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**The Time of Exception (Lithuanian Case)**

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## **The Time of Exception (Lithuanian case)**

Laws themselves must be examined continually against a higher framework than the immediate arena of their practical application. New security threats by global terrorist networks have challenged the existing criteria for legitimate military intervention. It identifies two types of positions – legal and moral. Morality and legality exist in a normative realm of virtues. Giorgio Agamben in the book “State of Exception” investigates the increase of power structures governments in times of crisis. We will analyze the case about the CIA built secret prison in a residential section of Vilnius from September 2004 through November 2005 (From the report of ABC News CIA used the prison to detain and interrogate top level al Qaeda prisoners captured around the world after 9/11). As a result of the ABC News.com story about Lithuania, the Council of Europe reopened its investigation into Lithuanian involvement in the CIA program, according to a Council of Europe official. Today both Lithuania and the United States try provide answers to this question. For us, this case is possibility to discuss such questions as sovereignty of state border, contradictions between moral values and legislation, the frontier between “rule” and “exception”. This case is possibility to revalue such definition of boundary studies as “territorialization” and “de-territorialization”.

**Key words:** border, sovereignty, “rule”, “exception”, “territorialization”, “de-territorialization”.

### ***Introduction***

I will give small and trivial remark before the presentation. Morality covers everything that can be called a human act, one that is done knowingly and freely, and thus one for which we are responsible. Legality can only have a very limited scope compared to the one of morality. It cannot promulgate, determine and

regulate everything in the moral law. At the same time, it cannot be separated from morality. Today in mass media and in public opinion the following slogans are being circulated: “world never will be same after 9/11, “we live in a global state of exception”; “law becomes fact and fact becomes law”.

I would like to present some hypotheses, which will be analyzed in the article. First, after 9/11 a new extraordinary vision of the world was created: “the time of exception” which changed the meaning of such general terms as external sovereignty, state border, international cooperation, sacred of the human life, breaking the law, and some others. Second, nowadays image of the "global enemy" manipulates human consciousness to the point where every exception can be made morally acceptable. The time of exception means that legal and moral norms are valid, but cannot be applied. Third, this is not only the case of new members of EU/NATO (Lithuania, Poland Romania, etc) pressured into illegal activity. It is a result of a confusion of values, priorities and ideas in the era in which “war is not war, and peace is not peace” (some flights, logistics and other parts of the chain, intermediate stops were supported by some EU members). Fourth, the ideas and theories of Walter Benjamin, Carl Schmitt’s and Giorgio Agamben caution us about such current political, legal and moral cases which cross continental, national, cultural and other borders.

### ***Some theory of law***

The theoretical key to our subject was found in the discourse of international law. The definition “external sovereignty” is connoted with a state's right to define its interests. The legal consequences of the status of state sovereignty are legal independence, jurisdiction over its own people and territory, self-determination, territorial integrity and non-intervention, possibility to become and to be a member

of an international organization. In fact, the term “sovereignty” first appears only in modern Europe and during this time has many different interpretations, and, at the same time, it has a central meaning, that of supreme authority within a territory. Territoriality is a principle by which members of a community are to be defined. It specifies that their membership derives from their residence within the borders of that community. This powerful principle may not correspond with identity.

Anne Peters adds that in contemporary positive international law, “the legal status of sovereignty is not a matter of degree (like illness or health). It is, in legal terms, still mostly conceived as an all-or-nothing status (like being alive or dead, or being married). Although states have more or less political, economic, and military power and may possess more or fewer legal competences, they are – under international law – legally equally sovereign” (Anne Peters 2009: 517). Public international law concerns relationships between sovereign nations. The sources for public international law development are customs, practice and treaties between and among sovereign nations, such as the Geneva Convention. They are no longer absolutely sovereign.

Today, European integration proceeds quickly. Globalization makes everything relative, and today, international legal sovereignty means that a state is acting as a recognized entity on the international arena, without being submitted to any foreign power. European Union law constitutes "a new legal order of international law" for the mutual benefit of the member states. The era of global connectedness has such issues as terrorism, drugs, climate change, migration, financial stability which should be dealt with only through institutionalized global cooperation. As wrote M. Hardt and A. Negri, the era of globalization is post-imperial. (Hardt and Negri 2000). It means that deciding such kind of a problem is possible only

through actions which are based on international law. International law is based on the Westphalian model as described in the following principles: states are legally equal; every state enjoys the rights inherent in sovereignty; state is obligated to respect legislation of other states; increased importance of territorial integrity; each state has the right to freely choose and develop its own political, social, economic, and cultural systems, to live in peace with other states. (Griffiths and O'Callaghan, pp. 296-97) All citizens of the member states are citizens of the European Union and among others they have the right to move and freely reside on the territory and to cross frontiers of the member states.

### ***Some theory of territory***

European Union law exists and functions on the European Union territory, which is limited by borders. Border as such is main actor in the case, under our analysis. The term "border" is extremely rich in significations, which is undergoing a profound change in meaning. Borders as an attempt to preserve all functions of the sovereignty of a state, no longer just define boundaries of territories; they are dispersed throughout. There are many characteristics of border management, border life, and borderlands that operate at borders everywhere, that inform the comparative and analytical foundations of border theory, and to which Eastern European borders are no exceptions.

Territory, or territoriality, has become an increasingly prevalent notion in the discourse of the EU. We note two tendencies in the dialectical process of the borders: "territorialization" and "de-territorialization". Hastings Donnan and Thomas M. Wilson in the middle of the 1990's underlined that "borders no longer function as they once did, or at least not in every respect... and globalization of culture, the internationalization of economics and politics have apparently resulted

in the opening up of borders and the relaxation of those state controls which limited the movement of people, goods, capital and ideas” but at the same time they add “the extent and the depth of these border transformations, which seem to fly in the face of numerous examples of international borders which have been made stronger and more impenetrable” (Donnan and Wilson 1999: 3).

The territorialization mostly means the differentiation of space and construction of borders. The de-territorialization is defined by taking over control and order away from a place (territory) that is already established, and weakening of ties between the local culture and the place, the removal of cultural subjects and objects from a certain location in space and time<sup>1</sup>. Space and time can, however, be regarded as one unit in absolute or relative terms. Zygmunt Bauman referred to this situation as “the symbolic end to the era of space” (Bauman 2002). Re-territorialization, as contrasted with de-territorialization, is the process through which territorial configurations of power are continually ordered and re-ordered. At the same time both processes of de-territorialization and re-territorialization are processes which are going on and developing not only on physical territory but on psychological territory which designates the status of the relationship between groups and/or individuals. According to Gilles Deleuze and Félix Guattari, processes of de-territorialization are differentiated into “relative” and “absolute” de-territorializations. For them, the relative de-territorializations mean the possibility of re-territorialization or return to the past. The absolute de-

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<sup>1</sup> The de-territorialization as definition at the end of the 1990’s starts to be linked not only with physical space but with virtual and cyberspace, internet connection, satellite TV, home employment or distance learning (Batty, Barr 1994).

territorializations are marked by impossibility of being territorialized again (Deleuze, Guattari 1994: 110). Not every author shares this point of view<sup>2</sup>.

Today, the process of de-territorialization and weakening of importance of territorial belonging are the principal tendency for the EU. It is the possibility of going beyond the form of a nation. Europe in its actual phase of history is a new form of post-national construction. As Étienne Balibar says, Europe is a frontier. For him a frontier is one of the most important themes today. This representation of border, essential as it is for state institutions, is nevertheless profoundly inadequate for an account of the complexity of real situations, of the topology underlying the sometimes peaceful and sometimes violent mutual relations between identities constitutive of European history. Balibar, in fact, discovered and made a list of some general features of European borders (Balibar 2004): territories in our political tradition are not only associated with the “invention” of a border, they are also inseparable from the institution of power as sovereignty; the borders of new socio-political entities are no longer entirely situated at the outer limits of territories; borders start to be a “transitional object”, and an object of permanent transgression. By this logic, European citizenship is a “citizenship of borders”.

### ***State of exception***

Giorgio Agamben’s book “*State of Exception*” investigates the increase of power structures that governments employ in supposed times of crisis. For him, “the state of exception” is a conflict between public law and political fact, legal order and life.

The confusion between the acts by an executive power and a legislative power is a

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<sup>2</sup> In the book  *Holding the Line: Borders in a Global World*, edited by Heather N. Nicol and Ian Townsend-Gault, the editors and all contributors reject the “borderlessness” principle. They shaped the view about borders as “symbolic violence”, and focus on specific topics, such as border security which today is mainly linked with trans-national terrorism and criminalized migratory issues (Nicol, Townsend-Gault 2005).

common characteristic of the state of emergency. This state defines a regime of the law within which the “norm is valid but cannot be applied”. Derridian “force of law” decrees that an executive power in certain cases can be authorized in the case of a state of emergency. “Force of law” as a technical legal term defines separation between the efficiency of law and its formal essence. Nowadays state is not parliamentary. It is governmental and as a result, it is the isolation of the “force of law” from the law itself.

The metaphor “state of emergency” depicts the terrible reality after 11.09 events. The 11 September attacks caused NATO to invoke Article 5 of the NATO Charter for the first time in its history. The Article states that an attack on any member shall be considered to be an attack on all. The invocation was confirmed on 4 October 2001 when NATO determined that the attacks were indeed recognized under the terms of the North Atlantic Treaty. The consequences of Article 5 were unwritten feelings that the problem of the USA security is common Western community goal for which all methods are good. The image of western civilization’s enemy actualized immediately after 11.09 events. The question of the status and image of the unprecedented enemy comes to be very important. The era post 11.09 created “an illegal, secret, almost virtual worldwide network in which lawlessness (criminality) coincides with ‘fundamentalist’ ethic-religious fanaticism – and since this entity has no positive legal status, the new configuration entails the end of international law which, at least from the onset of modernity, regulated relations between states” (Slavoj Zizek 2002). The image of global enemy created the idea that starts “time of exception“ when the old order no longer works, and starts the time of new order where some minor juridical exceptions are

possible: to cross state borders without registries, official permission and customs examination, and other.

### ***Agamben's dichotomies***

In the theory of “state of exception”, Agamben found some dichotomies: “*territorialization*” and “*de-territorialization*”, *potentiality* and *actuality*, *sacrum* and *profanum* (the sacred, Homo Sacer), *exception* and *rule*, *law* and *force-of-law*, *freedom* and *camp*. We will start with dichotomy of possibility and potentiality, which is very important to our case. In *Homo Sacer*, Agamben aims to connect such problems and definition as the *potentiality* and *actuality*. Agamben's definitions of *potentiality* and *actuality* are very useful for examination of our case. This dichotomy rather turns them inside-out, pointing out the zone where they become indistinguishable. Our case is a good example of this indistinguishableness. The investigation of the CIA secret prison in Lithuania doesn't answer whether there were prisoners at this place (quite possibly, there were none). But according to Agamben's logic, it is not important and relevant: the potentiality has a stable tendency to become reality under concrete circumstances, *if something was built as a prison we should be ready that it will be used as a prison*. The connection between power and law he unites with the problem of political and social ethics in a context where the latter has lost its previous religious, metaphysical, and cultural grounding. “In our age . . . the state of exception comes more and more to the foreground . . . and begins to become the rule” (Agamben 1998: 15).

Agamben's *Homo Sacer* reopens the discussion about dichotomy of *sacrum* and *profanum* with the focus on the *sacred* sense. For him today the definition sacred has only a shadow of religious past. The figure of *Homo Sacer* “allows us to uncover an original political structure that is located in a zone prior to the

distinction between sacred and profane, religious and juridical" (Agamben 1998: 74). Agamben wrote that "life (for the West) is sacred only insofar as it is taken into the sovereign exception, and to have exchanged a juridico-political phenomenon (homo sacer's capacity to be killed but not sacrificed)..." (Agamben 1998: 85).

The sacred man is "taken outside" of both the divine and profane law as an exception and is thus abandoned by them. For us, Agamben's conclusion that the exception becomes the norm or rule of contemporary policy is important.

How do our definitions and dichotomy work in this case? *Legality* can only have a very limited scope compared to the one of *morality* (today discussions focus mostly on definition of legality: how and who has broken the law). In our case, *potentiality and actuality move through two possibilities*.

First, something was built as a prison but what is important is that it was not used as a prison. Second, something was built as a prison and it is not important whether it was used or not as a prison. In our case, *Sacrum or Homo Sacer* is a case of breaking the Geneva Convention which in Article 27 says that "there is no intermediate status; nobody in enemy hands can be outside the law". The dichotomy *law and force-of-law* is evidence of the changing idea that *law* as such isn't broken, only some border procedures are infringed, but *force-of-law* starts to depend on the concrete situation and pragmatic (very important) state's interest and its immediate strategic perspectives. In this situation, a border starts to be a "transitional object", and an object of permanent transgression (Étienne Balibar). Judith Butler found two models of power: sovereign-governmental and disciplinary. Mostly, our understanding of law goes through its relation with both powers' modalities from which disciplinary power concerns mostly with state's

interest, while sovereign rather focuses on lives of those whom the state deems outsiders (Agamben's *Homo Sacer*, Derridian *Other*). For Butler, *indefinite detention* is a ground of decision about "who will be human or who will not" (Judith Butler 2004: XVI).

Further, *a detention camp or prison are* important structural elements of the state of exception. "The camp is the space that is opened when the state of exception begins to become the rule". Following Agamben's point of view, Antaviliai (a residential section of Vilnius where, according to ABC News' information, a secret prison was built) is the "hidden matrix" of contradiction between morality and legality, between sovereign-governance and disciplinary definition of power.

### ***European Case***

From the beginning, we have presented the hypotheses that this case is not only the case of some new members of the \EU/NATO (Lithuania, Poland Romania, etc) pressured into illegal activity. It is a result of confusion of values, priorities and ideas in the era in which "war is not war, and peace is not peace" (some flights, logistics and other parts of the chain, intermediate stops were supported by some EU members). Some information from EU documents confirms that. The European Report, adopted on February 14, 2007, concludes that many European countries tolerated such illegal actions as secret flights over their territories. The countries named were: Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Sweden and United Kingdom. The report criticized some European countries for their "unwillingness to co-operate" with investigators. This kind of "unwillingness" usually had some of the following stages:

- "unwillingness to co-operate" (the information is not true, it is rumors)

- we don't know anything about this case
- we will try to investigate
- we have found some evidence (traces and shadows, but we are uncertain about how it was used)

### ***Lithuanian Case:***

In August 2009, ABC News reported that the CIA built a secret prison in a residential section of Vilnius over the period from September 2004 through November 2005. The CIA used the prison to detain and interrogate top level al Qaeda prisoners captured around the world after 9/11. Lithuania was the only unknown European country to house so called "black sites," after the identities of Poland and Romania were reported in late 2005 by the *Washington Post* and ABC News' Brian Ross.

The CIA purchased the property in March 2004, the same month Lithuania marked its formal admission to NATO. Poland joined NATO in 1999, and Romania joined in 2004. "The older members, the original 15 members of NATO, would never have said yes to something like this," said former White House counterterrorism czar Richard Clarke, now an ABC News consultant. "But the new members were easy to please." The local official reaction followed the logics of the named stages. First stage: "The Lithuanian Government denies all rumors and interpretations about alleged secret prison that supposedly functioned on Lithuanian soil." "The US is a strategic ally of Lithuania in all fields, including covert operations and counter-terrorism".

Second stage:

“Obviously, this is not helping Lithuania's image.” “Therefore it is vital that we conduct an investigation and clear any doubts.” Third stage: “If this is true, Lithuania has to clean up, accept responsibility, apologize, and promise that it will never happen again.” Forth stage: “We cannot place Lithuania in a position, for whatever interests, where it may become a target for international terrorists“.

"Both Lithuania and the United States must provide answers to these questions", - said Lithuanian president Dalia Grybauskaite. In fact, after years of issuing denials, Lithuania's leaders are no longer ruling out the possibility that the CIA operated a secret prison. "From a legal point of view, it would mean that Lithuania, along with the United States, was contributing to quite serious violations of human rights," said Dr. Dainius Žalimas, adviser to the Defense Minister.

At the same time, we are being introduced to another opinion in the international mass media: “There are important legal issues at stake," said John Sifton, a human rights researcher. "As with Poland and Romania, CIA personnel involved in any secret detentions in Lithuania were not only committing violations of U.S. federal law and international law, they were also breaking Lithuanian laws relating to lawless detention, assault, torture, and possibly war crimes. Lithuanian officials who worked with the CIA were breaking applicable Lithuanian laws as well."

### ***Public Opinion***

In Lithuania, public opinion about ABC News information that the CIA built a secret prison in a residential section of Vilnius was contradictory. The opinions have split, with some people believing that there was a detention camp, and some not. . In mass media, we have found both *pro and contra arguments*. Mostly, arguments *pro* were reduced to the following opinions:

“USA is a strategic ally of Lithuania”; “it is our way of understanding and defending democratic solidarity”; “international terrorism is the most dangerous enemy of the democratic and safe world.”

We understood that USA from the legal perspective cannot keep Al-Qaeda prisoners only on its own territory”, “we understood our participation in the building of secret prison to keep Al-Qaeda prisoners, as moral obligation to USA which supported us for the last fifty years in restoring Lithuanian independent state”, “we were in the process to become a full member of the North Atlantic Treaty Organization (NATO) and we understood our participation in the building of secret prison as our first task for NATO”. Mostly, arguments *contra* were reduced to the following opinions: “we are a small state and we don’t want to be a target for a terrorist attack, because Al-Qaeda prisoners were jailed on the Lithuanian territory”, “we break Lithuanian laws relating to lawless detention, assault, torture and U.N. Convention Against Torture, as well as the European Convention on Human Rights”, “to build this prison meant to be ready to accept unlawful assault and torture on our national territory”, “nobody asked us if we agree or not to take this risk and responsibility”.

RAIT Ltd as a representative of International chain Factum group organized a sociological survey about the possibility of existence of the CIA built secret prison in Lithuania (2009, September 8-18)

Respondents were 1029 Lithuanians aged between 15 and 74 years old. To the question “Do you believe that the CIA built a secret prison in a residential section of Vilnius?” the respondents gave the following answers:

28,8 % - probably not

18,5% definitely not

Negative answers in general – 47.3%

19,7% - probably yes

4% - definitely yes

Positive answers in general – 23.7%

29% of the respondents did not express any opinion.

### **Conclusions:**

1. New extraordinary vision of the world after 9/11 as the time of exception (“a fact becomes law”).
2. Today's image of "global enemy" manipulates human consciousness to the point where any exception can be made morally acceptable.
3. This is not only case of new members of the EU/NATO (Lithuania, Poland Romania, etc) pressured into illegal activity. It is a result of confusion of values, priorities and ideas in the era of globalization (some flights, logistics and other parts of the chain, intermediate stops were supported by some EU members).
4. Lithuania showed “a willingness to co-operate” with EU investigators.
5. The ideas and theories of Giorgio Agamben, Walter Benjamin and Judith Butler pre-caution about such current political, legal and moral cases which cross continental, states, cultural and other borders.

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