

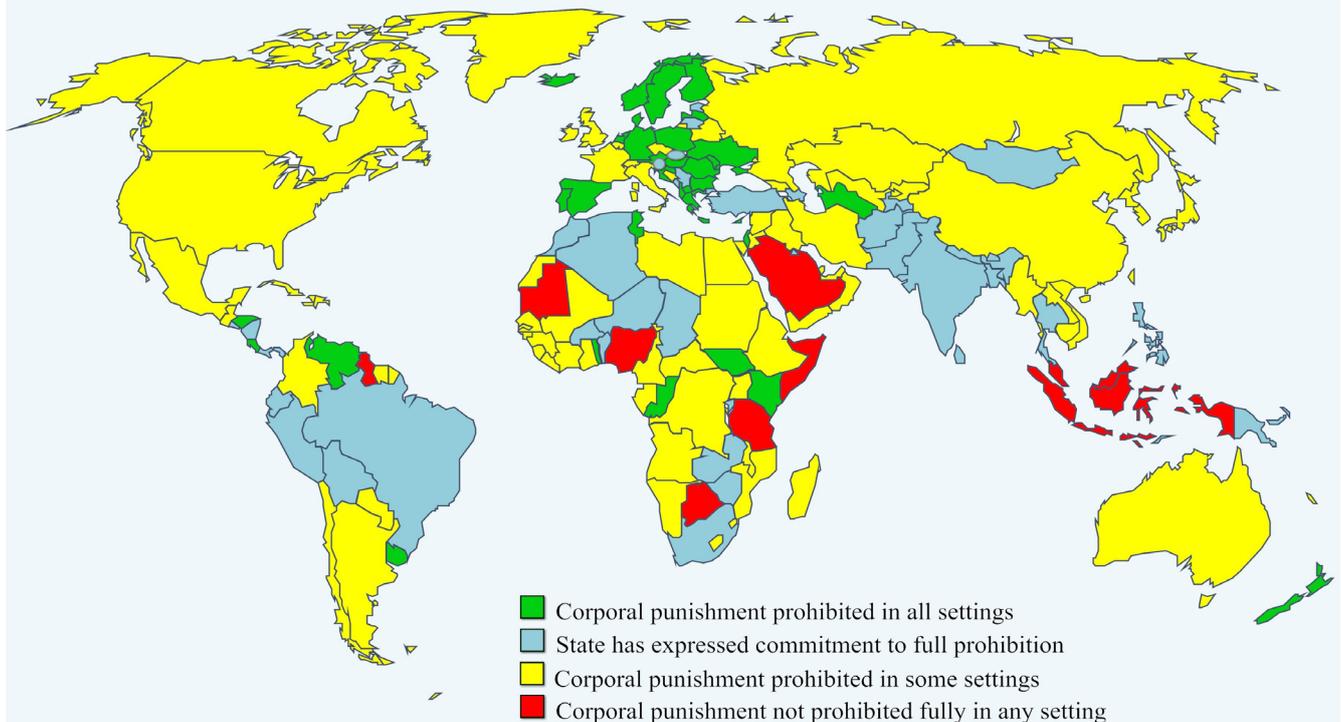


Global Initiative to
End All Corporal Punishment
of Children

Prohibiting all corporal punishment of children: learning from states which have achieved law reform

Briefing prepared by the Global Initiative to End All Corporal Punishment of Children (www.endcorporalpunishment.org), May 2014

Progress towards prohibiting all corporal punishment*



*Based on information held by the Global Initiative, May 2014

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Introduction

Law reform to prohibit corporal punishment of children in all settings, including the home, is an obligation under international human rights law. To date (May 2014), only 37 states – covering just 5.5% of the global child population – have achieved this, though many others have made a commitment to enacting full prohibition and/or have bills which would prohibit actively under discussion. In the majority of states, corporal punishment is prohibited in one or more settings outside the home (e.g. in education, justice and/or care systems); in at least 24 states corporal punishment is not fully prohibited in any setting.

Laws which prohibit corporal punishment

The aim of law reform to prohibit corporal punishment is to ensure that children have equal legal protection from assault to that which adults enjoy. The struggle to achieve equal protection results from deep rooted negative attitudes towards children as somehow not fully human, as needing to experience pain in order to learn and become acceptable members of society, as possessions rather than individual people and rights-holders. These views are sometimes reflected in religious beliefs. Thus corporal punishment in childrearing has been socially regarded as acceptable or even a duty and in most states this has been reflected in laws and/or court judgments (case law) which explicitly condone or authorise its use by parents and other adults. These laws often co-exist with other legislation purporting to protect children from “violence” and “abuse”. While most physical “abuse” of children is corporal punishment – is administered in a context of discipline, control or punishment – laws which penalise “abuse” or “cruelty” are not generally interpreted as prohibiting all corporal punishment. Prohibiting corporal punishment therefore requires law reform which sends a clear message about the unacceptability and unlawfulness of all corporal punishment in all the settings of children’s lives.

Prohibition of corporal punishment is achieved when:

- all defences and authorisations of corporal punishment are repealed (removed) so that the criminal law on assault applies equally to assaults on children, whether or not described as discipline or punishment; and
- legislation explicitly prohibits – or is clearly interpreted as prohibiting – all corporal punishment and other cruel and degrading punishment.

Each of these aspects of law reform is discussed further below, using examples of laws from states which have achieved full prohibition.

Repealing defences and authorisations of corporal punishment

It is obvious that if corporal punishment is to be prohibited, laws and regulations which explicitly state that it can be used, by whom and in what manner, must be repealed. For example, where education law specifically sets out how many strokes of the cane may be inflicted on a pupil or where criminal laws specify whipping as punishment for certain crimes, then these provisions must be removed from the statute books.

However, the Global Initiative’s experiences of working on the issue with governments and with civil society, together with its research on laws in all states, have revealed that the need to repeal provisions authorising a “right of correction”, or a “right to administer reasonable punishment/chastisement”, or a “right to moderately and adequately correct a child”, is less readily acknowledged. But without explicit repeal of these defences and justifications, children do not have equal protection from assault, even if laws exist against violence and abuse of children.

The examples below, from Costa Rica, Honduras, Malta and Venezuela, illustrate how defences and justifications can be repealed in an explicit way which sends a clear message that corporal punishment is unlawful – a message that would not be sent if the defence was simply dropped from the law.

| Repeal of legal defences and justifications for corporal punishment | |
|---|---|
| Costa Rica | |
| Family Code, amended 2008, article 143 | <i>Parental authority confers the rights and imposes the duties to orient, educate, care, supervise and discipline children, which in no case authorises the use of corporal punishment or any other form of degrading treatment against minors.</i> |
| Code on Children and Adolescents, amended 2008, article 24bis | <i>Children and adolescents have a right to receive counselling, education, care and discipline from their mother, father or tutor, as well as from their caretakers or the personnel from educational and health centres, shelters, youth detention or any other type of centres, that in no way represents an authorisation of any sort to these parties for the use of corporal punishment or degrading treatment.</i> |
| Honduras | |
| Family Code, amended 2013, article 191 | <i>Parents, in the exercise of parental authority, have the right to exercise orientation, care and correction of their children, and to import to them, in keeping with the evolution of their physical and mental faculties, the guidance and orientation which are appropriate for their comprehensive development. It is prohibited for parents and every person charged with the care, upbringing, education, treatment and monitoring [of children and adolescents], whether on a temporary or permanent basis, to use physical punishment or any type of humiliating, degrading, cruel or inhuman treatment as a form of correction or discipline of children or adolescents....</i> |
| Malta | |
| Criminal Code, amended 2014, article 339 | <i>Every person is guilty of a contravention against the person who – ... (h) being authorised to correct any other person, exceeds the bounds of moderation: Provided that, for the avoidance of any doubt, corporal punishment of any kind shall always be deemed to exceed the bounds of moderation.</i> |
| Venezuela | |
| Law for the Protection of Children and Adolescents, amended 2007, article 358 | <i>The responsibility for raising children includes the shared duty and right, which is equal and non-derogable, of the father and mother to love, raise, train, educate and look after their children, sustain and assist them financially, morally and emotionally, using appropriate corrective measures that do not violate their dignity, rights, guarantees or overall development. Consequently, all forms of physical punishment, psychological violence and humiliating treatment, which harm children and young people, are prohibited.</i> |

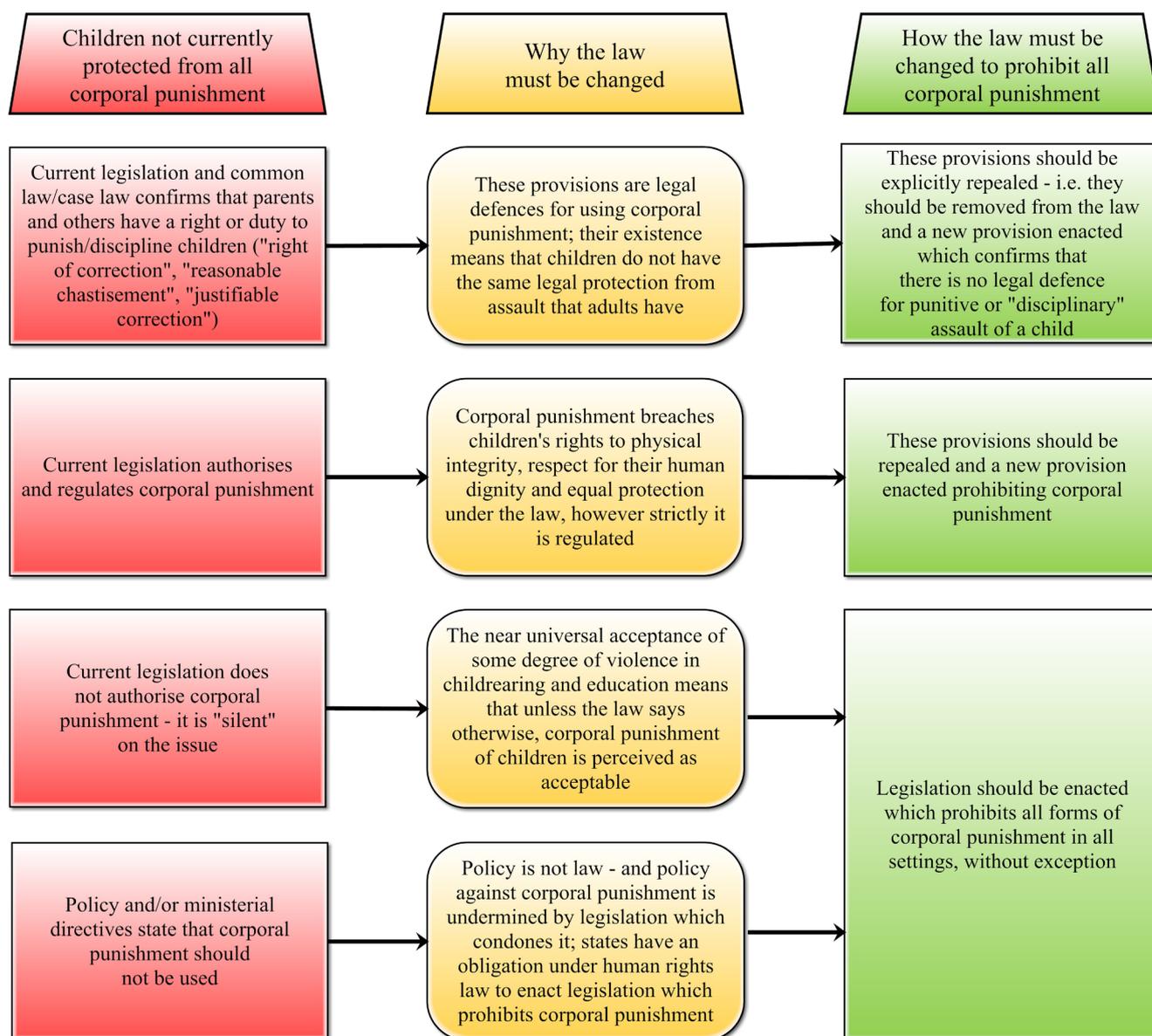
States which prohibited corporal punishment in the home less recently, and which therefore have more experience of enforcing prohibition, also attest to the importance of explicitly repealing defences and ensuring the law sends a clear message which cannot be misinterpreted.

Explicitly prohibiting all corporal punishment and other cruel and degrading punishment

Once all authorisations and defences for corporal punishment have been repealed, criminal law on assault will apply to children as to all other persons and any assault, including in the name of “discipline”, will be unlawful, whoever the perpetrator. But to send a clear message and thus to effectively challenge the strong traditional social acceptance of violent punishment, the law should explicitly state that corporal punishment is prohibited. In the above examples from Costa Rica, Honduras and Venezuela, explicit prohibition was enacted as part of the repeal of defences for the use of corporal punishment. Other examples of laws explicitly prohibiting all corporal punishment in childrearing are given below.

| Explicit prohibition of corporal punishment in states in Africa, Europe and Latin America | |
|--|--|
| Austria | |
| Federal Constitutional Act on the Rights of Children 2011, article 5(1) | <i>Every child has the right to non-violent upbringing. Corporal punishment, the infliction of mental suffering, sexual abuse and other abuses are prohibited....</i> |
| Finland | |
| Child Custody and Rights of Access Act 1983, article 1(3) | <i>A child shall be brought up in the spirit of understanding, security and love. He shall not be subdued, corporally punished or otherwise humiliated. His growth towards independence, responsibility and adulthood shall be encouraged, supported and assisted.</i> |
| Germany | |
| Civil Code, amended 2000, article 1631 | <i>Children have the right to a non-violent upbringing. Corporal punishment, psychological injuries and other humiliating measures are prohibited.</i> |
| Kenya | |
| Constitution 2010, article 29 | <i>Every person has the right to freedom and security of the person, which includes the right not to be ... (c) subjected to any form of violence from either public or private sources; (d) subjected to torture in any manner, whether physical or psychological; (e) subjected to corporal punishment; (f) treated or punished in a cruel, inhuman or degrading manner.</i> |
| Poland | |
| Family Code, amended 2010, article 96 | <i>Persons exercising parental care, care or alternative care over a minor are forbidden to use corporal punishment, inflict psychological suffering and use any other forms of humiliation.</i> |
| Sweden | |
| Parenthood and Guardianship Code, amended 1979, article 1 | <i>Children are entitled to care, security and a good upbringing. Children are to be treated with respect for their person and individuality and may not be subjected to corporal punishment or any other humiliating treatment.</i> |
| Uruguay | |
| Code for Children and Adolescents, amended 2007, article 12bis | <i>It is prohibited for parents, guardians, and all other persons responsible for the care, treatment, education or supervision of children and adolescents, to use physical or any other kind of humiliating punishment as a form of correcting or disciplining children or adolescents....</i> |

Prohibiting all corporal punishment of children



The need for clarity

Effective prohibition of corporal punishment requires that the language used is clear and not liable to misinterpretation. The examples of explicit prohibition on page 4 leave no doubt that children should not be physically punished. In contrast, laws which prohibit "all forms of violence" or which confirm the child's right to "respect for human dignity and physical integrity" are unlikely to be perceived and interpreted as prohibiting all corporal punishment in childrearing by those who support the use of some degree of violent punishment of children. Similarly, laws which prohibit "corporal punishment that causes harm" may be construed as not prohibiting all corporal punishment by those who believe that only physical punishment which reaches some threshold of severity is harmful and that "light" physical punishment is acceptable or even in the child's best interests. So-called "compromise laws" – laws which limit rather than prohibit the use of corporal punishment (e.g. making corporal punishment of older children unlawful but allowing it for younger children, or prohibiting blows to the head or the use of an implement but by implication allowing slaps) – do not achieve equal protection from assault for children.

Recognition of the need for legal clarity

Denmark

In 1985, a private Bill was passed by Parliament which amended the Majority Act to state:

Parental custody implies the obligation to protect the child against physical and psychological violence and against other harmful treatment.

Contemporary commentators suggested that the law reform signalled to parents that violence should never be used in childrearing but that its legal effects were uncertain. Other commentators subsequently suggested that parents' traditional "right to punish" still existed and allowed at least minor forms of physical punishment.

In 1997, a Bill was proposed which would clarify the legal situation and send an explicit message that all corporal punishment is unacceptable and unlawful. The proposer of the Bill stressed the educative purpose of the reform, stating: "In the opinion of the advocates of the change in the law, it is important for those groups who work with families to have firm, clear and unequivocal legal grounds for being able to say that under no circumstances may one use violence in the upbringing of a child.... Doctors, the police and social workers come into contact with families where children are regularly beaten. These groups will – if the law is changed – be able to point out that it is wrong to hit a child and instead give advice on other ways to resolve conflicts.... Clear legislation and a plainly worded explanation of the reasons for it are vital if we are to change public opinion on the issue of the corporal punishment of children."

The Bill was passed and the Parental Custody and Care Act was amended to explicitly state:

The child has the right to care and security. He or she shall be treated with respect as an individual and may not be subjected to corporal punishment or any other degrading treatment.

Norway

Until 1972, the Criminal Code provisions on assault stated that parents and others *in loco parentis* had the right to use moderate corporal punishment in bringing up children. In 1972, amid much controversy, this provision was removed. Strictly speaking, this reform made the criminal law on assault equally applicable to punitive assault of children by parents. In fact it led to further confusion about parents' right to punish children and a 1983 poll found that a considerable majority (68%) opposed prohibiting all physical punishment.

In 1987, an attempt was made to clarify the prohibition of corporal punishment by amending the Parent and Child Act. During the debate, the Minister of Justice suggested that even though parental physical violence was already unlawful under the Criminal Code, this new reform would address the lack of understanding and knowledge about the law by informing the general public that children have the same protection from violence under the criminal law as everyone else. When the amendments were enacted, this overt message was widely promoted and from 1987 corporal punishment as a way of bringing up children was considered unacceptable.

In fact, the 1987 amendment to the Parent and Child Act, although officially interpreted as confirming prohibition of all corporal punishment, did not explicitly refer to corporal punishment but stated:

The child shall not be exposed to physical violence or to treatment which can threaten his physical or mental health.

In 2005, while upholding the conviction of a man under the Criminal Code for smacking his stepsons on their bare bottoms with his hand, the Supreme Court stated that lighter smacks would be permitted (30 November 2005, *HR-2005-01865-A*). Following a review of the law, further amendments to legislation were passed in 2010, intended to confirm prohibition of all corporal punishment. Article 30(3) of the Act, as amended in 1987 and again in 2010, now states:

The child must not be exposed to violence or otherwise be treated so that its physical or mental health is endangered. This includes violence used in raising the child. The use of violence and frightening, harassing or otherwise inconsiderate behaviour towards the child is forbidden.

The need for prohibition in legislation

Prohibition must be enacted in legislation. Only when corporal punishment is prohibited in law can it be properly implemented and enforced. Government circulars and policy advice not to use corporal punishment are positive but do not amount to prohibition and are inevitably undermined by laws which allow corporal punishment. In some states, high level court judgments have ruled that corporal punishment is unlawful under existing law – but there is always the possibility that future court rulings will overturn such legal interpretation, and so such judgments must always be reflected in legislation.

The inadequacy of court rulings – Portugal's journey towards prohibition

In 2007, the Portuguese Parliament passed Law 59/2007 which amends the Penal Code to punish all corporal punishment of children, including by parents. Before this reform, the Government had argued that corporal punishment was already prohibited under existing legislation as interpreted by the courts. For example, the Civil Code states that parent-child relations are characterised by obedience and parental authority (article 1878) but in 1994 the Supreme Court ruled this did not give parents the right to use physical aggression in childrearing (Supreme Tribunal de Justica, 9 February 1994). A later Court of Appeal decision (12 October 1999) referred to the absence of a right to use physical discipline in the Civil Code.

The courts had also passed relevant judgments in relation to the Penal Code provision punishing “bodily injury or impairment of health of another” (article 143.1). In 1991, the Supreme Court stated that a simple slap which caused no injury and no physical or mental suffering constituted a “light corporal assault” and was therefore punishable under article 143.1 (judgment 18 December 1991). This judgment was confirmed in Supreme Court decisions on 21 January 1999 and 4 March 1999.

In 2003, the World Organisation Against Torture brought a complaint against Portugal under the collective complaints procedure of the European Social Charter, alleging that Portugal was in breach of article 17 of the Charter because legislation did not explicitly prohibit corporal punishment of children, including by parents. In view of the Portuguese case law described above, the European Committee of Social Rights concluded by 9 votes to 4 that there was no violation of this article because section 143 of the Criminal Code as interpreted by the Supreme Court provided a legal prohibition of all forms of corporal punishment of children and that no legal provision authorised the use of corporal punishment of children (*Resolution ResChS(2005)1, Collective complaint No. 20/2003 by the World Organisation against Torture (OMCT) against Portugal, adopted by the Council of Ministers on 20 April 2005*).

But on 5 April 2006, the Supreme Court overturned its previous interpretation of legislation, ruling that slaps and spankings are “legal” and “acceptable” and that failure to use these methods of punishment could even amount to “educational neglect”.

The World Organisation Against Torture submitted a second complaint under the collective complaints procedure in May 2006. This time the European Committee of Social Rights found the situation in Portugal to be in breach of article 17 of the Revised Charter because there is no explicit prohibition in law of all corporal punishment of children, including in the home. In its decision, the Committee stated the need for explicit and effective prohibition of corporal punishment (*Collective complaint No. 34/2006 by the World Organisation against Torture (OMCT) against Portugal, Decision on the merits 5 December 2006, paragraphs 19 to 22*):

To comply with Article 17, states' domestic law must prohibit and penalise all forms of violence against children, that is acts or behaviour likely to affect the physical integrity, dignity, development or psychological well being of children.

The relevant provisions must be sufficiently clear, binding and precise, so as to preclude the courts from refusing to apply them to violence against children.

Moreover, states must act with due diligence to ensure that such violence is eliminated in practice.

Following this, the Government announced it would review the Criminal Code and explicitly prohibit all corporal punishment. Prohibition was finally enacted in 2007.

Further information

For further information on all aspects of prohibiting corporal punishment in all settings, including details of laws in all states which have achieved full prohibition, see the website of the Global Initiative – www.endcorporalpunishment.org. The following publications and many other resources can be downloaded free of charge:

Campaigning for law reform to prohibit corporal punishment (2009), a series of seven briefings on various aspects of law reform, in English, Arabic and French

Campaigns Manual: Ending corporal punishment and other cruel and degrading punishment of children through law reform and social change (2010), published jointly with Save the Children Sweden

Ending legalised violence against children: Global report 2013, published jointly with Save the Children Sweden

Prohibiting all corporal punishment of children: Frequently Asked Questions (2009), in English, French and Spanish; also available as a child-friendly version

Prohibiting corporal punishment of children: A guide to legal reform and other measures (2009), in English, French and Spanish

To sign up for the Global Initiative e-newsletter email info@endcorporalpunishment.org. The Global Initiative is always pleased to offer technical advice and support on law reform, including detailed assessments of national legislation: email info@endcorporalpunishment.org.

“In the light of the traditional acceptance of violent and humiliating forms of punishment of children, a growing number of States have recognized that simply repealing authorization of corporal punishment and any existing defences is not enough. In addition, explicit prohibition of corporal punishment and other cruel or degrading forms of punishment, in their civil or criminal legislation, is required in order to make it absolutely clear that it is as unlawful to hit or ‘smack’ or ‘spank’ a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed ‘discipline’ or ‘reasonable correction’.

“Once the criminal law applies fully to assaults on children, the child is protected from corporal punishment wherever he or she is and whoever the perpetrator is....”

Committee on the Rights of the Child,
General Comment No. 8 (2006)

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