



# ROUNDTABLE ON REVISITING DEATH PENALTY IN NIGERIA

August 10th 2010

## COMMUNIQUE

### Introduction

For well over three decades now, efforts have been made in Nigeria to consider the expansion of the use or extinction/abolition of the death penalty. The extension of the death penalty to drugs caused public outcry, particularly when it was applied retroactively to execute two citizens who committed the offence of drug trafficking before the promulgation of the anti-drug trafficking decree, and it eventually became one of the reasons adduced for the overthrow of the Buhari/Idiagbon military regime in 1984. Also, effort to re-extend it to drugs and narcotic offences was brought up for a vote by members of the public at a national conference on drugs and narcotics in Lagos in 1990; but it was fiercely resisted and the proposal was resoundingly defeated in the vote then cast by members of the public participating at the Conference, led by the Nigerian Bar Association, the Nigerian Labour Congress, and the Market Women's Association.

International global trend on the imposition of death penalty reveal the following:

- Currently of the 192 countries on the planet, 111 countries have de facto or de jure abolished the death penalty.
- Among countries around the world, almost all European and many Pacific Area States have abolished death penalty.
- In Latin America, most states have completely abolished the use of death penalty, while some countries, such as Brazil, allow for capital punishment only in exceptional situations, such as treason committed during wartime.
- The United States (the Federal Government and 35 of the States), Guatemala, most of the Caribbean and the majority of democracies in Asia (e.g. Japan and India) still retain it.

In Africa, the following statistics is obtainable:

- 18 African Countries that still retain the death penalty include: Botswana, Cameroon, Chad, Comoros, DR Congo, Egypt, Equatorial Guinea, Ethiopia, Guinea, Lesotho, Liberia, Libya, Nigeria, Sierra Leone, Somalia, Sudan, Uganda, and Zimbabwe.
- 14 African Countries that have abolished the death penalty include: Cape Verde (1981), Mozambique (1990), Namibia (1990), Sao Tome & Principe (1990), Angola (1992), Guinea Bissau (1993), Seychelles (1993), Mauritius (1995), Djibouti (1995), South Africa (1997), Cote D'Ivoire (2000), Senegal (2004) Rwanda (2007), Burundi (2009).
- 21 de facto Abolitionist Countries include: Algeria (1993), Benin (1993), Burkina Faso (1988), Central African Republic (1981), Congo (1982), Eritrea (1989), Gabon (1981), Ghana (1993), Gambia (1981), Kenya (1987), Madagascar (1958), Malawi (1992), Mali (1980), Mauritania (1989), Morocco (1993), Niger (1976), Swaziland (1989), Togo (1979), Tunisia (1991), Tanzania (1995) Zambia (1997).
- Only 10 African countries have ratified the Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty: Cape Verde (2000), Djibouti (2002), Guinea-Bissau (2000), Liberia (2005), Mozambique (1993), Namibia (2004), Rwanda (2008), Sao Tome & Principe (2000), Seychelles (2004), South Africa (2002). Nigeria is not a party to the Protocol.

In furtherance of its determination to bring contemporary issues to public discuss and arrive at practical recommendations that will move the nation forward, the Nigerian Institute of Advanced Legal Studies, on the 10<sup>th</sup> of August 2010, held a one day Roundtable on Revisiting Death Penalty in Nigeria. The Keynote address was delivered by Professor Adedokun Adeyemi FNIALS, former Dean of Law University of Lagos, a distinguished academic, and criminologist. Other paper presenters include: Professor Karisu Chukkol, Faculty of Law, Ahmadu Bello University, Zaria; Professor Cyprain Okonkwo SAN, Nigerian Law Reform Commission; Professor N. Udombana, Dean, Faculty of Law, Akwa Ibom State University, Uyo; Chief Awa U. Kalu SAN; Professor Nnamdi Aduba, Nigerian Institute of Advanced Legal Studies; Mrs. Catherine Atoki, Chairperson, Committee Against Torture in Africa, Gbenga Atoki Chambers and Dr. I. A. Olatunbosun, Vice Dean, Faculty of Law, Obafemi Awolowo University, Ile Ife. Other participants included representatives from the Nigerian Army, Nigerian Navy, Ministries of Justice from across the federation, Ministry of Defence, the Judiciary, legal practitioners, the academia, NGOs, media houses and the public.

### Observations:

The Roundtable made the following observations:

1. The offences that attract the death penalty under our law presently are: Murder (sections 319 of the Criminal Code and 221 Penal Code); Treason (sections 37 and 38 of the Criminal Code and section 411 of the Penal Code); Treachery (section 49A of the Criminal Code); Giving False Evidence leading to the conviction and execution of an innocent person (section 159 of the Penal Code); Robbery with Firearms or Offensive Weapons (section 1 of the Robbery and Firearms Act); Trial by Ordeal Resulting in Death (sections 208 of the Criminal Code and section 214 of the Penal Code); Abatement of Suicide by a Person Below 18 years of Age or by an Insane or Intoxicated Person (section 227 of the Penal Code); Adultery for a Muhsin and Allied Offences such as Incest or Rape (Shari'a Penal Codes such as Zamfara's); Homicide where the relations of the deceased elect that the offender be put to death (Sharia Penal Statutes); Homicide Committed at an Attempted Robbery (Sharia Penal Statutes); Homicide under Islamic law where the Victim was Lured by his Assailant (Gheelah); Aiding the Enemy and Cowardly behaviour by Members of the Armed Forces (sections 45, 46 and 47 of the Armed Forces Act).
2. The offences previously punishable with death but which are no longer so, include: Counterfeiting of a Nigerian Banknote or Coin; Wilful Act of Sabotage which Obstructs or Prevents the Production or Distribution of Petroleum Products in Nigeria; Arson of Public Buildings, Offices, Ships, Aircrafts, etc.; Tampering with Oil Pipelines; Fraudulent Importation of Minerals or Mineral Oil; Tampering with Electric and Telephone Cables; Unlawful dealing in Petroleum Products and Offences in relation to Indian Hemp (under the Indian Hemp Act, 1966).
3. Death penalty was alien to the traditional Nigerian society, and therefore was an imposition of colonialism. Imprisonment was also unknown to our traditional system of criminal justice.
4. International human rights law appears to defer to sovereignty by not placing an absolute ban on death penalty. Human rights treaties generally limit the scope of applicability and State practice is not uniform. Such treaty provisions include:
  - a. Article 3 of the Universal Declaration of Human Rights (UDHR) provides that "everyone has the right to life, liberty and security of person", but makes no reference to the death penalty.
  - b. Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that "every human being has the inherent right to life. This shall

- be protected by law. No one shall be arbitrarily deprived of it” The ICCPR allows for the imposition of the death penalty so long as it is not arbitrary
- c. By Article 6(1) of the ICCPR, the death sentence is acceptable as long as it is not imposed on someone below the age of 18 years of age and a pregnant woman is not executed.
  - d. The Convention on the Rights of the Child merely prohibits the imposition of death sentence on persons below the age of 18 (Article 37(a)).
  - e. The Second Optional Protocol to the ICCPR on the Abolition of the Death Penalty, adopted in 1989 provides for the total abolition of the death penalty but allows States Parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol (Article 2(1)). Only 72 countries, excluding Nigeria have so far ratified the Optional Protocol (as at 8 Aug. 2010), which is not enough to crystallize into international custom.
5. International Humanitarian Law (IHL) does not prohibit the death penalty, but merely provides rules regarding its imposition in time of war:
    - a. The Third Geneva Convention protects prisoners of war by limiting the scope of death penalty on them; it provides that where a death sentence has been passed, the execution shall not be carried out before the expiration of a period of at least six months (Arts. 100 & 101).
    - b. The International Criminal Tribunal for the former Yugoslavia (ICTY) Statute (1993) & International Criminal Tribunal for Rwanda (ICTR) Statute (1994) exclude the death penalty for crimes under those statutes
    - c. The International Criminal Court (ICC) Statute (1998) excludes the death penalty from the punishments which that Court is authorized to impose, even though the Court has jurisdiction over extremely grave crimes: crimes against humanity, genocide and war crimes.
    - d. In December 2007 and 2008 the General Assembly adopted Resolutions 62/149 and 63/168, calling for a moratorium on the use of the death penalty.
  6. The debate on the death penalty in our criminal justice system rages between the Abolitionists and the Retentionists. Their views are stated as follows:
    - A. The Abolitionists:
      - i. The death penalty is an inhuman and degrading treatment. The Mosaic Law “thou shall not kill” should apply with equal force to both the State and individuals.
      - ii. The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state. This cruel, inhuman and degrading punishment is done in the name of justice.
      - iii. The death Penalty is based on the “primitive” instinct of revenge; hence it is unscientific and does not conform to the current penological studies of the aim of punishment, for instance, the ultimate aim of punishment is not to inflict pain on the convicts, but to help mend them and imbibe society's better values and goals. This is also based on the belief that crime is pathological.
      - iv. Executing the convicts may not serve any general deterrence in homicide cases which is usually committed by those in highly charged emotional states, for instance, loss of self control due to provocation.
      - v. Executing a convicted murderer will not bring back his victim. Under Islamic law, the relations of the deceased may elect to rather be compensated in monetary terms or sentence to term of imprisonment under ta'azir .
      - vi. Many incidents of robbery may result in the deaths of the victims principally because of attempts by the robbers to hide evidence.
      - vii. A sentence of death if carried out is irreversible. Since the standard of proof in our criminal trials is beyond reasonable doubt, not beyond a shadow of death it is not error free. DNA testing in advanced countries shows that innocent persons are sometimes sentenced to death. These technologies are new or non-existent in Africa.
    - B. The Retentionists:
      - i. The theory of Retribution posits that the criminal deserves what s/he gets. Punishment is an expression of the wrongness of the crime, a vindication of the law. Evil deserves castigation and wrong doing deserves reparation by adequate deprivation and punishment for the wrongdoer.
      - ii. A wrong being a negation right (to life), punishment (i.e. a sentence of death) must be imposed as a negation of that negation to achieve a “dialectical equilibrium”.
      - iii. A convicted murderer executed for his crime is at least silenced forever and his execution would have reduced the number of would be murderers on the streets. Once executed, he will certainly not be in a position to kill again.
      - iv. Our Constitution, i.e. the 1999 Constitution even as reportedly amended, sanctions the existence of the death penalty in our criminal justice system.
      - v. The moral blameworthiness of heinous crimes such as murder as enunciated in the Law of Moses, “An eye for an eye, a tooth for a tooth”. The practice of the populace lynching motorists that run down pedestrians and causing their deaths, lays credence to this.
      - vi. Statistics being churned out to show the death penalty not serving as a general deterrence are not wholly accurate in so far as they do not address the other variables that presently exist. For instance, socio-economic conditions of the present may be the real explanation of why crimes of violence, e.g Robbery have been on the increase despite the existence of the death penalty for robbery since the early 1970s.
      - vii. Abolition could encourage self-help. The knowledge that a wanton murderer would get only a life sentence with the possibility of state pardon may compel an overzealous police officer or the victim of such an offence to seek revenge outside the law.
      - viii. Were the National Assembly to abolish the death penalty by merely legislating it away, the kind of autonomy enjoyed by the federating units in the area of legislation will be further withered away. In particular, this may lead to unnecessary controversy with the majority of the states in the North drawing the conclusion that that will be “killing” Shari'a through the backdoor- i.e. doing away with the Islamic punishments of murder, hiraba, adultery and its affiliates.
  7. The death penalty has been usually justified on two penological grounds, namely, that of elimination and deterrence.
    - A. In relation to elimination, the African countries have been pursuing the easiest course, namely that of elimination of the offenders from society. Nonetheless, this pressing reality of the African situation must be posed squarely against the strong demands for the observance of human rights and the development of humane penal policies, for which pre-colonial Africa was well known.
    - B. As regards deterrence, empirical studies on the offences of murder, armed robbery and those of drugs and narcotics have demonstrated clearly that no efficacy could be shown for the operation of the death penalty for those offences.
  8. Studies also show that the time lapse between the time of conviction and sentence of death to the time of execution has increased from the two years discovered in a study carried out between 1967-1986 to over ten years and beyond, even up to twenty years in some instances. Hence, the general lack of executions has clearly demonstrated that executions have no bearing whatsoever on the level of the crime incidents.
  9. It is significant that there were no executions of condemned convicts in Nigeria during the period 1999 – 2009 , except for the year 2002, when there was only 1 execution for culpable homicide in Kaduna, which was carried out on 3<sup>rd</sup> January, even though there were 475 condemned convicts in the prisons in that year; whilst there were only 7 executions in 2006 as follows: 1 for culpable homicide in Jos, carried out on 15 January, 2 for armed robbery in Kaduna, carried out on 30 May, and 4 for armed robbery in Enugu, which were carried out on 12 July, even though there were 739 condemned convicts in the prisons in that year.
  10. The number of condemned convicts in the Nigerian prisons has steadily increased from 2002 to 2009, with the peak being reached in 2009 (852). These increases can be attributed to the stoppage in the executions of condemned prisoners in thirty-three (33) States and the Federal Capital Territory, whose Governors have refused the signing of any execution warrants since the enthronement of democracy in Nigeria since 1999.
  11. The decrease in the incidents of armed robbery in Lagos State is attributed to the increase in the operational efficiency of the police, which has continued to increase steadily during the democratic dispensation.

12. The religious objection on the ground of Islam cannot be sustained in view of the fact that an Islamic country like the Libyan Arab Jamahiriya has long abolished the death penalty. Yet the Quran in Nigeria is certainly not different from that in Libya.
13. Some states in Nigeria have capitalized the offence of kidnaping, whilst the real people behind those that commit the kidnaping, the robberies and murders are not caught and prosecuted.

Recommendations:

At the end of the Roundtable, the following recommendations were made:

1. For the prevention/reduction and control of crime in Nigeria we can profitably embark upon and sustain a rigorous and consistent law enforcement process. The success of this has been demonstrated in Lagos State.
2. The Western countries that are clamouring for the abolition of death penalty have come a long way. Nigeria is not ripe now to abolish the death penalty therefore, death penalty should be retained in our statute books in its narrowest form as follows:
  - a. It should not apply to trial by ordeal which results in death (section 208 of the Criminal Code and section 214 of the Penal Code).
  - b. It should not apply to cases of armed robbery which does not result in death.
  - c. It should not apply to abatement of suicide (section 227 of the Penal Code).
3. In place of the death penalty for some offences, imprisonment of a maximum of twenty (20) years to life imprisonment can be considered. Such punishment, backed with rigorous and consistent law enforcement, will certainly address the fear factor implicit in the insecurity posed to citizens by crime and criminals.
4. The religious perspective to death penalty should not be undermined in view of the multi-religious background of Nigeria.
5. The proposal to abolish death penalty in Lagos State should be given a rethink because it will increase the rate of capital crimes and make those who commit crime to become bolder.
6. Death penalty should be retained as it is presently in the Military and Armed Forces Statutes as they are trained to kill with weapons, it is important for very stringent measures to be put in place to deter them from making wrong use of the arms and ammunitions in their possession.
7. The inevitable long wait between the imposition of the death sentence and the actual infliction of death, usually referred to as the death-row phenomenon makes the death penalty to be characterized as a cruel, inhuman and degrading treatment. Therefore, condemned persons should not be kept on death row for a long period.
8. A time line should be allowed within which to exhaust all appeals, before the death warrant should be carried out.
9. Government has a stake in terms of the provisions of social justice and good governance in order to discourage people from violent crimes.
10. If death penalty has to be abolished, then the government must improve the conditions of imprisonment, provide social conditions, overhaul the law enforcement and sensitize and carry the people along.
11. The Nigerian Government must discern “the voice of the people” from the “morbid state of public feelings” and “the voice of the uninstructed mob”. In other words, we must try to ascertain to what extent public opinion is well informed and instructed and legal issues must not be hinged merely on sentiments. To this end, Nigerians generally should be sensitized and involved in the decision whether or not to abolish the death penalty from our penal system.

Lagos, Nigeria.  
10<sup>th</sup> August, 2010.

**Signed:**  
**Professor Epiphany Azinge, SAN**  
*Director General,*