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TRANSCRIPT OF THE DEBATE: STATE RESPONSIBILITY FOR THE CIA'S SECRET PRISONS IN THIRD STATES (OUTSIDE THE US)

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First of all, it is crucial to define the point of departure for the subsequent discussion. The topic of our conference today concerns the question of state responsibility for alleged CIA secret prisons in third states, outside the US territory. Accordingly, it must be clearly stressed that we are not going to discuss the political aspects of the establishment of CIA prisons in Europe. Moreover, we are not going to decide whether such installations were actually established or not. The core aim of our discussion is to re-examine the legal aspects of such alleged activities, in particular, the state responsibility for human rights violations on the level of national and international law.

I would like to start with some general remarks concerning the responsibility of states for violations of human rights. I believe that we can consider this question in two contexts: first, as state responsibility for violations of international instruments in the domain of human rights by parties to these treaties; second, as state responsibility for violations of customary international law. The latter context is probably more interesting.

Generally speaking, the problem of responsibility of states for violations of a treaty is regulated by Article 60 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention). According to this provision, every party other than the perpetrator (a defaulting state) is entitled to invoke such a violation of the treaty as a reason for suspending the operation of the treaty (under some circum-

stances) with respect to itself. According to paragraph 5 of the same article, these rules are not applicable to human rights treaties. So, from this perspective, every party to the 1969 Vienna Convention is entitled to invoke the responsibility for violations of a multilateral treaty, and not only the state that is directly injured. However, there are good reasons to treat human rights treaties as special regimes – what are sometimes called – "self-contained regimes". A "self-contained regime" is a notion of international law that refers to certain treaties, which contain all norms related to a specific issue or to a specific field. In particular, they contain institutional, substantive and procedural norms. A very good example of such a treaty is the European Convention on Human Rights.

It is also necessary to recall the 1966 International Covenant on Civil and Political Rights (ICCPR), a fundamental instrument on human rights on the universal level. Article 44 of the ICCPR allows state parties to use other procedures of international law, not only those regulated by the Covenant, if it comes to any dispute concerning its application. This means that the regime provided by the Covenant is not necessarily a self-contained regime.

As for general problems of state responsibility, one needs to point to the recent codification, which was completed by the International Law Commission in 2001, namely the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. While the status of these Draft Articles is still unclear, the document can arguably be treated as codification of customary international law. According to the draft, there are two premises of state responsibility: first, the violation of international obligations by a state; second, the possibility of attribution of the wrongful act to that state – which means that there must be a close connection between state agents or other subjects acting on behalf of the state. This seems to be relatively clear. As regards the first premise, i.e. the violation of international obligations, state responsibility can take place either on the basis of the violation of a treaty – here the situation is again quite clear – or as a result of a violation of customary law or any other source of international law.

What is interesting in the context of human rights violations is the fact that most violations of international conventions on human rights concern the states' own nationals. In other words, a state usually violates the rights of its own nationals. In a regular situation under international law, there is an injured state, meaning that the violation of international law by one state caused certain damage, either substantive or moral, to another state. However, in the case of violations of human rights, it may be difficult to identify an injured state because the violation concerns the nationals of that state.

Who can invoke state responsibility? Here we come to one of the fundamental issues of international law, namely the classification of certain categories of norms as peremptory norms of international law or *ius cogens*, on the one hand, and something which is called obligations *erga omnes*, on the other hand. It seems that, if we look at the Draft Articles on State Responsibility, we can draw a distinction between these two notions, although even in the jurisprudence of the International Court of Justice, which is an important authority, it may be difficult to identify it. It seems that *ius cogens* is a notion of substantive law, while the obligations *erga omnes* concern rather the problem of formal, procedural law.

So, who can invoke state responsibility? In the case of serious violations of international obligations *erga omnes* – a number of obligations in the domain of human rights constitute obligations *erga omnes* – it is the international community that can make such a claim. The Draft Articles go even further by suggesting that every state is entitled to claim state responsibility for such violations. This issue arises, in most cases, when we speak about violations of human rights treaties, for instance, the violation of the regime of the European Convention on Human Rights. Even if there is a claim brought by one of the states to the Strasbourg Court, this is an action by a party to the Convention. So, it is very hard to say whether it is really a kind of *actio popularis* or an expression of the obligations *erga omnes* or merely an action allowed by the Convention.

With regard to violations of the customary international law, it is more difficult to evaluate whether a state is responsible for violations of such norms since the status of different obligations in the domain of human rights is unclear. Most states would say that fundamental human rights are customary law, but not all of them. In this context, we can look at the judgment of the House of Lords in the *Pinochet* case. This decision is very instructive for our discussion. The House of Lords was not willing to acknowledge the binding force of customary obligations of the United Kingdom before the UN Convention against Torture entered into force with respect to the UK. The House of Lords held that prior to 1988 [the date when the Convention entered into force], the United Kingdom was not bound by the ban on torture.

Of course, we have some other examples recognizing human rights obligations as customary law: the *Barcelona Traction* case and the Draft Articles on State Responsibility. I do not intend to go here into further details. This was just an introduction, which should situate our subsequent discussion in a certain framework of international law. And just before finishing, I would like to refer, for a moment, to the question of attribution.

The state is responsible for the acts of its agents. State organs, state agencies are decisively those subjects for whose actions the state is responsible. The state is

also responsible for the acts of *quasi*-agents, people or subjects who act on behalf of the state, but who are not formally its agents. However, what may also happen is a situation where third states are involved. So, under what circumstances can one state be responsible for the acts of another state? Or to what extent can the state be responsible for the acts committed by the agents of another state? And, I suppose this very important point brings us to the topic of our discussion today.

The issue is that there were probably some activities in several European states, not to mention some states outside Europe. These acts arguably constituted violations of international law, and therefore, according to the well-established principle of international law, which was clearly formulated in one of the primary international legal cases, namely the *Chorzów Factory* case, (…) could result in responsibility of the state perpetrating such acts.

Let us try to discuss how the issue of state responsibility could be examined in our present case: the activities of the US secret services in some European states.

Now, I would like to suggest prof. Georg Nolte to present some reflections on state responsibility, but also on the activities of the Venice Commission in respect to that case.

Prof. Georg Nolte [Professor for Public Law, International Law and European Law, Humboldt University Berlin, Faculty of Law, former member of the Venice Commission of the Council of Europe, and current member of the UN International Law Commission]

I will speak in a less systematic way than my colleague Władysław Czapliński. What we are talking about is a part of a larger context. The larger context is what was called by the Bush administration the "war on terror". The so-called "renditions" were one of the aspects of this "war on terror". This war was and, in a sense, still is a great challenge for international law. Many international lawyers have thought about it, and have taken a position, and many courts have rendered judgments.

I look at the issue not only from the perspective of a professor of international law in Germany, but also as a former member of the Venice Commission of the Council of Europe. The Venice Commission is an advisory commission of independent experts. The Commission originally had, and still has, the purpose to advise states on how to make the transition to constitutionalism, democracy and human rights. In recent years, however, the Commission has also turned to advise on other and more general matters.

After 2001, the issue of the "war on terror" also came up in the Venice Commission. In 2003 the Parliamentary Assembly of the Council of Europe for-

mulated a question to the Venice Commission about the "possible need of developing the Geneva Conventions". This was a code form of asking the Commission to say something about the Guantanamo. So, one of the questions raised was whether it would be necessary or appropriate to re-interpret the Geneva Conventions in order to have an appropriate legal framework for the "war on terror". The argument was that the Geneva Conventions were concluded in 1949, when classical armies confronted each other, when we had symmetrical forms of warfare, but that now we have new wars which are asymmetrical, with respect to which we cannot distinguish anymore between combatants and civilians, and there were some people who would be even worse than combatants, so they should have no or only very little legal protection. The Commission, however, formulated an opinion which basically said: "no, the Geneva Conventions are fine, they must only be properly applied, the 'war on terror' must be led in a way which respects the Geneva Conventions." Today, this position is generally accepted. But you can imagine that at the time, in 2003, there was an immense pressure to say: "well, we should just do away with the old rule since we are living in a new world, in a new time". The opinion of the Commission was a part of the resistance by lawyers against certain methods in the so-called war on terror. Other institutions later adopted similar positions, national constitutional courts, and to a certain extent also the US Supreme Court.

Two years later, press reports came up about the renditions. Here again, not one state, but a parliamentary commission of the Council of Europe (CoE), on the international level, initiated a question to the Venice Commission which should identify and formulate the standards which the CoE Member States were obliged to follow. The question referred to the international legal obligations of the CoE Member States in respect of secret detention facilities and the interstate transport of prisoners. Again, the Commission formed a working group, composed of seven persons, on the basis of whose draft the Commission rendered an opinion of thirty-five pages detailing the obligations of the CoE Member States. This was necessary because states and people were insecure about what exactly were the obligations of the Member States concerning something which they did not really see, and which seemed to be outside the realm of the state.

There were two cases. The first two countries which were involved were Germany and Italy. There was an abduction from the streets of Milan of a person called Hassan Mustafa Osama Nasr (also known as Abu Omar). He was snatched from the street and flown to an Italian US military airport. From there, he was transported to the US military airport of Ramstein in Germany. In Ramstein, planes were changed and he was transported to Egypt where he was tortured. When press reports about the case came out nobody knew the exact facts. But there were substantiated suspicions and a person was nominated as an investigator – Mr. Dick

Marty, a Swiss lawyer, from the Council of Europe. In this context, the Venice Commission was supposed to formulate abstract criteria to enlighten states what were their obligations in such a case.

The Venice Commission distinguished between three levels of law which was applicable in that connection, namely: the level of national law, the level of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, and the level of general international law.

Why were states insecure about their legal obligations? Well, because the alleged renditions took place only, or almost only, on the airplanes - nobody could see them. It was half in the realm of the military. There are stationing agreements. In fact, Germany had concluded a treaty with the US on the stationing of troops. And it appears that no German official ever knew that a plane coming from Italy transported a detainee who was subsequently transferred to Egypt. So, the question was: what does it have to do with us? Do we have really any obligations? Did it not concern the Americans, and in a sense did it not take place in an extraterritorial space?

The response of the Venice Commission was on three levels. The first concerned the level of national law. You have to realize that the Council of Europe is not only about international legal obligations. It is also about national law. It is about taking national law seriously as part of the rule of law. So, the first question is whether such a practice of rendition is relevant under the national law concerned. The German Constitution, for example, guarantees certain rights for everybody within the German territory. If a person is to be arrested in Germany there must be a legal basis; the German parliament must enact legislation; and there are certain rules of procedure which have to be followed, even in questions concerning foreigners, who are deported, extradited or just transported. There must be a basis in parliamentary legislation for that. There must also be some supervision. So, the first part of the response of the Venice Commission was: "look at your own law, you have to take it seriously, and in a European state, under the rule of law, the constitution should be interpreted as requiring a legislative basis for such practices." Accordingly, under the rule of law, a state cannot just do that *ad hoc*.

The second level is the regime of the European Convention on Human Rights. Here we have to distinguish two aspects: the first aspect is: who acts – the CIA, an organ of the USA? However, the US has not ratified the European Convention on Human Rights (ECHR), and it is therefore not bound by its regime. So, there is no violation of this Convention by the United States. But this is only a part of the story. First of all, there is also the International Covenant on Civil and Political Rights (ICCPR) to which US is a party, and it is bound by its regime. However, with regard to the US, we face a problem of interpretation. The United

States say that the ICCPR only applies to persons on US territory. Since persons in Italy or in Guantanamo are not in the territory of the US, the United States assert, the ICCPR does not apply to the US. The rest of the world is of a different opinion, and the Committee under the ICCPR is also of a different opinion. This issue was an important part of the Guantanamo question. But the question which was put to the Venice Commission was about the legal obligations of the US. The question was what are our obligations as Member States of the CoE. It is possible that the US has no obligations, but that the CoE states do have such obligations. The CoE states have concluded a treaty, the ECHR, which has always been interpreted in the sense that states must ensure and respect the rights which are granted under the Convention to all people under their jurisdiction. This means that every person in Germany must enjoy human rights and the government must look at it and guarantee such enjoyment.

Is this, by any way, changed by the fact that Germany has concluded the stationing agreement with the US? No. First, stationing agreements themselves say that German law applies as far as this is not expressly excluded. There is only one relevant modification which concerns the limitations as to what the German government can do in US airports Germany. German officials cannot just come and search. The airports are to a limited extent like embassies. There is a limitation to the execution of the law, but all these stationing agreements say that the stationing forces have to obey the local law. So, it is not really a question of the substantive law that the liberty of the person, and the freedom from torture or inhumane or degrading punishment must be respected. Germany must not only refrain from unlawfully arresting people or torturing people, but it also must guarantee that no person in that territory be tortured or unlawfully arrested by other states.

Another question is how Germany can guarantee this if it has also concluded a treaty with the US stating that it will not inspect the airport. Here is the core of the problem. The problem is not whether there is an obligation. A simple answer would be: these are two different treaties; one treaty – the stationing agreement – is not a higher law compared to the ECHR, and the ECHR is not higher law compared to the stationing agreement. So, it is possible that there are two conflicting obligations.

The Venice Commission said that if every state must have the right to search and inspect every foreign military installation in its territory, this would make military co-operation impossible. On the other hand, one cannot say foreign forces must be able to do whatever they like; there must be still a responsibility. So, the Venice Commission said that every state must investigate and must do what it can, in particular if there are reasons to suspect that the military installations are abused for illegal purposes. The territory state must do something, must inquire, must put pressure, must ask.

Under the ECHR, Germany had its own obligation to make sure that its territory was not used for human rights violations. There is only a sort of a practical difficulty of implementing it *vis-à-vis* the United States. Now, of course, if we look at the political reality, it was practically and politically impossible to say: "we send a few German policemen to the US airport". Nobody seriously considered that, but that was also not necessary once the issue was publicly debated.

So once there was political attention, there was a reaction on the part of the United States. The US Secretary of State, Ms Condoleezza Rice, more or less said: "well, we are doing things, but we do not overdo it, and we will talk". The US secret services seem to have quickly limited their activities at least in certain areas of Europe - we do not know exactly how far they went. The aim of the opinion of the Venice Commission was to raise awareness; its opinion was not a judgment. But, everybody should know that states have their responsibilities in such situation, even if they cannot easily enforce them with their police.

And finally there is a third level, which is the level of general international law to which Prof. Czapliński has referred. Even without the ECHR there would be responsibility for tolerating or not sufficiently inquiring that people are being sent to be tortured through your territory or even tortured on your territory. This is the question of what we call *ius cogens*. What are the most elementary human rights, which are not only formulated in treaties but also in customary international law? The prohibition of torture is one of the very few human rights which clearly belongs to this category. With regard to the liberty of the human person it is a more difficult question whether it can be said: "the liberty of the human person can be derogated from under the human rights treaties to certain extent". One could perhaps say: "if there is a situation of an armed conflict, for instance in Afghanistan, which is also an armed conflict, then it is not always necessary to have specific parliamentary legislation and procedure as to how transports to a prisoners' camp are to be effected". So, there is some leeway of interpretation. But if somebody is notched from the streets of Milan then it is different. There is a provision in the 2001 Draft Articles on State Responsibility to which Prof. Czapliński has referred, which says that a state which aids or assists another state to commit an internationally wrongful act is itself responsible (Article 16). *Nota bene*, both states are responsible. First, the precondition is that one state commits a violation by torturing somebody or sending somebody to torture. That is a violation in itself. Thirty, fifty or one hundred years ago there was a clear understanding that if a state commits a violation that is its responsibility. If another state helps, that is not that state's responsibility. Taking an analogy from criminal law, in criminal law you are not only responsible if you kill a person, but you are also responsible if you incite somebody else to kill a person. In international law,

a state which tells another state: "you should attack this third state" is not responsible. There is no responsibility for incitement, but according to Article 16 on state responsibility, there is now responsibility for aiding and assisting in the commission of an internationally wrongful act. The problem of this provision in our context is – like in criminal law – whether states are only responsible for aiding and assisting if they actually know that they are aiding or assisting. In Germany, the government might have said: "we do not know what is happening in Ramstein, so we are not responsible for aiding and assisting; only once we know that something is happing there, can we be held responsible".

There is another aspect to it: what if the cooperation is only a cooperation between the secret services, and not even the Prime Minister knows about it? The rules under international law are clear: if a state official acts, even if it is *ultra vires,* it is attributed to the state and the state is responsible.

The problem mostly is that at this third level of state responsibility and *ius cogens* there will normally not be another state which complains because it is only a state, not an individual, who can invoke another state's responsibility. An individual can raise claims under the European Convention on Human Rights, but under general international law, a claim can only be invoked by another state.

In 2005, and probably still today, no government would spoil its political relationships with the United States by formally invoking state responsibility in such situations. They would perhaps make certain statements to the press, and voice their concern about certain things that are happening, but it would be considered an unfriendly act to invoke state responsibility in that context. And, in a sense, it was ultimately not necessary to do so. I think that the public reaction in Europe has fortunately contributed not only to the rethinking but also to the changing of the practice.

Prof. Władysław Czapliński:

Thank you, Georg. I suppose it was exactly at the centre of the issue, which we intend to discuss today. Now, I would like to invite Dr. Adam Bodnar to present the current status of the investigations in Poland.

Adam Bodnar [Assistant Professor of constitutional law and economic law, Warsaw University, Faculty of Law, Legal Expert at the Helsinki Foundation for Human Rights, Warsaw]

I would like to thank the organizers for inviting me to this debate. I would like to present some observations regarding what we currently know about the existence of CIA prisons in Poland and about the current state of investigation. I will also share my views with regard to potential responsibility of Polish officials.

Poland was accused of hosting CIA prisons in November 2005 in publications of the Washington Post and a report of Human Rights Watch. At that time, not many people in Poland believed this story and treated this accusation as a kind of conspiracy theory. Politicians constantly denied any cooperation with CIA. The story was neither sufficiently followed by domestic media. However, as a result of international interest and pressure, the Parliamentary Assembly of the Council of Europe launched an investigation. The Report by Dick Marty disclosed that the US cooperated with Poland with regards to the transportation and detention of so-called high value detainees. A second report was prepared by the investigation committee of the European Parliament. According to it, a black site operated by the CIA was located in Stare Kiejkuty, which is a school for Polish intelligence officers. Several times, high-value detainees were transported by CIA-operated planes, which landed in Szymany in northern Poland.

Notably, the Polish authorities refused any cooperation on this matter, despite increasing criticism and pressure by the international community.

It is clear that the rendition program established practices that were also an obvious violation of domestic law, including the Polish Constitution. For example, using torture in all instances for whatever reason is against Article 40 of the Polish Constitution since the prohibition of torture and of inhuman or degrading treatment is absolute. There are no exceptions to this constitutional rule, e.g., in the form of *raison d'etat* that is commonly invoked in Poland as a justification to possible abuses. No situation might be therefore an excuse, under Polish law, to torture anybody, even persons charged for terrorist activities. There is also no excuse, under Polish law, for providing space for or enabling officers of other states to torture, even if Polish officials were not involved in the actual torture. The lack of control over a state's own territory, which produces such effects, may equally bring responsibility for violation of both domestic and international law. Therefore, one may wonder why Polish authorities did not respond at all to any calls for an independent investigation by international community.

The change came in 2008 when Prime Minister Donald Tusk ordered an official investigation in the case. The investigation is now led by the Appellate Prosecution Office in Warsaw. Formally, it concerns the abuse of power by Polish officials (Article 231 of the Criminal Code) by permitting the loss of control over the sovereign territory of Poland. However, according to certain leaks disclosed by the media, it is possible that the case may also end up with charges of war crimes.

The existence of CIA prisons was subject to strict scrutiny by Polish non-governmental organizations. Amnesty International organized many public actions aiming to raise public attention with regard to this issue. The Helsinki Foundation for Human Rights pressed for an investigation, but also requested

disclosure of information from public authorities. Two such motions were particularly successful. In 2009, the Foundation obtained from the Polish Air Navigation Services Agency a list of all arrivals and departures of CIA-operated planes at Szymany airport. This information was the first public confirmation that such planes landed. In 2010, the Helsinki Foundation obtained from the Border Guard a list of flights along with the number of crew and passengers for each flight. Although the names were not disclosed, it was clear that some passengers stayed in the territory of Poland.

According to this data, the CIA prison most probably operated in Poland between 3 December 2002 and 22 September 2003. There are many traces showing that the most important high-value detainees were imprisoned in Poland, including Khalid-Sheikh Mohammad, Al-Nashiri and Abu-Zubaydah.

The investigation that started in 2008 did not bring any immediate results. However, a serious and quite unexpected change occurred in 2010. The legal representative of Al-Nashiri, Mikołaj Pietrzak, in cooperation with the Open Society Justice Initiative, requested joining the investigation and obtaining a "victim" status for his client. According to the motions, Al-Nashiri was transported from Thailand to Poland at the beginning of December 2002 and then held in Poland for a couple of months. This application was followed by another one submitted by lawyers representing Abu-Zubaydah (in cooperation with the international NGO Interights). In both cases, the Prosecution Office agreed to grant "victim" status. In consequence, the lawyers may now present evidence motions and have access (albeit limited) to case files.

One of the major issues in the investigation is access to state secrets. It seems that there are serious restrictions on the Prosecution Office getting access to certain secret documents and also on exempting highest officials from confidentiality restrictions. Second, the Prosecution Office cannot count on any cooperation with the US authorities. Already in 2009, the US Department of State refused, on the basis of the mutual legal assistance treaty between the US and Poland, any such cooperation. A new motion was submitted in 2011, but one should not expect positive results.

As it was already noted, the media reported, based on an unofficial source within the Prosecution Office, that the prosecutors conducting the investigation had collected sufficient evidence to prosecute before the State Tribunal the top state officials in office during the period when the operations of the CIA prisons in Poland allegedly took place. They are to be charged for committing war crimes, the offence stipulated under Article 123(2) of the Polish Criminal Code. However, this information comes from an anonymous source and until now has not been confirmed by the Polish Prosecution Office.

Apart from constitutional accountability, individuals may also be charged for war crimes in light of international criminal law. There is little doubt that rendition constitutes such a crime. For instance, the use of torture is a violation of common Article 3 of the Geneva Conventions. Officials could be held accountable in their own national courts, in the courts of the many other states that have jurisdiction over such serious crimes, or even before the International Criminal Court. However, there must be political will to commence proceedings before the ICC, since the right to turn to the ICC belongs only to state parties to the ICC Statute.

With regards to domestic responsibility of individual persons involved in the CIA rendition program in Poland, it is possible that the investigation will end up with a bill of indictment against Polish intelligence officers who were involved in arranging the CIA black site in Poland. Theoretically, it would be possible to also hold CIA officers responsible for crimes committed (as they were committed in the territory of Poland). Polish law does not, however, recognize trials *in absentia*. At the same time one cannot realistically expect that the US authorities would extradite its own intelligence officers.

It is not clear what kind of responsibility Polish politicians involved in cooperating with the CIA may face. According to his recent statement, MEP Józef Pinior stated that he has seen a note undersigned by the Polish Prime Minister Leszek Miller allowing for cooperation with the CIA on this matter. Furthermore, the minister responsible at that time for supervising Polish intelligence could be involved, Mr. Zbigniew Siemiątkowski, or even the former President of Poland, Mr. Aleksander Kwaśniewski. They may face responsibility before the Polish State Tribunal, a special constitutional organ created to deal with violations of law and the Constitution by the highest officials. If the Prosecution Office will decide to charge any politicians, it will have to submit a motion to the Parliamentary Committee on Constitutional Responsibility, as a starting point for the criminal process. However, the decision to accuse anybody before the State Tribunal is highly political. A motion with respect to members of the government must be submitted by the President or at least 1/4 of Sejm deputies, while the decision to accuse before the State Tribunal requires consent of at least 3/5 of Sejm deputies. Until now, proceedings before the State Tribunal have ended up with official accusations and final verdicts on very rare occasions. In the case of CIA prisons, a mere start of proceedings before the Parliamentary Committee on Constitutional Responsibility would have precedential value. Please note, however, that a political decision not to charge anybody before the State Tribunal does not release ministers from potential criminal responsibility for abuse of power.

As long as the investigation is not completed, Poland will face serious international criticism for violating its international obligations. Numerous negative

comments by the UN Special Rapporteurs, the UN Human Rights Committee, the European Parliament, the Parliamentary Assembly of the Council of Europe and the Council of Europe Commissioner for Human Rights show how seriously this issue is treated in the international arena and how diligent the investigation should be.

Władysław Czapliński:

Now, I would like to invite Dr. Ireneusz Kamiński to present his observations.

Ireneusz Kamiński [Lecturer in European law, comparative law, legal cultures and traditions, Jagiellonian University, Faculty of Philosophy, Assistant Professor at the the Institute of Law Studies of the Polish Academy of Sciences, Legal expert at the Helsinki Foundation for Human Rights, Warsaw]

The existence of a CIA rendition centre in Poland, which is becoming more and more confirmed by growing evidence, may bring about legal responsibility of Poland within the framework of several international legal instruments. In that context, it must be remembered that the prohibition of torture is currently recognised as a peremptory rule of international law and no exceptions apply to this prohibition, even during war or in the situation of a serious conflict. Furthermore, no reservations are allowed to international conventions dealing with the prohibition of torture.

First, the European Convention on Human Rights prohibits acts of torture and other degrading or inhuman treatment in its Article 3. Assuming, hopefully, that Polish citizens (functionaries) did not participate in inflicting acts of torture on those kept in the Stare Kiejkuty centre, this fact does not relieve Poland from responsibility for such acts. Polish State institutions, certainly of the very high level, must have authorised the establishment of the centre or at least must have given the Americans a free hand to make use of the buildings in Kiejkuty. In either situation, Poland voluntarily declined control over a piece of its territory. Even in pretending naively that the Americans abused the confidence of the Polish state authorities, Poland did not verify what was going on in Kiejkuty, who was transported there and for what reasons, and for how long. In any case, such "omissions" made it possible for acts of torture to happen. The lack of efficient control by the State makes it responsible for acts that occurred due to such remissness. Under the European Convention, a Party State violates the prohibition contained in Article 3 not only when its organs (functionaries) are direct perpetrators but also in cases of consent or acquiescence.

Under Article 3 of the European Convention, Poland is also obliged to undertake an efficient investigation into the circumstances of torture and other prohibited acts that allegedly took place in Kiejkuty (procedural aspect of Article 3). This means that all elements relevant to the presence of the Americans and their detainees must be established and subsequently revealed. Moreover, those responsible for torture must be made legally accountable. Legal sanctions should be adequate to the very nature of the committed acts. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires in Article 4 that all acts of torture be offences under domestic criminal law. It also provides that the same principle applies to an act by any person which constitutes complicity or participation in torture. All instances of torture should be punishable by appropriate penalties which take into account their grave nature.

The joint application of the European Convention and the UN Convention Against Torture should result, first of all, in penal prosecutions of the torturers or, at least, in attempts to identify and criminally prosecute them. Since, however, the direct perpetrators could be foreigners, it might be difficult to fulfil the obligation of prosecution in the case of non-extradition (a very probable event).

The same obligation to prosecute also applies to Polish accomplices, who can be divided into two groups. The first group comprises all those who knowingly and directly participated in the organisation of torture or created conditions enabling it. But it must also be taken for granted that the relevant high-level state institutions (officials) knew what the Kiejkuty centre was for and authorised the existence of the rendition centre. This means that to meet the standards of the European Convention (reconstructed with the referral to the UN Convention Against Torture) the prosecution of high-level politicians should also take place (before the State Tribunal) and lead to appropriate severe penalties.

Second, Poland may become responsible under the UN Convention Against Torture. The basic text of the Convention merely obliges the Member States to submit to the Committee Against Torture periodic reports on the measures taken to give effect to their undertakings under the Convention (Article 19). Any Member State may also accept by a declaration that it recognises the competence of the Committee to receive and consider communications lodged by another State Party (Article 21) or an individual (Article 22) against that Member State for not fulfilling its obligations under the Convention. Poland made such a declaration on 12 May 1993, and since then the Committee has become competent to hear communications against Poland. This means that, in case there is no adequate reaction required under the UN Convention to acts of torture, another State Party (provided it has also lodged an analogous declaration) or an individual (in particular, a victim of torture) is entitled to file a communication to the Committee. While

domestic legal measures should be of a penal character, national legislation must also offer victims of torture appropriate civil redress and "an enforceable right to fair and adequate compensation" (Article 14).

Third, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for a mechanism of periodic and *ad hoc* visits to any place where persons are deprived of their liberty by a public authority. Such visits are followed by reports. State Parties should permit visits and only exceptional circumstances may justify lodging "representations" against such visits on specific grounds (national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or the fact that an urgent interrogation relating to a serious crime is in progress). This mechanism, which is of a preventive character, can be used at the time when a certain detention centre operates (hypothetically, it could have been applied to Kiejkuty between 5 December 2002 and 22 September 2003 when detainees are reported to have been held there).

Finally, the Statute of the International Criminal Court might be applicable to the secret rendition centre in Poland. Under Article 8, the ICC is competent to adjudicate claims of war crimes, among which torture and other inhuman treatment are explicitly enumerated. Assuming that the "war on terror" is a kind of war, committing any acts contrary to the customs of war and defined as war crimes might result in proceedings before the Court. Poland accepted the Statute of the Court on 12 November 2001 and the Statute came into force as of 1 July 2002. Therefore, if those Polish citizens who are responsible for acts of torture in Kiejkuty (by organising and authorising them) are not brought to justice and penalised appropriately in Poland, there may be an investigation and a subsequent indictment before the Court (at the request of another State Party or by the Court's Prosecutor acting *proprio motu*).

Prof. Władysław Czapliński:

I would like to thank the panellists for their interventions. We have just heard a lot of interesting information and observations. And now, we open the discussion.

DISCUSSION (selection of questions and answers)

Irmina Pacho, a lawyer at the Helsinki Foundation for Human Rights (Warsaw):

I would like to share a certain observation. When analyzing the cases, which are currently being decided before the courts in other states (including the US), one may argue that Poland is now in a particular, unique situation.

Accordingly, two individuals, who were granted the status of injured persons, have joined the prosecutor's investigation. Poland has a unique chance to reveal the backstage, the circumstances of the CIA's activity on its territory, and to reveal the role which the Polish state played in these activities. When we compare what is happening before the US courts, one may conclude that these tribunals are closing the way to enforce claims brought by the former detainees, e.g. *Maher Arar* case (2010), *Khaled El-Masri* case (2007), and the case brought by Mr. Binyam Ahmed Mohamed and five other detainees currently being decided before the US Supreme Court.

This would concern two issues: one, the question of reparations; second, the international pressure exercised on Poland. As regards the latter one, one has to recall the statements issued by the Council of Europe (in particular, the opinion expressed by Thomas Hammarberg, the CoE Commissioner for Human Rights) and the UN Committee of Human Rights. These two bodies clearly expressed the view that the argument relating to state or military secrecy cannot be invoked in cases, which involved serious violations of human rights. This must be taken seriously by Poland. There must be a fair and effective investigation. And its results must be revealed to the public.

Marcin Starzewski, the Geremek Foundation (Warsaw):

I would like to ask the Polish members of the panel whether Poland should or is entitled to ask for the extradition of the CIA's functionaries (officers) if it were proved that they tortured detainees in the Polish territory. [...].

Marcin Kałduński, Nicolaus Copernicus University (Toruń)

I have two questions to both professors. The first one concerns the issue of state responsibility as adopted by the International Law Commission in its commentary to the 2001 Draft Articles on State Responsibility. There are two concepts of state responsibility, namely, independent and derived (for instance, as that adopted in 1924 by Max Huber with regard to the British claims in Morocco).

My first question is: if the concept of derived state responsibility is a notion of general international law, could you provide us with sufficient international practice and *opinio iuris*? In other words, does sufficient international practice and *opinio iuris* exist that we could talk about a norm of customary international law?

And the second question is: if we assume that the crime of torture had indeed been committed in Polish territory by the CIA, could Poland be sued before the International Court of Justice? And, if the answer is yes, could Poland invoke the Monetary Gold principle?

Krystyna Kowalik-Bańczyk, Institute of Legal Studies of the Polish Academy of Sciences (Warsaw)

I have a very basic question to Prof. Nolte. It has been said that, if the state helps another state in violating international law, it is responsible itself for such violation. My question is what is the definition of "help"? Is it also "passive help" which is the case here? Or rather must it be "active help"?

Prof. Georg Nolte

I am not sure whether I have understood all the questions well from the translation. Moreover, I would like to stress that I am very reluctant to make any statements which would directly apply to the situation in Poland. I should also say that I am not a member of the Venice Commission anymore, and obviously, I am not speaking in the name of the International Law Commission of the United Nations.

With regards to the question concerning the situation in which a state would be put before the International Court of Justice for providing its territory for such an operation [of secret prisons], it is in principle possible that the Monetary Gold rule could be invoked. This rule means that when two states have a controversy over a legal issue, and this legal issue can only be resolved if the Court would have to simultaneously determine the legal situation of a third state which has not submitted to its jurisdiction, then the ICJ cannot pronounce on the dispute between the two original states. This is a rule which is, in a certain sense, necessitated by the current structure of international law and international adjudication. The ICJ has grappled with this rule: at one point the Court has interpreted it more widely, at another point more narrowly. It is a matter of speculation, but in my view, it is a serious argument here if we would be before the ICJ.

However, the question is also whether the fact that the dispute concerns *ius cogens* changes anything. My guess would be that the argument could go in both directions. You may say that it is so important for *ius cogens* to be adjudicated that the Monetary Gold rule should be narrowly interpreted. But you may also say that it is particularly important to protect the interests of third states if the violation of *ius cogens* is in question. Once again, the argument may go in two directions.

As regards the question concerning the notion of aiding and assisting an internationally wrongful act and whether inactivity can be treated as such help. The provision on state responsibility for aiding and assisting under Article 16 of the Draft Articles on State Responsibility is a substantive issue when we compare it with the Monetary Gold principle, which is a procedural principle. Article 16 is a substantial innovation in international law. In the early 1980s, after Roberto Ago, the Special Rapporteur of the International Law Commission, introduced a draft

article to that effect it was criticized by some people. They were arguing that there was not enough practice to justify it. Ago invoked several cases in which states had provided their airports to other states which then allegedly used them for attacking third states. One of those states which provided airports, as you can imagine, was the Federal Republic of Germany.

In 1958, there was a crisis in Lebanon and Jordan and the US supported the governments there against an insurrection. The US delivered goods and soldiers via Ramstein and other German airports. The Soviet Union protested and accused Germany that it was helping an aggression. The Federal Republic of Germany responded that there was no aggression and claimed that Germany only helped the legitimate governments of Lebanon and Jordan. Roberto Ago drew the conclusion that Germany did not say that it was entitled to help for every purpose. He interpreted this case and argued that the Federal Republic of Germany recognized that it would not have been entitled to help if the US acts constituted aggression.

Since the International Law Commission is not only responsible for the codification of international law, but also for its progressive development, Roberto Ago argued that even if there were only a few cases which could be interpreted to support what later became Article 16, the prohibition of aid and assistance for internationally wrongful acts should be recognized. Interestingly, the proposal was not very much objected to by states. The Federal Republic of Germany, however, did object. Later, James Crawford developed Ago's view in his preparation of the Draft Articles on State Responsibility and argued that there was indeed state responsibility for aiding and assisting. There was not much criticism when the Draft Articles were proposed in the Sixth Committee in 2001 to the UN General Assembly. It is interesting to see that, now when this rule really becomes relevant, some states are having second thoughts, and questions of interpretation come up. Is it already a prohibited help when we give money to a state which does something wrongful with the money?

I think it is probably right to accept that such a rule against aiding and assisting exists, but I also think that it should not be interpreted too broadly. But if we talk about providing airports for committing acts which really go to the core of international law – aggression and torture – there is no doubt that such a rule exists.

Prof. Władysław Czapliński

But, the question must be addressed whether the state granting such kind of aid should be aware of the purpose for which the aid would be used. Or is it rather just absolute? Or are certain governments suspected of violating human rights? And, therefore, even if there is no embargo by the UN Security Council,

should states just abstain from helping when they suppose that such aid could be used for violating human rights?

Prof. Georg Nolte

Of course, that is an important question. There are different degrees and we have to look at the case itself. If forces of a state or Martians would land in an uninhabited part of the territory of another state and would do something terrible, this would not entail the responsibility of the latter state. If, however, an organ of a state invites armed forces of another state in a particular context in which it should know what is the purpose of their operation, then we have a rule in law which is called *res ipsa loquitur* – "the thing speaks for itself". Even if you cannot attribute positive knowledge, you must assume that there was intention to help.

We are living in a time of globalization, which also means that territory becomes less important; relationships which are independent from territory become more important (e.g., via the Internet). In a sense, the role of the United States in the world as a global power with many allies is a symptom of non-territorial factors putting pressure on territorial factors. Territory is, of course, not just territory. Territory is a normative concept which concerns groups of people who control a particular territory and who must reaffirm it if they do not want to lose it in the process of globalization. The case of the CIA's activities is a useful reminder that we should not forget to geographically locate issues. We should not say: "there is this abstract process taking place and therefore I am not responsible for it." Such abstract processes take place on a part of the globe, and every state, every society has responsibility for a part of the globe. Otherwise, we risk losing our standards.

Prof. Władysław Czapliński

The last observation that you made is particularly interesting since for very long time, and even now, the notion of territory is basic for many international lawyers. What you have just said is the fact that people connected with a given territory are more important than the territory itself, as they must control that territory…

Prof. Georg Nolte

I have said nothing revolutionary. The principle was formulated as early as in 1923 by Max Huber in the *Island of Palmas* case. He established the principle that territory is the responsibility of the people living on it. Territory in the abstract is nothing, territory in the abstract is Pluto, it is a star or a planet, but territory on earth is socially significant.

Prof. Władysław Czapliński

One short comment: who should sue Poland before the ICJ? Even if there is an *erga omnes* obligation, there are limitations on bringing a claim to the ICJ. When we look at the *Barcelona Traction* case, we think mostly of this famous passage concerning obligations *erga omnes*, but we forget the next page, where the Court held that even if a certain norm constituted an obligation *erga omnes*, it did not mean that any other state could bring a claim to the Court based upon this obligation *erga omnes.*

Prof. Georg Nolte

In my view the ICJ is probably the wrong court to think about. The rendition issue is primarily a human rights issue. Under the European Convention on Human Rights, an individual is the most likely person to complain. Such persons would have to be found. There are good lawyers who are waiting to file an application before the European Court of Human Rights.

Adam Bodnar

With respect to the two questions which have been posed to the Polish members of the panel, the first one concerned the issue of extradition of the CIA's functionaries, and whether Poland may request this. There is a bilateral mutual legal assistance treaty between Poland and the US. It does not create any restrictions with regard to the extradition of US nationals. There is even a case, currently pending before the Polish Constitutional Court, which concerns the request for extradition of a Polish national under this treaty. This case is very interesting since there are some provisions from the treaty of 1993, which survived from the time when the Polish Constitution prohibited the extradition of Polish nationals. After amendments to the Constitution, there was a revival of certain provisions of the treaty concluded prior to the enactment of the Constitution.

But, generally speaking the problem with extradition of the CIA's functionaries is different. First all, do we know the names of the persons who were actually involved in torturing the detainees? In fact, there was only one name mentioned: Mr. Duece Martinez who allegedly managed to convince Khalid Sheikh Mohammed to testify. However, it is a political question whether a Polish prosecutor would decide to make such a strong argument and request the extradition. From the legal point of view, such a request would be possible, but I doubt whether the prosecutor would decide to make it. (…).

To conclude, I would argue against the claim that Polish involvement in the establishment of CIA secret prisons constituted "passive" help. It was not passive help. First of all, there were aircrafts, which were private aircrafts but were

awarded the status reserved only to state aircrafts or to military aircrafts. There was cooperation in transportation between the Szymany Airport and Stare Kiejkuty. There was provision of some services and supplies to the zone in Stare Kiejkuty. There is no data evidencing that Polish officers were involved in torturing the detainees, but they actively helped in creating the whole infrastructure, which made it possible to conduct these operations. It is unlikely that the Polish government did not see anything, since there was some level of cooperation which made the CIA's activities possible.

Prof. Władysław Czapliński

It is time to close our debate. I would like to thank you very much for your presence and a very interesting discussion.

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