



Awareness Raising and Training Measures for the Istanbul Protocol in Europe

History of the Use and Prohibition of Torture

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Introduction

The use of torture predates the Middle Ages. During the Inquisition period, the use of torture was systematically regulated by law with the express purpose of obtaining a confession. While torture disappeared as a formal and expressly legalised interrogation technique in most legal system throughout the 18th and 19th century, it was legalised again during the fascist and national socialist regimes, colonial administration and most recently in the Bush administration's 'War on Terror'.

Although the Istanbul Protocol itself does not provide any information on the history of torture, we have summarised the main developments for the interested learners. This may support an understanding that torture was always part of legal or quasi-legal proceedings and therefore closely connected to public officials' and State responsibility. Moreover such a summary gives a glimpse on the different purposes torture was used for historically.

1. Pre-Inquisition Period

Torture has existed since long before the medieval period. One of the first records of torture comes from Egypt, where people were whipped as a means of interrogation after a crime had been committed. In Classical Greece only slaves were allowed to be subjected to torture. It was held that a slave's testimony, for example, was admissible only if extracted by torture, on the assumption that slaves could not be trusted to reveal the truth voluntarily. Slaves were considered an object belonging to their masters without any moral authority of their own. As a slave was no subject to law any harm done to the slaves was legally affecting their masters. At the same time the masters were responsible for any harm done by their slaves. From a procedural point of view slaves were witnesses, so they were not tortured because of crimes they committed themselves, but to be interrogated about crimes their masters were accused of. (1) (2).

According to Roman criminal law from the 2nd century AC on free citizens could be tortured if they were suspected of having committed a serious crime. Persons belonging to the lower classes, as slaves, could also be tortured in other cases. A serious crime was considered, for example, the act of denying the authority of the king or his representatives. Hence the function of torture is seen as a means to preserve the power of the rulers. In consequence it was not only used in order to discover the truth in criminal cases, but also to force the early Christians to recall their believe. (1).

2. Inquisition Period

In the Middle Ages and early Modern period, following the adoption of the Roman law and in consequence the introduction of its procedural rules, torture became a formal part of the European justice systems. Before in many countries ordeals were applied as a means of establishing the guilt of the accused. Various types of ordeals existed, all having the same aim: If the suspect was innocent, God would save him from injuries. In 1215 Pope Innocent III prohibited the participation of representatives of the church in the practice of ordeals. In contrast to the process by ordeal, the goal of using torture was not to proof the guilt or innocence of a suspect. It was applied to get a confession or additional information. So it was not god who decided the case, but it was man who did so using the evidence obtained under torture. (1)

In the “Papal Bull”, authorised by Pope Innocent IV in 1252 – only a few years after the prohibition of ordeals by Pope Innocent III -, torture was introduced for the express purpose of obtaining a confession. The accused was first threatened with torture in the hope that the threat itself might elicit a confession. If these initial threats failed, the suspect was brought to the torture chamber and presented with the torture instruments. The chamber was designed in a way to strike fear and horror. It was usually an underground residence lacking windows and with only a few candles to light the room. The executioner was clothed entirely in black with the head and face covered, except for two eye-holes. The victims were stripped to their underwear and their hands were bound together. The combination of darkness, an anonymous tormenter and the victim’s own physical helplessness were created a setting which would arouse a feeling of complete powerlessness in the victim. While the victim went through this demoralising process, the questions put to him were repeated. If the suspect still denied his guilt, the agony would begin.

This use of torture was connected to a judicial system, which regarded a confession as “the queen of proofs”. Basically, to allow for the conviction of a suspected criminal, it was necessary to have concrete evidence, congruent testimonies of two witnesses, or, where these were lacking, the confession of the accused himself/herself. Circumstantial evidence was not regarded sufficient for a conviction. Where “full evidence” was lacking, thus torture had to be applied to get a confession. As one author has noted, the judicial precondition for applying torture was a degree of circumstantial evidence which would today be sufficient to convict a suspect. (3) On the other hand, in countries with another legal system that was not so much based on obtaining a confession, like in the English common law system, there was no (or nearly no) room and

need for torture. (2, 4)

The "law of torture" regulated the different stages of the judicial proceedings. It stipulated that torture was to be distinguished from the various forms of corporal punishment used as sanctions against persons already convicted and condemned.

With the beginning of Medieval Inquisitions in response to growing religious (so called "heretic") movements, torture became a central component of the judicial system from the 13th up to the 18th century. Expressing "heretic" opinions can be understood, similar to the Roman period (*crimen laesae maiestatis*), as an act of denying the authority of the church. In 1484 Pope Innocence VIII explicitly authorised the use of torture in cases against witches. It was especially difficult for women accused of being a witch to prove their innocence. If they withstood the torture without confessing this could be interpreted as an "evil influence" that allowed them to bear the unbearable. The heydays of witchcraft proceedings took place in 1562, 1590, 1626 and 1650. In the 18th century there are just few records of witchcraft cases: for example in Germany one of the last executions is reported in 1775. (1)

3. Age of Enlightenment

During the Age of Enlightenment torture was abolished nearly everywhere in Europe. This shift in attitude was due to several, sometimes interconnected factors. On the one hand, the ideals of humanism got hold within the wider society and the rulers of principalities. This led to a humanised criminal law where judicial procedures and punishments had to respect the dignity of the person. But these ideas alone could not have gained acceptance by themselves if they weren't supported by formal doubts as to the usefulness of torture to elicit the truth on the one side and a major shift of the legal system on the other. This major shift included a "system of free judicial evaluation of the evidence" where circumstantial evidence played a bigger role. Moreover, newly introduced punishments like "punishment on suspicion" (*Verdachtsstrafe*) and imprisonment allowed for the judge to convict a criminal even without "full evidence". Hence the gap was closed between conviction to death and acquittal, since before this shift for serious crimes there was only "the choice between the alternatives of death or freedom." (2)

With all these changes, torture as a symbol of the old regime was consequently abolished in many European countries. During his stay in Egypt in 1798, Napoleon Bonaparte wrote to Major-General Berthier that "the barbarous custom of whipping men suspected of having important secrets to reveal must be abolished. It has always been recognised that this method of interrogation, by putting men to the torture, is useless. The wretches say

whatever comes into their heads and whatever they think one wants to believe. Consequently, the Commander-in-Chief forbids the use of a method which is contrary to reason and humanity”.

4. 19th to the 21st Century


In the 19th century, torture as a formal and legalised technique of interrogation had practically disappeared from all European Criminal Codes. However, at the beginning of the 20th century torture reappeared as an officially recognised technique in Russia between 1917 and 1922, and later in fascist Italy and Spain, and National Socialist Germany.

After the end of the totalitarian regimes in Europe, however, the use of torture did not disappear. In the 1950s for example, the French colonial administration subjected many Algerians to torture. Reports of torture by the military, police and the secret services continued to emerge during the Cold War era, the period of totalitarianism in Southern America and Africa, and during the Balkan War in the 1990s.

Today, the use of torture for the purpose of extracting a confession has continued to be routine practice in many countries around the world, even though torture and ill-treatment are *absolutely prohibited under international law*. In addition the purpose as well as the application of torture have changed considerably over the past century, as Darius Rejali argues in his inquiry into *Torture and Democracy*. There he makes two claims: according to the first one, it was the leading democracies as he calls them (the US, France and Great Britain) that developed new methods of torture that would leave no or nearly no marks on the bodies of the victim. He calls these new techniques “clean torture” (whereas the author Alfred McCoy calls them “no-touch torture” (5)).

The development of those “clean” techniques was due to several combined factors: the need for legitimacy of democracies towards its citizens; the official acknowledgement of human rights which again are a basis of democratic legitimacy; and, finally, the growing monitoring of the implementation and observance of human rights standards by organisations like Amnesty International or UN human rights bodies since the 1970s. To avoid detection by those monitoring mechanisms (and hence again a questioning of legitimacy), democratic states had to resort to torture that leaves no evidential marks. From here these “clean” techniques eventually spread to non-democratic states that are also increasingly under public (UN and AI) monitoring. The second claim, Darius Rejali brings forward, is that the purpose of torture shifted (at least in democracies) from obtaining a confession of a *past* crime to surveillance of *future* events. (4)

Recent discussions about the fight against global terrorism have revealed these new techniques of coercive “clean” interrogation amounting to torture, to-

 For a full overview of the history of torture

gether with new attempts to justify the use of torture under certain circumstances.

| see Edward Peters' acclaimed book (6).

5. Literature

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