

# BOTSWANA

## SUBMISSION TO THE UN COMMITTEE AGAINST TORTURE

74<sup>TH</sup> SESSION, 12 -29 JULY 2022

Amnesty International welcomes the opportunity to make a submission to the UN Committee against Torture (CAT). In this submission, Amnesty International sets out its concerns regarding the flogging of a child and the unlawful use of the death penalty under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention against Torture'). This should not be seen as an exhaustive account of the organization's concerns.

### 1. CORPORAL PUNISHMENT (ARTICLE 1)

Amnesty International is concerned with the violation of the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under the Convention against Torture and the Convention on the Rights of the Child.<sup>1</sup> In Botswana corporal punishment (flogging) is routinely used as a form of punishment in traditional courts and is also lawful under section 27 and section 61 of the Children's Act<sup>2</sup>. In our 2020/21 Annual Report<sup>3</sup> Amnesty International noted that according to the NGO Ditshwanelo (the Botswana Centre for Human Rights), a 16-year-old boy was flogged at a traditional court (*Kgotla*) in Mahetlwe village in Kweneng District by the village's Deputy Chief, and on instructions from the police, for not wearing a face mask as required by regulations put in place in response to the Covid-19 pandemic.

### 2. UNLAWFUL USE OF THE DEATH PENALTY (ARTICLES 2 & 16)

Amnesty International is concerned about violations of the Convention against Torture, particularly around the State's obligation to prevent torture or other ill-treatment through the unlawful use of the the death penalty in several circumstances as part of sentencing in the criminal justice system.

#### 2.1 MANDATORY IMPOSITION OF THE DEATH PENALTY

According to the Botswana Penal Code<sup>4</sup>, four crimes carry mandatory death sentences:

- murder (Section 203 (1)),
- treason (Section 34),
- instigating a foreigner to invade Botswana (Section 36), and
- and committing assault with intent to kill in the course of piracy (Section 63 (2))

Furthermore, pursuant to the Botswana Defence Force Act, 1997<sup>5</sup>, officers and soldiers who commit the following military offences shall be liable to suffer death or any other punishment provided by the Act:

- aiding the enemy (Section 27),
- communication with the enemy (Section 28),

<sup>1</sup> Article 37(a) of the Convention on the Rights of the Child; Committee on the Rights of the Child, General Comment No. 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), U.N. Doc. CRC/C/GC/8, 2006.

<sup>2</sup> Children's Act, 2009, No. 8 of 2009

<sup>3</sup> Amnesty International Report 2020/21: The state of the world's human rights, April 7, 2021, Index Number: POL 10/3202/2021

<sup>4</sup> Penal Code (Amendment) Act, Cap. 08:01 2018

<sup>5</sup> Botswana Defence Force Act, No.3 of 2018

- cowardly behaviour (Section 29),
- mutiny (Section 34),
- failure to suppress mutiny with intent to assist the enemy (Section 35), and
- civil offence if it is treason or murder (Section 66 (3) (a)).

The imposition of the mandatory death penalty is prohibited under international human rights law and standards. The UN Human Rights Committee has stated that “mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature.”<sup>6</sup> On 28 November 2019, the African Court on Human and Peoples’ Rights ruled in a landmark judgement that mandatory imposition of the death penalty was unfair, because it denied the convicted person the right to be heard and present mitigating circumstances; and constituted an arbitrary deprivation of life.<sup>7</sup>

Amnesty international recorded three executions were carried out in Botswana in 2021, six people were sentenced to death and one person’s death sentence was commuted. At the end of 2021, six people were under sentence of death. All of the above are men, and all convicted of murder. The number of persons executed in 2021 was identical to the number of those executed in 2020.<sup>8</sup>

## 2.2 SECRETIVE EXECUTIONS AND BURIALS

People on death row are subjected to cruel, inhuman or degrading treatment prior to executions. The date and time of the set execution is not communicated to them in advance. There is a separate place where people on death row are housed, it is called “Cell 10”. The day before a person is executed, they are transported to the “death watch” cell at 6am in the morning, this is where they spend the last 24 hours of their life. They are executed by hanging at 6am the morning after that. As stated by the Human Rights Committee, “[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]”.<sup>9</sup>

The authorities of Botswana also do not provide notice of any set executions to the family members and representatives of those at imminent risk, nor the forthcoming executions announced to the public.

Furthermore, the bodies of those executed are usually not released to their family members for burial.

As noted by the Human Rights Committee, “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.”<sup>10</sup> Transparency is also a critical safeguard to guaranteeing their rights and protecting against unlawful executions.

The authorities of states that have not abolished the death penalty must respect the prohibition on the use of torture or other ill-treatment also with regard to the carrying out of the execution itself to prevent the arbitrary deprivation of life.<sup>11</sup> Botswana uses ‘hanging by the neck until you are dead’ as an execution method, in 2019 the 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.<sup>12</sup> Amnesty International opposes the death penalty in all cases without exception, regardless of the nature or the circumstances of the crime; guilt, innocence or other characteristics of the individual; or the method used by the state to carry out the execution.

## 2.3 VIOLATION OF THE RIGHTS TO A FAIR TRIAL AND EFFECTIVE LEGAL REPRESENTATION

In Botswana and poverty remains a factor at all stages of the death penalty. The socio-economic circumstances of a person charged with a capital crime are relevant to an assessment of the crime itself, greatly influence the criminal trial and have a significant impact upon the sentencing process. In the end it is people from disadvantaged economic backgrounds have been most commonly at risk of

<sup>6</sup> Human Rights Committee, General comment No. 36, Article 6: right to life, UN Doc.CCPR/C/GC/36, 3 September 2019, para.37.

<sup>7</sup> African Court on Human and Peoples’ Rights, *Ally Rajabu and Others v. United Republic of Tanzania*, Application No. 007/2015, 28 November 2019, para.114, <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/63d/f99/5f563df99fbc7507699184.pdf>

<sup>8</sup> Amnesty International, *Death sentences and executions in 2021*(Index ACT 50/5418/2022), May 2022.

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> Human Rights Committee, General comment No. 36, Article 6: right to life, UN Doc.CCPR/C/GC/36, 3 September 2019, para.40

<sup>12</sup> 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>

execution in Botswana. In October, 2019, Amnesty International research revealed that there was a correlation between death penalty sentences and poverty. Various interlocutors including academics, ordinary citizens and legal practitioners provided anecdotal evidence indicating that those sentenced to death were mainly from socially deprived communities where alcohol consumption and gender based violence were high. Due to inadequacies of the system of pro deo - free legal assistance, the right to a fair trial is not guaranteed to most persons charged with capital offences who come from such backgrounds.

The right to a fair trial is a human right and is legally binding on states as part of customary international law.<sup>13</sup> Violation of fair trial guarantees provided for in Article 14 of the ICCPR would render the death sentence arbitrary in nature;<sup>14</sup> and the arbitrary deprivation of life, as well as the use of torture and other ill-treatment and punishment, are absolutely prohibited under customary international law.<sup>15</sup> As noted by the Human Rights Committee, “[l]egal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination. Any deprivation of life based on discrimination in law or fact is ipso facto arbitrary in nature.”<sup>16</sup>

## 2.4 AGAINST GLOBAL TREND TOWARDS ABOLITION

At the time of writing, the majority of the world’s countries (110) have abolished the death penalty for all crimes and more than two-thirds are considered by Amnesty International to be abolitionist in law or practice. State support for the calls by the UN General Assembly for the establishment of a moratorium on executions with a view to abolishing the death penalty has continued to grow, with the most recent resolution being adopted in December 2020 with 123 votes in favour, the highest support for such resolutions to date.<sup>17</sup>

The growing number of states prohibiting the death penalty or refraining from using it point to the increasing recognition of the death penalty as a cruel punishment in itself, inconsistent with the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Amnesty International opposes the death penalty unconditionally as the ultimate cruel, inhuman and degrading punishment.

## 3. RECOMMENDATIONS

Amnesty International calls on the Botswana government to:

- **Abolish all forms of judicial corporal punishment in law, including by traditional courts and within school and home settings.**
- **Urgently abolish the death penalty for all crimes. Pending this, the organization call the authorities to immediately:**
  - Introduce a moratorium on executions and initiate an informed national public debate aimed at promoting full abolition of the death penalty;
  - Remove from national legislation provisions that violate international human rights law and standards, including by removing the mandatory death penalty for all offences;
  - Ensure that those facing execution, their family members and legal representative are promptly informed of the set time of the execution, and that bodies are returned to family members should they wish to receive them;
  - Ensure that all persons facing the death penalty – including those from disadvantaged or marginalized socio-economic backgrounds – are provided access to competent legal assistance, from the moment of arrest or when they first face criminal charges, all the way through to appeals and other recourse procedures, and ensure that Legal Aid is provided sufficient resources to appoint competent pro bono lawyers in all regions; and
  - Support international initiatives in favour of ending executions and abolishing the death penalty.

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<sup>13</sup> Safeguard no.5 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Economic and Social Council Resolution 1984/50 of 25 May 1984; see Amnesty International, Fair Trial Manual, Second Edition (Index: POL 30/002/2014).

<sup>14</sup> Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.41

<sup>15</sup> Human Rights Committee, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, para.8; Report of the Special Rapporteur on Extrajudicial Executions, UN Doc. A/67/275, 2012, para. 11; Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, para.1.

<sup>16</sup> Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para.61.

<sup>17</sup> UN General Assembly resolution 75/183 of 16 December 2020.

