A campaign on the role of juries could further aim at informing the public about the responsibilities of jurors;

(h) To review the system of election of members of the judiciary at state level, in order to ensure a degree of independence and impartiality similar to that of the federal system. It is recommended that in order to provide a greater degree of independence and impartiality that judges be elected for longer terms, for instance 10 years or for life;

(i) In view of the above, to consider inviting the Special Rapporteur on the independence of judges and lawyers to undertake a visit to the United States;

(j) To develop an intensive programme aimed at informing state authorities about international obligations undertaken by the United States and at bringing national laws into conformity with these standards; to increase the cooperation between the Department of Justice and the Department of State to disseminate and enforce the human rights undertakings of the United States;

(k) To lift the reservations, particularly on article 6, and the declarations and understandings entered to the ICCPR. The Special Rapporteur also recommends that the United States ratify the Convention on the Rights of the Child. He further recommends that the United States consider ratifying the first and second Optional Protocols to the ICCPR.

B. Concerning killings by the police

157. The Special Rapporteur is concerned by the reports of violations of the right to life as a result of excessive use of force by law enforcement officials which he received during his mission, and he will continue to monitor the situation closely.

158. While acknowledging that the police face extremely difficult situations in their daily work, authorities have an obligation to ensure that the police respect the right to life.

159. Preliminary recommendations to the Government of the United States include the following:

(a) All alleged violations of the right to life should be investigated, police officials responsible brought to justice and compensation provided to the victims. Further, measures should be taken to prevent recurrence of these violations;

(b) Patterns of use of lethal force should be systematically investigated by the Justice Department;

(c) Training on international standards on law enforcement and human rights should be included in police academies. This is particularly relevant because the United States has taken a leading role in training police forces in other countries;

(d) Independent organs, outside the police departments, should be put in place to investigate all allegations of violations of the right to life promptly and impartially, in accordance with principle 9 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions;

(e) In order to avoid conflict of interest with the local district attorney's office, special prosecutors should be appointed more frequently in order to conduct investigations into allegations of violations of the right to life, to identify perpetrators and bring them to justice.

Notes

1/ Resolutions 1997/61, 1996/74, 1995/73, 1994/82 and 1993/71 entitled "Extrajudicial, summary or arbitrary executions".

2/ Security Council, in establishing international criminal jurisdictions for the former Yugoslavia and Rwanda, excluded the death penalty, stipulating that imprisonment was the sole penalty to be imposed by the tribunals for crimes as abominable as genocide and crimes against humanity.

3/ In its general comment on article 6 of the ICCPR, the Human Rights Committee observed that "the article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable". The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life. See HRI/GEN/1/Rev.3, part I.

4/ Resolutions 1396 (XIV), 2393 (XXIII) and 2857 (XXVI), and resolution 32/61 of 8 December 1977 entitled "Capital punishment".

5/ ECOSOC resolutions 1996/15, 1989/64, 1984/50, 1930 (LVIII), 1745 (LIV) and 1574 (L) "Capital punishment".

6/ The first Optional Protocol to the ICCPR allows individuals to submit communications to the United Nations Human Rights Committee, a body of experts established to supervise the implementation of the Covenant (article 28). Under article 40 of the Covenant, States parties must submit reports every five years on the measures they have taken which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of these rights. The reports presented are examined by the Human Rights Committee, which adopts concluding observations summarizing its concerns and makes recommendations to the State party concerned.

7/ See William A. Schabas, The Abolition of the Death Penalty in International Law (2nd ed.), Cambridge and New York, Cambridge University Press, 1997.

8/ See Decision of the Human Rights Committee, CCPR/C/39/D/305/1988 of 15 August 1990.

9/ Preliminary observations of the Human Rights Committee on the third periodic report of Peru (CCPR/C/79/Add.67, para. 15).

10/ Human Rights Committee, general comment No. 6, op. cit., at note 3, para. 7.

11/ Universal Declaration of Human Rights; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Safeguards guaranteeing protection of the rights of those facing the death penalty; and ECOSOC resolution 1989/64 on implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.

12/ Human Rights Committee, general comment 13, op. cit. at note 3, para. 5.

13/ CCPR/C/47/D/282/1988, para. 10.6.

14/ For the texts of the reservations, declarations and understandings, see CCPR/C/2/Rev.4.

15/ See CCPR/C/79/Add.50, para. 14.

16/ See also International Commission of Jurists, Administration of the Death Penalty in the United States, June 1996, p. 36, citing the 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: “... 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.”

17/ Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain and Sweden.

18/ Human Rights Committee, general comment 24, op. cit., at note 3, para. 1.

19/ Ibid., para. 6.

20/ Ibid., para. 18.

21/ Ibid, para. 10.

22/ General Assembly resolution 2856 (XXVI) of 20 December 1971.

23/ Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, the United States Government and the United States Military.

24/ Alaska, Washington, D.C., Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin.

25/ As of 31 July 1997. Statistics come from the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund, Inc.

26/ Ibid.

27/ Ibid.

28/ Victor L. Streib, Capital Punishment of Female Offenders: Present Female Death Row Inmates and Death Sentences and Executions of Female Offenders, Ohio Northern University, July 1997.

29/ Human Rights Watch, Children's Rights Project, March 1995 and Amnesty International, USA: Death Penalty Developments in 1996.

30/ In the same recommendation, the ABA stated that "apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty".

31/ From the 1994 Survey of State Legislation compiled by the National Coalition to Abolish the Death Penalty, as cited by Amnesty International, USA: Death Penalty Developments in 1994.

32/ Ibid.

33/ Denis Keyes, William Edwards and Robert Perske, "People with mental retardation are dying, legally." See also Amnesty International, op. cit., which states, "Amnesty International has documented the cases of over 50 prisoners suffering from severe mental impairment who have been executed in the USA since 1982".

34/ Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, New Mexico, New York, Tennessee and Washington.

35/ Mental retardation "refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skills areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before

age 18". Randall Coyne and Lyn Entzeroth, "Report regarding implementation of the ABA's recommendations and resolutions concerning the death penalty, Georgetown Journal on Fighting Poverty, note 366.

36/ Bryan A. and Ruth Stevenson, "Deliberate indifference: judicial tolerance of racial bias in criminal justice, Washington and Lee Law Review, vol. 51, p. 509.

37/ Staff report on racial disparities in federal death penalty prosecutions 1988-1994 by the Subcommittee on Civil and Constitutional Rights, United States General Accounting Office, to the Senate and House Committees on the Judiciary, February 1990.

38/ Connecticut, Delaware, New Hampshire, New Jersey, South Carolina and Virginia.

39/ From "Politics and the death penalty: can rational discourse and due process survive the perceived political pressure?", Fordham Urban Law Journal, vol. XX, No. 2, 1994.

40/ Death Penalty Information Center, "Killing for Votes: The Dangers of Politicizing the Death Penalty Process", October 1996, citing S. Bright, "Judges and the politics of death: deciding between the Bill of Rights and the next election in capital cases", Boston University Law Review, vol. 75.

41/ Ibid.

42/ Texas Coalition to Abolish the Death Penalty, June 1997.

43/ See also, International Commission of Jurists, op. cit. at note 16, p. 124. "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."

44/ On 19 March 1996, the Governor of New York sent a letter to Mr. Johnson, in which the Governor declared that "... the death penalty is the law in New York State ...". By letter dated 20 March, Mr. Johnson replied to the Governor, stating that "As to your statement, 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 (...). You know that the United States Supreme Court has declared that the death penalty cannot and should not be mandatory". The decision of the Governor has been challenged in court by the District Attorney.

45/ New York Times, 7 October 1997.

46/ Amnesty International, Urgent Action (UA) 13/95. AI Index: AMR 51/10/95.

47/ Dennis Longmire, “Americans' attitudes about the ultimate weapon”, in Flanagan and Longmire (eds.), Americans View Crime and Justice. A National Public Opinion Survey, Sage Publications, 1996, chap. 7.

48/ W. Bower “Popular support for the death penalty: mistaken beliefs”, in The Machinery of Death, Amnesty International USA, 1995.

49/ The Special Rapporteur was informed that the Prison Guards Union, which is one of the most powerful unions in the country, funds victims' rights movements.

50/ Houston Chronicle, 2 October 1997.

51/ Amnesty International, Police Brutality and Excessive Force in the New York City Police Department, June 1996, AI Index: AMR51/36/96, note 2, p. 3.

52/ Many other cases were brought to the attention of the Special Rapporteur during his mission, including in Santa Rosa, Chicago, Seattle, Los Angeles, San Francisco, and in New Jersey. In addition, cases of brutality, violence and bad prison conditions in Mississippi, particularly in Parchman Prison; Hernando City Jail; Quick Bed Facility 2-D in Pearl, Rankin County; and Delta Correctional Facility, Bolivar County, which the Special Rapporteur received during his mission will be transmitted to the Special Rapporteur on the question of torture.

53/ See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65), which set forth in detail the above-mentioned obligations, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

54/ Abner Louima, a 30-year-old Haitian immigrant, was arrested on 9 August 1997 outside a popular Haitian night club in Brooklyn. He has filed suits alleging that he was beaten and tortured by police officers.

Annex*

AS APPROVED BY THE ABA HOUSE OF DELEGATES
3 February 1997

AMERICAN BAR ASSOCIATION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
SECTION OF LITIGATION
SECTION OF TORT AND INSURANCE PRACTICE
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW
MASSACHUSETTS BAR ASSOCIATION
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
NEW YORK STATE BAR ASSOCIATION

RECOMMENDATION

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted February 1989) and Association policies intended to encourage competency of counsel in capital cases (adopted February 1979, February 1988, February 1990, August 1996);

(ii) Preserving, enhancing and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted August 1982, February 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted August 1988, August 1991); and

(iv) Preventing execution of mentally retarded persons (adopted February 1989) and persons who were under the age of 18 at the time of their offences (adopted August 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offenses, the Association takes no position on the death penalty.

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* Reproduced in the language of submission only.