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JUVENILE SENTENCING SCHEMES

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Introduction

This report focuses on the sentencing of juvenile offenders to sentences in violation of international human rights law, namely the death penalty, life imprisonment without any possibility of release, and a range of corporal punishments. Juvenile offenders are children who committed an offense before they reached eighteen years of age, as defined by the international standards contained in the U.N. Convention on the Rights of the Child (“CRC”).¹ Establishing this age threshold was essential to protect children because they cannot be expected to have achieved the same level of psychological and neurological development as an adult, even when they become teenagers. Experts have documented that they lack the same capacity as an adult to use reasoned judgment, to prevent inappropriate or harmful action generated as a result of high emotion and fear, and to understand the long-term consequences of rash actions.² Age considerations therefore demand that juveniles in conflict with the law receive special treatment in justice systems. Under international law, certain extreme sentences applicable to adults are not applicable to children.

Human Rights Advocates (“HRA”) submitted a written statement to the Human Rights Council to address the imposition of the death penalty, life imprisonment without possibility of release, and corporal punishment on child offenders. In the past years, there has been some progress towards the abolition of these sentences. However, several states are still confronted to enforcement problems. In addition, HRA is concerned that some juvenile offenders are regularly sentenced under adult laws, either because they are deemed to be adults under the

¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

² MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF 3, LESS GUILTY BY REASON OF ADOLESCENCE, available at http://www.adjj.org/downloads/6093issue_brief_3.pdf (discussing the decision-making capacity of adolescents); MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. & JUVENILE JUSTICE, ISSUE BRIEF 4, ASSESSING JUVENILE PSYCHOPATHY: DEVELOPMENTAL AND LEGAL IMPLICATIONS, available at http://www.adjj.org/downloads/4536issue_brief_4.pdf (discussing the applicability of adult psychopathy assessments to adolescent individuals); See also U.N. G.A., *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, U.N. Doc. A/RES/40/33 (Nov. 29, 1985).

state's definition of a child, or because of age determination mistakes. HRA specifically address the latter issue, which is encountered by many States and frequently puts teenagers at a risk of being treated as adults in criminal justice systems.

I. Death Penalty

A. International Law Prohibits Sentencing Juvenile Offenders to Death

Sentencing juvenile offenders to death is prohibited by international law. Article 37 of the CRC provides:

*States Parties shall ensure that: ... Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*³

In addition, Article 6 of the International Convention on Civil and Political Rights (“ICCPR”)⁴ provides that “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age”

The ban against this practice was widely adopted, and became a norm universally accepted by the international community. The prohibition is now considered a *jus cogens* norm, from which no country can derogate.⁵ The Human Rights Committee has confirmed that the prohibition of executing children is a rule of customary international law, which may not be the subject of a reservation made by a State party to the ICCPR.⁶

B. Progress Toward Universal Abolition of the Death Penalty for Juveniles

Some national laws still allow capital punishment for crimes committed by minors. Among them, Iran, Saudi Arabia, Sudan, Tonga, the United Arab Emirates,⁷ and possibly the

³ Convention on the Rights of the Child, art 37(a), *supra* note 1.

⁴ International Convention on Civil and Political Rights, art. 6, para. 5, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

⁶ Human Rights Committee, *General Comment No. 24*, para. 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

⁷ See Iranian Penal Code, art. 82 and others; Tongan Criminal Offences Act, §44 and 91; On Saudi Arabia, see Committee on the Rights of the Child, *Concluding Observations: Saudi Arabia*, para. 32 and 73, U.N. Doc. CRC/C/SAU/CO/2 (2006); On Sudan, see CHILD RIGHTS INTERNATIONAL NETWORK, *Inhuman sentencing of children in Sudan*, Nov. 2010, available at www.crin.org/docs/Sudan_Final.doc; On the United Arab Emirates, see CHILD RIGHTS INTERNATIONAL NETWORK, *Inhuman sentencing of children in the United Arab Emirates*, Sept. 2010, available at www.crin.org/docs/UAE_Final.doc.

Indian autonomous region of Jammu and Kashmir,⁸ still have the death penalty on the books for juvenile offenders. Yet, the number of countries actually carrying out executions has continuously decreased over the past years. Only one country reportedly executed juvenile offenders in 2010 and 2011, down from three countries in 2009, and five in 2008. Between January 1, 2005 and September 2, 2008, the following states are known to have collectively executed 32 juvenile offenders: Iran (26), Saudi Arabia (2), Sudan (2), Pakistan (1), and Yemen (1).⁹ Eight juvenile offenders were executed worldwide in 2009 (five in Iran, two in Saudi Arabia, and one in Sudan).¹⁰ In 2010, only one person is known to have been executed for a crime committed before the age of eighteen, in Iran.¹¹ It is reported that Iran executed at least four juvenile offenders in 2011,¹² although authorities only acknowledge one.¹³ Yemen reportedly executed a juvenile offender in early 2012,¹⁴ although it had not carried out an execution of a youth offender since 2007.¹⁵

C. Countries Must Stop Sentencing Juvenile Offenders to Death and Remove All Remaining from Death Row

Although universally condemned and prohibited by international law, the death penalty is still imposed by courts on juvenile offenders in Iran, Pakistan, Saudi Arabia, Sudan and Yemen, although some of these states have abolished the sentence in their laws.

⁸ Indian juvenile justice legislation does not apply in Jammu and Kashmir. Juvenile Justice (Care and Protection of Children) Act, 2000, Section 1(2). It is unclear whether the death penalty can be legally imposed on juvenile offenders, but it appears that it may be imposed on male offenders aged 16 or 17 at the time of the offense. See CHILD RIGHTS INTERNATIONAL NETWORK, *Inhuman sentencing of child offenders in India*, Oct. 2011, available at http://www.crin.org/docs/UPR_India_briefing.pdf.

⁹ HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS: ENDING THE JUVENILE DEATH PENALTY IN IRAN, SAUDI ARABIA, SUDAN, PAKISTAN, AND YEMEN 1* (2008), available at http://www.hrw.org/sites/default/files/reports/crd0908webwcover_0.pdf.

¹⁰ HUMAN RIGHTS WATCH, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty*, October 8, 2010, available at <http://www.hrw.org/news/2010/10/09/iran-saudi-arabia-sudan-end-jvenile-death-penalty>.

¹¹ *Id.*

¹² INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, *Execution of juvenile raises total to 4 in 2011*, September 22, 2011, available at <http://www.fidh.org/Execution-of-juvenile-raises-total>.

¹³ AMNESTY INTERNATIONAL, *Annual Report 2011: Iran*, available at <http://www.amnesty.org/en/region/iran/report-2011#section-64-13>.

¹⁴ CHILD RIGHTS INTERNATIONAL NETWORK, *Yemen: Young man executed for offence allegedly committed as a minor*, Feb. 9, 2012, available at <http://www.crin.org/resources/infodetail.asp?id=27487>.

¹⁵ HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS*, *supra* note 9, at 16.

In 2011, at least 143 juvenile offenders remained on death row in Iran, the actual total being reportedly higher as the authorities restricted reporting on the death penalty.¹⁶ Under Iranian law, majority is attained at puberty, as specified in the Civil Code as 15 lunar years (14 years and 5 months) for boys and 9 lunar years (8 years and 8 months) for girls.¹⁷ The death penalty may be imposed for a variety of offenses.¹⁸ It is applied in cases of adultery “regardless of the age or marital status of the culprit.”¹⁹ In cases of murder, Iran implements “qesas,” under which the victim’s family has the right to demand the execution of the perpetrator.²⁰ Urged to abolish the death penalty for juvenile offenders, government officials have argued that Iran is in compliance with international law because it does not execute juvenile offenders until after they turn eighteen.²¹ Yet, the Committee on the Rights of the Child has made clear that under Article 37(a) of the CRC, “the explicit and decisive criteria is the age at the time of the commission of the offence. It means that a death penalty may not be imposed for a crime committed by a person under 18 regardless of his/her age at the time of the trial or sentencing or of the execution of the sanction.”²²

Iran passed encouraging legislation in early 2012:²³ The country’s Penal Code was amended to remove the death penalty for juvenile offenders in crimes whose punishment can be administered at the discretion of the judge.²⁴ However, it appears that a death sentence may still be applied to minors who committed crimes that carry mandatory sentences.²⁵

¹⁶ *Id.*

¹⁷ HUMAN RIGHTS WATCH, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty*, *supra* note 10.

¹⁸ *Id.*; AMNESTY INTERNATIONAL, *Annual Report 2011: Iran*, *supra* note 13.

¹⁹ HUMAN RIGHTS WATCH, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty*, *supra* note 10.

²⁰ *Id.*

²¹ *Id.*

²² Committee on the Rights of the Child, *General Comment No. 10*, para. 75, U.N. Doc. CRC/C/GC/10 (2007).

²³ Najmeh Bozorgmehr, *Tehran to abandon death by stoning*, Financial Times, Feb. 12, 2012, available at http://www.ft.com/cms/s/0/0b17bd2a-5590-11e1-9d95-00144feabdc0.html?ftcamp=published_links/rss/home_uk/feed//product#axzz1mCi8rdl2.

²⁴ Saeed Kamali Dehghan, *Iran 'misleading international community' with death penalty claims*, The Guardian, Feb. 13, 2012, available at <http://www.guardian.co.uk/world/2012/feb/13/iran-misleading-death-penalty-claims>.

²⁵ *Id.*

In Pakistan, the informal moratorium on executions that begun in 2008 continues. However, and despite the 2000 Juvenile Justice System Ordinance banning the death penalty for crimes committed by persons under eighteen,²⁶ the death penalty was imposed on at least one juvenile in 2011.²⁷ It is unclear how many juvenile offenders remain on death row, out of approximately 8,000 prisoners awaiting a commutation of sentence.

In north and south Sudan, courts continued to pass death sentences against juveniles in 2011.²⁸ In a particular case, although the government gave assurances that eight children would not be executed, their sentences had not been commuted by the end of the year.²⁹ In another case, four persons reportedly under the age of 18 were sentenced to death. Only two of them were medically examined to determine their age.³⁰ In December 2008, the Supreme Court in Khartoum found that the prohibition of the death penalty for children did not extend to “hodud” offenses, and that the definition of a child should be drawn from the definition of an adult provided in the Criminal Act, that is, “adult means any person whose puberty has been established by definite natural features and who has completed 15 years of age.”³¹

In Saudi Arabia, no execution of a juvenile was reported since 2009. The strict secrecy of the criminal justice system makes it difficult to know exactly how many juvenile offenders remain on death row. In 2009, eight of them were suspected to be under death sentences.³² As of November 2011, at least one juvenile offender remained on death row,³³ but this number is likely to be higher.

²⁶ HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS*, *supra* note 9, at 10.

²⁷ AMNESTY INTERNATIONAL, *Annual Report 2011: Pakistan*, available at <http://www.amnesty.org/en/region/pakistan/report-2011#section-107-11>.

²⁸ AMNESTY INTERNATIONAL, *Annual Report 2011: Sudan*, available at <http://www.amnesty.org/en/region/sudan/report-2011#section-133-9>.

²⁹ *Id.*

³⁰ *Id.*

³¹ HUMAN RIGHTS WATCH, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty*, *supra* note 10.

³² AMNESTY INTERNATIONAL, *Saudi Arabia: Two juveniles executed by Saudi authorities among a group of five*, May 11, 2009, available at <http://www.amnesty.org/en/for-media/press-releases/saudi-arabia-two-juveniles-executed-saudi-authorities-among-group-five-2>.

Yemen amended its Penal Code in 1994 to require reduced sentences for crimes committed by persons under 18, including a maximum penalty of ten years' imprisonment for those who commit capital offenses.³⁴ However, the country lacks adequate mechanisms for determining the age of defendants who lack birth certificates.³⁵ As a result, courts sometimes sentence to death persons under age eighteen at the time of the crime. In 2008, at least eighteen other juvenile offenders were believed to be on death row in Yemen.³⁶

In addition, more than twenty child offenders remain on death row in Nigeria,³⁷ although this country is not known to have executed a juvenile offender since 1997.³⁸ In the absence of a commutation of their sentence, these persons are in effect serving sentences of life imprisonment without possibility of release.

HRA urges all States to abolish the practice of sentencing child offenders to capital punishment and to remove from death row all remaining persons who were sentenced to death for crimes committed before they were eighteen.

II. Life Imprisonment Without Possibility of Release

A. International Law Prohibits Sentencing Juvenile Offenders to Life Imprisonment Without Possibility of Release

Life sentences without the possibility of release for offences committed by juveniles are proscribed by international law. Article 37(a) of the CRC expressly prohibits it,³⁹ and Article 37(b) further provides that the "imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time."⁴⁰ Article 14 of the ICCPR also requires that an individual's status as a minor be taken into account in

³³ Rizana Nafeek, sentenced to death in July 2007 for a crime allegedly committed at age 17.

³⁴ Yemeni Penal Code, art. 31.

³⁵ HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS*, *supra* note 9, at 16-17.

³⁶ *Id.* at 16.

³⁷ AMNESTY INTERNATIONAL, *Annual Report 2011: Nigeria*, available at <http://www.amnesty.org/en/region/nigeria/report-2011#section-104-9>.

³⁸ HUMAN RIGHTS WATCH, *Iran, Saudi Arabia, Sudan: End Juvenile Death Penalty*, *supra* note 10.

³⁹ *See* Sec. I.A.

⁴⁰ Convention on the Rights of the Child, art 37(b), *supra* note 1.

sentencing.⁴¹ The prohibition against juvenile life imprisonment without the possibility of release is so widely practiced that it reached the level of a *jus cogens* norm.⁴²

Experts have noted that life imprisonment without the possibility of release “condemns a child to die in prison. Short of the death penalty, [it] is the harshest of sentences that may be imposed on an adult. Imposing such a punishment on a child contradicts our modern understanding that children have enormous potential for growth and maturity as they move from youth to adulthood, and the widely held belief in the possibility of a child’s rehabilitation and redemption.”⁴³

B. Countries with Life Imprisonment Without Possibility of Release on the Books Must Amend their Laws

A handful of States have laws that either explicitly allow life imprisonment without the possibility of release for juvenile offenders or have ambiguous statutory language which suggest that such sentences could be imposed. These countries are Antigua and Barbuda, Argentina, Australia, Cuba, Dominica, Fiji, Saint Vincent and the Grenadines, the Solomon Islands, Sierra Leone, Sri Lanka, Tonga and Zambia. Each of these countries is party to the CRC.

In Argentina, Australia, Cuba, Saint Vincent and the Grenadines and Sierra Leone, although there are no know cases of child offenders serving a sentence of life imprisonment without possibility of release, the law potentially authorizes the imposition of a such a sentence on juvenile offenders. Article 14 of the Argentinean Penal Code provides that parole may not be granted to recidivists and in other specific cases.⁴⁴ Although child offenders may

⁴¹ “In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.” International Convention on Civil and Political Rights, art. 14, para. 4, *supra* note 4.

⁴² Vienna Convention on the Law of Treaties, art. 53, *supra* note 5.

⁴³ CONNIE DE LA VEGA & MICHELLE LEIGHTON, SENTENCING OUR CHILDREN TO DIE IN PRISON: GLOBAL LAW AND PRACTICE 983

⁴⁴ Argentinean Penal Code, art. 14.

not be charged as recidivists,⁴⁵ and Article 14 was never applied to deny parole review to a juvenile offender, in theory the law authorizes a potential sentence of life imprisonment without possibility of release for offenders aged 16 or 17 at the time of the offense.⁴⁶ In Cuba, the absence of a juvenile justice system puts minors in conflict with the law at a risk of being sentenced as adults, including to life imprisonment without the possibility of release.⁴⁷

In Antigua and Barbuda, Dominica, Fiji, Tonga, the Solomon Islands, Sri Lanka, and Zambia, juvenile offenders may be detained for an indeterminate duration which may potentially amount to the child's natural life. In Antigua and Barbuda, for instance, a person who committed a crime under the age of eighteen years may be detained "during Her Majesty's pleasure."⁴⁸ In Fiji, a juvenile offender may be detained "for such period as may be specified in the order"⁴⁹ and a court may decline to fix a non-parole period.⁵⁰ Although there is no known child offender serving this indeterminate sentence, the law in those countries appears to allow the imposition of a life sentence without the possibility of release.

HRA urges those countries to amend their laws even though they are not applied in practice, in order to rid of ambiguity and to comply with their international obligations under the CRC.

C. The United States Remain the Only State Imposing Life Imprisonment Without Possibility of Release in Practice

While a handful of countries legally maintain the possibility to impose a sentence of life imprisonment without the possibility of release on child offenders, only one country actually imposes it in practice. In the United States of America, approximately 2,570 youth offenders are currently serving life without parole sentences for crimes committed when they

⁴⁵ *Id.*, art. 50, para. 3.

⁴⁶ Children under 16 may not receive a criminal conviction. Law 22.278, art. 1.

⁴⁷ Cuban Penal Code, art. 30.1

⁴⁸ Antigua and Barbuda's Offences Against the Person Act, Part I, para. 3(1).

⁴⁹ Fiji's Juveniles Act 1974, Sec. 31.

⁵⁰ Fiji's Sentencing and Penalties Decree 2009, Sec. 18(2).

were under the age of eighteen.⁵¹ Although the United States have not ratified the CRC, as a signatory they are “obliged to refrain from acts which would defeat the object and purpose of [the] treaty.”⁵² In addition, the United States is a party to the ICCPR. The Human Rights Committee concluded that sentencing of children to life imprisonment without the possibility of release violates the guarantee to protect children based on their status as minors.⁵³ The Committee noted that the U.S. reservation regarding treating juveniles as adults in “exceptional circumstances” does not prevent the United State from committing a violation, and remained concerned that the treatment of children as adults is not only applied in exceptional circumstances. Other monitoring bodies have expressed concerns about the practice of sentencing juvenile offenders to life imprisonment without the possibility of parole in that country.⁵⁴

HRA urges the United States to abolish the practice of sentencing juvenile offenders to life imprisonment without the possibility of release at the federal level and to educate states to ensure that all child offenders are afforded the opportunity to come before a parole board.

III. Corporal Punishment

A. International Law Prohibits Sentencing Juvenile Offenders to Corporal Punishment

There is an obligation under international law to prohibit all corporal and other degrading forms of punishment of children. It is premised on the right of every person to

⁵¹ HUMAN RIGHTS WATCH, *AGAINST ALL ODDS, PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES* 1 (2012).

⁵² Vienna Convention on the Law of Treaties, art. 18, *supra* note 5.

⁵³ Human Rights Committee, *Concluding Observations: United States of America*, para. 34, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (2006).

⁵⁴ The Committee Against Torture noted that “sentences of life imprisonment of children ... could constitute cruel, inhuman, or degrading treatment or punishment” as prohibited in Article 16 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Committee Against Torture, *Conclusions and Recommendations: United State of America*, para. 34, U.N. Doc. CAT/C/USA/CO/2 (2006); The Committee on the Elimination of Racial Discrimination found that the sentence is incompatible with Article 5(a) of the Convention on the Elimination of All Forms of Racial Discrimination, which guarantees the right to equal treatment before all justice systems. The Committee relied on the disproportionate imposition of this sentence to children belonging to racial, ethnic, and national minorities. Committee on the Elimination of Racial Discrimination, *Concluding Observations: United State of America*, para. 21, U.N. Doc. CERD/C/USA/CO/6 (2008).

respect for his or her dignity and physical integrity, originally formulated in the Universal Declaration of Human Rights⁵⁵ and affirmed in the CRC, other treaties, and human rights judgments. Corporal punishment as a sanction is in violation of these instruments and precedents.

Article 37(a) of the CRC requires states to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” Article 19, paragraph 1 requires states to protect children “from all forms of physical or mental violence.” The Committee on the Rights of the Child has repeatedly emphasized that this includes the prohibition of corporal punishment in all settings, including in juvenile justice systems.⁵⁶ The Committee defined “corporal” or “physical” punishment as any punishment in which “physical force is used and intended to cause some degree of pain or discomfort, however light.”⁵⁷ Human rights standards do not support the assertion that a certain degree of “moderate” or “reasonable” corporal punishment is in the best interest of the child. The Committee on the Rights of the Child stated that “interpretation of a child’s best interests ... cannot be used to justify practices, including corporal punishment or other forms of cruel or degrading punishment, which conflict with the child’s human dignity and right to physical integrity.”⁵⁸ International law also requires that manifestation of religious beliefs be limited in order to protect the fundamental rights and freedoms of others.⁵⁹

Other international instruments include provisions that have been interpreted as requiring the legal prohibition of corporal punishment.⁶⁰ This was affirmed by the Human

⁵⁵ Article 5.

⁵⁶ Committee on the Rights of the Child, *General Comment No. 8*, para. 12, U.N. Doc. CRC/C/GC/8 (2006); *General Comment No. 10*, para. 71, *supra* note 22; *General Comment No. 13*, para. 22, U.N. Doc. CRC/C/GC/13 (2011).

⁵⁷ Committee on the Rights of the Child, *General Comment No. 8*, para. 11, *supra* note 56.

⁵⁸ *Id.*, para. 26.

⁵⁹ *Id.*, para. 29.

⁶⁰ International Convention on Civil and Political Rights, art. 7, 10, 24(1)), *supra* note 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

Rights Committee,⁶¹ other monitoring bodies,⁶² and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.⁶³

Case law also support the ban on corporal punishments in juvenile justice sentencing schemes. In 1978, the European Court of Human Rights ruled that judicial birching of a juvenile in the United Kingdom breached Article 3 of the European Convention, which bars inhuman or degrading treatment or punishment.⁶⁴

B. Countries Must Amend their Laws and Stop Imposing Sentences to Corporal Punishment on Juveniles

Corporal punishment as a court sentence for children convicted of offences is prohibited in 155 States. Yet, at least 42 States still allow corporal punishment as a sentence under state, religious and/or traditional systems of justice.⁶⁵ For instance, Malaysia and Nigeria allow the whipping of male children found guilty of an offence.⁶⁶ In certain countries, children may be sentenced to punishments of extreme violence, including caning, flogging, stoning, and amputation. These sentences are sometimes carried out in public, adding to the cruelty of the punishment. In Saudi Arabia, flogging is mandatory for a number of offences, and can be ordered by judges, in their discretion, for other offences.⁶⁷ Sentences range from dozens to thousands of lashes, and are usually carried out in installments.⁶⁸ The 1969 Juvenile Justice Regulations encourage juvenile courts to limit penalties to admonishment, counseling or a reprimand, but under the 1975 Juvenile Justice Act, young

⁶¹ Human Rights Committee, *General Comment No. 20*, para. 5, U.N. Doc. HRI/GEN/1/Rev.9 at 200 (1992).

⁶² See e.g., Committee Against Torture, *Conclusions and recommendation, Saudi Arabia*, para. 4(b), U.N. Doc. CAT/C/CR/28/5 (2002).

⁶³ *Report of the Special Rapporteur on the question of torture*, para. 26(c), U.N. Doc. E/CN.4/2003/68 (2002); *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, para. 63, U.N. Doc. A/HRC/13/39 (2010).

⁶⁴ *Tyrer v. United Kingdom*, 26 Eur. Ct. H. R. 5 (ser. A) (1978).

⁶⁵ GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, ENDING LEGALISED VIOLENCE AGAINST CHILDREN, GLOBAL REPORT 2011 7 (2011).

⁶⁶ Malaysian Child Act 2001, para. 91(1)(g); Nigerian Criminal Code Act, para. 18.

⁶⁷ GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, SAUDI ARABIA – COUNTRY REPORT 2, updated Jan. 2012, available at <http://www.endcorporalpunishment.org/pages/pdfs/states-reports/Saudi%20Arabia.pdf>.

⁶⁸ *Id.*

persons under the age of eighteen may be sentenced to corporal punishment, including flogging, stoning and amputation.⁶⁹

The Committee on the Rights of the Child has expressed concern about such sentencing or disciplining of children to states including Brunei Darussalam, Iran, Nigeria, Saudi Arabia, Yemen, and has recommended that these countries amend existing laws to make these practices unlawful.⁷⁰

Only a small minority of states openly defended the use and legality of corporal punishment. The majority is committed to legal reforms and is considering draft legislation that would prohibit sentencing children to corporal punishment.⁷¹ Certain countries have recently abolished judicially imposed corporal punishment for children. For instance, Pakistan adopted in 2000 the Juvenile Justice System Ordinance, which prohibits corporal punishment in the penal system.⁷² However, several barriers prevent the Ordinance's enforcement. First, it does not apply yet to certain tribal territories.⁷³ Second, the Ordinance does not prevail over Hudood Laws of 1979, which provide for strict fixed punishments known as "hadd," for certain crimes.⁷⁴ These punishments include stoning to death for fornication, judicial amputation for theft, and flogging for consumption of intoxicants.⁷⁵ Although the hadd punishments may not be imposed on individuals convicted of crimes as

⁶⁹ *Id.*

⁷⁰ Committee on the Rights of the Child, *Concluding Observations: Brunei Darussalam*, para. 37, U.N. Doc. CRC/C/15/Add. 219 (2003); *Concluding observations: The Islamic Republic of Iran*, para. 45, U.N. Doc. CRC/C/15/Add. 254 (2005); *Concluding observations: Nigeria*, para. 40, U.N. Doc. CRC/C/NGA/CO/3-4 (2010); *Concluding observations: Saudi Arabia*, para. 44, U.N. Doc. CRC/C/SAU/CO/2 (2006); *Concluding observations: Yemen*, para. 41, U.N. Doc. CRC/C/15/Add. 267 (2005).

⁷¹ GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, GLOBAL REPORT 2011, *supra* note 65, at 5.

⁷² Article 12 of the Juvenile Justice System Ordinance states that no child may be given corporal punishment while in custody. It is not clear that this prohibits corporal punishment of children not given a custodial sentence, though it is reportedly interpreted as prohibiting corporal punishment as a court sentence. GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, PAKISTAN – COUNTRY REPORT 2, updated Jan. 2012, available at <http://www.endcorporalpunishment.org/pages/pdfs/states-reports/Pakistan.pdf>.

⁷³ The Ordinance does not yet apply to the Federally Administered Tribal Areas or the Provincially Administered Tribal Areas due to a provision in the Constitution of Pakistan stating that no act of Parliament shall apply to these areas until it is directed as such by the President of Pakistan. *See* Constitution of Pakistan, art. 247(3).

⁷⁴ UNICEF, JUVENILE JUSTICE IN SOUTH ASIA: IMPROVING PROTECTION FOR CHILDREN IN CONFLICT WITH THE LAW 94 (2006), available at http://www.unicef.org/rosa/Juvenile_Justice_in_South_Asia.pdf.

⁷⁵ *Id.*

children, the definition of a child under Hudood law is “a person who has not attained puberty.”⁷⁶ Girls are therefore particularly vulnerable since they generally reach puberty earlier than boys, and generally before the age of 18. As a result, corporal punishment is still applied to juveniles as a sentence in Pakistan, despite its prohibition under the Juvenile Justice System Ordinance.⁷⁷

HRA welcomes efforts to legislate on the issue of sentencing juvenile offenders to corporal punishment, and urges States to enforce the laws forbidding such practices. With regard to the remaining countries allowing them, HRA urges States to abolish the practice of judicially imposing corporal punishments on juveniles.

IV. Determining the Age of Children in Conflict with the Law

Under international law, juvenile offenders are persons under the age of eighteen at the time of the crime. They should not be sentenced under laws applicable to adults.⁷⁸

In many states, the lack of birth registration⁷⁹ and of adequate forensic facilities with staff trained in conducting age determinations often make a child’s age undeterminable, and frequently puts alleged juvenile offenders at risk of being treated as adults at the time of the crime. When they lack any document to prove their age at the time of the crime, when the court of first instance does not record their age, or when they do not benefit from competent legal assistance at crucial points during arrest and trial, children in conflict with the law are sometimes treated as adults and therefore receive capital sentences, life imprisonment without any possibility for release, or corporal punishment, not only in violation of international law, but also in violation of the country’s national criminal legislation. In Yemen for instance,

⁷⁶ *Id.*

⁷⁷ Committee on the Rights of the Child, *Concluding Observations: Pakistan*, para. 47, U.N. Doc. CRC/C/PAK/CO/3-4 (2009); CORPORAL PUNISHMENT OF CHILDREN, PAKISTAN – COUNTRY REPORT, *supra* note 72, at 3.

⁷⁸ Committee on the Rights of the Child, *General Comment No. 10*, para. 36, *supra* note 22.

⁷⁹ See UNICEF, *Factsheet: Birth Registration*, available at <http://www.unicef.org/newsline/2003/03fsbirthregistration.htm> (last visited Jan. 20, 2012).

although the death penalty was abolished for juvenile offenders, persons who were under eighteen at the time of the crime are regularly sentenced to death due to age determination mistakes.⁸⁰

HRA recommends that in cases where the age of a minor is in doubt, the minor shall be presumed to be under the age of majority until such an assumption is rebutted by the prosecution. If this burden is not met, the accused should be tried and sentenced as a juvenile. Such a presumption is necessary to protect children from being treated as adults in criminal justice systems. Similar presumptions as to the age of alleged offenders or asylum seekers have been created and implemented for that very purpose under several countries' criminal laws,⁸¹ and under European Union asylum law.⁸²

V. Recommendations

Based on the foregoing, Human Rights Advocates asks the Human Rights Council to urge all states to:

- a) Abolish the practice of sentencing child offenders to the death penalty and to remove from death row all remaining persons who were sentenced to death for crimes committed before they were eighteen;
- b) Abolish the practice of sentencing juveniles to life imprisonment without the possibility of release, and to ensure that all child offenders come before a parole board;
- c) Amend ambiguous laws to ensure no child offender is sentenced to life imprisonment without the possibility of release;

⁸⁰ HUMAN RIGHTS WATCH, *THE LAST HOLDOUTS*, *supra* note 9, at 16-17.

⁸¹ *See e.g.*, Malian Act No. 01-081 of 24 August 2001 on the criminal responsibility of minors and the establishment of juvenile courts, art. 2; Senegalese Criminal Procedure Code, art. 566.

⁸² *European Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, art. 10, para. 3(b), OJ L 326 of Dec. 13, 2005.

- d) Abolish the practice of sentencing juveniles to receive corporal punishment, and to protect all children's dignity and physical integrity; and
- e) Adopt laws requiring that in doubtful cases as to the age of an accused, the prosecution bear the burden of proving that the accused is over eighteen.

In addition, HRA urges the Human Rights Council to condemn the death penalty, life imprisonment without the possibility of release, and corporal punishment administered as judicial sentences or as a disciplinary sanction while children are in detention.

HRA finally urges the Human Rights Council to ask the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to address the various aspects of corporal punishment.