

## **TRAPPED IN-BETWEEN: HOW REFUGEE LAW REPRODUCES THE SOVEREIGN BAN**

*PRESOS NO MEIO: COMO O DIREITO DOS REFUGIADOS REPRODUZ O  
BANDO SOBERANO*

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**CONTENT:** Introduction; 1. Sovereignty, Territory and Life; 2. Non-returnable persons; 3. Excluded persons; Conclusion; Bibliography.

### **ABSTRACT**

Although international refugee law was designed to provide surrogate protection to people fleeing persecution, it creates situations in which a person cannot be returned and, simultaneously, cannot be accepted. It is unfruitful to approach the problem through traditional legal concepts. This is not a practical gap, but a conceptual one, caused by the way we think the relationship between sovereignty, territory and life. Giorgio Agamben defines this relationship through the concept of "sovereign ban." I argue that international refugee law reproduces the "sovereign ban's" modes of operation, leaving asylum-seekers in the ambiguous position of being included, but excluded at the same time; inside a state's territory, but outside the protection of the state's legal-political order. The structural failure of the discourse of refugee law opens space for individualized humanitarian protection. However, the discretionary space of humanitarianism may likewise be fulfilled by unconstrained manifestations of sovereign violence. Re-thinking the conceptual scheme that connects sovereignty, territory and life is a crucial step for a fully inclusive system of refugee protection.

**Keywords:** International Refugee Law; European Law; Giorgio Agamben; *Non-refoulement*.

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## RESUMO

Apesar de ter sido criado para dar proteção subsidiária a vítimas de perseguição, o direito internacional dos refugiados cria situações em que pessoas não podem ser mandadas de volta aos seus países de origem, mas, ao mesmo tempo, não podem ser aceitas pelo país receptor. Analisar o problema a partir de conceitos jurídicos tradicionais é infrutífero. Não se trata de uma brecha prática, mas de uma conceitual, causada pela forma que pensamos as relações entre soberania, território e vida. Giorgio Agamben define esta relação através do conceito de “bando soberano”. Eu argumento que o direito dos refugiados reproduz o *modus operandi* do “bando soberano”, deixando os que buscam asilo na posição ambígua de serem incluídos e excluídos ao mesmo tempo; dentro do território de um estado, mas fora da proteção da ordem jurídica deste estado. A falha estrutural do discurso do direito dos refugiados abre espaço para proteção humanitária individualizada. Entretanto, o espaço discricionário do humanitarismo também pode ser ocupado por manifestações irrestritas de violência. Repensar o esquema conceitual que conecta soberania, território e vida é um passo fundamental para um sistema de proteção a refugiados que seja totalmente inclusivo.

**Palavras-chave:** Direito Internacional dos Refugiados; Direito Europeu; Giorgio Agamben; *Non-refoulement*.

## INTRODUCTION

International refugee law was designed to provide surrogate protection to people fleeing persecution. The 1951 UN Refugee Convention establishes the thresholds for the acquisition of refugee status. The scopes of these standards and the corresponding burdens of proof have been trusted to each state-party’s legislative or judicial system. Once declared refugee by the national authority, the asylum-seeker is entitled to a comprehensive list of rights guaranteed by the Convention.<sup>2</sup>

Within this system of international protection, not every asylum-seeker actually fleeing persecution acquires refugee status. Many are victims of human rights violations not related to one of the Convention’s “reasons of persecution,” and many others are not capable of meeting the burdens of proof determined by national legal systems. To cover these gaps, international human rights instruments and judicial

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<sup>2</sup> The majority of the Convention’s text involves a list of rights that includes social rights, such as the right to work (Article 17 to 19) and the access to housing (Article 21) and education (Article 22).

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or quasi-judicial interpretations of their texts have developed mechanisms of complementary protection. They work as second chances for asylum-seekers to obtain some sort of international protection.

Nevertheless, although those second chances entail the right not to be returned to a country where there is risk of persecution, *they do not necessarily confer a legal status*, meaning that their beneficiaries are not entitled to a protected set of rights. Furthermore, even when a country or the European Union, for example, confers such a status, “exclusion clauses” make sure that not everyone in the need for protection actually acquires it.

The aim of this paper is to analyze this problem through the conceptual framework created by the Italian philosopher Giorgio Agamben. Although Agamben’s philosophical project aims at the exposure of a hidden ontology of Western politics<sup>3</sup> – based on what he calls the “sovereign ban” –, finding phenomenological manifestations of that metaphysical experiment is an indispensable task in theoretical and political perspectives.

On the one hand, the theory would not hold without minimum empirical observation. Concrete historical and contemporary manifestations of that hidden ontology provide evidence of its existence. On the other, according to the author himself, it is our political responsibility to “learn how to recognize this structure of ban in the political relations and public spaces in which we live.”<sup>4</sup> In this sense, the theory must be used as a critical tool in academic and political discourse.

Agamben has employed his conceptual framework to criticize American foreign policy<sup>5</sup> and the situation of refugees.<sup>6</sup> In this paper, I develop the latter objective

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<sup>3</sup> What Addison has called a “metaphysical thought experiment” (ADDISON, Simon. Book Review of *Borderscapes: Hidden Geographies and Politics at Territory's Edge*, edited by Prem Kumar Rajaram and Carl Grundy-Warr. **Journal of Refugee Studies** 21: 414-41, 2008).

<sup>4</sup> AGAMBEN, Giorgio. **Homo Sacer: O poder soberano e a vida nua I**. Belo Horizonte: Editora UFMG, 2004, p. 117.

<sup>5</sup> AGAMBEN, Giorgio. **Estado de Exceção**. São Paulo: Boitempo Editorial, 2003, p. 14.

with more empirical consistency. I contend that international and European legal discourses on refugee protection reproduce the “sovereign ban’s” modes of operation. Their gaps cannot be cognized through traditional legal and political standpoints. The problem is more than the insufficiency of current protection schemes. It represents the failure of the way in which we think the relationship between sovereignty, territory and life. Applying Agamben’s conceptual framework opens the possibility of re-thinking this relationship in order to imagine a fully inclusive system of international protection, still to be imagined by academics and policy-makers.

## 1. SOVEREIGNTY, TERRITORY AND LIFE

According to Agamben, the original political relation between sovereign power and life is not a contract, but the ban.<sup>7</sup> The “sovereign ban” operates through the “logic of exclusion/inclusion,” which is characterized by the double movement of removing subjects from the legal-political order and “re-capturing” them in “camps,” where they are destined to become “bare lives.”<sup>8</sup>

“Bare life” is pure biological life, which has been differentiated throughout the history of Western thought from political life. Agamben de-historicizes the Foucaultian thesis about the politicization of biological life by arguing that the production of “bare life” is, in fact, the original function of sovereignty. The sovereign fulfils this function through what Carl Schmitt has called the decision on the “state of exception,” creating a situation of anomie in which unconstrained manifestations of violence are possible. This is the hidden foundation of the rupture between territory and juridical-political order that has become clearer with the

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<sup>6</sup> AGAMBEN, Giorgio. We Refugees. **Symposium** No. 49(2), Summer, 1995, pp. 114-119.

<sup>7</sup> AGAMBEN, Giorgio. **Homo Sacer: O poder soberano e a vida nua I**, pp. 115-116.

<sup>8</sup> AGAMBEN, Giorgio. **Homo Sacer: O poder soberano e a vida nua I**, p. 85.

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increasing utilization of the “state of exception” as a technique of government in our time.<sup>9</sup>

The “camp” is the spatial manifestation of this rupture, where the “state of exception” becomes the rule and “bare life” is produced. For Agamben, the “camp,” not the city, is the biopolitical paradigm of the West. The specificity of our time is the expansion of a zone of indistinction between outside and inside, as the “state of exception” exceeds its spatial-temporal frontiers, making every location potentially a “camp” and every subject potentially “bare life.”

Concepts like “sovereign ban,” “bare life” and “camp” have been employed to analyze concrete problems by Agamben himself and others. The situation of refugees arguably has been the most common empirical target of this kind of analysis.<sup>10</sup> However, frequently authors do not ask themselves about the adequacy of this conceptual framework to their object of study or about the difficulties involving the concretization of this complex theory. Although in a very superficial way – due to space constrains –, I will shortly address these two issues for the sake of consistency.

The Agambenian framework is adequate to approach refugee related problems because it denies conceptual structures that are empirically challenged by these problems. For instance, refugees empirically challenge the concept of “citizenship” as a description of the connection between subject and juridical-political order. In their country of legal citizenship, they cannot exercise even the most basic rights that constitute the core content of this concept. In the receiving state, they do not

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<sup>9</sup> AGAMBEN, Giorgio. **Estado de Exceção**, p. 13.

<sup>10</sup> The examples are numerous, ranging from anthropology (TICKTIN, Miriam. Policing and Humanitarianism in France: Immigration and the Turn to Law as State of Exception. **Interventions**, Vol. 7(3), 347-368, 2005) to geography (RJARAM & GRUNDY-WARR (eds.). **Borderscapes: Hidden Geographies and Politics at Territory’s Edge**. Twin Cities: University of Minnesota Press, 2007.). Legal studies, however, have not taken the empirical step in this kind of analysis yet. Authors such as Zartaloudis use Agamben in a rather philosophical perspective (ZARTALLOUDIS, Thanos. **Giorgio Agamben: Power, Law and the Uses of Criticism**. New York: Ed. Routledge-Cavendish, 2009).

have legal citizenship and even when a legal status is conferred upon them, in practice it is usually hard to enjoy “citizenship” in a broader sense.

Thus the idea of “bare life” seems helpful. It allows us to imagine a relationship between subject and juridical-political order that does not entail civil, political or social rights, and yet does not preclude the use of sovereign violence against the subject; a relationship in which the idea of belonging – crucial to the concept of “citizenship” – is blurred by the indistinction between inside and outside.

Another conceptual structure denied by Agamben and empirically challenged by refugee related issues concerns the connection between territory and juridical-political order. The typical locations of asylum-seekers – such as detention camps, airport waiting zones and offshore processing areas<sup>11</sup> – defy the concept of “jurisdiction.” Wherever they might geographically stand, they are inside a juridical-political order in the sense that they are managed, administered and coercively stabilized by the receiving state; but, paradoxically, they are simultaneously outside this order because rights and procedural guarantees do not apply to these locations.

Therefore the concept of “camp” – the spatial manifestation of the state of exception – appears to be more adequate for analyzing such ambiguous spaces. The “camp” suggests a non-stable relationship between order and territory; a relationship that cannot be described through the distinction inside/outside. For Agamben, any territory in which there is a de facto suspension of the legal order is a camp, but the concept may also refer to an imaginary location. In this paper, I analyze the location of non-returnable persons in geographical, conceptual and legal terms. While geography separates state of origin and receiving state, law separates spaces of subjectivity within the geographical boundaries of the receiving state.

Assuming that this is enough to justify the application of the concepts of “bare life” and “camp” to empirical problems related to the situation of refugees, I shall

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<sup>11</sup> These are areas constructed in the countries of origin in order to prevent illegal entrance and to bypass international obligations.

address the difficulty in empirically using the concept of “sovereign ban.” Finding the “sovereign” is in itself a difficult task. We may locate it in the Parliament, the President, the “people”, or in all three at the same time, but one of the most important consequences of the rise of representative democracies and legal positivism for political theory has been the difficulty in locating the holder of sovereign power. Carl Schmitt, for example, attributed this contemporary invisibility of sovereignty to liberal theories of law, such as Hans Kelsen’s impersonal scientific objectivism, which traces the chain of legal validity to a hypothetical *Grundnorm*.<sup>12</sup>

Nonetheless, we may argue that the concrete results of the sovereign’s work – the decisions that coerce and influence people’s behavior – are observable. Therefore, by looking at them, even if we still cannot say for sure *where* or *who* the sovereign concretely is, we may determine *how* sovereignty operates. In this sense, Agamben’s concept of “sovereign ban” seems reliable precisely because it concerns sovereignty’s *mode of operation*, not its empirical location.<sup>13</sup> If sovereign decisions about refugees operate through the “logic of inclusion/exclusion,” then the use of the concept of “sovereign ban” is justifiable.

In the following sections, I will approach the gaps and exclusions of international refugee law through this conceptual framework. I analyze sovereign decisions from international and European refugee law texts and their interpretations by judicial and quasi-judicial institutions. Although they cannot be traced back to a single sovereignty, my hypothesis is that they reproduce in the international and regional spheres sovereignty’s *modes of operation* – i.e., the logic of the “sovereign ban.”<sup>14</sup>

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<sup>12</sup> “Now the machine runs by itself,” wrote Schmitt in *Political Theology* (SCHMITT, Carl. **Political Theology. Four Chapters on the Concept of Sovereignty**. Chicago: University of Chicago Press, 1985).

<sup>13</sup> In fact, for Agamben, it is a very fluid location, ranging from administrative officials and policemen to doctors and scientists.

<sup>14</sup> Taking Agamben’s theory to a supranational level is a further challenge of this analysis. Approaching the origins of these refugee law rules would require research on the workings of the UN’s and the EU’s lawmaking arenas, and on individual states’ diplomatic strategies.

## 2. NON-RETURNABLE PERSONS

The rules of *non-refoulement* – or non-return – are paramount to international refugee and human rights protection. Although legal scholars have called those norms principles in order to denote their centrality to international refugee law,<sup>15</sup> their structure is more akin to that of rules. Rules of non-return create negative obligations of not returning someone to a country of persecution or general inhuman circumstances. Nonetheless, they do not require the receiving state to confer a legal status upon those “not returned.”

The only *internationally mandatory* protected status is the one regulated by the 1951 Refugee Convention. The Convention determines (1) who is entitled to *refugee status*; and (2) what is the content of this status. The situation of “non-returnable persons” is a result of the difference between the *factual predicates* of the rules of *non-refoulement* explicitly and implicitly present in human rights instruments and the *factual predicate* of the 1951 Convention’s rule that confers *refugee status*.

Rules of command have a double structure characterized by the *factual predicate* and the *consequent*. The *factual predicate* determines the necessary and sufficient conditions for the application of a rule. The *consequent* prescribes the consequences that follow from the verification of those conditions. A rule’s structure is represented by the following sentence: “If *factual predicate*, then *consequent*.”<sup>16</sup>

In a rule of *non-refoulement*, the *consequent* is the prohibition of returning someone to his or her country of origin, where the person would suffer violations of human rights. Its structure is “if *factual predicate*, then prohibition to return.” In a rule that confers a certain legal status, such as the rule in Article 1 of the 1951 UN

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<sup>15</sup> For example in PIRJOLA, Jari. Shadows in Paradise – Exploring Non-Refoulement as an Open Concept. *International Journal of Refugee Law*, December 2007; 19: 639 – 660, in which the author explores the openness of the concept of *non-refoulement* in international law. Authors in general reproduce the language used by the UNHCR, the UN refugee agency.

<sup>16</sup> SCHAUER, Frederick. **Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life**. Oxford: Oxford University Press, 1991.

CANTISANO, Pedro Jimenez. Trapped in-between: how refugee law reproduces the sovereign ban. *Revista Eletrônica Direito e Política*, Programa de Pós-Graduação *Stricto Sensu* em Ciência Jurídica da UNIVALI, Itajaí, v.8, n.3, 3º quadrimestre de 2013. Disponível em: [www.univali.br/direitoepolitica](http://www.univali.br/direitoepolitica) - ISSN 1980-7791.

Refugee Convention, the *consequent* is the acquirement of that status. Its structure is "if *factual predicate*, then acquisition of status."

International protection is only complete when there is a combination of *non-refoulement* and protected status. This combination generates a "double inclusion" of the subject in the juridical-political order of the receiving state. On the one hand, *non-refoulement* includes by preventing exclusion. On the other hand, the protected status includes by attributing a series of rights to the protected person. The problem of "non-returnables" derives from the absence of the latter inclusion. They are included by the prohibition of *non-refoulement*, but excluded for their lack of status.

This situation of inclusion/exclusion happens because the *factual predicate* for the application of *non-refoulement* is different from the *factual predicate* for the acquisition of *refugee status*. Although international and European human rights laws provide five cases of *non-refoulement*, the lack of an international complementary status leaves people that are included by *non-refoulement*, but excluded from *refugee status* to the discretion of each state's humanitarian considerations.

Article 3 (1) of the 1984 Convention Against Torture textually determines that "no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." According to the UN Human Rights Committee, Articles 6 – right to life – and Article 7 – protection against cruel, inhuman or degrading treatment or punishment – of the 1966 International Covenant on Civil and Political Rights (ICCPR) create implicit obligations of *non-refoulement*.<sup>17</sup> On the European level, the European Court of Human Rights has decided that Article 3 and Protocol 6 of the European Convention on Human Rights implicitly require member-states not to

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<sup>17</sup> UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, **Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**, 2007, p. 9.

return someone expected to be subjected to torture or inhuman or degrading treatment or punishment, or death penalty, respectively.<sup>18</sup>

Within this legal framework, the danger of torture, a threat to life and an expectation of the infliction of cruel, inhuman or degrading treatment or punishment or of death penalty are all factual conditions that trigger the *consequent* “prohibition to return.” Any of these conditions would be sufficient for a first inclusion in the legal-political order of the receiving state.

Because the only *internationally mandatory* protected status is the one regulated by the 1951 Refugee Convention, the second inclusion – in terms of international law<sup>19</sup> – can only be operated through the acquisition of *refugee status*. The problem lies on the fact that acquiring *refugee status* depends on a broader set of conditions. According to Article 1 (a) (2) of the Convention, the status only applies to persons who

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.

National courts routinely apply this definition with a variety of interpretations. Nevertheless, it is textually clear that a person claiming *refugee status* must prove (1) a well-founded fear of being persecuted; and (2) that this persecution would occur for one of the reasons listed – race, religion, nationality, membership to a particular social group or political opinion. These are the two parts of the *factual predicate* of the *refugee status* rule.

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<sup>18</sup> EUROPEAN COURT OF HUMAN RIGHTS. **Soering v. United Kingdom**, Application No. 14038/88, 7 July 1989. For a list of cases asserting this rule see UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, **Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**, footnote 42.

<sup>19</sup> National legal systems may provide discretionary protection, as it will be demonstrated bellow.

Although torture, death or cruel, and inhuman or degrading treatment or punishment, all consist in persecution, they are not enough for fulfilling the *factual predicate* of the *refugee status* rule. Part (1) of the predicate requires a subjective state of mind – the “well-founded fear” – towards the risk of persecution; and part (2) requires the persecution to be for specific reasons. Therefore, not every person protected by the five rules of *non-refoulement* necessarily acquires *refugee status*. It is possible that there is a risk of torture, death or cruel, inhuman or degrading treatment or punishment and (1) the person is unable to prove a “well-founded fear,” or (2) the persecution is not based on one of the Convention’s reasons.

Those that fall in one of these two situations are the so-called “non-returnables.” On the one hand, they are included in the receiving state’s juridical-political order because the factual conditions they face trigger a prohibition of exclusion. On the other hand, they are excluded from that same order because these factual conditions are not enough to activate the obligation of conferring *refugee status* upon them, and because there is no alternative complementary status available in international law.

This paradoxical situation shows that when we analyze the legal framework of international protection as a whole, including all rules of *non-refoulement* and protected statuses available, its gaps – originated by the international community’s narrow definition of “refugee” and its silence about an alternative status – reveal a mode of operation similar to that of the “sovereign ban.”

According to Agamben, sovereignty operates through the “logic of inclusion/exclusion” of the subject in the juridical-political order. International refugee and human rights law reproduce this logic because the relationship between subject and order results in the paradox of the simultaneous inclusion through *non-refoulement* and exclusion through the lack of a protected status.

Analyzed through a spatial perspective, the position of “non-returnable” persons challenges the distinction between inside and outside. This anomalous figure,

produced by the silence of international law, stands in a non-location, or somewhere we cannot conceive through traditional accounts of the relationship between order and territory. Not inside, nor outside, the “non-returnable” is trapped somewhere in-between, a space in which the legal order is suspended, liberating the exercise of sovereign power from the boundaries and constraints imposed by a legal status. The legally constructed imaginary geography of the “non-returnable” is the “camp,” a space where the state of exception finds its permanent location.

Within this space, “non-returnables” are pure subjectivities without legal status who cannot be pushed back to their country of origin. The moment they depart – fleeing from threats to their basic rights – represents the disconnection between their “bare lives” and the juridical-political order of the state of origin. According to the fiction of the immediate application of *non-refoulement*, this exact moment creates an obligation for the receiving state of not returning them. However, the initial inclusion is followed – if we may establish a time sequence for analytical purposes – by exclusion.

Although these “bare lives” are “non-returnable,” international law does not guarantee them a legal status. The existence of a pure biological life that has lost every reference to the juridical-political order, but nevertheless must remain inside it reveals that the relationship between order and subject may be described as the capture of an exteriority – a living being that is not a legal subject, nor a complete outsider. For Agamben, this capture is the original function of sovereignty.

### **3. EXCLUDED PERSONS**

In 2004, the Council of the European Union enacted a directive creating a complementary status for asylum-seekers who do not qualify for refugee status.<sup>20</sup> Although the list of rights guaranteed to the beneficiaries of this alternative status is

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<sup>20</sup> COUNCIL OF THE EUROPEAN UNION. **Council Directive 2004/83/EC**, April 29<sup>th</sup> 2004.

significantly more restricted than that of the 1951 Refugee Convention, the initiative was based on a justifiable purpose: conferring a legal status upon “non-returnables.”

The strategy adopted was simple: equating the factual conditions for the acquisition of the new status with the factual conditions for the application of the above-mentioned rules of *non-refoulement*. Thus, the qualification rule for *subsidiary protection* – the name chosen for this status – applies to those facing a real risk of death penalty, torture or inhuman or degrading treatment or punishment.

Although the European initiative seems admirable, the 2004 directive does not guarantee subsidiary protection to every person who needs international protection but is incapable of acquiring refugee status. The Council directive contains “exclusion clauses” that preclude the acquisition of subsidiary protection even when the factual conditions for the application of the qualification rule are fulfilled. In fact, the rule’s *factual predicate* is not simply composed by these factual conditions. It encompasses the “exclusion clauses,” meaning that the *consequent* subsidiary status only applies to someone when there is a real risk of the above-mentioned human rights violations *and*, according to Article 17, when there are no serious reasons for considering that

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious crime;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

These clauses may be explained by two different rationales. They might have been designed to exclude undesirable people from the receiving community, which means

that a national security argument has prevailed to prevent dangerous individuals from being part of that community. Or they might have been inserted to prevent unworthy people from getting international protection, which means that a moral argument has prevailed in the determination of who deserves and who does not deserve protection from European law. Either way, there are harmful consequences.

The rules of *non-refoulement* of international and European human rights law apply to *any* person facing one of the above-mentioned relevant factual conditions. Therefore, even when the person has, for example, committed a serious crime (Article 17, b), or when any other “exclusion clause” apply, he or she is protected from forced return to a country where he or she would face death penalty, torture or inhuman or degrading treatment or punishment. When this person is unable to obtain *refugee status* – for one of the reasons mentioned in section three – and is excluded from *subsidiary status* – due to an exclusion clause –, and cannot be returned, he or she stands on the same ambiguous position of “non-returnable persons.” Both national security and moral arguments do not preclude the fact that, if returned, the dangerous or unworthy individual will suffer human rights violations.

It is true that the 2004 European directive enables non-returnables to acquire almost full inclusion<sup>21</sup> in the receiving state’s juridical order. However, the exclusion clauses reproduce the “sovereign ban,” perpetuating the “logic of inclusion/exclusion.” Apparently, simply filling in the gaps is not the adequate approach to the problem.

National security and moral arguments have played a strong role during the elaboration of the directive in order to create new gaps and it is reasonable to assume that even if other international or regional norms are created in the future, these arguments will continue to prevail and exclude persecuted subjects. It is impossible to cover all gaps because the problem lies on the way in which we currently think the relationship between sovereignty, territory and life. Only a re-

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<sup>21</sup> The rights conferred upon them are actually more restricted than the rights conferred upon Convention refugees.

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conceptualization of this relationship will pave the way for a potentially all-inclusive protection of human life.

Those who cannot be returned and nevertheless are excluded from *refugee* and *subsidiary status* are included by the prohibition of *refoulement* and excluded for their lack of status. The legal construction of their location indicates a space that is neither outside nor inside, resembling the space of the “camp,” where sovereignty is detached from legal restraints and the state of exception is concretized permanently. Their lives relate to the juridical order as exteriorities that are captured inside, stripped from a legal status and therefore subjected to the receiving government’s discretionary considerations.

## CONCLUSION

Within its own territorial space, sovereignty is originally and functionally tied to the production of “bare life.” Steven DeCaroli reconstructs the history of the “sovereign field” to argue that banishment – and the consequent creation of mere biological existences unprotected by the law – is a pre-condition for the establishment of predictable and egalitarian juridical-political orders. According to him, sovereignty guarantees the factual conditions for obedience by removing the subjects that threaten the unity, equality and stability of the state order. However, legal removal does not coincide with the physical removal from the state’s territory, but operates through the “abandonment of the individual to the dire consequences of the law’s complete withdrawal.”<sup>22</sup>

In the international arena, undesirable persons are not always physically pushed outside territorial borders. When protection gaps leave them to the situations of

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<sup>22</sup> DECAROLI, Steven. *Boundary Stones: Giorgio Agamben and the Field of Sovereignty*. In: Calarco & DeCaroli (editors). **Giorgio Agamben: Sovereignty and Life**. Stanford University Press, 2007, p. 62.

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non-returnable or excluded persons, they are abandoned to what international legal and political discourses construct as the space of humanitarianism.

Accordingly, if it is not internationally mandatory to confer protection upon an individual, when governments actually enforce mechanisms that guarantee them some sort of legal status, they are not complying with international law, but making a humanitarian gesture to protect human dignity. Many European countries have, for example, created mechanisms of complementary protection for persons threatened with human rights violations in their countries of origin who are entitled to *non-refoulement*, but cannot obtain refugee or subsidiary status. Those instruments are justified as humanitarian gestures towards people in the need for protection.<sup>23</sup>

To leave lives that are already fragile for their impossibility of returning to their country of citizenship to the space of humanitarian considerations means abandoning those individuals to discretionary actions that may or may not consist in beneficial gestures of protection. The locus of humanitarianism may likewise be fulfilled by unconstrained manifestations of sovereign violence.

Christoph Menke provides a useful framework to think about the connection between humanitarianism and sovereign violence. According to him, the sovereign suspension of the law consists in two cases of "concrete exception:" dictatorship and mercy. Although mercy, for Menke, is a negative act meaning "to abstain from the application of the law in the name of somebody,"<sup>24</sup> it acquires a positive form through, for instance, the humanitarian gesture of conferring a legal status upon a frustrated asylum-seeker.

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<sup>23</sup> For example, Austria's "Humanitarian Residence Permits," Italy's "Residence Permit on Humanitarian Grounds" and The Netherland's "Residence Status for Humanitarian Reasons." For a comprehensive list of these instruments, see EUROPEAN COUNCIL ON REFUGEES AND EXILES. **Complementary Protection in Europe**, 2009. Between May and June of 2009, I was involved in the drafting of this report while working at ECRE as a Michigan Fellow in Refugee and Asylum Law.

<sup>24</sup> MENKE, Cristoph. **Reflections of Equality**. Palo Alto: Stanford University Press, 2006.

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Either way, similarly to dictatorial power, mercy occupies a space that is not filled by legal obligations, a space in which sovereign power is exercised without legal boundaries. This argument is advanced by Ticktin in her study of how policing – “an expression of power with no normative legal constraints” – and humanitarianism are “two sides of the same coin” in the crisis of sovereignty that makes French immigration law and politics operate through the state of exception.<sup>25</sup> If, on the one hand, the exceptional space of the humanitarian may reveal surprisingly merciful gestures, on the other hand, it may leave fragile lives to the dangerous consequences of standing in-between the protection of the law.

This paper presented the legal construction of those spaces in-between, where the relation between sovereignty and life is not mediated by the language of law. When international refugee law leaves the protection of persons to the discretionary considerations of states, it does not fulfill its function of providing surrogate protection to human life. Rather, it simply reproduces the logic of inclusion/exclusion that according to Agamben consists in the hidden metaphysics of Western politics. Re-thinking the relationship between sovereignty, territory and life is the first step for a potentially all-inclusive system of refugee protection.

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<sup>25</sup> TICKTIN, Miriam. *Policing and Humanitarianism in France: Immigration and the Turn to Law as State of Exception*. **Interventions**.

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