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THE INTERPRETATION OF THE PROHIBITION OF TORTURE IN INTERBNATIONAL LAW AND THE CONSTITUTIONAL GUARANTEES THEREOF

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THESES

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I. Summary of research

The idea of human rights dates back to the period of Enlightenment and the French Revolution. The experience of the Second World War and Fascism exerted a cathartic effect on the international community, which resulted in the setting up and development of a global system for the protection of human rights. At the conference held in San Francisco in 1945, the representatives of the participating 51 countries as founders, expressing their commitment to put an end to the "scourge of the war", drafted the Charter of the United Nations, which was signed by the delegates on 26 June 1945. According to the Charter, the UN "promotes and encourages respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."

The General Assembly of the United Nations adopted the Universal Declaration of Human Rights (hereinafter referred to as: the "Declaration") on 10 December 1948, by which the member states obliged themselves to ensure that human rights and fundamental freedoms are respected universally and effectively, in cooperation with the United Nations Organisation. According to Article 5 of the document, "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 8 of the Declaration stipulates that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

The importance of national level fundamental rights protection against torture is well illustrated by the fact that while a mere 39 percent of the constitutions made provisions on the prohibition of torture in 1946 this rate had reached 84 percent by 2015. The prohibition of torture is set out in many global and regional international conventions on human rights signed by Hungary. The International Covenant on Civil and Political Rights (hereinafter referred to as: "ICCPR") was adopted on 23 March 1976, while the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as: "UNCAT")[1] was signed by Hungary on 26 June 1987, i.e. these were incorporated into the Hungarian legal system even before the change of the political and economic regimes in 1989. The European Convention on Human Rights (hereinafter referred to as: "ECHR") took

[1] International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment promulgated by decree law 3 of 1988

effect in Hungary on 15 April 1993, while the European Convention for the Prevention of Torture was introduced in Hungary on 1 March 1995, i.e. already after the Berlin Wall had come down.

The prohibition of torture became a constitutional fundamental right in Hungary as an achievement of the change of regime, essentially by incorporating the words of Article 7 of ICCPR into our law. Pursuant to Paragraph (1), Article III of the Fundamental Law of Hungary (hereinafter referred to as: "Fundamental Law") adopted in the spring of 2011, "no one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude". One of the key guarantees of the prohibition is ensured by Paragraph (3), Article XIV of the Fundamental Law, which stipulates that "no one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment".

Unlike in the documents created under the aegis of the UN, or the Constitution, the word *"cruel"* is not included in the text of Article III of the Fundamental Law, from which it cannot be concluded that the Fundamental Law does not provide protection against cruel treatment or punishments. What is probable is that, from a linguistic perspective, inhuman or degrading treatment or punishment also includes cruelty.

Pursuant to Paragraphs (2) and (3) of Article Q of the Fundamental Law, "in order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law, and Hungary shall accept the generally recognised rules of international law." As regards those conventions which had become part of the Hungarian legal system before the adoption of the Fundamental Law, it was declared that the taking of effect of the Fundamental Law does not affect the "*effect of the international legal obligations that had been undertaken earlier*".[2]

In addition to the compliance of the laws with the Fundamental Law, the examination of whether these conflict with any international conventions is the responsibility of the Constitutional Court, in which "the review of the same norm may lead to a different result depending on whether international law is taken into account, or is disregarded".[3]

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[2] Fundamental Law of Hungary, Closing and Miscellaneous Provisions, Section 8 (enacted by Article 20 of the Fourth Amendment to the Fundamental Law of Hungary. Effective as of 1 April 2013)
[3] Constitutional Court resolution No. 53/1993. (X. 13.), Section II.2, ABH 1993, p. 323

In its resolution No. 61/2011. (VII. 13.) AB, the Constitutional Court pointed out, as a principle, that in the case of certain fundamental rights, the Constitution defines their essential content in the same way as one of the international conventions (such as ICCPR and ECHR). According to the judicial body, in such cases, the level of the protection of fundamental rights provided by the Constitution cannot be lower than the level of rights protection provided internationally in any case whatsoever [typically by the European Court of Human Rights. "Arising from the principle of *pacta sunt servanda* [Paragraph (1), Article 7 of the Constitution, Paragraphs (2)-(3), Article Q of the Fundamental Law], the Constitutional Court shall follow the legal practices exercised in Strasbourg, and ensure the level of fundamental rights protection defined therein even if this would not necessarily follow from its own preventive "precedent" type resolutions."

The Constitutional Court, quoting the almost identical texts of the ECHR and Article III of the Fundamental Law, as well as its own practices, i.e. that it accepts the level of rights protection laid down in the international conventions and the related judicial practices as the minimum standard of the enforcement of fundamental rights, deemed the legal practices of the European Court of Human Rights interpreting Article 3 of the ECHR as ones that are "*emphatically governing*"[4], i.e. it applied this as a constitutional standard when it examined the compliance of Section 137(1) of the decree of the Ministry of Justice No. 6/1996. (VII. 12.) IM on the rules of execution of incarceration and pre-trial detention with the Fundamental Law. In its resolution No. 6/2014. (II. 26.) AB, the judicial body pointed out that "what can be concluded from Paragraph (2) of Article Q of the Fundamental Law, among others, is that ensuring the harmony of international law and Hungarian law is not only the legislator's responsibility but also, it is the obligation of all the state organs when it comes to interpreting the laws. This means that the law to be applied is to be interpreted by taking into account, and in compliance with international law."

II. Goal of research

Despite the general and absolute prohibition, neither the Fundamental Law nor the key human rights instruments that are part of the Hungarian legal system, with the exception

[4] Constitutional Court resolution No. 32/2014. (XI. 3.), reasons adduced [50]

of UNCAT, provide guidance as to what should be regarded as torture. The definition of the concept of cruel, inhuman or degrading treatment or punishment (hereinafter referred to as: "ill-treatment") is not provided by either the Fundamental Law, or the human rights conventions.

The primary goal of my study is to define the conceptual elements of torture and ill- treatment, as well as to explore and present the criteria distinguishing between the individual types of prohibited behaviours, furthermore, to review the state's obligations in the area of fundamental rights protection against torture and ill-treatment. The author proposes what further legal regulations should be considered in the Hungarian law in order to reinforce this prohibition as a fundamental right. It is another purpose of my paper to ensure that, besides the rich case law of the bodies controlling adherence to the international human rights instruments, as well as the legal literature available in foreign languages, the Hungarian researchers, lecturers, legislators and legal practitioners should also have a set of concepts and case law at their disposal in Hungarian.

III. Method of research

The basic method of my research was theoretical and explorative - comparative. The paper aims to present the conceptual elements of torture and ill-treatment, as well as the criteria of distinguishing between them, by explaining some cases of fundamental importance, by primarily relying on the legal interpretation activities performed by the Human Rights Council[5], the Committee Against Torture, the European Court of Human Rights for the enforcement of the prohibition of torture and ill-treatment.

Besides the Council of Europe, the Organisation of American States and the Organisation of African Unity also adopted regional human rights conventions. The American system of human rights protection rests on the Organisation of American States (hereinafter referred to as: "OAS") that was established in 1948. The American Convention on Human Rights (hereinafter referred to as: "ACHR"), which was signed in San José in 1969, listed as many as 20 fundamental rights, and it took effect on 18 July 1978. The enforcement of the rights ensured by ACHR is controlled by the 7-member Inter-American Commission on Human Rights (hereinafter referred to as: "Inter-American Commission") operating as a quasi-judicial organ, as well as the 7-

[5] Article 28 of ICCPR

member Inter-American Court of Human Rights which has a genuine judicial competence.

There are two large human rights systems operating on the African continent. One of them is the African Charter on Human and People's Rights (hereinafter referred to as: "African Charter") and the related two complaints mechanisms, while the other one is the Arab Charter on Human Rights adopted by the League of Arab States in 2004. The League of Arab States adopted the Statute of the Arab Court of Human Rights in September 2014 but the judicial body does not yet function. With regard to the deficiency of the human rights system of the Arab states, i.e. that it does not contain a mechanism that would assess the complaints concerning the application of torture and ill-treatment, the paper only aims to examine the system of the African Charter. Hungary cannot become part of the regional international conventions that serve as the basis for the inter-American or African systems of human rights but with regard to the interactions between the legal practices of the bodies controlling the state obligations arising from the above-mentioned documents, furthermore, the foreign citizens who arrive from continents different from Europe seeking international protection, the paper also touches upon the key directions of the interpretation of the prohibition of torture and ill-treatment as explained in these documents.

Besides the presentation of the legal practices of the bodies controlling the execution of the human rights conventions, the study also gives an overview of the most important foreign monographs and papers on the interpretation of the prohibitions, as well as the respective Hungarian legal literature.

IV. Structural units of the treatise and its key conclusions

The human rights ensured by the international conventions should be enforced on the national level, within the framework of the constitutional system of the state in question. The *first* chapter of the paper reviews the major international human rights instruments that contain the prohibition of torture and ill-treatment, along with the international bodies controlling the observance of such instruments. The documents issued by the international bodies controlling the observance of human rights conventions provide guidance on the interpretation of fundamental rights, including the prohibition of torture and ill-treatment, for the definition and fulfilment of the state's obligation to protect fundamental rights. By now, as a result of the activities performed by international

bodies, there is very rich case law at our disposal on the subjects of the definition of the conceptual elements of torture and ill-treatment and the respective perpetrators, the criteria for qualifying and distinguishing the behaviours that are prohibited, as well as the state's obligation to protect fundamental rights.

The *second and third* chapters give an overview of the conceptual elements of torture and ill-treatment by quoting the case law of the bodies controlling the observance of the international conventions and sometimes, that of the special representatives of the UN. In the case of the human rights conventions that do not contain the definition of torture, the definition of the conceptual elements of the prohibited behaviours is the responsibility of the national and international bodies controlling the application of the conventions. The *second* chapter explains that despite the doubtless difficulties of defining the concepts, it is the indisputable advantage of this situation that the conceptual elements of torture can be defined in response to the changes of the situations to be assessed, by including new ones if necessary. Contrary to this, it is a common feature of the definitions of torture used by UNCAT and the Inter-American Convention to Prevent and Punish Torture (hereinafter referred to as: "IACPPT") that took effect in 1987 that both of them define the material elements, the objectives and the offenders. Besides the similarities, there are numerous differences between the two definitions. IACPPT 1) does not require that the pain or suffering intentionally inflicted on the victim be *"sharp"*; 2) it contains the expression *"for any other purpose"* rather than *"for such purposes as"*; 3) its definition of torture also extends to those methods whose purpose is to destroy the personality of the victim, to reduce his or her physical or mental capacities, irrespective of whether the action in question causes any pain or suffering to him or her.

Comparing the definitions of torture provided by UNCAT and IACPPT, as well as the ones applied by the bodies supervising the execution of the international human rights instruments, which are more or less different from each other, the following elements can be recognised everywhere: a) the action, b) severe pain or suffering, c) a specific objective, d) the intention, and e) the perpetrator. In summary, it seems that torture is an intentional action or negligence that causes severe pain, which is committed by a person performing a public task, or one who acts in his official capacity, or with the latter's consent, someone else, for the purpose of obtaining a statement or information, for intimidation, pressure, discrimination, or as a punishment.

The *third* chapter that deals with the individual forms of ill-treatment points out that the prohibition is regulated by the global or regional level human rights instruments in almost the same way. Since the definition of cruel, inhuman or degrading treatment or punishment is not contained by any of the human rights instruments, the definition and interpretation of the conceptual elements of the prohibition were left to the supervisory bodies that examine the execution of the conventions through individual complaints, certain states, or specific situations.

The Human Rights Committee, the Committee Against Torture, the Inter-American Commission, the Inter-American Court of Human Rights and the African Commission, with reference to the absolute and general prohibition of torture, as well as cruel, inhuman or degrading treatment or punishment, do not deem it necessary to define the individual forms of ill-treatment. In their position, the distinction between the prohibitions can be done depending on the nature, goal and severity of the applied treatment. This is the approach that may explain that the sources of legal literature sometimes mention the prohibition of *torture, cruel, inhuman or degrading treatment or punishment* in summary, and thus, in a somewhat simplified form, as the prohibition of torture. However, the European Court of Human Rights strives to distinguish between the concepts of torture, cruel, inhuman or degrading treatment or punishment. According to the latter, in case the suspicion of the violation of the prohibition of ill-treatment arises, what should be examined first is whether the extent of the physical/mental pain or suffering caused by the behaviour demonstrated against the victim has reached the minimum level necessary for applying the provisions set out in Article 3 of ECHR, then it should be assessed whether it belongs to the categories of the concept of degrading, inhuman treatment or punishment, or torture. In the interpretation of the European Court of Human Rights, the pain or suffering caused by the behaviour under the concept of *inhuman* treatment or punishment does not reach the level that is required for establishing torture, it is not necessarily intentional and the goal mentioned in the case of torture is missing here. The behaviour causing the mildest form of suffering, which is *degrading* treatment or punishment, causes emotional torment manifested in the degrading or humiliation of the victim in his own eyes/in the eyes of others. The pain or suffering caused by an action defined as degrading treatment or punishment should also reach a minimum level in order for it to be under the effect of Article 3 of ECHR. The severity threshold is relative, as it depends on the circumstances of the case in question, including the duration of the treatment, its

physical and mental impacts, as well as the sex, age and health condition of the victim. Despite the active interpretation activity, the controlling bodies still could not find common ground regarding the concept of cruel, inhuman or degrading treatment or punishment.

The *fourth* chapter presents and analyses the sanctions clause in the official English, Arabic, Chinese, Spanish, French and Russian text of the second sentence of Section 1, Article 1 of UNCAT 1 but missing from the Hungarian translation promulgated by the 3/1988 decree law. Pursuant to this provision of UNCAT, the pain or suffering that is necessarily or incidentally involved by the statutory sanctions does not qualify as torture. As UNCAT does not mention at all whether statutory sanctions should be interpreted on the basis of the requirements set out by national or international law, or perhaps both, the concept and scope of the application of the clause are still no clarified. Except for a few legal scholars, both legal literature and the international bodies controlling the execution of human rights instruments, including the Committee Against Torture, agree that in justifying the lawfulness of an action, it is not sufficient to refer to the national law alone. It may happen that an action that is lawful in accordance with the national law runs counter to the requirements of international law. The Sharia law is a good example for this, which punishes the persons who commit certain criminal actions by capital punishment. It is not possible to quote the statutory sanctions clause in protection of a sanction that is lawful in the national law, as it is stipulated by the Quran but incompatible with international law.

By taking the prohibition set out in Article 3 of ECHR into account, the European Court of Human Rights strives to distinguish between the actions that are involved by the statutory sanctions and those that do not belong to this scope of actions. A similar position is taken by the European Court of Human Rights too. The purpose of these endeavours is to make a distinction between the treatments and punishments that are the reasonable and unavoidable elements of the criminal law system, and those actions that unjustifiably violate the physical and mental integrity of the individual. The point of the consistent legal practice of these bodies is that not even the sentences that can be imposed on the persons who commit the gravest crimes may run counter to the prohibition of torture or ill-treatment.

The *fifth* chapter deals with the questions of protection against the acts of torture committed by private individuals. The international bodies controlling the execution of global and regional human rights instruments agree that the states have positive

obligations to protect the persons under their jurisdictions from the violation of their fundamental rights, to punish those who commit these violations irrespective of whether they acted in their official or individual capacity, and to make adequate amends for the victims. There is also agreement on that, with regard to the traditional interpretation of torture, the persons committing violent acts qualifying as ill-treatment must be officials or persons who perform public tasks. Since the officials, or the persons who perform public tasks are not directly affected by the commitment of acts that belong to the category of ill-treatment in private relationships, the connection between the state and the private individual perpetrator is established by the circumstance that an official was aware, or must have been aware of the act but he or she did nothing to prevent or hinder it.

Since, according to international law, the state, as a general rule, is not liable for the behaviour demonstrated by private individuals, the unlawful behaviour of private individuals can only be attributed to the state if there is a relationship between the state and the act in question. In the legal practice of the European Court of Human Rights, the connection between the state and the private individual perpetrator is established if, while the authority was aware of, or must have been aware of the unlawful behaviour or the danger thereof, it did nothing to efficiently prevent it. It is a standard of state intervention whether it was able to stop the violation. In the application of ACHR, the connection to the state is the missed “due care”, which serves as the standard for the prevention of violence or appropriate reaction. The African Commission also applies a similar approach when it requires the states to demonstrate due care with regard to the prevention of violations, or providing the legal remedies accessible to the victims. According to the peculiar position taken by the African Commission, the violation of the state obligation of protection against the violent actions committed by private individuals in certain individual cases, or the missed punishment of the perpetrators in itself does not reach the level of gravity required for international action. The protocol on the rights of African women broadens the state’s obligations of the protection of women against the violent behaviour of private individuals as compared to the provisions set out in ACHR.

The *sixth* chapter of my paper gives an overview of what measures the state is obliged to take to ensure the enforcement of the general and unconditional prohibition of torture and ill-treatment, besides prohibiting the application of methods that hurt the physical and mental identity of individuals. This topic is essentially discussed on the

basis of UNCAT but in order to clarify the content of the individual obligations more accurately, it sometimes also touches upon the legal practices of the international bodies that control the application of the regional human rights instruments.

The state has both preventive and repressive obligations in the prevention of torture and ill-treatment. One of the characteristic features of this dual obligation is that prevention includes repression, as retaliation is inevitably of a preventive effect.[6] On the other hand, missing or not appropriately performing prevention should involve calling the persons committing torture to account, their punishment, in other words, retaliation.

The state is primarily obliged to prevent the situations in the scope of torture and ill-treatment by legislative, administrative, judicial and other efficient measures. It is a characteristic feature of prevention that the goal of controlling and identifying situations that carry the risk of the violation of fundamental rights is to prevent the occurrence of such violation. In order to prevent instances of torture, the state has to control, on a regular basis, the observance of the requirements, instructions, methods and practices of interrogation, as well as the provisions regarding the detention and treatment of detainees. As long as the laws accepted by, or the measures ordered by the state cannot appropriately prevent the behaviours that belong to the category of torture and ill-treatment, these should be reviewed and more efficient measures should be adopted. It is one of the most essential preconditions of efficient torture prevention that the state should eliminate the motives for violating the prohibition. Article 15 of UNCAT stipulates that a statement that is proven to have been obtained through torture cannot be used as evidence in any procedure whatsoever, "except as evidence of torture in proceedings against the person accused thereof to prove that the statement was made".

The systematic training of those working in the relevant positions is a key element of prevention, which is the state's obligation stemming from international law arising from Article 10 of UNCAT. The training should serve the extension of the professional knowledge of the staff, simultaneously to presenting the relevant human rights requirements. The mandatory training programme regularly held for the health care staff, the lawyers and the personnel of the law enforcement authorities should contain the presentation of the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Istanbul Protocol).[7]

[6] See Section 79 of Act C of 2012 on the Hungarian Criminal Code.
[7] Section 18, CAT, General comment 3

Pursuant to Paragraph (3), Article XIV of the Fundamental Law of Hungary, “no one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment.” Arising from the nature of refoulement that the statement on the violation of the absolute prohibition of torture or ill-treatment does not refer to a past event but to a future expulsion, deportation or extradition, the authorities of the state of residence are obliged to assess and consider the objective and subjective circumstances alike, when the risks are evaluated.

As part of its repressive obligations, the state should ensure that in its national law, all torture cases should qualify as crimes. The same refers to the attempt at torment and all other actions which qualify as participation or complicity in torture. The state should adopt such a criminal law provision which defines and criminalises torture in compliance with the international requirements, furthermore, punishes the act in proportion to its gravity. In the scope of its repressive obligations, on the one hand, the state is obliged to ensure the right to lodge a complaint at the competent authorities to all who claim to have been subjected to torture in the area of the state’s jurisdiction, on the other hand, the state is obliged, ex officio, to investigate into all such cases, without delay and objectively, where it can be “reasonably assumed” that a case of torture has taken place in the area of the state’s jurisdiction. When the investigation into the complaint begins, the competent authority should take measures in order to avoid that the persons concerned are exposed to ill-treatment or intimidation due to the complaint or their testimony. The pardon given to the persons who commit acts of torture, the possibility of any kind of justification of such acts, as well as that of an excuse not to call the perpetrator to account are not compatible with the absolute prohibition of torture, this is why any behaviour that belongs to the category of torture cannot be subject to a statute of limitation. The victim of the act of torture should be ensured the right to be indemnified and to be given appropriate and reasonable compensation, including the financial resources necessary for the fullest possible rehabilitation. If the victim dies as a result of the act of torture, his or her legal successors will be eligible to indemnification.

V. Brief summary of the conclusions drawn by the treatise and the usability of the findings of the research

The prohibition of torture and ill-treatment is a fundamental value of the international system of the protection of human rights and the Hungarian constitutional system alike. The law ensures a very high level of abstract protection against torture and ill-treatment both on the international and national levels, the practical implementation of which is hindered by several factors. The definition of the conceptual elements of torture and ill-treatment may cause difficulties, just like that of the method of distinguishing between the individual prohibited behaviours, as well as the criminal law definition of torture, along with the ranges of punishment that are proportionate to the gravity of the act.

Pursuant to Paragraph (1), Article 4 of UNCAT, "the state shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture." In harmony with this, it was also confirmed by the Human Rights Committee that the state "should adopt criminal legislation that defines and criminalises torture in accordance with international standards and provides penalties commensurate with the gravity of the act."8

The ECHR contains no such provisions which would oblige the states to criminalise torture in their respective national laws, so this obligation arises from the joint interpretation of Article 3 of ECHR and the other international human rights norms in the practice of the European Court of Human Rights.[9] The European Court of Human Rights explained the positive obligation of the state arising from the fundamental rights prohibition of torture in the Cestaro case, in the context of which it is obliged to adopt and apply efficient criminal law provisions. In the opinion of the European Court of Human Rights, the state is held liable for the behaviour of an official that belongs to the category of torture or ill-treatment even if the superiors of the perpetrator claim not to have been aware of such act.[10] As long as the European Court of Human Rights establishes, in one of its judgements, that the state in question has violated its obligation set out in the ECHR, or one of its related protocols, such violation

[8] "[T]he State Party should (a) Adopt criminal legislation that defines and criminalizes torture in accordance with international standards and provides penalties commensurate with the gravity of the act;" HRC Concluding Observations on the fourth periodic report of the Sudan, 19 August 2014, CCPR/C/SDN/CO/4, Section 15

[9] *Cestaro v. Italy*, Paragraph.113-121 and 244

[10] *Ireland v. United Kingdom*, Paragraph 159; *Paduret v. Moldova*, Paragraph 76

of the law shall be terminated pursuant to Article 46 of the ECHR, and its consequences shall be remedied in a way that the situation that existed before the violation was restored to the highest extent possible. When the national law does not allow, or only partially allows reparation, the provisions set out in Article 41 of the ECHR authorise the European Court of Human Rights to afford "*just satisfaction"* to the injured party.

One of the essential conditions of efficient torture prevention is that the state should eliminate the motives for the violation of the prohibition. Pursuant to Article 15 of UNCAT, a statement that is proven to have been obtained through torture cannot be used as evidence in any procedure whatsoever, "except as evidence of torture in proceedings against the person accused thereof to prove that the statement was made".

According to the position taken by the European Court of Human Rights, an item of incriminating evidence which "was obtained by the authorities as a result of a violent action, brutality or an action qualifying as torture, should never be used as the evidence for the culpability of the victim, irrespective of the evidentiary power thereof."[11] The state should ensure that the affected person should dispute the lawfulness of such an item of evidence of which it can be reasonably assumed that was obtained through torture, in any procedure whatsoever.[12]

One of the key goals of UNCAT is to ensure that the persons who commit torture should not be able to avoid criminal liability. Arising from the constitutional principle of "*nullum crimen sine lege, nulla poena sine lege"*[13], it is not possible to call to account, furthermore, to impose a sentence that is commensurate with the gravity of the crime, on the persons who commit acts of torture in lack of appropriate criminal law statutory provisions. According to the majority of the sources of legal literature dealing with this topic, the obligation to declare an action a crime as prescribed by Article 4 of UNCAT only refers to torture, *stricto sensu*, however, it is emphasised that neither UNCAT nor any other international conventions exclude the possibility of the state's criminalising some other actions, or certain forms of such actions that do not belong to the category of torture.

With the exception of Bulgaria, Poland, Lithuania and Hungary, the statutory provision of torture can be found in the penal codes of all the Central and Eastern

[11] *Jalloh v. Germany*, no. 54810/00, decision of 11 July 2006, Paragraph 105
[12] CAT Concluding Observations on the UK, (2004), CAT/C/CR/33/3, Section 5 (d)
[13] Pursuant to Paragraph (4) of Article XXVIII of the Fundamental Law of Hungary, "*No one shall be held guilty of or be punished for an act which, at the time when it was committed, did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty and a legal act of the European Union, under the law of another State*."

European states. In the lack of a stand-alone provision, the Hungarian criminal law orders to punish the individual behaviours defined in Section 1, Article 1 of UNCAT, which belong to the category of torture, as "average" crimes, in the framework of fragmented statutory provisions. In the current situation, the persons committing the acts of torture that are absolutely prohibited by both international law and in the Hungarian constitutional system cannot only enjoy the possibilities of the reduction or suspension of the sentence but in their case, the options of pardon and statutes of limitation are not excluded by the law either. It would qualify as the constitutional settlement of the problem if the acts of torture were sanctioned by the legislator in harmony with the expectations arising from the human rights conventions, in legislative harmony.

Pursuant to Article 14 of UNCAT, the state is obliged to ensure the right to enforceable compensation for the victims of torture in its national law. From the aspect of the protection of human rights, the costs should be borne by the state in the jurisdiction where the act of torture, which qualifies as a violation of a right, was committed. According to the rules of civil law, the damage incurred by the crime should be compensated by the entity that committed the unlawful act in line with the rules of actionable damage, which may be enforced in practice depending on the income of the person who committed the act.

Article 14 of UNCAT strives to combine the above-mentioned aspects. As long as it is established in a criminal procedure[14] that an act of torture was committed, the state, stemming from the absolute prohibition of torture, is obliged to provide reparation for the victim, ex officio, furthermore, to give him or her financial and non-financial compensation, which also covers the costs of rehabilitation, the obligation to pay which costs can be transferred to the perpetrator. Since the damage caused by the crime, or the grievance fee may only be enforced if the crime has been established by the court with binding force,[15] the victims cannot enforce their right to reparation and compensation ensured by Article 14 of UNCAT through no fault of their own, in lack of the statutory provision of the crime of torture, one that ensures the revealing of the crime, the calling of the perpetrators to account and their punishment, furthermore, one that provides on the special rules of compensation.

[14] See Articles 12 and 13 of UNCAT

[15] Section 2 (1) of Act LXX of 2020 on the speeded-up procedure launched for the reimbursement for damages caused by a crime, or the payment of a grievance fee

One of the key guarantees of the enforcement of the prohibition of torture and ill-treatment is that the evidence obtained in the above-mentioned way may not be used in any official procedures whatsoever. One of the reasons for the prohibition is that the majority of the acts of torture in the traditional sense of the word was committed by the staff members of the investigation authorities in order to obtain a statement of confession from the suspect. Act XC of 2017 on Criminal Proceedings (hereinafter referred to as: "Be") does not contain the obligation to exclude evidence obtained by torture. Pursuant to Section 167(5) of Be, a fact that comes from such means of evidence that was obtained by the authorities acting in the criminal case in question through a crime, in another prohibited way, or by the substantial limitation or violation of the procedural rights of the participants cannot be regarded as an item of evidence. It is questionable to what extent the court can be expected to disregard, on the basis of Article 15 of UNCAT, an item of evidence that was obtained by physical coercion, or instead of violence, by psychological methods that verge on psychological coercion applied by a private individual or the investigating authority, in lack of the statutory provision of torture, or the establishment of a crime.

VI. Proposal de lege ferenda

While Hungarian law ensures a very high level of abstract protection against torture and ill-treatment both on the international and national levels, it would make sense to create further legal regulations for the enforcement of this fundamental right. The most urgent task would be the creation of the special rules for the statutory provision of torture, as well as the reparation and compensation to be provided to the victim or in the case of the latter's death, his or her legal successors as required by international conventions. It should be considered that the act on criminal proceedings be supplemented by the requirements on the exclusion of evidence obtained through torture and ill-treatment. With regard to Article 10 of UNCAT, it would be justified to make the "Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" a part of the regular training material for the

health care staff, the lawyers, the law enforcement authorities and those working in positions where there is regular contact with persons deprived of their liberty.[16]

List of publications related to the topic of the dissertation*

1. Haraszti, Margit Katalin: *A kínzás önálló bűncselekményi tényállásának alapjogvédelmi funkciója*
   KÖZJOGI SZEMLE 13: 4 pp. 36-46., 11 p. (2020)

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