# The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand[1]

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## ABSTRACT

This paper looks at aspects of the detention of irregular migrants in Australia, Malaysia, and Thailand. The principle intention of the paper is to study detention of irregular migrants as a means of understanding politics and how notions of political participation and of sovereignty are affected by the detention of certain sorts of individual. What does the identification of certain "forms of life" to be detained say about the political norms of different societies? The conduit for this examination will be the Italian philosopher Giorgio Agamben's concept of *homo sacer*. Homo sacer is a term Agamben extrapolates from "ancient Roman law". It denotes a naked or bare life that is depoliticized. Homo sacer is the excess of processes of political constitution that create a governable form of life. Homo sacer is thus exempt or excluded from the normal limits of the state. At the same time, however, homo sacer is not simply cast out but is held in particular relation to the norm: it is through the exclusion of the depoliticized form of life that the politicized norm exists. This essay seeks to contextualize aspects of Agamben's argument by looking at detention as a form of exclusion in three different contexts.

## INTRODUCTION

This paper examines the detention of different types of irregular migrants in Australia, Malaysia, and Thailand. The conduit for this examination is the political theory of Giorgio Agamben, specifically his notion of *homo sacer.* Agamben invokes a term of ancient Roman law to describe a condition, or form of life,

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succinctly described as "bare". The homo sacer is the bare or depoliticized life that is distinguished from politicized forms of life, most clearly manifest in the citizen. Indeed, Agamben argues that the bare life is an excess or by-product of the production of politicized life. Agamben's political theory highlights the role of power: politics for Agamben is an ongoing process of clarification between inclusion and exclusion, between forms of life that the sovereign will protect and represent and those it will not. This distinguishing of included and excluded forms of life enables the sovereign to maintain its sovereignty: those forms of life that threaten the sovereign's jurisdiction over a particular land space are cast out, conceptually and at times physically, from "the norm". Those exempt from the operation of the sovereign law are consigned to what Agamben calls "zones of exemption" which gain their most obvious materiality in the detention camp. And yet their exemption must not be seen as a casting out of politics itself: the condition of exemption by which the normal political space is declared entails that the norm is dependent on its exempted other. The zone of exemption straddles and, ultimately, collapses the distinction between inclusion and exclusion.

The essay studies the detention of migrants as a concrete manifestation of a distinction between politicized and bare lives in three different political contexts. In doing so, the essay hopes to achieve three things. First, the essay will provide a nuanced reading of politics and political space, remarking on the blurring of the distinction between inclusion and exclusion and its importance for understanding politics. Second, the essay will study the juridical and political basis of detention in the different geographical and political contexts chosen. Third, the essay will contextualize Agamben's theory, testing its application in different geographical, political, and societal contexts.

A nuanced reading of the value of the homo sacer argument in understanding how irregular migrants are treated may then ensue. The paper offers an alternative rights oriented perspective of migration that may be of use to policy makers. It is a sense of human rights that refuses territorial limitations on these and instead harks to a cosmopolitan sense of humanity (Nyers, 2003). The essay will suggest that the territorial limitation of human rights is premised on a process of exclusion that would deny or conceal the reliance of the norm on the extraordinary. "Inside" and "outside" are not clearly demarcated; the inside relies on the outside for its coherence and for the cognition of its limits. This reliance means that spaces of inclusion and exclusion become blurred; the boundary between the two is not an empty moment or function of separation that divides two unconnected communities or experiences, but rather is a vibrant space of engagement and intercontamination. The ostensibly delimited space of territorial politics is thus expanded. Territorially truncated notions of "community" and "responsibility" are difficult to vindicate once the truncation is shown to rely on

a suppression of a relation with the outside. This poses a challenge to policy makers. The discourse of limited responsibility which vindicates the detention and exclusion of irregular migrants becomes difficult to maintain. The challenge is that policy is thought of in terms of a wider and less restrictive conception of obligation, responsibility, and community. The challenge is such that irregular migrants may make a legitimate claim for protection, irrespective of citizenship or means of entry into a host country.

The essay will continue with a brief section outlining why the refugee or irregular migrant generally may be conceived as homo sacer. The essay will then go on to the empirical studies of political discourses about irregular migrants and about the degrees of violence and other forms of abjection visited upon refugees in detention in Malaysia, Thailand, and Australia.

## HUMANS AND OTHERS

The encounter between irregular migrants and sovereign states may be characterized as an encounter between the detritus (of humanity) and the interiorized (of humanity). This way of looking at the encounter brings into focus two important aspects of Agamben's thought on the refugee.[2] The first is that the refugee should be thought of, paradoxically, as part of the *system* of the nation-state. By the system of the nation-state, Agamben refers to the regularizing process by which the meaning of the human being, of what it is to be human, is politicized. For Agamben, the history of politics is a history of bio-politics, a series of discursive and actual acts undertaken in order to appropriate the meaning of what it is to be human and to thereby distinguish an excess or, Schütz says, a waste, a remainder, a "no longer human" (Schütz, 2000: 121).

Agamben's history distinguishes between the politicized human being, made sense of in terms of the nation-state, and the no longer human, that which, for one reason or another, cannot be made sense of in terms of the nation-state. There is thus an interiorized humanity and a remainder or detritus humanity left over from the interiorizing process.

The second aspect of Agamben's thought on the refugee is the idea that the refugee or other irregular migrant, the detritus or remainder, is integral to the sovereign law that encompasses the interiorized humanity. This, Agamben suggests, is especially apparent when the refugee or irregular migrant is held within secure camps. These camps may be seen as zones of exception or exemption, where the sovereign law is exempt from operating. Yet this exemption comes about from a wilful act by the sovereign law: the sovereign law *exempts itself*

from operating. In the creation of secure zones where it is exempt from operating, the sovereign law maintains and perpetuates the norm or the regular. It is through the appropriation and control of the excluded, in effect its inclusion with its threat ameliorated, that the sovereign law maintains itself (Agamben, 1998: 15-29).

This is a paper that uses and problematizes Agamben's theory of politics, a theory that sees politics encompassing and depending upon the refugee as irregular migrant through a paradoxical act of exclusion, in order to shed light on the juridical basis of the detention of refugees and of the juridical structure of the detention camp that would allow for the withdrawal of certain fundamental freedoms that citizens take for granted. One intent of this paper is to understand the logic of modern sovereignty that would create spaces where its normal law is exempt and where certain "no longer humans" are to be contained. Thus, this paper sees the enclosure of certain human beings not as an anomaly of the logic of contemporary sovereignty, but a normal outcome of this logic.

The logic of modern sovereignty, as expressed in the sovereign state, is embodied most clearly in the disciplinary actions that render potentially disparate elements within the space of the sovereign state essentially homogeneous and governable. The encounter with an excess, which highlights homogeneity by its heterogeneity and unruliness, is both a threat to the regular order *and* integral for its continuation. It is a threat to the order because it reminds of the ruses undertaken to confine human beings to a politicized life within the nation-state (Dillon, 1999: 98). And it is integral to the continuation of the system of the nation-state because its unruliness serves to define the norm. By creating states or zones of exception where the sovereign law, *restricting itself*, ceases to operate, the sovereign law "creates and guarantees the situation that the law needs for its own validity" (Agamben, 1998: 17). The law defines itself, makes itself known, in negative terms, in terms of where it does not apply. The sovereign law is thus both inside and outside the sovereign space it creates. It entitles itself to effectively transgress its law in the creation of zones of exception where the law does not operate. It maintains a ruse of inside/outside while at the same time creating the ambiguous system of the nation-state that depends on the appropriation of the ostensibly excluded in order to maintain the inside.

In arguing that the sovereign law maintains itself and orders and delineates its space through the identification of a state of exception, the borders demarcating the included are stressed. It is through this emphasis that the borders between politics and life become difficult to distinguish. Hannah Arendt noted the indissoluble link between the "rights of man", central to the mythic foundations of many democratic states, and "the fate of the modern Nation-State" (Agamben,

1996: 160; citing Arendt, 1951). The possibility of human happiness, the scope and extent of what is possible, becomes intertwined with the nation-state. The reinforcement of this "indissoluble link" (Agamben, 1996: 160) is the condition of the refugee:

> Here the paradox is that precisely the figure that should have embodied human rights more than any other – namely, the refugee – marked instead the radical crisis of the concept. The conception of human rights based on the supposed existence of a human being as such, Arendt tells us, proves to be untenable as soon as those who profess it find themselves confronted for the first time with people who have really lost every quality and every specific relation except for the pure fact of being human. In the *system* of the Nation-State, the so-called sacred and inalienable human rights are revealed to be without any protection precisely when it is no longer possible to conceive of them as rights of the citizens of a State (Agamben, 1996: 160-161; my italics).

In spite of refugees' condition of bare existence, outside of the regulating norms and rules of the state, ostensibly indicating their claim on *human* rights more clearly than ever, refugees are marked out by their precise lack of rights. Their a- or extra-territorial form of existence seems to consign them to an abject condition of speechlessness which leaves them with little or no remit to challenge often ill-intentioned depictions (as well as occasional brutality or violence).

Agamben writes of "the *system* of the Nation-State" (Agamben, 1996: 161): the nation-state and its politicization of life is to be understood in terms of its relation with a zone of exception which the sovereign law excludes from the norm. This very act of exclusion, stemming as it does from a wilful act by the sovereign power itself, brings the zone of exception "inside", blurring the lines between "inside" and "outside".

Therefore, the ordering of space includes not only the conquest of land but also the encompassing of "the outside". This is so not only because of the threat that it poses in undomesticated form, but also because of the nature of the sovereign nation-state *system* where:

> …the exception is situated in a symmetrical position with respect to the example, with which it forms a system. Exception and example constitute the two modes by which a set tries to found and maintain its own coherence (Agamben, 1998: 21).

Agamben's concept of the *system* of the nation-state is important not least for its dissociation of the concept of territoriality from exclusively land-based accounts where a coherent space, the inside, is conquered and distinguished from an externality. In demonstrating the multiple spaces within the purportedly homogeneous nation-state, Agamben contributes to a growing (and especially post-colonial) literature on the inter-contamination of ostensibly distinct identities of

self and other. Agamben also demonstrates that sovereignty implies the exist-
ence of a state of exception where, and by which creation, it constitutes itself.
The space where politics *fundamentally* occurs is not the public spaces of
government and legislature but the hidden and ostensibly de-politicized zones
where control of the disparate other is, fundamentally, politics:

> The space declared improper for politics is singled out and indicated as the space of
> politics properly speaking … Bare life, *declared* outside, is by the same token factually
> singled out as the object, the inside, the territory *par excellence* of political action
> (Schütz, 2000: 122).

"Bare life" is what is distinguished from the politicized life of the sovereign
territoriality. "Bare life", what Agamben refers to as *homo sacer*, is the detritus
of the nation-state system, the system that distinguishes political life from "its
politically non-descript, politics-subtracted bare life" (Schütz, 2000: 121-122).
The argument of the homo sacer states that politics is bio-politics – action upon
the life of the human being so that the very form of existence of the human
being is politicized, leaving and identifying the detritus or waste in the distin-
guishing of human and no-longer human (Schütz, 2000: 121). Thus, Agamben's
de-centring of land-based accounts of territorial sovereignty is geared toward
showing that territoriality is premised, foremost, on a control of ontology. This
involves a de-limitation of the meaning of the human being which allows for the
spatialization of time and humanity. It allows for the foreclosure of the meaning
of human being in terms of "a principle that expresses an account of the char-
acter and location of political community in explicitly spatial terms" (Walker,
1993: 127). The importance given to a particular concept of ontology creates a
symbiotic structure of identity and temporality that constitute a series of as-
sumptions "that inform modern accounts of life inside and outside the sovereign
states" (Walker, 1993: 127). The upshot of this, R.B.J. Walker argues, is that
the affirmation of the principle of state sovereignty, a principle expressing char-
acter and location of political community as well underlying resolutions of
temporality and of the meaning of human identity, "has clearly set the conditions
under which accounts of historical possibility within states have been possible
at all" (Walker, 1993: 127).

This paper seeks to understand refugees in detention in Australia, Thailand, and
Malaysia as *hominis sacri*, bare lives consigned to zones of exemption where
the sovereign law ceases to function. Agamben's work can demonstrate that the
detention of refugees may be linked to ongoing processes of the constitution of
politics and the borders of the national community. This perspective allows one
to approach the refugee historically. This is a genealogical understanding which
takes note of the production of the meaning of the refugee. In so doing it pro-

vides a counter to the simple paeans about the eternal condition of abjection and loss that the refugee has somehow come into (Malkki, 1996). It furthermore distorts the simplistic sense of the refugee as one "forgotten" by the international community of nations: rather, the refugee is integrally tied into the practices of excluding and including that constitute and maintain the faceted *system* of the nation-state.

Empirically, Agamben's work suggests two avenues for this paper. First, an examination of those processes that create the refugee or illegal immigrant as the remainder left behind by procedures to solve particular problems. Agamben is not interested in the actions taken on refugees per se or in isolation; he is only interested if these may be linked to wider historical processes of political constitution. Thus, Agamben grounds the refugee as *homo sacer* historically. This paper will link discourses about the refugee to ongoing means of cohering borders of the political community. The second empirical avenue suggested by Agamben's work is an examination or exposition of the degrees of violence and abjection visited upon the body of the refugee or irregular migrant as a consequence of his or her confinement within zones where the normal law is exempt from operating.

Taking things further, the essay will seek to imbue particularity into Agamben's sometimes generalizing thought on refugees and politics. We will argue that attention to particular empirical examples highlights "degrees" of detention and of atrocity within zones of exemption in different geographical and political contexts. These may be accounted for by historical, social, or political connections of the irregular migrant to the political norm. Hence, an attention to detail may illumine specific processes of "othering" and specific forms of making the borders of the norm coherent.

## THE REFUGEE AS HOMO SACER

The concept of homo sacer derives from ancient Roman law, where it indicated a life that could be killed with impunity. Homo sacer was outside of the law. The law exempts the homo sacer from its reach. Today as a term indicating exclusion, the term may fit "the terrorists", killed with impunity and without trial and protest, in Yemen in November 2002 with a "clean shot" or commandeered off to indefinite detention in Guantanamo Bay. Equally, the term fits the refugee, subject to "inhuman" treatment by aid workers because of their lack of "access to legal remedies" (Harrell-Bond, 2002: 52) or commandeered from their boats to indefinite detention in Topside, Nauru or Manus, Papua New Guinea, Baxter,

Woomera, Villawood, Port Hedland and Maribyrnong in Australia or Semenyih, Malaysia.

The territorialization of modern existence means that the family of nations, mafia-like, keeps the law within itself. That is, the remit of the law, of justice, ends at the borders of the nation-state. The refugee, at the threshold of the nation-state, is outside the law; he or she may be subject to the remarkable hijacking of persons undertaken by the Australian navy and their forcible transport to countries other than their intended destination on the simple grounds that they have no basis upon which to protest. Australia has excised islands from its migration zone in order to deter potential arrivals. It has given itself the prerogative to unilaterally move boatloads of people to "declared safe countries" (declared by the Australian Immigration Minister) such as Papua New Guinea or Nauru.

Similarly, Barbara Harrell-Bond emphasizes the degree to which refugees in humanitarian aid camps may be seen as outside the law, without ready means for legal recourse. She asks, "can humanitarian work with refugees be humane?" Harrell-Bond emphasizes the difficulty of being humane, the difficulty of addressing the humanity of the refugee when that humanity is normally guaranteed by the office of the state. Hence, we enter a strange situation where aid becomes an act of charity. There is little or no scope for a relationship of accountability when the refugee is cast outside the very parameters of responsibility and accountability.

> … assistance to refugees is conceived of in terms of charity rather than as a means of enabling refugees to enjoy their rights. There are insufficient resources to meet needs, with the power to decide their allocation placed in the hands of humanitarian workers who have no responsibility to consider the views of those for whom they are intended. As a consequence, both humanitarian workers and refugees are "trapped" in asymmetrical relationships in a structure in which accountability is skewed in the direction of the donors who pay for assistance, rather than the refugees (Harrell-Bond, 2002: 53).

In a footnote to the passage quoted above, Harrell-Bond writes of the donors toward whom accountability is skewed, "these donor governments are notoriously anti-refugee" (Harrell-Bond, 2002: 53, fn. 6). This is a sweeping statement. Yet there is a certain amount of truth that governments, in general, are opposed to the refugee and particularly perhaps those richer donor governments. Hence, on the one hand, this hostility to the refugee is expressed in the possibility that aid may be withdrawn at any arbitrary time (when other "more pressing" issues arise or when media coverage peters out). On the other hand, the inimical attitude to refugees is potentially expressed in the desire that refugees remain in an inarticulate position. In this sense the humanitarian camp may be seen as a disciplinary strategy guaranteed by donor governments. The potential

for disruptive claims and inchoate assembly would be heightened if humanitarian relief agencies could be held accountable to the people they try to help (Prem Kumar, 2002).

There are clear lines between the refugee in a humanitarian refugee camp and the refugee in a detention centre. And it is even more sinister that there are clear lines between terrorist and refugee or irregular migrant. On 25 October 2001, US Attorney General, John Ashcroft, linked terrorist status with immigration status, bringing immigrants under suspicion and increasing the threat posed to the most vulnerable of immigrants, asylum seekers, and irregular migrants:

> Let the terrorists among us be warned. If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will work to make sure that you are put in jail and kept in custody as long as possible (cited by Nazarova, 2002: 1335).

The territorialization of life means that the refugee is put in a position where she lacks apportioned rights but depends on the charity or goodwill of aid workers or the police. The refugee is outside the law. Levels of innuendo and violence unthinkable to regular human beings, citizens, are regularly perpetrated against the refugee or asylum seeker. The refugee as homo sacer describes the condition of exclusion that those exempt from the normal sovereignty are subject to. However, there is something else to be emphasized. The structure of sovereignty is such that it is not an exclusively political or legal concept. The structure of sovereignty is, in Agamben's view, "the originary structure in which law refers to life and includes it in itself by suspending it" (Agamben, 1998: 28). That is, sovereignty refers to bio-politics as the creation and maintenance of politicized life and the consequent remainder left behind by "problem-solving procedures" such as the question of what to do with the inchoate human being (answer: turn him into a governable citizen). Thus, Agamben's focus is on the detritus of the system and it is through this detritus, paradoxically included by the very act of differentiation and exclusion, that the system maintains itself.

The next section will look at the creation and discursive conceptualization of the detritus, of the refugee or irregular migrant in Australia, Malaysia, and Thailand. It will begin by looking at how different conceptualizations of the refugee in political discourse serve to bolster the political and juridical norm. It will suggest that when held in physical stasis within secure zones of exception (detention camps), the refugee becomes a controllable figure that can be held in *discursive* stasis – the meaning and identity of the refugee may be created according to the needs and whims of the sovereign law. The second section following this will look at the treatment of refugees and irregular migrants in detention.

## DISCURSIVE CREATIONS OF THE REFUGEE AND IRREGULAR MIGRANT IN AUSTRALIA, MALAYSIA, AND THAILAND

This section of the paper will look at discourses of the refugee and illegal migrants as a means by which the state reinforces itself in Australia, Malaysia, and Thailand. This section builds on Agamben's sense that the refugee as homo sacer confined to a zone of exception is integral to the continued functioning of the norm. By delineating an exception the borders of the political are reinforced.

Liisa Malkki argues that the concentration camps in Europe after 1945 were used as a technique of control within which potentially dangerous groups of refugees wandering the continent could be held. Malkki suggests that the refugee camp as a means of confinement became in the years after 1945 "emplaced as a standardized, generalizable technology of power" (Malkki, 1995: 498).

The segregation of nationalities; the orderly organization of repatriation or third-country resettlement; medical and hygienic programmes and quarantining; *"perpetual screening"* and the accumulation of documentation on the inhabitants of the camps; the control of movement and black-marketing; law enforcement and public discipline; and schooling and rehabilitation were some of the operations that the spatial concentration and ordering of people enabled or facilitated (Malkki, 1995: 498; my italics).

The camp as a means where the refugee could be perpetually screened allowed, fundamentally, for the refugee to become a knowable entity. The camp, with its strategies of control expressed in confined spaces where statistics of the refugee could be compiled and where "rehabilitation" could ensue, allowed for the extrapolation of knowledge about the refugee. The camp was also a means of control ameliorating the economic and public order threat posed by the movement of peoples. Malkki demonstrated how the spatial concentration of people enabled not only their physical control but also the possibility of their discursive representation.

### Australia

The Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) represents the entrance of irregular migrants into Australian territory as an affront to Australian sovereignty. This sovereignty has to be ensured and, therefore, various legal manoeuvrings are undertaken to protect this sovereignty. It is noteworthy that these legal moves are backed up by a pillorying of the refugee, creating a figure of fear and criminality. These are then followed by a legal extension of zones of exemption, where offshore islands are "excised", and

becoming exempt from the operation of the normal migration law. Hence, while the normal migration law leads to the irregular migrant being detained in camps on the main Australian island, the new border protection laws legislated in late 2001 are remarkable for their extension of the zone of exception to include the entire country. This is a masterful act of differentiation where the law is exempt from being applied to the irregular migrant at first sight. This allows for her transfer to offshore detention camps and to the restriction of Australia's responsibility to cater for her future.

DIMIA represents the threat to Australian sovereignty posed by unauthorized boat arrivals in the following way:

> The Australian Government is firmly committed to ensuring the integrity of Australia's borders and to the effective control and management of the movement of people to and from Australia. This commitment stands beside Australia's absolute commitment to meeting its international obligations under refugee-related conventions. Underlying these commitments is the fact that Australia is a sovereign country which decides who can and who cannot enter and stay on its territory. Only Australian citizens have the unrestricted right to travel freely in and out of the country – all other people must have a legal authority in the form of a visa (DIMIA, 2002a: 1).

Following this statement, which makes the sovereignty rationale clear, as well as distinguishing between Australian citizens and unauthorized arrivals, DIMIA further justifies its border protection policies by likening refugees to criminals. Australia has recently experienced an influx of illegal boat arrivals, mainly from the Middle East. They are being transported to Australia by organized criminal gangs of people smugglers. It is significant that many of the people who pay people smugglers to move them around the world have bypassed effective protection arrangements in countries closer to their home (DIMIA, 2002a: 1).

The defence of Australia's borders becomes a moral point: if one helps unauthorized boat arrivals, one also assists "criminal gangs" of smugglers. This assertion of the moral aspect of border protection reinforces the coherence of the borders of the Australian polity by subtly making the refugee problem a collective one to be faced by all Australians – this is a contribution to the development of a collective siege mentality. The qualification that boat arrivals are from "the Middle East" adds to the fear of terrorism and is a subtle means of bringing race into the picture. Both these aspects are played on by Australian politicians. John Howard, Australian Prime Minister, soon after September 11 2001, inculcated suspicion into the general discourse, adding to the siege mentality, by noting in an interview with a national newspaper, "you have to be able to say that there is a possibility that some people having links with organizations that we don't want in this country, might use the path of an asylum seeker in order to get

here" (cited PM, 2002). This is a subtle "common-sense" argument, one that couches varied levels of violence and discrimination. By suggesting that some asylum seekers may have links with undesirable organizations, Howard effectively vindicates, justifies, and perhaps encourages suspicion towards all asylum seekers, all potential terrorists.

The refugee as homo sacer is held in discursive stasis, his voice is silenced or marginalized in the rush to associate him with terrorists and criminals thereby adding to the siege mentality and making the problem of border protection a collective one to be faced by all Australians. The racial aspects of the border protection policy are made relatively explicit by Phillip Ruddock, Immigration Minister, in an interview with the Australian Broadcasting Corporation in 2001:

> … there are some people who do not accept the umpire's decision, and believe that inappropriate behaviour will influence people like you and me, who have certain values, who have certain views about human rights, who do believe in the sanctity of life, and are concerned when people say, "If you don't give me what I want, I'm going to cut my wrists" … I'm saying that there are some people who believe that they will influence decisions by behaving that way. The difficult question for me is, "How do I respond?" Because I think if I respond by saying, "All you've got to do is slit your wrist, even if it's a safety razor", which is what happens in most cases. "..you'll get what you want." …You say it's desperation, I say that in many parts of the world, people believe that they get outcomes by behaving in that way. In part, it's cultural (cited in Four Corners, 2002).

This is a remarkable statement by the sitting Immigration Minister. He uses linguistic strategies to reinforce the borders between us and them as well as demarcating more explicitly the un-Australian quality of migrants. The term "umpire's decision" is an informal and cosy one, with implications clearly recognizable to middle Australia. These people in detention are cheats, alien to the Australian "fair go" culture. Thus, we have a deviant body of refugees, to be distinguished from "people like you and me". The impression of deviancy is cultivated by the usage of particular forms of language that is terribly seductive, setting up a normal value system and a strange or deviant "other" (Pickering, 2001). This is a language cultivated on dualisms or dichotomies, praising one's constituency while explicitly or implicitly denigrating others. Ruddock praises Australians for their "values", "human rights", and belief in "the sanctity of life". By implication there are others, people not like "you and me", who don't adhere to these, who don't have the same values, who have little conception of human rights, and, most sinister of all, don't believe in the "sanctity of life". Having set the tone, having seduced the (Australian) viewer by praising him, Ruddock then outlines the deviancy of asylum seekers who come from strange parts of the world where cutting wrists is a "cultural" practice.

Ruddock and Howard have also used other strategies whereby the bounds of the argument are closed by a pre-emptive restriction of the meaning of some terms. For example, DIMIA's official documentation distinguishes between boat arrivals and refugees, suggesting that boat arrivals are not and cannot be refugees:

> Many people travelling to Australia unlawfully are undertaking a secondary movement from their country of first asylum to use the asylum system to achieve a migration outcome. By doing so they take scarce resettlement places which would otherwise be available to refugees identified overseas as being in greatest need and for whom resettlement was the only viable solution to their plight (DIMIA, 2002a: 1).

Boat arrivals take settlement places "available to refugees". They are not therefore and cannot be refugees. They are therefore cheats, taking away places from the most needy. It should also be noted that Australia's conception of country of first asylum is an unusual one. On the one hand it includes Pakistan, a country where the burden of refugees from Afghanistan, Iran, and Iraq is straining that country's resources. On the other hand, it also includes designated safe countries such as Indonesia where asylum applications to the United Nations High Commissioner for Refugees (UNHCR) may be made. However, in Indonesia, there are three protection officers available for processing refugee claims (USCR, 2002: 12). UNHCR cannot seek out these refugees and has to wait for them to contact their offices. While all this is going on, Australia stipulates that anyone who has stayed more than seven days in a "safe country" cannot apply for full protection in Australia. Thus, the Australian Government pre-empts the argument by creating conditions that make it appear that boat people are, by definition, not "genuine" refugees.

This strategy of pre-empting the argument is also evident in Australia's response to criticism of its detention of children. Ruddock's response to this question in August 2002 in a national daily newspaper demonstrates most starkly the condition of being outside of the law that the refugee as homo sacer endures. The detainee is put outside of the law, he or she is unlawful and thus normal legal obligations cannot apply to detainees as they would apply to Australian citizens. In response to United Nations envoy Chief Justice Prafullachandra Natwarlal Bhagwati's report urging Australia to take a more humane approach to the detention of asylum seekers and criticizing the detention of children, Phillip Ruddock denied that the detention of children flouted Australian international legal obligations, saying that Justice Bhagwati had ignored fundamental rationales of government policy. "He ignores the fact that people in immigration detention have either become unlawful or have arrived in Australia without lawful authority" (*Sydney Morning Herald*, 2002). Ruddock does not address the substance of Justice Bhagwati's criticisms, he rather pre-empts the discussion by outlining a new set of parameters to demonstrate that detention does not

flout Australia's legal obligations. Detainees are unlawful, or "have become unlawful" while in detention. Leaving aside (temporarily) the admission that perhaps lawful people had been detained only to become unlawful later, the Australian Government's refusal to accept the basis of Justice Bhagwati's report appears, from Ruddock's interview, to be based primarily on the fact that legal obligations do not apply to detainees who are "unlawful".

Ruddock's response highlights starkly the condition of being outside of the law that the refugee as homo sacer is subject to. Ruddock has argued in the past, though, that detainees are not refugees but "rejectees":

> I see a lot of comments from time to time, particularly from those who are perhaps not dealing with these issues all the time, that these are refugees or asylum seekers. They are nothing of the sort . . . to use a term that is perhaps apt, they are a rejectee (*The Daily Telegraph*, 2002).[3]

A series of laws passed in the months after September 11, 2001 co-joined with existing laws on mandatory detention of illegal entrants demonstrate, however, the process by which the political constitutes itself in terms of its relation to "life", shaping thereby our sense of what an effective and moral politics should be (Spinks, 2001: 26). The point is that the creation of an underclass of "rejectees" populating detention centres has occurred because of pre-emptive legislation that effectively creates a state of emergency in Australia with the entire country being placed outside the normal juridical order vis-à-vis irregular migrants. The impression that detainees have undergone due process and have been rejected as refugees does not bear out. Australian border legislation has pre-emptively defined some irregular migrants who seek asylum as "rejectees". In so doing, the Australian Government has created an expansive zone of indistinction, encompassing by inference the entire Australian nation-state, where a stable exception has been created.

Let us recall that Agamben sees the space of exception, where the normal sovereign law halts, as a zone where the basis for distinguishing between the legal and illegal is eroded. The state of exception is willed by the normal sovereign law, it is thus taken into the normal sovereign space by its very exclusion from it. Stemming from the normal sovereign law, the state of exception is created normally: the normal withdrawal of the law (it has not been forced, there has been no coup) in a space of exception means that questions of the legality or illegality of what happens in the space of exception, "*simply makes no sense*" (Agamben, 1998: 170). Within the space of exception, one moves "in a zone of indistinction between outside and inside, exception and rule, licit and illicit, in which *the very concepts of subjective right and juridical protection no longer made any sense*" (Agamben, 1998: 170).

Agamben's concept of a space of exception may be given new weight when it is dissociated from referring exclusively to a contained space, such as a detention camp. While the detention camp is perhaps the ultimate space of exception, a series of laws in the past decade in Australia make the point that spaces of exception are relative, existing in relation to certain subjectivities and not to others. Thus, it may be argued that Australian policies which systematically remove a range of obligations and protections from applying to certain types of asylum seekers ensure that the entire Australian political space operates as a zone of exception for those asylum seekers. These policies and forms of legislation are fronted by the more than a decade old policy requiring the mandatory detention of all illegal arrivals. This piece of legislation ensures that the law does not normally operate for certain types of asylum seekers insofar as their removal from the Australian polity is institutionalized. This central aspect of asylum policy is backed up by two further pieces of legislation increasing the likelihood of many, if not most, asylum seekers being pre-emptively "rejectees" (or quickly discovered to be) and from there to be summarily consigned to mandatory (and indefinite) detention. These laws include the 2001 Border Protection Legislation Amendment Act which states that any person arriving in Australia after having stayed more than seven days in a given country where protection could have been granted cannot receive protection. This pre-emptive rejection of asylum seekers is furthered by border excision legislation where offshore islands and reefs (where the vast majority of irregular migrants enter) are removed from the Australian "migration zone".

Academic and legal concern about this "excision" have centred on the very important question of the "Pacific Solution" and the legal niceties (or lack thereof) of forcibly transhipping asylum seekers to areas other than their destination. Another interesting and important focus would be that by selectively placing a few islands and reefs outside the migration zone, the Australian Government has effectively placed the entire Australian nation-state outside the migration zone. DIMIA's statistics demonstrate that unauthorized boat arrivals in the first eight months of 2001 totalled 3,642; of these only 45 did not arrive at what is now a part of Australia that is outside the "migration zone" (DIMIA, 2002b). The intention of the excision legislation is not simply to remove certain offshore islands from the migration zone but to thereby place the entire Australian nation-state in a zone of exception, bringing no legal or political succour to asylum seekers. The maintenance of a state of exception has thus become a stable and institutionalized part of Australian law. The withdrawal of rights and protections to asylum seekers is notable for the way in which it appears to consign asylum seekers to a "bare life", a form of existence without the rights and protections due to politicized, normal, forms of life operating within nation-states. This distinguishing of a depoliticized entity appears to safeguard and add cohesion to

the Australian polity; it is in this further refinement and shaping of life, giving priority to certain forms of existence while denigrating others, that the rationale and justification for the effectiveness, necessity, or rightness of certain forms of politics and public morality are based.

The Australian Government's asylum policies may be said to further the spatial accounts of political and moral community through the distinguishing of forms of existence that do not merit the protection of that community. Moreover it is the act of differentiation that distinguishes the community, that helps the community recognize itself. By institutionalizing a discriminatory stance toward unauthorized boat arrivals, the Australian Government creates and maintains the Australian nation-state as a state of exception with regard to certain subjectivities. This bringing in of the ostensibly excluded into the *system* of the nation-state serves to cohere the bounds of the Australian polity while pre-emptively consigning asylum seekers to a depoliticized "bare life".

## Malaysia

The Malaysian Government's response to irregular migration is most obviously characterized in terms of economic cycles (DeVoretz, 1998). There is a recognized need for economic migrants to feed demand in economic boom periods across a range of sectors. Influxes of temporary migrants culminated in the 1990s with the expulsion of migrants following economic crises in East Asia. Other relative periods of economic growth have followed, culminating in a new round of expulsions in July and August 2002 which cannot be attributed simply to economics; indeed, this latest round of expulsion may have hurt the country's still-smarting construction industry trying to recover from the recession.

Another explanation for the temporary migration and expulsions is the episodic changes in nation-building strategy, which have veered from communalistic strategies designed to strengthen the position of the country's Malay population to a recent emphasis on a nationalism centred on demonstrating and celebrating "Malaysianness" over and above communal rivalry (Case, 2000). Spaan, van Naerssen, and Kohl have used this growing political discourse of "Malaysianness" nationalism to account for the shift in migration sensibilities and policies away from specific recruitment of Indonesian workers to bolster the position of Malays vis-à-vis the other principle races. The authors take note of the stigmatization over crime and disease associated with migrant workers, especially – they claim – Indonesians, when, rather than assimilating with the Malays, Indonesian immigrants became more visible particularly following influxes of illegal labour (Spaan et al., 2002).

Explanations of cyclical changes in migration due to changing economic or ethnico-political requisites provide useful information regarding the macro-level policy motivations of government. They also hint at underlying regimes of governmentality that work to create a governable and relatively docile workforce (Nonini, 2002). Donald Nonini argues that analyses of contemporary migration are nuanced by reference to "rationalities or governmentality", being those regimes of power and knowledge that seek to categorize and hierarchize workers in an orderly and governable pattern: "these rationalities treat immigrant populations as the object of discursive elaboration, normalization, and discipline, and transform them into governable subjects as well as laboring ones" (Nonini, 2002: 15).

The control of workforce can and does ensue, as Nonini argues, through strategies of governmentality that reflect wider social, demographic, and political rationalities of government. Hence, Spaan, van Naerssen, and Kohl demonstrate how the categorization of Indonesian migrants is influenced by the ethnic politics of the Malaysian Government and how, similarly, that categorization changes following shifts away from ethnicity-based politicking. Yet the argument made by Nonini, and by extension Spaan and his co-authors, perhaps takes for granted a fundamental presumption of arguments surrounding the idea of governmentality. The governmentality argument assumes a clear intent or goal behind disciplinary strategies. Nonini cites the "rationalities" of government, how different workers are rendered into different subjectivities with the intent of creating "governable labour". Our argument is that disciplinary strategies are an outcome of the government cohering and distinguishing a form of existence exempt from the operation of the law which thereby serves to distinguish an acceptable polity.

Nonini's argument explains too neatly the disciplinary strategies: they are designed and packaged to ensure the continued pliability of labour. Disciplinary strategies are thus the child of their collective intent. This paper, on the other hand, argues that such strategies, which appear to discipline and confine the labour migrant, are the secondary outcome of practices of what Agamben calls *bio*-politics. Politics is, to recall, fundamentally the creation and maintenance of politicized life and the concomitant distinguishing of de-politicized life, life denied the proper political agency. Those disciplinary strategies imposed upon the migrant worker are a secondary outcome from an "originary" distinction of the migrant worker from the citizen. It is this distinction that should be the primary pathology. This originary distinction allows for strategies of control to be exerted on the migrant worker but has also allowed for various types of criminal abuse to be exerted on the migrant worker. The originary distinction between citizen and migrant worker means that those disciplinary strategies may include techniques that would, if used on the citizen, be strictly illegal. The argument of this paper is that the migrant worker has occupied in Malaysia a

world where the norm does not exist. The migrant worker is underling, cast in
a zone where illegality and legality are hard to discern, and to whom all citizens
are as sovereigns. Following allegations that a 13-year-old girl (whose national-
ity is unclear) had been raped during her detention prior to being deported (with
or without her parents, Malaysia has in the past deported minors without the
knowledge or consent – and much less presence – of parents), a Home Ministry
official appeared to excuse the rape, saying in parliament:

> We (the Malaysian authorities) have investigated and found that the girl is not of a good
> character. When she was arrested and put in the detention camp, she could not produce
> any document.

The independent newspaper *Malaysiakini* reports the same official saying when
pressed by the media about the rights and wrongs of rape regardless of asper-
sions about "character": "there must be a lead to why she (the 13-year-old girl)
was raped". In another case with similar overtones, a woman found without
proper documentation was jailed and then allegedly raped by a police officer.
When the case was brought to the courts by women rights groups, a judge
ruled that there was evidence of consensual intercourse because the woman
failed to scream.

Aside from the demonstration of the legal greyness afflicting irregular or illegal
migrants in Malaysia, the case hints at another aspect of bare life: the depend-
ence on the whims of the police or other state auxiliary for full enjoyment of life,
livelihood, and personal security and dignity. The alleged rape by the police may
be associated with other allegations of physical and sexual abuse meted out on
illegal immigrants in and out of detention camps. Foreign workers, both legal
and illegal, allege extortion by the police. Amnesty International reports that
from 1992 to 1997, 71 illegal immigrants died in detention camps in Malaysia
(Amnesty International, 1997). Fifty-nine of these died in 1996 at Semenyih, the
largest of the camps, allegedly of beriberi, a disease arising from malnutrition
(*Asiaweek*, 1995) and largely eradicated in Malaysia since the 1940s. An inves-
tigation in 1995 by the Malaysian non-governmental organization Tenaganita
found evidence of sustained physical and mental abuse, including the restriction
of water to two glasses a day (and the bizarre provision of food in plastic bags
with holes so that they could not be used to collect rainwater), the housing of
detainees in overcrowded blocks (up to 500 people per block), the sharing of
three toilets and one bathroom, and the selling of extra water and sanitary pads
to female detainees in exchange for sexual favours (*Asiaweek*, 1995). These
allegations have led to the ongoing prosecution of Irene Fernandez, head of
Tenaganita, and these claims are being challenged in court in what has now
become the longest-running trial in Malaysian history. In one episode of the trial,

in 2000, a former detainee from Bangladesh, Moron Mozumder, in court testimony alleged that male detainees were sexually abused and that various forms of physical abuse were perpetrated on detainees (*Asia Times*, 2000).

The distinctions between legal worker and illegal immigrant are not of primary relevance here. *In the first place*, both types of worker inhabit blurred zones depending on goodwill rather than affixed rights. This is the primary pathology, how migrant workers, illegal entrants, and asylum seekers all occupy a zone created by an originary distinction between migrant worker and citizen.

Nonini's argument is teleological. Acts undertaken on migrant workers are classed as disciplinary strategies designed to bring about pliable and usable labour. What occurs, inevitably, is a refinement of the empirical evidence, explaining away or disregarding as anomalous those actions undertaken on the migrant worker which do the opposite of making labour pliable. Nonini explains away contradiction and paradox. There are perpetual activities of abuse and corruption. These are evident in a variety of forms from inadequate housing to police brutality to the creation of insecurity through employer practices of routine hiring and firing. In contrast to Nonini's argument, this paper understands migrant workers in light of an originary distinction in ontology which created governable identities and identified a remainder or excess. It is through this originary distinction between citizens and migrants that the treatment of migrant workers is to be understood in Malaysia.

Yet there are, obviously, distinctions and hierarchies in types of migrants. Those with valid work visas are to be differentiated from illegal entrants and those fleeing persecution. However, against this, one may take note of the originary distinction between citizen and homo sacer. This means, Agamben argues, that all citizens are as sovereign to the homo sacer. The levels of innuendo and physical and other forms of abuse directed at the migrant worker are enabled by an originary distinction between citizen and non-citizen.

The Malaysian Minister for International Trade and Finance, Rafidah Aziz, responds to reports of "rioting" by "foreign workers, in particular Indonesian workers":

> Recent incidents in the work place, involving foreign, and in particular, Indonesian workers, have put into clear perspective Malaysia's workforce requirements and the factors of supply and demand. For so long, there has been harmony within the workforce, and this has been a strong pull factor in making Malaysia an attractive manufacturing base. However, the disruptions resulting from the rioting by the foreign workers, dictate that there must be greater selectivity in sourcing workers from elsewhere. Of paramount importance is that foreign worker recruitment must be done properly, and

according to all the rules and regulations. Employers cannot take the risk of indiscriminate recruitment… The government would like to urge all employers to abide by the law, and refrain from recruiting foreign workers illegally… Recruitment of foreign workers should always be as a measure of last resort, and only in areas and activities that necessitate such recruitment (Rafidah, 2002).

The sweeping statements associating "rioting" foreign workers with illegality and suggesting the insecurity caused by recruiting foreign workers, particularly Indonesians, show how the identities and character of foreign workers are fluidly exploitable and creatively used as an explanatory classification. That is, rioting is accounted for simply by noting that it has been carried out by "foreign workers" and "in particular, Indonesians". The range of different questions and concerns that exist behind the terms "foreign worker", "Indonesians", and "rioting" are unworthy of discussion. Rioting is apparently accounted for in terms of the volatility of foreign, and especially Indonesian, workers' characters. The purchase that such non-explanations of riots and violence have is testament, perhaps, to the creative suspicion and fear generated by the term "foreign worker".

The legal foreign worker is not terribly distant from the illegal migrant, as suggested by Rafidah when, perhaps representative of the Malaysian imagination, she adopts terms "foreign worker" and "illegal worker" almost indiscriminately, confusing them, producing a medley of incoherence that ends up demonstrating the bias toward both foreign worker and illegal worker in Malaysia.

That foreign workers and irregular migrants occupy one side of an originary distinction between citizen and homo sacer is further emphasized by different forms of abuse at points of recruitment and employment which further serve to obscure the line between legal and illegal. Notable is the rounding up of workers as illegal because they fail to have the necessary documents on them: many employers tend to keep passports. Thus, workers are detained as illegal due to reasons beyond their control.

Corrupt or abusive recruitment practices include the payment of inordinately high recruitment fees by the worker and not the employer. Recruiters generally demand a fee to be paid off in monthly stages. Other allegations include sending foreign workers to factories other than the intended destination, thereby immediately making them illegal, and the illegal practice of sub-contracting (Multinational Monitor, 1996).

Of particular concern is the situation of those fleeing persecution in Malaysia. Rohyingya and Acehnese families and individuals have been subject to summary detention and expulsion (to Thailand or Indonesia) along the same lines as for-

eign workers. Under new laws they are also subject to whipping and fines if discovered to be illegal. The UNHCR office is unable to recognize many of these people as refugees due to difficulties in proving individual persecution and logistical difficulties. UNHCR has also in the past provided Rohingya individuals with letters stating their identity or that they were undergoing refugee status assessment. Such letters have recently not been honoured (Human Rights Watch, 2000).

## Thailand

Several distinct tendencies stand in Thailand's dealings with refugees, exiles, and undocumented migrants from Burma in the last decade. One strong tendency is that various elements of the state apparatus have often represented refugees, exiles, and undocumented migrants from Burma as "threats" to the "national geo-body" (after Thongchai Winichakul, 1995). These threats are various and multiple, ranging from issues of national security to aspects of social order, public health, even the physical environment. An illustration of this is provided by the *Bangkok Post* (26 May 2000) quoting the then Commander of the Royal Thai Third Army, Watanachai Chaimuanwong, responsible for a large segment of the border with Burma: "Burmese refugees from camps sneak out to fell trees for Thai and hill-tribe timber poachers. There are also thieves and drug addicts among them, and they are a crime problem in towns and bordering villages." In other words, the figure of the displaced person is represented here as an actual or potential threat to the body politic, to the social fabric, and also to the physical environment. In this particular report there was no mention of the actual numbers of refugees alleged to be involved, although it did state that there were at that time "80,000-plus Burmese refugees in Tak and Mae Hong Son provinces" alone, which suggests that only a very tiny minority of them were actually involved. However, the overall impression is that all of the refugees are an actual or potential "menace" by virtue of them being beyond the "normal" rules and regulations of the state.

A similar and more recent report under the headline, "Villagers lose patience with Burmese refugees. Pollution, disease blamed on camp" (*Bangkok Post*, 20 April 2003) focuses on a meeting between certain local leaders from Tak Province and Senator Udon Tantisunthorn in which they apparently urge the repatriation of refugees back to Burma. Apparently, small numbers of refugees were accused of encroaching upon forest reserve land, collecting wild products "illegally", and stealing from nearby farms. Such "illegal" violations of Thai spaces, natural resources, and the domains of citizens are increasingly being used by certain politicians and by the National Security Council of Thailand as a justification for their demands for early repatriation of refugees and other un-

documented migrants. This article also mentioned various health risks to Thai villagers living near to the huge Mae La camp which has a population of more than 42,000 people. But no details were given as to why the Thai authorities have been deliberately concentrating refugees into overcrowded camps near the border. Rather, we are left with the overriding impression that the inhabitants of the camps are the problem, not only to the Thai geo-body, but also to the physical bodies of individual Thai citizens.

Related to the depiction of refugees and undocumented migrants as "threats" is the dichotomous concern about order/disorder often associated with simplistic internal/external distinctions produced by the Thailand-Burma border. It is common for Thailand's media to play on the theme of chaos, rebels, drug-running warlords, and danger inside Burma's borderlands, which as the main source of many of the "Burmese" and "ethnic" refugees and undocumented migrants is viewed widely as a source of instability inside Thailand's borders as well. Rather than examine the underlying complex of political, military, and socio-economic causes of the large cross-border migrations flows, there is a strong tendency to view the refugees and migrants themselves as "the problem" (Grundy-Warr, 2002). As Nevzak Soguk (1996: 294) observes, refugees and undocumented migrants are frequently represented as transmitters of "anarchy from the outside", which simultaneously serves to help bolster state agencies that deal with matters of national security, "external affairs", and directly or indirectly handle refugee/migrant matters. In other words, politicians, border police, military officers, immigration officials, state refugee agencies, provincial authorities, national security council members, and numerous other state representatives and functionaries, can use, manipulate, emphasize and deal with the "problem" of refugees and myriad "threats" as a way of protecting the supposed rational order of the "state-nation-citizen nexus" (Soguk, 1999). In such ways, as Agamben (1996) observes, refugees are indeed "disquieting" elements in that they are perceived as "unhinging the old trinity of state-nation-territory". According to Soguk this also makes refugees and undocumented migrants "challenges" to states as state agencies and functionaries seek to (re)produce and reinforce notions of national security and territorial sovereignty. While refugees/ undocumented migrants/exiles/forcibly displaced persons have no permanent and rightful *place* within the domain of *the citizen* as *homo sacer*, their existence simultaneously serves to reify "the citizen as the constitutive element in the territory or space of the state" (Soguk, 1999: 212).

As so-called "transgressors" of Thai space, refugees and undocumented migrants are essentially in a status of non-belonging, non-citizenship, and they remain essentially without proper means and channels to give them a truly representative voice of their own. Indeed, the Thai state prefers not to use the term

"refugees" denoting some kind of official status as such, but rather uses the looser term of "displaced persons" for those living in "temporary camps" (which UNHCR calls refugee camps), in spite of the fact that many of the inhabitants have been living in them for up to 15 years. These temporary camps inhabit spaces within the borders of the Thai territorial state but are subject to distinctive laws and policies from the broader domain of Thai citizens. Indeed, the camps have produced trapped populations living in limbo, relatively secure but without any real say in their futures (Grundy-Warr and Wong, 2002; Grundy-Warr, 2002). These are essentially spaces of "exclusion", effectively but not totally isolated from much of Thai society. Thus, it could be argued that refugee camp inhabitants are in fact doubly caught within sovereign "territorial traps" (Agnew and Corbridge, 1995) as they cannot freely and safely return to their old "homeland" but they are spatially confined within camps that have highly restricted access and connectivity with villages in their immediate proximity.

However, it is misleading to characterize the situation facing all undocumented migrants in this way. Ironically, it is the very porosity of the border, and the very large numbers of daily "transgressions" across it, that mean that the majority of undocumented people live beyond these spaces of exclusion, within Thai villages and towns, in positions of great vulnerability, as mostly voiceless, anonymous, often highly exploited sweatshop workers, construction site workers, seasonal migrant labour, bar girls, and prostitutes. They are at the mercy of the whims and fancies of their employers, occasionally corrupt officials and police, and their luck in avoiding arrest, detention, and forcible repatriation.

We could provide numerous examples to illustrate the dominant and mostly negative representations of refugees and undocumented migrants in Thailand, although this would hardly be exceptional, as this tendency is strong in many so-called "nation-states". Here we would like to focus on a few selective examples that allow us to make some qualified general observations about the position or rather *lack of* place, relative insecurity, and status ambiguity of many displaced people from Burma within the "Thai" geo-body. It was reported recently that National Security Council Chief, Winnai Phattiyakuhul, stated that Thailand would end its role of sheltering and resettling refugees (*Asia Tribune*, 30 December 2002). Indeed, under the administration of Prime Minister Thaksin Shinawatra there has been a noticeable hardening of positions toward refugees and undocumented migrants. For instance, the Royal Thai Army has stepped up actions against undocumented migrants and refugees in the border areas near Burma. In December 2002, the Ninth Infantry Division apparently arrested several "Burmese nationals", actually members of the Karen National Union (KNU), in Sangkhla Buri district arguing that they were using Thai soil to launch attacks on Burma (*Bangkok Post*, 28 December 2002). A Royal Thai Army spokes-

person argued that this crackdown was "part of a bigger army drive to flush the border villages of illegal aliens". In the context of the borderlands, where many folks, particularly those belonging to ethnic minorities, have different kinds of identification that indicate status less than that of full citizenship, where there are many thousands of migrants without any form of identification, and where the whole issue of identity is extremely politicized and very sensitive, the current attempts by state agencies and the military to "crackdown" on "illegal aliens" represents arbitrary efforts to cleanse the Thai sovereign body when it has already been thoroughly transformed by decades of cross-border migration.

Refugees outside of the law are vulnerable to state whims. They are in a position where their very lives, not to mention livelihoods and dignity, are subject to *de facto* arrangements that may be withdrawn, changed, or undermined in accordance with changing state norms and priorities. The condition of being "in limbo" leaves refugees in a peculiar condition of being at once marginal and yet central to the state. In Thailand this condition is exemplified in the informal status bestowed upon refugees that at once renders them ostensibly marginal to the Thai state and yet at the same time serves to extrapolate and highlight a formal form of protection bestowed only upon Thai citizens. The condition of informality can only be thought with reference to a pre-extant formality. Thailand, at the historical crossroads of refugee movement, as the destination point of refugees from eastern and western borders, requires an informal zone to which refugees are consigned in order to render itself formal and coherent. The continued purchase and relevance of the Thai state lies in its continued ability to define a sanctified and orderly citizenry amid the cacophony of people within its borders. The informality/formality nexus and the distinguishing of a citizenry worthy of protection over and above the claims of informally protected people has recently been highlighted in the forced movement of refugees from Karenni Camp 3 in Mae Hong Son province, northwest Thailand, in part due to complaints from citizens in the area. From September 2002 to February 2003, all 4,347 refugees from Camp 3 near the Thai village of Ban Nai Soi were relocated to Camp 2, which already has a population of about 8,000 refugees and is only two kilometres from a border where in recent times there has been fighting just across the border between Karenni Army soldiers and the Burma Army. Refugees from Camp 3 were accused of: bringing insecurity to Nai Soi, stealing, environmental degradation, using drugs, and making bootleg liquor (*Bangkok Post*, 7 July 2002). Nevertheless, the fact is that this particular camp was established in 1995 and refugees often interacted with villagers in daily transactions, particularly for the purchase of supplies unavailable in basic food rations. The sudden decision to relocate the whole camp, without any opportunity for the Karenni refugee committee or community leaders to negotiate with relevant Thai authorities or UNHCR, may have as much to do with the Thai Government

wanting to put pressure on political parties like the Karenni National Progressive Party (KNPP) to enter ceasefire talks with the Burmese State Peace and Development Council (SPDC) as it has with local villager complaints about the Karenni refugees themselves. Certainly, the Thai Government made it clear that it wishes to be a "mediator" between recalcitrant groups like the Karen KNU, KNPP, and Shan State Army (SSA), and the Burmese military junta so "national reconsolidation" be achieved in Burma. Thus, the refugees and undocumented migrants are voiceless pawns in the wider geopolitical chessboard and machinations of sovereign states.

The forcible relocation of already forcibly displaced persons living under circumscribed conditions is indicative of the drastic and arbitrary way the Thai Government has responded to complaints from its citizenry and its own practices to uphold notions of territorial sovereignty and national security. The example also highlights another point made by Agamben: it is not only the state that is sovereign over the homo sacer, everyone (all citizens), is as sovereign before the homo sacer who may not defend any intrusion into her space by a formalized citizenry.

## CONCLUSION

The homo sacer analogy demonstrates the way in which irregular migrants are denied human rights taken for granted by citizenry. In an originary distinction creating territorialized life as the norm, irregular migrants may be subject to different sorts of hostile and abusive treatment. The homo sacer argument also demonstrates the limited purchase of continued reliance on distinguishing between "regular and irregular" migrants. The originary distinction between citizens and the excess other leads to the abusive treatment of ostensibly legal migrants. Thus, the homo sacer is a complex individual, one outside of the law, often as much due to bias and prejudice as through any concerted legal distinction.

We have tried to draw links between Agamben's rather Eurocentric argument to micro-spaces in South-East Asia and Australia. We have tried to emphasize that Agamben's conception of an originary distinction between forms of life provides a telling conduit for studying the constitution of sovereignty upon the bodies of so many abject people, the remainder or no longer human. We have, therefore, emphasized that sovereignty demands an exception in order to cohere itself. In this exception, both marginal and yet so very central to the territorial norm, refugees and irregular migrants are left in conditions of informality and brutality; the state legislates for its own withdrawal from zones of exception or

exemption where irregular migrants are consigned and consequently they de-
pend for their lives, livelihood, and dignity on the whims of the state or its
auxiliaries, such as the police. This picture of refugee and irregular migrant
existence is simultaneously a picture of state sovereignty in a territorial world
order and is perhaps a telling disruption of the false images of the refugee per-
petrated by international organs such as the 1951 Convention on the Status of
Refugees. The maxims of cross-border flight and state persecution underlying
the Convention rely, as has been noted by other scholars, on a gendered and
state-centric perception of the refugee and his or her persecution and flight
(Tuitt, 1996). Agamben's focus, on the other hand, emphasizes the fear of the
refugee ingrained in a territorial imagination, of its potentially disruptive influ-
ence on a well ordered biopolitical territoriality. The refugee, according to
Agamben, reminds of the straitened conceptions of what it is to be human
underlying territorial politics. Hence the growth in recent years of "temporary"
refugee camps along borders, detention facilities, and regimes of temporary
protection. Regimes of protection that are state-centric and that restrict such
protection and the rights that go with it (UNHCR's principle strategies of repa-
triation or re-integration is also state-centric, Chimni, 1999) fail to address the
fear of state toward refugees and other undocumented migrants. Instead, they
continue to obscure the dichotomies and exceptions at the core of the territorial
state. The false formalities of the 1951 Convention append and bolster the terri-
torial resolutions of what it is to be human. Conceptions of protection that are
not based on territory are needed; the Convention or other instrument (whether
national, regional, or international) must recognize the existence of refugees in
conditions of permanent temporariness subject to de facto whims and brutality
and make stringent moves toward a regime of extra-territorial protection.

There are significant impediments toward such extra-territorial protection com-
ing into force. The most obvious of which is whether nation-states would be
able or willing to create such avenues for protection that threaten the legal mo-
nopoly of the territorial state.  At root is the necessity to disrupt the logic of
sovereign monopoly in a territory. That a state must have an exhaustive and
monopolistic jurisdiction over a territorial space presumes not only that such
control may be effectively planned for and achieved, but also that the form of
politics premised on creating order and highlighting the threat of disorder is both
necessary and valid. That is, the politics of sovereignty that is premised on a
distinguishing of politicized forms of life while depoliticizing certain forms relies
on two contentious claims for its ongoing vindication. First, that a politicized
life may be distinguished from and entirely alienated from its depoliticized other.
This enables a claim of validity: if we can demonstrate that the politicized form
of life relies upon, on some level, the depoliticized for its establishment then the
ruse of their integral difference may be disrupted. The second claim is related

and is more complex. This is the claim that entails the necessity of such politics and derives from the spatio-temporal enclosing of human being. Territorial politics receives any ongoing justification it may have from the level and degree of acceptance of the idea that human life and aspiration is best performed and anticipated within a particular nation-state. This is at root an emotive or affective link to a state and to a nationality, but it is also abetted by laws that fit hand in glove with this affective link. The sense that citizens should deserve a greater level or degree of human rights than their fellow human beings who are irregular migrants is often a matter of little note, which indicates the hold that a territorial imagination has in how we think about and value ourselves and other humans.

If either, and preferably both, of these claims can be suitably disrupted then the territorial prerogative in refugee protection may be done away with. The protection of humans and not citizens must be the watchword in international refugee policy. Such protection may be best enabled perhaps by not working entirely within the 1951 Convention but by focusing on the universality of other declarations, most pertinently the Universal Declaration of Human Rights. This protection may also be helped by the acceptance that the territorial state is not the best adjudicator of the rights of irregular migrants. An independent international tribunal with the power to adjudicate over whether instruments such as the Declaration of Human Rights and the International Convention on the Protection of the Rights of All Migrant Workers have been adequately met in different locations must be an ultimate goal that, given our increased globality, is both, in the long run, achievable and realistic. Protection of irregular migrants must then begin with a re-questioning of the concept and limits of "human rights" and must then be devised in such a way that this protection does not become the principle or sole responsibility of the nation-state.

The instigation of a cosmopolitan sense of community and responsibility must, however, come from the state. International or global regimes of protection that diminish the right of the state to accord differentiated concepts of rights to different peoples within its borders must necessarily gain the backing of nation-states. Would nation-states thus cede aspects of their sovereignty (or, more fundamentally, their prerogative to think and adjudicate in territorial terms of limited obligation and responsibility to different forms of human being)? The challenge – and it is a *challenge*, no more and no less – posed by this argument to national-level policy makers stems from a demonstration of the way that spaces of inclusion rely on spaces of exclusion in order to outline and enforce limited conceptualizations of community and responsibility. The boundary between inclusion and exclusion is not a clear and empty moment separating two unconnected communities and experiences. The border is rather an area of vivid intercontamination; it is a site of fundamental politics where identities and

experiences intertwine. Border politics is the vanguard of forms of community and responsibility that are cosmopolitan and trans-national. The challenge of this argument is to draw policy makers attention to this fundamental and yet ignored space or condition of politics and to indicate forms of community, responsibility, and obligation that would then flow.

## NOTES

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2. Agamben does not use the term "refugee" in its specific legal sense. The distinction between refugees and irregular migrants is not of primary importance to Agamben's work; neither is it of primary importance here. There are differences between different types of irregular migrants; they are migrants for different reasons. Many of the reasons are difficult to locate or categorize. Indeed it may be sufficiently argued that the attempt to categorize reflects the dichotomous form of politics Agamben argues against and the desire for order and its creation through a forceful and performative understanding of different forms of life. In this paper, we use the term "irregular migrant" to specify both refugees and illegal foreign workers. Moreover, perspectives and categorizations of refugee protection regimes are sometimes too neat and have difficulty recognizing the manifold persecutions and fears that lead different people to feel that they are "forced" migrants deserving of some form of protection.

3. Phillip Ruddock cited in *Daily Telegraph* (UK), "Lawless thugs and 'rejectees'", 2 April 2002.

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## LE MIGRANT IRREGULIER EN TANT QUE *HOMO SACER*: MIGRATION ET DETENTION EN AUSTRALIE, EN MALAISIE ET EN THAILANDE

Cet ouvrage examine certains aspects de la détention des migrants irréguliers en Australie, en Malaisie et en Thaïlande. L'intention de principe de l'auteur est d'étudier la détention des migrants irréguliers pour tenter de mieux comprendre la politique et la mesure dans laquelle les concepts de participation politique et de souveraineté sont influencés par la détention de certaines catégories de personnes. Quel éclairage l'identification de certaines « formes de vie » susceptibles de privation de liberté jette-t-elle sur les normes politiques de différentes sociétés? C'est le concept d'*homo sacer* du philosophe italien Giorgio Agamben qui sert ici de support à ce déchiffrage. *Homo sacer* est un terme qui nous vient de la loi archaïque romaine. Il renvoie à la notion de vie nue et dépolitisée. *Homo sacer* traduit l'aboutissement d'un processus excessif de construction politique qui débouche sur une forme gouvernable de vie. *Homo sacer* est donc à l'écart ou exclu des limites normales de l'Etat. Cela étant, toutefois, il n'est pas simplement banni, mais sert d'instrument de relation particulière à la norme. C'est par l'exclusion d'une forme de vie dépolitisée qu'existe la norme politisée. L'auteur s'efforce de contextualiser les aspects de l'argumentation de Giorgio Agamben en l'appliquant à la détention en tant que forme d'exclusion dans trois contextes différents.

## LOS MIGRANTES IRREGULARES COMO *HOMO SACER*: MIGRACIÓN Y DETENCIÓN EN AUSTRALIA, MALASIA Y TAILANDIA

Este estudio analiza los aspectos relacionados con la detención de los migrantes irregulares en Australia, Malasia y Tailandia. Su finalidad es examinar la detención de migrantes irregulares como un medio para comprender las políticas y cómo las nociones de participación política y soberanía se ven afectadas por la detención de cierto tipo de personas. ¿Qué dice la identificación de ciertas "formas de vidas" que cabe poner bajo detención sobre las normas políticas de las distintas sociedades? Este estudio se guiará por el concepto de *homo sacer* del filósofo italiano Giorgio Agamben. *Homo sacer* es un término de Agamben extrapolado del "antiguo Derecho Romano". Representa la vida simple y llana, completamente despolitizada. *Homo sacer* es el exceso de procesos de constitución política que crean una forma de vida gobernable. Por consiguiente, *homo sacer* está excluido o exonerado de los límites normales del Estado. Sin embargo, al mismo tiempo, *homo sacer* no es simplemente un marginado sino que tiene una relación particular con la norma: es a través de su exclusión de la forma despolitizada de vida que existe una norma politizada. Este estudio intenta contextualizar los aspectos del argumento de Agamben al examinar la detención como una forma de exclusión en tres contextos distintos.