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Ius cogens human rights. The absolute right regarding prohibition of torture and the related interpretations, with particular consideration to the reservations of the United States

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Abstract

The following paper attempts to introduce the general characteristics of the concept of torture and to describe it both as human right and criminal act. I will furthermore address the specific interpretation of the USA with regards to their reservation towards the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Finally, the paper delineates the accountability of member states and the two methods applied to survey and prevent infringements.

Keywords

human rights, international law, convention against torture, *ius cogens*

I. Introduction, the *ius cogens* status of prohibition of torture

Prohibition of torture has become a *ius cogens* or – with another phrase – peremptory norm of general international law. This status has been reinforced by the Furundžija judgement of the International Criminal Tribunal for the Former Yugoslavia (ICTY),¹ which can be considered a milestone in international legal

¹ C.G. Marzen, *The Furundžija Judgment and its Continued Vitality in International Law*, “Creighton Law Review” 2010, 43, p. 505.

practice. The Tribunal has stated the international humanitarian legal regulation acknowledges the prohibition of torture as an absolute right: a non-debatable *ius cogens* norm generating *erga omnes* obligations.²

The prohibition of torture is therefore both an *ius cogens* human right and the most typical case of the absolute right that unites the human rights system, the right to human dignity. It is thus included in all fundamental human rights conventions. “Torture and other cruel, inhuman or degrading treatment or punishment” is prohibited both at the universal level, within the UN framework, and at the regional level, with continental scope, as well as by conventions dealing specifically with this subject.³ The prohibition of this delict is ensured by high-level abstract protection in these documents, which set obligations mainly for states.⁴ Further to these, international criminal law also includes prohibition of torture, which is thereby classified a felony. Thus, they mainly intend for the impeachment of torturers as private individuals. International courts dealing with such cases were the International Criminal Tribunal for the Former Yugoslavia (hereinafter: *ICTY*) and the International Criminal Tribunal for Rwanda. Their duties were transmitted to the International Residual Mechanism for Criminal Tribunals after their termination, while international criminal acts committed after 2002 are being assessed by the permanent International Criminal Court.⁵

The United Nations Convention against Torture (hereinafter: *UNCAT*)⁶ adopted in 1984 and coming into force in 1987 was the document most effectively contributing to the creation of independent and effective mechanisms against tor-

² T. Balázs, *Furundžija ügy – a humanitárius jog sarokköve*, “Jogelméleti Szemle” 2018, 3, p. 2–10.

³ B. Kiss, *A kínzás és más kegyetlen, embertelen, megalázó büntetés vagy bánásmód tilalma az emberi jogok rendszerében*, Juridpolforum, http://acta.bibl.u-szeged.hu/61950/1/juridpol_forum_008_002_197-212.pdf [accessed: 25.10.2021], p. 197–211, 201.

⁴ Which are as follows: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention against Torture, *UNCAT*). The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3). The Inter-American Convention to Prevent and Punish Torture. International Covenant on Civil and Political Rights (Articles 4, 7 and 10). Standard Minimum Rules for the Treatment of Prisoners (Article 31). Universal Declaration of Human Rights (Article 5). African Charter on Human and Peoples’ Rights (Article 5). American Convention on Human Rights (Article 5). The American Declaration of the Rights and Duties of Man (Article 27). Arab Charter on Human Rights (Article 8). Cairo Declaration on Human Rights in Islam (Articles 19 and 20). The Charter of Paris for a New Europe. convention on the protection of migrant workInternational Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 10). Convention on the Rights of the Child (Article 37). Source: International Justice Resource Center: <https://ijrcenter.org/thematic-research-guides/torture/> [accessed: 14.11.2021].

⁵ M.K. Haraszti, *A kínzás tilalmának értelmezése a nemzetközi jogban és a tilalom alkotmányos garanciái*, PhD dissertation, Budapest 2021.

⁶ It was announced by the decree law 3. of 1988. In Hungary.

ture. Article 4. mandates parties to classify all acts of torture as serious crimes in their own domestic criminal law. Torture is therefore punishable not only as an international but as a national crime as well.

I intend to add here – which will be particularly important later on – that, as the Convention does not explicitly specify how the member states need to comply with their obligations established in Article 4., the United States has especially noted in the 6th CAT report that all forms of torture defined in the Convention are only punishable by the law of the States within the territory of the USA, adding that the country maintains their stance towards all reservations related to the Convention with regards to their interpretation.⁷

We can distinguish between three fundamental types of torture due to its criminal nature: (1) torture as an individual criminal act found in international common law. (2) Torture as a war crime (with regards to the Geneva Convention [see similarities in Article 3 of both]). (3) Torture as a crime against humanity.⁸

Torture itself is best understood in terms of unequal, asymmetrical relations. Above all, it is a state of hopeless vulnerability to the arbitrary power of public officials, of hopeless helplessness in the face of the superiority of others, as diFabio put it.⁹ This is the way it is articulated in UNCAT, the Inter-American Convention and the criminal laws of individual states. Emphasising the incitement or consent, the coercion of a confession or statement by a person acting in a public capacity or in an official capacity for the purpose of punishment. This context is most relevant in penal institutions. Thus, violations of the prohibition of torture are most frequently found in the context of detention (as defined in the OPCAT, the Optional Protocol to the Convention against Torture¹⁰) and the cases related to the circumstances thereof. It is for this reason we need to first address the role and responsibility of the state authority.

II. Issues of state responsibility

In the case of the crime of torture, liability extends to the particular state even if the serious material offence is committed by an official of that state. Moreover, liabil-

⁷ United States' Sixth Periodic CAT Report, 2021.

⁸ L. Kovács, F. Sánta: *A kínzás büntette a nemzetközi jogban*, "Miskolci Jogi Szemle" 2010, 5(2), p. 12–30.

⁹ K. Zakariás, *Az emberi méltósághoz való jog*, [in:] J. András, F. Balázs (ed.), *Internetes Jogtudományi Enciklopédia*, 2017.

¹⁰ Translated by M.K. Haraszti; M.K. Haraszti, *A nemzeti megelőző mechanizmus mint a kínzás és más kegyetlen, embertelen vagy megalázó bánásmód megelőzésének eszköze*, "Acta Humana" 2009, 20(3), p. 3–26.

ity now also covers omission, complicity, consciousness of guilt and co-perpetration.¹¹ These forms of accountability were extended to the cases mentioned by the Furundžija judgment, in which the General Court decided to impose responsibility and accountability for the crime of torture in cases of omission on those who have the power to prevent the crime if it occurs in their presence.¹²

In the recent case *Gjini v. Serbia*,¹³ the European Court of Human Rights (hereinafter: ECtHR) held that, although it is a fact that the applicant did not file a complaint, this does not relieve the state of its obligation to investigate crimes of high substantive gravity, acts of inhuman or degrading treatment or punishment that it perceives or may perceive.¹⁴ The applicant alleged before the ECtHR that the acts of violence committed against him were carried out on the orders or with the tacit approval of the prison authorities, in particular because of his Croatian nationality.¹⁵

Therefore, it can be stated in general terms that – in relation to the absolute prohibition of torture – the Court’s case-law suggests where a person is taken into custody in good health but is released with injuries, it is always for the state concerned to provide a plausible explanation for his deterioration in health.¹⁶ This also means that the state must guarantee the health of the detainee – bearing in mind, of course, the extent to which the prison can be expected to do so – furthermore, that the manner and form in which the measure is carried out must not subject the person to hardship beyond the suffering that inevitably accompanies his detention.¹⁷

Moreover, exceptions for non-state actors’ conduct in breach of the prohibition of torture and ill-treatment are now increasingly narrow. Thus, in most cases, the state is liable even if a private individual commits the offence (i.e. the state has a positive obligation to protect persons at risk from conduct by private individuals that is in breach of Article 3 of the European Convention on Human Rights, here-

¹¹ T. Balázs, *Furundžija ügy... op. cit.*, p. 8.

¹² C.G. Marzen, *The Furundžija Judgment...*, *op. cit.*

¹³ *The case of Gjini v. Serbia* (Application no. 1128/16), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-189168%22%5D%7D> [accessed: 25.10.2021].

¹⁴ The same topic is being touched upon by the case *GRB v. Sweden*.

¹⁵ <https://ejeb.atlatszo.hu/2019/08/16/az-elitelteket-egymastol-is-meg-kell-vedeni-az-eroszato-kot-hivatalbol-is-ki-kell-vizsgalni/>.

¹⁶ M.K. Haraszi, *A kínzás és az embertelen vagy megalázó bánásmód és büntetések tilalma az ENSZ és az Európa Tanács legfontosabb dokumentumaiban, valamint az állampolgári jogok országgyűlési biztosának tevékenységében*, “Acta Humana” 2008, 19(3), p. 47–63.

¹⁷ B. Kiss, *Az alapjogok korlátozhatósága különleges jogrendben, különös tekintettel a (büntető-) igazságszolgáltatásra vonatkozó rendkívüli intézkedésekre*, [in:] M. Homoki-Nagy, K. Karsai, A. Gál (ed.) *Ünnepi kötet dr. Nagy Ferenc egyetemi tanár 70. születésnapjára*, Szeged 2018, p. 555–567. See also the judgement in *Velásquez Rodríguez v Honduras*, IACHR on 29.07.1988, article 172.

inafter: ECHR¹⁸). This has been reinforced by cases of domestic violence – which do not in itself meet the definition of torture – but nevertheless, the state is held responsible if, for example, despite several reports (thus, with the knowledge of the authorities) nothing is done to prevent the crime.¹⁹

In order to prevent overreaching by personnel, party states should provide training for law enforcement, border police and prison staff, in connection with UNCAT paragraph 10. This can be accomplished (as outlined in the US CAT 6 Report 2021 [see Part 2 of this paper for details on the CAT]) by providing law enforcement, prison and border patrol personnel with information on these rules and regulations from their respective agencies. Thus, they need also be aware that their possible violations will be investigated and violators may be prosecuted. In addition, prison staff are warned that they must report any injuries to prisoners without delay.²⁰ In the United States, the Federal Bureau of Prisons (PBP) also monitors violence between prisoners. PBP looks at a number of factors, such as classification based on prior criminal history, gang atrocities in prison, etc. Prisoners are given extended time to serve their sentences for violations.²¹ In any case, as the case of *Gjini v. Serbia* mentioned above indicates, it is necessary to protect prisoners from each other as well as from the staff.

However, the US reservation to UNCAT states that the US interprets Article 1 of the Convention as requiring with regards the term “consent” that the public official be aware of the activity constituting torture prior to its occurrence and breach their legal responsibility by failing to intervene to prevent such activity. However, under the US interpretation (as opposed to European case law), failure to comply with applicable legal procedural standards does not in itself constitute torture.

III. When is there a breach of an *ius cogens* norm? Questions of the gravity of the offence

The material gravity of an act to be considered as constituting a breach of the *ius cogens* norm often depends on the particular circumstances. Thus, the individual cases depend on the type of act committed, i.e. they are quasi relative in this interpretation. With regards to the substantive clarification of Article 7 of the International Covenant on Civil and Political Rights – (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In par-

¹⁸ M.K. Haraszti, *A kínzás tilalmának... op. cit.*, p. 112.

¹⁹ The case *Opuz v. Turkey* (Application no. 33401/02, 4.06.2009) can be considered a landmark in this regard.

²⁰ United States’ Sixth Periodic CAT Report, 2021, p. 21.

²¹ *Ibidem*, p. 30.

ticular, no one shall be subjected without his free consent to medical or scientific experimentation”²²) and Article 3 of the ECHR (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”), decision-makers will always consider the circumstances of the case to determine whether the act rises to the level of torture or ill-treatment.²³ (See also the case *Ireland v. the United Kingdom* below for a more precise definition of torture.)

In this context, if a violation of the prohibition of ill-treatment is suspected, the first question to be examined is whether the conduct towards the victim caused the physical/mental injury. The seriousness of the offence (torture) may often depend on the physical and mental health of the victim, their gender, age and the duration of the treatment.²⁴ Finally, it must then be clarified and assessed whether it falls within the definition of humiliation, inhuman treatment or punishment or torture.

The ECtHR has dealt with this issue mainly in cases concerning detention conditions, such as overcrowding, inadequate food and lack of medical care.²⁵ Moreover, the ECtHR (interpreting the transition differently from the European Commission of Human Rights, hereafter: the Commission) has introduced a so-called threshold level of severity. We know from practice that an extreme level of overcrowding, for example, may in itself, *sui generis*, be a violation of the Convention, while a less severe level will generally only give rise to a violation of Article 3 of the ECHR when combined with the negative effects of other circumstances.²⁶

Most recently, the ECtHR made a joint judgement on applications received between 2015 and 2017 from 32 prisoners in 6 different prisons in France. Representatives of the *Observatoire international des prisons* (International Prison Monitoring Organisation) also said that the prisons were overcrowded. They concluded that these conditions were in breach of the prohibition of torture and inhuman treatment under Article 3 of the ECHR.²⁷

²² In Hungary, the text of Article 7 of the ICCPR was adopted as a fundamental constitutional right after the regime change, and Article III of the Fundamental Law was enshrined with almost identical content to Article 3 of the ECHR.

²³ M.K. Haraszti, *Védelem a magánszemélyek kinzási cselekményeivel szemben*, “*Iustum Aequum Salutare*” 2021, 17(1).

²⁴ A.E. Juhász, *A kínzás, az embertelen, a megalázó bánásmód tilalma a fogvatartottakkal szemben PhD értekezés*, 2016, Szeged, http://doktori.bibl.u-szeged.hu/id/eprint/3140/1/juhasz_andrea_erika_phd_ertekezés.pdf [accessed: 25.10.2021], p. 42–43.

²⁵ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*

²⁶ *Ibidem*.

²⁷ <https://jogaszvilag.hu/vilagjogasz/franciaorszagban-is-sertik-az-emberi-jogokat-a-bortonkorulmenyek/> [accessed:25.10.2021].

Two further sets of questions follow from the above:

(III.1.) On the one hand, the question remains: what exactly is torture? What exactly is cruel, what is inhuman and what is degrading treatment? Does this concept differ, in what way and to what extent in the case of the US? What practical problems might arise?

And

(III.2.) how are alleged violations monitored and on what conceptual basis are they assessed (or what steps have been taken in the particular state to prevent violations, and whether mandatory preventive measures have been taken at all)?

III.1. The concept of torture - attempts to conceptualise the idea

Firstly, we must start from the fact that the crime of torture is an open-ended legal offence: the conduct can be defined by reference to the result. In fact, as it turns out, we are not talking about a single offence, but about several offences in combination.²⁸

Secondly, we should not forget that social or political changes have a fundamental impact on the content of a prohibition and the way it is perceived. Thus, we can see that what was previously considered as abuse, for example, has now been subsumed under the category of torture.²⁹ Moreover, note that, for example, a new regulation has been introduced in the article on torture, namely the prohibition of medical and scientific experiments.³⁰

What I think is important to point out about the idea is that it cannot be a constantly changing one either. In addition to the evolution and the connotation of it, a certain natural variation, the definition of torture must also have a certain analytical integrity. The latter ensures that the concept cannot be twisted and distorted according to political needs, depending on current ideological considerations. This is why it is important to cite the most successful and detailed formulation of the concept of torture, Article 1 of the UNCAT. The wording of Article 1(1) of the Convention against Torture has been adopted by the UN General Assembly, among others, and is also referred to in ECtHR judgments.

„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

²⁸ L. Kovács, F. Sánta: *A kínzás büntette...*, *op. cit.*

²⁹ Torture being accepted in criminal proceedings in most European countries until the mid-18th century is an established fact.

³⁰ *Ibidem*, p. 206.

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". The English text of the second sentence of Article 1(1) contains an important exception, namely that "pain or suffering arising only from, inherent in or incidental to lawful sanctions" does not constitute torture, but this has been omitted from the Hungarian translation for some reason.³¹

In addition to the UNCAT, torture is also defined in the Inter-American Convention to Prevent and Punish Torture (IACPPT) with a similarly detailed definition.³²

However, with the exception of Article 2 and 3 of the IACPPT and Article 1 of the UNCAT, no other international conventions contain such a definition of the prohibition of torture. What the IACPPT and UNCAT definitions have in common is that they have substantive elements and define the purpose and the perpetrator of the act (see the 3 components below). It should also be noted that the IACPPT has a broader definition of the concept. For example, there is no condition requiring that the pain or suffering intentionally inflicted by the perpetrator must be "severe" as well.³³

III.1.a. On the new components of the concept of torture

In the *Furundžija* case mentioned previously, the Court also specifically detailed the new "constituents" of torture in the context of armed conflict, thus expanding the concept. In this case, Article 5 of the Statute of the Tribunal already classifies rape as a crime against humanity, which is a serious violation of the Geneva Convention and constitutes an act of war crime.³⁴ Although it was previously prohibited, both implicitly and explicitly, in Article 27 of the Fourth Geneva Convention. Though, in this regard, the ICTY has argued at length that states have increasingly broadened the definition of torture to include acts of sexual abuse.³⁵ In fact, the Inter-American Commission on Human Rights has defined rape as torture back in 1996, in the case of *Raquel Martí de Mejía v. Peru*, pointing out that it is nothing more than a method of physical torture. In General Recommendation 35, which is a corollary to points 16 and 24 of CEDAW,³⁶ the Commission stated that violence

³¹ A.E. Juhász, *A kínzás, az...*, *op. cit.*, p. 33.

³² Inter-American Convention To Prevent and Punish Torture, Article 2, <https://www.oas.org/juridico/english/treaties/a-51.html> [accessed: 25.10.2021].

³³ M.K. Haraszti, *Védelem a magánszemélyek...*, *op. cit.*, p. 243–265.

³⁴ Until then, they were also banned under the 1949 Geneva Conventions and the two Additional Protocols during wartime; T. Balázs, *Furundžija ügy...*, *op. cit.*

³⁵ *Ibidem*.

³⁶ Based on General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, points 16 and 24.

against women by private individuals,³⁷ including domestic violence, can rise to the level of torture. Thus, as I have already mentioned, the state is equally responsible for these acts or omissions (taking into account the definition of torture, of course).³⁸

In any case, from the two conventions, the known commentaries, the interpretations of treaty bodies, “treaty monitoring committees”³⁹ and the courts, we can deduce the three components of the concept of torture. These are (1) the infliction of severe physical or mental pain or suffering (the objective element of the bearings of the case), (2) intentionality and purpose (the subjective element of the bearings of the case) and (3) the relationship between the perpetrator and the authority of the state.

III.1.b. The complex crime of torture (ill-treatment)

While torture is more specifically covered by two conventions, cruel, inhuman or degrading punishment or treatment is not precisely defined by UNCAT or any other international document (UNCAT only refers to it in Article 16 and “prevent[s] in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1”).⁴⁰ Moreover, according to the ECtHR’s interpretation in the Greece case, e.g. “there are forms of treatment to which all the adjectives apply, so that all torture is both inhuman and degrading, and all inhuman treatment is both degrading.” It also follows that there is a hierarchy between cases of ill-treatment according to their severity.⁴¹

The most progress on the definition of ill-treatment was made in the case of Ireland v United Kingdom. The criteria on the basis of which treatment or punishment may be torture, inhuman or degrading has been set out in the decision with regards to that case of the European Court of Justice.⁴²

As it is commonly known, British police forces in Northern Ireland used five techniques during the interrogation of suspected terrorists in their attempts to

³⁷ The Commission concluded in *X. and Y. v. the Netherlands* that the infliction of mental suffering on the victim of sexual violence leading to psychiatric disorders constituted prohibited treatment under Article 3 of the Convention, even though the perpetrator’s intention was clearly not to inflict mental suffering on the victim; L. Kovács, F. Sánta: *A kínzás büntette...*, *op. cit.*, p. 26.

³⁸ M.K. Haraszti, *Védelem a magánszemélyek...*, *op. cit.*, p. 48.

³⁹ On this issue, see: V. Lamm, *Some remarks on the specific case of the interpretation of human rights conventions*, [in:] K. Szoboszlai-Kiss, G. Deli (ed.), *Tanulmányok a 70 éves Bihari Mihály tiszteletére*, Győr 2013, p. 300–311. There are 10 human rights treaty monitoring committees today.

⁴⁰ M.K. Haraszti, *A kínzás tilalmának...*, *op. cit.*

⁴¹ L. Kovács, F. Sánta: *A kínzás büntette...*, *op. cit.*, p. 20.

⁴² *Ibidem*.

quell the movements in order to obtain the information they needed. The detainee is (1) being pulled a hood over their head and (2) made to stand against the wall for hours at a time in a constant (3) loud noise, (4) deprived of sleep, (5) food and drink for long periods of time. The judiciary did not classify the “five techniques” listed as torture, but as inhuman and degrading treatment.⁴³ In the Court’s view: torture implies a serious and deliberate cruelty which cannot be established without serious physical and mental injuries.⁴⁴ On the other hand, the Commission has already considered the elements of the same method, taken as a whole, to constitute torture.

At the same time, both the Commission and the ECtHR have specifically stressed in this context that the European Convention absolutely prohibits torture and inhuman or degrading treatment or punishment. It is thus independent of who the victim is, what they have done or what their conduct has been.⁴⁵ And in the case *Giri v Nepal*, based on Article 1 of the UNCAT, the Human Rights Committee body specifically explained that the “critical distinction” between torture and cruel, inhuman or degrading treatment or punishment is the existence of an element of intentionality, purpose.⁴⁶

Other relevant cases and provisions also make it clear that while cruel treatment and torture are always an offence against life and limb, humiliating and degrading treatment, for example, is an offence against human dignity. Thus, the latter must be judged under the human dignity clause (along the lines of the prohibition of objectification). Although the right to human dignity is generally considered to be the protected legal subject, torture attacks this right from several directions. Torture also violates the right to a fair trial, including the presumption of innocence and the right to remain silent.⁴⁷ Furthermore, humiliating treatment, in contrast to the previous two types of conduct, is based on the self-esteem of the person concerned and therefore also takes into account the subjective reaction of the victim.⁴⁸

The concept of “degrading” treatment was dealt with in detail in *Tyrer v United Kingdom*, a case concerning corporal punishment. The case concerned a 15-year-old boy on a British island in the Irish Sea who was sentenced to three strokes of the cane, carried out by a police officer in the police station in the presence of his father and doctor. The Court described this punishment as a manifestation of “in-

⁴³ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*, p. 207.

⁴⁴ M.K. Haraszti, *Az Embertelen és a megalázó bánásmód vagy büntetés definiálásának és értelmezésének irányai*, „Közjogi Szemle” 2019, 4, p. 1–10.

⁴⁵ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*

⁴⁶ M.K. Haraszti, *Az Embertelen és...*, *op. cit.*

⁴⁷ L. Kovács, F. Sánta: *A kínzás büntette...*, *op. cit.*

⁴⁸ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*

stitutionalised violence”, mainly because the boy was treated as an “object of official authority.”⁴⁹ Since one of the main objectives of Article 3 is to protect against attacks on the dignity and physical integrity of the person, this case constituted a violation thereof. Even though we cannot speak of either permanent or serious bodily harm in this case.⁵⁰

III.1.c. The US’s peculiarly narrow definition and the arguments for a “global war on terrorism”

The United States acceded to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 18 April 1988. Under Article 4 of the UNCAT, Section 2340⁵¹ of the United States Code also contains a criminal definition of torture, which of course does not include pain or suffering resulting from lawful punishment. It also lists the penalties that may be imposed (which include the death penalty) and the cases of jurisdiction.⁵²

But despite this, the United States has a particular interpretation of the definition of torture in several respects, and has made various reservations to UNCAT as well.⁵³ As is well known, the August 2002 Department of Justice Memorandum⁵⁴ (issued by Jay Bybee) narrowed the definition of torture even further, limiting it to physical pain, organ failure,⁵⁵ death or impairment of bodily functions. The Memorandum argued that the President – being the Commander-in-Chief of the army as well – has the power to authorise torture and cruel, inhuman or degrading treatment on the grounds of necessity or self-defence.⁵⁶ The Bush administration’s position has argued for a quasi “Scylla vs. Charybdis” position on the permissibility of torture, which involves choosing the lesser evil to prevent the greater. That is, “torture to elicit a confession is unlawful, but torture to obtain information from captured terrorists or insurgents may be exceptionally permissible.”⁵⁷ (See also “en-

⁴⁹ M.K. Haraszti, *Az Embertelen és...*, *op. cit.*, p. 5.

⁵⁰ K. Zakariás, *Az emberi méltósághoz...*, *op. cit.*

⁵¹ 18 U.S. Code § 2340, <https://www.law.cornell.edu/uscode/text/18/2340> [accessed: 25.10.2021].

⁵² 18 U.S. Code § 2340A – Torture, <https://www.law.cornell.edu/uscode/text/18/2340A> [accessed: 25.10.2021].

⁵³ See https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en#13 [accessed: 14.11.2021].

⁵⁴ Memorandum for Alberto R. Gonzales Counsel to the President, <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB127/02.08.01.pdf> [accessed: 12.10.2021].

⁵⁵ See B.R. Roth, *Just Short of Torture*, “Journal of International Criminal Justice” 2008, 6, p. 216.

⁵⁶ Enduring Abuse: Torture And Cruel Treatment By The United States At Home and Abroad - Executive Summary, <https://www.aclu.org/other/enduring-abuse-torture-and-cruel-treatment-united-states-home-and-abroad-executive-summary#A> [accessed: 25.10.2021] hereinafter: Enduring Abuse, USA, Summary.

⁵⁷ L. Kovács, F. Sánta: *A kínzás büntette...*, *op. cit.*, p. 17.

hanced interrogation techniques.”⁵⁸) The “global war on terrorism” was cited as a primary justification for this, which took on a whole new level after the attacks on New York on 11 September 2001. So, the idea of presidential power overriding treaties and congressional laws appeared shortly after the terrorist attacks. From that point on, once someone was labeled a terrorist, they were not entitled to the treatment accorded to ordinary citizens, nor were they restricted to legal means.

- Arguments for reservations: “Ticking time bomb scenario”

The question has a strong theoretical background in German criminal procedure. The legal principles justifying the use of force have been called *Rettungsfolter* (“salvation torture”), which explores the ethical and moral philosophical issues raised in the “ticking time bomb scenario” thought experiment.⁵⁹ Today, most legal scholars and philosophers of law are also sharply critical of this concept and consider the ‘ticking time bomb’ thought experiment to be a dangerously broad metaphor. This issue has been raised specifically in connection with the Landau Commission, which was established in Israel in 1987, and more recently in debates around the inviolability of human dignity.

The essence of the ticking time bomb scenario is that it differs from ‘ordinary’ torture in that the information is obtained in order to save human life.⁶⁰

The term *Feindstrafrecht*, ‘the criminal law of the enemy’, was coined in 1985 in connection with the same dilemma, and was outlined by Günther Jakobs in his study *Bürgerstrafrecht und Feindstrafrecht*. In it he drew on, among other things, the philosophical arguments of the Hobbesian social contract. According to the Hobbesian position outlined in *Leviathan*, the perpetrators of serious crimes such as sedition and treason should be punished not as citizens but as enemies.⁶¹ However, this statement, which is reminiscent of Utilitarian philosophy, the calculus of achieving the greater good, is not only not to be considered in the case of tragic collision in relation to the right to human dignity and the right to life, it is also not permissible in relation to the absolute prohibition of torture.

The former is also the case in the 2006 judgement of the German Federal Constitutional Court. In that judgment, it was held that – for example – granting a licence to shoot down a passenger plane hijacked by terrorists is a clear viola-

⁵⁸ See The Report of The Constitution Project’s Task Force on Detainee Treatment, 2013, <http://detainee-taskforce.org/pdf/Full-Report.pdf> [accessed: 14.11.2021].

⁵⁹ Practical issues in this respect can also be seen in the context of the Landau Commission set up in 1987. See for example M.K. Haraszi, *A terrorista méltósága. A kínvallatás alapjogi dilemmái*, “Közjogi Szemle” 2012, 2.

⁶⁰ K. Zakariás, *Az emberi méltósághoz...*, *op. cit.*

⁶¹ G. Jacobs, *Bürgerstrafrecht und Feindstrafrecht*, “Ritsumeikan Law Review” 2004, 21, p. 93–106.

tion of human dignity. This would make the civilians on board, the passengers as well as the crew mere objects of the rescue operation in order to save others. Therefore, so-called salvation torture (obtaining information to save human life) is not allowed.⁶²

Indeed, in *Gäfgen v Germany*,⁶³ the ECtHR Grand Chamber also faced this difficult question. In particular: can police officers threaten to torture a suspect if they believe it will save the life of an innocent child? Despite the police officers' motives, the Court found that they could not.⁶⁴ In the case, under Article 3 ECHR, the Court reiterated that "torture and inhuman or degrading treatment may not be used even in circumstances where the life of the individual is in danger."⁶⁵

Returning to US interpretations, in January 2005, the then acting White House Counsel and Attorney General referred to the US reservation to Article 16 in favour of limiting the prohibition of cruel, inhuman or degrading treatment to US territory. This restricts the prohibition of cruel, inhuman or degrading treatment to acts committed within the territory of the United States.⁶⁶ However, when the CIA's secret torture programme (in Guantánamo) was made public, George W. Bush eventually condemned the Justice Department's opinion authorising a form of torture and it was eventually withdrawn. Following this, the President signed the law passed by Congress on 30 December 2005.⁶⁷ This, the Detainee Treatment Act (hereinafter: DTA), prohibits "cruel, inhuman or degrading treatment or punishment" of detainees of the United States government, including Guantánamo detainees. It thus sought to remove ambiguities in the extraterritorial application of the Convention against Torture, declaring at the same time that all persons acting on behalf of the United States government are categorically prohibited from being subjected to any form of torture, regardless of where they are detained, i.e. irrespective of them being on US soil or not.⁶⁸ However, the DTA's narrow definition still did not clarify or provide guidance on the term "cruel, inhuman or degrading treatment or punishment". As a result, the selective interpretation of the Convention by the United States effectively continued to justify the unconstitutional interrogation techniques that led to widespread torture and ill-treatment of detainees

⁶² K. Zakariás, *Az emberi méltósághoz...*, *op. cit.*

⁶³ *Gäfgen v. Germany* [GC] – 22978/05. See also: Rettungsfolter (Ticking time bomb scenario): Report on the *Gaefgen v. Germany Case* Pending Before the European Court on Human Rights.

⁶⁴ *Gäfgen v. Germany*: Threat of Torture To Save A Life?, <https://strasbourgobservers.com/2010/07/06/389> [accessed: 25.10.2021].

⁶⁵ *Gäfgen v. Germany* [GC] – 22978/05.

⁶⁶ Enduring Abuse, USA, Summary.

⁶⁷ In the United States, Section 2340A of Title 18, United States Code currently prohibits torture by a public official by force of law against a person under the official's supervision or control. See <https://www.justice.gov/archives/jm/criminal-resource-manual-20-torture-18-usc-2340a>.

⁶⁸ Enduring Abuse, USA, Summary.

not only in Guantánamo, but also in Iraq and Afghanistan. Indeed, the anti-torture provisions of the DTA were changed by the Graham-Levin amendment. As part of this, it was now permissible for the DOD to use evidence obtained through the torture of Guantánamo detainees. In addition, it extended the prohibition of habeas corpus to returned prisoners, which no longer left any legal remedy if they were tortured.⁶⁹

In 2006, in a series of Legal Memoranda, senior government lawyers, led by then acting White House Counsel Alberto Gonzales, developed a framework. This demonstrated that the government had circumvented the international legal prohibition of torture and ill-treatment.⁷⁰ It is true that the US 6th CAT Report 2021 already states that the Biden administration is committed to closing the Guantánamo Bay detention facility and to respecting the rule of law, including the US Constitution, federal law, international treaty obligations and the Convention Against Torture. However, the report also confirmed that it would continue to withhold information on extradition.⁷¹

The latter is also problematic because the prohibition of torture is closely linked to the prohibition of refoulement. Article 3 of UNCAT states that no State Party is mandated to expel, return or extradite a person to a State where there is a risk that they would be tortured.⁷² In the United States, eligibility for asylum is established on the basis of proof that the applicant has suffered “persecution” or has a “well-founded fear” that he or she will suffer “persecution.” Thus, even if a person is not eligible for asylum, the State cannot deport them to a country where there is a real risk of torture. But “persecution” itself can include activities that do not fall within the narrow definition of torture in the US.⁷³ Thus, the United States interprets the phrase “if there are substantial grounds for believing that he would be in danger of being subjected to torture” used in Article 3 of the Convention to mean “if it is more likely than not that he would be subjected to torture.”⁷⁴

- Further practical dilemmas arising from the reservations

Hence, in addition to the theoretical problem of moral philosophy mentioned above, we also have two of the most important practical dilemmas concerning

⁶⁹ United States’ Sixth Periodic CAT Report, 2021.

⁷⁰ Enduring Abuse, USA, Summary.

⁷¹ United States’ Sixth Periodic CAT Report, 2021.

⁷² Article 3, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> [accessed: 25.10.2021].

⁷³ <https://ijrcenter.org/thematic-research-guides/torture/> [accessed: 25.10.2021].

⁷⁴ U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

the norms of *ius cogens*. On the one hand, (1) if we take the specific international treaty in question, we may ask the prosaic question: why would a state contract out of a given international treaty if it could violate it in practice? And second, (2) that if it contracts out in the form of an interpretative declaration, as the United States has, an international breach is even more difficult to establish.⁷⁵

The serious problem with this is that if a state circumvents the prohibition in this way, not only does it tarnish the administration of justice in that state, but it might also compromise the Rule of Law. This argument is also being made by many in relation to the detainees at Guantanamo Bay – as Vanda Lamm has emphasised – and the fact that this effectively gives them the power to disregard human rights in the name of security.⁷⁶ Because, despite the fact that peace-keeping is an important mission (for the sake of example), this does not exempt them from being held accountable for the most serious violations. It is precisely for this reason that Security Council Resolution 1422 of 12 July 2002, adopted under pressure from the United States, is difficult to accept. In this, the Council requested the suspension of any investigation by the ICC against a peacekeeper who is a citizen of a State not party to the ICC Statute. It is namely known that, although Clinton signed the Rome Statute, the Bush administration revoked it.⁷⁷

III.2.a. Monitoring infringements

Closely related to the above issues (including the dilemmas of the US reservations) is a paradoxical situation. If a violation of the prohibition of torture is committed with the consent of the State or by an official acting on its behalf, it will in fact be the duty of the very person who has consented in some way to the violation to prevent or eradicate it. This is why it is necessary to set up panels of independent experts, so that no State or State official is exempt from prosecution. Two methods are currently used to monitor and prevent violations. One (1) is a so-called “reporting system” and the other (2) is a “system of visitation”.

The first is used by the UN Committee against Torture (Convention Against Torture) (hereafter: CAT) and is composed of independent experts established by the conventions that form the basis of the UN human rights system. The Committee also has the power to investigate inter-state complaints (Article 21) and to receive individual complaints from victims (Article 22).⁷⁸

⁷⁵ Dr. G. Kardos drew my attention to the dilemmas mentioned.

⁷⁶ V. Lamm, *Adalékok a Rule of Law érvényesüléséről a nemzetközi jogban*, “Tanulmányok” 2009, 1.évf. 2.sz., p. 3–32.

⁷⁷ *Ibidem*.

⁷⁸ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*, p. 205: “In both cases, it is necessary for the State Party to declare its recognition of the competence of the CAT.”

The other method, the system of visits to places of detention is based on the Optional Protocol to the Convention against Torture (hereinafter OPCAT), which is the Optional Protocol to the UN Convention that entered into force on 22 June 2006. OPCAT, which operates in parallel with the CAT reporting mechanism, provides for independent bodies to carry out ongoing inspections of detention facilities and to maintain personal contact with detention staff. It focuses more on prevention than CAT. The International Red Cross operates such a system.

Thus, while the CAT (under Article 19) examines reports submitted by States Parties on the fulfilment of their obligations under the Convention,⁷⁹ within the OPCAT, possible violations may be raised in several fora. Firstly, there is a so-called Prevention Subcommittee (composed of 10 independent experts). On the other hand, it also provides for a national preventive mechanism to prevent torture for acceding States.⁸⁰ Both the Subcommittee and the national bodies make unannounced visits to places of detention and can conduct private interviews with detainees.

There is also a specific European regional system of visits to protect against torture. This is the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which has as many members as there are contracting parties. (Only Council of Europe member states may join).⁸¹ A similar regional system is in operation in the Americas, the Inter-American Convention to Prevent and Punish Torture, mentioned above, which is also based on the same visiting mechanism as the OPCAT.

III.2.b. Dilemmas arising from the cacophony of infringement control

As can be seen, there is no uniform protocol for the control of infringements, so a further problem arises regarding the cacophony between systems of reporting and prevention. While in Europe there is a relatively uniform and cooperative approach to monitoring violations of the prohibition of torture, in the United States the OPCAT standards are already considered to be "too intrusive". It was precisely on this basis that the Bush administration opposed the Protocol in 2002,⁸² and has not acceded to it since. Moreover, they argued, OPCAT would also violate the federal rights of individual US states.⁸³ This latter argument is implausible because

⁷⁹ *Ibidem.*

⁸⁰ *Ibidem.*

⁸¹ B. Kiss, *Az alapjogok korlátozhatósága...*, *op. cit.*, p. 208, and M.K. Haraszti, *A nemzeti megelőző...*, *op. cit.*, p. 4.

⁸² Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx> [accessed: 25.10.2021].

⁸³ United States' Sixth Periodic CAT Report, 2021.

OPCAT merely established procedural mechanisms in the Convention against Torture to enable States Parties to better comply with their existing obligations, but would not impose any new obligations on them.⁸⁴ It does not contain any provision that would impose any form of organisation on the national preventive mechanism. The requirements only address issues of functional independence, adequate staff expertise, gender balance and adequate representation of ethnic minorities.⁸⁵

Thus, it is still argued today (see CAT 6 report 2021) that: the US legal system already provides many opportunities for detainees to complain about abuse. They therefore stressed that the United States will continue to devote its resources exclusively to addressing such issues primarily through its own internal procedures and to dealing with violations of the Convention on the basis of the operation of its legal system.

It should be borne in mind, however, that this attitude is rooted mainly in the fact that the United States has always been much more individualistic than Europe in its international protection of human rights. That is why all the relevant documents were not signed until much later. Since their legal system is based on the right to liberty, individual freedom is an integral part of their self-image. They therefore assume that they already offer their citizens sufficient freedoms.⁸⁶

On the African continent, two major human rights systems include the prohibition of torture, the African Charter on Human and Peoples' Rights (Article 5) and the Arab Charter on Human Rights (Article 8). Of these, only the African Charter contains two complaints mechanisms. However, it cannot be denied that cultural differences play a significant role in the enforcement of human rights and the prohibition of torture,⁸⁷ which would require further investigation beyond the scope of this paper and will not be discussed here.

Conclusion

In short, we have gained an insight into the problem that, although the prohibition of torture is a *ius cogens* norm and an international crime, and even declared a crime by UNCAT States Parties at national level, there may be room for different inter-

⁸⁴ United States Ratification of International Human Rights Treaties, https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#_Overview_1 [accessed: 25.10.2021].

⁸⁵ *Ibidem*.

⁸⁶ G. Kardos, *Diplomácia és emberi jogok*, "Külügyi Szemle" 2002, 3, p. 5-6.

⁸⁷ See I. Takács, *Az emberi jogok lehetnek-e univerzálisak? A kulturális relativizmus és az univerzalizmus konfliktusa az emberi jogok filozófiai és gyakorlati megközelítéseiben*, "Jogelméleti Szemle" 2021, 3, p. 84–108.

pretations of this absolute right. And with regard to the US reservations, as Human Rights Watch Executive Director Kenneth Roth has put it, several serious dilemmas may arise. One of them is that once the norm against torture has been violated, the risk of torture is not only to ‘terrorist suspects’ but in fact to anyone who is detained. This in turn undermines other human rights. After all, if it is acceptable to violate the *ius cogens* prohibition of torture, how long before it is acceptable to violate the fundamental prohibition of attacks against civilians?⁸⁸ Alternatively, if the torturer can justify his conduct by reference to a higher good (be it “holy war” or even peacekeeping, salvation torture) we could easily fall back into the problem of strong cultural relativism, where the end itself can justify any means, but which goes far beyond the boundaries of civilised society. As the great French Enlightenment philosopher Condorcet put it: „[i]t is a grave error to believe (...) that the common good can ever demand injustice. This has been the excuse for tyranny everywhere, the pretext for the establishment of authoritarian regimes”.⁸⁹

The second is that, since an international legal norm can become an international *ius cogens* without the express consent of a State, or part of the international *erga omnes* (obligations towards the whole international community), no circumstances can be invoked in the case of a violation of human rights in the spirit of universality (as universalised in the Declaration⁹⁰). (Neither different cultural customs, nor the national legal sanction clause if it is contrary to international *ius cogens* law.) Indeed, the ‘legal sanction’ of any state must be legitimate not only under its own national law, but also under international law. In fact, it is international legality that should be kept in mind and interpreted in the first place, because only in this way can serious injustices based on (any) relativistic interpretations be avoided.

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⁸⁸ K. Roth, *Darfur and Abu Ghraib*, <https://www.hrw.org/legacy/wr2k5/darfurandabughraib/darfurandabughraib.pdf> [accessed: 25.10.2021].

⁸⁹ Opinion sur les émigrants. Condorcet, 1804, XVII. 29, quoted in M. Ludassy, *A forradalom szó kétfajta fogalmáról*, “Magyar Tudomány” 2008, 08, p. 910.

⁹⁰ G. Kardos, *A nemzetközi jog diszkrét bája. Ötvenéves az Emberi Jogok Egyetemes Nyilatkozata*, “Fundamentum” 1998, 4. szám, p. 5–9.

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