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The War on Terror and the State of Exception Paradigm

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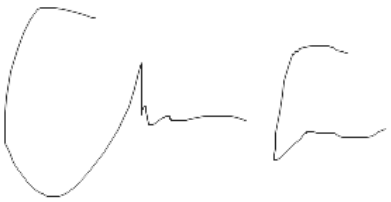
Statement of authenticity

This is to certify that the content of this thesis is the result our own study and that all external sources and information used to present our arguments have been acknowledged according to the standards of reference.
This work has not been submitted for the conferral of a degree elsewhere or any other purposes.

Bremen, 14/08/2017

Christen Corcoran



Sara Pasqualetto

> "Of all the enemies to public liberty war is, perhaps, the most to be dreaded, because it comprises and develops the germ of every other. War is the parent of armies; from these proceed debts and taxes; and armies, and debts, and taxes are the known instruments for bringing the many under the domination of the few. In war, too, the discretionary power of the Executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds, are added to those of subduing the force, of the people. The same malignant aspect in republicanism may be traced in the inequality of fortunes, and the opportunities of fraud, growing out of a state of war, and in the degeneracy of manners and of morals engendered by both.
>
> No nation could preserve its freedom in the midst of continual warfare."
>
> **-US President James Madison**, Apr. 20, 1795

1 | Introduction

> *"[S]ince 'the state of exception... has become the rule', it not only appears increasingly as a technique of government rather than an exceptional measure, but it also lets its own nature as the constitutive paradigm of the juridical order come to light" -Giorgio Agamben (2005: 6-7).*

During time of war, a constitution cannot act as it does during a normal legal paradigm. The constitution cannot prescribe exactly what a state should do to respond to each and ever emergency situation. The juridical does not have endless answers to solve chaos and crises that require immediate solutions. In many state constitutions, therefore, special powers are afforded to the executive during such emergencies in order to respond quickly to protect the state and its people from danger [1]. This is a mechanism that, while it is a function of a legal system, does not belong to a normal, legal paradigm of a state. It is meant to be a quick suspension of the law in order to restore order, a practice dating back to the *Iustitium* of the Roman Empire. The power to decide on such an emergency, as well as the power held when such an emergency is declared, should not be taken lightly as it represents something outside of typical legal jurisdiction. The consolidation of powers globally has had a profound impact on the way states govern their citizens and view their enemies. What one finds since the War on Terror began is these mechanisms are used, not for the temporary suspension of law to restore order, but result in the permanent a-legal paradigm of a State of Exception.

At the time this research is being written, 2017 marks the sixteenth consecutive year in which the world has been involved in the War on Terror. In response to the war, the world has changed in many significant ways. The security state is dominated by fear of an un-defined

[1] For example, the US Constitution has built into Article I: "the principle of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it".

enemy. Politics of counterterrorism have infiltrated the civil liberties once experienced under the normal legal system. State emergencies are being declared, and prolonged through extensions, regularly throughout the world. During times of war, many functions of the state are routinely transferred to executive bodies. Thereby, a select few persons are granted with extraordinary powers. Security has become the main focus and the main principle of countries worldwide. Globally, states circumvent international and domestic law and enact security policies as an instrument of government in attempt to regulate the chaos and disorder. Political philosopher, Giorgio Agamben, has asserted that a normal legal framework is not only abandoned during wartime, but "has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government" (2005: 14). This paradigm is characterized by politics dominated by a fear of terrorism. This hyper-securitization of states globally have significant implications towards the way governments operate, rule of law, and the human rights standard.

The application of law during the War on Terror has become far more political than legal. In 2007, then-Senator Barack Obama gave a speech denouncing the Bush administrations security strategy. He pointed towards actions which violate civil rights and liberties of, not only the American people, but the global community as a strategy in the War on Terror:

> "No more ignoring the law when it is inconvenient. That is not who we are. And it is not what is necessary to defeat the terrorists. The FISA court works. The separation of powers works. Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary" (Rosenthal 2013).

One now reads this quote in near irony. What one finds after eight years of an Obama administration under a US hegemonic system is not an improvement of human rights or a better adherence to the rule of law: rather the opposite. How can this be explained? What does it mean that Obama, someone who wanted to reverse back to a legal norm, could not

once he was in power- and actually made the State of Exception more prolific?

The purpose of this thesis is to investigate the present paradigm and pattersn of governance exists during War on Terror. It will pay special attention at researching mechanisms of governance in how it looks at the War on Terror and how it interacts with democratic values, juridical order, and human rights.

This research primarily focuses on the works of Giorgio Agamben, a political philosopher from Italy who has spent most of his professional career developing his theory on the State of Exception. This theory is one that takes special consideration of the *life* of its political subjects and the governmentality of the biopower that takes life as its subject. He also considers the legal structures, or lack thereof, of modern totalitarianism. This idea combines the research of Carl Schmitt and Michel Foucault into a single theory, bridging academic research of sovereign power and biopolitics, respectively. It is the hypothesis of this research that the mechanisms and structures of the War on Terror can be best explained by Giogrio Agamben and his theory on the State of Exception. While many scholars have sought to understand and explain the post-9/11 world, many important variables of the war such as: the sheer length, the extra-judicial detention and torture, the growing power given to the executive through state of emergency declarations or constitutional changes around the globe, the categorization of human life, the vast amount of civilian casualties, counter-terrorism policies of security, and many other aspects of the war are not able to be satisfactorily explained. The *State of Exception*, as formulated by Giorgio Agamben, is able to better explain the empirical reality of the War on Terror.

This research contributes to the field of International Relations in significant ways because of the implications of the State of Exception as a form of government. Power under this system is given increasingly consolidated from the legislative and especially the judicial

to the executive. Human life itself is taken as the subject of the government, and categorized into the political society's *self* and *other*. The implications of an Agamben State of Exception is quite important and society has a vested interest in knowing how they are being governed. Agamben is a respected theorist, although often criticized for being a-historical and his theories not being able to be applied to reality. This research seeks to make explicit this State of Exception in the War on Terror grounded in empirical evidence.

This thesis seeks to investigate the global paradigm that exists in the War on Terror. It will do so over several steps, starting with the the second chapter which will first document the history, both in the field of International Relations and of global politics, before 9/11. Afterward it discusses the international reaction and immediate war strategies of the War on Terror. The following section will go into the nuances of the War on Terror that make it distinct from other wars and make it harder to explain by legal and political scholars. In Chapter 3, various research of the State of Exception theory will be presented, including that of: John Locke, Carl Schmitt, Nicos Poulantzas, Michel Foucault, and Giorgio Agamben. This section highlights the strengths of Agamben's theory over the others in looking at the War on Terror paradigm. In Chapter 4, the Agambenian State of Exception theory will be applied to the empirical reality of the War on Terror. In the Conclusion chapter, this research will reflect on the the overall implications that the extra-legal paradigm of State of Exception has on human rights, while also discussing how the theory can be improved to reflect the true globality of the systems in tact.

2 | The War on Terror

> *"This war is more than a clash of arms–it is a decisive ideological struggle, and the security of our nation is in the balance. To prevail, we must remove the conditions that inspire blind hatred, and drove 19 men to get onto airplanes and come to kill us. What every terrorist fears most is human freedom. Free people are not drawn to violent and malignant ideologies–and most will choose a better way when they are given a chance. So we advance our own security interests by helping moderates, reformers, and brave voices for democracy. The great question of our day is whether America will help men and women in the Middle East to build free societies and share in the rights of all humanity. And I say, for the sake of our own security–we must"*
> *-President George W. Bush (2001).*

The attacks of September 11, 2001 marked a global turning point for governance and international relations. The War on Terror changed the lens through which International Relations looks at the world. War, its actors, its setting and its battlefields have shifted. This turning point marks important changes not only in warfare itself but conceptualizations of terms such as human rights, security, surveillance, governance, power, checks and balances, and enemies. International terrorist organizations entered the world's lexicon which shaped the political and social spheres indefinitely.

Sixteen years ago, a non-State actor attacked Western symbols of economic and military power. Less than 12 hours afterward, war strategies were being put into motion by the White House and the War on Terror began (Gordon 2007: 53). Because the US, the hegemonic power of the time, was attacked, the rest of the world deferred to the US in how to respond to these threatening actions. In deciding to enter this new phase of warfare, the US military became the leader of the coalition advancing the War on Terror. Former President George W. Bush

announced in a joint session of US Congress on Sept 20, 2001: "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated" (The White House 2001). Over the course of time, the size and scope of the war expanded. Enemies were, and still are, hard to define, and the battlegrounds spanned the globe. Today what we find in the War on Terror is so much larger than one non-State actor versus the US. How did this come to be? How can one explain the reality of today's practices of warfare? And how can one explain the form of governance that is practiced in the context to the war?

The following chapter will discuss the development of the War on Terror, beginning before the attacks of September 11, 2001, and proceeding to present day. Often times the War on Terror is packaged as two wars that occurred in Iraq and Afghanistan, however the consequences of the terrorism conflict is not limited to these territories and narratives. This involves new behavior when it comes to detainment, drones, different conceptualizations of allies, policy enforcement, intelligence, surveillance, and the involvement of a variety of actors. What would victory look like and how would one measure that? All of the changes that occurred to allow for this new warfare need to be addressed in the overall narrative of the War on Terror. The goal of this chapter is to give an objective and comprehensive historical account of the War while also highlighting key features of this War on Terror.

2.1 Leading Up to 9/11

> *"But I am resentful about the type of thing that America and Britain are doing. They want now to be the policemen of the world and I'm sorry that Britain has joined the US in this regard. It's a totally wrong attitude. They must persuade those countries like China or Russia who threaten to veto their decisions at the UN. They must sit down and talk to them. They can't just ignore them and start their own actions"* -Nelson Mandela (Sampson 2000).

Historical events are not isolated in time, of course, rather they are dynamic crescendos

of processes that have accumulated to reach a critical point. Therefore, it is important that one takes a couple of steps back from the microscope which scrutinizes 9/11 and reflect on what features of the international system led us to this point. The present literature that is currently available often does not present the War on Terror in the context of the decades before, this either being due to the fact that historians do not yet have access to material regarding the War on Terror, or because International Relations scholars chose to focus mostly on what happened after the war started. The processes and causal events, furthermore, are greatly debated by the various camps of International Relations, and will be discussed through the main scopes of IR in the following chapter, beforehand however this section will look at key historical factors that preceded the War on Terror.

2.1.1 Global Politics pre-9/11

> *"Profound and powerful forces are shaking and remaking our world, and the urgent question of our time is whether we can make change our friend and not our enemy,"* -Former President Bill Clinton, 1992 Democratic National Convention

The first historical trail one should look into is the USA's climb to unipolarity. Hegemony entitles a country to many forms of power: whether that be military, economic, political, or symbolic. The US of course gained this role as the unipolar hegemon with the fall of the Soviet Union, ending the almost 40 year long Cold War. During this conflict both countries, paying special attention to the US, expanded its spheres of influence geo-politically, increased military capabilities exponentially, and became the driving forces of global politics. After the collapse of the Soviet Union, the US maintained this military, social, and political power without the checks of another hegemonic pole. The Cold War was one of the first major irregular wars: no traditional battles were ever fought (excluding the proxy wars of Korea and Vietnam). In the same sense that the war itself was atypical, the end of the war was not a traditional one. What determined the end of the Cold War: the protests in Leipzig

undermining the authority of the government in Eastern Germany, the election of a non-communist government in Poland, the fall of the Berlin Wall, -was certainly not the direct actions of the United States. The winner did not emerge as the victor because of its ability to win or its military strength, rather the US won the Cold War because the USSR ceased to exist. This resulted into US hegemonic power being relatively unchecked from the perspective of many schools of thought in the field of International Relations.

The world had entered a new era of International Relations where the US certainly was given ample room to do as it pleased. After the Cold War, "[a]merica's economy is 40 percent larger than that of its nearest rival, and its defense spending equals that of the next six countries combined. Four of these six countries are close U.S. allies, so America's advantage is even larger than these figures" (Walt 2000: 64). Economic growth and trade liberalization was a large focus for the Clinton Administration, but former president Clinton entered office with little foreign affairs experience. In his inaugural address in 1992, Clinton asserted to the world and US audience that the US must protect the world-system it had created: "when our vital interests are challenged, or the will and conscience of the international community is defied, we will act - with peaceful diplomacy whenever possible, with force when necessary" (Horivitz 1993). Clinton had to convince the country to remain active in the international sector and not fall towards isolationism that was attractive for many in the country after decades of Cold War. The US had democratically elected a President at the height of unipolarity whose goals were economic expansion and to maintain the current world-order, and while the Clinton administration had a plan for their economic doctrine, their foreign affairs stood on much shakier grounds. "Thus the central paradox of unipolarity: the United States enjoys enormous influence but has little idea what to do with its power or even how much effort it should expend" (Walt 2000: 65). Global media coverage and international conflicts tested the commitment of the US to foreign affairs. "Clinton's was a doctrine of enlargement – of

strengthening and expanding the world community of market democracies, with intervention becoming a matter of choice" (WGBH American Experience 2012).

The 1990's saw a number of conflicts around the globe. From Somalia, to the Balkan Peninsula, to Rwanda and international terrorism on the rise; the United States was in a position where it had to make significant decisions on how to exercise its hegemony. "In the shadow of Vietnam, US interests took precedence over the outrage to the 'conscience of the international community'" (Ryan 2000). The United States' involvement in these conflicts was often delayed, non-effective, or non-existent. When the US did intervene, as the case with Somalia, Bosnia, and Iraq in 1998 "[t]hese were demonstrations of power, rather than effective uses of it" (Ryan 2000: 188).

When Clinton entered US presidency, he inherited a large peacekeeping mission initiated by the United Nations in Somalia. There was an uncomfortability in US Congress, especially among Republicans, that the UN would have too much control over US troops. "The administration's efforts to gain control over UN peacekeeping operations were inspired in part by congressional efforts to assert increasing control over foreign policy in general and over multilateral operations in particular" (Boys 2015: 120). It became a staple of the Clinton presidency that it would act "multilaterally when possible, but unilaterally when necessary" (Elden 2009: 159). During the Clinton Presidency, the US often would take unilateral actions around the globe that were not only in response to armed conflict, but specifically "each time [the United State's] vital interests were at stake; and by vital interests [it] meant 'ensuring uninhibited access to key markets, energy supplies, and strategic resources' along with anything that might be considered a vital interest by a 'domestic jurisdiction'" (Elden 2009: 159). Thereby, "President Clinton's handling of international institutions and multilateralism illustrates the central irony in his handling of foreign policy, namely, the degree to which he

departed from his initial idealism and embraced realpolitik" (Walt 2000: 78). It is important to note here that Clinton was not a hawkish president in the sense that he viewed the world in a realist definition of power through strong military actions, however with his antecessor in mind, the US maintained its hegemony and set a precedent of unilateral action. "Clinton may cloak U.S. policy in the rhetoric of 'world order' and general global interests, but its defining essence remains the unilateral exercise of sovereign power" (Walt 2000: 78). Madeline Albreit, then- Secretary of State, coined this concept of cooperating with other states when possible, and acting unilaterally when it was necessary, "aggressive multilateralism". By the time Bush was elected in 2000, the US had the reputation of acting internationally as it pleased, whether allies were supportive or not.

2.1.2 The Field of International Relations pre-9/11

> *"We remain at the end of history because there is only one system that will continue to dominate world politics, that of the liberal-democratic West,"* -Francis Fukuyama

International Relations is a field that not only looks at present and past systems of world politics, but the dominant discourses of prominent scholars have real effects on politics itself. In some ways, it is an *uroboros*, a snake that eats its own tail. Therefore it is an important aspect of the War on Terror as a whole to look at how International Relations was perceived, studied, and discussed pre-9/11. To understand the extent of changes that occurred after the attacks one must first look at where opinions and conceptions of global issues lay beforehand. The collapse of the Soviet Union brought forth new debates within the field of IR itself, where there was a "continuing clash between those who believe world politics has been (or is being) fundamentally transformed and those who believe that the future will look a lot like the past" (Walt 1998: 36). IR scholars were trying to define this new world in various ways which affects the way that politicians see threats, power and the

future. Two of the most prominent post-Cold War world-views were put forward by Francis Fukuyama and Samuel Huntington. The following section will both highlight the works of these two scholars while also placing their thoughts in the context of political outcomes.

Fukuyama viewed the end of the Cold War as a victory of ideology and famously claimed that the end of history had been reached. Values held by the west, especially the US, such as "democracy, individual rights, the rule of law and prosperity based on economic freedom – represent universal aspirations that will ultimately be shared by people all over the world, if given the opportunity" (Fukuyama 2002: 28). Liberal scholars, Fukuyama among others, saw confirmation of the democratic peace theory "as the number of democracies began to increase and as evidence of this relationship began to accumulate" (Walt 1998: 39). Changes that occurred around the end of the Cold War "seemed to some observers to offer hope for a new world order—one in which international law, Great Power cooperation, international organizations and democratic political systems would all play a larger part than they had been able to do for most of the twentieth century" (Roberts 2008: 347). Prominent liberal scholars renewed the discussion and promoted the democratic peace theory, which had real implications in real-world policies, justifying "the Clinton administration's efforts to enlarge the sphere of democratic rule" (Walt 1998: 39). Fukuyama presumed that overcoming this ideological divide would be the 'end of history'. Because states around the world increasingly shared liberal principles, according to Fukuyama and other liberal theorists, "democracies would 'have no grounds on which to contest each other's legitimacy'. Conflicts might divide the West from the rest, but not the West itself" (Mansbach / Rhodes 2009: 129).

From an economic perspective, the rise of globalization and worldwide interconnectivity shifts the attention away from military capabilities to economic and social prowess as standards of power. Simply put, "[a]s societies around the world become enmeshed in a web of

economic and social connections, the costs of disrupting these ties will effectively preclude unilateral state actions, especially the use of force" (Walt 1998: 40). Economic forces are becoming increasingly valued over traditional military. Fukuyama saw the post-Cold War system and framework as one that would last forever: "[h]umanity had not only discovered the forms of government and economic organization under which it would proceed from here on out, it had found the national boundaries and the hierarchy of states that would last indefinitely" (Douthat 2014).

Fukuyama's promotion of the universal implementation of western, democratic values and liberal markets had real effects. It became almost a beacon of the Clinton Administration and guided, while also justifying, economic expansion of the US. Joseph Nye, a neoliberal scholar, served as the Assistant Secretary of Defense for International Security Affairs for the Clinton administration and called this "political and cultural appeal— what Joseph Nye has called soft power— [...] so extensive that most international institutions reflect American interests" (Daalder / Lindsay 2003). What Fukuyama puts forth had incredible impact in state policies, defining how some conceptualize the world, and influenced international relations as a field.

Samuel Huntington, by contrast, fervently disagreed that US and western values is universal. He states in his 1996 book *Clash of Civilizations and the Remaking of World Order*, which was an expansion of his earlier article "Clash of Civilizations?", that this assumption of 'West is Best' is not only wrong, but it is arrogant (20). Huntington described the future of world conflict as one, not of ideology or politics or economy, but of civilizations (Huntington 1996: 21). "The increased extent to which people throughout the world differentiate themselves along cultural lines means that conflict between cultural groups are increasingly important; civilizations are the broadest cultural entities; hence conflicts between groups from

different civilizations become central to global politics (Huntington 1996: 128). Therefore, the main issues and most important conflicts of international relations "will occur along the cultural fault lines separating these civilizations from one another" (Huntington 1993: 25). The differences between the civilizations are even more basic between political regimes or ideologies; rather "history, language, culture, traditions, and more important religion" are the products of centuries that will not simply go away (Huntington 1993: 25). The increasing interactions that Fukuyama also described will not serve, according to Huntington, to connect everyone universally, but rather will highlight similarities within a civilization and demonstrate differences between them.

Therefore the unipolarity of the world will not last forever, rather will be replaced by multipolarity reflecting the different civilizations. Huntington has described the progression from so called uni-multi-polar to a true vision of multipolar as the "way in which inevitably the world is moving, and both the world and the United States will probably be much better off once we get there" (Huntington 2005). Huntington criticised the "arrogance" and "unilateralism" of U.S. policies, "political and intellectual leaders in most countries strongly resist the prospect of a unipolar world and favor the emergence of true multipolarity" (Huntington 1999: 42).

Despite its controversy, Huntington's 1993 article "Clash of Civilizations?" is said to be one of the most cited articles in history (Chiozza 2002: 711). Huntington's ideas were certainly debated and discussed in academia, and made their way into political thoughts as well. Even before the attacks of September 11, Americans began seeing the world as a much more dangerous place than even politicians (Pew Research Center 2001b). In electing Bush, foreign affairs and policy were a main focus for citizens: "there were signs that the public was rousing itself from its long inattention to international affairs" (Pew Research Center 2001b).

Therefore, not only did the political society care about other parts of the world, but they were also scared of what Huntington referred to as the different "civilizations" of the world. This became an important device for the Bush Administration in the promulgation of the War on Terror.

2.1.3 Relations With the Middle East pre-9/11

> *"[Clinton] understands that the Middle East is finely balanced between two alternative futures: one in which extremists, cloaked in religious or nationalist garb, would hold sway across the region, wielding weapons of mass destruction loaded onto ballistic missiles; and the other future in which Israel, its Arab neighbors and the Palestinians would achieve an historic reconciliation that would pave the way for peaceful coexistence, regional economic development, arms control agreements and growing democratization throughout the Middle East" -Martin Indyk (1993).*

The relations between the United States and the Middle East became increasingly important for international politics, especially after the end of the second World War. The region was becoming geostrategically important for its oil reserves, the emergence of an Israeli state and the cold conflict against the Soviet Union (Schuster 2004). Starting in the 1950s, the US engaged in the Middle Eastern politics by promoting a 'peace docrine' and monitoring the relations between Arab States and Israel in order to maintain stability (Beaver et al. 1999). The strong and stable support to Israeli policies in the 1960s and 1970s caused the first rupture in the relations between the US and the Arab world: the bloody campaigns undertaken by Israel during the Six-Days War with the silent support of the Americans reinvigorated Islamic nationalist tendencies in the area, which started seeing the US presence in the Region as a threat to the political stability of the States (Schuster 2004).

The diplomatic crisis in 1979 in Iran exacerbated the situation, and it was almost immediately followed by the invasion of Afghanistan by the Soviet troops. The necessity of strongly react to the USSR strike led the American administration to giving vast support to

local militias in terms of resources and armaments, which "would have horrifying unforeseen consequences many years later when Osama bin Laden, a veteran of the war in Afghanistan, would turn his anger and terrorist agents against the United States" (Schuster 2004).

The 1980s have been characterized by the degenerating situation in the Persian Gulf, especially with reference to the eight-years-lasting crisis between Iraq and Iran in which the US advocated in support of Saddam Hussein's regime, and that would have led to a reversed condition in the early 1990s, when Iraqi government invaded the region of Kuwait and the US intervened to contain and contrast the action (Schuster 2004). This campaign carried on by the Bush administration had been portrayed as a moral struggle against the atrocities committed by Saddam's regime, however

> "the United States had much to gain and uphold from its involvement in the Gulf. Foremost acting as the major (1) moderator and (2) oil client, this Crisis required U.S. involvement in order to maintain access to oil reserves and the integrity of its alliance system in the Middle East. This also provided an opportunity for the United States to offset its declining power in the global economy and to make it clear to the Middle Eastern countries that the United States is boss" (Beaver et al. 1999).

With the end of the Cold War, the US's foreign policy in the Middle East shifted from a strategy of Soviet containment towards one of peace and promoting development (Beaver et al. 1999); it is in this context that the Oslo Process took place to negotiate a peace agreement in particular between Israel and Palestine. Nonetheless, in the 1990s the Clinton Administration viewed the Middle East also in terms of economic expansion and strategic interests, of which the main goal being to secure relations with the allies in the region (Israel, Saudi Arabia and Egypt) and to maintain the control of the oil reserves (Indyk 1993). As Chomsky effectively described, "the crucial issue with regard to Middle East oil – about 2/3 of estimated world resources, and unusually easy to extract — is control, not access" (Chomsky 2005: 8). Moreover, a tendency towards responsive unilateral interventions opened with the

Clinton administration. Al Qai'da network began its war against the United States starting in mid 1990s with the bombing of the World Trade Center in 1993 and the attacks to the US embassies in Eastern Africa. The Clinton administration responded to these attacks almost immediately, and with little regard for the approval of the UN Security Council or other intergovernmental bodies (Schuster 2004).

This historical relationship between the US, the West, and the Middle East is important towards understanding the state of affairs one finds today. All the strategic, many times clumsy and self-interested, elements of this relationship have contributed building up of a strong anti-American sentiment, but still leaving a large space of action to the US due to their strong economic and strategic interests in the region as well as a bold set of alliances.

2.1.4 History of Terrorism and Counterterrorism Studies

> *"Governing a 'free people' who can claim a legitimate right to engage in revolutionary violence in reaction to tyranny creates special problems, including the constant threat of terrorism (e.g. by abolitionist, Ku Klux Klan, Indians, anarchists, Communists, right-wing militias, Tea Party, etc.). As a consequence there was a practical need to differentiate legitimate and illegitimate political violence"*
> -Michael Blain (2012).

The word *'terrorism'* as a term has been increasingly used in global politics, and is mostly associated with the ongoing conflict in the Middle East. The assessment given by Adam Roberts (2006) by which "[p]olitical debates about terrorism have perennially been ahistorical" seems to accurately mirror the general tendency of the current discussion. Nonetheless, the original meaning of the term stands for something rather different than what is implicated by the term now a days, shifting from the identification of a state-action to the description of any kind of illegitimate political violence. A discussion over the changes in the conceptualization of the word *terrorism* should help underlining the importance of its current use as an antonymic enemy in the ongoing conflict.

Blain (2012) gives an insight on the origin of the term and its evolution over the history and the debates. The initial characterization of the term "terror" dates back to the pre-modern State, wherein the sovereign exercised the so-called "right of death" through which the Prince was able to maintain order and justice by enacting violent acts towards transgressors. The whole political system relied on the implementation of "victimage rituals" in order to secure the asset of *sovereignty*: "The tyrant's terror was understood to be top-down. The right to use terror descended from the top of the power hierarchy" (Blain 2012). With the French Revolution and the problematics of illegitimate violence arising from the dynamics of the revolution itself, the understanding of the term *terror* started to change its characteristics and meaning. "There was a practical need in governing liberal societies to differentiate illegitimate from legitimate forms of political violence. Violence by the police and military would have to be differentiated from illegitimate forms of criminal or terrorist violence" (Blain 2012). A link is therefore created between the previous ideas of "fear and death" and its agency coming from an opposing "illegitimate" that is undermining the power structure (Blain 2012).

This conceptualization of *terrorism*, as an illegitimate use of violence against the established system, maintains its definition today. In the twentieth century, the birth of social sciences as a mean to understand the world and its social interactions established an important turning point in this regard: "[i]n addition to solving the conceptual problem of how to differentiate legitimate from illegitimate forms of political violence, the threat of terrorism added dramatic urgency to the movement to constitute the social sciences as adjuncts to government. There was a need for new modes of knowledge that would facilitate the social regulation of 'free' individuals and populations" (Blain 2012). Making sense of the definition of terrorism helps politicizing the struggles the State is undertaking, in a way that recalls Schmitt's argument of the existential identification of an enemy (Schmitt 1996a). In the same way, Blain sees "[t]he so-called global war on terrorism [as] a strategic response to the

post-cold-war, post-1989 global situation and perceived threats to the defense and expansion of Empire" (Blain 2012).

The difficulties encountered in defining terrorism in a general and all-encompassing way facilitate the diffuse employment of this term and the diverse nature of the elements identified with it. The extremely effective propaganda power of the term "terrorist" led politicians, leaders and media using it in the most disparate ways (Weinberg et al. 2004). It is in this light that the 'war on terror' is not only targeting al Qai'da terrorist network that declared itself responsible for the 9/11 attack, but "[i]t was also used to reinvigorate the US war on narcoterrorists in Columbia. Domestically, drug abusers could be attacked as supporters of terrorism; internationally, drug producers and distributors could be indicted as 'narcoterrorists'. Moreover, it could be used to re-elect President George W. Bush as Commander-in-Chief in 2004. Six years later, it was redeployed in attacks on immigrants and the politics of immigration" (Blain 2012).

The puzzle also resides on the rare and ahistorical references to counter-terrorism doctrines. The debate over terrorism, its definition and characteristics has often been followed by discussions over counter-terrorism policies, with unusual perspectives: "[t]he publicly articulated world-view of terrorists and their adversaries is often a world of moral and political absolutes, in which terrorism, or the war against it, is seen as an essentially new means of ridding the world of a unique and evil scourge" (Roberts 206: 105). Generally referred to as a counter-insurgency measure, counter-terrorism has not been implemented universally in the same way, but rather it has been part of the strategies implemented to ward off the different forms of terrorism over the history. The consequence that "the response of each country to the 'war on terror' has been deeply influenced by its own particular experience of terrorism and counterterrorism" (Roberts 2005: 104). In the same way as for the definition

of terrorism, a clear and unequivocal description of counterterrorism is still to be achieved.

Some problems have been highlighted in this respect. Roberts (2005) remarked that counter-terrorist narratives have been constellated with antinomian confrontations between evil and good, between villains and heroes, often leading to critical points. After 9/11 attacks, US President George W. Bush created a Manichean discourse, which defined the ultimate victory as the complete destruction of opponents, thus generating as an automatic response a military action towards what has been the host country of this terrorist network, Afghanistan. As will be highlighted later in this research, this reaction led to unexpected consequences, blearily implying that military actions "need to take into account of the long history of terror and counter-terror – and of the way historians have understood it" (Roberts 2005: 126).

2.2 After 9/11: New Kind of War and New Types of Enemies

> *"Now, this war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat. Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen"* -George W Bush (The White House 2001).

The fields of politics, military, law, and social theory were changed forever by the attacks of September 11th and the governing policies that were formed as a result of the war. For whatever Huntington, Fukuyama, or any other scholar could have predicted, September 11 altered the world. The world was now fighting in a different type of war. With the rise of jihadist and terrorist groups, the opponent is a non-state actor. From a theoretical point of view, this means: there are no borders to war, nation-building is not necessarily a goal of fighting the enemy, there is no clear identity to the enemy, and now the idea of terrorism is an existential threat to the West. Charles Tilly stated that "War makes states and states

make war," yet this new vision of the non-state, terrorist actor requires a new interpretation for this kind of modern war. The following section will account for the beginning stages of the War on Terror and what new structures and practices make this a conflict unlike any other.

2.2.1 How to Define the War on Terror

> *"Terrorism is a tactic wrapped in ideology; terror is an experience, and you can't declare war on one of those"* -Nancy Gibbs (2006).

How will this war be fought? How can one conceptualize a "victory" in the War on Terror: what would that look like? Who is the enemy? What are the objectives? Is the goal to defeat terrorism, state-building, or both? It was clear to the US and the world that war would look different, but exactly how so needed to be clarified and defined.

As soon as the attacks of 9/11 occurred, NATO forces and the western world deferred to US action on how to proceed. The US had, and still has, power and legitimacy not only to convince other states to support the war, but to follow America's lead. In President George Bush's declaration of war, he stated, "the NATO charter reflects best the attitude of the world: An attack on one is an attack on all. The civilized world is rallying to America's side" (The White House 2001). The message from Washington called all other states to help the fight on terrorism. President Bush went on to demand a united strategy to defeat this still-undefined enemy. "This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. We ask every nation to join us" (The White House 2001). President Bush, in addressing the U.N. General Assembly in November 2001, continued the U.S. leadership of the global coalition by "asking for a comprehensive commitment to this fight. We must unite in opposing all terrorists, not

just some of them". The United States was appealing to its allies to join their fight in the War on Terror following the "aggressive multilateralism" precedence of the 1990s, thereby allowing, and setting a precedence of, the US to define the terms of the war.

Western forces saw a different battlefield that required the rise of different techniques and strategies. Information technology became vital to the combat. A US General describes the changes: "The Sept. 11 attacks jolted the U.S. armed forces into a new era of war-fighting in which commando strikes, intelligence collection and manhunts often overshadowed heavy armor and big bombers of yesteryear's conflicts" (Scarborough 2011). The idea of "irregular warfare" then became the norm. This irregular warfare was centered around information and the expansion intelligence security. The US, as the hegemon and leader of the Western alliance, had both power in the sense of military strength and power in the sense of producing the type of war that would be fought.

A sharp distinction between this war and wars of the past, according to many including historian Bruce Hoffman, is that "unlike traditional wars, the war on terror does not have a clear beginning and an end" (Raz 2006). The Bush administration has given many explanations about what victory could look like, each clarification as vague as the next. In a town hall meeting in 2006, the President stated: "The long-term victory will come by defeating the hopelessness and despair that these killers exploit with a system that is open and hopeful. And the only such system is a free system" (Gilmore 2006). To combat "hopelessness and despair" is certainly something to rally behind, but it is also a goal without a clear direction or endpoint. UCLA Law Professor Khaled Abu el-Fadl states of this goal: "The executive branch could consider itself in a state of war for decades and decades to come, [...the language] hides many obscurities and ambiguities that lend themselves very easily to exploitation" (Raz 2006). Short term victories and objectives have also been clarified by the former President:

"The short-term objective is to use our intelligence and our allies to hunt these people down. And we're getting – we're doing it. And we're on the – we got brave, brave souls, who, every single day, are trying to find the al Qaeda leadership and the network" (Department of State 2006). It outlines the importance of targeting individual terrorists in the overall context of the War on Terror. This allows the US and its allies to celebrate the death of some of these individuals as small victories of the war, but "unlike in past wars, that does not mean that the threat has passed, that emergency powers are no longer needed, that we can go back to how things were" (Gibbs 2006). President Bush says the reason the US is fighting the overall War on Terror is because "the most solemn duty of government, is to protect our people from harm" (Department of State 2006). It is a war against that experience of attack.

Aspects of the war on the domestic front were shifting as well in the United States. Whereas in previous wars, domestic society was involved in the war effort by growing freedoms gardens, buying war bonds, taking part in the war production; the War on Terror marks a shift whereby the social sphere has a new role. This is different from previous wars. The US had learned from the mistakes it had made in the Vietnam War where "anti-war movements engendered a deep culture of skepticism towards militarism, known as the 'Vietnam syndrome,' which made revival of the draft a risky political option even amidst the jingoistic climate that followed the 9/11 attacks" (Kuzmarov 2014: 2). After the attacks on Afghanistan were authorized, "President Bush [...] instructed Americans to 'go about their daily lives'" (Raz 2006). To thwart dissent, the administration wanted to keep the war at a distance from the everyday American. "With the exception of volunteer soldiers and their families, the war is very distant for most Americans—and that's part of the message" (Raz 2006).

Congressional debates about war and fund allocation for military typically brings the

public into the the fold. In the aftermath of 9/11, all of these discussions happened behind closed doors for security purposes, allowing for the detachment of the American public to the culture and conceptualization of war itself. Private military corporations were utilized more than any war of the past, because when it comes down to it, "the American public doesn't mourn contractor deaths the way we do the deaths of our soldiers. We rarely even hear about them" (Maddow 2012: 206). It was a tool to detach the public from the war. The Bush administration's "support for mercenaries was one crucial weapon in an arsenal designed to distance the war from the public that included reliance on air power and eventually drones, Special Forces operations and the training of proxy units, and media censorship epitomized by the phenomenon of embedded reporters" (Kuzmarov 2014: 2). However, when society is increasingly distant from "the culture of war, the rhetoric politicians use to mobilize their populations in support of the military becomes unreal and insincere" (Ignatieff 2000: 189). At the same time that the US public was kept at a distance from war, the Bush administration also wanted to protect the country from future attacks. The new intelligence war had a "profound impact on the life of ordinary Americans" (Gellman / Miller 2013) in the sense that they are being scrutinized by new policies of security and surveillance. For the US government, anyone has the potential to be the enemy. The US government was investigating civilians rather than calling for their help.

2.2.2 New Definition of the Enemy

> *"Those who use the discourse of 'humanity' politically designate themselves as arbiters of 'humanity', drawing a line between who is human and who is in-human, who is good and who is evil, who is 'freedom-loving' and who is 'freedom-hating', to borrow from the vocabulary of US foreign policy since the terrorist attacks of 11 September 2001"* -Louiza Odysseos (2007: 126).

The US military had to adjust its concept of war in order to fight this new enigma of an enemy. "The enemy is not one person. It is not a single political regime. Certainly it is not a

religion. The enemy is terrorism—premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents" (Central Intelligence Agency 2003: 1). One of the most controversial struggles of the War on Terror fought by the Bush administration was taking place on the soil of definitions and identifications of enemies and allies.

Terrorists immediately became the official enemy to attack and eliminate in order to achieve peace and win the war. A men-hunt targeting specific names believed to be responsible for the attacks and affiliated with al Qai'da network helped picturing the enemy with faces, names, identities. The necessity of clarity and specificity regarding who the enemy is became one of the top priorities in the post 9/11, to establish certainty among the obscure sources of evil. As David Keen (2006) put it:

> "there was a profound sense of disorientation. Keeping the peace during the Cold War was based largely on the principle of deterrence: anyone contemplating a war had to reckon with the threat of large-scale retaliation [...] However, deterrence will not work with suicide terrorists. Part of this is because the terrorist is elusive and frequently escapes punishment."

These types of attacks quickly highlighted the difficulties the US military would face in coping with their elusive and fluid nature of terrorism and their network. Regardless of the fact that the physical target was being identified in the state of Afghanistan and, later, Iraq, the struggle in discerning terrorist targets from civilian targets became a strategic problem and made it harder for the soldiers to achieve their objectives. The Sergeant First Class John Meadows declared: "You can't distinguish between who's trying to kill you and who's not. Like the only way to get through shit like that was to concentrate on getting through it by killing as many people as you can" (Graham 2003). As it would soon become evident, the frustration of not being able to identify the enemy would manifest itself in the categories of peoples who would be imprisoned and the nature of their interrogations (Keen 2006).

At least two very important elements emerge here. The first is that the enemy in the War on Terror seem to be *terrorists*; not terrorism (Welch 2006). The strategy enacted since the beginning involving the elimination of specific people identified by the intelligence as the highest layer of the network followed the idea that terrorism is a snake, and that you have to get rid of the head in order to win. However, little consideration has been given to the origins of terrorism, the social, economic and political ones: "the war on terror as currently implemented adheres to a rigid law enforcement model rather than an informed paradigm aimed at understanding the nature of political violence" (Welch 2006: 44). But what is a terrorist then, how can one define *terrorist*?

This leads the discussion over the second element, that the perceived elusiveness of the enemy derives from the very same definition of enemy that has been given by the US administration in declaring this war. In a speech given by former President George W. Bush on Sept 20, 2001, he presented to the world a sharp dichotomy: "Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime" (The White House 2001). The dichotomy between good and evil was constantly present in President Bush's public speeches, "Peter Singer's research, published in 2004, found that Bush had referred to evil in 319 different speeches, and had used the word as a noun, a force in the world, rather than simply as an adjective describing certain acts" (Keen 2006: 8).

The War on Terror is unique in that it is hard to define the enemy in a more specific way than simply "terrorists" or "terror". The US used this lack of clarity to polarize the world into two groups: those with the US and those against. This is an artificial, but widely accepted, vision of the War on Terror. Pierre Bourdieu states that "the theory of knowledge

is a dimension of political theory because the specifically symbolic power to impose the principles of the construction of reality—in particular, social reality—is a major dimension of political power" (1994: 161). Thus the US uses their hegemonic, political and productive power to create the narrative to label terrorists. What the US sought to do is change the label of "pro-US"/"anti-US" to "pro-US"/ pro-terrorists. "Social classifications, as is the case in archaic societies where they often work through dualist oppositions (masculine/feminine, high/low, strong/weak, etc.), organize the perception of the social world and, under certain conditions, can really organize the world itself" (Bourdieu 1989: 22).

Nonetheless, both the categories 'evil' and 'pro-terrorists' are vague and have the potential to be applied at whim or when it is politically advantageous. "The problem with the term 'war on terrorism' is it leaves the enemy ill defined" (Raz 2006), thus allowing leaders, media and people to interpret it in multiple ways. The constant threat of an attack, the fact that terrorists are integrated and blended in the rest of the population directed feelings of suspicion and aversion towards every person or groups that could represent effectively the ideal identikit of a terrorist. A spiral of hate crimes against Middle Eastern and Muslims spread widely all across the West, in a sense creating a home front of the conflict.

"For every regime that sponsors terror, there is a price to be paid, and it will be paid. The allies of terror are equally guilty of murder and equally accountable to justice" (The White House 2001). It is now clear that what Bush is referring to in this statement are not only states and organizations, material suppliers or intelligence strategists, but all those who share one of the aspects that constitute a threat: identity, religion, violence.

2.2.3 New Political and Legal Structures

> *"[Tom Ridge, the first Secretary of Homeland Security] will lead, oversee and coordinate a comprehensive national strategy to safeguard our country against ter-*

> *rorism and respond to any attacks that may come. These measures are essential. The only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it and destroy it where it grows. Many will be involved in this effort, from FBI agents, to intelligence operatives, to the reservists we have called to active duty. All deserve our thanks, and all have our prayers."* -President George W. Bush (The White House 2001).

Within the first days, weeks and months after the September 11 attacks, the Bush administration was quick to mobilize changes in policy, security systems, and public discourse "prior to any in-depth analysis" of the enemies or the attacks themselves (Torok 2011: 138). The "attacks triggered extraordinary and simultaneous actions by the federal government on multiple fronts" (Falkenrath 2004: 170). Besides mobilizing an international military coalition to enter Afghanistan to fight al-Qai'da, the Bush administration took major strides in the domestic sphere to increase security and surveillance. Seen as too reactionary of an institution, Bush appointed a new director to the Federal Bureau of Investigations (FBI), Robert Mueller, to "fundamentally reform [the] organization" (Falkenrath 2004: 171). There was immense attention paid to reforming security at airports and during flights, therefore "Congress passed and the president signed the Aviation and Transportation Security Act and created a vast new federal agency, the Transportation Security Administration, with broad new regulatory powers" (Falkenrath 2004: 171). Soon afterwards, the administration passed the USA PATRIOT Act, an acronym which stands for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism". This act allows for the expansion of surveillance capabilities, allow for inter-governmental sharing and cooperation, increase penalties for terrorists and suspected terrorists, as well as grant access for new technologies for law enforcement (Department of Justice 2001). Furthermore, the Act allowed for search warrants and surveillance of persons without having to inform them of said activities (Department of Justice 2001). The State Department, not to be outdone, contributed to the onslaught of reforms by restricting visa access in the name of national

security. Congress passed the Enhanced Border Security and Visa Entry Reform Act in early 2002 which "represents the most comprehensive immigration-related response" (Jenks 2002). All of these actions were taken within the first few months following 9/11, often "without the benefit of a precise understanding of the details of the problems that had been exposed by the 9/11 attacks. Preoccupied with the need for action in the weeks after 9/11, the federal government agencies devoted little effort to studying or reflecting on the events leading up to the attacks" (Falkenrath 2004: 171).

To further develop security measures, the Bush administration established a new White House cabinet position and department on September 20, 2001. The Department of Homeland Security is "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur" (Mitchell / Pate 2003). From 2001 to 2013, US intelligence spent an estimated 500 billion dollars, "[t]he result is an espionage empire with resources and a reach beyond those of any adversary" (Gellman / Miller 2013). With the reliance on the intelligence community to fight the war, there have been strategic changes in the Defense Department. Former US Colonel Mansoor states of these changes, "there have been a lot of growing pains in that regard, but the capabilities have increased enormously" (Scarborough 2011).

The uniqueness of this new conflict challenged some of the most basic and widely accepted norms regarding warfare: "The Bush administration argued, for instance, that the Geneva Conventions did not apply to its war against al Qaeda because it was 'a new kind of war'" (Ralph 2013: 3). It was clear since the beginning that the involvement of a non-state actor as direct opponent in this conflict would have presented some complications to the general understanding of the war. A tension was created between the decision of the Bush

administration to declare a *war* against this "unconventional" enemy and the refusal to adhere to the established *jus in bello* (Ralph 2013). President Bush released an official statement soon afterward to upper-level White House staff calling for "new thinking in the law of war" (Lewis 2005). In a White House internal memorandum, he states: "[o]ur Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva" (The White House 2002), giving the indication that terrorism has forced the US and the world into a new era of *jus in bello*. The memorandum went on to say that "our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment" (The White House 2002). Just how strictly this "new thinking in the law of war" remains, or was ever, consistent with the Geneva Convention will be discussed at a greater length in later sections.

Legal definitions of international bodies were also changing during the early stages of the War on Terror. On September 28, 2001, the United Nations Security Council adopted the so called "Global Security Law" or, more formally, is known as Resolution 1373. As a measure to fight terrorism, Resolution 1373, which is binding for all member states, affects the domestic laws of all members to enact certain counterterrorism measures (United Nations Security Council RES 1373 2001). The 192 states were required to "make terrorism a serious crime in domestic law, along with conspiracy to commit terrorism, aiding and abetting terrorism, providing material support for terrorism, inciting terrorism, and other ancillary offenses" (Scheppele 2013). This was the first time that the UN had enacted a resolution that explicitly had legislative implications on all member states [2]. Many legal and International Relations

[2] Andrea Bianchi discussed the unique legislative characteristics of this Resolution in the European Journal of International Law, stating "the resolution seems to fit the definition given by Yemin: 'legislative acts have three essential characteristics: they are unilateral in form, they create or modify some element of a legal norm, and the legal norm in question is general in nature, that is, directed to indeterminate addresses and capable of repeated application in time': E. Yemin, Legislative Powers in the United Nations and Specialized Agencies (1969) 6" (2006: 883).

scholars have called this a new paradigm of international law (Bianchi 2006: 882).

The implementation of the resolution has been applied in various ways in different states, not because states were not willing to enact laws in accordance with the resolution, but due to the vague and ambiguous UN definition of "Terrorism" that has allowed nation states to implement counterterrorism measures as they see fit. One can see that "states proceeded to enact a proliferation of very different terrorism offenses, ranging from narrowly defined crimes to political crimes so broadly framed that they included all government opponents in their purview" (Scheppele 2013). UNSC Resolution 1373 also required states to share surveillance information to one another regarding terrorists or terrorist groups, as well as ensure "that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts" (United Nations Security Council RES 1373 2001), also it prohibits the financing of terrorism and travel of "known" terrorists. It specifically states that member states shall "[a]fford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings" (2001), which requires a certain amount of domestic surveillance. The resolution did not have a particular focus on human rights, due process, or privacy, thus various countries took different approaches to domestic methods of surveillance which will be discussed in following sections. A 2003 strategy report by the White House stated that the US planned to "use UNSCR 1373 and the [12] international counterterrorism conventions and protocols to galvanize international cooperation and to rally support for holding accountable those states that do not meet their international responsibilities" (The White House 2003: 19).

As described above, a major feature of Resolution 1373, whether purposely designed so or merely ill-conceived, is the vague definition employed by the United Nations to legally

define terrorism. Christopher Greenwood, judge at the International Court of Justice, described that the "search for a definition of terrorism in international law has proved almost as difficult as the quest for the Holy Grail" (2003: 506). Because of this difficulty, the United Nations and other international bodies sought to condemn specific activities associated with terrorism rather than legally defining it. In the 1990s, there was a stronger effort by the UN to condemn terrorism, leading to the Declaration on Measures to Eliminate International Terrorism (Greenwood 2003: 508-509), stating:

> "... criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them" (United Nations General Assembly RES 49/60 para 2 1994).

The UN and other intergovernmental bodies had been "consistent in following this approach in later resolutions" (Greenwood 2003: 509), however it does not give a definition for terrorism. After 2001, attempts to *legally* define terrorism has "reflected the fact that much contemporary terrorism is targeted against civilians" (Roberts 2006: 102). UN Security Council Resolution 1566 comes close to a definition of terrorism:

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act, which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism" (2004).

Although this definition may contain a basis for the UN to provide a formal, international, legal definition of terrorism, it emphasizes quite strongly the experiences of the War on Terror, and is not explicitly a definition at all. "The emphasis being quite largely on the threat to civilians or non-combatants, they might appear not to encompass certain acts such as attacks on armed peacekeeping forces, attacks on police or armed forces, or assassinations of heads of state or government." (Roberts 2006: 102). Why is an important point to dwell

on the legal definition, or lack thereof, of terrorism? As described in the sub-chapter above, this is a war where the very enemy itself is undefinable, yet resolutions such as that of the UNSC Resolution 1373 seek to target these very individuals that one cannot define. This gives away important political leniency in application of the law in deciding what and who is considered a terrorist or terrorism.

2.2.4 The Case of Iraq

> *"On December 11, 2003, when asked in a press conference whether his Iraq policy was consistent with international law, President George W. Bush joked, 'International law? I better call my lawyer; he didn't bring that up to me'"* -Kim Lane Schleppe (2013).

The legality of the preemptive nature of the War in Iraq is something that is consistently discussed in the field of International Relations and International Law. An attack on a state which prevents the presumed enemy from being able to attack themselves is illegal, full stop. The scholarly discussion is certainly rich with academic and legal opinions on the preemptiveness of the Iraqi invasion. While that is without a doubt necessary, what is also interesting is examining the discourse that was happening in Washington D.C. after 9/11 as it pertains to Iraq. The emergency created by 9/11 led to opportunities to intervene in other parts of the world.

One can find warnings of an expansion of the War on Terror early on in the political discourse post-9/11. President Bush had warned the US public and the world in 2001 that "Afghanistan is still just the beginning" of the War on Terror (The White House). Although Saddam Hussein had nothing to do with September 11th, he was quickly grouped together with the terrorist attacks. At the time of the Iraqi invasion, "70% of Americans believe the Iraqi leader was personally involved in the attacks" (BBC News 2003). How can this staggering statistic be possible if it is factually incorrect?

Perhaps it is due to the fact that the US President almost immediately started incorporating Iraq and Saddam Hussein into the post-9/11 discourse. Take for example this speech in January 2003 by then-President George Bush:

> "Before 11 September 2001, many in the world believed that Saddam Hussein could be contained. But chemical agents and lethal viruses and shadowy terrorist networks are not easily contained. Imagine those 19 hijackers with other weapons, and other plans - this time armed by Saddam Hussein. It would take just one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known" (BBC News 2003).

Not only does the invasion of Iraq seem to be a preemptive, illegal intervention, but it is also likely that this was allowed to happen because of discourses already going on involving the War on Terror. Why would a President try to group other actors into an ongoing emergency?

2.3 Expanding the War

> *"It is hard to resist the conclusion that this war has no purpose other than its own eternal perpetuation. This war is not a means to any end but rather is the end in itself. Not only is it the end itself, but it is also its own fuel: it is precisely this endless war - justified in the name of stopping the threat of terrorism - that is the single greatest cause of that threat"* -Glenn Greenwald (2013).

On May 1st, 2003, President George W. Bush gave the famous speech whereby he declared the war in Iraq, started two months earlier, a success for the US military. "In the battle of Iraq, the United States and our allies prevailed" (CNN 2003). Despite all the optimistic evaluations of the White House at that time, the conflict in Iraq would have continued for a decade more, causing side effects and a spiral of conflicts exploding all over the world. The global war on terror assumed different forms and involved many actors, giving the impression that this is a tendency destined to go further in the future: "Among senior Obama administration officials, there is a broad consensus that such operations are likely to be extended at least another decade. Given the way al-Qai'da continues to metastasize, some officials said no clear end is in sight...That timeline suggests that the United States has reached only the

midpoint of what was once known as the global war on terrorism." (Greenwald 2013). This section will examine different aspects of the current conflict, highlighting how geography, security and social consequences are interconnected and reiterate the dynamics of the conflict itself, helping expanding its scope and impact.

2.3.1 Globality of the War on Terror: Somalia, Yemen, Libya, Syria

> *"Elsewhere— in Pakistan, Libya, Yemen, and Somalia, for example— U.S. forces are busily opening up new fronts. Published reports that the United States is establishing "a constellation of secret drone bases" in or near the Horn of Africa and the Arabian Peninsula suggest that the scope of operations will only widen further"* -Andrew Bacevich (2012).

By early 2003, it was already clear to the US intelligence that restricting al Qai'da's activities to the Middle East was underestimating the scale and relevance of the network. The men-hunt started with the military action in Afghanistan demonstrated to be too narrow and superficial as the suspect of terrorist cells and actions have been placed well beyond that region.

In 2002, the US military expanded the Operation Enduring Freedom in the Horn of Africa, establishing a task force of different countries in the state of Djibouti. A combination of humanitarian aid and military training helped the US army to expand the control of the region and the tracking of suspect activities, as well as the building of good relationships with the countries in the area (Abegunrin 2014). The situation in the region collapsed with the increasing activities of the terrorist group al-Shabaab, which began to be a constant presence in the region since the 2007 Ethiopian invasion of Somalia and was responsible, among others, of the attacks at the Westgate mall and the University in Garissa (Savage et al. 2016). Very soon, this became a major priority for the US action against terrorism, forcing the US administration to increase their military operations in the Horn of Africa to

contrast the al Qai'da-affiliated group. The use of drones and airstrikes broadened, and even if the official authorization to carry on strategic airstrikes outside "areas of active hostilities" is not yet official, practically some exceptions have been made justifying them as "self-defense" (Savage et al. 2016). The threat of al-Shabaab continued to be a serious concern, and the US administration decided to treat it inside the War on Terror framework: "[t]he escalating American military engagement in Somalia has led the Obama administration to expand the legal scope of the war against Al Qaeda [...] The administration has decided to deem the Shabab, the Islamist militant group in Somalia, to be part of the armed conflict that Congress authorized against the perpetrators of the Sept. 11, 2001, terrorist attacks" (Savage et al. 2016).

Yemen has also being a crucial scenario of confrontation between the US and al Qai'da. Since the beginning of the War on Terror in Afghanistan, Yemen appeared to be a fundamental geostrategic site to control both the Middle Eastern front of the war (Afghanistan, Iraq, Pakistan) as well as the African one (Horn of Africa). The pro-American Yemeni government constituted a relevant support for the actions against terrorist groups in the area, while also being the focal center of the terrorist activities: "Yemen has emerged of late as one of the more fertile locations for Al Qaeda activity. Al Qaeda's Yemeni affiliate, the Islamic Army of Aden-Abyan (IAA), has executed a number of spectacular attacks against Western interests in recent years" (Schanzer 2004). The United States therefore engaged in a "shadow war" of covered airstrikes and raids to eliminate the jihadist cells in the territory (Shachtman /Ackerman 2012). After the 2011 Yemeni revolution, governmental support to the fight against terrorism became unstable and instead evoked the establishment of al Qai'da in the Arabian Peninsula organization (the same actor which claimed responsibility for the attack at Charlie Hebdo). Poverty, instability and corruption offered fertile soil for jihadist groups to work on the radicalization of the territory (Yuhas 2015). "Under the guise of the 'war on terror,' the

Obama administration is expanding US military operations in Yemen through stepped-up drone attacks and special operations forces on the ground" (Morrow 2012). The 2015 coup in Yemen exhausted the situation. A coalition led by Saudi Arabia started bombing Yemen to combat Houti forces, with the US providing intelligence and military forces. The unstable and violent situation led to more military operations in order to eradicate the jihadist groups from the territory. Massive airstrikes are continuing nowadays, leaving the assumption that the US engaged in a War on Terror in Yemen as well (Shachtman /Ackerman 2012).

After the Arab Spring and movements of liberation exploded all across Northern Africa and Middle East, some major issues also became part of the global war on terror. In Libya, the 2011 airstrike pursued by a coalition led by France overthrow the regime of Col. Qaddafi, leaving the country in a state of confusion and ungovernability since. In the same year, the civil war in Syria started as an uprising movement against the President Bashar al Assad, and evolved into a multi-fronts bloody conflict. In both these scenarios, the jihadist group Jama'at al-Tawhid wal-Jihad, self proclaimed caliphate and known as Islamic State, took advantage of the already violent situation and established its sphere of interest in the Syrian territory as well as in some Libyan cities, Surt in particular. The Islamic State's activities and attacks quickly concerned the US military, leading to some important consequences for the ongoing War on Terror: "In 2014, for example, Mr. Obama declared that the 2001 law authorized him to battle the Islamic State in Iraq and Syria." (Savage et al. 2016a), and in the Northern African country "the administration deemed Surt, Libya, an 'area of active hostilities,' [...] The move exempted the area from 2013 rules that restrict drone strikes and other counterterrorism operations away from battlefield zones, which President Obama had announced in a major speech that year that sought to turn a page in the long-running war against Al Qaeda" (Savage et al. 2016a). The United States adapted their strategy and warfare to new threats and necessities, perpetrating the same actions that characterized the

previous campaigns in Afghanistan and Iraq, while shifting the target from one enemy to another: from al Qai'da to ISIS.

These are only some of the multiple fronts of the global War on Terror. The examples mentioned above have nonetheless an important function in highlighting what seems to be a consistent pattern in the actions of the US military. In the areas where the United States established some sort of control or strategical basis, their actions and operations while trying to contrast terrorism, seem to fuel it and increase its scale. Like dominoes, US anti-terror headquarters in the Middle East and Africa seem to lead to more and more military involvement and increase the necessity of further military actions, confirming Greenwald's assumption that War on Terror leads to perpetuation of the very same War on Terror.

2.3.2 Privatization of War

> *"We must promote a more entrepreneurial approach: one that encourages people to be proactive, not reactive, and to behave less like bureaucrats and more like venture capitalists"* -Donald Rumsfeld (2002).

Another feature specific to the War on Terror is the vast expansion of private military involvement on the battlefield. Private Military and Security Companies (PMSC) can be seen as a capitalist outsourcing of war, and these companies are not subjected to the same legal standards as that of state armies. In Iraq and Afghanistan many PMSC are used widespread as a force that has immunity from regulations to which the state and UN militaries were subject. According to Amnesty International USA, PMSC are "engaging in a number of human rights violations including the abuse and torture of detainees, shootings and killings of innocent civilians, destruction of property, sexual harassment and rape, human trafficking in the recruitment of third-country nationals, weapons proliferation, and participation in renditions" (2017). In fact, in Iraq and Afghanistan, the number of contracted soldiers

outnumbers military personnel for the first time in history (Amnesty International USA 2017).

Who are these privatized soldiers? Presently they often come from the global south and make the decision to enlist in the PMSC's because they have no other choice to earn money for their family. This creates a dangerous "race to the bottom" in the international division of labor, but rather than manufacturing jobs, the profession is that of a soldier. The soldiers are getting paid minimum amounts for risking their lives in war situations. Furthermore the PMSC's have incentives to not provide them with the best equipment and ensure safety because the heads of these companies are the ones getting the big money from the contract, and a longer war would only give the more money. It is, once again, exploiting the global south for desperate and cheap labor. This creates a capitalist system of warfare that, while attempting to prevent human rights violations, in some ways creates a warped reality of questionable human rights. Additional manpower comes from individuals who could not meet the requirements to be in national armies. The standards are simply lower or nonexistent.

Outsourcing to PMSC's has been a way for state actors to move into a less transparent and less democratic realm of unaccountable warfare. Government contracts with PMSC creates a monetary incentive for the continuation of war. This cannot be overlooked or underestimated. It forces business solutions to a security conflict. From the USA, 40 cents for every dollar in the Iraq operation goes to the PMSCs (Scahill 2008). This is a dangerous relationship, and yet in the War on Terror one sees more PMSC contracts than ever before in history.

Why would the War on Terror rely so much on warfare that has less legal oversight than national militaries?

2.3.3 Rendition, Detention, and Interrogation

> *"The idea that governments must be capable of mass slaughter to secure the life and liberty of each individual member of society has become the biopolitical principle that defines the strategy of states. As recent events is the war on terrorism confirm, "torture" and "terror" did not disappear with the pre-modern state. Instead these practices have been reinterpreted in biopolitical terms as "enhanced interrogation" and "homeland security"* -Richard Blain (2012).

The high unpredictability of the terrorists' plan, the difficulty in discerning the attackers from the rest of the population, the level of intelligence behind the organizations made necessary for the US military to develop an interrogation strategy. A controversial series of practices and episodes became the paradigm of this new security strategy, leading to episodes like the ones involving Abu Ghraib and Guantànamo Bay (albeit not only).

In the aftermath of 9/11, the world witnessed a proliferation of security acts and anti-terrorism measures affecting the single individual and civilians. From security checks at the airport to emergency provisions in public spaces, one of the main ways to contain and contrast terrorism passes through incarceration and interrogation of suspected subjects.

The first example of these new legal instruments to contrast and prevent terrorism is the PATRIOT ACT, which became law in October 2001, signed by President George W. Bush. Among other dispositions to contrast terrorist organizations, the 2001 Act provided for authorization in targeting and incarcerating suspected terrorists and sympathizers, before any formal accusations or trial. This process can occur in two ways: "USA Patriot Act expands substantive grounds on which aliens can be excluded or deported for reasons of terrorism (section 411) and establishes a new mechanism for certifying and detaining aliens pending removal (section 412)" (Sinnar 2003: 1422). The PATRIOT Act gives definitions outlining the characteristics of the "designated" organizations to target, condemning any organization that provides support to the organization of terrorist activities (Sinnar 2003). However, in

section 411 the Act specifies that the same treatment should be reserved to undesignated organizations, which "include any group that the government deems to be a 'group of two or more individuals, whether organized or not' that engages in committing, inciting, or planning a terrorist activity" (Sinnar 2003: 1423). This means that the US government authorizes the incarceration of any individual that was even remotely connected with the targeted organizations, not providing any designation for the categorization of organizations (Sinnar 2003). The condition of emergency and the suspect that a second attack in the US soil was imminent was enough to justify exceptional methods, which were practically suspending part of the liberty rights of the suspects.

To support the general goals of protection from, and fighting of, terrorism, a covert and widespread prison system, involving countries in Asia and Eastern Europe, was then conceived by the CIA to detain and interrogate suspected terrorists (Priest 2005). Many of these sites remained unknown for years even to the Congress and Administration personnel, and for a specific reason. "The successful defense of the country requires that the agency be empowered to hold and interrogate suspected terrorists as long as necessary and without restrictions imposed by the US legal system or even by the military tribunals established for prisoners held in Guantanamo Bay" (Priest 2005). The high secrecy of the program was also meant to avoid possible "legal challenges" and reactions by domestic and international public (Priest 2005).

In the UK, the Houses of Parliament followed the US example by adopting the Anti-terrorism, Crime and Security Act, in 2001. Part 4 of the act elaborates on security measures concerning suspected terrorists (or affiliates) and provides for the detention of any non-citizen for indefinite time pending deportation. "If subject to immigration control, [...] If there was no country to which the person could be sent [...] section 23 authorised indefinite detention"

(Feldman 2005: 271). While the practice is unlawful with reference to regional human rights legislation, the indefinite detentions and deportations have been justified by the government as a matter of protection from a "threat to the life of nation". In particular, the derogation under Article 15 of the European Convention on Human Rights (ECHR) was legitimized "by the exigency of a public *emergency* [emphasis added]" (Feldman 2005: 271). Moreover, some exceptional measures have been adopted in order to pursue the removal of these people from the British territory, by negotiating with countries of departure some "no-torture" agreements, so that the UK would not have to face the violation of the principle of *non-refoulement*, and therefore a formal legal challenge (Elliott 2009). In 2004, the Law Lord established the inconsistency of the Part 4 with the ECHR for its discriminatory elements and unnecessary emergency measures, as a response to denounces of former inmates of Belmarsh prison. The 2001 Act has been replaced with the 2005 "Prevention of Terrorism Act", which establishes the enactment of 'control orders' in terms of detention and surveillance, that would be applied to both aliens and UK citizens, thus overcoming the problems of the previous one. The Prevention of Terrorism Act is still in force at the time of this research.

The measures enacted by the governments in terms of security have often been in tension with some human rights legislation. Nonetheless, the general justification for this tension can be summarized with the words of the Australian Attorney General in 2005: "Human security argues that people will only be able to reach their full potential if they live in a secure environment where their fundamental rights can be realised. Based on this premise, there is no massive dichotomy between security legislation and human rights" (Mathew 2008: 184). In this line, preemptive detentions and mass incarcerations are necessary side effects to guarantee the public good, that is a safe society, and liberty rights are the price to pay to achieve this objective.

2.3.4 Civil Casualties, Refugees and Migrants

> *"In Europe today it is forbidden to speak the truth... It is forbidden to say that today we are not witnessing the arrival of refugees, but a Europe being threatened by mass migration... It is forbidden to say that immigration brings crime and terrorism to our countries." - Hungarian Prime Minister Viktor Orban* (Amnesty International 2017: 20)

The impact of the War on Terror on civilian populations is serious and develops at many levels. Since the beginning of US-led alliance's strikes in Afghanistan, Iraq, Syria, Yemen, the number of casualties among the civilian population has been significant and ever-increasing: "[i]n the month of March so far, U.S.-led coalition airstrikes resulted in 110 separate incidents of reported civilian casualties, allegedly killing more than 1,200 people, according to Airwars, an organization tracking airstrikes. That number is already triple the previous high posted in January of this year" (Malsin 2017). In the attempt to engage in a "more precise" warfare, the Obama administration embraced the drone-strikes as a strategy to target only declared terrorist, and limit civilians' deaths. Documents provided by a military source, however, prove that in one year between 2012 and 2013 drone strikes killed two hundred people, 90% of whom were not targets (Scahill 2015). The recurrence of these incidents seem to draw a broader pattern: "[t]he "find, fix, finish" doctrine that has fueled America's post-9/11 borderless war is being refined and institutionalized. Whether through the use of drones, night raids, or new platforms yet to be unleashed, these documents lay bare the normalization of assassination as a central component of U.S. counterterrorism policy" (Scahill 2015).

In these deadly and dangerous environments, those who are able to escape the attacks seek refuge in neighboring countries. In 2006, Human Rights Watch counted that nearly half million Iraqi refugees crossed the border with Jordan to flee the violent consequences of Iraq's invasion (Frelick 2006), and a total of two million Iraqi citizens left their country in the aftermath of an increase of violence (Lobe 2007). Ten years later, the UN estimated that

about 51 million people were leaving their homes because of political or religious persecutions or because of war itself (Salopek 2015). Half of the total refugees worldwide were coming from Syria, Afghanistan and Somalia, where campaigns against terrorism were undertaken (United Nations 2015). The destructive combination of civil wars, terrorism and foreign interventions are at the core of the ongoing refugee crisis.

The backlash in European countries manifested in the rise of nationalist, anti-immigration parties, a tightening in immigration policies and regulations, and the creation of a public discourse connecting immigrants with the terrorist attacks spreading throughout the continent. The consequences for refugees would entail their deprivation of rights, violations of international norms and the reduction of migrants to nude lives.

2.4 The War on Terror Paradigm

Since September 11th, the world has been involved in a truly global struggle against terrorism. In fighting this war, one finds that states are employing new strategies, new mechanisms of warfare and peculiarities of governance that would appear to be descriptive of a unique epoch. The various variables of the war are often overlooked by scholars who seek to define the terms of the War on Terror. From the detention and torture of perceived enemies outside of normal legal jurisdiction, to preemptive warfare in expanding the war to Iraq, to an unprecedented amount of civilian casualties through drone strikes, to the use of Private Military and Security Companies which are not confined to the same legal standards as state militaries, to the rise of the security state and the criminalization of whistleblowers, and the lack of legal definition for the enemy *terrorist*: the major question that revolves around these nuances is how could such a-legal practices be allowed to exist in democratic systems?

The consistent thread between the new or unique features of the War on Terror seem to

indicate that many of the variables operate outside of a legal norm. The following chapter will explore various theories of a State of Exception to understand if it can better explain this new paradigm of governance.

3 | State of Exception: From Locke to Agamben

> *"[T]he State of Exception 'in which we live' is real and absolutely cannot be distinguished from the rule. Every fiction of a nexus between violence and law disappears here: there is nothing but a zone of anomie, in which violence without any juridical form acts." -Giorgio Agamben (2005: 59).*

In order to address the research question, which asks if the Agamben State of Exception can be viewed as a new paradigm of governance, one must first understand the concept of the *State of Exception* itself. Many scholars within the disciplines of political science and international relations have defined this concept through various perspectives and schools of thought. While there is no singular, all-encompassing definition of State of Exception, it is typically and historically understood as the extra-legal powers wielded by an executive during emergency, or exceptional, situations [3]. Because this executive power is not managed by juridical order, it has very important consequences on governance.

This wielding of extra-legal powers by the executive can be traced back to the times of the ancient Roman Republic. It was a mechanism of protection used when rule of law was not sufficient to respond to emergency situations. The institution of the *iustitium* was the instrument whereby the rulers temporarily suspended rule of the law and act in order to resolve situations of war or attack on the republic. This phenomenon of Roman tradition has influenced philosophers and jurists of recent times in the attempt to clarify the complicated relation between the constitutional juridical order and the underlying existence of this apparent a-legal instrument that is the State of Exception.

This chapter will present and discuss the main conceptualizations of the State of Ex-

[3] State of Exception and State of Emergency can be considered intertwining, in some senses synonymous, concepts. Various scholars give their own terminology to describe the same phenomenon and this will be highlighted in the following chapter.

ception. It seeks to trace the debates surrounding this theory from John Locke to Giorgio Agamben, accompanied by related and influential studies on sovereignty, biopolitics, governmentality and the state. The chapter will conclude by highlighting the main approach for this research, namely Giorgio Agamben's study, and why it provides the most relevant and applicable lens of analysis. The purpose is to understand the main differences between the eras and the perspectives taken by the various scholars while also presenting elements of State of Exception that will be fundamental to contextualize the theory into the framework of the War on Terror.

3.1 Lockean Prerogative Power and State of Exception

> *"The legislators can't foresee and make legal provision for everything that may in future be useful to the community, so the executor of the laws—having the power in his hands—has by the common law of nature a right to make use of it for the good of the society in many cases of difficulty where the existing law doesn't deal with the difficulty—until the legislature can conveniently be assembled to make laws that do"* - John Locke (1764: § 159).

John Locke is known as the father of classical liberalism and is perhaps one of the most influential philosophers of the past millennium. Locke's assertions of natural rights and natural "law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions" (1764: § 6) have informed the way that many states govern today.

Locke, at the same time, also acknowledged the limits of law and a pure adherence to a constitution in his *Second Treatise of Government* chapter 14 entitled "Of Prerogative": "many things there are, which the law can by no means provide for, and those must necessarily be left to the discretion of him, that has executive power in his hands" (1764: § 159). Locke argues that many times in order to secure public good and ensure liberty of the people "tis fit that the laws themselves should in some cases give way to the Executive Power (1764: §

159). In fact, if one were to follow the letter of the law too closely, it may end up violating a "higher law — the law of nature — the preservation of the community" (Feldman 2008). Constitutional order is sometimes insufficient to react to certain extraordinary situations.

Locke does not view this necessity of extra legal provisions as a limit of liberalism. Rather, the suspension of rule of law in favor of the executive can be "justified because of the unpredictable nature of social life" (1764: § 160). These are, of course, extraordinary circumstances according to Locke: "All accidents and necessities require the exercise of the prerogative" (1764: § 160). By prerogative, Locke means the "power to act according to discretion, for the public good, without the prescription of law and even against it" (1764: § 160). This action of prerogative power is used to describe Lockean State of Exception.

Laws can help to constrain the prerogative power of the ruler, however due to the unpredictable nature of social life, the prerogative, according to Locke, is an important feature of a constitutional republic. Locke asserts that, "[f]ixed laws can help restrain prerogative to a certain extent but cannot transform the irrational and unpredictable nature of political life nor eliminate the discretionary power necessary to respond to it" (Casson 2008: 944). Prerogative power stems from "pre-political power that remains in the constitutional order precisely because that order is insufficient" (Feldman 2008). The use of extra-legal prerogative powers, however, must be used in order to secure public good and restore the legal regime, not to undermine it.

The public, according to Locke, need not worry too much about the prerogative powers of the executive "as long as it is used to some extent for and not obviously against the good of the people" (1794: § 161). And if the prerogative encroaches upon the rights of the public, "the people had to have laws that explicitly set limits to the prerogative with respect to matters in which they had found it working to their disadvantage" (Locke 1764: §

162). Thereby limiting the prerogative from what Locke refers to as "weak monarchs" who use prerogative power for their own personal benefit rather than public good. This public judgment is a process which determines prerogative power from tyranny. The prerogative can be "nothing but the people's permitting their rulers to choose freely to do for the public good various things on which the law is silent or even against the direct letter of the law; and their accepting such choices when they have been made" (Locke 1764: § 164). Locke also brings a religious component into the discussion of judgment of the ruler, stating that people can appeal to the heavens if their rights are being suppressed (1764: § 168). Prerogative power, and Lockean State of Exception, are seen as a necessary (or accidental) feature of a constitutional regime for the very reason that law is not equipped to respond to every aspect of political life. Locke states that "well-framed governments include both legal and prudential elements" (1764: § 159). Locke contributed to the discussion of the State of Exception in his own theory of classic liberalism. This opened the door for other scholars to build upon this conceptualization of acting outside of the rule of law in modern democracies and regimes.

3.2 The Sovereign Dictator and Schmitt's State of Exception

> *"In the midsts of crisis, law is not sovereign. The Sovereign* [4] *is he who decides on the exception"* -Carl Schmitt (2005: 5).

Carl Schmitt was a political theorist and jurist and regarded as one of the most important critics of Liberalism in the 20th century. He is known especially for his contribution to the debate on the State of Exception and of sovereign power. Much of his work was a criticism of the failing Weimar Republic and its constitution, and a justification for the authoritarian, charismatic regime of the NSDAP. Today many separate "his writings [...] from their original context and are often seen as purely theoretical studies" (Tuori 2016: 97). While

[4] Locke does not use the word Sovereign, however Schmitt's usage of "Sovereign" and Locke's usage of "Executive power" and "Ruler" both refer to the same organ of governance.

there is no justification for supporting the Nazi party, his work remains highly influential, if not controversial, informing the writings of modern day theorists such as Agamben (2005), Dyzenhaus (1997, 1998), Hussain (2003); McCormick (1997); Meier (1998); Mouffe (1993) and continues to be cited in the post-September 11th context.

Schmitt develops his theory of State of Exception in both *Die Diktatur* (1989), written in 1921, and *Political Theology* (2005), first published in 1922. The State of Exception, according to Schmitt, is the "sovereign exercise of the power of a decision that is not codified in the existing legal order" (1989: 6). The exception exposes, for Schmitt, the superficiality of law because it is always dependent on the political expression of it. The sovereign's authority in a liberal, constitutional state "proves that to produce law it need not be based on law" (Schmitt 2005: 13).

It should be mentioned that Schmitt seeks to describe the political order of the modern state, which imitates sacred and transcendental order (Schmitt 1996b: 7-8). This is, according to neo-Schmittian John McCormick, what is referred to as the "metaphysics of existence" (1997: 165). Schmitt was highly influenced by his Catholic *petit bourgeois* upbringing. He believed that society, at any given point in history, reflects the theology of the time: "[t]he metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization" (Schmitt 2005: 46). Therefore it is his understanding that "[t]he 'omnipotence' of the modern lawgiver, of which one reads in every textbook on public law, is not only linguistically derived from theology" (Schmitt 2005: 38). Carl Schmitt, thereby, compares the State of Exception and the sovereign's ability to suspend legal order over the course of his writings to that of a religious miracle in the theological sense (2005: 36).

The ability to rule outside of constitutional order is referred to by Schmitt as dictator-

ship, stemming from the ancient Roman magistrate of dictator, as mentioned briefly in the introduction of this chapter. In ancient Rome, amidst situations when the city was in danger, the Senate and magistrates would allocate extraordinary powers to a designated person that would act as the dictator to manage and govern the city. Building upon this historical phenomenon, Schmitt provides his own understanding of dictatorship:

> "Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation— in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on one hand the idea of a normal situation that a dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favor of resolving this situation through dictatorship" (1989: xxiii).

It should be mentioned that Schmitt's conceptualization of dictatorship in regards to the State of Exception changed over the course of his two books. In *Die Diktatur*, Schmitt distinguished between two different types of dictators who operate in the State of Exception: commissarial and sovereign dictators. They differ, most importantly for this discussion, on their ability to *decide* on when an exception exists, ergo if they can decide when they would take on these extra-legal powers. The commissarial, for which Schmitt initially strongly advocates to preserve a republican, political order [5], distinguishes two decisions: the decision that an emergency situation exists (the exception), and the decision of how to act and what to do in response to said emergency (Schmitt 2005: 7). A commissarial dictator can *only* decide on the latter of the two. The commissarial dictator suspends the constitution with the aim to restore the original standing constitutional order and protect the state from the emergency. This suspension of constitutional order is itself embedded into the constitution as means to preserve the state.

This is juxtaposed with the concept of the sovereign dictator. The modern, sovereign

[5] This may seem contradictory to what was asserted a few paragraphs above, but Schmitt later abandons his endorsement of the commissarial and liberal constitutionalism.

dictators have the power not only to decide on the actions in the State of Exception, but also they have the power to decide on the exception itself: "it is the essence of sovereignty both to decide what is an exception and to make the decisions appropriate to that exception" (Schmitt 2005: xii). This has important consequences for the relevance of the constitutional state. "Although [the sovereign dictator] stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety." (Schmitt 2005: 7). Simply, the sovereign is able to affect laws and legal order even though he does not belong to normal legal functions. The ability to establish a new order is feature of a sovereign dictator and represents immense power. In this sense of dictatorship, "[a]ll law is situational law. The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision" (Schmitt 2005: 13). The sovereign dictator aims not to temporarily suspend the constitutional rule, as the commissarial, but to change the constitution and reorganize the state itself.

Overtime Schmitt abandons the distinction between the two types of dictators. In his book, *Political Theology*, Schmitt is dismissive, and actually asserts that it is potentially dangerous, to limit the power of the executive during the exception, thereby endorsing the idea of the sovereign dictator (Feldman 2008). "It is precisely the exception that makes relevant the subject of sovereignty" and nothing in an extreme emergency situation can be anticipated by law (Schmitt 2005: 6-7). Because of this unpredictability, Schmitt views it as a danger to limit the sovereign in the State of Exception:

> "If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated" (2005: 12).

Not only does Schmitt advocate for the unlimited power of the sovereign dictator with

this statement, but also criticizes liberal constitutionalism, for which he had previously embraced. In fact, the liberal normativism of the constitutional state is disrupted by the exception in a way that Schmitt finds redeemable: "[t]he exception is more interesting than the rule. The rule proves nothing; the exception proves everything. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition" (2005: 15). Limits should not be placed upon the executive during the State of Exception because it could prevent the preservation of the state or be all-together circumvented by the sovereign's power.

So what gives the sovereign dictator the power to decide on the exception? The decision "on the exception is the decision in the true sense of the word" (Schmitt 2005: 6). Schmitt describes in detail the implications of decisionism and the power of the sovereign. Schmitt used the term "'decisionism' to describe his view that the concrete moment of decision is more legally significant than any abstractly valid legal order" (Casson 2008: 945). The ties to natural law cease during the exception. A "genuine decision" [6] is the moment of judgement by the sovereign that a "real exception exists" and this decision is not derived from legal norm (Schmitt 2005: 6). This ability to make decision comes from inherent and special powers. In certain cases, the decision itself decides the status of sovereign (Schmitt 2005: 3). The authority to suspend law is "itself sovereignty" (Schmitt 2005: 9).

In his discussion of a State of Exception, Schmitt directly addresses, and disagrees with, a Lockean conceptualisation of rule of law in a liberal state [7]. Schmitt was extremely critical of constitutional liberalism, criticizing the incompatibility of the growth of executive powers during state emergencies with rule of law. Schmitt claims that this cannot be overcome.

[6] also translated as "pure decision"

[7] Many claim that Schmitt had a poor understanding of Locke. The prerogative is actually seen by some as analogous to Schmittian definition of commissarial dictatorship (Feldman 2008).

"There exists no norm that is applicable to chaos" (Schmitt 2005: 13) [8]. Constitutionalists are, thus, wrong to "assume that all governmental action can be contained within a set of explicit legal norms and thus fail to grasp the political reality of the exception" (Casson 2008: 944). Schmitt states: "[t]he most guidance the constitution can provide is to indicate who can act in [the State of Exception]" (2005: 7). Schmitt asserts that ideally, modern constitutionalists would want to eliminate the sovereign all together, however this is limited by because the juristic order cannot eliminate the extreme exception (2005: 7).

Unlike Locke, Schmitt does not believe that the executive is the embodiment of the people's will. Instead, the role of the sovereign and the power that he has in the exception is based upon the religious convictions of the society at that time. Schmitt used the U.S. as an example, following the understanding of Tocqueville, placing the role of the citizens outside that of the political sphere in the modern liberal state reflecting religious trends of the 20th century:

> "in democratic thought the people hover above the entire political life of the state, just as God does above the world, as the cause and the end of all things, as the point from which everything emanates and to which everything returns" (1989: 49).

This stems from the modern, liberal notion of separation of church and state where mankind itself had to be "substituted for God" (Schmitt 2005: 51). One has reached a point where theology cannot exist without the political: "[w]e have come to recognize that the political is the total, and as a result we know that any decision about whether something is unpolitical is always a political decision, irrespective of who decides and what reasons are advanced" (Schmitt 2005: 2).

Schmitt has been incredibly influential in his work in conceptualizing the State of Ex-

[8] Locke likely would not disagree with this statement, again underscoring the lack of attention that Schmitt gave to understand the prerogative.

ception and his theory of sovereignty. Legal order rests upon the political representation of the authority of the sovereign. In the State of Exception, the sovereign alone has the authority to "transcend" legal order to respond to extreme necessities. His work continues to be extremely influential and one sees his theories in many thinkers of the modern political sphere.

3.2.1 Benjamin's Heritage: Pure Violence and Pure Law

At the same time that Carl Schmitt was developing his theory on the sovereign dictator and the State of Exception, Walter Benjamin was also developing his theory on "Pure" violence, which later becomes extremely relevant to the field. Benjamin's eclectic research is an elaborate mixture of Marxist elements, critical theory approach and Jewish theology (Osborne/Charles 2015). Inspired by the critique of the Weimar Republic (sharing this experience with his counterpart Carl Schmitt), he developed a philosophical insight on the role of law and the "mystical" elements that characterize its origin.

The ideas presented by Schmitt and the conceptualizations in Benjamin's work seem to enter in a dialectic relation when it comes to the understanding of power and sovereignty [9]. A brief description of Benjamin's work would help clarify certain aspects of the theory of the State of Exception and the problematics of Schmitt's theory, Moreover, the thoughts presented in the *Critique of Violence* and *On the Concept of History*, in particular, have a great role in framing the analysis of later works on the State of Exception theorists.

Of particular interest is the idea of "violence", which gives the title to Benjamin's

[9] Agamben dedicates the fifth chapter of his book *State of Exception* (2005) to the juxtaposition of Schmitt's and Benjamin's ideas, making use of the latter to emphasize the flaws of the former. From the idea of "pure violence" to the understanding of the role of "decision", Agamben creates his theory of State of Exception that stands between the biopolitical perception of the political actions and the critical, aesthetic approach, inspired by the German philosopher Walter Benjamin.

essay *Critique of Violence*. In an analysis of the legal implications that surround the use of violence, the fundamental explanation will lay on the understanding of violence itself and the antinomian relation between means and ends (Abbott 2008). Benjamin outlines the difference between a "lawmaking" violence, which has its basis in the creation of a new legal order that has no precedents, and a "law-preserving" violence, which is exercised by an existent political or legal authority that aims at "fortifying" an existing organization (Abbott 2008). The issue at stake here is the intertwining connection between these two "faces" of violence. This is especially important when a latent element of lawmaking violence is always present in the exercise of law-preserving violence, thus making it difficult in certain situations to distinguish one from the other. An interesting example given by Benjamin to explain this "zone of indistinction" between these two forms of violence. Police forces are described as the embodiment of the intersection between the lawmaking and the law-preserving. Without being able to differentiate the two kinds of violence, the action of the police sometimes deviate from both of these forces to operate in situations of "exception" (Abbott 2008). The relevant implication of this factor is made explicit by Benjamin: "For today the police are no longer content to enforce the law and thus to preserve it; the police invent the law, publish ordinances, and intervene whenever the legal situation is unclear to guarantee security - which is to say, these days, nearly all the time" (Benjamin 1978: 243).

Relevant to later theories of the State of Exception also directly concerns the idea of "pure violence", which is in opposition to what Benjamin calls "mythic violence". The idea of purity here invokes a very specific meaning which relates to the binary dynamic between *means* and *ends* that then become disassociated. The purity of something rests on its capacity to be a *mean* in its essence, and without any relation to possible *ends*. A "pure" violence, therefore, would represent the source of an action that comes from outside the law, is not related to it and undermines the very foundational validity of law itself. This kind of violence

is also referred to as "divine violence", as that force that dismember the constituted order that relates violence with law, the "mythical" violence (McQuillan 2010).

There is a step in Benjamin's analysis that is particularly crucial. Benjamin supposes that law has its bases in "an originary violence in which 'the very resources of legitimacy' link up with 'a power of suspension and disruption.'" (Abbott 2008: 87). Through this suspension, which also demarcates credibility of legitimacy upon which the law is founded, the German philosopher is then able to draw a connection between the law [10]. This then functions by "providing a hidden support for [law's] obscene, exceptional dimension" (Abbott 2008: 87). This leads to the understanding that the exceptionality of law is supported by bare life itself. The inclusion of life into the law and the link between bare life and exception is integrated as core elements in the understanding of the State of Exception's nature and mechanisms.

Another important element in Benjamin's conceptualization of political power is the perception of the sovereign's agency in the political system. [11]. Schmitt's conception, which views the sovereign as the decisive, almost-divine authority that exercises his strength in the suspension of the law, is contrary to that of Benjamin. Instead he considers the sovereign as a pathetic puppet which has almost no control over the dynamics of the world around him. This weakness is further explained by McQuillan: "[t]he figure of the sovereign, is unable to prevent the 'catastrophic violence' of the state of emergency" (2010: 100). [12]

It is in the book *On the Concept of History* that the problems of the state of emergency are brought to light and a "solution" to them is presented. Benjamin outlines how the Nazi regime was able to regularize the State of Exception and make it permanent by suspending

[10] what Agamben later calls *bare life*

[11] This is nicely shown the chapter of Agamben's *State of Exception* in which he presents a supposed "esoteric dialogue" between Schmitt and Benjamin

[12] This notion, which stands as the backbone of the Italian thinker's work, will also play a fundamental role in determining the consequences of Agamben's idea concerning the normalization of the State of Exception.

the Weimar constitution. Therefore suspending simultaneously all liberty rights associated therein. Hence, the liberal restrictions to the executive's exercise of power have also been erased during the Third Reich. This is an important gesture as it did not provide any reassurance against the exception becoming permanent (McQuillan 2010). In this Third Reich example, any guise of a legal state of emergency which is claimed to be based on a relation with the rule of law that *de facto* does not exist, Benjamin calls for the implementation of a *real* state of emergency. This is the only instrument available that could improve "our position in the struggle against Fascism" (Benjamin 2003: 392). This real state of emergency is that of *pure violence* that reveals the fictitious, "mythic" violence exercised by the sovereign and that "deposes every constituted authorities" (McQuillan 2010: 104). The only way to overturn the permanent implementation of the State of Exception as a paradigm of executive action is for that "divine violence" to nullify the fictitious relation between violence and law and act in pure political terms outside the law. [13]

3.3 Crisis of the Hegemonic Ruling Class: Poulantzas' State of Exception

> *"The whole of the current phase [of capitalism] is permanently and structurally characterized by a peculiar sharpening of the generic elements of political crisis and state crisis – a sharpening which is itself articulated to the economic crisis of capitalism"* -Nicos Poulantzas (2000: 206).

Marxist conceptualization of power relations in the capitalist system stems from class domination. States are constructed in such a way to ensure the political interests of the hegemonic ruling class. Nicos Poulantzas contributed to the neo-Marxist literature on the State of Exception reflecting this ideology. He builds upon the structuralist foundation of Louis Althusser, although focuses his work more on social classes and politics rather than

[13] Many of these dynamics and concepts will be developed by Agamben in his own examination of the State of Exception and its mechanisms. What is crucial is that Agamben assimilates and re-elaborates Benjamin's thoughts on the relation between violence and law. The idea of sovereign power deriving from Benjamin's work constitutes one of the foundations for the State of Exception of the Italian author in addition to as the concept of purity as "mean without ends" provide fertile ground for the conclusion of his study.

marxist theory as a whole (Carnoy 1984: 97). The "generic elements" of capitalism are prone to crisis, and in certain cases, it leads to the crisis of the state.

Poulantzas sees a new age of capitalism. He asserts that capitalist states have moved beyond the phase of Capitalism which is characterized by the reproduction of capitalism to what is referred to as the “crisis of capitalism” (2008: 294). In order to understand the processes and state transformation involved in the crisis of capitalism phase, Poulantzas outlines exactly what is meant by the “crisis”. It could be falsely assumed when speaking of Marxism that this crisis would be economic in nature. Specifically, “not just any economic crisis can automatically bring down capitalism, but only those that translate themselves into political crises, for then the issue can be the overthrowing of capitalism” (2008: 295). This is not accidental or arbitrary, but generic elements of crisis are always at play in the reproduction of capitalism because of the continuous class struggle. Crisis is therefore constantly present in imperial-monopoly capitalism. “In its contemporary form, this conception considers the current reproduction of monopoly capitalism as a phase of ’general crisis’ continuing to the end of capitalism, that is, as a permanent crisis of capitalism” (Poulantzas 2008: 296). Capitalism can always use the crisis itself for reproduction. In this definition of the concept of crisis, it removes the need for specificity because “capitalism was always in crisis” (Poulantzas 2008: 296). However, crisis should be analyzed, according to Poulantzas, in its ability to reproduce capitalism and its effects on state transformation. This conceptualization of crisis shows that “all teleological concepts of crisis must be mistrusted: the end of capitalism does not depend on any crisis whatsoever but on the issue of the class struggles that manifest themselves therein” (Poulantzas 2008: 296).

When it comes to political crisis, the crisis itself is hard to pinpoint, according to Poulantzas. For the bourgeois, a political crisis would look like dysfunction in a typically

amicable political system. The hegemonic class, however, always overlooks the class struggle. This makes it "impossible to realize the proper place of the political crises but also, precisely to the extent that they reduce socio-political 'conflicts' to those of ideas and opinions, to speak of political crises in terms other than 'crises of values' or crises of 'legitimization'" (Poulantzas 2008: 297). Political crisis can be seen in the reproduction of institutionalized political power, which plays a role in the domination of the classes, "unless the struggle leads to the transition to socialism, this crisis can establish the way (sometimes the only way) for the restoration of an unsteady class hegemony and the way (sometimes the only way) for a transformation- adaptation of the capitalist state to the new realities of class conflict" (Poulantzas 2008: 297). On the one hand, capitalism carries with it a particular set of 'generic elements' and state apparatuses that make it extremely prone to conflict, but the actual political conflict, or Poulantzas' version of the State of Exception, has distinct features outside of a normal capitalist state.

Instead, the "political crisis consists of a series of particular traits, resulting in this condensation of contradictions in their political struggles with the state apparatus" (Poulantzas 2008: 298). Beginning in the political domain, the crisis of the state represents a stage of capitalism in which "a constantly present political crisis with a conception of the state as being in permanent open crisis" (Poulantzas 2008: 297). The norm is distinct from the conflict in that it represents instability in the hegemony itself, and is used as a way to reestablish or to restabilize the dominant social class. Poulantzas expounded upon this view of the difference between normal and exceptional regimes in his later work. In his essay "Crisis of the State" (1976), he states, "the capitalist state, characterized by hegemonic class leadership, does not directly represent the dominant class' economic interests, but their political interest: it is the dominant class' political power center, as an organizing agent of their political struggle" (190).

This is not an economic crisis like many other Leninists or Marxist might interpret, but a political conflict within the bourgeoisie, ruling class. In the capitalist system, an economic crisis may not affect the structures of political hegemony at all: "an economic crisis does not automatically translate itself into a political crisis or a crisis of the state because the political is not a simple reflection of the economic; the capitalist state is marked by a relative 'separation' from the relations of production, the accumulation of capital, and the extraction of surplus-value, a separation that constitutes in a specific field a proper organizational structure" (Poulantzas 2008: 298). The bourgeois may still have the power over other classes during economic conflict, so the crisis must be political in order to be exceptional. Poulantzas asserts that there can be a political crisis without any economic crisis whatsoever, however typically in the current phase of capitalism, one sees political crises around the world stemming from the economic domain. Thus enacting the crisis of the hegemony.

Following Gramsci in this particular conceptualization of social relations, Poulantzas describes characteristics of crisis of the hegemony, or structural crisis, which manifests itself into a crisis of the state. The structural characteristic "does not reside only in its peculiarities as an economic crisis but also in its repercussions as a political crisis and a crisis of the state" (Poulantzas 2008: 299). The economic can then turn into a political crisis. "The political crisis and the crisis of the state can come later than the economic crises, that is, wait until it culminates, occur when it is losing its intensity [...] or even after it has been reabsorbed" (Poulantzas 2008: 299). Political crises can also precede an economic crisis, or political crisis can even cause an economic crisis, for which Poulantzas cites the example of Chile under Allende (2008: 300).

Clarifying certain characteristics of political crises and the crisis of the state, Poulantzas specifies that "political crises [...] can be identified neither with a revolutionary situation nor

with a crisis of fascistization; these, while indeed containing general characteristics of political crisis, constitute particular types specified by their own traits" (2008: 300). The crisis of the state is sometimes confused with the so-called "fascistization" of a state. The fascist state can seemingly come out of no-where, but the political crisis must be a process which "consists of a particular conjunctural situation of condensation of contradictions" (Poulantzas 2008: 300). The political crisis contains within its features the crisis of the state. Specifically, "the political crisis consists principally in substantial modifications of the relations of force of class conflict, modifications which themselves specifically determine the exact elements of crisis at the heart of the state apparatus" (Poulantzas 2008: 300). The elements of crisis within the state are formed by the following: "contradictions between the classes in conflict, the configurations of class alliances of the power bloc and of the exploited-dominated classes, the emergence of new social forces, the relations between the organizational forms and the representation of classes, and the new contradictions between the power bloc and certain of the dominated classes, that support the power bloc, and so forth" (Poulantzas 2008: 300). This crisis, as previously stated, occurs at the center of the state apparatus. In other words, it happens within the hegemony of the dominant social class.

An ideological crisis also exists in a crisis of the state. Poulantzas proposes that "the political crisis always articulates an ideological crisis that is itself a constituent element of the political crisis" (2008: 301). The ideology of domination and subordination of the classes is not only present in the reproduction of itself and of capitalism, but also in the very separation of the social classes and social division of labor. The role of ideology is extremely important towards the use of social force: "ideological relations are directly part of the relations of force among the classes, in the configuration of alliances, in the forms of organization- representation that these classes use, in the relations between the power bloc and the dominated classes, and so forth" (Poulantzas 2008: 301). The dominant ideology is very present in the features

of the state apparatus themselves. This reproduces the ideology. The dominance, however, cannot be exerted onto the dominated social classes through violence, rather "dominance must always be represented as legitimate by state manipulation of the dominant ideology, which provokes a certain consensus on the part of certain classes and factions of dominated classes" (Poulantzas 2008: 301). But the power bloc's role in using ideology makes the dominant class very powerful. During the state crisis, the state and power bloc often act out in a more overtly violent nature in order to subordinate the dominated. This creates its own crisis of legitimacy of the hegemony:

> "[P]olitical crisis, both in modifying the relations of force in class conflict and in the internal ruptures that it provokes at the centre of the state apparatus, necessarily articulates crisis of legitimization: notably, the political crisis articulates a crisis of dominant ideology, as this materializes itself not only in the ideological state apparatuses (church, mass media, cultural apparatus, educational apparatus, etc.) but also in the state apparatus of economic intervention and its repressive apparatuses (army, police, justice, etc.) (Poulantzas 2008: 302).

Therefore the political crisis, once it has reached a certain threshold, creates a ripple effect of consequences regarding the social and political lives of the dominated classes. The hegemonic class in crisis must try to regain stability while also maintaining their ideological, social and political domination.

Poulantzas' theory of State of Exception derives from the relationship between the capitalist state and class struggle. The state of crisis "is articulated to the more general transformation relevant to the form of the state in the current phase of monopoly capitalism and that the characteristics of the crisis of the state that effect these states are part of these more general transformations" (Poulantzas 2008: 294). This differs in causes and structures than all of the other theorists that are presented. It certainly, however, contributes to the conceptualization of State of Exception and its understanding.

3.4 Foucault: Biopower, Biopolitics, Governmentality and Security

> *"[S]ociety's 'threshold of modernity' has been reached when the life of the species is wagered on its own political strategies. For millennia, man remained what he was for Aristotle: a living being with the additional capacity for political existence; modern man is an animal whose politics places his existence as a living being in question"* -Michel Foucault (1998: 143).

Michel Foucault adds his own unique perspective to this discussion of State of Exception. Foucault introduced new concepts to the debate, such as biopower, biopolitics, and governmentality, in his later works. This has greatly influenced the conceptualization of how governance is exerted through juridical, disciplinary and security measures. Although biopower, biopolitics and governmentality as conceptualizations were not fully articulated before Foucault's death, they had a great impact on the State of Exception literature one finds today.

3.4.1 Divergence from Sovereignty

Foucault recalls the ideas asserted by Carl Schmitt and Thomas Hobbes (and to a certain degree Locke) regarding sovereignty. As stated more elaborately in previous sections, Schmitt investigated the sovereign exercise of power and its existence outside legal order. Foucault describes sovereign power as "the right to decide life and death" (1998: 135). This ideology of political sovereignty continued to organize judicial codes since the time of Napoleon. Law is also complemented by its reference point to punishment: "[l]aw cannot help but be armed and its arm, par excellence, is death" (Foucault 1998: 144). Rather than using this dominant understanding of sovereign political philosophy, which is understood as a social contract between civil society and the sovereign bounding them together because of the protection the sovereign can provide, Foucault asserts that this connectivity can be better explained

through *governmentality*. This is a form of looking after a population: regulating, directing and shaping it. Through discipline and security, one can mold subjectivities.

The power that Foucault understands, rather than the "right to decide life and death", is "a power to foster life or disallow it to the point of death" (1998: 138). Foucault elaborates in *Society Must Be Defended* (2004) that the governmental, disciplinary power stands on its own and is essentially, fundamentally separated from the classic understanding of sovereign power. This marks a distinct change in the art of governance.

3.4.2 Historical Shift in the Art of Government

In the 16th century, people were asking themselves many questions: "How to govern oneself, how to be governed, how to govern others, by whom the people will accept being governed, how to become the best possible governor" (Foucault 1991: 87). This immediate coincided with the end of feudalism and centralization of the state and also how people wanted to spiritually be governed with the Reformation. This was a time of reconceptualization of the fundamental art of government. Many criticized "once shorn of its theological foundations and religious justifications, [the art of government] took the sole interest of the prince as its object and principle of rationality" (1991: 89). What connected the sovereign, or Prince, to his principality "may have been established through violence, through family heritage or by treaty, with the complicity or the alliance of other princes; this makes no difference, the link in any event remains a purely synthetic one and there is no fundamental, essential, natural and juridical connection between the prince and his principality" (1991: 90). The connection between the subjects and the sovereign is, therefore, fragile. It is only the protection of the territory and principality that binds the prince to his subjects (Foucault 1978: 90). Government, however, is separate from sovereignty. "The sovereign must always, if he is to

be a good sovereign, have as his aim, 'the common welfare and the salvation of all'" (Foucault 1991: 94).

During the 16th and 17th century, "the state is governed according to rational principles which are intrinsic to it and which cannot be derived solely from natural or divine laws or the principles of wisdom and prudence; the state, like nature, has its own proper form of rationality" (1991: 97). This is a change from previous paradigms, demarcating a shift in sovereign-judiciary power. The art of government itself was in a process of transformation [14].

This is a shift towards what Foucault describes as the usage of disciplinary power and *biopower*. These are "two poles of development linked together by a whole intermediary cluster of relations" (1998: 139). During this time period, Foucault notes an "explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations" (1998: 140). These state apparatuses beginning to emerge were those of security that affected the life of a population, hence the name *bio*power. The state started to intervene in fields such as "disease, pollution, grain security, policies such as public health, housing and urban planning" (Foucault 1994: 216). This also coincided with new "forms of knowledge" which served to analyze life of entire populations such as statistics, economics and demographics. This shifted the view of the population into a "singular organism with a set of biological characteristics" (Foucault 1998: 139).

[14] In the series of lectures Foucault presented, compiled in *The Foucault Effect: Studies in Government*, Foucault points out that this is before the onslaught of capitalism, therefore these processes go beyond those of structuralism

3.4.3 Discipline, Biopower and Biopolitics

Foucault introduced the concept of disciplinary power in his 1976 book, *Discipline and Punish*, which takes the body as the object of subjugation. Biopower is a power closely connected to discipline which, "focuses on the species body, the body imbued with the mechanics of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary" (Foucault 1998: 139). It is the regulation of an entire population through supervision and series of interventions. Biopower is regulation on a global scale: "it is the power to make live" (Foucault 1998: 137). Foucault goes on to describe this as "a power that exerts a positive influence on life, that endeavours to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations" (1998: 137). This power is not one that requires a physical sovereign, but "a type of power that presupposed a closely meshed grid of material coercions" (Foucault 2004: 36). Biopower and its regulatory controls governs life and views life itself as a tool worth wielding. The regulatory controls and the interventions done on a population through biopower is called, according to Foucault *biopolitics*.

Biopolitics[15], which emerged in the 18th century, is a new element within judicial power and disciplinary techniques. If law takes the individual as its subject, biopolitics takes everything, everyone, life etc. as its subject. The politics of the administration of life: "to ensure, sustain, and multiply life, to put this life in order" (Foucault 1998: 138) is the rationality of biopolitics. Hand in hand with biopolitics is the concept of *biopower* which is the power to apply biopolitics. This idea of looking at civil society as a biological organism that must be regulated through security mechanisms engages with the world differently than mechanisms

[15] "The term 'biopolitics' seems to have been invented by the Swedish political scientist Rudolf Kjellén (1864–1922), who understands it on the basis of an organicist conception of the state as 'life-form' and 'ethnic individuality'" (Wallenstein 2013: 7)

of law and discipline. Security, in this regard, is the management and regulation of disorder.

Through the 18th century, bio- and disciplinary remained two separate poles of power. Society itself was designated something very different from what we see today. Before the middle of the 18th century, according to Foucault, Locke does not differentiate between civil and political society because the two are indistinguishable at that time (2010: 297). "In Locke's *Second Treatise of Government*, chapter 7 is entitled: 'Of Political *or* [16] Civil Society.' So, until then, civil society is always a society characterized by the existence of a juridical and political bond" (2010: 297-298). This started to shift with questions of governmentality, of political economy and with the rise of capitalism which created subjects and reorganized the concept of civil society in very important ways.

The two powers that were originally separate, biopower and disciplinary, began to converge "in the form of concrete arrangements that would go to make up the great technology of power of the nineteenth century" (Foucault 1998: 140). With the development and expansion of capitalism, processes of governmentality needed to produce "docile bodies". The use of biopower and discipline in combination became a necessary feature of capitalism. The operation of these powers allowed for "controlled insertion of bodies into the machinery of production and the adjustment of the phenomena of population to economic processes" (Foucault 1998: 140-141). The development of capitalism was a catalyst for "general powers for economic benefits" to utilize "these technologies of power, which are at once relatively autonomous and infinitesimal" (Foucault 2004: 31). Juridical, disciplinary and security are three models of governance that are each present at any given time, however one of these elements will exert dominance over the others.

It is necessary to point out that, while Foucault did discuss biopolitics and biopower

[16] emphasis added

in the final chapter of his book, *The Will to Knowledge: The History of Sexuality Volume 1* (1976) and in some of his lectures and essays, the concepts are said to be "thought fragments" rather than a fully realized theory. His death came only three years after first writing about these concepts, and although many have worked on more fully defining biopower and biopolitics, Foucault himself was not able to complete this particular study.

3.4.4 Governmentality

The rise of security, or biopolitical mechanisms, also gave way for the "governmentalization" of the state (Foucault 2007: 109), the "science of government" which "constitutes society as the object of a knowledge and at the same time as the target of political intervention" (Foucault 1991: 108-109). To repeat what has been stated above, Foucault does not just look at the power coming from and expressed by the sovereign. Government of post-sovereign theory resides in the things it "manages and in the pursuit of the perfection and intensification of the processes which it directs; and the instruments of government instead of being laws, now come to be a range or multiform tactics" (Foucault 1991: 95). A whole population, with power flowing from different directions, not just from the sovereign, wields power to the extent that "a human being turns him- or herself into a subject" (Foucault 2001: 327). This term *population* does not only refer to the people themselves but also to statistics, variables and phenomenon that surround the people. Foucault provides three aspects of governmentality:

1. "The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in

the development of a whole complex of savoirs.

3. The process, or rather the result of the process, through which the state of justice of the Middle Ages, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes 'governmentalized'" (Foucault 1991: 102-103).

Governmentality, therefore, is presented as an alternative to the contractarianism required for subjectivity under sovereignty. Law itself becomes a tactic in the administration of the government, used only when it will optimize the well-being of a population. Birth rates, death rates, and the health of the entire population "thus becomes a value, a new object of analysis and intervention" (Foucault 1991: 115). The ideology of sovereignty perhaps exists so strongly and has been so influential in organizing the judiciary because of a strategic necessity of the state to exert this intervention (Foucault 2004: 37).

It should be mentioned that Foucault is very critical of the concept and relevance of the state. Governmentality, according to Foucault, could itself have caused the survival of the state because it "is at once internal and external to the state, since it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not, the public versus the private, and so on; thus the state can only be understood in its survival and its limit on the basis of the general tactics of governmentality" (Foucault 1991: 103).

3.4.5 Consequences of the Governmentality, Biopolitics Paradigm

Foucault asserts that Liberalism is a great form of governmentality whereby to exercise biopolitics. Political economics is one of the core obsessions of Liberalism, which as we have seen with previous State of Exception scholars, law or natural rights can be displaced. Governments of this school of thought do not feel obliged to moral or legal institutions. Foucault calls this a "de-facto limitation" of modern liberalism and goes on to say that this

does not expose the government as illegitimate nor de-subjectifies the public, only that it is a “clumsy, inadequate government that does not do the proper thing” (Foucault 2008: 10). In liberal forms of government, political theory itself will have a new body of knowledge of *economy* which holds new meaning in modernity of truths. Politics and economy “are not things that exist, or errors, or illusions, or ideologies. They are things that do not exist, and yet which are inscribed in reality and follow under a regime of truth dividing the true and false” (Foucault 2008: 20). This process also distinguishes society from the state, and even places them in direct opposition to one another. Hence the use of biopolitics in Liberalism. In his later work especially, Foucault highlights this relationship between modern liberalism and biopolitics. It may seem contradictory that a liberal state, which by definition would strive to be a "nightwatch" type of state with limited intervention, would then prefer the governmentality of biopolitics. Foucault [17] explains this difference with the concept of "freedom" in Liberalism "when seen within the strategic field of political economy, is a way to extract utility, a material and intellectual surplus value, from the individual, or rather, to extract this value through the individual as a grid for the interpretation and governing of reality" (Wallenstein 2013: 25). There is a strategic relationship between the maximization of economic outputs and the regulations of life itself.

Another consequence of the shift towards biopolitics and governmentality is the politics of *society*. Rather than being bound to the judgments of the sovereign, governments now act in relation to the life of populations. "Wars are no longer waged in the name of a sovereign who must be defended", or theories of sovereignty and sovereign power, rather "they are waged on behalf of the existence of everyone; entire populations are mobilized for the purpose of wholesale slaughter in the name of life necessity: massacres have become vital" (Foucault 1998: 137). Because biopolitics is a mechanism of regulatory controls onto

[17] using a nominalist method

a society, the modern biopolitical state is constituted from a specific type of racism. *State Racism*, as Foucault calls it, is a "racism that society will direct against itself, against its own elements and its own products [. . .] the internal racism of permanent purification, and it will become one of the basic dimensions of social normalization" (2004: 62). This state racism is a foundational characteristic of the biopolitical state because defense of the societal body becomes the essential mechanism defining both the function of the state and the origins of it. Foucault elaborates in *Society Must be Defended* that war is fought "not between races, but by a race that is portrayed as the one true race, the race that holds power and is entitled to define the norm, and against those who deviate from that norm, against those who pose a threat to the biological heritage" (Foucault 2004: 61).

This places Foucault in a particular place when it comes to the State of Exception. Exception seems like an improper term to use since the mechanisms of governmentality, biopower and discipline have been in operation for centuries. Foucault would agree that a State of Exception exists, in terms of extra-legality of powers, but views it as unexceptional and not a gap of legal order at all, rather "a norm within the policing grid of disciplinary power" (2004: 27–28).

Foucault's studies on biopolitics and governmentality have gained a wide range of responses. Many have developed theories far beyond what Foucault had originally presented. Foucault has many contemporaries who have sought to further develop this theory. Scholars such as Roberto Esposito, Antonio Negri, Michael Hardt, Paul Rabinow, Nikolas Rose, Hannah Arendt and, noteably, Giorgio Agamben who will be featured in the following section have worked within this biopolitical and governmentality world-view in their own work. Not only are these themes studies within International Relations, but in other disciplines such as law, demography, history of medicine, biology and several more (Wallenstein 2013: 8).

Governmentality and biopolitics have created a launching pad for a variety of new ways to view current exercises of power and security.

3.5 Giorgio Agamben: Bare Life and State of Exception

Giorgio Agamben is an Italian philosopher who received much attention in the last years for his contribution in the field of biopolitics. Coming from a background in aesthetics philosophy, from the late 1990s he re-directed his focus towards a more political ground. Particularly famous are his analysis of the figure of *homo sacer* as the emblem of the modern man, and his study on the origins and implications of the State of Exception. In this section, the relevance of Agamben's study in analyzing the modern patterns of governance is presented, and will be used in the following chapter as the key for the understanding of practices and policies.

3.5.1 Homo Sacer and the new modern paradigm

> *"Insofar as its inhabitants were stripped of every political status and wholly reduced to bare life, the camp was also the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation. This is why the camp is the very paradigm of political space at the point at which politics becomes biopolitics and homo sacer is virtually confused with the citizen."*
> - Giorgio Agamben (1998: 171).

Giorgio Agamben is well-renowned in the field of political philosophy mainly due to his research on and conceptualization of *homo sacer*. This study explored biopolitical structures characterizing modern politics. Presented throughout a series of three books, beginning with the namesake of the project, *Homo Sacer* (1998), Agamben investigates how the power started to incorporate life [18] into its political calculations.

[18] in the Greek notion of *zoe*, which identifies life in its biological sense, with no political value

One of the objectives in Agamben's study is the investigation of biopolitical structures in the studies of power, sovereignty, and exception. He recognizes the limits of Foucault in the sense that he failed (or did not have time) to develop biopolitical studies towards what is, in Agamben view, the realization of biopolitics in modernity: that is the totalitarian regimes of the 20th century. In the same way, he addresses Hannah Arendt and points out the lack of attention paid in her study of totalitarianism to the biopolitical sphere, which in his view would have created a more comprehensive analysis.

Therefore, Agamben's theory seeks to combine biopolitics with totalitarian studies. He builds this bridge in order to reach a better and more complete explanation of the mechanisms that led to the institution of concentration camps. The study takes place with special focus paid towards the concept of "bare life" and, consequently, the figure of *homo sacer* as the element of conjunction between the two perspectives (Agamben 1998; 72). Homo Sacer is a figure in the ancient Roman law, which defined the,

> "sacred man [as] the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that 'if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide.' This is why it is customary for a bad or impure man to be called sacred" (Agamben 1998: 71).

Homo sacer is, therefore, a man that has been sentenced to the revocation of his status as Roman citizen, thus losing the political and social value of his[19] life. This man's status is neither that of the law of the men, meaning that he can be killed with impunity for the murderer, nor that of the divine law, thus prohibiting to sacrifice his life to the Gods. These two characteristics of the figure of homo sacer determines the double exclusion to which the sacred life is subjected (Agamben 1998: 72). This is where Giorgio Agamben draws a connecting line between the sacred life and the sovereign: both of these figures stands in an

[19]The use of the masculine pronouns here on is justified considering that the status of citizen and, in general, the political status in the Republic was granted to only adult men

undefinable zone between the sacred and the human: "[t]he political sphere of sovereignty was thus constituted through a double exclusion, as an excrescence of the profane in the religious and of the religious in the profane, which takes the form of a zone of indistinction between sacrifice and homicide. The sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice, and sacred life - that is, life that may be killed but not sacrificed - is the life that has been captured in this sphere" (Agamben 1998: 83). The sacred life, the Greek *zoe*, is included in the juridico-political system through the inclusive-exclusion that also characterizes the system of the State of Exception.

The process that established the shift towards biopolitical structures is deeper and more radical than one might initially assume. The origin of life as the center of power dynamics is established, according to Agamben, in the *Declaration of the Rights of Man and Citizen of 1789*, in which the birth and the bare life of the human kind is *conditio sine qua non* for the attribution of civil and political rights. The declaration also establishes the binding relation between birth and state, thus founding the correspondence between *man* and *citizen*.

One finds with the end of the First World War and subsequent refugee crisis (that Arendt also addresses in *The Origins of Totalitarianism*), that the threefold setting of the nation-state based on territory, jurisdiction and birth (nation) was in jeopardy, questioning the identification of man with citizen, of birth with nation (Agamben 1998: 174-75). Traditional mechanisms started to collapse, and a new point of intersection between life and its insertion within the juridical order was established in the camp. The State of Exception became a new tool that physically contained those bare lives that could not be inscribed in the normal jurisdiction. The consequence being that the political order now bears in its own structure; a "deallocating location" in which "every life and norm can be taken" (Agamben 1998: 175).

This conceptualization directs Agamben's study to the understanding of the camps that came into being during the 20th century as political instruments of "including the excluded", demarcating a true biopolitical paradigm.

Therefore, the integration of the Foucauldian study on biopolitics with the study of totalitarian regimes in modernity leads Agamben to reflect upon the institution of concentration camps and their relevance in biopolitical terms. The extraordinary nature of these camps, and what was occurring within their boundaries, is of major interest for Agamben's theory on bare life and State of Exception. "Camps derive not from the ordinary juridical order (or from a transformation and development of prison law), but from the State of Exception and martial law" (Agamben 1998: 166-67). Agamben highlights a constitutive relationship between concentration camps and State of Exception, which is destined to revolutionize the very same structure and mechanisms of the institution of the State of Exception: "*[t]he camp is the space that opens when the state of exception starts becoming the rule.* In it, the state of exception, that was essentially a temporal suspension of the legislation on the base of a factual situation of danger, acquires a spatial permanent asset that remains, however, constantly outside the normal legislative order" (Agamben 1998: 168-69).

The fundamental basis for Agamben's subsequent study on the State of Exception is derived from the discussion on the concentration camps and their relation with *jurisdiction.* During Nazi era, the camp became the biopolitical space of the sovereign decision, "a territory that is posed outside the normal juridical order, but that is not, for this reason, simply an external space. What is in it excluded is, according to the etymological meaning of the term exception, *taken outside*, included through its own exclusion" (Agamben 1998: 170). The immediate consequence of this is that the very same State of Exception is now included in the jurisdiction, thereby creating "a new juridico-political order in which the norm becomes

indiscernible from the exception" (Agamben 1998: 168). This space, in which norm and exception lose their meaning and differentiation, becomes the place in which the exception is realized *normally*, eliminating the limits that the norm established and therefore creating a space in which everything becomes possible. The limit in the camp is essentially the same *bare life* as that of the people that are placed within it, and nothing that is committed against them can be considered as a crime (Agamben 1998: 170). "The biopolitical body, which constitutes the new fundamental political subject, in not a *quaestio facti* (for example, the identification of a certain biological body), nor a *quaestio iuris* (the identification of a certain norm to apply), but the stake of a sovereign political decision, that operates in the absolute indifference between fact and law" (Agamben 1998: 172). By stating that modern politics is all biopolitics, Agamben emphasizes that politics coincides with the "power on the decision over the un-political", which is the same *bare life* (Agamben 1998: 174). The camp then transforms into the space in which life and norm collapse into each other thus becoming indistinguishable. The camp, as it is meant with this biopolitical structure, is replicated every time the structure of the State of Exception is materialized and the juridical order is suspended (Agamben 1998: 176).

The study of the camp as the "biopolitical paradigm" of modernity, presented in *Homo Sacer*, develops into a more deep and close analysis of the State of Exception as political paradigm of today's system: "[w]hen Life and Politics, which are divided in origin and articulated through the state of exception in which bare life lives, tent to identify with one another, then all the life becomes sacred and all the politics becomes exception" (Agamben 1998: 148).

3.5.2 State of Exception: from *Iustitium* to *Auctoritas*

> *"Agamben identifies the state of exception with the power of decision over life. What is correlated with the exceptionality of sovereign power is the exception of life. It is life as bare or naked life, which, according to Agamben, means life captured in a zone of indiscernibility, of indistinction between zoe and bios, between natural and human life."* Jacques Rancière (2004: 300).

The analysis of the biopolitics in the modern political system continues with the second book of Agamben's trilogy, *State of Exception* (2005). In this book, Agamben discusses more deeply the themes and topics of *Homo Sacer*, expanding the analysis towards the elements, mechanisms and implications of the phenomenon of the State of Exception.

Giorgio Agamben seeks to evaluate the juridical bases for the enactment of the State of Exception by drawing a historical continuum from the Ancient Roman institutions all the way up to the recent policies post-9/11. Agamben pointed towards the arguments and rationale of traditional understandings of the State of Exception and its relation with the normal, legal paradigm to prove the fictional relation between law and State of Exception. The result of this study is the idea of a "permanent" State of Exception and the emphasis on its effects on the governmentalization of the state.

Agamben begins this analysis with the assumption that the political system enacted after September 11th, 2001 is an expression of the State of Exception. The specific character of the policies and governmental actions indicates that this expression of State of Exception is now a *paradigm* of modern politics. What follows is a thorough analysis of conceptualizations and mechanisms that constitute the normalization of the State of Exception as a "lethal machine" (Agamben 2005).

As a prerequisite for the following discussion, one must understand the role and the idea of *necessity*. The concept of necessity has played a primary part in the previously

mentioned and more classical analyses of the State of Exception. It is the fundamental element capable of providing the sovereign (or, in general, the executive) with a justification for governmental actions outside legal parameters. Agamben explains the concept of necessity through the words of Santi Romano as, "a condition of things that cannot be disciplined by norms established" (Agamben 2005: 38). Necessity, being the foundation of the whole architecture of the State of Exception, goes as far as to demarcate that the necessity becomes the primary source of law. The problem here, however, is quite easily identifiable: "[t]he concept of necessity is a completely subjective concept, relative to the purpose that is meant to be achieved [...] the implication of necessity requires a moral or political (in any case, extra juridical) evaluation whereby the juridical order can be judged either worthy its conservation or reinforcement also through its potential violation" (Agamben 2005: 41). The idea of necessity is not enough for Agamben to justify what he views as a standardized, "normalized" practice of the state that occurs in a condition of lawlessness. The basis for the mechanism which is responsible for the systematic "misuse" of power should not be delegated to an idiosyncratic dynamic. Agamben, therefore, chose to investigate deeper into the most intrinsic elements of the State of Exception.

The first of these elements that Agamben analyses is the mechanism of the State of Exception. He does so by including Schmitt's theory on the sovereignty and the State of Exception to provide an understanding of what and how processes happen in a situation of exception. It is here that Agamben considers the idea of *force of law* and it implication in a situation in which law is not applied, as it is the case under the State of Exception.

A key point developed by Schmitt in the *Political Theology* is that the legal norm and its application are separated in the State of Exception. But how are policies and action put into effect when the law exists but is not applied? Agamben borrows the conceptualization

of *force de loi* that Derrida develops in its omonimous essay, which refers to the "capacity of obligate" that is permissible of legal instruments (Agamben 2005: 37). Special focus must be placed on the notion that this force of law lies on a vital separation between "the applicability of the norm and its essence", wherein the result which normally acts without force of law, now has it and vice versa. This is a particularly important element when it comes to the State of Exception and its functioning. The separation between law and the application of norms is the reason behind executive actions in a state of necessity. While occurring in a *de facto* absence of law, the executive still has the capacity of enforcement: "The state of exception is, in this sense, the opening of a space in which application and norm manifest their separation and a pure force of law without law enforces (i.e. applies by dis-applying) a norm which has its application suspended" (Agamben 2005: 54).

3.5.3 The Genesis of State of Exception: the *Iustitium*

Tracing back the first appearance of the subject of his analysis, Agamben explores the ancient Roman institution of *Iustitium* as an insight on the origins of the paradigm of the State of Exception. This "original" form of State of Exception was declared in times of exceptional situations, for example, as a consequence of external or internal wars, and was meant to "suspend the law" (which is, interestingly, also a direct translation of the term *iustitium*) in order to be able to cope with the situation immediately, and without the limitations restricted by the legislative (Agamben 2005: 41).

The main idea behind the function of the *iustitium* is expressed in Agamben's study by the scholar Nissen: "When the law was no longer able to perform its highest task - to guarantee the public welfare - the law was abandoned in favor of expediency [...] instead of transgressing it, when it became harmful it was cleared away" (Agamben 2005: 45-46). The

institution of *iustitium* was declared each time out of a situation of necessity.

The description of the *iustitium* presented above is used by Agamben to provide a critique of Schmitt's theory, which aimed at framing the State of Exception into the legal structure of dictatorship. While the figure of the *dictator* in Roman law identified a person invested with full powers by the political institutions, the *iustitium* designated a space for political actions not to be limited by legal restrictions: "[f]rom this perspective, the state of exception is not defined as fullness of powers, a pleromatic state of law, as in the dictatorial model, but as a kenomatic state, an emptiness and standstill of the law" (Agamben 2005: 48). Schmitt, therefore, is wrong in inscribing the State of Exception into a legal framework. The false notion by Schmitt that the a-legality of the State of Exception remains somehow related to the constitutional law fails to take into consideration the essential element of the *Ausnahmezustand*, that is its legislative vacuum.

The legality of actions undertaken during *Iustitium* is also worth analyzing. But this phrase itself is contradictory. Being that this process is an institution that comes into being by suspension of the law, it is impossible to determine the validity or the *legality* of the actions that occur after a proclamation of the *iustitium*: "In the context of the iustitium, people are neither executing, nor transgressing, nor creating the law" (Agamben 2005: 50). This conceptualization of the *value* of the actions taken in the *iustitium* is fundamental to the understanding of what can be considered the essential character of the State of Exception. It is not a particular state of the law, but rather an order without law in which legality and jurisdiction lose any value (Agamben 2005: 51).

Declaration of the *iustitium*, however, does not come without consequences. The system that comes into being is one in which limits set by legal framework shatter. This leaves space for executive action, whose boundaries correspond with the bare life of human beings.

Agamben calls this a "force of law without law", which is a force that allows the sovereign to take down legal barriers and open a legal void, while still being able to enforce its will. Thus, it is a force that everyone tries to capture (Agamben 2005: 51). In the moment in which the State of Exception becomes the chosen instrument of government, while simultaneously the force of law without law is the only instrument to enforce political order, the fiction whereby the law links with the State of Exception creates a vicious, inextricable system. Once the State of Exception is utilized as a tool of political action at the hands of the executive, it unleashes a never-ending cycle of a-legal mechanisms.

3.5.4 The Different Twins: *Auctoritas* and *Potestas*

The concepts of *auctoritas* and *potestas* are brought in as key features of analysis, and are developed in depth in the final chapter of the *State of Exception*. The study focuses in particular on how these two aspects relate with one other and their role on the development of an understanding of the State of Exception.

Both two terms *auctoritas* and *potestas* identify an exercise of power. However, as the words of Walter Ullmann clearly explain, "*/a/uctoritas* is the faculty of shaping things creatively and in a binding manner, whilst *potestas* is the power to execute what the *auctoritas* has laid down" (2013: 21). *Auctoritas* and *potestas*, in virtue of this difference, were representatives, in the Republican era of Ancient Rome, of two institutions: the Senate (*auctoritas*) and the Magistrate (*potestas*) (Ullmann 2013: 21). Particularly relevant here is the fact that these two "powers", while being so similar, perform two very different roles, supporting and completing each other and at the same time remaining separated.

Agamben emphasizes the need of outlining the differences between these terms and the complementary relation that exists among the two, given that, quoting the Spanish intellec-

tual Fueyo, "the modern confusion of auctoritas and potestas [...] and their convergence in the concept of sovereignty 'was the cause of the philosophical inconsistency in the modern theory of state'" (Agamben 2005: 75). In this chapter, Agamben concludes that the term *potestas* identifies a normative way in which power is deployed, while *auctoritas* is defined as the power that gives legitimacy to certain acts, and is a meta-juridical source of power (Agamben 2005: 86).

The importance of *auctoritas* emerges from the description of the mechanisms whereby certain acts were put into effect in Ancient Rome. These mechanisms also highlight the deep relation existing between the two concepts, but also how different they really are. The *auctoritas*, in fact, was at the basis of at least three executive actions: the *iustitium*, the *interregnum*, and the *hostis iudicatio* [20]. Each of these three cases help in drawing attention to the special link that ties *auctoritas* and *potestas*, insofar as in each of these cases, the first act executed within the exception and necessity is to *suspend* the *potestas* and overcome the threat.

What appears from this analysis is that in each and every one of these situations, the suspension of the normal juridical order is considered to be an answer, or resolution, to exceptional situations. Therefore, all actions in the *iustitium* are not meant to be institutionalized or to change the Republic in a radical way, but rather they are intended to function as means to achieve stability and overcome these extraordinary circumstances.

Agamben takes this point a step further. The concept of *auctoritas* becomes correlated

[20] Apart from the iustitium, which has already been addresed in this chapter, the institution of *interregnum* and *hostis iudicatio* might need some clarifications. With the term *interregnum*, the Romans intended a phase of the "government" in which an interrex was nominated in the case where there were no senators nor magistrates, and in which the constitution was suspended. In this case, the *auctoritas* coming from the consoles has the power to suspend the *potestas* and to guarantee the functioning of the Republic in exceptional circumstances (Agamben 2005: 81). The *hostis iudicatio*, on the other hand, involved the action whereby a citizen that was considered threatening the security and stability of the Republic could have been designated as "public enemy", thus losing his status of Roman citizen. In this case, the *auctoritas* not only suspends the normal juridical order, but also the very status of a Roman citizen (*ius civium*) (Agamben 2005: 82).

to the figure of the *princeps*, especially in relation to the interpretation that Augustus gives of this (his) "office". The use of Augustus as emblematic figure is here of particular interest, given the peculiar character of the man and his political life. Augustus, in fact, is known as the *Princeps* and first emperor of Ancient Rome. However, it is also well known that the title of *princeps* was meant to maintain a "republican" connotation to this title, in the effort to display an appearance of Republican institutions while *de facto* exercising extraordinary powers. These exceptional powers were granted by the uninterrupted exercise of the *Iustitium* throughout the duration of his reign: "Augustus claimed in 27 [BC] to be accepting the provisions made then merely as a short-time solution necessitated by a continuing emergency. Over the course of his long reign, these emergency arrangements became permanent and were established as central and enduring elements in the architecture of the principate" (Rich 2012: 42).

By entering into a philological debate, Agamben outlines that the terms in which Augustus intends the *principatus* are that of *auctoritas*, and not those of *potestas*, this way posing himself in a position of the one that legitimizes every political action in the Roman system. This point here is relevant. The figure of the *princeps* does not match the features of the magistrate. This magistrate represents a pre-established figure that holds power that must then be bestowed to the individual invested with the office. The *principate* is "an extreme form of *auctoritas*" (Agamben 2005: 82), being that the *auctoritas* is not some form of power that is attributed by the Senate or the consoles, but as a feature coming from the person itself, making it impossible to separate the public figure from the private one.

This is, in Agamben's analysis, the same as with cases for modern figures of the *Duce* in Italy and the *Führer* in Germany. Both Mussolini and Hitler were not designated power by any magistrate office pre-existing their entrance into the political arena of Italy or Germany,

respectfully. *Duce* and *Führer* represent two figures that are intrinsically linked to the single individuals, therefore "belonging to the biopolitical tradition of auctoritas" (Agamben 2005: 107).

The origin of the power that characterizes the permanent rule of State of Exception is also clarified by Agamben. By criticizing certain studies from the 1940s on the charismatic power, Agamben states that the source of this ultimate form of *auctoritas*, "attains its appearance of originality from the suspension or neutralization of the juridical order - that is, ultimately - from the state of exception" (Agamben 2005: 85). The power of acting beyond the legal boundaries, the ability to suspend the normal legal paradigm and perform in a zone of indistinction between law and life, does not come from a charismatic element. It develops from the elimination of all the legal limits that gives the government total space for action. This is also a zone in which *auctoritas* and *potestas* become indistinguishable from one another.

It is this indistinction that makes the normalization of the State of Exception so dangerous. Agamben states of this, "[a]s long as the two elements remain correlated yet conceptually, temporally, and subjectively distinct (as in republican Rome's contrast between spiritual and temporal powers) this dialectic - though founded in fiction - can nevertheless function in some way. But when they coincide in a single person, when the state of exception, in which they are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine" (Agamben 2005: 86).

Ultimate goal of Agamben's analysis is to show the separation of law and life, which together with *auctoritas* and *potestas*, become indivisible in the paradigm of the State of Exception. Furthermore, the author stresses the necessity of re-discovering the space of action that exists between these two forces, "which once claimed for itself the name of 'politics'"

(Agamben 2005: 88).

3.5.5 The Consequences of Lawlessness: Side Effects of the State of Exception

The results of Agamben's inquiry are quite significant for an understanding of the modern political system. The key problem becomes, once again, the transformation of an exceptional instrument into a paradigmatic instrument of governance. Agamben's research seeks to go beyond the legal conceptualization and understanding of the State of Exception, while also aiming to emphasize the political meaning of it and the implication that is has in the essentially biopolitical dynamics of the modern times (McQuillan 2010). What one sees now in of governmental action, through Agamben's perspective, is the maximum effect of the fictitious notion that links law and *anomie*, in which, "[t]he normative aspect of the law can, thus, go unpunished and contradicted by a governmental violence that, ignoring, externally, international law and producing, internally, a permanent state of exception, pretends to be applying the law still" (Agamben 2005: 111).

In the context of the War on Terror the normalization of the exception can be found in some key elements indicative of this singular and new variation of conflict. The exception being transformed into the rule is met on a factual level. The War against Terrorism could be essentially defined as the fight against the constant threat of an attack and the indetermination of the enemy. The enemy of this war is a concept, and can be constructed or found anywhere in the world. The constant situation of emergency justifies the concentration of power in the hands of the executive. This leads to the implementation of biopolitical and security policies and actions that makes the state a "deadly machine". The indefinite detention of suspected terrorists are cited by Agamben as one of the many examples reflecting this tendency in the context of the War on Terror. The indistinction between life and law during a

State of Exception is made evident in these actions and the biopolitical engine works in a way that intends "to cancel any juridical status of the individual, thus producing unnameable and unclassifiable beings" (Agamben 2005: 12). Bush's actions in the aftermath of 9/11 attacks can be interpreted as the ultimate attempt to institute a condition in which life is included in the law through the suspension of the law itself, and become the center and ultimately the limit of state's action.

Entering into a State of Exception resides on the sovereign agency of declaring it and deciding over the suspension of the juridical order. However, less evident is the mechanism of "suspending the suspension" and returning to the normal juridical system: "[f]rom the effective state of exception in which we live it is not possible to come back to a state of law, insofar as the very same concepts of 'state' and 'law' are in question" (Agamben 2005: 111). The normalization of the State of Exception leads to the complete obscureness between legal and non-legal, between the exception and the norm, hence making it impossible to realize what the normal paradigm is after all. The sovereign decisionism that played a crucial role in Schmitt's theory of the state of emergency finds itself unable to decide once again over the applicability and essence of law. The sovereign thus appears here more like Benjamin's prince who, "while making an ineffectual 'gesture of executive power', nevertheless reveals 'at the first opportunity, that he is almost incapable of making a decision'" (McQuillan 2010: 100). The mechanisms of the State of Exception are then able to replicate and reproduce potentially to infinity.

The main consequences that this situation raises are, of course, rather dangerous. The first concerns what can be seen as the quintessential issue of biopolitics in Agamben's study. This places *bare life* at the center of political processes. Life, in its indistinction from the law, is transformed into the limit of governmental operations, thus producing *homines sacri*

deprived of any legal, political and social status, with all the relative implications for the application and value of human rights themselves. The second, also related to the "classical" biopolitical mechanisms, is that the governmental concentration of power leads toward a control over the production of knowledge and the stigmatization of those sources of knowledge that do not conform with the mainstream, governmental view.

The real-world outcomes connected to the State of Exception and its transformation to a new governmental paradigm of political performance will to be tested in the following chapter.

3.6 Current Paradigm and Strengths of Agamben

Having explored the various conceptualizations of State of Exception, and considering present day dynamics of governance and statehood, Agamben's theory is the most compelling lens with which to view the current paradigm. This theory combines the sovereign theory of power from Schmitt with the biopolitical mechanisms of Foucault, which together can better explain certain phenomenon occurring in the War on Terror.

Agamben conceptualizes his theory within the setting of the real world and how systems and structures are presently organized. Neither Poulantzas nor Foucault view statehood in the way that it presents itself in practice. Agamben's State of Exception, therefore, is more applicable to the state of affairs one finds today. It is simply more relevant to the structures and mechanisms to the current art of governance. Furthermore, Foucault's complete dismissal of the relevance of sovereign power presents an additional limit to the applicability of his theory to the post-September 11 context. One does find a concentration of power at the executive level, supporting the relevance of the features of sovereign power. On the other hand, Schmitt's theory itself is not sufficient enough to describe modern governmental

activities, however with the addition of the biopolitical domain, as applied by Agamben, it acquires a more robust meaning.

Locke's understanding of a State of Exception is still used today, however. While Locke did foresee the possibility of abuses by the *decisionism* in the State of Exception, he asserted that civil and political society would have the capabilities to react and overthrow a tyrant. This however, is simply not empirically true. Biopolitical mechanisms subjectify the social body, preventing political value and attribution of society's action, and undermines any dissidence.

Foucault does not have a completed theory of biopolitics. What Agamben provides is a more developed conceptualization of biopower and biopolitics in a state system. Foucault understood these processes confined within one system, whereas Agamben's development of biopolitics is a useful theorization for the international application of governmentality and Foucault's theory.

Agamben begins his theorization with a puzzle. How could concentration camps occur in any legal order? What he finds is that these camps are emblems of a State of Exception. Today, in the context of the War on Terror, legal boundaries are regularly ignored. Therefore, there are fertile reasons to believe that we are in a paradigm of an Agambenian State of Exception. This has significant consequences towards individuals and their role in the political domain. Life itself is inconsequential for this tactic of governance. This is dangerous for human rights globally. Natural, fundamental, inalienable rights simply do not exist in the Agamben State of Exception. There are no political or legal safeguards against state power and state violence once the state enters the zone of non-legal exception. The following chapter will present the empirical cases in which legal boundaries are crossed, indicating a paradigm of State of Exception may exist.

4 | A Post-9/11 Agambenian Paradigm

> *"Modern Totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system" –Giorgio Agamben (2005: 2)*

The War on Terror has ushered in a new era of governance, unprecedented in its scope. Three days after the September 11 attacks, President Bush used his Executive powers to enact Proclamation 7463, a national State of Emergency. This has been extended every year since by President Bush and subsequently President Obama, thereby creating a 16 year national emergency allowing for broad expansion of powers of the executive. With the start of the War on Terror, many states enabled mechanisms that would allow them to undertake policies and actions that would fall outside the normal legal paradigm. To respond to the blurred threat of Terrorism, a coalition of nations led by the United States justified the operationalization of practices that are considered unlawful under domestic and international law.

The initiation of a preemptive war without meeting any of the criteria listed in international legal instruments, the institution of "black sites" to perform torture and other degrading treatments, the criminalization of parts of the population are all worrying signals of a paradigmatic, exceptional way of governing. This has significantly impacted judicial and human rights standards under the evocation of an Agambenian State of Exception.

Using the words of Sarah Blake, "theories of bare life and the state of exception address violence perpetrated on the body in the exercise of extra-legal power" (2009: 56). The following chapter will discuss empirical evidence that one does, indeed, find in such an international paradigm while also discussing the consequences of this lasting practice of governance.

Table 1: **Elements of the State of Exception - A Comparison**

	Locke	**Schmitt**	**Poulantzas**	**Foucault**	**Agamben**
Does the executive decide on the exception?	yes	yes	Hegemonic ruling class does when it is in turmoil	There is no executive and there is no exception	yes
Is the norm distinguished from the exception?	yes	yes	Yes, there will be a crisis at the transition and open state violence(1977: 92, 93).	We are in a permanent exception	The exception is the norm
What is the role of the public?	Very important - and State of Exception is a time for public judgment of the ruler	important but occupy a separate space from the political sphere - theological dimension	Dominated under the hegemonic class	Subjectivation operated through disciplinary means. The social body is an object for the government	Not mentioned
What type of power is involved?	Prerogative	Sovereign, charismatic, authority, discretionary, decisionism	Structural, political	Disciplinary, biopower, governmentality, productive	Sovereign, biopower
Muses	-	Hobbes, Weber	Marx, Althusser	-	Schmitt, Foucault, Benjamin
When should the State of Exception be invoked?	Accident or necessity (1764: §160)	*Extremus necessitatus casus* (2005: 10), wartime or political instability (1989: 12)	When there is crisis in the hegemonic ruling class	That's not the right question to ask	That's not the right question to ask
What is the purpose of the State of Exception?	To defend public good or self preservation of the state	To establish a new order or preserve the old constitutional order	Attempt to neutralize the opponents of the hegemonic ruling class	Self-preservation of the system	To react to exceptional situation or to create one - governmental paradigm
The State of Exception stems from:	Liberalism - but it is not a bad thing	Limits of judicial order (liberal normativism of a constitutional state)	capitalism, statism, parliamentarism, shift from competitive capitalism to monopoly capitalism	Liberalism (state)	Development of security and liberal ideology (Agamben / Emcke 2001: 1)
Is the State of Exception permanent?	No	No, but the sovereign has monopoly on when to decide on the exception	No, but modern capitalism always has crisis as a possibility	If the system sees it as an effective way of subjectivation, yes	Once it becomes the rule then there is no way to come back from it - real State of Exception (Benjamin)

4.1 Expansion of the Executive

> *"In a number of states, emergency measures that are supposed to be temporary have become embedded in ordinary criminal law. Powers intended to be exceptional are appearing more and more as permanent features of national law"* -Amnesty International (2017: 7).

In the midst of a crisis, it is not law that orders the chaos. According to Schmitt, pure decision is a legal order that originates from, and is maintained by, political act. The pure decision's goal is state preservation above all else; including protection of its citizens. During a crisis, or State of Emergency, the power given to the executive, as discussed in the previous chapter, is not codified in a normal, legal order. What one finds today is a many states enacting their own State of Emergencies, citing the ongoing War on Terror as justification to order and secure the crises. There are also a growing number of states which are changing their constitutions to either allow for State of Emergency provisions, or to embed similar security legislation (many of which do not include due process of law) into the norm. In the a-legality of a State of Exception, laws immediately have political characteristics (Agamben 1998: 149). Furthermore since the laws, which are immediately political, have a biopolitical task, the implication of the law on politics and life "become one" (Agamben 1998: 149). The following section will highlight the scale and scope of the State of Emergency declarations around the world, while also identifying the biopolitical characteristics of many of the powers that allow the executive to wield.

The US State of Emergency 7463 is the emergency directly related to the War on Terror. It was declared 3 days after the September 11th terrorist attacks, stating former President Bush: *"A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States, I hereby declare that the national emergency has existed*

since September 11, 2001" -President George W. Bush on September 14, 2001. However, at the time of this research, 2017, marks the 38th consecutive year that the United States has operated under an official State of Emergency declaration [21] (Thronson 2013: 740). 32 separate State of Emergency declarations are currently in operation in the USA alone [22]. These emergencies allow for the US President to have various extended powers such as "the ability to financially incapacitate any person or organization in the United States, seize control of the nation's communications infrastructure, mobilize military forces, expand the permissible size of the military without congressional authorization, and extend tours of duty without consent from service personnel" (Thronson 2013: 737).

The State of Emergency declared in 2001 by former President George Bush was extended each year of Obama's presidency, citing "[b]ecause the terrorist threat continues, the national emergency declared on September 14, 2001, and the powers and authorities adopted to deal with that emergency must continue" (The White House 2016).

Many have noticed under current US President Donald Trump that he is specifically utilizing the feeling of emergency and chaos to carry out his agenda. Since entering office, "Trump has never allowed the atmosphere of chaos and crisis to let up" (Klein 2017). He is actively stirring feelings of insecurity as a political tool which "appears to be deliberately created" (Klein 2017). On August 10, 2017, President Trump informally announced a new, national State of Emergency in response to the opioid epidemic. US Secretary of Health and Human Services Tom Price has quested the necessity surrounding this declaration, stating "[m]ost national emergencies that have been declared in the area of public-health emergency have been focused on a specific area, a time-limited problem" (Ford 2017). The exact powers

[21] The oldest order dating back to the Iranian hostage crisis in 1979. Obama cited the need to continue such order due to US "relations with Iran have not yet returned to normal, and the process of implementing the January 19, 1981 agreements with Iran is still underway" (Thronson 2013: 752)

[22] An additional, informal State of Emergency was declared by President Trump on August 10, 2017. At the time of this research, it is not included in the tally because the exact terms of the emergency declaration have not been drafted.

that Trump will give himself under this emergency have yet to be decided upon the time of this research [23], however it is clear, according to Price, that this emergency has the potential to be long-lasting. Donald Trump asserted in the declaration speech: "It's a national emergency. We're going to spend a lot of time, a lot of effort, and a lot of money on the opioid crisis" (Ford 2017). A presidential commission, tasked with providing possible solutions to the epidemic, directly compared the loss of lives to opioids to lives lost to th terrorist attacks of 9/11 (Ford 2017).

Agamben stated that once a State of Exception has been evoked, borders become especially important (Agamben 2005: 1). One finds this in the discourse and executive orders of Trump. After the Manchester attack at a Ariana Grande concert, Trump shifted the blame towards the "ease" with which "thousands and thousands of people pouring into our various countries" (Klein 2017), despite the fact that the perpetrator was, in fact, born in the UK. The biopolitics are such that Executive can use emergencies such as this to identify the biopolitical body and those which are "others". Agamben asserts that a key indicator of a State of Emergency is that it "ceases to be referred to as an external and provisional state of factual danger and comes to be considef with the juridical rule itself" (1998: 168). To demonstrate this, President Trump has taken to directly criticizing juridical processes. Once the Executive Order, the so-called "Muslim Travel Ban", was determined to be illegal, Trump tweeted: "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!" (@RealDonaldTrump 2017b). Thus, placing perceived security measures above due process of law.

However, the US is not the only state implementing long-lasting States of Emergency. Similar reactions towards combating terrorism are sweeping through other parts of the world too. Beginning with Europe, one sees a profound transformation:

[23] "When asked what the emergency powers would entail, Trump declined to offer specifics" (Ford 2017).

> "The last two years, however, have witnessed a profound shift in paradigm across Europe: a move from the view that it is the role of governments to provide security so that people can enjoy their rights, to the view that governments must restrict people's rights in order to provide security. The result has been an insidious redrawing of the boundaries between the powers of the state and the rights of individuals" (Amnesty International 2017: 6).

Although populist Marine Le Pen, who promised tight counterterrorism measures, did not win the recent election in France, the country has been "building up [...] a surveillance state. The targeting of Muslims. The militarization of law enforcement. In that regard, France is not so different from the United States" (Intercepted 2017b).

After the Paris Attacks in November of 2015, President Hollande declared a State of Emergency in France in order to implement a variety of counterterrorism measures. It was a declaration that was only supposed to last 12 days upon its enactment. This particular State of Emergency gave Hollande the authority to "to set curfews, limit public gathering, establish so-called secure zones and extend police powers to carry out house searches without judicial oversight and confiscate certain classes of weapons, even if they're being owned legally" (Mohdin 2016). The French State of Emergency has been renewed 6 times, making it the "longest uninterrupted state of emergency since the Algerian War in the 1960s" (Agence France-Presse 2016). Two days after the Paris attacks, Hollande "announced his plan to modify the French constitution in response to terrorism" (Untersinger 2015), which ended up officially including the ability to enact a State of Emergency into the constitution and also included the ability to strip French citizenship from dual nationals. Former Prime Minister Manuel Valls "declared that France was facing a global and enduring threat" (Zatensky 2016), evoking the sense of a permanent exception. The extension was most recently approved citing a "a heightened risk of jihadist attacks" (Agence France-Presse 2016). Interior Minister Bruno Le Roux claimed that the State of Exception has "foiled no fewer than 13 attacks, involving about 30 individuals" (Agence France-Presse 2016), however this alleged statistic comes at a

price.

This is in juxtaposition to the fact that although, "4,200 raids have been carried [...o]nly six inquiries on terror-related charges have been launched so far" (Intercepted 2017b). And French politicians and police outwardly stating they target "visibly practicing Muslims" in these raids. French Muslims or people-who-look-Muslim are implicated as enemies of the biopolitical society, for whom extra powers must be used to remove them. Those labeled as enemies soon expanded to include not only "laws on the back of the ethnic neighborhoods that we call the *banlieue* here in France, on the back of Muslims in the so-called war against terror, these measures have been extended to our anarchist friends, to the union leaders, to environmentalists" (Intercepted 2017b). As of the time this research is being written, France has held a continuous State of Emergency which targets political outcasts of the biopolitical body for roughly a year and a half. "France's emergency measures, including house searches without warrant, assigned residence orders and the closure of mosques and businesses, and has expressed concern that France could be in a perpetual State of Emergency. Others have expressed fear that France will carry on in a permanent State of Emergency; that is, the emergency regime will become the 'new normal'" (Amnesty International 2017: 12-13). As of May of 2017, the French Government had classified over 17,000 people as terrorist suspects (Thiénot 2017).

In July of 2016, François Hollande almost ironically points out the problem with prolonging the State of Emergency himself, stating: "We can't prolong the state of emergency forever. That would make no sense, it would mean that we were no longer a republic with laws which can apply in all circumstances" (Amnesty International 2017: 11). Whatever his intentions were, the State of Emergency was extended, yet again contributing to the argument that the exceptional powers are a permanent component to the current paradigm.

Furthermore France is starting to expand their application of emergency measures "aimed at fighting terrorism to a state of emergency aimed at maintaining public order" (Zaretsky 2016). An overwhelming amount of the implementations of the State of Emergency has been used against people who are Muslim or look Muslim (Dalhuisen 2017). Black- and Arab looking persons are 20 times more likely to be arrested in France (Intercepted 2017b). Beginning in 2004, France started passing laws which target their Muslim population's rights to wear headscarves to school or work. More recently France has enacted a variety of surveillance laws such as "the criminalization of the BDS movement, the criminalization of social movements, the militarization of the police, the attempt to even change the French Constitution in order to strip from their citizenship; people who are convicted of acts of terror, meaning that if a person is charged with terrorism and convicted: He loses his citizenship" (Intercepted 2017b)[24]. The stripping of citizenship is not only a feature of an Agambenian State of Exception, but is also inconsistent with Article 15 of the Universal Declaration of Human Rights: "Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality" (UN General Assembly 1948). Some take it further yet, after "November's attacks, certain prominent figures on the right, like Laurent Wauquiez, even called for the creation of concentration camps for terrorism suspects" (Zaretsky 2016).

In the 2017 State of the Union Address, President Macron announced that he planned to lift the State of Emergency in fall of 2017. At the same time promising extensive new anti-terror laws that would institutionalize many aspects of the emergency declaration. Many human right groups, such as Amnesty International, have condemned these laws which would allow for the "French authorities shut down places of worship thought to be promoting ex-

[24]French Human Rights and Civil Liberties activist Yassar Louti points out of this particular argumentation of removing citizenship: "When terrorism was white in the 1950s, nobody spoke about revoking their citizenship, even if they had attempted to overthrow the president, Charles de Gaulle. Nobody tried to remove — to revoke the citizenship of the far-left white terrorists in the '60s and '70s, and the list goes on. But the day terrorism went from white to brown, then it became a question of identity" (Intercepted 2017b).

tremism for up to six months [...and...] allow authorities to act without requiring permission from the court in taking greater powers in securing areas or events which it perceives to be at risk" (Bell / Masters 2017). Thereby incorporating extra-legal aspects of a State of Emergency into the constitution itself.

Although France is the only European nation to have an active State of Emergency, Amnesty International is concerned by other state's actions which have "raised serious concerns about disproportionate emergency measures" that are beginning to be implemented on the rest of the continent (2017: 12). In a recent report by Amnesty International, it was assessed that "[i]ndividual EU states and regional bodies have responded to [terrorist] attacks by proposing, adopting and implementing wave after wave of counter-terrorism measures that have eroded the rule of law, enhanced executive powers, peeled away judicial controls, restricted freedom of expression and exposed everyone to government surveillance" (2017: 6). The report cited that certain states are adopting constitutional amendments which would make a State of Emergency easier to implement in response to a terrorist attack, including Bulgaria, France, Hungary, Luxembourg. Other states have implemented laws which mimic a State of Emergency in response to real or perceived terrorist threats; these countries include: Poland, the United Kingdom, and Austria. The report went on to investigate counter-terrorism initiatives implemented or proposed by European states and regional bodies instead "of strengthening the European human rights system, these measures have been steadily dismantling it" (Amnesty International 2017: 7). Amnesty International states that one of the most striking developments of the counter-terrorism measures is the frequency and ease of use with which State of Emergencies are declared. The Emergency is also frequently prolonged and appears to be taking a similar form to the norm. "Powers intended to be exceptional are appearing more and more as permanent features of national law" (Amnesty International 2017: 7).

Concrete examples of discriminatory implementations of the State of Emergency are documented throughout the report and include: *"Men, women and children have been verbally and physically abused. Passengers have been removed from planes because they 'looked like a terrorist'. Women have been banned from wearing a full body swimsuit on the beach in France. Refugee children in Greece have been arrested for playing with plastic guns. Instances of discrimination appear in every section of this report, highlighting that certain forms of discriminatory action by the state and its agents are increasingly seen as 'acceptable' in the national security context"* (Amnesty International 2017: 7). Consolidation of power at rapid speeds responding to a threat leaves little time to consider the human rights implication of a State of Emergency. Little to no judicial oversight can be a "recipe for abuse at the best of times" (Amnesty International 2017: 11). Amnesty International cites the rise of far right nationalist parties, anti-refugee sentiment, stereotyping and discrimination against Muslims and Muslim communities, intolerance for speech or other forms of expression" that is rampant across Europe in the present paradigm and states that the evocation of the State of Emergency " will target certain people for reasons that have nothing at all to do with a genuine threat to national security or from terrorism-related acts. Indeed, that is happening in Europe already" (2017: 11).

More and more countries are taking measures to make it easier to evoke a State of Emergency. "The threshold for the triggering and extension of emergency measures has been lowered – and runs the risk of being reduced even further in coming years" (Amnesty International 2017: 8). In this paradigm, the State of Emergency is used as tool of governmentality of the security state in attempt to make order out of disorder on the backs of people's rights and freedoms.

President Erdogan in Turkey has also declared a State of Emergency in response to

the failed coup of July 2016. The country has been in a continual State of Emergency ever since. Deputy Prime Minister Numan Kurtulmus asserted in the most recent extension of the declaration in April of 2017 that the State of Emergency is necessary, "to provide the continuance of measures aimed at securing the rights and freedoms of citizens" (Al Jazeera 2017). This is juxtaposed with the reality of the Emergency, "[t]he result of which has resulted in "over 7,500 people have been arrested, while 9,000 police officers, 2,745 judges, and 49,000 government workers have been fired" (Mohdin 2016), as well as the shut-down of over 600 schools (BBC News 2016a) as a direct result of the exceptional powers of the executive under Erdogan. One finds overwhelming use of censorship under the Turkish State of Emergency, including: "shutting down educational establishments, banning foreign travel for academics and forcing university heads of faculty to resign" (BBC News 2016a). Human Rights Watch warned against prolonging Turkey's Emergency stating: "The cabinet's decision to extend the state of emergency would further endanger human rights and the rule of law, which have already been badly damaged in Turkey under the state of emergency" (Al Jazeera 2017).

Tunisia is in a prolonged State of Emergency that has been in effect since November 2015 after ISIS took credit for an attack on the Presidential Guard. The Tunisian State of Emergency "grants emergency powers to the police, and also allows for the prohibition of demonstrations and any gatherings 'likely to provoke disorder'. It also provides for adoption of measures to 'control the press'" (Muisyo 2017). President Beji Caid Essebsi cited the continuous War on Terror as the need for prolonging the Emergency.

Mali has been in a State of Emergency since November 2015 when a regional group of al-Qai'da fighters stormed the Radisson Blu in Bamako. The State of Emergency, which was originally only intended to last 10 days, was prolonged for another six months this past April of 2017 (Diallo 2017). Although the original declaration of Emergency gave powers to

restrict public gatherings and gave additional authority to security 'services', the most recent extension of the Emergency also "gives security forces extra powers of arrest and detention" (Diallo 2017).

Venezuelan President Nicolas Maduro prolonged the State of Emergency in Venezuela for the 7th time this past May. Originally responding to economic and political unrest in recent years, and the alleged unsolicited interference by the United States, the Emergency was declared to "defend and guarantee citizens a dignified life, to protect them against threats, to maintain the constitutional order, to restore the social peace that guarantees an opportune access to basic goods and services, so they can enjoy their rights in an environment of peace and stability" (teleSUR 2017). This particular emergency extension, however, is explicitly illegal. According to "Article 236 of the Bolivarian Constitution allows Venezuela's head of state to prolong a 60-day state of emergency" only once, and Maduro has now extended the Emergency seven times (teleSUR 2017). What is especially interesting about the Venezuelan case is that the US Executive, Obama and Trump, respectively, have denounced Maduro for continuing to extend his powers in a State of Emergency. Trump recently, on Aug 1st 2017, called Maduro a "Dictator" (Boyer). The irony, of course, being that President Trump is criticizing the very mechanism which he, himself, is utilizing.

President Abdel Fattah al-Sisi extended the Egyptian State of Emergency in June of 2017, which was originally declared as a response to the Church Bombings of April. In addition to the expansion of police powers to arrest, surveillance and seizures, as well as the power to limit movement, the State of Emergency, "also grants Sisi the right to issue written or oral directives related to monitoring and intercepting all forms of communication and correspondence, imposing censorship prior to publication and confiscating extant publications, imposing a curfew or ordering the closure of commercial establishments and the sequestration

of private property" (The New Arab 2017). Opponents of the President fear that the extension was only made in order to "crackdown on political opponents and expand extra-judicial killings, enforced disappearances, without stopping terrorist attacks" (The New Arab 2017). Egypt's Constitution, however, only allows for a single extension of a State of Emergency [25], so this particular declaration *should* expire October 11 of 2017. The Association of Freedom of Thought and Expression has raised concerns of the censorship that was enacted during the first part of the Emergency, wherein over a hundred websites were blocked (The New Arab 2017).

At the level of global and regional governance bodies, one finds specific Resolutions having been passed to combat terrorism since the onset of the Global War on Terror. Many take an exceptional form from previous paradigms. The first of which, UNSC Resolution 1373 [26], which Schleppe, Director of the Law and Public Affairs Program at Princeton University, refers to as the Resolution which "signaled a change in the global order" (2006: 1). From a legal perspective, this Resolution, passed through the Security Council on September 28, 2001, was unique from all previous UNSC Resolutions in that it affected domestic legislation of all 191 member states, "all states were commanded to fight global terrorism in a common template forged by international organizations. And, perhaps more uniquely, most actually did so" (Schleppe 2010: 438-439). After this Security Council resolution was passed, "for the first time in Security Council history, a state could be in noncompliance with international law by failing to have on its books a particular criminal offense, or a particular regime for monitoring financial transactions, or a particularly strict asylum policy" (Schleppe 2006: 1). This is an international coordination of domestic laws, not just an establishment of a new international law, which mandated governments worldwide to become hyper-vigilant

[25] Likely included in the Constitution which went into effect in 2014 because the country of Egypt had been in a near perpetual State of Emergency from 1967 to 2012.

[26] see S.C. Res. 1373, Sept. 28, 2001, U.N. Doc. S/RES/1373.

against terrorism. This particular resolution is included in the section on State of Emergency because of its unique characteristics both politically and legally. It sets a new precedent for the Security Council, this body "now has the capacity to require all U.N. member states to change their domestic laws in parallel in order to tackle common threats" (Schleppe 2010: 440). As a direct response towards terrorism, and as an exercise of the special powers of the Security Council to impose domestic laws in each member states, this must be considered relevant towards a State of Exception paradigm.

Many international governing bodies soon utilized Resolution 1373 to pass counterterrorism measures of their own, complying their member states to further-yet obligations. The European Union "sped up initiation of the European Arrest Warrant to create a Europewide system for arrests and prosecutions of terrorists" (Schleppe 2010: 441). Since then, the EU has continued to push member states to enact more and more regulations. The African Union also took steps to enforce member states to pass legislation in compliance with Resolution 1373 [27]. ASEAN [28] and the Organization of American States [29], respectively, organized their counter-terrorism strategies in compliance with the UNSC Resolution. While normally there is a compliance problem with international law, the widespread application of "the Resolution 1373 framework makes the anti-terrorism campaign an extraordinary example in international law" (Schleppe 2010: 443). After September 11th, the State of Emergency regarding the terrorist attacks of 9/11 did not remain national within the US, the security measures and the exception spread around the globe.

Resolutions with similar legal features have since been passed by the UNSC in that they are legally binding. More recently UN Security Council Resolution 2178, which is nicknamed

[27] see African Union, The Peace and Security Agenda: Preventing and Combating Terrorism in Africa, http://www.africa-union.org/root/AU/AUC/Departments/PSC/Counter_Terrorism.htm

[28] see Association of Southeast Asian Nations, ASEAN's Stance on Terrorism, http://www.aseansec.org/12636.htm

[29] see Inter-American Committee against Terrorism, Organization of American States, http://www.cicte.oas.org/Rev/En

the "Foreign Terrorist Fighter" Resolution, was adopted "at rocket speed in September 2014, required states to pass laws to counter the threat of 'foreign terrorist fighters'" (Amnesty International 2017: 6). Primarily drafted by the United States, the Resolution states in paragraph 5 that states must, "prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities" (UN Security Council Resolution 2178 2014). Furthermore member parties must prosecute training or fighting with foreign terrorist groups, or financing their operations, as a "serious criminal offense" (UN Security Council Resolution 2178 2014). Domestic applications of the Resolution have included measures similar to those structures one would find in a State of Emergency:

> "[E]xpansion of police powers of search and seizure, in some cases without judicial authorization; gag orders and other restrictions on speech; constraints on religious observance and protests; sweeping travel bans; banishment measures including revocation of citizenship, in some cases without a criminal conviction or adequate legal safeguards; and unfettered collection of individuals' metadata such as phone call logs and Internet activity. Other provisions authorize prolonged detention before charge or trial, or the use of special courts, secret witnesses, and secret evidence. Harsh punishments include lengthy prison terms and, in some countries, the death penalty" (Human Rights Watch 2016b: 9).

Again, no universal, legal definition for terrorist exists, posing serious concerns for many human rights bodies such as Human Rights Watch. This human rights advocacy group warns that the Resolution has been applied domestically "by such laws include not only terrorism suspects but also peaceful protesters, journalists, political opponents, civil society, and members of ethnic or religious groups, many of them Muslims" (2016b: 1). While states have a responsibility to protect those in their jurisdiction, many laws such as these have had the opposite effect, and has already degraded the universality of human rights standards towards specific populations.

In isolation, perhaps some of these declarations of a State of Emergency would not raise enough concern to warrant the need to call this a new *paradigm*, but they are not isolated and they are not short term. The *prolonged* nature of these Emergencies is highly disturbing given its implications to rule of law and human rights. The constant threat of 'terrorism', an undefinable enemy, is an important excuse to remain in a constant State of Emergency. With the ability to equip the executive with special powers at his or her discretion, the State of Emergency is being utilized more as a tool of politics in the present paradigm. Under a Schmittian State of Exception, one would find the suspension of the norm in order to restore constitutional order. Under this paradigm, we do not see a return to the previous legal norm, in fact, one finds a domino effect worldwide of states preparing themselves to enact a State of Emergency or to continue to extend those already in effect. The State of Emergency seems to be applied as a tool for governments. The more it is being implemented, according to Agamben, return to a normal legal paradigm becomes impossible. The application of the State of Emergency globally is like squeezing toothpaste out of a tube: it is easy to get the toothpaste out, but becomes next to impossible to return it back once it has been expelled from the tube.

4.2 The Security State and Dirty War

> *"While disciplinary power isolates and closes off territories, measures of security lead to an opening and globalisation; while the law wants to prevent and prescribe, security wants to intervene in ongoing processes to direct them. In a word, discipline wants to produce order, while security wants to guide disorder"* -Giorgio Agamben (2001).

In 2006, US General David Petraeus developed the official counterinsurgency, or COIN, strategy of the War on Terror. The goal was to not just have soldiers fight in war, but be nation builders as well. The phrase "win the hearts and minds" of the Afghani or Iraqi people

was frequently repeated in political rhetoric. However, this particular aspect of the mission was confusing for the soldiers on the ground. There was uncertainty as to what they were doing. Infantry men and women could not understand why they were handing out "[b]ags of salt, things of ghee, bags of rice. We would hand out crayons for the kids. I distinctly remember the, uh, map puzzles of Afghanistan with watercolor paint set. We handed out quite a bit of those" (Koenig 2015) recalled US soldier Jon Thurman.

This particular aspect of the COIN strategy failed soon after it was implemented. For soldiers this task was counterintuitive to how they had been trained in bootcamp, how they had been indoctrinated by the military, to look at war. "I think a lot of guys were a little bit weirded out by going out and shaking hands, and, you know, I figured there'd be a little bit more shooting involved" (Koenig 2017). The disciplining of the soldiers pays little attention towards creating a distinction between *Muslims*, *Arabs*, Middle Eastern people from those that they are the real enemies of the war (Taliban, al Qai'da, etc.). There is very little care by the Department of Defense to distinguish civilians from the enemy. In bootcamp, Navy SEALs, for example, used "Muslim woman wearing a religious head scarf with [verses from the] Quran behind her" as practice targets for training (Hooda 2012). Islamophobia is widespread in the US military and that has real consequences on how the US targets civilians in this war.

This research has made many references to the undefinable enemy of the War on Terror. One of the many consequences this aspect of the State of Exception paradigm has is on the globalization of securitization. This implies the idea the the State of Exception leads to "measures of security work towards a growing depoliticization of society" (Agamben 2001). This paradigm of security, according to Agamben, is incompatible with democracy. Security works to try to control a world that is full of chaos and emergency, not to try to prevent

the disorder altogether. The security state acts more as a police state. What one finds in the War on Terror is the global police of the US "now becomes politics, and the care of life coincides with the fight against the enemy" (Agamben 1998: 147).

The operations of the US military and government throughout the entire campaign has resulted in the deaths of far more civilians by policy or strategy than in previous wars. So much so that accurate numbers of civilian casualties are either undisclosed due to top secret security levels, or mis-filed as enemy combatants (Scahill 2015). This is a pure expression of a state's power to determine who is allowed to let live and who to allow to die. The biopolitics of this paradigm immediately identifies biological characteristics politically (Agamben 1998: 148). The US has re-branded this concept into the term "targeted killings" most noticeably realized in the tool that is *drone*.

The drone has been "President Barack Obama's weapon of choice, used by the military and the CIA to hunt down and kill the people his administration has deemed — through secretive processes, without indictment or trial — worthy of execution" (Scahill 2015). With campaigns in Afghanistan, Yemen, Syria and Somalia, these drone strikes are sometimes even occurring outside declared war zones.

Top Secret documents that were leaked in 2015 to *The Intercept* regarding specifics of the drone programs revealed that the "Obama administration masks the true number of civilians killed in drone strikes by categorizing unidentified people killed in a strike as enemies, even if they were not the intended targets" (Scahill). The documents also indicated that the strikes were not just targeting al Qai'da and Taliban operatives, but armed local groups as well. It was stated in the aforementioned document that there is not much fact checking when it comes to the accuracy of the intelligence before drone strikes are made. Most intel comes from metadata associated with phone SIM cards and computers, a tactic which is widely known

to be unreliable but is in-use anyway. While these operations are extremely secretive, the US may try to defend their actions because of the emergency created by their enemy. They may try to say that collateral damage is simply the price for containing terrorists. In reality, we find "security and terrorism forming a single deadly system in which they mutually justify and legitimate each others' actions" (Agamben 2001). The leaked documents demonstrate just that, highlighting "the futility of the war in Afghanistan by showing how the U.S. has poured vast resources into killing local insurgents, in the process exacerbating the very threat the U.S. is seeking to confront" (Scahill 2015).

The whistleblower responsible for leaking the above-described document is an unnamed person from the special operations community. This person stated of the perception of the intelligence community regarding the lives of those they kill:

> "They have no rights. They have no dignity. They have no humanity to themselves. They're just a 'selector' to an analyst. You eventually get to a point in the target's life cycle that you are following them, you don't even refer to them by their actual name. [A process which contributes to] dehumanizing the people before you've even encountered the moral question of 'is this a legitimate kill or not?'" (Scahill 2015).

According to Agamben, society, even the most modern, identifies homines sacri. This is immediately political as demonstrated by the US government's ability to allow for their death. This practice does nothing to gather intelligence or help win the war. It is a process of hyper-securitization. "When politics, the way it was understood by theorists of the 'Polizeiwissenschaft' in the eighteenth century, reduces itself to police, the difference between state and terrorism threatens to disappear" (Agamben 2001). The Department of Defense, as led by the US President, decides on the value, or non-value, of life.

If Obama and Bush put these kinds of operations into motion, Trump is taking it to the next level. In fact, "just six months into office, Trump is presiding over a bloodbath that is killing civilians in record numbers in Iraq in Syria" (Intercepted 2017c). Furthermore an

independent war monitoring group, *Airwars*, "estimates that more than 2,200 civilians have been killed in U.S. and coalition strikes since Trump became president" (Intercepted 2017c). To circle back to a point made above, the governmentality that is being applied with massive pressure on the US population right now separates the *self* from the *other*. For many, these civilian casualties raise little alarm, in fact the civilians are grouped in with the enemy. [30] The aforementioned whistleblower states that the security community treats civilians killed by drone strikes as "guilty by association, [...] a drone strike kills more than one person" (Scahill 2015).

Policies that allow for actions such as drone strikes and extrajudicial, covert "target killings" lead towards a system of elimination of categories of people, be them Muslim, Arabic, Yemeni, Syrian, Somali, etc. Not only political and military enemies of the US are being targeted by policies, but categories of people. "Maybe the time has come to work towards the prevention of disorder and catastrophe, and not merely towards their control. Today, there are plans for all kinds of emergencies (ecological, medical, military), but there is no politics to prevent them (Agamben 2001). Agamben pointed at this indistinction between enemy and biological characteristics of *types* of people as the base of modern totalitarianism under the State of Exception. "[W]e can say that politics secretly works towards the production of emergencies. It is the task of democratic politics to prevent the development of conditions which lead to hatred, terror, and destruction — and not to reduce itself to attempts to control them once they occur" (Agamben 2001).

[30] To give a brief personal anecdote, I (Corcoran) recently moved back to the US and was talking to my politically active neighbor who self identifies as neither Republican nor Democrat. Although he could not even remember the name of the country of Syria when speaking with me, he proposed, and wrote letters to various politicians including Trump, suggesting that the US should "bomb it until it is a big hole in the ground". When I asked him about civilians who lived there he simply responded "no one is innocent over there". That is part of the governmentality and separation of the self that the state is creating.

4.3 Biopolitical Bodies, Detention, Torture

> *"When a conservative member of the U.S. Congress recently designated the Guantanamo prisoners as 'those who were missed by the bombs' and thus forfeited their right to live, he almost literally evoked Agamben's notion of homo sacer, a man reduced to bare life no longer covered by any legal or civil rights"* –Slavoj Zizek (Agamben 2005).

Agamben has asserted that the State of Exception has become the rule (2005: 6), and nowhere is this more explicitly demonstrated than in Guantanamo Bay prison. "Neither prisoners nor persons accused, but simply 'detainees', they are the object of a pure de facto rule, of a detention that is indefinite not only in the temporal sense but in its very nature as well, since it is entirely removed from the law and judicial oversight" (Agamben 2005: 3-4). Those detained have lost all legal identity within the physical confinement of the detention camp, thus constituting the detainees as having the status of bare life. Judith Butler has stated of the status of Guantanamo detainees that the bare life has reached its "maximum indeterminacy" (Agamben 2005: 4).

The important question for Agamben in his book *Homo Sacer* in regards to how an extreme violation of legal norms, namely the Nazi *Lager*, is not how people allowed for such things to happen, but rather how the state and legal structures can allow for these spaces of a-legality to be created. The paradigm of the State of Exception is an extension of wartime authority and the suspension of the constitution. What one sees after the declaration of war in 2001 is exactly that.

Although there are certainly detention centers throughout the world which represents bare life and a State of Exception, this particular section will focus on the detention camp of Guantanamo Bay because it is not as covert as other "black sites", therefore more specifics are known of what takes place within its boundaries. It should be mentioned, however, that the

SSCI Report (2014) which investigated mechanisms of detention, rendition and interrogation have found that the practices of Guantanamo Bay are not particular, rather normal practice of CIA detention facilities of the present era.

Article I of the US Constitution states the, “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion of Invasion the public Safety may require it” (Art. I, § 9). It is constitutionally unclear whether the decision to suspend Habeas Corpus is that of the legislative body or that of the president’s, however in practice the President has had the sovereign decision on the State of Exception since the presidency of Abraham Lincoln. Article 2 of the Constitution goes on to explicitly name the president as the “Commander in Chief of the Army and Navy of the United States” (Art. 2, § 2). The sovereign power of the President is essentially anchored to the emergency created during times of war and immediately became a central discourse to the Bush administration when discussing his role as the Commander in Chief and protector of the American people. This directly makes reference to his powers as the sovereign in the State of Exception. Bush was thus, “attempting to produce a situation in which the emergency becomes the rule, and the very distinction between peace and war (and between foreign and civil war) becomes impossible” (Agamben 2005: 22).

Six days after the terrorist attacks of September 11th, George Bush gave a *military* order of the creation of the "Rendition, Detention and Interrogation" program of the CIA (Central Intelligence Agency 2014), thereby directly evoking the State of Exception. The subject under RDI program was anyone "posing a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities" (Human Rights Watch 2015), although Bush makes special mention of al Qai’da combatants as subjects of the detention facilities in his order. This military order, directly citing the State of Emergency declaration 7463, led to

the creation of such detention camps as Abu Ghraib and Guantanamo Bay. These detention camps are born out of a State of Exception and martial law (Agamben 2005).

It should be mentioned briefly that Agamben's conception of the State of Exception does not mean that the norm is abandoned, just that it is suspended. Therefore it is neither within or outside of judicial order, rather it does not belong to it. The entire Third Reich is to be considered a State of Exception. In the context of the War on Terror, national constitutions remain in tact, and yet suspended, and international law ignored completely.

This is explicitly seen in the circumvention of the anti-torture statutes when designing the RDI program of Guantanamo Bay prison. The CIA employed lawyer John C. Yoo to provide "legal arguments to support administration officials' assertions that the Geneva Conventions did not apply to detainees from the war in Afghanistan" (Lewis 2005). Yoo's argued that because al Qai'da and the Taliban are non-state actors, the Geneva Convention and the War Crimes Act could be bypassed because the detainees were not party to such treaty to govern war (US Department of Justice 2002). In a White House internal memorandum, Bush calls for a new thinking in laws of war, stating: "Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva" (The White House 2002). The memorandum went on to say that "our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment" (The White House 2002).

The State of Exception is founded upon the principle of necessity. In the context of the "necessity" to respond to the War on Terror, President Bush's decision to evoke a State of Emergency and expand executive powers is a subjective judgment; something "undecidable in fact and law" (Agamben 2005: 30). The executive's necessity to make a decision is, of course,

his discretion. Upon enacting the State of Exception, one sees immediate consequences in regards to labeling the *self* and the *other* of the War on Terror. “The immediately biopolitical significance of the State of Exception as the original structure in which law encompasses living beings by means of its own suspension emerges clearly in the ‘military order’ issued by the president of the United States on November 13, 2001, which authorized the ‘indefinite detention’ and trial by ‘military commissions’ (not to be confused with the military tribunals for by the law of war) of noncitizens suspected of involvement in terrorist activities” (Agamben 2005: 3).

The State of Exception is a "point of imbalance between public law and political act in an ambiguous, uncertain, borderline fringe at the intersection of the legal and the political" (Agamben 2005: 1). During the time of responding to necessity, the question of borders becomes critical to the mechanisms of biopolitics. What one found in the aftermath of the September 11th attacks was the implementation of a variety of "security" mechanisms designed to constitute new subjects of the biopolitical body. “The USA Patriot Act issued by the U.S. Senate on October 26, 2001, already allowed the attorney general to ‘take into custody’ any alien suspected of activities that endangered ‘the national security of the United State,’ but within seven days the alien had to either be released or charged with the violation of immigration laws or some other criminal offense” (Agamben 2005: 3). Biopolitical mechanisms are implemented to create divisions of the USA *self* and the enemy *other*.

This is a separation through detention of the *terrorist body* [31] from the rest of the global society. “What is new about President Bush’s order is that it radically erases any legal status of the individual, thus producing a legally unnameable and unclassified being”

[31] The biopolitical creation of the *terrorist* body is one that blurs a legal and real definition of someone who might threaten the USA and the West. It is an incredible expression of power which separates the biopolitical body of the *other* immediately produces definitions for the USA or West body. The production of this body is an "application of the rule" (Agamben 1998: 174).

(Agamben 2005: 3). The goal is the exclusion of detainees from the political community. Once physical spaces of the exception have been created, there can be no return to classical politics (Agamben 1998: 188).

The detainees of Guantanamo Bay are most certainly characterized as *Homines Sacri* of the modern paradigm. Their detention is pure expression of power by the USA, and simply an actualization of the capacity to exert such a power. The latest figures show that there have been a total of 780 detainees since the detention camp opened in 2002, however only eight of these detainees have actually been tried by a military commission and one detainee stood trial in a US Federal Court (Human Rights First 2017). 93 percent of the detainees have been held for more than 10 years without any due process of law (ibid.) [32]. The spatial borders of the detention camp represent a very clear State of Exception. Within the confinement of Guantanamo Bay prison, policy allowed for the following methods of interrogation: "(1) the attention grasp; (2) 'walling'; (3) facial hold; (4) facial slap; (5) cramped confinement; (6) wall standing; (7) stress positions; (8) sleep deprivation; (9) waterboarding; (10) use of diapers; (11) use of insects; and (12) mock burial" (US Senate Select Committee on Intelligence 2014: 136). It is a place of legal limbo, quite literally as it is outside of the USA's legal jurisdiction. A total of nine prisoners died during their detention. In modern biopolitics, according to Agamben and Foucault, the sovereign is "he who decides on the value or non-value of life as such" (1998: 147). The existence of Guantanamo Bay itself is a direct demonstration of the sovereign powers of the US President.

To follow Agamben's lead, it is important to understand how Guantanamo Bay was able to happen in a constitutional democracy. "Not only do the Talibans captured in Afghanistan not enjoy the status of POWs as defined by the Geneva Convention, they do not even have

[32] To give more specific empirical figures, Human Rights First has reported that 32 detainees were determined by US Federal Courts as being held unlawfully as well as 21 detainees who have lost their habeas corpus petitions challenging their detention (2017).

the status of persons charged with a crime according to American laws" (Agamben 2005: 3).

How can juridical procedures and power mechanisms cause spaces like Guantanamo Bay to happen? The CIA has since reported that these acts were not only well known by government officials, but the product of policy design; "the record shows that the Secretary of State, Deputy Secretary of State and Ambassadors in detention site host countries were aware of the sites at the time they were operational. In addition, Station Chiefs in the respective countries informed their Ambassadors of developing media, legal, or policy issues as they emerged, and provided a secure communication channel for discussion of these matters with Washington" (Central Intelligence Agency 2014: 11) [33].The mechanisms described in the paragraph above violate both domestic and international laws of torture. The camp (in reference to the Holocaust camps of the Third Reich) is, according to Agamben, opened once the State of Exception becomes the rule (1998: 168-169).

Regarding the domestic, criminal investigation of the Rendition, Detention and Interrogation Program of Guantanamo Bay, U.S. Attorney General Eric Holder tasked Justice Prosecutor John Durham to look into 101 cases of alleged abuse back in 2009. Holder stated before the preliminary review commenced that that "the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees" (Department of Justice 2009). The legality of the program itself was not investigated; merely the investigation by the US Justice Department was to make sure that everyone "acted in good faith" to their commands. The State of Exception "appears as the legal form of what cannot have legal form" (Agamben 2005: 1). What is clear is that "[t]he gap in liability for the post-9/11 counter-terrorism abuses is actually pretty alarming and pretty broad" (Bierman 2015). Executive Director of the ACLU Anthony Romero stated "If our laws have meaning, we can't

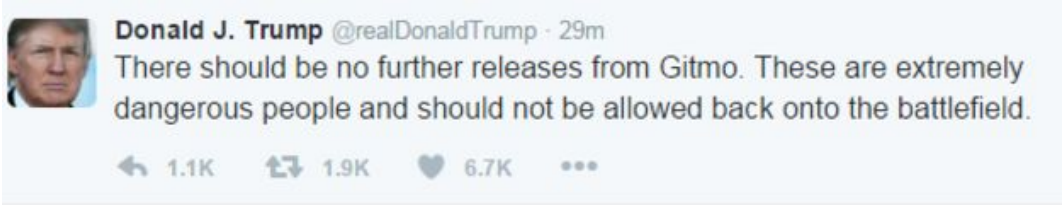
[33]There were numerous detention facilities worldwide to which this quote makes reference.

accept that some of [the U.S.'s] most senior officials authorized criminal conducts and were never held accountable" (UN Human Rights Council 2015), but perhaps this is indeed an indication that the legal paradigm has changed:

> "The proper characteristic of this violence is that it neither makes nor preserves law, but disposes it and thus inaugurates a new historical epoch" (Agamben 2005: 53).

Towards the end of his Presidency, Bush did consider shutting down the detention facility, not because of the juridical and human rights violations, but because (according to his memoir) "the detention facility had become a propaganda tool for our enemies and a distraction for our allies," (2010: 180). President Obama did sign an Executive Order to shut down Guantanamo Bay in 2009 and commissioned a task force to try to have the detention facility closed within a year. This failed to happen because the task force determined, "[i]t was likely to designate several dozen detainees as impossible to prosecute for various reasons, but too dangerous to release" (Savage / Shane 2016). The statement effectively cites the definition of *Sacred* persons in the Agamben sense. Therefore, the detainees remained locked up without judicial trial. Thus demonstrating that once begun, the State of Exception becomes rule, and classic politics is impossible to restore. [34]

Current US President Trump is rumored to have drafted an Executive Order that will reopen the prison for new detainees. On January 3, 2017, he tweeted the following:



[35].

Furthermore the current President has expressed that he wants to expand the sacred bodies

[34] Whether or not Obama was committed to restoring a legal paradigm by closing Guantanamo Bay, it proved to be impossible given the new epoch of governmentality

[35] Gitmo is colloquialism for Guantanamo Bay Detention Camp stemming from the military code for the camp *GTMO*

to include *family members* of suspected terrorists:

> "Mehdi Hasan: Would you kill the family of a terror suspect? Yes or no?
>
> General Michael Flynn: Waterboarding was legal.
>
> MH: OK. Would you kill the family of a terror suspect? Yes or no?
>
> MF: I would, I would have to see what the circumstances of that situation was.
>
> MH: Are you kidding me?
>
> Donald J. Trump: You have to take out their families. When you get these terrorists, you have to take out their families." (Intercepted 2017c) [36].

Under the Trump Presidency, one has seen, in fact, an incredible increase in civilian casualties in Arab nations. These *Homines Sacri* are often the victims of bombs or drones that are said to target one or two suspected terrorists, but more often than not kill entire towns and villages. If those in Guantanamo Bay were "missed by the bombs" the current administration will make sure that their families are not. Thereby continuing the identification of sacred biopolitical bodies of the modern paradigm, incapable of being tried in the court of law, and also incapable of being released. They are bodies which are viewed as having been "missed by bombs" yet cannot be legally tried in the court of law. A true zone of indecidability, thereby residing in a permanent State of Exception.

4.4 Whistleblowers: Security and the new Witch-Hunt

> *"Every West Point graduate knows wars are won not with bombs but with information. Control the facts, and you control the battlefield"* - Michael Ames (2016).

Intelligence is a tool for policy-makers. Therefore, once the War on Terror began, the intelligence community in the US ballooned exponentially. After September 11, "seventeen million square feet of offices in thirty-three handsome and generously funded new complexes powered up twenty-four hours a day, where an army of nearly one million American profession-

[36] Trump's quote was not a response to Hasan's nor General Flynn's statement, they were made at different times

als spies on the world and the homeland" (Maddow 2012: 5). Counterterrorism mechanisms to prevent surprise attacks require the growth of the intelligence community. In the aftermath of the Cold War, the espionage system once used to gain and control the information of the Soviet Bloc experienced a shift. A combination of an already existing apparatus and an always advancing technology created an all-hearing structure that could not separate the outside from the inside: "And what [the government] did, of course [...] was to unchain the listeners from law [...] Fudging with the Foreign Intelligence Surveillance Act carried them into the land where law no longer provided them with useful landmarks" (Moglen 2013: 4-5). In this section it will be highlighted how once this space of anomie is entered, every action, measure or policy occur in a space of a-legality without necessarily referring to legal acts, nor having legal consequences (Agamben 2005: 63).

It is also worth emphasizing that in this context "the policy-maker is not a passive recipient of intelligence but actively influences all aspects of intelligence" (Lowenthal 2015). The intelligence community gathers information, but also must frame the information for the public under the guidance of the policy-makers. The US government must safeguard any counter-narrative to their depiction of the War on Terror in order to maintain legitimacy and power. The US has imposed divisions as part of their "world-making" strategy. When former members of the intelligence community expose malpractices of the US government, it threatens their imposed world-view.

'Whistleblower' is an increasingly common term to refer to someone who reports internal misconduct. The federal Whistleblower Protection Act (WPA) provides "statutory protections for federal employees who engage in 'whistleblowing,' that is, making a disclosure evidencing illegal or improper government activities" (Whitaker 2007: 5). The idea of the act is to protect these individuals while placing accountability on the government. Rather than

providing these protections, the US Government, under both the Bush and Obama administrations, have turned the tables. In fact, "those who have gone public disclosing illicit and immoral behavior by the federal government have been consistently singled out for discrimination and excessive punishment" (Hagopian 2015). A former NSA employee states, "[r]ather than address its own corruption, ineptitude and illegal actions, the government made me a target of a multi-year, multi-million-dollar federal criminal 'leak' investigation as part of a vicious campaign against whistleblowers that started under President George W. Bush and is coming to full fruition under President Obama" (Friedersdorf 2011). Furthermore, with the backdrop of the Global War on Terror, the Obama administration "also jailed more whistleblowers and journalists than any other president" (Hagopian 2015). The government "has chosen to ignore the legal definition of whistleblower [...] and has prosecuted truthtellers" (Kiriakou 2013). The government, instead, is using its power to silence all dissenting voices.

The US government has the power to create a unitary voice by criminally investigating or prosecuting anyone whose actions or words goes against their narrative. These individuals are employees with little symbolic power to combat the established order. The government does not try to discredit their claims, rather tries to eliminate any debate at all. The US government instead threatens, prosecutes and otherwise delegitimizes the individual itself rather than their claims to censor any leaked-information. In keeping the government's narrative, "attacking whistleblowers and censoring non-classified information [...] short-circuits public debate" (Friedersdorf 2011).

The charges being leveled at whistleblowers and journalists are considered extreme and have not been used often throughout US history. Under the Obama Administration, eight people have been charged under the Espionage Act of 1917, a charge that has only been used three times prior in history (Bloomfield 2013). The goal of the US, while prosecuting

someone under the Espionage Act, “is not to punish a person for spying for the enemy, selling secrets for personal gain, or trying to undermine [U.S.] way of life. It is to ruin the whistleblower personally, professionally and financially" (Kiriakou 2013). Stephen Kim, who leaked documents related to North Korea while he was working at State Department, spoke about how his life changed after the conviction and the labeling as whistleblower: "homeless, penniless, family-less [...] I cannot go back to what I was. That person is gone” (Maass 2016). One of the charged individuals, John Kiriakou (2013) stated, “[t]he effect of the charge on a person’s life – being viewed as a traitor, being shunned by family and friends, incurring massive legal bills – is all a part of the plan to force the whistleblower into personal ruin, to weaken him to the point where he will plead guilty to just about anything to make the case go away [...] It is meant to send a message to anybody else considering speaking truth to power: challenge us and we will destroy you” (Kiriakou 2013). The case against leakers and whistleblowers is continuing in even harsher terms with the Trump administration and its former communications director Anthony Scaramucci declaring his will to "kill" all the leakers to pursue the President’s agenda (Lizza 2017).

Particularly interesting is the case of US Private Chelsea Manning, her whistleblowing, and the consequences she had to face before a tribunal and after in prison. After months spent in Iraq, keeping track of the "significant actions[37]" of the military, the Army analyst leaked classified information including videos and diplomatic reports (Shaer 2017). The reason for this came from the understanding that certain information should not have been kept hidden and that people needed to acknowledge the status of the war and the actions undertaken by the US government in the Middle East, especially against civilians. Manning had a clear view about it: "Let’s protect sensitive sources. Let’s protect troop movements. Let’s protect nuclear information. Let’s not hide missteps. Let’s not hide misguided policies. Let’s not

[37]They are also known as "SigActs", and it is the term that normally refers to "the written reports, photos and videos of the confrontations, explosions and firefights that form the mosaic of modern war" (Shaer 2017).

hide history. Let's not hide who we are and what we are doing" (Shaer 2017).

Once discovered by the military, Manning was imprisoned in Camp Arfijan in Kuwait, and then transferred to the military facility in Quantico, Virginia. The conditions in which she lived, the treatment reserved to her by the staff, the consideration she received in stating her reasons could make one believe she had no value, no voice to be heard, not worth the consideration.

> "At Quantico, Manning spent 23 hours a day in a 6-by-8-foot cell, for nearly nine months, much of it on Prevention of Injury, or P.O.I., status, in conditions that a United Nations special rapporteur later said could qualify as torture [38] [...] While on P.O.I. watch, Manning wore what's known as a "suicide smock," a white nylon garment that is all but impossible to twist or rip into a noose. She had no pillow, no sheets. She was required to give regular verbal confirmation during the day that she was O.K" (Shaer 2017).

The poor conditions in which she was held were exacerbated by the fact that, at the time, Chelsea Manning was transitioning gender, male to female. At the prison facility, the Army refused to provide hormones' therapy to inmates, but also simply to acknowledge that Manning should have been addressed as a woman, not as a man[39] (Shaer 2017). Because the *bio*, or life itself, is the target of the political, the US government disallowed whistleblower Manning's ability to govern her own body. This led to a decrease in Manning's psychological health, which caused her to attempt suicide twice while imprisoned (Associated Press 2016). The status of her gender dysphoria was used by the government to discredit her entire narrative rather than to address the concerns she had raised about the Iraqi civilians being targeted by the US Department of Defense.

[38] UN Special Rapporteur on Torture Juan Mendez conducted a 14-months investigation on the conditions in which Chelsea Manning was held, concluding that "the 11 months under conditions of solitary confinement (regardless of the name given to his regime by the prison authorities) constitutes at a minimum cruel, inhuman and degrading treatment in violation of article 16 of the convention against torture. If the effects in regards to pain and suffering inflicted on Manning were more severe, they could constitute torture" (Pilkington 2012).

[39] In this regard, it is worth mentioning the recent ban of transgender people from the military service in the United States, advanced by the Trump Administration. One of the argument presented by the president himself referred to the "tremendous medical costs and disruption that transgender in the military would entail" (Davis / Cooper, 2017).

The consequences of her actions reached the point to which Manning had to face the possibility of life imprisonment, being charged, among other things, with the accuse of "aiding the enemy" (Shaer 2017). The judge found her guilty of all charges except for two (including aiding the enemy), condemning her to 35 years in prison. After seven years served between Fort Leavenwort and Fort Meade, President Obama commuted her sentence and she was released in May 2017.

[40]

Manning is not the only one to be identified by the US government as a whistleblower under peculiar circumstances. Edward Snowden, John Kiriakou, Thomas Blake are all among the eight people being charged under the Espionage Act of 1917. The choice of referring to this century-old legal document has a very important and powerful symbolism when it comes to understanding the objectives and consequences of whistleblowers' criminalization. In fact, the law states that "one is guilty if one discloses classified information 'with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation'" (Greenwald 2013c). The stories of these people, who decided to publicize classified information to the American public, tell a different tale. In these cases, the intention of these whistleblowers was not to sell information to a foreign actor to make profit or undermine the security apparatuses of the country. Rather, the aim was to make

[40] (@xychelsea 2017)

the public aware of mal- or anti-democratic practices, measures and policies undertaken by the US government, which is "what every single whistleblower and source for investigative journalism, in every case, does - *by definition*" (Greenwald 2013c).

What is at stake then? The language and the terminology used in the 1917 law is fairly broad, and potentially opens the door to very different applications compared to what is the original objective of this act (Greenwald 2013c). A spectrum of interpretation so large leaves to prosecutors and accusers the liberty to shape the meaning, as well as the targets of the Espionage Act. This tool has not been used, in fact, against all leakers. Former CIA director David Petraeus was also discovered leaking classified information to non-authorized people, nonetheless he did not face the same process of public shaming, or the risk to spend many years incarcerated (Maass 2016; MacAskill/Ackerman 2016). "The only leaks they're interested in severely punishing are those that undermine them politically. The 'enemy' they're seeking to keep ignorant with selective and excessive leak prosecutions are not The Terrorists or The Chinese Communists. It's the American people" (Greenwald 2013c).

The pattern, once again, delineates on one side the governmental efforts to manage a society through securitization and biopolitical measures (like surveillance); on the other the "outsiders", who for different reasons do not fit or comply with the biopolitical body and that, for the sake of the main society, are criminalized and deprived of political, legal or social value. Like suspected terrorists, refugees or criminals; whistleblowers are silenced and de-legitimized in the name of the protection and safety of the social body. The result being that people are led to think that "[w]hen the morality of freedom was withdrawn, [the] State began fastening the procedures of totalitarianism on the substance of democratic society" (Moglen 2013: 7). All legitimacy was stripped away by the title of "espionage." This creates labels and divisions, which orders society.

The issue with whistleblowers in the United States, especially in relation to the War on Terror and the state's actions related to it, is particularly significant. The state, in a State of Exception paradigm, has a vested interest in appearing to be operating democratically and legally even if it is not. Whistleblowers pose a direct threat to this. "Washington has always needed an 'ism' to fight against, an idea against which it could rally its citizens like lemmings. First, it was anarchism, then socialism, then communism. Now, it's terrorism. Any whistleblower who goes public in the name of protecting human rights or civil liberties is accused of helping the terrorists" (Kiriakou 2013).

In the fight against terrorism, it is not only the perpetrators of violent acts that are prosecuted. The attempts to discover the illegality in which government and military are operating are severely condemned, to the point that those who seek to reveal this "fiction" are *kept outside* the social body, deprived of legal and political status. The debate over state's policies is taking place on a different level: "skepticism is being treated as sinful. And that's when you know you're not really part of a policy debate. This is a theological debate. You know these are people looking for apostates" (Intercepted 2017a). Every person who stands between the state's actions, the governmental discourse and the enemy, by shaping a new (and opposing) narrative, is brought into the conflict and tried as a traitor. In a war in which information and discourse play the biggest role, violence can take the form of a leak, a classified information or the disclosure of governmental secrets.

It seems particularly important for the US administrations to protect state secrecy with regards to actions undertaken in the context of the War on Terror. A relatively large portion of documents leaked in 2010 did not contain confidential or strategic information, the publication of which could hardly being considered a matter of national security (Greenwald 2013a). This means that what is really behind the obsessive control of information is not

the information itself, but rather the capability of the government to use this secrecy as an instrument to be able to act in a State of Exception. As Judith Butler put it in her study over the *Precarious Life*:

> "[o]ne way a hegemonic understanding is achieved is through circumscribing what will and will not be admissible as part of the public sphere itself [...] To produce what will constitute the public sphere, however, it is necessary to control the way in which people see, how they hear, what they see [...] The public sphere is constituted in part by what can appear, and the regulation of the sphere of appearance is one way to establish what will count as reality, and what will not. It is also a way to establish whose lives can be marked as lives, and whose deaths will count as deaths" (2004: XX-XXI).

Keeping information classified, limiting the access to documents and materials, labeling and criminalizing those who try to uncover those abuses of powers, all this gives the government space to act and perform in a space of unaccountability, of non-legality, where "fact and law coincide" (Agamben 2005: 26). Here secrecy means anomie, anomie means extraordinary powers, and special powers, in a situation of exception, most certainly imply abuses.

4.5 Refugee Camps, *Homines Sacri* and the Policies of Exclusion

> *"The camp is the space produced by the enforcement of an exception to the law, and those who end up in it are robbed of any legal protection insofar as they are sanctioned as threats to the stability of the political itself [Means without End 37]. This branding of certain social assemblages as guilty regardless of any proven criminal behavior uncovers the sacrificial logic at the heart of the camp: the lives of others are sacrificed to protect the lives of a self-authenticated collectivity"* (Fabbri 2009: 77).

One must not look far to understand that the world is facing one of the biggest and most serious refugee crises in the history of mankind. Conflicts, persecutions, climate change, droughts, low life expectancies are only some of the reasons that lead millions of people around the world to flee from their homes and seek refuge in another country. A long and complex debate is accompanying this issue with special attention given to whether or not these people should be entering receiving countries, to what extent they are entitled to full integration to

most countries, and which are the rights that may be conferred to them.

This analysis, however, will concentrate on the first step, the phase in which hundred of thousands of people are held in precarious structures of "reception", where laws, rights and normal legal practices seem to be suspended or not existent. Many scholars and researchers tackled this issue, formulating a discourse around the relationship between Agamben's figure of *homo sacer* and the modern refugee. An example of this connection is worth presenting in this research, given the relevance and the deep link with the main subject of this study. Thus, a connection between the policies of reception, the state of refugees in these "refugee camps" and the security issues framed in the discourse of the War on Terror will be presented.

The start of the War on Terror did not just commence a long, bloody war in the Middle East. Many cities throughout the world have been theaters of massive killings claimed by various terrorist groups. Since then, political discourses and media coverage largely concentrated on the portrait of a constant, imminent menace of further attacks and violence, allegedly coming from the Middle Eastern World and its citizens. This affected national and regional politics in many different ways.

In Europe, there have been many examples of how immigration and the refugee crisis influences political actions. The Brexit Campaign in the UK in 2016 vastly focused on the issue of migrants and integration. The leaders advocating for the "Leave" vote presented figures and facts depicting a "mass immigration" investing the United Kingdom (Travis 2016). A recent survey conducted in Britain shows that "Britain's vote to leave the EU was the result of widespread anti-immigration sentiment, rather than a wider dissatisfaction with politics" (Bulman 2017). Elsewhere in the continent, anti-immigration sentiments are shaping government actions. Hungary and Poland fiercely stated their unwillingness to welcome refugees, implementing the creation of containers-camps delimited by fences, while "[a] recent

survey by the CBOS organization found that 74 percent of Poles don't want migrants from Africa or the Middle East in their country" (Ciobanu 2017). With the increasing number of arrivals in the Italian ports in 2017, the government of Italy urged the EU states and institutions to work on a drastic change of the migration policies and spread the responsibility of migrants reception. A few days later, the Austrian governments announced the decision of militarizing the Alpine border to prevent immigrants and refugees from entering Austria's territory (Squires 2017).

This is not only a European issue. Cases of mistreatments, torture and abuses on refugees are spread all around the world, from the reception centers in Italy and the Jungle in Calais, to the mega-camps in East Africa. It is important to emphasize the global scale of this crisis, and how closely and deeply related all these experiences are.

The case of refugees' abuses in the islands of Nauru and Manus (Papua New Guinea), in the Pacific Ocean, with the support and endorsement of the Australian government, got the attention of media and human rights organizations world wide. Over the years, this "offshore processing" has become regular policy, with the government of Australia paying Nauruans to manage and take care of the "resettlement" (Human Rights Watch 2016a). These camps "were designed to be punitive and were widely promoted as a deterrent, to discourage anybody from seeking sanctuary in Australia by boat [41]", created to face exceptional waves of arrivals from South East Asia (Doherty 2016). The practices and conditions in the Nauruan refugee center have been kept secretive, with the Australian government passing an Act in the parliament that foresees a prison detention for staff members of the centers leaking information about the camps (Doherty 2016).

[41] The Australian governmental policy regarding the reception and resettlement of refugees does not allow the resettlement in Australian territory for people arriving by boat, while arrivals by plane are not subjected to this treatment (Doherty 2016).

A Human Rights Watch report on the conditions of refugees in Nauru described the situation as "prison-like", with little or no medical care even for the most serious cases, no freedom of movement and absolute indeterminacy as far as the time of "reception" is concerned (Human Rights Watch 2016). The consequences for physical and mental health of the refugees are disturbing, with leaked documents stating: "[a]woman who misses her husband in Australia carves his name into her chest with a knife. A girl writes in her school notebook, 'I want death, I need death'" (Bochenek 2016).

This policy on immigration control in Australia found approval especially among right-wing parties and supporters. Senator Hanson from the anti-immigration party One Nation referred to the Parliament about immigration:

> "We are in danger of being swamped by Muslims, who bear a culture and ideology which is incompatible with our own [...] It's about belonging, respect and commitment to fight for Australia. This will never be traded or given up for the mantras of diversity or tolerance. Australia had a national identity before federation, and had nothing to do with diversity and everything to do with belonging" (Agerholm 2016).

It is very important to emphasize the willingness of the Australian government to keep refugees outside the border. A bipartisan consensus from the two main parties in toughening the measures to prevent illegal immigration lead to the introduction of *Operation Sovereign Borders* (BBC News 2016). This act sees the military controlling the Australian waters and supervising the reception procedures, to ensure that no boats enter national territory and that every ship is re-directed to Nauru or Manus (BBC News 2016b).

The implementation of these measures that are preventing what would be the first, basic inclusion of refugees in Australia (which is *touching* the Australian soil) are strong signals of what is a path towards the securitization of borders and a standardized exclusion of people. What has been designed as a temporary solution for an emergency situation has developed into a paradigm of abuse, justified by the need to keep the Australian territory secure from

Muslim threats.

The refugee camp Dadaab is a structure of five camps that form the largest refugee complex of the world, in North-East Kenya. It has been established in 1991, during the Somalian clans' conflict, when thousands of people left the country to escape violence. Since then, the initially temporary solution for the great amount of Somali refugees grew large until it reaches, in most recent time, the size of a metropolis [42] (Hujale 2016). Three generations of people grew up in this camp, without being able to integrate into Kenyan society: "there is no prospect of local integration for the denizens of Dadaab, and only a lucky few will be resettled" (The Economist 2016).

Kenyan laws do not allow the refugee population in Dadaab to settle outside the camp, making it impossible to integrate into the economic, social and cultural life of the country that hosted most of them since their birth (Hujale 2016). While growing and developing an economic identity of its own, the refugee camp has never being part of the government's agenda with regards to resettlements and integration, rather the approach of the Kenyan State is hostile and defensive: "Dadaab is a much safer place these days, but that is not how Kenya's politicians sees things. The government says the camp harbour al-Shabab terrorists" (The Economist 2016).

The threats of terrorist attacks on behalf of the Somali terrorist group has led the Kenyan government to talk about the possibility of dismantling and closing the camp[43], without addressing the required policies and measures of integration for the hundred-thousands of people living currently in the camp (Hujale 2016). In a press statement, the Kenyan government issued the question of the camp:

"[W]e as a Government have the cardinal responsibility of providing security for

[42] Dadaab could be considered the third Kenyan city after Nairobi and Mombasa
[43] this proposal has been stopped by the high Court of Kenya (Gettleman 2017).

> all Kenyans [...] The camp had lost its humanitarian nature, and had become a haven for terrorism and other illegal activities. For us as Government, Kenya will always come first. The lives of Kenyans matter. Our interest in this case, and in the closure of Dadaab Refugee Camp, remains to protect the lives of Kenyans" (Bloom et al. 2017).

Despite the absence of recurrent violent abuses from the State, the refugees in Dadaab are constantly experiencing the violence of being deprived of the possibility of being *polis*, of being considered part of the valuable political body that, in Agamben's rationale, is identified by the Greek term *bìos* (Parfitt 2009: 51). Instead, what they are facing is a condition of perpetual precariousness in which their lives have no value beyond the limited reality of the camp, deprived of political and social rights, living in a legal limbo between society and nature.

A few points could be added in relation to the status of refugees around the world that has been addressed above. Firstly, the perpetration of abuses and human rights violations towards asylum seekers has reached systematic scales. In an international system that is supposed to be regulated by a human rights regime, this is explicable only assuming the nature of "homines sacri" of these refugees, nature that defines these men and women as "so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime" (Agamben 1998: 171). The deprivation of political and legal status makes it so it is impossible to appeal to the role of the States as guarantors of the rights and protection of the individuals (Lee 2010: 62).

Refugees, especially in certain political discourses, represent everything that should be kept outside political society (diseases, criminality, diversity etc). As prisoners and patients that are isolated from the rest of society because they embody security or health threats, so refugees are kept outside, not only physically but also "ideally", in the construction of the image of the society. A sense of belonging is determining the access to a certain society.

The terrorist threat has helped shaping the portrait of the "Muslim immigrant" that tries to undermine the safety of the population.

But while the exclusion of a particular portion of the population has almost always been part of the construction of a society, what is striking is the way it is undertaken, and where. Democratic societies, wherein rule of law and human rights are supposed to be respected and protected, are implementing policies and acts that violates domestic and international laws. The "fiction", described by Agamben, by which the government claims a supposed link between exception an norm, is made clear in the way many countries are handling refugees. Not only this happens outside any normal legal framework, but for this same reason it cannot be appointed or prosecuted insofar as they do not refer to any law (Agamben 2005: 35). What remains are the lives of the refugees deprived of legal status, trapped into the exceptional space of the camps.

For the whole body of people living inside the society, able to profit from political, civil, social rights, there is the need to have an "outside" people that are deprived of them: "the differential allocation of grievability that decides what kind of subject is and must be grieved, and which kind of subject must not, operates to produce and maintain certain exclusionary conceptions of who is normatively human" (Butler 2004: XIV-XV). The issue goes even deeper and more essential: "the life of the One is guaranteed only by the death of everyone else" (Esposito 2004: 116). The immunitary mechanisms of communities make so that every element, person or group that do not fit is automatically expelled, and incarnates the element, the bare life that must be sacrificed for the health of the rest. As in Agamben's study, this not only marks the safety of a population or political system, but the exclusion of the *bare lives* of refugees establish the ontological affirmation of the "inside": "[i]t is through the exclusion of the depoliticized form of life that the politicized norm exists" (Rajaram / Grundy-Warr

2004: 33).

4.6 *The Unbearable Lightness of the Exception*

> *"In the modern era, misery and exclusion are not only economic or social concepts, but eminently political categories [...] In this sense, our age is nothing but the implacable and methodical attempt to overcome the division dividing the people, to eliminate, radically the people that is excluded" (Agamben 1998: 179)*

The cases presented in this chapter outline the current state of policies and measures put in place under the pretense of the War on Terror. An arbitrary implementation of emergency measures and the increasingly widespread use of the executive powers as the primary source of political action are building a perpetual zone of anomie, which is expanding into every aspect of life since 2001. This space where law is suspended is the theater for divisions, power, state violence and de-humanization. It is a complex machine fueled by its self-implementation and a diffusion that occurs automatically and easily.

As time passes, the end of this War on Terror does not seem to be getting closer. New war-grounds have opened, additional techniques of surveillance have been developed, new categories of peoples have been targeted. The spread of exceptional governmental practices is always reiterated and justified under the necessity of a swift and strong response to a deadly threat. The results of this approach is the de-liberalization of democracies, the reduction of the political lives of certain individuals to bare lives, and the control over every aspect of the lives of the political body. What will be at the end of this path? What are the real, deep consequences of this paradigm? What is at stake in the run towards the achievement of security?

When the nexus between law and exception has lost the distinction (Agamben 2005: 58), human action itself will break its relation to law. The field of law itself becomes essen-

tially ambiguous: the relationship between life and law "celebrate and periodically replicate the anomie through which the law applies itself to chaos and to life only on the condition of making itself, in the state of exception, life and living chaos" (Agamben 2005: 73). Normative characteristics of rule of law, in the State of Exception, are "obliterated and contradicted with impunity by a governmental violence that- while ignoring international law externally and producing permanent state of exception internally- nevertheless still claims to be applying the law" (Agamben 2005: 87). The real State of Exception, in which we live, is one incredible consolidation of power which seeks to remove the ties of human action to law and simultaneously by a norm with no relation to *bios* or life (Agamben 2005: 86). The State of Exception, according to Agamben, has therefore is in its maximum, worldwide reach (2005: 87).

What is evident by the empirical evidence is that one does find that governance is moving deeper and deeper into a paradigm of consolidated powers under the Agamben State of Exception. The implications of the modern totalitarianism in exceptional regimes are very important. The next chapter of this research will consider the issue of human rights protection in the context of a State of Exception. The state of rule of law, how the international human rights regime is affected and what is the space for the implementation of democracy in this scenario will be discussed.

5 | Human Rights and State of Exception

> *"If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declaration of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man" -Hannah Arendt (1966: 300).*

Taking into consideration the international impact of the expansion of the exception, noteworthy are also the repercussions that such a paradigm is causing on the international human right regime. Biopolitical strategies of government raised many concerns with regards to the implementation of human rights laws, highlighting in fact a problematic disregard of these norms. This research will present a perspective on the conceptualization of human rights in order to understand to which extent the current interpretation of fundamental rights is enough to defend them from arbitrary measures, and which is the way forward to improve and strengthen the international human rights regime.

The institutionalization of the exception is problematic from an international human rights perspective. The use of "emergency" in the hegemonic discourse is sufficient to justify abuses that violates the most basic fundamental rights. While the original argument around the rights of man talks about intrinsic qualities of humanity that naturally bears certain rights and guarantees, the reality demonstrates that at the core of the individual is an existence of mere life deprived of political significance. Slavoj Zizek effectively emphasized what is the real meaning of an expansion of human rights violations: "[w]hat if the true problem is not the fragile status of the excluded but, rather, the fact that, on the most elementary level, we are *all* 'excluded' in the sense that our most elementary, 'zero' position is that of an object

of biopolitics, and that possible political and citizenship rights are given to us as a secondary gesture, in accordance with biopolitical strategic considerations?" (Zizek 2002: 95).

Many considerations along this line have been made, bringing back to the spotlight the debate started sixty years ago by Hannah Arendt (1966) in relation to the refugees in Europe in the aftermath of the Second World War. Exceptions, emergencies, urgent situations often need to be handled outside the legal boundaries set to regulate the norm. The problem arises when these exceptions become the rule, when the emergencies last decades, when the urgencies appear constantly in the agenda of the ruler. A system that relies on the emergency to govern all the aspects of the political life will certainly deviates towards an abusive, deadly machine which offers the bare life of its individuals to the altar of security, to maintain and safeguard the hegemonic establishment. The most relevant, troubling aspect of all this is that the undermining of democratic systems is coming from democracies themselves: "the threat to the life of a nation – to social cohesion, to the functioning of democratic institutions, to respect for human rights and the rule of law – does not come from the isolated acts of a violent criminal fringe, however much they may wish to destroy these institutions and undermine these principles - but from governments and societies that are prepared to abandon their own values in confronting them" (Amnesty International 2017: 8).

In the War on Terror, the disregard for human rights seems to be a major feature in the strategy to defeat the enemy. The problem lies once again in the way in which the exception is perceived, portrayed and played. While one can see the exception in the peculiar and unique way in which this conflict is fought, it should not be seen as the main military strategy. The effects are already undermining the effectiveness of the normal legal paradigm, which is being overcome by the exception in the structuring of strategies and plans:

> *"Everyone understands that new anti-American extremists, new terrorists, will always arise and always be available for recruitment and deployment. Everyone*

> *understands that even if al Qaeda is destroyed or decapitated, other groups, with other leaders, will arise in its place. It follows, then, that the War on Terrorism will be a war that can only be abandoned, never concluded. The War has no natural resting point, no moment of victory or finality. It requires a mission of killing and capturing, in territories all over the globe, that will go on in perpetuity. It follows as well that the suspension of human rights implicit in the hybrid war-law model is not temporary but permanent"* (Luban 2002: 13-14).

The paradigm created with the declaration of the War on Terror have all the means and preconditions to reiterate itself, and constantly reproduce a paradigm of lawlessness.

It should be stressed what is important to acknowledge here is not the non-legality of the War on Terror. It is in fact arguable that wars in general can be considered "lawful". Despite the intricate and complex stratagems to still put this conflict in the domain of international legality, this is not the main issue. The real problem, the one that would most likely affect the global politics in a dangerous way, is that the conflict took the form of domestic and international measures that were unrelated with field battles. The constant emergency that proliferated since 9/11 led many countries to undertake controversial approaches in protecting state security, approaches that escalated into a blurred and separation of powers, a normalization of arbitrary governmental actions, that barely related to the War on Terror itself. As it has been put in the recent report that Amnesty International published: "[t]he rise of far right nationalist parties, anti-refugee sentiment, stereotyping and discrimination against Muslims and Muslim communities, intolerance for speech or other forms of expression – risk that these emergency powers will target certain people for reasons that have nothing at all to do with a genuine threat to national security or from terrorism-related acts. This is happening in Europe already" (Amnesty International 2017: 7-8).

What is the way forward from here? The first would entail an apparently simple, but rather radical shift in the way human rights are currently perceived. As Jacques Rancière (2004) described in his essay *Who is the subject of the rights of man?*, the solution to concep-

tualize the subjectivation of human rights lies on the eradication of the link between these rights and victims, and the opening of a political space in which the "excluded" can claim their part in the society (304). Rancière refers to the *dissensus*[44] as the political ground where the subjectivation of human rights occur and legitimately attribute them. Referring to those that are kept outside the political process, he claims that "[t]hese rights are theirs when they can do something with them to construct a dissensus against the denial of rights they suffer" (Rancière 2004: 305-306). The answer to the alleged emptiness of human rights stands, for the French philosopher, on the space between citizenship and victimization: "[t]he strength of those rights lies in the back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test." (Rancière 2004: 306).

Ultimately, the solution lies in the separation of private and public, the placement of *zoe*, bare life, into a private, de-politicized dimension. Life would not be the center of state's calculations and strategies, and the space would be left to the managing and operation of public matters, which is politics. In this regard, Rancière solution is not that far from what Agamben describes at the end of *State of Exception*. The ultimate answer for the end of a perpetual exception resides, for Agamben, in the re-discovery of the political space that lies between the norm and life, which is essentially *pure violence* (Agamben 2005: 112). Both Rancière and Agamben call for a re-evaluation of the political dimension, which would ultimately re-establish the original separation between *bios* and *zoe*, private and public, fact and law.

[44]For a more elaborate illustration of this concept, refer to Rancière, Jacques (1999): *Disagreement: Politics and Philosophy*. Minneapolis: University of Minnesota Press.

6 | Conclusion

> *"Only a politics that will have learned to take the fundamental biopolitical fracture of the West into account will be able to stop this oscillation and to put an end to the civil war that divides the people and the cities of the earth" -Giorgio Agamben (1998: 180).*

The relation between State of Exception and law is complicated and controversial. In modern times, the State of Exception has moved from a context of conflict to enter and be normalized into peaceful times as well (Humphreys 2006: 679). A large part of the establishment of an emergency regime lies on the necessity of a suspension of law. Agamben argues that this suspension often does not appear in total disengagement with the normal legal paradigm, but that there is an existential link between norm and exception: "this space devoid of law seems, for some reason, to be so essential to the juridical order that it must seek in every way to assure itself a relation with it" (Agamben 2005: 51). This fictitious connection between legal and exceptional transforms the debate over the public good and the methods to achieve it. In the moment when the emergency blur with the norm, when the boundaries between legality and non-legality fade, issues that have been strongly denounced in the normal legal paradigm are portrayed as legitimate and necessary. Since 2001, issues like the legalization of torture (Zizek 2002), expansion of surveillance, *refoulment* of refugees, which are condemned by both domestic and international norm, appeared in the public debate (and in the agenda of the governments) as measures to control the chaos of emergency situations.

The consequences of this mechanism can be seen from this very last statement. Provisional and exceptional measures will not come singularly. The breach in the normal, legal paradigm that consents the infiltration of non-legal actions remains open and like a tiny

hole in a fabric tissue, it enlarges the more one let things through, allowing more, bigger non-legalities to enter the system. This is ultimately what makes the exceptionalities appear regular: the absolute non-distinction between the normal and the exceptional.

In the context of the War on Terror, this indistinction between norm and exception has been emphasized from the beginning. The enactment of the PATRIOT ACT by the Bush administration that allowed the unlawful stop and persecution of *alleged* terrorists, the epidemic spread of anti-immigration laws, the harsh regulations against the leaking of classified information; these are all examples of measures that the liberal-democratic legal paradigms in principle refute, but that have been introduce in the body of laws to react to the threats of terrorism. Exceptional measures entered the legal framework as responses to an emergency, while *de facto* shaping the political and legal structures in definite ways. As in the classic biopolitical scenario, the main objects of these measures are the individuals, the lives are at the core of the managing and administering interests of the government. Mistreatment of prisoners and refugees, civilian casualties, are not accidents or simple byproducts of the war. It is a necessary feature to establish the inside from the outside, the legal from the non legal, to maintain the fictional relation between exception and law. And what is affected, the ultimate target of these measures is the politically-valued life of certain groups (terrorists, Muslims, refugees, individuals). The final outcome of the State of Exception is the reiteration of bare life, upon which the State of Exception is able to reproduce and activate itself, maintaining a relation with the normal legal paradigm.

A few recommendations for further studies can be made in light of the discussion presented in this research. It is worth analyzing to what extent the theory applied here can (or cannot) explain *international* systems, and not just parallel, domestic, state patterns occurring globally. Foucault and Agamben's analysis of biopolitics and governmentality is

a predominantly domestic-focused theoretical approach, and it would be worth-while to do more research at the international level. The presentation of the empirics and the framework of the War on Terror place the State of Exception paradigm into a global pattern. An analysis of an international application of biopolitics is recommended, and implementations on the Agamben conceptualization of the State of Exception are proposed.

6.1 Global domesticity: State of Exception in the Global Order

This research presented the case that a global State of Exception as a paradigm of government exists. Practices and policies, not only from the United States, but from Europe, Africa and the Pacific have been brought as examples of what seems to be the full realization of a governmental paradigm founded on consolidation of executive powers to organize emergencies.

There is a general problem in applying biopolitical theories to the international realm. One finds biopolitical practices occurring globally, but theory is still linked to the state dimension. Selby (2007) presents a critical reflection upon the mainstream contextualization of Foucault in the field of international relations. According to Selby what is especially problematic regards the attempts to "translate" an essentially domestic focus into an international arena is that it fails to recognize that power in the internal context has very different features from power at the international level (Selby 2007: 338-339). Despite many relevant differences between Foucault and Giorgio Agamben's interpretation of biopolitics, the Italian philosopher also concentrates his analysis into a domestic, state-centered context. To provide a solution to a potentially questionable application of Agamben's theory to an alien context, the argument presented by Selby himself could result helpful and improve Agamben's analysis.

Selby advocates for a contextualization of Foucauldian biopolitics within a Marxist perspective (2007: 326). The complementarity of biopolitical investigations on the *how* of power and a Marxist analysis of the *why* of power would result in a fully realized, all-encompassing theorization of governmental power over life, that could find application in the international environment (Selby 2007: 340-341). For this research on an international State of Exception, a Marxist perspective could enlighten on the structural reasons for the standardization of the exception with regards to the global order. The discriminatory policies, the criminalization of populations, the expansion of security would then appear not only as mere (albeit abusive) instruments of government, but as means for the preservation of a *status quo*. The efforts of the hegemonic "class" of global powers to defend and maintain their position are channeled in exceptional measures that eradicate the political value of people, objects and places. The survival of the institutionalized ruling class depends on the eradication of *alieni*[45] from the political life, which can be undertaken only through exceptional measures.

A potential combination of the Agambenian theorization with a Marxist perspective would also increase the relevance of the theory in another respect. Agamben stresses the relevance of the camp as *nomos* of modernity, and as emblematic *locus* of the State of Exception. The examples described in this research gives a more dynamic description of the mechanisms of State of Exception and biopolitics in general. The figure of the camp appears, at times, too static. The tendency of governmental executive actions in this framework seems to fit more with a center-periphery dynamics. The objects of targeting and criminalizing processes have expanded together with the fronts of this conflict: starting with terrorists, the states kept finding new "threats" to eliminate, from Muslims, to refugees, to leakers and so on. Moreover, the State of exception is not only developing its features in confined areas of non-legality, but rather this non-legality is affecting different aspects of political and social life,

[45]In the latin meaning of "belonging somewhere else, stranger"

as well as the private sphere of populations. The dynamics of center and peripheries better explain this expansion of exceptional mechanisms, by integrating the idea of a securitization of what could be considered the "centers". The inclusive exclusion of Agamben's thoughts finds its place in the confinement of groups and practices to the thresholds of societies, both literally and figuratively. The existential struggle of the hegemonic centers versus the stranger, dangerous peripheries is today taking the form of a paradigm of exception.

6.2 A Paradigm of Normal (and Normative) Exception

This research outlined the main features of the State of Exception in biopolitical terms while also drawing a connection to strategies and policies undertaken in particular in the framework of the War on Terror. From the planning of military strategies to the securitization of population; the operations of governments pass through the exception to enter a ground of anomie.

This paradigm expands beyond the fight against terrorism. The military is affected more in depth than merely in the contexts of this war with privatization and technology reshaping the panorama of the armed forces. The techniques of surveillance to detect suspected terrorists are regularly implemented and affecting a significant part of the population. Society itself developed mechanisms of "self-defense" to isolate, persecute and eliminate sections of populations perceived as dangerous, from refugees, to minorities, to dissenters. In this scenario, governments are distancing themselves from the role of guarantors of liberties, rights and peace, and rather walking down the path of arbitrariness and exceptionalism, with no clear end term.

The concentration of power in governmental hands is driving countries and society towards a space where no legal guarantees are in place, because the legal paradigm itself is

compromised. The justification of defending the nation from the terrorist threat is undermining fundamental democratic principles that based those liberties that exceptional actions are claiming to be protecting. As Agamben said in 2001, it should be "the task of democratic politics to prevent the development of conditions which lead to hatred, terror, and destruction and not to limits itself to attempts to control them once they have already occurred". There is the need to re-establish the boundaries between the fields of political, legal and administrative actions, to interrupt the vicious dynamics of exceptionality and re-discover the value of a politics where biological life is not the ultimate sacrifice for peace.

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