



DITSHWANELO

BOTSWANA

Stakeholder Report for the United Nations Universal Periodic Review

Submitted by The Advocates for Human Rights,
a non-governmental organization in special consultative status

The World Coalition Against the Death Penalty
and
Ditshwanelo

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Founded in 1983, **The Advocates for Human Rights** (The Advocates) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publication. The Advocates is the primary provider of legal services to low-income asylum seekers in the Upper Midwest region of the United States. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a death penalty project to provide pro bono assistance on postconviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition against the Death Penalty.

The World Coalition Against the Death Penalty (WCADP), an alliance of more than 150 NGOs, bar associations, local authorities, and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

Ditshwanelo (The Botswana Centre for Human Rights), is a human rights non-governmental organization founded in 1993 in Botswana. It aims to improve human rights through education and governance. The group has campaigned against capital punishment and for LGBT rights.

EXECUTIVE SUMMARY

1. This report addresses Botswana's compliance with its international human rights obligations with respect to the death penalty. The country is a sovereign member state of the British Commonwealth of Nations,¹ the African Union,² the Southern African Customs Union,³ and the Southern African Development Community.⁴
2. Botswana retains the death penalty, going against global trends and regional trends in Sub-Saharan Africa.⁵ In Botswana, the death penalty may be imposed for non-lethal crimes, such as espionage, aiding the enemy, cowardly behaviour, failure to suppress mutiny, and terrorism. Moreover, mandatory death sentences are imposed in cases of murder, treason, instigating a foreigner to invade the country, and aggravated piracy.
3. During its third-cycle review, Botswana received seventeen recommendations to impose a moratorium on executions as a preliminary step toward the full abolition of the death penalty, all of which were noted. Since its 2018 Universal Periodic Review, Botswana sentenced 16 additional people to death (2 people in 2021), and executed 9 people by hanging, being the only country in sub-Saharan Africa to have carried out executions in 2021. Botswana is missing an opportunity to break the cycle of executions and demonstrate that justice can be delivered without using the death penalty⁶ by joining the majority of the world's countries who have already abolished the practice.
4. This report recommends that Botswana abolish the death penalty, ratify relevant human rights treaties, improve detention conditions for all people, ensure all people facing the possibility of the death penalty have access to competent legal counsel and the right to a fair trial, and take steps to reduce the backlog of cases in its criminal court system.

I. IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

A12 Acceptance of international norms; A27 Follow-up to Universal Periodic Review, A41 Constitutional and legislative framework

Status of Implementation: Partially Accepted, Not Implemented

5. During its third-cycle review, Botswana received several recommendations, inviting it to take necessary steps to effectively incorporate into domestic law those international human rights conventions that Botswana has ratified, including the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷ Botswana accepted four recommendations to accelerate the efforts to domesticate the international human rights treaties and to take the necessary steps to do so.⁸
6. Botswana has not ratified the Second Optional Protocol to the ICCPR⁶ and has repeatedly voted against UN General Assembly resolutions calling for a moratorium on the use of the death penalty, including most recently in 2020.⁹

D23 Death penalty

Status of Implementation: Not Accepted, Not Implemented

7. In 2018, Botswana received twenty-two recommendations related to the death penalty, amongst which seventeen included a recommendation for imposing a moratorium on executions as a preliminary step towards the full abolition, all of which Botswana noted.¹⁰
8. Since the 2018 UPR, Botswana sentenced 16 people to death (including two people defendants in 2021¹¹) and carried out 9 executions by hanging, making Botswana the only country in sub-Saharan Africa to have carried out executions in 2021.¹² Botswana commuted the death sentence of one person, a Zimbabwean national.¹³
9. Currently, not only can defendants still be sentenced to death for non-lethal crimes, such as espionage, aiding the enemy, cowardly behaviour, failure to suppress mutiny, and terrorism,¹⁴ but in accordance with the Botswana Penal Code,¹⁵ courts hand down mandatory death sentences for people convicted of murder, treason, instigating a foreigner to invade the country, and aggravated piracy. Not all these crimes rise to the level of “most serious crimes” under Article 6(2) of the ICCPR.
10. It appears that under some circumstances, courts may circumvent the mandatory death penalty. For example, in 2019, the High Court in Lobatse, during a ruling on extenuation, ruled that it was “satisfied that there are extenuating circumstances which abate the moral blameworthiness of the accused entitling the Court to impose a sentence other than death.” The Court sentenced the defendant to 20 years’ imprisonment.¹⁶
11. As part of Botswana’s prior UPR, Botswana pledged to hold a public debate regarding abolition of the death penalty. To date, Botswana has not held any public consultations or debates regarding the abolition of the death penalty. Earlier this year, Botswana’s Minister of Justice, Machana Ronald Shamukuni, conceded to the Committee Against Torture that “[c]onsultations on the death penalty specifically have not yet commenced. However, this was a subject of ongoing debate, and was being discussed within the review of the Constitution, and there would be further public discussions in this area.”¹⁷ As the Justice Minister suggested, through a Presidential Commission of Inquiry, Botswana recently held a public consultation on review of the Constitution. But media reports suggest that most speakers who commented on the topic stated that they thought Botswana should retain the death penalty.¹⁸
12. Prior to Botswana’s third cycle UPR, the country established a Legal Aid Programme, which provides legal services to people with limited financial means who are involved in civil and criminal cases. In cases involving murder and the potential for capital punishment, the government appoints a private practice attorney/lawyer for the accused, rather than a Legal Aid Programme lawyer.¹⁹ As of the date of the report, there is no public information regarding how and to what extent the Legal Aid Programme provides legal services in cases involving capital crimes.

D25 Prohibition of torture and cruel, inhuman, or degrading treatment

13. Botswana has signed and ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and has ratified the African Charter on Human and Peoples' Rights,²⁰ the latter of which specifically prohibits in article 4 the arbitrary deprivation of the right to life and in article 5 cruel, inhuman, or degrading punishment.²¹
14. The UN Committee Against Torture has expressed concern that Botswana has not yet defined "torture" as a specific offense and has recommended that Botswana establish a definition in line with Convention guidelines.²²
15. The UN Working Group on Arbitrary Detention has received testimonies about police excessive use of force, including beatings, electrocution, and suffocation of suspects to extract confessions.²³ If a magistrate hears such allegations, the magistrate can order medical examinations, but they often do not get ordered or performed, and the case proceedings continue.²⁴
16. Despite any safeguards under the law regarding methods of execution,²⁵ the Committee Expert and Country Co-Rapporteur against Torture noted during the constructive dialogue held on 20 July 2022²⁶ that "death by hanging was considered to be torture, and the fact that persons were not aware when the penalty would be enacted was a form of psychological torture." This Committee Expert recalled that "there was also no opportunity for the condemned to have a last meeting with their family."
17. Amnesty International has recalled that in 2019, the African Court on Human and Peoples' Rights found that hanging "inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment" because of the inherent suffering involved when using this method of execution.²⁷
18. Amnesty International has also reported that the conditions under which authorities carry out executions amount to cruel, inhuman and degrading punishment, noting that "The date and time of the set execution is not communicated [to the person sentenced to death] in advance," the prisoners are placed in a specific cell called "Cell 10," "where they spend the last 24 hours of their life," and recalling that "[f]ailure to provide individuals on death row with timely notification about the date of their execution constitutes, as a rule, a form of ill-treatment, which renders the subsequent execution contrary to article 7 of the [International Covenant on Civil and Political Rights]."²⁸
19. Individuals facing the death penalty and their family members do not receive advance notice of the execution,²⁹ and authorities deny family members access to their relative's grave or the right to transfer the body for private burial.³⁰
20. Amnesty International notes that "failure to provide relatives with information on the circumstances of the death of an individual may violate their rights under article 7, [of the International Covenant on Civil and Political Rights], as could failure to inform them of the location of the body, and, where the death penalty is applied, of the date on which the State party plans to carry out the death penalty. Relatives of individuals deprived of their life by the State must be able to receive the remains, if they so wish."³¹ Amnesty International emphasizes that "[t]ransparency is also a critical safeguard to guaranteeing their rights and protecting against unlawful executions."³²

D26 Conditions of detention

21. The UN Working Group on Arbitrary Detention observed poor detention conditions prevalent in detention facilities in Botswana.³³ Most of the needed repairs have been outstanding for years. Police detainees lack adequate bedding—prisoners sleep on the floors or extremely thin mattresses—and the facilities require significant refurbishing to be able to provide sanitary conditions, including drinking water.

D51 Administration of justice and fair trial

22. The Constitution and laws of Botswana provide the right to a fair and public trial, generally enforced by an independent judiciary. For indigent defendants at risk of being sentenced to death, the Botswanan Government provides legal counsel or appoints private attorneys to work pro bono.³⁴

23. The Registrar of the Court of Appeal is required to provide legal counsel to defendants facing the death penalty. The quality of counsel, however, is inadequate, and legal counsel's access to their client is often insufficient to provide a proper defense. Appointed counsel are often inexperienced junior lawyers.³⁵

24. The President of Botswana must confirm any death sentence and has the option to grant clemency. Although courts have held that it is unconstitutional to deprive a death-sentenced defendant of access to counsel,³⁶ the time period for a defendant to submit a clemency petition is insufficient, and many people sentenced to death lack adequate and qualified counsel to assist with such efforts.³⁷

25. Court proceedings are significantly delayed for many reasons, including an insufficient number of court reporters to produce records of proceedings, and failure of a magistrate or defense counsel to appear, resulting in the frequent adjournment and rescheduling of trials. Some 200 cases have been reported backlogged, contributing to excessive pre-trial detention and arbitrary detention.³⁸

II. RECOMMENDATIONS

26. The coauthors of this report suggest the following recommendations for the Government of Botswana:

- Abolish the death penalty and replace it with a penalty that is fair, proportionate, and in accordance with international human rights standards;
- Ratify the Second Optional Protocol to the ICCPR;
- Removing the mandatory death penalty for all offences and prohibit the death penalty for any crime that does not include an intentional killing by the person being sentenced to death;
- In the meantime, introduce an official moratorium on executions;
- In the meantime, undertake a study of the method of execution with a view to ascertaining whether it amounts to torture or inhuman or degrading treatment;
- In collaboration with civil society, initiate a public dialogue about the use of the death penalty in Botswana and the efficacy of alternatives to the death penalty;

- Hold public consultations and debates on the abolition of the death penalty and redouble efforts to hold a national discussion on the death penalty as a step to toward a moratorium on executions and eventual abolition of the death penalty;
- Ensure that every person facing execution, their family members, and their legal counsel receive timely notification are of the set time of the execution, and ensure that family members are able to receive the body of the person after execution and have the right to transport the body for a private burial or, in the alternative, have access to the grave of the family member who has been executed;
- Ensure that all persons at risk of being sentenced to death, including people from disadvantaged or marginalized socio-economic backgrounds, receive competent legal assistance, starting from the moment of arrest or charging, all the way through to appeals and other recourse procedures, including any potential clemency or mercy processes;
- Provide sufficient resources and funding for the appointment of competent lawyers with experience and training in capital cases, for gathering evidence for the defense, and for retaining expert testimony for the defense, regardless of the region in which the case is tried;
- Define torture in its legislation as a specific offense that conforms with Convention Against Torture and adopt a law introducing criminal responsibility for law enforcement officers who engage in torture; and
- Prohibit judges from considering as evidence any statements obtained through coercion, torture, or ill-treatment, except when offered to prove the crime of torture, and require judges to order the prompt and effective investigation of any such allegations raised by the defense.

¹ The Commonwealth, “Member countries”, (1 October 2022). Available online at <https://thecommonwealth.org/our-member-countries>

² African Union, “Member States”, (1 October 2022). Available online at https://au.int/en/member_states/countryprofiles2

³ The Southern African Customs Union, “Botswana”, (1 October 2022). Available online at <https://www.sacu.int/show.php?id=543>

⁴ The Southern African Development Community, “Botswana”, (1 October 2022). Available online at <https://www.sadc.int/member-states/botswana>

⁵ ReliefWeb, *Death sentences and executions 2021*, (23 May 2022). Available online at <https://reliefweb.int/report/world/death-sentences-and-executions-2021>

⁶ Amnesty International, *Botswana: President Masisi's first year in office marred by executions*, (8 August 2022). Available online at <https://www.amnesty.org/en/latest/press-release/2020/10/botswana-president-masisi-first-year-in-office-marred-by-executions/>

⁷ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Botswana Addendum* (18 June-6 July 2018), U.N. Doc. A/HRC/38/8/Add.1, ¶128.37 (National Human Right Framework) Take necessary steps to incorporate into domestic law those international human, rights conventions that Botswana has ratified. (Slovakia)

⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Botswana Addendum* (18 June-6 July 2018), U.N. Doc. A/HRC/38/8/Add.1, ¶128.38 – 128.44

⁹ United Nations General Assembly, *Resolution adopted by the General Assembly: Moratorium on the use of the death penalty*, (16 December 2020). Available online at <https://undocs.org/A/RES/75/183>.

¹⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Botswana* ¶ 129.16 Abolish the death penalty (France) (Honduras) ¶ 129.17 Consider abolishing the death penalty (Mozambique); ¶ 129.18 Give due consideration to the legal abolition of the death penalty and to the commutation of all death sentences to terms of imprisonment (Liechtenstein); ¶ 129.19 Impose a moratorium on the use of the death penalty (Montenegro); ¶ 129.20 Establish an official moratorium on executions and abolish the death penalty (Germany); ¶ 129.21 Establish a moratorium on the application of the death penalty, with a view to holding informed debates about its full abolition (Mexico); ¶ 129.22 Establish a moratorium on the death penalty as a first step towards its full abolition and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Portugal); ¶ 129.23 Agree to a moratorium on the death penalty as a first step towards its ultimate abolition, as previously recommended (Ireland); ¶ 129.24 Impose a country-wide moratorium on the death penalty that immediately halts all sentences and executions, with a view towards complete abolition of the death penalty (Iceland) ¶ 129.25 Consider implementing a moratorium on the death penalty (Ghana); ¶ 129.26 Enact a moratorium on the use of the death penalty, with a view to abolishing it, and enhance the promotion and the protection of the right to life (Holy See); ¶ 129.27 Establish a formal moratorium on the death penalty, as a step towards complete abolition of this practice (Australia); ¶ 129.28 Establish and implement a moratorium on executions as a first step towards the abolition of the death penalty (Belgium); ¶ 129.29 Establish a moratorium on the use of the death penalty with a view to its abolition in law and practice (Chile) ¶ 129.30 Establish a moratorium on executions, with a view to fully abolishing the death penalty, as previously recommended (Estonia); ¶ 129.31 Consider a moratorium on the death penalty, with a view to its legal and practical elimination (Ecuador); ¶ 129.32 Repeal the death penalty and consider a moratorium pending its complete abolition (Canada); ¶ 129.33 Hold public consultations on the use of the death penalty and consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Uruguay); ¶ 129.34 Consider initiating an inclusive public discussion on the implementation of a moratorium on the death penalty with the aim of abolishing it (Angola); ¶ 129.34 Consider initiating an inclusive public discussion on the implementation of a moratorium on the death penalty with the aim of abolishing it (Angola); ¶ 129.35 While welcoming the public debates on the death sentence, Namibia encourages Botswana to consider placing a moratorium on executions, commute all death sentences to other sentences and consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (Namibia); ¶ 129.36 Promote a national debate on the death penalty, with a view to establishing a moratorium on executions (Italy); ¶ 129.37 Abolish the death penalty definitively, hold a public debate to that end, and, in the meantime, humanize the process to mitigate the suffering of the persons sentenced and their families (Spain); ¶ Also available online at <https://undocs.org/A/HRC/WG.6/29/BWA/1>.

¹¹ Mmegi Online, *Two Killers Executed*, (8 February 2021). Available online at <https://www.mmegi.bw/index.php?aid=88636&dir=2021/february/08>

¹² African Legal Information Institute, *Amnesty International Death Penalty Report: A Time for judges to reflect*, (26 May 2022). Available online at <https://africanlii.org/article/20220526/amnesty-international-death-penalty-report-time-judges-reflect>

¹³ Amnesty International, *Botswana: Submission to the UN Committee against Torture: 74th Session, 12 -29 July 2022*, (30 June 2022). Available online at <https://www.amnesty.org/en/documents/afr15/5762/2022/en/>

¹⁴ Cornell Center on the Death Penalty Worldwide Database, “Botswana Country Profile” (2020). Available online at <https://deathpenaltyworldwide.org/database/>.

¹⁵ Botswana Penal Code (Amendment) Act, Cap. 08:01 2018.

¹⁶ Amnesty International Global Report, *Death Sentences and Executions 2021*, p 47

¹⁷ Office of the High Commissioner for Human Rights, *Experts of the Committee against Torture Commend Botswana on the Ratification of Core Human Rights Treaties, Ask Questions about the Death Penalty and the Ombudsman’s Office* (Press Release), 20 July 2022, available at <https://www.ohchr.org/en/press->

releases/2022/07/experts-committee-against-torture-commend-botswana-ratification-core-human (last visited Oct. 10, 2022).

¹⁸ Ditshwanelo, Email communication, Oct. 7, 2022, on file with The Advocates for Human Rights.

¹⁹ Ditshwanelo, Email communication, Oct. 7, 2022, on file with The Advocates for Human Rights.

²⁰ University of Minnesota Human Rights Library, *Ratification of International Human Rights Treaties - Botswana*. (n.d.). Available online at <http://hrlibrary.umn.edu/research/ratification-botswana.html>

²¹ African Union, “African Charter on Human and Peoples’ Rights”, (1 October 2022). Available online at https://au.int/sites/default/files/treaties/36390-treaty-0011__african_charter_on_human_and_peoples_rights_e.pdf.

²² UN News, *UN Committee against Torture: Focus on Botswana, Nicaragua, Palestine, United Arab Emirates*, (29 July 2022). Available online at <https://news.un.org/en/story/2022/07/1123652>

²³ OHRCR, U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to Botswana* (15 July 2022).

²⁴ OHRCR, U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to Botswana* (15 July 2022).

²⁵ “Prior to carrying out the execution, the officer in charge of the prison where the execution is to take place and the person charged with the execution shall together satisfy themselves that the appliances to be used for the execution are sound and in good working order and that every reasonable precaution has been taken to ensure the efficient, quick, and humane execution of the sentence.” U.N. Human Rights Office of the High Commissioner, “U.N. Treaty Body Database”. Available online at <https://www.ohchr.org/en/press-releases/2022/07/experts-committee-against-torture-commend-botswana-ratification-core-human>

²⁶ Office of the High Commissioner for Human Rights, *Experts of the Committee against Torture Commend Botswana on the Ratification of Core Human Rights Treaties, Ask Questions about the Death Penalty and the Ombudsman’s Office* (Press Release), 20 July 2022, available at <https://www.ohchr.org/en/press-releases/2022/07/experts-committee-against-torture-commend-botswana-ratification-core-human> (last visited Oct. 10, 2022).

²⁷ African Court on Human and Peoples’ Rights, *Ally Rajabu and Others v. United Republic of Tanzania*, Application No. 007/2015, 28 November 2019, para.119, <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/63d/f99/5f563df99fbc7507699184.pdf>

²⁸ Human Rights Committee, General comment No. 36, Article 6: right to life, UN Doc.CCPR/C/GC/36, 3 September 2019, para.40, and Concluding observations of the Human Rights Committee, Japan, UN Doc. CCPR/C/JPN/CO/5. See also Concluding observations on the second periodic report of Japan, adopted by the Committee at its fiftieth session (6-31 May 2013), UN Doc.CAT/C/JPN/CP/2; and interim report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/67/279, para. 50; Amnesty International, *Botswana Submission to The Un Committee Against Torture* 74th Session, 12 -29 July 2022, p 2.

²⁹ UN News, *UN Committee against Torture: Focus on Botswana, Nicaragua, Palestine, United Arab Emirates*, (29 July 2022). Available online at <https://news.un.org/en/story/2022/07/1123652>

³⁰ Mmegi Online, *‘Return Bodies of Executed Persons’*, (15 Nov. 2021). Available online at mmegi.bw/news/return-bodies-of-executed-persons/news. See also Human Rights Committee, *Concluding observations on the second periodic report of Botswana*, UN Doc. CCPR/C/BWA/CO/2, 24 Nov. 2021, ¶¶ 15, 16(c) (noting that “the body of the executed person is not returned to the family for private burial” and recommending that Botswana “[e]nsure that prisoners and their families are informed in advance of the date of execution and that the body is returned to the family for private burial”).

³¹ Human Rights Committee, General comment No. 36, Article 6: right to life, UN Doc.CCPR/C/GC/36, 3 September 2019, para.56. See also Committee against Torture, *Concluding observations on the fifth periodic report of Belarus*, UN Doc.CAT/C/BLR/CO/5, 7 June 2018, para.54.

³² Amnesty International, Botswana Submission to The Un Committee Against Torture 74th Session, 12 -29 July 2022, p 2

³³ OHCHR, U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to Botswana* (15 July 2022).

³⁴ On file with The Advocates for Human Rights.

³⁵ OHCHR, U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to Botswana* (15 July 2022).

³⁶ *Ntesang v. State*, Criminal Appeal no. 57 of 1994, BWCA 12, Ct. of Appeal of Botswana, p. 16, Jan. 30, 1995.

³⁷ Criminal Procedure and Evidence Act of Botswana, sec. 299(1), Jan. 1, 1939, as updated through to 2005; Constitution of Botswana, sec. 53, Sep. 30, 1966, as updated through to 2006; Criminal Procedure and Evidence Act of Botswana, sec. 299, Jan. 1, 1939, as updated through to 2005; U.N.G.A., Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Question of the death penalty*, para. 46, U.N. Doc. A/HRC/33/20, Jul. 12, 2016.

³⁸ OHCHR, U.N. Working Group on Arbitrary Detention, *Preliminary Findings from its visit to Botswana* (15 July 2022).