

UNITED STATES OF AMERICA

@Follow up to Amnesty International's Open Letter to the President on the death penalty

In January 1994, Amnesty International called on the US Government to recognize its constitutional responsibility for ensuring equal protection of the law to all US citizens by establishing a Presidential Commission on the death penalty, with a moratorium on all executions until the Commission reported its findings. In an Open Letter to President Bill Clinton, Amnesty International said that such a study would serve to remove the issue of capital punishment from the political and emotional climate which presently surrounds it. The Commission's report and recommendations could provide officials, legislators and the public with an objective body of information to guide decisions on the issue.¹

The 10,000-word letter cited Amnesty International's own and other research which shows that death sentences in the USA are imposed disproportionately on the poor, on minorities, on the mentally ill or retarded, and on those without adequate legal counsel. This shameful state of affairs, the organization said, was a matter for the US federal authorities to investigate and remedy with the utmost urgency. Eleven areas of particular concern were cited. These included: the serious conflict between retention of the death penalty and the USA's formal pledges and commitments to international human rights standards; evidence that the death penalty is disproportionately imposed on the basis of race; the use of the death penalty against juvenile offenders and the mentally impaired; inadequate legal representation at trial and on appeal; failure to grant clemency for political reasons; the exorbitant cost of the death penalty, and public opinion.

Amnesty International had received no substantive response from the US government by the end of the year. Meanwhile, developments on the death penalty during 1994 added further weight to Amnesty International's arguments, and grounds for concern steadily increased.²

◆ **International human rights:** Article 4 (2) of the ACHR³ states: "In countries that have not abolished the death penalty ... its application shall not be extended to crimes to which it does not presently apply."

¹ *United States of America: Open Letter to the President on the death penalty*, AI Index: AMR 51/01/94, published January 1994.

² This paper should be read in conjunction with *USA: Developments on the death penalty during 1994*, AI Index: AMR 51/01/95, published in January 1995.

³ American Convention on Human Rights, signed by the USA in 1977 but not yet ratified.

However, in September 1994, the President signed legislation introducing the death penalty under federal law for more than 50 offenses, several of them not resulting in loss of life. The 1994 Federal Death Penalty Act provides for the death penalty as a possible punishment for a range of crimes, mostly involving the murder of federal officials. It would also permit the death penalty for certain non-homicidal offenses such as the attempted assassination of the President, treason, espionage and major drug-trafficking. This mammoth expansion of the death penalty was presented to the public as an effective anti-crime measure, even though there is no credible scientific evidence from the USA or elsewhere to suggest that the death penalty will deter crime more effectively than other punishments.

◆ **Equal protection:** There continues to be disturbing evidence of racial discrimination in the application of the death penalty in the USA. More than 88% of the prisoners executed during 1994 had been sentenced to death for the murder of white victims as had the large majority of all prisoners executed since the death penalty was reinstated in the 1970s. This is despite the fact that blacks and whites are the victims of homicide in roughly equal numbers. Racial disparities in death sentencing are particularly evident in some individual judicial circuits in states with a long history of discrimination. Johnny Watkins, who was black, was executed in Virginia in March 1994 for the murders of two white victims. He was convicted and sentenced to death by an all-white jury in a jurisdiction whose population is approximately 35 per cent black. All black prospective jurors were excluded from the jury pool by the prosecutor.

William Hance, black, was executed in Georgia in March 1994 despite evidence that the sentencing deliberations at his trial were marked by misinformation, misconduct and racial bias. One of the jurors said several jury members had made racially derogatory comments about William Hance, including a reference to him as "just one more sorry nigger that no one would miss." The only black juror said in a sworn affidavit that she had **not** voted for the death penalty because of Hance's mental impairment. But the rest of the jury ignored her and announced a unanimous verdict for death. When the jurors were polled individually in the court-room, she was too intimidated to say that she disagreed.

◆ **Execution of the mentally impaired:** A large number of mentally ill and mentally retarded prisoners are under sentence of death in the USA; Amnesty International has documented the cases of over 50 prisoners suffering from serious mental impairment (including mental retardation, brain damage, or a history of mental illness) who have been executed since 1982. Several prisoners executed during 1994 were mentally retarded or mentally ill or both. William Hance, mentioned above, was diagnosed borderline mentally retarded and brain damaged. However, at his first trial he was allowed to act as his own co-counsel, despite the fact that a clinical psychologist who examined him said that he was incapable of assisting "in an appropriate, rational way" in his own defense. John Thanos was executed in Maryland, at his own request, in May, despite a wealth of evidence that he was

suffering from severe mental disorders and was very probably incompetent to make the decision to waive his appeals.

◆ **Execution of juvenile offenders:** The USA continues to sentence minors to death in violation of Article 6 of the ICCPR⁴ which states that death sentences must not be imposed on people who were under 18 years of age at the time of the offence. At the end of 1994, approximately 37 juvenile offenders were under sentence of death in 12 states. According to Amnesty International's research, since 1990 **only four countries worldwide** are known to have executed juvenile offenders: one prisoner was executed in Saudi Arabia and Pakistan in 1992; one in Yemen in 1993, and six in the USA. A total of nine juvenile offenders have been executed in the USA since 1985, the most recent was Christopher Burger in Georgia, in December 1993.

◆ **Current legal safeguards to prevent and remedy errors in capital cases are inadequate.** In February, retiring US Supreme Court Justice Harry Blackmun expressed the opinion that the death penalty as currently administered in the USA is unconstitutional and "remains fraught with arbitrariness, discrimination, caprice and mistake." After more than 20 years of constitutional analysis, he concluded that contemporary legal standards have created "a system that fails to deliver the fair, consistent and reliable sentences of death required by the Constitution."

Like Justice Blackmun, retired US Supreme Court Justice Lewis Powell also now concludes that the death penalty cannot be decently administered and, as currently practised, brings the law itself into disrepute. Were he still a member of the Court, he said, he would now vote against the death penalty in all cases.

◆ **Provision of counsel:** Many poor defendants are inadequately represented by lawyers untrained in capital punishment law. Poorly paid lawyers have often failed to investigate defendants' backgrounds or raise relevant mitigating evidence at the sentencing hearing. Many of those scheduled for execution during 1994 received ineffective assistance of counsel. A J Bannister in Missouri was represented at trial by a court-appointed public defender who visited him four times for a total of less than one hour prior to the trial, did little or no investigation and presented no mitigating evidence.

◆ **The risk of executing the innocent:** It is unlikely that any judicial system, however elaborate, could prevent the risk of executing innocent people. During 1994, several alleged miscarriages of justice in capital cases came to light. In January, Earl Washington was granted a conditional pardon in Virginia after DNA testing showed that he was not the man who had committed the rape which immediately preceded the murder of which he was convicted and sentenced to death. In September, Joseph Burrows was released from death row in Illinois,

⁴International Covenant on Civil and Political Rights, which the USA ratified in June 1992 only after entering a large number of reservations to non-derogable articles, including Article 6 on the right to life.

five years after he was convicted of a murder he did not commit. Two witnesses who testified against him recanted their evidence and one admitted that she alone was responsible for the killing. At the end of 1994, a Board of Inquiry in Missouri was considering the case of Lloyd Schlup, who came within nine hours of execution in November 1993. Evidence suggested he had played no part in the murder of a fellow-inmate in Missouri State Penitentiary for which he was sentenced to death in 1984.

But Roy Stewart was executed in Florida in April despite appeals for clemency from those who had **prosecuted** his case at trial and on appeal. He was convicted of the murder of a woman on the basis of a confession he made to police after six hours' interrogation and retracted at trial. Calvin Fox, the Assistant Attorney General who prosecuted Stewart on appeal for more than seven years, wrote letters and made statements urging clemency, to no avail. In his opinion, practically every point in the confession was inconsistent with the physical facts of the case.

◆ **Executive clemency:** Clemency was denied in a number of deserving cases during 1994. Harold 'Wili' Otey was executed in Nebraska in September. Otey, black, was sentenced to death for the 1977 rape and murder of a white woman during a robbery at her home. Otey had no prior criminal record and had made substantial efforts towards his rehabilitation while in prison. In June 1991 the Nebraska Board of Pardons denied clemency by two votes to one. Otey's attorneys unsuccessfully challenged the composition of the Board of Pardons, whose members are the state Governor, the state Attorney General and the Secretary of State. The Attorney General, they argued, had a clear conflict of interest, having prosecuted the case on appeal, opposed Otey's *habeas corpus* application, and actively sought to expedite the execution.

In 1994, as in previous recent years, Texas executed more prisoners than any other state but did not grant clemency in a single case.

In retaining the death penalty, with some 2,948 prisoners now under sentence of death, and 258 executions carried out since 1977, the USA is repeating the mistakes made in other nations in using capital punishment. Recognizing these mistakes, a growing number of countries have rejected the death penalty and abolished it. Amnesty International continues to appeal to the US authorities to advance international human rights by joining their ranks. The organization will continue to ask the President to establish a Commission of Inquiry on the death penalty, in the belief that the federal government has the duty and the constitutional responsibility for ensuring that all US citizens are afforded equal protection of the law in the field of capital punishment. Amnesty International also urges the US government to withdraw its comprehensive reservations to Article 6 of the ICCPR (Right to Life) - reservations which defeat the very object and purpose of the treaty.