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Security, Transnational Law and Emotions

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to the 1984 United Nations Convention Against Torture

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Sylvia Kesper-Biermann

“Torture is abhorrent. It is barbaric and inhumane”, stated Amnesty International (AI) in a recent report and observed “a global crisis of barbarism, failure and fear”. “Although governments have prohibited this dehumanizing practice in law and have recognized global disgust at its existence”, declared the organisation,¹ torture and other ill treatment had been reported from 141 countries between 2009 and 2013. “You’ve hung from the ceiling for hours. Your muscles scream. Electric shocks convulse your body. Water forced into your mouth. You think you’re drowning. Rape. Mock executions. Whatever it takes to break you. To make you submit. To sign a confession, or hand over information. You’re hidden away from the world’s gaze. You think you are forgotten, you think you are alone. All over the world, states are torturing people just like you”. Hence, the organisation addressed the alleged danger of individuals to suffer ill-treatment by the state. “Once governments use or allow torture, no one is safe”, it declared and explained the practice as a “respond to perceived threats against national security”.² With this appeal, Amnesty International launched its ‘Stop Torture’ campaign in May 2014.³ The date was deliberately chosen 30 years after the text of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) had been adopted by the United Nations General Assembly.⁴ It was the first legally binding regulation on a global scale and is still estimated to be the core of a robust transnational legal regime against torture.⁵

During the ‘Stop Torture’ campaign, the 1984 Convention served as a focal point both for a strong commitment of the international community to ban torture and the disappointment of “30 years of broken promises”. Meanwhile, Amnesty International repeatedly pointed to the complex, inconsistent and in part contradicting relations between torture, security, emotions and (international) law. It is the aim of this chapter to suggest some systematic observations in this respect by combining different approaches, e.g. from security studies, criminal and international law and emotions research. Since CAT was the preliminary end

¹ AMNESTY INTERNATIONAL (2014a) 5f. – I thank Anna Middel, Cologne, for proofreading an earlier draft of this article.

² AMNESTY INTERNATIONAL (2014a) 11, 39.

³ AMNESTY INTERNATIONAL (2014b).

⁴ CONVENTION 1984.

⁵ Cf. e.g. KRETZMER (2010).

of a development that had started more than 200 years ago with the formal abolition of torture in Europe, it is necessary to adopt a distinct historical perspective and to take long-term developments into account. In this regard, the emergence and persistence of a global anti-torture consensus is particularly striking. It can be considered a historically grounded normative order based on justification narratives with considerable legitimising and delegitimising potential on the national as well as the international level.⁶

This chapter is divided into four parts. First, the definition of torture and the relations between torture and security will be depicted in a chronological sketch from the Early Modern Period to the late 20th century. Hence, demands from the history of security can be met to turn away from the (nation) state as a framework of research and to focus on individual security issues and functions instead.⁷ The second part will discuss how and to which extent the prohibition of torture was translated into national and international legal regulations and in what way this process was related to transnational law regimes. Special attention will be paid to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The aforementioned statements of Amnesty International point to the crucial but often ignored or underestimated role of emotions in this context. The third part will thus examine the significance of emotions, notably disgust, for the formation and maintenance of the transnational anti-torture consensus during the 19th and 20th centuries. Fourth, a conclusion will summarise the results.

I. Torture and Security

There is no generally accepted definition of torture. In everyday use, the term can be applied in any possible context and comes along with a wide range of associations. Scholars from a number of disciplines, including history, take account of different perspectives and work with various understandings.⁸ Torture is also a concept of international law. Art. 1 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provided one of the first and still the most important and influential definition. It reads

“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

⁶ Cf. the research programme of the Cluster of Excellence “Normative Orders”, University Frankfurt/Main, URL: <http://www.normativeorders.net/en/research/programme> [15.12.2017].

⁷ ZWIERLEIN (2012) 382. This article also provides an outline of the current state of (historical) security research.

⁸ Cf. ALTENHAIN (2013b).

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.”⁹

The Convention thus distinguished torture from lawful penalties which basically aimed at corporal punishment. This exclusion had met demands of Asian, African and Middle Eastern countries maintaining corresponding punishments, mainly legitimated by regulations of the *Qur'an*, in their penalty systems.¹⁰ Furthermore, the scope was limited to public officials, or in other words: to state torture, and therefore excluded all forms of violence between non-state actors. Concerning torture methods, it did not enumerate individual techniques or instruments but rather explicitly embraced the infliction of (severe) physical as well as mental pain. Finally, deliberate, intentional action in order to fulfil specific purposes was mentioned as a condition. The Convention listed five objectives which are generally regarded to be key functions of torture: to get access to information, to obtain a confession, to punish, to intimidate and to coerce the victim or third persons.¹¹ Despite the ongoing extensive political and scholarly debates on this definition, it must be considered not only fundamental for an (international) legal concept of torture. It also provides an appropriate basis for a historical perspective.

Such a long-term view should take into account that torture was permanently intertwined with two diverse and competing concepts of security. On the one hand, torture could be assessed as a threat to individual security, to physical and mental integrity and to human and civil rights. In this case, the individual had to be protected from public officials or governments who inflicted severe pain and suffering. On the other hand, torture could be perceived as a necessary, inevitable means - e.g. by enforcing information - to safeguard the social and political order, in other words to ensure state and/or international security. Thus, persons considered a danger to the public are believed to have been particularly at risk, especially when held in detention. Christopher Einolf argues that torture was most commonly used against people who were “not full members of a society, such as slaves, foreigners, prisoners of war, and members of racial, ethnic, and religious outsider groups”.¹² The two notions of security could not be achieved simultaneously. They are rather to be seen as permanently conflicting and accompanied by continuing negotiation processes on various levels including historiography.¹³ That's why justification narratives proved to be essential for legitimising and delegitimising not only the use of torture but (inter)national political and legal orders altogether.¹⁴ Looking at the past therefore provides insight into the shifting emphasis between

⁹ CONVENTION (1984). Cf. also BURGERS/DANELIUS (1988).

¹⁰ Cf. RAESS (1988) 129.

¹¹ Cf. e.g. AMNESTY INTERNATIONAL (2014b) 6.

¹² EINOLF (2007) 101.

¹³ See SCHMOECKEL (2009).

¹⁴ On the concept of justification narratives with regard to normative orders see FORST/GÜNTHER (2011).

individual and state security. It reveals that torture must not be included in a linear trajectory from state to human security, not even for the last 50 years.¹⁵

During Early Modern times, torture was a legally permitted and widely practised element of criminal proceedings in continental Europe. In England, due to the different legal system, it was less relevant and no longer in use after 1640.¹⁶ Generally, torture was regarded as the only possible and therefore useful means to investigate potential criminal acts, to release the innocent and to punish the guilty. In this context torture had above all two objectives, to obtain a confession when it was necessary for a conviction and to gather additional information about further offences, accomplices, objects like stolen property and much more.¹⁷ To ensure public security by punishing and preventing crime was the overall goal and it was justified with reference to the basic functions and purposes of the state.¹⁸ Thus, early modern torture can be seen as an integral part of a pre-modern 'security culture' aiming first of all at the well-being of society. Although legal safeguards restricted the use of torture and it had occasionally been opposed since the 16th century,¹⁹ individual security, understood as the protection of the individual from the state, had only minor impact.

This changed in the second half of the 18th century when judicial torment was seriously challenged. A general crisis of legitimacy concerning the criminal justice system went along with altered ideas of the relations between the state and the individual and with changed conceptions of security. Instead of turning to the particulars of the well-studied extensive (anti-) torture discourse around 1800,²⁰ I will mention three criticisms that proved to be of particular importance for further developments. First, the effectivity of torture and hence its usefulness for criminal proceedings was doubted. This was especially true with regard to confessions, the main object of historical and contemporary scholarly debates. Second, torment was now perceived as inhumane and violating basic human rights.²¹ The protection of the individual, his physical (and mental) integrity, in other words: individual security, should thus take precedence over alleged interests of the state. Third, torture now seemed irreconcilable with the rule of law and the emerging notion of legal security (*Rechtssicherheit*).²² Early modern torment thus soon developed into a symbol for the 'police state', arbitrariness and cruelty, in short the pre-enlightened status of society altogether. The German jurist Karl Theodor von Welcker stated back in 1834: "Die Tortur nun aber wagt ja heut zu Tage auch nicht ein Jurist, nicht ein Regierungsmann mehr zu vertheidigen. Der laute allgemeine Abscheu, der Ruf: Barbar! Würde alsbald solchen Vertheidigern entgegen kommen?"²³ Its abolition

¹⁵ Cf. for this position ZWIERLEIN (2012) 381; DAASE (2010).

¹⁶ For a long-term history of torture including early modern times see PETERS (1985); ZAGOLLA (2006); LANGBEIN (1976).

¹⁷ For a detailed account see HÄRTER (2011a); ZAGOLLA (2003) 138-143.

¹⁸ Cf. CONZE (1984) 845-848.

¹⁹ Cf. SCHMOECKEL (2000) 93ff.

²⁰ For a detailed account see SCHMOECKEL (2000).

²¹ For this aspect cf. HUNT (2007) 70-112.

²² Cf. CONZE (1984) 853-855; ARNAULD (2006).

²³ WELCKER (1834) 584.

was perceived as an indicator of ‘civilisation’ and ‘advancement’ ever since, constituted an essential element of European self-description and self-assurance, distancing it from other parts of the world and providing the occasion to define its (leading) position in a global context.

The critics succeeded, from the 1740s onwards, progressively in Europe and beyond. Torture was abolished and prohibited in national and international law in several stages.²⁴ In the framework of historical security research, freedom from torture can be designed as an important feature of the “ideal of a completely secure society” from the enlightenment onwards²⁵ and one reason why the 19th century appeared, in retrospect, as a “golden age of security”.²⁶ The critics’ arguments provided the basis for a novel justification narrative legitimising the absolute and unlimited ban on torture. Its discursive construction at a certain historical time was soon sealed out and the condemnation of torment perceived as a universal value and irreversible matter of course. Based on the interconnection of human dignity, the rule of law, individual security and the inappropriateness of state coercion and violence, the anti-torture narrative constituted henceforth an important pillar for the legitimacy of legal and political orders – this meant, in turn, that accusations of this sort could call into question the basic principles pertaining to an individual state or an international order.²⁷ The anti-torture narrative turned out to remain significant throughout the 19th and 20th centuries and was, in addition, basically untouchable. Ever since the 1850s at the latest, it was impossible to support the use of torture in principle. Hence, only few questioned the hegemonic narrative at all, for example Ernst Albrecht, state premier of Lower Saxony, in 1976 or philosophy professor Michael Levin in 1982.²⁸ When they did so their rationale did not aim at the outright suspension but at a more lenient approach to the ban on torture. Nevertheless, they were far from meeting with approval.

But despite this broad consensus torture practices persisted throughout the 19th and 20th centuries, permanently contradicting anti-torture laws and narratives.²⁹ Alf Lüdtke has stressed the stability of police procedures, including violence, and perceptions across political ruptures from the 18th to the 21st centuries.³⁰ The prospect to ensure and maximise state security by means of coercion played a major role in the course of this. To governments and state officials the objectives of torture still seemed promising and worthwhile, the justification narrative of public security still convincing. Authorities anywhere in the world used torture for gathering information and obtaining confessions. Even though no longer formally needed for convictions, the latter were in many cases welcome in order to facilitate proceedings

²⁴ For details see chapter 2.

²⁵ ZWIERLEIN (2010) 258.

²⁶ Stefan Zweig 1947 quoted by CONZE (1984) 859.

²⁷ Examples concerning Germany and Europe in: KESPER-BIERMANN (2013); KWASCHIK (2013).

²⁸ ALBRECHT (1976); LEVIN (1982); cf. with further examples HERBST (2011).

²⁹ Much research has been done in this field. To contrast the ban on torture and prevailing torture practices is a common theme of studies, e.g. with regard to the USA. See for example MCCOY (2006).

³⁰ LÜDTKE (2006).

and to prove the successful performance of state officials.³¹ Painful interrogations served, in addition, as a systematic course of action to suppress opposition and to intimidate the population, especially in authoritarian and totalitarian regimes. An essential goal besides collecting information or evidence was to alter the beliefs or even the personalities of the supposed opponents, turning them into loyal citizens. Given the prevailing condemnation and prohibition of torture, these practices had to remain invisible and were constantly denied. The use of techniques like electric shocks, deprivation of sleep, stress positions or isolation, frequently summarised in the term ‘white torture’, resulted at least to some extent from this situation for mental methods of ill-treatment left no traces on the bodies of the victims.³²

Apparent changes have occurred since the 1990s, since the overall consensus on the absolute prohibition of torture has been challenged from many quarters. Politicians, jurists, state officials and scholars pleaded for the use of torture in exceptional circumstances, hinting for example at the ticking bomb scenario. A major debate has evolved, referring among others to 9/11 and the ‘war on terror’ or, in the case of Germany, to the abduction of Jakob Metzler and ‘rescue torture’ (*Rettungsfolter*). Films, TV series and other expressions of popular culture have reflected these alterations, frequently showing unusual interrogation techniques as unwanted yet inevitable means of protecting the political order.³³ Those challenging the anti-torture narrative past and present repeatedly emphasised the need for attaining and upholding public security in view of perceived threats. In this justification narrative security for the overall majority of citizens has been rated higher than the rights of the alleged offender. Moreover it has been argued that, under certain circumstances, torture is compatible with the rule of law and human rights. Because this understanding of the relation between torture and security resembles much more early modern notions focussing on the protection of public order rather than the protection of the individual from the authorities, Cornel Zwierlein recently discussed a cyclical development of security cultures with similarities between premodernity and postmodernity.³⁴

Trends over the last twenty years, however, were not linear and one-dimensional; they were still characterised by competing notions of security. The overall ambivalent attitude towards torture in the early 21st century reveals Amnesty International’s 2014 global torture survey. Whereas 36 percent of respondents believed that torture could be justified in some cases to protect the public, 44 percent feared torture if taken into custody.³⁵ Alongside demands for a relaxation of the absolute prohibition of torture, therefore, the protection of citizens from ill-treatment by the state was, again, affirmed and this time explicitly introduced as a security issue. The emerging concept, at the international level, of ‘human security’ comprised free-

³¹ Cf. a case from 1951 portrayed by ZAGOLLA (2003) 143-147; PETERS (1985) 225-228.

³² This context is elaborated with special regard to democracies by REJALI (2007).

³³ There is an immense amount of publications on all of these aspects, cf. e.g. the recent overview ALTENHAIN (2013a).

³⁴ Cf. ZWIERLEIN (2010) 254f.; ZWIERLEIN (2012) 379-381. See also the observations of DAASE (2012).

³⁵ ATTITUDES TO TORTURE (2014). A total of 21,221 citizens across 21 countries were interviewed. The results display wide variations between world regions.

dom from torture as a basic ingredient.³⁶ With its individual-centred dimension targeting at physical integrity and the preservation of human dignity, the 1994 United Nations Development Programme's Report, the key document unfolding the approach, mentioned torture as a threat to personal and political security.³⁷ Accordingly, human rights violations measured by torture were perceived as an essential indicator of human security. The interrelation with the rule of law "as the all-important framework" continues unabated, as for example the 2005 UN Report of the Secretary-General "towards development, security and human rights for all" acknowledged.³⁸

II. Torture and Transnational Law Regimes

Torture was, in different ways, linked to law. On the one hand, the use of torture could be codified in legal norms as was the case in early modern continental Europe. After its formal abolition this was, obviously, no longer possible yet practices with similar functions were now and then laid down in legal provisions under other names, for example so-called punishments for disobedience (*Lügen- und Ungehorsamsstrafen*) in early 19th century Germany.³⁹ But these were rare exceptions for acts of torture usually occurred outside the scope of law. On the other hand, the prohibition of torture and the protection of the citizen from ill-treatment by the state evolved from around 1800 onwards as an important matter of lawmaking on national and international levels. The abolition of torture was initially codified in legal norms of individual states. The European powers formally abolished torment from their criminal law mainly between the second half of the 18th century and the 1850s. Among the first were Sweden (1734/1772) and Prussia (1740/1754), among the last Portugal (1826), Baden (1831) and the canton of Glarus in Switzerland (1851).⁴⁰ However, these measures must not be seen as isolated actions, on the contrary, they were accompanied by an international expert discourse of jurists, state officials and philosophers and with mutual exchange between territories. A mere glance at the discussion of Cesare Beccaria's theses on torture, outlined in his famous, often translated book "On crimes and punishments" from 1764 shows the pan-European communication community.⁴¹ But although governments took similar measures, the responsibility for the compliance with the prohibition of torture was located within the sovereignty of the individual state, not within the international community. It was generally assumed that authorities would act according to the rule of law. Furthermore, the 19th century faith in ongoing progress made it easy to believe that torture had disappeared for ever

³⁶ Cf. MACFARLANE/FOONG KHONG (2006); DEBIEL/WERTHES (2013).

³⁷ UNITED NATIONS (1994) 30, 32.

³⁸ UN REPORT (2005) 35.

³⁹ Cf. WILLENBERG (2011); KNAPP (2011).

⁴⁰ Cf. PETERS (1985) 125-128.

⁴¹ Recent German translation: BECCARIA (2005); circulation and reception discussed in DEIMLING (1989).

and would pose no actual threat, neither to contemporary nor future generations. Thus, for example, the 1911 entry on torture in the *Encyclopaedia Britannica* reflected the belief that “the whole subject is now one of only historical interest as far as Europe is concerned”.⁴²

This view changed fundamentally during the 1930s and 1940s. Violations of human rights in general and of the freedom from torture in particular occurred on a massive scale, especially in National Socialist Germany and the Soviet Union, leading after 1945 to a number of consequences on the national as well as transnational level.⁴³ On the one hand, some states like Germany improved their indigenous legal provisions against torture.⁴⁴ If nation states intentionally and systematically applied ill-treatment to govern their citizens, on the other hand, protection could only be expected from outside, that is from international or supranational frameworks. The ban on torture was therefore integrated in international law.⁴⁵ Signatories of the Geneva Conventions of 1949 and the Additional Protocols of 1977 officially agreed not to torture captured persons in armed conflicts whether international or internal. The Universal Declaration of Human Rights in 1948 included freedom from torture at all times, stating in Article 5: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. It was followed by the International Covenant on Civil and Political Rights (1966) and various regional regulations including the European (1950), American (1969) and African (1981) conventions on Human Rights, the 1981 Universal Islamic Declaration of Human Rights and the Inter-American Convention to Prevent and Punish Torture (1985).⁴⁶ The development culminated in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975) and finally the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), both adopted by the UN General Assembly.

The emergence of this substantial body of international legal provisions was not only driven by experiences of and conclusions drawn from the first half of the 20th century. Particularly with regard to the making of CAT more recent developments played a crucial role. As has already been pointed out, torture practices did not cease after the Second World War. International security concerns apparently played an important role in this context. This was in itself not entirely new, because authorities had already during the 18th and 19th centuries used torture in the course of war⁴⁷ and intended to combat and prevent perceived cross-border threats, e.g. bands of robbers, international crime or networks of political opponents like anarchists, at least in part with torture. Moreover, they had created a range of instruments for

⁴² TORTURE (1911) 72.

⁴³ Cf. CLARK (2001) 38; PETERS (1985) 184-191.

⁴⁴ Cf. KESPER-BIERMANN (2013) 284f.

⁴⁵ Cf. BRUHA/STEIGER (2006).

⁴⁶ Cf. KRETZMER (2010), paragraph 2-5.

⁴⁷ E.g. during the Philippine-American War 1899-1902, cf. DAUENHAUER (2015) 35-109; see for general considerations PETERS (1985) 153-155.

transnational cooperation in criminal prosecution.⁴⁸ During the 1950s, physical and mental coercion and violence was inflicted in military conflicts in the framework of decolonisation, e.g. the Algerian War, in wars between nations, e.g. the Korean War, and it began to establish itself as a constituent part of the cold war. A strong rise of government-initiated ill-treatment was discerned by non-state actors during the 1960s and 1970s. At that time trade unions, churches, political parties and human rights organisations, namely Amnesty International, entered the scene, addressed the subject and a broad international public.⁴⁹ AI put the subject at the top of its agenda and started its first global anti torture campaign in 1972.⁵⁰ To the organisation, the early 1970s were a time when torment seemed to revive, not limited to exceptional cases or confined parts of the world, but as a world-wide “method of political control” regardless of the respective economic or political system. The 1973 Report on Torture explained: “In short, what for the last two or three hundred years has been no more than an historical curiosity, has suddenly developed a life of its own and become a social cancer”; threatening “the citizens of every country, however long its tradition of civilised conduct”.⁵¹ Torture was, according to the findings of the human rights organisation, used by dictatorships in Latin America and Europe, by communist countries as well as by democracies.

In addition, Amnesty International perceived fundamental changes beyond the sole dimension of reported cases of ill-treatment. First, interrogation techniques were being described as constantly “refined” and “sophisticated”, focussing on mental rather than physical methods. Western European states, for example, responded to terrorist activities during the 1970s with procedures such as the ‘five techniques’ in Britain or solitary confinement in Germany, practices which some thought equivalent to torture.⁵² Second, internationalisation took on a new quality. “Foreign experts are sent from one country to another, schools of torture explain and demonstrate methods, and modern equipment used in torture is exported from one country to another”, the 1973 report explained.⁵³ This was, amongst others, obviously targeting the USA and its “School of the Americas”, in 1961 assigned to the specific goal of “anti-communist counterinsurgency training” for Latin American government personnel.⁵⁴ Hence, in view of the internationalisation of torture, a new approach to combat it appeared to be necessary. In this respect, the human rights organisation believed in the relevance and impact of transnational legal norms.⁵⁵ It put a new focus on developing international norms at the UN by appointing, in 1973, a legal officer explicitly for this purpose and cooperating with the International Commission of Jurists in Geneva and other NGOs.

⁴⁸ Cf. HÄRTER (2011b).

⁴⁹ RAESS (1988) 29ff., lists non-state actors. For Amnesty International see DEVRIES (1998); CLARK (2001) 39ff.

⁵⁰ For details see DEVRIES (1998); CLARK (2001) 43ff.

⁵¹ AMNESTY INTERNATIONAL (1973) 8.

⁵² AMNESTY INTERNATIONAL (1973) 218f.; KELLER (1981); concerning the British and German cases see COBAIN (2012) 135ff.; RIEDERER (2014); KWASCHIK (2013).

⁵³ AMNESTY INTERNATIONAL (1973) 17.

⁵⁴ See GILL (2005).

⁵⁵ For the following see from the rich body of literature HUCKERBY/RODLEY (2009); COOK (1996).

In 1977, they formed the “Informal Liaison Group on Torture”. Another step in this direction was to enhance public awareness in the international community and increase resistance against ill-treatment all over the world. The advocacy of Amnesty International in fact constituted part of a broad transnational discourse during the 1970s and early 1980s. The 1973 Report on Torture, accompanied by an international conference, attracted worldwide attention and the 1984 Anti-Torture Convention is said to have been adopted due to the influence of the latter. It is “one of the most clearly documented examples of the positive impact of NGO activity on global norm emergence”, argues Ann Marie Clark.⁵⁶ The organisation lobbied national governments to bring the question before the UN General Assembly, it prepared draft conventions as early as 1971 and submitted recommendations to the various draft proposals discussed at the UN.

CAT, substantially based on the Declaration of 1975, implemented a system of legally binding regulations that went far beyond mere declarations and affected the transnational as well as the national level. To begin with, it provided the aforementioned definition of torture. The individual states committed themselves to take a comprehensive set of measures to prosecute and prevent it. In addition to precautions in criminal law and criminal proceedings these included, for example, the training of law enforcement personnel (Art. 10) and the “systematic review [of] interrogation rules, instructions, methods and practices” (Art. 11).⁵⁷ Beyond these impacts on national law, the regulations aimed at the transnational level covering expulsion and extradition. “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”, stated article 3. Eventually, the Convention established a United Nations Committee against Torture, consisting of “ten experts of high moral standing and recognized competence in the field of human rights” (Art. 17 (1)). The signatories had to report to the Committee on the measures they had taken to give effect to the provisions of the convention. Moreover the body of experts could make inquiries concerning torture allegations.

The provisions of the 1984 Convention responded to what had been identified, particularly during the international debates and occurrences of the 1970s, as the most common causes of torture. Art. 15 pointed out that “any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings”. Interestingly enough, CAT explicitly addressed and at the same time ruled the maintenance of public or national security as a justification narrative out: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” and continued that this also applied to “an order from a superior officer or a public authority” (Art. 2).⁵⁸ The ban on torture as an absolute prohibition was thus underscored. Furthermore, it is to this day seen as customary international law and even *ius cogens*, i.e. a fundamental, overriding principle from which

⁵⁶ CLARK (2001) 55.

⁵⁷ This and the following quotes according to CONVENTION (1984).

⁵⁸ For a short discussion of this aspect see BRUHA/TAMS (2006) 21f.; BRUHA/STEIGER (2006) 41-48.

no derogation is ever permitted.⁵⁹ The global recognition and “international normative consensus”⁶⁰ on this issue becomes also apparent considering the further development of the convention. CAT came into force in 1987; to this day the vast majority, that is 80 percent of UN state members, has ratified it (2017: 162 of 193).⁶¹ It is also approved by the largest part of the world population. 82 percent of respondents in Amnesty’s 2014 survey supported international rules against torture.⁶² Although considered the most important document the 1984 Convention was surrounded and supplemented by additional anti-torture provisions in international law. They included, apart from the above-mentioned, e.g. the Convention on the Rights of the Child (1989) or the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). Recently, the implementation of an International Criminal Court has improved the rights of the individual to prosecute ill-treatment and international courts like the International Criminal Tribunal for the Former Yugoslavia have strongly confirmed the significance of the prohibition of torture in their decisions.⁶³

Along with national law, international treaties, expert, advocacy and media discourses and various state practices these norms shaped a transnational anti-torture regime in its own right.⁶⁴ Due to its cross-cutting nature,⁶⁵ it was related to other law regimes and its history dated back to the abolition of judicial torment around 1800. The anti-torture regime originated in the context of penal reform. Legal regulations prohibiting torture were thus initially implemented in national criminal law and continued to be part thereof, enforced by international provisions like CAT, to date. To a much lesser extent and at a later stage, torture is also an offence in international criminal law.⁶⁶ However, freedom from torture has, since the Second World War, been understood, above all, in the framework of humanitarian and human law, constituting the main element of the justification narrative based on human dignity, the rule of law and individual security. In 1986 Jack Donnelly thus pointed to “the emergence of a relatively strong international human rights regime against torture”⁶⁷; freedom from torture is also referred to as “probably the human right most robustly protected under international law”.⁶⁸

⁵⁹ Cf. BRUHA/STEIGER (2006) 12; WET (2004).

⁶⁰ CLARK (2001) 44.

⁶¹ United Nations Treaty Collection, chap. IV/9 (6.11.2017), URL: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#3 [6.11.2017].

⁶² ATTITUDES TO TORTURE (2014).

⁶³ Cf. BAHAR (2009) 34-36; WET (2004) 97-99.

⁶⁴ Cf. HÄRTER (2011b).

⁶⁵ BRUHA/TAMS (2006) 21, call it “Querschnittscharakter des völkerrechtlichen Anti-Folter-Regimes”.

⁶⁶ Cf. WERLE (2007) 342-347.

⁶⁷ DONNELLY (1986) 23.

⁶⁸ AMNESTY INTERNATIONAL (2014a) 8; see also DONNELLY (1986).

III. Torture and Emotions

Regarding the history of torture from the middle of the 18th to the end of the 20th century in view of transnational law regimes, the continuity of the predominant repudiation and prohibition of torture including its justifications is remarkable. This is all the more the case when it is taken into account that this consensus transcended national and cultural boundaries, constituting a true global narrative. The exceptional position of torture in this respect is clearly shown in comparison with closely related issues. Concerning the rejection and prohibition of slavery, a similar consensus emerged from the 18th century onwards and was codified in international law, but lost momentum and significance in human rights discourses during the 20th century.⁶⁹ The abolition of the death penalty, on the other hand, never gained similar universal support, neither within individual states nor within Europe or beyond. The same applies to the range of criminal penalties, particularly corporal punishment. This is reflected in the exclusion of “the pain or suffering arising only from, inherent in or incidental to lawful sanctions” from the 1984 anti-torture convention.

This raises the question as to why the transnational anti-torture regime proved to be stable for such a long time. An answer, at least with regard to Europe, has to consider the significance of emotions. Emotions were important for the formation and stabilisation of transnational law regimes in general and the anti-torture regime in particular. With regard to torture and security, various emotions come into play. Fear is one of them, addressing in a double sense the two competing notions of security: fear of individual ill-treatment by public authorities and fear of threats to the well-being of the public that have to be met with coercive measures against the alleged perpetrators. The latter could serve as an emotional support for the justification narratives advocating the use of torture. This line of thought will not be considered further because with respect to international norms against torture other emotions proved to be crucial. It is striking that the abolitionist discourse from the 18th century onwards was conducted with a highly emotional language, using frequently words like ‘inhumane’, ‘barbarous’, ‘horrible’, ‘cruel’ and, particularly prominent, ‘disgusting’. Since the condemnation of torment became the prevailing narrative around 1800, it could almost exclusively be talked about by using these expressions. Thus, the connection of torture with negative emotions became self-evident very quickly, was no longer reflected upon and remained largely unchanged well into the 20th century. A German teaching guide book for schools stated in 1981: „Bei den meisten Schülern löst das Stichwort ‚Folter‘ auf der emotionalen Ebene eine Mischung aus Abscheu und Faszination aus [...] Diese Mischung von unmittelbarer Betroffenheit und Sensationslust, Mitleid und Ekel gilt es [...] bewußt zu machen“.⁷⁰

Thus the range of feelings included sensationalism, fascination, compassion, concern and, particularly, disgust which I will focus on. Recent academic research analyses disgust as a complex emotion, presuming at least two types that perform different tasks: On the one

⁶⁹ Cf. ECKEL (2014) 38.

⁷⁰ WERTE UND NORMEN (1981) 11.

hand, the so-called core-disgust is meant basically to guard the body from disease. It is closely linked to distancing oneself from potentially infectious food, practices or living beings and therefore particularly significant for the individual. On the other hand the so-called moral disgust is viewed as a social emotion, the “emotion of civilization”.⁷¹ Valerie Curtis in 2011 stressed the role of disgust in decision-making about what is right and wrong and how to act according to the moral norms of a given society. If certain condemned customs were labeled as disgusting, they would be avoided and, conversely, generally accepted behaviour would be supported. The said emotion can thus be seen as an important “motive to punish antisocial behaviour and to shun the breakers of social rules”.⁷² Since the enforcement at least of some of these rules or, in other words, the protection of social order is a function of law, the impact of disgust on the latter becomes obvious. Evolutionary biologist Marc Hauser suggests that disgust is highly effective as a social emotion, because it “enjoys a certain level of immunity from conscious reflection, and it is contagious”.⁷³ As embodied moral judgement, the rejection of what is perceived as inappropriate behaviour goes hand in hand with physical reactions, even nausea.

Adopting an historical perspective, it is significant to note that both types of disgust are not immutable instincts or inborn feelings but require socialisation and enculturation. In general, emotions and their expressions are said to be shaped in cultural and social frameworks. Elicitors of disgust therefore vary between cultures and historical periods, which becomes evident, for example, with regard to homosexuality. In the first part of this paper I have argued that the assessment of torture changed around 1800 from an inevitable and useful means of criminal proceedings to a severe violation of human dignity and a threat to any just political and social order. Hence, the shift in moral judgement durably bonded torment and disgust, converting its condemnation into a universal value.⁷⁴ The connection was facilitated, because early modern torture affected the body and its physical integrity which core disgust was meant to protect. Lynn Hunt has pointed out the changing attitudes to the body originating during the second half of the 18th century. The violation of the body evoked feelings of compassion and empathy with those individuals whose body had been injured ever since and laid the ground for the unrestricted, emotionally backed support of human rights in Europe, freedom from torture being one of them.⁷⁵ During the late 1700s and early 1800s, abolitionist advocacies contributed to this development by emotional appeals that should gain widespread support for their cause, giving dramatic and brutal accounts of the horror, pain and barbarism concerning the maltreatment inflicted upon victims of torment.⁷⁶

In fact, the synthesis of torture and disgust proved considerable mobilising potential for the prohibition of torture around 1800 and remained to do so on a national and transnation-

⁷¹ ROZIN/HAIDT/McCAULEY (2008) 769. See also NUSSBAUM (2004); MILLER (1997).

⁷² CURTIS (2011) 3478.

⁷³ HAUSER (2006) 198.

⁷⁴ Cf. ROZIN/HAIDT/McCAULEY (2008) 763.

⁷⁵ See HUNT (2007) 70-112.

⁷⁶ Cf. KESPER-BIERMANN (2011) 152-154.

al level during the 19th as well as 20th century.⁷⁷ This becomes evident with regard to Amnesty International. Its emergence as a human rights organisation was already closely linked to emotions. In his famous newspaper article ‘The Forgotten Prisoners’ future founder Peter Benenson wrote in 1961: “Open your newspaper any day of the week and you will find a report from somewhere in the world of someone being imprisoned, tortured or executed because his opinions or religion are unacceptable to his government [...] The newspaper reader feels a sickening sense of impotence. Yet if these feelings of disgust could be united into common action, something effective could be done.”⁷⁸ He described the emotions of an individual facing the global extent of injustice and human rights violations including torture as “feelings of disgust”. To conquer the “sickening sense of impotence”, joint civic engagement on a transnational scale seemed to be the only way. Obviously, Benenson’s account expressed the current condition of many, because it is said to have triggered the association of like-minded contemporaries and led to the foundation of Amnesty in the same year.

Historians of emotions have confirmed the crucial role of emotions for social movements. Given the moral dimension of disgust, it could fuel outrage and anger, integrate the actors and lead to a sense of moral superiority, the firm conviction to stand on the right side and fight for a just cause.⁷⁹ Many statements of Amnesty International reveal this, especially those paralleling torture with slavery. During the 1970s and 1980s the organisation’s activities focussed on the global fight against torture, most notably by means of the anti-torture campaigns of 1972 and 1984. They drew extensively on the world-wide consensus on the condemnation of torture which made fundamental opposition impossible and raised substantial support for the organisation as well as for the cause itself. More than one million signatures were collected for an anti-torture petition submitted to the United Nations in 1973; Amnesty gained new members, substantially increased its funds, improved the professional approach to campaigning and changed from a “case-driven lobbying group” to a “norm-oriented human rights organization”.⁸⁰ The Campaign is thus referred to as “a prototype for AI’s campaign on other human rights problems”.⁸¹

The appeal to emotions – compassion for the victims of torment, indignation against the perpetrators and disgust in view of human rights violations – constituted an essential part of abolitionist advocacy during the 1970s. But addressing an (international) public at an emotional level produced, besides positive results, unintended and undesired effects. The human rights organisation admitted in 1982, reflecting on the 1972 campaign: “Some of our materials presented torture out of context and resulted in a lot of sensational – almost

⁷⁷ KWASCHIK (2013) 291f., points to the mobilising potential of torture allegations but does not relate it to disgust.

⁷⁸ BENENSON (1961).

⁷⁹ For the general framework see e.g. ABRAMS (2011).

⁸⁰ HUCKERBY/RODLEY (2009) 19.

⁸¹ CLARK (2001) 46f., 55 (quote).

pornographic press coverage”⁸² This aims at the role of the media as additional major actors in the formation and stabilisation of the transnational anti-torture regime. Whereas the debate around 1800 had mainly been an expert discourse in journals and pamphlets limited to a well-educated public, torture entered the expanding quality and popular press from the late 19th century onwards, then spreading to new mass media such as radio, film and television. Reporting covered first of all current torture allegations at home and abroad, many of them put forward by advocacy groups such as human rights organisations.⁸³ Media coverage provided information on techniques of torment, on victims and accused accompanied by pictures if possible. These stories used and addressed the emotions of the audience;⁸⁴ at the same time the overall condemnation of torture furnished their scandalising potential. By delegitimising certain authorities and political orders, the media helped to stabilise the transnational anti-torture justification narrative. The absolute ban on torture was the self-evident basis of all media reporting and was permanently reiterated.

Beyond that, there was another reason why the media readily took up the issue time and again. Amnesty International alluded to this facet of disgust in the previously cited reflection of the 1972 campaign. As an ambivalent emotion, disgust is deeply connected with fascination and pleasure, sometimes involving sexual connotations. This clearly applies to torture given its large presence in 19th and 20th century popular culture. Seeing and experiencing torment became a popular leisure-time occupation, fascinating and sparking feelings of shuddersome delight.⁸⁵ Not later than from the 1830s onwards, exhibitions and museums showcased torture chambers and objects, torment moreover featuring prominently in novels and light fiction, popular-science style books, later films and TV series.⁸⁶ A necessary condition for enjoying disgust was, however, that it was not perceived as personally threatening. Torture met this requirement: Since early modern torment was understood as an outdated, remote part of history, the time lag thus provided sufficient distance, whereas modern, contemporary torture was believed to occur either in geographically distant regions or to affect only specific groups of people, often perceived as being not full members of a society,⁸⁷ like (suspected) terrorists. The imagery almost subconsciously associated with it from the 19th century onwards was not limited to any national boundaries, but formed an important part of a transnational, shared anti-torture regime.

⁸² Amnesty International, CAT 1984/85. Discussion of Objects and Methods, 15.4.1982, quoted from DEVRIES (1998) 143.

⁸³ See ECKEL (2014) 377-381.

⁸⁴ For a general outline see BÖSCH/BORUTTA (2006).

⁸⁵ Cf. KESPER-BIERMANN (2018).

⁸⁶ Cf. also for the following e.g. BEE (2013); GÖRLING (2014); BÄCHLER (2013).

⁸⁷ Cf. EINOLF (2007).

IV. Conclusion

The late 18th and early 19th century saw the emergence of a transnational law regime prohibiting torture, shaped by international discourses, declarations, legal regulations in national and international law, non-governmental advocacy and media coverage. Although it was closely linked to transnational criminal law and human rights regimes, it shaped a specific anti-torture regime in its own right. Actors included legal experts, state officials, politicians, civil society players and journalists. The vast majority of them supported and strengthened the global justification narrative that torment was a severe violation of human dignity and the rule of law, delegitimising authorities and any social or political order. Furthermore, the reconsideration of so-called ‘medieval’ legal practices gave European societies a reason for self-assurance and served as evidence for the improvements of modernity. It was also used as an indicator of ‘civilisation’, distancing Europe from other parts of the world and providing the occasion to define its (leading) position in a global context.

A crucial factor for the remarkable stability of the anti-torture narrative was its permanent association with emotions, especially disgust. As embodied moral judgement with a certain level of immunity from conscious reflection, disgust effectively led to the avoidance and damnation of behaviour contradicting generally accepted social norms. Amongst others, due to the fascination and pleasure also connected with the emotion, a set of images about torment prevailed in European popular culture during the 19th and 20th centuries. Hence, torture with its emotional implications was largely present and with it a pool of associations ready to be called upon. The examination of the connections between disgust and the global anti-torture regime suggests, in my opinion, to ask for the significance of emotions for the formation and maintenance of other transnational law regimes as well.

Human security, understood as the freedom from torture, figured prominently in the narrative. According to the hegemonic discourse, the individual had to be protected by the international community and thus by transnational (legal) norms and institutions. But there was always a competing understanding of security: State security or international security, some argued, in certain cases could only be obtained, for example, by enforcing information from a person. The relation of overall security and individual security therefore, in the case of torture, has to be seen as permanently conflicting, accompanied by continuing negotiation processes on various levels including justification narratives. A long-term view shows the shifting emphasis between both notions of security in legal provisions. Moreover, from the abolition of torture onwards there was a constant contradiction between the broad consensus on anti-torture laws and coercive state practices. This has, again, become obvious since the 1990s when the ban on torture has been challenged from many quarters in the light of perceived threats to the well-being of society and public order. If this will lead to a fundamental change of the transnational anti-torture regime, dominating for the last 200 years, remains to be seen.

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