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## **OMCT's Position on Flogging, Stoning and Amputation**

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To the Committee on the Rights of the Child:

On 28 June 2000, the CRC stated in its Concluding Observations on Iran that "persons...can be subjected to a variety of types of cruel, inhuman or degrading treatment and punishment such as amputation, flogging, and stoning, which are systematically imposed by judicial authorities."<sup>1</sup> The CRC repeated this language in its Concluding Observations on Saudi Arabia on 22 February 2001, noting that "persons who committed crimes when they were under 18 may be sentenced to a variety of methods of cruel, inhuman or degrading treatment or punishment such as flogging, stoning and amputation..."<sup>2</sup> OMCT is deeply concerned by the apparent categorization of these three practices as only forms of cruel, inhuman or degrading treatment or punishment and not as torture.

The Committee Against Torture recently described flogging, stoning and amputation as "corporal punishments...that are not in conformity with the Convention," without further clarification as to whether such practices can amount to torture.<sup>3</sup> OMCT believes that such clarification is necessary in international human rights jurisprudence in order to create a firm legal prohibition against these severe punishments, and to promote the utmost protection of all people from the infliction of flogging, stoning and amputation.

The Commission on Human Rights resolution 1998/38 allows for the possibility of declaring these practices to be forms of torture, as it "reminds governments that corporal punishment can amount to cruel, inhuman or degrading punishment *or even to torture.*" [italics added]

In his 1997 report to the Commission on Human Rights, Nigel Rodley, the UN Special Rapporteur on Torture, analysed flogging, stoning and amputation within the framework of Article 1 of the Convention Against Torture (CAT). He does not refer to them as forms of ill-treatment, but rather acknowledges that

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<sup>1</sup> CRC/C/15/Add.123

<sup>2</sup> CRC/C/15/Add.148

<sup>3</sup> *Concluding Observations on Saudi Arabia*, 28 May 2002, CAT/C/CR/28/5, para. 4b

these punishments are inherently so severe that they reach the level of torture envisioned in Article 1. He examined the alleged "grey zone" of corporal punishment, including the practices of flogging, stoning and amputation, as such acts of violence have not been clearly defined as either "torture" or "other cruel, inhuman or degrading treatment" in international jurisprudence.<sup>4</sup>

Article 1 of the CAT defines "torture" as "...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

In his analysis, the Special Rapporteur argues that, simply because certain practices like flogging, stoning and amputation are condoned in the penal codes and legislation of such countries as Sudan, it does not follow that they fall within the "lawful sanctions" exception of Article 1. Instead, he argues, "lawful sanctions" should only refer to practices that are in conformity with internationally accepted standards of punishment.<sup>5</sup> He adds that "To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State."<sup>6</sup> OMCT fully supports the Special Rapporteur's position on this matter and deems that the practices of flogging, stoning and amputation clearly contradict international human rights norms.

Regarding the level of suffering imposed through such punishments, OMCT wishes to recall that the European Commission of Human Rights has concluded that "numerous medically certified trauma on various parts of the body, consistent with the application of beatings involving punches, kicks and blows with a truncheon and baseball bat, was proof of torture."<sup>7</sup> As suggested by Nigel Rodley, this finding renders it plausible that "any serious infliction of physical pain leaving visible evidence now constitutes torture, at least at the European level."<sup>8</sup> Since flogging and stoning are bound to result in trauma that is similar to that caused by beating, it is logical to infer that flogging and stoning would also amount to torture.

Furthermore, the Inter-American Convention to Prevent and Punish Torture recognizes that severe pain and suffering is not always a requisite element of torture: "For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. *Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical*

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<sup>4</sup> *Report of the Special Rapporteur on torture*, 10 January 1997, E/CN.4/1997/7

<sup>5</sup> *Ibid.*, page 4.

<sup>6</sup> *Ibid.*, page 4.

<sup>7</sup> *Selmouni v. France*, Application No. 25803/94, Report, 11 Dec 1997.

<sup>8</sup> Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, 2<sup>nd</sup> Ed., Oxford, 1999, p. 102.

*pain or mental anguish.*" [italics added] Therefore, even in the case of an amputation performed on a person who is anesthetized during surgery, the person does not necessarily experience severe physical pain and suffering, but the amputation will nevertheless be deemed a form of torture due to the irreversibly diminished capacity of the victim. This argument is even more persuasive when amputations are performed without any form of anesthesia.

Therefore, OMCT deems that amputation and stoning should be deemed to constitute torture in all circumstances because these two practices inherently cause severe pain and suffering. However, the categorization of flogging depends on the context, taking into account the number of lashes inflicted, physical and mental effects, sex, age, and health of the victim. In serious cases, it must be recognized that such punishment amounts to torture.

OMCT believes that states must assume a higher degree of responsibility when punishments of flogging, stoning and amputation are carried out against children, because they are internationally recognized as a vulnerable group in need of greater legal protection. Indeed, the existence of an international convention that specifically aims to protect the rights of children illustrates that they have distinct, particular needs. Furthermore, the Convention on the Rights of the Child has been almost universally ratified, demonstrating the collective concern of the international community.

At the international conference on children, torture and other forms of violence held in Tampere, Finland in 2001, the participants noted that "As children are more vulnerable to the effects of violence than adults and have limited capacity to express, to defend [themselves], and to understand, the general international definition of torture must be interpreted in a way which will effectively protect their rights."<sup>9</sup> This child-oriented perspective requires a new interpretation of various components of the definition of torture in the CAT, namely the "severe pain and suffering" requirement. Children may have pain thresholds that vary with their age, sex, health, maturity and personal circumstances.

In this regard, the outcome document of the Tampere conference reports that:

"According to the UN Human Rights Committee, this threshold will also depend on the nature, purpose and severity of the treatment applied. Similarly, in *Aydin v. Turkey*, the European Court of Human Rights deemed that the level of pain and suffering imposed on a 17-year-old girl by Turkish security forces had to be evaluated 'having regard to her sex and youth and the circumstances under which she was held.' In this respect, the Inter-American Court of Human Rights also considers that 'in order to establish if torture has been inflicted and its scope, all the circumstances of the case should be taken into consideration, such as the nature and context of the respective aggressions, how they were inflicted, during what

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<sup>9</sup> OMCT, Mannerheim League for Child Welfare, *Outcome document for the International Conference on Children, Torture and other forms of Violence: Facing the Facts, Forging the Future*. 27 November – 2 December, 2001, Tampere, Finland, page 40.

period of time, the physical and mental effects and, in some case [sic], the sex, age and state of health of the victims."<sup>10</sup>

In Sudan, amputation can be imposed as punishment for crimes of murder and armed robbery, even when the offenders are children.<sup>11</sup> The Sudanese penal code permits execution by stoning for the crime of adultery. This punishment can be carried out on children who are married before the age of eighteen and commit adultery. To protect children in such a country in which these practices are permitted in domestic law, it is imperative that these punishments be declared forms of torture, in order to strongly underline states parties' obligations to prevent and remedy such abuses. The infliction of punishments such as flogging, stoning and amputation can lead not only to immediate physical and psychological damage, but also to developmental problems and diminished physical capacity over a lifetime.

It is OMCT's position that flogging, stoning and amputation are punishments of severe brutality, and as such they belong within the parameters of the legal definition of torture. OMCT believes that people are more powerfully protected when the Committee and other international human rights bodies recognize these practices as forms of torture. This issue is particularly timely in light of the upcoming session during which the Sudan report will be discussed.

OMCT therefore urges the Committee to take a strong position on this matter and declare that any case of stoning and amputation is a case of torture under any circumstance, and that flogging may amount to torture depending on the number of lashes inflicted, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. These practices fall at the extreme end of a range of prohibited punishments and result in devastating long-term trauma to a victim's physical and psychological integrity.

OMCT believes that there is a need to convey an unambiguous message to the international community that these practices are not lawful, even if permitted in domestic legislation, and are prohibited in all cases. In this regard, OMCT would urge the Committee to express this message through the adoption of a General Comment on Article 37 (a) of the Convention on the Rights of the Child. OMCT wishes to recall Recommendation No. 3 of the Tampere Declaration, which requests that "the Committee on the Rights of the Child produce General Comments on the provisions relating to children and violence in the Convention on the Rights of the Child, in particular articles 19 and 37, taking into account the special vulnerability of children to torture and other forms of violence..."<sup>12</sup>

A clear position on this matter would also certainly be a valuable contribution to the upcoming international study on violence against children, which has been recommended by the UN General Assembly in its 2001 session.<sup>13</sup>

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<sup>10</sup> *Ibid.*

<sup>11</sup> World Organization Against Torture (OMCT), *Rights of the Child in Sudan*, June 2002, section 4.1. (unpublished)

<sup>12</sup> OMCT, Mannerheim League for Child Welfare, *Outcome document for the International Conference on Children, Torture and other forms of Violence: Facing the Facts, Forging the Future*. 27 November – 2 December, 2001, Tampere, Finland, page 12.

<sup>13</sup> A/RES/56/138, 15 February 2002, para. 5c.