

NIGERIA

The Death Penalty and Women under the Nigeria Penal Systems

1. Introduction

1.1 Why the Nigerian government should abolish the death penalty

The year 2003 saw a high level of international and national interest in and discussion on the death penalty in Nigeria. The recent extension in parts of Nigeria of the death penalty to areas many consider to be private aspects of life has focused the debate on both the appropriateness of the death penalty in general and on the use of the criminal justice system as a way to regulate sexual behaviour. Amnesty International believes that the death penalty in its application in Nigeria violates women's human rights according to international human rights law and standards and has a discriminatory effect on women in certain cases and for certain crimes. Amnesty International opposes, without reservation, the death penalty, in all countries and in all cases. The death penalty violates the right to life and is the ultimate cruel, inhuman and degrading treatment. It is irrevocable and can be inflicted on the innocent. Furthermore, it has never been shown to deter crime more effectively than other punishments. The international trend is for countries to abolish it.

The death penalty is still on the statute books in Nigeria and the Constitution of the Federal Republic of Nigeria 1999 ('the Constitution') does not prohibit its application. Accordingly, Section 33(1) permits the derogation of the right to life "*in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria*". The Penal Code (Northern States) Federal Provisions Act of 1959 ('the Penal Code'), and the Criminal Code Act applying in southern Nigeria of 1961 ('the Criminal Code') and the *Sharia* penal codes all prescribe the death penalty for a range of criminal offences¹.

Amnesty International is aware of the Nigerian courts having passed at least 33 death sentences since 1999. Of these, at least 22 were handed down under the Criminal Code or the Penal Code. One of the convicted was a woman charged with culpable homicide after having had a still-born baby which event the court termed as an illegal abortion. As of July 2003, according to the Prison Rehabilitation and Welfare Action (PRAWA)², a Nigerian human rights organization, there are in total 487 people awaiting the execution of their death sentence in Nigeria, 11 out of these are women³. To the knowledge of Amnesty International executions are being carried out both under the Penal Code, the Criminal Code and *Sharia* penal law⁴.

The Penal Code and the Criminal Code prescribe the death penalty for criminal offences such as armed robbery, treason, murder, and culpable homicide.

The new *Sharia* penal codes which came into force in 12 states⁵ in northern Nigeria since 1999, define someone who has committed *zina* as “*whoever, being a man or a woman fully responsible, has sexual intercourse through the genital [sic] of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act*”⁶. *Zina* was previously punishable by flogging for Muslims under the Penal Code. However, in the States that have introduced *Sharia* penal laws, *zina* carries a mandatory death sentence if the accused is married, while 100 lashes is the mandatory sentence if the accused is not married. The charge of *zina* and the punishment for it prescribed in the law applies to Muslims only. Of particular interest is that by using the death penalty in this way, other rights are being violated, such as the right to be free from discrimination, freedom of expression and association and the right to privacy. While Amnesty International opposes the death penalty under any circumstances whatsoever, Amnesty International believes that *zina* as a criminal offence for Muslims only negates the principle of equality before the law and equal protection of the law and the organization furthermore opposes the criminalization of consensual sexual relations between people over the age of consent. The application of the death penalty for *zina* offences combined with the gender-discriminating evidence rules within the *Sharia* penal codes have meant that women have disproportionately been sentenced to death for *zina* in northern Nigeria since the introduction of new *Sharia* penal codes. Amnesty International has raised this concern by campaigning on the cases of Safiya Yakubu Hussaini, Amina Lawal and Fatima Usman. Amnesty International is aware of at least 11 death sentences handed down since 1999 by *Sharia* courts in the States of Bauchi, Jigawa, Katsina, Niger and Sokoto and in four of these the convicted are women. Three of these cases concern women accused of *zina*. Only two men were sentenced for *zina* in the same period.⁷ As of November 2003, four people have lodged appeals against their death sentences and are awaiting dates for a hearing. Two of the women, Safiya Yakubu Hussaini and Amina Lawal, have had their convictions for *zina* overturned on appeal. The most recent woman convicted of *zina* is Fatima Usman who received her death sentence in May 2002 by the *Sharia* court of Gawu-Babangida, Niger State. Although at present no-one sentenced to death for *zina* under the new *Sharia* penal legislation, has yet had their sentence carried out, Amnesty International remains concerned that prescribing the death penalty for the crime of *zina* is in violation of international standards including Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which Nigeria is a state party, which states “*sentence of death may be imposed only for the most serious crimes*”⁸. The organization is additionally concerned that the practice of prescribing the death penalty for *zina* violates the right of women to be free from discrimination and the rights to freedom of association and expression and the right to privacy. The definition of *zina* de facto recognizes that men have in certain cases, namely marriage, sexual rights over women. This in itself is a violation of the principle of equality between the sexes and results in women in reality having less control over their sex life than men. This social context results in women’s human rights being violated and Amnesty International fears that the definition in law endorses an unequal relationship between men and women and leads to men having power over women, denying them the right to exercise control over their own sexuality and control over their reproductive rights⁹.

The report shows evidence that women’s human rights are violated and that women face discriminatory effects both in the letter and in the application of the law

regarding the application of the death penalty. Amnesty International has found that for example, the right to a fair trial and due process, and in one case the rights of the child are being seriously violated in the cases shown in this report. In certain cases and with regard to certain crimes women are treated differently than men and are disproportionately sentenced to death. This applies in particular to the rules of evidence regarding *zina* within *Sharia* criminal codes of procedure, and is particularly serious in cases of women facing capital punishment.

Amnesty International opposes the death penalty, for both men and women, in all cases as a violation of fundamental human rights - the right to life and the right not to be subjected to cruel, inhuman or degrading treatment. The right to life is fundamental and absolute, and may never be suspended even during states of emergency according to Article 4(2) of the ICCPR, as ratified by Nigeria on 29 October 1993. As of November 2003, according to Amnesty International references, 76 countries have formally abolished the death penalty for all crimes. In Africa, 11 countries have abolished the death penalty for all crimes since 1986. Nine other countries retain the death penalty but can be considered as abolitionist in practice, in other words the death sentence is not carried out. Thirty-two countries still retain the death sentence for ordinary crimes¹⁰. Within the Economic Community of West African States (ECOWAS), there is a trend towards abolition, whether *de facto* or *de jure*; in less than 10 years the number of *de facto* and *de jure* abolitionist countries has increased from one to 10¹¹. All of this should be seen in the context of a growing international trend towards the abolition of the death penalty since the end of the second World War. This trend could even lead to abolition acquiring the status of a customary non-derogable rule of international law¹². For countries which have not yet abolished the death penalty international law prescribes that they can only impose it for the “*most serious of crimes*”¹³ and in doing so they have to comply with international standards of fair trial at a minimum as prescribed under Article 14 of the ICCPR and the United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’) adopted by the UN Economic and Social Council in 1984.

As mentioned, Nigeria has ratified the ICCPR and the African Charter on Human and Peoples’ Rights¹⁴, which contain provisions on the right to a fair trial which are applicable in the case of the death penalty. These provisions include amongst others the right of access to legal counsel, the right to be heard by a competent, independent and impartial tribunal established by law and the right to appeal. The ICCPR also contains the right to seek pardon or commutation in Article 6(4). The Convention on the Elimination of Discrimination against Women includes provisions on equality before the law, and the Convention on the Rights of the Child¹⁵ prohibits the use of the death penalty for offences committed by persons below the age of 18. However, Nigeria has not ratified the Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty.

The abolition of the death penalty is one of the core human rights issues on which Amnesty International has consistently advocated for since its inception. Amnesty International’s opposition to the death penalty is well documented, and other organizations also support our belief that the death penalty has not been found to be a

more effective deterrent against violent crimes than other punishments. For example, a survey on the relation between the death penalty and homicide rates in the world, conducted for the UN in 1988 and updated in 2002, concluded: *"Research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment and such proof is unlikely to be forthcoming"*.¹⁶ This was recognized in the Nigerian context by the State Governor for Oyo State who urged that *"Nigeria abolish the death penalty from its legislation (...) as death sentences have not reduced the number of innocent people murdered"*.¹⁷ Amnesty International also remains concerned that globally, the death penalty is used disproportionately against members of disadvantaged social groups. In the case of Nigeria for example, women of socio-economically deprived backgrounds, who are illiterate, have no husband and become pregnant are disproportionately affected.

As a result of the increased interest in and debate on the propriety or otherwise of the death penalty in Nigeria, the President Chief Olusegun Obasanjo has initiated a parliamentary debate on the issue which commenced on 13 November 2003. In furtherance of this process the Minister of Justice inaugurated a panel of experts which will serve as the National Study Group on the Death Penalty with 12 members representing different aspects of the Nigerian society. Amnesty International has been invited to supply documentation on the death penalty and this report is part of Amnesty International's contribution.

Hence, Amnesty International urges that Nigeria follows the positive trend of many of its neighbouring countries and countries in other parts of the world, and sets a positive example by abolishing the death penalty for all crimes once and for all. Pending that, Amnesty International calls on the Nigerian government to impose an immediate moratorium on any pending executions, in accordance with the African Commission on Human and Peoples' Rights Resolution on the moratorium on the death penalty¹⁸.

1.2 The application of the death penalty is violating women's human rights

Amnesty International is concerned that women's human rights are violated in the context of the application of the death penalty in Nigeria. This is foremost evidenced by the cases in this report where the right to a fair trial and due process are being seriously violated, under the Penal Code, the Criminal Code and the *Sharia* penal codes. Furthermore, both the law and the practice as documented by Amnesty International are in contradiction to the rights of the child guaranteed under the Convention of the Rights of the Child as ratified by Nigeria.

Amnesty International is concerned that against a worldwide trend to restrict the application of the death penalty to the most serious crimes and increasingly to limit its use with a view to abolition with guidance from international human rights bodies, recent legislation in Nigeria has increased the number of crimes that are subject to the death penalty. Furthermore, the crimes for which the death penalty can be applied differ under the Penal Code, the Criminal Code and under *Sharia* penal codes. This incongruity in the application of the penal systems in Nigeria undermines the principle of equality before

the law as enshrined in the Nigerian Constitution¹⁹ and international instruments. It also undermines the principle of universality in the application of the right to physical and mental integrity of every human being and the right to life.

This report firstly looks at the definitions of the capital offences in Nigeria's legislation, as well as obligations under international human rights law and standards. Secondly, the report highlights how the penal systems affects women in practice; the operation of the legal system at the pre-trial, trial and appellate stages, as exemplified by the cases of women charged or convicted of a variety of offences under the three penal systems.

Amnesty International has found that there are cases of women charged with or convicted of capital offences under all the penal systems and who are either awaiting trial or are awaiting the execution of the sentence for prolonged periods of time. Amnesty International is concerned that women are in some cases kept in prison awaiting execution for as long as 10 years under conditions which in themselves amount to cruel, inhuman and degrading treatment.

1.3 The death penalty and how it disproportionately affects women

The principle of non-discrimination and equality before the law forms a major part of every human rights treaty. This means that women's rights should be upheld at all times and at the same time as for men. Discrimination against women on grounds of sex has been defined in Article 1 of Convention on the Elimination of All Forms of Discrimination against Women, which Nigeria has ratified, as:

*"...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*²⁰

This report, in examining the application of the death penalty to women across the three coexisting penal systems in Nigeria, aims to demonstrate that the application of the death penalty is disproportionately affecting some of the poorest sections of Nigeria's women. The report also illustrates the systematic abuses of women's human rights which women in Nigeria's prisons have already encountered prior to entering the criminal justice systems. As Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women states *"States Parties shall accord to women equality with men before the law"*.

Amnesty International's investigation has found that poor, illiterate, rural women who do not conform to social norms and have had a pregnancy outside marriage appear to be at particular risk of being charged with capital offences in all of the penal systems of Nigeria. In this report Amnesty International also reports on cases of women who are either charged with or have been convicted of abortion-related offences which carry the death penalty. Although Amnesty International does not take a position on whether or not

women have a right to choose to terminate a pregnancy, the organization categorically and unconditionally opposes the use of the death penalty for all people and for all crimes. Amnesty International also opposes grave violations of the right to be free from discrimination.

The above should be seen within the background of socio-economic statistics on Nigerian women and girls. Women enjoy a fairly high participation rate (as compared to men) in the labour force. In 1993, World Health Organisation figures indicated that 34.3 per cent of all women participated in the work force. Yet other socio-economic indicators remain dismal. Almost half the women in Nigeria are unable to read or write - the illiteracy rates for women and girls over 15 were 40.6 per cent in 2002.²¹ Amnesty International mission interviews have revealed that early and forced marriages are common. Nigerian women have on average 5.1 children in their lifetime. This should be seen in the light of the Nigerian infant mortality rate which is the third highest in the world, at 110 deaths per 1,000 live births, surpassed only by Ethiopia and India. A recent statistical study²² estimates the rate of use of modern contraception at less than 10 per cent. The same study found that 610,000 unsafe and illegal abortions²³ had been carried out in 2001, and a study from 1994 found that 50 per cent of all maternal mortality is abortion-related in Nigeria²⁴. These statistics are to be borne in mind when considering why so many of the women whose cases Amnesty International has highlighted in this report have been charged with *zina* and abortion-related capital offences.

Amnesty International will show that discrimination, as defined by the Convention on the Elimination of All Forms of Discrimination against Women in Article 1, applies to the conditions of life that many women incarcerated in Nigeria's prisons have experienced. Amnesty International believes that multiple layers of discrimination and deprivation experienced at the hands of their husbands, family and the community has a direct bearing on why they are in prison, charged with offences that carry the most serious penalty – the death penalty.

During a mission in March 2003 Amnesty International interviewed a number of women in the Katsina prison, Katsina State, and one woman in the Sokoto prison, Sokoto State in northern Nigeria. Additional information about women prisoners was received from other sources. From the mission findings certain factors seem to be emerging. First, none of the women were charged with armed robbery or murder. Amnesty International is not aware of any women facing such charges from the mission conducted last year, however according to the statistics provided by Legal Defence and Assistance Project (LEDAP), a Nigerian human rights non-governmental organization, one woman sentenced to death for murder had her sentence confirmed in 2002.

Secondly, most women interviewed were being held on or had been convicted of culpable homicide for abortion-related offences, all of them carrying the death penalty.

Thirdly, nearly all the women spoken to said that they were illiterate and many of them said that they had been married at a very early age. The nexus between illiteracy and early marriage was summed most poignantly by one woman pleading to be allowed to learn to read. She said, *"Most of us can't read or write. Without it you can't do anything in Nigeria. My husband didn't send me to school."* A Nigerian woman who has

had her right to education restricted is more likely to experience violations of her right to a fair trial and due process. These violations amount to discrimination against women as defined by the Convention on the Elimination of All Forms of Discrimination against Women.

Amnesty International found that of all the cases of women charged with or convicted of offences relating to abortion or *zina* in only two the men who were alleged to be the father were held responsible for either the pregnancy or the alleged abortion and charged or convicted on the same basis as the woman. Only two men in the cases of abortion were questioned. In most of the cases of men accused of *zina*, the denial of the person was sufficient to free him. Amnesty International is concerned that women who are poor and marginalized are disproportionately brought before the courts in Nigeria for certain capital offences. This is because the violation of the economic and social rights has a discriminatory effect on the women and in some cases results in the violation of their civil and political right to a fair trial and due process.

2. The Nigerian penal system

2.1 The pluralistic Nigerian penal system

Nigeria has three major penal legislations coexisting.²⁵ They consist of the Penal Code and the accompanying Criminal Procedure Code Cap 81 Laws of the Federation 1990 ('CPC'), the Criminal Code and the accompanying the Criminal Procedure Act Cap 80 Laws of the Federation 1990 ('CPA') and the *Sharia* penal legislations²⁶ in 12 northern states including both laws defining the criminal offences and their punishments as well as for those states that have adopted them the accompanying criminal procedure codes. All these penal legislations contain provisions that Amnesty International considers contrary to international standards of fair trial, including the death penalty. The three systems establish different offences, punishments and criminal procedures depending on the state in which the law is applied and on the religion of the accused. For example, the *Sharia* penal codes are applicable to people of Muslim faith in the 12 states which have introduced these codes as well as non-Muslims who agree to be bound by them. The Penal Code is applicable to all residents (both Muslim and non-Muslim) of the states under its jurisdiction, and likewise the Criminal Code is applicable to all its residents in the southern states under its jurisdiction²⁷.

Until 1999, however, there were only two sets of criminal laws in force in Nigeria: the Criminal Code, applicable in the southern states, and the Penal Code, applicable in the northern states. These are part of the Nigerian criminal law system, mainly influenced by the British legal system. Although there are similarities between the two codes, the 1959 Penal Code of northern Nigeria introduced some provisions which consider consensual sexual relations between people over the age of consent or consumption of alcohol as punishable offences for Nigerian citizens of Muslim faith, but which are not punishable for non-Muslims.²⁸ During this time the local courts which were allowed to apply *Sharia* law²⁹ in both civil and criminal matters as long as it did not contradict principles of written law, natural justice, equity or good conscience³⁰. Thus,

the judges could try the offences of *zina*, hurt and homicide but were not allowed to pass sentences of amputation or stoning to death.

With the restoration of civilian rule in 1999, 12 states introduced *Sharia* penal codes. This new legislation comprises three parts: penal codes laying down the criminal offences and sentences, criminal procedure codes regulating the procedures in criminal cases and a law which relates to the establishment of the courts and the competence of the respective judicial authorities.³¹ As a result the jurisdiction of the *Sharia* courts has been widened to encompass criminal cases. The first code of this kind was introduced at the initiative of the Governor in the northern State of Zamfara in 1999³², and was followed shortly by Niger State. Ten further states have followed suit: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Sokoto and Yobe. These states have either adopted *Sharia* penal legislation in part or as a full replacement of the Penal Code applicable to Muslims, and most of them are modelled on the Zamfara code. The main difference between these codes and the Penal Code is that they have added the *Sharia* offences prescribed in the *Qur'an*: *zina* and drinking alcohol. These are sanctioned with specific *Sharia hudud* punishments.³³ For example, theft is punishable by amputation of the hand, drinking of alcohol by flogging and *zina* if married or divorced by death by stoning.³⁴ In addition, the Islamic law of homicide and hurt has also been added, with retaliation, *qisâs*³⁵, or monetary compensation, *diya*, as punishments. Amnesty International is concerned where the *Sharia* penal law prescribe the death penalty or other penalties that amount to torture or cruel, inhuman and degrading punishment, which Amnesty International opposes and considers to be in violation of international human rights law.

The fact that this penal legislation is associated with a religion has no relevance for Amnesty International, instead our analysis focuses solely on how it affects human rights in Nigeria. Amnesty International is an independent and impartial human rights organization, which neither supports nor opposes any religion or belief. Amnesty International bases its research analysis on international human rights law and standards, and neither supports nor opposes *Sharia* law nor any other system of law *per se*. Amnesty International opposes violations of international human rights standards in all penal systems in Nigeria, including the right to life and the right to be free from torture or cruel, inhuman and degrading treatment or punishment.

2.2 Appeals and courts in capital cases

2.2.1 Nigerian criminal laws

All cases under the Penal Code and the Criminal Code which are subjected to the death penalty must be tried by the High Court of each state. The State Governor has the formal right of clemency or confirmation of implementation of irreversible corporal punishments, including the death penalty, on recommendation by advisory bodies such as the Judicial Service Commission and *Sharia* Commissions. Appeals of judgments handed down by the state High Courts are heard by the Federal Court of Appeal. The Supreme Court of Nigeria is the highest court of appeal in the federal system. As a last resort the President

of the Federal Republic of Nigeria can exercise his right to prerogative of mercy and commute the sentence of death.³⁶

2.2.2 *Sharia* penal law

Cases attracting the capital punishment, such as *zina*, are tried by the lower *Sharia* courts. The right of appeal to an Upper *Sharia* court is guaranteed in all the *Sharia* criminal procedure codes. For instance, the *Sharia* Criminal Procedure Code of Sokoto State establishes: "Whoever is dissatisfied with the order, ruling, decision or judgment made by a *Sharia* Court may appeal to the Upper *Sharia* Court sitting in its appellate jurisdiction."³⁷ The subsequent appellate court is the *Sharia* Court of Appeal in each of the 12 states, and if that particular state does not have one the case may be transferred to the *Sharia* Court of Appeal in another state. When the judicial remedies at the state level have been exhausted, the case can be taken to the Federal Court of Appeal.³⁸ So far no case has yet been brought to this level. Finally, the President has the right to exercise mercy.

3. The death penalty in the Nigerian penal laws

3.1 The national laws

As previously noted, the death penalty is still permitted under the Nigerian Constitution. The Constitution guarantees the right to life "save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria" as Section 33(1) spells out. In the case of *Kalu vs. the State*³⁹ from 1998 the Supreme Court of Nigeria confirmed the constitutionality of the death penalty when used as a sentence for a criminal offence for which the subject has been found guilty according to a court of law. It is obligatory that any criminal offence is defined and that the punishment is contained in a written law.⁴⁰ According to the Constitution⁴¹ it is within the exclusive legislative powers of the Federal Government to regulate the police force and rules regarding evidence. In any administration of a penal system, in particular one which permits the death penalty, provisions on the right to a fair trial are essential. Some aspects of the right to a fair trial and due process are covered by Section 35 of the Constitution. This includes, amongst other, that anybody arrested or detained according to Section 35(1)(c)(c) shall "be brought before a court of law within a reasonable time".⁴² Reasonable time is in this section defined as within one day of arrest or detention if he/she is within 40 km of the nearest court and two days in any other case (Section 35(5)). The arrested or detained person has the right to be informed in writing of the facts and grounds for the arrest and detention within 24 hours of the arrest or detention in a language which he/she understands. Provision is also made for the trial to be conducted by a court or tribunal established by law and constituted in such a manner as to secure its independence and impartiality (Section 36(1)). Although there is no constitutional guarantee of free legal assistance for indigent defendants, there are provisions under the Legal Aid Act, the Penal Code and the Criminal Code which require the court to assign a counsel to an indigent defendant in a capital case.⁴³

The Penal Code and the Criminal Code contain similar rules regarding the application of the death penalty.⁴⁴ They prescribe death by hanging or firing squad⁴⁵ as the sentence for a category of serious criminal acts. For example, murder under Section 319 of the Criminal Code and culpable homicide in Section 221 of the Penal Code are sanctioned by death.

Other criminal offences which carry the death penalty are armed robbery⁴⁶, treason or instigation of an invasion of Nigeria⁴⁷, trial by ordeal where death results⁴⁸, fabricating false evidence leading to the conviction to death of an innocent person⁴⁹, and aiding suicide of a child or lunatic.⁵⁰

The Penal Code and Criminal Code prohibit the use of the death penalty for people under 17 years old, establishing that “*an offender who in the opinion of the court has not attained the age of seventeen years at the time of the offence... shall not be sentenced to death*”⁵¹. This falls short of international standards, which set 18 as the age below which a person should benefit from special protection before the law and prohibits capital punishment. The Convention on the Rights of the Child Article 37 states “*States Parties shall ensure that: (a)Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age*”.

Under the newly introduced *Sharia* penal codes⁵², the behaviour of women and men of Muslim faith is now governed by legislation that defines criminal offences some of which carry the sentence of death by stoning. The death penalty has been introduced under the *hudud* for criminal offences such as *zina*⁵³, rape⁵⁴, “*sodomy*” as termed in *Sharia* penal codes⁵⁵ and incest⁵⁶, but also for robbery⁵⁷. Intentional homicide⁵⁸ under the *qisas* category⁵⁹ and a few witchcraft and juju offences under *tazir*⁶⁰ also carry the death sentence. With regard to the first four offences the convicted is executed by stoning, however in the latter cases the method of execution is not specified.

Amnesty International has encountered violations of the right to a fair trial and due process of women in the context of the offence of *zina* within the *Sharia* penal system. *Zina* is punishable by death by stoning if the convicted is married or divorced⁶¹, otherwise by imprisonment⁶² and flogging. Judges in cases of *zina* do not have any discretion with regard to the sentences they are handing down; they are mandatory. One sentence applies if the defendant is married or has at some point entered a legal marriage, and another one applies if the defendant is not married and has never been. Partly as a consequence of the way the evidence rules operate, the number of women sentenced to death on conviction of *zina* as compared to men, is disproportionately high. In the cases known to Amnesty International, four women and two men have been convicted.

Amnesty International opposes the death penalty in all circumstances. The organization also opposes the criminalization of consensual sexual relations between people over the age of consent, since it violates the rights of both men and women to free expression, association and privacy.

3.2 Nigeria's human rights obligations

The general trend in the international community is towards the abolition of the death penalty.⁶³ However, 32 African states still retain the death penalty, including Nigeria. The death penalty is not simply an internal matter for states. International human rights law requires that the death penalty only be imposed for the most serious crimes, as stated in Article 6(2) of the ICCPR and Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. Amnesty International remains concerned that in its application of the death penalty Nigeria is failing to meet its obligations under international human rights treaties. As previously noted, conventions which have been ratified by Nigeria include the ICCPR⁶⁴, the African Charter on Human and Peoples' Rights⁶⁵, and the Convention on the Rights of the Child⁶⁶ which all guarantee the right to life and the right not to be arbitrarily denied his/her right to life. While none of the conventions prohibit the use of the death penalty as such, they include provisions which regulate for which criminal offences it can be applied and to whom.

The ICCPR restricts the category of offences to the "*most serious crimes*" in retentionist countries.⁶⁷ Other regulations on the use of the death penalty include the UN Human Rights Committee General Comment which states that the use should only be as an exceptional measure⁶⁸, and that the scope should not go beyond "*intentional crimes with lethal or extremely grave consequences*"⁶⁹ as stated in the UN Commission on Human Rights resolution 2003/67. This was reiterated by the Special Rapporteur on extrajudicial, summary or arbitrary executions.⁷⁰ Also, in the opinion of the UN Human Rights Committee "*the imposition of the death penalty for offences which cannot be characterized as the most serious, including....illicit sex*", and has added that making the latter punishable by death is incompatible with the ICCPR.⁷¹ The UN Human Rights Committee has confirmed its use as "*a quite exceptional measure*"⁷². Hence, Amnesty International is concerned that despite the fact that acts termed as "adultery" and "fornication" are not recognizable criminal offences under emerging international law, the offence of *zina* is punishable with death. Both the ICCPR and the Convention on the Rights of the Child prohibit the imposition of the death penalty for crimes committed by a person below the age of eighteen. The ICCPR additionally states that the sentence of death shall not be carried out on pregnant women.

Article 14(1) of the ICCPR states that every person charged with a criminal offence shall be entitled to "*a fair and public hearing by a competent, independent and impartial tribunal established by law*". Furthermore, the right to a fair trial includes the right of anyone facing a criminal charge to a fair trial and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent until proven guilty; the right to be informed promptly and in detail of the nature and cause of the charges against him or her in a language which he or she understands; the right to have adequate time and facilities for the preparation of a defence; the right to communicate with counsel of the defendant's choice; the right to legal assistance if the defendant cannot understand the language used in court; the right to appeal; and the right to be granted amnesty, pardon or commutation of the death sentence. The Convention on the Elimination of All Forms of Discrimination against Women also requires states to "*establish legal protection of the rights of women on an equal basis with men and to ensure through*

*competent national tribunals and other public institutions the effective protection of women against any act of discrimination*⁷³, which enables women access to justice and the right to a fair trial in capital cases on the same footing as men.

Another important regulation regarding the application of the death penalty is the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. These state that the death sentence shall not be carried out on pregnant women or new mothers⁷⁴, which is particularly relevant to women facing accusations and trials regarding *zina* under *Sharia* penal codes. Additionally, the Safeguards prohibit the use of the death penalty on persons below the age of 18 at the time of the commission of the crime. Furthermore, the death penalty may only be carried out “*pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the ICCPR*”, see Safeguard 5. This set of Safeguards also includes the right to appeal and the right to seek pardon or commutation of sentence (Safeguard 7).

4. The criminal law practice

4.1 Abortion-related offences

Many abortion-related offences are, in the cases known to Amnesty International, deemed to fall under the capital offence of culpable homicide under the Penal Code and the Criminal Code.⁷⁵ However, there are also specific provisions for abortion-related offences not imposing the death sentence under the Penal Code and the Criminal Code. For example, the Penal Code imposes a penalty of 14 years imprisonment for a woman causing a miscarriage.⁷⁶ Likewise, the Criminal Code prescribes imprisonment for up to seven years for any person who attempts to procure an abortion, and up to 14 years for a woman’s own attempt to procure an abortion. However, in all cases of which Amnesty International is aware, women involved in abortion-related cases have instead been charged with the offence of culpable homicide and are therefore subject to the death penalty.⁷⁷ Culpable homicide is defined in Section 221 of the Penal Code:

“Except in the circumstances mentioned in Section 222 of this Penal Code, culpable homicide shall be punished with death: (a) if the act by which the death is caused is done with the intention of causing death; or (b) if the doer of the act knew or had reason to know that death would be the probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause.”

During a mission to Nigeria in March 2003 Amnesty International interviewed seven women detained at the Katsina prison, Katsina State, and found that one of the interviewees had already been convicted of culpable homicide and sentenced to death by hanging for having had an abortion. Of the women still awaiting trial, three had been charged with the capital offences of culpable homicide. Two of the women had been charged or convicted under the Penal Code and one under the *Sharia* penal code of Katsina.

- **RM**⁷⁸, 23, as interviewed by Amnesty International, is held in detention in Sokoto State and is charged with culpable homicide under the Penal Code. She married at 10 years of age and is illiterate. According to her statement she has been charged with having killed her baby, but she told the delegation that she delivered the baby after having had stomach aches, and was subsequently taken into hospital because she developed complications after the delivery. During that time her baby was cared for by her mother. When she was still in hospital she was told that her baby had died. Her husband allegedly complained to the police which subsequently arrested her and she has been in detention for over one year.
- **IJ**, 35, conceived a baby out of wedlock after she had divorced her husband. According to her testimony to Amnesty International, the stillborn baby was delivered during the eighth month of pregnancy. A villager reported the delivery to the traditional leader who in turn reported it to police. IJ says she was alone at the delivery. It is not clear if she put her thumbprint on a statement or not, and whether she was properly informed about the charges. She neither had legal representation at the police station nor during the trial. The police allegedly withheld medical evidence from the court that corroborated IJ's account. She was convicted of culpable homicide under the Penal Code in 1993 and sentenced to death by hanging two years later. She has been in detention and prison in Katsina prison for 10 years in total. Her right of access to a lawyer has now been secured and she is awaiting her appeal which was lodged six months ago. Her family has abandoned her and warders in the detention centre have prejudicial attitudes to IJ based on the offence she has been convicted of. No progress on her case was reported at the time of writing this report.
- **HI**, 25, has been charged with culpable homicide and concealment of births under the Penal Code. She had a baby after she was divorced from her husband. According to her testimony to Amnesty International, she asked a woman for help to find a solution to her situation and was advised to have an abortion. She says she had an abortion and after that she visited a doctor who gave her medication which she did not take. HI then began bleeding. The woman advised her to go to hospital and went with her but subsequently reported her to the police station. The police appeared to suspect that she had had a full-term baby. HI is illiterate and was reportedly forced to put her thumbprint on a document she could not read. Her confession was allegedly fabricated by the police. She has been in detention since arrest and as of March 2003 she was awaiting trial in Katsina prison. No progress has been reported in her case to this date.

Another group of five women, as known to Amnesty International, are reportedly charged with committing culpable homicide in relation to alleged acts of infanticide under Section 221 of the Penal Code and are at the time of writing this report awaiting trial in Sokoto State in northern Nigeria.

A common characteristic of all these cases is that they concern women from rural low-income backgrounds, and that most of them had conceived outside a functioning marriage as they were either unmarried, separated or divorced at the time of their arrest. They had generally been reported to the police by third parties, including village heads and neighbours. Two of the interviewees from Katsina State told Amnesty International

that they had had still births in the last three months of pregnancy, but had been reported for inducing abortions. None of the women from Katsina State or Sokoto State had legal representation at the police station at the time of the arrest or during the investigation/interrogation, or appeared to have been informed of the reasons for their arrest. Furthermore, several of them appeared to have signed or thumb-printed confessions they had not written, as most of them could not read or write, and were apparently fabricated by the police. Upon charge the women were not kept informed by the authorities of their rights. Furthermore, medical evidence which could have been used to exonerate some of them was either never obtained by the police or in the case of the woman who has been convicted may have been deliberately excluded by the police in order to secure a conviction. It is also not clear whether these women have been charged with the correct offences. Additionally there appears to be a tendency to charge women with the capital offence of culpable homicide as opposed to invoking provisions of the law that imposes prison sentences for specific abortion-related offences. These women are also from poor and marginalized communities and are facing impairment of their right to a fair trial and due process as a result of lack of access to legal representation and illiteracy.

Amnesty International takes no position on whether or not women have a right to choose to terminate pregnancies. The African Union in July 2003 recognized the rights of women to control their fertility in its Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women⁷⁹. It is thereby for the first time explicit in stating the right to reproductive rights and abortion in international human rights law. Furthermore, official bodies that interpret human rights treaties are increasingly indicating support for the position that, where it is legal, abortion should be safe and accessible and further that it should be permitted in cases where pregnancy results from rape.⁸⁰ International human rights bodies have also urged states to remove criminal sanctions on abortion when possible; that is, women should not be charged or convicted for having an abortion.⁸¹

Amnesty International does believe that the denial of these women's right to a fair trial, including access to a lawyer and the right to be brought before a judicial authority within a reasonable time as guaranteed both in the ICCPR and the Nigerian Constitution, are violations of Nigeria's international legal obligations. In many of these cases the organization has demonstrated the nexus between the discriminatory effect of violation of economic and social rights on the enjoyment of the right of a fair trial and due process for women from poor and disadvantaged backgrounds.

4.2 The rights of the child

According to Article 6(5) of the ICCPR and Article 37(a) of the Convention on the Rights of the Child, courts shall not sentence to death people who were under the age of 18 at the time when the crime was committed. This is regardless of their age at the time of trial or sentencing. Amnesty International has reported a case of a potential minor arraigned before the courts in a case of murder.

- **EW** claims to be 17 years old, but has been entered into the criminal records as being 21 years of age. She has been charged with murder, a capital offence, and was arraigned before the Ebute Metta Magistrate court in Lagos State in 2000. As of March 2003 she had not yet been brought to court and was awaiting trial in the Kirikiri women's prison, Lagos State. She has not had access to a lawyer. It has not been established whether EW has been released.

Furthermore, following a visit by The Nigerian Special Rapporteur on Children to the Nigerian National Human Rights Commission to the Ikoyi prison, Lagos State, in March 2003, five cases of juvenile offenders who were detained and charged with capital offences were reported to Amnesty International. It is not known how many of these were women. It has subsequently been confirmed that these minors have been moved to a hostel for juvenile offenders in Abeokuta, but it is not clear whether the charges for capital offences have been dropped.

Amnesty International opposes imposition of the death penalty on people under the age of 18 at the time of the commission of the crime. This is in violation of Nigeria's international human rights obligations.

The weakness of the Nigerian legal framework for the protection of children's rights in general has been confirmed by Dr M. Tawfiq Ladan, member of the Expert Working Group on Children's Rights and Juvenile Justice Administration in Nigeria who stated that it is "*weak, uncoordinated and not in line with Nigeria's obligations under the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the UN Convention on the Elimination of all Forms of Discrimination Against Women*".⁸²

4.3 The right to legal representation

Access to justice and legal representation is a domain where women, especially those from poor and marginalized communities who are charged with a criminal offence, are facing discriminatory effects in different respects.

Although there is a constitutional right of a suspect to represent herself/himself or through a legal counsel of her or his choice this right to legal representation of one's choice⁸³ does not impose a corresponding constitutional duty on the State to provide legal representation: the guarantee is limited to assuring a person willing and able to afford counsel that he/she would not be denied this right. In practice this means that the enjoyment of this right is relatively limited for women who do not have access to adequate funds. However, the scope of the constitutional right appears to have been expanded by means of the Legal Aid Act and Sections 352 and 186 of the CPA and the CPC respectively, providing that where an accused is charged with a capital offence, the court must, where he is undefended by counsel, if practicable, assign a counsel to him/her. Under the Legal Aid Act, the Legal Aid Council is to assign counsel to indigent persons charged with the offence of murder, manslaughter, maliciously or wilfully wounding or inflicting grievous bodily hurt and assault occasioning actual bodily hurt. On the right to legal representation in capital cases, the Supreme Court of Nigeria stated in the case of

*Joseph v. The State*⁸⁴ that “if [a defendant] cannot afford the services of the counsel, the state assigns one to him.” Where there has been assignment of counsel the Supreme Court has required effective counsel before it will hold that the right to legal representation has in fact been respected as pronounced in *Udofia v. The State*.⁸⁵

The lack of legal representation for persons charged with a capital offence, as in most of the cases in this report, is in itself contrary to Nigerian law, the ICCPR (Article 14(3)(d)), the African Charter on Human and Peoples’ Rights (Article 7(1)(c)), and the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty⁸⁶ as well as the recently adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Section H(c))⁸⁷. When this right is denied to the defendants, women who are from poor and socially disadvantaged backgrounds are furthermore discriminated against. This is so since legal representation is costly and as a result it becomes inaccessible because most of these women lack direct access to financial resources. Another aspect in which women in rural areas, whose right to legal representation has been denied, are discriminated against with regard to access to justice, is that legal aid is sometimes logistically inaccessible in remote areas of Nigeria. For example, there are cultural barriers to women travelling away from the home, and they may furthermore lack financial resources to fund travel to and from a lawyer’s office.

This is aggravated by the fact that the women Amnesty International interviewed had not been informed of the right to legal representation and that this seems to be common practice. In practical terms this means that for low income and/or rural women and many others the remaining rights are purely theoretical as they do not have access to a lawyer who can be present during investigation and prepare their defence, examine and cross-examine witnesses, and lodge an appeal. In practice, without a lawyer there is no follow-up on the cases to ensure a timely investigation, to challenge the legality of an arrest and ensure a speedy trial. These concerns are demonstrated by the case of EJ below.

- **EJ**, 25, was charged with culpable homicide under Section 221 of the Penal Code and is in detention in Katsina State awaiting trial. She has been in detention since her arrest apart from seven days which she spent in hospital. She is married and has got three children, however, she left her husband whom she married at 20, when she was three months pregnant. She was already pregnant when she went to look after a sick relative in another village where she delivered a stillborn baby at the seventh month of pregnancy. The police took her statement which was not read out to her until she was in court. She has no legal representation. At the time of writing the report no progress in her case was reported.

4.4 The right to a fair trial and due process without undue delay

All safeguards and due process guarantees set out in international standards applicable during pre-trial, trial and appellate stages must be fully respected in capital cases. This includes the right that proceedings, including investigation, trial and appeal, must be completed without undue delay, according to the ICCPR (Article 9(3) and 14(3)(c)), and the African Charter on Human and Peoples’ Rights (Article 7(1)(d)). The Human Rights Committee in its recommendation has held that the following delays are regarded as undue delays: one week between arrest and being brought before a judge; holding the

accused in detention for 16 months before trial, and a delay of 31 months between trial and dismissal of appeal.⁸⁸ In some cases the Constitution limits pre-trial detention to two months. However, in capital cases there is no such limitation and mechanisms for judicial review of detention do not operate in practice.

The situation of unreasonable time delays between the time of arrest and trial in capital cases in Nigeria is a serious concern of Amnesty International. PRAWA reports that the average pre-trial waiting time in Nigerian detention centers and prisons varies from state to state, but it is rarely less than five years. The waiting time is even longer according to the Comptroller-General of Prisons, who admits that the pre-trial time in detention for people convicted of capital offences is normally over 10 years.⁸⁹ According to statistics from November 2003 provided by the Minister of State for Internal Affairs, the number of inmates awaiting trial is around 25,000.⁹⁰

Regarding the situation of the women cited in this report, generally when they were arrested as suspects for capital cases they were remanded in prison waiting for the file to be transferred from the police to the office of the Director of Public Prosecutions who takes the decision whether to initiate a judicial process. In many cases known to Amnesty International, these files go missing and the detainees remain in detention without trial for years, thus seriously violating basic fair trial rights, especially the right to be brought to trial without undue delay. The absence of a lawyer, which is more likely for women as argued above, makes it more likely that no-one will be pushing for retrieval of the files.

- **BO, NO and CS** are women who have been charged with capital offences and who are incarcerated at the Kirikiri women's prison in Lagos State. They have been incarcerated for up to 5 years, and reportedly have not been informed of a date for their trials because their files are said to have been misplaced. As of March 2003 they had not been brought to trial yet and were still awaiting trial dates. It is not clear from the information received by Amnesty International whether these three women have been released.
- **PE, 20**, who suffers from severe polio, told an Amnesty International delegation that, on October 2001 she had an argument with a man over a property belonging to her grandfather. The man allegedly attacked her with a machete and in the resulting struggle both were injured. She managed to grasp a machete and in the fight he reportedly got a cut in his head. They were both taken to hospital. She was sent home one month later. The man died in hospital in December 2001. She was arrested by the police and was later remanded in custody in prison awaiting trial for a capital offence. She has never had legal representation and is still awaiting trial in Owerri Prison, Imo State. She has appeared five times in court, but her case has been adjourned every time due to the fact that her file had not reached the court. No progress has been reported on her case.

The right to a fair trial and due process without undue delay was clearly not upheld in these cases. The Human Rights Committee, in its authoritative interpretation of the ICCPR, has stated that the execution of a death sentence after a trial in which the fair

trial provisions of the ICCPR has not been respected amounts in itself to a violation of the right to life.⁹¹

4.5 The right not to be subjected to cruel, inhuman or degrading treatment

The situation of overcrowded pre-trial detentions and prisons, as exemplified by a report from four prisons in Lagos State from March 2003⁹², may in itself amount to cruel, inhuman and degrading treatment. Regarding the pre-trial aspect for women in capital cases, the fact-finding visit revealed several issues of concern.

According to the Nigerian Special Rapporteur on Children to the Nigerian National Human Rights Commission, the Ikoyi prison in Lagos State, is seriously overcrowded with facilities for 800 but has an inmate population of 1804. Out of the incarcerated 94 per cent are awaiting trial, and 35 per cent of those for capital offences. There is no reported ratio of female/male inmates for this prison. At the Kirikiri medium security prison, the alarming trend is that out of the 1676 incarcerated awaiting trial (94 per cent out of the total number of inmates) on the date of the visit, 75 per cent were awaiting trial in capital cases. There were no statistics on the ratio female/male available. The situation reported from the visit to the Kirikiri women's prison showed that 77 per cent of the inmates are awaiting trial, but no statistical data was reported for the number of women awaiting trial in capital offences. In November 2003 Amnesty International was informed that four of the women from the four Lagos prisons detailed in this report and the one from March 2003, had been released. However, it is not clear whether they have been released on bail, or if the charges have been dropped.

Furthermore, in the prisons visited by the Nigerian Special Rapporteur on Children to the Nigerian National Human Rights Commission there is a general lack of medical facilities for common ailments such as malaria, tuberculosis, scabies and hypertension but also specific medical provisions for women, including pregnant women and women with babies. Amnesty International is concerned that the crowded prison conditions as reported here amount to cruel, inhuman and degrading treatment contrary to international human rights standards.

5. The *Sharia* penal law practice

5.1 Concerns regarding discrimination and non-universality of human rights in the application of the *Sharia* penal system

Amnesty International has different human rights concerns with regard to the *Sharia* penal system as compared to the Penal Code and the Criminal Code. Although Muslim women are being discriminated against on the basis of religion and gender by all three penal legislations, Amnesty International's main concern is that the death sentence is applied to offences which are not punishable with the death penalty under the Penal and Criminal Codes. Hence, a married or divorced Muslim in the north will be sentenced to

death by stoning in the northern *Sharia* states if proved guilty of *zina*, whereas for a Muslim living in southern Nigeria, where the Criminal Code applies, consensual sexual relations between people over the age of consent is not punishable. This negates the principle of universality of human rights, equality before the law and has a discriminatory effect on women on the basis of religion, and as already outlined, on the basis of sex.

The African Commission on Human and Peoples' Rights has reiterated that the ratification of the African Charter on Human and Peoples' Rights diligently obliges a State to undertake the harmonization of its legislation to the provisions of the ratified instrument.⁹³ Furthermore, it has commented on the application of *Sharia* law: "*when national courts apply Sharia, they must do so in accordance with the other obligations undertaken by the State. Trials must always accord with international fair trial standards.*"⁹⁴

Amnesty International is concerned that during some trials in *Sharia* courts international standards of fair trial and due process are not upheld. Furthermore, the evidence rules under *Sharia* penal codes of procedure in Nigeria, in some cases such as in the Katsina State rules which are unwritten, have a discriminatory effect on women and make it more likely than men that they will be convicted of acts of consensual sexual relations between people over the age of consent. According to the dominant *Maliki* interpretation of *Sharia* in Nigeria, pregnancy is often considered sufficient evidence to convict a woman for *zina*.⁹⁵ The oath of the man denying having had sexual intercourse with the woman is considered sufficient proof of his innocence unless four independent and reputable eye-witnesses declare his voluntary involvement in the act of sexual intercourse.

This legal framework does not protect the human rights of women. The vulnerability of women is twofold under this penal legislation: firstly, women are treated as criminal offenders for crimes which do not amount to a criminal offence elsewhere in Nigeria and for which they are more likely than men to be charged and convicted. Secondly, where coercion or lack of consent is an issue, their rights as victims of crimes are largely undermined by legislation which works in favour of men. Amnesty International believes that the issue of consent should be taken into account if it is part of the facts of a case. The mere fact that the law defining *zina* recognizes that men have sexual rights over women constitutes a coercive factor in their relationship, forcing women into a position where their overall power to conduct their sexual life is limited.

5.2 The principle of *nulla poena sine lege*

A basic principle of criminal law is that a criminal charge has to be based on a criminal offence as found in applicable written law at the time of the offence, a principle known as *nulla poena sine lege* (no criminal offence without a written law). This is found in the Constitution Section 36 (12)⁹⁶, Article 9(1) of the ICCPR, and Article 40(2)(a) of the Convention on the Rights of the Child. In the case of Safiya Yakubu Hussaini this right was violated initially.

- **Safiya Yakubu Hussaini**, 36 On 25 March 2002, the *Sharia* Court of Appeal of Sokoto State ordered the acquittal of 35-year-old Safiya Yakubu Hussaini, who was sentenced to death by stoning for *zina*. She had been sentenced to death on 9 October 2001 by a *Sharia* court in Gwadabawa after she confessed to having had sexual relations with Yakubu Abubakar, whom she was not married to. President and judge Muhammadu Bello Sanyinawal said the sentence would be carried out as soon as the woman had weaned her baby, and that she had 30 days from the day the judgment was passed to lodge an appeal. Yakubu Abubakar was set free for 'lack of evidence'. The appeal court acquitted Safiya Yakubu Hussaini on the grounds that the alleged crime had taken place before the entering into force of the *Sharia* penal code of Sokoto State.⁹⁷ Under the Penal Code, in force before the introduction of the *Sharia* penal legislation in Sokoto State, the alleged crime would never have attracted the death penalty.⁹⁸

5.3 The rights of the child

The age when a person reaches *taklif* is flexible under *Sharia* penal law, and is defined as the age at which a person attains legal and religious responsibility.⁹⁹ This is commonly regarded as being the age of puberty and is therefore widely variable. Young girls and boys therefore face no dispensation when faced with being charged and tried for capital offences, contrary to the ICCPR and the Convention on the Rights of the Child which prohibits the use of the death penalty on those who were under 18 years of age when the act was committed.

Amnesty International fears that female and male young offenders under the age of 18 are being sentenced to the death penalty in Nigeria, a practice which violates international provision on the protection of the rights of the child.

5.4 The right to legal representation and the right to be promptly informed in a language which the defendant understands

The right to legal representation is a fundamental tenet of the right to a fair trial and due process and includes the following:

- the right to be informed of the right to counsel (the ICCPR (Article 14(3)(d)), the African Charter on Human and Peoples' Rights (Article 7), and the Convention on the Rights of the Child (Article 37(d)) and to free legal assistance (the ICCPR Article 14(3). This right applies from the time of arrest including interrogation and at all stages of the proceedings.
- the right to adequate time and facilities to prepare a defence and communicate with counsel (the ICCPR (Article 14(3)(b))
- the right to be informed promptly and in detail in a language which he or she understands the nature of the charges against him or her (the ICCPR Article 14(3)(a), the Convention on the Rights of the Child Article 40(2)(b)(vi), the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Section M(2)(a) and Section N(1)(a))

The Beijing Declaration and Platform for Action (Article 61(a)) calls on governments to “ensure access to free or low cost legal services, including legal literacy, especially designed to reach women living in poverty”. Legal assistance in capital cases should be guaranteed, and the Human Rights Committee has confirmed this view by stating that “it is axiomatic that legal assistance should be made available to a convicted prisoner under sentence of death. This applies to all stages of the judicial proceedings [including appeal].” Furthermore, the Human Rights Committee has stated that the unavailability of legal aid amounts to a violation of Article 6 and Article 14 of the ICCPR.

In all cases known to Amnesty International of women tried for capital offences under the *Sharia* penal legislation in northern Nigeria, the accused had no access to legal representation during their first trial. The *Sharia* codes of criminal procedure and the *Sharia* penal codes introduced in some of the states does not make explicit mention of the right to legal representation of every accused who is being tried. For example, the only provision on legal defence in the *Sharia* criminal procedure code of Sokoto is: “A legal practitioner shall have the right to practice in the *Sharia* courts in accordance with the provisions of the Legal Practitioners Act, 1990”¹⁰⁰, but the code does not guarantee the right of the accused to have access to a legal practitioner.

- **Amina Lawal**, 30, was first heard on 30 January 2002 by the *Sharia* court of Bakori which sentenced her to death by stoning for *zina*. Yahaya Muhammad, the man who allegedly was involved in the act of *zina*, was acquitted. Her first trial involved numerous breaches of international fair trial standards and of the *Sharia* penal code of Katsina State alike. She did not have legal representation throughout the first trial, and there was no interpretation. Furthermore, the judge reportedly did not explain why she was being tried and the nature of her alleged offence. Her right to appeal was however granted and she had legal representation when she appealed against the sentence before the Upper *Sharia* court.¹⁰¹ The judges in the first court of appeal upheld her sentence to death. However, on the second appeal she was acquitted. The judges in the Katsina *Sharia* Court of Appeal overturned her sentence on 25 September 2003 on the grounds that neither the conviction nor the confession was legally valid.¹⁰²

The trial of Amina Lawal did not meet national or international standards of a fair trial. Nigeria’s international obligations require respect for the right to legal representation. The denial of a free interpreter violates the Nigerian Constitution¹⁰³ and international law and standards of fair trial.

In all the current cases under *Sharia* penal legislation known to Amnesty International where the accused has access to legal representation the right to appeal has been respected. But the question remains as to what is the situation when the person is tried without legal representation, and in cases which are not brought to the attention of any lawyers or human rights organizations. Amnesty International fears that without proper legal representation, the accused remains at high risk of further violations of his/her human rights.

5.5 The right to a fair trial without undue delay

The ICCPR Article 14(3)(c) includes the right to be “*tried without undue delay*”. The Nigerian Constitution requires that a suspect should be brought before the court in a reasonable time¹⁰⁴ defined as one to two days depending on the distance of the nearest Court (Section 35(5)). Amnesty International holds that the case of Fatima Usman displays long delays in the appeals process, and this could pose the risk of ultimately violating her right to a fair trial and due process without undue delay, as stated in the Nigerian Constitution and Nigeria’s international human rights obligations.

- **Fatima Usman**, 30, was convicted on 27 August 2002 together with Ahmadu Ibrahim of *zina* and sentenced to death by stoning by a *Sharia* court in Gawu-Babangida, Niger State. They were held in prison until October 2002, when they were granted bail pending appeal on humanitarian grounds since she was in a very advanced stage of pregnancy. The couple appealed against the sentence to the *Sharia* Court of Appeal of Minna, Niger State, and the case was adjourned on the 3 June 2003. No date for a hearing has been set.

5.6 The right to be tried in the defendant’s presence

The right to a fair trial and due process includes the right to be present at trial and appeal, which is a binding legal obligation for Nigeria according to the ICCPR Article 14(3)(d). The ICCPR guarantees that everyone, in the determination of any criminal charges against him/her, is to be tried in his/her presence, and to defend himself/herself in person or through legal assistance of his/her own choosing. The Human Rights Committee has held that “when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary”¹⁰⁵.

- **Fatima Usman**, 30, was tried *in absentia* at the second hearing at the *Sharia* court in Gawu-Babangida, Niger State when the judges passed her death sentence.

Amnesty International is concerned that the right to be present at all stages at criminal proceedings, especially in capital cases, is being violated in *Sharia* courts as shown in the case of Fatima Usman.

5.7 Evidence, confession and discrimination against women

The majority of death sentences for *zina* are handed down to women. One of the reasons for this is that in relation to the weight of evidence women and men are subjected to different requirements. According to scholars under the *Maliki* school of thought, but which appears to be contrary to some interpretations of the *Qur’an*, pregnancy is often considered sufficient evidence to condemn a woman for *zina*. However, the mere fact of her being pregnant does not mean that she has committed *zina*. Pregnancy can also occur as a result of non-consensual or coerced sexual relations. Amnesty International is concerned that the *Sharia* penal law in its application in Nigeria does not allow protection

from assault for women. On the other hand, for the man the oath denying him having had sexual intercourse with the woman is often considered sufficient proof of his innocence, unless four independent and reputable eye-witnesses declare his voluntary involvement in the act. If the man named as the father was to deny involvement the woman has no right to request any form of paternity test as proof of paternity as it is not usually accepted by the Nigerian *Sharia* courts.¹⁰⁶ This has a discriminatory effect on women and has led to women being disproportionately sentenced to death for *zina*.

- **HR**, 30, was charged with the capital offence of culpable homicide in *Sharia* Court 3 in Katsina State. She had a baby before marriage, but a few months later she married the alleged father. She was accused of the death of her six-month-old baby by the traditional leader of her village and taken to the police. She was remanded in Katsina prison awaiting trial. Her husband was charged but denied he was responsible for the pregnancy and charges against him were dropped. As of March 2003 HR did not have legal representation and was waiting a date for her trial. She has no news from her family.

Another problem with evidence in relation to women under the *Sharia* penal codes, is the issue of confession as evidence. According to the Evidence Act¹⁰⁷, used in conjunction with the Penal Code, a confession is not deemed to provide sufficient evidence to secure a conviction. However, under the Zamfara *Sharia* criminal procedure code for example, a confession in the absence of any corroborative evidence can be used to secure a conviction. Although both systems of criminal procedure impose formal duties on the police and courts to ensure that all evidence is obtained free of duress, the reality is that there is a long history of torture and ill treatment of people in custody by security forces across Nigeria and reports of pressure exercised by state-endorsed vigilante groups in order to enforce the new *Sharia* penal legislation¹⁰⁸. With respect specifically to women there is also strong social pressure exercised against women accused of trespassing rules and norms relating to their sexual/gender role in society. Confessions that have been obtained in such circumstances will increase the incidence of unsafe convictions.

Amnesty International fears that in reality this means that *Sharia* penal legislation as implemented in northern Nigeria does not protect women from possible sexual assault and coercion, instead it may lead to situations where it is the victim of assault who is punished.

- **Safiya Yakubu Hussaini**, 36, was sentenced to death by stoning for *zina* on 9 October 2001. She allegedly confessed having been made pregnant by Yakubu Abubakar, who was subsequently set free for 'lack of evidence'. The Court reportedly did not pursue the allegations of coercion.¹⁰⁹

The implication of the decision in the case of Safiya Yakubu Hussaini is that men who rape girls and women can go unpunished as long as they make sure that there are no witnesses to their crime. But women and girls who are victims of rape or coercion have their situation further compounded. The women will instead be subjected to potentially

false accusation of *zina*. This clearly violates the rights of women while protecting those who rape them.

5.8 Concerns regarding the competence of courts

The *Sharia* criminal procedure codes in Nigeria vary in their requirements regarding the number of judges which make up properly constituted courts and which can conduct the hearings and pass sentences in criminal, including capital, cases in the lower *Sharia* courts. On appeal the requirement is generally for three judges to hear a case. When a case is heard by one sole judge in the lower *Sharia* courts this raises the concern of a potential lack of guarantees for adequate safeguards of fair trial standards. Amnesty International fears that this could also distort the impartiality of the courts. Furthermore, judges ruling in capital cases are often the same judges who adjudicate in civil matters and have rarely received adequate training to judge criminal matters under the new criminal procedures.¹¹⁰ This can also have serious implications on the competence of the court.

- **Amina Lawal**, 30, was sentenced to death for *zina* by the lower *Sharia* court of Bakori in Katsina State. The court was composed of a sole judge¹¹¹ and Amina Lawal was sentenced to death by a lower *Sharia* court which was not properly constituted. The requirement according to the Katsina State Law Providing for the Establishment of *Sharia* Courts and Related Matters Law No. 5 of 2000 is that a lower *Sharia* court in Katsina State is properly constituted when one *Alkhali* (judge who is knowledgeable in *Sharia* law) sits with two members¹¹². Amnesty International considers that Amina Lawal's right to a fair trial by a competent court as stated in ICCPR Article 14(1) was violated.

6. The parliamentary debate

President Olusegun Obasanjo has on many occasions expressed his opposition to the death penalty in general, and has commented on the sentence of death by stoning under *Sharia* penal codes as “...we cannot imagine or envisage a Nigerian being stoned to death(...)it has never happened. May it never happen.”¹¹³ Furthermore, the issue has been increasingly highlighted in the media in the context of the constitutionality of the death penalty and the overcrowded detention centers and prisons. At the international level Amnesty International has raised awareness about the death penalty in Nigeria by campaigning on the cases of Amina Lawal, Safiya Yakubu Hussaini and Fatima Usman, among others, all of them sentenced to death by stoning for *zina* under different *Sharia* penal legislations.

As a result of the increased interest in and debate around the death penalty the President has initiated a parliamentary debate on the issue which commenced in Lagos on 13 November 2003.¹¹⁴ The Federal Government wants to consult with all stakeholders, and as was confirmed when an Amnesty International delegation met with the Nigerian Minister of Justice in October 2003, the debate is initially held at the state level in

different parts of the country in order to include the views from the different regions. As part of this debate the Minister of Justice inaugurated a panel of experts which will serve as the National Study Group on the Death Penalty. This group consists of 12 members representing different aspects of Nigerian society exemplified by men and women from law faculties, the human rights movement, the National Human Rights Commission, the Nigerian Police Force, the National Council for the Propagation and Defence of *Sharia*, the press and the Federal Ministry of Justice amongst others.¹¹⁵ At the end of June 2004 this group is to have reviewed the arguments for and against the abolition of the death penalty, consulted all stakeholders including having accepted memoranda from Nigerians on the issue of the death penalty and to have produced a policy document to guide the Federal Government. Amnesty International has been invited to provide documentation on the death penalty.

The initial consultation shows the expected split between different stakeholders, with the human rights groups opposing the death penalty and favoring abolition, while for example the Minister of State for Internal Affairs¹¹⁶, representatives of State Attorneys and the Nigerian Prisons Service have declared their support for the retention. For example, at a conference of the State Attorney Generals, the State Attorney of Bauchi State, is of the opinion that the abolition of the death penalty would invite a military coup and therefore be a threat to the path to democracy for Nigeria.¹¹⁷ The Comptroller-General of the Nigerian Prisons Service has furthermore stated its opposition to the abolition based on the argument that it would further aggravate the situation of overcrowded prisons in Nigeria.¹¹⁸ The Minister of State for Internal Affairs emphasized that for the death sentence to be used it has to be “*confirmed beyond all reasonable doubts that a person convicted in a case of capital offence is seen to be actually guilty. If this is the case, there is no reason why he should not be killed.*” Furthermore, the Honourable Justice Aruwa, of the Kogi State *Sharia* Court of Appeal supports the death penalty as a sentence for the most heinous crimes as long as “*the executions follow as swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve.*”¹¹⁹ However, according to Amnesty International, the argument based on deterrence cannot be upheld since scientific studies have shown that the death penalty has never been shown to deter crime more effectively than other punishments. In fact, a Nigerian study published in 1987 found no consistent pattern in the relationship between the average number of executions carried out and the incidence of either murder or armed robbery.¹²⁰

On the basis of the findings in this report, the death penalty in its application within the Penal Code, the Criminal Code and the *Sharia* penal codes is violating women’s human rights to fundamental fair trial and due process. Additionally, it has a discriminatory effect on women in certain cases and especially with regard to the offence of *zina*, under the *Sharia* penal codes. Amnesty International therefore urges the Nigerian Study Group on the Death Penalty to recommend the abolition of the death penalty to the Federal Government.

7. Conclusions

Amnesty International concludes on the application of the death penalty in Nigeria that, in some respects, it violates women's human rights and that in certain cases and for certain crimes it has a discriminatory effect on women in practice under all the penal codes.

For example, the category of offences for which the Nigerian laws allow the passing of the death penalty is wider than what is contained in international law, exemplified by the *Sharia* penal code offence of *zina*. Additionally, Nigerian courts are still passing the death penalty on juvenile offenders, which clearly violate the rights of the child.

Serious violations of the right of access to justice and the right to a fair trial and due process in the practice of the Penal Code, Criminal Code and *Sharia* penal law are common. This is especially serious in capital cases and can in pre-trial cases be exemplified by women who are awaiting trial for capital offences for up to 10 years as reported here. Additionally, women are being sentenced to the death penalty after trials in which their right of legal representation, right to a trial without undue delay, right to be informed in a language which they understand, the right to be heard in their presence amongst other rights are being violated. Furthermore, under the evidence rules in the *Maliki* interpretation of *Sharia* penal codes, women are facing discriminatory effects as a result of rules regarding the weight of their evidence. This has, as is shown in this report, led to the number of women sentenced to death for *zina* being disproportionately high. Women who are illiterate, have children outside marriage and are from socially disadvantaged groups risk having their rights to a fair trial and due process further compounded as shown by the cases Amnesty International has highlighted here and therefore the application of the death penalty in such cases in Nigeria has a discriminatory effect on women.

Amnesty International is also concerned by the lack of training of judges in the lower *Sharia* courts whose jurisdiction has been expanded from civil law to passing sentences in criminal cases.

States have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether these acts are perpetrated by the State or by private persons, and provide protection to victims. If the Government of Nigeria fails to protect women as potential victims of for example rape in circumstances of *zina* under *Sharia* penal codes as well as fails to punish the perpetrators it means that the Nigerian Government falls short of exercising due diligence.

In summary, the death penalty is a violation of the right to life and is the ultimate cruel, inhuman and degrading treatment. The fact that the death penalty in its application in Nigeria in certain circumstances violates women's human rights, has a discriminatory effect on women in certain cases and for certain criminal offences, combined with the fact that no scientific study has proved the death penalty to be a more effective deterrent

than any other punishments, Amnesty International urges the Nigerian Government to abolish the death penalty for all crimes.

8. Amnesty International's recommendations

8.1 Amnesty International's recommendations to the Federal Government of Nigeria

Amnesty International calls on the Federal Government of Nigeria to undertake the following:

- Take immediate steps to abolish the death penalty in law and practice. A culture of respect for human rights must include the abolition of the death penalty, which is the ultimate violation of one of the most fundamental human rights - the right to life.
- Ensure full implementation in domestic law of all international treaties signed and ratified by Nigeria as well as relevant UN standards, rules and declarations.
- Respect and promote international standards of fair trial and due process.
- Pending abolition, immediately impose a moratorium on pending executions and commute all death sentences under Nigerian criminal law and *Sharia* penal law.
- Ratify international human rights instruments such as the two Optional Protocols to the ICCPR, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, and the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights.
- Immediately remove any death sentences passed on persons under the age of 18 at the time of commission of the crime, including the case documented in this report.
- Introduce a legal reform which aims at harmonizing the Penal Code, the Criminal Code and *Sharia* penal law in order for them to conform with international human rights law and standards.
- Review or amend legislation inconsistent with international human rights obligations.
- Reform and remove obstacles to the administration of justice system in order to respect the right to liberty of suspects.
- Ensure that rights of girls and women who are amongst the most vulnerable members of society are fully protected against discriminatory laws and practices. In order to guarantee this protection Amnesty International calls for reforming the law by including provisions in the law of evidence that includes greater protection for girls and women, especially by addressing their rights as victims of rape to a remedy.
- Introduce measures ensuring that all women and men have access to free legal representation from the moment of arrest and detention and through to the appellate stage of the proceedings.
- Introduce training initiatives for law enforcement personnel, prosecutors and judges within the legal systems of Nigeria aiming at strengthening the respect for human rights according to international human rights treaties ratified by Nigeria, particularly the provisions of these instruments that forbid beatings, use of excessive force, and arbitrary arrest and detention.
- Undertake independent inspection of places of detention.

- Ensure that detainees are given immediate access to lawyers of their choice, medical assistance and their family.
- Release immediately from prison those arbitrarily detained.
- Give prompt and fair trial to those presently being held.
- Undertake swift and impartial investigations into any allegations by defendants of ill treatment. The findings and methods of such investigations should be made public, and those suspected to be responsible should be brought to justice.
- Conditions of prisons should be improved and minimum standards of healthy conditions, good ventilation, lighting and maximum space should be provided. Sanitary installations should be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. Reasonable food, good drinking water and medical services should also be provided.

8.2 Amnesty International's recommendations to the Nigerian judiciary

Amnesty International calls on the Nigerian judiciary to ensure:

- The use of and reference to international human rights obligations in their decisions in order to ensure that the application of Nigerian law follows the human rights obligations of Nigeria.

8.3 Amnesty International's recommendations to the Nigerian law enforcement institutions

Amnesty International calls on the Nigerian law enforcement officials to:

- Ensure that they inquire immediately into, and document on arrest or first contact, the age of any suspect who appears to be younger than 18. Persons under 18 should be enjoying all their rights to proper treatment under Article 37 of the Convention on the Rights of the Child and the Standard Minimum Rules for the Administration of Juvenile Justice.¹²¹
- Ensure that documentation in cases of people incarcerated for capital offences is kept in a safe place and duly passed on to the relevant officials in the course of the proceedings.

Appendix 1. Persons on death row in Nigeria as of July 2003¹²²

State	M	F	Total
Adamawa	1	-	1
Akwa-Ibom	28	-	28
Bauchi	3	-	3
Benue	1	-	1
Borno	3	-	3
Cross River	8	-	8
Delta	37	-	37
Edo	29	2	31
Enugu	52	1	53
Gombe	3	-	3
Jigawa	4	-	4
Kaduna	50	-	50
Kano	5	-	5
Katsina	-	1	1
Kebbi	6	1	7
Kogi	3	-	3
Kwara	1	-	1
Lagos	16	-	16
Ogun	106	1	107
Plateau	40	1	41
Rivers	60	4	64
Taraba	10	-	10
Yobe	6	-	6
Zamfara	4	-	4
Total	476	11	487

(Source: PRAWA, November 2003)

ENDNOTES

¹ Nigeria is a Federal Republic of 36 states and one Federal Capital Territory (Abuja). The states are further subdivided into 589 local government areas. The Federal Government defines and monitors national policy, while state and local governments are charged with implementing such policies. However, each state has its own government, laws and judiciary.

² Interview with Dr Agomoh, former Executive Director of PRAWA, 11 November 2003.

³ In a recent reference the Federal Government agrees that the number of condemned people awaiting execution is 487, see The Guardian, *Government still to decide on the death penalty, says Justice Minister*, as posted on the URL <http://ngrguardiannews.com/> on 14 November 2003.

⁴ To the knowledge of Amnesty International the last execution took place on 3 January 2001 in Katsina State when M. Sani Yakubu Rodi (m) was hanged for the murder of a woman and her children. This was the first execution since Katsina State introduced the new *Sharia* Law to make provision for the Establishment of Sharia Courts and related matters Law No. 5 of 2000 and the Law to provide for the Adoption of Islamic Penal System for the State, Law No. 6 of 2000 on 31 July 2000. Amnesty International, *West Africa: Time to abolish the death penalty*, AI Index AFR 05/003/2003. No official executions were carried out in 2003.

⁵ Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara.

⁶ Each state shares a similar definition of *zina*, see for example Section 121 of The *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State.

⁷ Two of the men allegedly involved in these cases were acquitted, on the basis of swearing on the *Qur'an* and for 'lack of evidence'. They are Yahaya Muhammad in the case of Amina Lawal and Yakubu Abubakar in the case of Safiya Yakubu Hussaini.

⁸ See p. 11.

⁹ Please see C96 of the Beijing Declaration and Platform for Action. UN Doc E.96.IV.13.

¹⁰ African Commission on Human and Peoples' Rights, press release 10 October 2003.

¹¹ Amnesty International, AI Index AFR 05/003/2003, *op. cit.*, p. 1.

¹² William A. Schabas, *The Abolition of the Death Penalty in International Law*, second edition, Cambridge University Press, 1997, p. 20.

¹³ Article 6(2) of the ICCPR, and Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. The notion of "*the most serious crimes*" is interpreted to "*not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, non-violent religious practice or expression of conscience and sexual relations between consenting adults*" by the Commission on Human Rights Resolution 2003/67 on the question of the death penalty.

¹⁴ Nigeria ratified the African Charter on Human and Peoples' Rights on 22 June 1983.

¹⁵ Nigeria ratified the Convention on the Rights of the Child on 19 April 1991.

¹⁶ Roger Hood, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, 2002, p. 230.

¹⁷ Amnesty International, AFR 05/003/2003, *op. cit.*, p. 3.

¹⁸ African Commission on Human and Peoples' Rights Resolution urging the states to envisage a moratorium on the death penalty, as adopted at its 26th ordinary session, Kigali, 1999. See http://www.achpr.org/Recommendations___Resolutions-_ACHPR_88-02.pdf

¹⁹ The Constitution, Section 17(2)(a) states "*Every citizen shall have equality of rights, obligations and opportunities before the law*".

²⁰ Nigeria ratified Convention on the Elimination of All Forms of Discrimination against Women on 13 June 1985.

²¹ The corresponding figure for men was 26.5 per cent in 2001, according to the Nigeria Data Profile as published on URL http://www.dcc-sy.com/pkg8/w_atlas/countries/Nigeria.htm

²² UNFPA, State of World Population: Nigeria, as published in *Campaign to end fistula*, URL <http://www.unfpa.org/fistula/docs/nigeria.pdf>

²³ An abortion is a criminal offence regardless of the duration of the pregnancy under the Penal Code and the Criminal Code unless it is performed to save a pregnant woman's life.

²⁴ International Planned Parenthood Federation – Africa Region, *Unsafe Abortion and Post-abortion Family Planning in Africa*, London, 1994.

²⁵ Although the customary law system is part of the Nigerian pluralistic legal system, it is not part of the analysis of this report.

²⁶ The State Government of Gombe has assented to the *Sharia* bill but has not yet implemented *Sharia* penal law within its legal system. (Please see Daily Trust, *Cleric wants Sharia in Gombe*, as posted on URL <http://www.mtrustonline.com/dailytrust> on 12 November 2003.)

²⁷ The geographical areas of jurisdiction of the Penal Code and the Criminal Code are corresponding to the different administrative areas at the time of independence.

²⁸ This was part of a government policy acknowledging the large Muslim population of northern Nigeria and has to be seen within the historical backdrop of the British indirect rule of northern Nigeria. Initially when the British occupied northern Nigeria they did not interfere with the existing justice system. Instead the courts of the *alkalis* (Islamic judges, *kadis*) and emirs were left intact and continued to apply the *Sharia* law in both civil and criminal matters as long as it was compatible with enacted, written laws and not repugnant to natural justice, equity or good conscience. The introduction, in 1904, of a Criminal Code in northern Nigeria, did not entail the abolition of *Sharia* criminal law and allowed the so called native courts to try acts under Islamic law, regardless of whether or not they were punishable under the Criminal Code. The *Sharia* courts would sentence persons for *zina* offences, although this was not mentioned in the Criminal Code, and would try persons for homicide, according to the *Maliki* school of thought, in disregard of the relevant provisions of the Criminal Code. Thus Islamic law, based on the *Maliki* school of thought, coexisted with enacted criminal law, a situation which did not come to an end until 1960 with the coming into force of the 1959 Penal Code for northern Nigeria. The main effect it had on the application of *Maliki* Islamic law were the *Sharia* penalties; the British abolished amputation and other penalties under Islamic law such as stoning and crucifixion, but still allowed flogging. It included some provisions that were based on *Sharia* criminal law and were meant to pay respect to the Muslim population. Thus, *zina* and drinking alcohol remained punishable by law for Muslims.

²⁹ It is important to distinguish *Sharia* law as a religious legal system, as opposed to the *Sharia* penal law of Nigeria. The former lays down rules regarding a Muslim person's personal life with regard to worship, ritual, conduct, as well as legal matters such as contracts, marriage, inheritance and divorce. This religious legal system regulates more or less what is known as family law as well as contract law and has always applied to people of Muslim faith in northern Nigeria. These rules stem from the four sources of *Sharia* law, that are recognized by all schools of jurisprudence, namely the *Holy Qur'an*, *sunna* (normative legal custom), *qiyas* (analogical reasoning) and *ijma* (consensus of the jurisconsults). The *Sharia* penal codes, however, introduce criminal offences such as *zina*, murder, rape, and robbery as part of the *Sharia* legal system.

³⁰ Akintunde Olusegun Obilade, *The Nigerian Legal System*, Spectrum, 2002, p. 100.

³¹ In some states, such as Katsina, there is no written criminal procedure code and codes have been criticized for being drawn up too hastily leaving many definitions vague and codes incomplete. In addition, separate laws are used to officially introduce new pieces of legislation and abrogate the validity of previous legislation.

³² This Code remained in force until the recent enactment of *Sharia* criminal codes were introduced as the penal codes for Muslims of the northern States. Prof. Ruud Peters, *The Reintroduction of Islamic*

Criminal Law in Northern Nigeria: a study conducted on behalf of the European Commission, Lagos 2001, p. 4.

³³ *Hudud* punishments are regarded as being penalties for crimes against religion, as opposed to private vengeance which is the other group of penalties under Islamic law. The *hudud* punishments are representative of certain acts which have been forbidden or sanctioned by punishments in the *Qur'an* and are regarded as crimes against religion. These are *zina*, false accusation of *zina*, drinking wine, theft, and highway robbery. See Joseph Schacht, *op. cit.*, p. 175.

³⁴ The punishment of death by stoning for *zina* is based on the *sunna* source of *Sharia* law, in other words not the *Qur'an*, whereas flogging for the same offence is based on the *Qur'an*.

³⁵ See p. 10 and endnote 59.

³⁶ Akintunde Olusegun Obilade, *op. cit.*, p. 169.

³⁷ Section 233(2)(a) the *Sharia* Criminal Procedure Code Law 2000 of Sokoto State.

³⁸ If the person does not appeal the case to the Federal level he/she can turn to the State Governor who can exercise his prerogative of mercy to commute the sentence.

³⁹ *Kalu vs. The State* (1998) 12SCNJ.

⁴⁰ Akintunde Olusegun Obilade, *op. cit.*, p. 5.

⁴¹ Section 4 of the Constitution.

⁴² Section 35(4) of the Constitution.

⁴³ See pp. 15-16. This is especially important because women and men of socially disadvantaged groups are often discriminated against within the justice system owing to the fact that they lack access to economic resources and frequently cannot afford legal assistance. These particular circumstances are why the entitlement to free legal representation, where the defendant is lacking financial means is protected by the ICCPR Article 14(3). Another important regulation regarding the application of the death penalty is the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. This set of principles also set the standard for the right of anyone facing a case of capital punishment to adequate assistance at all stages of the proceedings. Additionally, the Beijing Declaration and Platform for Action (Article 61(a)) calls on governments to “ensure access to free or low cost legal services, including legal literacy, especially designed to reach women living in poverty”.

⁴⁴ The Criminal Code introduces the death penalty for offences like treachery (49A(1)), armed robbery (402B) and murder (319(1)).

⁴⁵ The method of execution depends on the category of criminal offence.

⁴⁶ The Robbery and Firearms Decree No. 5 of 1984 and Section 401 of the Criminal Code.

⁴⁷ Sections 37 and 38 of the Criminal Code and Sections 410 and 411 of the Penal Code.

⁴⁸ Section 208 of the Criminal Code and Section 214 of the Penal Code.

⁴⁹ Section 159(2) of the Penal Code.

⁵⁰ Section 227 of the Penal Code.

⁵¹ Section 39(1) of Criminal Code.

⁵² It should be noted here that to date Amnesty International has not been able to acquire all *Sharia* penal codes and criminal procedure codes of the states which have introduced *Sharia* penal codes. The reason for this is twofold; firstly, acts are not always properly published, and secondly, the ones which are not necessarily made available to the public. Hence we refer to the codes which Amnesty International has access to. These are from the States of Kaduna, Kano, Katsina (the Law to make Provision for the Establishment of *Sharia* Courts and related matters Law No. 5 of 2000 and the Law to provide for the Adoption of Islamic Penal System for the State Law No. 6 of 2000), Sokoto and Zamfara.

⁵³ Sections 126 and 127 of the *Sharia* Penal Code Law 2000 of Zamfara State; 128 and 129 of the *Sharia* Penal Code Law of Sokoto State; Sections 121 and 122 of the *Sharia* Penal and Criminal

Procedure Codes 2002 of Kaduna State; and Sections 124 and 125 of the *Sharia* Penal Code Law 2000 of Kano State.

⁵⁴ Note that the death sentence is applied if the defendant is married and the subject for the act is somebody else than the spouse. Hence, rape within marriage is not a criminal offence within the *Sharia* penal system. Sections 128 and 129 of the *Sharia* Penal Code Law 2000 of Zamfara State; Sections 130 and 131 of the *Sharia* Penal Code Law of Sokoto State; Sections 123 and 124 of the *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State; and Sections 126 and 127 of the *Sharia* Penal Code Law 2000 of Kano State.

⁵⁵ Sections 130 and 131 of the *Sharia* Penal Code Law 2000 of Zamfara State; Sections 132 and 133 of the *Sharia* Penal Code Law of Sokoto State; Sections 125 and 126 of the *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State, note that according to the *Sharia* Penal Code of Kaduna the act of “sodomy” is defined as “*whoever has anal coitus with any male person is said to commit the offence of sodomy*”; and Sections 128 and 129 of the *Sharia* Penal Code Law 2000 of Kano State, where the act is sanctioned by death by stoning if the defendant is or has been married. In Kano the *Sharia* penal code defines “*lesbianism*” as “*whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another commits the offence of lesbianism*” and is sanctioned in the same way as “*sodomy*”, see Sections 183 and 184 of the same code.

⁵⁶ The death penalty applies if the defendant is married, see Sections 132 and 133 of the *Sharia* Penal Code Law 2000 of Zamfara State; Sections 134 and 135 of the *Sharia* Penal Code Law of Sokoto State; and Sections 127 and 128 of the *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State.

⁵⁷ Note that for robbery to be punishable by the death penalty the defendant must have caused death in the process of the robbery. See Sections 152 and 153 of the *Sharia* Penal Code Law 2000 of Zamfara State; Sections 154 and 155 of the *Sharia* Penal Code Law of Sokoto State; Sections 147 and 148 of the *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State; and Sections 139 and 140 of the *Sharia* Penal Code Law 2000 of Kano State.

⁵⁸ Sections 199 and 200 of the *Sharia* Penal Code Law 2000 of Zamfara State; Sections 201 and 202 of the *Sharia* Penal Code Law of Sokoto State; Sections 192 and 193 of the *Sharia* Penal and Criminal Procedure Codes 2002 of Kaduna State; and Sections 142 and 143 of the *Sharia* Penal Code Law 2000 of Kano State.

⁵⁹ *Qisas* in short means the right of relatives to choose that a deliberate offender be punished in the same manner as his or her act, in certain cases of murder or grievous bodily harm.

⁶⁰ Exemplified by offences relating to ordeal, witchcraft and “*juju*” (Sections 408-413) in the *Sharia* Penal Code Law 2000 of Sokoto State, and Sections 405-409 of the *Sharia* Penal Code Law 2000 of Zamfara State.

⁶¹ The word *zina*, both in general use and as a term defined in the *Sharia* penal codes does not accurately translate as “adultery”. *Zina* is intended to cover consensual heterosexual relations where neither partner is married, where one or both are married to another, or where one or both are divorced. The punishments vary according to marital status.

⁶² Under the Kaduna State *Sharia* Penal and Criminal Procedure Codes 2002, Section 122 unmarried women can only be sentenced to flogging, whereas unmarried men are both sentenced to flogging and imprisonment for *zina*.

⁶³ As envisioned by Prof Schabas, the abolition of the death penalty will soon attain the status of non-derogative international rules of international law, so called *jus cogens*.

⁶⁴ Article 6(1) “*Every human being has the inherent right to life....No one shall be arbitrarily deprived of his life.*”

⁶⁵ Article 4 “*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*”

⁶⁶ Article 6 (1) “States Parties recognize that every child has the inherent right to life.”

⁶⁷ Article 6(2) of the ICCPR reads “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes...”

⁶⁸ Human Rights Committee General Comment 6, para 7.

⁶⁹ UN document

<http://www.unhchr.ch/huridocda/huridoca.nsf/6d123295325517b2c12569910034dc4c/cc0e2a6d48fbc470c1256d24003274d6?OpenDocument> E/CN.4/RES/2003/67/add.2, 9 January 2003.

⁷⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the 59th session of the UN Commission on Human Rights, UN document E/CN.4/2003/3/Add.1 on Nigeria.

⁷¹ Concluding observations of the Human Rights Committee on the report of Sudan submitted under Article 40 of the Covenant, UN document No. CCPR/C/79/Add.85, 19 November 1997, para. 8.

⁷² Human Rights Committee General Comment 6, para 7.

⁷³ Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.

⁷⁴ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Safeguard 3.

⁷⁵ See the Penal Code Sections 83 and 97, and the Criminal Code Sections 221, 232, 233, 234, 235 and 239.

⁷⁶ See Section 232 of the Penal Code. “Whoever voluntarily causes a woman with child to miscarry shall, if the miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment for a term which may extend to fourteen years or with fine or with both.” The explanatory note to this explains that a woman who causes herself to miscarry is within the meaning of this section.

⁷⁷ See the Penal Code Sections 83 and 97, and the Criminal Code Sections 221, 232, 233, 234, 235 and 239.

⁷⁸ Names have been truncated in order to protect the women interviewed.

⁷⁹ See Article 14. The protocol was adopted in Maputo on 11 July 2003, and on 16 December 2003 Nigeria signed but has as of 12 January 2004 not yet ratified the protocol.

⁸⁰ See for example, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women Article 14(2)(c) and CEDAW General Recommendation No. 24; UN Doc. A/55/38, 2000, para.180 (Jordan); UN Doc. A/55/38, 2000, (Myanmar) paras. 129–130; UN Doc. A/55/38/Rev.1, 1998, (Panama) para. 201; UN Doc. A/52/38/Rev.1, 1997, (Venezuela) para. 236.

⁸¹ Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 24, Paragraph 31(c) “When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion”. CEDAW has asked states parties to review legislation making abortion illegal.

See for example, Argentina, 23/07/97, UN Doc. A/52/38 Rev.1, Part II, para. 319; Cameroon, 26/06/2000, UN Doc. A/55/38, para. 60; Ireland, 01/07/99, UN Doc. A/54/38, para. 186; Jordan, 27/01/2000, UN Doc. A/55/38, para. 181; Nepal, 01/07/99, UN Doc. A/54/38, paras. 139 and 148. In several sets of concluding observations, the Human Rights Committee has criticized legislation that criminalizes or severely restricts access to abortion. (See for example, Venezuela, 26/04/2001, UN Doc. CCPR/CO /71/V EN, para. 19; Kuwait, 19/07/2000, UN Doc. CCPR/CO /69/KWT, A /55/40, para. 15; Lesotho, 08/04/99, UN Doc. CCPR/C/79/Add.106, para. 11) The Human Rights Committee has issued more specific recommendations to several states parties advising that they review or amend legislation criminalizing abortion. (See for example, Guatemala, 27/08/2001, UN Doc. CCPR/CO /72/G TM, para. 19; Kuwait, 19/07/2000, UN Doc. CCPR/CO/69/KW T, A/55/40, para. 16; Tanzania, 18/08/98, UN Doc. CCPR/C/79/Add.97, para. 15).

⁸² Dr Muhammed Tawfiq Ladan, *An overview of state obligations in respect of children's rights in Nigeria*, unpublished paper, p. 9.

⁸³ The Constitution Section 36(6)(c).

⁸⁴ 1985 1 N.S.C.C. at 144.

⁸⁵ 1988 3 N.W.L.R at 84.

⁸⁶ Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

⁸⁷ Adopted by the African Commission on Human and Peoples' Rights during its 33rd Ordinary session from 15 to 29 May 2003 in Niamey, Niger.

⁸⁸ *McLawrence v. Jamaica*, UN Doc CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6.

⁸⁹ The Guardian, *Government yet to abolish the death penalty, says Justice Minister*, as published on the URL <http://nrguardiannews.com/> on 14 November 2003.

⁹⁰ Daily Trust, *25,000 suspects await trial – Minister, as published on URL* <http://www.mtrustonline.com/dailytrust/> on 19 November 2003.

⁹¹ *Smith v. Jamaica*, UN Doc.CCPR/C/47/D/282/1988, 12 May 1993, para 10.6.

⁹² The report was made available to Amnesty International by the Special Rapporteur on Children of the Nigerian National Human Rights Commission. The aim of the visit was to verify information from reports alleging that several children and young offenders had been incarcerated in the Kirikiri and Ikoyi prisons, Lagos State.

⁹³ See Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa vs. Sudan (Communications No. 48/90, 50/91, 52/91 and 89/93).

⁹⁴ Communications No. 48/90, 50/91, 52/91 and 89/93, para 10.

⁹⁵ Contrary to today's *Sharia* penal codes, classical *Sharia* law required four witnesses to be produced in order to prove a woman guilty of *zina*. The reason for this requirement is to protect women from false accusations of having committed *zina*. This is according to the *Qur'an* Surah An-Nur 24:23 "*And those who launch a charge against chaste women and produce not four witnesses flog them with eighty stripes and reject their evidence ever after for such men are wicked transgressors*". Hence, the *Maliki* interpretation as represented by the *Sharia* penal codes in northern Nigeria appears to be discriminating against women in the sense that it appears to be easier to convict a woman of the offence of *zina*. See also Iman, *The stipulated punishments (hudud) in Sharia, and their significance*, unpublished paper, 8 July 2002.

⁹⁶ "*A person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law.*"

⁹⁷ The *Sharia* penal code of Sokoto State establishes death by stoning for *zina* or also termed as "*adultery*" in *Sharia* penal law. Consensual sexual relations between people over the age of consent is not punishable at all in the Criminal Code of southern Nigeria.

⁹⁸ Amnesty International, *Nigeria: BAOBAB for Women's Human Rights and Amnesty International Joint Statement on the implementation of new Sharia-based penal codes in northern Nigeria*, AI Index AFR 44/008/2002 - News Service Nr. 54.

⁹⁹ For instance under the Sokoto *Sharia* Penal Code Law 2000, in cases of *hudud* the act is only regarded as an offence if the child is above the age of *taklif*, which is unspecific and does not define the actual age. Instead the *taklif* is defined as "*the state of attaining legal and religious responsibility by both age and mental soundness*". See Chapter I and Section 73. The same situation applies to the Zamfara *Sharia* Penal Codes, see Sections 47 and 71.

¹⁰⁰ Section 191(1) *Sharia* Criminal Procedure Code Law 2000, Sokoto State.

¹⁰¹ As a result of the international interest and support for women charged with offences under *Sharia* penal law, a Nigerian women's human rights organizations formed a coalition which provided legal representation to Amina Lawal at the appeal stages of her case.

¹⁰² Amnesty International, *Nigeria: Amina Lawal's death sentence quashed at last but questions remain about discriminatory legislation*, AI Index AFR 44/032/2003 - News Service No. 222.

¹⁰³ Article 36(6)(e) of the Constitution.

¹⁰⁴ Article 35(4) of the Constitution.

¹⁰⁵ Human Rights Committee General Comment 13, para 11.

¹⁰⁶ In the judgment in the case of Amina Lawal, the *Sharia* Court of Appeal in Katsina State has stated that they do not consider pregnancy outside marriage alone to be sufficient proof of *zina* and cites an unknown source which claims that a divorcee can be said to be pregnant for five years after divorce.

¹⁰⁷ The Evidence Act, as amended by Decree No. 61 of 1991, Sections 27-32.

¹⁰⁸ Amnesty International, *Nigeria: Security forces: Serving to protect and respect human rights?*, AI Index AFR 44/023/2002, pp. 185-186.

¹⁰⁹ Amnesty International WARAN action (08/01).

¹¹⁰ R. Peters, *op. cit.*, p. 16.

¹¹¹ Amnesty International, *Nigeria: New Sharia penal legislation. Amina Lawal – the details of the case. Update 8*, AI Index 44/033/2003.

¹¹² Section 4(1) "A *Sharia* Court shall be properly constituted if presided over by an Alkali sitting with two members".

¹¹³ President Obasanjo stated this at a public appearance on 1 October 2002.

¹¹⁴ The Guardian, *op. cit.*

¹¹⁵ The 12 members are: Prof Yomi Dinakin, Faculty of Law, Ondo State University; Saudatu Mahdi of Womens' Rights Advancement Project Alternative, Lagos; Oluyemisi Bamgbose, Faculty of Law, University of Ibadan; Bukhari Bello, National Human Rights Commission; a representative of the Nigerian Police Force not yet filled at the writing of this report; a representative of the Nigerian Prison Service, not yet filled at the writing of this report; Father John Patrick Ngoyi, the Catholic Justice and Peace Commission; Muhammed Inuwa, National Council for the Propagation and defence of *Sharia*; Eze Anaba, the Vanguard newspaper; Dr Tawfig Ladan, Faculty of Law, Ahmadu Bello University; Yemi Akinseye-George, Federal Ministry of Justice; and Olawale Fapohunda, Legal Resources Consortium.

¹¹⁶ This Day, *Death Penalty Stays, says Minister*. As published on URL www.thisdayonline.com on 20 November 2003.

¹¹⁷ Vanguard, *Bauchi Attorney General Warns Against Abolition of Death Penalty* as posted on URL <http://www.vanguardngr.com/> on 10 November 2003.

¹¹⁸ The Guardian, *op. cit.*

¹¹⁹ This Day, *Death penalty appropriate for Heinous Crimes*, as posted on URL <http://www.thisdayonline.com/law/20031104law07.html> on 4 November 2003.

¹²⁰ A. A. Adeyemi, *Death penalty: criminological perspectives: The Nigerian situation*. *Revue Internationale de Droit Penal*, 3e et 4e trimesters 1987, pp. 485-502.

¹²¹ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 'The Beijing Rules', as adopted by the UN General Assembly resolution 40/33 of 29 November 1985.

¹²² PRAWA, November 2003.