Working towards the promotion of positive forms of discipline and the abolishment of corporal punishment to ensure children's rights to their dignity and physical integrity.

article 19

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Corporal Punishment in the spotlight

Welcome to the first edition of Article 19, a dedicated journal that seeks to highlight issues relating to all forms of corporal punishment of children.

This journal seeks to serve as a mechanism through which diverse and relevant information advocating the prohibition of all forms of corporal punishment of children in South Africa and on the African continent can be disseminated.

We acknowledge that in South Africa, our transition to democracy has brought benefits for children who were previously subject to whipping as a sentence, or caning and other forms of physical discipline in schools and institutions. In this regard, our Constitutional Court has advanced the move to ensuring a culture of protection for children, as well as emphasising the need to recognise their rights to dignity and physical integrity. These developments in the public sphere will be discussed more fully in the article on the legal status of corporal punishment on page 4.

The burning issue in relation to corporal punishment is the one that centres on corporal punishment in the home. South Africa and other African countries allow parents to use reasonable physical punishment to discipline their children and, despite their international obligations under Article 19 of the United Nations Convention on the Rights of the Child, this practice has not been abolished. Therefore we are striving to work towards the abolishment of the use of physical violence against children as a disciplinary measure.

At the same time, we recognise the need to address the various concerns relating to a ban on corporal punishment. It has been said that while corporal punishment in schools has been prohibited, educators have not been equipped with knowledge on positive forms of discipline in order to bridge the gap between physical and alternative forms of discipline.

Similarly, the debate surrounding domestic corporal punishment is controversial and often personalised. On the one hand, the abolitionists base their arguments on human rights principles, while on the other, the supporters of corporal punishment hold the view that their religious and cultural beliefs permit the use thereof.

This publication will therefore feature a diverse range of articles that examine

- legal issues
- case studies
- examples of best practice and positive parenting
- research
- voices of children
- training on alternatives and positive forms of discipline
- developments in parliament, and
- law reform initiatives in other African countries.

It is our goal to furnish readers with accurate information in order to create an environment committed to eradicating the physical punishment of children.

UN Secretary General's Global Study on Violence against Children

Background

In 2000 and 2001, the Committee on the Rights of the Child devoted two days of general discussion to the theme of violence against children. As a result of these discussions[1], the Committee recommended that the Secretary-General be requested, through the General Assembly, to conduct an in-depth international study on violence against children (CRC/C111, par. 707). The Committee emphasised that this study should be "as thorough and influential" as the 1996 United Nations study on the impact of armed conflict on children (A/51/ 306 and Add. 1), known as the Machel study. In his letter to the Secretary-General of 12 October 2001, transmitting the Committee's request, the Chairperson of the Committee on the Rights of the Child emphasised that the study "should lead to the development of strategies aimed at effectively preventing and combating all forms of violence against children, outlining steps to be taken at the international level and by States to provide effective prevention, protection, intervention, treatment, recovery and reintegration" (A/56/488, annex).

In 2001, the General Assembly, in resolution 56/138 requested the Secretary-General to conduct "an in-depth study on the question of violence against children". In its resolution 2002/92 on the rights of the child, the Commission on Human Rights suggested that the Secretary-General "appoint an independent expert to direct the study, in collaboration with the Office of the High Commissioner for Human Rights, the United Nations Children's Fund and the World Health Organisation". In the same year, the General Assembly, in resolution 57/190 reaffirmed its request and encouraged the Secretary-General to appoint an independent expert to direct the study. On 12 February 2003, the Secretary-General appointed Mr Paulo Sergio Pinheiro as the independent expert to direct the study.

Objectives of the study

The study will provide an in-depth global picture of violence against children and propose clear recommendations for the improvement of legislation, policy and programmes relating to the prevention of and responses to violence against children. The study will document the magnitude, incidence and consequences of various types of violence against children. For each type of violence against children addressed, the study will also review what is known about the causes and associated risk and protective factors. Its focus will be on prevention strategies, in particular through the identification of best practices in prevention, including those designed by children. It will also survey legal responses to violence and services for children who have been the victims of violence, again including interventions designed by children; furthermore, the study will describe the evidence demonstrating which interventions work, which are promising, and which have been shown to be ineffective.

The study should provoke comprehensive national reviews of the situation of violence against children in as many countries as possible covering, among other things, prevalence, legal frameworks, child protection systems, statistics, violence in institutions, evaluation of reports and recording of data and initiatives that have proven to be effective to protect children and prevent violence against them.

The process of the preparation of the study will include consultations at the regional, sub-regional and national levels, which will aim to ensure that member states and all parts of civil society pay increased attention to violence against children. The study will also seek to generate sharing approaches to the issue, in particular from a South-to-South perspective. Efforts will be made to discern gaps in legal protection at the international, regional and national levels and to put forward specific proposals for strengthening legal standards, policies and programmes. The study will make recommendations for action consideration by member states, the UN system and civil society, including remedies and preventive and rehabilitative measures, at the national and international levels. It is hoped that the study will be a dynamic force for change by fostering advocacy for, and promoting proven interventions to

1 State violence against children (CRC/C/9100, chapter V) and Violence against children, within the family and in schools (CRC/C/111, chapter V)

prevent violence against children, and that it will be a catalyst for the mobilisation of resources and political will at the international and national levels that are required to address the problem. It is also expected that the study will stimulate the creation of networks and partnerships directed at the elimination of violence against children.

The Regional Consultations will involve government, NGOs and child participants. Consideration will be given to a range of settings, both public and private, where violence against children occurs: schools, including military schools; religious institutions; care and residential institutions; detention facilities and prisons; in sports; on the streets; and in work situations. Violence in the context of the administration of justice will be addressed, with emphasis on corporal and capital punishment as well as maltreatment and torture. The study will examine violence inflicted by teachers on students in schools, as well as among students, including bullying/hazing.

Regional consultation

Regional Consultation for Eastern and Southern Africa is scheduled for 18 – 20 July 2005, probably in South Africa although this has not yet been confirmed. It will include a focus on corporal and other forms of degrading and humiliating punishment. Peter Newell of the End Corporal Punishment Campaign will lead some of the discussion on this issue. ●

For further information, please contact:

- Carol Bower at carol@rapcan.org.za. Carol is a member of the International NGO Advisory Panel to the Study.
- Amaya Gillespie at agillespie@unicef.org. Amaya is the Director of the Study.
- Ashley Theron at atheron@unicef.org. Ashley is with the South African office of UNICEF and a member of the ESAR Steering Committee for the Consultation.
- Ulrika Soneson on ulrika.soneson@za.rb.se. Ulrika is based at the Save the Children Sweden office in South Africa and is one of the organisers of the inputs on corporal punishment.

Further information about the study can also be obtained at:

- http://www.crin.org/violence/
- http://www.ohchr.org/english/bodies/crc/study.htm

Working with teachers around alternatives to corporal punishment

Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) started working with alternatives to corporal punishment in 2002. Initially, this was rather ad hoc with workshops being offered to teachers. In 2003, this work became more focused, and workshops were developed and delivered in terms of the "Abuse No More" Protocol of the Western Cape Education Department.

In 2004, the workshop material was compiled into a manual for a two-hour workshop, but this was not sufficient time to deal with the basic issues, and the programme was expanded to a four-hour one early this year.

Lessons learned from this involvement have included the following:

- There is a perception that to advocate against corporal punishment is to advocate for a situation of no discipline at all. Discipline and corporal punishment are very firmly linked in the minds of adults.
- Educators feel very strongly that, when corporal punishment was prohibited in schools, little attempt was made to provide them with opportunities to explore alternatives to corporal punishment and other ways of dealing with disciplinary issues in a classroom setting.
- Not being allowed to beat children in a school setting has sometimes resulted in discipline becoming focused on other humiliating consequences for children who misbehave.
- There is a strong sense that "legitimate corporal punishment" and child abuse need to differentiated from each other, and that the former is acceptable. There is little understanding of the notion that any form of corporal punishment is abusive.
- In working with educators, we have found that it is critical that the RAPCAN staff member delivering the workshops has experience as an educator if (s)he is to be taken seriously by other educators.
- There is a dearth of understanding, and very little information, on alternatives to corporal punishment and other methods of disciplining children.

Some of the aspects covered by this training will be featured in forthcoming editions of Article 19.

In the near future, RAPCAN is hoping to develop a "Tips for Teachers" booklet on these issues. For further information, consult the RAPCAN websitee: www.rapcan.org.za. ●

The legal status of corporal punishment in South Africa

South Africa, by ratifying the United Nations Convention on the Rights of the Child (CRC) in 1995, committed itself to fulfilling all the obligations under the Convention. One such obligation is to protect children from all forms of physical and mental violence as outlined in Article 19. It should be noted that this protection extends to all forms of corporal punishment and especially that which happens in the family. Similarly, there are relevant provisions in the South African Constitution (Act 108 of 1996), such as section 28(1)(d), which aims to protect children from neglect, maltreatment, abuse and degradation; section 12(1)(e), which provides for the right not to be treated or punished in a cruel, inhuman or degrading way, and section 10, which provides that everyone has inherent dignity and the right to have their dignity respected and protected.

In South Africa, the use of corporal punishment has been abolished in all aspects of public life. However, the use thereof is still allowed within the home as parents are allowed to physically chastise their children, provided that such punishment is reasonable.

This article seeks to provide the current legal status of corporal punishment in South Africa and also some insight into the law reform proposals to date.

The use of corporal punishment in public life

As already mentioned, the imposition of corporal punishment on children has been abolished in all aspects of public life in South Africa. The use thereof has been abolished in the judicial system, in schools, at all educational institutions and in prisons. In addition, regulations under the Child Care Act (74 of 1983) were amended to prohibit corporal punishment of children in the residential care system, including children in children's homes, schools of industry, reform schools and foster homes.

The Constitutional Court has also pronounced on this issue in two cases, namely in S v Williams and others SA 632 (CC) 1995 and in Christian Education South Africa v The Minister of Education 2000 (10) BCLR 1051 (CC), and has confirmed that corporal punishment violates a child's right to dignity and the right to be protected from cruel, inhuman and degrading treatment or punishment. In the Williams matter, the Constitutional Court found that corporal punishment violated the right to dignity and declared judicial corporal punishment unconstitutional on the basis that it was cruel, inhuman and degrading. In the Christian Education case the applicants sought to have section 10 of the Schools Act 84 of 1997 (which makes it a criminal offence to administer corporal punishment in schools) declared unconstitutional and invalid to the extent that it was applicable to independent schools where parents or guardians had consented to corporal punishment being imposed. In addition, the applicants alleged that this prohibition interfered with their right to freedom of religion. The Constitutional Court held that the prohibition of corporal punishment was a justifiable limitation of the right to freedom of religion. Similarly, the High Court, when this matter was heard before it, held that corporal punishment in schools violated the right to dignity and the protection against cruel, inhuman and degrading treatment or punishment.

The use of corporal punishment in private life

However, despite the fact that corporal punishment has been abolished in public life, it still remains in South African family life on account of the fact that corporal punishment of children is still allowed in the home or by parents. This is regulated by South Africa's common law which provides for moderate or reasonable chastisement. The general rule is that a parent may inflict moderate and reasonable chastisement on a child for misconduct provided that this is not done in a manner offensive to good morals or for

other objects than correction and admonition (see R v Janke and Janke 1913 TPD 382). This chastisement can include the imposition of corporal punishment that must be restrained and tenable. If a parent or person acting *in loco parentis* (in the place of the parent, for example, a step-parent) exceeds the bounds of moderation or acts from improper or ulterior motives or from a sadistic propensity, such parent or person can face both criminal and civil liability (see S v Lekghate 1982 (3) SA 104 (B) and Du Preez v Conradie 1990 (4) SA 46).

In deciding whether or not the punishment falls within the boundaries of being moderate, reasonable, fair and equitable, the court will take various factors into account. These include the nature of the offence; the physical and mental condition of the child; the motive of the person administering the punishment; the severity of the punishment (i.e. the degree of force applied); the object used to administer the punishment and the age, sex and build of the child. Even with the presence of these factors to guide magistrates hearing the matter, in practice, different courts hearing a case with similar facts can reach different conclusions, thereby creating inconsistency within the judicial system.

In terms of the common law, the parent has a discretion as to what form of punishment should be imposed and the court will not lightly interfere with this discretion unless it has been exercised in an improper manner. In addition, where a parent or person *in loco parentis* is charged with assaulting his or her child and argues that he or she did not act unlawfully, having simply exercised the right to inflict disciplinary chastisement, such a parent can possibly avoid being held liable for his or her actions. Consequently, even though common law crimes such as assault, assault with the intention of causing grievous bodily harm and attempted murder do exist in South Africa, parents charged with these crimes against their children can raise the defence of reasonable chastisement and avoid being held liable for physically punishing their children. In that case, the court will then decide whether it is a valid defence in the circumstances.

Law reform proposals to address domestic corporal punishment

Recent law reform proposals in South Africa have attempted to deal with the issue of corporal punishment in the home. In the first instance, a Project Committee of the South African Law Reform Commission (SALRC) was requested to review and investigate the Child Care Act of 1983 with the aim of making recommendations to reform the welfare law relating to children.

During December 2002, the SALRC released, along with its report, a draft Children's Bill. Section 142 of this version of the Children's Bill (the SALRC version) referred to the issue of corporal punishment, which expressly prohibited the use of corporal punishment on a child in public life. With regard to the use of corporal punishment in the home or by parents, this section abolished the common law defence of reasonable chastisement available to parents and persons who have control of a child in any court proceedings. This meant that, should a charge of assault be brought against a parent, such a parent would then no longer be able to rely on the defence of reasonable chastisement. By such a provision the SALRC version of the Bill did not go as far as to provide for an outright ban on corporal punishment by parents or in the home.

The reason for this appears from the Discussion Paper on the Review of the Child Care Act (Discussion Paper 103, Project 110), where it is stated that the SALRC, during its consultative processes, did not receive a clear mandate to support an outright ban of corporal punishment (by parents) and that opinion on this issue was divided.

However, the SALRC has recommended that, in order to influence public opinion on this matter, an educative and awareness-raising campaign be embarked upon to prevent physical punishment of children as suggested by the CRC.

The Children's Bill

The SALRC handed its work to the Department of Social Development in January 2003. In August 2003, the department, after consulting and gaining input from all the relevant partner-departments, released an amended version of the Bill (the Departmental draft) with the aim of inviting public comment and submissions thereon. Section 139 of this version of the Bill dealt with the issue of corporal punishment. It was significantly different from the SALRC version, in that this provision no longer contained the clause which abolished the common-law defence of reasonable chastisement. This therefore left the status quo unchanged, with the result is that parents still have the right to reasonably chastise their children and still have the right to raise the defence of reasonable chastisement where they are criminally charged.

The Children's Bill (B70 of 2003) that was introduced into parliament, unlike earlier versions of the Bill, contains no express reference or devoted clause relating to the issue of corporal punishment, thereby also retaining the status quo.

Conclusion

Despite the inroads that have been made into the use of corporal punishment , South Africa's legal system still allows for the use of corporal punishment in the home and by parents or caregivers. This is a sad indictment of the country's failure to protect its children against all forms of physical violence and its inability in this regard, thus far, to respect their bodily integrity and dignity. ●

**** Illustration courtesy of children from Tembisa township.***

CASE NOTE

Kenyan law on corporal punishment in the home

by Godfrey O Odongo – Doctoral Candidate and Research Intern, Children's Rights Project, CLC, University of the Western Cape

Introduction

Three different approaches characterise the law governing corporal punishment in Kenya. Firstly, Kenyan law relating to corporal punishment in schools remains rooted in post-colonial legislation, namely, the 1968 Education Act under which the 1972 Education (School Discipline) Regulations were promulgated. These regulations permit corporal punishment in schools but only in certain highly restricted circumstances. Subsequent to this Act, the Ministry of Education placed an official ban on the use of corporal punishment in schools. How ever, in spite of the strict legislative conditions, the official ban on caning and Kenya's international obligations under the UN Convention on the Rights of the Child (CRC), a 1999 study by Human Rights Watch has revealed that corporal punishment still exists in Kenyan schools and, when meted out, does not comply with the restrictions of the 1968 Act and 1972 Regulations[1].

In relation to the use of corporal punishment as a sentence in Kenya's criminal justice system, the Criminal Law (Amendment) Act 5 of 2003, which came into force on 25 July 2003, abolished corporal punishment as a sentence for both adult and child offenders.

Unlike the instances of corporal punishment in schools and in the criminal justice system, where some legislative guidance exists, the use of corporal punishment as a "disciplinary measure" in the home has been left to the sphere of common law. By virtue of reception of English law (as provided in section 3 of the Judicature Act, Chapter 8, *Laws of Kenya*), English law on reasonable chastisement applies in the determination of what may be reasonable chastisement of a child by a parent or guardian. Court jurisprudence has not dealt with cases where a defence of reasonable chastisement has been raised in a crime of physical abuse or assault of a child.

The effect of the new children's legislation

With the coming into force of the Kenyan Children's Act 8 of 2001, the law relating to Kenyan children has been revolutionised. The Act has been lauded as a commendable attempt at domesticating the provisions of the UN Convention of the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child.[2] It expands the applicability of the principle of the best interests of the child to all issues relating to children (in public or private law). Hitherto, this principle was only invoked in the realm of private law disputes in relation to guardianship and custody. The Act comprehensively provides for the human rights of children – civil, political and economic, social and cultural.

In addition, section 18(1) of the Act provides that "No child shall be subjected to torture, cruel treatment or punishment, unlawful arrest or deprivation of liberty". A criminal offence is created by virtue of section 20 of the Act for the breach of provisions and the other rights protected in the Act. Section 20 provides that:

> *Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights [under the Act] such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.*

Despite the legislation's modest attempt at the domestication of international norms, the debate regarding its deficiencies rages on. One of the highlighted points of controversy concerns the lack of severity of the punishment of one year's imprisonment (maximum) and a monetary fine for a violation of the guaranteed children's rights. A rare criminal case reviewed by the Kenyan High Court has

*1 Human Rights Watch (1999) S*pare the Child: Corporal Punishment in Kenyan Schools *Vol 11 No. 6 (A)*

2 See Odongo, G.O "The domestication of international standards on the rights of the child: A critical and comparative evaluation of the Kenyan example" (2004) 12(4) International Journal of Children's Rights *419-430*

highlighted the controversy in relation to the inadequacy of this punishment. On a positive note, however, the case affirmed the child's right to be protected from torture, cruel treatment and punishment even where the perpetrator was the child's own parent.

The case of Isaac Mwangi Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004 (Unreported).

The appellant, Isaac Mwangi Wachira, was charged in the lower court with the offence of subjecting a child to torture contrary to section 18(1) as read with section 20 of the Children's Act. The prosecution alleged that the appellant wilfully subjected his three-year old daughter to torture by pinching her with fingernails on the face, ears, back and thighs, allegedly to punish her. On his own plea of guilty, the lower court convicted the appellant with the offence as charged. In addition to the appellant's own admission of guilt, the lower court relied on a medical doctor's examination report which revealed that the child had injuries on the head, neck, thorax, abdomen and the upper and lower limbs. The lower court also noted from this report that the appellant had subjected his daughter to this punishment for a sustained and prolonged duration of time. Citing the tender age of the child and the severity of the appellant's conduct, the lower court then sentenced the appellant to three years' imprisonment.

Following his conviction and sentence, the accused then appealed to the High Court for a review of the sentence of three years' imprisonment on the basis that the Children's Act provides for a maximum custodial sentence of one year.

It is of note that on review, the High Court expressly rejected the appellant's argument that he was merely a parent disciplining his child as a factor in mitigation of sentence. The High Court made the observation that the "appellant had no justification in injuring the complainant, his own daughter". Further, the Court reasoned that the appellant "could not be said to have been disciplining a child of three years". At the same time, "the child could not be said to have been at fault to deserve the punishment that was meted out to her by the appellant ..."

The Court was further not persuaded to consider the argument that a non-custodial sentence would be more appropriate in the appellant's case in light of his status as a single parent with other children to care for. The High Court held that the appellant was properly convicted by the lower court on his own plea of guilty. Even though the High Court set aside the sentence of three years' imprisonment that had been imposed by the lower court (replacing it with one year's imprisonment) based on section 20 of the Children's Act, the Court was unequivocal in its disapproval of the appellant's conduct.

The Court therefore invoked its original and unlimited jurisdiction under section 60 of the Kenyan Constitution and section 118 of the Children's Act on the Court's jurisdiction regarding children in "need of care and protection", which can be argued to make the Court "an upper guardian" of the best interests of children. In the High Court's considered opinion:

> *... the circumstances of the case warranted the custody of the said child and the other children of the appellant to be taken away from the appellant. He cannot be trusted not to harm the said child once he has served his term in prison ...*

The High Court went further to affirm the provisions of the Children's Act in relation to parental responsibility as distinguished from parental rights (section 23 of the Act). In the words of the Court:

> *The society expects the appellant to give protection and love to his children, especially when they are of young and tender age ...*

Conclusion

The circumstances of this case (the severe, sustained beating/pinching of a defenceless child of tender years), places it out of the context of what proponents of corporal punishment in the home would term "reasonable". It is therefore important to note that due to the unique facts of the case, the High Court's judgement does not amount to a judicial ban on corporal punishment in Kenyan homes.

However the case is a landmark in the Kenyan context for a number of reasons. Firstly, it affirms the new Act's provisions in relation to the right of children to be protected from torture, and cruel, inhuman and degrading treatment. Specifically, the case asserts that private individuals, including a child's own parent, can commit torture, cruel treatment or punishment (traditionally thought to be only committed by the State and not private individuals) under the pretext of parental discipline.

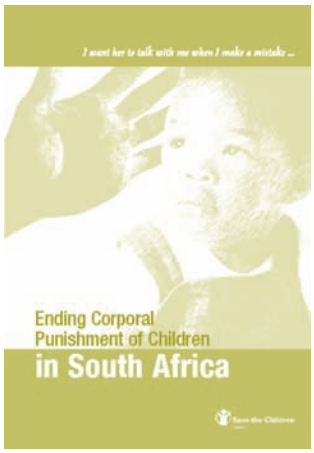
Secondly, the case confirms the power of Kenyan courts to judicially subject to scrutiny the status of corporal punishment in the home.

Thirdly, this case indicates the crucial role of the Kenyan High Court as an upper guardian of the best interests of children in cases of physical or other abuse.

Last but not least, the case brings to the fore a need for an explicit legislative ban on corporal punishment in the home and schools in Kenya, mirroring the ban of corporal punishment in Kenya's criminal law. This legislative need is further motivated by the potential of many similar cases not receiving official remedial attention and thereby continuing the violation of children's rights guaranteed under the new children's law. ●

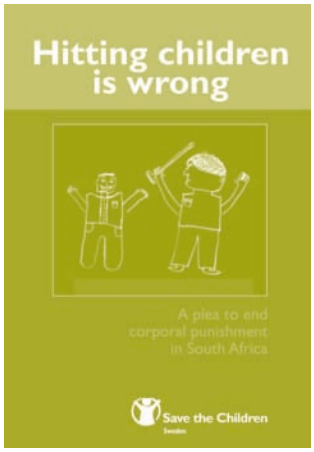
Save the Children Sweden publishes material to eradicate all forms of corporal punishment

The South African office of Save the Children Sweden has been, for many years, promoting and advocating a child-friendly society in which all forms of corporal punishment have been eradicated. To this end it has consistently published research and handbooks that deal with issues of corporal punishment.



Ending corporal punishment of children

Save the Children Sweden has published three booklets on corporal punishment and other forms of humiliating and degrading punishment of children in South Africa, Swaziland and Zambia respectively. The publications outline international obligations to prohibit corporal punishment and to engage in public education. They also provide information on the prevalence of this form of punishment in the different countries, and include children's views and experiences of corporal and humiliating punishment based on quantitative and qualitative surveys of close to 6 000 children in South Africa, Swaziland and Zambia. In addition, they provide recommendations on steps to be taken by government and civil society to ensure that the culture of corporal punishment and other forms of humiliating and degrading punishment of children is replaced by positive, non-violent forms of discipline that are based on respect for children's rights.



Hitting children is wrong: a plea to end corporal punishment in South Africa

This was published in 2002 and is a useful tool which seeks to provide legal and other arguments in order to advocate for the abolishment of the use of physical means to punish children in the home and elsewhere.

To order copies of the publications free of charge please contact Save the Children Sweden (Immogen@za.rb.se, tel: 012 341 1186).

Forthcoming event

Regional Consultation for Eastern and Southern Africa for the UN Study on Violence against Children, 18 – 20 July 2005 in Gauteng, SA.

Useful websites:

- www.endcorporalpunishment.org
- www.neverhitachild.org
- www.nospank.net
- www.stophitting.com
- www.childrenareunbeatable.org.uk
- www.crin.org

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