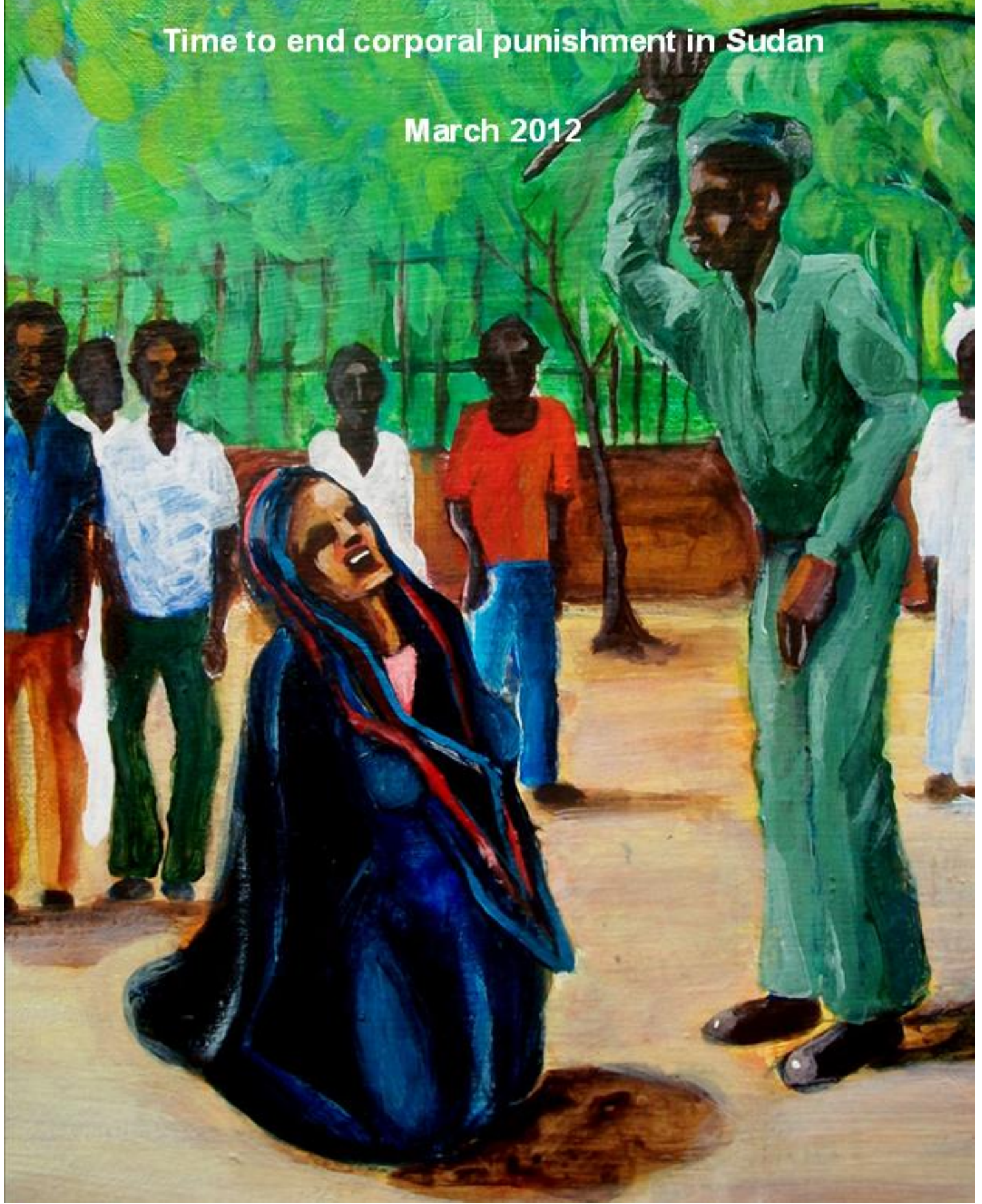


# No more cracking of the whip:

Time to end corporal punishment in Sudan

March 2012





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Credit for artwork: Mohamed Abbakar

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## I. Introduction\*<sup>1</sup>

Hardly a day passes by without women and men being whipped in Sudan. The punishment is applied in almost casual fashion. Those subjected to it are normally left to suffer the pain and humiliation that comes with it in silence. Official silence ignored decades of concerns expressed by regional and international human rights bodies. This changed dramatically in December 2010. A video clip published online showed two policemen whipping a young woman in full view of dozens of bystanders.<sup>2</sup> She is seen pleading but the policemen scorn her and carry on regardless. The whipping drew public protests by women's rights groups in Sudan and international condemnation as it cast the spotlight on the arbitrary and humiliating nature of the punishment.<sup>3</sup> It also highlighted the gender dimension of this practice - it is often women who suffer for committing so-called public order offences, such as wearing 'indecent dress'.

The Government of Sudan responded by condemning the leak and publication of the video, claiming that the incident was exceptional.<sup>4</sup> Indeed, the Government of Sudan repeatedly defended whipping (also referred to as flogging), claiming that it is effective in deterring crime and preferable to imprisonment.<sup>5</sup> The reliance on this form of punishment is evident in the Criminal Act of 1991 and other statutes, including Public Order acts that greatly expanded the number of offences to which whipping and other corporal punishments attached (amputation of limbs and stoning as fixed punishments (hudud) under Islamic law (*Sharia*)<sup>6</sup>).

The Government of Sudan has referred to Sharia to justify corporal punishment. Indeed, following the referendum, President Bashir reportedly said: 'Sharia law

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\* The Criminal Law Reform Project is a joint initiative by REDRESS and the Sudanese Human Rights Monitor aimed at advancing the recognition of rights for all people in Sudan and the process of bringing Sudanese law in conformity with the Interim National Constitution and international standards binding on Sudan and forming an integral part of Sudan's Bill of Rights. For further information, please visit [www.pclrs.org](http://www.pclrs.org).

<sup>1</sup> REDRESS and the Sudanese Human Rights Monitor would like to express their gratitude to the School of Oriental and African Studies (SOAS) Human Rights Clinic, namely Professor Lynn Welchman, for her collaboration and Kirstin Nirmala Gooray, Elham Saudi, Arooj Riaz Sheikh and Kirsten Squires, for their invaluable research assistance. We are also grateful to Mohamed Osman for his research, including interviews, on corporal punishment in the Sudanese system, and to Dr. Mohamed Abdelsalam Babiker, Melanie Horn, Fahad Siddiqui, Sarah Elibiary and Helen McElhinney for their contribution to this report.

<sup>2</sup> See *Video: Sudan's judiciary orders probe into video of woman being flogged*, Sudan Tribune, 12 December 2010, available at: <http://www.sudantribune.com/Sudan-s-judiciary-orders-probe,37253>.

<sup>3</sup> *Sudan police arrest women protesting at flogging video*, Africa Reuters, 14 December 2010, available at <http://af.reuters.com/article/topNews/idAFJOE6BD07U20101214>; *Over forty women arrested after anti flogging protest*, Sudan Tribune, 15 December 2010, available at: <http://www.sudantribune.com/Over-forty-women-arrested-after,37282>.

<sup>4</sup> *Sudan's Bashir endorses lashing of YouTube woman, says North will transform into Islamic state*, Sudan Tribune, 19 December 2010, available at: <http://www.sudantribune.com/Sudan-s-Bashir-endorses-lashing-of,37345>.

<sup>5</sup> See *Letter dated 18 February 1994 from the Permanent Representative of the Sudan to the United Nations Office at Geneva addressed to the Assistant Secretary-General for Human Rights*, UN Doc. E/CN.4/1994/122, 1 March 1994, paras.72,73 (in response to report prepared by Mr. Gáspár Bíró, UN Doc. E/CN.4/1994/48, 1 February 1994); *Information Received from Sudan on the implementation of the concluding observation of the Human Rights Committee (CCPR/C/SDN/CO/3)*, UN Doc. CCPR/C/SDN/CO/3?Add.1, 18 December 2009, para.44.

<sup>6</sup> Article 3 of the Criminal Act 1991 stipulates that hudud means the offences of drinking alcohol, apostasy (ridda), adultery (zina), defamation of unchastity (quazf), armed robbery (hiraba) and capital theft.

has always stipulated that one must whip, cut, or kill'.<sup>7</sup> However, a closer look at the law demonstrates that the offences for which corporal punishment can be inflicted greatly exceed crimes subject to Sharia punishments. There are also differences of opinion in respect of the circumstances in which Sharia should be applied, with scholars holding that it should be confined to ideal just societies that we do not live in today.<sup>8</sup> Opponents to the application of Sharia, including those from a religious background, point to the recent history of its repressive and arbitrary use in Sudan, both at the time of the Mahdiya (1885-1889) and after the introduction of the 1983 September laws under Nimeri.<sup>9</sup> Indeed, in practice, whipping has not simply been one type of punishment for unlawful conduct. Instead, it is used primarily against those who do not conform to the public moral order imposed following the 1989 coup and often belong to marginalised communities, such as Southerners in the Sudanese capital Khartoum. Corporal punishment therefore serves as a visible expression of state superiority and an instrument of repression.

This Report forms part of reform efforts calling for an end to corporal punishment in Sudan. It examines statutory law on, and the practice of this punishment, with a focus on whipping as its most prevalent type. (There appears to be a de-facto moratorium on other forms of corporal punishment, although isolated judgments imposing amputations have been reported from time to time<sup>10</sup>; the legal and policy considerations relating to whipping apply in equal, if not stronger measure, to other forms of corporal punishment – including the highly problematic law on, and use of the death penalty in Sudan).<sup>11</sup> The Report builds on a series of interviews with victims, lawyers, judges and officials to illustrate judicial practice and the administration of flogging as punishment.<sup>12</sup> It also considers recent developments, including the abolition of corporal punishment as judicial

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<sup>7</sup> See Sudan's Bashir, *supra* note 4.

<sup>8</sup> See on this point A. An Naim, 'Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The meaning of Cruel, Inhuman or Degrading Treatment or Punishment', in A. An Naim (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Philadelphia Press: Philadelphia, 1992, 19-43, particularly at 34-37.

<sup>9</sup> See in this context, Abdelsalam Hassan Abdelsalam and Amin M. Medani, 'Criminal Law Reform and Human Rights in Africa and Muslim Countries, with particular reference to Sudan' in Lutz Oette (ed.), *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, Farnham: Ashgate, 2011, 33-56, at 45-49.

<sup>10</sup> See for example: World Organisation Against Torture (OMCT), *Sudan: the Government of Sudan has once again resumed the use of amputations as punishment*, 30 May 2000, available at: <http://www.omct.org/urgent-campaigns/urgent-interventions/sudan/2000/03/d14973/>; OMCT, *Sudan: a man sentenced to the amputation of his hand*, 26 February 2001, available at: <http://www.omct.org/urgent-campaigns/urgent-interventions/sudan/2002/02/d15641/>; Human Rights Watch (HRW), *Sudan Justice: Stonings, Amputations*, 1 February 2002, available at: <http://www.hrw.org/news/2002/02/01/sudan-justice-stonings-amputations>; Amnesty International, *Sudan: Boy, 16, faces judicial amputation of hand and foot*, 31 October 2003, available at: [http://www.amnesty.org.uk/news\\_details.asp?NewsID=14938](http://www.amnesty.org.uk/news_details.asp?NewsID=14938); SUDAN: *Anti-torture group expresses concern at amputations*, IRIN, 2011, available at: <http://www.irinnews.org/printreport.aspx?reportid=30501>.

<sup>11</sup> See African Centre on Justice and Peace Studies, *Widening the Scope: The expanding use of the death penalty in law and practice in Sudan*, December 2010, available at: [http://www.acjps.org/Publications/Reports/2010/WideningtheScope\\_ExpandingUseofCapitalPunishment.pdf](http://www.acjps.org/Publications/Reports/2010/WideningtheScope_ExpandingUseofCapitalPunishment.pdf).

<sup>12</sup> 17 interviews were carried out in Khartoum from 1 October 2011 to 20 November 2011.

punishment in the 2010 Child Act,<sup>13</sup> which may serve as opening for broader reforms.

Sudanese law and practice does not take place in a vacuum. Sudan is bound by international law – indeed, international human rights treaties to which Sudan is a party form an integral part of the Bill of Rights in the Interim National Constitution (INC) of 2005.<sup>14</sup> The Report therefore examines applicable standards, including consideration of Sudan’s practice by regional and international treaty bodies over the last twenty years, to determine the compatibility of Sudan’s law and practice with international law. The question of corporal punishment has also been a highly topical issue in other countries in the region and around the world, and the Report shows a growing trend towards the abolishment of such practices as judicial sanctions due to a combination of legislative reform and developments in the jurisprudence. In its final Chapter, the Report puts forward the case for the abolition of corporal punishment. The practice is not only found to be contrary to binding international standards but is also frequently harmful, discriminatory, and arbitrary, and therefore incompatible with the basic principles governing the rule of law.

Sudan is at a crossroads. A constitutional review is underway and there are outstanding demands for a fundamental reform of Sudan’s criminal laws and public order laws.<sup>15</sup> The choice is between maintaining a system of punishments associated with the repressive and arbitrary use of state power on the one hand, and laws that respect human rights and do not discriminate, unduly harm, or humiliate those that are found to have committed an offence, on the other.

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<sup>13</sup> See article 77 (d) of the 2010 Child Act; however, the UN Committee on the Rights of the Child expressed serious concerns that ‘under article 36 of the Sudan Interim Constitution, the death penalty may be imposed on persons below the age of 18 in cases of retribution or hudud’. See *Concluding Observations: Sudan*, UN Doc. CARC/C/SDN/CO/3-4, 1 October 2010, para.35.

<sup>14</sup> Article 27 (3) of the Interim National Constitution 2005.

<sup>15</sup> For current developments, see UNMIS, *Republic of Sudan Constitution Making Symposium*, May 2011, available at <http://unmis.unmissions.org/Default.aspx?tabid=4865>, and for reforms, see Oette, *supra* note 8, and REDRESS and Sudanese Human Rights Monitor, *Criminal Justice and Human Rights: An agenda for effective human rights protection in Sudan’s new constitution*, February 2012.

## II. Sudanese law and practice

### 1. Law

#### 1.1. History

The application of corporal punishment throughout Sudan's history shows that it initially served a symbolic purpose of deterring would-be offenders and opponents in what essentially were autocratic systems with a weak law enforcement apparatus.<sup>16</sup> The Mahdi (1885-1898) regime imposed an idiosyncratic rule of Sharia (Islamic law) that relied heavily on corporal punishments to enforce the moral order envisaged. The practice was characterised by harsh and arbitrary punishments that often targeted women for transgressing the moral standards enforced by the regime.<sup>17</sup> During the subsequent Anglo-Egyptian condominium (1898-1956), the British, who were effectively in control, transplanted the Indian penal code of 1860 in 1898, which was amended in 1925. The criminal law prescribed corporal punishment that served as a useful instrument of colonial control, and the native administrative tribunals also applied whipping.<sup>18</sup> The 1925 Criminal Act was replaced by the 1974 Criminal Act during the Nimeri regime (1969-1985), which retained whipping as a punishment. In 1983, as part of a move to regain political control, Nimeri adopted the so-called September laws, a hastily drafted version of Sharia.<sup>19</sup> The laws resulted in a wave of excessive and arbitrary punishments, including a case where a bookkeeper accused of embezzlement had his hand amputated before his initial conviction was overturned on appeal.<sup>20</sup> This period culminated in the execution of Mohamed Taha for the crime of apostasy, which was not even on the statute books at the time,<sup>21</sup> and ended with the fall of Nimeri in 1985. After a brief democratic interlude, the current regime staged a coup and took power in June 1989.

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<sup>16</sup> See Abdelsalam and Medani, *supra* note 9, particularly at 38-43.

<sup>17</sup> *Ibid.*, at 40, with further references.

<sup>18</sup> See I. Lindsay, 'Wote Timamu (All present and correct), Effendi', in *The Overseas Pensioner*, no.67, Spring 1994, available at: <http://www.corpun.com/lindsay.htm> (eyewitness account of juvenile judicial caning in 1950s Sudan under British colonial rule).

<sup>19</sup> See Abdelsalam and Medani, *supra* note 8, at 46, and A. Layish and G.R. Warburg, *The Reinstatement of Islamic Law in Sudan under Numayri: An Evaluation of a Legal Experiment in the Light of its Historical Context, Methodology and Repercussions*, Leiden: Brill, 2002, at 75-142.

<sup>20</sup> *Ibid.*

<sup>21</sup> Abdelsalam and Medani, *supra* note 8, at 47. See also Abdullahi An-Na'im, 'Mahmud Muhammad Taha and the Crisis in Islamic Law Reform: Implications for Interreligious Relations', *Journal of Ecumenical Studies*, Philadelphia, PA (Temple University) (1998) Vol. 25 (1), 1-21, available at <http://www.law.emory.edu/aannaim/pdf/dwld16.pdf>.



## 1.2. Current legal framework

Corporal punishments are provided for in the 1991 Criminal Act for offences subject to hudud, qisas and ta'zir punishments, as well as in various other laws, particularly public order acts.

**Hudud** punishments are based on the text of the Quran and the Sunna (sayings and deeds of the Prophet), and include the death penalty,<sup>22</sup> amputation<sup>23</sup> and lashing. They apply to the following offences:

- adultery (zina) = (stoning (if married) or whipping (if unmarried) (100 lashes));<sup>24</sup>
- apostasy (ridda) = (death penalty);<sup>25</sup>
- armed robbery (hiraba) = (death penalty, death and crucifixion, cross-amputation (right hand-left foot));<sup>26</sup>
- capital theft (sariqa) = (amputation of right hand);<sup>27</sup>
- wrongful accusation of adultery (quazf) = (80 lashes);<sup>28</sup>
- and drinking of alcohol (shurab al-sharms) = (40 lashes).<sup>29</sup>

The hudud punishments are fixed by law. Their strict nature is evident in the rule that limits the imposition of the death penalty (not to be passed against any person who has not attained the age of eighteen or who exceeds seventy years of age or pregnant or lactating women (after two years of lactation)) and limits the punishment of whipping (not to be passed against any person sixty years of age or older, or a sick person whose life would be endangered by whipping or whose sickness would thereby be aggravated).<sup>30</sup> It is also underscored by the rule that such sentences 'shall not be remitted by pardon'.<sup>31</sup>

The hudud system is based on the rationale that these offences constitute the most serious crimes and deserve severe punishment because they violate the just order. The imposition of such punishments is subject to strict evidentiary requirements, which differ between, and even within, the Islamic schools of law.<sup>32</sup>

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<sup>22</sup> Article 27 (1) of the Criminal Act 1991: 'Death penalty shall be by hanging, lapidation [adultery (zina)], or in the same manner, in which the offender caused death [qisas]... and it may be accompanied by crucifixion [in cases of armed robbery (hiraba)].' See for its execution, articles 189-194 Criminal Procedure Act 1991.

<sup>23</sup> This penalty may take the form of amputation of the right hand [capital theft] and cross-amputation (amputation of the right hand and left food) [armed robbery].

<sup>24</sup> Article 146 (1) Criminal Act 1991.

<sup>25</sup> Ibid., article 126 (2).

<sup>26</sup> Ibid., article 168.

<sup>27</sup> Ibid., article 171 (1).

<sup>28</sup> Ibid., article 157 (3).

<sup>29</sup> Ibid., article 78 (1).

<sup>30</sup> Ibid., articles 27 (2) and 35 (1).

<sup>31</sup> Ibid., article 38 (1).

<sup>32</sup> R. Peters, *Crime and Punishment in Islamic Laws: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge: Cambridge University Press, 2005, at 30-38.

The question of corporal punishment in Sharia has given rise to considerable debate between those that insist on a literal application of their reading of Islamic sources and those that stress that hudud punishments should either not be taken literally or only be applied in 'perfect' societies, or both.<sup>33</sup>

**Qisas** (retribution) has its origin as a private right entailing individual and collective liability and applies in cases of murder and inflicting bodily harm.<sup>34</sup> The punishment mirrors the injury inflicted: 'In case of murder, retribution shall be death by hanging or, if the court sees fit, it shall be in the same manner in which the offender caused death'.<sup>35</sup> In cases of bodily injury, the injured party is entitled to demand 'the punishment of an intending offender with the same offensive act he has committed', including amputation of limbs.<sup>36</sup> The 1991 Criminal Act specifies the conditions applicable to the imposition of qisas punishments. The right to demand retribution vests in the victim(s) (and his or her relatives) who may choose between retribution and pardon.<sup>37</sup> The latter may be subject to the payment of *dia* (blood money) or be given unconditionally.<sup>38</sup>

**Ta'zir** penalties are defined in the 1991 Criminal Act as 'any penalty other than hudud and retribution (qisas)'.<sup>39</sup> It is sometimes referred to as discretionary punishment. Ta'zir penalties, which were originally the domain of judges,<sup>40</sup> are today based on legislation, such as the 1991 Criminal Act and other laws. Punishments for crimes falling within this category comprise most of the penalties listed in Part IV, Chapter 1 of the 1991 Criminal Act, namely the death penalty, imprisonment, fine, whipping, forfeiture and destruction and the closing of premises.

Punishment for Ta'zir leaves judges with considerable discretion that is only limited by the maximum punishment a court can impose. Section 39 of the 1991 Criminal Act provides guidance to courts with regards to the circumstances to be taken into consideration when determining the appropriate penalty, 'in particular, the degree of responsibility, motives for commission of the offence, seriousness of the act, grievousness of the injury, the dangerous nature of the offender, his position and previous convictions and all the other circumstances surrounding

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<sup>33</sup> See M. El-Awa, *Punishment in Islamic Law*, Illinois: American Trust Publications, 1993; An Naim, *supra* note 8; and T. Ramadan, *An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World*, 2005, available at: <http://www.tariqramadan.com/An-International-call-for,264.html?lang=fr>. Other scholars suggest that the imposition of hudud punishments can be minimised if not averted 'through adherence to strict and lawful procedural rules of Islamic law'. See M. Baderin, *International Human Rights Law and Islamic Law*, Oxford University Press, Oxford: Oxford University Press, 2003, at 85.

<sup>34</sup> Article 28 of the Criminal Act 1991.

<sup>35</sup> *Ibid.*, article 28 (3).

<sup>36</sup> *Ibid.*, articles 28(1) and (4) and 30. The punishment for inflicting wounds is set out in Schedule I to the Criminal Act 1991.

<sup>37</sup> *Ibid.*, article 28 (2).

<sup>38</sup> *Ibid.*, see articles 31 and 32.

<sup>39</sup> *Ibid.*, article 3.

<sup>40</sup> Abdelsalam and Medani, *supra* note 9, at 45.

the incident'. Special considerations apply in cases of multiple offences and persistent offenders.<sup>41</sup>

### 1.3. The legal framework for the punishment of whipping

Whipping is provided for as hudud punishment for adultery, wrongful accusation of adultery and drinking of alcohol, and for 18 other offences in the 1991 Criminal Act (rioting, breach of public peace, intoxication, gambling, habitual dealing in alcohol, insulting religious beliefs, sodomy, rape, gross indecency, indecent and immoral acts, materials and displays contrary to public morality, practicing prostitution, running places of prostitution, seduction, false accusations of unchastity, insult and abuse, capital theft (where hudud is remitted) and theft).<sup>42</sup> Public order laws, which are enacted by the localities, also provide for whipping as one of the punishments for infractions of prohibitions. For example, the Khartoum Public Order Law allows for the imposition of whipping in respect of 17 prohibitions set out in the Law,<sup>43</sup> including for a failure of men and women to queue separately.<sup>44</sup>

The number of lashes is specified in the offences concerned and ranges from twenty to one hundred lashes. The Criminal Procedure Code specifies how the punishment is to be carried out, namely that it shall be in public<sup>45</sup> and that 'a man shall, generally, be whipped while standing...and a woman shall be whipped while sitting...[whereby] whipping shall be lump sum, temperate, moderate and non-cracking and non-breaking, distributed, otherwise than the face, head and fatal places, by a moderate whip, and any other similar tool may be used'.<sup>46</sup> A sentence may be suspended where the health condition of the offender does not allow the remainder of the sentence to be executed.<sup>47</sup> Moreover, '[s]ave in Hudud offences, no sentence of whipping shall be passed, upon a person, who attained sixty years of age, or a sick person, whose life would be endangered by whipping, or whose sickness would thereby be aggravated (2) Where the penalty of whipping is remitted, by reason of age, or sickness, the offender shall be punished with an alternative penalty'.<sup>48</sup> However, with the exception of hudud punishments, the law

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<sup>41</sup> Articles 40 and 41 of the Criminal Act 1991.

<sup>42</sup> Ibid., articles 68 (rioting), 69 (breach of public peace), 78 (intoxication and nuisance), 80 (gambling), 81 (habitual dealing in alcohol), 125 (insulting religious beliefs), 146 (adultery), 148 (sodomy), 149 (rape), 151 (gross indecency), 152 (indecent and immoral acts), 153 (materials and displays contrary to public morality), 154 (practicing prostitution), 155 (running places of prostitution), 156 (seduction), 157 (false accusations of unchastity), 160 (insult and abuse), 173 (capital theft) and 174 (theft).

<sup>43</sup> Article 26 (d) of the Khartoum Public Order Law 1998. The punishment of whipping has been retained for several offences in the draft Khartoum Social Control Act, 2010. See on latest developments, REDRESS and Sudanese Human Rights Monitor, *The Draft Social Control Act for Khartoum State, 2011: Flogging into Submission for the Public Order*, November 2011, at 6-12, available at:

[http://www.redress.org/downloads/publications/Draft%20Public%20Order%20Law%20November%202011\[1\]](http://www.redress.org/downloads/publications/Draft%20Public%20Order%20Law%20November%202011[1]).

<sup>44</sup> Article 20 of the Khartoum Public Order Law.

<sup>45</sup> Article 189 of the Criminal Procedure Code 1991.

<sup>46</sup> Ibid., article 197 (a).

<sup>47</sup> Ibid., article 197 (c).

does not require the medical examination of a person prior to whipping.<sup>49</sup> Moreover, the execution of whipping shall be suspended ‘where it transpires...that the health condition of the offender does no longer bear the remainder of the sentence...’<sup>50</sup>

Procedurally, most offences subject to the punishment of whipping are subject to summary trials before public order courts.<sup>51</sup> These trials follow a basic procedure in which the judge hears the prosecutor and the complainant, the accused answers, and testimonies of witnesses (prosecution and defence if any, are heard), following which a judgment is issued.<sup>52</sup> The verdict is subject to appeal but defendants may waive their right to appeal.<sup>53</sup>

#### 1.4. Findings

The legal framework governing offences subject to whipping raises a series of concerns. Strikingly, what should be exceptional, namely corporal punishments, even under Sharia, appears to have become the rule. The large number of offences that carry whipping as punishment indicates that this is not coincidental. A series of statements made in the Sudanese public, in submissions to United Nations (UN) bodies and the sentiments expressed during interviews carried out for this Report show that officials, judges and others view whipping as an effective punishment based on its supposed deterrent effect.<sup>54</sup> The reference to Sharia often made in this context seemingly serves as justification and template for whipping even where it is imposed as Ta’zir punishment (see above at II.1 (ii)). This creates a discourse in which the lines between Sharia and other crimes become increasingly blurred, which shifts the focus from the nature and impact of punishments to their source of justification.

The scope of application for whipping is broadened by the fact that many of the crimes carrying the punishment are vaguely defined, for example breach of public peace, intoxication, insult and abuse, and most public order law offences, particularly those relating to ‘indecent’ conduct.<sup>55</sup> This is problematic because it is incompatible with the principle of legality, i.e. that persons should know what conduct is liable to punishment, and it provides officials and judges with extremely wide discretion that may result in arbitrary law enforcement and judicial decision-making. In addition, the nature of offences is such that they are more likely to target certain groups in society, particularly women in case of public

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<sup>48</sup> Article 35 of the Criminal Act 1991.

<sup>49</sup> Article 194 of the Criminal Procedure Act 1991.

<sup>50</sup> Ibid., article 197 (c).

<sup>51</sup> Ibid., article 175.

<sup>52</sup> Ibid., articles 176, 177.

<sup>53</sup> See on appeals, *ibid.*, articles 179-188 A.

<sup>54</sup> See in particular *supra* note 5.

<sup>55</sup> Amin M. Medani, ‘A Legacy of Institutionalized Repression: Criminal Law and Justice in Sudan’, in: Oette, *supra* note 8, 67-88, at 68 and Asma Abdel Halim, ‘Gendered Justice: Women and the Application of Penal Laws in Sudan’, *ibid.*, 227-241, at 238-240.

order offences such as ‘wearing indecent dress’, which makes the law potentially discriminatory.<sup>56</sup>

The seriousness of whipping is not matched by adequate procedural safeguards. It is clear that the summary trials do not afford adequate rights of the defence.<sup>57</sup> Coupled with a system where the availability of legal aid is extremely limited, this setting enhances the likelihood of ‘summary’ justice, in which whipping becomes a routine punishment.

The law governing the application of whipping, by stipulating that it shall be carried out in public, adds a further element of humiliation in addition to that already inherent in the nature of the punishment. The safeguards against the adverse consequences of whipping, on the other hand, are rather limited. The exemptions only apply in narrow circumstances and are subject to the discretion of non-medical persons, such as the magistrate or someone else acting in his or her stead deciding that someone is not fit to bear further whipping.<sup>58</sup> As will be seen in the next section, concerns about the legal system are borne out in practice.

## 2. Practice

There is no reliable data on the application of corporal punishments in Sudan, which makes it extremely difficult to gauge the nature and extent of the practice. Some data is kept in the records of the police and courts, as well as of relevant ministries, but is not made publicly available as a matter of course. During the research for this Report, access to this data was not obtainable from the research bureau of the judiciary, supposedly because of orders of the chief justice not to make this information public.<sup>59</sup> There is no freedom of information act or any such legislation that would allow anyone in Sudan to compel the authorities to release the relevant data.<sup>60</sup> In the absence of this, anyone

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<sup>56</sup> See Human Rights Committee, *General Comment No.28: Equality of rights between men and women (article 3)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000, para.13: ‘States parties should provide information on any specific regulation of clothing to be worn by women in public. The Committee stresses that such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.’

<sup>57</sup> See in particular article 14 (3) (b) ICCPR: ‘To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing’; (d): ‘To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’

<sup>58</sup> Article 197 (c) of the Criminal Procedure Code 1991.

<sup>59</sup> Interview by researcher with administrative staff of Sudan’s Research Bureau of the Chief Justice conducted in October 2011.

<sup>60</sup> Article 25 (2) of the Press and Publications Act stipulates a qualified right for journalists to obtain information from

interested must rely on private contacts who may be willing to share what they know confidentially. Moreover, some information may be gleaned from the Sudan Law Journal in respect of the limited number of cases reaching the appeal level. As a result, the picture concerning corporal punishments applied in Sudan remains obscure. This lack of information is itself part of the problem because it undermines transparency and a clearer understanding of the practice. Nevertheless, anecdotal accounts of lawyers and others working within the system, NGOs, reports by UN bodies and jurisprudence from the African Commission on Human and Peoples' Rights on the practice of corporal punishment<sup>61</sup> provide some insight into the nature and prevalence of corporal punishment. Recent practice indicates that there is a de-facto moratorium on amputations and stoning, although isolated judgments imposing the punishment of amputation have been reported.<sup>62</sup> The Government of Sudan declared as much in its reply to the UN Human Rights Committee in 2009: 'The State does not impose the penalty of amputation under any circumstances'.<sup>63</sup> Whipping is by far the most prevalent form of corporal punishment. Lawyers and others working within the system report that it is inflicted regularly and is part of the courts daily routine.<sup>64</sup>

Available evidence, including interviews conducted for this report in 2011 in Sudan point to the following typical practice: many of those subjected to whipping appear to belong to marginalised groups, such as impoverished women, tea-sellers,<sup>65</sup> and those from certain backgrounds, including Southern Sudanese and Darfurians, particularly for alcohol related offences<sup>66</sup> or for alleged adultery.<sup>67</sup> However, the sentencing of a well-known football player to forty lashes for

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official sources according to the law, which is in practice, in the absence of freedom of information legislation, subject to the discretion of public authorities.

<sup>61</sup> See for example, Human Rights Council *Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman*, UN Doc. A/HRC/14/41, 26 May 2010, para.29; Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Sudan, Sima Samar*, UN Doc. A/HRC/7/22, 3 March 2008, para.71; *Curtis Francis Doebbler v Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 236/2000 (2003).

<sup>62</sup> *Supra* note 10.

<sup>63</sup> *Supra* note 5, para.14.

<sup>64</sup> Medani, *supra* note 8, at 75.

<sup>65</sup> Strategic Initiative on Women in the Horn of Africa (SIHA), *Beyond Trousers: The Public Order Regime and the Human Rights of Women and Girls in Sudan, A Discussion Paper*, Submission to the 46<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, the Gambia, 12 November 2009, available at:

<http://www.pclrs.org/downloads/Miscellaneous/Public%20Order%20Submission%20Paper%20MASTER%20FINAL.pdf>

<sup>66</sup> *Sudan's date-gin brewers thrive despite Sharia*, BBC News, 29 April 2010, available at: <http://news.bbc.co.uk/1/hi/8638670.stm>.

<sup>67</sup> OMCT, *Sudan, Woman Sentenced to 75 Lashes*, 19 February 2002, available at: <http://www.omct.org/violence-against-women/urgent-interventions/sudan/2002/02/d15636/>; OMCT, *Sudan: 30 lashes of the whip of a 15 year-old girl in Nyala*, 10 June 2003, available at: <http://www.omct.org/rights-of-the-child/urgent-interventions/2003/06/d16330/>; OMCT, *Sudan: Woman sentenced to 100 lashes of the whip on charges of adultery in Nyala*, 19 March 2004, available at: <http://www.omct.org/violence-against-women/urgent-interventions/sudan/2004/03/d16793/>; ReliefWeb, *United Nations Sudan Situation Report*, 4 May 2006, available at: <http://reliefweb.int/node/207590>; U.S. Department of State, Bureau of Democracy, Human Rights, and Labor Report on Sudan 2006 (Recounts women sentenced to 30 lashes for 'defaming' police officers), 6 March 2007, available at: <http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm>.



drinking alcohol,<sup>68</sup> the whipping of students<sup>69</sup> and the targeting of a journalist and those in her company for wearing 'indecent dress'<sup>70</sup> shows that societal status is not the only factor. Gender and certain types of conduct, often in combination, appear crucial factors. In other words, anyone who does not behave according to the prevailing moral norms, including as interpreted by individual police officers, is at risk of being arrested and charged with offences punishable by whipping. The arrest itself is frequently carried out by the public order police who come to know about what they consider 'morally deviant' behaviour. Crucially, the large number of vaguely worded offences gives police officers considerable leeway and power in determining whether anyone is suspected of having breached the law. Upon arrest, which is often carried out in form of collective raids known as *khasa*,<sup>71</sup> the suspects are frequently detained overnight and brought before the judge for a summary trial the next day. The proceedings tend to be short, commonly not more than half an hour, with the police or security officer setting out the case for the prosecution. Defendants frequently have limited awareness of the law and no legal assistance, and may also be anxious to minimise the societal fallout of drawn-out legal proceedings over charges of 'indecent' behaviour. As a result, their willingness and ability to defend themselves is seriously undermined and many defendants, following conviction, waive their right to appeal to put the experience behind them as quickly as possible. The punishment of whipping is then carried out on the spot.

Interviews conducted with officials, lawyers and those subjected to corporal punishment indicate that officials carrying out the whipping regularly do not adhere to the rules. The number of lashes is exceeded, parts of the body are hit that should be exempt, and those lashed are sworn at. In short, the limited safeguards of monitoring by a magistrate or someone else acting on his/her behalf, are frequently disregarded. The whipping video that surfaced in December 2010 therefore appears to reflect reality rather than constitute an aberration.<sup>72</sup> In practice, a punishment forming part of broader notions of a state imposed morality and security becomes a licence to lash out and insult marginalised members of society, thereby reinforcing hierarchies of power, ethnicity and gender.

This practice makes it clear why the stance taken by the journalist Lubna Hussein made her case so exceptional. She was arrested in July 2009 for 'wearing an indecent dress' (i.e. trousers). However, unlike her friends who were with her at the time, she refused to stand trial and publicly protested against her

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<sup>68</sup> *Worgu Sentenced to Flogging in Sudan*, BBC News, 11 November 2009, available at: <http://news.bbc.co.uk/sport1/hi/football/africa/8355246.stm>.

<sup>69</sup> *Doebbler v Sudan*, supra note 61, paras.1-5.

<sup>70</sup> See on Lubna Hussein's case, SIHA, *Beyond Trousers*, supra note 65, and *The Case of Lubna Hussein: A Rallying Cry against Sudan's Public Order Legislation?* In African Centre for Justice and Peace Studies, Sudan Human Rights Monitor, June-July 2009, available at: [http://www.acjps.org/Publications/Human\\_Rights\\_Monitor-Issue2-FINAL.pdf](http://www.acjps.org/Publications/Human_Rights_Monitor-Issue2-FINAL.pdf).

<sup>71</sup> *Ibid*, SIHA, *Beyond Trousers*, supra note 65, at 11.

<sup>72</sup> See supra note 2.

treatment. Her case generated publicity around the world, casting the spotlight on arbitrary law enforcement and administration of justice in the context of Sudanese public order laws.<sup>73</sup> This may have been crucial in influencing the court's determination of punishment, namely convicting her to payment of a fine instead of the customary whipping (ten of the women arrested together with Lubna Hussein were given ten lashes each).<sup>74</sup>

### 3. The problematic nature of whipping as applied in Sudan

The Sudanese practice of applying whipping as punishment is characterised by a number of features that expose its highly problematic nature, including:

- Harm caused

There is a lack of research that would make it possible to determine the physical and psychological impact of whipping in Sudan. However, studies carried out in other countries suggest that whipping inflicts considerable physical pain, including lasting scars depending on its intensity.<sup>75</sup> It may also result in psychological suffering, which stems from the powerlessness and humiliation inherent in officially sanctioned cruelty. This impact is heightened in the Sudanese context where whippings are carried out in public and frequently accompanied by verbal humiliation meant to reinforce the inferiority of the victim. The moral condemnation inherent in the whipping further isolates the victims as they may not garner any sympathy from the public or even those close to them for the treatment received. The shame of the punishment and lack of public acknowledgment may leave deep psychological scars and there is a clear need for further research to learn more about the detrimental consequences of whipping for victims. The harm caused is not confined to the victims as families and friends may suffer from the physical and/or psychological fall-out. Indeed, whole groups of persons or communities at risk may suffer from the very prospect of potentially facing such punishment, which may result in a heightened sense of fear and development of avoidance symptoms that may adversely impact on mental well-being.

- Discrimination

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<sup>73</sup> SIHA, *Beyond Trousers*, supra note 65.

<sup>74</sup> See Human Rights Council, *Report of the independent expert on the situation of human rights in the Sudan*, Mohammed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010 on the application of sharia laws to non-Muslims, at para.29: 'On 3 July 2009, the Public Order Police arrested 13 Muslim and non-Muslim women from a privately-owned restaurant and charged them with "indecent dressing". Some of the women were allegedly slapped and harassed. A judge in a Public Order Court found most of them guilty and sentenced them to lashing and the payment of fines or, in the alternative, imprisonment. On 18 November 2009, a 16 year old non-Muslim Sudanese girl was sentenced by a Public Order Court to 50 lashes for "indecent dressing" for having worn a skirt and blouse.'

<sup>75</sup> See for example Amnesty International, *A Blow to Humanity: Torture by Judicial Caning in Malaysia*, 6 December 2010, at 5, 32-34, 37-38, 40-41, available at: <http://www.amnesty.org/en/library/info/ASA28/013/2010>.

The interviews conducted, the cases considered by regional and international mechanisms, and reports by national and international Non-Governmental Organisations (NGOs) suggest that women seem to be at particular risk of whipping, and women from a disadvantaged background (Darfurian tea-sellers, Southern Sudanese alcohol-sellers and Ethiopian refugees) appear to be especially vulnerable.<sup>76</sup> Unsurprisingly, this inter-sectoral discrimination (class, gender, ethnicity) mirrors broader power relations in society. Whipping often follows alleged infractions of public order laws of a (potentially) sexual nature, such as indecent dressing, running a place of prostitution or other forms of behaviour considered deviant.<sup>77</sup> Women therefore face arrest by male police officers who are reported to have offered to drop charges in exchange for sexual favours.<sup>78</sup> The whipping of women by men is in itself a gendered punishment, which often has hardly disguised sexual overtones. The gender dimension of whipping is also evident in the targeting of men whose behaviour does not fit perceived gender stereotypes, particularly where they behave in an 'effeminate' way. In August 2010, for example, 19 men were reportedly given 30 lashes each for 'dancing in a womanly fashion' (i.e. wearing women's dresses and make up).<sup>79</sup>

- Arbitrariness and abuse

The legal regime, particularly in the context of public order laws, vests the executive with broad powers and provides limited safeguards against the imposition of whipping as punishment and any abuse during the actual execution. In practice, whipping appears to be an integral means to establish and maintain a particular order based on security considerations and gendered notions of state imposed morality. Its use forms part of a repressive culture that uses corporal punishments as a disciplining device. Beatings and lashings, or both, appear to be commonplace at home, in school, in the army and in prisons.<sup>80</sup> This suggests that recourse to the infliction of corporal pain is viewed as an effective method of instilling discipline. In an important recent development, the 2010 Child Act has been reformed and now prohibits any whipping or beatings in school,<sup>81</sup> as well as whipping as a judicial sanction against children (anyone under the age of eighteen years).<sup>82</sup> However, it is not clear to what degree this reform signals a broader change in direction. Officially, Sudan claims that corporal punishments, particularly whipping, serve as an effective deterrent.<sup>83</sup> Islamic scholars and

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<sup>76</sup> SIHA, *Beyond Trousers*, supra note 65.

<sup>77</sup> Halim, *Gendered Justice*, supra note 55, at 238-240.

<sup>78</sup> SIHA, *Beyond Trousers*, supra note 65, at 11.

<sup>79</sup> *Cross-dressing men flogged in Sudan for being womanly*, BBC News, 4 August 2010, available at: <http://www.bbc.co.uk/news/world-africa-10871494>.

<sup>80</sup> Mohamed Osman, *Corporal Punishments in the Sudanese Judicial System*, 2011 (on file with REDRESS).

<sup>81</sup> Article 29 (1) (a) of the Child Act 2010.

<sup>82</sup> *Ibid.*, article 77 (d).

<sup>83</sup> *Supra* note 5.

officials interviewed for this report seem to share this sentiment.<sup>84</sup> It is clear that Islamic injunctions underpin the belief in the justice and necessity of corporal punishments. This religiously informed acceptance appears to have been fused with an instrumental approach that transforms the narrow and exceptional scope of application in Sharia into a paradigmatic and routine punishment for a range of transgressions that run counter to the interest of the dominant order. As this order has been developed without any democratic legitimation, both following the introduction of Nimeri's 1983 September laws and the 1989 coup, corporal punishments form part of a broader question as to what kind of society people want to live in.

### **III. International standards**

#### **1. Sudan's treaty obligations**

Sudan is a party to several treaties that prohibit torture and other cruel, inhuman or degrading treatment or punishment, namely the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities (CRPD), and the African Charter on Human and Peoples' Rights (ACHPR).<sup>85</sup> Sudan is also bound by customary international law, which recognises the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

#### **2. The prohibition of corporal punishment under international law**

##### **2.1. Treaty law**

##### **2.1.1. Sources**

The prohibition of torture or cruel, inhuman or degrading treatment or punishment is expressly recognised in several treaty provisions. This includes article 7 ICCPR, articles 1 and 16 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), article 37(a) of the UN Convention on the Right of the Child (CRC), article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), and article 15 CRPD at the international level as well as articles 5 ACHPR, article 5 (2) of the American Convention on Human Rights (ACHR) and article 3 of the European Convention on Human Rights (ECHR) at the regional level. This prohibition is absolute. It cannot be derogated from in

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<sup>84</sup> Osman, *supra* note 80.

<sup>85</sup> ICCPR, acceded to 18 March 1986; CRC, ratified 3 August 1990; CRPD, ratified 24 April 2009; ACHPR, ratified 18 February 1986.

times of emergency.<sup>86</sup> States are also not permitted to enter reservations that modify the scope of the prohibition.<sup>87</sup>

The provisions governing the prohibition of torture and cruel, inhuman or degrading treatment or punishment (CIDTP) do not specifically mention 'corporal' punishment. However, all UN treaty bodies and regional commissions and/or courts have found that such punishment is incompatible with the prohibition under international law. While some decisions suggest that corporal punishment may amount to torture,<sup>88</sup> which may be justifiable on account of its purpose and/or severity, others classify it as CIDTP.<sup>89</sup> Irrespective of its legal qualification, it is clear that corporal punishment would amount to a violation of states parties' obligation in respect of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under the relevant treaties.

Corporal punishments do not constitute lawful sanctions excluded from the scope of the prohibition of torture and CIDTP. Such an expectation has been the subject of debates surrounding article 1 CAT, which provides that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. Initially, the drafters intended to specify that such 'sanctions' need to be consistent with the Standard Minimum Rules ('SMRs') for the Treatment of Prisoners.<sup>90</sup> The SMRs stipulate, *inter alia*, that '[c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences'.<sup>91</sup>

Some states, such as Saudi Arabia, have argued that corporal punishment cannot be considered torture or CIDTP where it is the 'law of the land'.<sup>92</sup> However, the Special Rapporteur on Torture and several leading writers in the field have repeatedly emphasised that sanctions must be lawful under domestic and international law.<sup>93</sup> As rightly noted, this means that punishments that meet

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<sup>86</sup> Human Rights Committee, General Comment 29, States of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

<sup>87</sup> Human Rights Committee, General Comment 24, *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, 4 November 1994.

<sup>88</sup> *Doebbler v Sudan*, supra note 61; *Caesar v Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am Ct. H.R. (Ser. C) No. 123 (2005).

<sup>89</sup> *Tyrer v United Kingdom*, 25 April 1978, European Court of Human Rights (Application no. 5856/72); *Higginson v Jamaica*, Human Rights Committee, Communication No. 792/1998, U.N. Doc. CCPR/C/74/D/792/1998 (2002).

<sup>90</sup> J.H. Burgers and H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dordrecht: Martinus Nijhoff Publishers, 1988, at 121.

<sup>91</sup> *Standard Minimum Rules on the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, article 31.

<sup>92</sup> *Summary record of the first part (public) of the 519th meeting: Denmark, Saudi Arabia*, UN Doc. CAT/C/SR.519, 17 May 2002, para.30.

<sup>93</sup> UN General Assembly, Note by the Secretary-General, *Torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/60/316, 30 August 2005, paras.26-28; N.S. Rodley and M. Pollard, *The Treatment of Prisoners*

the threshold of torture cannot by definition fall within the scope of the lawful sanctions clause, thus leaving it without any apparent scope of application.<sup>94</sup> Even if certain forms of corporal punishment were not understood to constitute torture, they would still constitute inhuman, cruel or degrading punishment, and thus violate article 16 CAT. This debate is relevant for Sudan – though it is not a state party to the CAT yet – because it illustrates the understanding of the key treaty body and international lawyers of what types of punishment may be considered compatible with international standards concerning the prohibition of torture and CIDTP.

In a notable development, the Islamic Republic of Pakistan entered a reservation to article 7 ICCPR (prohibition of torture and inhuman, degrading and cruel treatment and punishment) and several articles of the CAT. According to this reservation, the relevant provisions should be applied ‘to the extent, that they are not repugnant to the provisions of the constitution of Pakistan and the Sharia Laws’, which could potentially include corporal punishment.<sup>95</sup> However, several states parties objected to these reservations on the ground that they left the scope of Pakistan’s obligations under the respective treaties unclear.<sup>96</sup> Following political pressure, Pakistan decided to withdraw this part of its reservations in 2011.<sup>97</sup> This episode confirms the general rule on reservations, according to which they must be clear and must allow other states and the treaty body in question to discern to what degree the state concerned considers itself bound by the treaty. Reservations must also conform to the general rule that states may not invoke their internal laws to justify a failure to perform their treaty obligations.<sup>98</sup>

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*under International Law*, 3<sup>rd</sup> ed. Oxford: Oxford University Press, 2009, 445, who also refer to the position of states endorsing this interpretation, citing UN Doc. A/39/499 (1984), paras.11, 13, 19 and 21.

<sup>94</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, UN Doc. A/HRC/13/39/Add., 5 February 2010, paras. 212-219.

<sup>95</sup> Pakistan ratified both the ICCPR and CAT in June 2010 and lodged several reservations. Reservations to the ICCPR can be found at [http://www.bayefsky.com/pdf/pakistan\\_t2\\_ccpr.pdf](http://www.bayefsky.com/pdf/pakistan_t2_ccpr.pdf) and reservations to CAT can be seen at [http://www.bayefsky.com/pdf/pakistan\\_t2\\_cat.pdf](http://www.bayefsky.com/pdf/pakistan_t2_cat.pdf).

<sup>96</sup> Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, United Kingdom, United States and Uruguay all objected to Pakistan’s reservations to the ICCPR ([http://www.bayefsky.com/pdf/pakistan\\_t2\\_ccpr.pdf](http://www.bayefsky.com/pdf/pakistan_t2_ccpr.pdf)). See for example, objections made by Canada, 27 June 2011: ‘The Government of Canada considers that reservations which consist of a general reference to national law or to the prescriptions of the Islamic Sharia constitute, in reality, reservations with a general, indeterminate scope. This makes it impossible to identify the modifications to obligations under the Covenant that each reservation purports to introduce and impossible for the other States Parties to the Covenant to know the extent to which Pakistan has accepted the obligations of the Covenant, an uncertainty which is unacceptable, especially in the context of treaties related to human rights.’ The same countries, with the exception of Uruguay, also objected to Pakistan’s reservations to the CAT ([http://www.bayefsky.com/pdf/pakistan\\_t2\\_cat.pdf](http://www.bayefsky.com/pdf/pakistan_t2_cat.pdf)).

<sup>97</sup> *Pakistan PM directs to withdraw most of reservations on ICCPR, CAT*, World Tribune Pakistan,

22 June 2011, available at:

[http://www.worldtribunepakistan.com/news\\_detail.php?page\\_id=28333](http://www.worldtribunepakistan.com/news_detail.php?page_id=28333).

<sup>98</sup> HRC General Comment 24, *supra* note 87, and Human Rights Committee General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004.



## 2.1.2. Practice

### (a) United Nations

#### (i) International Covenant on Civil and Political Rights

Article 7 ICCPR provides that: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The Human Rights Committee, which is responsible for monitoring the compliance of states parties, such as Sudan, with their treaty obligations, has interpreted article 7 ICCPR as follows:

the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee's view, moreover, the prohibition *must extend to corporal punishment*, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure... (emphasis added).<sup>99</sup>

It emphasised that the purpose of article 7 is to 'protect the dignity and both the physical and mental integrity of the individual'.<sup>100</sup>

In its concluding observations on the reports submitted by states parties, the Committee repeatedly expressed concern about the imposition of corporal punishment by state parties, including Sudan, on the grounds that such practice is incompatible with article 7. In the period 2005-2010, the Committee called on several states to abolish laws allowing for corporal punishment as a judicial sanction, including Botswana,<sup>101</sup> Iran,<sup>102</sup> Libya,<sup>103</sup> the United Republic of Tanzania,<sup>104</sup> the Sudan<sup>105</sup> and Yemen.<sup>106</sup>

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<sup>99</sup> Human Rights Committee, *General Comment 20, Article 7 (Forty-fourth session, 1992)*, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para.5.

<sup>100</sup> *Ibid.*, para.2.

<sup>101</sup> Human Rights Committee, *Concluding Observations on Botswana*, UN Doc. CCPR/C/BWA/CO/1, 28 March 2008, para.19.

<sup>102</sup> Human Rights Committee, *Concluding Observations on Iran*, UN Doc. CCPR/C/IRN/CO/3  
3 November 2011, para.19.

<sup>103</sup> Human Rights Committee, *Concluding Observations on Libya*, UN Doc. CCPR/C/LBY/CO/4, 15 November 2007, para.16.

<sup>104</sup> Human Rights Committee, *Concluding Observations on Tanzania*, UN Doc. CCPR/C/TZA/CO/4, 6 August 2009, para.16.

<sup>105</sup> Human Rights Committee, *Concluding Observations on Sudan*, UN Doc. CCPR/C/SDN/CO/3, 29 August 2007, para.10.

<sup>106</sup> Human Rights Committee, *Concluding Observations on Yemen*, UN Doc CCPR/CO/84/YEM, 9 August 2005, para.16.

This practice demonstrates that the Committee rejects the assertions made by states, such as by one of the Sudanese delegates in 2007, that ‘flagellation and whipping, for example, were lawful forms of punishment in the Sudan and as such not incompatible with the Covenant’.<sup>107</sup> (As noted above, states may not invoke national laws to justify a failure to perform their treaty obligations.)

The Committee’s position was also affirmed in its jurisprudence, particularly in *Osbourne v Jamaica* and *Higginson v Jamaica*. The cases concerned the use of whipping as a criminal sanction, here the use of a tamarind switch.<sup>108</sup> The Human Rights Committee found a violation of article 7 ICCPR in both cases, holding that:

Irrespective of the nature of the crime that is to be punished or the permissibility of corporal punishment under domestic law, it is the consistent opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.<sup>109</sup>

The Committee has also commented on the gendered dimension of corporal punishment. Of particular interest in the Sudanese context, the Committee stated in its General Comment 28 on the equality of men and women that article 7 may be violated if corporal punishment is imposed in order to enforce any specific regulation of clothing to be worn by women in public.<sup>110</sup>

## **(ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Article 1 of the CAT defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’. Further, article 16 of the CAT stipulates that ‘[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts

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<sup>107</sup> Human Rights Committee, *Consideration of third periodic report of the Sudan*, CCPR/C/SDN/3, 12 July 2007, para.38.

<sup>108</sup> *George Osbourne v Jamaica*, Human Rights Commission, Communication No. 759/1997, U.N. Doc. CCPR/C/68/D/759/1997 (2000) and *Higginson v Jamaica*, *supra* note 89.

<sup>109</sup> *Ibid.*, *Higginson v Jamaica*, para. 4.6; *Errol Pryce v Jamaica*, Communication No. 793/1998, U.N. Doc. CCPR/C/80/D/793/1998 (2004) para. 6.2; *Boodlal Sooklal v Trinidad and Tobago*, Communication No. 928/2000 (2 February 2000), CCPR/C/73/D/928/2000, para. 4.6.

<sup>110</sup> Human Rights Committee, General Comment 28, *Equality of rights between men and women* (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), 29 March 2000, para.13.

are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’.

The Committee against Torture has expressed its concern over the practice of corporal punishment in a number of concluding observations, such as on Indonesia,<sup>111</sup> Saudi Arabia<sup>112</sup> and Yemen.<sup>113</sup> The case of Indonesia is instructive. The Committee stated that ‘it is deeply concerned that local regulations, such as the Aceh Criminal Code, adopted in 2005, introduced corporal punishment for certain new offences’. It expressed a series of concerns, namely over: ‘the execution of punishment in public and the use of physically abusive measures (such as flogging or caning) that contravene the Convention and national law’; arbitrary application, i.e. ‘the enforcement of such provisions is under the authority of a “morality police”, the *Wilayatul Hisbah*, which exercises an undefined jurisdiction and whose supervision by public State institutions is unclear’; and the disproportionate impact of the administration of such punishments on women.<sup>114</sup>

### **(iii) Convention on the Rights of the Child**

Article 37 of the CRC provides that ‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment’.

The Committee on the Rights of the Child has taken a strong position against corporal punishment of children, that is ‘any punishment in which physical force is used and intended to cause some degree of pain and discomfort, however light’,<sup>115</sup> which it set out in its General Comment 8 and General Comment 13.<sup>116</sup> The Committee considered such punishment in all settings, including in the justice system, and found the practice ‘directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity’<sup>117</sup> and to be ‘inherently degrading’.<sup>118</sup> Importantly, it stated that the prohibition of corporal punishment is absolute, and cannot be justified.<sup>119</sup>

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<sup>111</sup> See Committee Against Torture, *Concluding Observations on Indonesia*, UN Doc. CAT/C/IDN/CO/2, 2 July 2008. Accordingly to Amnesty International, the Indonesian bylaw in Aceh (Islamic Criminal Code) allows for ‘stoning to death for adultery and caning of up to 100 lashes for adultery’ (See Amnesty International’s Open Letter About the Islamic Criminal Code in Aceh, 5 November 2009, Ref: ASA 21/021/2009).

<sup>112</sup> Committee Against Torture, *Concluding Observations on Saudi Arabia*, UN Doc. CAT/C/CR/28/5, 12 June 2002, para. 4(b).

<sup>113</sup> Committee Against Torture, *Concluding Observations on Yemen*, UN Doc. CAT/C/YEM/CO/2/Rev.1, 25 May 2010, para.18.

<sup>114</sup> *Ibid.*, para.15.

<sup>115</sup> Committee on the Rights of the Child, General Comment 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, UN Doc. CRC/C/GC/8, 2 March 2007, para.11.

<sup>116</sup> *Ibid.* and Committee on the Rights of the Child, General comment No. 13, *The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13, 18 April 2011, para.22 (a).

<sup>117</sup> *Ibid.*, General Comment 8, para.21.

<sup>118</sup> Committee on the Rights of the Child General Comment 13, para.24.

<sup>119</sup> Committee on the Rights of the Child General Comment 8, para.29: ‘In certain states, the Committee has found that children, in some cases from a very young age, in other cases from the time that they are judged to have reached

The Committee has repeatedly called on states to outlaw corporal punishment as a judicial sanction, such as in its concluding observations on Nigeria<sup>120</sup> and Yemen,<sup>121</sup> and called on states to implement laws and programmes to effectively stop all forms of corporal punishments of children.

## **(b) Regional systems**

### **(i) African**

Article 5 of the African Convention on Human and Peoples' Rights states that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

*Doebbler v Sudan* is the leading case on corporal punishment before the African Commission on Human and Peoples' Rights.<sup>122</sup> The case concerned eight students (male and female) who had been convicted and sentenced to fines and lashes on the grounds of violating 'public order' contrary to Article 152 of Sudan's Criminal Act of 1991 because they were not properly dressed or were acting in a manner considered to be immoral. Each of the students was sentenced to a fine and between 25 and 40 lashes. The lashes were carried out in public on the bare backs of the women using a wire and plastic whip that leaves permanent scars.<sup>123</sup>

The African Commission, in considering whether the lashes violated the prohibition in article 5, stated that:

whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.<sup>124</sup>

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puberty, may be sentenced to punishments of extreme violence, including stoning and amputation, prescribed under certain interpretations of religious laws. Such punishments plainly violate the Convention and other international human rights standards ...'

<sup>120</sup> Committee on the Rights of the Child, *Concluding Observations on Nigeria*, UN Doc. CRC/C/NGA/CO/3-4, 11 June 2010, para.6, 40-41.

<sup>121</sup> Committee on the Rights of the Child, *Concluding observations on Yemen*, UN Doc. CRC/C/15/Add.267, 21 September 2005, paras.41-43.

<sup>122</sup> *Curtis Francis Doebbler v Sudan*, supra note 61.

<sup>123</sup> *Ibid.*, para.30.

<sup>124</sup> *Ibid.*, para.37.

The Commission dismissed the argument that the punishment was justified because the acts for which it was imposed were criminal under domestic law. Its position on the question of the imposition of corporal punishment was unequivocal, namely that:

there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.<sup>125</sup>

Accordingly, the Commission found that the punishment had violated article 5 of the African Charter. The decision in *Doebbler v Sudan* constitutes a strong and unequivocal statement on the prohibition of corporal punishment under the Charter. Importantly, it suggests that corporal punishment amounts to torture in its own right.

## **(ii) European**

Article 3 of the European Convention on Human Rights provides that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

*Tyrer v UK* is the leading European Court of Human Rights case on corporal punishment. Indeed, its early date and the persuasive reasoning of the Court mean that it has become an important precedent that has been relied upon in international and national jurisprudence.

The case concerned a 15-year-old citizen of the United Kingdom who was a resident of the Isle of Man. After pleading guilty in the local juvenile court to unlawful assault occasioning actual bodily harm, Mr. Tyrer was sentenced to three strokes of a birch. Following an unsuccessful appeal, the High Court of Justice of the Isle of Man ordered Mr. Tyrer to be medically examined on that day to determine whether he was fit to receive the punishment. Upon confirmation, he was birched in the presence of his father and a doctor. The Court described the details of the birching as follows:

The applicant was made to take down his trousers and underpants and bend over a table; he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke. The applicant's father lost his self-control and after the third stroke "went for" one of the policemen and had to be restrained. The birching raised, but did not cut, the applicant's skin and he was sore for about a week and a half afterwards.<sup>126</sup>

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<sup>125</sup> *Ibid.*, para.42.

<sup>126</sup> *Tyrer v UK*, supra note 89, para.10.

For the punishment to be ‘degrading’ and in breach of Article 3, ‘the humiliation or debasement involved must attain a particular level’ and be other than that usual element of humiliation (i.e. that comes with a criminal conviction).<sup>127</sup> As explained by the Court ‘the assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution’.<sup>128</sup>

The Court rejected the claims made by the Attorney General in defence of the state’s use of judicial corporal punishment, namely that such (judicial) punishment (i) does not outrage public opinion, (ii) acts as a deterrent<sup>129</sup>, (iii) was carried out in private without publication of the offender’s name, and (iv) was a fit punishment for a crime involving violence. The Court stated that ‘even assuming that local public opinion can have an incidence on the interpretation of the concept of "degrading punishment" appearing in Article 3, it does not regard it as established that judicial corporal punishment is not considered degrading by residents of the Isle of Man who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves’.<sup>130</sup>

Further, a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control ‘[a]bove all... it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be’.<sup>131</sup>

Publicity may be a factor in determining whether a punishment is ‘degrading’, but the absence of publicity will not necessarily prevent a punishment from falling into that category. ‘It may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.’<sup>132</sup> The Court noted:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an

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<sup>127</sup> Ibid., para.30.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid., para.31.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid., para.32.



assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.<sup>133</sup>

It was irrelevant whether corporal punishment was suitable for a crime of violence and that birching was an alternative to a period of detention. 'The fact that one penalty may be preferable to, or have less adverse effects or be less serious than, another penalty does not of itself mean that the first penalty is not "degrading" within the meaning of Article 3.'<sup>134</sup>

### (iii) Inter-American

Article 5 of the American Convention on Human Rights provides that: 'No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.'

*Caesar v Trinidad and Tobago* is the leading case on corporal punishment in the American system, in which the Inter-American Court of Human Rights held that the sentence of 15 strokes of the cat-o'-nine tails<sup>135</sup> against a male convicted of rape violated, *inter alia*, Article 5 of the American Convention prohibiting torture or cruel, inhuman or degrading treatment or punishment.<sup>136</sup>

The Court stressed the absolute nature of the prohibition of torture and cruel, inhuman or degrading punishment or treatment, cited a number of international authorities to the effect that corporal punishment is prohibited, and pointed out that several states had recently abolished their laws providing for such punishments.<sup>137</sup> It concluded:

Regarding the law and practice in Trinidad and Tobago of judicial corporal punishment by flogging, the Court considers that the very nature of this punishment reflects an institutionalization of violence, which, *although permitted by the law*, ordered by the State's judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging

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<sup>133</sup> *Ibid.*, para.33.

<sup>134</sup> *Ibid.*, para.34.

<sup>135</sup> The Oxford English Dictionary defines the cat-o'-nine-tails as 'a rope whip with nine knotted cords, used for flogging'.

<sup>136</sup> *Caesar v Trinidad and Tobago*, *supra* note 88.

<sup>137</sup> The Court states: 'Examples of recent legislative change include: the Abolition of Corporal Punishment Ordinance 1998 (Anguilla), the of Corporal Punishment (Abolition) Act 2000 (British Virgin Islands), the Prisons (Amendment) Law 1998 (Cayman Islands), the Criminal Law (Amendment) Act (Act No 5 of 2003) (Kenya), the Punishment of Whipping Act 1996 (Pakistan) (but still permitted for "Hudood" crimes), and the Abolition of Corporal Punishment Act 1997 (South Africa).'

constitutes a form of torture and, therefore, is a violation *per se* of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in Article 5(1) and 5(2), in connection with Article 1(1) of the Convention...(emphasis added).<sup>138</sup>

Further, the Court expressed its 'profound regret' that the state authorities had opted for a punishment that was 'in blatant violation of the State's obligations':

While the Inter-American Court is neither authorized nor required by the Convention to pronounce on the compatibility of the actions of individuals with the Convention, it is nevertheless obvious that the conduct and decisions of civil servants and state agents must be framed within those international obligations. In the instant case, where the Corporal Punishment Act of Trinidad and Tobago gives the relevant judicial officer an option to order corporal punishment in addition to imprisonment in certain circumstances, the Court feels bound to put on record its profound regret that the presiding officer in the State's High Court saw fit to exercise an option which would manifestly have the effect of inflicting a punishment that is not merely in blatant violation of the State's international obligations under the Convention, but also is universally stigmatized as cruel, inhuman, and degrading.<sup>139</sup>

## 2.2. Customary International Law

The United Nation's concern about corporal punishment dates back to the late 1940s when the UN Trusteeship Council examined the practice of judicial corporal punishment in several trust territories.<sup>140</sup> As a result, the UN General Assembly resolved to call for the abolition of judicial corporal punishment in 'the Cameroons and Togoland under British administration and that corporal punishment should be formally abolished in New Guinea'.<sup>141</sup> In 1975, the Commission on Human Rights concluded that public floggings in Namibia instigated by South Africa 'have become a shocking feature of the punishment of opponents of the *apartheid* policy'.<sup>142</sup>

The UN has developed a substantial body of standards on the administration of justice that demonstrate its support for, and considerable consensus on, the

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<sup>138</sup> *Caesar v Trinidad and Tobago*, supra note 88, para.73.

<sup>139</sup> *Ibid.*, para.74.

<sup>140</sup> The Cameroons (UK), New Guinea (Australia), Ruanda-Urundi (Belgium), Tanganyika (UK), and Togoland (UK) had provisions for corporal punishment. See Rodley and Pollard, supra note 93, at 429.

<sup>141</sup> UN General Assembly Resolution 323 (IV), 15 November 1949, cited *ibid.*, at 429-430.

<sup>142</sup> Res 5 (XXXI) (14 February 1975), Commission on Human Rights, Report, 31<sup>st</sup> session, ESCOR, 58<sup>th</sup> Session, Supplement No.4 (1975), Chapter XXIII, cited *ibid.* at 430-431.

prohibition of corporal punishment. Rule 31 of the Standard Minimum Rules on the Treatment of Prisoners that were approved by the UN Economic and Social Council (ECOSOC) in 1957 and 1977 prohibits corporal punishment. The 1975 UN General Assembly Declaration on the Protection of All Persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment, specifically provided that sanctions are only lawful 'to the extent [that they are] consistent with the Standard Minimum Rules for the Treatment of Prisoners', i.e. excluding corporal punishment. This was indirectly confirmed in the 1988 Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment according to which '[n]o person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.

The 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty echoes and elaborates on the standard minimum rules by stipulating that '[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned'. This prohibition of corporal punishment, though seemingly primarily focusing on disciplinary offences, applies in equal measure to judicial sanctions. It is couched in the language found in international treaties, namely 'cruel', 'inhuman', 'degrading', and based on the fact that such punishment is a violation of basic dignity.

The UN Special Rapporteur on Torture has made it clear that corporal punishment is incompatible with international standards. His 2003 recommendations state that '[l]egislation providing for corporal punishment, including excessive chastisement ordered as a punishment for a crime or disciplinary punishment, should be abolished'.<sup>143</sup> In a recent report in 2010, the Special Rapporteur lamented the continuing use of this form of punishment, finding that '[w]hat is common to all these forms of corporal punishment, however, is that physical force is used intentionally against a person in order to cause a considerable level of pain. Furthermore, without exception, corporal punishment has a degrading and humiliating component. All forms of corporal punishment must therefore, be considered as amounting to cruel, inhuman or degrading punishment in violation of international treaty and customary law.'<sup>144</sup> The UN Human Rights Council has for its part reminded states that '[c]orporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture'.<sup>145</sup>

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<sup>143</sup> Commission on Human Rights, *Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38*, UN Doc. E/CN.4/2003/68, 17 December 2002, para.26 (c).

<sup>144</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/13/39/Add.5, 5 February 2010, para.209.

<sup>145</sup> Human Rights Council Resolution 8/8, 18 June 2008, para.7(a).

A large number of ratifications of relevant treaties, such as the UN Convention against Torture, the ICCPR, as well as regional human rights treaties,<sup>146</sup> a series of UN declarations, and national laws and jurisprudence prohibiting or abolishing corporal punishment provide considerable evidence of state practice accompanied by *opinio juris* (belief in the binding nature of a rule) that is required to demonstrate the customary nature of a norm.<sup>147</sup> This is reinforced by the prohibition of corporal punishment in international humanitarian law applicable during times of armed conflict.<sup>148</sup>

For a norm to attain such status, practice needs to be sufficiently uniform and consistent. An overwhelming number of states have abolished corporal punishment; only a few states still permit the use of flogging and other corporal punishments in their legal systems.<sup>149</sup> Considering the weight of state practice and *opinio juris* mentioned above, their number is not sufficient to undermine the recognition of corporal punishment as a prohibited form of cruel, inhuman or degrading punishment, if not torture. States that have continuously objected to the prohibition of corporal punishment may have the status of persistent objectors that are exempt from the rule.<sup>150</sup> However, a persistent objector must object to the recognition of a rule from the very beginning. This would arguably not be the case where states become parties to relevant treaties without entering relevant reservations to this effect (which may in any case be incompatible with the object and purpose of the treaty concerned). Moreover, a state cannot be a persistent objector where the rule concerned has attained the status of peremptory norm (*jus cogens*) and is so fundamental that no state may derogate from it.<sup>151</sup> This has been recognised for the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>152</sup> Corporal punishment therefore falls within the prohibition of torture as a rule of customary law having attained the status of *jus cogens* that all states are bound by. As a result, states may not apply corporal punishment and should, in line with the jurisprudence of treaty body and courts, and recommendations by UN bodies, abolish corporal

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<sup>146</sup> See supra at 3.2.1.1. The Arab Charter on Human Rights of 2004 is the only regional human rights treaty that does not contain an explicit prohibition of cruel, inhuman or degrading 'punishment' although its article 8(1) prohibits torture or cruel, degrading, humiliating or inhuman treatment.

<sup>147</sup> See article 38 of the Statute of the International Court of Justice.

<sup>148</sup> See article 87 Third Geneva Convention; article 32 Fourth Geneva Convention; article 75, para.2 Additional Protocol I as well as article 3 common to all four Geneva Conventions (referring to 'mutilation, cruel treatment and torture ... humiliating and degrading treatment' but not corporal punishment as such) and article 4 (2) (a) Additional Protocol II to the Geneva Conventions. According to the ICRC Customary International Humanitarian Law database, the prohibition of corporal punishment constitutes customary international law, see [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule91](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule91).

<sup>149</sup> Available research suggests that around thirty states retain corporal punishments on their statute books although they may not necessarily apply it in practice. See [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org).

<sup>150</sup> I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed., Oxford: Oxford University Press, 2008, 11.

<sup>151</sup> See in this context Rodley and Pollard, supra note 93, at 442, who discuss whether a country such as Saudi Arabia 'could claim a historic or regional variation of customary law' but find that this would be incompatible with the *jus cogens* nature of the prohibition of torture.

<sup>152</sup> *Prosecutor v Furundzija*, IT-95-17/1-A, ICTY Judgement of the Appeals Chamber 21 July 2000; *Al-Adsani v The United Kingdom*, 35763/97, European Court of Human Rights, 21 November 2001; *Caesar v Trinidad and Tobago*, supra note 88; Committee against Torture, General Comment Number 2, *Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 28 January 2008, para.1.

punishment as a judicial sanction provided for in their statutory laws, particularly criminal law, or customary laws.

### **3. Corporal punishment in Sudan before regional and international treaty bodies**

#### **3.1. African Commission on Human and Peoples' Rights**

The African Commission had the opportunity to consider the practice of corporal punishment in the landmark case of *Curtis Francis Doebbler v Sudan* (see brief summary above at III.2.1.2. (b) (i)). When considering the case, the African Commission rejected the state's argument that 'the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country'.<sup>153</sup> Following a review of international standards, it found that the lashings violated article 5 of the African Charter and requested the Government of Sudan to:

'Immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments;  
Abolish the penalty of lashes; and to Take appropriate measures to ensure compensation of the victims.'

Subsequently, the African Commission examined Sudan's compliance with its substantive obligations under the African Charter when considering the state's third periodic report covering the period from 2003 to 2008. The Commission found that corporal punishment was still on the statute books and applied in practice. It recommended that Sudan '[e]nact legislation banning the use of corporal punishment and all other inhuman and degrading treatment'.<sup>154</sup>

#### **3.2. UN bodies**

##### **3.2.1. Human Rights Committee**

In its concluding observations on Sudan's first state party report, the Human Rights Committee responsible for the monitoring of the ICCPR found in 1997 that:

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<sup>153</sup> *Doebbler v Sudan*, supra note 61, para.34.

<sup>154</sup> Sudan state party report, 13 - 27 May 2009, Banjul, The Gambia, Consideration of Reports Submitted by States Parties under the Terms of Article 62 of the African Charter on Human and Peoples' Rights, *Concluding Observations and Recommendations on the Third Periodic Report of the Republic of Sudan (2003-2008)*, 54.

Flogging, amputation and stoning, which are recognized as penalties for criminal offences, are not compatible with the Covenant. In that regard, the Committee notes that:

By ratifying the Covenant, the State party has undertaken to comply with all its articles; penalties which are inconsistent with articles 7 and 10 must be abolished.<sup>155</sup>

In addition:

The Committee expresses concern at official enforcement of strict dress requirements for women in public places, under the guise of public order and morality, and at inhuman punishment imposed for breaches of such requirements. Restrictions on the liberty of women under the Personal Status of Muslims Act, 1992 are matters of concern under articles 3, 9 and 12 of the Covenant. Therefore: It is incumbent on the State party to ensure that all its laws, including those dealing with personal status, are compatible with the Covenant.<sup>156</sup>

These concerns were echoed in 2000 by the Committee on Economic, Social and Cultural rights responsible for monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR):

The Committee is also gravely concerned about the occurrence of flagellation or lashing of women for wearing allegedly indecent dress or for being out in the street after dusk, on the basis of the Public Order Act of 1996, which has seriously limited the freedom of movement and of expression of women.<sup>157</sup>

It strongly recommended that Sudan:

...reconsider existing legislation, particularly the 1996 Public Order Act, in order to eliminate discrimination against women, thereby ensuring their full enjoyment of human rights in general and economic, social and cultural rights in particular.<sup>158</sup>

In 2007, the Human Rights Committee expressed its concern about:

...the scale of values applied to punishment in the State party's legislation. It considers that corporal punishment including flogging and amputation is inhuman and degrading...The State party should abolish all forms of punishment that are in breach of articles 7 and 10 of the Covenant.<sup>159</sup>

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<sup>155</sup> Human Rights Committee, *Concluding Observations on Sudan*, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.9.

<sup>156</sup> *Ibid.*, para.22.

<sup>157</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on Sudan*, UN Doc. E/C.12/1/Add.48, 1 September 2000, para.24.

<sup>158</sup> *Ibid.*, para.34.

<sup>159</sup> *Supra* note 105, para. 10.

In 2010, the Committee on the Rights of the Child expressed its concerns in relation to the corporal punishment of children:

The Committee notes that the Child Act (2010) prohibits corporal punishment in schools. It also notes the adoption of the national plan to combat violence entitled “A Sudan Worthy of Children”. The Committee, however, is seriously concerned that corporal punishment, particularly caning and flogging, is widely practised in schools, in homes, in courts and in prisons.

Taking into account its general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, the Committee urges the State party to take all the necessary measures to end the practice of corporal punishment, and in particular, to:

(a) explicitly prohibit corporal punishment by law in all settings, ensure effective implementation of the law and prosecute offenders...<sup>160</sup>

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<sup>160</sup> Committee on the Rights of the Child, *Concluding Observations on Sudan*, UN Doc. CRC/C/SDN/CO/3-4, 1 October 2010, para.39-40.

### 3.2.2. UN Charter bodies

The UN has raised concerns about corporal punishment in Sudan since the early 1980s. In 1984, Mr. Mubanga-Chipoya, a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated during the consideration of the practice of 'decisive justice courts' in Sudan that 'no rule of law or religious principle, including rules that might draw on the Islamic religion could justify barbarous actions such as amputation'.<sup>161</sup> Subsequently, the Sub-Commission adopted resolution 1984/22, which recommended that the Commission on Human Rights 'urge the Governments, which have such legislation [providing for the penalty of amputation] or practices to take appropriate measures to provide for other punishments consonant with Article 5 [of the Universal Declaration]'.<sup>162</sup>

The Special Rapporteur on Sudan has repeatedly expressed concerns about the practice of corporal punishment in Sudan and urged Sudanese authorities to abolish such punishment. In 1994, the then Special Rapporteur emphasised that corporal punishments cannot be justified with reference to religious laws, which resulted in a stern rebuke by the Government of Sudan.<sup>163</sup> Since then, the various Special Rapporteurs have repeatedly reported on incidents of corporal punishment that have come to their attention.<sup>164</sup> This included the following report: '[o]n 1 December 1997, a serious incident took place in front of the UNDP Office in Khartoum when, in broad daylight and in the presence of United Nations staff and numerous passers-by, the security forces and uniformed elements brutally disrupted a peaceful demonstration by a group of approximately 50 women who wanted to transmit, through this office, a letter of protest to the Secretary-General against the forced conscription of their sons and brothers into the government Popular Defence Forces. As reported later, 36 women received 10 lashes each following a summary trial at which they were convicted for public order offences. One woman received 40 lashes, the additional lashes inflicted allegedly because she was wearing trousers and a T-shirt'.<sup>165</sup> The situation had not changed more than twelve years later when the Special Rapporteur reported that '[i]n Khartoum, ongoing violations stemming from the uneven application of

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<sup>161</sup> UN Doc. E/CN.4/Sub.2/1984/SR.23, para.63, cited in Rodley and Pollard, *supra* note 93, at 431, according to whom Amnesty International reported to the Sub-Commission that '58 sentences of amputation had been imposed and at least 34 had been carried out in the past eight months'.

<sup>162</sup> *Report of the Sub-Commission of Prevention of Discrimination and Protection of Minorities*, UN Doc. E/CN.4/1985/3; UN Doc. E/CN.4/Sub.2/1984/43, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G84/132/09/pdf/G8413209.pdf?OpenElement>.

<sup>163</sup> See *Report of the Special Rapporteur, Mr. Gáspár Bíró, submitted in accordance with Commission on Human Rights resolution 1993/60*, UN Doc. E/CN.4/1994/48, 1 February 1994, paras.59-61, and UN Doc. E/CN.4/1994/122, *supra* note 5, paras.72,73.

<sup>164</sup> See most recently Human Rights Council, Report of the independent expert on the situation of human rights in the Sudan, Mohammed Chande Othman, UN Doc. A/HRC/14/41, 26 May 2010, para.29.

<sup>165</sup> Commission on Human Rights, 54<sup>th</sup> session, Situation of human rights in the Sudan Report of the Special Rapporteur, Mr. Gáspár Bíró, submitted in accordance with Commission on Human Rights resolution 1997/59, UN Doc. E/CN.4/1998/66, 30 January 1998, para.42.



public order laws remain a major concern. At the core of the regime is article 152 of the Criminal Act of 1991, which criminalizes undefined “indecent and immoral acts” and recommends corporal punishment. The Public Order Police most frequently apply this provision to and carry out arrests of women, many of whom are not Muslims, regardless of the Comprehensive Peace Agreement and the prohibition by the Interim National Constitution’.<sup>166</sup>

#### 4. Findings

African and UN treaty bodies, as well as UN Charter mechanisms have been uniform in their condemnation of corporal punishment in Sudan as a violation of the prohibition of torture and inhuman, cruel or degrading punishment. They have also highlighted its discriminatory aspects in the context of public order laws. However, Sudan has defied these findings and recommendations; it has not taken any action to re-examine the use of corporal punishment, particularly in the form of floggings. On the contrary, Sudan has repeatedly sought to justify the practice, referring both to its national laws and utilitarian arguments. As noted by the African Commission in the case of *Doebbler v Sudan*, Sudan stated ‘that it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives’.<sup>167</sup> The Commission castigated the Government of Sudan, stating that ‘[t]he law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law’.<sup>168</sup>

Recently, in response to the Human Rights Committee’s recommendation to abolish corporal punishment, Sudan stated that:

It views the penalty of flogging, which is carried out on condition that it does not cause excruciating pain or leave a mark and only after consultation with a doctor, as a much better option than the alternative, namely, imprisonment, which has social consequences and wastes employment opportunities. Moreover, flogging is not carried out in public.<sup>169</sup>

The arguments raised by Sudan do not absolve it from its obligation to abolish corporal punishments. National laws contrary to international standards are no

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<sup>166</sup> Supra note 164, para.29.

<sup>167</sup> *Doebbler v Sudan*, supra note 61, para.43.

<sup>168</sup> Ibid., para.44.

<sup>169</sup> Human Rights Committee, *Information received from Sudan on the implementation of the concluding observations of the Human Rights Committee (CCPR/C/SDN/CO/3)*, UN Doc. CCPR/C/SDN/CO/3/Add.1, 18 December 2009, para.14.

excuse; rather, states are obliged to bring their legislation in conformity with their international obligations.<sup>170</sup> Indeed, Sudan's interim national constitution provides in its Bill of Rights, article 27(3), that '[a]ll rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill'. However, in article 33, the word punishment has been omitted from the prohibition that '[n]o person shall be subjected to torture or to cruel, inhuman or degrading treatment'. The discrepancy between international treaties and article 33 has not been considered by the Sudanese judiciary to date. However, it raises concerns about Sudan's commitment to incorporate international treaties fully.

The argument put forward by the Government of Sudan that flogging does not result in excruciating pain may not withstand closer empirical scrutiny. It certainly does not alter its inherently humiliating character even where it is not carried out in public (although Sudanese legislation provides that whipping is to be carried out in public and it frequently is as demonstrated by the flogging video). The involvement of a doctor (which the law does not envisage for all forms of whipping, see above at II. 1(iii)), rather than justifying the practice, raises further concerns about a breach of medical ethics. Such ethics prohibit health professionals from facilitating practices that constitute violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment.<sup>171</sup> Given its inherently humiliating character, a state cannot invoke utilitarian arguments to justify the practice. Such an approach takes no account of the dignity and rights of the individuals involved, or international consensus what are considered acceptable minimum standards of treatment.

The seemingly stark dichotomy between whipping and imprisonment is misleading as criminal justice systems around the world recognise a number of alternative sanctions. This may include community service, fines and suspended sentences (probation), which would appear to adequately reflect the gravity of the transgression in most cases of public order offences at the heart of corporal punishment practices.

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<sup>170</sup> Human Rights Committee General Comment No. 31, supra note 98.

<sup>171</sup> See Human Rights Council Resolution 10/24, *Torture and other cruel, inhuman or degrading treatment or punishment: the role and responsibility of medical and other health personnel*, available at: [http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_24.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_24.pdf).

## IV. Towards the worldwide abolition of corporal punishment

### 1. The UK and the abolition of corporal punishment

Corporal punishment as a judicial sanction formed part of the corpus of colonial laws. In the British Empire,<sup>172</sup> the Indian Penal Code of 1860 served as template for criminal laws elsewhere, including in Sudan.<sup>173</sup> Whipping was 'deliberately excluded from the category of punishments recognized by the Indian Penal Code of 1860, but was authorized as a punishment for certain offences by the Whipping Act of 1864' (later amended by the Whipping Act of 1909).<sup>174</sup>

Meanwhile, in the UK itself, corporal punishment was increasingly being questioned, and, following the recommendations of the Cadogan Committee appointed in 1937, section 2 of the Criminal Justice Act, 1948, abolished corporal punishment. A subsequent review set up to consider the re-introduction of corporal punishment, namely the Advisory Council on the Treatment of Offenders (ACTO), reached the same conclusion in 1960. The reviews undertaken by both bodies are instructive since they constitute a thorough and persuasive evaluation of the subject that resulted in and upheld the abolition of corporal punishment in the UK up to this day.

The Cadogan Committee, having rejected retribution and reformation of offenders as possible justification for corporal punishment,<sup>175</sup> focused on its value as a deterrent. The Committee examined the records of 440 men convicted between 1921 and 1930 of robbery with violence, and compared the subsequent records of those who were flogged with the records of those who were not. It concluded that sentences of imprisonment or penal servitude without flogging were no less effective than those with flogging. The Committee found that those who had been flogged for crimes other than robbery with violence, including those without previous convictions of serious crimes, had worse subsequent records than those who were not flogged. It was only among those who had previously had the worst criminal records that the subsequent records of men who had been flogged were slightly better than for those who had not.<sup>176</sup> The Committee also examined the alleged deterrent effect of corporal punishment on others. It found no foundation for the common belief that specific outbreaks of crime were put down by flogging, or evidence that the introduction of flogging had

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<sup>172</sup> R. H. Arnot, 'The Judicial System of the British Colonies', *The Yale Law Journal* Vol. 16 (7), May 1907, 504-513.

<sup>173</sup> For an overview of codification British Colonial Africa see H.F. Morris, 'A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa 1876-1935', *Journal of African Law*, 18 (6), 1974, 6-23.

<sup>174</sup> C. Ilbert, 'British India', *Journal of the Society of Comparative Legislation*, Vol. 11 (2), (1911), 353.

<sup>175</sup> Cadogan Committee. *Report of the Departmental Committee on Corporal Punishment*. Cmnd. 5684. London: Her Majesty's Stationery Office, 1938. Reprint, 1963, 58.

<sup>176</sup> *Ibid.*, at 81-82.

resulted in a decrease in the number of offences for which it might be imposed. It was therefore not satisfied that corporal punishment had an exceptionally effective influence as a deterrent.<sup>177</sup>

Importantly, the Committee also considered the possible detrimental psychological effects of corporal punishment, and warned that '[i]n its own interests society should, in our view, be slow to authorize a form of punishment which may degrade the brutal men further and may deprive the less hardened man of the last remaining traces of self-respect'.<sup>178</sup>

ACTO<sup>179</sup> made use of statistical evidence, both of trends in crime and of the records of those who received judicial corporal punishment in the past; medical evidence, including that of psychiatrists, of the effect of this penalty on different types of individuals; and evidence of the experience in other countries. It also invited the opinions of several government bodies and organisations (judges, prison officers etc) and members of the general public.

ACTO, too, was not satisfied that the numbers likely to be deterred by corporal punishment were sufficient to justify reintroduction.<sup>180</sup> It also reiterated that judicial corporal punishment is out of line with modern penal methods and would work against the success of reformatory treatment, such as probation: 'constructive methods for reformation depend largely on the establishment of a proper relationship between the offender and those in authority'<sup>181</sup>; this was 'unlikely to be achieved if the treatment would begin with a beating'.<sup>182</sup>

After the abolition of corporal punishment in the UK in 1948, the United Kingdom established Committees to address the issue in Hong Kong on at least two occasions in 1952 and in 1966. The report for Hong Kong followed the Cadogan Committee Report and ACTO, in stating that corporal punishment does not function as an effective deterrent and that corporal punishment should be abolished.<sup>183</sup>

The UK experience is instructive. While whipping was retained as punishment in the colonies, changes in the perception of the nature and purpose of criminal justice resulted in the abolition of corporal punishment in the UK. This was aided by the thorough work of the Cadogan Committee that considered fundamental

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<sup>177</sup> Ibid., at 91.

<sup>178</sup> Ibid., at 59.

<sup>179</sup> Great Britain. Advisory Council on the Treatment of Offenders, *Corporal punishment: report*, London: Her Majesty's Stationery Office, 1960.

<sup>180</sup> Ibid., at 26-27.

<sup>181</sup> Ibid., at 17.

<sup>182</sup> Ibid.

<sup>183</sup> Hong Kong. Committee to Examine the Law and Practice Relating to Corporal Punishment in Hong Kong, *Report of the Committee to Examine the Law and Practice Relating to Corporal Punishment in Hong Kong*, Hong Kong : S. Young, Gov't Printer, 1966.

goals of criminal justice, examined individual cases, and assessed the impact of the punishment on individuals.

## **2. Complete and partial abolition of corporal punishment, with particular reference to practice in the region**

While a small number of states retain corporal punishments as a judicial sanction,<sup>184</sup> several states in the region do not provide for such punishment, such as Bahrain, Djibouti, Egypt, Kuwait, Jordan, Morocco and Tunisia.<sup>185</sup> There is a noticeable trend towards its abolition worldwide, which is particularly evident in the African context. Abolition has resulted from political transitions, campaigns by civil society actors and others, and national and international jurisprudence. It has taken the form of express constitutional prohibitions, reforms of statutory law, and binding judgments (that have rendered void any laws that prescribe corporal punishments).

The Kenyan example is instructive. Following political changes in 2002, the government then in power declared that it had taken a number of measures to protect against human rights violations, having ‘emerged from an oppressive one party regime that had a culture of gross violations of human rights nurtured by oppressive laws and institutions inherited from the colonial era’.<sup>186</sup> These measures included the abolition of corporal punishment by section 5 of the Criminal Law (Amendment) Act 2003 (Act No.5 of 2003). The Kenyan Constitution of 2010, which resulted from a thorough review and consultation process, expressly stipulated in article 29 (e) that: ‘Every person has the right to freedom and security of the person, which includes the right not to be subjected to corporal punishment’. By virtue of article 2(4) of the 2010 Constitution, any law, including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency. In conjunction with the reforms to the Criminal Law, these provisions signal a decisive commitment to the abolition of corporal punishment and a high threshold of protection against re-introduction.

The highest courts of several African states have interpreted constitutional provisions that prohibit ‘torture and other cruel, inhuman or degrading treatment or punishment’ to apply to all forms of corporal punishments. The Zimbabwe Supreme Court found that corporal punishment was inhuman and degrading, and

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<sup>184</sup> Supra note 149.

<sup>185</sup> The following states either expressly prohibit corporal punishment as a punishment for crime, or do not provide for corporal punishment as a judicial sanction in their legal systems: Algeria, Bahrain, Djibouti, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Morocco, South Sudan, Syria and Tunisia. The Global Initiative to End All Corporal Punishment of Children lists Algeria, Bahrain, Djibouti, Egypt, Iraq, Israel, Jordan, Kuwait, Lebanon, Morocco, South Sudan, Sudan, Syria and Tunisia as states where corporal punishment is prohibited in the penal system as a sentence for a crime for juvenile offenders, see *Progress towards prohibiting all corporal punishment in the Middle East and North Africa*, July 2011, available at: <http://www.endcorporalpunishment.org/pages/pdfs/charts/Chart-MidEast-NorthAfrica.pdf>.

<sup>186</sup> Statement by the Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Martha Karua, EGH, at the Presentation of Kenya’s Initial Report under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva 13<sup>th</sup> – 14<sup>th</sup> November, 2008.

violated the prohibition of torture and degrading punishment in Zimbabwe's constitution.<sup>187</sup> In *Stephen Ncube v the State; Brown Ishuma v the State and Innocent Ndhlovu v the State*, it held that:

1. The manner in which it [whipping] is administered ... is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world being incompatible with the evolving standards of decency;
2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status;
3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of sadistic and unscrupulous prison officer who is called upon to administer it; and
4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.<sup>188</sup>

Following political transitions, the practice of corporal punishments was also successfully challenged before Namibia's Supreme Court and South Africa's Constitutional Court respectively. In *Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State*, Justice Mahomed, A.J.A. found that corporal punishment constituted a form 'inhuman or degrading' punishment on the grounds that:

1. Every human being has an inviolable dignity. A physical assault on him sanctified by the power and the authority of the State violates that dignity. His status as a human being is invaded;
2. The manner in which the corporal punishment is administered is attended by, and intended to be attended by, acute pain physical suffering 'which strips the recipient of all dignity and self-respect'. It 'is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency'. (S v Ncube and Others (supra at 722B-

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<sup>187</sup> *Stephen Ncube v The State; Brown Tshuma v The State; Innocent Ndhlovu v The State*, Zimbabwe Supreme Court Judgment No. 156/87, (SC), *Common L Bull* (1988) 593.

<sup>188</sup> Cited approvingly by the High Court of Zambia, in *Banda v The People* (S.C.Z. Judgment No. 25 of 1986) [1987] ZMSC 1; (1986) Z.R. 105 (S.C.) (28 January 1987) para.11.

C.). 3. The fact that these assaults on a human being are systematically planned, prescribed and executed by an organised society makes it inherently objectionable. It reduces organised society to the level of the offender. It demeans the society which permits it as much as the citizen who receives it. 4. It is in part at least premised on irrationality, retribution and insensitivity. It makes no appeal to the emotional sensitivity and the rational capacity of C the person sought to be punished. 5. It is inherently arbitrary and capable of abuse leaving as it does the intensity and the quality of the punishment substantially subject to the temperament, the personality and the idiosyncrasies of the particular executioner of that punishment. 6. It is alien and humiliating when it is inflicted as it usually is by a person who is a relative stranger to the person punished and who has no emotional bonds with him.<sup>189</sup>

Holding corporal punishment as a sanction unconstitutional in *S v Williams and others*, the South African Constitutional Court stated laconically that '[i]f adult whipping were to be abolished, it would simply be an endorsement by our criminal justice system of a world-wide trend to move away from whipping as a punishment'.<sup>190</sup> The Ugandan Constitutional Court, in *Kyamanywa Simon v Uganda*, similarly found that corporal punishment (six strokes of the cane) violated the prohibition of torture and cruel, inhuman or degrading treatment or punishment in Uganda's constitution, agreeing emphatically with the reasoning in *Ex parte Attorney General, Namibia in Re Corporal Punishment*.<sup>191</sup>

## V. Reasons for abolition

The application of corporal punishments has been justified on the grounds of religion, tradition or its deterrent value. However, the reports by review commissions and judgments by various national courts cited above have demonstrated persuasively that law-makers and judges around the world increasingly view such punishment as outdated. This point has been articulated with great clarity in *Ex parte Attorney General, Namibia in Re Corporal Punishment*,<sup>192</sup> which linked the question of appropriate punishments with that of national identity in light of shared international standards:

the question as to whether a particular form of punishment authorised by law can properly be said to be inhuman or degrading involves the exercise of a value Judgment by the Court. It is however, a value judgment which requires

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<sup>189</sup> *Attorney-General, Namibia: In Re Corporal Punishment by Organs of the State*, Supreme Court of Namibia, 5 April 1991 (SAL 1991(3) 76 NMS SA 14/90), at 22-23.

<sup>190</sup> *S v Williams and Others*, Constitutional Court of South Africa, 9 June 1995 (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995), para.12.

<sup>191</sup> *Kyamanywa Simon v Uganda*, Constitutional Reference No.10 of 2000, Ruling of 14 December 2001.

<sup>192</sup> *Banda v The People*, supra note 188.

objectively to be articulated and identified regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibia people as expressed in its national institutions and Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibia share. This is not a static exercise. It is a continually evolving dynamic. What may have been accepted as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's Orthodox might appear to be today's heresy. The provisions of article 8 (2) of the Constitution are not peculiar to Namibia; they articulate a temper through out the civilised world which has manifested itself consciously since the second world war. Exactly the same or similar articles are to be found in other instruments. See for example article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; article 1(1) of the German Constitution; and article 7 of the Constitution of Botswana; article 15(1) of the Zimbabwean Constitution. In the interpretation of such articles there is a strong support for the view that the imposition of corporal punishment on adults by organs of the state is indeed degrading or inhuman and inconsistent with the civilised values pertaining to the administration of justice and the punishment of offenders.

The fact that this reasoning has been endorsed by a number of African courts and that all regional human rights treaty bodies have found corporal punishment to violate human rights points to an emerging international consensus. This development reflects changing perceptions of criminal justice away from an overly physical and punitive approach to judicial sanctions towards alternative forms of sanctions, including of a non-custodial nature.

There is also little evidence to suggest that corporal punishment has a greater deterrent effect than other forms of punishment, such as imprisonment. Indeed, the likelihood of being caught and punished, rather than the nature of the punishment, is widely seen as a major deterrent.<sup>193</sup> The belief in its deterrent value, rather than its actual deterrent effect, appears to underpin calls for introducing or maintaining flogging and other corporal punishments.

Religious commands are another justification put forward for corporal punishments. Several countries with a Muslim majority retain corporal

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<sup>193</sup> For further discussion on the topic, see for example D. S. Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' in *Crime and Justice*, Vol. 23, 1998, 1-42.



punishments. Under Sharia, such punishments are confined to a limited range of crimes only. This means that corporal punishment does not have to apply to state-made (tazir) crimes, as has been recognised in Pakistan.<sup>194</sup> In addition, there is a continuing debate on whether the Sharia punishments should be applied literally in modern times. Indeed, a number of states with a Muslim majority do not have corporal punishment on their statute books.<sup>195</sup>

Beyond doctrinal questions, there are several compelling reasons why corporal punishment should be prohibited. This concerns its harmful impact on the individual and its record of abuse as an instrument that serves state interests to impose or maintain repressive regimes or public order, which is frequently done in a discriminatory and arbitrary fashion. It is no coincidence that corporal punishment has been introduced and used by dictatorial or authoritarian regimes as part of ideological projects, such as in Afghanistan, Iran, Iraq, Libya, Northern Nigeria, Pakistan and Sudan.<sup>196</sup> Notably, some of the regimes that reverted to corporal punishments, such as Iraq and Libya, were of a secular nature, and seemingly used Sharia to shore up their legitimacy.<sup>197</sup> In several of these countries, including Sudan, the scope of offences subject to corporal punishment greatly exceeded the rather small number of crimes subject to hudud or qisas in Islamic law. Flogging and other such punishments have been used as an integral part of systems seeking to deter protest,<sup>198</sup> dissent<sup>199</sup> and disobedience,<sup>200</sup> or to impose monolithic models of public and moral order.<sup>201</sup>

This practice suggests that corporal punishment is considered as an effective means of literally striking fear in society and of coercing 'deviants' into submission in a highly symbolic and public way that labels victims as outcasts deserving of the harshest punishment. It reinforces marginalisation and has a

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<sup>194</sup> Abolition of the Punishment of Whipping Act, 1996, published in the Gazette of Pakistan Extraordinary, Part I, 15th April, 1996.

<sup>195</sup> Supra note 185.

<sup>196</sup> Peters, supra note 32, at 153-173.

<sup>197</sup> For Iraq, see *Note by the Secretary-General on the Situation of Human Rights in Iraq*, UN Doc. A/49/651, 8 November 1994, paras. 44-71 and *Report on the situation of human rights in Iraq*, submitted by Mr. Max van der Stoep, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1994/74, UN Doc E/CN.4/1995/56, 15 February 1995 paras. 32-43. For Libya, accusations of see Law No. 148 of 1972 (relating to theft and robbery), Laws No. 70 and 20 of 1973 (relating to illegal sexual intercourse, or zina), Law No. 52 of 1974 (relating to unfounded adultery, or qazf), Law No. 89 of 1974 (relating to the drinking of alcoholic beverages) and Law No. 13 of 1425, amended in 1995, concerning theft and armed robbery (haraba).

<sup>198</sup> See for example, Human Rights Watch, *Saudi Arabia: Flogging Used to Silence Protesters*, 16 January 2005, available at: <http://www.hrw.org/news/2005/01/16/saudi-arabia-flogging-used-silence-protesters>.

<sup>199</sup> Such as against Mohamed Taha in Sudan, supra note 21.

<sup>200</sup> See for example, IRAQ: *Focus on victims of penal mutilation*, IRIN Humanitarian News and Analysis, 24 November 2003, available at: <http://www.irinnews.org/printreport.aspx?reportid=22421>; *After effects: Hussein's Rule: Iraqis Tell of a Reign of Torture and Maiming*, New York Times, 24 April 2003, available at: <http://www.nytimes.com/2003/04/24/international/worldspecial/24MAIM.html?th>.

<sup>201</sup> This applies in particular in Afghanistan under the Taliban, Iran and Saudi Arabia. See for an account of Pakistan's experimentation with corporal punishment in respect of sexual offences, Sohail Akbar Warraich, 'Through the Looking Glass: The Emergence, Confused Application and Demise of Pakistan's Hudood Rape Laws', in: Oette, supra note 9, at 243-267.

clearly gendered impact where male dominated societies discipline women for failure to adhere to dress codes or sexual conduct labelled as unacceptable. Homosexuals and others not conforming to what is considered the sexual norm are also vulnerable to corporal punishment. Public order laws are often enforced by public order police and subject to summary trials, which has led to concerns over arbitrariness, corruption (including in the form of sexual favours) and abuse of policing and judicial powers. Importantly, the limited safeguards against corporal punishment increase the risk that it is deliberately used to target and punish certain groups, such as immigrants, ethnic minorities or others, often irrespective of the culpability of individuals under national law.

International standards recognised in regional and international treaties and customary international law are not abstract prescriptions that are blind to the difficulties of effectively combating crime. Instead, they have developed against the background of the state sanctioned abuse of its powers to protect the dignity of individuals and guarantee the fair administration of justice. Country experiences to date provide ample evidence to demonstrate why the prohibition is so important: Corporal punishments are often stipulated for a wide range of vaguely worded offences, applied arbitrarily in a repressive environment, and often result in extreme physical (and psychological) harm. Unsurprisingly, medical standards make it clear that doctors should not be complicit in this practice,<sup>202</sup> and medical practitioners, such as in Pakistan, have openly protested against floggings.<sup>203</sup> They are part of a growing international movement and struggle to stop any torture, inhuman, degrading or cruel treatment or punishment, including corporal punishments. Sudan is no exception.

## VI. Recommendations

Based on the findings of this Report, and with a view to ending the harmful and discriminatory impact of corporal punishment and considering Sudan's commitments under international human rights law, REDRESS and the Sudan Human Rights Monitor urge the Government of Sudan to:

- Publicly declare an unequivocal moratorium on the imposition of all forms of corporal punishment with immediate effect;

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<sup>202</sup> See for accounts of such complicity, British Medical Association (BMA), *The Medical Profession and Human Rights; a Handbook for a Changing Agenda*, London: Zed Books Ltd., 2001, at 170-175. The BMA refers to instances where doctor were involved in the implementation of punishment (for instance in Iraq in the late nineties doctors were asked to perform amputations and brandings), devising punishment mechanisms (the Tehran University Medical School reportedly tried to develop devices for mechanically amputating hand or fingers), preparing a convict for punishment (reportedly in Saudi Arabia doctors were instructed to remove several pints of blood from prisoners prior to amputation), and teaching others to administer punishment (it was reported that in the 1980s a British doctor taught guards in Sudan how to carry out judicial amputations).

<sup>203</sup> See Amnesty International, *Medical Letter-Writing Action: Whipping in Pakistan*, AI Index ASA 33/01/90, 23 February 1990. See on applicable medical standards, Human Rights Council Resolution 10/24, supra note 171; and the World Medical Association, *WMA Council Resolution on Prohibition of Physician Participation in Torture*, adopted by the 182nd WMA Council Session, Tel Aviv, Israel, May 2009, available at [http://www.wma.net/en/30publications/10policies/30council/cr\\_8/](http://www.wma.net/en/30publications/10policies/30council/cr_8/).

- Request the Ministry of Justice to identify legislation that needs to be amended or repealed to bring Sudanese laws in conformity with Sudan's obligations under international human rights law;
- Enshrine an absolute prohibition of torture, inhuman, degrading and cruel treatment or punishment in the new Constitution;
- Undertake legislative reforms resulting in the abolition of all forms of corporal punishment from the Criminal Act, public order laws and other relevant legislation;
- Enact legislation that makes torture and other cruel, inhuman or degrading treatment or punishment, including whipping, a criminal offence subject to punishments reflecting the seriousness of the crime;
- Hold accountable any officials who inflict corporal punishment or, for violations to date, who exceeded their power when inflicting corporal punishment.
- Provide adequate forms of reparation for any individuals subjected to corporal punishment, including access to medical treatment where necessary.



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