Miskolc University
Faculty of Law
Ferenc Deák Doctoral School

JUDr. Rebecca Lilla Hassanová, PhD.

Pandora's box?
Prohibition of Torture in a Comparative Analysis

Theses of the PhD research

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1. Introduction

Probably there isn't a more fundamental human right than the prohibition of torture. Nonetheless, it is subject to persistent violations as well as arbitrary interpretations across the globe. The research offers a comparative analysis of how the prohibition of torture is understood and enforced within different legal and judicial frameworks, ranging from universal international law to regional human rights systems.

The complex issue of the prohibition of torture reveals a landscape fraught with questions rather than definitive answers, underscoring the vast disparities in its acceptance and implementation across the globe. Despite being one of the most recognized and foundational human rights, the prohibition of torture demonstrates significant variations in interpretation and enforcement, reflecting profound cultural, legal, and political differences among regions. While jurisprudence around the prohibition is undoubtedly evolving, it often highlights stark contrasts in judicial attitudes and practices, raising concerns about inconsistencies in human rights protections. The prohibition as such, is generally understood as being one of the fundamental right of the international human rights protection. The impression hence leads to the thought that if there are such "issues" in this core right, it may doubt the overall effectiveness of the whole international human rights system itself. This raises critical inquiries: if such a fundamental norm can be undermined or ignored, what does that imply for the broader spectrum of human rights protections? Such skepticism may lead to broader implications regarding the effectiveness and universality of human rights principles, suggesting that any erosion of this fundamental norm could have far-reaching

consequences for the integrity of human rights advocacy and enforcement worldwide. In essence, questioning the efficacy of the torture prohibition forces us to confront deeper concerns about the integrity and operational capacity of the human rights system as a whole, challenging the notion of universality and the commitment of states to uphold the rights and dignity of all individuals.

The dissertation presented here seeks to define several conceptual elements related to the prohibition of torture and ill-treatment. It also examines the obligations that states hold concerning the protection of fundamental rights against such abuses. This study offers a thorough investigation of the international legislative framework governing the prohibition of torture, addressing its nature, scope, and functions. The topic is closely tied to the broader context of human rights protection, which has been universally recognized since the aftermath of World War II.

The thesis explores in detail the prohibition of torture, which is broadly regarded as part of the *ius cogens* within international law. Scholars commonly assert that the prohibition is universally accepted, meaning it is an absolute and binding norm worldwide. Nevertheless, upon examining all the most influential regional human rights practice and its frameworks, several questions have emerged. The research of the dissertation will address these questions and demonstrate different issues which specify the complexity of the prohibition.

2. Research Phases: A Structured Inquiry

The research was systematically organized into two distinct but interconnected parts, each designed to build upon the other and contribute to a comprehensive understanding of the complexities inherent in the prohibition of torture.

Part A: General Comparative Analysis of Different Human Rights Frameworks

This initial phase was dedicated to mapping the legal and normative landscape surrounding the prohibition of torture. It involved a comprehensive comparative analysis of the universal international legal framework and the four primary regional human rights systems: the European, Inter-American, African and Asian systems.

The scope of this part was extensive, encompassing a detailed review of key legal instruments, declarations, and conventions. This included foundational documents such as the UN Convention Against Torture (UNCAT), the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the African Charter on Human and Peoples' Rights (ACHPR). The analysis scrutinized not only the explicit provisions of these instruments but also the interpretive guidance provided by international and regional human rights bodies.

The objectives of Part A were multifaceted. Primarily, it aimed to identify the core elements of the prohibition of torture as articulated in different legal frameworks, highlighting

commonalities and divergences in their definitions, scope and application. Secondly, this part sought to elucidate the obligations imposed on states to prevent, investigate, and punish acts of torture, examining the various mechanisms established for ensuring state compliance. Finally, it aimed to assess the degree to which each system effectively incorporates the prohibition of torture and to identify any significant gaps or shortcomings in their legal architecture.

Part B: Specific Aspects of the Prohibition of Torture

Building on the foundational analysis established in first part of the work, the second part of the research focused on contemporary issues that pose significant challenges to the prohibition of torture. This involved exploring how these issues influence the interpretation, recognition and overall acceptance of the prohibition.

The scope of the second part was strategically narrowed to focus on the key areas of concern. This included an examination of corporate accountability for human rights violations related to torture, analyzing the extent to which corporations can be held responsible for complicity or direct involvement in acts of torture. It also involved an exploration of the potential use of the prohibition of torture as a tool for advancing climate justice, assessing whether severe environmental degradation can be construed as a violation of human rights, particularly in the scope of Art. 3 of the European Convention on Human Rights. Further, the study addressed the impact of the “war on terror" on the prohibition of torture, examining the legal and ethical justifications invoked to

legitimize coercive interrogation techniques and the establishment of secret detention facilities. Lastly, it covered an analysis of asylum law and the principle of non-refoulement, assessing how the principle intersects with the prohibition of torture and the extent to which states uphold their obligations to protect individuals from being returned to places where they face a risk of torture.

The primary objective of second part was to critically evaluate how contemporary challenges test the limits of the existing legal framework governing the prohibition of torture. By analyzing these specific aspects, the part sought to identify emerging trends in the scope of the prohibition.

2. Research Methods: A Comprehensive Approach

The dissertation employed a comprehensive and multifaceted methodology designed to ensure the validity and reliability of the research findings.

A central component of the research methodology was the qualitative analysis of primary legal sources, including treaties, conventions, declarations, protocols, and case law from international and regional courts and tribunals. This analysis involved a close reading of legal texts to identify the scope of prohibitions, obligations of states, and mechanisms for enforcement.

To assess the acceptance and the coherence of the various human rights frameworks, the research employed a comparative legal analysis. This involved systematically comparing the legal provisions and judicial interpretations of the prohibition of torture across the UN, European, Inter-

American, African and Asian systems. This comparison allowed for the identification of similarities, differences, and gaps in the protection against torture in different regions. The study also undertook a doctrinal analysis, interpreting legal principles and rules within the broader framework of international law. This involved examining how specific provisions, such as those related to *ius cogens* norms and non-derogable rights, are understood and applied in different legal contexts.

The research additionally applied a case study methodology to illustrate the practical application of legal principles and the challenges involved in enforcing the prohibition of torture. Specific cases from international and regional courts were analyzed to provide concrete examples of how legal frameworks are interpreted and applied in real-world scenarios.

When analyzing and evaluating the subject of research, based on the opinions presented and knowledge already acquired, the dissertation will be guided by the following general hypotheses. First, the definition of torture, as defined and applied by the UN Convention Against Torture (UNCAT), causes confusion and leaves room for national implementation that may defeat its purpose. Second, the prohibition of torture is undermined to the level that it can no longer be understood as part of ius cogens. Third, the European regional human rights framework attempts to fight the "current trends" of reinterpretation by widening the scope of the prohibition in the region, thus negatively influencing its universal acceptance. Working hypotheses and their indicators will be developed after a deeper analysis in individual parts of the dissertation.

3. Summary of Research Results: Core Findings

The research yielded several significant findings that shed light on the complexities and challenges surrounding the prohibition of torture.

The persistent instances of torture, coupled with varying interpretations of its definition, support doubts about the peremptory nature of the norm. The author hence claims, that despite its classification as a *ius cogens* norm, the prohibition of torture is not universally recognized and accepted. The lack of a clear and universally accepted definition of torture allows states to exploit ambiguities and justify exceptions, undermining the absolute character of the prohibition. Moreover, significant differences were observed among the various regional human rights systems and their approach to the prohibition of torture. The European system, with its influential jurisprudence and enforcement mechanisms, stands in contrast to the weaker protections offered in other regions, such as the Islamic and Asian systems.

The research presented, that corporate entities are being increasingly involved in human rights abuses, including torture, but legal framework for holding them accountable still remain underdeveloped. The study highlights the need for greater corporate responsibility and effective mechanisms to address corporate involvement in torture. The absence of effective accountability mechanisms at both the national and international levels regularly enables perpetrators of torture to operate with impunity. Many states fail to adequately investigate allegations of torture, prosecute offenders, and provide remedies to victims.

After the start of the "war on terrorism" several countries started to a reevaluate their interpretation of the prohibition of torture, with some states attempting to justify coercive interrogation techniques in the name of national security. This trend threatens to erode established human rights norms and firmly undermines the absolute character of the prohibition.

Furthermore, the dissertation explored the emerging discourse linking climate change to human rights, particularly the prohibition of torture. While this area of law is still evolving, the study suggests that severe environmental degradation can lead to human suffering that may constitute cruel, inhuman, or degrading treatment, highlighting the need to address climate change through a human rights lens.

Lastly, a crucial role in prevention of torture is represented by the principle of non-refoulement, prohibiting the return of individuals to countries where they face a risk of ill-treatment. However, there are still continuous challenges in ensuring that states fully comply with their non-refoulement obligations.

4. Author's own publications related to the theses

1. Hassanová, R.L. Šmigová, K. Derogačná klauzula Európskeho dohovoru o ochrane ľudských práv a základných slobôd v čase koronakrízy, *Dôsledky pandémie na formovanie medzinárodného práva, Zborník príspevkov z XIII. slovensko-českého medzinárodnoprávneho sympózia*, 2022.

2. Hassanová, R.L. Derogation clause in the times of Corona crisis, In Bándi, Gy.: *Law in Times of Crisis. Selected doctoral studies*, Pázmány Press, Budapest, 2023.
3. Hassanová, R.L. Implementácia Rímskeho štatútu do práva Európskej únie, *Vývojové determinanty verejného práva v európskom priestore: vedecký zborník,* 1. ed., Vysoká škola podnikání a práva, Prague, 2021.
4. Hassanová, R.L. Zákaz mučenia v rámci dohovorov medzinárodného humanitárneho práva, In *Liber Amicorum Dalibor Jílek*, rw&w Science & New Media Passau-Berlin-Prague, 2023.
5. Hassanová, R.L. Prohibition of torture in the framework of Inter-American system for the protection of human rights, *Slovak Yearbook of International Law*,Vol. XII, 2022.
6. Hassanová, R.L. Protection of Children under International Law. In: Central and Eastern European Legal Studies. Vol. 1/2020, 2021.
7. Hassanová, R.L. The Prohibition of Torture and its Implications in the European Legal Sphere, *Central European Journal of Comparative Law*, Vol. IV, 2023/1.
8. Hassanová, R.L. Zodpovednosť medzinárodných organizácií s ohľadom na Návrh článkov Komisie pre medzinárodné právo, *Bulletin Slovenskej advokácie*, Vol. 26/7-8, 2020.

5. Conclusion

At the heart of the international human rights regime lies the categorical prohibition of torture, a norm enshrined in a comprehensive legislative framework composed of pivotal treaties such as the United Nations Convention Against Torture, alongside customary international law and regional human rights instruments. These sources collectively assert a universal repudiation of torture, highlighting its non-derogable status as a *ius cogens* norm. This designation underscores the prohibition's unyielding nature, demanding unwavering adherence from states and establishing a moral and legal obligation to prevent, prosecute, and eradicate such practices. The character of this prohibition is profoundly emblematic of the broader human rights mission to protect and preserve human dignity, serving as a cornerstone for the global commitment to uphold justice and accountability.

Yet, in reflecting upon the prohibition of torture, we encounter one of the most profound paradoxes within the sphere of human rights: a norm that is universally lauded yet unevenly adhered to. This discordance challenges us to consider the underlying structures that support or undermine human rights protections globally. The dynamics at play, extend beyond legal codification and delve into the realms of political will, cultural perception, and the broader socio-economic realities that shape state compliance and accountability. Thus, examining the prohibition of torture compels us to ask whether the current human rights framework is sufficient to foster genuine universality and effectiveness.

The research presented herein illustrates that, although the prohibition of torture initially appears to be an absolute and

non-derogable right devoid of exceptions, states nonetheless find ways to exploit ambiguities in its definition to suit their own interests. Numerous binding international treaties that reinforce the prohibition often employ vague language regarding the obligations imposed, ostensibly paving the way for jurisprudence to adapt the rights in accordance with societal needs. Proponents of this flexibility may argue that the intention was to continuously expand the scope of the right. Conversely, skeptics may label this perspective as overly idealistic, asserting that the drafters, being States themselves, sought to create space for future interpretations that align with their own agendas. Nevertheless, there is a consensus among scholars that the abuse of such vagueness occurs with alarming frequency, highlighting the ongoing challenges in the enforcement of the prohibition against torture.

The lack of universal acceptance and recognition casts a shadow on the feasibility of the prohibition of torture as a truly universal standard. Even in jurisdictions that have ratified international treaties and conventions aimed at eradicating torture, the implementation of these norms often falls short. This situation begs the question of how we can reconcile the eloquence of legal texts with the harsh reality that torture persists, often under the guise of national security or counter-terrorism efforts. Ultimately, the exploration of the prohibition of torture compels us to delve into deeper ethical considerations regarding accountability, the role of the international community, and the integrity of human rights advocates. The ineffectiveness of existing frameworks raises critical inquiries about the commitment of global governance systems to uphold the dignity of every individual. Given this intricate interplay between law, practice, and morality, this dissertation aimed to

scrutinize the current understanding of the prohibition of torture through a comparative analysis that underscores the need for a comprehensive and enforceable human rights regime.

The primary objective of this study was to analyze and compare the prohibition of torture across various legal and judicial frameworks, beginning with the universal protection of human rights and extending through the European, Inter-American, and African systems, concluding with a brief examination of other regions and their respective systems (if one may even refer to them as systems). The fundamental source for the definition of torture across the aforementioned systems is rooted in the UNCAT. As previously noted, the prohibition against torture is often articulated in vague terms within various treaty texts. It is evident that most treaties lack a clear definition, unlike the UNCAT. However, while the definition provided in the UNCAT is not without its shortcomings, it is unlikely that the majority of challenges stem directly from the definition itself. Legally, it is imperative for human rights standards to be supported by a legislative framework, nonetheless, without effective enforcement mechanisms, the text loses its inherent value. Consequently, the author concludes that the first set hypothesis, that the definition of torture as set forth and interpreted by the UNCAT contributes to confusion and allows for domestic interpretations that may undermine its fundamental purpose, holds some validity. However, it is essential to recognize that the root of the violations of the prohibition of torture is not primarily attributable to the UNCAT itself.

Recognized as a *ius cogens* norm, the prohibition's character transcends legal formalism to embody a universal moral imperative, symbolizing a collective resolve to preserve

the sanctity of human dignity across all cultures and jurisdictions. Through this prism, the prohibition underlines the broader commitment of the international community to uphold justice and human rights in an increasingly interconnected world. Nevertheless, upon careful consideration, it is imperative to question whether the prohibition of torture truly attains the status of *ius cogens*, or whether this classification remains more of an aspiration among scholars engaged in the analysis and drafting of international norms. According to the Vienna Convention on the Law of Treaties, *ius cogens* norms are those that are accepted and recognized by the international community as a whole, existing as peremptory norms that cannot be derogated from. This status necessitates that such norms be embedded within both international and national legislative frameworks on a universal level. However, several challenges promptly emerge. The definition of *ius cogens* demands universal recognition and acceptance by the international community as a whole. As demonstrated within this dissertation, numerous regions across the globe either fail to incorporate the prohibition of torture within their legal frameworks entirely or include it in documents that lack binding authority. For instance, the ASEAN human rights framework, which has yet to be ratified by signatories to attain binding status, exemplifies this issue. This situation raises critical concerns regarding the genuine universality and enforceability of the prohibition as a *ius cogens* norm, suggesting a gap between scholarly intent and practical implementation across diverse geopolitical landscapes.

Moreover, the definition of *ius cogens* requires not only widespread recognition but also universal acceptance. For instance, while the Islamic human rights framework does

include the prohibition of torture within a binding treaty, the absence of mechanisms for individual complaints to the Arab Human Rights Committee and the non-operational status of the Arab Court of Human Rights highlight significant enforcement gaps. Human rights frameworks that generally function effectively, such as the Inter-American and European systems, also experience deficiencies, though in different forms. This dissertation highlighted issues concerning corporate accountability, demonstrating how powerful multinational corporations often establish operations in "grey zones," such as regions in Africa or Asia. Evidence indicates that in these areas, corporations frequently neglect their human rights commitments. National authorities in affected countries often find themselves powerless against such formidable entities. As a result, these companies frequently evade sanctions for human rights violations, even when there are clear links to illicit treatment. This underscores a global deficiency in enforcement mechanisms when dealing with corporate entities, suggesting that the prohibition of torture is neither universally recognized nor accepted as it ought to be. While violations do not inherently negate the necessity of these norms, given the immutable nature of human behavior and the fundamental need to establish rules, if *ius cogens* is to be truly universally recognized and accepted, the prohibition of torture, as it stands, fails to meet this criterion. Consequently, the second hypothesis is confirmed, indicating that without more comprehensive and effective enforcement mechanisms, the purported universality of such norms remains an unfulfilled aspiration.

To further bolster the argument, we must consider the issue of the divergent interpretations of what constitutes illicit treatment. The values protected by *ius cogens* guarantee that

these fundamental principles are protected and interpreted consistently, even if individual states or actors have different preferences. Throughout this work, it has been noted that even nations perceived as democratic and committed to human rights obligations sometimes attempt to stretch or manipulate the definition of torture to suit their own agendas. The post-2001 shift, following the infamous terrorist attacks, illustrates that what is considered non-derogable can be swayed by interpretations of the definition itself. National authorities have, at times, redefined the concept through certain memoranda. Fear is an extremely powerfull tool, thus authorities prioritized the aspect of national security over the established understanding of illicit treatment. Even some scholars have defended such measures. However, the nature of a peremptory norm strictly prohibits arbitrary reinterpretations, allowing neither reservations nor derogations, and can only be modified by another norm of equivalent status. Memoranda and similar documents certainly fail to meet these stringent criteria. Thus, it is pertinent to assert that when the prohibition of torture is subject to the discretion of its interpreters, it cannot satisfy the requirements of a *ius cogens* norm. This illustrates a fundamental challenge in maintaining the integrity and consistency of such a crucial international standard, besides validating the second hypothesis of the work.

During the research, the author observed that the diverse frameworks frequently drew upon the European legal paradigm, particularly through references to the case law of the ECtHR and, at times, to the ECHR itself. This reliance can be attributed to the relatively broad scope of application of the prohibition within the European region, complemented by the enforceability of ECtHR judgments. Consequently, the author

acknowledges the merit of the European human rights framework in striving to achieve the highest standards of human rights protection globally.

However, the author contends that interpretations of the prohibition within this region, particularly by the ECtHR, are taking unpredictable turns that could yield contrary outcomes. Some of these interpretations, as evidenced in the case law of the ECtHR, warrant scrutiny. For example, in the Gäfgen case, the Court, while attempting to assert the absolute nature of the prohibition, suggested that there could be no justification for violating Article 3 of the ECHR. Firstly, the judgment subsumed the threat of torture under the prohibition, further asserting that such threats, regardless of their potential implications for the lives of many individuals, are impermissible. It is clear, that the right to life does not hold the same status as the *ius cogens* norm, rendering it as "less" than the prohibition of torture. This prompts however a critical question: would such reasoning hold if a genuine threat were to manifest? Furthermore, as the scope of the prohibition continuously expands with similar interpretation, the core significance of the right may inadvertently become diluted and diminished.

In this sense, we may mention the Duarte Agostinho application, which attempted to expand the article even to an unexpected interpretation. The application claimed, that the climate anxiety of the vulnerable groups sufficies the threshold of Art. 3. Althought, the application was held inadmissible, one might stop to reflect whether the modern but “strange” application isn’t the result of the widening observed in the jurisprudence of the Court. Consequently, the author claims tha the third hypothesis, that European regional human rights

framework attempts to fight the „current trends“ of reinterpretation, by widening the scope of the prohibition in the region is in fact true.

While the research elucidates the complexities surrounding the prohibition of torture, it also highlights the imperative for a renewed commitment to enforce this fundamental norm rigorously. The existence of varying interpretations and the opportunistic redefinition of torture, rooted in political agendas, threaten to undermine the very fabric of human rights protections. To safeguard the integrity of the prohibition against torture, the international community must prioritize the establishment of a strong enforcement mechanisms that are both effective and adaptable. This may involve renewed international cooperation aimed at harmonizing standards and fully integrating the prohibition into national legal systems, ensuring that it is unequivocally recognized and implemented.

Furthermore, it is crucial to engage in a comprehensive dialogue with state parties to the various human rights treaties, fostering a collective understanding of the inviolable nature of the prohibition. Such initiatives can serve to bridge the gap between normative discourse and practical application, reinforcing the idea that human rights are universal and must be upheld without exception. The challenges faced in achieving true universality can be mitigated through cross-regional collaborations, exchanges of best practices, and capacity-building efforts aimed at strengthening judicial systems. This approach can help empower national courts to hold violators accountable effectively and mitigate the influence of powerful actors seeking to evade scrutiny.

Additionally, the interplay between human rights and corporate accountability must be a focal point of future research and advocacy. The troubling trend of multinational corporations operating usually in third world countries coupled with the inability of local authorities to challenge these entities effectively, underscores the need for an international framework that addresses corporate complicity in human rights abuses. This includes establishing clear guidelines and mechanisms that can hold corporations accountable when they violate human rights, thereby reinforcing the prohibition of torture and related abuses in practice.

As we look to the future, it is also vital to remain vigilant against the ever-evolving landscape of human rights challenges. The emergence of new threats, such as those posed by advances in technology and the rise of authoritarian governance structures, accentuates the necessity for continual adaptation and reaffirmation of the principles underpinning the prohibition of torture. It is essential that scholars, practitioners, and activists remain engaged in thoughtfully grappling with these ongoing issues, ensuring that the principle of non-torture remains not only a theoretical ideal but a practical reality.

In conclusion, the journey toward realizing the full potential of the prohibition against torture is fraught with complexities, but it remains an essential endeavor. The findings of this dissertation reinforce the notion that the prohibition, while formally recognized as a *ius cogens* norm, requires a powerful and unwavering commitment from both states and civil society to be genuinely universal. The pathway forward hinges on collaborative efforts to eradicate the ambiguities that allow for abuse and reinterpretation while reestablishing the core significance of this fundamental human rights principle.

Only through concerted international efforts can we hope to ensure that the prohibition of torture is firmly anchored in both law and practice, thereby affirming our collective commitment to uphold human dignity in an increasingly complex world.