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## A RECURRING PHENOMENON: THE LAWFUL SANCTIONS CLAUSE IN THE DEFINITION OF TORTURE AND THE QUESTION OF JUDICIAL CORPORAL PUNISHMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW

### **Abstract:**

*Despite the universal condemnation of torture, the prevention of appalling practices of ill-treatment has not been achieved in the 21st century. The repugnant practice persists and even increases because of the disingenuous interpretations of the definition of torture and the lack of effective enforcement mechanisms. Notwithstanding the cogency of the absolute and non-derogable prohibition of torture, particularly regarding the treatment of detainees, nowadays corporal punishment as a punitive measure is arguably a recurring phenomenon in several former British colonies and in States where the legal system is based on Islamic Sharia. While several legally binding universal and regional instruments prohibit torture in general terms, with no specific definition, the scope of the Convention against Torture definition was narrowed down by the lawful sanctions clause. The universality of the definition has been undermined by the inclusion of this clause, since different States have different practices when it comes to lawful and unlawful sanctions. The intractable problem of the interpretation of the definition by the State-Parties and the lack of effective control mechanisms has perennially posed the greatest challenge with respect to compliance with International Human Rights Law. In light of the above, this article seeks to critically dissect the lawful sanctions clause within the context of corporal punishment.*

**Keywords:** human rights, prohibition, torture, inhuman treatment, corporal punishment

### **INTRODUCTION**

Despite the universal condemnation of torture, the prevention of appalling and persistent practices of ill-treatment has not been achieved during the second half of the 20th

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century and the beginning of the 21st century, a period which has been characterized as affected by a plague of torture.<sup>1</sup> While torture is perceived as an aberration that must never be permitted to occur under International Human Rights Law (IHRL), nonetheless the repugnant practice persists and increases because of the disingenuous interpretations of the definition of torture and the lack of effective enforcement mechanisms.

Notwithstanding the cogency of the absolute and non-derogable prohibition of torture, particularly regarding the treatment of detainees and prisoners,<sup>2</sup> nowadays corporal punishment as a punitive measure is arguably a recurring phenomenon in a number of States.

As a result of the significant obstacles to discovering information about the practice, including, *inter alia*, the fear to complain, the absence of independent witnesses given the intrinsic nature of such acts and their geographical isolation,<sup>3</sup> the impossibility to obtain precise statistics – or even a rough picture of the ongoing prevalence of ill-treatment towards detainees – reliable information on the phenomenon is relatively low. However despite these hindrances Amnesty International has documented the occurrence of torture and other inhuman, cruel or degrading treatment in 141 countries between 2009 and 2013.<sup>4</sup>

The intractable problems of the deceitful interpretation of the definition by the States and the lack of effective control mechanisms have perennially posed the major challenge in relation to compliance with IHRL leading to pervasive detrimental effects and consequences for detainees.

Furthermore, the relative priorities of the different limbs of the prohibition also enables States to argue that their impugned practices fall short of torture when it comes to the legal interpretation of the definition,<sup>5</sup> while various States have nevertheless admitted that their conduct may amount to cruel, inhuman or degrading treatment, as a textualist reading of the United Nations (UN) Convention against Torture (CAT or the Convention)<sup>6</sup> proffers that the absolute ban refers only to torture, and not to other forms of ill-treatment.<sup>7</sup>

While several legally-binding universal and regional instruments prohibit torture in general terms without specifically defining the term, the scope of the CAT definition

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<sup>1</sup> M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, Deutsches Institut für Menschenrechte, Kehl: 2005, p. 158.

<sup>2</sup> The use of the terms “detainee” or “prisoner”, either together or separately, refers to any person under the supervision of State officials.

<sup>3</sup> N. Rodley, M. Pollard, *The Treatment of Prisoners under International Law*, Oxford University Press, New York: 2009, p. 10.

<sup>4</sup> Amnesty International, *Torture in 2014, Thirty Years of Broken Promises*, Amnesty International, London: 2014, p. 10.

<sup>5</sup> F. L. Rouillard, *Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum*, 21 *American University International Law Review* 9 (2005), p. 20.

<sup>6</sup> Convention against Torture (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85.

<sup>7</sup> Article 2 of the CAT.

was narrowed down by the lawful sanctions clause contained therein. Whereas practices of torture are in clear violation of both domestic and international law, the lawfulness of corporal punishment persists in the penal codes of several States, particularly in States where the legal system is based on Islamic *Sharia*. The universality of the definition of torture within the CAT has therefore been undermined by the inclusion of the lawful sanctions clause, since different States have different practices when it comes to lawful and unlawful sanctions.

In light of the above, this article seeks to critically dissect various aspects of the challenges surrounding the prohibition of torture and other forms of ill-treatment. The article will dwell upon and tackle the highly controversial lawful sanctions exception contained in the definition of torture set out in Article 1 of the CAT, viewing the issue in the context of corporal punishment.

## 1. THE LEGAL PROHIBITION OF TORTURE AND OTHER FORMS OF ILL-TREATMENT UNDER IHRL

This section analyses the prohibition of torture contained in general universal human rights treaties, most notably the CAT, which is arguably the only multilateral torture-specific treaty that provides a definition of torture, thus creating a general authoritative guideline. It examines the definition contained in the CAT, focusing on the lawful sanctions clause. It also outlines the interpretation of the lawful sanctions clause by human rights treaty bodies at the international and regional levels to illustrate the amorphous points of the clause, which have permitted States to stray considerably from their obligations under IHRL, leading to the perpetuation of the practice of corporal punishment.

It is argued herein that the lawful sanctions clause is not a *carte blanche* provided to the State-Parties, and that it must be interpreted in a manner consistent with the spirit of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment (CIDTP or other forms of ill-treatment).

### 1.1. The international law approach

Many aspects of IHRL in the modern world were formulated in response to the crimes committed during World War II.<sup>8</sup> The adoption of the Universal Declaration of Human Rights (Declaration), arguably the principal achievement in the development of international human rights, heralds rights for individuals and includes a universal proscription of torture and CIDTP in Article 5,<sup>9</sup> giving rise to the prohibition which pervades subsequent universal and regional human rights instruments.<sup>10</sup>

<sup>8</sup> Rodley & Pollard, *supra* note 3, p. 45.

<sup>9</sup> Universal Declaration of Human Rights (adopted 10 December 1948), UN General Assembly Res. 217 A (III).

<sup>10</sup> Rodley & Pollard, *supra* note 3, p. 45.

Following ample time devoted to drafting procedures, the General Assembly (GA) on 9 December 1975 adopted a resolution containing the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in order to provide more effective protection against torture.<sup>11</sup> Notwithstanding the non-binding nature of the Declaration, it not only formulated a coherent set of rules, composed of 12 articles that sought to prohibit the commission of torture, but also provided the first definition of torture.<sup>12</sup>

Torture and CIDTP are explicitly prohibited in various binding international human rights treaties, with most setting up committees with mandates to monitor the compliance of State-Parties with their obligations under the respective instruments. All of the pertinent provisions enshrined in a number of universal and regional treaties are not only “non-derogable in times of war and emergency ... [but] it is also ensured without any restriction whatsoever.”<sup>13</sup>

Due to the unconditional recognition of its prohibition by the international community, torture is widely regarded as a universally abhorrent practice prohibited by customary international law,<sup>14</sup> which has acquired the status of *jus cogens* pursuant to Article 53 of the Vienna Convention on the Law of Treaties (VCLT).<sup>15</sup> Furthermore, the prohibition of torture has also been entrenched in international law as an *erga omnes* obligation, meaning that the rights or obligations are owed by a State towards the international community as a whole.<sup>16</sup>

The International Covenant on Civil and Political Rights (ICCPR)<sup>17</sup> was the first binding universal human rights treaty to outlaw the practice of torture and the CIDTP under Article 7, with the intention to protect the physical and mental integrity and dignity of individuals.<sup>18</sup>

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<sup>11</sup> Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly Res. A/RES/3452(XXX), (9 December 1975); See also O. Hathaway, *Tortured Reasoning: The Intent to Torture under International and Domestic Law*, 52 Virginia Journal of International Law 791 (2012), p. 798.

<sup>12</sup> J. Herrmann, *Implementing the Prohibition of Torture on Three Levels: The United Nations, the Council of Europe, and Germany*, 31 Hastings International and Comparative Law Review 437 (2008), p. 441.

<sup>13</sup> M. Nowak, *Challenges to the Absolute Nature of the Prohibition of Torture and Ill-treatment*, 23 (4) Netherlands Quarterly of Human Rights 674 (2005), p. 674; See also Article 5 of the UDHR; Articles 7 and 4(2) of the ICCPR; Articles 3 and 15(2) of the ECHR; Articles 5(2) and 27(2) of the ACHR; Article 5 of the ACHPR.

<sup>14</sup> B. Simma, A. Philip, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Australian Yearbook of International Law 82 (1992), pp. 86-93; See also, M. Nowak, *supra* note 13, p. 674.

<sup>15</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

<sup>16</sup> Rouillard, *supra* note 5, pp. 14-17.

<sup>17</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

<sup>18</sup> Human Rights Committee (HRC), *General Comment 20* (GC), UN Doc. HRI/GEN/1/Rev.1 (1992), para. 2.

At the regional level, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>19</sup> was adopted by the Council of Europe in 1948. Similarly as with the ICCPR, the ECHR does not provide a definition of torture, however the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR) have made significant contributions to the development of this substantive right and the establishment of a demarcation line between torture and other forms of ill-treatment. Other human rights treaties of regional applicability, such as the African Charter on Human and People's Rights (ACHPR or the African Charter),<sup>20</sup> the American Convention on Human Rights (ACHR),<sup>21</sup> and the Revised Arab Charter on Human Rights (ArCHR)<sup>22</sup> also prohibit torture and CIDTP, with minor variations in wording.

The backbone of the international framework for combating torture was established with the creation of the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment, based substantially on the Declaration against Torture, and the Optional Protocol to the Convention against Torture,<sup>23</sup> for the specific purpose of defining, implementing, and enforcing the proscription of torture and other forms of ill-treatment. In 1985, the Organization of American States (OAS), reproducing major UN human rights instruments on the regional level, adopted the Inter-American Convention to Prevent and Punish Torture, which contains a broader definition in Article 2, encompassing more acts of coercion than the definition provided in the CAT.<sup>24</sup>

In order to reinforce the protection from torture, the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) in 1987.<sup>25</sup> It applies a more stringent approach with regard to the implementation of the prohibition of torture and its monitoring body, the Committee for the Prevention of Torture (CPT), appears as an effective control mechanism<sup>26</sup> which is authorized to carry out periodic visits and inspect detention centres and prisons of the Member States of the Council of Europe with the aim of protecting detainees from torture.<sup>27</sup>

<sup>19</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 10 December 1948, entered into force 4 November 1950), 213 UNTS 222.

<sup>20</sup> African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986), CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58.

<sup>21</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123.

<sup>22</sup> Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008).

<sup>23</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002, entered into force 22 June 2006), UN GA Res. A/RES/57/199.

<sup>24</sup> Rodley & Pollard, *supra* note 3, p. 51.

<sup>25</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989), ETS 126.

<sup>26</sup> Herrmann, *supra* note 12, pp. 445-446.

<sup>27</sup> *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, CPT Standards "Substantive" Sections of the CPT's General Reports, Imprisonment (1992),

The prohibition of torture is also enshrined in other non-binding instruments specifically designated to deal with torture and other forms of ill-treatment. Such instruments include the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment,<sup>28</sup> and the Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.<sup>29</sup> The latter instrument applies to those who function in roles as health personnel, and is particularly pertinent to physicians, as the prohibition of torture against detainees is a gross contravention of medical ethics.<sup>30</sup> Other principles, rules, and manuals have reiterated the prohibition of torture (namely the Standard Minimum Rules for the Treatment of Prisoners<sup>31</sup> and the Manual of the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, widely known as the “Istanbul Protocol”).<sup>32</sup>

## 1.2. The CAT and the Committee against Torture

Despite the universal consensus in favour of outlawing torture, it remains a convoluted and controversial concept under international law. Each perpetrator seeks to characterize his or her own conduct as a non-violation of the prohibition, and governments argue that their behaviour does not qualify as torture and is therefore not outlawed under international law.<sup>33</sup> The relatively vague definition of the prohibition of torture seems to allow a remarkable degree of discretion to the signatory States in providing their own interpretation of the concept.

It is therefore necessary to identify what constitutes torture, or what is meant by the prohibition of torture, so that State-Parties to the Convention are bound to a clearly shaped and constant standard, a uniform definition without any gaps that would allow them to circumvent the rules or create obstacles to the international community put-

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available at: <https://irm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806ce96b> (accessed 30 May 2017); See generally A. Cassese, Current Development: A New Approach to Human Rights: The European Convention for the Prevention of Torture, 83 *American Journal International Law* 128 (1989).

<sup>28</sup> General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment*, UN Doc. A/RES/43/173 (1988).

<sup>29</sup> General Assembly, *Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners*, UN Doc. A/RES/37/194 (1982).

<sup>30</sup> H. J. Burgers, H. Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff Publishers, Dordrecht: 1998, p. 22.

<sup>31</sup> Economic and Social Council (ECOSOC), *Standard Minimum Rules for the Treatment of Prisoners*, UN Congress on the Prevention of Crime and the Treatment of Offenders (1955), Resolutions 663 C (XXIV) and 2076 (LXII), (1957/1977).

<sup>32</sup> United Nations High Commissioner for Human Rights (OHCHR), *Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment*, HR/P/PT/8/Rev.1 (2004).

<sup>33</sup> Rouillard, *supra* note 5, p. 20.

ting pressure on incorrigible governments so as to completely eradicate, prevent, and punish torture.

While all international treaties forbid torture in absolute terms, they usually neither define it nor contain a definition of the CIDTP. Article 1 of the CAT is the first legally binding provision within international law to define the term “torture”. With 161 State-Parties, the CAT contains the most widely agreed-upon definition of torture.<sup>34</sup>

Article 1 of the CAT codifies the following criteria for an action to constitute torture: first, an intentional infliction of severe physical or mental pain or suffering; second, its commission for one of the purposes enumerated within the article; and third, with the involvement or acquiescence of a public official. Nevertheless, the scope of the CAT definition was narrowed down by the so-called “lawful sanctions clause”, which excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

### 1.3. The meaning of the lawful sanctions clause

The Declaration against Torture explicitly excludes pain and suffering arising from lawful sanctions, while providing that torture should be defined in accordance with the Standard Minimum Rules for the Treatment of the Prisoners (SMR).<sup>35</sup> These rules provide, *inter alia*, a complete prohibition of corporal punishment for disciplinary offences, designating only the application of certain disciplinary measures below the threshold of corporal punishment.<sup>36</sup> While the SMR are relevant for disciplinary sanctions and conditions of detention, it is difficult to argue that they apply to judicial sanctions, such as judicial corporal punishments, which do not directly result from incarceration.<sup>37</sup>

When drafting the CAT, some States proposed the deletion of the considerably criticized reference to a soft law instrument such as the SMR, which would ultimately be provided with a semblance of a legally binding force even though this was beyond the intention of the States participating in the drafting process.<sup>38</sup> The draft Convention proposed by the International Association of Penal Law (IAPL) referred in its definition to “lawful sanctions not constituting cruel, inhuman or degrading treatment or punishment”,<sup>39</sup> while the Danish delegation proposed the wording “lawful sanctions consistent with international rules for the treatment of persons deprived of their liberty” without reference to any specific instrument.<sup>40</sup> However, the Working Group

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<sup>34</sup> *United Nations High Commissioner for Human Rights (OHCHR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Status of Ratification Interactive Dashboard, <http://indicators.ohchr.org/> (accessed 30 May 2017).*

<sup>35</sup> Article 1 of the Declaration against Torture.

<sup>36</sup> Article 31 of the SMR.

<sup>37</sup> *Ibidem.*

<sup>38</sup> A. Boulesbaa, *The UN Convention on Torture and the Prospects for Enforcement*, Martinus Nijhoff Publishers, Dordrecht: 1999, p. 28.

<sup>39</sup> Burger & Danelius, *supra* note 30, pp. 34-39.

<sup>40</sup> Economic and Social Council (ECOSOC), *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, Commission on Human Rights*, UN Doc. E/CN.4/1314 (1978), para. 47.

decided not to pursue those suggestions and accepted the revised Swedish draft, excluding the reference to a contextual element and in this way opening the door to diluting the prohibition.<sup>41</sup>

Thus while several legally binding universal and regional instruments prohibit torture in general terms with no specific definition, the scope of the CAT definition was narrowed down by the lawful sanctions clause, which excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions” without any reference to the SMR.<sup>42</sup>

While the ICCPR does not include any “sanctions clause” exception to the general rule, the Human Rights Committee (HRC) has found in its case law that certain types of sanctions are permissible, which it has assessed under both national and international law, the latter taking precedent in cases of conflict.<sup>43</sup> The ECHR does not contain any similar clause concerning lawful sanctions, but it can be inferred from the ECtHR jurisprudence on this issue that it has drawn a distinction between lawful and unlawful sanctions.<sup>44</sup> However, the concept of lawful sanctions does not give an unfettered right to States and must be consistent with the spirit of the absolute prohibition of torture and CIDTP.<sup>45</sup> Similarly to the CAT, the IACPPT exempted lawful measures from the prohibition of ill-treatment, providing a narrower exception in its Article 2 by stating that the use of methods and performance of acts prohibited and referred to in the definition do not fall within the meaning of the clause. Article 5 of the ACHPR encompasses no explicit exclusion, however the African Commission has concluded that such treatment may be justified in certain circumstances, even though otherwise prohibited.<sup>46</sup>

Burgers and Danelius discerned the CAT “lawful sanctions” clause as an exception to the scope of torture, but it is unclear whether the sanctions must also be in compliance with international norms in order to be lawful.<sup>47</sup> The resulting loophole raises the question of whether lawful sanctions under domestic law are excluded from Article 1 even if they give rise to severe suffering which would otherwise be qualified as torture.

One could argue that certain forms of punishment, including corporal punishment, do not fall under the exception and are clearly in violation of IHRL, however

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<sup>41</sup> C. E. Coracini, *The Lawful Sanctions Clause in the State Reporting Procedure Before the Committee against Torture*, 24 *Netherlands Quarterly of Human Rights* 305 (2006), p. 309.

<sup>42</sup> Article 1 of the CAT.

<sup>43</sup> HRC, *Osbourne v. Jamaica* (App. No. 759/1997), UN Doc. CCPR/C/68/D/759/1997 (2000), para. 9.1; *Antti Vuolanne v. Finland* (App. No. 265/1987), UN Doc. CCPR/C/35/D/265/1987 (1989), para. 6.4.

<sup>44</sup> ECtHR, *Dedovskiy and Others v. Russia* (App. No. 7178/03), 15 May 2008, paras. 80-86; ECtHR, *Archip v. Romania* (App. No. 49608/08), 27 September 2011, ECtHR, *Thuo v. Cyprus* (App. No. 3869/07), 4 April 2017, paras. 141-149.

<sup>45</sup> ECtHR, *Tyrer v. The United Kingdom* (App. No. 5856/72), 25 April 1978, paras. 33-35.

<sup>46</sup> Association for the Prevention of Torture (APT) & Center for Justice and International Law (CEJIL), *Torture in International Law: A Guide to Jurisprudence*, SRO-Kundig, Geneva: 2008, p. 138.

<sup>47</sup> Burgers & Danelius, *supra* note 30, p. 122.



this view undoubtedly has not been shared by some Islamic States when it comes to forms of punishment derived from *Sharia* law.<sup>48</sup> The absence of an indication in the definition of torture that lawful sanctions must be in accordance with the international standards has led to a conclusion that it leaves some leeway, at least to a certain extent, for national legislation to avoid the prohibition by sanctioning certain methods of punishment.

Thus the uniformity and universality of the definition has seemingly been undermined by the inclusion of the lawful sanctions exception, since different States have different practices when it comes to lawful and unlawful sanctions. Yet such an interpretation seems contrary to the purpose of the CAT and to the mandate of the UN in strengthening international standards and promoting universal human rights.<sup>49</sup> The clause also cannot be upheld in light of the general rules of interpretation envisaged in Article 31 of the VCLT (or the principle expressed in Article 27).

The application of corporal punishment, particularly flogging, amputation, and stoning, are unquestionably unlawful during custodial interrogation and cannot simply be perceived as lawful due to authorization in a legitimate manner through national law, as this would otherwise lead to the acceptance of all punishments regardless of their cruelty.<sup>50</sup>

Ingelse opined that removing the reference to the SMR unforeseeably offered an opening to a number of States which were reluctant to adhere to the instrument on the basis that it may infringe upon the use of corporal punishment provided in Islamic law or *Sharia* and the wording of the second sentence secured the willingness of these States to ratify the Convention.<sup>51</sup> Indeed, international instruments sometimes avoid using sharp language in order to achieve a higher degree of ratification, including in some instances "as a concession to certain Islamic States."<sup>52</sup>

Nowak posits that the lawful sanctions clause should no longer be taken into account as it is a futile provision, devoid of any meaning.<sup>53</sup> On the other hand, Rodley acknowledges the view that a broader term for lawful sanctions refers to the concept of deprivation of liberty through imprisonment by an independent and competent court or other sanctions accepted as legitimate in almost all penal systems and by the interna-

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<sup>48</sup> *Ibidem*; see generally General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/60/316 (2005), para. 27; Economic and Social Council (ECOSOC), *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, Report of the Special Rapporteur, Mr. Nigel S. Rodley*, UN Doc. E/CN.4/1997/7 (1997), paras. 7-10 & UN Doc. E/CN.4/1997/7/Add.1 (1996), para. 435.

<sup>49</sup> Article 1(3) of the UN Charter.

<sup>50</sup> ECOSOC, *supra* note 48, para. 8.

<sup>51</sup> C. Ingelse, *The UN Committee against Torture: An Assessment*, Kluwer Law International, The Hague: 2001, pp. 213-214.

<sup>52</sup> M. Nowak, *Recent Developments in Combating Torture*, 19 SIM Newsletter 24 (1987), p. 25.

<sup>53</sup> Nowak considers that "the lawful sanctions clause has no scope of application and must simply be ignored." M. Nowak, E. McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press, Oxford: 2008, p. 84.

tional community, insofar as they conform with the SMR.<sup>54</sup> While it is difficult to see how lawful imprisonment could constitute torture as defined in Article 1 of the CAT, the mere imposition of a sentence may give rise to serious psychological consequences. Accordingly, it can be concluded that the lawful sanctions clause has not become completely unnecessary and useless, however the clause has no scope of application in the context of corporal punishment.

Therefore it may be stated that the lawful sanctions clause is not a *carte blanche* given to States Parties to determine the lawfulness of sanctions under domestic law,<sup>55</sup> and the clause cannot be invoked by the States in order to disguise continuous violence. Accordingly, judicial sanctions ought to be exempt from this exclusion where they fail to comply with IHRL standards.

## 2. IS CORPORAL PUNISHMENT A PERMISSIBLE SANCTION UNDER IHRL?

The purpose of this section is to identify the challenges related to the use of the lawful sanctions clause for the most severe cases of corporal punishment. Furthermore, it discusses the authentic interpretations of the treaty bodies, adopted since the inception of their operation, in determining the legal status of corporal punishment and the CIDTP. Ultimately, the question will be raised as to whether cultural relativity is a factor in the current interpretation of lawful sanctions.

It is herein argued that all forms of judicial corporal punishment must be classified cruel, inhuman and degrading punishment, while certain cases, particularly the amputation of limbs, stoning, and flogging are manifestly incompatible with Article 1 of the CAT and must be qualified as torture, despite not being explicitly recognized as such by some human rights mechanisms. It is also argued that those substantive human rights which are listed as non-derogable rights and are considered *jus cogens* should be objectively enforced, regardless of the cultural peculiarities relative to a specific context.

### 2.1. State practices

Whereas practices of torture are in clear violation of both domestic and international law, the lawfulness of corporal punishment is a “grey area”<sup>56</sup> in international law and persists in the penal codes of several States, in particular in several former British colonies and in States where the legal system is based on Islamic *Sharia*.<sup>57</sup>

<sup>54</sup> ECOSOC, *supra* note 48, para. 8; *See also*, Rodley & Pollard, *supra* note 3, pp. 30-31.

<sup>55</sup> Association for the Prevention of Torture, *The Definition of Torture, Proceedings of an Expert Seminar*, APT, Geneva: 2001, p. 20.

<sup>56</sup> C. Giffard, *The Torture Reporting Handbook: How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights*, Human Rights Center of the University of Essex, Essex: 2000, p. 14.

<sup>57</sup> Global Initiative to End All Corporal Punishment of Children, *Reports on Every State and Territory*, <http://www.endcorporalpunishment.org/progress/country-reports/> (accessed 30 May 2017); *see also* Rodley & Pollard, *supra* note 3, p. 428.

While international law strongly rejects corporal punishment for disciplinary offences in several provisions, including its prohibition in Article 31 of the SMR, in the GA resolutions, and in the rulings of the IACoMHR,<sup>58</sup> international instruments lack any explicit reference to judicial corporal punishments, leaving it up to the treaty bodies to examine.

The primary goals of corporal punishment involve causing pain and suffering for various purposes, e.g. for the rehabilitation of the offender, retribution, and general or specific deterrence.<sup>59</sup> For most forms of corporal punishment, the outcome ranges from short term suffering to permanent injuries or disfigurement, which are supposedly directed not only at amending the behaviour of those punished but also to send a strong message to other potential offenders.<sup>60</sup>

In interpreting *Sharia*, Indonesia, Iran, Libya, Nigeria, Pakistan, Saudi Arabia, Yemen and several other States have regarded corporal punishment as a normal penalty for a wide variety of offences, including flogging and whipping for adultery and drinking alcohol, and the amputation of limbs for theft.<sup>61</sup> Yet most of these States have acceded to the CAT without any reservations, despite the existence of these forms of punishment in their legal systems.<sup>62</sup>

## 2.2 Interpretation of the international and regional bodies

Since 1949 the UN GA has dealt with several instances of corporal punishment by adopting resolutions that considered such punishment inhuman and called for the immediate abolition of judicial and administrative corporal punishment, for example in Cameroon, New Guinea, Rwanda, Togoland, and several other States.<sup>63</sup> In 1997, Special Procedures Mandate-Holder Rodley refuted the justification of procedurally legitimate forms of corporal punishment in reliance on domestic law and reported to the Commission on Human Rights that any form of corporal punishment is contrary to the prohibition of ill-treatment and may even amount to torture.<sup>64</sup>

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<sup>58</sup> See generally General Assembly, *Abolition of Corporal Punishment in Trust Territories*, UN Doc. 562/VI (1952), para. 4; Organisation of American States (OAS), *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, Resolution OEA/Ser/L/V/II.131 Doc. 26 (2008).

<sup>59</sup> T. Miethe, H. Lu, *Punishment: A Comparative Historical Perspective*, Cambridge University Press, Cambridge: 2005, pp. 33-34.

<sup>60</sup> *Ibidem*, pp. 33-34.

<sup>61</sup> Global Initiative to End All Corporal Punishment of Children, *Reports on Every State and Territory*, <http://www.endcorporalpunishment.org/progress/country-reports/> (accessed 30 May 2017). See generally M. Abbakar, *No More Cracking of the Whip: Time to End Corporal Punishment in Sudan*, Redress Trust, London: 2012, pp. 21, 23; see also Miethe & Lu, *supra* note 59, pp. 15-17, 37, 180; M. Lawan et al., *An Introduction to Islamic Criminal Justice: A Teaching and Learning Manual*, Higher Education Academy, London: 2011, p. 74; R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge University Press, Cambridge: 2005, pp. 153-174.

<sup>62</sup> United Nations High Commissioner for Human Rights (OHCHR), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Status of Ratification, Interactive Dashboard*, available at: <http://indicators.ohchr.org/> (accessed 30 May 2017).

<sup>63</sup> General Assembly, *Social Advancement in Trust Territories*, UN Doc. 323/IV (1949), paras. 2, 6.

<sup>64</sup> ECOSOC, *supra* note 48, para. 6; General Assembly (2005) *supra* note 48, paras. 18-28.

The Committee against Torture adopted an extremely cautious and silent approach, which prevailed during the debates on State-Parties' reports.<sup>65</sup> For instance, during the review of the report of Mexico, the Mexican delegation did not respond to the questions of the Committee against Torture concerning the exclusion of legitimate sanctions from the concept of torture provided by domestic law.<sup>66</sup>

A similar situation took place with regard to Article 16 of the CAT, when the Committee questioned the factual existence of corporal punishment in Afghanistan and Tunisia, and once again the delegations left these questions largely unanswered.<sup>67</sup> In both cases the Committee did not further insist on an answer or comment on the question. At the same time, the invocation of only Article 16 with regard to corporal punishment has, in certain cases, limited such punishment to merely cruel or inhuman punishment, possibly avoiding the application of the lawful sanctions clause under Article 1. Another instance occurred in 1990, when the Netherlands asked the Committee members to explain the lawful sanctions clause, but did not obtain any reply.<sup>68</sup>

Only in the late 1990s and early 2000s did the Committee's position towards the cessation of corporal punishment undergo a clear change. In its concluding observations on Namibia, the Committee against Torture recommended "the prompt abolition of corporal punishment."<sup>69</sup> Furthermore, in its consideration of the report of Zambia it found corporal punishment to be a clear violation of Article 16 regardless of the length of the cane used as specified in the Zambia's Prison Act.<sup>70</sup>

An important debate on the issue of corporal punishment and the lawful sanctions clause developed when the Committee considered the report of Saudi Arabia, and the Saudi delegation stated that corporal punishment was exercised under judicial and medical supervision while taking into consideration the specific features of the victim, such as his or her state of health.<sup>71</sup> The Committee concluded that corporal punishment, particularly the amputation of limbs and flogging, were incompatible with the CAT.<sup>72</sup> In 2015, in its concluding observations on the report of Saudi Arabia, the

<sup>65</sup> Ingelse, *supra* note 51, pp. 287-288.

<sup>66</sup> General Assembly, *Report of the Committee against Torture*, UN Doc. A/44/46 Supp. 46 (1989), paras. 179-201.

<sup>67</sup> General Assembly, *Report of the Committee against Torture*, UN Doc. A/45/44 Supp. 44 (1990), paras. 412, 424; *See also*, General Assembly, *Report of the Committee against Torture*, UN Doc. A/48/44 Supp. 44 (1993), paras. 58-59.

<sup>68</sup> General Assembly (1990), *supra* note 67, para. 456.

<sup>69</sup> General Assembly, *Report of the Committee against Torture*, UN Doc. A/52/44 Supp. 44 (1997), para. 250.

<sup>70</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention (Zambia)*, UN Doc. CAT/C/SR.494 (2001), para. 34.

<sup>71</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture (Denmark)*, UN Doc. CAT/C/SR.519 (2002), para. 24.

<sup>72</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture (Saudi Arabia)*, UN Doc. CAT/C/CR/28/5 (2002), para. 4(b).

Committee again expressed its deep concerns that the State-Party continued to impose corporal punishment and reiterated that Saudi Arabia “should amend its legislation in order to abolish all such forms of corporal punishment as they amount to torture and cruel, inhuman or degrading treatment or punishment, in violation of the Convention.”<sup>73</sup> It will be interesting to see Saudi Arabia’s response, and possible adjustments in accordance with the Committee’s concluding observations, in its next periodic report, which is still pending.

The Committee has been reluctant to clarify the scope of lawful sanctions and has made no clear proclamations concerning the issue of corporal punishment, restricting its direct engagement in the matter to the reviews of Member States’ reports. In its concluding observations, however, the Committee has gradually recognized that certain forms of severe punishment are illegal and condemned the practices of stoning and the amputation of limbs and flogging, stating that such sanctions were incompatible with the CAT.

This issue has also been interpreted in the jurisprudence of international and regional courts and committees. The leading case before the ECtHR in this regard was *Tyrer v. The United Kingdom*,<sup>74</sup> in which the ECtHR was faced with the question of the compatibility of judicially-ordered corporal punishment with Article 3 of the ECHR, as administrated under the penal law of a self-governing British Island, the Isle of Man. In this case, a fifteen year old school boy was sentenced to judicial birching, a sentence administered by the police officer whilst the applicant was forced to remove his trousers and underpants for the execution of the punishment,<sup>75</sup> and as a result of which the applicant’s skin was sore for about ten days.<sup>76</sup>

The Court asserted that punishment has to attain a certain level of severity in order to amount to torture or inhuman punishment and indicated that judicial corporal punishment constitutes a violation of Article 3 of the ECHR as in most if not all cases humiliation of the victim is one of the effects of the judicial punishment, adding that the assessment is also dependent on the circumstances of the case.<sup>77</sup> The Court pointed out that the elements of humiliation had reached a level of seriousness that amounted to degrading punishment based on aggravating circumstances, amongst them, the requirement that the applicant display his bare posterior, although it also stated that the bare posterior was not the only or decisive factor.<sup>78</sup>

The Court’s finding that degrading punishment had occurred concerned not only the specific circumstances of the case, such as the imposition of the punishment on the bare buttocks, but in addition the Court attempted to address all incidents of judicial

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<sup>73</sup> Committee against Torture, *Concluding Observation of the Second Periodic Report of Saudi (Saudi Arabia)*, UN Doc. CAT/C/SAU/CO/2 (2016), para. 11.

<sup>74</sup> ECtHR, *Tyrer v. The United Kingdom*.

<sup>75</sup> *Ibidem*, paras. 9-10.

<sup>76</sup> *Ibidem*, para. 10.

<sup>77</sup> *Ibidem*, para. 30.

<sup>78</sup> *Ibidem*.

corporal punishment, as such punishment constituted institutional violence carried out against a victim, who is treated as an object in the power of the authorities, and thus constituted an assault on his or her dignity and physical integrity.<sup>79</sup> Although not all forms of corporal punishment absolutely fall under the prohibition, as some may not be considered sufficiently severe to reach the level of degrading punishment, the permissibility of judicial corporal punishment appears now to have been officially ruled out by the ECtHR.

In 2005, the IACtHR dealt with the matter of corporal punishment in the case of *Caesar v. Trinidad and Tobago*. For the crime of attempted rape, the applicant was sentenced to 20 years in prison and subjected to 15 strokes with a cat-o-nine tails.<sup>80</sup> For the administration of punishment, Caesar was forced to lie naked while his head was covered and his hands and feet were harshly tied to a metal frame in the presence of a doctor in the room.<sup>81</sup> Afterwards, he was taken to the infirmary where he spent two months.<sup>82</sup>

After canvassing all existing international practices, including the views of the HRC and the ECtHR in the *Tyrer* case, the IACtHR found corporal punishment to constitute a *per se* violation of Article 5 of the ACHR, stressing the inherently cruel, inhuman and degrading nature of corporal punishment and declaring “corporal punishment by flogging ... as a form of torture.”<sup>83</sup> The Court considered that the nature of this punishment reflects “an institutionalization of violence, which, although permitted by the law, is a sanction incompatible with the Convention.”<sup>84</sup> The IACtHR examined the case not only in general terms, but also in light of the particular circumstances surrounding it, such as extreme humiliation resulting from the aggravating circumstances and the mental anguish from the undue delay in carrying out the punishment: factors that were also relevant for the determination of reparations.<sup>85</sup>

When it comes to the African system, the AComHPR was faced with the issue of judicially-ordered corporal punishment, namely whipping, in the case of *Curtis Francis Doebbler v. Sudan*, where university students were subjected to 25 to 40 lashes for violating public order based on immorality and improper apparel.<sup>86</sup> The administration of the punishment, which consisted of whipping with a plastic whip, left permanent scars and was carried out in public without the presence of a doctor.<sup>87</sup> The State argued

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<sup>79</sup> *Ibidem*, para. 33; see also D. M. Evans, R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Oxford University Press: New York: 1998, pp. 88-91.

<sup>80</sup> IACtHR, *Caesar v. Trinidad and Tobago*, 11 March 2005 (judgment on the merits, reparations and costs), para. 3.

<sup>81</sup> *Ibidem*, para. 49(27).

<sup>82</sup> *Ibidem*, para. 49(30).

<sup>83</sup> *Ibidem*, paras. 51(h), 70, 88; The Court further argued that the prison doctor breached his medical ethics by permitting the execution of such punishment.

<sup>84</sup> IACtHR, *Caesar v. Trinidad and Tobago*, para. 73.

<sup>85</sup> *Ibidem*, para. 88.

<sup>86</sup> IAComHR, *Curtis Francis Doebbler v. Sudan* (236/2000) (2003), para. 30.

<sup>87</sup> *Ibidem*, paras. 30-31.

that the corporal punishment was justified under the domestic criminal law in force in Sudan.<sup>88</sup> The African Commission held that the imposition of physical punishment by the State was contrary to Article 5 of the ACHPR and called on Sudan to abolish the penalty of lashes from its criminal code.<sup>89</sup> The African Commission further asserted that there is no right for the government of a country to apply physical violence to individuals for offences, since it would be considered “tantamount to sanctioning State sponsored torture under the Charter” and contrary to the very nature of the human rights contained in the Charter.<sup>90</sup>

The first opportunity for the HRC to consider the matter of the compatibility of judicially-imposed corporal punishment with the ICCPR occurred in the communication of *Osbourne v. Jamaica*, where the applicant was convicted for robbery and illegal possession of firearms, and consequently sentenced to 15 years in a prison and ten strokes by a tamarind switch.<sup>91</sup> At the time of the submission of the application, the punishment had not yet been carried out, however the HRC had knowledge of the infliction of such forms of punishment in Jamaica from another communication.<sup>92</sup> The only argument Jamaica used as justification was that the imposition of this punishment was permissible under its Constitution.<sup>93</sup> The HRC stated that regardless of the brutal nature of the criminal act, the imposition of corporal punishment was incompatible with Article 7 of the ICCPR and requested the State to refrain from administering such a sentence.<sup>94</sup> The HRC posited that the mere imposition of a sentence with a tamarind switch breached Article 7, whether or not the punishment was actually carried out.<sup>95</sup> The HRC did not address any possible aggravating factors and instead issued a general view regarding the prohibition of corporal punishment as a violation of Article 7.

The HRC has also held that certain forms of corporal punishment and disciplinary sanctions duly prescribed in domestic law were to be classified as torture based purely on the severity, purpose, and nature of the punishment.<sup>96</sup> It also strictly condemned corporal punishment in a number of its concluding observations.<sup>97</sup>

<sup>88</sup> *Ibidem*, para. 34.

<sup>89</sup> *Ibidem*, paras. 42, 44.

<sup>90</sup> *Ibidem*, para. 42.

<sup>91</sup> HRC, *Osbourne v. Jamaica* (App. No. 759/1997), UN Doc. CCPR/C/68/D/759/1997 (2000), para. 2.1.

<sup>92</sup> *Ibidem*, para. 3.3.

<sup>93</sup> *Ibidem*, paras. 4.2-5.1.

<sup>94</sup> *Ibidem*, paras. 9.1, 11; *See also*, HRC, *Boodlal Sooklal v. Trinidad and Tobago* (App. No. 928/2000), UN Doc. CCPR/C/73/D/928/2000 (2001), para. 4.6; *Errol Pryce v. Jamaica* (App. No. 793/1998), UN Doc. CCPR/C/80/D/793/1998 (2004), para. 6.2.

<sup>95</sup> HRC, *Higginson v. Jamaica* (App. No. 792/1998), UN Doc. CCPR/C/74/D/792/1998 (2002), para. 4.6.

<sup>96</sup> International Human Rights Institutions, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.7 (2004), paras. 130, 151.

<sup>97</sup> HRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee*, Iraq, UN Doc. CCPR/C/79/Add.84 (1997), para. 12; Sudan,

While the provisions governing the prohibition of torture and CIDTP do not expressly contemplate the abolition of corporal punishment, the international and regional treaty bodies have recognized that such punishments are incompatible with the prohibition of torture and CIDTP under international law. Ultimately, corporal punishment ought to be qualified as torture due to evolving standards in IHRL as reflected in the ECtHR case law.

### 2.3. The line between torture and other forms of ill-treatment

Notwithstanding the fact that almost all regional and international Courts and Committees have categorized corporal punishment as constituting either torture or CIDTP, the question of which category of the prohibition is breached by judicial corporal punishment remains unclear. Nowak pointed out that corporal punishment has a humiliating and degrading component, and argued that all forms of corporal punishment, without exception, must be considered CIDTP in violation of both customary and treaty law.<sup>98</sup>

First of all, the potential use of the lawful sanctions clause by a State-Party would not automatically make such practices compatible with the CAT as Article 16, which prohibits CIDTP, contains no exceptions clause. Accordingly, those practices fulfilling all the elements of torture, but exempt from Article 1 due to the lawful sanctions clause, would still amount to a violation of Article 16 in spite of the lawfulness of the sanctions under domestic law, and accordingly the State-Party would be in breach of its international obligations under the CAT.<sup>99</sup>

The consideration of CIDTP involved in the second part of the Convention's title was deemed necessary, as a considerable number of obligations applied exclusively to torture according to the wording of the Convention. The creation of two categories has important legal repercussions with respect to the possibility of employing the various procedures and to the extent of the obligations binding on the State-Parties. Rodley stressed that the distinction is of cardinal importance as only torture appears "automatically to be crime under international law entailing the individual criminal responsibility of the perpetrator."<sup>100</sup>

Notwithstanding the non-derogable nature of the overall prohibition of torture and CIDTP in a myriad of universal and regional human rights treaties, Article 2 of the CAT provides that no exceptional circumstances whatsoever may be invoked as a justification of torture, meaning that this restriction is limited only to torture, thereby

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UN Doc. CCPR/C/79/Add.85 (1997), para. 9; Libyan Arab Jamahiriya, UN Doc. CCPR/C/79/Add.101 (1997), para. 11; Cyprus, UN Doc. CCPR/C/79/Add.88 (1998), para. 16, Lesotho, UN Doc. CCPR/C/79/Add.106 (1999) para. 20; Sri Lanka, UN Doc. CCPR/CO/79/LKA (2003), para. 11; Yemen, UN Doc. CCPR/CO/84/YEM (2005), paras. 15-16.

<sup>98</sup> General Assembly, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/HRC/13/39/Add.5 (2010), para. 209.

<sup>99</sup> Coracini, *supra* note 41, p. 317.

<sup>100</sup> Rodley & Pollard, *supra* note 3, p. 444.



expressly precluding CIDTP and putting into question the absolute nature of the prohibition of other forms of ill-treatment.<sup>101</sup>

Due to the blurred interpretation of the Convention with regard to the issue of the delineation between the two forms of treatment, a dilemma has been created for States concerning the obligation to prosecute perpetrators of ill-treatment. The Convention only requires States to punish torture under Article 4, without any reference to CIDTP, which tends to operate in favour of governments who attempt to circumvent the prohibition of torture by avoiding the requisite level of severity that amounts to torture.<sup>102</sup>

In addition, General Comment 2 also deals with the categorization of torture as a non-derogable and peremptory norm, while making no explicit indication as to other forms of ill-treatment.<sup>103</sup> The Convention specifies that torture and CIDTP are not coextensive and addresses acts of a lesser severity in Article 16.<sup>104</sup>

Article 16 neither explicitly prohibits cruel, inhuman or degrading treatment nor defines the term, leaving the parameters of CIDTP open to interpretation.<sup>105</sup> Rodley suggests that the Committee against Torture implicitly reintegrates other forms of ill-treatment into the same sort of status as torture via the preventive measures which must be applied, not only to torture but also to other forms of ill-treatment according to Article 16, and further postulates that while absoluteness is a matter of interpretation, it is impossible to read the Convention in good faith without reaffirming the absolute nature of all aspects of the rule.<sup>106</sup> Shany stressed that the proposition that States Parties can invoke international provisions in order to derogate from the prohibition of ill-treatment falling short of torture is not an express reflection of *lex lata*,<sup>107</sup> while Gaer considered that the prohibition of two degrees of illegality is an absolute human right.<sup>108</sup> It thus appears that the non-derogability dimension applies *pari passu* to all aspects of the rule.<sup>109</sup>

In 2003, the Committee against Torture attempted to draw a line between Articles 1 and 16 of CAT with regard to corporal punishment, taking into account the purpose of its imposition. It declared that the infliction of flogging as punishment would amount to a violation of Article 1 if the purpose was to cause pain, and a violation of Article 16

<sup>101</sup> Article 2 of the CAT.

<sup>102</sup> J. Harper, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 Santa Clara Law Review 893 (2009), p. 903.

<sup>103</sup> Committee against Torture, *General Comment 2* (GC), UN Doc. CAT/C/GC/2 (2008), para. 1.

<sup>104</sup> Article 16 of the CAT.

<sup>105</sup> J. Parry, *Torture Nation, Torture Law*, 97 Georgetown Law Journal 1001 (2009), p. 1037.

<sup>106</sup> Rodley & Pollard, *supra* note 3, p. 354.

<sup>107</sup> Y. Shany, *The Prohibition against Torture and Cruel, Inhuman, and Degrading Treatment and Punishment: Can the Absolute Be Relativized under Existing International Law?* 56 Catholic University Law Review 837 (2007), p. 858.

<sup>108</sup> F. Gaer, *Opening Remarks: General Comment No 2*, New York City Law Review 187 (2008), p. 187.

<sup>109</sup> N. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, 34 Denver Journal of International Law and Policy 185 (2006), p. 185.



society or even in the eyes of the victim subjected to such punishment.<sup>114</sup> This gives rise to claims of legitimacy or justifications for alleged violations on the basis of cultural relativism.<sup>115</sup> However, Zechenter stressed that if the universality of human rights is swallowed by a variety of competing legitimacies, and if human rights have different meanings in different societies, then the entire IHRL system would be undermined and rendered meaningless.<sup>116</sup>

Proponents of cultural relativism may argue that the doctrine generates a legal defence for States vis-à-vis their duty to observe human rights.<sup>117</sup> Yet, no international human rights treaty allows for the modification of certain rights on the basis of local cultural traditions. Furthermore, all human rights treaties reiterate the possession of human rights equally by all individuals, based on the simple fact of being human.<sup>118</sup> Only the ECHR provides, in Article 56(3), that “[t]he provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.”<sup>119</sup> However, reading this provision as supporting the doctrine of cultural relativism has been rejected in the *Tyrer* case, where the ECtHR had stressed that in its determination of a violation of the ECHR it cannot be influenced by the domestic criminal law standards of the Member States.<sup>120</sup> It also noted that judicial corporal punishment was not necessary for the maintenance of law and public order, regardless of the acceptance of such practices by local public opinion, as suggested by the British Government.<sup>121</sup> Confirming the trans-boundary nature of human rights law, this judgment consequently supported the view that human rights are not negotiable and cannot be ignored or modified on the basis of cultural relativism.

Even when it comes to customary international law, cultural relativists exclude legitimate criticisms by external authorities, arguing that the notions of non-intervention and self-determination are the legal bases for cultural relativism.<sup>122</sup> However this is

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<sup>114</sup> L. A. Wendland, *Handbook on State Obligations under the UN Convention against Torture*, APT, Geneva: 2002, p. 25.

<sup>115</sup> D. Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 *Stanford Journal of International Law* 345 (1999), p. 377.

<sup>116</sup> Zechenter, *supra* note 113, p. 320.

<sup>117</sup> J. Donnelly, *Cultural Relativism and Universal Human Rights*, 6 *Human Rights Quarterly* 400 (1984), p. 410.

<sup>118</sup> T. Higgins, *What is a Human Right? Universals and the Challenge of Cultural Relativism*, 11 *Pace International Law Review* 107 (1999), p. 112.

<sup>119</sup> The wording of “such territories” refers to colonial territories, as para. 4 of Article 56(3) extends to all or any of the territories providing that “[a]ny State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court as provided by Article 34 of the Convention”; See generally F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, Oxford: 2014, pp. 116-212.

<sup>120</sup> ECtHR, *Tyrer v. The United Kingdom*, para. 38.

<sup>121</sup> *Ibidem*.

<sup>122</sup> F. Teson, *International Human Rights and Cultural Relativism*, 4 *Virginia Journal of International Law* 869 (1984-1985), pp. 879-880, 882.

illusory, as the internal self-determination which underlies the obligation of the non-intervention principle requires respect for basic human rights of all individuals and the development of independent socio-economic, political, and cultural principles harmonized with IHRL standards.<sup>123</sup> This reading of the principle is reflected in and supported by the Charter of the United Nations<sup>124</sup> and was agreed upon by the European States in the Helsinki Accords.<sup>125</sup>

While considering both radical universalism and radical relativism as misguided and inappropriate, Donnelly allowed for a weak cultural relativism, an intermediate position mixing universalism and relativism in such domains as, *inter alia*, the right to political participation or determination of political mechanisms as well as several economic, social and cultural rights.<sup>126</sup> Despite the cross-cultural variations, Donnelly argues that the principle of self-determination could not be a cloak or justification for despotism and threats against human dignity, including the prohibition of torture, and that a practice which arguably presents a practice of modern barbarism could not be an expression of local cultural traditions.<sup>127</sup>

Furthermore, the UN Special Rapporteur, Coomaraswami, on violence against women has indicated that when it comes to practices such as the amputation of limbs, stoning, and flogging, “cultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily.”<sup>128</sup> Another glaring deficiency of cultural relativism is that it fails to acknowledge culture as a dynamic historical process, whereby existing customs are not necessarily accepted by the majority of a community’s members.<sup>129</sup>

The debate regarding the universality of human rights and socio-cultural differences was in the limelight during the second UN World Conference on Human Rights. The Vienna Declaration and Programme of Action, which was adopted at this conference on 25 June 1993, repeatedly reaffirmed the universality of human rights. Paragraph 5 of the Declaration provided that human rights must be respected globally “in a fair and equal manner” and that “it is the duty of States, regardless of their political, eco-

<sup>123</sup> *Ibidem*; see also C. Mojekwu, *The African Perspective in International Human Rights Law*, in: J. Nelson, V. Green (eds.), *International Human Rights: Contemporary Issues*, Human Rights Publishing Group, New York: 1980, p. 89; D. R. Gilmour, *The Meaning of „Intervene” within Article 2 (7) of the United Nations Charter: An Historical Perspective*, 2(16) *International and Comparative Law Quarterly* 330 (1967), pp. 330-351.

<sup>124</sup> Articles 1 and 55 of the UN Charter; with regard to the non-intervention principle in Article 2(7) of the UN Charter, various scholars posit that criticism and discussion concerning to the enforcement of human rights does not constitute “intervention”.

<sup>125</sup> Conference on Security and Co-Operation in Europe Final Act (Helsinki), *Declaration on Principles Guiding Relations between Participating States* (1975), I. *Sovereign Equality, Respect for the Rights Inherent in Sovereignty & VIII. Equal Rights and Self-determination of People*, pp. 4, 7.

<sup>126</sup> Donnelly, *supra* note 117, pp. 401-402, 406-408.

<sup>127</sup> *Ibidem*, pp. 413-414.

<sup>128</sup> T. Franck, *Are Human Rights Universal?* 1(80) *Foreign Affairs* (2001), p. 198.

<sup>129</sup> A. D. Renteln, *Corporal Punishment and the Cultural Defense*, 73 *Law and Contemporary Problems* 253 (2010), p. 256; see also Zechenter, *supra* note 113, p. 332.

conomic and cultural systems, to promote and protect all human rights and fundamental freedoms.”<sup>130</sup>

As to the qualification of the lawful sanctions clause, it can be perceived as subjective since the lawfulness of sanctions varies between States in light of their particular political, cultural, and religious traditions. Still, the notion of fundamental human rights to which everyone is entitled is *prima facie* universal and the prohibition of torture is absolute in a substantive part of treaty law and in addition in customary international law, which cannot be overridden by any particular cultural imperatives. Indeed, the invocation of cultural relativity in order to mask oppression is cynical,<sup>131</sup> and such claims should at least meet the minimum standards of human dignity.

Furthermore, maintaining respect for cultural identities and the value of diversity cannot deprive human rights law of its substantive core, as can be gleaned from both universal and international treaties, which tender a uniform articulation of the absolute prohibition of torture<sup>132</sup> and those human rights which are listed as non-derogable rights and are considered *jus cogens* should, thus, be objectively enforced, regardless of peculiarities relative to a specific context.

Lastly, there is no disagreement as to the absolute prohibition of torture as no State considers torture a form of cultural heritage.<sup>133</sup> In fact, even when it comes to religious grounds for resorting to local practices, there is a general agreement of the importance of human dignity in *Sharia* as the basis of religious values.<sup>134</sup>

Thus cultural relativism cannot be used as a justification for corporal punishment based on the argument that human dignity can be tied to various cultural, philosophical, or religious conceptions. Ultimately, the idea of punishment such as imprisonment is to restrain offenders from committing crimes and provide correctional treatment rather than to respond to criminal behaviour with further crimes under IHRL.

## 2.5. State Obligations

This section illustrates in particular a number of relevant aspects associated with the implementation of internationally-prescribed principles of State responsibility, elucidating the relationship between principles of State responsibility and human rights, in

<sup>130</sup> *The Vienna Declaration and Programme Action* (adopted 24 June 1993), UN Doc. A/Conf. 157/24 (Part 1), at 20-46 (13 October 1993); 172 States participated in the adoption of the Vienna Declaration.

<sup>131</sup> A. An-Naim, *Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman and Degrading treatment or Punishment*, in: A. Abdullahi (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, Philadelphia: 1995, p. 19.

<sup>132</sup> Zechenter, *supra* note 113, pp. 320-321; see also Article 5 of the UDHR; Articles 7 and 4(2) of the ICCPR; Articles 3 and 15(2) of the ECHR; Articles 5(2) and 27(2) of the ACHR; Article 5 of the ACHPR.

<sup>133</sup> B. Kausikan, *An East Asian Approach to Human Rights*, 2 *Buffalo Journal of International Law* 263 (1996), p. 265.

<sup>134</sup> H. Bielefeldt, “Western” versus “Islamic” Human Rights Conceptions? *A Critique of Cultural Essentialism in the Discussion of Human Rights*, 28(1) *Political Theory* 90 (2000), p. 109.

particular the prohibition of torture. At the international level, there are a number of specific provisions aimed at more effectively combating torture. Article 2(1) of the CAT states that “effective legislative, judicial and administrative or other measures [shall be taken] to prevent acts of torture in any territory under its jurisdiction.”<sup>135</sup> The necessary measures enumerated in this provision are mandatory but not exhaustive, as indicated by the word “or”, while the mandatory nature of the requirement of effectiveness is emphasized.<sup>136</sup>

In its reports, the Committee against Torture has stated that non-effective legislative and administrative measures in preventing torture do not comply with the requirements set by the CAT, and effective measures have been interpreted as constituting all appropriate measures for the protection of a society from acts of torture.<sup>137</sup>

In order to provide full effect to the CAT, the Committee against Torture affirmed that the term “legislative measures” requires States to ensure the transposition and adoption of the definition as set out in the CAT.<sup>138</sup> The definition must encompass all component factors of absolutely prohibited acts of torture, without any derogation in domestic criminal legislation, while also classifying torture as a general offence.<sup>139</sup>

While there is no explicit indication as to the timeframe for the implementation of effective measures, the Committee against Torture has generally required States to proceed with prompt amendments of domestic penal legislation.<sup>140</sup> Nowak has asserted that the obligation to refrain from torture (obligation to respect), as implicitly stated in Article 2(1) of the CAT, is absolute and cannot be subject to progressive realization.<sup>141</sup> The urgent measures must take effect immediately and States must bear in mind the absolute nature of the prohibition of torture at all times.

Thus, a consistent understanding of States’ responsibilities with regard to torture involves the positive obligations to respect, protect and fulfil human rights<sup>142</sup> by taking

<sup>135</sup> Article 2(1) of the CAT.

<sup>136</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention (Chile)*, UN Doc. CAT/C/SR.77 (1991), para. 22; *(Morocco)*, UN Doc. CAT/C/SR.203 (1994), para. 51; *(Columbia)*, UN Doc. CAT/C/SR.238 (1995), para. 35.

<sup>137</sup> General Assembly, *Report of the Committee against Torture*, UN Doc. A/50/44 (1995), para. 71; Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture (Nepal)*, UN Doc. CAT/C/NPL/CO/2 (2007), para. 13.

<sup>138</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture (Congo)*, UN Doc. CAT/C/DRC/CO/1 (2006), para. 5.

<sup>139</sup> *Ibidem*, para. 5; General Assembly, *Report of the Committee against Torture*, UN Doc. A/51/44 (1996), para. 114.

<sup>140</sup> General Assembly, *Report of the Committee against Torture*, UN Doc. A/56/44 Supp. 44 (2001), para. 129.

<sup>141</sup> Nowak & McArthur, *supra* note 53, pp. 115-116.

<sup>142</sup> S. Marks, F. Azizi, *Responsibility for Violations of Human Rights Obligations: International Mechanism*, in: C. James et al. (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford: 2010, p. 731.

immediate steps to ensure the transposition and adoption of the definition incorporating all component factors of absolutely prohibited acts of torture in domestic criminal legislation.

## CONCLUSIONS

Despite the myriad of legally binding obligations on State-Parties envisaged in universal and regional human rights law instruments for the purpose of eradicating torture – generally acknowledged to be an atrocious violation of human dignity – the legal meaning of the term torture remains largely unclear. Disingenuous interpretations of the definition of torture by States and the lack of effective enforcement mechanisms have posed the biggest challenge in relation to compliance with IHRL.

One of the most pressing issue is thus to strengthen the enforcement mechanisms of relevant human rights treaties, as State practices have demonstrated that even the existing provisions prohibiting torture are not strictly implemented in national systems. This non-compliance is the result of substantial deviation by States from the CAT definition of torture within their national legislation, diminishing the enforceability of States' international obligations and the overall effect of the prohibition.

At the same time, the CAT focuses mainly on defining torture but fails to do the same with respect to CIDTP. Furthermore, the recommendations and concluding observations of the Committee against Torture appears inconsistent in classifying an act as either torture or CIDTP. The combination of these facts operates to attenuate the concept of the prohibition of CIDTP. Thus, clarification of the concepts and the relationship between them and the development of stable international mechanisms for combatting torture and CIDTP remain pivotal.

One of the most efficient ways of revealing the practices of torture is the establishment of National Preventive Mechanisms (NPM) through the ratification of the Optional Protocol to the CAT (OPCAT), which allows for inspections of local detention facilities and for the initiation of a constructive dialogue with competent authorities in order to initiate investigations into every single allegation of torture and other forms of ill-treatment and monitor the implementation of the Committee's recommendations and proposals.<sup>143</sup>

While challenges associated with the functional independence of NPMs remain,<sup>144</sup> the creation of such mechanisms can be seen as a step forward toward the local prevention of torture, in particular corporal punishment. The compliance body of OPCAT is the Subcommittee on Prevention of Torture (SPT), which having a particular resonance

<sup>143</sup> Article 19(b) and (c) of the OPCAT; R. Murray, *National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All*, 26 *Netherlands Quarterly of Human Rights* 487 (2008), pp. 503-505; see also M. Nowak, *Fact-Finding on Torture and Ill-Treatment and Conditions of Detention*, 1 *Journal of Human Rights Practice* 101 (2009), p. 103.

<sup>144</sup> Murray, *supra* note 143, pp. 497-501.

and encompassing complementary efforts works toward the prevention of torture by carrying out regular and transparent visits to places of detention, following up on the recommendations to the States Parties in the form of confidential reports.<sup>145</sup> Nevertheless, these reports may be published in case a State fails to cooperate or improve the situation in accordance with the recommendations.<sup>146</sup>

The effective protection of individuals and the worldwide eradication of torture will also likely be achieved through the operation of Article 21 of the CAT, which provides that “[a] State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention.”<sup>147</sup> Thus the Committee against Torture should not only enhance the complementary efforts of the SPT within the framework of close cooperation with the NPM and individual States for the prevention of torture, but also should encourage States Parties to the Convention to use the procedures enshrined in Article 21, which will strengthen the effective enforcement of the Convention’s provisions.

The widespread eradication of physical chastisement is a manifestation of its rejection as a prohibited form of CIDTP and/or torture. Although corporal punishment has disappeared in large parts of the world, a number of States still adhere to the practice of rendering corporal punishment. However, gradual developments towards the universal abolition of corporal punishment are visible. For instance, following the concluding observations and recommendations of the Committee against Torture, Qatar amended its law regulating penal and correctional institutions and in 2009 abolished flogging as a disciplinary measure.<sup>148</sup> Another notable development is related to the Islamic Republic of Pakistan, which initially lodged reservations to Article 7 of the ICCPR and several articles of CAT, stating that the provisions should be applied to the extent that they are not contrary to the constitution of Pakistan and *Sharia* law. Inasmuch as several States Parties objected to those reservations, emphasising that they gave rise to uncertainties and ambiguities in relation to Pakistan’s obligations under the respective treaties, Pakistan yielded to the political pressure and partially withdrew its reservations in 2011.<sup>149</sup>

Ultimately, apart from the destructive effects of corporal punishment, embodying a grievous harm directed at a victim, the practice has broader consequences on the entire surrounding community. Besides physical injuries, other severe and permanent damage occurs, including but not limited to chronic psychological distress, feelings of shame

<sup>145</sup> Article 16(4) of the OPCAT.

<sup>146</sup> F. Ledwidge, *The Optional Protocol to the Convention against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture*, 17 Helsinki Monitor 69 (2006), pp. 73-75, 81.

<sup>147</sup> Article 21 of the CAT.

<sup>148</sup> Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention (Qatar)*, UN Doc. CAT/C/QAT/2 (2011), para. 27.

<sup>149</sup> Pakistan, *ICCPR Reservations and Declarations*, [http://www.bayefsky.com/pdf/pakistan\\_t2\\_ccpr.pdf](http://www.bayefsky.com/pdf/pakistan_t2_ccpr.pdf); Pakistan, *CAT Reservations and Declarations*, [http://www.bayefsky.com/pdf/pakistan\\_t2\\_cat.pdf](http://www.bayefsky.com/pdf/pakistan_t2_cat.pdf) (both accessed 30 May 2017).



and humiliation, inability to trust others, and severe insomnia and depression, resulting in aggressive behaviour by the victim towards others.<sup>150</sup>

Corporal punishment thus has devastating effects on the entire community, and it is rightly regarded as “an effective means of [...] striking fear in society.”<sup>151</sup> Corporal punishment must be prohibited in all circumstances; and no derogation, limitation, or relativisation ought to be permitted. The fight against torture, and in particular corporal punishment, is far from being effectively tackled on the international and regional levels and vigorous efforts must be undertaken for the eventual eradication of torture and other forms of ill-treatment. In particular, the human rights treaty bodies must initiate a constructive dialogue with competent authorities through the NPMs in order to urge State-Parties to abolish all forms of corporal punishment through legislative reforms, and to amend domestic law to bring it into conformity with the State Parties’ obligations under international human rights law.

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<sup>150</sup> S. Twiss, *Torture, Justification, and Human Rights: Toward an Absolute Proscription*, 29 *Human Rights Quarterly* 346 (2007), p. 358.

<sup>151</sup> Abbakar, *supra* note 61, p. 43.