



THE UPR PROJECT AT BCU

Submitted by:

The UPR Project at BCU
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About the UPR Project at BCU:

Birmingham City University's Centre for Human Rights was created in 2014 to promote human rights, ensure access to justice, and enhance the rule of law around the world. We seek to achieve this through leading research, education, and consultancy. We submit expert reports to international human rights regions, provide advisory services to governments and nongovernmental organisations, and draft legal opinions and file legal briefs in domestic courts and international human rights courts.

The Centre for Human Rights established the UPR Project in 2018 as part of our consultancy service. We engage with the Human Rights Council's review process in offering support to the UPR Pre-sessions, providing capacity building for UPR stakeholders and National Human Rights Institutions, and the filing of stakeholder reports in selected sessions. The UPR Project is designed to help meet the challenges facing the safeguarding of human rights around the world, and to help ensure that UPR recommendations are translated into domestic legal change in member state parliaments. We fully support the UPR ethos of encouraging the sharing of best practice globally to protect everyone's human rights. The UPR Project at BCU engages with the UPR regularly as a stakeholder, having submitted seven reports and been cited by the OHCHR. You can read more about the UPR Project here: www.bcu.ac.uk/law/research/centre-for-human-rights/projects-and-consultancy/upr-project-at-bcu

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INTRODUCTION

1. The Republic of South Sudan [hereinafter South Sudan] is party to three of the nine core international human rights treaties: the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and, the Convention on the Rights of the child (CRC).¹
2. This Stakeholder Report focuses upon capital punishment and recommends that South Sudan ratifies the International Covenant on Civil and Political Rights (ICCPR) and safeguards the right to life. We make recommendations to the Government of South Sudan on this key issue, implementation of which would also see Sudan moving towards achieving Sustainable Development Goal 16 which aims for peaceful and inclusive societies, access to justice for all and effective, accountable and inclusive institutions at all levels.

CAPITAL PUNISHMENT

A. South Sudan and International Law on the Death Penalty

3. The death penalty has remained a distinctive feature of South Sudan's penal system since, and prior to, the country's independence in 2011. Since independence South Sudan has executed at least 43 people.²
4. The sovereign right to impose the punishment is located in the Transitional Constitution 2011. Article 11 states that "every person has the inherent right to life, dignity and the integrity of his or her person which shall be protected by law; no one shall be arbitrarily deprived of his or her life." Article 21 provides limitations on the death penalty, restricting it to "extremely serious offences in accordance with the law"³ however it fails to define what it considers as 'extremely serious'. It also prohibits its imposition on individuals under the age of 18, those over the age of 70, pregnant women or women with children under the age of two.⁴
5. The Permanent Representative of South Sudan in Geneva, Riek Puok Riek, informed the UN Human Rights Council in September 2012 that "South Sudan agrees with... the logic of abolishing the death penalty. But we believe that this is a process that could be approached gradually."⁵
6. In a speech to the South Sudan Constitutional Review Commission in May 2013, the state's Chief Justice, Chan Reec Madut, affirmed that the country will continue imposing the punishment.⁶ He stated that, "the transitional constitution does not have a provision that prohibits [the] death penalty. This means that our judges will continue to rely on

current laws until [such time] when constitutional amendments [are] made through an act of parliament.”⁷

7. The death penalty continues to remain a lawful punishment in South Sudan for offences and conduct which contravene the evolving jurisprudence on ‘most serious crimes’ under international law.⁸ For example, treason; terrorism-related offenses resulting in death; aggravated drug trafficking; and bearing false witness resulting in an innocent person’s execution.⁹

International Law Promoting the Restriction and Abolition of the Death Penalty

8. The United Nations’ framework for regulating the application of the death penalty comprises a corpus of international human rights law and jurisprudence. Of particular relevance are Articles 6, 7, and 14 ICCPR,¹⁰ its Second Optional Protocol,¹¹ the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,¹² the Secretary General’s quinquennial reporting,¹³ the Secretary General’s Question on the Death Penalty,¹⁴ and the Human Rights Committee decisions.¹⁵ Other relevant treaties include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment¹⁶ and the Convention on the Rights of the Child.¹⁷
9. The General Comment on the Right to Life¹⁸ provides an interpretive lens on the death penalty and concerning ICCPR Article 6(6), which states, ‘[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment,’ it:

reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights.¹⁹
10. Furthermore, the eighth and most recent iteration of the UN General Assembly’s biennial resolution to impose a global moratorium on the use of the death penalty was passed on 16 December 2020. A total of 123 votes were recorded in favour, 38 votes against, 24 abstentions and 8 countries were absent. South Sudan has taken part in five such resolutions to date, voting in favour in 2012, 2014, against in 2016, and then moved to abstain in both the 2018 and 2020 resolutions.²⁰
11. South Sudan’s voting record is also reflected in its absence as a signatory to the Joint Permanent Missions’ most recent *note verbale* of dissociation, which records a formal objection to the Secretary General of the United Nations on the attempt to create a global moratorium on the death penalty.²¹ Both the abstention to the UNGA resolution and absence from the *note verbale* suggests an anti-death penalty trajectory and also provides the platform for South Sudan to signal its support for a global moratorium in the forthcoming resolution.

B. Implementation of Recommendations from Cycle Two in 2016

12. South Sudan received 233 recommendations in the Second Cycle of which 203 were accepted and 30 were noted.²² A total of 11 recommendations focused on the death penalty of which four were accepted.²³

Recommendations concerning South Sudan's Adoption of International Law

13. **Australia** (para 129.9), **Montenegro** (para 129.7), and **Rwanda** (para 129.7) recommended South Sudan to ratify the Second Optional Protocol to the ICCPR. These were all noted. However, similar recommendations from **Croatia** (para 128.11), **Portugal** (para 128.9) and **Uruguay** (para 129.8) were accepted. This is most likely because they also recommended ratification of other instruments such as the ICCPR and ICESCR as opposed to a specific focus on the Second Optional Protocol aimed at abolition of the death penalty.
14. South Sudan is yet to ratify either of these treaties (ICCPR and ICESCR) despite indicating support to do so.

Recommendations concerning Abolition

15. **Ukraine** (para 129.15) recommended South Sudan to abolish the death penalty whilst **Georgia** (para 129.14), **Australia** (para 129.9), and **Uruguay** (para 129.8) recommended a moratorium on the death penalty. **Iceland** (para 129.16) urged the State to “[b]ring all those suspected of criminal responsibility to justice in accessible ordinary civilian courts, using fair trials and without making recourse to the death penalty” and **the Holy See** (para 128.39) recommended a continuation of efforts to “improve conditions of detention and abolish the death penalty, with a view to commuting all death sentences”. It is only the Holy See’s recommendation that was accepted in this regard. Whilst such recommendations are welcomed, it is crucial that they remain specific and measurable in order to assess the level of implementation. Broad recommendations, whilst easy to accept, lack any impetus to bring about real change.²⁴
16. Signalling its continuing attachment to the practice, South Sudan responded to the recommendations stating that it does not impose the death penalty “except under rare situations...Therefore, abolition of the death penalty is not a priority.”²⁵ It has since continued to carry out executions in contravention to international law. Four individuals were executed in 2017, two of whom were children at the time of the crime.²⁶ A further seven executions took place in 2018,²⁷ eleven in 2019²⁸ with numbers falling sharply to two in 2020.²⁹
17. In May 2018, 37 death row prisoners, including at least one child and a breastfeeding mother, were transferred from prisons in the Equatoria region in the south of the country to Juba Central Prison.³⁰ This is in direct contravention to Article 21 of the Transitional Constitution which prohibits the juvenile death penalty and execution of expectant or weaning mothers.

18. Eleven executions took place in 2019. In February 2019, 7 of 11 individuals were executed and three were from the same family. However, the family was not notified of the execution. Two individuals were executed on 27 September 2019 and another two were executed on 30 September 2019, one of whom was a child.³¹
19. On 28 November 2019, a landmark judgement issued by the African Human Rights Court ruled that the mandatory imposition of the death penalty was inherently unfair, because it precluded the convicted person the right to a fair trial and the ability to present mitigating circumstances. However, despite this ruling, South Sudan continued to carry out further executions with two executions taking place in 2020.³²
20. It is also deeply concerning to note that in response to the increased violence in the Lakes state, General Majak Akech, inspector general of the South Sudan National Police Service and a Lakes state native, encouraged the newly appointed governor, Lieutenant General Rin Tueny Mabor, to apply punishment for criminals commensurate with the situation which includes “death by firing squad”.³³ We urge the government to ensure sentencing is administered without recourse to the death penalty.
21. Notwithstanding the above, we welcome the decision made by the South Sudan Court of Appeal to quash Magai Matiop Ngong’s death sentence on 14 July 2020 and his subsequent removal from death row on 29 July. Magai was 17-years old, and therefore still a child, when sentenced to death in November 2017 in violation of both South Sudanese law and international law.³⁴ We urge the government of South Sudan to ensure the death penalty is never applied to those under the age of 18 and to amend its constitution in line with international law.

C. Further Points for South Sudan to Consider

Adopting the UPR Recommendations to Enable the People of South Sudan to Benefit from Advances in Effective Penology

22. The right to benefit from scientific advancement should also apply to the progress in social science research on the death penalty. The Universal Declaration of Human Rights, Article 27, states, “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”³⁵ and the ICESCR article 15 (1)(b) recognises the right of everyone, “[t]o enjoy the benefits of scientific progress and its applications.”
23. Roger Hood and Carolyn Hoyle have produced the leading social science and criminological investigations into the death penalty worldwide and have concluded:

[t]hose who favour capital punishment ‘in principle’ have been faced with yet more convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice. Some of them

have set out on the quest to find the key to a ‘perfect’ system in which no mistakes or injustices will occur. In our view, this quest is chimerical.³⁶

24. Social science investigations now demonstrate that reflecting appropriate government means that whilst capital punishment could be created within a legitimate parliamentary process,³⁷ it is now clear that the application of the death penalty renders an illegitimate and inhumane outcome.³⁸ Abolition in South Sudan would enable the people of the country to benefit from the advancement of the leading social scientific research on punishment policies.

The Universal Periodic Review Recommendations and the Contribution to the Sustainable Development Goals

25. South Sudan should consider adopting the UPR recommendations as an expression of mutual reinforcement of the government’s commitment to promoting the Sustainable Development Goals.³⁹ The human rights values expressed in both the UPR and the SDGs can be woven together to promote policy coherence.⁴⁰

26. SDG 16 provides for “Strong Institutions and Access to Justice and Build Effective Institutions,” but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and “protect fundamental freedoms,” and to further this, SDG 16.A.1 identifies the importance of relevant national institutions, for building capacity at all levels, to prevent violence and combat terrorism and crime.

D. Recommendations

We recommend the government of South Sudan to:

- i. Ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.
- ii. Develop, in consultation with civil society and relevant regional bodies, a comprehensive action plan to work towards a moratorium, with a view to abolition, within the next three years.
- iii. Amend the 2011 Transitional Constitution of South Sudan to prohibit the death penalty.
- iv. Affirm its commitment to SDG 16 on access to justice and strong institutions through its support at the next biennial vote on the UNGA Resolution on the moratorium on the use of the death penalty.

¹ See <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx>.

² Oluwatosin Popoola, ‘Sub-Saharan Africa Must Protect Lives by Abolishing the Death Penalty’ (*Amnesty International*, 21 April 2020) <www.amnesty.org/en/latest/news/2020/04/sub-saharan-africa-must-protect-lives-by-abolishing-the-death-penalty/> accessed 2 April 2021.

³ Article 21(1).

⁴ Articles 21(2) and 21(3).

⁵ See ‘South Sudan’ <www.handsoffcain.info/bancadati/africa/south-sudan-20000205>.

⁶ ‘South Sudan Says Death Penalty Remains Until Constitution Amended’ (*Sudan Tribune*, 3 May 2013) <www.sudantribune.com/spip.php?article46452> accessed 23 April 2021.

⁷ *ibid.*

⁸ See UN Doc CCPR/C/GC/R.36/Rev.2.

⁹ See eg 'Republic of South Sudan (South Sudan)' (*Death Penalty Worldwide*, 26 April 2013) <<https://deathpenaltyworldwide.org/database/#/results/country?id=69#fn-21342-T67P82W700609>>.

¹⁰ International Covenant on Civil and Political Rights (1976) 999 UNTS 171, Article 6 (right to life); Article 7 (the prohibition against torture and inhuman or degrading treatment or punishment); and Article 14 (the right to a fair trial and the principle of equality of arms).

¹¹ The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128, December 15, 1989.

¹² Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council Resolution, 1984/50; Additions to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic and Social Council Resolution 1989/64; and the Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic Council Resolution 1996/15.

¹³ See eg, ECOSOC Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General UN Doc E/2015/49 (13 April 2015).

¹⁴ See eg, Report of the Secretary General, Question of the Death Penalty, A/HRC/27/23, 30 June 2014.

¹⁵ For example, *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

¹⁶ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 10 December 1984.

¹⁷ Article 37(a) Convention on the Rights of the Child, G.A. Res 44/25, 20 November 1989.

¹⁸ UN 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, CCPR/C/GC/36, 30 October 2018.

¹⁹ *ibid* para 50.

²⁰ Resolution on the Moratorium on the use of the death penalty, UNGA Res. 67/176 20 December 2012, adopted by 111 votes to 41, with 34 abstentions; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 69/186 18 December 2014 *adopted by 117 votes to 37, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 71/187, 19 December 2016 *adopted by 117 votes to 40, with 31 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 73/175 17 December 2018 *adopted by 121 votes to 35, with 32 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 75/183, 16 December 2020 *adopted by 123 votes to 38, with 24 abstentions*.

²¹ UNGA, 'Note verbale dated 13 September 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General' (16 September 2019) UN Doc A/73/1004.

²² UNHRC, 'Report of the Human Rights Council on its thirty fourth session' (31 May 2017) UN Doc A/HRC/34/2, para 835.

²³ See UNHRC, 'Report of the Working Group on the Universal Periodic Review – South Sudan' (28 December 2016) UN Doc A/HRC/34/13.

²⁴ Amna Nazir, 'The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan' 4(1) RSIL Law Review 126, 153.

²⁵ See UNHRC, 'Report of the Working Group on the Universal Periodic Review – South Sudan: Addendum' (8 March 2017) UN Doc A/HRC/34/13/Add.1, para 7.

²⁶ Amnesty International, 'South Sudan: One of Just Two Executing States in Sub-Saharan Africa in 2017' (*Amnesty International*, 16 April 2018) <<https://www.amnesty.org/en/latest/news/2018/04/south-sudan-one-of-just-two-executing-states-in-sub-saharan-africa-in-2017/>> accessed 1 April 2021. See also Amnesty International, *Global Report: Death Sentences and Executions 2017* (2018).

²⁷ Amnesty International, *Global Report: Death Sentences and Executions 2018* (2019).

²⁸ Amnesty International, *Global Report: Death Sentences and Executions 2019* (2020).

²⁹ Amnesty International, *Global Report: Death Sentences and Executions 2020* (2021).

³⁰ Amnesty International, 'South Sudan: Execution spree targets even children and threatens nursing mothers' (*Amnesty International*, 7 December 2018) <<https://www.amnesty.org/en/latest/news/2018/12/south-sudan-execution-spre-targets-even-children-and-threatens-nursing-mothers/>> accessed 1 April 2021

³¹ Amnesty International, 'Sub-Saharan Africa Must Protect Lives by Abolishing the Death Penalty' (*Amnesty International*, 21 April 2020) <<https://www.amnesty.org/en/latest/news/2020/04/sub-saharan-africa-must-protect-lives-by-abolishing-the-death-penalty/>> accessed 1 April 2021.

³² Amnesty International, 'Africa: Positive Death Penalty Decision Undermined by Continued Executions' (*Amnesty International*, 10 October 2020) <<https://www.amnesty.org/en/latest/news/2020/10/africa-positive-death-penalty-decision-undermined-by-continued-executions/>> accessed 1 April 2021

³³ Manyang David Mayar, 'Calls for Death Penalty Rise in Response to South Sudan Lakes State Violence' (*VOA News*, 21 June 2021) <www.voanews.com/africa/south-sudan-focus/calls-death-penalty-rise-response-south-sudan-lakes-state-violence> accessed 1 July 2021.

³⁴ ‘South Sudan: Quashing of Teenager’s Death Sentence Must Lead to Abolition of the Death Penalty’ (*Amnesty International*, 9 July 2020) <www.amnesty.org/en/latest/news/2020/07/south-sudan-quashing-of-teenagers-death-sentence-must-lead-to-abolition-of-the-death-penalty/> accessed 2 May 2021.

³⁵ It is further recalled that the Human Rights Council determined that the basis of the Universal Periodic Review includes consideration of the Universal Declaration of Human Rights, see, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1 18 June 2007.

³⁶ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 7-8.

³⁷ John Rawls stated, “[a]t some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy,” in, *Political Liberalism* (Columbia University Press 2005) 248.

³⁸ Austin Sarat stated, “law cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves,” in, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press 2001) 21.

³⁹ See the UN Sustainable Development Goals website, <https://sustainabledevelopment.un.org/?menu=1300>.

⁴⁰ The first two cycles of the UPR were reviewed under a data mining procedure and of the circa. 50,000 recommendations, it was possible to link more than 50% of those to SDG targets, see, The Danish Institute for Human Rights, *Linking the Universal Periodic Review to the SGGs*, p. 2.