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THE DEFINITION OF TORTURE IN CONTEMPORARY INTERNATIONAL LAW AND PRACTICE

Master thesis

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INTRODUCTION

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[1] (1984) (hereinafter – CAT) defines and prohibits torture. Numerous treaties at international, regional and national level are adopted to ensure protection from it, however, the issue of torture is still painful.

This research is aimed to analyse the evolution of torture definition. It will explain to what extent the definition of torture is applicable in contemporary practice and how it should be composed in order to eradicate torture. Nevertheless, this research is aimed to analyse the definition of torture, the prohibition of torture will be touched as well because the definition is meaningless without the prohibition.

In the first part the international legal regulation will be discussed explaining which international documents prohibit torture, which of them define torture, what monitoring and judicial mechanisms are created. The second part is aimed to analyse how definition of torture evolved in international law during the years and how it was narrowed in the USA practice. In the third part the definition of torture applicable in Lithuania will be analysed.

Problem. The numerous international legal mechanisms are created to define, prohibit and prevent torture. The definition of torture is enshrined in the CAT, however, there is no uniform definition of torture applicable in international legal practice. In order to ensure the protection from torture it is necessary to know what acts constitute it. There is no clear answer what torture is. The practice of the USA shows how narrowly the definition of torture could be interpreted in the context of "war on terror". The Lithuanian legislation does not contain the definition of torture and specific crime punishing infliction of torture.

Relevance of research. The international judicial bodies are using the definition of torture enshrined in the CAT in their practice. However, they are interpreting it differently, because the definition does not mach the needs of contemporary human values, and should be amended relying on the practice and interpretations of international judicial bodies. While there is no uniform definition of torture in international law and practice, the torture still exists. The universal uniform definition of torture is necessary in order to ensure the eradication of it. The definition enshrined in universal convention would ensure the states parties would be bound by the clear and uniform definition. This definition could not be interpreted differently only as it is done in international judicial practice. That would increase the level of responsibility of the states and would create better conditions for individuals to protect their human rights that were

[1] UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984//http://www2.ohchr.org/english/law/cat.htm accession 2011-05-11.

violated. There is no Lithuanian or foreign authors analysing the definition of torture applicable in Lithuania and it will be the first research on this issue. There is no clear definition of torture or specific norms criminalising torture in Lithuania, except torture of the animals. It will be interesting to analyse how the courts interpret the definition of torture and how it is applicable in practice. This part will be relevant for the lawyers and politicians in Lithuania to understand what issues exist regarding the definition of torture, what weaknesses and strengths it has in this country.

Hypothesis. The scope of the torture definition enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had changed and does not mach the needs of contemporary human values, and should be amended relying on the practice and interpretations of international judicial bodies.

The object of research. The evolution of the definition of torture applicable in the international level and the scope and content of the definition of torture applicable in Lithuania will be analysed in this work.

The subject matter of research. Definition of torture; US arguments interpreting the definition of torture; cases suspected of torture; cases investigating torture; the aspects of applicability of the definition of torture; Lithuanian definition of torture and it's interpretation.

Purpose of research. To analyse how the legal scope of torture definition has changed throughout the years and to what extent the definition of torture is applicable in contemporary legal practice.

The goals of research:

1. To overview legal regulation and legislation prohibiting and defining torture.
2. To compare the different interpretations of the definition of torture.
3. To analyse how the different interpretations influenced the scope of the definition of torture.
4. To analyse the definition of torture applicable in Lithuania and how it is influenced by the international practice.

The methods of research. Because of the nature of this research, theoretical-analytical method will be used. With the help of this methods the author is trying to evaluate the significance of the definition of torture and its interpretation and to reach goals of the research.

Logical-analytical method, as the logical contemplation, is necessary to reveal goals of the research, summarizing results, providing outcomes and suggestions.

Historical method will help to examine the alternation of the scope of the torture definition.

Document research method is necessary to search and analyse documents relevant to the purpose of this work.

All methods mentioned above will influence summarizing of results and reliability providing conclusions and suggestions.

Sources of research. The main source of this research is the definition of torture enshrined in the article 1of the UN Convention against torture. The definitions of torture evolved during the years in the jurisprudence and the definition determined in the statute of the Permanent International Criminal Court will be used as well. The opinion of the author is based on the works of worldwide known scholars that are analysing the definition of torture (D. M. Evans, R. Morgan, N. Rodley, G.H.Miller and others). The UN resolutions, the documents of the United States Department of Justice, the testimonies and the reports regarding torture in Abu Ghraib and Guantanamo will be used. Other international documents prohibiting torture are reviewed as well. The cases of European Court of Human Rights as the main source defining the acts of torture will be used as the basis for the jurisprudence. The decisions of other international courts, commissions and the committees on the definition of torture are used. Lack of up to date literature on the issue of the definition of torture resulted that the biggest part of the data for the research is obtained through worldwide database – The Internet.

1. The concept of torture in contemporary international law

1.1. The developments in legal regulation prohibiting torture in international law

Torture is the violation of human rights that infringes objectives of the United Nations Charter[2]. Torture violates norms of the numerous international documents that prohibit and declare it as an insult to human dignity. The principle of respect for basic human rights and freedoms is breached by torture. As Karima Bennoune an Associate Professor at Rutgers School of Law stated: "moving from rules to values, the prohibition of torture must be at the heart of any conception of human dignity".[3]

In this part of the thesis we will focus on international legal regulation that prevents and defines torture. All documents that prohibit torture prohibit cruel, inhuman, degrading, ill-treatment or punishment as well. The distinctions depend on the nature, purpose and severity of the treatment applied.[4] Therefore, recognising that torture is not the only element of ill-treatment and all these elements interacting with each other we will analyse only torture as the highest level of human suffering.

1.1.1. The prohibition of torture at universal level

The Universal Declaration of Human Rights[5] (1948) (hereinafter - UDHR) is considered the primary instrument of the human rights Other UN human rights instruments are based on it. UDHR ensure comprehensive list of human rights and fundamental freedoms. The inherent human right to be free from torture and degrading treatment is established in it: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[6] Article 5 declares.

UDHR is a document of a recommendatory nature. The common understanding concerning the inalienable and inviolable rights is stated and codified in it. Certain UDHR provisions over time became the codification of customary international law. Such a nature of UDHR indicates that it was set up in more than 30 universal and regional treaties, with the purpose of development of special provisions, as well as many countries around the world

[2] Charter of the United Nations//http://www.un.org/en/documents/charter/ accession 2011-05-04.
[3] Benoune K. Terror/Torture. P.28//http://www.boalt.org/bjil/docs/BJIL26.1_Bennoune.pdf accession 2011-05-04.
[4] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992//http://www.unhcr.org/refworld/docid/453883fb0.html accession 2011-05-04.
[5] Universal Declaration of Human Rights//http://www.un.org/en/documents/udhr/ accession 2011-05-04.
[6] Ibid. Article 5.

recognized UDHR provisions in their constitutions and other national acts.[7] UDHR became a background for other legal acts of international law that are developing and protecting human rights. One of them is prohibition of torture. The right not to be tortured is widely recognised as a customary norm and is biding on the state even if the state is not a party to any treaty prohibiting torture.

Looking back in to the history of adoption of UDHR we realize that the purpose of this declaration was to set up general principles or standards of human rights. It was accompanied by conventions which defined specific rights and their limitations.[8] These conventions are: International Covenant on Civil and Political Rights[9] (1966) (hereinafter – ICCPR) and International Covenant on Economic, Social and Cultural Rights (1966). "The ICCPR has created new standards and obligations to which States should conform".[10] The ICCPR falls under the scope of this research because of the prohibition of torture enshrined in its' Article 7: „No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[11] ICCPR established a monitoring body – the Human Rights Committee (hereinafter – HRC). It's purpose is to receive and to examine reports of the States parties to the covenant, issue observations, make recommendations to the States parties, consider communications from individuals. The competence granted to the HRC by the Optional Protocol to the ICCPR is contained in Article 5 (4) which states: "The Committee shall forward its views to the State party concerned and to the individual." The scope of this rule is quite clearly defined. The HRC has the authority only to send its observations to the State party concerned.[12] This document does not contain the definition of torture and this leaves more space for the HRC to decide which acts constitute torture. The cumulative approach is used by the Committee making a decision does an act inflicted could be defined as torture. It does not go in to the details could one or another act be defined as torture and does not provide explanation or interpretation on the torture definition or its elements. The Committee considers whether acts inflicted infringe the prohibition of torture contained in Article 7 of the ICCPR. In this way it is forming the practice which acts fall under the scope of torture definition.

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[7] Žalimas D., Žaltauskaitė-Žalimienė S., Petrauskas Z., Saladžius J. Tarptautinės organizacijos. - Vilnius: Justitia, 2001. P.336.

[8] Fact Sheet No.2 (Rev.1), The International Bill of Human Rights//http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf accession 2011-05-06.

[9] International Convenant on Civil and Political Rights//http://www2.ohchr.org/english/law/ccpr.htm accession 2011-05-06.

[10] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 (1968) §3// http://www1.umn.edu/humanrts/instree/l2ptichr.htm accession 2011-05-06.

[11] International Convenant on Civil and Political Rights. Article 7//http://www2.ohchr.org/english/law/ccpr.htm accession 2011-05-06.

[12] Sendic v. Uruguay No. 14/63, 1981. §14//http://www.bayefsky.com/pdf/116_uruguay63vws.pdf accession 2011-05-06.

The United Nations condemned torture in numerous resolutions and declarations. General Assembly (thereafter – UNGA) in twenty-eighth session in 1973 adopted resolution 3059 regarding the question of torture and other cruel, inhuman or degrading treatment or punishment,[13] In 1974 UNGA announced resolution 3218 "Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment"[14], and in 1975 UNGA announced one more resolution 3453 regarding Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment[15] and adopted declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment or Punishment.[16] The UN General Assembly each year adopts resolution concerning the problem of torture. The most recent resolution regarding the prohibition of torture was adopted in 2011[17]. It evidences that the problem of torture remains for almost 50 years.

"United Nations adopted the Standard Minimum Rules for the Treatment of Prisoners (1957)[18] that became an integral part of the prohibition of torture"[19] and Code of Conduct for Law Enforcement Officials (1979)[20]. The recommendations for improvement of the international standards protecting the rights of the prisoners and detainees are provided in these acts. Standard Minimum Rules for the Treatment of Prisoners completely prohibit corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments as punishments for disciplinary offences. Instruments of restraint, such as handcuffs, chains, irons

[13] UN General Assembly resolution No. A/RES/3059(XXVIII) Question of torture and other, cruel inhuman or degrading treatment or punishment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/31/IMG/NR028131.pdf?OpenElement accession: 2011-05-07.
[14] UN General Assembly resolution No.A/RES/3218(XXIX) Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/20/IMG/NR073820.pdf?OpenElement accession 2011-05-07.
[15] UN General Assembly resolution No. A/RES/3453(XXX) Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/66/IMG/NR000166.pdf?OpenElement accession 2011-05-08.
[16] UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment No. A/RES/3452(XXX)//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/65/IMG/NR000165.pdf?OpenElement accession 2011-05-08.
[17] UN General Assembly resolution Torture and other cruel, inhuman or degrading treatment or punishment No. A/RES/66/150//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/82/PDF/N1146782.pdf?OpenElement accession 2011-05-08.
[18] Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977//http://www2.ohchr.org/english/law/treatmentprisoners.htm accession: 2011-05-09.
[19] Žilinskas J. Nusikaltimai žmoniškumui ir genocidas tarptautinėje teisėje bei Lietuvos Respublikos teisėje. – Vilnius: Lietuvos Teisės Universitetas, 2003. P.96.
[20] Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979//http://www2.ohchr.org/english/law/codeofconduct.htm accession 2011-05-09.

and strait-jackets shall never be applied as restraint measures. In addition, the irons and chains in general shall not be used as a restraint measures[21].

The rules of international regulation of armed conflict are contained in International Humanitarian Law (hereinafter - IHL), enshrined in four Geneva conventions and two Additional protocols.[22] This law applies only in situations of armed conflict: international – conflict between two states (Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties[23]) and non-international – conflict inside the state between government troops and the opposition (to all armed conflicts which are not international and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups[24]). IHL is relevant to this research because all Geneva Conventions and Additional protocols, which constitute IHL, prohibit the torture of any person who is in the disposition of the other party including, in the case of non-international armed conflict, where that party is nongovernmental in nature.[25] The Commentary of Geneva conventions[26] define what acts could constitute torture. This definition evolved in the jurisprudence of international criminal tribunals.[27]

Prohibition of torture is not just an international human rights matter. It is prohibited in international criminal law as well. In order to ensure punishability for the crimes of the armed conflicts including torture the international tribunals were established in the cases of the Former Yugoslavia and Rwanda. Prohibition of torture was enshrined in the statutes of these tribunals. However, these tribunals could examine cases regarding these particular conflicts only for which they were established. In 1998 by adoption of the Rome Statute[28] the Permanent International Criminal Court (hereinafter - ICC) was established. It is the first permanent, treaty based, international criminal court established to help in ending impunity of the perpetrators for internationally condemned and prohibited acts. One of them is torture enshrined in article 7(1f)

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[21] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. §31, §33.//http://www2.ohchr.org/english/law/treatmentprisoners.htm accession: 2011-05-09.

[22] 1949 Geneva conventions and Additional protocols//http://www.icrc.org/ihl.nsf/CONVPRES?OpenView accession 2011-05-10.

[23] 1949 Geneva Conventions common Article 2//http://www.icrc.org/ihl.nsf/WebART/365-570005?OpenDocument accession 2011-05-10.

[24] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Article 1//http://www.icrc.org/ihl.nsf/WebART/475-760004?OpenDocument accession 2011-05-10.

[25] 1949 Geneva Conventions common Article 3//http://www.icrc.org/ihl.nsf/WebART/365-570006?OpenDocument accession 2011-05-10.

[26] The Geneva Conventions of 12 August 1949 Commentary. Conventions I-IV. – Geneva: International Committee of the Red Cross, 1958-1960. First reprint, 1994-1995.

[27] ICTY, ICTR, ICC.

[28] Rome Statute of the International Criminal Court//http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf accession: 2011-05-10.

of the Rome Statute as a crime against humanity. In its work international criminal tribunals developed the definition of torture applicable in the cases of an armed conflictand based on the definition of the CAT.

The CAT was adopted by United Nations taking into account Article 5 of the UDHR and Article 7 of the ICCPR as well as seeking to expand the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment or Punishment, as to make the fight against torture around the world more effective and to create a control mechanism. This convention is the first and one of the few international documents that deals directly with prohibition of torture and contains the definition of torture. It establishes the Committee against Torture, the purpose of which is to monitor the implementation of the CAT. All member states to the CAT are obliged to submit reports to the Committee about the situation of human rights in their territories. "The state reporting procedure, which has become the classical monitoring mechanism for UN treaty bodies, is also the central instrument under the CAT."[29] According to these reports the Committee issues recommendations. Under certain circumstances the Committee has the right to consider complaints from private individuals complaining of violations of their human rights. The UN General Assembly adopted the Optional Protocol to the CAT (2002), and confirmed that torture and other cruel, inhuman and degrading treatment or punishment are prohibited and constitute grave violations of human rights. The aim of the Protocol is to create a permanent system of inspection constituted of independent international and national authorities in order to prevent torture and other cruel, inhuman or degrading treatment or punishment in the places of detention. According to the Optional protocol, more advanced monitoring system was designated. The Sub-Committee was established with the purpose to conduct periodic visits to the places of detention. The States parties were obliged to create national visiting mechanisms in order to ensure regular monitoring for places of detention and to prevent violations.

Numerous international legal documents prohibit torture and just a few of them define torture. The 1975 UN declaration and the CAT are the only universal documents that contain definition of torture. It is possible to find the definition in the interpretations made by the international courts or in the commentaries of the documents.

1.1.2. The prohibition of torture at regional level

The CAT was recognised in almost all countries around the world. Nevertheless, at regional level own unions and regional legislation system was adopted. The first regional legal

[29] Bank R. Country-oriented Procedures under the Convention against Torture: Towards a New Dynamism//Alston P, Crawford J. The Future of United Nations Human Rights Treaty Monitoring. – Cambridge: Cambridge University Press, 2000. P.147.

act that condemns torture, is the 1950 European Convention of Human Rights and Fundamental Freedoms[30] (hereinafter – ECHR), which not only prohibits the use of torture as a violation of human rights, but points out this human right is absolute. This convention establishes the European Court of Human Rights (hereinafter – ECtHR) to consider complaints. It is the widely cited judicial body that interprets the norms of this convention and one of them is prohibition of torture. ECHR does not propose the definition of torture, but its Article 3 is comprehensively interpreted in the decisions of the ECtHR. It has a mechanism of individual petitions and issues quite big amount of decisions regarding the issue of torture. These decisions could be considered as a basis for the evolution of the definition of torture and will be used in this research as well.

"On 28 September 1983, the Consultative Assembly of the Council of Europe adopted Recommendation 971 (1983) on the protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment. In this text, the Assembly recommended, in particular, that the Committee of Ministers adopts the draft European convention on the protection of detainees from torture and from cruel, inhuman or degrading treatment or punishment, which was appended to the recommendation"[31]. The Committee of Ministers after consultation with the Assembly in 1987 adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[32]. The goal of this Convention was to create preventive mechanism to investigate the treatment of individuals deprived of their liberty and to strengthen their protection from torture. The Convention established an authority - the European Committee against Torture and Inhuman or Degrading Treatment or Punishment - which is carrying out visits to the detention facilities of the member-states. The goals of these visits are framed and the objectives of the Committee are enshrined in the convention. The main goal of this Committee is to monitor situation in the places where persons deprived of their liberty are placed, to identify the problems of torture or other cruel, inhuman or degrading treatment and to give recommendations with the purpose to eliminate these issues.

Another document in Europe protecting form torture is the Charter of fundamental rights of the European Union (2000). It is done in very broad terms through protection of human dignity. According to the opinion of Danutė Jočienė, judge of the ECtHR, the human rights stated in Charter and in ECHR are the same. However, the human rights protection stated in

[30] European Convention on Human Rights and Fundamental Freedoms. Rome, 4.XI.1950//http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf accession 2011-05-12.
[31]European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Explanatory report//http://conventions.coe.int/treaty/en/Reports/Html/126.htm accession 2011-05-12.
[32] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Strasbourg, 26.XI.1987//http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm accession 2012-05-12.

Charter is broader: protection of human dignity in Article 1 of the Charter is the same as protection from torture enshrined in Article 3 of the ECHR.[33]

Another region that is interesting for this research is the Americas. In 1969 the American Declaration of Human Rights[34] was adopted. Article 5 declares the prohibition of torture: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." In order to ensure implementation of this human right (and other human rights enshrined in this convention) The Inter-American Court of Human Rights and the Commission on Human Rights were established. The functions of the Commission are: to disseminate information in the society; to monitor actions of member states regarding implementation of human rights; to get reports and advise the member states. The Inter-American Court of Human Rights is a judiciary body with the function to resolve disputes regarding violation of human rights.

One year later after the CAT was adopted, the Inter-American Convention to Prevent and Punish Torture[35] was drafted and entered in to force in 1987. It condemns and prohibits torture as a violation of human rights and contains the definition of torture. The paradox is, one of the biggest and most powerful members of Organization of American States (hereinafter – OAS) and of all the World – United States of America - is not a member of this Convention. Nevertheless, the USA is legally bound by the customary law to prohibit torture, after 9/11 it made a decision to understand the definition of torture according the interpretation of its own[36].

It is necessary to mention that the African region has its' own legal act prohibiting torture. In Article 5 of African Charter on Human and People's Rights[37] (1981) the prohibition of torture is enshrined. It should be noted that this legislation gave the beginning to human rights in the African continent, but even today, the region's peoples' rights protection is quite complicated.

In the regional legislation only Inter-American convention against torture contains the definition of torture. The burden defining and interpreting the definition of torture is on the regional judicial bodies.

The need to protect humanity from torture in the international regulation was triggered by the need to protect human values from grave violations. There are more than enough international treaties, monitoring and judicial bodies have been created at universal and regional

[33] Jočienė D.Pagrindinių teisių apsauga pagal Europos Žmogaus Teisių konvenciją ir Europos Sąjungos teisę//Jurisprudencija. 2010, Nr.3(121).P. 105.
[34] American Declaration of Human Rights, adopted at San Jose, Costa Rica 1969//http://www.oas.org/juridico/english/treaties/b-32.html accession 2011-05-12.
[35] Inter-American Convention to Prevent and Punish Torture. Adopted at Cartagena de Indias, Colombia 1985// http://www.oas.org/juridico/english/sigs/a-51.html accession: 2011-05-12.
[36] For more information look Part II, Chapter 2 of this research.
[37] African Charter on Human and People's Rights. Adopted in 1981// http://www.hrcr.org/docs/Banjul/afrhr.html accession: 2011-05-12.

levels that spread information, give recommendations for the states, ensure observation of right not to be tortured. Nevertheless, lots of allegations of torture remain.

1.2. Torture as a concept of an absolute prohibition

The prohibition of torture that is enshrined in numerous international legal documents is fundamental and absolute right that is known as *jus cogens*[38] norm. The absolute nature of the norm is universally recognised. No derogations or limitations could be applied to this right. As a consequence, States are also restricted from making derogations which may put individuals at risk of torture.[39] Some acts prohibiting torture contain an article that prohibits any limitations or derogations from the right not to be tortured even in the cases of an armed conflict or when there is a threat to state security (ICCPR Art. 4, CAT art. 2, American Convention on Human Rights art. 27, European Convention on Human Rights art. 15, ect.). The absolute and fundamental nature of the prohibition of torture is determined and confirmed in the judicial practice. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the torture is prohibited in absolute terms.[40] It was stated in the cases concerning the extradition and the state security.

An interesting position was expressed by the European Commission in the Greek Case[41] to uphold the concept of absoluteness. It held that torture comprises inhuman treatment. In defining inhuman treatment, it stated "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation is unjustifiable"[42]. Thus, despite the non-derogable nature of torture as stated in article 15 of the ECHR, the Commission appears have left the possibility to be argued that there are circumstances when inhuman treatment and therefore torture could be justified. This controversial position was changed in Ireland v. UK. The ECtHR held that the prohibition of torture "… makes no provision for exceptions and no

[38] Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980//http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accession 2011-06-01. Art. 53 „[...]For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[39] Foley C. Combating Torture.
P.25//http://www.essex.ac.uk/combatingtorturehandbook/english/combating_torture.pdf accession 2011-06-03.

[40] Burgorgue-Larsen L., Ubeda de Torres A. The The Inter-American Court of Human Rights.Case Law and Commentary. – Oxford: Oxford University Press, 2011. P.373.

[41] Torture was applied to the political prisoners in Greece. The states of Denmark, France, Netherlands, Norway and Sweden filled the complaints before the European Commission of Human Rights and ECtHR on this issue.

[42] Reidy A. The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights Human Right Handbook No.6. - Council of Europe, 2002. P.16//
http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf accession 2011-09-18.

derogation from it is permissible […] even in the event of a public emergency threatening the life of the nation".[43]

The judicial practice in the cases regarding the extradition confirmed that prohibition of torture is an absolute and non-derogable right. In the case Soering v. UK the applicant feared to be extradited from the UK to the USA where he would be sentenced to death penalty because of a murder he committed and will be subjected to "death row" phenomenon. The ECtHR approved that no derogations and exceptions in time of war or other national emergency are allowed under ECHR Article 3. In this case ECtHR had described the prohibition of torture as "an internationally accepted standard" [44]. In the case Chahal v United Kingdom the ECtHR repeated the determination of the absolute nature of the prohibition of torture one more time. In this case the applicant was complaining about the decision to send him back to India based on the clause of national security of the United Kingdom. The applicant claimed that in the case of extradition back to the country of origin he will face a real risk of torture because he has participated in the acts of terrorism. In this case the ECtHR stated that even in the case of threat to national security the derogations and limitations for the right not to be tortured are not allowed. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.[45] This principle was reaffirmed in recent case Saadi v. Italy. In this case the applicant was arrested in Italy under the suspicion of international terrorism. He was a Tunisian national, lived in Milan and complained about the deportation to Tunisia where he was sentenced for membership in a terrorist organisation and for incitement to terrorism. He alleged that in the case of deportation he will be subjected to ill-treatment and the Article 3 of the ECHR would be violated. The ECtHR based its reasoning on the Chahal case and stated, that states even when protecting their communities from terrorist activities, can not question the absolute nature of the prohibition of torture.[46]

The absoluteness of the prohibition of torture was confirmed in the cases concerning the state security. In the Aydin v. Turkey[47] case the applicant and her family were detained under suspicion of involvement in the resistance movement. The applicant alleged torture and rape while she was held in the custody by the security forces. The applicant was blindfolded, beaten, stripped naked, placed in a tyre, hosed the water under high pressure. After three days of the ill

[43] Ireland v. The United Kingdom, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977. §163//http://www.unhcr.org/refworld/docid/3ae6b7004.html accession 2011-09-25.
[44] Soering v. The United Kingdom, 1/1989/161/217 , Council of Europe: European Court of Human Rights, 7 July 1989. §88//http://www.unhcr.org/refworld/docid/3ae6b6fec accession 2011-09-25.
[45] Chahal v. The United Kingdom, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996. §80//http://www.unhcr.org/refworld/docid/3ae6b69920.html accession 2011-10-29.
[46] Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008. §137//http://www.unhcr.org/refworld/docid/47c6882e2.html accession 2011-10-29.
[47] Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997. §81//http://www.unhcr.org/refworld/docid/3ae6b7228.html accession 2011-09-29.

treatment she and the members of her family were released. The ECtHR in this case stated that the prohibition of torture is absolute even if there are well-founded suspicions that a person is involved in terrorist activity. The practice of the ECHR acknowledged that "even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment."[48] This was stated by the ECtHR in the case Labita v. Italy where the applicant was arrested on suspicion of belonging to the mafia. He claimed he was subjected to ill-treatment during the detention in prison, where the ill-treatment of inmates (slapping, squeezing of testicles, beatings, insults and intimidation) was systematic. The applicant complained about ill-treatment which had occurred during six months. Criminal proceedings were discontinued because the perpetrators could not be identified. The ECtHR in the most of the cases emphasised no derogations or limitations could be applicable for this essential human right. The ECtHR was the first judicial body that confirmed this concept.

In the case Tomasi v. France Mr. Tomasi's complained about the violation of right not to be tortured. The Government tried to justify treatment applied to Mr. Tomasi because he was held on suspicion of being involved in a terrorist attack. The Court rejected this defence stating; "The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals".[49]

In the case Kemal Kahraman v. Turkey the applicant was arrested by the police officers on suspicion of membership of the IBDA-C (Great Eastern Islamic Raiders' Front). He was believed to have been involved in the bombing of bars and clubs in Istanbul which had caused casualties. The applicant claimed that during his questioning by the police officers he was blindfolded and subjected to various forms of ill-treatment: suspended by his arms ("reverse hanging"), hosed with cold water and beaten up by the police officers. The ECtHR emphasised „international law against torture is so fundamental that it is a jus cogens […]which overrides all other principles of international law"[50]. It is clear that the court in almost 30 years has not changed it's opinion regarding absolute nature of the prohibition of torture. The practice of the ECtHR proves the prohibition of torture even in the circumstances of the threat of terrorism remain a non-derogable right.

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[48] Labita v. Italy, 26772/95, Council of Europe: European Court of Human Rights, 6 April 2000. §119//http://www.unhcr.org/refworld/docid/402a05eba.html accession 2011-10-30.

[49] Tomasi v. France. Judgement 27 of August 1992. §115//www.univie.ac.at/bimtor/dateien/ecthr_1992_tomasi_vs_france.doc accession 2011-10-15.

[50] Kemal Kahraman v. Turkey. Judgement 22 July 2008. §18//http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=38288829&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=37943&highlight accession 2011-11-05.

In all cases the ECtHR emphasizes the absolute nature of the prohibition of torture and underlines that this right is non-derogable and unlimited. In this way the court rejected arguments of the states that were trying to justify their actions by the statements of necessity in the case of threat to the national security. The practice of the court show that the prohibition of torture, defined in the number of international legal acts, help to secure persons from torture more effectively. Nevertheless, the absoluteness of prohibition of torture and it's customary nature, the acts of torture occur in recent years. The practice of the states show, even now the phenomenon of torture is widely common. "Even the tightest controls cannot prevent some whiff of freedom from entering public consciousness, and the region's security forces have all too often responded with torture. Yet the fight against terrorism and political Islam led to growing international tolerance of, and sometimes active complicity in, torture"[51].

The different interpretations of the elements of the torture definition in further research will be analysed. The comparison of the elements with the interpretation of the United States of America will be made. The application of the definition by this state in the context of terror was interpreted very controversially at international level. The declassified documents of the US Department of Justice gave a possibility to analyse the interpretation made by the USA. This analysis will show how narrowly the definition was interpreted comparing to the interpretation by the international bodies.

[51] Human Rights Watch. World report 2012.events of 2011. P.15//http://www.hrw.org/world-report-2012 accession 2012-04-21.

2. The content and interpretation of the definition of torture in contemporary international law and practice

2.1. The settlement of the definition of torture at international level

The ICCPR and ECHR do not contain the definition of torture. Only the general prohibition of it is provided there. It is more reasonable to create prohibition in general terms as it is done now and to leave further development of the definition for the international courts. That makes prohibition more flexible and easy operating in the volatile world. Acts which were not possible to classify as torture in the past, could be classified as torture in the future.[52] The aim of these provisions is to protect both the dignity and the physical and mental integrity of the individual. "It is the duty of the State party to afford everyone protection through legislative and other measures, […] whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity".[53] The ECtHR in it's practice is using the elements of torture definition as it is enshrined in the CAT, but its own interpretation is evolved.

The articles of Geneva Convention and its additional protocols did not specify what acts could be defined as torture, as well. Only the Commentary of torture related articles explains what it could be. According to the Commentary of the Geneva Convention, torture is an attack on the human person, which infringes fundamental human rights[54]

Those are not necessarily any attacks on physical integrity, the „progress" of the science involving physical suffering, do not necessarily cause bodily injury. Prohibition of torture is absolute, it covers all forms of torture, the act of torture itself is reprehensible, regardless of its perpetrator, and cannot be justified in any circumstances. It wilfully caused great suffering (useless and unnecessary) with the purpose to obtain confessions or information that affects physique or health of a person. The commentaries of the Geneva Convention were published between 1958 and 1960[55] and it was the first attempt to explain the definition of torture. It was chosen to define torture in broad terms instead of creating an exhaustible list of certain acts that would be covered by the term of torture. This choice was explained by the Committee of the Red

[52] Selmouni v. France, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999//http://www.unhcr.org/refworld/docid/3ae6b70210.html accession 2012-01-19. The applicant a Netherlands and Moroccan national was held in police custody and questioned by police officers in France. He was suspected in drug-trafficking. The lodged a complaint for a bodily harm, wounding with a baseball bat, indecent assault, assault that resulted in a loss of an eye and rape. All actions were committed by police officers in the performance of their duties.

[53] UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992. §2// http://www.unhcr.org/refworld/docid/453883fb0.html accession 2011-05-04.

[54] The Geneva Conventions of 12 August 1949 Commentary. Convention (IV) relative to the Protection of Civilian Persons in Time of War – Geneva: International Committee of the Red Cross, 1958. First reprint, 1994. P.222, Article 32.

[55] The Geneva Conventions of 12 August 1949 Commentary. Conventions I-IV. – Geneva: International Committee of the Red Cross, 1958-1960. First reprint, 1994-1995.

Cross as ,,It is always dangerous to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible, and, at the same time, precise."[56] The flexibility of this definition makes it possible to be used after more than 50 years it was created.

The declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment or Punishment is defining torture as an offence against human dignity, and violation of human rights and fundamental freedoms, and it should be acknowledged as an offence under national criminal law of the States. According to professor J. Žilinskas, this declaration is the primary source defining torture.[57] The essential elements of torture according to this definition are:

- Severity of mental or physical pain or suffering;
- Specific status of the perpetrator;
- Intention and purpose.

This definition remains almost not changed until nowadays. The definition to a very large extent coincides with the definition of torture in the CAT. "The Trial Chamber II of the international Tribunal has rightly noted […] that indeed the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has hence concluded that that definition "thus reflects a consensus which the Trial Chamber considers to be representative of customary international law"[58]

Most of the documents prohibiting torture contain only the general prohibition of it. It is left for the judicial institutions apply and interpret the content of it. The precise definition is enshrined only in a few instruments. Because of the dynamicity of the life and the new approaches to the values of the humanity, precise definition with clearly expressed elements and requirements for the act could become restrictive and create obstacles to apply it in contemporary practice. In this situation the definition does not match the primary purpose it was designed for. It is more reasonable to define a prohibition of torture in general terms and to leave

[56] The Geneva Conventions of 12 August 1949 Commentary. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. – Geneva: International Committee of the Red Cross, 1959. First reprint, 1995. P.54.
[57] Žilinskas J. Nusikaltimai žmoniškumui ir genocidas tarptautinėje teisėje bei Lietuvos Respublikos teisėje. - Vilnius: Lietuvos Teisės Universitetas, 2003. P.96.
[58] Prosecutor v. Furundzija Case No.: IT-95-17/1-T. §160//http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf accession 2012-01-19. The accused, Anto Furundzija, was the local commander of a special unit of the military police of the HVO known as the "Jokers". He and Accused B were charged with the commitment of torture and outrages upon personal dignity, including rape.

it for further interpretation by the courts, as it was done in ICCPR, ECHR and etc. Judicial bodies adopt their decisions according to the needs and values of humanity in that particular period. If they are restricted by the detailed definition it is hard to interpret it and apply.

„The interpretation of what constitutes torture is constantly evolving".[59] The elements of the definition of torture and its interpretation could be found in the practice of international judicial bodies. The definition contained in the CAT is used as a background for the interpretation. The definition of torture in the international law is based on the findings of the previous judicial practice, therefore the subsequent practice proposes new interpretations of it. The notion of torture should be broadly conceived so that its interpretation may develop in order to make more effective the prohibition of new, subtle methods of torture.[60]

It is necessary to remark; the practice of the judicial bodies defining the act of torture is not uniform. Some judicial bodies do not use one or another element of the definition in practice (for the broader explanation about the development of the definition of torture, look further Chapter 3).

2.2. The development of the definition of torture in the US legislation

The prohibition of torture is enshrined in the legal acts, which show, that it is not clear what acts constitute torture and to what extent it should be applicable. This opens room for the different interpretations of the definition contained in the CAT. States respect the absoluteness of prohibition of torture and ban these acts in their domestic legislation according to the requirements of the CAT. The different interpretations of the definition create the possibility for the states to use some acts, that might be defined as torture, as interrogation techniques. There are countries that are using (or used it before) a different interpretation of torture and legitimising some interrogation techniques that in practice could be defined as torture.

The most controversial interpretation of the definition of torture was used by the United States of America (hereinafter – US). The US started their interpretation by including a declaration and understanding to the CAT during the advice and consent procedure in the Senate, both of which were ultimately interpreted by the UN as constituting reservations.[61] Reservations to the CAT were made according to the US Senate Resolution adopted on 27 October 1990.[62]

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[59] Giffard C. The Torture Reporting Handbook. – Colchester: Human rights center,Univercity of Essex, 2000. P.15.
[60] Cullen A. Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights//http://www.lcil.cam.ac.uk/Media/Anthony_Cullen_Defining_Torture_Article.pdf accession 2012-01-20.
[61] Druce G. Does waterboarding constitute torture?//Dartmouth Law Journal, Fall 2008, Volume 6, Issue 3. P.356.
[62] Text of resolution of advice and consent to ratification as reported by the committee on foreign relations//http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:100TD00020: accession 2012-02-05.

Before the CAT was ratified, the US had a prohibition of torture enshrined in the national laws. The prohibition of torture and cruel, inhuman or degrading treatment or punishment was recognized by federal courts as an accepted norm of customary international law and it was applicable in the judicial decisions.[63]

The Eighth amendment to the United States Constitution stated: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[64] The interpretation of the Eighth amendment was left for the judicial practice. The analysis of the US legal practice shows that the very wide definition was used by the US Constitution to prohibit all forms of ill-treatment that could be imposed. It was not clear which acts could be defined as torture, but the torture in general as an act of punishment was forbidden by the Eighth amendment of the Constitution. In Wilkerson v. Utah the Court found that "difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it safe to affirm those punishments of torture and all others in the same line of unnecessary cruelty are forbidden"[65]. Torture was considered as an act that constitutes cruel and unusual punishment according to US laws. In the case Furman v. Georgia the court reaffirmed that torture is an act that constitute cruel and unusual punishments. In this case the Court observed, that "punishments are cruel when they involve torture or a lingering death."[66] In the case Wilkerson v. Utah was stated "it is safe to affirm that punishments of torture and all others in the same line of unnecessary cruelty are forbidden by that Eighth amendment."[67] This judicial practice proves the acts of torture was prohibited by the Eighth amendment and was included in to the definition of cruel and unusual punishment as the constituting element. An old US judicial practice is used to explain how the definition of torture was interpreted by the US in the past. In further research the recent cases will be analysed in order to show how the interpretation changed. The new point of view was expressed in the case Furman v. Georgia by Justice Brennan. He wrote: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[68] Therefore, forty years ago in US courts there was an understanding that what not a criminal offence was before could be defined as such nowadays. It was proposed to put more acts under the prohibition of cruel and

[63] Committee against torture. Convention against torture and other cruel inhuman or degrading treatment or punishment. Initial reports of states parties due in 1995. United States of America. 2000 February 9. P.19-20//http://www.state.gov/documents/organization/100296.pdf accession 2012-02-06.
[64] http://www.law.cornell.edu/constitution/billofrights#amendmentviii accession 2012-02-07
[65] Wilkerson v. Utah 1878//http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=99&invol=130 accession 2012-02-06
[66] Furman v. Georgia, 1972//http://law2.umkc.edu/faculty/projects/ftrials/conlaw/furman.html accession 2012-02-06
[67] Wilkerson v. Utah 1878//http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=99&invol=130 accession 2012-02-06
[68] Furman v. Georgia, 1972//http://law2.umkc.edu/faculty/projects/ftrials/conlaw/furman.html accession 2012-02-06

unusual punishment in order to protect society from treatment that could dishonour it. In Selmouni v. France in 1999 by the ECtHR the same was repeated in the context of torture. The new understanding of the interpretation of the definition of torture was proposed by Justice Brennan which leads to the widening of the definition. Because of that, more acts should fall under this definition.

All necessary measures were installed in the US legislative and judicial system to prevent ones from torture. The acts of torture were falling under the definition of cruel and unusual punishment and constituted ill-treatment. The US courts explained cruelty as a general definition and torture was a specifying act constituting the cruel action. The different understanding was proposed by the CAT where cruel inhuman or degrading treatment could constitute act of torture. According to the US Constitution the cruel act is more severe than torture, because torture constitutes cruel treatment. Therefore, if an act constituting cruel treatment was committed it automatically would violate the Constitution. Therefore, less severe form of ill treatment was needed to breach the laws of the United States.

Torture is also prohibited under the United States Code 18 U.S.C. § 2340-2340A (hereinafter - 18 U.S.C. § 2340-2340A) where the torture is defined as any "act committed by a person acting under the colour of law specifically intended to inflict severe physical or mental pain…"[69]. In 1994 the US Senate ratified the CAT subject to an understanding that refines the definition of torture contained in Article 1[70] and it is incorporated into the Code of Federal Regulations 8 CFR. § 208.18 (hereinafter - 8 CFR, § 208.18). This understanding was crucial for the interpretation of the definition of torture after 9/11 and was influenced by the 18 U.S.C. § 2340-2340A, defining torture as specifically intended to inflict severe pain or suffering. The Code of Federal Regulations 8 CFR § Sec. 208.18[71] governed the implementation of the CAT in the United States. It explained the application of the CAT in US legal system and gave the guidelines what acts could be defined as torture.

After the 9/11 the interpretation of the eighth Amendment of the US Constitution made by the courts in more than one hundred years was negated by G.W.Bush administration stating: "it (the Eight amendment) was designed to protect those convicted of crimes".[72] Therefore, it was decided that the prohibition enshrined in the Eighth amendment is applicable only for convicted persons and not for the detainees. In this way the application of the Eighth amendment

[69] 18 U.S.C. § 2340//http://www.law.cornell.edu/uscode/text/18/2340 accession 2012-02-10.
[70] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.296//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-02-12.
[71] The Code of Federal Regulations 8 CFR § Sec. 208.18//http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15320.html#0-0-0-11369 accession 2012-03-04.
[72] Working group report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations. 6 March 2003. P.36//http://www.american-buddha.com/911.tortureworkgroup25.htm accession 2012-03-04.

and the interpretations and findings of the judicial practice was rejected and the new interpretation was evolved regarding the interpretation of the definition.

Establishing that the USA Constitution does not define prohibition of torture implied for the detainees, the Bush administration made an interpretation regarding customary international law. The conclusion was reached that the US Executive Branch is not bound by international customary law because it is not US federal law. It was decided by the department of Justice that presidential decisions regarding the detention and trial of the accused of terrorism override customary international law[73].

The Department of Justice interpreted definition of torture enshrined in the 18 U.S.C. § 2340-2340A and explained in the 8 C.F.R. § 208.18. According to these documents, for an act to constitute torture it must have the same elements as it is defined in the CAT. The main reasons for the application of different extent of the definition were different interpretation of these elements.

In order to explain the evolution of the definition of torture the elements of it will be analysed further. The further analysis of the definition will show how the interpretation of it has changed during the years and what influence was made by the interpretation of the US. It will reveal which interpretations the judicial bodies are using nowadays.

2.3. Elements of the definition of torture

2.3.1. Severity of mental or physical pain or suffering

A concept of severity is very hard to define and substantiate in order to establish which act is severe enough to be defined as torture. The question is: how much actual pain or suffering must be inflicted before the conduct rises to the level of torture? The element of severity was differently understood by the judicial bodies that have a mandate to decide which acts fall under the definition of torture.

European Commission of Human Rights and ECtHR have decided differently on the matter of torture. In the Greece case it was the first attempt to distinguish torture from cruel, inhuman or degrading treatment. This case was concerned with the acts of torture perpetrated by the armed forces after the revolution. Torture was initially employed to break the relatively small resistance movement. After the restoration of democracy during the trials it was proved that acts of torture were committed by "trained officers of middle rank"[74]: the psychological and mental

[73] Memorandum dated January 22, 2002, Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees//http://www.american-buddha.com/911.senateinquirydetaineescustody.htm accession 2012-03-04.
[74] Evans M., Morgan R., Preventing torture. – Great Britain: Oxford University press, 2001. P.79-80.

methods of intimidation and interrogation such as falanga[75]; sexual abuse; Palestinian hanging[76]; jumping on the stomach; extraction of finger or toe nails; burning; electric shock and ect.[77] The most important thing in the Greek case was, the Commission explanation that: "The word 'torture' […]it is generally an aggravated form of inhuman treatment." As the Commission stated "inhuman treatment" covered "at least such treatment as deliberately causes severe suffering, mental or physical" its reasoning might therefore be taken to mean that "torture" required a degree of pain or suffering that was somehow more intense than "severe". [78]

The first inter-state case brought before the ECtHR[79] was Ireland v. United Kingdom. Before the ECtHR it was considered in the Commission. The Commission concluded that „five interrogation techniques" consisting of hooding[80], noise, wall-standing, deprivation of sleep and bread and water diet applied during interrogation constitute torture. The Commission observed that the combined application of these techniques was „designed to put severe mental and physical stress, causing severe suffering, on a person in order to obtain information from him".[81] ECtHR changed the decision of the Commission declaring that defining acts of torture depend „on the intensity of the suffering inflicted". In the court's opinion a „special stigma" is needed to deliberate inhuman treatment causing very serious and cruel suffering."[82] Nevertheless the systematic and cumulative application of the „five techniques" the ECtHR decided the suffering in this case did not amount to torture. The same special stigma and very serious and cruel suffering concept the ECtHR used in the case Aydin v. Turkey[83]. The rape that occurred in this case was defined as torture because of its especially grave nature; that leaves „deep psychological scars on the victim which does not respond to the passage of time as quickly as other forms of physical and mental violence"[84]. The rape was also defined as an act of the "acute physical pain […] which must have left […] feeling debased and violated both physically and emotionally." This conclusion of the ECtHR regarding rape is possible explanation of what is covered under the wording "special stigma". The element of "special stigma" was repeated in the

[75]Falanga - a form of corporal punishment in which the soles of the feet are beaten with an object such as a cane, rod or club, a stout leather bullwhip, or a flexible bat of heavy rubber. It is also sometimes favoured as a form of torture because although extremely painful, it leaves few physical marks.
[76] Palestinian hanging - a form of torture in which the victim's hands are first tied behind their back and suspended in the air by means of a rope attached to wrists, which most likely dislocates both arms. Weights may be added to the body to intensify the effect and increase the pain.
[77] Evans M., Morgan R., Preventing torture. – Great Britain: Oxford University press, 2001. P.80.
[78] Rodley N. The treatment of prisoners under international law. Third edition. – Great Britain: Oxford University Press, 2009. P. 91.
[79] http://www.nuigalway.ie/human_rights/Projects/Project_Ireland/ireland_v_uk.html accession 2012-02-02.
[80] Hooding - is the placing of a hood over the entire head of a prisoner.
[81] Evans M., Morgan R., Preventing torture. – Great Britain: Oxford University press, 2001. P.80.
[82] Ireland v. The United Kingdom, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977. §167//http://www.unhcr.org/refworld/docid/3ae6b7004.html accession 2011-09-25.
[83] Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997//http://www.unhcr.org/refworld/docid/3ae6b7228.html/ accession 2011-09-09.
[84] Ibid. §83.

case Saadi v. Italy. The ECtHR explained that it is embodied in the CAT by making the distinction between the torture and inhuman or degrading treatment.[85] The element of severity is measured by the duration of the consequences left by the act that could be defined as torture. In the case Dedovskiy and Others v. Russia the applicants were Russian nationals. The case concerned the applicants' allegation that, while serving a prison sentence at a correctional colony in Russia, they were ill-treated by the a special unit created to maintain order in detention facilities. The ECtHR explained that the truncheon blows cause intense mental and physical suffering, even though they did not apparently result in any long-term damage to the health.[86] The tendency to define as torture the acts that could not be defined as it before was revealed by this international practice. The level of severity is decreasing and more acts of ill-treatment are defined as torture.

More strict view regarding the use of force against a person deprived of his liberty proposed ECtHR in the case Ribitsch v. Austria. In this case the applicant and his wife were arrested for drug trafficking. Mr Ribitsch and his wife were held in police custody for about a month. During detention the questioning officers insulted him grossly and then assaulted repeatedly in order to wring a confession. ECtHR found a violation of Article 3 and stated "any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 of the Convention"[87]. That was confirmed in the cases Sheydayev v. Russia, Artyomov v. Russia[88] and others. The very wide interpretation of the ECtHR was applied to constitute breach of Art. 3 of the ECHR. In the case Artyomov v. Russia the court accepts that the use of force may be occasionally necessary to ensure prison security, to maintain order or to prevent crime in penitentiary facilities. Nevertheless, such force may be used only if indispensable and must not

[85] Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008. §136//http://www.unhcr.org/refworld/docid/47c6882e2.html accession 2011-10-29.
[86] Dedovskiy and others v. Russia, decided 15 May 2008. §85//www.univie.ac.at/bimtor/.../ecthr_2008_dedovskiy_vs_russia.doc accession 2012-03-02.
[87] Ribitsch v. Austria, 42/1994/489/571 , Council of Europe: European Court of Human Rights, 21 November 1995. §38//http://www.unhcr.org/refworld/docid/3ae6b7010.html accession 2012-03-01.
[88] Sheydayev v. Russia, decided 7 December 2006. §59//www.univie.ac.at/bimtor/.../ecthr_2007_sheydayev_vs_russia.doc accession 2012-03-01; The applicant was a Russian national who was performing military service at time, was taken in for questioning as a witness to an incident involving violent hooliganism. He claimed he was subjected to ill-treatment by police officers while kept in custody and complained violation of Article 3 of the ECHR; Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §145//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02; The applicant, a Russian national who was found guilty of aggravated blackmail and was sentenced to five years' imprisonment. Relying on Article 3 of the ECHR he complained about the appalling conditions of his detention and he had been severely beaten on two occasions by officers of a special unit carrying out searches and on one other occasion by an officer on duty. The ECtHR found violation on the art.3. Two occassions of severe beating was defined as torture.

be excessive.[89] According to this interpretation, it is not allowed to use any sort of physical force if it was not really necessary. It could be used only in special circumstances in order to save the life of the detained person or to protect civil society from the actions of the particular detainee.

A very important statement was made by ECtHR in the case Arif Celebi and others v. Turkey[90]. The applicants were Turkish nationals and they claimed they had been tortured while detained in the police custody on suspicion of membership of an illegal armed organisation. Such particular acts as blindfolding, forcing to remain standing or sitting for a long time, deprivation of sleep, subjection to noise, beatings, stripping and making to lie in cold water, leaving exposed to the circulation of cold air was considered as torture according to Article 3 of the ECHR. These actions were applied for 7 persons. For a few of them actions that could be defined as torture in isolation from other acts were applied. The acts implied for others in the case Ireland v. United Kingdom were described as not of the particular severity and cruelty to amount to torture. Decision in the Arif Celebi and others v. Turkey reversed the decision in the case Ireland v. United Kingdom stating these acts are torture and proved the statements of the Justice Brennan from the US, and interpretation of the court in the case Selmouni v. France.

In the case Sufi and Elmi v. UK[91] two Somali nationals, Mr Sufi and Mr Elmi entered UK and asked for asylum. Mr.Sufi was refused and Mr. Elmi was granted Indefinite Leave to Remain in the UK. During their stay in the UK they were sentenced and imprisoned for several times. A decision was made to issue a deportation order and return them to Somalia because their continuing presence in the UK constituted a danger for the state security. The applicants alleged that if returned to Somalia they would be at real risk of ill-treatment contrary to Article 3 and/or a violation of Article 2 of the ECHR. According to the findings of the ECtHR in this case the non-discriminatory measures targeted to the community living in particular area such as "the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict"[92] is of such a level of intensity that would constitute treatment contrary to the Article 3 of the convention. The definition of torture contained in the CAT is constructed to secure someone from torturous actions directed to the integrity of his body and health. However, this case expands the scope of the definition and the torturous acts inflicted on the population where the person residing could

[89] Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §168//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.
[90] Arif Celebi and Others v. Turkey, Applications nos. 3076/05 and 26739/05, Council of Europe: European Court of Human Rights, 6 April 2010//http://www.unhcr.org/refworld/docid/4bc852b12.html accession 2012-03-04.
[91] Sufi and Elmi v. United Kingdom, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011//http://www.unhcr.org/refworld/docid/4e09d29d2.html accession 2012-04-25.
[92] Ibid. §248.

be contrary to Article 3 of the ECHR. This evidences, during the time the interpretation of the severity is getting broader, more acts are defined as severe enough to constitute torture and the level of severity is getting lower.

The Human Rights Committee in the cases regarding torture was not trying to distinguish torture from other forms of ill-treatment and to decide separately on the acts committed. It kept all actions as one and decided that all these actions constitute torture. In the case Estrella v. Uruguay the applicant, Argentine national, concert pianist, stated that he became a member of the Movimiento Peronista in Argentina because he wished to contribute to the wider dissemination of knowledge of music, among the deprived sectors of the population. His activities, which were unpaid, involved giving courses, lectures and public concerts. These activities were allegedly considered to be "subversive" by the new military Government. His activities as a mussician were suspended. Later an armed individuals in civilian clothes broke in his house, and kidnapped him. He was brought to some unrecognized place and subjected to torture. Later he was brought to military barracks and subjected to ill-treatment. The HRC decided that electric shock, beating with rubber truncheons, punches and kicks, hanging up with the hands tied behind back, pushing in to the water until one is nearly asphyxiated, making standing with legs apart and arms raised for up to 20 hours constitute torture. These physical acts were accompanied by psychological torture: threats of torture to relatives or friends, inducing a state of hallucination; mock amputation.[93] In the case Sendic v. Uruguay The author of the communication was a Uruguayan national residing in France. She submitted the communication on behalf of her husband Uruguayan citizen, detained in Uruguay. Her husband had been the main founder of the Movimiento de Liberacion Nacional (MLN-Tupamaros). She commented that it had been a political movement - not a terrorist one -aimed at establishing a better social system. After seven years of clandestine activity, her husband was arrested by the Uruguayan police. Later he was kidnapped by a military group and placed in the military detention. He was kept in five places of detention where he was subjected to mistreatment and torture. HRC decided that infliction of "planton"[94], beatings and lack of food constitute torture.[95] The same was found in the case Grille Motta v. Uruguay where the serious allegations of ill-treatment and torture claimed by Mr. Grille Motta to have continued for about 50 days after his arrest. Furthermore, the applicant named some of the officers of the Uruguayan Police whom he stated were responsible for the infliction of electric shock, "submarino"[96], insertion of bottles or barrels

[93] Estrella v. Uruguay No. 74/1980, 1983. §10//http://www.bayefsky.com/pdf/125_uruguay74vws.pdf accession 2012-03-05.
[94] Planton – standing upright with the eyes blindfolded.
[95] Sendic v. Uruguay No.R14/63, 1981. §16.2//http://www.bayefsky.com/pdf/116_uruguay63vws.pdf accession 2012-03-05.
[96] Submarino – putting the detainee's hooded head in to foul water.

of automatic riffles into anus; forcing to remain standing hooded and handcuffed with a piece of wood thrust in to mouth for several days and nights.[97] In order to define all these acts as torture the cumulative approach was used.[98] All torture acts inflicted in the above mentioned cases are of such a nature that leave physical and psychological effects and some special instruments are used for perpetration. The frequency of infliction and lasting for some particular time is another common feature of these actions. It shows that HRC had its own formula for establishing the level of severity that could constitute torture.

In the case Dragan Dmitrijevic v Serbia and Montenegro the applicant was arrested in connection with the investigation of a crime. The Committee Against Torture concluded that the handcuffing to a radiator and beating with nightsticks, striking with a big metal bar, kicking and punching up by several police officers, insulting ethnic origins, resulting the bleeding of complainant from his ears, despite which the beating continued can be characterized as severe pain or suffering and constitute torture.[99] The same level of severity was confirmed in the case Ali Ben Salem V. Tunisia. The Committee concluded that the police officers actions directed to a person by hitting him many times on the back of the head and neck and kicking, dragging 15 metres along the courtyard face down and up a flight of stairs leading to the police station, spraying tear gas in the face during interrogation, banging his head against a wall, resulting of unconsciousness for an undetermined period, refusing to take to the toilet constitute torture. The UN Committee Against Torture included the beatings of police officer in to the acts constituting torture though the Bush doctrine explained they are not severe enough to amount to torture.

The wording "aggravated treatment" was used in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Almost the same wording was used in the draft of the CAT submitted by Sweden. It was defined as "aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".[100] The same wording was submitted by the Chairman of the Working group. Regarding the level of severity of pain or suffering almost all participating states agreed it should be defined more broadly as "severe pain or suffering". Only two states the United Kingdom and the United States proposed to establish extreme level of suffering. It would restrict the definition of torture and fewer acts would fall under this definition. The usage of a narrower

[97] Grille Motta v. Uruguay No. 11/1977, 1980. §16//http://www.bayefsky.com/html/107_uruguay11vws.php accession 2012-03-06.
[98] Rodley N. The treatment of prisoners under International Law. Third edition. – Great Britain: Oxford University Press, 2009. P. 92.
[99] Dragan Dimitrijevic v. Serbia and Montenegro, CAT/C/33/D/207/2002, UN Committee Against Torture (CAT), 29 November 2004. §5.3//http://www.unhcr.org/refworld/docid/42b2ac852.html accession 2012-03-07.
[100] Burgers J.H., Danielius H., The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment – The Netherlands: Martinus Nijhoff Publishers, 1988. P.41.

definition of torture by US is supported by the US court of appeals in the case Price and Fray v. Socialist People's Libyan Arab Jamahiriya. In this case two US citizens were accused of espionage for taking pictures contained of Libyan people daily life and were detained in Libya. They complained had been tortured in the prison of Libya. The court stated, the severity requirement is crucial to ensuring that the conduct [...] is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. The United States understand that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.[101] According to the findings of this court „severity" should be considered as acts „including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out; in order to ensure that they satisfy the [...] definition of torture.[102]

According to US understanding, only a few acts amount to torture. During the ratification process of the CAT the US Congress codified the view that torture included only the most extreme forms of physical or mental harm. When it submitted the Convention to the Senate, the Reagan Administration took the position that the CAT reached only the most heinous acts.[103] It was applicable only for the acts with unusual cruel practice, such as sustained systematic beatings, electric shocks applied to the sensitive parts of body, hanging in positions that cause extreme pain. The Code of Federal Regulations[104] reflects the United States' longstanding position that torture is an extreme form of cruel, inhuman, or degrading treatment or punishment.[105]

After the events of 9/11the US President Administration interpreted the definition of torture enshrined in the CAT. It was done in the context of terror and necessity to safeguard states' right for security in order to protect the innocent people. The interpretation was based on

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[101] Price and Fray v. Socialist People's Libyan Arab Jamahiriya 294 F.3d 82. §36-37//http://law.justia.com/cases/federal/appellate-courts/F3/294/82/545692/ accession 2012-03-10.

[102] Ibid. §40.

[103] *The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhumane nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.* U.S. Department of Justice Office of Legal Council. Memorandum for Alberto R. Gonzales counsel to the President. August 1, 2002//news.findlaw.com/wp/docs/doj/bybee80102mem.pdf accession 2012-03-10.

[104] 8 CFR § Sec. 208.18 (a) (2) "Torture is an **extreme** form of cruel and inhuman treatment […]"//http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15320.html accession 2012-03-12.

[105] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.297//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10; The respondent is a native and citizen of Haiti. He entered the United States without inspection at an unknown time and place. The respondent was convicted of sale of cocaine in the USA. The decission was made to expell him to Haitian prison. The respondent claimed that upon his return to Haiti he will be persecuted and tortured by Haitian authorities. The Board of Immigration Appeales cannot find that the respondent has established that it is more likely than not that he will be tortured if he is returned to Haiti.

the commitments of the US that were made during the ratification of the CAT. These interpretations are stated in the memos of the US Department of Justice and changed the previous interpretation of the definition of torture making it more vigorous in the combat against terror. In the absence of the definition of "severe" the US Department of Justice used the dictionary explanation to interpret this term "in accordance with its ordinary or natural meaning". In this way, the definition "severe" was explained as such high level of intensity that the pain is difficult to endure.[106] The statutes defining an emergency medical condition was used to clarify the notion of the "severe pain". It was stated that in order to constitute torture "severe" has to reach such a high level "that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions"[107] Mark Richard, Deputy Assistant Attorney General explained that under the Bush administration's submissions with the treaty „the essence of torture" is treatment that inflicts „excruciating and agonizing physical pain". In the memorandum on interrogation of al Qaeda operative[108] the application of interrogation techniques was decided and the level of severity of these acts was analysed. The level of severity of each interrogation technique was analysed separately and the conclusion was reached. All of them were found to not constitute torture because of lack of extreme severity.

The opinions of the US courts were based on this interpretation. In the matter J-E decided by the Board of Immigration Appeals (hereinafter – BIA) the term "severe" was interpreted in practice. This case was cited in other cases[109] that are based on the same concept of severity. As it was stated in the mentioned case, the United States took the position that "torture" is limited to extreme forms of cruel, inhuman, or degrading treatment or punishment.[110]

After the allegations about abusive treatment in the prisons of Guantanamo and Abu Ghraib appeared, the investigations were launched in order to establish the existence of these

[106] U.S. Department of Justice Office of Legal Council. Memorandum dated August 1, 2002, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A//http://www.american-buddha.com/torture.memo14togonzales.htm accession 2012-03-15.
[107] Ibid.
[108] U.S. Department of Justice Office of Legal Council. Memorandum dated August 1, 2002, Re: Interrogation of al Qaeda Operative//http://www.american-buddha.com/torture.2bybeememoaug12002.htm accession 2012-03-17.
[109] In Re M-B-A Decided September 24, 2002, Board of Immigration Appeals; Cadet v. Bulger No.03-14565, July 20, 2004// http://www.justice.gov/eoir/vll/intdec/vol23/3480.pdf accession 2012-03-10. The respondent was the citizen of Nigeria who entered the United States as a nonimmigrant visitor. She subsequently adjusted her status to that of a lawful permanent resident. She was convicted in the USA of importation of a controlled substance and possession of heroin with intent to distribute. The Service issued a document charging that the respondent is removable as an alien convicted of an aggravated felony and a controlled substance violation. In her application for protection under the Convention Against Torture, the respondent stated that if she is returned to Nigeria she would be imprisoned and tortured as a result of her drug conviction in this country. During the proceedings the respondent failed to demonstrate that it is more likely than not that she will be tortured by a public official, or at the instigation or with the consent or acquiescence of such an official, if she is deported to Nigeria.
[110] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P. 295//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.

abuses. The appointed officials exercised these investigations and delivered reports regarding their findings. Mayor General George R. Fay stated in his report that direct physical assault, such as delivering head blows rendering detainees unconscious, sexual posing and forced participation in group masturbation, as the extremes were the death of a detainee in custody, rape committed by a US translator and observed by a female soldier, sexual assault of a female detainee are, without question, criminal and can not be directly tied to a systemic US approach to torture or approved treatment of detainees. [111]

Another official investigating the allegation of torture LTG Randall M.Schmidt in its testimony stated that short shackling (it was never authorized in interrogation. It was authorized as a security control measure for detention), threatening with a dogs, interrogation for 20 hours a day in the white cell at least 54 days - 20 hours a day and 4 hours off, in that four hours one was taken to a white room with all the lights on; interrogations that he found to be abusive and degrading. It might have hovered above the level of inhuman. And it was certainly not torture.[112] The officials inquire to prove only the most extreme acts such as a rape, which was acknowledged as torture. The acts that do not cause physical injuries are not defined as torture under the US interpretation.

The BIA in the matter J-E-implicitly concluded that the other forms of police brutality in Haiti (beatings with fists, sticks, and belts) did not rise to the level of severity necessary to constitute CAT-prohibited "torture.".[113] The legal conclusion in this case was essential that only particularly vicious and deliberate acts of cruelty […] and not lesser acts of police brutality, amount to torture.[114]

International tribunals are basing their findings interpreting the elements of definition of torture enshrined in the 1975 Declaration or the CAT. The choice of the definition depends on the date the legal act containing definition entered in to force and the date the case was examined. The courts are giving a great attention to the element of severity and the understanding of this element varies. The analysis of the cases showed that the judicial bodies understand severity as especially grave treatment that leaves both physical and emotional "wounds"; the act should be of the particular frequency, duration and particular measures should be used. The judicial practice shows there are three understandings of this element: aggravated treatment; special stigma is needed; extreme suffering. As the drafts of the CAT show the

[111] AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. MG G.R.Fay Investigating Officer. P. 9// news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf accession 2012-03-20.
[112] Testimony of LTG Randall M.Schmidt. Taken 24August 2005 at Davis Mountain Air Force Base, Arizona//http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20050825.pdf accession 2012-03-25.
[113] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P. 302//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[114] Ibid. P.302.

primary version of the definition contained the element of aggravated treatment, the valid definition now contains the "severe pain or suffering". The concept of special stigma evolved from the definition of torture enshrined in the CAT. The courts decided that severe pain or suffering should be more severe in order to be defined as torture and the requirement of special stigma was attached.

An attempt to define level of severity as "extreme" made by the US was not accepted by other states. This interpretation was used only in the US doctrine regarding the definition of torture. The practice of international tribunals evidences willingness to make the torture definition broader than it was designed in the CAT. Usually, ill-treatment consists of a complex of acts that should be discussed as one before the court. Examination of them in separation leads to the conclusion that the less severe treatment than torture was inflicted. Nevertheless, a person had to suffer all these acts by himself. The court's practice shows, the cumulative approach is used to decide on the severity of the acts inflicted. The analysis of the judicial practice shows the level of severity is decreasing. The primary approach formulated in the Greek and Ireland v. UK cases is not changing; just more acts are falling under the definition of torture. The requirement of a long term effect or post-traumatic stress of a torture is changed and is not needed anymore. The ECtHR acknowledges, that all unecessary physical force used against prisoner is a violation of Article 3 of the ECHR. Therefore, all physical harm inflicted on a person could be defined as torture regardless its severity. The concept of severity would be left to distinguish the level of mental harm inflicted on a person. Mental harm is a very subjective element therefore it is hard to decide on its severity. Because of this reason the evolved system to set level of severity is needed. In this situation some acts of the mental harm would fall under the definition of torture and some of less severity under the definition of cruel or inhuman treatment. Meanwhile, all unnecessary physical harm inflicted on a person would constitute torture because it diminishes human dignity and infringes right not to be tortured.

2.3.2. The elements of intention and purpose

Some instruments defining torture contain a reference to purposive and intentional elements: article 1 of the CAT; article 2 of the inter-American Convention to Prevent and Punish Torture. The definition of torture enshrined in the ICC Statute article 7(2)(e) contains the element of intention but lacks of the purpose. Mentioned acts enlist what kind of purposes could be in order to define torture: obtaining information or a confession, punishing, intimidating or coercing, or purpose of discrimination of any kind. This list is not exhaustive and the very broad terms are used, therefore, it is easier for the judicial bodies to apply it in different situations.

The practice of the international judicial bodies shows the intentional and purposive elements existed in the judicial practice prior the definition of torture enlisted in the CAT appeared. The European Commission on Human Rights in the Greek case regarding the intention stated "such treatment as deliberately causes severe suffering"[115]. The word „intention" was not used directly, but the word „deliberately" defines the form of the intention. The element of purpose was very important and was discussed more openly: "torture is an inhuman treatment which has a purpose, such as the obtaining information or confessions, or the infliction of punishment"[116]. The Commission recognized the special purpose is needed to define some particular act as torture. It was enlisted what kind of purpose it could be because ECHR lacks any explanations about what the term torture means. For this reason, the judicial body interpretation is very important explaining the definition of torture. In the Ireland v United Kingdom the ECtHR did not analyse the purpose of the actions, but it pointed out the object of the application of five techniques such as the extraction of confessions, the naming of others and/or information[117]. Aksoy v. Turkey reaffirmed the findings of the cases discussed above. The applicant was arrested, taken into the police custody and detained for fourteen days. According to the applicant he was subjected by the police to a form of torture known as 'Palestinian hanging' which involved being stripped naked and hung up by his arms. He also alleged to have been electrocuted in his genitals, kicked, slapped and verbally abused whilst in this position. He stated that as a result of the hanging he lost the use of his arms and hands. The Court considered that the treatment could be inflicted only deliberately and „with the aim of obtaining admissions or information from the applicant".[118] In other words, this form of treatment has been intentionally inflicted, and so serious and cruel that could only be described as torture.

The judgement in Selmouni v France is very important in formation of the ECtHR approach regarding purpose element, because it contained the ECtHR first reference to the definition of torture contained in Article 1 of the CAT. Making reference to this definition, the Court re-emphasised the purposive element of torture, which had been indicated in the The Greek Case. The ECtHR has referred to the CAT in several of its subsequent decisions, noting that, "in addition to the severity of the treatment, there is a purposive element as recognised in the United Nations Convention against Torture… which defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining

[115] http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/tortureorcrual/mental/ accession 2012-04-23.
[116] http://www.wcl.american.edu/hrbrief/14/2devos.pdf?rd=1 accession 2012-04-23.
[117] Ireland v. The United Kingdom, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977. §167//http://www.unhcr.org/refworld/docid/3ae6b7004.html accession 2011-09-25.
[118] Aksoy v. Turkey, 21987/93 , Council of Europe: European Court of Human Rights, 26 November 1996. §64//http://www.unhcr.org/refworld/docid/3ae6b6fa4.html accession 2012-03-30.

information, inflicting punishment or intimidating."[119] In the same case Selmouni v France the ECtHR stated "that where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused."[120] Failing to provide such an explanation was upheld as evidence the victim was tortured. It was enough to prove intent by providing evidences of physical harm inflicted during the applicant's stay in the custody.

In the case Khadisov and Tsechoyev v. Russia the applicants were Russian nationals who lived in Ingushetia (Russia). They were shot at when cutting grass for hay in local meadows. They alleged that it was the attack of Russian troops. The applicants gave an explanation in the District Department of the Interior about the incident. The applicants alleged that they were tortured by the servicemen in order to make them confess for being involved with paramilitary groups and claimed the violation of the Article 3 of the ECHR. The ECtHR stated "the sequence of events also demonstrates that the pain and suffering were inflicted on them (the complainants) intentionally, in particular with the view of extracting from them a confession […] and because of this reason, taken as a whole and given its purpose and severity, the applicants' ill-treatment had amounted to torture"[121]. According to the ECtHR it is not necessary to prove intention; the sequence of the events is enough to demonstrate the torture was inflicted intentionally. Similar wording was stated in the case Artyomov v. Russia where the ECtHR explained that the use of force by the officers of special-purpose during the actions in the colony was intentional and "aimed at debasing the applicant and forcing him into submission."[122] In some cases the wording intentionally interchanges with the wording deliberately, but the meaning of this element remains the same: to show that the act was inflicted not incidentally. In the case Dedovskiy and others v. Russia the court decided "the gratuitous violence, to which the officers deliberately resorted, was intended to arouse in the applicants feelings of fear and humiliation and to break their physical or moral resistance."[123] There is no such requirement in the ECHR to prove the elements of intention and purpose, however, in all cases the ECtHR decide on these elements.

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[119] Torture in International Law. A guide to jurisprudence. – Geneva: Association for the Prevention of Torture, Center for Justice and International Law, 2008. P.59.

[120] Selmouni v. France, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999. §87//http://www.unhcr.org/refworld/docid/3ae6b70210.html accession 2012-01-19.

[121] Khadisov and Tsechoyev v. Russia, decided 5 May 2009. §132-133//http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=846624&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 accession 2012-03-30.

[122] Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §156//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.

[123] Dedovkiy and others v. Russia, decided 15 May 2008. §85//www.univie.ac.at/bimtor/.../ecthr_2008_dedovskiy_vs_russia.doc accession 2012-03-02.

After the CAT entered into force, the courts used the same wording to define purpose as it was stated in the convention. In the later case Artyomov v. Russia purpose was defined differently: as an act to debase the applicant and force him into submission[124]. The same wording was used in the case Dedovskiy and others v. Russia[125]. This shows, when the ICTY in the cases Prosecutor v. Brdanin, Prosecutor v. Furundzija explained the list of purposes in the convention is not exhaustive and other purposes could be used to define torture, international judicial bodies started to define purpose differently. Therefore, the purposes identified by the international judicial bodies did not match the list defined in the CAT. However, the purposive element still was discussed.

Inter-American Commission on Human Rights as an institution deciding on the violations of human rights in American region in the case Mejia v. Peru[126] found that intention is an element that defines an act as torture. In this case the applicant Mrs.Mejia and her husband were accused by members of "Batallón Nueve de Diciembre" and were assaulted in their house. Mrs.Mejia was raped and her husband was abducted. The corpse of her husband was found on the bank of the river with the signs of torture. The Commission found that the purpose of the personal punishment and intimidation was used. The practice of the Inter-American Commission on Human Rights requires to prove intention and purpose of the action. The Inter-American Convention to Prevent and Punish Torture proposes a preliminary list of purposes, but it is modified differently from the CAT and is not exhaustive as well.

Under the American Convention on Human Rights, the perpetrators' intent need not to be established.[127] in Paniagua Morales v. Guatemala, the Inter-American Court of Human Rights found that the Guatemalan government tortured individuals in violation of Article 5 of the American Convention on Human Rights on the basis of autopsies which "reliably revealed signs of torture".[128]

The definition used in the ICTY practice contains the same purposes as the CAT. It was repeated in the cases Prosecutor v. Brdanin, Prosecutor v. Furundzija and ect. The list is not exhaustive and could be amended by the practice of the tribunal. „The prohibited purposes […] do not constitute an exhaustive list" was stated in the case Prosecutor v. Brdanin. In the case Prosecutor v. Furundzija the list of purposes was extended including the purpose of humiliating.

[124] Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §156//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.
[125] Dedovkiy and others v. Russia, decided 15 May 2008. §85//www.univie.ac.at/bimtor/.../ecthr_2008_dedovskiy_vs_russia.doc accession 2012-03-02.
[126] Raquel Marti de Mejia v. Peru, Case 10.970, Report No. 5/96, 1996//http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm accession 2012-03-20.
[127] Article 5 of the American Convention on Human Rights states: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment."
[128] Miller G.H. Defining Torture. P.13// http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf accession 2012-04-25.

This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity.[129]

The elements of the intention and purpose were interpreted by the Committee Against Torture. In the case Dragan Dmitrijevic v Serbia and Montenegro[130] it decided that beatings perpetrated by the police officers during the detention were inflicted intentionally. In the case Ali Ben Salem V. Tunisia[131] the complainant was a Tunisian national and a human rights activist in this country. He was arrested, brought to the police station and subjected to severe ill-treatment there: dragged along the courtyard face down and up a flight of stairs leading to the police station, beaten, in particular by one policeman, another officer sprayed tear gas in his face, a policeman banged his head against a wall, leaving him unconscious. When he asked to be taken to the toilet the policemen refused, he was obliged to drag himself along the floor to the toilets. Later, he was dumped at a construction site where he was discovered by the workers and taken to hospital. The Committee decided the physical injuries were inflicted on the complainant deliberately by the officials with a view to punish him for acts he had allegedly committed and to intimidate him. The Committee decided these actions were inflicted intentionally and purposively.

The most controversial interpretation regarding these elements was made by Bush Administration. As it was mentioned above the US Senate ratified the CAT with the ratification resolution that refines the definition of torture contained in Article 1 of the Convention. The requirement of "specific intent" was added to the definition. The US resolution stated: "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering"[132]. The same wording was included in to the 8 CFR § 208.18(a)(5) as a basis for implementation of the CAT. In the Memorandum for Alberto R. Gonzales acting with the specific intent was explained as an action that has expressly intended to achieve the forbidden act or express purpose to disobey the law[133]. In the case of torture the main object or purpose of the defendant should be to inflict the pain. The element of

[129] Prosecutor v. Furundzija, ICFY 10 December 1998, Case No.: IT-95-17/1-T. §162//http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf accession 2012-01-19; Prosecutor v. Radoslav Brdanin, ICFY 1 September 2004, Case No. IT-99-36-T. §481, §487// http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4146fd744 accession 2012-01-19.

[130] Dragan Dmitrijevic v Serbia and Montenegro CAT/C/33/D/207/2002. §5.3//http://www.unhcr.org/refworld/country,,CAT,,MNE,,42b2ac852,0.html accession 2012-03-07.

[131] Ali Ben Salem V. Tunisia 7 November 2007, CAT/C/39/D/269/2005. §16.4//http://www.chr.up.ac.za/index.php/browse-by-subject/478-tunisia-ben-salem-v-tunisia-2007-ahrlr-54-cat-2007.html accession 2012-03-31.

[132] 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)//http://www1.umn.edu/humanrts/usdocs/tortres.html accession 2012-04-01.

[133] U.S. Department of Justice Office of Legal Council. Memorandum dated August 1, 2002, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A//http://www.american-buddha.com/torture.memo14togonzales.htm accession 2012-03-15.

purpose in the US interpretation was incorporated in to the element of intention. In the Memorandum for J. B. Comey it was stated that „purpose corresponds loosely with the common law concept of specific intent"[134]. In the matter J-E was stated the act must have an illicit purpose, but it usually indicates the type of motivation that typically underlies torture and the illicit purpose requirement emphasizes the specific intent requirement[135]. The element named "motive" was proposed. But in the same memorandum for J. B. Comey was explained that torture is prohibited under US law and could not be used for a „good reason". That means all reasons named as motives to inflict torture are illegal and are not acceptable. Therefore, even the motive to protect national security could not be justified. The motive and the intention is not the same, the element of purpose was renamed to motive. Theoretically US doctrine replaced the element of purpose by the element of motive, but practically it was not applicable.

Understanding alone that a particular result is certain to occur does not constitute a specific intent. Even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith[136]. According to this interpretation person who applies torture acts to another person without any specific intent to torture them could not be held responsible for torture. Even if the extremely severe act is inflicted on a person it could not be defined as torture if it is not specifically intended. In the matter J-E the BIA stated an act that results in unanticipated or unintended severity of pain or suffering does not constitute torture and the rough and deplorable treatment, such as police brutality, does not amount to torture[137]. In this case was explained that in order to constitute torture, the act must be specifically intended to inflict severe pain or suffering. The ratification documents make it clear that this is a "specific intent" requirement, not a "general intent" requirement. "Specific intent" is defined as the "intent to accomplish the precise criminal act that one is later charged with" while "general intent" commonly "takes the form of recklessness or negligence."[138] However, it was very complicated to apply the element of intention. It is very hard to prove whether it was specific intention to inflict severe pain or suffering for a person, or just a general intent to obtain some information without any intent to make someone suffer. The element of specific intention was used in the

[134] U.S. Department of Justice Office of Legal Counsel. Memorandum Dated December 30, 2004. Re: Legal standards Applicable Under 18 U.S.C. §§ 2340-2340A. P.16//http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf accession 2012-04-03.
[135] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.298//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[136] Working group report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations. 6 March 2003. P. 9//http://www.american-buddha.com/911.tortureworkgroup25.htm accession 2012-03-12.
[137] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P. 298//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[138].Ibid. P.300-301.

matter J-E stating that indeterminate detention of criminal deportees by Haitian government in Haitian prisons lacks specific intent to inflict severe physical or mental pain or suffering, nevertheless they are subjected to torture and other ill treatment there. US condemned this practice, but because the specific intent of the Haitian government was not found, the practice could not be defined as torture. The court stated: "there is no evidence that they are intentionally and deliberately creating and maintaining such prison conditions in order to inflict torture"[139]. This interpretation was confirmed in the case Cadet v. Bulger.[140] Lack of specific intent results that only few acts could be defined as torture. Therefore, more acts fall beyond the definition of torture and could be applicable as interrogation techniques in the war against terrorism.

As it was indicated in the analysed cases, the elements of intention and purpose are widely used in international fora establishing the act of torture. According to the CAT, it is necessary to prove those two elements otherwise the act would not fall under the definition of torture. "Purely negligent conduct, therefore, can never be considered as torture. when a detainees, for example, forgotten by the prison guards and slowly starves to death, such conduct certainly produces severe pain and suffering, but it lacks intention and purpose and, therefore, can only be qualified as cruel and/or inhuman treatment."[141] However, the ECtHR practice shows it is enough to provide physical evidence of injuries inflicted in order to prove intent. The flexibility of the elements is very important because of the human values that are constantly changing. The decisions of international courts were constructed according to the definition of torture where the element of intention is used to decide whether an act of torture was conducted deliberately and not by the accident. No specific intention is required because it is very hard to decide what exactly this definition means and how to prove that someone had a specific intention. General intent is a less demanding standard, requiring merely that the actor intended to perform the conduct as opposed to intending to create a particular result in violation of the law.[142] Though, to prove general intent is enough and the special intent is not needed in international practice. According to the authors opinion, it would be reasonable to waive the requirement to prove intention. It would not be obligatory to prove intention of a perpetrator in order to establish an act of torture. The court would be obliged to make an assessment on this

[139] In re J-E-, 23 I&N Dec. 291 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P. 301//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[140] Cadet v. Bulger No. 03-14565, decided July 20, 2004//http://caselaw.findlaw.com/us-11th-circuit/1380282.html accession 2012-02-25; The applicant a Haitian national was accused of a firearm and two robbery offences committed in the USA. The immigration and Naturalisation Service decided return him to Haiti. The applicant argued he will be subjected to torture there. His appeal was dismissed, the previous decision was upheld, stating the indefinite detention does not constitute torture and there are no other threats for the applicant.
[141] Nowak. M., Mcarthut E. The United Nations Convention Against Torture. A Commentary. - Oxford: Oxford University Press, 2008. P. 73.
[142] Miller G.H. Defining Torture. P.14// http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf accession 2012-04-25.

issue to decide on the amount of compensation for a victim. In this case the existence of the element of intention would affect only amount of the compensation, but not the possibility to decide if it was torture or not. The requirement of this element only creates a possibility for the perpetrator to avoid the responsibility if it was not proved.

The definition of torture does not contain the exhaustive list of the purposes therefore it is not restricted and is open for further development. The lack of the exhaustive list of purposes leave the room for judicial interpretation what purposes could be included. However, lack of this element can not be the reason to refuse to define an act as torture. The level of severity is an element which shows whether it was torture or not. Regardless of what purpose was, the suffering inflicted on a person triggers the responsibility of a perpetrator. Lack of a purpose requirement would help to define violence as torture, because sometimes perpetrators are acting without any clear purpose.

2.3.3. The specific status of the perpetrator

The article 1 of the CAT states that torture should be "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 effect of such language is to suggest that the prohibition is not concerned with private acts of cruelty; international concern arises only where cruelty has official sanctions.[143] "Even the worst abuse or most inhuman treatment of a person will not be considered torture in violation of the CAT unless somehow the state is involved".[144] Article 4(1) of the CAT contains an obligation for the state to "ensure that all acts of torture are offences under its criminal law". These provisions create the mechanism for the eradication of impunity of state officials at national level. The establishment of powerful mechanisms to punish officials for the crimes of torture is very important, because the prosecution of the state official for commitment of torture is very complicated and sometimes almost impossible because of their immunities (Pinochet case; Bush case[145]), of lack of evidences or subjective judicial system. It is difficult to establish such effective system that would make possible for governments to ensure that no acts of torture

[143] Rodley N. The treatment of prisoners under International Law. Third edition. – Great Britain: Oxford University Press, 2009. P.88.
[144] Miller G.H. Defining Torture.
P.17//http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf accession 2012-04-25.
[145] Augusto Pinochet former Chile president had immunity for all the life in Chile from the crimes commited. After he came to United Kingdom for the medical treatment the norms of the CAT was applied by the United Kingdom and prosecution started. He was tried in London. It was done because of an obligation of the country to prosecute perpetrators of torture if they come to another country. G.W.Bush former USA president who legitimised the controversial interrogation techniques. The legal process should be started in order to establish is he responsible for that or not. The trial of G.W.Bush probably would never be started in the USA because of its former status, but it could be done in another country. Because of this reason, G.W.Bush should avoid visits to other countries for the rest of the life.

will be committed by agents under their authority. However, the requirement for the perpetrator to have mandate of state official narrows the field of applicability of the CAT. In the case G.R.B. v. Sweden[146] the applicant was a Peruvian citizen residing in Sweden and seeking for asylum in this state. She and the members of her family were active supporters of Communist party in Peru. The applicant left the country and went to former Ukrainian SSR to study. After four years when she came back to visit her family she learnt her parents had been arrested and ill-treated before they were released. During her stay in Peru she was assaulted and raped by the men belonging to Sendero Luminoso (Maoist guerrilla insurgent organisation in Peru). The applicant claimed the existence of a substantial risk for her to be subjected to torture in Peru. The UN Committee Against Torture considered "issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of Article 3 of the Convention." That means Convention is not applicable in the cases when the threat of torture comes from non-governmental entities. The CAT strictly requires the status of the perpetrator should be a state official and the non-state actors do not fall under the scope of the definition of torture enshrined in it.

Regarding the element of perpetrator international human rights law and international criminal law have their own views and the broader definition is used in international criminal law. It recognizes that not only state officials but other actors of non-governmental nature could be held responsible for torture.[147] International tribunals for Former Yugoslavia and Rwanda have adopted a definition of the crime of torture along the lines of that contained in the CAT, which, in order to avoid the situation of impunity, excluded the element of state official and applied the definition without it because in the situation of non-international armed conflict the perpetrator of torture could be non-governmental agent[148].

The ECtHR opinion regarding the private actors was parallel with the international criminal law. It upheld the opinion the element of perpetrator should include state officials and non-state actors. In the case H.L.R. v. France the applicant was a Colombian national travelling from Colombia to Italy and arrested in possession of cocaine. He was convicted of an offence under the misuse of drugs legislation and sentenced to 5 years imprisonment and the order was

[146] G.R.B. v. Sweden, CAT/C/20/D/083/1997, UN Committee Against Torture (CAT), 15 May 1998. §6.7//http://www.unhcr.org/refworld/docid/3f588ee53.html accession 2012-04-05.
[147] The Geneva Conventions of 12 August 1949 Commentary. Convention I-IV. – Geneva, 1958-1960. First reprint, 1994-1995. P. 370-372, art. 50 (conv.I). P. 266-268, art. 51 (conv. II). P. 627, atr.130 (conv. III). P.221-224,art. 32 (conv. IV). P.598, art.147(conv. IV); Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. – Geneva: International Committee of the Red Cross. Martins Nijhoff Publishers, 1987. P.873, Art. 75 (2)(a)(ii); P.1373-1374, Art. 4(2)(a).
[148] Prosecutor v. Radoslav Brdanin, ICFY 1 September 2004, Case No. IT-99-36-T. §481// http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4146fd744 accession 2012-01-19.

made to exclude him from French territory permanently. H.L.R. complained that if he was deported to Colombia he would be treated contrary to Article 3 of the ECHR. The ECtHR in this case stated: „owing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention could also be applicable where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection"[149]. The practice of the International tribunals and ECtHR widened the scope of the definition contained in the CAT and included private persons in to it.

The problems could arise to demonstrate the consent or acquiescence of the public official in order to raise his responsibility. Because of this reason ECtHR stated that the persons who are deprived of their liberty are in vulnerable position and authorities are under a duty to protect their physical well-being[150]. ECtHR underlines the general states duty to protect the person and did not go deeper in to the considerations regarding consent or acquiescence. The Rome Statute for an International Criminal Court has slightly extended the definition in the UN Convention against Torture; it does not explicitly require the consent or acquiescence of a public official or any other person acting in an official capacity[151].

The state official could not be held responsible if he acted according to the law and the acts inflicted were lawful sanctions. The ECtHR "response" to this statement was included in the cases Ribitsch v. Austria, Sheydayev v. Russia, Artyomov v. Russia.[152] The court explained any physical force which has not been made strictly necessary by the conduct of the person who is deprived liberty diminishes human dignity infringe Article 3 of the ECHR. In the case Artyomov v. Russia established the test what the word „necessary" in the context of a liberty deprived person mean. In courts opinion the use of force may be necessary on occasion to ensure the prison security, to maintain order or to prevent crime in penitentiary facilities. Such force may be

[149] H.L.R. v. France, 11/1996/630/813, Council of Europe: European Court of Human Rights, 22 April 1997. §40//http://www.unhcr.org/refworld/docid/3f3779b24.html accession 2012-04-06.
[150] Tarariyeva v. Russia Judgement 14 December 2006. §73// http://menneskeret.dk/files/DoekerPDF/Case%20of%20Tarariyeva%20v%20Russia.pdf accession 2012-04-07; Sarban v. Moldova, Judgement 4 October 2005. §77//www.univie.ac.at/bimtor/dateien/ecthr_2006_sarban_vs_moldova.doc accession 2012-04-07; Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §145//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.
[151] The Rome Statute Article 7(2)(e) "Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused".
[152] Ribitsch v. Austria, 42/1994/489/571 , Council of Europe: European Court of Human Rights, 21 November 1995. §38//http://www.unhcr.org/refworld/docid/3ae6b7010.html accession 2012-03-01; Sheydayev v. Russia, decided 7 December 2006. §59//www.univie.ac.at/bimtor/.../ecthr_2007_sheydayev_vs_russia.doc accession 2012-03-01; Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §145//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02..

used only if indispensable and must not be excessive[153]. Because of the higher standards of human rights protection and more effective ways to secure the person the judicial practice should accept the findings of the ECtHR and allow the use of force only in the cases that is really necessary. All other use of force should be defined as excessive and constitute torture even if it is defined in the domestic laws of the state.

The CAT is applicable only in the cases when the acts are perpetrated by state public official and is not arising from lawful sanctions. The US Code of Federal Regulations defined perpetrator as a public official[154], the CAT stated the perpetrator could be a public official or other person acting in an official capacity. The US in the Senate report[155] interchanged the term public official with the governmental authority stating that definition of torture includes only acts that occur in the context of governmental authority. This leads to the contrary interpretation than it was used in international practice. Mentioned legal acts defined the minimum requirement for the perpetration as the consent or acquiescence of the perpetrator. The question arose who could be defined as public officials and what does it mean "with the consent or acquiescence of a public official". In the case Y-L, A-R, R-S-R three respondents in this consolidated matter before the BIA are foreign nationals who bear final judgments of conviction for felony drug trafficking offences in the United States. As a result of the respondents' aggravated felony convictions, the Immigration and Naturalization Service commenced removal proceedings against them. The respondents, claiming that their lives and/or freedom would be severely imperiled upon deportation to their countries of origin they will be subjected to treatment contrary to the CAT. The BIA explained public officials as "authoritative government officials". Notwithstanding the term "public official" used by the judicial body in the cases[156] citing US Code of Federal Regulations, it stated the protection under the CAT is available only if the torture would "occur […] in the context of governmental authority"[157]. The judicial decisions were based on this interpretation. In the case S-V the respondent was a native and citizen of Colombia. He was admitted to the United States as a lawful permanent resident. After 17 years the respondent was convicted of the offences of grand theft, resisting arrest without violence, and driving while his license was suspended. He received a sentence of 4 years' imprisonment. The respondent was

[153] Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010. §168//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.
[154] 8C.F.R. § Sec. 208.18 §(a)(1) Implementation of the Convention Against Torture//http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15320.html accession 2012-03-12.
[155] Text of resolution of advice and consent to ratification as reported by the committee on foreign relations//http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:100TD00020: accession 2012-04-03.
[156] In Re Y-L, A-R, R-S-R Decided 5 March 2002//http://www.ilw.com/immigrationdaily/cases/2002,0308-AG.pdf accession 2012-04-02; In Re S-V Decided 9 May 2000//http://www.ilw.com/immigrationdaily/cases/2002,0308-AG.pdf accession 2012-04-02.
[157] In Re Y-L, A-R, R-S-R Decided 5 March 2002. P.283//http://www.ilw.com/immigrationdaily/cases/2002,0308-AG.pdf accession 2012-04-02.

also convicted at that time of robbery and was sentenced to 4 years' imprisonment, to run concurrently with the other sentence. The respondent argues in the case of removal he would be in danger from nongovernmental guerrilla, narcotrafficking, and paramilitary groups in Colombia. In this case the Colombian government officials were defined as the only perpetrator who could inflict torture.[158] In the concurring opinion Judge Gustavo D.Villageliu explained the extent of the term "government". He stated it was not limited to political units recognized as valid. Rather, it included "a political organization that exercises power on behalf of the people subjected to its jurisdiction." According to his opinion, the Colombian rebels who control approximately 40 percent of the country's territory may well be considered a part of the government participating or acquiescing in the torture of an individual within its territory.[159] Despite his opinion courts interpreted the act of torture that extends to neither wholly private acts nor acts inflicted or approved in other than an official capacity.[160] In the case J-E the court stated „torture covers [...] governmental acts [...] not acts by private individuals not acting on behalf of the government"[161]. Nevertheless, the US it is not bound by the decisions of international courts,[162] the decision do not include private actors in to the element of perpetrator was based on the Committee against torture decision in the case G.R.B. v. Sweden. This case was used by the US to base its interpretation regarding the status of perpetrator. The US interpretation of the definition rejected the possibility for the private actors to be responsible for the acts of torture. In some situations even the police officers and low-level agents did not met requirements of the „governmental authority". It should be high ranking officials who give consent or acquiesced to inflict torture.

Contrary to the interpretation of the US, international practice finds officers of the lower level, such as police officers[163], servicemen[164], officers of the special-purpose[165] responsible for

[158] In re S-V-, United States Board of Immigration Appeals, 9 May 2000. P.1312//http://www.unhcr.org/refworld/docid/3ae6b7660.html accession 2012-04-05.
[159] Ibid. *CONCURRING OPINION*: Gustavo D. Villageliu, Board Member.
[160] In Re Y-L, A-R, R-S-R Decided 5 March 2002. P.283//http://www.ilw.com/immigrationdaily/cases/2002,0308-AG.pdf accession 2012-04-02.
[161].In re J-E-, 23 I&N Dec. 299 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.300-301//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[162] Working group report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations. 6 March 2003. P. 6//http://www.american-buddha.com/911.tortureworkgroup25.htm accession 2012-04-07.
[163] Dragan Dimitrijevic v. Serbia and Montenegro, CAT/C/33/D/207/2002, UN Committee Against Torture (CAT), 29 November 2004// http://www.unhcr.org/refworld/docid/42b2ac852.html accession 2012-03-07; Ali Ben Salem V. Tunisia 7 November 2007//http://www.chr.up.ac.za/index.php/browse-by-subject/478-tunisia-ben-salem-v-tunisia-2007-ahrlr-54-cat-2007.html accession 2012-03-31; Arif Celebi and Others v. Turkey, Applications nos. 3076/05 and 26739/05, Council of Europe: European Court of Human Rights, 6 April 2010//http://www.unhcr.org/refworld/docid/4bc852b12.html accession 2012-03-04.
[164] Khadisov and Tsechoyev v. Russia Judgement 5 May 2009//http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=846624&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 accession 2012-03-30.

the infliction of torture. A public official's acquiescence to torture "requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity"[166]. The United States Senate included an understanding replacing the word "knowledge" in this definition of acquiescence with the word "awareness," indicating that actual knowledge of activity constituting torture is not required. This revision is also reflected in the regulations[167]. The Senate Committee on Foreign Relations clarified the point by stating that "[t]he purpose of this condition is to make it clear that both actual knowledge and 'wilful blindness' fall within the definition of the term "acquiescence"[168] To demonstrate "acquiescence" government officials, it is necessary to do more than show that the officials are aware of the guerrillas activity constituting torture but are powerless to stop it. The demonstration is needed that officials are wilfully accepting of the guerrillas' torturous activities. Accordingly, the court considered that a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities[169].

The responsibility of the perpetrator in the US was disputable claming that actions of the perpetrator would arise from the lawful sanctions. According 8 CFR § 208.18(a)(3) "Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture." In the matter J-E the indeterminate length detention of the Haitians who are forced to return to the country after having been convicted of crimes abroad detention was interpreted as a legitimate national interest in protecting its citizens from increased criminal activity. This detention procedure was found designed as Haiti's detention policy designed by the Haitian Ministry of Justice to protect the populace from criminal acts and "to prevent the 'bandits' from increasing the level of insecurity and crime in the country." The court found it in itself does not constitute torture, appears to be a lawful enforcement sanction and is not intended to defeat the purpose of the CAT to prohibit torture.[170].

Defining the perpetrator as state official restricts the application of the definition. The US interpretation was based on this approach and excluded all private actors from the definition of torture. The contemporary judicial practice of the ECtHR and ICTY included private actors in

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[165] Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.
[166] In re J-E-, 23 I&N Dec. 299 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.300-301//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.
[167] 8 C.F.R. § 208.18(a)(7)//http://law.justia.com/cfr/title08/8-1.0.1.2.11.1.1.18.html accession 2012-04-08.
[168] In re S-V-, United States Board of Immigration Appeals, 9 May 2000.
P.1311//http://www.unhcr.org/refworld/docid/3ae6b7660.html accession 2012-04-05
[169] Ibid. P.1312.
[170] In re J-E-, 23 I&N Dec. 300 (BIA 2002), United States Board of Immigration Appeals, 22 March 2002. P.300-301//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-03-10.

to the scope of the definition. States responsibility for the actions of the private actors would widen the scope of the definition. It is very important because some actors could never be defined as public officials, despite that they are organised into the groups and spread fear of torture in the country, and the state could not be responsible for their actions. The consent or acquiescence should be excluded from the definition as it is done by ICC. If someone did not directly took part in the act of torture it is very hard to prove he knew about the act of torture or gave consent. This vagueness creates conditions for impunity of the perpetrators.

3. The content and interpretation of the definition of torture in Lithuanian legal system

3.1. Anti-torture legislation in Lithuania

The Lithuanian history reveals that nation has suffered from the acts of torture committed by the occupying powers during and after World War II. The files were found in places of detention and interrogation and survivors of these outrageous acts witness what happened and what acts were committed in order to extract a confession. Having in mind these acts, it was very important for Lithuania to criminalize torture after the independence was announced in 1991. When the Republic of Lithuania became independent it started the process of accession to various international treaties in order to ensure implementation of various standards applicable in other countries.

The first international instrument that was ratified in 1991 was the ICCPR in order to ensure the evolution of human rights in the state. In 1995 the ECHR was ratified by Lithuania and that reflected its desire fully to discharge its obligations in the field of human rights which was attributable to its long-standing democratic tradition[171]. In 1996 the Republic of Lithuania acceded to the CAT and in 1999 to the European convention for the prevention of Torture and Inhuman or degrading Treatment or Punishment and its two protocols. However, the CAT is not ratified yet. The statute of the ICC was ratified in 2003. After the independence was announced the country moved very fast towards protection of the human rights and the prohibition of torture; that was ensured by its legislation.

In accordance with the article 138 of the Constitution of Lithuania[172] all international treaties are a part of the legal system of the state. The Act on International Treaties[173] adopted in 1999 states: all international treaties that came in to force are binding; in the case of collision between international treaty norms and national law the international treaty should be applicable. Nevertheless the direct effect, almost all international treaties ratified by Lithuania was incorporated in domestic law[174].

The provisions of the international documents prohibiting torture are provided in the Article 21 of the Constitution of the Republic of Lithuania which states: "It shall be prohibited to

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[171] United nations Human rights committee sixty first session. Summary record of the 1634th meeting. CCPR/C/SR.1634, 3 February 1998. §3//http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/35291b257c203a8f802565a8005b53d3?Opendocument accession 2012-04-18.

[172] Constitution of the Republic of Lithuania. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. – Vilnius: Lietuvos Respublikos seimo leidykla, 1996.

[173] Law on treaties of the Republic of Lithuania. 22 June 1999 No.VIII-1248. Article 11. §1-2//http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=265678 accession 22012-04-18.

[174] United Nations Committee against torture forty first session. Summary record (partial) of the 841st meeting. CAT/C/SR.841, 11 November 2008. §10// http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/449/52/PDF/G0844952.pdf?OpenElement accession 2012-04-18.

torture, injure a human being, degrade his dignity, subject him to cruel treatment as well as establish such punishments"[175] The Constitution defines general prohibition as it is done in ICCPR or ECHR and does not provide detailed definition of torture.

The new Criminal Code[176] and the Code of Criminal Procedure[177] entered into force in 2003. However, these acts do not contain the definition of torture. The infliction of torture is defined as an aggravating circumstance establishing the responsibility of the perpetrator[178]. The prohibition of torture is incorporated only in to the dispositions of the norms punishing certain acts[179]. These acts prohibit the use of violence, intimidation, degrading treatment impairing a person's health, but do not prohibit torture as the separate criminal act. The Criminal Code does not specify elements of the crime of torture, because torture refers mainly to the method of an act rather than the act itself or its consequences. According to to the criminal consequences, an act can be described as murder, severe health impairment, minor health impairment, infliction of physical pain or insignificant health impairment. Commitment of the mentioned crimes involving torture or other cruel treatment is considered a qualified form of a crime. When the perpetration of other crimes involves torture or degrading treatment of the victim, this fact is considered as an aggravating circumstance[180]. The Criminal Code does not specify the elements of the crime of torture, because torture refers mainly to the method of an act rather than the act itself or its consequences. A person may be prosecuted for torture under some other articles of the Criminal Code since the execution of acts of torture involves commitment of a crime[181]. As it was stated before the Committee of Red Cross, other international organisations and judicial bodies prefer to use the general definition of torture without going in to detailed list of particular actions that are defined as torture. However, there is no specific criminal norm punishing the crime of torture and the norm defining torture in Lithuania. The prohibition is based only on certain acts that could be committed in conjunction with torture. The prohibition of torture is enshrined in the Constitution, however the implementation of this prohibition is not developed in

[175] Constitution of the Republic of Lithuania. Adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. – Vilnius: Lietuvos Respublikos seimo leidykla, 1996. P.11.
[176] Republic of Lithuania Criminal Code, approved by law No.VIII-1968 of 26 September 2000//http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=111555 accession 2012-04-18.
[177] Republic of Lithuania Code of Criminal Procedure, approved by law No.IX-785 of 14 March 2002// http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=163482 accession 2012-04-19.
[178] Republic of Lithuania Criminal Code, approved by Law No. VIII-1968 of 26 September 2000. Art. 60//http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=111555 accession 2012-04-18.
[179] Ibid. Art. 99, art. 100, art. 103, art. 129, art. 135, art. 138, art. 140, art. 310.
[180] United Nations Committee against torture, Consideration of reports submitted by state parties under article 19 of the convention. Lithuania. CAT/C/LTU/2 10 August 2006. §105//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/438/86/PDF/G0643886.pdf?OpenElement accession 2012-04-20.
[181] United Nations Committee against torture. Written replies by Lithuania to the list of issues to be taken up in connection with the consideration of the second periodic report of Lithuania. CAT/C/LTU/Q/2/Add.1, 24 October 2008. §1//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/447/20/PDF/G0844720.pdf?OpenElement accession 2012-04-20.

the criminal law and the definition of torture is not evolved in order to separate the act of torture from other crimes.

The Code of enforcement of punishments[182] does not provide the definition of torture as well. The only connection with the prohibition of torture is enshrined in article 7 named "Principle of humanity". It states: "The punishment for a person could not be aimed to torture, to impose cruel treatment or humiliate dignity". It prohibits torture as a tool to punish someone, but does not explain what torture means according to the laws of Lithuania.

After the first visit of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – CPT) in Lithuania the Prosecutor General issued an order on Control in ensuring protection of the detained and arrested persons against torture and inhuman or degrading treatment or punishment[183]. It contained the general prohibition of torture: all measures should be taken to ensure the protection of all detained persons from torture and other cruel or inhuman treatment. No definition of torture was provided.

Elements of the method of torture or another extremely cruel crime are described in Ruling No. 46 of the Supreme Court of Lithuania, "On case-law in the field of crimes against human life".[184] This ruling defines torture as an act extending over a certain period of time and causing severe physical or mental suffering to the victim through direct contact with his body or creating the conditions for such suffering[185]. It is the only interpretation of the definition of torture that could be and is widely used by the Lithuanian courts.

The act of torture as such is prohibited in the Constitution of Lithuania in general terms. No specific legal acts or norms prohibiting torture or explaining which acts could be defined as torture are adopted. The only interpretation of the definition is proposed by the Supreme Court, but it is in the context of the crimes against human life.

3.2. The definition of torture applicable in Lithuania

The laws of Lithuania do not specify the definition and the elements of the crime of torture. The term torture used in the Criminal Code refers mainly to the method of an act rather

[182] Republic of Lithuania Code of Enforcement of Punishments, approved by Law No. IX-994 of 27 June 2002// http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=370789 accession 2012-40-20.
[183] Order of the Prosecutor General on Control in ensuring protection of the detained and arrested persons against torture and inhuman or degrading treatment or punishment No.I-177 issued 18 November 2004// http://www.prokuraturos.lt/LinkClick.aspx?fileticket=6IXOFIpPTRA=&tabid=148 accession 2012-04-20.
[184] Lietuvos Aukščiausiojo Teismo Senato nutarimas Nr.46 "Dėl teismų praktikos nusikaltimų žmogaus gyvybei bylose" 2004 m. birželio 18 d. §17//http://www.litlex.lt/scripts/sarasas2.dll?Tekstas=1&Id=76881 accession 2012-04-20.
[185] United Nations Committee against torture. Written replies by Lithuania to the list of issues to be taken up in connection with the consideration of the second periodic report of Lithuania. CAT/C/LTU/Q/2/Add.1, 24 October 2008. §1//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/447/20/PDF/G0844720.pdf?OpenElement accession 2012-04-20.

than the act itself or its consequences[186]. The legal acts prohibiting torture do not specify what exactly the term torture means. The interpretation of what constitutes torture is provided only in the Ruling No. 46 of the Supreme Court of Lithuania, "On case-law in the field of crimes against human life". This ruling defines torture as an act extending over a certain period of time and causing severe physical or mental suffering to the victim through direct contact with his body or creating the conditions for such suffering (due to pain, hunger, thirst, cold, heat, forced degrading acts etc.). Murder by another extremely cruel method means the taking of life in an extremely painful way (for example, by painful poisoning, burning, burying alive, dropping from a high place etc.) or causing a large number of injuries. In this case the duration of the pain felt by the victim from the act of violence to his death is irrelevant. A murder may also qualify as an extremely cruel murder when at the time of killing or before it the victim is subjected to degrading treatment (for instance, he is forced to injure himself), when the perpetrator intentionally prevents the injured victim from receiving help, when the murder involves damage to the autonomous integrity of the body (for example, beheading), or when the victim is killed in the presence of his close relatives and therefore experiences severe emotional suffering.[187] This interpretation explains the crime of torture could be punished only in connection with another crime and gives this crime extremely cruel nature. The definition of torture in Lithuania is left for the application and interpretation of the courts. Further the elements contained in the definition of torture of the CAT will be discussed.

The element of severity is defined by the Supreme Court as severe physical or mental suffering, as it is enshrined in the CAT. According to the wording of the articles of the Criminal Code criminal acts mentioned before could be done by "torturing or in extremely severe manner". Sometimes courts are making mistakes while applying this norm. Instead of applying one of the requirements (torture or extreme severity) the requirement of "torture and extremely severe" is applicable. In the criminal case No.1A-210/2009[188] the Court of Appeal stated that the murder of the victim was executed by torturing and in extremely severe manner. In this case the defendant A.B. stroked blows 42 times with the stick, by feet and by hands which resulted the death of the victim. The same was upheld by the Vilnius district court in the case No.1-44-

[186] United Nations Committee against torture. Written replies by Lithuania to the list of issues to be taken up in connection with the consideration of the second periodic report of Lithuania. CAT/C/LTU/Q/2/Add.1, 24 October 2008. §1//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/447/20/PDF/G0844720.pdf?OpenElement accession 2012-04-20.

[187] Lietuvos Aukščiausiojo Teismo Senato nutarimas Nr.46 "Dėl teismų praktikos nusikaltimų žmogaus gyvybei bylose" 2004 m. birželio 18 d. §17//http://www.litlex.lt/scripts/sarasas2.dll?Tekstas=1&Id=76881 accession 2012-04-20.

[188] Lithuanian Court of Appeal, Criminal case No. 1A-210/2009, judgement 7 May 2009//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=0e4e5172-b9af-4cc2-a399-79251accdfd2 accession 2012-04-21.

376/2008[189] where the defendant stroke 22 blows that caused broken bones and injured viscera, and resulted in death of the victim. This interpretation coincides with the extreme level of severity maintained by the USA. In the Criminal code of Lithuania definitions of torture and extreme severity are not convertible terms. The conjunction "or" is placed in between and that means that it is necessary to choose in which manner the crime was made – by torturing or extremely severe[190]. It is crucial to distinguish these two terms; otherwise it will be very difficult to define an act as torture because of insufficient level of severity. That would create conditions for the impunity of a perpetrator. The Courts are using the term of extreme severity because it is more widely used by the courts and interpreted by the Supreme Court more clearly in the Ruling No.46. The courts are not going in to the deep consideration regarding the content of severity because there is no definition and specific crime of torture in Lithuania. They are just stating an act of torture as aggravating circumstance. The Supreme Court of Lithuania is avoiding to use the term "torture" and changes it with the term "extremely severe"[191] in this way the term torture is eliminated from the decisions of the Supreme Court.

In the criminal case No.1-133-376/2009[192] the fact that the victim was not screaming and did not express the infliction of extreme pain in other manner while she was beaten by the defendant to death, was upheld as an evidence she was not tortured. The main argument to negate those actions was torture, she could not feel the real level of the pain because she was affected by the alcohol. There is no explanation in domestic practice should the victim feel the pain inflicted or not According to the international practice, beatings resulting in the death of a victim are torture. In the criminal case No. No.1A-210/2009 the Court of Appeal states the effect of alcohol on the victim and the shock experienced could not affect the ability of the victim to feel the inflicted pain. Therefore, the ability of the victim to feel the pain and to understand the infliction of torture actions is not important.

Analysis of the cases shows, the Lithuanian courts prefer to define torture as extremely severe acts. According to the practice of the courts, beatings of the victim fall under this notion. Nevertheless, the international judicial bodies apply the element of "severe pain or suffering". According to the cases Dedovskiy and Others v. Russia (ECtHR), Estrella v. Uruguay (HRC),

[189] Vilnius district court, Criminal case No.1-44-376/2008, judgement 28 April 2008//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=6d0a6b28-5f3a-4b5d-8652-a0378c490442 accession 2012-04-21.
[190] Lithuanian Court of Appeal, Criminal case No. 1A-486/2006, judgement 30 November 2006//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=79da2a02-9095-4cb4-98a0-08f39b26d1f4 accession 2012-04-21.
[191] Lithuanian Supreme Court cases No.2K-118/2010, No. 2K-519/2009, No. 2K-791/2007//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-22.
[192] Vilnius district court, criminal case No.1-133-376/2009//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=11f81c43-128f-41d5-8207-61c0f48c605c accession 2012-04-22.

Dragan Dmitrijevic v. Serbia and Montenegro (Committee Against T)orture) beatings constitute acts of torture. However, mentioned international judicial bodies bases it's opinions by applying the definition according to the CAT proposed model and the element of "severe pain or suffering" is applicable. Contrary to the CAT the notion of "extreme suffering" in Lithuania is used. In the criminal case No. 1A-92-2005[193] the court stated that the victim was beaten to death and he suffered severe physical and mental pain. According to this the court decided the victim was tortured. In the criminal case No.1A-486/2006 the severe beating, forcing to undress in the winter and dropping the victim in to the well was defined as extremely severe and constituting torture. In the case No. 1A-34/2011[194] severe beating by the hands, with the baseball bat, with the pan, with the electric cooker and skewer, kicking resulting in severe injuries of the victim was defined as extremely severe and constituting torture. Placing of the branches in to the anus of the victim was defined as extreme severity and enough to be defined as torture[195].

In the case 2K-153/2009 the victim was complaining he had been beaten by the police officers. The question of torture was not discussed in this case and the level of severity was not established, because the disposition of the article argued does not contain the reference to the use of torture. However, the ECtHR in the case Ribitsh V. Austria stated any physical force which was not really necessary infringes Article 3 of the ECHR.

These examples show the lack of criminalisation of torture and comprehensive interpretation create barriers for courts in the process of application of law and protection of the victim interests. It is not clear for the courts what level of severity should be constituted as torture; therefore, the same acts very often are assessed differently. In one case the act is defined as torture and in another not. This creates the obstacles for the harmonised assessment of the crimes. However, in most of the cases, beatings fall under the scope of torture. This could be explained by the influence of the decisions made by the international judicial bodies. According to the international and domestic courts decisions, the practice of Lithuanian courts coincide with the international definition of what acts constitute torture. The level of severity is established correctly, however the wrong term is used to define it. The term "severe pain or suffering" according to the CAT should be used. Lack of: criminalisation of torture, definition of torture

[193] Lithuanian Court of Appeal, Criminal case No. 1A-92-2005, judgement 19 January 2005//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=07224bf9-282e-473c-b9dd-af5e4d117a0c accession 2012-04-22.
[194] Lithuanian Court of Appeal, Criminal case No. 1A-34/2011, judgement 11 February 2011//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e58f85a7-613a-4335-a5a6-b5d6fad198ca accession 2012-04-22.
[195] Panevezys district court, Criminal case No.1-00017-491/2007, judgement 15 January 2007//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=33d48c07-3fb6-400c-884b-9e00ed8cb488 accession 2012-04-22.

and uniform domestic practice creates obstacles to apply the element of severity correctly and in the same manner as it is done in international level.

Prior to making analysis of the intention element, the concept of guilt should be explained. The Supreme Court in the case No.2K-428/2008[196] states the form of guilt should be defined in each case because it is essential for the qualification of the criminal act. Not going deeper in to the criminal law, it is necessary to explain that the action could be defined as an accident when the perpetrator does not understand the consequences of the action. If actions of the perpetrator show him acting with the aim to reach the consequences he reached that could be defined as deliberate action. In Lithuanian criminal law the element of intention of the definition of torture could be defined as specific intention – with the aim to inflict severe pain – or not a specific intention – with the aim to do some harm to a person, but without any frame of mind to inflict such pain. In the case No. 1A-92-2005 the severe beatings were inflicted by the defendants on a victim that resulted in death. According to the court, the defendants knew about the consequences of their actions just they were not interested in the result (be it the death of a victim or a serious bodily injury). The explanation was provided by the court: a specific intention is when the perpetrator inflicts severe physical or mental pain and understands doing that. In the cases No.1-44/2008[197], No.1-00017-491/2007[198] the act of torture and the importance of the specific intention of perpetrator was established. In the Court of Appeal case No.1A-34/2011 actions of perpetrators were defined as extremely severe and, because of that, inflicted with the specific intention and reaching the level of torture. In all mentioned cases the courts defined the intention as specific, because the aim of the perpetrators was to inflict severe pain on a victim or even to kill. As it was stated in the part II chapter 3.2 of this research after analysis of the decisions of international tribunals, the element of intention is used by international judicial bodies. However, it is only general intention. General intention is a less demanding standard, requiring only the conduct contrary to the law without specific intent to inflict particular torture act. According to the international practice, torture should be inflicted intentionally, but without specific intent to torture. The ECtHR stated the element of intention could be proved by providing evidences about violence inflicted on a person if he was not injured prior a detention. Inter-American Court of Human Rights stated the autopsies which reveal the signs of torture is enough to prove the intention.

[196] Lithuanian Supreme Court, Criminal case No.2K-428/2008, Judgement 16 December 2008//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-23.
[197] Vilnius District court, Criminal case no.1-44-376/2008, Judgement 28 April 2008//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=6d0a6b28-5f3a-4b5d-8652-a0378c490442 accession 2012-04-21.
[198] Panevezys district court, criminal case No.1-00017-491/2007////http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=33d48c07-3fb6-400c-884b-9e00ed8cb488 accession 2012-04-22.

It is hard to interpret the element of intention used by the Lithuanian courts, because the act of torture is incorporated in to the specific criminal act that requires specific intention. In its' reports to the Committee against Torture the state of Lithuania ensures the crime of torture is criminalised in separate articles of the Criminal Code. Therefore, these acts could be defined as torture and specific intent is needed in order to apply it to full extent. The requirement of specific intent did not coincide with the practice of the international judicial bodies.

In Criminal code of Lithuania the element of purpose is expressed in the disposition of the particular article. If the article imposes penalty for murder by torturing or in extremely cruel manner, the purpose would be to kill someone using torture or causing other extreme pain. The purpose of the perpetrator depends on the criminal action that was performed. The specific propose required for the action of torture is the infliction of severe physical or mental pain or humiliation of the victim[199]. According to the international practice, the element of purpose is required by almost all judicial bodies. The only exception is ICC where more flexible definition of torture was constructed and excluded the element of purpose. The practice of ICTFY explains the element of purpose could be interpreted broader than it is defined in the CAT. The element of intention and purpose are used by the courts to define the act of torture, but no explicit requirements are established what intention and what purpose should be to constitute torture. These two elements could be understood only in the context of other crimes deterred in the Criminal Code. The courts are using interpretations of the judicial practice applicable in the cases of murder and bodily injuries. Creating its own definition, Lithuania could use an example of the ICC and exclude this element from the definition. This would release the courts deciding regarding the purpose, because according international practice the list of purposes is not exhaustive in the CAT and other purposes could be used defining act as torture.

The element of the perpetrator of torture is not defined or explained anywhere in the Lithuanian laws or practice. The analysis of Lithuanian laws could disclose who could be defined as a perpetrator of torture. The element of the perpetrator is very important in the CAT definition of torture. It is aimed to the torture acts inflicted exclusively by public official. The ECtHR and international criminal tribunals (ICTY and ICTR) recognises that acts of torture could be committed by non-state actors as well. More acts could be defined as torture when the element of perpetrator falls out of the definition. According to the criminal law of Lithuania a private person or public official could be defined as such. Norms of the Criminal code are applicable for private persons and for public officials as well. The chapter XXXIII of the Criminal Code is designed for crimes made by public officials, but it does not contain explicit

[199] Panevezys district court, criminal case No.1-00017-491/2007; Vilnius District court, Criminal case no.1-44-376/2008, Judgement 28 April 2008; Lithuanian Court of Appeal, Criminal case No. 1A-92-2005, judgement 19 January 2005; Lithuanian Court of Appeal, Criminal case No. 1A-210/2009, judgement 7 May 2009.

punishment for the torture crime. The only possibility to make a public official responsible for the torture crime is to fill a complaint on the ground of article 228 "Abuse of mandate". Lithuania, submitted to the Human Rights Committee under the article 40 of the ICCPR in its third periodic report, ensuring that illegal use of physical coercion by a police officer while on duty qualifies as an intentional criminal act punishable under article 228 of the Criminal Code[200]. The complaint regarding the physical force used by police officer was lodged in the case No. 2K-153/2009[201], but the defendant was accused only by excessive use of powers and not by torture or inhuman or degrading treatment at least. The same situation was in the case No. 2K-164/2009[202]. In both cases the police officers were beating the detainees and they were held responsible only for the excessive use of force. According to this, the crime of torture could be committed exclusively by a private person, because there is no criminal norm according to which public official could be held responsible for this act. He could bear personal responsibility and be prosecuted as a private person for the particular act committed, but as a state official he would be responsible only for excessive use of powers.

According to the Prosecutor General order on Control in ensuring protection of detained and arrested persons against torture and inhuman or degrading treatment or punishment, the officers' responsibility in cases of torture is stated. It is ordered for the prosecutors to ensure the protection of the detainees form the torture or other ill-treatment, but if there are no legal norm in the legislation punishing the infliction of torture, it is impossible to require ensuring the protection from these actions. According to the existing legal situation it would be logical to require protect detainees form murder, body injuries or other criminal actions enshrined in the Criminal code.

Lack of clear definition of torture and criminalisation of it creates obstacles in the judicial practice to apply elements of torture definition enshrined in the CAT. The courts are trying to interpret the definition of torture according to the international practice and requirements of the CAT, however, the acts of torture are interpreted in the context of the other crimes and it is hard to form the uniform practice on the definition of torture. According to the courts' practice it seems the extreme suffering is needed. However, acts enshrined as torture sometimes are of a lower severity that extreme as it was proposed by US interpretation. It is hard to decide on the intention and purpose of torture, because all decisions are made regarding other criminal acts and

[200] Human Rights Committee. Consideration of reports submitted by states parties under article 40 of the Covenant. Third periodic national report of states parties. Lithuania. No.CCPR/C/LTU/3, 29 November 2010. §95// http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/471/88/PDF/G1047188.pdf?OpenElement accession 2012-04-23.

[201] Lithuanian Supreme Court, criminal case No. 2K–153/2009, judgement 21 April 2009//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-1995-m..html accession 2012-04-22.

[202] Lithuanian Supreme Court, criminal case No. 2K–164/2009, judgement 12 may 2009//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-1995-m..html accession 2012-04-22.

torture was only as additional element. The specific intention and purpose is needed for the qualification of these crimes. The practice of the courts should show how it should be deciding on the crime of torture, after the act of torture would be criminalised. According to the international practice, general intention should be enough. Because international practice explained, the list of purposes in the CAT is not exhaustive the purposes of torture could be very different. The element of perpetrator is criminalised by the Lithuanian Criminal Code. The practice of the courts evidences, it is harder to prosecute the state official for the crime of torture than a private person. The explicit criminalisation of torture and explanation that the private persons and public officials could be prosecuted on the background of this norm would ensure ability to punish all individuals who would commit this crime.

3.3. The definition of torture in Lithuania in the context of international practice

The analysis of the torture definition applicable in Lithuania evidences there is no definition enshrined in the law and no works or analysis of scholars on this issue. Professor J.Žilinskas in his monograph about crimes against humanity and genocide in international and Lithuanian laws analysed the definition of torture.. However, it was done explaining torture as one of the crimes against humanity and the constituent element of the genocide definition. As a separate crime in national legislation and possibility to criminalise and define it was not analysed.- Only the interpretation by the Supreme Court on this matter exists. The act of torture is not criminalised as a separate criminal act and is not defined in the Lithuanian legislation. This creates a room for impunity. In the Article 2(1) of the Criminal Code the principle *nullum crimen, nullum poena sine* is stated. This means a person could be responsible only for the crime that is defined by the Criminal Code. It is dangerous to have a list of crimes that could be defined as torture and lack of specific crime punishing torture in general terms, because it is impossible to criminalise all acts that could be defined as torture. In this case of a precise list the perpetrator could be left unpunished if different way to torture would be used than it is criminalised. In the case of separate crime and establishment of definition of torture the wider possibilities would be for the victim of torture to fill in a complaint. There would be no need to look for a criminal norm which covers the act of torture committed. The possibility would be created to punish acts that did not fall under the scope of any criminal norm. The definition of torture in Lithuanian legislation would help the courts to develop practice punishing torture acts, because the creation of the definition would be based on the international practice and examples of it would help to avoid mistakes and impunity. It is impossible for now, because there is no such crime as torture. This would reveal if the problem of torture exist in Lithuania, because now it is covered by the

other crimes. More researches of scholars and debates in the public area are needed to ensure discussions on this issue. This problem is latent for now and no one is trying to resolve it. While the prohibition exists, the legal background for its operation is not prepared, and the proper protection from torture could not be ensured inside the state.

The crime of torture is incorporated in to other crimes. This incorporation creates a list of crimes that could be defined as torture and in this way restricts the definition of torture used by international tribunals. The ways of torture vary and it is impossible to criminalise all acts that could be defined as torture. In this situation some acts are left unpunished. There is no judicial practice on the crime of torture alone and that creates an illusion the crime of torture does not exist or is not very significant in Lithuania. There is a possibility to lodge a complaint to the independent public authorities such as prosecutor's offices, Ombudsmen of the Seimas, Equal Opportunities Ombudsman, administrative courts, against the actions performed by public officials. However, if an act performed did not mach the crime defined in the Criminal code, maximum what could be done, the perpetrator could be held responsible for the excessive use of mandate. In this situation the definition of torture is subjected to the limitations.

The absence of a comprehensive definition of torture in the Lithuanian legislation and lack of a specific criminal offence in criminal law is highly criticized by the UN Committee against torture[203]. The member of the Committee against torture Mr. Gallegos Chiriboga commented "that the incorporation of the definition of torture in its Constitution was the key to ensuring that there could be no statute of limitations on"[204] crime of torture. However, to put the general prohibition in to the Constitution is not enough, the clear and comprehensive definition is needed. The Committee against torture accepts the explanation of Lithuania that under the Lithuanian criminal code all acts that may be described as "torture" within the meaning of the CAT are punishable, however, the Committee is concerned that the crime of torture is not incorporated in to the domestic law[205]. The argument of the Lithuanian that the definition of torture is reflected in several articles of the Lithuanian Criminal Code and the list of offences

[203] UN Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Conclusions and recommendations of the committee against torture. Lithuania. No. CAT/C/CR/31/5, 5 February 2004. §5(a)//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/402/72/PDF/G0440272.pdf?OpenElement accession 2012-04-24.

[204] United Nations Committee against torture forty first session. Summary record (partial) of the 841st meeting. CAT/C/SR.841, 11 November 2008. §46//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/449/52/PDF/G0844952.pdf?OpenElement accession 2012-04-18.

[205] UN Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Conclusions and recommendations of the committee against torture. Lithuania. No. CAT/C/LTU/CO/2, 19 January 2009. §5//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/04/PDF/G0940304.pdf?OpenElement accession 2012-04-24.

involving torture are constantly being updated[206] were followed by the comment of the Committee against torture asking to provide information about any measures taken to incorporate in to domestic law the definition of torture and to appropriately punish torture[207].

Since Lithuania acceded to the CAT the Committee is pushing to adopt some comprehensive legislation regarding the definition of torture in Lithuania. The Committee recommends adopting the definition with all elements of the article 1 of the CAT. That would extend the scope of the definition of torture applicable in the state. More crimes could be punished and the level of problem of torture in Lithuania could be identified. The prohibition of torture would not be just theoretical, but the complaints could be lodged based on the article criminalising torture. Without any comprehensive explanation what is torture in Lithuania, the application of the elements of definition is not clear. The level of severity of torture is confusing and sometimes it is too high comparing with the international practice. The element of a perpetrator is applicable wider than in the CAT. The non-state actors fall under this element. It should be left like that, because restriction to apply the CAT only in the cases when perpetrator is a state official makes the definition restricted and leaves the room for impunity of the private persons. The definition of torture should be based on the practice of the ECtHR, because it is using the broadest definition evolved by the interpretation of the court. This definition is the most comprehensive, flexible and easy adopting according to the needs of the contemporary society.

[206] UN Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Second periodic report of Lithuania. No.CAT/C/SR.839, 7 November 2008. §3//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/449/32/PDF/G0844932.pdf?OpenElement accession 2012-04-24.

[207] UN Committee against torture. List of issues prior to the submission of the third periodic report of Lithuania No. CAT/C/LTU/Q/3, 22 February 2011. §1//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/409/32/PDF/G1140932.pdf?OpenElement accession 2012-04-24.

CONCLUSIONS

1. After reviewing the legal regulation and legislation prohibiting and defining torture it can be concluded that there is more than enough international treaties, monitoring and judicial bodies created in order to spread information, give recommendations for the states, ensure observation of the implementation of the right not to be tortured. The practice of the international judicial bodies proves the right not to be tortured is absolute and non-derogable. Even the statements of necessity in the case of threat for the national security can not justify infliction of torture. Nevertheless all efforts to ban torture, lots of allegations of torture remain.

2. After reviewing the definition of torture used by different international judicial bodies it can be concluded that the elements of the definition of torture enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are used by the judicial bodies to determine an act of torture. Internationally used elements of the definition of torture are: a) severe pain or suffering; b) purpose; c) intention; d) perpetrator. These elements have not changed during the years, however, the scope of the elements was widened by the judicial practice and more acts that were not covered by it before fall under the definition of torture: physical force even if it did not result in any long term damage or is not strictly necessary by persons conduct; forcing to remain standing or sitting for a long time; exposing to the circulation of cold air; indiscriminate bombardments and military offensives carried out by all parties to the conflict; unacceptable number of civilian casualties; the substantial number of persons displaced and unpredictable; widespread nature of the conflict.

3. After the analysis of the element of "severe physical or mental suffering" it is possible to conclude that the judicial bodies started to interpret it broader. Such acts as deprivation of food or sleep, subjection to noise, wall-standing were not defined as torture almost 50 years ago, fall under the definition of torture in recent practice. According to the European Court of Human Rights practice, the long term damage is not required anymore and non-discriminatory measures targeted to the community could be defined as torture. The analysis of international practice regarding the element of severity proves that "extreme severity" is not acceptable in international practice, because it creates a background for the violation of human rights and dignity, and only few acts could be defined as torture according to it. In the international practice the level of severity is getting lower and more acts are included in to the definition of torture. Analysis of the European Court of Human Rights practice shows, all necessary physical actions against human body could be a violation of Article 3 of the European

Convention of Human Rights. To make the definition of torture easier applicable the "severe physical or mental suffering" could be interchanged with "physical or severe mental suffering".

4. After the analysis of the element of intention it is possible to conclude that the interpretations of the international judicial bodies were constructed according to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment definition of torture where the element of intention is obligatory in order to decide if an act of torture was conducted deliberately and not incidentally. According to the international practice it is enough to prove the general intent and the special intent is not needed. It would be reasonable to waive the requirement to prove intention, because the requirement of this element creates a possibility for the perpetrator to avoid responsibility. The court would make assessment on its own regarding the intention in order to decide on amount of a compensation for a victim. In the case of an incidental torture the compensation could be lower. However, each act of torture was it intentional or not, should be punished.

5. Following the analysis of the element of purpose of torture it is possible to conclude that the definition of torture does not contain the exhaustive list of the purposes therefore it is not restricted and is open for further development. Not exhaustive list of purposes leaves the room for judicial interpretation what purposes could be included. However, lack of this element can not be the reason to refuse defining an act as torture. Presuming the person could act without any clear purpose, it is not a precondition to define ill-treatment as cruel or inhuman and it would be reasonable to exclude this element from the definition of torture, as it is done in the Rome Statute. The level of severity is an element which shows was it torture or not. Regardless of what purpose was, the suffering inflicted on a person triggers the responsibility of a perpetrator.

6. After the analysis of the element of perpetrator it is possible to conclude that defining the perpetrator as state official, as it is done in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, restricts states responsibility. The US interpretation was based on this approach and excluded all private actors from the definition of torture. The contemporary judicial practice of the European Court of Human Rights and International Criminal Tribunal for the former Yugoslavia includes private actors in to the scope of the definition. The same should be done in the definition applicable universally. The responsibility of the state for the actions of the private actors would widen the scope of the definition. It is very important because some actors could never be defined as public officials, but despite that they are organised into the groups and spread fear of torture in the country, but

the state could not be responsible for their actions. The consent or acquiescence should be excluded from the definition as it is done by International Criminal Court. If someone did not directly took part in the act of torture it is very hard to prove he knew about the act of torture or gave consent.

7. After the analysis of a legal background for the prohibition of torture in Lithuania it can be concluded that the prohibition of torture is enshrined in the Constitution of the Republic of Lithuania in general terms. However, the implementation of this prohibition is not developed in the domestic criminal law and practice. The definition of torture has not evolved in order to distinguish the act of torture from other crimes and to ensure punishment of the perpetrator. No specific norms defining torture are adopted. Criminal Code prohibits particular acts that could be defined as torture. It makes a restriction for the protection from torture. The only specific criminal norm punishing infliction of torture is composed to protect animals. The specific criminal norm punishing act of torture is needed in the Criminal Code of Lithuania. Because there is no legal norm in the legislation punishing the infliction of torture, it is impossible to require ensuring the protection from these actions.

8. The analysis on how the definition of torture applicable in Lithuania complies with the international practice shows that lack of clear definition of torture and criminalisation of it creates obstacles in the judicial practice to apply elements of torture definition enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Torture is enshrined in the Criminal Code only as an aggravating circumstance of some particular crime. Nevertheless, the elements of the definition of torture could be indicated in the Lithuanian courts practice. The level of severity of torture is confusing and sometimes it is too high comparing with the international practice. The element of a perpetrator is applicable wider than in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the non-state actors fall under this element. However, state officials could be punished only for the excessive use of mandate and not for torture. The explicit criminalisation of torture and explanation that the private persons and public officials could be prosecuted on the background of this norm would ensure ability to punish all who commit this crime. The elements of intention and purpose are used in the context of specific crimes and are not directed to establish act of torture. Acts of torture are interpreted in the context of the other crimes and it is hard for the courts to form the uniform practice on the definition of torture. It is necessary to adopt definition of torture in Lithuania and it should be

based on the practice of the European Court of Human Rights, because it is using the broadest definition evolved by the interpretation of the courts.

9. According to the conclusions stated above it is possible to conclude the hypothesis of the research is completely approved, because the definition of torture applicable in practice is broader than it is stated in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The definition of torture and the specific criminal norm punishing torture should be incorporated in to the legal system of Lithuania.

Suggestions and recommendations

1. Suggesting redefining the definition of torture contained in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and to incorporate in to the legal system of Lithuania, and state it as follows: "Torture means any infliction of physical or severe mental pain on a person under control of the accused." This would ensure that the uniform universal practice prohibiting torture and ensuring eradication of it will be formed; the states parties would be bound by the clear and uniform definition; increase of the level of states responsibility and would create a better conditions for individuals to protect their human rights.

2. Recommending incorporate a norm in to the Criminal Code of the Republic of Lithuania and state it as follows:

"A person who tortured another person or treated with cruelty or degraded him/her

Shall be punished…

This would ensure that the wider possibilities would be for the victim of torture to fill in a complaint; there would be no need to look for a criminal norm which covers the act of torture; the possibility would be created to punish acts that did not fall under the scope of any criminal norm covering torture; the uniform judicial practice applying definition of torture will be formed.

LITERATURE

1. Legal acts

1. Constitution of the Republic of Lithuania, adopted by the citizens of the Republic of Lithuania in the Referendum of 25 October 1992. – Vilnius: Lietuvos Respublikos Seimo leidykla, 1996.
2. Code of Criminal Procedure of the Republic of Lithuania, approved by law No.IX-785 of 14 March 2002//http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=163482 accession 2012-04-19.
3. Code of Enforcement of Punishments of the Republic of Lithuania, approved by Law No. IX-994 of 27 June 2002//http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=370789 accession 2012-40-20.
4. Criminal Code of the Republic of Lithuania, approved by law No.VIII-1968 of 26 September 2000//http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_l?p_id=111555 accession 2012-04-18.
5. Law on treaties of the Republic of Lithuania. 22 June 1999 No.VIII-1248//http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=265678 accession 22012-04-18.
6. Order of the Prosecutor General on Control in ensuring protection of the detained and arrested persons against torture and inhuman or degrading treatment or punishment No.I-177 issued 18 November 2004//http://www.prokuraturos.lt/LinkClick.aspx?fileticket=6IXOFIpPTRA=&tabid=148 accession 2012-04-20.
7. African Charter on Human and People's Rights, adopted in 1981//http://www.hrcr.org/docs/Banjul/afrhr.html accession 2011-05-12.
8. American Declaration of Human Rights, adopted at San Jose, Costa Rica 1969//http://www.oas.org/juridico/english/treaties/b-32.html accession 2011-05-12.
9. Charter of the United Nations//http://www.un.org/en/documents/charter/ accession 2011-05-04.
10. Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979//http://www2.ohchr.org/english/law/codeofconduct.htm accession 2011-05-09.
11. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949//http://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument accession 2011-05-15.

12. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949//http://www.icrc.org/ihl.nsf/INTRO/370?OpenDocument accession 2011-05-15.

13. Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949//http://www.icrc.org/ihl.nsf/INTRO/375?OpenDocument accession 2011-05-15.

14. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949//http://www.icrc.org/ihl.nsf/INTRO/380 accession 2011-05-15.

15. Covenant on Civil and Political Rights//http://www2.ohchr.org/english/law/ccpr.htm accession 2011-05-06.

16. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Strasbourg, 26.XI.1987//http://conventions.coe.int/Treaty/en/Treaties/Html/126.htm accession: 2012-05-12.

17. European Convention on Human Rights and Fundamental Freedoms. Rome, 4.XI.1950//http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf accession 2011-05-12.

18. Inter-American Convention to Prevent and Punish Torture. Adopted at Cartagena de Indias, Colombia 1985//http://www.oas.org/juridico/english/sigs/a-51.html accession 2011-05-12.

19. Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968, U.N. Doc. A/CONF. 32/41 (1968)//http://www1.umn.edu/humanrts/instree/l2ptichr.htm accession 2011-05-06.

20. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977//http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument 2011-05-15.

21. Rome Statute. Statute of the International Criminal Court//http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf accession 2011-05-10.

22. Standard Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977//http://www2.ohchr.org/english/law/treatmentprisoners.htm accession: 2011-05-09.

23. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by

General Assembly resolution 39/46 of 10 December 1984//http://www2.ohchr.org/english/law/cat.htm accession 2011-05-11.

24. United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment No. A/RES/3452(XXX)//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/65/IMG/NR000165.pdf?OpenElement accession 2011-05-08.

25. United Nations General Assembly resolution No. A/RES/3059(XXVIII) Question of torture and other, cruel inhuman or degrading treatment or punishment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/281/31/IMG/NR028131.pdf?OpenElement accession 2011-05-07.

26. United Nations General Assembly resolution No.A/RES/3218(XXIX) Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/20/IMG/NR073820.pdf?OpenElement accession 2011-05-07.

27. United Nations General Assembly resolution No. A/RES/3453(XXX) Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment//http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/001/66/IMG/NR000166.pdf?OpenElement accession 2011-05-08.

28. United Nations General Assembly resolution Torture and other cruel, inhuman or degrading treatment or punishment No. A/RES/66/150//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/82/PDF/N1146782.pdf?OpenElement accession 2011-05-08.

29. Universal Declaration of Human Rights//http://www.un.org/en/documents/udhr/ accession 2011-05-04.

30. Vienna Convention on the Law of Treaties. Done at Vienna on 23 May 1969. Entered into force on 27 January 1980//http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accession 2011-06-01.

31. 18 U.S.C. § 2340//http://www.law.cornell.edu/uscode/text/18/2340 accession 2012-02-10.

32. The Code of Federal Regulations 8 CFR § Sec. 208.18//http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11261/0-0-0-14927/0-0-0-15320.html#0-0-0-11369 accession 2012-03-04.

2. Judicial decisions

Committee against torture

1. Ali Ben Salem V. Tunisia 7 November 2007, CAT/C/39/D/269/2005//http://www.chr.up.ac.za/index.php/browse-by-subject/478-tunisia-ben-salem-v-tunisia-2007-ahrlr-54-cat-2007.html accession 2012-03-31.

2. G.R.B. v. Sweden, CAT/C/20/D/083/1997, UN Committee Against Torture (CAT), 15 May 1998//http://www.unhcr.org/refworld/docid/3f588ee53.html accession 2012-04-05.

Human Rights Committee:

3. Sendic v. Uruguay No. 14/63, 1981//http://www.bayefsky.com/pdf/116_uruguay63vws.pdf accession 2011-05-06.

4. Estrella v. Uruguay No. 74/1980, 1983//http://www.bayefsky.com/pdf/125_uruguay74vws.pdf accession 2012-03-05.

5. Grille Motta v. Uruguay No. 11/1977, 1980//http://www.bayefsky.com/html/107_uruguay11vws.php accession 2012-03-06.

Inter-American Commission on Human Rights

6. Raquel Marti de Mejia v. Peru, Case 10.970, Report No. 5/96, 1996//http://www1.umn.edu/humanrts/cases/1996/peru5-96.htm accession 2012-03-20.

International Criminal Tribunal for Former Yougoslavia

7. Prosecutor v. Furundzija, ICFY 10 December 1998, Case No.: IT-95-17/1-T//http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf accession 2012-01-19.

8. Prosecutor v. Radoslav Brdanin, ICFY 1 September 2004, Case No. IT-99-36-T// http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4146fd744 accession 2012-01-19.

European court of human rights:

9. Aksoy v. Turkey, 21987/93, Council of Europe: European Court of Human Rights, 26 November 1996//http://www.unhcr.org/refworld/docid/3ae6b6fa4.html accession 2012-03-30.

10. Arif Celebi and Others v. Turkey, Applications nos. 3076/05 and 26739/05, Council of Europe: European Court of Human Rights, 6 April 2010//http://www.unhcr.org/refworld/docid/4bc852b12.html accession 2012-03-04.

11. Artyomov v. Russia, Application no 14146/02, Council of Europe: European Court of Human Rights, 27 May 2010//http://www.unhcr.org/refworld/docid/4c04cc302.html accession 2012-03-02.

12. Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997//http://www.unhcr.org/refworld/docid/3ae6b7228.html accession 2011-09-29.

13. Chahal v. The United Kingdom, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996//http://www.unhcr.org/refworld/docid/3ae6b69920.html accession 2011-10-29.

14. Dedovskiy and others v. Russia, decided 15 May 2008//www.univie.ac.at/bimtor/.../ecthr_2008_dedovskiy_vs_russia.doc accession 2012-03-02.

15. H.L.R. v. France, 11/1996/630/813, Council of Europe: European Court of Human Rights, 22 April 1997//http://www.unhcr.org/refworld/docid/3f3779b24.html accession 2012-04-06.

16. Ireland v. The United Kingdom, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977//http://www.unhcr.org/refworld/docid/3ae6b7004.html accession 2011-09-25.

17. Kemal Kahraman v. Turkey. Judgement 22 July 2008//http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=38288829&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=37943&highlight= accession 2011-11-05.

18. Khadisov and Tsechoyev v. Russia, decided 5 May 2009//http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=846624&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 accession 2012-03-30.

19. Labita v. Italy, 26772/95, Council of Europe: European Court of Human Rights, 6 April 2000//http://www.unhcr.org/refworld/docid/402a05eba.html accession 2011-10-30.

20. Ribitsch v. Austria, 42/1994/489/571 , Council of Europe: European Court of Human Rights, 21 November 1995//http://www.unhcr.org/refworld/docid/3ae6b7010.html accession 2012-03-01.

21. Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008//http://www.unhcr.org/refworld/docid/47c6882e2.html accession 2011-10-29.

22. Sarban v. Moldova, Judgement 4 October 2005//www.univie.ac.at/bimtor/dateien/ecthr_2006_sarban_vs_moldova.doc accession 2012-04-07.

23. Selmouni v. France, 25803/94, Council of Europe: European Court of Human Rights, 28 July 1999//http://www.unhcr.org/refworld/docid/3ae6b70210.html accession 2012-01-19.

24. Sheydayev v. Russia, decided 7 December 2006//www.univie.ac.at/bimtor/.../ecthr_2007_sheydayev_vs_russia.doc accession 2012-03-01.

25. Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989//http://www.unhcr.org/refworld/docid/3ae6b6fec accession 2011-09-25.

26. Sufi and Elmi v. United Kingdom, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011//http://www.unhcr.org/refworld/docid/4e09d29d2.html accession 2012-04-25.

27. Tarariyeva v. Russia Judgement 14 December 2006//http://menneskeret.dk/files/DoekerPDF/Case%20of%20Tarariyeva%20v%20Russia.pdf

28. Tomasi v. France. Judgement 27 of August 1992//www.univie.ac.at/bimtor/dateien/ecthr_1992_tomasi_vs_france.doc accession 2011-10-15.

Other courts and tribunals

United States of America:

29. Cadet v. Bulger No. 03-14565, decided July 20, 2004//http://caselaw.findlaw.com/us-11th-circuit/1380282.html accession 2012-02-25.

30. Furman v. Georgia, 1972//http://law2.umkc.edu/faculty/projects/ftrials/conlaw/furman.html accession 2012-02-06

31. In re J-E-,United States Board of Immigration Appeals, 22 March 2002//http://www.unhcr.org/refworld/docid/404749be2.html accession 2012-02-12.

32. In Re M-B-M Decided September 24, 2002 U.S. Department of JusticeExecutive Office for Immigration Review Board of Immigration Appeals//http://www.justice.gov/eoir/vll/intdec/vol23/3480.pdf accession 2012-03-10.

33. Price and Fray v. Socialist People's Libyan Arab Jamahiriya 294 F.3d 82//http://law.justia.com/cases/federal/appellate-courts/F3/294/82/545692/ accession 2012-03-10.

34. In re S-V-, United States Board of Immigration Appeals, 9 May 2000. P.1312//http://www.unhcr.org/refworld/docid/3ae6b7660.html accession 2012-04-05

35. In Re Y-L, A-R, R-S-R, United States Board of Immigration Appeals Decided 5 March 2002//http://www.ilw.com/immigrationdaily/cases/2002,0308-AG.pdf accession 2012-04-02.

36. Wilkerson v. Utah 1878//http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=99&invol=130 accession 2012-02-06

Lithuania

37. Lithuanian Supreme Court criminal case No. 2K-791/2007 judgement //http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-22.

38. Lithuanian Supreme Court, Criminal case No.2K-428/2008, Judgement 16 December 2008//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-23.

39. Lithuanian Supreme Court, criminal case No. 2K–153/2009, judgement 21 April 2009//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-1995-m..html accession 2012-04-22.

40. Lithuanian Supreme Court, criminal case No. 2K–164/2009, judgement 12 May 2009//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-1995-m..html accession 2012-04-22.

41. Lithuanian Supreme Court, criminal case No. 2K-519/2009, judgement 1 December 2009//http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-22.

42. Lithuanian Supreme Court criminal case No.2K-118/2010, judgement 16 March 2010// http://www.lat.lt/lt/teismo-nutartys/nutartys-nuo-2006-6bt1.html accession 2012-04-22.

43. Lithuanian Court of Appeal, Criminal case No. 1A-92-2005, judgement 19 January 2005//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=07224bf9-282e-473c-b9dd-af5e4d117a0c accession 2012-04-22.

44. Lithuanian Court of Appeal, Criminal case No. 1A-486/2006, judgement 30 November 2006//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=79da2a02-9095-4cb4-98a0-08f39b26d1f4 accession 2012-04-21.

45. Lithuanian Court of Appeal, Criminal case No. 1A-210/2009, judgement 7 May 2009//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=0e4e5172-b9af-4cc2-a399-79251accdfd2 accession 2012-04-21.

46. Lithuanian Court of Appeal, Criminal case No. 1A-34/2011, judgement 11 February 2011//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=e58f85a7-613a-4335-a5a6-b5d6fad198ca accession 2012-04-22.

47. Vilnius district court, Criminal case No.1-44-376/2008, judgement 28 April 2008//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=6d0a6b28-5f3a-4b5d-8652-a0378c490442 accession 2012-04-21.

48. Vilnius district court, criminal case No.1-133-376/2009//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=11f81c43-128f-41d5-8207-61c0f48c605c accession 2012-04-22.

49. Panevėžys district court, Criminal case No.1-00017-491/2007, judgement 15 January 2007//http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=33d48c07-3fb6-400c-884b-9e00ed8cb488 accession 2012-04-22.

3. Special literature in English language

1. Bank R. Country-oriented Procedures under the Convention against Torture: Towards a New Dynamism//Alston P, Crawford J. The Future of United Nations Human Rights Treaty Monitoring. – Cambridge: Cambridge University Press, 2000.

2. Benoune K. Terror/Torture//http://www.boalt.org/bjil/docs/BJIL26.1_Bennoune.pdf accession 2011-05-04.

3. Burgorgue-Larsen L., Ubeda de Torres A. The The Inter-American Court of Human Rights.Case Law and Commentary. – Oxford: Oxford University Press, 2011.

4. Burgers J.H., Danielius H., The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment – The Netherlands: Martinus Nijhoff Publishers, 1988.

5. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. – Geneva: International Committee of the Red Cross. Martins Nijhoff Publishers, 1987.

6. Cullen A. Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights//http://www.lcil.cam.ac.uk/Media/Anthony_Cullen_Defining_Torture_Article.pdf accession 2012-01-20.

7. Druce G. Does waterboarding constitute torture?//Dartmouth Law Journal, Fall 2008, Volume 6, Issue 3.

8. Foley C. Combating Torture//http://www.essex.ac.uk/combatingtorturehandbook/english/combating_torture.pdf accession 2011-06-03.

9. Evans M., Morgan R., Preventing torture. – Great Britain: Oxford University press, 2001.

10. Giffard C. The Torture Reporting Handbook. – Colchester: Human rights center,Univercity of Essex, 2000.

11. Miller G.H. Defining Torture//http://www.cardozo.yu.edu/cms/uploadedFiles/FLOERSHEIMER/Defining%20Torture.pdf accession 2012-04-25.

12. Nowak M., Mcarthut E. The United Nations Convention Against Torture. A Commentary. - Oxford: Oxford University Press, 2008.

13. Reidy A. The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights Human Right Handbook No.6. - Council of Europe, 2002//http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf accession 2011-09-18.

14. Rodley N. The treatment of prisoners under international law. Third edition. – Great Britain: Oxford University Press, 2009.

15. The Geneva Conventions of 12 August 1949 Commentary. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. – Geneva: International Committee of the Red Cross, 1959. First reprint, 1995.

16. The Geneva Conventions of 12 August 1949 Commentary. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. – Geneva: International Committee of the Red Cross, 1960. First reprint, 1994.

17. The Geneva Conventions of 12 August 1949 Commentary. Convention (III) relative to the Treatment of Prisoners of War. – Geneva: International Committee of the Red Cross, 1960. First reprint, 1994.

18. The Geneva Conventions of 12 August 1949 Commentary. Convention (IV) relative to the Protection of Civilian Persons in Time of War. – Geneva: International Committee of the Red Cross, 1958. First reprint, 1994.

19. Torture in International Law. A guide to jurisprudence. – Geneva: Association for the Prevention of Torture, Center for Justice and International Law, 2008.

4. Special literature in Lithuanian language

20. Jočienė D.Pagrindinių teisių apsauga pagal Europos Žmogaus Teisių konvenciją ir Europos Sąjungos teisę//Jurisprudencija. 2010, Nr.3(121).

21. Lietuvos Aukščiausiojo Teismo Senato nutarimas Nr.46 "Dėl teismų praktikos nusikaltimų žmogaus gyvybei bylose" 2004 m. birželio 18 d.//http://www.litlex.lt/scripts/sarasas2.dll?Tekstas=1&Id=76881 accession 2012-04-20.

22. Žalimas D., Žaltauskaitė-Žalimienė S., Petrauskas Z., Saladžius J. Tarptautinės organizacijos. - Vilnius: Justitia, 2001.

23. Žilinskas J. Nusikaltimai žmoniškumui ir genocidas tarptautinėje teisėje bei Lietuvos Respublikos teisėje. – Vilnius: Lietuvos Teisės Universitetas, 2003.

5. Othe literature/sources

1. AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade. MG G.R.Fay Investigating Officer//news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf accession 2012-03-20.
2. Explanatory report. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment//http://conventions.coe.int/treaty/en/Reports/Html/126.htm accession: 2011-05-12.
3. Fact Sheet No.2 (Rev.1), The International Bill of Human Rights//http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf accession 2011-05-06.
4. Human Rights Watch. World report 2012.events of 2011//http://www.hrw.org/world-report-2012 accession 2012-04-21
5. Testimony of LTG Randall M.Schmidt. Taken 24August 2005 at Davis Mountain Air Force Base, Arizona//http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20050825.pdf accession 2012-03-25.
6. Text of resolution of advice and consent to ratification as reported by the committee on foreign relations//http://thomas.loc.gov/cgi-bin/ntquery/z?trtys:100TD00020: accession 2012-02-05.
7. United Nations Committee against torture. Convention against torture and other cruel inhuman or degrading treatment or punishment. Initial reports of states parties due in 1995. United States of America. 2000 February 9//http://www.state.gov/documents/organization/100296.pdf accession 2012-02-06.

8. UN Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Conclusions and recommendations of the committee against torture. Lithuania. No. CAT/C/CR/31/5, 5 February 2004, §5(a)//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/402/72/PDF/G0440272.pdf?OpenElement accession 2012-04-24.

9. United Nations Committee against torture, Consideration of reports submitted by state parties under article 19 of the convention. Lithuania. CAT/C/LTU/2 10 August 2006//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/438/86/PDF/G0643886.pdf?OpenElement accession 2012-04-20.

10. United Nations Committee against torture. Written replies by Lithuania to the list of issues to be taken up in connection with the consideration of the second periodic report of Lithuania. CAT/C/LTU/Q/2/Add.1, 24 October 2008//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/447/20/PDF/G0844720.pdf?OpenElement accession 2012-04-20.

11. United Nations Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Second periodic report of Lithuania. No.CAT/C/SR.839, 7 November 2008, §3//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/449/32/PDF/G0844932.pdf?OpenElement accession 2012-04-24.

12. United Nations Committee against torture forty first session. Summary record (partial) of the 841st meeting. CAT/C/SR.841, 11 November 2008//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/449/52/PDF/G0844952.pdf?OpenElement accession 2012-04-18.

13. United Nations Committee against torture. Consideration of reports submitted by states parties under article 19 of the convention. Conclusions and recommendations of the committee against torture. Lithuania. No. CAT/C/LTU/CO/2, 19 January 2009//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/403/04/PDF/G0940304.pdf?OpenElement accession 2012-04-24.

14. United Nations Committee against torture. List of issues prior to the submission of the third periodic report of Lithuania No. CAT/C/LTU/Q/3, 22 February 2011//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/409/32/PDF/G1140932.pdf?OpenElement accession 2012-04-24.

15. United Nations Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or

Punishment), 10 March 1992//http://www.unhcr.org/refworld/docid/453883fb0.html accession 2011-05-04.

16. United Nations Human rights committee sixty first session. Summary record of the 1634th meeting. CCPR/C/SR.1634, 3 February 1998//http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/35291b257c203a8f802565a8005b53d3?Opendocument accession 2012-04-18.

17. United Nations Human Rights Committee. Consideration of reports submitted by states parties under article 40 of the Covenant. Third periodic national report of states parties. Lithuania. No.CCPR/C/LTU/3, 29 November 2010//http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/471/88/PDF/G1047188.pdf?OpenElement accession 2012-04-23.

18. U.S. Department of Justice Office of Legal Council. Memorandum for Alberto R. Gonzales counsel to the President. August 1, 2002//news.findlaw.com/wp/docs/doj/bybee80102mem.pdf accession 2012-03-10.

19. U.S. Department of Justice Office of Legal Council. Memorandum dated August 1, 2002, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A//http://www.american-buddha.com/torture.memo14togonzales.htm accession 2012-03-15.

20. U.S. Department of Justice Office of Legal Council. Memorandum dated August 1, 2002, Re: Interrogation of al Qaeda Operative//http://www.american-buddha.com/torture.2bybeememoaug12002.htm accession 2012-03-17.

21. U.S. Department of Justice Office of Legal Council. Memorandum dated January 22, 2002, Re: Application of Treaties and Laws to al-Qaida and Taliban Detainees//http://www.american-buddha.com/911.senateinquirydetaineescustody.htm accession 2012-03-04.

22. U.S. Department of Justice Office of Legal Counsel. Memorandum Dated December 30, 2004. Re: Legal standards Applicable Under 18 U.S.C. §§ 2340-2340A//http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/security/library/policy/national/doj-dag_torture-memo_30dec2004.pdf accession 2012-04-03.

23. 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)//http://www1.umn.edu/humanrts/usdocs/tortres.html accession 2012-04-01.

24. Working group report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations. 6 March 2003//http://www.american-buddha.com/911.tortureworkgroup25.htm accession 2012-03-04.

6. The Internet database

1. http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/comparativeanalysis/tortureorcrual/mental/ accession 2012-04-23
2. http://www.law.cornell.edu/constitution/billofrights#amendmentviii accession 2012-02-07
3. http://www.nuigalway.ie/human_rights/Projects/Project_Ireland/ireland_v_uk.html accession 2012-02-02
4. http://www.wcl.american.edu/hrbrief/14/2devos.pdf?rd=1 accession 2012-04-23.

ANNOTATION

Šilinytė Evelina. The Definition of Torture in Contemporary International Law and Practice/Joint Program International Law master thesis. Supervisor: Prof. Dr. L. Jakulevičienė, Vilnius: Mykolas Romeris University, Faculty of Law, 2012.

Key words: UN Convention Against Torture; definition of torture; elements of the definition of torture; severe pain; intention; purpose; perpetrator; criminal norm punishing torture.

This master thesis analyses the concept and definition of torture, enshrined in the UN CAT, and it‘s relevance in the modern international law and legal practice. Main legal documents prohibiting torture, as well as the nature of absolute prohibition of torture are analysed. The analysis of the absolute nature of the prohibition of torture is based on international jurisprudency. The thesis presents the study of the concept of torture, it‘s elements, and ways in which they are applied in the practice of international judicial institutions. The international practice is compared with US practice interpreting the definition of torture, as the definition of torture proposed by US was named controversial on the international level. Such a comparison is made to reveal the differences between US and international practice in applying the definition of torture. The analysis of the different cases of international legal institutions shows the ways of applying the definition of torture and what the definition of torture actually is now. The Lithuanian version of the definition of the prohibition of torture and its legal basis was described. The attention was drawn to the significance of the specific legal norm prohibiting torture and the incorporation of the concept of torture into national law.

ANOTACIJA

Šilinytė Evelina. Kankinimo apibrėžimas šiuolaikinėje tarptautinėje teisėje ir praktikoje/Tarptautinės teisės Jungtinės programos magistro baigiamasis darbas. Vadovė: Prof. Dr. L. Jakulevičienė, Vilnius: Mykolo Romerio Universitetas, Teisės fakultetas, 2012.

Raktiniai žodžiai: JT Konvencija prieš kankinimą; kankinimo apibrėžimas; kankinimo apibrėžimo elementai; stiprus skausmas arba kančia; tyčia; tikslas; vykdytojas; norma baudžianti už kankinimą .

Magistro darbe nagrinėjamas kankinimų apibrėžimo, išdėstyto Jungtinių Tautų konvencijos prieš kankinimus 1 straipsnyje, aktualumas šiuolaikinėje tarptautinėje teisėje ir praktikoje. Darbe aptariami pagrindiniai tarptautiniai dokumentai, draudžiantys kankinimą, bei analizuojamas kankinimų draudimo absoliutus pobūdis. Absoliutaus pobūdžio analizė buvo atlikta nagrinėjant tarptautinę jurisprudenciją. Darbe išanalizuoti kankinimų sąvoką sudarantys elementai, jų taikymas įvairių tarptautinių teisminių institucijų praktikoje. Tarptautinė praktika lyginama su JAV praktika interpretuojant kankinimų sąvoką, kadangi šios valstybės pasiūlytas kankinimų apibrėžimo išaiškinimas tarptautiniu lygmeniu buvo įvertintas gana prieštaringai. Tuo siekiama atskleisti kiek JAV pasiūlyta praktika, skiriasi nuo šiuolaikinės tarptautinės praktikos taikant kankinimų apibrėžimą. Nagrinėjant tarptautinių teisminių institucijų bylas siekiama pademonstruoti kaip kito kankinimų apibrėžimo taikymas praktikoje ir koks jis yra dabar. Taip pat įšnagrinėtas Lietuvos Respublikoje taikomas kankinimų draudimo apibrėžimas ir kankinimų draudimo užtikrinimo įstatyminė bazė. Atkreipiamas dėmesys į tai, koks yra svarbus specifinės normos baudžiančios už kankinimą ir kankinimų apibrėžimo inkorporavimas į nacionalinę teisę.

SUMMARY

Torture is prohibited in a great number of international treaties. Some of the documents prohibit torture in general terms; some of them propose the definition of torture. The purpose of this research is to analyse how the legal scope of torture definition enshrined in the CAT has changed throughout the years and to what extent the definition of torture is applicable in contemporary legal practice. In the first part the international legal regulation will be discussed explaining which international documents prohibit torture, which of them define torture, what monitoring and judicial mechanisms are created. The definition of torture is differently interpreted in the jurisprudence of international tribunals. The actions which were not defined as torture 50 years ago are understandable as torture in recent jurisprudence. The second part is aimed to analyse how definition of torture evolved in international law during the years and how it was narrowed in the USA practice. Different interpretations of the definition of torture are compared in order to analyse which elements of torture definition enshrined in the CAT used in contemporary international judicial practice and to what extent they are applicable. This explains to what extent definition of torture is applicable by international judicial bodies in contemporary practice and what requirements it should fulfil to ensure the needs of contemporary human values. In the third part the definition of torture applicable in Lithuania will be analysed. There is no clear definition of torture or specific norms criminalising torture in Lithuania, except torture of the animals. The crime of torture is incorporated in to other crimes. This issue is latent for now and no one is trying to resolve it. While the prohibition exists, the legal background for its operation is not prepared and the proper protection from torture could not be ensured inside the state.

SANTRAUKA

Tarptautinės sutartys draudžia kankinimus. Vienos jų tiesiog draudžia kankinimus, kitos – pateikia kankinimų apibrėžimą. Šio darbo tikslas – išanalizuoti, kaip keitėsi teisinė kankinimo apibrėžimo apimtis ir kokia apimtimi jis yra taikomas šiuolaikinėje tarptautinės teisės praktikoje. Pirmoje darbo dalyje aptariama tarptautinė teisinė bazė, aiškinant kurie dokumentai draudžia kankinimus, kurie nustato kankinimų apibrėžimą, aiškinama kokie yra sukurti monitoringo ir kiti teisines priežiūros mechanizmai. Kankinimų apibrėžimas yra skirtingai interpretuojamas tarptautinių tribunolų jurisprudencijoje. Veiksmai, kurie prieš 50 metų nebuvo klasifikuojami kaip kankinimai, šiandien jau patenka į šią sąvoką. Antroje dalyje analizuojama kaip kankinimų apibrėžimas, pateiktas JT Konvencijoje prieš kankinimą, laikui bėgant, kito ir kaip jo taikymas buvo apribotas JAV praktikoje. Lyginamos įvairios kankinimų apibrėžimo interpretacijos, siekiant išanalizuoti JT Konvencijos prieš kankinimą apibrėžimo elementus, naudojamus šiuolaikinėje tarptautinėje teisėje ir išsiaiškinti kokia apimtimi jie yra taikomi. Taip paaiškinama, kokia apimtimi šiuolaikinėje praktikoje šį apibrėžimą taiko tarptautinės teisminės institucijos ir kokius reikalavimus jis turi atitikti, tam kad užtikrintų šiolaikinių žmogiškųjų vertybių poreikius. Trečioje dalyje analizuojamas kankinimo apibrėžimas, kuris yra taikomas Lietuvoje. Reikia pripažinti, kad Lietuvoje nėra aiškaus kankinimų apibrėžimo ir normos, kriminalizuojančios kankinimus, išskyrus normą, numatančią bausmę už gyvūnų kankinimą. Kankinimas yra inkorporuotas į kitų nusikaltimų definicijas. Šiuo metu ši problema yra latentinė, ir niekas nemėgina jos spręsti. Nors kankinimai yra draudžiami LR Konstitucijoje, tačiau teisinėje sistemoje nėra išvystytas šio draudimo įgyvendinimas todėl tinkama apsauga nuo kankinimų negali būti užtikrinta.