Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 200, 2009, 425-431.

Anja Katarina Weilert, Grundlagen und Grenzen des Folterverbotes in verschiedenen Rechtskreisen

Summary

1.1. It is not easy to define exactly what "torture" means. While this term is used colloquially to stigmatize any cruel act, it needs to be defined more clearly if it is to be looked at as a legal term. In international law, the first binding definition is found in Art. 1 para 1 of the UN Anti-Torture Convention:[1690] "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions." This definition is the result of a long process which was influenced by the jurisdiction of the European Court of Human Rights. Furthermore, torture needs to be differentiated from "inhuman treatment", whereby torture is the more narrow term. Torture is *inter alia* made up of both "severe" pain or suffering, and a purposive element, the latter one not being essential for an "inhuman treatment". Neither the severe pain alone nor the breaking of the will on itself, but the conjunction of both makes torture to be so condemnable.

1.2. According to Art. 1 para 1 sentence 1 of the UN Anti-Torture Convention, the infliction of severe pain or suffering for reasons of *punishing* a person is torture. However, this definition is problematic from a historic, systematic and teleological perspective because there are convincing arguments for corporal punishment as a *separate* category. But because corporal punishment is also used to intimidate and to coerce human beings to comply with an (undemocratic) state system, there is a certain justification to embrace it under the definition of torture.

[1690] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

1.3. Despite the agreement on the definition in Art. 1 para 1 of the UN Anti-Torture Convention, there still is insufficient agreement on the application of these criteria. In applying them, problems arise which are partly based on the different cultural backgrounds and on the fact that states try to justify their behavior through the use of euphemismus e.g., "moderate coercion", rather than calling it "torture".

1.4. There are further problems concerning the interpretation of the "lawful sanctions" in Art. 1 para 1 sentence 2 UN Anti-Torture Convention. While the Islamic States understand this exception clause as a way to put corporal punishment out of the definition, it is stated here that it does not make sense that every state can circumvent the definition by relying on national laws which provide for measures falling under sentence 1 of the said Article.

2. On the international level, torture is forbidden by international customary law as well as treaty law. According to Art. 2 para 2 UN Anti-Torture Convention and Art. 4 para 2 UN Covenant on Civil and Political Rights[1691] no derogation of the prohibition of torture is permitted. Torture cannot be justified by any reasons or exceptional circumstances. Moreover, the prohibition of torture belongs to the canon of *ius cogens* rules. Due to this comprehensive prohibition of torture, no state officially declares torture as a legal method. If torture is used – most of the time in secret – , it is usually denied.

3.1. The Germanic people rarely practiced torture. The reasons for this are lying in the decentralized structure of their tribes, the character of punishment as a private issue for individual parties, as well as the way that evidence was traditionally obtained: if evidence was needed, one referred to oath, ordeal or duel, which made torture unnecessary. In the Late Middle Ages, torture became used by the church to fight the heretics as well as during secular criminal proceedings to convict criminal offenders. The implementation of the inquisitorial principle in criminal proceedings and the focus on obtaining a confession of the accused resulted in a wider use of torture. Finally, torture became regulated by law, which at the same time restricted its application. Most notably, the Constitutio Criminalis Carolina (the first common German Criminal Code, dated 1532) cut back the arbitrariness which was accompanying the use of torture. However, it was not until the 18th century that the abolition of torture began and then quickly spread.

[1691] United Nations International Covenant on Civil and Political Rights.

3.2. At the present time, torture is prohibited by the German Constitution according to Art. 104 para 1 sentence 2 Grundgesetz (GG) ("Misshandlungsverbot"), Art. 2 para 2 sentence 1 GG and above all by the protection of human dignity (Art. 1 para 1 GG). Although the German Constitution declares human dignity to be "unantastbar" (sacrosanct), some writers allege that torture is permissible if it is used to repel the infringement of the human dignity of a victim ("Würdekollision"). They argue that Art. 1 para 1 GG at the same time obligates the state to refrain from infringing human dignity as well, as it calls on the state to protect human dignity from being infringed by third persons. They allege that both duties, to not infringe and to protect human dignity, are equal. This view is rejected in this thesis and it is thoroughly put forward why the *prohibition* to infringe human dignity by acts of the state is stronger than the calling for protecting it from being violated through terrorists or delinquents.

On the sub-constitutional level there exists no authorization for the state officials to use torture in any situation. It is explained why there is no antagonism despite the fact that the German law allows its officials to kill e.g. a hostage-taker under certain premises. If a state official faces a "ticking-bomb" situation and he uses torture to prevent the catastrophe, he will be held accountable at a criminal court for his deed. It is alleged that torture can never be justified under German law. However, the person may be excused if the requirements of § 35 para 1 Strafgesetzbuch (criminal code) or of the "übergesetzlicher entschuldigender Notstand" are fulfilled. This distinction is important, as a "justification" means that the deed is approved by the legal order, while the "exculpation" only takes into account the tragic situation in which the state official has been placed.

With this absolute prohibition of torture in national law, Germany complies with its international obligations, as the country is part of all important international treaties which prohibit torture.

4.1. The traditional Jewish Law did not provide for any torture to extract confessions. A confession was not even admitted as evidence in trial. However, ancient Jewish Law does know painful methods of execution, especially stoning. Finally, the death penalty was abolished around 30 A.D.

4.2. In Israeli law, questions on the admissibility of torture have been at times very unclear and are not satisfyingly answered up to the present day. In the course of fighting terrorism, the Israeli General Security Service (GSS) was using rigorous methods. The Landau Commission, which was established in 1987 to examine these interrogation practices,

found in its report: "The means of pressure should principally take the form of non-violent psychological pressure through a vigorous and extensive interrogation, with the use of stratagems, including acts of deception. However, when these do not attain their purpose, the exertion of a *moderate measure of physical pressure* cannot be avoided." (emphasis added). Although the commission confined the admissible measures only to those being "far from the use of physical or mental torture, maltreatment of the person being interrogated, or the degradation of his human dignity", it seemed that "moderate measure of physical pressure" would in practice amount to torture or at least come very close to it. The Landau Report was discussed controversially. The GSS applied the methods that were approved in the Landau Report quite extensively. It took several years for the Supreme Court in 1999, to rule that the use of "physical means in interrogations" is illegal if there is no law providing for it. Furthermore, the Court clarified that "necessity" does not legally empower an official to torture, but may only be invoked in trial in respect of the criminal liability. The Court left open the question whether the *Basic Law: Human Dignity and Liberty* allowed the Knesset (Parliament) to pass a law providing for the use of torture. According to Sec. 4 *Basic Law: Human Dignity and Liberty*, "all persons are entitled to protection of their life, body and dignity". But according to Sec. 8 *Basic Law: Human Dignity and Liberty,* a law infringing human dignity can be justified if it is "befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required or by regulation enacted by virtue of express authorization in such law". This leads to the crucial question whether a law legalising torture meets the criteria set forth in Sec. 8 of this Basic Law. Up to now, this controversial question is not clarified by the Supreme Court, but the more convincing arguments seem to be against it. In addition, only if Israeli law does not empower any authority to use torture in interrogations, will the country comply with its international obligations under the UN Anti-Torture Convention and the UN Covenant on Civil and Political Rights.

5.1. The Shari'ah (the Islamic law) is binding on every Muslim. It is basically made up of four different sets of "legal sources", of which the core is the *Quran*. The Quran is followed in importance by the *Sunna*, which is the tradition of the deeds and behavior of Muhammad, who is the most important prophet of the Islam. Additional important parts of the Shari'ah are the consensus (*ijmā*) and the analogy (*qiyās*).

The Shari'ah contains the prohibition against the torture of suspects and witnesses. A confession is only valid if it is made voluntarily. This

rule is strengthened by the ability to revoke a confession at any time in trial, even after a legally binding judgment. In case of such a revocation, the judgment may only be enforced if there has been enough evidence for it even without the confession. These provisions make it less attractive to use torture in trial. Nevertheless, torture was used during the period of the Mamluks.

The particular question regarding the use of torture to prevent danger is not explicitly addressed in the Shari'ah. Furthermore, it is quite difficult to draw any implicit or definite conclusions on this topic, as the concept of human dignity, which is highly relevant for this question, was not a theme in traditional Islam. The Islamic tradition was primarily based on the community (*umma*), not on the individual. Nowadays, scholarly voices interpret the Quran as having an inherent understanding of modern western human dignity. The broad majority of conservative Islamic scholars do not take those progressive voices very seriously as they try to insert western culture into Islam. After all, it seems possible to interpret the Shari'ah as allowing torture for the sake of saving human lives, although this view is far from being compelling. As the Shari'ah does not have any command on this topic, any "Islamic state" is free to regulate this question. Corporal punishment, on the other side, is explicitly commanded by the Shari'ah. However, the practice of the Islamic states is quite restrained in regard to those punishments.

5.2. Pakistan was, from its founding, connected with Islam, and this religious affiliation was the decisive factor for dividing the former British colony into India and Pakistan. At first, Pakistani law was called *Anglo-Muhammadan Law,* a mixture of British law and Islamic law with the emphasis on the first. More and more, the requirements of the constitution to strengthen the Quranic commandments were put into practice. This culminated in the introduction of the Islamic criminal law in 1979, with its provisions of corporal punishment.

Altogether, the relationship of the Shari'ah and the constitution of Pakistan is ambiguous. This leads to a vague concept of human dignity in the constitution of Pakistan. Therefore it is difficult to draw any conclusions about the prohibition of torture which go beyond Art. 14 para 2 of the Pakistani constitution ("No person shall be subjected to torture for the purpose of extracting evidence"). Recent jurisprudence of the Pakistani Supreme Court has boosted the Islamic law even when it comes to human rights.

On the sub-constitutional level, torture with the aim of coercing a confession is prohibited. In addition to that, there is no law empowering the use of torture for the sake of preventing danger.

Pakistan is a party to the Geneva Conventions, but neither to the UN Anti-Torture Convention nor to the UN Covenant on Civil and Political Rights.

6.1. Altogether it is shown that in the respective countries, the degree of the prohibition of torture is dependent on the quality of the protection of human dignity. Thus Germany, with its absolute protection of human dignity, has the strongest prohibition of torture. In German law, there is no justification at all for any infringement of human dignity. Moreover, human dignity is not subject to balancing against other fundamental rights. State officials are not allowed to torture any suspect or terrorist, neither for the sake of saving life, nor for the sake of conserving human dignity of other people. In Israel, human dignity is not protected as comprehensively, because an infringement can be justified if certain conditions are met. On the constitutional level, the prohibition of torture is only warranted by the protection of human dignity, and it is debated whether a law allowing for torture, especially with regard to the "ticking-bomb scenario", would be admissible. Due to the undeveloped concept of human dignity in Pakistan, the legal protection of torture is insufficient. Besides the fact that Pakistan introduced harsh corporal punishments (which fall under the definition of torture after the UN Anti-Torture Convention), it is not clarified how far the prohibition of torture reaches if it comes to cases not falling under Art. 14 para 2 of the Pakistani constitution.

6.2. Human dignity is not a purely legal term. It cannot be defined without relation to a certain "Weltanschauung" or a religious value system. Due to the fact that the prohibition of torture and the protection of human dignity are interdependent, it is found that the prohibition of torture is mirrored by the idea of man (Menschenbild), and the value system which a certain society shares.

6.3. The uneasiness which results from an absolute prohibition of torture even in the "ticking-bomb" cases is the consequence of the separation of law and morals as a matter of principle. A possible moral justification for a person who uses torture to prevent extreme danger does not lead to a legal empowerment. The moral feelings may be recognized in trial when it comes to the question of personal "guilt". However, they cannot justify what is illegal and cannot be the basis for any legal empowerment. The absolute prohibition of torture does not overburden state officials. In the face of an apocalyptic catastrophe, an official will probably use torture even though he/she knows that he/she will be held responsible for it. The moral conflict would be comparatively limited as the fear of punishment in trial will fade against the background

of the imminent catastrophe. At least the conflict would not be much worse than the dilemma that the state official would face if he/she had to decide whether the requirements of a potential legal authorization for torture would be fulfilled.

7.1. It is not denied that the use of torture might be a successful tool to prevent harm. Nevertheless, the prohibition of torture should be absolute. A state under the rule of law which legalizes torture is infringing the rule of law. The well-known slippery slope argument is very applicable to the attempt to make torture lawful for extraordinary situations. In addition, detainees are at the mercy of their guards in a very special manner. The control by the public is only rudimentary. Due to this, a legal empowerment of torture will very probably be misused. Once introduced, the legalization of torture under exceptional circumstances would be extended more and more, until they say: „Die ich rief, die Geister, werd' ich nun nicht los." – The ghosts I called for, I do not get rid of any more. (*Goethe*, Der Zauberlehrling – sorcerer's apprentice).