

Secretary-General's report on a moratorium on the use of the death penalty Commentary on the Botswana Penal Code's Abolition of Capital Punishment

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Word Count: 1,495

The following proposal provides feedback on the Botswana Penal Code and its adherence to international law instruments regarding the preservation and honoring of the 'right to life' as an inalienable fundamental human right. More specifically, the report converges upon the violation of the right to life nationally through the sentence to death¹ as an enforced punishment within the Setswana Penal Code. Employing research from public interest and human rights groups such as the Ditshwanelo Human Rights Centre, Amnesty International, and the broader international human rights community this document aims to quell the ongoing debate around capital punishment as a human rights concern in anticipation of Botswana's Universal Periodic Review of May 2023 and contribute to the General Assembly at its seventy-ninth session in September 2024

The 'right to life' as assured by the African Charter on Human and Peoples' Rights (ACHPR)², Botswana's Constitution of 1966³, and International Covenant of Civil and Political Rights (ICCPR)⁴ is an inalienable right. As a supreme right, life is fundamental to the realization and strength of all human rights amongst all laws and justice systems, its violation (i.e. the denial of life) irrespective of the circumstance is cruel, unusual, and inhuman. Capital Punishment in Botswana occurs at the nationally sanctioned level as a sentencing response to crimes of a grave nature.⁵ Thus, Botswana has established legal norm surrounding the death sentence for grave nature crimes and created its *retentionist* practices in maintaining capital punishment. While grave crimes must be addressed sternly human beings must not be prescribed fatal punishments that desecrate the sanctity of the 'right to life.' The following urges the esteemed High Court of Botswana to recognize the inherent, grave, and cruel violation of the most important right — to life.

The Right to Life

Being one of the few countries upholding capital punishment as a competent sentence for grave nature offenses, Botswana has become an outlier regarding the death penalty. The

¹ Penal Code, Laws of Botswana, c 08:01, s 25-33(1)

² Article 4, African Charter On Human And Peoples' Rights

³ Article 4, Constitution of Botswana 1966

⁴ Article 6, International Covenant of Civil and Political Rights 1966

⁵ (i) Murder, (ss202, 203(1)),

(ii) Treason (s34),

(iii) Instigating a foreigner to invade Botswana (s35), and

(iv) Committing assault with intent to murder in the course of the commission of piracy (s63 (2)).

Abolitionist stance assumed by her neighboring nation South Africa has effectively created a diplomatic rift on the issue of the right to life regarding criminal sentencing with special attention to the *Interights et. al V. Botswana* during the landmark Mariette Bosch execution. Botswana has continuously failed to uphold *Article 4* of the *African Charter On Human And Peoples' Rights* recognizing human beings as inviolable and consistently fails to ensure “respect for life and the integrity of the person”⁶ by performing capital executions.

On Execution

No state, Botswana or otherwise, may effectively assume the responsibility of deciding who dies and who lives. The act of killing is a form of retributive justice that offers no potential for legal remedy or recourse it renders the righting of any criminal wrongs impossible. Furthermore, we cannot empower inherently imperfect laws and justice systems to make irreversible decisions. In the case of wrongful execution, the act of killing has no equivalent remedy, in fact, should we hold ourselves to the same standards that we held convicted murderers, the state must be criminalized for its murder against citizens.

The death penalty is not Setswana. The death penalty stems from a time when society had no pragmatic method of removing some criminals from the general population except by execution – Especially in western society. The death penalty is a supplantation of Botswana’s previous restorative modes of justice that were frankly less brutish and more civilized than what the western world has offered us in the process of globalization and post-colonialism. British imperialism and its settlers came to the new world bringing a legal code founded on the practice of capital punishment.

The Botswana judicial system and the Ministry of Justice must be as humane as possible when administering any form of justice.⁷ However, the death penalty strips our government of its judicial humanity insofar as it focuses on retribution rather than rehabilitation and correction which are fundamental to Botswana’s Prison and Rehabilitation Services and Administration of Justice (AOJ) models. The death penalty as retribution prioritizes cruel and inhuman suffering which ultimately has no net benefit of the state in terms of cost and socio-judicially.⁸

The punishment of death for murder is not only hypocritical but has “never prevented determined men from injuring society.”⁹ Several scholastic endeavors have dissected this phenomenon in several directions. Firstly, capital punishment has no causal or correlative link to a decrease in murder or grave crimes. The deterrence theory behind the instigation of the death penalty does not hold, in fact, the contrary is observed. In statistical analyses performed globally, the empirical results show that democracies that have abolished the death penalty suffer from significantly lower crime rates in comparison to their retentionist neighbors. **Figure 1** supports this profusely — by using the United States federal justice system, we have close comparative evidence of this how ineffective deterrence via capital punishment truly is. Abolitionist states, as shown below have nearly a 15-20% lower murder rate than *retentionist states*.

⁶ Article 4, African Charter On Human And Peoples’ Rights

⁷ Beccaria, Cesare. *An Essay on Crimes and Punishments: By the Marquis Beccaria of Milan. with a Commentary by M. De Voltaire, A New Edition Corrected.* 1872.

⁸ *Ibid.* Beccaria, Cesare. *An Essay on Crimes and Punishments*

⁹ *Ibid.* Beccaria, Cesare. *An Essay on Crimes and Punishments*



Murder Rates in Death Penalty and Non-Death Penalty States

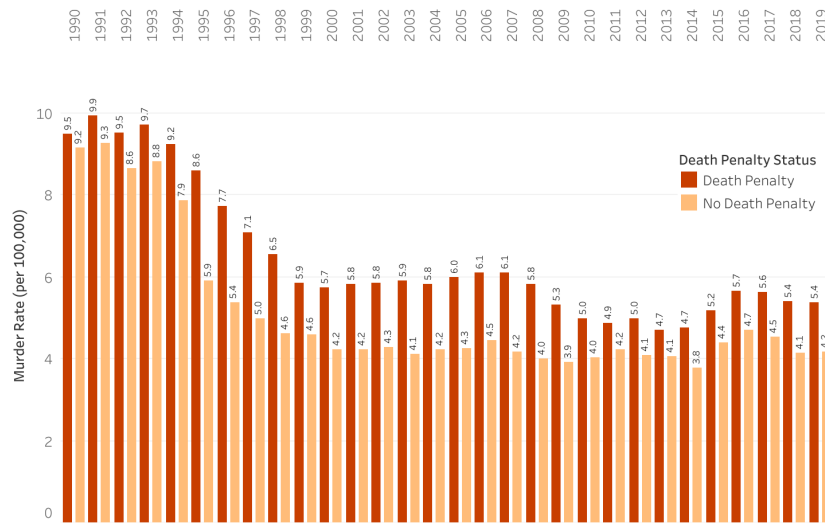


Figure 1: Murder Rates in Death Penalty and Non-Death Penalty States (1990 - 2019) Death Penalty Information Center.

On an international scale, the abolition of the death penalty in states such as Poland, Ukraine, and most significantly South Africa has led to immense decreases in murder rates as a whole. Botswana itself has a powerful deterrent mechanism — social cohesion. Owing to remarkable cultural strength and community as well as Botswana’s own government in providing social security, Botswana’s population demonstrates social and inter-community cohesion. These broad social and organizational characteristics are inextricably correlated to the lack of grave crime in such communities.¹⁰

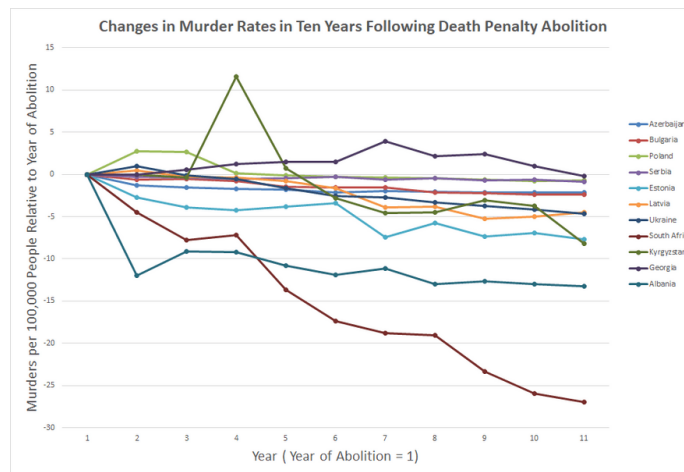


Figure 2: Changes in Murder Rates in Ten Years Following Death Penalty Abolition (2018) Abdorrahman Boroumand Center.

Opening a Moratorium on the Death Penalty

Creating Nationwide Dialogue around the criminalization of the death penalty; (recognizing customary law nationally)

As per Botswana's Implementations of agreed recommendation from the 2nd Cycle Review, it is the responsibility of the government of Botswana to 'undertake dialogue'¹¹ on the abolition of the death penalty in her legal future. Furthermore, this report urges the ratification of the *Convention Against Torture without a Death Penalty Reservation* and to *Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty

Botswana must become a signatory to the Convention against Torture without any reservation and ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. In doing so, customary law becomes standardized national practice within the Setswana judicial system. Recognizing customary law is fully within Botswana's potential as it has referred to the ICCPR and the Universal Declaration of Human Rights — capital punishment should not become an exception. Though Botswana has made significant strides in effectively implementing the recommendations of the previous Universal Periodic Review¹², the 93 recommendations do not suffice especially if the right to life is put into a precarious position by retaining the death penalty. Becoming signatories to the convention and protocol mentioned above elevates Botswana's consideration of human rights by recognizing the relevance of customary law in today's international landscape.

Life constitutes the 'irreducible core of human rights.'¹³ By enforcing the death penalty governments brutalize the very citizens it aims to protect sending forth the message that human lives are susceptible to claim by our own elected governments. By retaining the death penalty – criminals become the victors insofar as Botswana falls victim to its own legal sword — dignifying the grave criminal acts it seeks to condemn. We should view the act of murder as hostility not the person behind the act. Punishing the act of killing by killing the perpetrator would be dignifying the very act we wish to condemn.

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¹¹ Mid-Term Progress Report on the Implementation of Agreed Recommendation from the Second Cycle Review, 2016

¹² Amnesty International: Submission to the 43rd session of the UPR Working Group, 3 May 2023, AFR 15/6088/2022.

¹³ Tshosa, Onkemetse B. The Death Penalty in Botswana in the Light of International Law: The Case for Abolition .

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