

**The Universality of Exception, Human Rights, and the Denial of
the Otherness as Justification to Mass Atrocities and Crimes
against Humanity**

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In his trilogy "Homo Sacer", "State of Exception" and "What remains of Auschwitz", Giorgio Agamben analyzes important aspects of the human condition and human rights concepts over the centuries. Through an internationalist perspective, and based on the concepts brought about by Agamben's Homo Sacer, this paper argues that the State of exception is constantly in force, alongside the universality of human rights – thus the coexistence of the universality of the exception and the universality of human rights, not ignoring the debates on universalism versus relativism, and the hazard of imposing a 'one-size-fits-all' approach to every situation. Furthermore, this research explores the denial of the otherness as a means to justify mass atrocities grounded on speeches and policies that reject any kind of diversity. Additionally, taking into consideration the boundaries between the human and the Homo Sacer, this study questions the possibility of an international vindication of human rights, and the legitimacy of external interference in States that are lenient towards violations of human rights. This analysis will be guided by the concept of jus cogens and the role of the International Criminal Court as an alleged mechanism of deterrence of further abuses and reinforcement of International Human Rights Law.

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THE UNIVERSALITY OF EXCEPTION, HUMAN RIGHTS, AND THE DENIAL OF THE AS OTHERNESS JUSTIFICATION TO MASS ATROCITIES AND CRIMES AGAINST HUMANITY

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1. INTRODUCTION

Over the last decades, widespread and systematic violations of human rights have been justified by discourses that legitimize repressive actions, constructing and reconstructing historically palatable and even admirable versions of violence. Arbitrary power uses the ideology of terror as justification for the adoption of instruments of violence. Hannah Arendt claims that terror becomes part of the

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ideology of totalitarian governments, where fear and rational logic act as principle of action, ignoring personal characteristics and convictions of individuals to objectively select the enemies of mankind against whom terror is unleashed.¹

As a result of reiterated abuses, cycles of violence and impunity have left as a legacy a permanent reproduction of violence, alongside a culture of denial of diversity. The non-acceptance of the “other” (other ethnicity, religion, political opinion) not only reproduces violence as makes it tolerable and justifiable, operates as the basis of oppressive discourses rooted in society, and relieves violations of human rights.

In this context, Agamben’s aforementioned trilogy is of extreme importance, as it demonstrates that the phenomenon previously referred to as ‘State of exception’ has now become the rule. According to the author, this State is characterized by its triviality, as it does not fall inside or outside the rule of law, but in a zone of complete indifference, ‘in which the emergency becomes the rule and that the very distinction between peace and war is impossible’²; a legal form of **something that could not have a legal form.**

Walter Benjamin, quoted by Agamben, believes that there is no established concept of history that understands and analyses the State in which the emergency becomes the rule, and the exception ceases to be portrayed as merely temporary. In this sense, this study aims to consider Agamben’s concepts in order to facilitate the understanding of the constant State of exception, and reinforce the added value of the testimony of victims of unimaginable atrocities in concentration camps institutionalized by the Nazi regime.

Furthermore, the authors intend to contribute to the establishment of a framework of protection of the human dignity that considers the

1. Arendt H, 2011, *Origens do Totalitarismo*, São Paulo: Companhia das Letras, p. 517.

2. Agamben G, 2004, *Estado de Exceção*, São Paulo: Boitempo, p. 37.

irreducible minimum of existence; allows for discussions on the legitimacy of external intervention in States that fail to respect the minimum standards of human rights; and explores the relationship between the aforementioned framework, the concept of *jus cogens*, and the Rome Statute of the International Criminal Court. This approach is justified by the fact that the protection of human rights and the international concern regarding the denial of the otherness is expressed in Article 7 of the Rome Statute, concerning the scope of crimes against humanity.

Thus, this research proposes to investigate the following questions: Within neoliberal societies, who are those to whom the State provides nothing beyond its negligence? Which sectors of society live at the mercy of the rights guaranteed not only by human rights treaties, but also by UN resolutions and cogent rules of International Law? What is the role, if any, of the denial of the otherness in the wake of conflicts that lead to human rights atrocities? What repressive ideologies and cultural practices do States use to allow, encourage or even commit those massacres? To what extent could the concept of sovereignty be affronted on behalf of the protection of human rights, and what is the legal framework that would allow for such an interpretation?

Lastly, Agamben's concept of Homo Sacer and the idea of the irreducible minimum will be important to defend a human rights theory that analyses the possibility of external intervention in States that are responsible, both through omission and commission, for violations of rights.

2. MATERIALS AND METHODS

This article investigates the commission of mass atrocities along four dimensions, each one examined in a particular section. The first relates to Agamben's definition of 'State of Exception', which has become the rule to rationalize or overlook constant violations of human rights, committed both in the private and the public spheres. This section will also consider Foucault's understandings of sovereign power and biopolitics, as well as Baumann's ideas on the recurring exclusion of some sectors of society due to modern capitalism and globalization.

The second element studied in this paper is the ideology of repression and the use of denial to undermine the value of particularities among peoples and individuals. In order to grasp the strength of these politics, it is important to consider not only how hate speeches and values inform individual and communal behavior towards 'the other', but also, and perhaps most importantly, how such ideas are deliberately formulated by those in power to serve doubtful, self-funded and abhorrent interests.

In addition, the third aspect explores the value of the testimony of the survivors of concentration camps during the Holocaust, for they were the ones who suffered the consequences of biopolitics in its most extreme and perverse form. Urged by the aspiration to give testimony, they survived, and now they tell their stories exposing the horror to which they were submitted. This analysis is relevant for the research as it demonstrates that the attacks against human dignity were part of an institutionalized policy adopted by the Nazi regime, within a purposeful will of extermination of 'the other'.

Finally, the fourth dimension investigates Agamben's concept of Homo Sacer, the idea of the irreducible minimum, and the notion of *jus cogens*, in order to analyze the possibility of external intervention in States that are responsible, both through omission and commission,

for violations of rights. This section will bear in mind the plurality and value inherent in each culture, and the impracticality of imposing Western values based on universalist theories, without ignoring, however, that international standards of human rights protection might not be sufficient to guarantee, on the ground, the effective protection of human dignity, thus justifying external action. Ultimately, this research will conclude with an analysis of *jus cogens* in regards to the International Criminal Court, as crimes against humanity fall within the jurisdiction of the Court and are defined in Article 7 of the Rome Statute.

3. RESULTS

The exclusion of some sectors of society is evidenced by starvation, by unemployment, which does not allow them to participate in neoliberal societies, and by some diseases that the State does not bother to heal (all of them constituting examples of ‘social death’). However, this exclusion is also reflected on people who are victimized by grave violations of human rights in States where their protection is neglected and when the international community remains inert.

Within this perspective, one of the conclusions of this analysis is that the conducts defined by the Rome Statute as crimes against humanity must be recognized and prosecuted as such in order to encompass the necessary protection of human rights. Nonetheless, this protection may be manipulated to prioritize political interests instead of the dignity of people. In this regard, Zizek stresses that an important question to be studied is the reification of human rights, as an immaterial element that has been used as exchange of interests in some States¹ and also to impose Western interests upon other cultures.

1. Zizek S, 2005, *The Parallax View*, Massachusetts: The MIT Press,

This is the reason why it is extremely important for the academic community to dispose time and energy on these questions, since a consensus among universalism, relativism, and human rights seems unlikely to occur.

Considering the political issues involving the protection of human rights, it is also relevant to highlight the importance of the prohibition and repression of acts of torture, arbitrary detention, discriminatory ideologies, racism, religious repression, taking into account the role played by the denial of the otherness in the perpetuation of such conditions, and based on the respect of cultural traditions.¹

Hence, through the respect of cultural diversity and the protection of human rights without transforming them into political objects, it is important for each and every State to effectively implement the human rights standards related to human dignity established by conventions and international treaties.

4. THE STATE OF EXCEPTION

To understand the State of Exception, it is important to start with Michel Foucault's studies, which have been very influential in Agamben's work, mainly with regards to sovereign power and biopolitics. Sovereign power, to this author, is a concept that has changed along the years concerning the control over life and death of the citizens; the power to make or let live, with the transformations of the 19th century, has become the power to make live and let die².

In his book "In Defense of Society", Foucault indicates that, in

1. Donnelly J, 1982, Human rights and human dignity: an analytical critique of non-Western conception of human rights, Washington: The American Political Science Review Vol. 76, N.2, p.207.

2. Foucault M, 2000, Em defesa da sociedade: Curso no Collège de France, São Paulo: Martins Fontes, p.285.

this century, the sovereign is the one who chooses who should live and who should be left to death. This question is related to political issues, hence the politics becomes *biopolitics*. Dialoguing with Aristoteles, Agamben brings Foucault's definitions about this concept insofar the men are no longer considered animals, capable of having political existence; politics is now tied to the life in general and to every human being.

Therefore, it is important to highlight the obligation of States to protect and implement human rights. Some steps have been taken to protect those rights in the last years, such as the adoption of citizen's constitutions and international treaties. With so many offenses to human rights on the last century, it is also possible to refer to the creation of mechanisms to protect the materiality of these rights, as international criminal tribunals and the International Criminal Court.

The aforementioned control, exercised by the sovereign, is from where emerges the necessity of the recognition of the biopolitics on the societies. To Michel Foucault¹, this concept is different from the power of the sovereign until the 19th century because it formerly related to discipline whereas it currently relates to control (control over citizens' birth, death, reproduction numbers, elderly etc., as well over economical and political situations). The power exercised over the citizens is now exercised over groups of people.

These concepts are important for understanding the State of Exception because it must be analyzed in connection with the sovereign power and the notion of sovereignty in each State. In this type of State, the legal system is no longer applicable and the people are under the rule of a head of State that leaves them to die. It is also important to highlight that the legal system is still existent in these periods, but with no effectiveness: the legal system exists, but with no

1. Foucault, op. cit., p.291.

law enforcement.¹

In such circumstance, it is perceivable that the decisions must always come from the sovereign, once the legal system has no effectiveness – unrelated with rationality and Law. There is still another perception, that these decisions of letting die are always influenced by political interests and the necessity of maintaining the capitalist economic model, as previously stated. These political issues, besides the neoliberal character of the sovereigns, sustain this model and, consequently, leave the human rights protection abandoned in societies.

In this globalization model, the exclusion of some categories of citizens is a logical result, as we can see in Zygmunt Baumann's work. Excluded individuals are referred to as 'wasted lives', as people are treated like rubbish.² This concept refers to the exclusionary character of globalization, once it is not possible to encompass everybody. The capitalist model, mostly in a neoliberal bias, depends on the hierarchy of social classes and on the exclusion of some people, which has no relation with the changes brought about by modernity³.

The exclusion of some individuals is also evidenced by the victimization of some peoples by grave violations of human rights in countries where their protection is neglected and the international community is inert. Some of these offensive conducts are defined in the Rome Statute, characterizing crimes against humanity. They are:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: Murder; Extermination; Enslavement; Deportation or forcible

1. Agamben, 2004, op. cit., p.12.

2. Baumann Z, 2008, Vidas Disperdiçadas, Rio de Janeiro: Jorge Zahar, p.96.

3. Godoy M., 2010, Estado de Exceção e Refugio Humano: o Campo e as Vidas Disperdiçadas, Fortaleza: Anais do XIX Encontro Nacional do CONPEDI, p.9.

transfer of population (...) Torture; Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹

All the conducts listed in the Rome Statute protect people against violations to their dignity. The insertion of such conducts as crimes against humanity, however, has been proved to be not enough. The obligation of protection flourishes when the reality is no longer shocking and the ‘emergency state’ or the ‘State of exception’ becomes a rule.² Also, in this space where there is no application of the legal system, it is not a correspondence with a dictatorial reality, but an anomy in which legal conceptions are suspended or deactivated. It is still Agamben’s understanding that this emergency state that goes beyond the norms is essential to the state of law and its debate, and also very important to politics.

Finally, to conclude this brief analysis of how the State of Exception has been spread on the world in such a way that it can be considered a rule, it is important to highlight that this State has very thin boundaries between Law and politics, being also different from

1. Rome Statute of the International Criminal Court, 1998.

2. Agamben, 2004, op. cit., p.38.

the laws of war (which have a special and transitory characteristic, with a well defined objective). The State of Exception brings a connection between people and Law, once it has a valid legal system, but at the same time abandons the people, as legal norms are not applicable to them.

5. THE IDEOLOGY OF REPRESSION AND THE DENIAL OF THE OTHERNESS

The denial of the otherness is a key element in the ideology of repression, as it underpins the rejection of particularities among peoples and individuals. In this regard, repressive politics commonly rely on hate speeches and exclusionist values.

The 'other' can manifest itself within a society by two different ways. Firstly, the other may be invisible, irrelevant, underexposed among the dominant majority who controls the political power and the public sphere. Initially, one might consider that being invisible is rather helpful for the individual, as against him no active infliction of pain would even be relevant for the majority. However, it is precisely the 'unknowability'¹ of the others that substantiates repressive ideologies against them, 'for if they stood visible to us, the infliction of that injury would be impossible'.² In this sense, Scarry notices that 'there exists a circular relation between the infliction of pain and the problem of "otherness". The difficulty of imagining others is both the cause of and the problem displayed by the action of injuring'.³ For the author, our actions towards the other are designed by the way we

1. Scarry E, 1999, The Difficulty of Imagining Other Persons, in: Carla Hesse and Robert Post (eds.), Human rights in Political Transitions: Gettysburg to Bosnia, New York: Zone Books, p. 282.

2. Ibid, p. 282.

3. Ibid, p. 281.

imagine others.

Systematic violence against the other may also be caused by overexposure, when the opposing group is considered to be the main threat to the existence and survival of the rest. Under circumstances of collective fear and insecurity, the existence of a group to be blamed for is crucial and also justifies mass atrocities. In such situations, 'we may come to feel morally obligated to join together against those who threaten or impede us, and do what must be done'.¹ The problem here is that 'what must be done' usually means widespread violence against a specific group of people. Additionally, a sense of belonging to our own community is enhanced when we share antagonism to a subsection of society or to an external enemy.²

As an example, during the Second World War the Jews were deliberately regarded as the leading reason for all problems that affected Germany at the time. Economic decline, instability and unemployment were altogether caused by Jews, thus, they needed to be eliminated so as to eliminate the aforementioned difficulties. Moshman stresses that Jews were not precisely inhuman, but antihuman. According to him, the Jews 'came to be seen as less than fully German, and ultimately as less than fully human, part of a nonhuman mass of Jews'.³ A story told by a Nazi soldier illustrates this image:

Otherwise all I knew about the Jews was what came out of the loudspeaker or what was given us to read. We were told they were the cause of all our misfortunes... They were trying

1. Moshman D, 2007, Us and Them: identity and genocide, Identity: An International Journal of Theory and Research, Vol. 7(2) p.123.

2. Staub E, 2009, The Roots of Evil: The Origins of Genocide and Other Group Violence, New York: Cambridge University Press p. 42.

3. Moshman, 2007, p. 121.

to get on top of us, they were the cause of war, poverty, hunger, unemployment...¹

This idea that ordinary people, Germans in general, were given manipulated information about the role of the Jews in the problems faced by the country reflects the importance of the media in genocidal processes and the formation of a genocidal ideology. The use of propaganda as incentive to mass killings was so present in recent history that article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination expressly condemns all forms of propaganda and organizations that are 'based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form'.

The Nazi propaganda was focused on three main lines of argument: the first encompassed a deep devaluation of Jews, being referred to as evil, bloodsuckers, pests, parasites, low creatures; the second referred to Jews as a real threat to racial purity, as 'their very existence threatened contamination and therefore the inherent superiority of Germans';² and the third denoted a general threat to the whole Germany, given that the Jews were part of a worldwide conspiracy to defeat the country.³

The fact is that moral exclusion of the other is essential for internal moral justification of our actions against that other. Furthermore, 'people who devalue other groups will tend to regard moral values as inapplicable to them and exclude their members from the moral realm'.⁴ Consequently, Staub argues that the reason why

1. Wiesenthal S, 1997, *The Sunflower: On the Possibilities and Limits of Forgiveness*, 2nd. edition, New Your: Schocken Books p.40.

2. Staub, 2009, p. 104.

3. Ibid, pp. 103-104.

4. Staub, 2009, p. 71.

some Christians risked their own lives to help Jews in the Nazi- occupied Europe was precisely their inclusiveness, ‘a predisposition to regard all people as equals and to apply similar standards of rights and wrong to them’.¹ It is not within the objectives of this paper to establish the role, either positive or negative, of the Christians during the Holocaust. Nevertheless, one might not ignore the value of the Christian dogma for the construction of a negative ‘Jewness’ and as a fundamental source of anti-Semitism.²

During the Holocaust, the attacks against the human dignity were part of a established policy adopted by the Nazi regime within a purposeful will of extermination of ‘the other’, rather than constituting isolated acts perpetrated by individuals against other individuals.

For Stangl, a German commander of the death camp Treblinka, ‘the Jews were more like “cattle,” a mindless herd, making its way toward the slaughterhouse where it would be transformed into “a mass of rotting flesh” that “had nothing to do with humanity”’.³ Hence the relevance of the process of dehumanization in the escalation of mass atrocities and crimes against humanity, as dehumanizing the opposing group constitutes the second stage of the genocide ideology, following dichotomization.

Weitz illustrates the dehumanization process of the Jews as follows:

Jews were the maggots feeding on a rotting corpse, the parasites that had to be surgically removed, the sexual predators preying on German women, a spider that sucks people’s blood, a plague worse than the Black Death, the

1. Ibid.

2. Ibid, p. 101.

3. Moshman, 2007, p. 121.

*sponger who spreads like a noxious bacillus and then kills his host.*¹

For Moshman, it is 'our own identity as moral agent that forces us to deny the identities of those we destroy'.² Under this reasoning, there exists no moral obligation towards inhuman objects. Ignoring the value of the other as a human being allows the oppressor to impose all means necessary to destroy the enemy. Colonizers applied this rationale to justify the ruthless extermination of native populations, as they were considered less than human, savages, barbarians who were in the way of progress and civilization, thus their elimination being of imperative necessity.

There are also more subtle ways of inflicting pain that do not involve active participation of the perpetrators. Indeed, destruction of minorities by assimilation was also a major enterprise of the explorers within the conception of nation building and colonization, which required that particularities of certain groups be ignored and assimilated into the broader new reality.

Evidently, under and overexposure are not exclusivist projections of the other. On the contrary, being rejected as a human being and simultaneously considered as the threat against 'us' are complementary versions of the same rationale that ultimately leads to mass violence. Scarry sustains that

Monstrosity and invisibility are two subspecies of the other, the one overly visible and repelling attention, the other unavailable for attention and hence absent from the outset. The two are common strategies for representing the other in actual political life. Turkish persons in Germany can be

1. Weitz E D, 2003, A century of genocide: Utopias of race and nation, Oxford: Princeton University Press p. 106.
2. *Ibid*, p. 127.

underexposed, nameless, while also being overexposed, as in the unclothed belly dancing by which they are known to German citizens and tourists.¹

Thus, overexposure can be interpreted both as the guilt and the caricature of the other, similarly located outside the legitimate, human group of real and valued persons to which we belong. In any event, the other is a stranger, stereotyped non-understandable figure without individual or collective value that, if not simply irrelevant to us, poses a threat to our own survival.

In this line of argument, Saddam Hussein constitutes a unique example of such image of the other. Initially considered to be the main and sole responsible for the terror against the United States and the threat for the survival of American citizens, he was also ‘an unjust caricature – a magnified cartoon of swagger and cruelty – of the otherwise missing, hence featureless, Iraqi population’.² The hunt for one single man was then justified because he was *the* threat, and all the Iraqi population, including individual features of each person within the country, was then vanished due to the allegedly magnitude of the fight against terror. This is why, morally speaking, American citizens might believe that the Iraqi war was justifiable, regardless of the lives of Iraqi citizens it affected. One tends to forget that people are people everywhere, and if I, as an individual, suffer, if my family dies or gets wounded, an Iraqi individual also suffers if his family dies or gets wounded. Something so obvious seems to be completely ignored on a daily basis.

It is also important to emphasize that being the other signifies being different, and being different has always been a cause of fear. Stereotypes are thus difficult to be transformed, meaning that any

1. Scarry, 1999, p. 288.

2. Ibid, p. 289.

singular characteristic of certain group, no matter how generally positive under normal circumstances, may be molded as a negative factor to be considered against that same group. About the construction of a Jewish stereotype, Staub notices:

*Jews had different habits, customs, clothing, and external appearance. These differences were partly religious, partly cultural, and partly imposed by authorities. Human beings, as I have noted, fear the different, the unusual, especially when it is prejudiced as bad or dangerous. (...) Jewish culture encouraged devotion to learning, industriousness, and other characteristics that helped Jews succeed in spite of adverse circumstances. In an atmosphere of prejudice, envy, and resentment, even such positive characteristics as warm, positive family relations and a relatively peaceful life-style were cast in a negative light.*¹

Even after the atrocities are committed, the rejection of the other as a recognizable group still informs the denial of the crime itself, thus enabling the perpetrators to maintain their moral self-conception. In this sense, ‘once we have done whatever we have done, for whatever reason, our moral identities motivate us to deny or dispute evidence and interpretations that make us look immoral’.²

Moreover, ‘denial accompanies and follows genocide so routinely as to constitute its normative final phase’.³ Such denial constitutes more than a random recurrence throughout history. On the contrary, it demonstrates an institutionalized pattern of conduct, perceivable in different conflicts around the world and in different periods: the forced disappearances in Latin America, the extermination of

1. Staub, 2009, p. 102.

2. Moshman, 2007, p. 127.

3. Ibid, p. 126.

concentration camps in Germany, and the annihilation of native peoples, to name a few. In the first case, the strategy was to deny the governmental knowledge of the events, thus denying the existence of the victims and the role of the State in the atrocities. In the second case, the Operation Reinhard involved the massive elimination of Jews in concentration camps and the burning of their bodies, so as to cover any evidence of their mere existence.¹ In the third example, denial involved the institution of concepts of progress, civilization and nation building as superior ideals to be achieved against the barbarians and savages.

6. THE VALUE OF THE TESTIMONY

Regarding the second book of Giorgio Agamben analyzed in this article, it is interesting to notice the value of the testimony of survivors of concentration camps.² They are the ones who were submitted to biopolitics in its most extreme form and resisted in order to share their experiences, which still shock the mankind. Remembering and reviving stories of that period is not only a duty of memory or a necessity of the victims to have their stories told. The testimony reveals gaps that cannot be fulfilled, which consist on the deepest point of human existence.

The necessity of the testimony was the force that urged the victims to survive,³ to tell the horror lived in concentration camps and how they were submitted to atrocities and offences to their dignity. In some cases, atrocities that bring people away from citizenship and are committed with the contempt of the State have no clear relation to

1. Moshman, 2007, p. 128.

2. Agamben G. 2008, *O que resta de Auschwitz: o arquivo e a testemunha (Homo Sacer III)*, São Paulo: Boitempo.

3. Agamben, 2008, op. cit., p. 25.

regimes or declared political intentions. With the acts recognized as offence to human rights, individuals are excluded from the globalized capitalist regime. Such offences are commonly based on cultural beliefs – justified in the relativism of human rights and, therefore, that do not permit, theoretically, action of the ruling elite from other countries.

Those differences between current States and States from the past, and the form by which the rejected people, the ‘human waste’, can be defined as a product of the egocentric character of States and of the citizens resulted from neoliberalism, demonstrating that there is not only one testimony to be given. There is no group of survivors or homogeneity of the victims that permit a specific research of how they ended on that situation. It is not the interest to disqualify eventual experiences shared or stories of life of some people, but to reinforce the impossibility of a general and objective analysis of the testimony.

Moreover, in a world where boundaries have become porous and sovereignty is no justification to certain acts, globalization makes it more difficult to identify the effective victims. As unrecognized victims, it is hard to obtain their testimony and to have a reunion of identified victims to fight together for better conditions. In this situation, there are many people who do not perceive themselves as victims or do not know how they became forgettable for the society. With that in mind, it is possible to establish three major points of concern for jurists and researchers:

I – Inside neoliberal societies, who are the ones to whom the State gives nothing but neglect and do not have perspective to be included in the consumer society? The human rubbish, as the aforementioned definition by Baumann, is an entity that does not integrate societies and, because of that, lives deprived not only by treaties of human rights but also by UN resolutions and cogent norms of International Law. As examples of this exclusion, it is possible to mention

indigenous tribes, quilombola societies, and so forth.

II – Which cultural practices use this artifice to foment atrocities against human rights? The relativist theories in recognition of human rights can erroneously lead to the acceptance of any conduct based on cultural beliefs, but it is imperative to remember that no act can justify violations of human rights. In this line, Slavoj Žižek argues: “I do not buy left relativism that understands that we should not impose western notions of human rights. This justifies anything and it is in this way that I criticize tolerance”.¹

III – Could the sovereignty of States be defied to protect human rights? If so, what is the legal framework of the international protection of such rights applicable to these countries?

In this last point, it must be clarified that sovereignty is not natural or universal, but an idea of human power that, if absolute or unlimited, would be immoral. Although being used as justification to some acts in the name of the State, this is a paradigm that must be affronted. With social power with the people, the State power must be limited. Furthermore, there are no undeniable territories or homogeneous populations², hence Kant’s concepts regarding universal hospitality must be considered.³ Accordingly, this third concept encompasses the great number of immigrants that leave their countries in search for better conditions.

Thus, it is fairly challenging to define to which citizens human rights are denied and in which way the human conditions are denied to them. There is a very light boundary that separates human beings from

1. Slavoj Ž, 2013, Eu não sou um daqueles esquerdistas loucos, Folha de São Paulo [Serial on the Internet] 2013 september, Available from: <http://www1.folha.uol.com.br/fsp/ilustrissima/131366-quot-eu-nao-sou-um-daquelles-esquerdistas-loucos-quot.shtml>. Accessed October 10, 2013.

2. Menaut A.C.P, 2013, Después de La Soberanía, [Serial on the Internet] 2013, September, Available from: <http://e-spacio.uned.es:8080/fedora/get/bibliuned:DerechoPolitico-2001-50-13620/PDF>. Accessed October 17, 2013.

3. nt I., in Derrida J., 2001, On Cosmopolitanism and Forgiveness, London: Routledge, p.20.

citizens – the living body and the one that has dignity. In this regard, it is enriching to understand Agamben's questions about what it means to continue to be a human being and not only a living body. What was important in the concentration camps was the almost biological vindication to remain belonging to humanity, the last feeling to belong to this species. Which one is this last feeling? Is there anything close to this? ¹

As an example of circumstances in which the feeling of humanity is lost, Agamben uses the term "Muselmann" to define these individuals who live in the limit between life and death. The situation, according to him, between life and death is the constant characteristic of the Muselmann, the walking cadaver par excellence. An unlighted face with oriental anguish². This is the author's description of the recognition of the individual who is closest to death and far from humanity and dignity.

Furthermore, to achieve the Muselmann condition, the most extreme standards of suffering were inflicted upon individuals, achieving a point where there is nothing left of humanity. The central and disconcerting conclusion is that every men and women have inside themselves the human and the inhuman, the possibility of being capable of everything inside.³

With the exposed arguments, it is possible to measure the difficulty existent to recognize and reintegrate people in Muselmann conditions and the human rubbish to the societies, as they are not a specific focus of the biopolitic exercise of most countries. Individuals with no humanity are inserted within societies and are mostly forgotten by States and its sovereigns – and might even the product of State's actions. Despite the progresses of the legal protection of

1. Agamben, 2008, op. cit., p.65.

2. Agamben, 2008, op. cit., p. 76.

3. Ibid, p. 83.

human rights and the creation of international courts, it is still complex to define who are these people who need an intervention to be saved.

7. HOMO SACER AND THE IRREDUCIBLE MINIMUM

The Homo Sacer concept will be extremely important to the establishment of the boundaries about human rights and when these rights lose a particular characteristic, depending on the biopolitical context, to be comprehended as universal. Agamben begins his analysis of these concepts with two greek terms that define the word life: *zoé*, the natural life representing the simple existence common to all human beings; and *bios*, the way of life particular to each individual placed in a social group.¹

Zoé, when inserted in a (bio)political context, starts to suffer interference of the sovereign power that acts in the group, in its whole, to achieve certain goals of the government (revisiting here Michel Foucault's theories).² Based on that differentiation between 'forms of life', and on the political space of inclusion and exclusion of people, added to the new perspectives of sovereignty and porosity of boundaries, it is possible to conclude that the 21st century has a complicated issue: the indistinction of these categories. The political space is not well defined; the State of exception can now be understood as a rule, since it has become routine to suppress rights and, consequently, the natural living is not always on the fringe of the legal order as it should be. The society has people that are not citizens, that have nothing but the natural life – a naked living.³

1. Agamben G, 2010, *Homo Sacer, o poder soberano e a vida nua I*, Belo Horizonte: Editora UFMG, p. 09.

2. Foucault, 2000, op. cit.

3. Agamben, 2010, op. cit., p.155.

As such, it is undeniable that some individuals do not have their lives protected by the legal system, not being able to have citizenship, which remains only in formal statements, and do not achieve the dignity existent only in treaties. As the author argues, each and every human being can become this condition, nominated Homo Sacer, everybody has a life with no meaning – unworthy to be lived and with no quality of legal asset.

Relating to this question, a universalist perspective that refers to human rights must be analyzed. It is about a universal conscience, endowed with some maximum values constituted by humanity along history; it is connected to the essential core of rights related to human dignity. About dignity, it is based on guarantees of its intangibility and on the perspective of equality to every individual; on the pursuit of liberty, realization of justice and the construction of some consciousness that preserves these principles as a whole¹.

In addition, according to Jorge Miranda, human rights should be guaranteed by constitutional norms, given their relation with universal conscience. When this situation does not occur, there is an open space to a critical judgment: could the deficiency of written norms in protecting human rights, in front of the impossibility of the State to defend them, be sufficient to permit the action of other countries, thus disregarding the idea of sovereignty?

Jorge Reis Novais² can help answering this question with the concept of minimum of existence, which is also connected to the dignity of human beings: that thing without which a person is obligated to live in absolute misery, involuntarily transformed into an object of the actions of the State. Also, according to Flávia Piovesan, dignity should be a matrix to all constitutions, which would have the

1. Miranda J, 2000, Manual de Direito Constitucional: Direitos Fundamentais. Volume IV, Coimbra: Editora Coimbra, p.48.

2. Novais J.R.,1987, Contributo para uma Teoria do Estado de Direito: do Estado de Direito Liberal ao Estado Social e Democrático de Direito, Coimbra: Almedina, p.295.

duty to establish it as a parameter to every interpretation and judicial act. Every law should be elaborated according to principles of justice and ethical values, so as to support the legal system and inform interpretations of the norm.¹ And so, these exigencies should be attached to the 'minimum ethical irreducible'. The defense of constitutional systems, even when relying on international treaties, should always focus on the protection of basic human rights, the minimum standards without which a person could become a Homo Sacer.

Ergo, it must be emphasized that legal concepts only exist to protect human rights. But mostly, regarding constitutionalism, cultural plurality is an important factor and impositions of Western values need to be strongly avoided. On this subject, Jack Donnelly sustains:

One of the key differences between the modern Western and the non-Western approaches to human dignity is the much greater individualism of the Western human-rights approach. Rights held by individuals will of course tend to be more individualistic in their operation and effects than group rights or substantively similar non-rights protections because of the special claims justified by rights-based entitlements and the substantial discretionary control of the right-holder. (...) Ahmad Yamani likewise argues that the West "is so over-zealous in its defense of the individual's freedom, rights and dignity, that it overlooks the acts of some individuals in exercising such rights in a way that jeopardizes the community."²

Therefore, it is very important that cultural rights be taken into account in situations of violations of human rights. Thus, the authors conclude to the need for a broad interpretation of the 1969 Vienna Convention, so as to achieve the protection of those rights in a

1. PIOVESAN, Flávia. *Direitos Humanos e o Direito Constitucional dos Direitos Humanos*. 12^a Ed. Saraiva, 2011

2. Donnelly, *op. cit.*, p.311.

perspective of the irreducible (existential) minimum and to avoid that citizens become Homo Sacer. Article 53 of the Vienna Convention states that:

*A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*¹

Hence, with this interpretation, the application of *jus cogens* norms has *erga omnes* effects and cannot be drifted away by any citizen or treaty given their mandatory characteristic. These norms, however, should not be confused with customary law, once their repeated denial would eventually change the legal system of the State. *Jus cogens* norms, on the other hand, in order to be drifted away would need another norm with the same nature, another norm of international law – as also established by the Vienna Convention.²

This concept, it is important to observe, differs from that of Professor Cheriff Bassiouni,³ who defends that *jus cogens* is customary law transposed to the international level. However, the author also sustains that these rights have *erga omnes* effects and maintains that these norms must be respected by every single citizen.

The fact that these norms are inserted in the Vienna Convention and that this treaty has been ratified by a considerable number of

1. Vienna Convention on the Law of the Treaties, 1969.

2. Ferreira, G.B., 2013, *Direito Público no Mercosul: Intervenção Estatal, Direitos Fundamentais e Sustentabilidade: anais do VI Congresso da associação de Direito público do Mercosul: Homenagem ao Professor Jorge Luis Salomoni*, Belo Horizonte: Fórum, p.538.

3. Bassiouni M. C., 1999, *Crimes against humanity in Internacional Criminal Law*, 2^a ed.

States prevent eventual invocation of sovereignty concepts to protect States that perpetrate human rights offences. Even citizens and heads of States have in their positive obligations the duty to respect and implement these universal norms – the minimum without which people cannot be considered humans. Finally, the International Criminal Court, established by the 1998 Rome Statute, was created in order to complement the protection of human rights, allowing for the prosecution of crimes committed not only by States that have ratified it, but also by States referred by the United Nations Security Council.

Lastly, regarding the crimes that fall under the jurisdiction of the International Criminal Court, it is once again relevant to underscore Article 7 of the Rome Statute, which criminalizes conducts classified as crimes against humanity: ‘(...) or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court’; and also: ‘Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health’.¹ Hence, the protection intended by the Rome Statute in relation to human rights is evident, as it is also clear with regards to the aforementioned Homo Sacer conditions, within a universalist perspective.

8. CONCLUSION

The perception of how the denial of the otherness is still very present in the society is extremely relevant if one notices the daily fight of individuals to have their rights respected. Thus, the growing concerns of the international community to protect and implement human rights deserve attention as we consider all the difficulties in defining which

1. Rome Statute of International Criminal Court, 1998.

rights must be understood as universal and how this perspective could otherwise be considered Western and imposed to other cultures.

In neoliberal societies, it is perceptible that some individuals are not inserted in the system and receive nothing but the contempt of the political treatment of States. Excluded from the capitalist system, these people are daily violated in their dignity when found in the impossibility to achieve the irreducible minimum of conditions to live. However, this exclusion is somewhat different from the one seen in the victims of the Nazi Regime, regarding to whom the necessity to testify their experiences was often what gave them strength to survive. Currently, there are several forms and sources of atrocities and exclusions around the world, usually justified by national rules and policies that ultimately alter the perception of those who live under such circumstances.

With this perceived range of offences to human rights, it is difficult to obtain a homogeneous testimony from all the victims, or even to recognize them as a homogeneous group. Due to this lack of identification of the survivors, it becomes much more challenging to have an overall and objective analysis of the violations, thus the study of the denial of the otherness that is still widely existent is even more relevant to the understanding of the subject.

Violations of human rights do not occur exclusively through action, as omission can be equally disturbing when deliberately employed to control and oppress the most underprivileged people of society. It is perceived that ideologies that reject the existence of the other are constantly used to undermine the dignity of groups and individuals so as to deny them access to the most basic rights.

Guaranteeing minimum rights, whether of civic and political character or of economic and social content, is a moral duty imposed upon all governments, as 'for people to be able to act as citizens, and to be able to count themselves as such, they must have the kind of

independence that such minimal protections ensure'.¹

Likewise, it is important not to forget Agamben's concepts regarding the Rule of Law, and how it has been overturned by the State of Exception. Moreover, the author recognizes that the exception is important to strengthen the norms and to reinforce the relevance of the Rule of Law. The connection of this exceptional situation, which is now widespread and has become the rule, with politics is very clear – and it is different from a State of War, for example, which has a special and transitory character, with a well-determined objective. Even conducts committed within the latter are envisaged in the Rome Statute so as to protect individuals from violations that are so common in our societies that may occur without our due attention.

With the end of the Cold War, serious human rights abuses led to the establishment of the *ad hoc* international tribunals for the Former Yugoslavia (ICTY – 1993) and Rwanda (ICTR – 1994). Created by the UN to address the atrocities committed during the conflicts, these tribunals, alongside with subsequent hybrid courts, corroborated the need for a permanent court to persecute mass atrocities. Finally, the International Criminal Court was established in 1998 and became operational in 2002, with the mission of putting an end to impunity and prosecuting the most responsible for 'unimaginable atrocities that deeply shock the conscience of humanity'². Hence, the Rome Statute has criminalized conducts that violate some *jus cogens* rules and acts that disrespect human rights.

Thus, the denial of the otherness is usually the foundation of ideologies that encourage violence against other groups and incite the commission of mass atrocities and crimes against humanity. In this regard, Agamben's concept of State of Exception explores the denial

1. Cass Sunstein, 2001, "Designing Democracy: What Constitutions Do", New York: Oxford University Press, p.222.

2. Rome Statute of the International Criminal Court, 1998.

of the otherness as opposed to the Rule of Law in order to justify atrocities against the human dignity. It is important to observe, however, that the human dignity is not violated solely through State action, but also through the lack of implementation of minimum standards of life that are inherent in the very idea of dignity.

The evolution of International Criminal Law allowed for the establishment of the International Criminal Court, and with it the possibility of international prosecution of those responsible for unimaginable atrocities that violate the mankind as a whole. The application of internationally recognized concepts such as the idea of *jus cogens* norms empowers the international community to contend that, as stated in the preamble of the Rome Statute, 'the most serious crimes of concern to the international community as a whole must not go unpunished', thus guiding the discussion concerning the possibility and legitimacy of external intervention on States that do not follow the international legal framework of human rights protection.

Accordingly, it is imperative to recognize the importance of plurality for the recognition of human dignity, and the reason why the denial of the otherness is such an affront to human beings. The respect for norms of International Law cannot be restricted to their acceptance, but includes the obligation of the States and the international community to make them effective to each and every individual. Offences against human rights must become an exception, so as to ensure that the State of Exception is not a rule. As previously stated, unimaginable atrocities not always allow for a clear testimony, but it is significant that each and every claim becomes a lesson to enforce the protection of individual humanity.

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