

# **Tracing the Exception: International Trusteeship as the *Homo Sacer* of International Politics**

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## **Abstract**

This paper traces the exception that the institution of international trusteeship presents in the international order and International Relations theory. It argues that the pervasiveness of the exception is indicative of sovereign power which has the capacity to decide on the suspension of law and that this power normalizes the state of exception in order to reproduce the sovereignty of the international trust. To this end, the paper connects the philosophical account of Giorgio Agamben on *Homo Sacer* and the *State of Exception* with an empirical case study of the UN Interim Administration in Kosovo and the 'Standards for Kosovo' project.

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*“In our age, the state of exception comes more and more to the foreground as the fundamental political structure and ultimately begins to become the rule.”*

(Agamben 1995: 90)

## Introduction

The discipline of International Relations has, in its mainstream form, for a long time relied on the dividing boundaries between the domestic and the international, the realm of sovereignty contrasting with the realm of anarchy. However, the institution of international trusteeship, which came to being at the same time as theorizing about International Relations, continues to challenge this binary vision of the order in the international system. It is no longer the victorious powers which assume the administrative authority over trusts, but complexes of international agencies endowed with vast executive, legislative and judiciary powers over non-state territories. Employed in emergency situations of humanitarian crises, the task of international administrations is to substitute for local governance vacuum, ensure protection of human rights, and exit as soon as viable self-governance mechanisms are available. However, this is often not the case. Originally labeled as cases of exception and emergency, their presence is not only becoming the codified norm in territories already under trust, but their use is being considered as a foreign policy tool of failed states management.

The aim of this paper is to trace the exception that this institution poses to the international order and International Relations thinking about sovereignty and power, and

argue that it is indicative both of a sovereign power present at the international level which has the capacity to decide on the suspension of existing domestic law and normalize the state of exception so that it perpetuates the sovereignty of the international trust. To this end, we will use the conceptual toolbox provided by Giorgio Agamben's account of *Homo Sacer*, the depoliticized form of being exposed to sovereign power, and *State of Exception* which the sovereign seeks to perpetuate in order to reproduce itself. Finally, we will trace the mechanisms by which exception becomes the rule, and discuss the case of the UN Interim Administration of Kosovo, which can be considered the paradigmatic example of sovereign power legitimizing the political fact of exception, as it is both unprecedented in the scope of administrative powers it is endowed with, and in the sources of its legitimacy which give no guidelines on its exit and form of governance thereafter.

The argument will proceed as follows. In the first chapter, we will depart from the existing scholarly literature on international trusteeship focusing mainly on juridical aspects and effectiveness of governance in internationally administered territories, and introduce the problem area of trusteeships as the one connected with sovereignty and lack thereof. We will turn toward the 'camp as paradigm' approach adopted by Jenny Edkins who extends the Agambenian framework to the realm of the International Relations and traces the notion of sovereign power imposing upon a depoliticized entity.

The theoretical background of this paradigm will be further discussed in chapter two, which will address the Agambenian conceptual triptych of *Homo Sacer*, sovereign power and the state of exception, and argue that this paradigm provides a fruitful perspective on the nature of international trusteeship and its position in the international

order. The crucial lessons that we shall derive from Agamben's political theory for purposes of this work will thus be the following. First, the sovereign and *Homo Sacer* exist in a mutually constitutive relationship enabled by sovereign's capacity to suspend existing law. Second, such a juridico-political constellation can give birth to an infinite number of *Homines Sacri*, and decide on their fate not in a legal or ethical code but as a political act. Third, the internal dynamics of the state of exception are such that what originally was a deviation from the norm becomes indistinguishable from it. The final chapter will connect these theoretical observations with the empirical case study of the international administration of Kosovo.

## Chapter One: Theoretical framework

This chapter seeks to connect the existing scholarly writing on the institution of international trusteeship<sup>1</sup> with International Relations' intra-discipline debate on the nature of sovereignty and statehood, in order to posit the problem of trusteeship not only as a problem of sovereignty and lack thereof, but as an indicator of sovereign power endowed with the right to decide on the conditions and quality of sovereignty and statehood.

Within the existing literature discussing the theoretical aspects of international trusteeship we can define two broad theoretical perspectives: first, the juridico-normative stream dealing mainly with the legal attributes and historical development of the institution of trusteeship, and second, the empirico-analytical literature focusing on international territorial administration as a policy tool aimed at ill-governed societies. In order to set the stage for theorizing about trusteeships within the discipline of International Relations where the explicit notions of this problematique have so far been lacking, we will first discuss the major findings and shortcomings of these existing literatures.

While both literatures acknowledge exceptionality in the use of trusteeship as a tool of international administration, it will be argued that neither of them can successfully cope with the shifting notions of sovereignty and power that trusteeship incurs in the international system. In the last section of the chapter we will therefore proceed to the realm of International Relations, where the theme of sovereignty is debated between

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<sup>1</sup> Hereinafter, 'international trusteeship' and 'international territorial administration' will be used interchangeably.

adherents of (neo)realism and its opponents from the Foucault-informed school of thought. It will be suggested that the poststructuralist critique of Realist accounts on sovereign statehood opens the door for understanding the ways in which international trusteeship challenges the traditional notion of sovereignty, yet, by separating the concepts of ‘power’ and ‘sovereignty’ as a producer and product, it stops short of providing an angle through which we could successfully conceive of both the exceptionality and pervasiveness of international trusteeship. Finally, we will introduce the concept of ‘camp as a paradigm of modern life,’ which eventually weds ‘sovereignty’ and ‘power’ into a single force, endowed with the right to decide on statehood and statelessness, sovereignty and lack thereof. This move will eventually extend the paradigm of camp to the realm of International Relations and pave the way for Agambenian analysis of trusteeship in the following chapters.

### ***1.1 Juridico-normative approach***

Writing from a legal perspective, Matheson (2001) and Wilde (2000, 2001) focus on the juridical aspects of institutional development and the normative implications of trusteeships. In order to cope with the historical background of the international community substituting for the lack of domestic governance, Wilde uses the umbrella term ‘international territorial administration,’ (ITA) referring to a “formally constituted, locally based management structure operating with respect to a particular territorial unit.” (Wilde 2001: 585) While tracing the origins of ITA, which stretch back to the League of Nations<sup>2</sup>, he distinguishes forms of ITA based on the scope of administrative powers

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<sup>2</sup> Leaving out the pre-League of Nations International Control Commission for Albania (1913-1914), the oldest ITA governed by the League was the administration of the Saar Basin (1920-35).



(limited or plenary) and the nature of administration. Following this classification, he sees international trusteeship as a form of international territorial administration with direct control of a given territory, and with plenary administrative powers<sup>3</sup>.

In an attempt to explain how international administration projects operate, Wilde looks at the official reasons put forward to justify the deployment of international organizations in the administration of a territory, and defines two problem areas that these projects aim to address: ‘sovereignty’ and ‘governance.’ The roots of the first problem stem from the legal understanding of the ITA as a negation of ‘normal’ administrative practice in which sovereign power is exercised by actors whose spatial identity corresponds to that of the territorial unit and its population. (Wilde 2001: 583) The ITA is then meant to respond to a situation in which ‘normal’ legislative and executive order is hampered by a sovereignty problem with the presence of local actors exercising control over the territory, or with the conduct of the governance of local actors. Shortly, the perceived sovereignty problem addresses the *identity* of local actors, while the perceived governance problem concerns the *quality* of their administrative control.

The key to understanding the link between administrative control and sovereignty within the legal literature is the assumption that the holder of the former is determinative of the latter (Matheson 2001): administrative control over a certain territory becomes an indication of governmental authority and determines who is legally sovereign. Consequently, in responding to the sovereignty problem, the employment of the ITA produces new spatial identity within which the international organization is seen as “neutral” compared with the local actors to whom the sovereignty problem relates.

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<sup>3</sup> In this context, both Kosovo and East Timor can be regarded as groundbreaking projects, unprecedented both in scope of administrative powers and mandate of the international agencies.

Addressing the failure of the ‘normal’ sovereignty model, Wilde identifies two situations that may arise: the sovereignty problem is either internal or external. In the first scenario<sup>4</sup>, the failure of internal sovereignty is marked by the absence of unified governmental structures. In this case, ‘normal’ sovereignty model is just temporarily suspended, and is expected to be restored after the ITA’s exit. In the second case, lack of external sovereignty is expressed by the given territory’s incapacity to be recognized as a state or part of a state<sup>5</sup>. In this situation, activities of ITA alone cannot be sufficient as recognition by other actors is needed. Therefore, the major task of ITA here is to assist and mediate the process of final status settlement.

The second purpose of establishment of ITA in a certain territory, coping with the ‘governance problem,’ is not concerned with the identity of actors exercising government, but the quality of governance of these actors. (Wilde 2001: 592) Local governance institutions are either perceived as incapable of conducting any governance at all, or they exercise control in conflict with certain policy guidelines, considered as lack of ‘good governance’. In the event of absence of any governance structures, such as in Kosovo after the NATO-led military intervention in 1999, ITA is supposed to fill in the governance vacuum and take on the role of administration provider pending the establishment of institutions of local self-government.

In terms of the actual governance delivery, the ITA is expected to address three main objectives: first, to promote a certain territorial status, be it free city territory status, unified city, statehood, substate autonomy, or an undetermined future status. Aside from promotion of the territorial status, the ITA can also be responsible for bringing the

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<sup>4</sup> Administration of Mostar can be considered as an example here.

<sup>5</sup> The cases of Kosovo and East Timor are again unprecedented examples of a situation when international communities are expected to cope with both external and internal sovereignty problem.

territorial status into being, or support the continuation of existing status.<sup>6</sup> Alongside these processes, the administration is expected to enable governmental institutions, and finally, ensure democratic policies and elections. Within this general framework, case specific tasks are also implied: in case of Kosovo, for instance, ITA is supposed to make sure that newly established local authorities observe basic human and minority rights<sup>7</sup>.

However, on a normative level, no matter to which dimension of the sovereignty question the ITA is expected to respond, the use of ITA generally reinforces the ‘normal’ sovereignty model in that local territorial administration and locally identified ‘state’ sovereignty, although at the moment unobtainable, are both the ideal. When addressing this concern, ITA typically envisions some form of local territorial administration as the outcome to the question of gradual transfer of sovereignty on local authorities. In addressing the sovereignty problem, the ITA is argued for as the instance of last resort, (Wilde 2001: 591) and therefore should pervade only as long as installment of local actors cannot be reached – until the reestablishment of the ‘normal’ sovereignty model. In spite of such reasoning, however, cases of current international territorial administration, such as Kosovo, show that there is more at stake than return to normality.

Further product of such conception of international territorial administration is the notion of double unpreparedness: local people are deemed ‘not ready’ to handle administrative authority, and local leaders ‘not ready’ for the challenge of democratic responsibility. Nevertheless, once certain basic institutions had been restored and local leaders presented themselves, ITA was continued, partly because these leaders were

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<sup>6</sup> The Kosovo mission is the most complex use of ITA so far, since it performs all three functions.

<sup>7</sup> In case of Kosovo, the character of the problem changed over time: ITA was needed in order to preserve lives and freedoms of the Kosovar Albanians in the Serb-dominated FRY government. However, later on the situation reversed, and the international administration became more charged with protection of Kosovar Serbs, as the minority threatened by revenge attacks.

deemed “not ready” for the challenge of democratic responsibility – meaning the ITA was now, as in Kosovo from the start, “filling a void of its own making.” (Wilde 2001: 600)

Crucial drawback in juridical thinking in terms of the sovereignty/governance problem is that it does not address the issue of what happens when the ITA is initially created in order to solve the governance problem but finally ends up creating or affecting problem of sovereignty. In the case of Kosovo, international territorial administration was imposed in order to cope with governance gap in the territory. Paradoxically, the ITA solution, as performed by the United Nations Interim Mission, ended up creating an unprecedented sovereignty problem which both the institution itself and previous international legal practice find difficult to account for<sup>8</sup>. In legal documents transferring powers to the UN, there is no mention of exit of the administration, let alone evidence of how to terminate such mission.

## ***1.2 Empirico- analytical approach***

Where juridical literature deals with issues of ‘sovereignty’ and ‘governance’ through examining historical as well as current cases, the central theme of the empirico-analytical approach is the question of ‘effectiveness’ of international trusteeship. In this context, trusteeship is discussed as one of the policy options in dealing with “weak, war-torn or contested states and territories.” (Caplan 2007: 232) In order to evaluate success and drawbacks in the existing cases, Lyon (1993), Caplan (2007), Fearon and Laitin (2004) attempt to define conditions, obstacles, and alternatives of the use of the institution. Especially in the cases of post-9/11 contributions, research is to a certain

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<sup>8</sup> For instance, Resolution 1244 which forms the legal basis for the Interim Administration of Kosovo, provides no guidance or time line on its exit strategy.

extent guided by notions of possible applicability of international trusteeship in the case of ‘failed states.’ For purposes of this paper, the later works are worth our attention as they define the current research agenda on the institution of international trusteeship, and, as well as the juridical/normative literature, embark on a sovereignty problem which they find unable to solve, and that we will address in the last section of this chapter.

Caplan’s (2007) main research interest lies with the practical applicability of international trusteeship in so-called failed states. Even though he is lukewarm to the idea of trusteeship as an ideal case solution, he advocates for a limited use of trusteeship-like structures as the ‘least worst option’ in post-conflict territories. He introduces the term ‘neo-trusteeship’ in order to set up a dividing line between previous cases of international administration and on-going ones which, according to him, form responses to collapsed or collapsing states. For him, the essence of international trusteeship is the “temporary third-party control of the principal governance functions of a state or territory.” (Caplan 2007: 232)

His account departs from legal thinking on trusteeships in that he refuses to see international legitimacy, i.e. the UN mandate, as the prime source of success of such administration. In spite of its relative appeal to foreign donors (such as in Kosovo), he suggests that blessing of the UN Security Council bears little or no importance to local populations, which tend to be more concerned with ‘effectiveness’ of the administration. In the event of the administration’s limited capability to deliver its promises, local population becomes frustrated with the trusteeship arrangement, seeing it, as in the case of Kosovo’ UN interim mission, “to be not a vehicle but an impediment to Kosovo independence.” (Caplan 2007: 235)

In defining the elements of success, he invokes the ‘principal benchmark’ of absence of hostilities among the conflicting parties, usually ensured by presence of international security forces. However, presence of foreign peacekeepers cannot sustain peace alone: first, it cannot create sufficient conditions for long term peace and regeneration of war-torn societies, (Caplan 2007: 234) and second, its success is conditioned upon the local population’s acceptance of foreign engagement. As positive local reception is hardly predictable, it forms the first obstacle in employment of international trusteeships.

Aside from securing the end of hostilities and exercising an ‘effective’ government, Caplan puts forth the following conditions of trusteeship’s success: small size of the governed territory and local support. “Problem arises when the aims of the international community and those of the local population or its representatives (either chosen or self-appointed) are at odds with one another. Under such circumstances, it may be difficult to secure the co-operation of local parties that is required to implement an ambitious state-building agenda.” (Caplan 2007: 236) He suggests that there are at least three alternatives to the institution of trusteeship: no intervention on part of the international community, containment of the situation, and finally shared sovereignty or assistance.

Where Caplan only slightly touches upon the issue of neocolonial overtones that employment of international trusteeships implies, Fearon and Laitin (2004) coin the term ‘postmodern imperialism’ when speaking of the institutions of (neo)trusteeship<sup>9</sup> and contrast it with classical imperialism of the pre-UN time. According to them, both forms

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<sup>9</sup> Speaking of neotrusteeship, they refer to the “complicated mixes of international and domestic governance structures that are evolving in Bosnia, Kosovo, East Timor, Sierra Leone, Afghanistan, and, possibly in the long run, Iraq.” (Fearon and Laitin 2004)

of imperialism share a degree of control over domestic political authority and basic economic functions by foreign countries. However, postmodern imperialism departs from the classical variant in that it brings in a multilateral complex of foreign powers, international and nongovernmental institutions that assert control over certain territory, as opposed to a single imperial power of earlier times. Besides the international legal mandate, the most crucial difference, according to them, lies in the spatio-temporal compression of postmodern imperialism: it is assumed that the agents of neotrusteeship do not share the expansive ambitions of classical imperialism, neither they conceive of their governance as indefinite in time. They should exit as soon as main objectives of their mission have been accomplished.

Within the paradigm of ‘effectiveness’ which informs the empirico-analytical approach, they identify four major problems of the current system – those of recruitment, coordination, accountability, and exit. While grounding their ontologic assumptions about the nature of international order in Realist positivism (cf.), the problem of coordination is assumed to stem from anarchical settings of the system where the UN can be considered as an inappropriate leading agent, and that it would be more efficient if missions were led by a major power with a dominant military force.

In sum, the above mentioned literature deals with the international trusteeship while covering three key problem areas: sovereignty, governance, and effectiveness. While the problems of governance and effectiveness, addressing the quality and assessing the visible outcomes of international administration, cannot be dismissed and to a great extent inform current thinking on international trusteeships, for purposes of this paper they will be read as only secondary to the key problematique of sovereignty. The issue of

international trusteeship creating a sovereignty problem has already been touched upon in Wilde's account but has not been devoted more attention. The empirico-analytical cluster decided to either ignore the matter or address sovereignty issues as a part of exit policy of international trustees. We will depart from these accounts and focus our attention on the compatibility of international trusteeship with traditional accounts of sovereignty and statehood which have both been for a long time the underlying themes within the discipline of international relations.

### ***1.3 International Relations and the Debate on Sovereignty***

Within the realm of International Relations, the explicit concept of international trusteeship remains undertheorized. While relations between sovereign states form a primary unit of analysis of positivist approaches in IR, there is a significant gap of thinking about stateless territories governed by international administration and the challenges they pose to traditional accounts of sovereignty and statehood. In order to overarch the gap and shed new light on the isolated cases of exception in the pattern of international system, we will build on the ongoing debate about the nature of sovereignty and statehood led between Realist thinkers in the discipline of IR and their critics from the poststructuralist camp.

Authors writing from Realist positions take sovereignty as the ontological predisposition of statehood, in order to conceive of sovereign states as the basic constitutive components of the international system. While drawing a dichotomy between the realms of domestic and international affairs, they argue that the former is governed by hierarchic structures of power, whereas the latter's main characteristic is its anarchic



nature. As Krasner eloquently posits, “sovereign states are rational self-seeking actors resolutely if not exclusively concerned with relative gains because they must function in an anarchical environment in which their security and well-being ultimately rest on their ability to mobilize their own resources against external threats.” (Krasner 1992: 20)

Krasner’s standpoint, ascribing agency only to sovereign states has its roots in the core writings of the discipline, informed by Morgenthau’s Realism and Waltz’s neo-realism. In Morgenthau’s account of *Politics among Nations*, politics is governed by objective laws, among which the interest-seeking principle of sovereign states assumes prior position. Waltz (1979) builds on Morgenthau’s assumptions about the interest-seeking nature of states but brings in a precisely defined structure. According to him, this structure consists of three important characteristics: the ordering principle of the system, the character of the units in the system, and finally distribution of the capabilities of the units in the system. (Waltz 1979: 79-87) As regards the ordering principle, domestic political systems are supposed to be governed by hierarchic structures, with authoritative power exercising the jurisdiction of political and legal processes. On the other hand, the ordering principle of the international system is anarchic, with an absence of any overarching authority that would regulate the behavior of nation-states toward each other.

In the state-centric view shared by both discipline-defining authors, sovereignty is described as condition qualifying a state-like entity for admission to international society. Krasner (1999) further elaborates on this thought and goes on to distinguish between four types of sovereignty: domestic sovereignty, which refers to the public authority’s degree of control within a state, interdependence sovereignty, referring to the ability of public authorities to control transborder movements; international legal sovereignty, which

addresses the practice of mutual recognition of state or other entities, and Westphalian sovereignty, which implies the norm of nonintervention into domestic affairs of states. (Krasner 1999: 3-25) As he suggests, this logic of sovereignty is not inviolable: in effect, violations of international legal and Westphalian sovereignty have their place in the international system, as long as they obey the higher order of logic of security dilemma. Krasner then argues in favor of this logic, stating that the Westphalian and international legal sovereignty<sup>10</sup> are nothing but an ‘organized hypocrisy’: undermined by the frequent occurrence of conventions, contracts, coercion and imposition by other rulers. His rationale, again, echoes the classical realist positions: “The extent to which particular structures will be institutionalized, rules and norms will be followed, depends on the power and interests of rulers. Westphalian sovereignty has frequently been compromised because autonomy has clashed with competing principles and disparate interests in an environment of asymmetrical power.” (Krasner 1999: 228)

While observing that notions of welcomed or imposed intervention challenge traditional conceptions of sovereignty, however, his account helps little in understanding the underlying intricacies of power which guide decisions on what qualifies as an intervention, and which form of intervention gets adopted.

Such drawbacks may perhaps stem from the limits of realist epistemology which, according to Cox (1986), deals with the “prevailing social and power relationships and the institutions into which they are organized, as the given framework for action.” (Cox 1986: 208) If, as he suggests, all theories are always for someone and some purpose, then

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<sup>10</sup> The major difference between the two of them lies in that, unlike Westphalian, international legal sovereignty cannot be violated by invitation of external power, while both are derogated by coercive intervention. (Krasner 1999: 24)

Realist thinking can be placed within his category of a problem-solving theory, then its objective lies in “fixing limits or parameters to a problem area (...) and reducing the statement of a particular problem to a limited number of variables which are amenable to relatively close and precise examination.” (Cox 1986: 208) Similar patterns informed not only the Realist accounts of sovereignty but also the juridico-normative and empirico-analytical thinking on international trusteeships at the beginning of the chapter. We will now turn toward a critical deconstructivist/poststructuralist approach challenging the realist ontology of sovereignty and statehood, as well as the adopted epistemology of the knowable and objectifiable reality.

In order to treat reality as a separate realm of objectified facts, Realism takes these facts, such as the dichotomy of domestic sovereignty juxtaposed by international anarchy, and synthesizes them into a pattern of interstate relations. Poststructuralism, on the other hand, focuses on the hidden agenda of power constructing knowledge (and vice versa) and criticizes realist writers for naturalizing and reifying the international system by treating structures which have a specific and transitory history as if they were ‘permanent’, ‘normal’ or ‘given’ political facts. (Burchill 1996: 182) Methods that poststructuralist authors use in order to uncover the arbitrariness of Realist world, include deconstruction, double reading, genealogy, and are intellectually indebted to French postmodernism and its textual analyses and study of discourse. While the subject of our interest here is the notion of sovereignty, we will reflect on authors whose response to the Realist paradigm of sovereignty has been most elaborate: Richard Ashley, RBJ Walker and Cynthia Weber.

Richard Ashley, in his contribution to Der Derian's *International/Intertextual Relations* uncovers Realism's ontologic assumptions about sovereign statehood by pointing at the epistemologic constructions that were used in order to establish state as a sovereign entity. As he contends, "modern statecraft is a modern mancraft" and conception of a state as a unitary, sovereign actor is possible only through the parallel with a man as a sovereign being. Where Realists assume the sovereignty of statehood and manhood as a pre-given fact, Ashley investigates nature of relationship between the paradigm of sovereignty impacts modern political life. In his analysis/deconstruction of the latter's causality, sovereignty and modern political life are mutually constitutive: modernity gives birth to a reasoning man who is able to conceive of his existence as unbounded by God-given laws. In return, the newly founded paradigm of sovereignty constitutes modern political life by enabling the extension of sovereign manhood to sovereign statehood. Ashley thus effectually denaturalizes one of the stepping stones in thinking about international relations.

Cynthia Weber's *Simulating Sovereignty* builds on Ashley's critique, however, her conceptualization of sovereignty is less static: in an attempt to uncover historicity of the paradigm and question its fixed meaning in modern politics, she reveals how the concept has changed through times, together with changing notions of what justifies intervention into domestic affairs, and what are the modes of punishment for such intervention. She is interested in practices which according to her define the very location of modern statehood: practices of imposition and intervention that Krasner treated as detrimental to Westphalian sovereignty, are in her view, producing the expanded realm of domestic sovereignty. Following Foucault and Derrida, she argues that knowledge

produced by interests of power constructs the scope of political acts which are justified as domestic (such as the US invasion of Panama) rather than international. Weber's main critique of the positivist/structuralist thinking is that it wrongly relies on sovereignty being the referent of the state. Instead, she suggests, sovereignty, too, needs a referent, as its meaning (signified) changes in all the cases of intervention that she examines.

In sum, while criticizing the Realist account of sovereignty, poststructuralist scholarship focuses on various modes of sovereign statehood coming to the forefront as dominant subjectivity at the order of knowledge-producing structures of power. (cf. Edkins, Persram and Pin-Fat 1999: 1-17) Be it the mode of construction via parallel with sovereign manhood, as with Ashley, mode of simulating sovereign statehood in rules on (non)intervention, as with Weber, or mode of juxtaposing the sovereign domestic sphere with anarchical international system, as exposed by RBJ Walker, poststructuralist authors trace notions of power producing knowledge and selling it as something natural, objective and self-evident. However, even though they manage to go beyond practical reasoning of their Realist counterparts, there appears to be a missing chain link connecting the concept of power with the concept of sovereignty. If we accept the claim that power is the driving force in production of knowledge about modern sovereign statehood, then we must add that power is also invested with the right to decide on what qualifies as sovereignty and what qualifies as statehood. From Foucauldian perspective, perceiving power as the producer and sovereignty as the product, we have to seek a perspective that will help us overcome the object/subject boundary, and unite them as a single agency. Thus, in order to analyze the grey zone of territorial statelessness, we arrive at the concept of sovereign power incurring the right to decide.

Such move, however, is neither pioneering nor solitary. In *Trauma and the memory of politics*, Jenny Edkins (2000, 2003) provides an account of how the ‘camp,’ be it concentration, famine relief or refugee, functions as a zone of indistinction, i.e. zone of no distinction between the rule of law and chaos, inside and outside, licit and illicit. In an ‘emergency situation’, decided upon by sovereign power, it operates as a state of exception where rules are temporarily abandoned. However, as she fears, in modernity the state of exception expands from the margins to take over the normal order and expands the reach of sovereign power.

The philosophical grounding in her account of the camp as the paradigm of modern political life is the work of Italian philosopher Giorgio Agamben who himself treats concentration camp and its inhabitants as beings deprived of their humanity by exposure to sovereign ban, ie. sovereign power having the ultimate right to decide on the conditions of their existence. In Agamben’s logic of sovereign power, Nazi concentration camp produces the sovereign ban of camp attendants and the totalitarian regime following the suspension of the previous state of order, in which both groups of humans were treated as equal citizens endowed with a complex of civic and human rights. In Edkins’ extension of Agamben’s model to the sphere of international relations, sovereignty is similarly produced in the case of relief aid donors and international agencies, such as the United Nations and NATO exercising authority over famine relief camps and refugee camps. Production of sovereign power by creating the institution of international trusteeship as an exceptional measure to deal with the governance problem in emergency situations will be the subject of the following chapters.

## Chapter Two: Agambenian Perspective

*“The atomic situation is now at the end point of this process: the power to expose a whole population to death is the underside of the power to guarantee an individual’s continued existence.” (Foucault 1984: 260)*

*“What emerges is the singular fact (...) that every male citizen (...) immediately finds himself in a state of virtually being able to killed, and is in some way sacer with respect to his father.” (Agamben 1998: 89)*

The aim of this chapter is to lay out the major points of Giorgio Agamben’s writing relating to the nature of sovereign power and argue that the Agambenian philosophic framework provides us with a perspective through which the emergence and perpetuation of international trusteeship, as a form of deviation from normal order, can be grasped. As the platform of this perspective is formed by the conceptual triangle governed by mutually constitutive relations between sovereign power, *Homo Sacer* and the state of exception, this chapter will focus on how these concepts relate to each other, and how they translate into what Agamben considers to be the guiding principle of modern politics.

### 2.1. Sovereign power

At the beginning of his account of *Homo Sacer: Sovereign Power and Bare Life*, Agamben claims to set out to correct Foucault’s regretful abandonment of the traditional model of power, by focusing on the juridico-institutional dimension of the concept. However, while Foucault’s bio-power focuses its explanatory sight on the politics of life, i.e. how political subjectivities are captured and their identities reproduced by

mechanisms of power, sovereign power is more concerned with politics of death, and with the necessary decision made by rulers about life and death. However, Agamben builds not only on Foucault's bio-power as the life producing power, but weds his concept with the Schmittian moment of decision as the sovereign arena of the political, and Walter Benjamin's vision of emergency becoming the rule. Sovereign power is for Agamben embedded in the moment of decision and is released under the situation of emergency upon which it can decide. The infamous paradox of sovereignty then dwells in that sovereign is at the same time inside and outside the juridical order. It has both the authority to create law and set conditions under which it is applicable, and the authority to suspend the law provided that 'exceptional' circumstances emerge. Borrowing from Schmitt's *Political Theology*, it again is the sovereign who decides on the exception, and it is the act of such a decision that defines the monopoly of power that he exercises: "the decision reveals the essence of state authority most clearly." (Schmitt, qtd. in Agamben 1998: 16)

The decision that sovereign power takes in Agambenian discourse has the form of a ban<sup>11</sup>: a decision by which sovereign power may exclude someone from life in *polis*, and thus from existing legal constraints. Furthermore, as Agamben paraphrases old Roman codex, "to ban someone is to say anyone can harm him." (Agamben 1998: 105) Sovereign ban thus expulses a given object from the protection of juridical order given by the sovereign power itself<sup>12</sup>, and exposes life as a bare life that no longer qualifies as worthy of living.

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<sup>11</sup> According to Agamben, "banned" in Romance languages originally meant both "at the mercy of" and "out of free will, freely", both "excluded, banned" and "open to all, free." (Agamben 1998: 56)

<sup>12</sup> Here it is important to note that "abandonment respects the law" (Agamben 1998: 59) in that the one who is banned stands outside the law – where the law no longer applies.



Such a decision produces a form of life to which power is connected by ties of mutual constitution: the ban, as the political decision *par excellence*, produces a certain form of life by its expulsion from the polis, and in return the existence of this life form confirms the action of the sovereign power. “The ban is the force of simultaneous attraction and repulsion that ties together the two poles of the sovereign exception: bare life and power, homo sacer and the sovereign. Because of this alone can the ban signify both the insignia of sovereignty (...) and expulsion from the community.” (Agamben 1998: 111) Finally, in order to fully understand what Agamben means by ‘sovereign power’ we now have to turn to the representative of the ‘bare life’ we mentioned as the form of life produced by sovereign power: *Homo Sacer*. This ancient figure drawn by Agamben from old Roman law represents the mirror image of sovereign power, and enters into symmetrical relationship with the sovereign by its exposure to the sovereign ban.

## **2.2 Homo Sacer**

The story of the birth of *Homo Sacer* begins in old Roman law where the figure is introduced as ‘the one who may be killed but not sacrificed.’ It is precisely his relationship with sovereign power that put Homo Sacer in this unfavorable position of being abandoned by law and excluded from human society. The form of life attributed to *Homo Sacer* is bare life, and its characteristics stem from the Greek distinction between simple natural life, *zoe*, and political life, *bios*. Bare life is none of these, in fact, its location is somewhere midway. It no longer belongs in the domestic sphere (Greek *oikos*) like *zoe* does, but neither is its existence political, as its stripped bare of belonging in the

political community. Its guiding characteristic then is its vulnerability and its exposure to sovereign power, to death. In tandem with sovereign ban, bare life then forms “the originary political element.” (Agamben 1998: 88)

The Agambenian ‘killed but not sacrificed’ then addresses this form of exposure: in relation to *Homo Sacer*, all men are sovereign and can kill him without being punished by human law, without actually committing a crime according to human law. This moment forms the first dimension of the Sacer’s exclusion: exclusion from human law. His sacredness then implies the second form, exclusion from divine law, from which is Sacer excluded by incapacity to be devoted to God. Therefore, being sacred does not imply anything noble, it is in fact a curse: “and *homo sacer* on whom this curse falls is an outcast, a banned man, tabooed, dangerous.” (Agamben 1998: 79) But again, similarly to sovereign decision on exception, which is included in the juridical order by its very exclusion from it, *homo sacer* is included in the community by his exposure to the sovereign power: by being able to be killed. Both mirror images then enter into the ‘sovereign 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)

### **2.2.1 Trusteeship: Entity between life and death**

While *Homo Sacer* is included in the (juridical) order solely by its exclusion – that is, by his capacity to be killed, international trusteeship is included in the (international) order by its exceptional nature. Not belonging to the community of states while at the same time being decided upon by a nexus composed of sovereign states

posits trust at the intersection between two distinctive forms of life. If old Greek *zoe* in Agamben's thesis was a simple natural life common to all beings, then within the community of states any self-proclaimed state formation is endowed with that sort of existence. However, in terms of *bios*, which in the old Greek distinction meant the exclusive political life of an adult male citizen, distinction emerges between entities that are formally capable of entering political relations and those who are not. In this situation, statelessness forms a disqualifying factor for an empowered political activity of a territory. Moreover, while statelessness may take a variety of forms on substate levels, the case of international trusteeship brings in yet another aspect: the exercise of sovereign authority on behalf of someone else. Thus, political entity under trust 'may be killed but not sacrificed' in that it may not enter relations with others as equals, yet other entities may decide upon its fate. Such decision then eludes the normal order in which its object, as an object of sovereign ban, is located outside domestic borders. Yet, such decision is included in the normal order precisely because it happens in a state of emergency, oftentimes on humanitarian grounds, encoded in international conventions such as United Nations Charter, and *in bono* of the given entity. In sum, when Agamben contends that "*Homo Sacer* belongs to God in the form of unsacrificeability and is included in the community in the form of being able to be killed," (Agamben 1998: 82) it is then the type of power which exercises this decision that can replace the word 'God,' and 'international system' which stands for 'community.' Under these circumstances, we can think of trusteeship as the form of bare life, locked between two poles – the full fledged and unconditioned political life of states, and the simple natural life belonging to substate territorial entities which might or might not claim the right to statehood.

Such move is neither novel nor unproblematic. Thinking of states as living entities has a long tradition in political theory, from Hobbes' *Leviathan* towards contemporary writings on state and group personhood<sup>13</sup>. In the discipline of International Relations, however, personifying states does not reflect conventional state ontology, as it would disturb both the Realist assumption of lack of community on the anarchic international level, and the objective laws governing the relations among states. Treating states as human beings is thus undertaken either by poststructuralists criticizing the North/South relations, or recently by the founding father of constructivist stream of thought, Alexander Wendt. In his article about state personhood, Wendt (2004) notes that state personhood must be constituted both from inside and from outside: while "inside refers to the role of structures and processes within the body of a person, (...)outside refers to the role of social recognition in making persons." (Wendt 2004: 292) The second dimension – external recognition – is particularly important here as in international law it is a crucial factor conditioning legal embracement of statehood. As Wendt acknowledges later, "someone can be constituted from the inside as a person even if this is not socially recognized, a situation we have seen throughout history when certain people – women, racial Others, and so on- were deemed intrinsically incapable of the cognitive functions necessary for personhood." (2004: 293) It is then this discrepancy between inside and outside recognition that brings about the figure of *Homo Sacer* vis-à-vis whom all men are sovereign, because they can decide upon his (non)existence. Trusts

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<sup>13</sup> This issue is notably being addressed by David Runciman who argues that "the trust does not fall under the sway of Roman notions of group personality – it was never subject to the limitations of incorporation." (Runciman 1997: 67) In his claim, trusteeship is thus never fully a person. Trustees, unlike hobbesian representatives, "do not have their actions ascribed to whatever it is they are to benefit - when the trustees act, we do not imagine the protected countryside to have performed the action - they merely act on the beneficiary's behalf." (Runciman 1997: 67)

find themselves precisely in this position: while having bodies, i.e. de facto statehood, they are excluded from the other states by the absence of recognition of such statehood. Aside from that, they oftentimes acquire this status in an emergency situation of a humanitarian crisis or severe conflict.

### **2.3 Exception and Zone of Indistinction**

“The correct question to pose concerning the horrors committed in the camps is, therefore, not the hypocritical one of how crimes of such atrocity could be committed against human beings. It would be more honest and, above all, more useful to investigate carefully the juridical procedures and deployment of power by which human beings could be so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime.”

(Agamben 1998: 171)

It is now the final, third point of the conceptual triptych formed by sovereign power, *Homo Sacer* and state of exception that we turn our attention to. Having explored the relationship between sovereign power and *Homo Sacer*, we already touched upon the role of emergency in their mutual constitution, as it is both the sovereign’s capacity to decide on exception and suspend law, as well as *Homo Sacer*’s primary condition of existence, that connects the two of them. Aside from being the constitutive platform for both the bare life and sovereign ban, state of exception<sup>14</sup>, however, is guided by its own internal dynamics of expansion and perpetuation that we now need to explore.

Similarly to sovereign power and homo sacer, state of exception is excluded from human law and included in normal order by the same logic. Its spatial localization,

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<sup>14</sup> The sovereign exception (from the latin ex-capere, to take something out) implies the “very meaning of State authority” (Agamben 1998: 17) and the suspension of law is then the reverse image of law, in that it in effect defines the law itself.

however, is the zone of indistinction, the sphere where the human law no longer applies and where the decision on who becomes a *Homo Sacer*, stripped bare of human rights, becomes a *questio facti*, political fact, rather than *questio iuris*<sup>15</sup>, legal question. If, following Schmitt, the political can be primarily characterized by the sovereign decision on who is friend and who is enemy – and here, it is important to note, such decision can only be exercised under exceptional conditions, in a state of emergency – then the concentration camp can be considered a zone of indistinction *non plus ultra*, the ultimate sphere of the bio-political.

### 2.3.1. Camp as the paradigm

Within the camp, which forms the center of Agamben's attention as the paradigmatic example of localized state of exception, where inhabitants were stripped bare of any political status and reduced to bare life. Here it is that he divorces himself from the bio-political paradigm of prison and soul asylum introduced by Foucault, as these institutions operate *within* the juridical order. Instead, concentration camp seems to be the original location of state power, as it is both normal order and regular law governing the lives of ordinary citizens that is being suspended and locates what is being taken out, the *Ausnahme*.

In his analysis of the Nazi concentration camp and later similar camps in the Yugoslavian conflict, Agamben focuses primarily on the suspension of their lives from any human law within the exception, arguing that “the exception does not subtract itself

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<sup>15</sup> As Agamben puts it, “the camp is a hybrid of law and fact in which the two terms have become indistinguishable.” (Agamben 1998: 170)

from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule.” (Agamben 1998: 18) That is, if the sole existence of sovereign power deciding on rule and exception persists in political order, totalitarianism cannot be considered as the sole political situation where ‘everything is possible.’ In this logic, the matrix from which the state of exception grew is still open and alive under a similar juridical scheme.

The idea that the camp as a paradigm of political life persists and that such a paradigm can give birth to an infinite number of *homines sacri* is then one of the crucial stepping stones of Agambenian philosophy, which opens doors for us either to dismiss Agamben’s thought as unjustifiably pessimistic, or writers sympathizing with his claims who set out to trace zones of indistinction and new forms of sovereign power leaking through the juridical order and constituting new forms of bare life, such as Jenny Edkins in her above mentioned *Trauma and the Memory of Politics*, or Jasmina Husanovic in her analysis of *“In Search of Agency”: Beyond the “Old/New” Biopolitics of Sovereignty in Bosnia*. (Edkins and Pin-Fat 2004)

Mechanisms allowing such move can then be found in the nature of the sovereign that seeks to reproduce itself by bringing along its reverse side: bare life. The idea of perpetuation of the exception as a means of reproducing the sovereign’s life may indeed make Agambenian philosophy seem paranoid by nature and certainly finds its opponents. The point of this section, however, was not to trace the academic debate on Agamben’s philosophy but rather to lay it out as a mode of thinking about power and its relation to life and capacity to decide on and perpetuate the state of exception.

### 2.3.2 Normalizing the state of exception

In Agamben's thesis, state of exception and sovereign power are mutually constitutive. The sovereign is situated outside the law, has the legal power to suspend its validity, and decides on whether the law is applied or not. Thus, the metaphysical location of law is not outside of the exception, instead, rather paradoxically, outside of itself. (Agamben 1998: 15) By extension, provided that law and exception are two sides of the same coin, they produce sovereign power and its inherent capacity to decide on what constitutes the law and what stands outside of it. Through the state of exception, the sovereign "creates and guarantees the situation that the law needs for its own validity." (Agamben 1998: 17) The primacy of rule, constituting itself in opposition to the exception, excludes the state of exception from the juridico-political order creating the very space of rule validity. However, rule vacuum and ban on juridico-political order do not disempower the sovereign. On the contrary, the very location of exception enables the sovereign to abandon the normative division of 'inside' and 'outside' of the law. Thus, sovereign ban on exception creates 'zone of indistinction' where regulation on inside and outside, order and chaos is no longer valid. (Agamben 1998: 19)

In the recent debate on the nature of exception in international politics, Jef Huysmans (2006) refers to exception as a "method of conceptualizing the character of international political order by means of constitutional-legal reasoning." He agrees with Agamben that "the norm does not define the exception but the exception defines the norm." (Huysmans 2006: 136) <sup>16</sup> For Huysmans, too, exception identifies two forms of

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<sup>16</sup> In order to conceptualize the understanding of exception in international relations, Huysmans establishes a theoretical triad of normativism, decisionism, and institutionalism. (Huysmans 2006: 137)



politics: politics within the rule of law and politics as the arbitrary exercise of power, which are both located in the separate realms: domestic and international, respectively. He argues that both legal skepticism and epistemological positivism make it possible for international politics to be primarily the domain of ‘facts,’ and allow for the shift from normativity to normality. Thus, normative issue (Agamben’s question *iuris*) becomes a question of political fact, normalized and objectified reality.

Similarly, Edkins (1999) argues that political life is being executed by ‘normalizing power’: “the judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the ‘social worker’-judge; it is on them that the universal reign of the normative is based.” (Edkins 1999: 51) This process is, according to Edkins (1999: 51-52) helped along by mechanisms of normalization, technologization and depoliticization of the public sphere. The notion that norm imposition helps depoliticize public life radically departs from pluralist and institutionalist theorizing on international norm creation, suggesting that states accept norms and rules either for the “mutual protection of sovereignty and the facilitation of commerce” or in order to realize “common values that go beyond self-preservation and sovereignty.” (Zacher and Matthew 1995: 134) The following section will suggest that international norm creation in an emergency situation does not necessarily lead to return to law and order, rather - by conditioning the object of its power to compliance – to perpetuation of the exception.

### Chapter Three: Case of the UN Interim Administration in Kosovo

Having introduced the thought of Giorgio Agamben on the role of the complex relationship between sovereign power, *Homo Sacer* and state of exception, we will now use this conceptual nexus as a tool box which will help us unpack the dynamics of exception in a prime example of contemporary time trusteeship – the UN Interim Administration in Kosovo. In the first section, we will witness the birth of *Homo Sacer* in the UN resolution and legal documents released in Kosovo after the NATO military intervention in Kosovo. Even though this intervention can be considered a paradigmatic showcase of sovereign power's presence, it is not the primary object of our interest here, and will be examined only in connection with the state of exception it brings about: suspension of state sovereignty, as well as suspension of existing law in the Kosovo province. In this juridical vacuum, sovereign power exposes the bare life of the province not only to the decisions of unaccountable mechanisms, but also conditions its existence by policies that effectually perpetuate the exceptional status of the province. With final status of the province unclear, it is up to the community of citizens to decide on life of an equal, i.e. Kosovo embracing full fledged statehood, or death, metaphorically meaning the re-installment of Serbian sovereignty. In the last section of the chapter we will thus discuss the Standards for Kosovo project from the perspective of power that constitutes itself by conditioning life and exposing it to death, thus perpetuating the undecidable state of exception.

Prior to the 1999 intervention by allied forces, Kosovo's status was that of a regional autonomy within the republic of Serbia. During the Balkan Wars it became a part of Serbia, and as such entered the Kingdom of Serbs, Croats and Slovenes

established after the first World War, and Republic of Yugoslavia after World War II. With a significant Albanian majority, Kosovo gained a high degree of autonomy under the constitution of 1974, encoded in the status of an autonomous province. However, these powers were revoked fifteen years later, along with the rise of Milosevic's regime and its nationalist tendencies. Slovenian and Croatian claims of independence in the early 1990s brought the question of Kosovo's own independence which gained a wide support in the unofficial referendum. However, the Badinter Arbitration Commission, set up by European countries to provide guidelines according to which parts of former Yugoslavia could apply for recognition as sovereign states, decided in favor of preserving the existing border lines, according to the *uti possidetis* rule. In principle, the commission stated that only constituent republics of the federation could form new states and thus disqualified possible claims of both Kosovo and the other autonomous region, Vojvodina. In the latter half of the decade, after the end of the Bosnian conflict, continuing violations of human rights of Kosovo Albanians became severe and escalated into an armed conflict between the Yugoslav forces and newly formed Kosovo Liberation Army (KLA). In 1998, as a response to massacre in which 60 civilians got killed, NATO members started to debate on whether they could employ force without the sanction of the Security Council and the Contact Group. The coercive action<sup>17</sup> was eventually prompted by another massacre in Racak and failure to end the Serb-led violence by the Rambouillet accords. While much has been written on the intricacies of the intervention which was

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<sup>17</sup> Bellamy (2002) recognizes seven periods of international engagement prior to 1999: Non-engagement, limited engagement, malign non-engagement, debating intervention, unarmed intervention, coercive diplomacy, and limited war.

never sanctioned by the UN, Richard Holbrooke provides a succinct account of the international community's approach to the use of force:

My advice and position on Kosovo, from the beginning of my involvement in the spring of 1998 on, was basically that the Serbs and the Albanians would never be able to settle their problems unless there was an outside international security presence on the ground. The hatred between Serbs and Albanians in Kosovo was far, far greater than any of the so-called ethnic hatreds of Bosnia, which had been grossly exaggerated by the crooks, and the mafioso demagogues in the ethnic communities of Bosnia. This was the real thing in Kosovo between Albanians and the Serbs. Different cultures, different languages, and different histories, but a common obsession with the same sacred soil. And, therefore, it was going to be essential for us to recognize that the situation would require an outside involvement.

(Richard Holbrooke in Interview for the PBS)

The orientaling notions present in this excerpt resonate well with the logic employed by the international community in its standpoint toward the Balkan crises. However, whether prompted by perceptions of Albanians and Serbs as essentially irreconcilable, or Serbs as clearly defined perpetrators unlike in the case of the previous conflict, international community decided to employ strategy of action. For purposes of this paper, however, we need to focus on what entity this military action brought about and what form or status it was awarded.

### ***3.1 Suspension of sovereignty and the Birth of the Homo Sacer***

In order to set up an international administration, double suspension had to occur: suspension of sovereignty of Republic of Yugoslavia, as well as suspension of existing legal system in the Kosovo territory. The term 'suspension of sovereignty' as defined in legal literature, refers to "extreme situations in which a clear rupture is observed between the proposition of sovereignty and the social and political realities on the ground."

(Yannis 2002: 1037) Such extreme situations can be either brought about by forceful intervention<sup>18</sup> into domestic affairs of another state, and subsequent occupation of that territory, or by conceding a given territory under the former Mandates or Trusteeship System of the UN<sup>19</sup>.

In the context of Kosovo, this meant that sovereignty as a legal concept was no longer applicable to the territory, and as such was substituted by the rights and obligations of the international administration, encoded in the UNSCR 1244 and internal regulations. However, the suspension of sovereignty of Yugoslavia over Kosovo can essentially be considered a reaction to a political fact of post-intervention power vacuum. As such it was again the primacy of *questio facti* over *questio iuris* that served as a “legal rationalization of a political reality that has produced an abnormal legal situation.” (Yannis 2002: 1040) Similarly to the historical cases of the old Trusteeship system, the decision that a certain territory be placed under the United Nations administration was reserved to political considerations, and the fact that now Security Council gained the capacity to dispose of territories<sup>20</sup>, instead of the winning powers as in the Mandate and Trusteeship systems, did not significantly change the mode of governance from the perspective of the governed objects.

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<sup>18</sup> In case of foreign invasion, the position of international law is that while the legal personality of the state under occupation is not annulled, its sovereign rights are suspended. In this sense, the legal continuity of statehood is qualified. (Yannis 2002: 1038)

<sup>19</sup> Both systems essentially created a situation in which some states were more sovereign than others. Both responded to the after-war political realities by codifying the status quo in international legal documents. In the latter case, Article 77 of the UN Charter narrowed the amount of territories to which the trusteeship could apply to former mandates, territories detached from enemy states during the Second World War, and territories placed under the system by states responsible for their administration. (Yannis 2002: 1040)

<sup>20</sup> In Agambenian perspective, this precedence may be a sign of emerging intersection between a legal and political question in which it may not be able to decide which one is determinative of the latter. While political action creates a legal situation in which sovereignty is being suspended, international law is in return expected to provide an *ex post* assessment and legitimization of such act. Thus it may happen, that even though article 78 of the Charter reserves the institution of trusteeship only to UN non-members, it is legally possible to expel a state from the UN and then place it under trusteeship.

The bare life of Kosovo province then begins with the United Nations Security Council Resolution 1244 which in effect suspended the existing sovereignty of Yugoslavia and became the formal source of authority and legitimacy. Followed by UNMIK Regulation 1/99, known as the ‘mother of regulations’, it invested all legislative, executive and judicial authority in regard of Kosovo in the UN Interim Administration, and assigned the Special Representative of the Secretary-General as its head. (Section 1, Reg 1/1999) This Representative (hereinafter referred to as the SRSG) thereby became close to omnipotent: he was endowed to appoint any person to perform functions in the civil administration and judiciary, or remove such person.

In terms of the legal code, the Regulation 1/1999 originally set out only to apply the Yugoslav law that had been applicable in Kosovo prior to the NATO campaign which began on March 24, 1999. However, this decision was met with protests from the Kosovo Albanian side. (Yannis 2001) On second thoughts, the international administration therefore decided to suspend the pre-war legal complex that was in force for a decade, and adopted the law<sup>21</sup> that was in force prior to the Milosevic’s abrogation of Kosovo’s autonomy on March 22, 1989. (Yannis 2004: 70) The interesting point raised by Yannis (2002) is that the administration considered the law-related issues and suspension of Yugoslavian laws and institutions in Kosovo, as well as the regulation of external relations of the administration, to be primarily *political* matters, and not legal ones.

In effect, Yugoslavian authorities were excluded from any administrative roles in the territory. The international administration was then divided in four sections, presided by the SRSG, and each of them was assigned to a different international agency: UN

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<sup>21</sup> This was later codified in the Regulation 1999/24 On the Law Applicable in Kosovo.

High Commissioner for Refugees (UNHCR) became in charge of humanitarian assistance pillar, Organization for Security and Cooperation in Europe (OSCE) led the Democratization and Institution Building pillar, European Union took care of the Reconstruction and Economic Development pillar and finally, the Civil Administration pillar was led by the UN itself.

### **3.2 Perpetuating the exception: Standards for Kosovo rethought**

*„Frankly, the standards that Kosovo has been asked to meet are standards that even my own country Denmark would have difficulties meeting.“*

(Soren Jessen Peterson, SRSG, Interview for the BBC, 2006)

Following the 1999 bombing campaign and the installment of an interim international administration, international community left the final status of the province open to speculations. In an attempt to either condition and motivate the Kosovo Albanian majority into adopting a more accommodationist approach towards its Non-Albanian minorities, or delay the final status settlement, a set of internationally consented standards was laid down at the beginning of 2002. These internal benchmarks were, however, meant to address not only the interethnic relations of Kosovo, but also other areas that the international community rendered suitable as precursors to Kosovo's entering the community of states in a somewhat less provisional way. In an emergency situation of a humanitarian crisis, United Nations Resolution 1244 created a vacuum of state power where sovereignty was exercised by an international decree. Blurring of the inside/outside divide under a state of exception empowered the international agency as a sovereign ban with the right to normalize and condition political life of the province.

The aim of this section is to argue that the Standards for Kosovo, as a codified expression of the normalizing power of the UN, did not stimulate empowering the local population and catalyzing the resolution of the final status, as their authors envisioned. Instead, the politics of standard imposition can be read as a mechanism perpetuating the exceptional rule of external sovereign power. Focus of our attention here are those factors that obscured the basis for a fair judgment of Kosovo's performance, and, instead of triggering the province's way out of provisional schemes, contributed to preserving the provisional status quo. As will be discussed, the external factors beyond responsibility of local institutions and population were the lack of accountability of local institutions stemming from the state sovereignty vacuum, and second, failure of international agencies to provide a safe and secure environment conducive to the standards implementation.

The 'Standards before status' were originally introduced by the former SRSG, Michael Steiner, in mid-2002. While to critics on both sides they appeared as just another temporizing measure giving only few details on how they would be evaluated, by whom, and what would be the impact on the form of final status settlement (ICG 2003, ICG 2004), to the Contact Group and international agencies operating in Kosovo the standards provided a much needed legitimacy of their actions<sup>22</sup>. The eight benchmarks attempted to address key issues that Kosovo was facing and that, in the eyes of the international community, separated Kosovo from legal existence, whatever the form of it may be. The

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<sup>22</sup> The standards gave hope in that they seemed to give agency back to Kosovo. As ICG (2004) put it, "where previously UNMIK rule appeared to have no expiry date, the countdown had begun." The UN officers supported this perception with promising statements as regarded the much desired grant of independence if – and only after – all the standards were achieved – "All options are on the table" was as far as some would go. (ICG 2004: 23)



standards, in their final form endorsed by the UN<sup>23</sup>, covered functioning democratic institutions, the rule of law, freedom of movement, sustainable returns and the rights of communities; the economy, property rights, dialogue with Belgrade, and the building of the Kosovo Protection Corps (KPC) as a civilian emergency organization.

While it was unclear who and how would measure performance in all eight areas<sup>24</sup>, it was believed that success in their implementation depended largely on the commitment of Kosovo's population and its provisional government. As the ICG report summarizes it, "now it seemed possible to channel growing Kosovo Albanian impatience, frustration, and insecurity into constructive processes." (ICG 2004) The following subsections will deal with these assumptions and divide the bulk of standards in two broad categories: those where lack of accountability formed a hindrance in delivering the desired performance, and those where achievement was hampered by a lack of trust and a failure of international agencies to provide a safe environment.

### **3.2.1 Standards and accountability**

The first item was the "Functioning Democratic Institutions," which provided the imperative of free and democratic elections, availability of basic public services such as health care, utilities, and education, and the principle of anti-discrimination. In regard of minority rights, all communities were meant to be given fair access to employment in

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<sup>23</sup> As of December 10, 2003, when they were made public, followed by Kosovo Standards Implementation Plan on March 31, 2004.

<sup>24</sup> Until 2004, formulation of these issues was rather vague. This trend still persists on the official UNMIK website introducing Standards to large public, stating that "the progress or absence of the progress will be clear to everyone. Street signs will be in all the languages – or they won't Buses will move freely through all areas, or they will be stoned. Citizens will cooperate with the Police to fight crime or otherwise criminals will be free to roam Kosovo. It will be clear when life in Kosovo becomes normal for all its citizens, whoever they are and wherever they live." (Standards for Kosovo)

public institutions, which in turn would abide by recommendations of Ombudsperson, holding the government transparent and accountable.

Issues hampering the successful achievement of the first standard turned out to be, however, beyond the normative reach and responsibility of the provisional and freely elected self-government. First of all, the Constitutional Framework on Self-Government (2001) attributed only limited powers of the Provisional Institutions of Self-Government (PISG), comprising of the Assembly, President of Kosovo, Government, Courts and other bodies and institutions, such as the Ombudsperson Institution. Notably, the judiciary, the police and the legislature remained in control of the UNMIK. This created a vacuum of accountability, much criticized by the provisional institutions. Several reports of the Ombudsperson institution reiterate that the lack of accountability has created a “paradox, whereby those entities that are in Kosovo to help preserve human rights and the rule of law are themselves not answerable to the very persons they are obliged to protect.” (Ombudsperson 2004: 21)

Furthermore, the immunity of UNMIK and Kosovo Force had been on various occasions rendered incompatible with international human rights standards. (Benedek 2004: 222) In such circumstances, serious problems were reported by victims of human rights violations pursuing claims against UNMIK. While the UN retained its imposed and unaccountable sovereignty in the decision-making process, both the executive and the judiciary branches of the PISG were still being perceived as weak and riddled with corruption. (Ombudsperson 2006: 11) It is no wonder then that the majority of Kosovo inhabitants placed little trust in either.

Aside from limited capacity and lack of trust, continuing existence of parallel institutions had continued to hinder accountability of the PISG and its freedom to create a functioning and democratic political environment. As the ICG and OSCE report state, even throughout and after the armed conflict of late 1990s, Belgrade had managed to retain and support parallel structures in health, culture, education, justice and even security. (OSCE 2003) The building of an institutional fifth column had in the eyes of many spoiled “the establishment of a civic contract between Kosovo’s Serbs and Albanians.” (ICG 2003: 26) Kosovo Serbs locked in ethnically defined enclaves and encouraged by uncomparably high salaries from Serbia proper<sup>25</sup>, never came to recognise UNMIK, let alone the PISG.

The second standard, ‘rule of law’ aimed at effective law enforcement, compliant with European standards. Police, judicial and penal system were meant to act impartially and fully respect human rights. A crucial point here was the question of which law to apply and lack of jurisdictional will on the part of UNMIK to clarify the issue<sup>26</sup>. (Ombudsperson 2006) Even as of 2006, there was still much legal uncertainty as to which of the old Yugoslav laws were still applicable or not and there was “still no competent judicial body to which those bodies responsible for implementing the law could address such matters.” (Ombudsperson 2006: 11) As we mentioned earlier, the UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo, amended by UNMIK Regulation No. 2000/59, provides that the laws applicable in Kosovo are UNMIK

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<sup>25</sup> This system of double salaries stopped in March 2006, when the Serbian Coordination Centre for Kosovo and Metohija demanded that all individuals receiving salaries from both Serbia proper and the PISG choose and keep only one of the salaries. (Ombudsperson 2006: 32)

<sup>26</sup> One special aspect of the Kosovo judicial system is the existence of international judges, who are appointed and assigned to courts in Kosovo only by the SRSG with no legally specified nomination or recruitment procedures.

Regulations, laws of the Kosovo Assembly and Yugoslav laws from before 22 March 1989. Even though such formulation may sound clear, in many instances the Regulations passed by the UNMIK created confusion, stating merely that they „supersede any other law or other provisions that are inconsistent with it, but still do not specify exactly which law or laws they are replacing.“ (Ombudsperson 2006: 12) Moreover, beyond the attempts at clarification lie the laws applied by the parallel court system administered by the Serbian Ministry of Justice and other parallel administrative offices. These institutions never recognized UNMIK Regulations, and set out to follow the legislature of Serbia proper. (OSCE 2003, Ombudsperson 2004, 2006)

Thirdly, Standards’ emphasis on ‘economy’ attempted to move Kosovo closer to Europe and assist in reshaping Kosovar economy in order to create more jobs and attract foreign investment. Lack of accountability of local institutions can be blamed even here for providing low legitimacy of setting this benchmark as a precursor to status settlement. Status uncertainty, that is, deters investors, and “without the myriad club membership open only to nation states, Kosovo’s development is stunted under the current UN rule.” (ICG 2004: 3) Furthermore, as most Kosovars consider unemployment the most serious problem they are facing (UNDP 2004a, UNDP 2004b), many families are dependent on support from their migrant children. However, as Kosovo Albanians cross the borders into Western Europe and enter labor markets<sup>27</sup>, these nations “seek to throw them back.” (ICG 2004)

Finally, ‘dialogue’ between the PISG and Belgrade over “practical issues such as energy, transport, communication, missing persons etc.” had been hampered not only by

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<sup>27</sup> In 2002, 50 percent of Kosovo’s GDP was accounted for by foreign assistance, 30 percent by remittances from the diaspora – and only 20 percent by domestically generated economic activity. In 2003, exports covered a mere 4 percent of imports. (UNDP 2004b)

lack of PISG's accountability within Kosovo and its inhabitants, but generally by the very lack of recognition of Kosovo's self-governing institutions by Serbian government. As common sense would have it, it takes two to tango, and Kosovo's institutions can only hardly live up to this standard, unless they are recognized as a partner to a dialogue. Furthermore, Belgrade has been hostile not only to the idea of Kosovo's international trusteeship and (partial) self-governance but had consistently opposed the process of Standards implementation, with an increased intensity after the March 2004 crisis. (UNDP 2004a: 23)

### **3.2.2 Standards and security**

While lack of accountability obscured ownership of standard implementation process in the case of institution building, rule of law, economy and dialogue, it will be argued here that international agencies' failure to provide a safe and secure environment played against the remaining four standards - "freedom of movement," "sustainable returns and rights of communities," "property rights" and "KPC." Events that displayed the unpreparedness and fragility of UNMIK police and KFOR troops took place in mid-March 2004 and further stigmatized communication with Kosovo's Non-Albanian minorities, Belgrade, and trust towards security providing institutions.

United Nations Security Council Resolution 1244<sup>28</sup> authorized the international security presence to establish a safe environment for all people in Kosovo and "to facilitate the safe return to their homes of all displaced persons and refugees." (Annex 2, Art 4, UNSCR 1244) Since KFOR's arrival, over 235,000 members of non-Albanian

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<sup>28</sup> However, it is important to note that the UNSCR 1244 was enacted under Chapter VII Chapter VII of the UN Charter which concerns threats to international peace and security, and not democratic state-building.

minority groups have been displaced to neighboring countries, and over 20,000 were displaced within Kosovo. (HRW 2002, ICG 2002) However, as the ICG Report in 2002 states, ensuring security and future for minority communities in Kosovo, as one of the chief goals of the international community, had been far from satisfactory. (ICG 2002: 17) Unescorted movement of Serb minorities outside of the enclaves around Pristina was still rare, and minorities even somewhat adapted to these restrictions, considering it “natural not to move outside their communities without armed escort.” (ISG 2002: 17)

At the beginning of its mission, UNMIK decided that it would be too early to promote reconciliation between communities in Kosovo. Memories of the 1990s, the war and hatreds among the communities were assumed to be too strong. Therefore, the administration adopted a less ambitious goal of peaceful co-existence, after which communities would be able to reconcile. However, such policy tended to “entrench, rather than alleviate, existing divisions.” (ICG 2002: 20) In 2002, the international community recommended that the international community should send a clear message that minorities have a place in Kosovo by providing a safe and secure environment<sup>29</sup>. (ICG 2002: 17)

The attacks of Kosovar Albanians on Non-Albanian minorities in March 2004 had caused serious concerns relating to capacity and preparedness of the international forces to protect and provide safe environment. In many instances,<sup>30</sup> KFOR troops and UNMIK police refused to come to the assistance of besieged minorities. In other instances, attacks

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<sup>29</sup> However, military protection of minorities had been exercised primarily in the form of checkpoints enclosing Serb enclaves, which were criticized as „contributing to a siege mentality among the Serb community.“ (ICG 2004)

<sup>30</sup> In Svinjare and Vucitrn/Vushtrri, both located in direct vicinity of KFOR camps, no international response came to assist the Serbian and Ashkali inhabitants being targetted by the rioting Albanians. The entire village of Svinjare (137 buildings) was burned to the ground and in Vucitrn/Vushtrri, sixty nine Ashkali houses were burnt. (HRW 2004)

against cultural and religious symbols of the Serbian community<sup>31</sup> were lead without international response. Moreover, even where the international troops were present, they often proved ineffective and outnumbered<sup>32</sup>. (HRW 2004, ICG 2004) The rampage left nineteen dead, nearly 900 injured, over 700 targeted Non-Albanian inhabitants' homes damaged or destroyed, together with 36 Serbian Orthodox churches<sup>33</sup>, roughly 4, 500 people displaced. (ICG 2004: 3) Most of these people have not returned to their homes (as of June 2006), mostly for security reasons, many of them sold their properties and moved elsewhere. (Ombudsperson 2006: 13)

As regards feelings of personal security, the two communities varied to a great extent, too: where the majority of Kosovo Albanians felt 'somewhat safe' on the street (39.7%), most Non-Albanian minorities felt 'somewhat unsafe' (36.5%) and an alarming third of Kosovo Serbs felt 'very unsafe' (33.3%). (UNDP 2004a: 32) As regarded confidence in security institutions, during the two years leading to the March riots, Kosovo Albanians' dissatisfaction with the performance of KFOR increased only slightly, UNMIK police scored somewhat less<sup>34</sup>, while confidence in the local KPS rose to nearly 98 percent. On the other hand, Kosovo Serbs' trust in these institutions dropped dramatically and alarmingly. As of early March 2004, only 11.4 percent Serbs were satisfied with the performance of KFOR, less than four percent with UNMIK police and not even one percent of the respondents trusted in the KPS. (UNDP 2004a: 32)

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<sup>31</sup> Serbian orthodox churches dating back to the fourteenth century were burnt in the town of Prizren (HRW 2004)

<sup>32</sup> In Djakovica/Gjakove, for instance, a few dozen Italian KFOR troops attempted to protect the last remaining Serbian Orthodox Church until they were overwhelmed by rioting crowds. (HRW 2004)

<sup>33</sup> None of them had been reconstructed as of June 2006. (Ombudsperson 2006)

<sup>34</sup> From 78.5 percent in November 2002 to 57.1 in March 2004 (UNDP 2004)

To sum up, while the Standards for Kosovo became a yardstick by which to measure the province's readiness for statehood, the agency of Kosovo's institutions and inhabitants in delivering the set of goals was limited by factors beyond their responsibility: low accountability of the PISG and no accountability of the UNMIK, and failure of the latter to provide a secure environment. Lack of ownership in the standard implementation process frustrated hopes of Kosovo's inhabitants stuck in limbo of provisional trusteeship since June 1999 and contributed to violent unrests of March 2004. These two days of armed attacks at Kosovo's non-Albanian minorities and international institutions exposed the fragility and unpreparedness of security providing agencies. Not able to secure an environment where democracy, human and minority rights could thrive, and exercising sovereign powers over the province, international community set up conditioning measurements the accomplishment of which was not solely in the hands of the local population. Thus, the relevance of the standards as a basis for judgment on the province's readiness for statehood thus remained obscured, and can be seen primarily as a mechanism that allowed for perpetuation of the interim administration and normalization of its exceptional governance.



## Conclusion

The aim of this paper was to establish the institution of international trusteeship as *Homo Sacer*, an entity included in the community of states by the sovereign's decision on its political exclusion, and trace the mechanisms which enable the perpetuation of the state of exception in which it exists. What then do trusteeships as *Homines Sacri*, tell us about location of sovereignty? Historically, sovereignty has been locked inside states. Spatially, the principle of state sovereignty "fixed a clear demarcation between life inside and outside a centered political community." (Walker 1989: 62) Presumed lack of centered political community, in return accounted for the inside/outside boundary in international politics. However, with sovereign power entering the body of a territorial entity we can no longer rely on this distinction.

Following the Agambenian conceptual nexus, we framed the debate about trusteeship as that of sovereign power entering the body of a depoliticized entity. From this perspective exclusion of trusteeships from the international order by their inclusion as *homines sacri*, to whom sovereign power relates, changes location of sovereignty and obscures the anarchical condition of international system. Moreover, should such life conditioning power govern the relationships in the political community or international arena, then, following Agamben, anyone can become *Homo Sacer* with respect to sovereign power.

As Agamben fears, „the juridically empty space of the state of exception (...) has transgressed its spatiotemporal boundaries and now, overflowing outside them, is starting to coincide with the normal order, in which everything again becomes possible.“ (Agamben 1998: 38) As we saw in the case of the Kosovo administration,

temporal boundaries of the exceptionally imposed trusteeship were never clearly defined, and the sovereignty of the UN interim administration was only partially reduced by the provisional self-government established in 2001. Thus, the fate of the province became exposed to the international community which could decide whether it would adopt the political life of an equal, while embracing statehood, or death – the re-installment of Serbian sovereignty. Unable to agree on what the final status of the province would be, international community used its powers coded in the UNSCR 1244 and policies under the heading of Standards for Kosovo in order to reproduce and normalize its exceptional sovereignty over domestic issues.

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