Bodies at the check post: Sovereignty, borders and lack of access to health care services

Dani Filc

ABSTRACT

The paper analyzes restrictions to Palestinians' access to health care services in the Occupied Territories as an example of the ways in which Israel's de facto sovereignty, as the power to draw borders and to decide on the exception, makes the Palestinians' nude bodies homines sacri. It shows how the check post functions as the mark of sovereignty, as the place where Palestinians' lives are reduced to what Giorigio Agamben calls "bare life." The paper also shows that, even in cases where the state of exception has become the norm, there is still a need to appeal to a discourse of fictitious legal sovereignty in order to sustain the state of exception.

Introduction

Since the beginning of the second Intifadah in September 2000, access to health care services has become very difficult for the Palestinians living in the Occupied Territories. Their situation was exacerbated in April 2002, when Israel returned to full and direct occupation of the territories that, as a result of the Oslo agreements, had been under Palestinian control. While the Palestinian Authority still enjoys formal control over those areas, de facto Israel has total power over most of the Occupied Territories, severely controlling Palestinians' property, movement and lives. The Occupied Territories represent a space where the state of exception has become the norm. Israel exercises its power through roadblocks, the construction which the Israeli government calls a "separation fence" and the Palestinians call a "wall," and the Israel Defense Force's (IDF) constant presence, strictly limiting Palestinians' access to health care services. This limitation of access exemplifies in a very primary way the complex relationship between sovereignty, borders and power over bodies. The present paper discusses theoretical contributions from Carl Schmitt, Giorgio Agamben and Michel Foucault in order to better understand the ways in which sovereignty, borders and bodies interact in the specific case of the Palestinian territories occupied by Israel.

Sovereignty, borders and the state of exception

Sovereignty is a concept with a double meaning. *State sovereignty* is the power to decide, as elaborated by Bodin and Hobbes, while *popular sovereignty* is the democratic, constituent power of the people. The power to decide about the state of exception and the power to define borders are the central marks of state sovereignty. In his book *Political Theology*, Carl Schmitt proposed that "[S]overeign is he who decides on the exception" (1985:5). For Schmitt, this authority to decide is sovereignty's main mark: "...the authority to suspend valid law...is so much the actual mark of sovereignty" (1985:9).

The decision as to whether the state of exception should be applied cannot be rationally derived from a set of rules or norms. The state of exception cannot be deduced from the norms, as the exception is the state in which all norms are suspended and the installment of a state where exceptional measures can and should be taken. In Schmitt's view, only the sovereign may decide on these questions, and this capacity is what defines it as sovereign. The sovereign is the entity that determines "what constitutes public order and security" and "when they are disturbed" (1985:9). In the state of exception, the sovereign enjoys unlimited authority; the constitutional order is suspended, and, while law recedes, the state, the sovereign, remains (1985:12). The state of exception as the suspension of the state of law is valid, however, insofar as it leads once again to the state of law. The need to suspend the valid law is exceptional, and it is justified only as a way to protect the state from its enemies and as the only means which will allow restoration of the state of law.

The establishment of borders is a second central characteristic of state sovereignty. Borders represent markers of the power that a state has over society (Baud and Van Schendel, 2003). In the Westphalian world, borders are both the precondition and the expression of state sovereignty. For Schmitt, "sovereignty is always established upon a border and is primarily exercised in the imposition of borders" (cited in Balibar, 2004:140). The occupation of land and the demarcation of borders are the original juridical acts. The border draws the limits of the space where the sovereign can decide on the exception.

The Italian philosopher, Giorgio Agamben, builds on Schmitt's concepts of sovereignty and exception. Like Schmitt, Agamben emphasizes sovereignty's significance as state sovereignty. However, while Schmitt conflated sovereignty's two meanings (since the state represented the people in an unproblematic way), Agamben considered sovereignty solely as state sovereignty, ignoring its popular facet. The sovereign, by installing the state of exception, produces bare life, i.e., life exposed to death. The inclusion of bare life into the polis, in the figure of *homo sacer*, is at the basis of the Western state and politics and at the basis of the idea of sovereignty. In Agamben's words, "the production of a bio-political body is the original activity of sovereign power" (1998:6). This inclusion, however, is an "excluding" one. Bare life is included in the political by its exclusion from the juridical order, by its constitution

as *homo sacer*. The sacred man is the one "situated at the intersection of a capacity to be killed and yet not sacrificed, outside both human and divine law" (Agamben, 1998:73). The *homo sacer* is included in the community as the excluded one, as the one who may be killed and whose killing will not be considered murder. S/he is included within the law as the one who is excluded from the protection of the law (1998:82). For Agamben, this is the meaning of sovereignty, "the originary structure in which law refers to life and includes it in itself by suspending it" (1998:28-29). As the sovereign is the entity which includes life within the law by the suspension of life, Agamben can state that "the sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law passes over into violence" (1998:32). The border is the physical expression of this limit, since the border delimits the spatial threshold where the state of law becomes violence.

This form of relation which defines sovereignty, a relation in which something is included solely through its exclusion, is what Agamben understands as the state of exception. Agamben follows Schmitt in linking sovereignty with the demarcation of a territory and the state of exception. The state of exception is the foundation of Western polities; "in its archetypical form, the state of exception is...the principle of every juridical localization, since only the state of exception opens the space in which the determination of a certain juridical order and a particular territory first becomes possible" (Agamben, 1998:19). This space is not only figurative, but also highly concrete. Borders define the space where the process of inclusion through exclusion takes place. As in the case of migrant workers, the very crossing of the borders represents inclusion through exclusion. Ettiene Balibar expresses the way in which the borders play a central role in the process of inclusion/exclusion, when he claims that borders are "the point where, even in the most democratic of states, the status of citizen returns to the condition of a 'subject,' where political participation gives way to the role of police" (2004:109). At the borders, the state of exception always becomes the norm, as the controls and guarantees of the juridical order are suspended (Balibar, 2004). At the margins, sovereignty loses its popular, constituent facet and appears only as state sovereignty.

In the state of law, the valid norm, the law, enjoys also the force of law; but in the state of exception, a separation is introduced between these two elements. The valid norm has no force, while decisions which are not legal do have the force of law. The state of exception represents

> the isolation of the force of law from the law itself. The state of emergency defines a regime of the law within which the norm is valid but cannot be applied (since it has no force), and where acts that do not have the value of law acquire the force of law (Agamben, 2002).

The state of exception is not a dictatorship, but a space devoid of law, characterized by the existence of the force of law without a valid law. The state of exception is a "zone

of anomy in which all legal determinations find themselves inactivated" (Agamben, 2002). In Agamben's view, this space devoid of law is essential to the legal order itself. The law, in order to guarantee its functioning, necessarily has to relate to an anomy. In sum, the anomy is not a transient interruption of the state of law, but is always included in the latter, which must constantly refer to the former as a condition of its functioning.

Agamben does not consider the state of exception as a temporal suspension of the rule in order to ensure the viability of the state of law. He follows Benjamin's claim in the theses on history, that if we look at history from the perspective of the oppressed, we can see that "the 'state of emergency' in which we live is not the exception but the rule" (Benjamin, 1973:4). However, while Benjamin considered the state of exception to be the rule only for the oppressed, Agamben sees it as the fundamental characteristic of modern states. Agamben claims that, in Western societies, where the limits between the state of emergency and the state of law are blurred, the former becomes permanent. In different politico-juridical contexts, the sovereign makes the state of exception permanent by declaring a "fictitious" state of emergency. Agamben (2002) states that

> at least since Napoleon's decree of December 24, 1811, French doctrine has opposed a "fictitious or political" state of siege in contradistinction to a military state of siege. In this context, English jurisprudence speaks of a "fancied emergency"; Nazi legal theorists spoke unconditionally of an "intentional state of emergency" in order to install the National Socialist State.

He considers the intentional creation of a permanent state of emergency "one of the most important measures of contemporary states, democracies included."

Thus, in our day, the state of exception is not, as Schmitt thought, a sovereign's decision limited in time, aimed to defend the state from its enemies and allow the return to the state of law. It is not a transient state "whose aim it is to make the norm applicable by a temporary suspension of its exercise," but a permanent situation where the sovereign may suspend the law in such a way that "it is impossible to distinguish transgression of the law from execution of the law, such that what violates a rule and what conforms to it coincide without any remainder" (Agamben, 1998:57). In this state of indistinction between violence and the law, it is the sovereign who has the power to decide between the two "to the very degree that he renders them indistinguishable from each other" (Agamben, 1998:64). When the state of exception is no more a transient situation, and the clear distinction between the state of law and the state of exception disappears, we are left with "a zone of anomy dominated by pure violence with no legal cover" (Agamben, 2002).

Sovereignty is an embodied phenomenon. In the past, state sovereignty was embodied in the king's dual body. Today it is embodied both as the inclusion/exclusion of life and as the establishment of borders. Sovereignty as the decision on the exception, as Agamben claims, has as one of its central features the constitution of the *homo sacer*'s

body. Sovereignty as the establishment of borders is embodied since borders are power exercised on bodies. The borders function as the limit which bodies can or cannot pass. Borders define which bodies are included and which bodies are included through their exclusion. At the border, power appears not as governmentality, i.e., as a complex intersection between techniques of discipline and technologies of the self, but as power over bare life.

Borders, where the juridical norm is suspended and where sovereignty loses its double character, also define spaces where the state of exception becomes the norm. Borders define spaces, such as the Occupied Territories, where people become de facto, not potential, *homines sacri*. For them, the law exists only as they are excluded from it, and "the political system transforms into an apparatus of death" (Agamben, 2002). The border and the multiplication of internal borders (in the form of check posts and obstacles) define the spaces where the difference between the state of law and the state of exception is effaced.

The state of exception as the limit of Palestinian access to health care

From the beginning of the occupation in 1967 until 1993, Israel was in charge of the health care system in the Occupied Territories. The Oslo agreements transferred the responsibility for several services, health care among them, to the Palestinian Authority.[1] The first steps of those agreements also left all Israeli settlements in the Occupied Territories. Thus, several blockades and controls were established in order to protect the Jewish settlements. With the beginning of the second Intifadah in September 2000, Israel erected new check posts and barriers within the West Bank and the Gaza Strip. These divide each area into several "geographical cells." The West Bank is dissected into northern and southern blocs (with Jerusalem and its environs in between), and is additionally divided into regions according to city-governorates: Jenin, Nablus, Ramallah, Salfeet, Jericho, Tul Karm, Qalqilya, Bethlehem and Hebron. Each region is in turn divided into sub-regions, which may at times constitute a single village, isolated from all other villages and towns in its vicinity. By the end of 2003 there were fifty-six manned check posts in the West Bank, as well as 607 physical roadblocks that prevent the passage of motor vehicles–457 dirt piles, 94 concrete blocks and 56 trenches (Swissa, 2003). Moreover, most of the main roads in the West Bank are closed to Palestinians. At times, the internal closure has been accompanied by siege (known by the euphemism "encirclement"). Israel has "encircled" districts and individual villages, cutting them off from the remaining parts of the West Bank. The Gaza Strip, for its

1 However, it did so without providing the necessary powers to efficiently take on this responsibility.

part, is dissected by the Gush Kattif check post into two blocs: the southern bloc, including Rafah and Khan Younis–which, in turn, includes the completely isolated Mawasi area–and the northern bloc, which includes Deir Al-Balah, Gaza and Jabalia (Ziv, 2002).

In addition, Israel is in the process of constructing a complex of fences and barriers, known in Israel as "the separation fence" and in the Occupied Territories as "the wall." This system is located east of the 1967 borders and within the Occupied Territories. The declared objective of this complex is to constitute a physical obstacle preventing entry of Palestinians into Israel. However, the route of the fence, determined with a view to including as many settlements as possible on its western side, forms isolated Palestinian enclaves within the West Bank. For example, the city of Qalqilya is completely surrounded by a wall, with only one gate in the northeast. Passage via this gate is also controlled by the Israeli military. In the area of Baqa a-Sharqiya and Nazlat Issa, two parallel fences have been erected (Ziv, 2002). The development of settlements and the physical division of the West Bank and the Gaza Strip by internal borders indicate that Israel is the de facto sovereign in the Occupied Territories.

As a consequence of the internal division of the Occupied Territories, a complicated system of permits and authorizations has been established in order to pass the blockades, travel from one territorial cell to another, or enter Israel from the West Bank or the Gaza Strip. Palestinians' daily lives are bureaucratically managed by an apparatus whose only aim is control through the different possible interactions between bodies and borders. The first step to achieve a permit is to get a magnetic card, which makes it possible to obtain a transit permit. The multiplication of internal check posts that require transit permits during blockade has turned the magnetic card into a lifesaver. Obtaining one is dependent on the absence of a "prohibition on security or police grounds." Palestinians are subjected to double jeopardy; if someone in the family was killed by the IDF, the entire family is considered a security threat, as it is "more likely that they will be involved in a terrorist attack" (Ziv, 2003).

The case of Muhammad Tabazeh tragically exemplifies this. On October 20, 2003, the Israeli air force directed two rockets, within a minute and a half, at a car whose passengers were suspected of being Hamas activists in the Nusseirat refugee camp in the Gaza Strip. Many residents who arrived there after the first rocket were hit by the second, including Mahmoud Tabazeh, a 14-year-old boy. Because of his serious condition, he was transferred for treatment to Tel HaShomer hospital. His brother Abed, age 23, a student of economics and statistics, was killed, as was his cousin Ibrahim, a schoolboy in the twelfth grade. Other members of the family were also injured. His father, Muhammad, had a permit to work in Israel, but when he tried to visit his son in the hospital, the soldiers at the Erez check post (the main gate to and from the Gaza Strip) confiscated his permit. When he asked why, he was told "it is because of your children, because of what happened to your family." From the moment his sons became victims of the IDF, the father was prohibited on security grounds: not only could he not

visit his son, but he also stood to lose his job. Because of the refusal to allow his father to enter Israel, his son Mahmoud had to undergo an extremely serious and complicated operation without a single member of his family at his bedside (Ziv, 2003).

The classification of "security risk" can prevent anyone from receiving a permit, even if seriously ill.[2] The prohibition on security grounds is a highly arbitrary one. Different authorities may arrive at contradictory decisions about the same person, and the intervention of human right organizations has succeeded in modifying the decisions concerning specific cases, indicating that there are no "objective" security reasons for the denial of permits. The denial of freedom of movement severely affects access to health care services and causes significant damage, even leading to avoidable deaths. The system of blockades and permits not only impedes patients' access to health care facilities, but also makes it very difficult for the health care staff to reach their workplace or their patients' homes. Since Israel's control of movement is pervasive, health care issues, such as the importing of medicines and medical equipment donated or purchased abroad, and the decision to which medical center patients can be referred, are subject to the will of Israeli security forces (Ziv, 2003).

The internal partition of the West Bank and the Gaza Strip and the establishment of internal borders are not the sole manifestation of Israel's de facto sovereignty. This is also expressed in Israel's capacity to decide about the emergency. For almost four years, the Occupied Territories have been under a state of emergency, where the rule of law has been suspended and the state of exception has become the rule. The fact that Israel's Supreme Court has rejected almost all petitions concerning Palestinians' freedom of movement or IDF actions in the West Bank and Gaza Strip symbolizes that the Occupied Territories are a space where law has been suspended. Many of the petitions were rejected by the High Court on procedural grounds, without discussing the substance of the claims. Sometimes petitions were rejected under the claim that they were too general, even when they detailed particular cases (Supreme Court, 9109/96). On other occasions, the Court considered itself unable to address policies taken for security reasons, or it accepted the IDF explanations. The de facto suspension of the state of law is reflected also in cases where the Attorney General dismissed petitions, claiming that the complaint was "too unspecific" (Ziv, 2003). Furthermore, when there is agreement that, in certain cases, the law or the norms were violated, action is rarely taken against those who violated procedures (Ziv, 2002).

Even in those cases where the Court did express its concern about violations of international law and the government accepted the Court's deliberations, the research of human rights organizations showed that the government took no action to make

2 When a permit is requested on medical grounds, the petition is checked by the Health Coordinator in the Civil Administration.

amends. The security forces, for their part, clearly consider the Occupied Territories as a space devoid of law. In its answer to the Supreme Court, following a petition by four human rights organizations against the IDF commander in the Gaza Strip, the respondent argued that "in this situation [where fighting is taking place], great caution should be taken in applying the judiciary criticism to the security forces' actions. We are talking about actions that are at the limits of the judiciary audit" (Supreme Court, 4764/04:3).

When confronting demonstrated violations of Palestinians' rights, the government and the security forces claim that the violations of rights, rules and laws are "exceptions." However, as put by a report of Physicians for Human Rights, "the actual situation in the field proves that it is the 'exceptions' that are the true policy" (Ziv, 2002:25). The state of exception is precisely that state where "exceptions" become policy, become the rule, and where the norm becomes the exception. Every action which would be considered normal under the state of law becomes an exception under the state of emergency. Living within restricted "geographical cells" becomes the rule, while "normal," free movement outside these "cells" becomes an exception requiring special permission. The mere desire to stay by a hospitalized child's bedside becomes an ordeal, and authorization is granted only as an "exception," as exemplified by the case of the Haruf family.

Abed Haruf, a one-year-old baby, the son of Saed Haruf from the village of Odelia in the Nablus district, was hospitalized in Nablus for five days, suffering from anemia. The father wanted to visit his baby son and tried to reach Nablus, which is situated 7 kilometers from his village. Due to the closure, he was obliged to pass via Hawara check post (south of Nablus) on his way. He was not allowed to cross into Nablus since he had no permit. His application to the Israeli District Coordination Office (DCO) at Hawara for a permit was refused. Mr. Haruf was officially denied passage within the West Bank, for "security reasons" (Ziv, 2003). After the intervention of Physicians for Human Rights (PHR) and a Parliament member, Mr. Haruf was allowed, as "an exception," to stay at his son's bedside.

In its answer to PHR-Israel concerning the denial of movement to medical teams and sick people in the Nablus area, the Ministry of Defense stated that "uncoordinated and spontaneous" movement will be allowed–if at all–only in "emergency cases" (in Ziv, 2003:16). Thus, even for medical teams, freedom of movement exists only as an exception. The "Procedure for the Handling of Residents of Judea and Samaria Who Arrive at a Checkpoint in an Emergency Medical Situation" makes the IDF policy concerning Palestinian access to emergency care explicit. Its second article states:

> As a rule, the checkpoint commander will allow a person to cross the checkpoint (including entering Israel) to obtain medical treatment, even if the individual does not have the requisite approval, if an urgent medical emergency is involved. An example of a case of urgent medical emergency is a woman about to give birth, a person suffering from massive bleeding, or a person with a serious burn injury who arrives at the checkpoint (in Swissa, 2003:8).

However, in all non-urgent cases, the "resident" must obtain the approval of the local DCO before they reach the check post. Free access to health care services, which should be the norm, is possible only as an exception, in an emergency.

Under the state of exception, all Palestinians become *homines sacri*, whose life is reduced to bare life and its taking is not a crime. This is made clear not only by the great number of civil casualties, but also by the management of Palestinians' health. The IDF openly assumes that its aim is providing for Palestinians only as bare lives. In a response to PHR-Israel, the Ministry of Defense stated, "[T]he civil administration offices in Judea and Samaria operate daily in an intensive way in order to allow Palestinian populations that are not involved in terrorism to conduct a basic life pattern" (in Ziv, 2003:16).

The transformation of Palestinians into *homines sacri* is clearly exemplified by their lack of access to health care services. The multiplication of borders in the form of blockades and check posts makes access to health care services, even in emergencies, extremely difficult. Figures from the Palestinian Red Crescent show that ambulances are able to reach their destination only in 30 percent of the cases. Before the second Intifadah broke out, in late September 2000, 95 percent of Palestinian women in the West Bank gave birth in hospitals. By September 2002, that figure went down to less than 50 percent (Swissa, 2003:8). Testimonies given to human rights organizations indicate that, in many cases, soldiers delay ambulances even in cases of "urgent medical emergencies," do not consult with medical officials, and do not give sick people the benefit of the doubt, as they should according to the army's own written procedures. Moreover, in 2003, the roads in the Nablus area were completely closed at least three times even for ambulances, which were not allowed to enter the city (Swissa, 2003).

Unmanned blockades, such as soil ramps or concrete blocks, physically prevent sick people unable to cross these obstacles from reaching the manned check posts, and through these, perhaps gaining access to medical centers. In the village of Azmut, unmanned blockades make it impossible for ambulances to enter the villages. Patients must walk on foot to the ambulance, which waits on the road. Sometimes the ambulance is unable to reach the road, as it must pass through at least two manned check posts along the way. The local physician reported two cases of patients who died due to delays in evacuation. The village pharmacist suffered a cardiac incident and was taken on foot toward the road, where an ambulance was waiting; he died on the way. In the second case, a woman in labor attempted to walk from Azmut toward the road, but her passage was blocked by soldiers. She gave birth in the open and her child died shortly after (Ziv, 2002).

Nor does access to manned check posts prevent the loss of Palestinian lives. On November 14, 2000, Jimal Ibrahim Balawal, a resident of the village of Sinjil near Ramallah, suffered a heart attack. An ambulance that was supposed to take him to hospital in Ramallah was delayed by IDF soldiers when attempting to leave the village. After waiting approximately 30 minutes, during which time the soldiers refused to

respond to the pleas of the nurses accompanying the patient, the ambulance was forced to turn back. The patient later died in the medical center in the village, which naturally lacked the equipment and medical expertise that could have saved his life (Ziv, 2002).

Obstacles to access to health care result not only from the limitation of the patients' movements, but also from limitations to the medical staff's movements. In one of the absurd cases in which the Occupation bureaucracy is so fertile, a West Bank doctor who works at a hospital in East Jerusalem and possesses a permit for entry into Israel for this purpose was requested to provide expert advice at a hospital in the city of Nablus in the West Bank. When he reached Hawara check post at the southern outskirts of Nablus, he was told that the permit he holds is only valid for entry into Jerusalem. The Civil Administration claimed that he should have applied for a "blockade permit" to enter Nablus. All claims to the effect that, if he was found eligible for entry into Israel, there was no logic in denying his entry into Nablus, were in vain, and the doctor was obliged to return (Ziv, 2003).

The analysed examples illustrate that, in the Occupied Territories, the state of exception has become the norm, and the Palestinians have become *homines sacri*. Israeli rule is based on blurring of the limits between the state of law and the state of exception. This process is parallel to the blurring of the limits of a future Palestinian state by the proliferation of borders within the Occupied Territories. As Amireh claims, the proliferation of internal borders and check posts produced "a potential Palestine that will be constructed puzzle like, from areas with no names, marked only by the letters A,B and C" (2003:765).

This dual process of blurring and proliferation of borders represents only one of the several dimensions that the border as a mark of sovereignty plays in the Occupied Territories. A second dimension is that the border between Israel and the Territories draws the limit between a geographical space where the state of exception represents a possible form of power and a space where the state of exception becomes the norm, a space whose [Palestinian] inhabitants are *homines sacri*. The border between Israel and the Occupied Territories functions as an organic membrane, permeable for the Israeli settlers but impermeable for the Palestinians, who are included only as the excluded.

At a third level, those internal borders and check posts represent one of the central mechanisms that produce Palestinians as *homines sacri*. At the check post, the power exercised over the bodies of Palestinians reduces them to bare life: bodies waiting, queues of bodies, bodies checked from the outside and the inside (by the use of metal detectors). Blocking access to basic health care, to medical-assisted birth and to life-saving procedures means that expending Palestinians' lives is not a crime. The check post demedicalizes bodies, and by this process it transforms them in bare life, dying without access to health care. Those deaths are neither a crime nor a sacrifice, only the banal spending of human lives.

The occupied territories, the exception and the rhetoric of (fictitious) sovereignty

We have seen how the role of the Israeli government and the IDF, and the conditions of the Palestinians, correspond to Schmitt's and Agamben's conceptions of sovereignty and the state of exception. The state of exception that exists in the Occupied Territories does not result from the norm; rather, as Schmitt claims, it results from Israel's arbitrary decision (artibrary in the sense that it does not logically result from application of the norm). It is the Israeli government that makes all decisions; it designs borders and decides over lives. This power does not stem from any legal norm, but rather from sheer force. Israel's "decision frees itself from all normative ties and becomes in the true sense absolute" (Schmitt, 1985:36). However, there is a central aspect in which the situation in the Occupied Territories does not fit Schmitt's conception of sovereignty and the state of exception. For Schmitt, the sovereign is bound by the formula *Protego ergo obligo* (I can impose my decision since I offer protection). Protection is the sine qua non counterpart of sovereignty, but the Palestinians in the Occupied Territories are totally unprotected. Israel's re-occupation of the Territories since September 2000 did not lead to its taking any responsibility for the needs and protection of the Palestinian population, especially regarding access to health care services. Thus, Schmitt's definition of sovereignty is insufficient to explain the situation in the Occupied Territories, and we should appeal to Agamben's definition of the term.

Palestinians are for Israel *homines sacri*, who can be killed but not sacrificed. As in Agamben's (1998) definition of the concept *homo sacer*, Palestinians are killed not as the result of application of the law, but as a consequence of suspension of the law and the blurring of the limits between norm and violence. Moreover, as Agamben argues against Schmitt, the state of exception is not the temporary suspension of law in order to allow a return to the state of law. In the Occupied Territories, the exception has become permanent and the law exists only in the form of its suspension. As in the case of the Roman *Iustitium*, in which Agamben finds the antecedent to the state of exception, in the Occupied Territories the army can "kill a man without going to trial, ... destroy his house, and take his belongings" (Agamben, 2002:3). In the state of exception, the force of law is isolated from the law itself. Sovereignty is reduced to sheer force, the force of the Israeli state. The norm (the Palestinian Authority's rule) is valid but has no force, and military rule has no validity but has "the force of law." The Palestinian population in the Occupied Territories lives in a space and time where the law is suspended. It is subjected to pure de facto sovereignty, to a force that "is outside of the law and of all forms of legal control" (Agamben, 2002:1). The Occupied Territories has become "a zone of anomy dominated by pure violence with no legal cover" (Agamben, 2002:1).

For Agamben, the link between the state of law and the state of exception resides in the former's need for constant appeal to anomy and violence. He claims that

> [F]or one reason or another, this space devoid of law seems so essential to the legal order itself that the latter makes every possible attempt to assure a relation to the former, as if the law in order to guarantee its functioning would necessarily have to entertain a relation to an anomy (Agamben, 2002:2).

However, as Israel's responsibilization of the Palestinian Authority for providing health care to the Palestinian population shows, even in the state of exception, there is a need to appeal to some sort of legal cover. The case of the Occupied Territories illustrates that the necessary link between norm and anomy functions both ways. Not only does the state of law constantly refer to the state of exception, but the state of exception needs the fiction of a legal cover. The state of exception, which has become the rule, builds on fictitious sovereignty in order to perform (Agamben, 2002). In the case of the Palestinians' (lack of) access to health care services, Israel refers to a fictitious sovereignty and a fictitious state of law, as if the state of emergency were not the real rule. The Israeli Supreme Court acts as if a fictitious state of law applied to the Occupied Territories. The President of the Supreme Court himself claims constantly that Israel's occupation must comply with humanitarian and international law. The violence of the state of exception requires referral to a fictitious state of law.

While Agamben speaks about a "fictitious state of emergency," in the Occupied Territories the state of emergency is real, and the role of law (the rule of the Palestinian Authority's law) is a fiction. The PA's fictitious sovereignty allows the IDF and the Israeli government to separate the two terms in Schmitt's *Protego ergo obligo* formula. Sovereignty (in the sense both of the decision about the exception and as the entity for whom men and women are *homines sacri*) does not require protection (neither in the sense of protecting the lives of Palestinians, since they are all *sacri*, nor in the sense of providing basic services). The PA's sovereignty is fictitious since, while it has the validity of the law, it lacks the force of law. However, this fictitious sovereignty enables the perpetuation of the state of exception, covering for the fact that the Israeli government and the IDF do not provide basic services and needs. The appeal to the norm which lacks force functions as a way to deepen oppression, since its fictitious validity exempts the sovereign power of the duty to provide even a minimum degree of protection.

In sum, the situation in the Occupied Territories conforms to Agamben's claim that Schmitt was wrong in positing a temporal and spatial separation between the state of law and the state of exception. In the Occupied Territories, *nomos* and anomy, the state of law and pure violence, are no longer separated, neither temporally nor conceptually. The state of law refers always to the anomy of pure violence and bare life. The Occupied Territories have become "a zone of anomy dominated by pure violence," where the exception is the rule and the norm is exceptional. However, the ways in which the Israeli government deal with health care issues in the Occupied Territories show that the lack of separation between the state of law and the state of emergency is reciprocal. The state of law refers to the state of anomy, but the state of emergency is reinforced by

the appeal to a fictitious state of law. The sovereign's raw power gains in effectiveness by appealing to fictitious sovereignty; the legal cover increases the sovereign's power, which is no longer limited by the obligation to protect its subjects. The legal cover represented by the appeal to the PA's fictitious sovereignty exempts the Israeli government from any obligation to provide protection to the Palestinians, such as health care services. Thus, the fictitious sovereignty and the appeal to a fictitious state of law help perpetuate the state of emergency.

Conclusion

The Occupied Territories are an example of a spatial unity under the state of exception, where sovereignty exists only as state power and not as popular sovereignty. As in Schmitt's definition of the state of exception, the Occupied Territories are not under the rule of a norm or constitution (on the contrary, the current situation is clearly against international law), but are the result of a decision, that of the Israeli government. Israel's de facto sovereignty draws the borders that delimit a place in which the force of the law and its legitimacy are separated, and the state of law is suspended. The Palestinian Authority's law remains formally valid but lacks force, and Israel's decisions and actions have the force of law even though Israeli law does not apply to the Occupied Territories. Finally, as the case of the lack of access to health care services exemplifies, Palestinians in the Occupied Territories became *homines sacri* in Agamben's sense, since they can die and be killed without their deaths being considered a crime.

Israel's de facto sovereignty over the Occupied Territories can be understood first and foremost as embodied power, or power over bodies. Sovereignty draws borders and imposes them differentially over bodies: borders do not exist for Jewish settlers, and are closed for Palestinians. The proliferation of borders in the form of check posts and barriers has an inclusive/exclusionary role: it includes territories, but excludes the Palestinians bodies, which can only be included as bare life.

The borders represent an intersection between bio-power and sovereignty. Foucault opposed non-legal bio-power exercised over bodies to the idea of sovereignty. However, if we consider the case of the Occupied Territories in Agamben's terms, then non-legal power exercised over bodies and found "at the extremities" (in our case the borders) is also an expression of sovereignty. The borders are the physical symbol of the suspension of the norm; they are a locus where power is–as Foucault claimed about bio-power– "less legal." At the borders, subjects are "gradually, progressively, really and materially constituted" (Foucault, 1980:86), and sovereignty exists only as constituting *homines sacri* and not as a democratic, constituent power.

Foucault claimed that the new kind of power he discussed is exercised over bodies, as opposed to sovereignty, which is exercised over the earth and its products. As we saw above, the borders and check posts are a point of intersection where government

over the earth becomes government over "human bodies and their operations" (Foucault, 1980:88). For Foucault, medicine was the intersection between disciplinary power and sovereignty. He claimed that "[T]he developments of medicine, the general medicalization of behaviors, conducts, discourses, desires, etc., take place at the point of intersection between the two heterogeneous levels of discipline and sovereignty" (Foucault, 1980:90). A universalized medical rationality "at the same time monopolized by particular political geographies" develops at the intersection of bio-power and state sovereignty (Seremetakis, 2003:490). Within the sphere of governmentality and bio-power, the idea of risk and medical rationality "...erase borders in the name of medicalized notions of public safety and risk" (Seremetakis, 2003:491).

The case of the Occupied Territories, however, shows a different kind of intersection between bio-power and sovereignty, an intersection built on demedicalization. The check post is the epitome of demedicalization, as it prohibits access to health care and negates the logic and practices related to public health. However, it is still a point of intersection between the power over the earth (which Foucault saw as the central characteristic of sovereign power) and the power applied over the bodies. It is this second type of intersection between sovereign and disciplinary power, built on demedicalization, that produces subjects as *homines sacri*.

The case of the Occupied Territories reveals the limits of Schmitt's and Agamben's understanding of sovereignty and the state of exception. Although the state of exception does not result from the norm but from the sovereign's decision, the decision still needs to appeal to the law. While for Agamben the blurring of those limits means that the state of law needs to appeal constantly to the state of exception, in the Occupied Territories there is also the constant need to anchor the state of exception in a fictitious state of law, or to adjudicate to the Palestinian Authority a fictitious sovereignty which de facto it does not exercise. In a response to the Supreme Court concerning a PHR's petition, the Attorney General's office stated

> As stated in the agreements between the State of Israel and the Palestinian Authority, powers and responsibility in the field of health were transferred from the military government and the Civil Administration to the Palestinian Authority. This principle was first established in the Agreement regarding the Preparatory Transfer of Authorities, the second appendix of which states that the powers and responsibility of the military government and the Civil Administration in the field of health shall be transferred to the Palestinian Authority; in the context thereof, responsibility for all the health institutions was transferred (cited in Ziv, 2002:36).

In sum, Israel's rule over the Occupied Territories, especially so since the beginning of the second Intifadah, is an example of the ways in which state sovereignty and borders interact to constitute human bodies as *homines sacri*. The borders and check posts established by Israel in the Occupied Territories delimit a space–the intersection

between sovereignty and bio-power–where sovereignty exists only as the producer of bare life, and where the state of exception becomes the norm.

References

Agamben, Giorgio (2002). "The state of exception." Lecture given at the Roland Barthes Center, April 20, 2002, http://www.generation-online.org/p/fpagambenschmitt.htm.

_____. (1998). *Homo Sacer: Sovereign Power and Bare Life*. Stanford, CA: Stanford University Press.

Amireh, A. (2003). "Between complicity and subversion: Body politics in Palestinian national narrative." *The South Atlantic Quarterly* 102, 4: 748-772.

Balibar, Ettiene. (2004). *We, the People of Europe?* Princeton, NJ: Princeton University Press.

Baud, M., and Van Schendel, W. (2003). "Toward a comparative history of borderlands." *Journal of World History* 8, 2:211-242.

Benjamin, Walter. (1973). *Theses on the Philosophy of History* in *Illuminations*. London: Collins Fontana Books.

Foucault, Michel. (1980). "Two lectures." In M. Foucault, *Power/Knowledge*. New York: Pantheon.

Schmitt, Carl. (1985). *Political Theology: Four Chapters in the Concept of Sovereignty*. Cambridge, MA: MIT Press.

Seremetakis, M. (2003). "In search of the barbarians: Borders in pain." *American Anthropologist* 105, 3:489-491.

Swissa, S. (2003). *Harm to Medical Personnel*. Tel Aviv: Physicians for Human Rights-B'tselem.

Ziv, H. (2003). *At Israel's Will: The Permit Policy in the West Bank*. Tel Aviv: Physicians for Human Rights.

_____. (2002). *A Legacy of Injustice*. Tel Aviv: Physicians for Human Rights.