

Penalty for Committing Fornication & Adultery (Zina) in Islamic Law as a Violation of Freedom from Torture

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OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada.

ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidajsd.com

Also available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

Abstract: Islamic law forbids fornication and adultery (*zina*) and is regarded as one of the serious hudud offences. Islamic law tries to enforce sexual morality to the core and anyone who is found guilty of fornication is punished with one hundred lashes and a married Muslim who is found guilty of adultery may be stoned (*rajm*) by a group of Muslim believers until that person dies to send a clear warning to wannabe adulterers. Notably the penalty of stoning for committing adultery is not explicitly mentioned in the Quran but only mentioned flogging with one hundred lashes as punishment for both fornication and adultery. Both flogging and stoning as punishment for *zina* are not in line with the doctrine of international human rights that forbids torture. The transformative ambition of the 2030 agenda for sustainable development acknowledges the importance of human rights for all in achieving a sustainable development that leaves no one behind.

Keywords: Torture, punishment of *zina*, freedom from torture, and degrading punishment

Introduction

In Islamic law a married person who is convicted for committing adultery may be stoned (*rajm*) by a group of Muslim believers until that person dies. Notably the punishment for adultery by stoning to death is not mentioned in the Quran.¹ This is so because the Quran only prescribes the flogging of the culprit of fornication and adultery with one hundred lashes and stoning is not mentioned at all. The same verse of the Quran makes it categorically clear that such punishment by flogging must take place in front of the believers.² This is done with a clear intention of discouraging illicit sexual intercourse amongst the Muslim believers and to enforce sexual morality to the core. So, the harsh punishment that is imposed on any Muslim that commits illicit sexual intercourse (*zina*) is to deter them from falling into this grievous sin of *zina* that is completely unacceptable in the Muslim community.

The exclusion of stoning (*rajm*) in the Quran as a punishment for any Muslim believer that commits *zina* has opened the door for a serious debate around the issue. Islamic modernist together with the Kharijites originating from Iraq are of the view that stoning is not permissible at all. However, stoning (*rajm*) is referred to in many hadiths.³ Hadith is considered by most Muslims and Islamic scholars as the authoritative source of Islamic law.⁴ No wonder, many Islamic schools of thought (*madhhab*) accept stoning as a prescribed punishment for adultery.⁵ On the face of it, the punishment of adultery by stoning to death is not in line with the international human rights law that forbids torture and punishment that is cruel, inhuman and degrading. Flogging a person with one hundred stripes is also not likely to be in line with the international human rights instruments that forbids torture. It goes without saying that the human rights standards against torture are contained both in the law of treaties and customary international law. Moreover, human rights standards against torture are also contained in non-binding resolutions and other instruments that are also referred to as soft law, which has been adopted by the United Nations, regional and sub-regional organisations such as the African Union (AU) and Southern African Development Community (SADC). The international

¹ Cook Michael The Koran A Very Brief Introduction (2000) Oxford University Press 140; E Ann Black, Hossein Esmacili and Nadirsyah Hosen Perspectives on Islamic Law (2014) 222-223.

² Quran 24: 2

³ Sahih Muslim 17: 4191-4209, 17: 4916 and 17: 4194.

⁴ Nisrine Abiad Sharia, Muslim states, and international human rights treaty obligations (2008) British Institute of International and Comparative Law 24-25; OU Kalu "Safiyya and Adama: Punishing Adultery with Sharia stones in Twenty-first-century Nigeria" 2003 (102) African Affairs 389-408.

⁵ E Ann Black, Hossein Esmacili and Nadirsyah Hosen Modern Perspectives on Islamic Law (2014) 222-223.

community of states have the consensus that torture is forbidden and is not justifiable under any circumstances.⁶ It is highly disturbing that despite the general agreement among states that torture must be prevented and forbidden and that its perpetrators must be punished, statistics reveals that torture is still prevalent in many states of the world.⁷ This paper intend to show that the punishment of *zina* by stoning or flogging is a violation of freedom from torture or cruel, inhuman or degrading punishment and it has no place in our contemporary South African society that promotes the doctrine of international human rights. In doing so this chapter will discuss the international human rights standards against torture as documented in customary international law and the international human rights instruments that were signed by South Africa.

This chapter is divided into five thematic parts. The first part will discuss the historical background of the development of prohibition of torture under international law, the second part will discuss the prohibition of torture under customary international law, the third part will discuss the United Nations (UN) standards against torture, the fourth part will discuss the African Union (AU) standards against torture and the fifth part will discuss the domestic laws of South Africa that deals with the regulation of torture.

Prohibition against Torture under Customary International Law

Notably, torturer was generally used and acceptable in criminal law as a way of extracting truth when interrogating suspects and was also used as a deterrent to wannabe offenders.⁸ At the initial stages of the development of international law there were no standards against torture.⁹ The domestic changes of laws designated to outlaw torture were indeed a gradual process which commenced in France as early as 1879 but 159 years later (during the world war 2) many people experience torture. At the war, many countries of the world gathered with a no going back attitude regarding the issue of war and torture that had already threatened international peace and harmony. Countries formed a body that will deliberate on issues that affect them as the international community and named it as the United Nations (UN). One of its mandates was to combat against torture. The first international instrument that was adopted by the UN after the end of World War 2 was the Universal Declaration of Human Rights (UDHR) and 18 years later two other important human rights instruments were also adopted by the UN.¹⁰ The UDHR gave no definition of torture or any example of what exactly constitutes torture but made it clear and unequivocal that torture is forbidden.¹¹ In a similar vein, the ICCPR never attempted to define what constitutes torture but also made it clear that torture is forbidden. A closer look at an article of the ICCPR that prohibits torture shows that it forbids any person to be exposed to torture, it forbids any form of exposing a human being to treatment that is inhuman or cruel and degrading punishment. Both punishments for committing an Islamic offence of *zina* are cruel, degrading and a violation of ICCPR. In as far as article four of the ICCPR authorizes countries who are signatories to Covenant to ignore their responsibilities under certain circumstances, article seven of the ICCPR forbids torture without providing any exception. The scope of article seven of the ICCPR is broad enough to cover acts producing psychological suffering as well as bodily pain. The prohibition of torture encompasses corporal punishment and unwarranted punishment for a crime.¹² One hundred lashes that are used as punishment for committing an Islamic offence of *zina* is an obvious example of excessive chastisement and contrary to the provisions of article seven of the ICCPR. As already mentioned earlier, torture was commonly used to get information when interrogating suspects for it to be used in criminal proceedings. Article seven of the ICCPR has been interpreted as imposing a duty upon states to exclude any form of evidence obtained through torture. If the evidence obtained through torture is excluded in criminal proceedings, it would discourage the investigating officers from using torture as one of the investigating modus operandi.¹³ The Human Rights Committee (HRC) of the UN has laid emphasis on the fact that the provision of article seven cannot be

⁶ A Harel and A Sharon "What is Really Wrong with Torture?" 2008 (6) 2 Journal of International Criminal Justice 246.

⁷ Amnesty International "Torture in 2014: 30 Years of Broken Promises"

<https://www.amnesty.org/en/documents/ACT40/004/2014/en/> [accessed 05 June 2019].

⁸ WP Nagan and L Atkins "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement" 2001 (14) Harvard Human Rights Journal 92.

⁹ T Buergenthal "The Normative and Institutional Evolution of International Human Rights" 1997 (19) 4 Human Rights Quarterly 703.

¹⁰ International Covenant on Civil and Political Rights (ICCPR) of 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

¹¹ Article 5 of the Universal Declaration of Human Rights (UDHR) of 1948.

¹² ICCPR General Comment No. 20: Article 7 (Prohibition of Torture, or other cruel, inhuman, or degrading treatment or punishment) adopted at the 44th session of the Human Rights Committee, on the 10th of March 1992.

¹³ T Thienel "The Admissibility of Evidence Obtained by Torture under International Law" 2006 (17) 2 European Journal of International Law 356.

interpreted in isolation but together with article ten because these articles complement each other.¹⁴ State parties to the ICCPR are expected to make laws, and take other necessary measures within their reach to prohibit torture. Article two of the ICCPR extends the provision of article seven to both acts and omission. It begins by mandating member states to take some measures in ensuring the realization of the rights enshrined in the covenant. These measures include the passing of national laws, establishment of the competent legislative, judicial, and administrative measures,¹⁵ as well as enforcing decisions when taken against torture.¹⁶ The member states have a legal duty to forbid all acts that are prohibited by article seven and ten whether committed by an individual, group of people or by state officials.¹⁷ The failure to prosecute and punish the culprits of torture will amount to the violation of article seven.

Member states to the ICCPR are mandated within a period of one year after the covenant has entered into force to report to the Human Rights Committee.¹⁸ The Committee may also request periodic reports from each state from time to time. If the committee request reports on the measures taken against torture, the state that is requested has a duty to submit such report as requested by the committee. The periodic reports pertaining to torture must reflect on the reality of the situation on the ground, laws that have been made that will combat against torture and the decisions of the courts on the issue of torture. The report is also expected to show if there are any improvements. Since the earlier mentioned human rights instruments have not even tried to define torture, this left a gap which necessitated an instrument that will define torture. This gap eventually led to the establishment of the Convention against Torture (CAT) in 1984 which provided for primary broad definition of torture at an international arena. where torture was defined for the first time in the international human rights instruments. CAT was a reaction of the international community of states against the persisting problem of torture in all corners of the world.¹⁹ The South African government is amongst those states that were deeply concerned about the ongoing torture and decided to sign the CAT in 1993 and ratified it in 1998. CAT is unique and that makes it different from other international human rights instruments that forbid torture in one or two articles without even defining it. On the contrary, CAT pays particular attention to torture in almost all its articles. Member states have obligations that are clearly spelt out in substantive articles one to sixteen and article nineteen which requires them to present periodic reports to the committee against torture.²⁰ Member states have the legal responsibility to integrate the definition of torture into their domestic legal frameworks. Article one subsection one of the CAT came up with a comprehensive definition of torture. Such definition includes severe pain and suffering whether inflicted physically or mentally as a form of punishment. Punishment by flogging or stoning makes the one who is punished to undergo severe pain and suffering both physically and mentally. CAT provides for an absolute prohibition of torture.²¹ The state cannot rely on religion or culture as justification for perpetrating acts of torture. It goes without saying that one hundred lashes and death by stoning that is used as punishment for the *hudud* offence of *zina* in Islamic law is in breach of the CAT. The prohibition of torture is absolute in the sense that under no circumstances whatsoever it can be used as justification. The prohibition against torture is a right that cannot be taken away no matter what and has no justification at all. The permissibility of one hundred lashes in conjunction with stoning as penalty for the *hudud* offence of *zina* constitutes an impediment to the eradication of torture. Article four of the CAT creates a responsibility to outlaw torture, to sue culprits of torture and to inflict suitable penalty on those found guilty of committing torture. Whenever there is a reasonable belief that torture has been committed, countries are directed to investigate the matter as quickly as possible and to be impartial.²² The South African Law Reform Commission (SALRC) ought to investigate the Islamic offence of *zina* and its punishment soon and make its recommendations. This is so because the Islamic theologians such as JAMIATUL ULAMA approves flogging as

¹⁴ Mulezi v Democratic Republic of Congo 2004 AHRLR 3 (HRC 2004) par 5,3; Human Rights Committee General Comment 20 para 14; Kouider Kerrouche v Algeria Communication 2128/2012 (HRC) 3 November 2016, UN Doc CCPR/C/118/D/2128/2012 para 8; Human Rights Committee General comment 21 para 3.

¹⁵ ICCPR article 2 (3) (b).

¹⁶ ICCPR article 2 (3) (c).

¹⁷ Human Rights Committee General Comment 20, 31 para 8.

¹⁸ Article 40 of the ICCPR.

¹⁹ M Lippman "The Development and Drafting of the United Nations Convention against Torture and other Cruel, inhuman or degrading treatment or punishment" 1994 (17) 2 Boston College International and Comparative Law Review 275; Amnesty International "Conference for the Abolition of Torture: Final Report" 1973.

²⁰ The Committee against Torture is established according to the provisions of article 17 of the Convention against Torture in order to monitor its implementation.

²¹ Article 2 (2) of the Convention against Torture (CAT).

²² Article 12 of the Convention against Torture (CAT); Abdulrahman Kabura v Burundi Communication 549/2013 (Committee against Torture), 11 November 2016, UN Doc CAT/C/59/549/2013 paras 3.4 & 7.4 the Committee against Torture held that Burundi had violated the provision of article 12 because it failed to investigate act of torture even after it was reported to the relevant authorities in June 2007 and again in November 2012.

punishment for fornication and adultery. In view of the prevalence of fornication and adultery in our contemporary society, one may reasonably assume that South African Muslims may not hesitate to impose flogging as punishment to any culprit as their religion demands. The Convention on the Rights of the Child (CRC) forbids torture that is inflicted on a child.²³ In General Comment thirteen, the Committee on the Rights of the Child interpreted physical violence to comprise corporal punishment and all forms of torture.²⁴ In the context of the CRC torture means violence against children which is imposed for the purpose of getting a confession, punishing children for unwanted behaviour or to compel children to partake in activities against their will. The act of partaking in the illicit sexual intercourse is one of the unwanted behaviours in Islamic law that lead to serious punishment of flogging and even death by stoning if committed by a married person. The punishment for the *hudud* offence of *zina* is a contravention of the CRC. African Children's Charter is there to complement the CRC by mandating African states to take all necessary measures in ensuring the protection of children from torture.²⁵

The African Charter on Human and People's Rights (ACHPR) is the major human rights instrument in the African continent that was adopted by the Assembly of the Heads of States and Government of the Organisation of African Union in 1981 and entered into force in October 1986. It provides for the freedom from torture and other cruel, inhuman or degrading treatment.²⁶ The African Commission on Human and Peoples' Rights (African Commission) has adopted the CAT definition of torture.²⁷ African member states have an obligation to prevent and forbid torture and this obligation requires those who act on official capacity to avoid inflicting torture and other cruel, inhuman and degrading treatment.²⁸ Countries that signed the CAT have an obligation to safeguard their citizens against torture. In ensuring that torture is truly forbidden and eliminated, countries are expected to protect freedom from torture in their constitutions and relevant legislations.²⁹ Torture is forbidden absolutely by the ACHPR in the sense that under no circumstances whatsoever would states be permitted to derogate from it.³⁰

Customary international law is defined as the "general practice accepted as law."³¹ It is a generally accepted practice that torture is a forbidden at an international level.³² The ban against torture meets both the requirement of *usus* and *opinion juris* which makes it a fragment of customary international law.³³ Moreover, because freedom from torture has been mentioned in the UDHR which has already acquired the position of customary international law.³⁴ Protection against torture has been catapulted to the status of peremptory norm.³⁵ A peremptory norm is a norm that cannot be ignored by the countries of the world because they recognize it as an essential norm.³⁶ Torture is regarded as one of the crimes against humanity and there is an agreement amongst the scholars of international law that torture is a crime

²³ Convention on the Rights of the Child (CRC) article 37 (1).

²⁴ Committee on the Rights of the Child, General Comment 13 para 22 (a).

²⁵ Article 16 (1) & article 1 of the African Children's Charter.

²⁶ Article 5 of the African Charter on Human and Peoples' Rights (ACHPR).

²⁷ Egyptian Initiative for Personal Rights v Egypt Communication 334/06 (ACHPR) 2011 para 162; Abdel Hadi & others v Republic of Sudan Communication 368/09 (ACHPR) 22 October – 05 November 2013 paras 70-73; Zimbabwe Human Rights NGO v Zimbabwe Communication 245/2002, (2006) AHRLR 128 (ACHPR 2006) para 180.

²⁸ International Pen and others (on behalf of Saro-Wiwa) v Nigeria, 2001 AHRLR 75 (ACHPR 1994) para 79; Malawi African Association and others Mauritania (2000) AHRLR 149 (ACHPR 2000) para 12.

²⁹ Commission Nationale des Droits des L'home et des Libertes v Chad (2000) AHRLR 66 (ACHPR 1995) para 20.

³⁰ Article 27 (2) of the African Charter on Human and Peoples' Rights (ACHPR); Gunme and others v Cameroon Communication 266/2003 (African Commission) 26th Activity Report para 1, 113 and 114; Media Rights Agenda v Nigeria the Commission held that "the African Charter does not contain a derogation clause. Therefore, limitations on the rights and freedoms enshrined in the charter cannot be justified by emergencies and special circumstances."

³¹ Statute of the International Court of Justice (ICJ) article 38 (1) (b).

³² M Akehurst "custom as a source of International Law" (1974-75) 47 British Yearbook of International Law 53, North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark, FRG v Netherlands) ICJ Rep 1969 3 para 41; The Asylum Case (Columbia v Peru) 1950 ICJ Reports 395; J Brownlie Principles of International Law (2003) 6; SS Lotus (France v Turkey) 7 September 1927 PCIJ Ser. A No. 10 (Lotus case); J Charney "Universal International Law" 1993 (87) American Journal of International Law 529.

³³ NS Rodley and M Pollard "Criminalisation of Torture: States' Obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" 2006 (2) European Human Rights Law Review 115.

³⁴ United States of America v Iran 1980 ICJ Reports 1.

³⁵ L Juma "The Role of Human Rights in Post-Conflict Situations in Africa" 2008 (2) 2 Malawi Law Journal 279.

³⁶ Article 53 of the Vienna Convention on the Law of Treaties (VCLT) of 1969.

against humanity and constitutes one of the authoritative norms of international law.³⁷ The international community of states has a legal duty not to pass any piece of legislation, nor take any administrative action or court decisions which permits torture. It goes without saying that South Africa is not an exception; it is also not expected to authorize the punishment of *zina* by stoning to death or by flogging because that would conflict with the doctrine of human rights and customary international law. The countries of the world have an additional duty to investigate any allegation of torture, to prosecute the culprits of torture and punish those who are found guilty of committing torture.³⁸ Since the ban against torture has gained the status of customary international law it is automatically law in South Africa.³⁹

Domestic Law on the use of Torture

South Africa prohibits torture, treatment that is cruel, insensitive, or humiliating punishment in terms of section 12 (1) of the Bill of Rights.

In April 2008, SCA issued the landmark ruling on torture in the matter of *Mthembu v the state*.⁴⁰ The CAT stipulates that any evidence obtained because of torture is inadmissible in any court proceedings⁴¹ and this has been domesticated by section 35 (5) of the Constitution. The central issue in *Mthembu v the state* was the use of a statement obtained because of torture to secure a conviction of a criminal suspect. The torture was not directed against the appellant but against Mr. Ramseroop (the chief witness of the state), who incriminated the appellant in many crimes through narrative. Ramseroop revealed during the trial that he had been assaulted and tortured by police before leading them to the important evidence implicating the applicant. The main question was whether the evidence revealed and pointed out by Ramseroop while subjected to torture could be used against the appellant to secure his conviction.⁴² The Supreme Court of Appeal (SCA) held that the admission of evidence obtained through torture compromises the integrity of the judicial process and brings the administration of justice into disrepute. It stated that torture is one of the most serious human rights violations as it is 'barbaric, illegal and inhumane.'⁴³ The unanimous judgment by the Supreme Court of Appeal emphasised that the absolute prohibition on the use of force in both South African law and in international law demands that 'any evidence' which is obtained because of torture must be excluded in any proceedings.⁴⁴

In the case of *McCallum v South Africa*,⁴⁵ Mr Bradley McCallum instituted a communication with the United Nations Human Rights Committee concerning an alleged incidence that occurred on the 17th of July 2005 while he was still under detention at St Albans Correctional Centre in Port Elizabeth. In July 2005 an assault of prisoners by prison officials took place in St Albans Correctional Centre and it happened because of retaliation for the fatal stabbing of a prison warder. The assault in question was extremely cruel, inhuman, and mercilessly deprived the prisoners of their dignity. Mr Bradley McCallum claimed to be a victim of many violations under the International Covenant on Civil and Political Rights (ICCPR). On the 2nd of November 2010, the United Nations Human Rights Committee released its findings and found that South Africa violated the provisions of the International Covenant on Civil and Political Rights (ICCPR). The Committee's findings were as follows: Mr Bradley McCallum's claim was admissible because there was no other international investigation on the matter was being conducted and that he exhausted all the available domestic remedies. South African government violated the rights of Mr Bradley McCallum that are protected under articles 7, 10 and 2 (3) of the ICCPR. South Africa encroached upon article 7 of the ICCPR, which forbids torture by failing to investigate Mr Bradley McCallum's claims of ill-treatment.

³⁷ A Biachi "Human Rights and the Magic of *Jus Cogens*" 2008 (19) 3 European Journal of International Law 498; JG Starke Introduction to International Law (1989) 56; E De Wet "The Prohibition of Torture as an International Norm of *Jus Cogens* and its implications for National and Customary Law" 2004 (15) 1 European Journal of International Law.

³⁸ Prosecutor v Auto Furundzija case No IT-95-17/1-T Judgment 10 December 1998 para 155-156.

³⁹ National Commissioner of the South African Police Service v South African Human Rights Litigation Centre and another 2015 (1) SA 315 (CC) 81.

⁴⁰ *Mthembu v The state* (64/2007) (2008) ZASCA 51 (10 April 2008).

⁴¹ Article 15.

⁴² See also D Ally "The need for clarity on whether suspects may rely on section 35 (5) of the Constitution of the Republic of South Africa, 1996: A comparative analysis" 2010 CILSA 239-259.

⁴³ *Mthembu case* para 32.

⁴⁴ *Ibid.*

⁴⁵ *The McCallum v South Africa – CCPR/C/100/D/1818/2008* Communication No.1818/2008.

Legislative framework

The Prevention of Combating and Torture of Persons Act⁴⁶ is the legislation that it is aimed at the prevention of torture and combating against torture of persons in South Africa. The heading of the act is ambiguous and send a confusing message, in laymen's terms it means an act that fight against the prevention of torture of persons. It should actually read as 'Prevention and Combating of Torture of Persons Act'.⁴⁷ The Act commences by acknowledging the fact that South Africa 'has a shameful history of gross human rights abuses, including the torture of many of its citizens and inhabitants.'⁴⁸ As a member state to the CAT, South Africa intends to honour its obligations in terms of the CAT by committing itself to 'preventing and combating of torture of persons, among others, by bringing persons who carry out acts of torture to justice as required by international law.'⁴⁹ South Africa has adopted the definition of torture that was first expounded by the CAT and domesticated it through the provisions of section 3 of the Act.

Conclusion

South African is a country that respects and observes the doctrine of human rights. To observe human rights is to treat an individual as having dignity⁵⁰ while a human right violation 'is a failure to honour people's special nature, often by treating them merely as a means to some ideology such as racial or religious purity or to some prudently selfish end.'⁵¹ The punishment for adultery by stoning treats people as merely means to religious purity. As already argued earlier on, the punishment by stoning constitutes a violation of freedom from torture, cruel, inhuman and degrading punishment. Punishment by stoning encroaches upon the philosophy of compassion, love and caring for each other and therefore is a violation of the right to human dignity and not in line with the spirit of *Ubuntu*.

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⁴⁸ Preamble.

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