CENTRAL EUROPEAN UNIVERSITY

RULING OUT THE STATE OF EXCEPTION
– WOULD THE CLOSURE OF GUANTÁNAMO ELIMINATE THE CAMP AS A PARADIGM OF GOVERNANCE? –

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Introduction

The twentieth century marks a significant point, a point of no-return in the history of politics. It marks the end of an order based on the system of sovereign nation-states, which provided a definite frame, for hundreds of years, within which politics could be practiced. Politics traditionally – when practiced under the sovereign power and within a certain territory belonging to a certain nation, in other words under a set of pre-existing norms – created the state of law that, in turn, established a secure environment for human life. With the First World War, however, this order essentially broke down: its territorial arrangements cut off the continuity or at least the consensus over the existence of continuity between nation, state and territory. With this the set of norms tied to the nation, which is an indispensable prerequisite of politics, within the territory of the state became unrecognizable. Although there were attempts to restore the lost order, from that time on it has been more and more beyond reach, since the process of globalization further strengthened the distinction and separation of nation, state and territory.

Consequently – having its traditional frame and with that the traditional political terms, such as state, right and law destroyed – in the twentieth century the nature of politics, both domestic and international, has been going through a profound change. As a result, politics is no longer able to fulfil its function. It can no longer establish the state of law, and create a higher order – political order – that, in turn, provides the people with security. Instead, it loses its essence in attempting to circumscribe the frames of the polity within which it can be practiced. Since norms are no longer clear, they cannot be taken for granted, this attempt to circumscribe them is rather arbitrary. Consequently laws are, just like their foundation, arbitrarily defined, they do not constitute a comprehensive set of rules that can stand for political order and security. Rather they constitute a set of exceptional measures.

Politics, in this sense, establishes not the state of law but, as Giorgio Agamben – a contemporary Italian philosopher – calls it, the state of exception. This is similar to the state of emergency as they both consist of emergency measures, however, it is only declared when a clear factual threat to the order occurs and as such it lasts until the threat is removed. More importantly, in the state of exception there still exists a clear set of norms; normalcy and emergency are distinguished. In contrast, in the state of exception norm and anomie, friend and enemy, normalcy and emergency, inside and outside are indistinguishable. As such, the state of exception is essentially unlocalizable. Once, it is localized, geographically circumscribed, it opens up an essentially insecure place, the camp, where the exception becomes the rule in its totality and so where the most deadly consequences of the state of exception occur.

Numerous contemporary scholars claim that the state of exception with all its deadly consequences can be very well demonstrated in contemporary American politics. Since the terror attacks on the World Trade Centre and the Pentagon a great number of emergency measures has been taken in the name of a national emergency. However, this national emergency lasted for several years, already till the termination of the Bush Administration, and may be even continued during Obama. Moreover, as I argue, it can even be extended to Europe. In this way exception seems to become the rule, anomie and emergency seems to blur with norms and normalcy. The most obvious indicator of the state of exception is the Guantánamo Bay Detention Camp, the camp, where law is suspended and exception, in its totality, becomes the rule. In this paper I capture this state of exception – clearly distinguishing it from the state of emergency – with all its consequences, but most importantly with the camp, and analyse whether the new Administration would and could make a difference and eliminate the state of exception by the closure of Guantánamo and other measures of that kind. For this purpose, first I provide a theoretical background – based

most importantly on the work of Giorgio Agamben – where I define and describe the main terms, their meanings and consequences. In the second chapter I apply the theory on the United States by proving that unlike the Bush Administration's claim, American politics is much more about the state of exception than about the state of emergency: after a general analysis of the War on Terrorism fought by the United States, I specially focus on Guantánamo, the camp, and on the life it produces. Finally, I examine the future perspectives for the restoration of the rule of law during the new Administration by assessing the first measures of Obama. Here I also analyse a specific case, the issue of the resettlement of Guantánamo detainees within Europe, since, I argue, it may well indicate the extension of the state of exception to Europe.

The Concept of Modern Politics

In the antique world Aristotle defined man as "a living animal with the additional capacity for political existence."[1] This view of humanity is also reflected in the ancient Greek language: it does not have one single word for life, but differentiates between biological life (*zoë*), that of any living being, and the one specific for humans, a politically qualified life (*bios*). *Zoë* and bios thus refer to two distinct and separate spheres of life, to the private (*oikos*) and the public (*polis*). While the private sphere is concerned with physical existence – survival and reproduction – in the public one man becomes a human, it is there where its specific capacity occurs: in the *polis* the voice that, outside the *polis*, is to express only pain and pleasure is transformed to language. According to Hannah Arendt, in the private sphere people are "slaves" of their needs at the mercy of nature and it is in the public one where laws enable them to build reason, to plan, to act and thus to gain freedom. Aristotle formulates it as "born with regard to life, but existing essentially with regard to good life."[2] In the antique world, the public sphere and politics that takes place within it thus is strictly separate from biological needs and concerns and embody something that capacitates man for "good life".

More than two millennia after Aristotle, Michel Foucault provided a radically different picture of modern man and, through that, politics. He defined man as "an animal whose politics calls his existence as a living being into question."[3] In this chapter, which gives a theoretical frame to the discussion on Guantánamo, I examine what exactly this fundamental change is, and what its root and implications are. Here I rely most importantly on the work of Giorgio Agamben. First I describe the basic construction of Western politics, characterizing

[1] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 3.
[2] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 2.
[3] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 3.

both antique and modern concepts. Second I capture the profound change that took place some time during that more than two millennia, more specifically, according to Foucault, at the dawn of modernity and that fundamentally determine contemporary politics and life. In the last two sections of this chapter, I explore the essential consequences of the concept of modern politics on politics and life itself.

Sovereign Power and its Implications

While, throughout history, politics has been, on the one hand, seen as an end in itself in qualifying man as human, its function has also always been viewed as a means of creating order, providing a frame for human life. Thomas Hobbes, living in the turmoil of the seventeenth century Europe, described the condition of men without public sphere and politics – that was later called state of nature – as "a war of every man against every man,"[4] and contrasted it with the state of society where, through justice, order is established.

The state of nature that precedes society, for Hobbes, is an essentially lawless place and as such it is a place of pure violence. Since there is no common language of people, there is neither understanding, nor objectivity, but only the various and competing perceptions of people, "quarrels over the definition of words and the denomination of things."[5] Therefore the terms good and bad, just and unjust do not have sense, and law cannot be circumscribed either. Only the social contract, which is the consent of natural persons to escape from the pure violence of the state of nature, can enable the implementation of law and justice. The social contract creates a polity, a state of law essentially by two acts. First, it opens up a shared public space where politics can be practiced. The nature of this public space varies according to the different political concepts. It may be autocratic, as it is in the Hobbesian

[4] Michael C. Williams, pp. 213
[5] Pat Moloney, pp. 262

"body politic", where nobody but the sovereign practices politics in the public sphere, or it may be pluralistic, as in the concept of Hannah Arendt, for whom man realizes his freedom in this public sphere. Second, it creates an "artificial person,"[6] the sovereign, who is provided with the virtue of naming, and has the last word in determining the signification of words. The sovereign by the social contract is entitled to, and by the establishment of a common language – that is the establishment of understanding and objectivity within the polity – is enabled to implement law. With implementing law, at the same time, it monopolizes and institutionalizes the violence and eliminates its pure form. The main pillar of law and order is thus the sovereign, for he maintains the state of law and the normal functioning of the shared public space and as such he guarantees justice and order.

Carl Schmitt, in one of his works written during the interwar period in Germany, defined the sovereign as the one "who decides on the state of exception,"[7] where by the state of exception he means the suspension of the rule of law. This definition points out that the sovereign does not only rule by law, he can abandon it when he finds necessary to do so: he is entitled to decide the relation between life and law, whether it is application or abandonment. In a normal situation he applies law. But in case of emergency, that is when the order itself is endangered and that is to be decided by the sovereign, he can suspend law temporarily, for the sake of the order, to restore normalcy by removing the threat and making law applicable once again. This authority of the sovereign embodies an essential paradox: he is placed, at the same time, inside and outside the law. As Giorgio Agamben formulates it: "If the sovereign is truly the one to whom the juridical order grants the power of proclaiming a state of exception and, therefore, of suspending the order's own validity, then the sovereign stands outside the juridical order and, nevertheless, belongs to it, since it is up to him to decide if the

[6] Pat Moloney, pp. 261
[7] Giorgio Agamben: State of Exception, pp. 1

constitution is to be suspended in toto. […] The law is outside itself."[8] Since rule cannot exist without exception, and it is the exception that explains and confirms both the rule and itself, juridical rule cannot exist without the sovereign exception: the exception is inclusively excluded from the juridical order, its inclusion is based on its very exclusion.

Agamben goes even deeper in analysing this sovereign exception, and refines the term further, using a social model that defines two statuses existing within the society: one can be member of and/or included in a society, where membership corresponds to presentation and inclusion to representation. In the normal case a member is, at the same time, included in society, thus both presented and represented. However, this is not the only option; deviations to the rule do occur, such as the singular who is presented but not represented, or the excrescent who is, vice versa, represented but not presented. In this model Agamben places the sovereign exception under a fourth condition, in between singular and excrescent: "What emerges in this limit figure is the radical crisis of every possibility of clearly distinguishing between membership and inclusion, between what is outside and what is inside, between exception and rule."[9] The paradox of sovereignty, its inclusion in the juridical rule exactly by its exclusion has serious, straightforward implications for the juridical order.

> "Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the exception: it nourishes itself on this exception and is a dead letter without it. In this sense, the law truly has no existence in itself, but rather has its being in the very life of men. The sovereign decision traces and from time to time renews this threshold of indistinction between outside and inside, exclusion and inclusion, nomos and physis, in which life is originarily excepted in law."[10]

Transformation of Politics

The elemental construction of politics, with its basis on the sovereign together with its above described implications regarding the juridical order, has been a permanent feature of

[8] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 15
[9] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 25
[10] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 27

politics along the history of the "West": it characterized the antique Greek and Roman politics, just as that of the Holy Roman Empire in the Middle Ages and the politics of nation-states in our modern age. However, as the two distinct definitions of men by Aristotle and Foucault indicate, still there must have been a radical change in the nature of politics at a point somewhere along that more than two millennia.

Aristotle's definition of man – "a living animal with the additional capacity for political existence"[11] – as I already described it above, refers to the existence of two distinct spheres of human life, the private and the public one. The private space, which is only concerned with the biological existence, is separated and excluded from the public one, where politics takes place and where man realizes his human essence. Contrasting Aristotle, for Foucault man is "an animal whose politics calls his existence as a living being into question."[12] The difference between the definitions can be captured at two crucial points. On the one hand, Foucault does not highlight the existence of an essential difference between animal and man, he does not name politics an additional capacity of man. It does not mean that, for Foucault, man is identical to animal, however, the lack of emphasizing their distinctness is still significant. On the other hand and more importantly, the definition of the contemporary man indicates that the public and private spaces of life are no longer separate from each other. In the contrary, the public becomes concerned with the private, and thus the two spheres become blurred and indistinguishable. Furthermore, the public one, that signs the additional capacity of humans for Aristotle, casts the private – the physical existence, survival and reproduction – into question for Foucault. In sum, by the twentieth century politics has essentially transformed: while in antique times it was something that qualified man as human, in our times politics threatens the existence of man itself.

[11] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 3.
[12] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 3.

Foucault linked the radical transformation of politics to modernity: "At the threshold of the modern era, natural life begins to be included in the mechanisms and calculations of state power, and politics turns into biopolitics."[13] With this he meant that the sovereign power became more and more concerned with the biological existence of its people. On the one hand, it transformed the territorial state into a state of population. On the other hand, it initiated a process of the bestialization of men. Independently from Foucault, Arendt drew the same conclusion regarding the transformation of politics; according to her modernity brought biological life into the centre of politics, thus the natural life gained primacy over political action. However, if we consider the elemental construction of politics, the implications of sovereign power, the transformation appears somewhat different. In this sense the private has always been included by exclusion into the public and thus biopolitics is not a new phenomenon, it has been existing since the concept of sovereign itself exists.

> "The Foucauldian thesis will then have to be corrected, or, at least, completed, in the sense that what characterizes modern politics is not so much the inclusion of *zoë* in the *polis* – which is, in itself, absolutely ancient – nor simply the fact that life as such becomes a principal object of the projections and calculations of State power. Instead the decisive fact is that, together with the process by which the exception everywhere becomes the rule, the realm of bare life – which is originally situated at the margins of the political order – gradually begins to coincide with the political realm, and exclusion and inclusion, outside and inside, *bios* and *zoë*, right and fact, enter into a zone of irreducible indistinction."[14]

In other words, the transformation of politics is essentially characterized by the exception becoming the rule, by the emergence of a zone of indistinction where outside and inside, nature and order, normalcy and emergency blur with each other. As such, biopolitics is only one aspect of this transformation. In parallel with this process, as one of its consequence, the continuous and intensive expansion of the executive power can also be caught out. For the normalcy and emergency becomes indistinguishable, the sovereign plays an increasingly important role in deciding between them and introducing adequate ruling, and it essentially becomes unbound by law.

[13] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 3
[14] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 9

Agamben placed the transformation of politics in time, just like Foucault and Arendt, at the threshold of modernity. More specifically, he referred to the First World War as a decisive point in the process, since it marked the radical and irrevocable crisis of the traditional frame of politics, the nation-state system. Having the direct link between nation, state and territory cut off, norms – which come with the nation and which come first in relation to law –became essentially unrecognizable within the polity. This, in turn, led to the crisis and break-down of the basic political categories, to the penetration of the state of exception into politics and, most importantly, to the elimination of the traditional frame of human life. This is the figure of the refugee, the living being deprived of all rights, who – becoming a mass phenomenon after the First World War – best demonstrates the transformation of politics.

State of Exception, the "Rule" of Modern Societies

As described above, there exists no state of law, no juridical rule without indicating the existence of the state of exception; for the originary form of law is exception, the exception is already included into the rule itself by its very exclusion. It is the sovereign who embodies both the state of law and the state of exception and it is he who decides whether the law or the exception dominates in the polity, whether by its application or its abandonment law is applied to life. Before modernity the exception used to be marginalized in the political order and occurred only in a case of emergency. However, in modern politics the exception appears in the centre of the political order and becomes the rule so that, according to Agamben, we are living essentially in the state of exception. In this section of the paper I aim to capture the fundamental differences between the state of emergency and the state of exception and, more importantly, the construction of the state of exception and its implications for the juridical order.

In classical politics, the introduction of the state of emergency by the sovereign power used to refer, as it is indicated by its name, to an emergency situation when the public safety, the existence and survival of the polity in its current form was endangered by an external or internal factor, be it an earthquake, a deadly disease spreading within the state, an external attack or a civil war. The danger of the disintegration or destruction of the polity necessitated the suspension of law, the deactivation of "all legal denominations and above all the very distinction between public and private."[15] Civil liberties that represent an essential benefit of the order could thus have been suspended. Nevertheless, it only served the safeguarding of law and its applicability to the normal situation, thus it lasted temporarily, till the order was restored. Once that was achieved, it enabled the reintroduction and reapplication of law, the return to the state of law from the state of anomie. In Roman law, the institution of "iustitium" marked exactly this point: when the Republic, for whatever reason, was in danger, the senate, declaring a "iustitium", suspended the law till the order was restored.

In the politics of the twentieth and twenty-first century – which is characterized by the zone of indistinction – normalcy and emergency became indistinguishable and started to blur with each other. Such a situation vested the sovereign with a greater freedom in deciding on emergency: the sovereign may no longer limit himself "to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety),"[16] moreover, he may even maintain a permanent emergency. As such, in modern polities emergency may be placed right in the centre of the juridical order, qualifying the exception, which in the past appeared only temporarily, as the rule itself. Once the exception becomes the rule, the state of law transforms into the state of exception, and legal denominations, the distinctions between public and private become permanently deactivated. Furthermore, this situation enables the sovereign to permanently suspend civil liberties and permanently deprive people of their

[15] Giorgio Agamben: State of Exception, pp. 51
[16] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 170

essential rights and freedom. Nevertheless, the state of exception is not a lawless place, it is not a state of nature. Instead it is a zone of indistinction between the state of nature and the state of law. The suspension of the law does not result in its abolition, rather in the creation of a zone of anomie. What remains is "a law that no longer has force or application"[17] and that essentially exists as a living law in the person of the sovereign. The state of exception "introduces a zone of anomie into the law in order to make the effective regulation of the real possible,"[18] A major consequence of it is that violence – that is pure violence in the state of nature, while in the state of law it is monopolized and institutionalized by the sovereign – in the state of exception, is still not violence unbound of law. As Schmitt formulates it, violence is included in the law by its exclusion.

In the Western juridical system – that is based on a double structure consisting of two distinct elements, a normative, juridical one and an anomic one – "the state of exception is the device that must ultimately articulate and hold together the two aspects of the juridico-political machine by instituting a threshold of undecidability between […] life and law."[19] At the point, where "the state of exception […] becomes the rule, […] the juridico-political system transforms itself into a killing machine,"[20] since it opens up a space between law and life for human action. As such, in the permanent state of exception, political life disappears, the only political action that remains is the action of the separation of violence and law. The totalitarian regimes of the twentieth century are obviously the manifestation of the above described process and as such they are essentially modern phenomena. Only modern politics – where biopolitics comes to the centre of the political order and the realm of bare life starts to coincide with the political realm transforming the state of law into the state of exception – could have accounted for the process of the radical and rapid transformation of parliamentary

[17] Giorgio Agamben: State of Exception, pp. 63
[18] Giorgio Agamben: State of Exception, pp. 36
[19] Giorgio Agamben: State of Exception, pp. 86
[20] Giorgio Agamben: State of Exception, pp. 86

democracies of the twentieth century into totalitarian "killing machines"[21] and could have turned a space that used to provide its people with security totally insecure.

As we are still living under the conditions of modern politics, and, according to Agamben, more and more in a permanent state of exception, totalitarianism is still a substantial problem, a potential present: "If there is a line in every modern state marking the point at which the decision on life becomes a decision on death, and biopolitics can turn into thanatopolitics, this line no longer appears today as a stable border dividing two clearly distinct zones."[22] And what makes the situation even more problematic is that, according to Agamben, the permanent state of exception marks a point of no-return, as it destroys the classical concept of state and law. In this sense, from the permanent state of exception there is no way back to the state of law.

The Camp and Bare Life

While the state of law is a place that can be geographically circumscribed, the state of exception is essentially unlocalizable till the sovereign establishes the camp where exception, in its totality, becomes the rule. The setting up of the camp is justified by the permanent emergency – that is introduced without clear factual evidence for it, by the sovereign's arbitrary decision – to keep the people who, as presented by the sovereign, threaten the order. As such, the camp is "the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life,"[23] where the implications of the state of exception manifest most obviously. It can be clearly shown in the example of totalitarian rules: the culmination of Nazism was the concentration camp, where the deadly consequences

[21] Giorgio Agamben: State of Exception, pp. 86
[22] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 122
[23] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 171

of the state of exception became visible. Here, through examining the nature of the camp, I capture the implications of the permanent state of exception to the human life.

The camp is included in the juridical order only through its very exclusion, just as the state of exception, and it is not part of the normal order, as neither the state of exception is: "The camps are not born out of ordinary law [as the prison law from penal law] but out of the state of exception and material law."[24] In the camp the sovereign completely frees himself from the subordination of law and in this way everything becomes possible. The juridical protection that used to provide security in the state of law, and so marked the essence of it, in the camp becomes invalidated. There is no longer a clear definition either of friend or of enemy, fact and law are indistinguishable, they blur with each other. The camp is thus a totally insecure place where everything is possible, "decisions about life and death are entirely arbitrary,"[25] "life […] itself becomes the place of a sovereign decision."[26] The inhabitants of the camp are presented by the sovereign as anti-human, and as such they are deprived of any legal status, they are even deprived of the status of an ordinary enemy, and so of all civil liberties. Thus, they have no longer private or public life, they are reduced to a bare existence, to a life in the most extreme degradation. "The extreme situation [that] becomes the very paradigm of the daily life"[27] within the camp reduces them to objects, separates them from their dignity and moral conscience. In this sense, they can no longer be called human: they really represent a threshold between human and inhuman. As such, functionaries of the camp have unlimited power over them.

The term "Homo Sacer" of Roman law captured exactly the same figure: he embodied a life which could be killed but not sacrificed and so whose death could not be called death. The life of the "Homo Sacer" was excluded both from the human and the divine sphere. In the

[24] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 169
[25] Jenny Edkins, pp. 3
[26] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 142
[27] Giorgio Agamben: Remnants of Auschwitz : The Witness and the Archive, pp. 49

Nazi concentration camps this figure was called Muselmann – by the very inhabitants of the camp who were all to become a Muselmann – for the position it usually took was similar to a praying Muslim. Agamben describes him as the one who "no longer had room in his consciousness for the contrasts good or bad, noble or bare, intellectual or unintellectual, he was a staggering corpse, a bundle of physical functions in its last convulsion."[28] Agamben identified a football match between the camp guards and the detainees as the most horrible moment of the camp, when those who were extremely humiliated and deprived of their humanity acted just as in a normal situation, somehow showing solidarity with the system.

What makes the camp even more deadly is its permanent nature: just as the state of exception marks a permanent emergency, the camp represents a necessarily permanent tool of the fight against those who are presented by the sovereign as a threat to the order. Thus, the camp can only be closed, eliminated, once the state of exception is eliminated. And for that, according to Agamben, the concept of state and law that are destroyed in the state of exception has to be redefined.

[28] Giorgio Agamben: Remnants of Auschwitz : The Witness and the Archive, pp. 41

The Permanent Emergency of the Global War on Terror

The granting of the sovereign with the power of suspending law in case of emergency has been included in the constitution of most of the modern Western states. Moreover, the state of emergency has not only been enabled by law, but has been an often and widely used practice since the French Revolution. By the end of the First World War, this process led to a great extension of the executive powers, that started to embody legislative competences: "exceptional legislation by executive decree (which is now perfectly familiar to us) became a regular practice"[29] in Western democracies. The escalation of these processes had deadly consequences regarding the Western polities of the twentieth century: the public sphere and politics of these polities were essentially suspended by the continuous military and economic emergencies declared by the sovereigns.

The twenty-first century did not bring change either, rather the contrary. Examining the phenomenon of the Global War on Terror that was initiated by the former American President, George W. Bush after the terror attacks on the 11 September, 2001, it becomes clear that the state of emergency created by the attacks – that had been an exception to the rule – never terminated, but was transformed into a permanent state, into the state of exception – where exception is placed in the very core of the rule, in its totality. This state of exception can be detected at several points in the post-"9/11" politics of the United States: in the suspension of both domestic and international law, in the sovereign acting as omnipotent, as a living law, in the permanent restriction of civil liberties and, most importantly, in the camp – one of them is the Guantánamo Bay Detention Camp – whose detainees are presented and handled by the sovereign as anti-humans. To support this argument, in this chapter first I

[29] Giorgio Agamben: State of Exception, pp. 13

describe the perception and the presentation of "9/11"within the United States and the way it supported the introduction of a permanent emergency arbitrarily declared and maintained by the sovereign. Then I analyse the emergency measures that clearly indicate the existence of the state of exception. Finally I focus on Guantánamo which, I argue, is the physical manifestation, the localization of the state of exception, and as such produces bare life, that can be killed but not sacrificed.

"9/11", from Emergency to Exceptionalism

"9/11", a series of suicide attacks on the World Trade Centre and the Pentagon by al Qaeda – whose leader, Osama bin Laden was trained by the United States at the end of the 1970s to fight against the Soviet invasion of Afghanistan – was not the first terror act in the history of the United States, but it was the most deadly one causing the most damage. The attacks, beside killing almost 3000, mostly civilian, people questioned the security of the American people and consequently destroyed public trust and order. People lost their basic comfort by feeling continuously threatened and unsafe, and as a consequence the normal flow of life, the routine – that is essential for the maintenance of order – was suspended. The restoration of order evidently required extraordinary measures that necessitated the declaration of a state of emergency. Bush, three days after the attacks, announced the introduction of a "National Emergency by reason of [those] attacks and the continuing and immediate threat of further attacks on the United States."[30] However, this state of emergency, in the Bush Administration's rhetoric, from the very beginning, appeared as a permanent state, one that has to be indefinitely maintained in order to handle the continuous threat of another deadly attack on the United States and that has the War on Terror at its core.

[30] Derek Gregory: The Black Flag: Guantánamo Bay and the Space of Exception, pp.407

Bush, in his speeches from the very first day of the attacks, never stopped labelling them as an act of evil, and as such committed against the United States' values and against the whole civilized world: "Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly attacks." […] Thousands of lives were suddenly ended by evil, despicable acts of terror."[31] In this sense, "terrorism becomes the name to describe the violence waged by the illegitimate."[32] Interestingly, with its rhetoric the Bush Administration focused much more on presenting the attacks as a continuous deadly threat, than on ensuring the people of their security which is the first step of the restoration of the order from the state of emergency. Moreover, the presentation of the attacks as an act of evil, as an act against the values of the American people, as an act against the whole civilized world, and its first emergency measures even strengthened the insecurity of the people. For instance, after "9/11" for a while there were warnings every few hundred meters along the main highways, that asked drivers to be cautious and if they experienced something unusual, to inform the authorities immediately.

Through these measures the Administration did not justify the introduction of emergency measures for and till the restoration of security and normalcy, but rather cleared the ground and prepared for a moral war that essentially has an indefinite character. The emergence of the Global War on Terror from the "9/11" terror attacks on the United States was thus a very short and straightforward process. Already on the day after the attacks Bush visualized this as an enormous fight of the good against the evil: "This enemy attacked not just our people, but all freedom-loving people everywhere in the world. The United States of America will use all our resources to conquer the enemy. We will rally the world. The freedom-loving nations of the world stand by our side. This will be a monumental struggle for

[31] Theofanis Verinakis: The Exception to the Rule pp. 104
[32] Judith Butler: Guantánamo Limbo pp. 23

good versus evil. But good will prevail."[33] The War on Terror was officially announced on the 20 September as "civilization's fight"[34] and was labelled by Vice President Dick Cheney as a war "different than the Gulf War was, in the sense that it may never end, at least, not in our lifetime."[35] All these terms used by the Administration implicated the total and permanent nature of the introduced emergency: a moralistic war was announced that may never terminate. On the 23 September, emergency was declared again. Moreover – within the frame of the National Emergencies Act that was passed in 1976 with the aim to impose checks and balances on the emergency powers of the President – the national emergency was essentially extended till the end of the second term of the Bush Administration. The former president introduced emergency even for the inauguration of the new president, Barack Obama, in order to secure the District of Columbia during the ceremony. Emergency thus became the rule since once it was introduced after "9/11", it never terminated. Moreover, it was no longer based on factual evidence, on a deadly threat on the United States and its order, but simply on the sovereign's arbitrary decision, which is a clear evidence of the state of exception.

Another evidence of the state of exception is the sovereign's continuous and arbitrary use of exceptional means in the fight against terrorism. "When Rumsfeld said that this was no regular situation, since the United States was fighting a terrorist organization, and not a country, he implied that the extraordinary character of terror justifies the suspension of law in the very act of responding to terror."[36] Vice President Dick Cheney formulated it as: "it's going to be vital for us to use any means at our disposal basically, to achieve our objectives."[37] Even before the official announcement of the War on Terrorism, Bush issued a secret directive that enabled the Central Intelligence Agency, on the one hand, to set up detention facilities outside the country and on the other hand to use exceptional interrogation

[33] Theofanis Verinakis: The Exception to the Rule pp. 105
[34] Theofanis Verinakis: The Exception to the Rule pp. 108
[35] Bob Woodward: CIA Told to Do 'Whatever Necessary' to Kill Bin Laden
[36] Judith Butler: Guantánamo Limbo pp. 23
[37] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 7

techniques on suspected terrorist leaders. In this way the president gave the Agency free hand, he provided it with tools of "fight" that were unthinkable prior to "9/11". We may call these simply emergency measures. But what essentially indicates their belonging to the state of exception is their becoming permanent and normal, even codified in law: they were neutralized and legalized by the omnipotent sovereign who clearly acts as a living law.

The USA Patriot Act of 2001 that was passed with the purpose of enhancing domestic security and assisting the War on Terrorism initiative on the 25 October, 2001 belongs to the above mentioned bunch of legislation. The short name of the act refers to the term "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism". It was heavily criticised by several domestic and foreign "bodies", as it further strengthened the executive power in the United States and significantly limited civil liberties. The Act consists of ten titles – such as Enhancing Domestic Security Against Terrorism, Enhancing Surveillance Procedures, Protecting the Border, Removing Obstacles to Investigating Terrorism, Strengthening the Criminal Laws Against Terrorism – each representing a segment of the counter-terrorism measures. It limited civil liberties most importantly by authorizing the Attorney General to take anyone who is suspected of having ties with terrorism into custody. Furthermore, it authorized the indefinite detention of suspected terrorists. It also granted the authority to the Secretary of State to designate any group as a terrorist organization by publishing a notice in the Federal Register. Regarding the border protection, it ordered the development of a system for identification based on biometric technology that is a clear sign of the occurrence of politics as biopolitics, being concerned with the human body itself. To secure the funding the counter-terrorism activity, the Act established a separate fund for counter-terrorism within the Treasury of the United States. However, in 2005, there was an attempt in the United States to make changes to the Act for enhancing civil liberties. Finally, in 2006, five years after the emergency of the terror

attacks, it was reauthorized without significant changes. In sum, this act is a clear example of the exceptional measures being independent from any factual emergency and becoming a technique of government.

The signing of the bill to create the Department of Homeland Security by Bush on the 25 November, 2002 can be also seen as a sign of the institutionalized emergency, an attempt to strengthen and extend the executive power that, in turn, can further loose democratic control and weaken the rule of law. The act represented the biggest restructuring of government agencies in the history of the United States merging previously separate functions and responsibilities in one single organization with the declared aim "to quickly intercept foreign or hazardous materials or persons entering the United States."[38] The permanent, indefinite nature of the Global War on Terror and thus the permanent nature of this state of emergency of the United States can be captured through the "permanency" of the war on Afghanistan and Iraq as well. The war on Afghanistan – that is not fought exclusively by the United States, but with the support of several European and other foreign forces and that is still ongoing – was launched less than a month after the terror attacks with the aim of the destruction of the al Qaeda and the removal of the Taliban. That is a rather broadly defined goal that provides the executives with the power to declare its achievement arbitrarily and as such, to make it never-ending. The war against Iraq was attempted to be justified by the suspicion of its bearing of weapons of mass destruction and of its support of terrorist organizations. Although, none of these claims was proven – either before, or after the launching of the war – without a United Nations' Security Council resolution to authorize the war, the United States started it in 2003 and still fights it. In the case of Iraq the United States, referring to emergency, abandoned not domestic law, but international law: Kofi Annan considered the war illegal from the United Nations' Charter's point of view.

[38] Theofanis Verinakis: The Exception to the Rule pp. 10

In sum, the emergency that was created by "9/11" in the United States, instead of being eliminated after the direct threat had been removed, was arbitrarily extended and maintained by the sovereign without the clear factual evidence of emergency, thus it was transformed into the state of exception. In the name of this permanent emergency he justified the suspension of both domestic and international law and presented himself as the living law: "That had originally been enacted as temporary emergency or counterterrorism measures, […] were subsequently transformed into permanent legislation."[39] This led not only to the extension of the executive power and the suspension of essential civil liberties, but also resulted in the growing insecurity of people by the permanent suspension of any order.

Exceptional Character of Guantánamo

The continuous threat on the United States, moreover, on the civilized, as presented by the sovereign, justified the opening of a detention facility where the non-civilized, the anti-human, the evil can be safely locked up. Although, exceptional measures – such as the USA PATRIOT Act – were already introduced to facilitate the gaining of intelligence information from these people, suspected terrorists detained within the United States could still reach the civilian courts. Thus, the "ideal" place for the camp was outside the territory of the United States, but under its control. Moreover, setting up the camp within the country would have created a target for terrorist operations. As John Yoo, a former Department of Justice lawyer wrote it, "no location was perfect, but the U.S. Naval Station at Guantánamo Bay, Cuba, seemed to fit the bill."[40]

Guantánamo Bay, in the south part of Cuba, is a place that belongs to the Republic of Cuba, but where the United States practices sovereignty. According to the Platt Amendment –

[39] Oren Gross: Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?
[40] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 9

the amendment to the Cuban constitution, that was agreed by the two concerned states in 1903 – "the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas], while in turn, the Republic of Cuba consents that during the period of the occupation by the United States […] the United States shall exercise complete jurisdiction and control over and within said areas."[41] After Cuba's socialist revolution, Fidel Castro tried to terminate this lease, but without avail, since the lease could be modified or terminated only with the mutual consent of the parties or by the unilateral abandonment of the place by the United States, as stated in the agreement. The unique characteristics of the territory, its extraterritoriality were exploited already prior to the set up of the present detention camp: during the Haitian refugee crisis, between 1991 and 1994 it served as a camp to host "refugees" who were deprived of the right to apply for asylum in the United States for their being outside its territory.

The first detainees of the facility arrived at Guantánamo on the 11 January, 2002, four months of the terror attacks. They were either captured or bought for cash bounties by the Unites States during the first operations of the war on Afghanistan. Cash bounties for the handover of terrorists that were announced by leaflets dropped by the American troops drove the local militia and the local leaders to capture people regardless of their connection to terrorism. And the United States paid for them and detained them without substantial screening, also regardless of their connection to terrorism. "Pakistan President Pervez Musharraf later wrote in his autobiography, In the Line of Fire: A Memoir, that Pakistani troops took 689 al Qaeda suspects into custody after "9/11", and subsequently turned over 369 to the Central Intelligence Agency, which paid "millions of dollars" in exchange."[42] This way of collecting detainees is clearly not in line with any law, not even with the international law on armed conflicts. It is only in line with the arbitrary decision of the sovereign.

[41] Simon Reid-Henry: Exceptional Sovereignty? Guantánamo Bay and the Re-Colonial Present
[42] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 17

Guantánamo was neither in line with international law in the way its detainees were regarded and handled: they were deprived of the protections provided by the 1949 Geneva Convention related provisions, on the treatment of prisoners of war (POWs). The United States argued that the 1949 Geneva Convention cannot be applied on people captured in the War on Terror, since according to the Convention definition they do not possess POW status: POWs belong to the notion of conventional, legitimate war, as they belong to a state recognized by the international community and they operate under regular armed forces. "For the United States, these are not POWs, because this is no ordinary war; it is not primarily a battle between recognizable nation-states or, in the parlance of the Geneva Conventions, High Contracting Parties."[43] Speaker of the House, Dennis Hastert expressed it very clearly in one of his statements: "It's a unique situation and we'll have to deal with it in a unique way."[44] Thus, the United States referred to the existence of a unique, emergency situation and attempted to justify its unlawful steps not only at home, but also in the international community. And according to this justification, the prisoners of this unique, illegitimate war, the non-civilized, the anti-humans – the unlawful enemy combatants, as the United States terms them – could consequently be handled on a unique, exceptional way, deprived of any protection that the international law provides. Moreover, they could be deprived of any rights: they could be detained without trial for an indefinite period of time, and if they were tried they could be sentenced to death without the right of appeal against the decision.

Once these people entered Guantánamo, they were completely dehumanized and lost even the chance to reintegrate into "humanity", for they were cut off from the American civilian courts and lawyers, and consequently deprived even of the right to question their "unlawful enemy combatant" status before civilian courts. Furthermore, they were subjected to enhanced interrogation techniques that represented another proof of the Bush

[43] Judith Butler: Guantánamo Limbo pp. 20
[44] Judith Butler: Guantánamo Limbo pp. 22

Administration's ignorance of international law and of the exception becoming the rule. The introduction of these enhanced techniques was enabled first in August, 2002, by a legal memorandum that redefined torture:

> "Abuse does not rise to the level of torture under the United States' law unless such abuse inflicts pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. Mental torture required, in this legally dubious view, suffering not just at the moment of infliction but […] lasting psychological harm, such as seen in mental disorders like post-traumatic stress disorder. To qualify as torture, the infliction of pain had to be the "precise objective" of the abuse rather than a by-product."[45]

Moreover, on the 2 December, 2002, Secretary of Defence Donald Rumsfeld issued a directive that named and authorized previously prohibited interrogation methods, such as the "isolation [of detainees] for thirty days at a time, twenty-four hour interrogations, and the exploitation of individual phobias (such as fear of dogs) to induce stress,"[46] the deprivation of individuals of light and sound, removal of clothing, forced grooming. Rumsfeld withdrew this directive in January, 2003 and designated a working group to assess and recommend a new set of interrogation methods. In mid-April he approved twenty-two of the recommended techniques, including environmental and dietary manipulation, extended isolation and sleep adjustment. These measures that clearly indicate the executive embodying extended, legislative competences were heavily criticized domestically and internationally as well, for being ineffective and, furthermore, for their increasing the terror threat. Nevertheless, the sovereign, acting as a living law, did not repeal them.

The use of military commissions to try non-American suspected terrorists is another crucial indicator of the abandonment of international law and the state of exception. When Bush – a month after the terror attacks on the United States – authorized it in a military order, he once again ignored international law, that permits the use of military commissions instead of civilian courts only in case of armed conflicts, since their "rules impose important

[45] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 11
[46] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 11

limitations on the ability of defence counsel – both military and civilian lawyers – to mount an effective defence of their clients."[47] On the one hand, Bush's military order captured not only military personnel but civilians who had no connection to armed conflict and who were not accused of committing crimes, acts inside of the context of an armed conflict. "Using military courts to try such persons violates their right to trial by an independent and impartial court. […] The Bush Administration appeared intent on evading the due process protections of Unites States' federal courts by trying civilians for alleged military offenses that are in fact crimes that should be prosecuted in a regular criminal court."[48] On the other hand, the Administration deeply contradicted itself depriving detainees from the POW status and at the same time trying them by military commissions.

After a two-year-long operation of the Guantánamo Bay Detention Camp, in 2004, the United States' Supreme Court ruled in the case of Rasul v. Bush that federal courts have jurisdiction over habeas corpus petitions of unlawful enemy combatants", and a district court ruling even suspended the military commissions at Guantánamo. However, "rather than conducting habeas hearings in federal courts, the U.S. military established an internal system of military panels called Combatant Status Review Tribunals (CSRT) to review the evidence on each detainee and assess whether he was an "enemy combatant."[49] Moreover, shortly thereafter, the Detainee Treatment Act of 2005 (DTA) passed by the Congress completely washed away the decision in Rasul v. Bush that was an attempt of jurists to restore the rule of law. The DTA, once again, stripped federal courts from hearing habeas corpus petitions of the detainees of Guantánamo. And, once again, "in 2006, the Court ruled the DTA's jurisdiction-stripping provisions unconstitutional in Hamdan v. Rumsfeld, [but] in response, Congress

[47] Briefing Paper on U.S. Military Commissions, pp. 6
[48] Briefing Paper on U.S. Military Commissions, pp. 3-4
[49] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 57

reasserted itself by passing the Military Commissions Act of 2006 (MCA)"[50] that placed unlawful enemy combatants under the jurisdiction of the military commissions. These rulings could not be challenged till the end of the term of the Bush Administration, till June, 2008. Finally "the Supreme Court decided Boumediene v. Bush and found that Guantánamo detainees had a constitutional right to have a federal court adjudicate their petitions for habeas corpus, challenging the legality of their detention […] [and] ruled that the Congressionally-created circuit court review of a CSRT decision was flawed and an inadequate substitute for habeas corpus proceedings."[51] These four years essentially represent a legal limbo created by the sovereign who claims omnipotent authority challenging the federal court's decisions. As such it is an obvious indicator of the exception being the rule, placed in that role by the sovereign.

The existence of Guantánamo as the camp that emerged from the state of exception, not as a prison that emerged from penal law, is a straightforward implication of these above mentioned facts. The sovereign who decides on the exception, and who "no longer limits himself […] to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety),"[52] applied law to life at Guantánamo by totally abandoning it. And as such, Guantánamo became altogether excluded from the juridical order, its inclusion is only realized through its very exclusion.

Guantánamo as the Camp

If Guantánamo is the localization of the state of exception, the camp, then it is essentially a place where individuals lose their humanity altogether and are reduced to bare life, to an existence that has no intrinsic value, that can be killed, but not sacrificed.

[50] Ariel Meyerstein: The Law and Lawyers as Enemy Combatants
[51] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 58
[52] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 170

Moreover, it is a place where everything becomes possible, it is "the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life."[53] Lawyer Clive Stafford Smith who defended many of the detainees captured very well this essence of Guantánamo: "Iguanas are free enough, and if my escort accidentally runs one over it's a $10,000 fine, as US environmental laws apply in Guantánamo. On the other hand, if you feel the need to hit one of the 500 prisoners who are now four years into their captivity it is called mild non-injurious contact and there are no consequences."[54]

The bare life in Guantánamo becomes evident and clear in many aspects within the camp: in the inhuman environment and conditions the prisoners live in, in their isolation from the world, in the inhuman interrogation techniques, in the unpunished abuses committed against the detainees by the guards. This bare life is essentially produced by the deprivation of the suspected terrorists of any legal status. Consequently they are deprived of the very basic human rights. For years, they had been deprived even of the action of self-defence, while, according to official reports of United States' agencies, a great number of the detainees had no connection to terrorism at all. That is also supported by the fact that by the end of the second term of the Bush Administration 525 detainees were released from Guantánamo from the approximately 800 prisoners who passed through it. What made it even more problematic is that there was even no "effective screening processes to separate the innocent from the dangerous."[55] Since, according to one of the emergency measures introduced in 2001, suspected terrorists could be indefinitely detained without trial, only 3 have been ever prosecuted by military commissions and about 150 have been tried and charged by Unites States' federal courts. As such the inmates of Guantánamo became "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

[53] Giorgio Agamben: Homo Sacer – Sovereign Power and Bare Life, pp. 171
[54] Clive Stafford Smith: Inside Guantánamo, pp. 14
[55] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. vii

as well, since it is entirely removed from the law and from judicial oversight,"[56] they became the objects of the arbitrary decisions of the sovereign, of the executive. And so anything, everything became possible for them, even to be released without trial after years of detention.

One of the most obvious indications of the arbitrary decision of the executive over the camp inhabitants is the "level system" introduced at the end of 2002. This system classifies detainees on a scale from one to four based on their perceived cooperativeness with the interrogators. In level 1 status are the detainees who showed the most cooperativeness, and they possess "privileges" compared to the higher level detainees. "Detainees could also be categorized as level 5 for "intelligence gathering purposes" by interrogators and housed in a segregated intelligence block."[57] Prisoners are also distinguished according to the level of threat they mean for the United States and their value for the intelligence, and based on that they are accommodated in the appropriate camp unit of Guantánamo. The most "valuable" detainees are placed in the Camp 3, 5, 6 and 7 and handled in an inhuman way depriving them from all human needs, except for the basic physical ones, and isolating them from normalcy. They are locked up twenty-two hours a day, alone, in their cells that do not have, or have only a little window; even in their two-hour-long recreation time they are separated from each other in individual cages; in some cells lights are turned on all day to enable the continuous observation of the individual. This is a clear indication of the erasure of the private life of individuals. Individuals no more have either private or public sphere, they possess only their bare life. Camp 1, 2 and the Echo Camp, in contrast with the above mentioned ones have less restrictions on the detainees and allow more space for the detainees to act: they can eat, pray and some of them can even play together. In Camp 4, for instance, there is a soccer field, movies are provided, and "some detainees have reportedly been given the opportunity to

[56] Giorgio Agamben: State of Exception, pp. 3-4.
[57] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 31

attend Pashto, Arabic, and English classes."[58] Nevertheless, none of the detainees is allowed to receive visitors, except official ones, such as lawyers (only since 2004), or the representatives of the International Committee of the Red Cross. None of them can receive phone calls from family or friends. Except for censored letter, they are completely cut off from their life prior to Guantánamo, cut off from normalcy, they exist in the space where the exception rules.

Normalcy ceases to exist also in the interrogation techniques. As I already described above, enhanced techniques were introduced to interrogate the prisoners in Guantánamo for the sake of the United States' national security. Moreover, interrogators had omnipotent authority over the detainees: some detainees reported that their access to medical care and the handover of private letters were depending on their cooperativeness with the interrogators that is, by the way, prohibited by international law. In the camp, according to former inmates, many other types of abusive treatment both by interrogators and guards appeared that all indicate the dehumanization of the inmates: short shackling, the use of stress positions, sexual humiliation. Furthermore, regardless of the numerous reported abuses committed by the personnel in Guantánamo, during the Bush Administration none was prosecuted for that, which, again, indicates the omnipotence of the camp management and that in the camp nothing is impossible.

Not even the release of the detainees who are not found guilty follows the normal process: "By January 2005, the military had reviewed the cases of 558 detainees and found all but 38 subject to continued detention as enemy combatants. Officially, the Unites States' military had not determined these 38 men to be innocent of wrongdoing but rather designated each of them no longer an enemy combatant and thus eligible for release."[59]

[58] Up Alone – Detention Conditions and Mental Health at Guantánamo, pp. 7
[59] Laurel E. Fletcher and Eric Stover: Guantánamo and its Aftermath, pp. 57

The existence of Guantánamo, the camp – where law is suspended in its totality, where decisions are completely arbitrary, where everything is possible, and that deprives people of their dignity and reduces them to a bare life – is the most deadly consequence and, at the same time, the ultimate proof of the state of exception. In order to get this essentially inhuman place closed, first the state of exception has to be eliminated by redefining the concept of state and law that are currently destroyed in the United States.

Closure of Guantánamo, a Solution?

The public sphere and the politics and policies of the United States after "9/11", totally at the mercy of the sovereign's arbitrary decisions – which were justified again by arbitrarily declared emergency – were subject to heavy criticism both inside and outside the United States. However, as could have been predicted after the announcement of the War on Terrorism and became even clearer with the launching of the war on Iraq, no essential change could possibly take place during Bush's Administration. Thus, what was most importantly at stake in the Presidential elections of 2008 was the rule of law, the question whether the new Administration would eliminate the permanent emergency and return back to normalcy by respecting law. The 44th President of the United States, Barack Obama who graduated in law, thus faces high expectations – both from home and abroad – and also a great challenge: to restore the rule of law while, at the same time, maintaining order within the country.

The closure of Guantánamo is indispensable for the restoration of the state of law, since, as indicated in the previous chapter, it is the camp, the localization of the state of exception, a totally insecure place where everything can happen. However, the closure of the camp is a rather complex and broad issue in itself as it has to be shut all together and not only relocated from Guantánamo to another location. Thus, there is a technical task to be done: the appropriate relocation of the current detainees. That is, on the one hand, the resettlement of some sixty detainees, a quarter of the total number of the current inmates, who were not found guilty, but who – according to the non-refoulement principle of the customary international law which does not allow to return anyone to a country where that person would face a real risk of torture or cruel, inhuman, degrading treatment, punishment – cannot be returned to their country of citizenship or residence. On the other hand, the already charged detainees

have to be transferred to a prison within the United States. Finally, those who were not tried first have to be tried to determine their future status. At the same time, all these legal practices enforced by the Bush Administration that enabled the emergence and existence of the camp have to be erased. In this sense, the fight against terrorism has to be completely redefined and re-tracked so that it complies with the United States' Constitution and international law and that is not only based on the sovereign's arbitrary decision.

In this chapter I assess if the measures and actions of the Obama Administration so far match with the described tasks. For the assessment first I describe and then evaluate the declared goals of the Obama Administration and its first achievements related to the closure of Guantánamo. Finally I analyse the issue of the cleared detainees' resettlement, in which the European Union may assist the United States. This question is critical in the closing process, since, as it seems now, there is a chance that with this act the camp would somehow continue in Europe.

Obama's Attempts to Restore the Rule of Law

Obama already as a candidate expressed his concern about the arbitrarily created counterterrorism rules of the Bush Administration, the necessity of restoring the rule of law and his intention to do so if he takes office. In accordance with his campaign promise, two days after his inauguration Obama issued three executive orders – "Review of Detention Policy Options", "Ensuring Lawful Interrogations" and "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" – each aiming to review and revise the laws and measures related to counterterrorism and get them in accordance with the United States' Constitution and international law.

The "Review of Detention Policy Options" directive ordered the establishment of a Special Task Force consisting of the Attorney General, the Secretary of Defence, the

Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Director of the Central Intelligence Agency, the Chairman of the Joint Chiefs of Staff, and other officers or full-time or permanent part-time employees of the United States.

"The mission of the Special Task Force shall be to conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice."[60]

This directive is a clear demonstration of the intension of restoring law regarding all the detention related policies inasmuch as it implicitly promises to rule out the options that are not in line with law.

The other order, "Ensuring Lawful Interrogations", aimed to re-regulate interrogation by erasing techniques that were practiced by the previous Administration but that, in fact, do not comply with law: "All executive directives, orders, and regulations inconsistent with this order, including but not limited to those issued to or by the Central Intelligence Agency from September 11, 2001, to January 20, 2009, concerning detention or the interrogation of detained individuals, are revoked to the extent of their inconsistency with this order."[61] The directive also emphasizes the necessity for the humanly treatment of persons who are subjected to interrogation, the rejection of their torture and the preservation of their dignity, that indicates the refusal of reducing human life to bare life. It orders the closure of the Central Intelligence Agency's secret detention facilities, which were set up in 2001, almost immediately after "9/11". They are black spots of secrecy, however, they are presumed to belong to the same kind of phenomenon as Guantánamo and, as such, to produce bare life. With this order the directive touches upon another crucial issue: the closure of Guantánamo would make little sense if such camps would continue to operate on the land of the United States. The order to close those secret prisons was already implemented on the 9 April, 2009.

[60] Executive Order – Review of Detention Policy Options
[61] Executive Order – Ensuring Lawful Interrogations

For conducting the commands of the directive, there was even a Special Task Force on Interrogation and Transfer Policies established.

Finally the "Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities" directive ordered that "the detention facilities at Guantánamo for individuals […] shall be closed as soon as practicable, and no later than 1 year from the date of this order."[62] For the time being the order emphasized the importance of the conduct of the detention facility and the detention of prisoners to be "in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions"[63] and the directive itself. Moreover it requested the review of the conditions at the Detention Camp within thirty days. The directive also set out rules also about one of the most criticized aspect of Guantánamo, namely it ordered the suspension of any conduct of the military commissions by the Secretary of Defence. However, this directive can be also seen as a definite step toward the closure of Guantánamo, it was criticized for failing to answer the critical question of "what to do with the inmates". In April, still without providing a detailed plan about the conduct of closure, Obama asked Congress for eighty million USD to finance the process. But in May, based on security concerns, this bill was rejected by the democratic-controlled Congress. The fact that the legislative power refused to cooperate with the sovereign in the restoration of law, at least at this point, raises serious questions regarding the concept of law: it makes unclear what is law, and what is law existing only through its suspension.

Nevertheless, in his speech at the National Archive Museum on the day after the rejection of the bill, Obama confirmed his view that order can be established only by returning to the rule of law, namely the rejection and reformation of the Bush

[62] Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities
[63] Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities

Administration's concept of War on Terrorism. He clearly signalled that those counterterrorism rules and measures were based exclusively on the arbitrary decision of the sovereign regardless of the people and the values, the way of life of the people whom it binds. Moreover, politics during the previous Administration lost something essential of its character that led to undesirable outcome – to the state of exception.

"All too often, our government trimmed facts and evidence to fit ideological predispositions. Instead of strategically applying our power and power principles, too often, we set those principles aside as luxuries that we could no longer afford. And during this season of fear, too many of us, Democrats and Republicans, politicians, journalists, and citizens fell silent. In other words, we went off course. […] The decisions that were made over the last eight years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable; a framework that failed to rely on our legal traditions and time-tested institutions and that failed to use our values as a compass."[64]

In contrast, he defined his role in preserving law that is based on the way of life of the people: "I've studied the Constitution as a student. I've taught it as a teacher. I've been bound by it as a lawyer and a legislator. I took an oath to preserve, protect, and defend the Constitution as commander-in-chief. And as a citizen, I know that we must never, ever turn our back on its enduring principles for expedient's sake."[65] Furthermore he emphasized that he himself, as the sovereign, is not an exception to law: "As president, I, too, am bound by the law."[66]

In this speech Obama specifically addressed and pushed the question of Guantánamo. For the sake of both the American values and the security interests he highlighted the importance of the compliance with domestic and international rules regarding the fight against terrorists. And, as such, he rejected sovereign omnipotence:

"Al Qaida terrorists and their affiliates are at war with the United States, and those that we capture, like other prisoners of war, must be prevented from attacking us again. Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone. And that is why my

[64] Remarks of President Barack Obama: Protecting Our Security and Our Values, pp. 4
[65] Remarks of President Barack Obama: Protecting Our Security and Our Values, pp. 3
[66] Remarks of President Barack Obama: Protecting Our Security and Our Values, pp. 10

Administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law."[67]

Although the above mentioned measures and this speech of Obama give a clear sign of its intention to trace back the United States to normalcy from the state of exception most importantly by denying the sovereign omnipotence and re-implementing the rule of law, success is still not guaranteed. Right now Obama faces the legislative power's resistance and opposition in achieving the declared goals, in conducting the restoration of order. This fact clearly supports Agamben's argument that there is no return from the state of exception to the state of law, for what are at stake are the concept of state and law. Furthermore, according to the criticism of some humanitarian organizations, Obama's actions are not even always reflecting and in line with his declared goals. In the next section I discuss this question, whether the performance of the Administration really can be seen as a way back to normalcy.

Back to Normalcy?

The closure of Guantánamo was ordered and important steps have been already taken during the first four months of the new Administration to eliminate the state of exception. However, it is still not a warrant of the success. Humanitarian organizations, in the assessment of the performance of the new executive, criticized some recent measures related to counterterrorism and also expressed their concerns about the lack of the introduction of some other necessary measures. In the light of the criticism it can be seriously questioned if the closure of Guantánamo would mean the real elimination of the state of exception and the camp.

The strongest concern of the organizations was the reanimation of the military commissions which were even heavily criticized by Obama himself during the campaign. His condemnation of the use of commissions was very clearly expressed: "by any measure, our

[67] Remarks of President Barack Obama: Protecting Our Security and Our Values, pp. 10

system of trying detainees has been an enormous failure."[68] In accordance with his rhetoric shortly after his inauguration he suspended their proceedings for 120 days, for the time of the prisoners' status review process. Nevertheless, when the suspension expired, after all, he decided to resume their operation: "Administration lawyers have become concerned that they would face significant obstacles to trying some terrorism suspects in federal courts [since] judges might make it difficult to prosecute detainees who were subjected to brutal treatment or for prosecutors to use hearsay evidence gathered by intelligence agencies."[69] However, Obama attempted to distinguish and separate his Administration's commissions from the ones of the Bush Administration by introducing significant reforms to their operation. The use of hearsay evidence as a proof against suspected terrorists will be restricted, it will be available only if determined reliable by a judge. The new rules will also "block the use of evidence obtained from coercive interrogations […] and allow detainees greater freedom to choose their attorneys."[70] Obama claimed that these reforms not only enable fairer trials, but place back the commissions within the frame of law: "Instead of using the flawed commissions of the last seven years, my Administration is bringing our commissions in line with the rule of law."[71] These measures may significantly improve the trials in the question of civil liberties, but they do not change the nature of the commissions. "An inherent problem with the commissions is their lack of independence. Being part of the larger military structure, they are vulnerable to improper executive branch influence and control."[72] Thus, the major concern is not about the civil liberties. It is simply the fact of using military commissions in trying suspected terrorists who, according to law, are criminals and as such should be tried by civil courts. "Shayana Kadidal, a Guantánamo lawyer with the New York-based Centre for Constitutional Rights, said that fairness was clearly an issue but no matter how extensively

[68] Peter Finn: Obama Set to Revive Military Commissions – Changes Would Boost Detainee Rights
[69] William Glaberson: U.S. May Revive Guantánamo Military Courts
[70] Peter Finn: Obama Set to Revive Military Commissions – Changes Would Boost Detainee Rights
[71] Remarks of President Barack Obama: Protecting Our Security and Our Values, pp. 9
[72] US: Revival of Guantánamo Military Commissions a Blow to Justice – New Rules Won't Ensure Fair Trials

the system was reformed there is a problem of public confidence in the process both here and overseas."[73]

More importantly, their use reflects the Administration's view on the fight against terrorism that, in this sense, did not change significantly compared to the previous Administration's view. Even if Obama avoids the use of the terms War on Terrorism and Global War on Terror, by resuming the military commissions he still presents it as a war and as such, an essentially emergency situation. It can be also proved from examining the handling of the enemies captured in Afghanistan. Although the term enemy combatant is no longer in use in connection with terrorism – instead "members of enemy forces and members of an opposing armed force"[74] appear in official documents – in March, "in response to a federal court order seeking a definition of the term enemy combatant, the Obama Administration claimed the authority to pick people up anywhere in the world on the grounds of support for or association with al Qaeda or the Taliban, and to hold them indefinitely in military detention."[75] It makes clear that changing the denomination of terrorists is just a technical issue that does not have practical implications. "The only substantive difference from the position previously asserted by the Bush Administration is that if the person's link to al Qaeda or the Taliban is support, that support must be substantial. But membership in any of the targeted organizations remains grounds for detention."[76] This means that basically there is no difference.

The continued operation of the detention facility in Bagram – which currently holds approximately 680 detainees "without any due process"[77] – is also worrisome, especially because its closure is not even planned in the near future. Its prisoners cannot challenge the justness of their detention, since are deprived of the right to habeas corpus hearings, just like

[73] Ed Pilkington: Obama to continue military tribunals at Guantánamo
[74] Report Card on President Obama's First 100 Days, pp. 6
[75] Report Card on President Obama's First 100 Days, pp. 5
[76] Report Card on President Obama's First 100 Days, pp. 6
[77] Clive Stafford Smith: Closing Guantánamo, pp. 28

the detainees in Guantánamo during the Bush era for several years. Furthermore, the Obama Administration seems to continue the legal limbo regarding detained people's status and rights. The Administration refused a district court's decision taken in April that, based on the Boumediene v. Bush decision, vested three Bagram prisoners – who were captured abroad – with the same rights as the detainees at Guantánamo. "The Justice Department appealed the ruling, arguing that because Bagram, unlike Guantánamo, is located in a traditional theatre of war, the courts have no jurisdiction over detainees held there."[78]

These facts deeply question if the Obama Administration is really on the way to eliminate the state of exception and get back to the rule of law. Regardless of its rhetoric, many of its measures are in line not with law, but with Bush's questionable polities and practices. The most obvious indications of the state of exception are the military commissions and the legal limbo concerning Bagram. They both implicate the war on the irregular enemy to be continued and to continue to justify emergency measures based on the arbitrary decisions of the sovereign. Moreover, Bagram may be one of the places where the camp of the state of exception can be replaced.

Resettling of Guantánamo Detainees in Europe

Bagram is not the only place where the detainees suspected of having a relation to terrorism may experience the camp. The ex-prisoners who were cleared and who are expected to be resettled in the European Union may also become the victims of the state of exception. Although most probably they will not be locked up in the camp, they may remain at the mercy of the sovereign's arbitrary decision in a less visible way. If so happens, it will obviously indicate the penetration of the state of exception into European politics – where the United

[78] Report Card on President Obama's First 100 Days, pp. 6

States was heavily criticized for operating Guantánamo – and, as such, further deadly consequences on politics, rights, civil liberties, on life in Europe.

The European Union's countries are asked to accept and resettle current detainees of Guantánamo – those who were not proved to have any connection to terrorism – both by humanitarian organizations and the United States. The European Union is not in the position to refuse the request for two main reasons. On the one hand, it has always emphasized its commitment to human rights and to fight against terrorism accordingly. As Javier Solana, the European Union's High Representative for the Common and Security Policy, expressed it in 2006, after the terror attacks in London and Madrid: "I believe that we can tackle terrorism effectively within the existing international legal framework of human rights and humanitarian law. That framework should guide our actions and set clear limits."[79] Furthermore, the fact that the Union and many of its countries have criticized Guantánamo for its being unlawful and have been calling for its closure from the very beginning, charges it with the duty of assisting in the closure. On the other hand, the European Union is charged with this duty since several of its countries helped the United States in operating Guantánamo – "the United States had used aircrafts to transfer terrorist suspects between countries to interrogate them using torture and ill-treatment"[80] – and moreover "the United States "was operating secret detention facilities in Europe."[81] Being aware of the moral duty, several European countries and the Union itself expressed its willingness to accept detainees. However, the discussions about the resettlement raise serious concerns regarding European politics: both the way the European Union processes the issue and the frame designed during

[79] Introductory remarks by Javier Solana EU High Representative for the Common Foreign and Security Policy European Parliament Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

[80] Introductory remarks by Javier Solana EU High Representative for the Common Foreign and Security Policy European Parliament Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

[81] Introductory remarks by Javier Solana EU High Representative for the Common Foreign and Security Policy European Parliament Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

this process seem to deviate from normalcy and thus produce the symptoms of the state of exception and, as such, to continue "Guantánamo" in a different, less visible form for the ex-detainees.

The exceptionality of the processing the issue by the European Union can be seen in the exceptional extension of the executive powers of the common bodies of the Union. The asylum and immigration policy falls under the common policies within the Union, and so their rules are already settled: the initiative was codified in the Amsterdam Treaty, and the creation of the standards was carried out after the terror attacks in London and Madrid. Nevertheless, the executive power regarding these policies still lies with the member states. Thus, the decision about the non-citizens' resettling and the form of their resettling within the European Union is essentially a member state competency, and as such it does not require common assessment or action. However, the Union did initiate common assessment and action: already after the executive order of Obama – much before he asked for the Union's assistance – it initiated to create a common frame for this resettlement procedure within the member states. On the 26th of January on a Council meeting on General Affairs and External Relations it opened the question for discussion.

> "Ministers acknowledged that this raised a number of political, legal and security issues which need further study and consultation. The question of whether member states might accept former detainees is a national decision, but ministers agreed on the desirability of a common political response and so decided to explore the possibility of coordinated European action."[82]

The European Parliament has also been actively debating about "Guantánamo" since the end of January, with rather similar findings. After the discussions, at the beginning of February, the Parliament adopted a resolution on the return and resettlement of the Guantánamo detention facility inmates. The resolution, beside strongly welcoming the decision of the new president of the United States, called

[82] Press Release on 2921st Council Meeting, pp. 9

"on the member states, should the United States' Administration so request, to cooperate in finding solutions, to be prepared to accept Guantánamo inmates in the Union, in order to help reinforce international law, and to provide, as a priority, fair and humane treatment for all and recalls that member states have a duty of loyal cooperation to consult each other regarding possible effects on public security throughout the Union."[83]

These actions of the Union's common bodies essentially indicate that the issue of the sixty inmates, for the Union, qualifies as an emergency that requires emergency measures. But is it in fact a real emergency, resettling innocent people who were falsely detained in the camp for years, that requires exceptional processing and moreover, exceptional measures, or is it only arbitrarily declared by the Union? Do they really threaten the security within the Union? Most of the representatives of the Union and its countries perceive and present them as such. This is obviously reflected in the official talks between the Union's representatives and the Obama Administration that took place in March in Washington. There, the Union's Justice Commissioner, Jacques Barrot, and the Czech Interior Minister, Ivan Langer expressed their concerns regarding the detainees to be taken and requested the United States to provide all the information, including secret intelligence information about them. "Because the Union has no internal borders, information about each detainee the United States seeks to resettle must be shared with all 27 member states; […] there is one condition: maximum information."[84] The representatives also consulted of the status potentially granted to the inmates: "Should they be accepted, the former prisoners might be granted restricted residency status, possibly limiting their movement within the Schengen zone, or be put under surveillance."[85]

These facts make it clear and obvious that the Union, perceiving a security threat, launched an exceptional process to create exceptional measures that, in turn, may seriously restrict the civil liberties of those innocently people who falsely bear the "stamp" of Guantánamo, after being transferred to Europe. If it really happens, if these people are granted

[83] Non-Legislative resolution on the Return and resettlement of Guantánamo prisoners T6-0045/2009
[84] E.U. wants answers before accepting detainees
[85] EU to test US data sharing on Guantánamo inmates: Barrot

a status that does not exist in law, that is outside of law then their life will not change essentially. They will still possess only a bare life transferred to Europe that can be killed but not sacrificed, that is outside of both divine and human.

Conclusion

The United States' War on Terrorism clearly proves the irrevocable break-down of politics, which – having lost its traditional frame, the nation-state system – is no longer able to fulfil its function, to create the state of law and provide human life with a secure and definite frame. Having the continuity between norm, law and territory cut off, there is no longer a clear set of norms that could guide the sovereign in circumscribing law, moreover that could impose control on it. Being reduced to an arbitrary sovereign decision, law – domestic and international – essentially lost its meaning. In this sense neither the Bush, nor the Obama Administration can be considered lawful. Thus, Obama's attempt to restore the rule of law seems to be a mission impossible: in the absence of clear norms the attempt to circumscribe law would still lead to the state of exception. It is clearly demonstrated by the Congress' rejection to fund the closure of Guantanamo, the closure of camp, which is the most deadly manifestation of the state of exception: there is no common agreement on the norm, consequently no rule, other than exception, can be based on it. Moreover, the issue of the closure indicates the lack of a clear set of norms in Europe as well: while it was criticizing the Bush Administration for its exceptional measures in Guantanamo, in the resettling of ex-Guantanamo detainees it also seems to introduce the same kind of exceptional measures.

However, the closure of Guantanamo and the elimination of the state of exception all together is still a vital issue for the protection of human life that, otherwise, may lose its essence and can be reduced to a bare life, which is not worth of living. Thus, these goals – which can only be achieved by the establishment of a consensus of the international community over the redefinition of the frame of politics and the basic political categories such as state and law – should not be abandoned. At the moment, it is rather unclear what this new

political concept would look like, but by a constant attempt to establish this, it can be gradually circumscribed. The responsibility for this issue lies with the whole international community: it has to work together to reach a consensus over this new political concept.

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