

## Corporal punishment in public schools: A call for legal reform

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### Summary

*The use of corporal punishment within the public educational system of African states is unlawful, detrimental to the health and welfare of the children, and an unnecessary impediment to educational excellence in the region. Public school corporal punishment violates several international and regional human rights treaties, customary international law, and may breach jus cogens norms prohibiting torture and recognising a fundamental right to respect for human dignity. The United Nations Convention on the Rights of the Child, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights expressly condemn all forms of corporal punishment. In addition, the Universal Declaration of Human Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the African Charter on the Rights and Welfare of the Child can also be interpreted to prohibit the practice of public school corporal punishment. Most African states have ratified these international and regional human rights instruments; therefore, laws authorising this practice should be repealed and alternative methods should be encouraged through legal reform. This article explains how laws authorising public school corporal punishment breach human rights law, and calls for law reform in African states. In addition to the repeal of such laws, this article suggests legislation that could be implemented domestically to condemn and prohibit this practice.*

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## 1 Introduction

On 22 February 2006, Alice Williams caned her student, Georgina Archer, for disrupting the classroom.<sup>1</sup> According to Georgina and her classmates, the teacher used a bamboo cane to strike her head and shoulders, while she sat at her desk trying to shield herself with her arms. The cane struck Georgina in the left eye, causing permanent blindness. Georgina was a 12 year-old junior secondary student at Sakumono Complex Schools in Tema, Ghana.

The facts of the case of *Republic v Williams*<sup>2</sup> illustrate why human rights law condemns the practice of public school corporal punishment.<sup>3</sup> Corporal punishment is a painful, intentionally inflicted physical harm administered by a person in authority for disciplinary purposes.<sup>4</sup> Historically, the general rationale justifying the use of corporal punishment is that the infliction of pain, injury, humiliation and degradation would deter offenders from committing similar conduct in the future.<sup>5</sup> However, experts and scholars contend that, rather than deterring future offences, corporal punishment only results in promoting violent behavior in children and towards them.<sup>6</sup>

<sup>1</sup> Interview with William Archer, father of Georgina Archer, in Tema, Ghana (10 June 2006); interview with Charles Archer, attorney for Georgina Archer, the law offices of Charles Archer in Tema and Accra, Ghana (10 & 12 June 2006 respectively). Mr Archer and Charles Archer provided most of the facts from the case discussed in this section; the remaining facts are derived from the author's personal observations of the criminal proceedings that took place on 10 June 2006.

<sup>2</sup> Court case D8/30/06. The Tema Circuit Court 'A' had not rendered a decision at the time this article was written.

<sup>3</sup> See also *United Nations study on violence against children*, 61st session, UN Doc A/61/299 (2006) (a comprehensive report on the implementation of corporal punishment against children, including within educational settings).

<sup>4</sup> CP Cohen 'Freedom from corporal punishment: One of the human rights of children' (1984) 2 *New York Law School Human Rights Annual* 1; MA Straus *Beating the devil out of them: Corporal punishment in American families and its effects on children* (2001) 4; *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada* [2004] SCR 76 <http://www.canlii.org/en/ca/scc/doc/2004/2004scc4/2004scc4.html> (accessed 31 March 2008).

<sup>5</sup> Amnesty International *Combating torture: A manual for action* [http://www.amnesty.org/resources/pdf/combating\\_torture/sections/appendix15.pdf](http://www.amnesty.org/resources/pdf/combating_torture/sections/appendix15.pdf) (accessed 15 November 2007); see 'A trauma-organised society? Looking at the numbers' <http://www.sanctuaryweb.com/Documents/Downloads/Trauma-organized%20society%20Bearing%20Witness.pdf> (accessed 15 November 2007).

<sup>6</sup> n 3 above, paras 24-37; 'Is corporal punishment an effective means of discipline?' <http://www.apa.org/releases/spanking.html> (accessed 27 October 2007); 'Research: effects of corporal punishment' <http://www.stophitting.com/disathome/effectsOfCP.php> (accessed 27 October 2007); ChildAdvocate.org, [http://www.childadvocate.org/1a\\_arguments.htm](http://www.childadvocate.org/1a_arguments.htm) (accessed 27 October 2007); 'A trauma-organised society?' (n 5 above); SH Bitensky *Corporal punishment of children: A human rights violation* (2006) 192.

The children of Africa have a fundamental right to education.<sup>7</sup> However, in order to exercise this right they must face the threat of physical harm issued directly by the state government. Parents who do not want their children subjected to corporal punishment at school have little choice if they cannot afford to send the child to a private school, or to educate the child themselves.

This article explains how laws authorising public school corporal punishment breach human rights law, and calls for legal reform in African states.<sup>8</sup> Furthermore, it is suggested that legislation should be implemented domestically to condemn and prohibit this practice.<sup>9</sup>

## 2 Public school corporal punishment and human rights law

The corporal punishment of children by the government of a state within a public school setting breaches their fundamental rights as human beings, including (1) respect for their human dignity and physical

<sup>7</sup> Art 18(3) International Covenant on Civil and Political Rights, GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966); art 13 International Covenant on Economic, Social, and Cultural Rights, GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966); art 29(1) United Nations Convention on the Rights of the Child, 28 ILM 1448, 1577 UNTS 3 (20 November 1989).

<sup>8</sup> The scope of this article addresses every child attending public or state-sponsored educational institutions that are prior to college, undergraduate, or professional studies (ie grade schools). The age and gender of the child are irrelevant to the arguments being asserted. The author recognises that public school corporal punishment breaches the human rights obligations of all nations; however, the scope of this discussion will be limited to African nations that continue the practice. *Ending legalised violence against children: Global Report 2007* [http://www.crin.org/docs/GI\\_report\\_07.pdf](http://www.crin.org/docs/GI_report_07.pdf) (accessed 19 October 2007) (providing a list of African countries that continue the practice of public school corporal punishment). This article will not condemn corporal punishment within all settings. Nonetheless, the author recognises that corporal punishment within the home as well as judicial and military settings may also violate international law. See W O'Neill *A humanitarian practitioner's guide to international human rights law* <http://www.ciaonet.org/wps/watson/onw01.pdf> (accessed 5 December 2007); *Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment* [http://ec.europa.eu/external\\_relations/human\\_rights/torture/guideline\\_en.htm](http://ec.europa.eu/external_relations/human_rights/torture/guideline_en.htm) (accessed 24 December 2007); 'Special Rapporteur on Torture concludes visit to Togo, HR/07/63' <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/5FD294437C596102C12572C1004E7457?opendocument> (accessed 31 January 2008); 'In war on terror, many countries violating human rights standards, Third Committee told', GA/SHC/3830 <http://www.un.org/News/Press/docs/2005/gashc3830.doc.htm> (accessed 31 January 2008); General Comment of the Committee on the Rights of the Child, 42nd session para 12, UN Doc CRC/C/GC/8 (2006). The historical roots of corporal punishment within African societies and educational systems as well as the reasons for the continuation of the practice would require an exhaustive analysis that is not within the scope of this article. The purpose of this article is to explain the legal grounds and claims for prohibiting public school corporal punishment. The author realises that establishing a legal standard is only one step towards solving the problem. The issue of implementation raises context and culture-specific issues that are beyond the article.

<sup>9</sup> *Ending legalised violence against children* (n 8 above).

integrity, and (2) freedom from torture and other cruel, inhuman or degrading treatment or punishment.<sup>10</sup> The United Nations (UN) Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (CCPR), and the African Charter on Human and Peoples' Rights (African Charter) expressly condemn all forms of corporal punishment. In addition, the Universal Declaration of Human Rights (Universal Declaration), the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the African Charter on the Rights and Welfare of the Child (African Children's Charter) can also be interpreted to prohibit the practice of public school corporal punishment. Most African nations have ratified these international and regional human rights instruments.<sup>11</sup>

Below, section 2 discusses applicable human rights law and considers international cases addressing corporal punishment.

## 2.1 Application of human rights law to the practice of corporal punishment in public schools

### 2.1.1 The United Nations Convention on the Rights of the Child

The UN Convention on the Rights of the Child (CRC) was created to ensure that all persons under the age of 18 are afforded the necessary protection of their human and individual rights.<sup>12</sup> The Committee on the Rights of the Child (CRC Committee) is an 18-member body of highly regarded experts on children and the law, and was established to monitor compliance with this treaty.<sup>13</sup> The members are selected

<sup>10</sup> Arts 5 & 7 Universal Declaration of Human Rights, GA Res 217 (III), UN Doc A/810 (10 December 1948); arts 28 & 37(a) CRC; arts 7, 10, 24(1) & 26 CCPR; arts 1, 2 & 16 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39 UN GAOR Supp (No 16) (1984); art 5 African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/3/Rev 5 (1981); art 16 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

<sup>11</sup> Status of Ratifications of the Principal International Human Rights Treaties <http://www.unhchr.ch/pdf/report.pdf> (accessed 18 October 2007); List of Countries Which Have Signed, Ratified/Accessed to the African Union Convention on African Charter on Human and Peoples' Rights, [http://www.achpr.org/english/ratifications/ratification\\_charter\\_en.pdf](http://www.achpr.org/english/ratifications/ratification_charter_en.pdf) (accessed 18 October 2007); List of Countries Which Have Signed, Ratified/Accessed to the African Union Convention on African Charter on the Rights and Welfare of the Child, [http://www.achpr.org/english/ratifications/ratification\\_child\\_en.pdf](http://www.achpr.org/english/ratifications/ratification_child_en.pdf) (accessed 18 October 2007).

<sup>12</sup> Art 1 CRC.

<sup>13</sup> n 15 above, art 43 paras 1-3; see Office of the United Nations High Commissioner for Human Rights, Committee on the Rights of the Child-Members <http://www.ohchr.org/english/bodies/crc/members.htm> (accessed 27 January 2007); see CP Cohen 'A guide to linguistic interpretation of the Convention on the Rights of the Child: Articles 1, 41 and 45' in CP Cohen & HA Davidson (eds) *Children's rights in America: UN Convention on the Rights of the Child compared with United States law* (1990) 33; see Y Iwasawa 'The domestic impact of international human rights standards: The Japanese experience' in P Alston & J Crawford (eds) *The future of human rights treaty monitoring* (2000) 245-258-59.

by state parties and consideration is given to geographical and legal system distribution.<sup>14</sup>

Several CRC articles apply to the prohibition of corporal punishment within public schools. Article 37(a) states that all state parties shall ensure that '[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.'<sup>15</sup> Additionally, article 19 reads as follows:<sup>16</sup>

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from *all forms of physical* or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

In its General Comment No 8, the CRC Committee on the Rights of the Child interpreted articles 37(a) and 19 jointly and reasoned that, because corporal punishment is a form of violence, it is unacceptable under the Convention.<sup>17</sup> Furthermore, this Committee called for the elimination of legislation allowing for reasonable or moderate correction, and the repeal of all legislation allowing schools the authority to practise corporal punishment.<sup>18</sup> This Committee stresses that such legislation does not conform to the Convention, as it requires that *all forms* of violence against children be eliminated.<sup>19</sup>

Public school corporal punishment clearly violates article 37(a) of CRC because it mandates that physical violence be employed by the government to maintain discipline.<sup>20</sup> Furthermore, article 19 is breached when the local Ministry of Education authorises the practice in public schools.

Pursuant to articles 29(1) and 28(2), public education systems that use corporal punishment fail to provide an environment that promotes nonviolence or that ensures disciplinary measures consistent with the child's human dignity. Article 28(2) of the Convention provides that '[s]tate parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's

<sup>14</sup> Art 43 CRC.

<sup>15</sup> Art 37(a) CRC.

<sup>16</sup> Art 19(1) CRC (my emphasis).

<sup>17</sup> Report of the UN Committee on the Rights of the Child on the Seventh Session, UN Doc CRC/C/34, Annex IV 63 (November 1994); see also Concluding Observations of the Committee on the Rights of the Child: Ethiopia, 26th session, paras 38-39, 47, UN Doc CRC/C/15/Add 144 (2001); and Concluding Observations of the Committee on the Rights of the Child: Mozambique, 29th session, paras 38-39, UN Doc CRC/C/Add 172 (2002).

<sup>18</sup> CRC Committee General Comment No 8, 42nd session paras 32-33, UN Doc CRC/C/GC/8 (2006); see also Concluding Observations of the Committee on the Rights of the Child: Kenya, 28th session para 64, UN Doc CRC/C/15/Add 160 (2001); Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania, 27th session para 67, UN Doc CRC/C/15/Add. 156 (2001).

<sup>19</sup> General Comment No 8 (n 18 above).

<sup>20</sup> n 18 above, para. 8.

human dignity and in conformity with the present Convention'.<sup>21</sup> The CRC Committee has interpreted article 28 as limiting the forms of discipline that can be administered by schools, and as promoting non-violence.<sup>22</sup> Furthermore, article 29(1) of the Convention sets forth 'that the education of the child shall be directed to (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential'.<sup>23</sup> The CRC Committee interpreted article 29(1) as including, within the right to an education, a need to provide the child with the ability to achieve 'a balanced, human rights-friendly response' to challenges in the world through disciplinary measures respectful of one's dignity.<sup>24</sup> The right to an education extends to the environment within educational institutions, and thus the Committee has stated that schools should be 'child-friendly' and that education must be provided in a way that respects the child's dignity.<sup>25</sup>

### 2.1.2 The International Covenant on Civil and Political Rights

The UN Human Rights Committee, the interpretative body for the International Covenant on Civil and Political Rights (CCPR), has stated that the prohibition against torture in the Covenant extends to corporal punishment and excessive chastisement 'ordered as punishment for a crime or as an educative or disciplinary measure'.<sup>26</sup> Furthermore, this Committee has directed state parties to notify them 'if corporal punishment is imposed to enforce a regulation',<sup>27</sup> and to punish offenders.<sup>28</sup> In accordance with these interpretations of CCPR, public school corporal punishment clearly breaches article 7 of the treaty.

Article 9 provides that '[e]veryone has the right to liberty and security of person'.<sup>29</sup> Furthermore, article 24 of CCPR states:<sup>30</sup>

<sup>21</sup> Art 28(2) CRC.

<sup>22</sup> CRC Committee General Comment No 1, 26th session para 8, UN Doc CRC/GC/2001/1 (2001); SH Bitensky 'Educating the child for a productive life: Articles 28 and 29' in Cohen & Davidson (n 13 above) 167-174.

<sup>23</sup> Art 29(1) CRC.

<sup>24</sup> CRC Committee General Comment No 1 (n 22 above).

<sup>25</sup> n 22 above, para 8; see eg, Concluding Observations of the Committee on the Rights of the Child: Andorra, 29th session paras 39-40, UN Doc CRC/C/15/Add 176 (2002); see also Concluding Observations of the Committee on the Rights of the Child: Chile, 29th session paras 31-32, UN Doc CRC/C/15/Add. 173 (2002); see also Concluding Observations of the Committee on the Rights of the Child: Cape Verde, 28th session paras 35-36, UN Doc CRC/C/15/Add. 168 (2001).

<sup>26</sup> Human Rights Committee General Comment No 20, 1138 mtg para 5 (1992) [http://www.refugeelawreader.org/316/General\\_Comments\\_of\\_the\\_Human\\_Rights\\_Committee\\_No.\\_20.pdf](http://www.refugeelawreader.org/316/General_Comments_of_the_Human_Rights_Committee_No._20.pdf) (accessed 31 January 2007). Art 7 of CCPR states: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ...'

<sup>27</sup> Human Rights Committee General Comment No 28, para 13, UN Doc CCPR/C/21/Rev 1/Add 10 (2000).

<sup>28</sup> Human Rights Committee General Comment No 20 (n 26 above) para 13.

<sup>29</sup> Art 9(1) CCPR.

<sup>30</sup> Art 24 CCPR.

Every child shall have, without any discrimination as to race, color, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

However, inherent in the administration of corporal punishment is a violation of the child's security of person since he is being subjected to physical violence against his will. Furthermore, the state cannot simultaneously protect the child pursuant to article 24, while engaging in the administration of cruel, inhuman or degrading punishment that breaches the child's human rights under article 7.<sup>31</sup>

### 2.1.3 The Universal Declaration of Human Rights

Article 1 of the Universal Declaration states that '[a]ll human beings are born free and equal in dignity and rights'.<sup>32</sup> Article 2 further supports that the rights and freedoms afforded to adults are also applicable to children.<sup>33</sup> Article 5 of the Universal Declaration states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.<sup>34</sup> While the Universal Declaration is held to be non-binding, the non-derogable rights enshrined within it, such as article 5, are held to be binding under customary international law.<sup>35</sup>

<sup>31</sup> SH Bitensky 'Spare the rod, embrace our humanity: Toward a new legal regime prohibiting corporal punishment of children' (1998) 31 *University of Michigan Journal of Law Reform* 412.

<sup>32</sup> Art 1 Universal Declaration (my emphasis).

<sup>33</sup> Art 2 Universal Declaration: 'Everyone is entitled to all the rights and freedoms set forth in this Declaration.'

<sup>34</sup> Art 5 Universal Declaration (my emphasis).

<sup>35</sup> P Sieghart *The international law of human rights* (1983) 53; O Schachter 'International law in theory and practice' in HJ Steiner & P Alston *International human rights in context: Law, politics and morals* (2000) 226 229; see PG Lauren *The evolution of international human rights visions seen* (2003) 232; Committee on the Enforcement of Human Rights Law, International Law Association, Final Report on the Status of the Universal Declaration of Human Rights in National and International Law in RB Lillich & H Hannum *International human rights: Problems of law, policy and practice* (1995) 166 166; MG Johnson 'A Magna Carta for mankind: Writing the Universal Declaration of Human Rights' in MG Johnson & J Symonides *Universal Declaration of Human Rights: A history of its creation and implementation 1948-1998* (1998) 19 67. The principle of international law prohibiting torture is generally accepted as *jus cogens*, a mandatory norm accepted and recognised by the international community and from which no derogation is permitted. See United Nations General Assembly Official Records, 50th session para 177 A/50/44/ (1995); United Nations General Assembly Official Records, 51st session para 65(i) A/51/44 (1996); see JH Burgers & H Danelius *The United Nations Convention Against Torture: A handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1988) 12; H Charlesworth & C Chinkin 'The gender of *jus cogens*' in Steiner & Alston (above) 173-74.

This declaration of the right not to be subjected to torture or inhumane treatment, in most written constitutions, is declared to be an absolute unqualified right. It is not derogable, even in an emergency. The legislature cannot whittle the right down, or legislate it away in the interests (for example) of public order.<sup>36</sup>

Corporal punishment is held to be 'inconsistent with the prohibition of torture and other [cruel, inhuman or degrading] treatment or punishment enshrined in the Declaration'.<sup>37</sup>

Through the state-sponsored corporal punishment of children, several African nations continue to breach their human rights obligations under this international declaration. Allowing for the lawful use of corporal punishment within the public educational system clearly violates the non-derogable right set forth in article 5 of the Universal Declaration, which is applicable to all human beings, including children.

The Special Rapporteur on Torture considers corporal punishment a violation of CCPR, as the practice also breaches the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).<sup>38</sup> Paragraph 21(h) of those Guidelines states that '[e]ducation systems should, in addition to their academic and vocational training activities, devote particular attention to avoidance of harsh disciplinary measures, particularly corporal punishment'.<sup>39</sup> As well, paragraph 51 emphasises that 'no child shall be subjected to harsh or degrading correction or punishment'.<sup>40</sup> The Special Rapporteur notes that these provisions reveal that allowing corporal punishment would be contrary to its own Preamble as well as that of the Universal Declaration.<sup>41</sup> Accordingly, public school corporal punishment clearly violates paragraphs 21(h) and 51 of the UN Guidelines for the Prevention of Juvenile Delinquency.

#### 2.1.4 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) defines torture as<sup>42</sup>

[a]ny act by which severe pain or suffering, whether physical or mental,

<sup>36</sup> *State v Pickering* [2001] AILR 51 <http://www.austlii.edu.au/au/journals/AILR/2001/51.html> (referring to art 5 of the Universal Declaration and art 7 of CCPR).

<sup>37</sup> Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para 48, A/57/173 (2 July 2002).

<sup>38</sup> n 37 above, para 51.

<sup>39</sup> United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) GA Res 45/112 para 21(h) (1990).

<sup>40</sup> n 37 above.

<sup>41</sup> n 37 above, para 53.

<sup>42</sup> Art 1 CAT.

is intentionally inflicted on a person for such purposes as ... 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 ... 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.

This treaty also seeks to ban acts that may not rise to the level of torture, but nonetheless violate a person's individual and human rights.<sup>43</sup> Article 16(1) of CAT states as follows:<sup>44</sup>

Each 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 1, when such acts 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.

While public school corporal punishment may not reach the level of severity necessary to fall within the ambit of article 1, this punishment may consistently lie within the scope of article 16(1).<sup>45</sup> The teachers and administrators are acting in an official capacity on behalf of the state when punishing their students. Therefore, the only element that must be determined in order to find a violation of this Convention is severity.

The Committee Against Torture (CAT Committee) has stated that corporal punishment may constitute a violation of CAT, and the Commission on Human Rights has also noted in its resolutions that 'corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture'.<sup>46</sup> '[C]hildren are necessarily more vulnerable to the effects of torture and, because they are in the critical stages of physical and psychological development, may suffer

<sup>43</sup> Former Rapporteur for and member of the Committee on the Rights of the Child, Marta Santos Pais, has stated that it is a mistake to identify torture with 'extremely serious and massive cases' since it may 'cover a wide degree of situations', even those which cause 'unperceivable mental suffering' or those involving 'a disciplinary measure which may be degrading or inhuman'. Bitensky (n 31 above) 353 396-97 (citing Address at the International Seminar on Worldwide Strategies and Progress Towards Ending All Physical Punishment of Children (Dublin, Ireland, 22 August 1996) (transcript on file with *University of Michigan Journal of Law Reform*).

<sup>44</sup> Art 16(1) CAT.

<sup>45</sup> NS Rodley 'Foreword' in G van Bueren (ed) *Childhood abused: Protecting children against torture, cruel, inhuman and degrading treatment and punishment* (1998) xv.

<sup>46</sup> Report of the Committee Against Torture, UN GAOR, 50th session Supp 44 paras 169 & 177, UN Doc A/50/44 (1995); see eg Commission on Human Rights Resolution 2002/38 para 5, 50th mtg. pmb UN Doc E/CN 4/Res/ 2002/38 (2002); Commission on Human Rights Resolution 2001/62 para 5, 77th mtg pmb UN Doc E/CN 4/Res 2001/62 (2001); Commission on Human Rights Resolution 2000/43 para 3, 60th mtg pmb UN Doc E/CN 4/Res /2000/43 (2000); Commission on Human Rights Resolution 1999/32 para 3, 55th mtg pmb UN Doc E/CN 4/Res /1999/32 (1999).

graver consequences than similarly ill-treated adults.<sup>47</sup> Furthermore, the CAT Committee has expressed the view that the elimination of corporal punishment is a positive development in a state's advancement towards implementing CAT.<sup>48</sup>

Article 2 of CAT requires that state parties to the Convention ensure that 'effective legislative, judicial, and administrative measures are enacted to ensure that torture or degrading treatment does not occur within its borders'.<sup>49</sup> The CAT Committee has clearly stated that merely limiting the punishment does not constitute effective legislative measures to restrict corporal punishment.<sup>50</sup> Thus, the incorporation of public school corporal punishment into the laws of a state violates article 2 of this Convention. Furthermore, limiting the beatings in order to promote 'reasonableness' does not constitute effective legislative measures to prevent cruel, inhuman or degrading treatment in accordance with article 2.<sup>51</sup>

### 2.1.5 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) has two provisions that are relevant to ensuring that the child is protected from corporal punishment issued by the state within educational settings. Article 5 states:<sup>52</sup>

Every 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.

Article 5(1) of the African Charter notes that 'all individuals shall have the right to dignity and all forms of torture or degrading punishment

<sup>47</sup> Report of the Special Rapporteur, Mr Nigel S Rodley, submitted to Commission on Human Rights, Concerning the Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 52nd session, para 10, UN Doc E/CN4/1996/35 (1996).

<sup>48</sup> Consideration of Reports Submitted by States Parties Under Article 19 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 21st session para 74(d), A/54/44 (17 November 1998).

<sup>49</sup> Art 2(1) CAT.

<sup>50</sup> Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para 53, UN Doc A/57/173 (2002). ('[T]he Special Rapporteur believes that any form of corporal punishment of children is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment of punishment. He therefore calls upon states to take adequate measures, in particular legal and educational ones, to ensure that the right to physical and mental integrity of children is well protected in the public and in the private spheres.')

<sup>51</sup> See generally United Nations General Assembly Official Records, 50th session A/50/44/ (1995); see generally United Nations General Assembly Official Records, 51st session A/51/44 (1996).

<sup>52</sup> Art 5(1) African Charter.

should be prohibited by the state'.<sup>53</sup> However, inherent to the administration of corporal punishment is an intentional, physical harm caused to another human being against his or her will; therefore, public school corporal punishment breaches a child's right to human dignity and article 5 of the Charter.

Article 18 states that '[t]he state shall ensure the ... protection of the rights of the woman and the child as stipulated in international declarations and conventions'.<sup>54</sup> International law recognises the right to be free from torture or cruel, inhuman or degrading treatment or punishment, and the right of respect for human dignity. Furthermore, corporal punishment has been categorised, at a minimum, as a form of cruel, inhuman or degrading treatment and several committees have interpreted various human rights treaties as calling for the repeal of laws that allow this practice. Therefore, public school corporal punishment breaches obligations under article 18 and applicable international laws. Furthermore, as it would be reprehensible to submit adults to corporal punishment, children have a right to freedom from such treatment as well. There is no legitimate basis to discriminate in the treatment of adults and children with respect to the administration of corporal punishment by the government of a state. Pursuant to the African Charter, several African states, including Zambia, have outlawed the use of corporal punishment in schools.<sup>55</sup>

### 2.1.6 The African Charter on the Rights and Welfare of the Child

Under the African Charter on the Rights and Welfare of the Child (African Children's Charter), article 16 requires that the educational measures practised within a state must be such that they protect the child from degrading maltreatment.<sup>56</sup> Furthermore, this Charter establishes that, even when a child is subjected to discipline within schools, they should still be treated with humanity and dignity.<sup>57</sup> Under article 16 of the African Children's Charter, public school faculties, acting as proxies for the government, cannot simultaneously protect the child from degrading treatment, and engage in the practice of corporal punishment. Even if a child has been struck in the name of discipline, it is a violation of

<sup>53</sup> As above.

<sup>54</sup> Art 18(3) African Charter.

<sup>55</sup> Zambia's initial state report on the implementation of the African Charter, [http://www.achpr.org/english/state\\_reports/40\\_Zambia%20initial%20report\\_Eng.pdf](http://www.achpr.org/english/state_reports/40_Zambia%20initial%20report_Eng.pdf) (accessed 11 March 2007); see The African Commission on Human and Peoples' Rights: Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa [http://www.achpr.org/english/declarations/Guidelines\\_Trial\\_en.html](http://www.achpr.org/english/declarations/Guidelines_Trial_en.html) (accessed 11 March 2007); see n 7 above and accompanying text.

<sup>56</sup> Art 16 African Children's Charter.

<sup>57</sup> Art 11 African Children's Charter.

the African Children's Charter and international standards because it breaches her right to human dignity. Therefore, pursuant to the African Children's Charter, signatories to this human rights treaty should cease public school corporal punishment.

## 2.2 Application of international case law to public school corporal punishment

The African Commission on Human and Peoples' Rights (African Commission) and national courts have found that corporal punishment can amount to cruel, inhuman or degrading treatment, or even torture. While these legal decisions may not have a binding effect on African nations, they persuasively highlight that the practice of corporal punishment in public schools contradicts human rights law.

### 2.2.1 African case law

The African Commission monitors the implementation of the African Charter,<sup>58</sup> and has heard at least one case regarding the administration of corporal punishment by the government of a state.<sup>59</sup>

In *Doebbler v Sudan*,<sup>60</sup> the African Commission addressed the question whether the action of administering 'lashes' to a student amounted to corporal punishment, and whether such an act was in violation of the Charter. The Commission held as follows:<sup>61</sup>

Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.

In reaching its decision, the African Commission noted that a determination of cruel, inhuman or degrading treatment or punishment depends upon the circumstances of the case, and that article 5 would be interpreted as broadly as possible 'to encompass the widest possible array of physical and mental abuses'.<sup>62</sup> The Court relied upon the reasoning of the European Court of Human Rights in *Tyrer v United Kingdom*.<sup>63</sup> The Commission held that<sup>64</sup>

<sup>58</sup> Art 45 African Charter.

<sup>59</sup> Art 5 African Charter. List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and Peoples' Rights (n 11 above).

<sup>60</sup> (2003) AHRLR 153 (ACHPR 2003).

<sup>61</sup> n 60 above, para 36.

<sup>62</sup> As above.

<sup>63</sup> Discussed below.

<sup>64</sup> n 60 above, para 42.

[t]here 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.

The African Commission requested the government of Sudan to abolish the penalty of lashes and 'take appropriate measures to ensure compensation of the victims'.<sup>65</sup>

Corporal punishment in public schools clearly constitutes a violation of article 5 of the African Charter when applying the reasoning set forth in *Doebbler*. The government, through its agents in the educational system, is applying physical force to children for various offences. Since the Commission interprets article 5 to have a wide scope, several types of punishment could fall within the ambit of inhuman and degrading treatment. Since many African nations have ratified the African Charter, public school corporal punishment should cease in these states pursuant to the African Commission's interpretation and application of article 5.

The following cases are African constitutional decisions regarding public school corporal punishment. As such, the jurisdiction of the Court and the binding power of the case are limited to the state governed by the Constitution under review. Nonetheless, these cases show that parts of the continent have already banned the practice of public school corporal punishment as a violation of the rights to human dignity and freedom from cruel, inhuman or degrading punishment.

In *Ex parte Attorney-General of Namibia, In re Corporal Punishment by Organs of State*, the Supreme Court of Namibia held that corporal punishment by or on the authority of the government was contrary to article 8 of the Constitution of Namibia,<sup>66</sup> which recognises the rights to respect for human dignity and protection from inhuman or degrading treatment or punishment.<sup>67</sup> Therefore, public school corporal punishment contradicted the Constitution and was held to be unlawful.<sup>68</sup>

In *A Juvenile v State*, the Supreme Court of Zimbabwe held that the imposition of corporal punishment on schoolchildren violated section 15(1) of the Constitution of Zimbabwe and constituted degrading treatment.<sup>69</sup> In reaching this decision, the Court relied on jurisprudence

<sup>65</sup> n 60 above, para 44.

<sup>66</sup> Art 8(2)(b) of the Namibian Constitution provides that 'no persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment'. T Maluwa *International law in post-colonial Africa* (2000) 47.

<sup>67</sup> [1992] LRC (Const) 515.

<sup>68</sup> As above. In *S v Williams & Others*, the Constitutional Court of South Africa held that juvenile whipping was unlawful and unconstitutional under secs 10 and 11(2) of the new Constitution of the Republic of South Africa ([1995] 2 LRC 103). See also A Lester 'The relevance of international human rights norms' (1996) 7 *Developing Human Rights Jurisprudence* 23 42.

<sup>69</sup> Maluwa (n 66 above).

from the European Court of Human Rights to interpret the Constitution and article 5 of the African Charter.<sup>70</sup>

In South Africa, the legislature passed the South African Schools Act in 1996.<sup>71</sup> Section 10 of the Act provides:<sup>72</sup>

- (1) No person may administer corporal punishment at a school to a learner.
- (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault.

In the case *Christian Education South Africa v Minister of Education*, the constitutionality of this Act was challenged, and the Constitutional Court of South Africa upheld the Act as valid and constitutional.<sup>73</sup> The Court held that<sup>74</sup>

the outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children.

### 2.2.2 The European Court of Human Rights

Several cases on the subject of corporal punishment have been adjudicated before the European Court of Human Rights (European Court). These cases involved claims brought under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), which states: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’<sup>75</sup> In applying article 3, the European Court applies a severity standard to the totality of the circumstances to determine if a breach of the Convention has occurred.<sup>76</sup> In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity.

The decisions discussed below further illustrate that corporal punishment is widely held to be cruel, inhuman or degrading treatment and that state-sponsored corporal punishment is a breach of human rights law. Furthermore, these cases demonstrate the operation of the severity standard which is used to determine what forms of punishment constitute cruel, inhuman or degrading treatment.

<sup>70</sup> As above.

<sup>71</sup> *Christian Education South Africa v Minister of Education* 1999 2 SA 83 (CC).

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> As above. The Court cited CCPR several times throughout the opinion.

<sup>75</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms art 3, 213 UNTS 221 (1953).

<sup>76</sup> *Assenov & Others v Bulgaria*, 96 Eur Ct HR 3264 3288 (1998).

In *Costello-Roberts v United Kingdom*, the European Court of Human Rights applied the severity requirement by considering if the petitioner had produced<sup>77</sup>

evidence of severe or long-lasting effects as a result of the treatment complained of. A punishment which does not occasion such effects may fall within the ambit of Article 3 ... provided that in the particular circumstances of the case it may be said to have reached the minimum threshold of severity required.

The petitioner had been struck three times on his clothed buttocks with a rubber-soled shoe, and there was no visible sign of bruising.<sup>78</sup> The Court held that, based on these facts, the petitioner had 'adduced no evidence of any severe or long-lasting effects as a result of the corporal punishment he received'.<sup>79</sup> Therefore, there was no violation of article 3 of the European Convention.<sup>80</sup>

However, in the case of *Warwick v United Kingdom*,<sup>81</sup> the Court held that a single cane stroke across the petitioner's hand, which resulted in a bruise, was sufficient to constitute degrading punishment. 'The punishment consisted of a physical injury inflicted by a man, in the presence of another man, on a 16 year-old girl, who under domestic legislation is a woman of marriageable age.'<sup>82</sup> Another important factor which affected the Court's deliberation was the presence of a bruise that was not 'of a merely trivial nature'.<sup>83</sup> The Court also noted that it could not '[exclude] that the punishment also had adverse psychological effects'.<sup>84</sup>

In *Y v United Kingdom*,<sup>85</sup> the petitioner was a 15 year-old male who was caned four times on his clothed buttocks, and the punishment left heavy bruising and swelling. The Court held that the headmaster's punishment constituted a violation of article 3 of the European Convention, reasoning that 'the injuries inflicted on the applicant cannot be dismissed as trivial'.<sup>86</sup>

In *Tyrer v United Kingdom*,<sup>87</sup> the Court held that the administration of lashings, although carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the

<sup>77</sup> *Costello-Roberts v The United Kingdom*, 247 Eur Ct HR 47, 59-60 (1993).

<sup>78</sup> *Costello-Roberts* (n 77 above) 52-53.

<sup>79</sup> *Costello-Roberts* (n 77 above) 59-60.

<sup>80</sup> *Costello-Roberts* (n 77 above).

<sup>81</sup> *Warwick v United Kingdom* App No 947/81, 60 Eur Comm'n HR Dec & Rep 16-17 (1986).

<sup>82</sup> As above.

<sup>83</sup> n 81 above, 17.

<sup>84</sup> As above.

<sup>85</sup> *Y v United Kingdom*, App No 14229/88, 17 Eur HR Rep (Ser A) 238, 239-43 (1991) (Commission report).

<sup>86</sup> n 85 above, 239 241-43.

<sup>87</sup> *Tyrer v United Kingdom* 26 Eur Ct HR (Ser. A) (1978), 2 EHRR, 1 para 30 (1979-80).

exhaustion of appeal rights, violated the rights of the victim. The Court reasoned that<sup>88</sup>

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 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 authorities constituted an assault on precisely that which it is one of the main purposes of article 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.

In the aforementioned cases, the severity standard is applied by considering the totality of the circumstances. However, evidence of physical harm is an important factor in reaching a determination. The greater the evidence of physical harm (ie swelling, bruising, scars, etc), the more likely that the European Court will find that the administration of punishment reached the level of cruel, inhuman or degrading treatment. Also, the embarrassment endured by the victim and the identity of the person administering the punishment in relation to the victim play a significant role in this determination.

As discussed in *Tyrer v United Kingdom*, public school corporal punishment allows 'institutionalised violence' to be implemented by the authorities of the state, and children are treated as 'an object in the power of authorities'. In accordance with the decision in that case, even the threshold required by the severity standard could not save this practice under article 3 of the European Convention.

### 3 A recommended solution: Implementation of a severity standard through local legislation

An important issue raised in the cases discussed above is the existence of a severity standard when human rights law prohibits the use of corporal punishment in any form, at any level of reasonableness. Is the severity standard a regional or national analysis that is inconsistent with international law?<sup>89</sup> The answer is that there cannot be such a standard, because all forms of punishment cannot be categorised as corporal punishment. Thus, the standard creates a means of identifying what forms of punishment should be prohibited by law, and what forms are acceptable.

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<sup>88</sup> As above.

<sup>89</sup> See generally U Kilkelly *The child and the European Convention on Human Rights* (1999) 160-161.

Several courts have asserted that, included within the right to freedom from cruel, inhuman or degrading punishment, is a right against disproportionality.<sup>90</sup> In *Buzani Dodo v The State*,<sup>91</sup> the Constitutional Court of South Africa stated that '[t]he concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading'. Therefore, the severity standard is a manifestation of the right against disproportionality that courts use to determine if a punishment has reached the level of cruel, inhuman or degrading treatment.

For example, in the case of *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada*, the Supreme Court of Canada held that section 43 of the Criminal Code does not violate sections 7,<sup>92</sup> 12,<sup>93</sup> and 15(1)<sup>94</sup> of the Canadian Charter of Rights and Freedoms.<sup>95</sup> Section 43 justifies the reasonable use of force by way of correction by parents and teachers against children in their care.<sup>96</sup> In its reasoning, the Court utilised a severity standard to narrow the scope of section 43 to disciplinary measures that would not breach its human rights obligations by amounting to corporal punishment.

The force must have been intended to be for educative or corrective purposes, relating to restraining, controlling or expressing disapproval of the actual behaviour of a child capable of benefiting from the correction. While the words 'reasonable under the circumstances' on their face are broad, implicit limitations add precision. Section 43 does not extend to an application of force that results in harm or the prospect of harm. Determining what is 'reasonable under the circumstances' in the case of child discipline is assisted by Canada's international treaty obligations, the circumstances in which the discipline occurs, social consensus, expert evidence and judicial interpretation. When these considerations are taken together, a solid core of meaning emerges for

<sup>90</sup> Eg *State v Pickering* (n 36 above); *S v Vries* (1996) 12 BCLR 1666.

<sup>91</sup> 2001 3 SA 382 (CC).

<sup>92</sup> 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.' Constitution Act 1982, being Schedule B to the Canada Act 1982, ch 11 (UK) <http://www.canlii.org/en/ca/const/const1982.html#sec7> (accessed 31 January 2007).

<sup>93</sup> 'Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.' Constitution Act 1982 (n 92 above).

<sup>94</sup> 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Constitution Act 1982 (n 92 above).

<sup>95</sup> *Canadian Foundation for Children, Youth and the Law v Attorney-General in Right of Canada* (n 4 above).

<sup>96</sup> As above.

'reasonable under the circumstances', sufficient to establish a zone in which discipline risks criminal sanction.<sup>97</sup>

Thus, if the severity standard bans all corrective measures that can be characterised as corporal punishment, then legislation authorising the practice will be repealed.<sup>98</sup> However, alternative disciplinary measures that do not meet the severity threshold will be permissible, and will allow schools to maintain discipline and order amongst students.

While the severity standard signifies the advancement of children's human rights, the test could be more comprehensive. Also, the severity standard is usually applied on a case-by-case basis by considering the totality of the circumstances, as demonstrated in the European Court cases, which can hamper uniformity in the administration of the law. As previously discussed, international human rights calls for the complete elimination of *all* forms of corporal punishment.<sup>99</sup> The reasonableness, moderation or justifiability of the punishment is irrelevant.<sup>100</sup> Thus, this article asserts that a definitional standard should be added as the first prong of the severity standard to characterise certain forms of punishment as illegal *per se*, regardless of the severity with which they are administered. African legislatures could clearly define acts that constitute corporal punishment, and then apply the severity standard as a catchall for acts that are not expressly stipulated in the definition of corporal punishment, but nonetheless reach a level of severity that requires its elimination. For the first prong, the author recommends the adoption of the definition set forth by the CRC Committee:<sup>101</sup>

[a]ny punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involve hitting ('smacking', 'slapping', 'spanking') children, with the hand or with an implement - a whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears, forcing children to stay in uncomfortable positions, burning, scalding or forced ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices). In addition, there are other non-physical forms of punishment ... for example,

<sup>97</sup> As above. However, it must be noted that Justice Binnie dissented in part, stating: 'By denying children the protection of the criminal law against the infliction of physical force that would be criminal assault if used against an adult, sec 43 of the Criminal Code infringes children's equality rights guaranteed by sec 15(1) of the Charter. To deny protection against physical force to children at the hands of their parents and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the Criminal Code, into a second class citizen.' Justices Arbour and Deschamps also dissented.

<sup>98</sup> 'Top court upholds spanking law' <http://www.corpun.com/cad00401.htm#teachers> (accessed 28 October 2007). International Covenant on Civil and Political Rights: Fifth Report of Canada [http://www.pch.gc.ca/progs/pdp-hrp/docs/fifth\\_iccpr/fifth\\_e.pdf](http://www.pch.gc.ca/progs/pdp-hrp/docs/fifth_iccpr/fifth_e.pdf) (accessed 28 October 2007).

<sup>99</sup> CRC General Comment (n 18 above) para 2; see United Nations Study on Violence Against Children, 61st session UN Doc A/61/299 (2006).

<sup>100</sup> As above.

<sup>101</sup> n 18 above, para 11.

punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.

The repeal of laws authorising public school corporal punishment, and the implementation of this two-pronged analysis would be consistent with international law, promote judicial efficiency, and uphold the right against disproportionality.

#### 4 Conclusion

The use of corporal punishment within the public educational system of African states is unlawful, detrimental to the health and welfare of children, and an unnecessary impediment to educational excellence in the region. Public school corporal punishment violates several international and regional human rights treaties, customary international law, and may breach *jus cogens* norms prohibiting torture and recognising a fundamental right to respect for human dignity. Therefore, laws authorising this practice should be repealed and alternative methods should be encouraged through law reform. 'We must remember that children struggle every day to cope with the pressure that violence brings into their lives,' said Ms Cheryl Gilwald, South Africa's Deputy Minister of Correctional Services.<sup>102</sup> 'The true measure of a nation's humanity is the respect with which it treats its children.'<sup>103</sup>

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<sup>102</sup> UNICEF 'Call to ban corporal punishment wraps up South Africa meeting on violence' [http://www.unicef.org/infobycountry/media\\_27721.html](http://www.unicef.org/infobycountry/media_27721.html) (accessed 13 March 2007).

<sup>103</sup> As above.