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Empire, Emergency & the Law

John Reynolds

Supervisor: Dr. Kathleen Cavanaugh
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Blá Cliath, 2014
**Introductions: Traditions of the Oppressed**

*The tradition of the oppressed teaches us that the “state of emergency” in which we live is not the exception but the rule.*

It is, by now, a familiar mantra: we live in a permanent state of emergency. This is typically framed, however, as a relatively recent paradigm shift in which traditional normalcy/emergency lines of distinction have become blurred. With the onset of the “global war on terror”, the world was ushered into what has been painted as an “exceptional” scenario, unprecedented in modern history.

Liberal critics of the George W. Bush administration warned that we were witnessing the crystallisation of a potentially permanent discharge of executive power in a manner not countenanced since the days of Carl Schmitt. The amorphous war was almost immediately cast as temporally indefinite, likely to extend beyond our own lifetimes. There was seemingly ubiquitous reference to Schmitt’s maxim that ‘[s]overeign is he who decides on the exception … He decides whether there is an extreme emergency as well as what must be done to eliminate it.’ After all, ‘what could offer better proof of the cogency of Schmitt’s central problematic than the world’s most powerful state asserting its sovereignty by declaring a state of emergency?’ This in turn prompted recitals of the maxim that ‘the state of exception has become permanent and general; the exception has become the rule.’ The prevailing zeitgeist framed the idea of permanent emergency as a pioneering departure from what went before. It had become the ‘new paradigm’, the ‘new

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normal’.\(^6\)

Against this backdrop, South African author J.M. Coetzee reflected on the political nature of his early novels; in particular, the extent to which *Waiting for the Barbarians* and its depiction of “the Empire” and its state of emergency was rooted in the actual security policies of the apartheid regime in the 1970s. He recalled that the apartheid police could raid, arrest and detain at will. They were indemnified from legal recourse through the provisions of enabling emergency and security legislation; “[a]ll of this and much more, in apartheid South Africa, was done in the name of a struggle against terror. I used to think that the people who created these laws that effectively suspended the rule of law were moral barbarians. Now I know they were just pioneers, ahead of their time.”\(^7\)

One’s place in the sequence of history is always relative, however. Apartheid South Africa’s emergency laws may have appeared ahead of their time when considered in the shadow of the post-2001 security legislation to which Coetzee refers. But they were temporally concomitant to similar special powers deployed by the British government in Northern Ireland, to the Ba’athist regime’s indefinite suspension of Syria’s constitution, and to Israel’s emergency measures in Palestine, amongst others. As this thesis will demonstrate, these measures were not new, but rather were themselves links in an ongoing historical chain of racialised emergency politics.

The thesis sets out to interrogate the nature of emergency legal doctrine—from the institutional and constitutional planes of international relations, national security and political economy, down to more mundane planes of daily existence—with particular reference to colonial legal history. It will show that emergency law has been (and remains) deeply implicated in settler-colonial and related processes of dispossession and exclusion, and suggests that the precedent of concerted emergency rule under European colonialism demonstrates, in this context, the historical myopia of those assumptions and narratives of novelty that permeated the post-2001 debates.

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Assumptions are best explored and problematised by examining their genealogy. To the extent that contemporary states of emergency and exception have been situated in historical context, significant elements of the discourse and its protagonists are marked by a distinct Eurocentrism. Giorgio Agamben’s genealogical mapping of the state of exception, for instance, is encased firmly within the Western political tradition, tracing the origins of the exception from Roman law doctrine through the French revolution and martial law in England to the Weimar Republic and the Nazi regime, and modern juridico-political systems in Italy, Switzerland and the United States. The particular bloodline of emergency that Agamben sketches, from ancient Rome to Article 48 of the Weimar Constitution, is, he claims, ‘certainly correct.’ For Agamben, when it comes to the idea of security-driven emergency rule as ‘a permanent technology of government’, prior to the evolution of the contemporary security state or control state ‘[t]he only clear precedent was the Nazi regime.’ He discusses eighteenth and nineteenth century France and England but manages to bypass entirely Europe’s colonial empires and their inveterate histories of states of emergency.

The question of whether, and in what ways, colonial history is germane to contemporary international political and legal debates remains a point of contestation. For many, colonialism is an anomaly of the past, corrected by processes of universalism and of no further relevance as an analytic category. Brad Roth, for example, describes colonialism as a ‘legal aberration’ and argues that critiquing contemporary norms as reflective of patterns of Western domination is redundant. In contrast, Third World scholars show such a

12 Brad Roth, ‘Governmental Illegitimacy and Neocolonialism: Response to Review by James
position to be historically naïve and politically bankrupt. Reflecting on Frantz Fanon’s view of imperial history as ineluctably connected with violence, Antony Anghie concludes that it is ‘crucial to argue that imperialism has always governed international relations, rather than seeing imperialism as having ended with formal decolonization.’ The stakes here are high, given the extent to which the modern Western state and the contemporary international order have pinned their legitimacy on a democratic and universal rupture from historic patterns of domination and exclusion. Such a rupture is, in many regards, a fiction.

In the legal domain, the influence of colonialism continues to percolate – everywhere from the structural biases built into world trade law that benefit the post-industrial global North, to the ongoing use of colonial-era laws as mechanisms of repression within global South states. In relation to emergency law specifically, contemporary reality cannot be viewed in isolation from colonial history. While analogous doctrines may be traced back to Roman law, as shown by Agamben and Clinton Rossiter, the doctrine of emergency assumed a position of such centrality to governance in the British empire, in particular, for that precedent to be unavoidable. It has been avoided and absent, however, in the bulk of relevant scholarship on the state of emergency, some notable works notwithstanding. Nasser Hussain provides a compelling account of the jurisprudence of martial law and the state of emergency in British India, demonstrating the role of the emergency legal form at the heart of colonial policy. This brings to mind Fanon’s rebuttal of any perceptions of French exceptionalism in Algeria, in which he showed that the violence of


French militarism in the empire was by no means anomalous; it was structural and systemic. Emergency powers, far from being deviant aberrations from a liberal norm, are ‘generalized’ as part of a ‘pattern of police domination, of systematic racism, of dehumanization rationally pursued’; apparently ‘monstrous practices’ implemented under the state of emergency, such as torture, are ‘inherent in the whole colonialist configuration.’

Third World international lawyers develop this line of analysis in showing how emergency doctrine was bound up in ‘the racist ideology of colonialism and the pragmatic need to discredit Third World resistance’; a fear of mass anti-colonial movements, in this regard, ‘served as the central reason for the imposition of emergencies in the colonies.’

The underlying rationale for emergency doctrine as it has unfolded—through population management and control, premised on a ‘symbiosis between law and the violence employed to maintain its authority’—tends to get lost in much of the contemporary debates, however. Substantial analysis has revolved around the nature of the emergency’s relationship with the rule of law and the juridical order; the degree to which a state of emergency involves a suspension or abandonment of “normal” law. Whether exceptional powers are allowed for in law, or are limited by law, remains a point of friction; are such powers situated beyond the legal Rubicon in order to extinguish law entirely? Or, conversely, do these powers operate to uphold the very system of law itself? These questions raise broader issues as to the epistemology of legal form and how the protagonists of the rule of law/emergency debates read “law” in often very different ways. The notion of sovereignty on both the international and constitutional law planes is also implicated, with Anghie noting that the ‘enduring and perhaps unresolvable problem arises from the paradox that the sovereign is both within and outside

While there has been much engagement with Schmitt’s theory of the sovereign’s exclusion of law through the state of exception as an antidote to this constitutive paradox of sovereignty, the primacy of Schmitt’s thesis is not axiomatic. Even a fleeting survey of the historiography of emergency powers—and colonial legacies are instructive here—reveals their inscription over time into law. The normalisation of emergency may entail the dilution of certain freedoms, but this comes courtesy of statute-based powers enacted by parliament. It may involve the eschewal of constitutional or human rights protections, but in a manner provided for by the constitution or human rights treaty itself. That is, it does not invariably entail the suspension of the juridical order, as some, relying heavily on Schmitt, suggest. Depictions of the state of exception as a space beyond law are often rooted in a somewhat naïve conception of law as a rational and ideologically neutral actor, and of the “normal” rule of law as an auspicious force in practice. The function of law as an instrument of conquest in the history of modern empire offers an important negation of such typologies. A significant corollary of the shortcomings of emergency law discourse, in its neglect of the colonial base, is an analytic lacuna when it comes to questions of race. This is symptomatic of a broader disciplinary malaise:

One of the more remarkable features of contemporary international relations and international law is the disappearance of race—and its related concepts of “civilized”/”uncivilized”—as a term which is central to the self-definition of the discipline. … Despite the absence of such distinctions in contemporary international law, racialized hierarchies persist and are furthered by ostensibly neutral international law and institutions.21

In probing the nature of the relationship between race and emergency legal regimes and discourse, the story of the state of emergency told here, like any

20 Antony Anghie, ‘Rethinking Sovereignty in International Law’ (2009) 5 Annual Review of Law and Social Science 291, 306. This paradox of sovereignty reflects the problematic of international law writ large: how the law-creating sovereign can be compelled by that same law, or can extricate itself from its reach.

account of such a pervasive doctrine and practice, is inevitably partial. Emergency doctrine, that ‘mixture of history, politics and emotion’, cannot be reduced to any single linear narrative. Various other aspects of the story of emergency law have been expounded in depth elsewhere. The contribution of this thesis will be to expatiate on particular colonial history elements; to drill down into the constitutive race and class components of the state of emergency law and reveal it as a widespread and often mundane, everyday experience.

The language of the “state of emergency” itself raises quandaries which merit noting, with the term connoting a very elastic concept that has been stretched to cover almost any situation of political, economic or social unrest, instability, tension or conflict. Significantly, the idiom of emergency law is seen as less truculent and more digestible than its progenitor of martial law; in response to journalistic references to martial law, the contemporary state is habitually at pains to emphasise that a declaration of emergency is not one of martial law. In addition to threats to the environment or instances of ‘war, or terrorism, which threatens serious damage to the security of the United Kingdom’, an “emergency” under British law includes ‘an event or situation which threatens serious damage to human welfare in a place in the United Kingdom … if it involves, causes or may cause loss of human life, human illness or injury, homelessness, damage to property, disruption of a supply of money, food, water, energy or fuel, disruption of a system of communication, disruption of facilities for transport, or disruption of services relating to health.’ Such a potentially panoptic definition is mirrored in the breadth of the mandate of the Federal Emergency Management Agency in the United States and, arguably, the wide margin of appreciation allowed to states

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23 This is not to argue that the colonial template and legacy is all-encompassing. Contemporary power is increasingly diffuse, extending beyond state forms and manifesting in new modes of hegemony and dominance, while some of its underlying means remain present.

24 Civil Contingencies Act 2004, s.1-2.
under international human rights law in determining what constitutes a ‘public emergency which threatens the life of the nation’.  

It is against this background that emergency powers have become universal and endemic, a standard instrument of coercion and control. By the late 1990s, some one hundred countries had been under a state of emergency in the preceding decade, encompassing three-quarters of the earth’s surface. The impact of this is all too concrete; ‘emergencies, both conceptually and practically, have prevented the realization of basic human rights to millions of people in countries around the world.’ It also belies the diagnoses of a purportedly unprecedented situation that have been attached to post-2001 “counter-terrorism” and security discourses.

In reflecting on how we have arrived at the point where the language and logic of emergency are so embedded, this thesis explores how emergency doctrine—as it is now understood in the field of law—crystallised from within colonial legal systems, particularly those of the British empire from the early nineteenth century onwards. Its implications beyond that episode in history are substantiated by the continuities and mimicries we see in various “post-colonial” forms, including within liberal international legal projects. International human rights law now offers an ostensible non-discrimination rhetoric when it comes to states of emergency. While exemptions from particular rights are facilitated by international law in contexts of self-declared public emergencies, derogation measures may ‘not involve discrimination solely on the ground of race, sex, language, religion or social origin.’ Lived experiences and state practice, by contrast, show that emergency measures and

28 This terminology is adopted with reservation, wary of the over-simplification inherent in the implied temporal break from the colonial. “Post-colonial” is used here in general terms to denote the period after the end of formal European rule in colonised territories. “Postcolonial”, by contrast, will be used in reference to postcolonial theory and related scholarly literature.
29 Article 4(1), International Covenant on Civil & Political Rights.
INTRODUCTION

RACE OF THE OPPRESSED

race often continue to remain intimately entwined.

Of course, not all states of emergency in hegemonic contexts are necessarily affected in a racially discriminating manner.\(^3^0\) Racial dynamics have, however, been sufficiently prevalent as to be an identifiable constitutive component of emergency doctrine. Colonial and post-colonial histories are replete with racially inflected emergency measures. Such structural racialisation is not a phenomenon unique to suppression in the colony, or securitisation in the post-colony. States of emergency that were not born out of state security or political violence have similarly witnessed the targeting of particular racial groups by liberal democratic state authorities – as the experiences of African-Americans in the aftermath of Hurricane Katrina in New Orleans so aptly demonstrate.

In the context of traditional empire, we can cite, by way of example, the special powers used to deal with “criminal tribes” in India, the measures taken against the Kikuyu population in the Kenyan emergency of the 1950s, or France’s actions during its war in Algeria. And in realms where formal colonialism no longer pertains, the mass Japanese internment in the United States during the Second World War (which provides a crucial backdrop of racialisation to present-day security law and policy discussions\(^3^1\)), the continuation of emergency powers by dominant groups in post-independence India and Sri Lanka, or the former metropole of France falling back on a state of emergency when social unrest arises from an uneasy relationship with its post-colonial citizenry, are diverse examples that demonstrate the continuing reach of racialised emergency.

The appropriateness of the “colonial” and “post-colonial” frames will continue to be contested, while many more emergency situations do not fall easily inside such brackets. Israel is a case in point; at once a post-colonial

\(^3^0\) Emergency powers are often deployed against dissidents and opponents purely on the basis of political ideology, as was the case under a number of Latin American dictatorships and military juntas between the 1960s and the 1980s. Emergency measures deployed in the economic sphere are generally marked by an impact on the basis of class rather than race, albeit often with significant overlap between the two categories.

 territory and colonising state,\textsuperscript{32} it has been in a declared state of emergency since its inception in 1948. Racialised emergencies in settler-colonial societies—whether in Alabama in 1963,\textsuperscript{33} Pretoria in 1986,\textsuperscript{34} or Alice Springs in 2007\textsuperscript{35}—often do not clearly fit within one or other of these frameworks. The place of Italy’s declared ‘nomad emergency’\textsuperscript{36}—a twenty-first century European state using emergency laws to control an ethnic group present in the territory since the fourteenth century—on the spectrum of coloniality is ambiguous. Likewise Britain’s protracted conflict in the long-annexed colony in the north of Ireland. The international state of emergency underlying the global “war on terror” is infused with many of the hallmarks of colonial relations in a purportedly post-colonial world, and thus also sits uneasily between these parameters. This gives rise to definitional questions around the analytic and material paradigms in which states of emergency are performed. In examining such questions in the broader context of law and colonialism, the overarching conceptual lens that frames this thesis is that of Third World Approaches to International Law.

**On Theory & Method: Third World Approaches**

Much work has been done theorising and problematising the complex and contested categories of the “colonial” and the “post-colonial”, as well as derivatives represented by the “neo-colonial”, the “auto-colonial”, the “self-


\textsuperscript{34} On apartheid’s emergency laws, see, for example, Gilbert Marcus, ‘Civil Liberties Under Emergency Rule’ in John Dugard, Nicholas Haysom & Gilbert Marcus (eds.), *The Last Years of Apartheid: Civil Liberties in South Africa* (New York: Foreign Policy Association, 1992) 32–54.


colonial”, and so on.\footnote{See, for example, Aijaz Ahmad, ‘Postcolonialism: What’s in a Name’ in Roman de la Campa, E. Ann Kaplan & Michael Sprinker (eds.), Late Imperial Culture (London: Verso, 1995).} The concomitant ruptures and continuities inherent in the overlap between such categories are captured well by Gayatri Spivak’s pronouncement that ‘[w]e live in a post-colonial neo-colonized world.’\footnote{Gayatri Spivak, The Post-Colonial Critic: Interviews, Strategies, Dialogues (Sarah Harasyn ed. London: Routledge, 1990) 166.}

Postcolonial theory has long been occupied by the politics of syntax, periodisation and categorisation. “Post-colonial” or “postcolonial”; does the hyphen imply a severance of the colonial, its absence the seamlessness of colonialism’s contiguity? Or does the prefix, regardless of the hyphen’s presence or absence, connote a temporal break from colonialism? From whose perspective has colonialism ended? What is implied by the reduction of non-European traditions in all of their diversity to a generic “pre-colonial” history? Why privilege the coloniality of relations between nations over other forms of social relations—class, gender, religion—as our primary analytic lens? Whilst these important questions will continue to be revisited, what is important to note here is that across a diversity of temporal and territorial spaces, whether framed in colonial, post-colonial or neo-colonial paradigms, the embedded dynamics of racialised power structures and value systems persistently underpin states of emergency, even where overt articulations and invocations of race have dissipated. Where ‘direct colonialism has largely ended’, as Edward Said puts it, imperialism ‘lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices.’\footnote{Edward W. Said, Culture & Imperialism (New York: Vintage, 1993) 9.}

With this in mind, the manifestations of emergency doctrine in the context of hegemonic control systems can be contextualised in four related and often overlapping paradigms. These are:

i. the colonial past, relating to emergency laws and powers implemented in a situation of direct colonial rule in European empires;
ii. *the colonial present*, relating to emergency legal regimes that are inextricably linked to the ideology and architecture of ongoing settler-colonisation processes;

iii. *the imperial present*, relating to state of emergency discourse as it pertains to global counter-terrorism policy and international political economy dynamics;

iv. *the post-colonial neo-colonial present*, relating to the continuities, reproductions and transplantations of colonial emergency rule within the legal and policy frameworks of former colonies and metropoles, as well as settler colonial societies.

The form and content of what can be referred to as *emergency modalities*\(^40\) may vary significantly across these loosely demarcated categories, but certain common elements can be identified running through the historical continuum, along an axis of conquest and control. The impact of racialised emergency rule is felt most intensely, of course, by its others: the colonised native, the suspect community, the indigenous people; oppressed minorities and wretched majorities of the earth who remain peripheral to the flows of transnational capital. In historical terms, many of these constituencies can be seen as emanating in different forms from beneath the extended banner of the “Third World”. Following the lead of anti-colonial and postcolonial scholars, this is an understanding of the Third World not in the sense of a place or fixed demographic, but of a project – an anti-imperial project; a social and political consciousness that bands together a diversity of actors through their common marginalisation by the particularities of Northern hegemony.\(^41\)

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\(^{40}\) With this, my intention is to capture the diversity of forms that emergency takes in different settings, encompassing various types of laws and legal constructs (statutory legislative acts, constitutional provisions, court decisions, executive decrees, military orders, emergency powers, martial law, derogations) and the institutions charged with implementation or oversight of same (special courts, military tribunals, emergency administrative bodies, international monitoring bodies).

The nomenclature of the Third World is as susceptible to contestation as any label that purports to encompass and unify the heterogeneity of peoples that, in the global vista, account for ‘most of the world’. Given its Cold War origin as a modern “Third Estate” of sorts, peripheral to the dominant industrialised worlds of a bipolar North, the concept of the Third World is subject to critique as anachronistic and obsolete. It does not reflect contemporary geographic distributions of subaltern populations, or the complicity of the elites of the South in all of the exploitation and inequality that the current international political and economic order entails. The Third World, it is argued, is but ‘a tattered remnant of another time’. It fails to adequately speak to the place in contemporary world systems of the former Soviet sphere (the Second World), nor to the plight of the planet’s indigenous peoples (the Fourth World).

These are well-founded and important arguments. They remain at least partially grounded, however, in a territorialised geopolitical topography that locates the Third World in opposition to the Atlantic realm of Western Europe and North America. The contemporary Third World may also be imagined in a more nuanced and inclusive conceptual sense, signifying not just the former colonial territories, historically bound together and defined (by Eurocentric visions) as uncivilised spaces ripe for conquest, exploitation and “development”, but all communities on the receiving end of the political, economic and cultural impacts of imperial relations, whether in New Delhi or


New York. The Third World project, by that or any other name, remains concerned with inequalities primarily between North and South, but also within North and South. Bhupinder Chimni unpacks the plurality of the categorisation further:

Unnecessary importance is often attached to the end of the cold war. The growing north-south divide is sufficient evidence, if any were needed, of the continuing relevance of the category “third world”. Its continuing usefulness lies in pointing to certain structural constraints that the world economy imposes on one set of countries as opposed to others. … However, the presence or absence of the third world, it is worth stressing, is not something that is either to be dogmatically affirmed or completely denied. It is not to be viewed as an either/or choice in all contexts. The category “third world” can coexist with a plurality of practices of collective resistance. Thus, regional and other group identities do not necessarily undermine aggregation at the global level. These can coexist with transregional groupings and identities. In the final analysis, the category “third world” reflects a level of unity imagined and constituted in ways which would enable resistance to a range of practices which systematically disadvantage and subordinate an otherwise diverse group of people.45

Chimni emphasises the importance of distinguishing between the political concept of the Third World and the ruling elites of former colonised nations that have bought in to prevailing rules of global governance and transnational capital. Given that elite’s neglect of the welfare of the peoples of the South and its failure to address the class and gender divides that fester within, there is ‘an obvious dialectic between struggles inside third world countries and in external fora.’46 David Kennedy’s argument that ‘the difference between the First and Third Worlds has eroded because all nations now face political, social, and economic challenges once typical of the Third World’47 implies the enduring importance of a consciousness of the historical experiences and struggles of the Third World. This is a crucial component of any attempt to historicise (from a global perspective) the doctrine of emergency, and to

deconstruct its coloniality. As Karen Mickelson has it, ‘[t]he “Third World” terminology itself may appear out-of-date, but its very contingency, involving an insistence on history and continuity, may in fact be one of its strengths.”

In the field of international law, emphasis on this concept of the Third World, whether understood in its purely historical context or as an analytical frame of ongoing relevance, opens up the horizon of Third World Approaches to International Law (TWAIL):

The Third World is a political reality ... a stream of historical experiences across virtually all non-European societies that has given rise to a particular voice, a form of intellectual and political consciousness. Although there is wide diversity among Third World societies, the term is historicized as part of a strategic paradigm for resistance and liberation. The “Third World” must therefore be understood as a direct attack on the Western hegemony of the globe. TWAIL is the expression of this confrontation in the discipline, theory, and practice of international law.

Best understood as a political grouping of loosely affiliated international legal scholars, TWAIL can be seen in its broad construction as encompassing both theoretical and methodological dimensions. Offering a theory of international law as well as important contributions to the science of method in international legal studies (if not a method itself), it is an intellectual school with an activist bent that coheres around a broadly unifying set of ideas. This approach to legal scholarship is marked by a commonality of convictions revolving around the core tenets that international law is deeply rooted in the political, cultural and economic backdrop of the European imperial project and that colonial patterns persist within the structure and norms of international law. As such, colonial legal concepts are not only crucial to understanding the history of international law but have retained a formative role in contemporary international law. Subordination of the periphery by imperial centres has been

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facilitated by the law itself. As such, the primary thrust of TWAIL is to understand and deconstruct the role of international law in creating and perpetuating racialised hierarchies and structural material inequalities. TWAIL then attempts to construct and present alternative normative legal edifices for international governance that unsettle festering colonial power dynamics.\textsuperscript{51}

This movement of scholars has thus endeavoured to identify areas where such racial and material hierarchies remain—buttressed by supposedly anodyne international legal norms and institutions\textsuperscript{52}—and to amplify historically silenced Third World and postcolonial vocals in international debate. Leading TWAIL voices in this regard identify two distinct generations of Third World international law scholarship, very much informed by the prevailing geopolitical context.\textsuperscript{53} The first generation of Third World jurists and scholars emerged as African and Asian nations rode the wave of decolonisation into the arenas of international law and relations from the 1950s to 1970s.\textsuperscript{54} Their intention was to reform and reconstruct the existing order of classic international law, famously described in this context by Algerian diplomat and jurist Mohammed Bedjaoui as ‘a set of rules with a geographical bias (it was a European law), a religious-ethical inspiration (it was a Christian law), an economic motivation (it was a mercantilist law) and


political aims (it was an imperialist law). Third World scholars began to challenge the parochial and celebratory historical narrative of international law as written by their Western counterparts. Their own narrative, by contrast, evoked an anti-hegemonic critique of the system, with a radical reform agenda. Now that the decolonised states had an equal voice and vote in the United Nations General Assembly, it was hoped that a more democratic international legal order could be attained so as to redress the imbalance and exclusion that had long underwritten North-South relations. Emphasis was placed on the fact that pre-colonial societies were neither strangers nor averse to the idea of international law. The exploitative and disempowering


56 Citing their predecessors’ identification of the common adherence to forms of international law among ostensibly very different societies, Anghie and Chimni refer us to the fact that ‘non-European societies had developed sophisticated rules relating, for example, to the law of treaties and the laws of war’. Antony Anghie & B.S. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’ (2003) 2 Chinese Journal of International Law 77, 80. Alexandrowicz’s study of the law of nations in the East Indies, for example, informs such challenges to the idea that the non-Western world was unfamiliar with international legal practices in the pre-colonial era. C.H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967). Chimni also cites, by way of example, Judge Weerantramy’s opinion in the Nuclear Weapons judgment of the International Court of Justice detailing the presence of international legal norms and humanitarian laws in non-Western systems, as well as Judge Ammoun’s references in the Barcelona Traction case to the importance of common ideals of prosperity and peace (rather than protection of the economic activities of industrialised powers) as the primary objective of a universal international law. B.S. Chimni, ‘The Past, Present and Future of International Law: A Critical Third World Approach’ (2007) 7 Melbourne Journal of International Law 499, 501. The pitfalls inherent in such arguments—of falling into the trap of reproducing Eurocentric versions of what international law is, and thus of feeding the West’s universalising discourses—are highlighted by Koskenniemi:

Even radical Marxian or tiers-mondist voices critiquing the absence of a non-European perspective have tended to employ European concepts and categories to do this. The early postcolonial works by C.H. Alexandrowicz, R. P. Anand and T. O. Elias, for example, sought to correct the bias in the field by examining legal practices among Asian rulers and treaty relations between African communities even before the entry of the Europeans in those territories. But as Onuma has pointed out, to the extent that they have been written in the vein of “they, too, had an international law”, they ended up once again projecting European categories as universal. To argue that there was natural law in India, too, or diplomatic immunities in the Chinese realm, may – depending on the way the argument is laid out – finally turn out to support the universal nature of European categories …

hierarchies that had crystallised with the joining of international law to the hip of the European colonial project were to be abrogated by harnessing the transformative potential of international law to take into account the needs and aspirations of the peoples of the newly independent states and to advance their political and economic agendas. The aim was thus not simply to repudiate the existing international legal order but to produce a truly universal and participatory international law. Attempts were made ‘to formulate a new approach to sources doctrine by arguing that General Assembly resolutions passed by vast majorities had some binding legal effect.’

Structural reform of the global economy—the crucial accompaniment to political independence—was envisioned in the form of a New International Economic Order.

While discrete advances were made, such as with the consolidation of the doctrine of permanent sovereignty over natural resources, attempts to democratise the international legal system and empower the General Assembly were generally stilted by positivist arguments relating to sources and consent. The much-touted New International Economic Order, meanwhile, failed to gain traction in the face of the global North’s economic interests and the hegemony of the Bretton Woods institutions. The principles of sovereign equality of states and non-intervention, given understandably

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significant weight by newly independent societies, came to be used as a cynical shield for systematic abuses of power in post-independence states. The regimes of Qadhafi and Mugabe were only the most prominent among many on account of a selective Western media agenda.

In the face of such setbacks, any concerted collective Third World approach appeared to have retreated from view by the 1980s. It re-emerged, however, in the late 1990s, evolved and adapted to the shifting geopolitical sands and very much invigorated by the ground-breaking work of a new generation of Third World scholarship. While this work distinguishes itself from earlier assessments of the relationship between international law and the Third World—most notably through a decidedly more critical interrogation of the post-colonial nation-state—the core impetus of the preceding generation still resonates. Put in its most fundamental terms, this critical Third World approach ‘gives meaning to international law in the context of the lived experiences of the ordinary peoples of the third world in order to transform it into an international law of emancipation.’

Those lived experiences in recent years have given rise to a plethora of issues of concern, from continuing conditions of underdevelopment, structural biases in the global economic order and contemporary formations of empire, to questions of international

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environmental justice, regulation of trade and investment, and discourses of culture, gender and human rights.

Underpinning, in some shape or form, all of the TWAIL scholarship on these issues is the question of race, with colonialist convictions of cultural superiority—expressed across a range of guises from benevolent “civilising mission” narratives to unconcealed racism—critiqued for continuing to efface the claims and contributions of non-Europeans. The centrality of race—through its derivative civilised/uncivilised binaries—to the self-definition of the discipline of international law (as the law of civilised nations) is as relevant to the political economy of material inequalities as it is to more overt imperial violence. Particular emphasis is placed on the idea that colonial power dynamics and legal concepts were and remain integral to the formation and development of modern Western legality and, in turn, international legal norms. This includes the doctrine of emergency, which has its own story to tell of colonial origins and evolution, civilised/savage binaries, and post-colonial continuities and replications.

The TWAIL perspective is thus instructive in reading the historical and contemporary patterns of emergency doctrine on a number of levels. It speaks to the specific role of emergency law in the context of the broader racialised control function of law in the colonial project, as well as to the bearing that the colonial experience of states of emergency may have had on the evolution of Western legality and jurisprudence and, by consequence, on the doctrinal corpus of international law. It also charts the legacy of emergency doctrine as it developed in colonial spaces and manifests today in different spaces (outposts of ongoing colonisation, former imperial metropoles, formally independent colonies), in addition to the ways in which the reach of states of emergency extends beyond the traditional sites and forms of international and constitutional law (courts, parliaments, legislation, human rights discourse) to the banal and everyday planes of material existence (livestock, ID cards, shopping baskets, water meters). Finally, it is through this prism that the manner by which the administrative and bureaucratic violence of emergency has become an embedded feature of oppression can be examined.
This thesis endeavours to navigate the extensive discourse on states of emergency and emergency doctrine, guided by TWAIL sensibilities. Chapter 1 seeks to understand the relationship between sovereignty’s racial element and its Schmittean exception-decision element as mutually constitutive. The execution of sovereignty in the colony, through a racialised and temporally unconstrained emergency rule, is explored with reference to Foucault’s theory of governmentality. The chapter further engages with postcolonial theory and critical histories of international law in examining the view of colony, the space “beyond the line”, as a space of dehumanisation, exclusion and exception.

Chapter 2 proceeds to map the emergence of the doctrine of emergency from a colonial historical vantage point. The origins of the modern conception of the state of emergency are traced to its genesis in English martial law, from where it swiftly embarked upon an evolutionary path that began with the export of English law in Britain’s “first empire” and underwent a series of ‘colonial mutations’. With emergency governmentality in the colonial context inherently tied to forms of political exclusion, the impacts of the state of emergency were largely contingent on race. I draw on a range of historical material to illuminate how the emergency was constructed under colonial legal systems as part of an institutionalisation of difference and the shoring up of authority over the native other. The key argument here relates to the place of emergency law in the construction and consolidation of empire. Building on this, it is possible to gauge the extent to which the dualistic conceptions of the rule of law and the state of emergency—and the ambivalent and illimitable spaces between and beyond—shaped the praxis of imperial governance. A follow-on question goes to the normative boomerang effect of this on constitutional and international law discourse in the West; the role played by colonial traditions in the formation of modern law. The legacy of such a process extends to the nature of the contemporary state, and the utilisation of emergency doctrine in population control with respect to particular

communities. What we must ask, in that light, is not just how the problematic of emergency—the fundamental tension between sovereignty and the rule of law—cross-pollinates in the colonies, as Hussain puts it, but ‘to what extent we are to read the colonial as an iteration of the modern.’

With that in mind, Chapter 3 expounds the long shadow of colonialism to demonstrate the influence of the prevailing backdrop of late imperial wars on the normative framing of international human rights law, and to probe the approach of the European Court of Human Rights, in particular, to “counter-terrorism” measures that mimic the emergency paradigm of colonial “counter-insurgency”. The chapter draws on extensive archival research on the state of emergency in Kenya in the 1950s to examine the practice of the colonial state and its relationship with early international human rights law. The analysis continues to the jurisprudence under the European Convention on Human Rights relating to emergency measures in Cyprus, Northern Ireland, and, more recently, the “war on terror”. Here, the derogation regime that was enshrined in human rights law evidences a failure to make any radical break from the constitutive role played by emergency in state conceptions of sovereignty, and can be seen as a release valve that significantly dilutes the field’s counter-hegemonic impulses. While much has been written on the legal criteria and mechanics of states of emergency and derogations clauses in international law, there is a dearth of analysis of how emergency powers claimed such a prominent position in the human rights architecture at its inception. This lacuna is addressed through a review of the drafting records of the core international civil and political rights treaties, which suggest that underpinning the discretion to derogate from certain obligations was the perceived need for a protective mechanism to insulate prevailing political and economic power structures. As such, when we speak today of the deprivation of rights during a state of emergency, we imply not merely (and sometimes not at all) the abuse of law by a given state, but a more intrinsic issue with the nature of law itself. The derogation regime can be understood as part of sovereignty’s broader

normative order, with the capacity to perpetuate state power by distilling hegemonic underpinnings and interpretations into ostensibly neutral norms. It must be reiterated here that the concept of hegemony is not limited to imperial power dynamics; the nature of globalisation has rendered traditional cartographies of hegemony overly simplistic.

Chapter 4 develops this theme of cartographies, grounding earlier theoretical discussions—around the colony as a space of exception—in the fractured lands of Palestine. Israel’s multifarious emergency modalities are examined in a “colonial present” setting that marries traditional territorial colonisation with modern security biopolitics. What most discernibly links Israeli practice vis-à-vis the Palestinians with other colonial encounters is the function of emergency law in the imposition and maintenance of sovereignty.

With the focus to this point primarily on the racial elements of emergency doctrine, Chapter 5 moves to address its related class elements, and the particular role played by states of emergency in sustaining and reinforcing economic structures. The ways in which race and class are interlaced with emergency powers can be seen from the evolution of capitalist world systems under the colonial trading companies. The ground is laid here for further analysis of such patterns, with the imperative of struggles from below having now evolved from an identity struggle to a global class struggle; from a Third World project against colonial structures to a global South project against neoliberal structures.65 The reproduction of the language and logic of national emergency in the economic sphere serves to elide the distinctions between physical war and class war, as well as between threats to fundamental security and more prosaic socio-economic issues.66 This demonstrates the reach of emergency doctrine, in the wider context of international law as a material project that ‘unfolds on the mundane and quotidian plane through sites and


Chapter 6 concludes by considering the limits and possibilities imbued in the language and discursive process of law as both a constraining and enabling device, for states seeking to consolidate security apparatuses through the doctrine of emergency as well as for subjugated groups seeking to loosen the bind of emergency rule. The normalcy/emergency dichotomy is revisited, with the assumptions of temporariness of the state of emergency questioned on the basis of historical trends. While the stated aim of the emergency measures may be merely to mitigate the prevailing crisis and restore normalcy, the question begs as to whether the restoration of a normalcy unaltered by the emergency is really possible, or even desirable. The historical evolution of the state of emergency shows, at the same time, that it is not a self-evident and unchanging behemoth. It is something malleable and dynamic, covering terrain which may be imbued with a transformative and emancipatory potential. It is in this light that the conclusion of the thesis presents scope for resistance to hegemonic modes of emergency governance, and the articulation of radical alternatives, particularly through progressive politics in the global South.

Walter Benjamin’s assertion about the state of emergency being the rule rather than the exception has been cited regularly in response to the post-2001 homeland security paradigm, but often without sufficient appreciation of the full ambit of his commentary. Benjamin wrote that ‘[t]he tradition of the oppressed teaches us that the state of emergency in which we live is not the exception but the rule’; in this regard ‘[n]ot man or men but the struggling, oppressed class itself is the depository of historical knowledge.’ The widespread ‘amazement that the things we are experiencing are “still” possible’ is not grounded in any historical consciousness or philosophical

thought. The failure to grasp this fundamental element of the state of emergency feeds in to the general thrust of a TWAIL critique of contemporary discourse.

Benjamin’s contention, and one not properly absorbed by many international lawyers and commentators writing about the “new” situation of normalised emergency, was that the permanence of the emergency is revealed to us not through the prevailing situation—whether that of the Great Depression and the state of exception in 1930s Europe in Benjamin’s context, or the global wars against terrorism and crises of finance capitalism in ours—but through the ongoing history and tradition of the oppressed, who have been consistently subject to emergency rule as a form of political, cultural and economic subordination. The permanent nature of the state of emergency must be understood through a historical reading of state and global power as embedded class and racial rule, rather than through any reactionary analysis of “new” contemporary events. As Mark Neocleous advises, ‘[i]f you want to know what emergency power looks like, read the history of the oppressed’. Guided by such history and its subaltern voices, this thesis offers a modest contribution to the deconstruction of emergency power.


1. EMERGENCY AND THE OTHER

Who were black men and Mau Mau anyway, he asked for the thousandth time? Mere savages! A nice word – savages. Previously he had not thought of them as savages or otherwise, simply because he had not thought of them at all, except as part of the farm – the way one thought of donkeys or horses in his farm, except that in the case of donkeys and horses one had to think of their food and a place for them to sleep.¹

The war that is going on beneath order and peace, the war that undermines our society and divides it in a binary mode is, basically, a race war.²

The deluge of post-2001 literature on states of emergency and exception has been marked, perhaps more than anything else, by its resuscitation of Carl Schmitt and its fixation with binary legal/extra-legal distinctions that seek to locate sovereign action within or beyond a juridical order.³ While such mapping may be an instructive conceptual exercise, it is unable in and of itself to fully encapsulate and elaborate the problems posed by emergency legal doctrine. Submersion in the spatial dimensions of the exception tends to obscure the crucial temporal aspects of emergency rule, linkages between the two notwithstanding. In addition, a blind spot with regard to colonial history and the question of race is denoted by the Eurocentric nature of Schmitt’s writings on the exception, a trait which is maintained in the work of Giorgio Agamben and other contemporary Western theorists.

While the inside/outside theoretical contestations remain important and to a large degree unavoidable, the analysis presented here—in a bid to unmask the underlying purpose, legacies and effects of emergency legal discourse—seeks to move beyond prevailing legal-extra-legal debates in two principal ways. The first, building on Leonard Feldman’s appeal for us to reorient the way we conceptualise and investigate the state of emergency, is to focus primarily on the temporality of the ‘prosaic politics of emergency’⁴ rather than

¹ Ngũgĩ wa Thiong’o, Weep Not, Child (Nairobi: Heineman, 1964) 77.
the spatiality of the extraordinary state of exception; on models that demonstrate the normalisation of the exceptional over time through ongoing and proliferating lawmaking processes, as opposed to sporadic sovereign “suspensions” of legal norms. The second is to examine the concept of emergency as an often racialised component of sovereignty and governmentality. These central and interconnected threads are integral to understanding emergency politics, past and present, and illustrate the story of how states of emergency continue to operate, discriminate and alienate. Both the temporality and racialisation of emergency are illuminated by reference to colonial history; rooted in that history is the legal construction of the state of emergency. The discussions of the temporal and racialised aspects of emergency that follow in this chapter are, therefore, bridged by an examination of the idea of the colony as a space of exception, and the role of law in colonial governance.

I. Of Space & Time: Exception, Emergency, Governmentality

On Good Friday, 1998, the adoption of the Belfast Agreement by the Irish and British governments, with the endorsement of the majority of nationalist and unionist political parties, brought a formal end to protracted conflict in the political unit of Northern Ireland. The British government had introduced executive emergency powers there upon the partition of the island of Ireland in 1922. It had first invoked formal derogations under Article 15 of the European Convention of Human Rights, to render those powers compatible with the Convention, as far back as 1957. A cumulative process of emergency lawmaking grew from the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974. As the statute titles suggest, the illiberal measures provided for were framed as exceptional and temporary. The laws were, however, renewed and updated

5 Sporadic clashes between nationalist and unionist communities still occur, while marginal paramilitary groups remain nominally active, but levels of violence are significantly lower than during the “Troubles” – the particular period of conflict in the north of Ireland that lasted from the late 1960s through to 1998.

periodically in the northern Irish context through the following decades. Such parliamentary management of the conflict resulted in the Irish Catholic population being framed as a suspect community\(^7\) and subjected to ongoing emergency measures. The origins of this model of emergency “code” can be traced back long before the 1970s, both in Britain itself\(^8\) and on the island of Ireland, where post-annexation colonial history is particularly illuminating as regards modern-day security politics. Following the 1996 Lloyd Report\(^9\) on legislation against terrorism (a lengthy process involving much consultation and deliberation), the Terrorism Act 2000 rolled back some emergency executive powers but consolidated the majority of them as permanent features of UK counter-terrorism law and practice, which would be applicable not just in Northern Ireland but throughout Britain as well. What is significant here is that this act of normalisation of emergency measures came in the context of a security threat conspicuous primarily by its retreat; enacted as the legislation was after the end of overt conflict in the north of Ireland, and before the attacks of 11 September 2001 and 7 July 2005. Despite this, the 2000 Act was, arguably, the most draconian piece of counter-terrorism legislation adopted in London to that point.

How, then, does such a calculated, cumulative process of emergency politics sit with the commonly-perceived essence of an emergency – a sudden, grave and unforeseen crisis demanding an urgent, decisive and temporary response? As standard formulations would have it, ‘an emergency is an unanticipated, fundamental threat to the legal order that is temporary and urgent in the double sense that it requires quick action and is of limited duration.’\(^{10}\) The ticking bomb scenario is typically presented as the exemplar of such a threat. There is, however, a vast discrepancy between such

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imaginations of emergency and the reality of how emergency powers come to pass. The notorious time bomb—dramatically palpitating its way towards our certain catastrophe lest an exception to the prohibition of torture be made—is a far cry from the deliberate, bureaucratic process of inquiry, review and report that led to the entrenchment of emergency powers in the Terrorism Act 2000, and from the parliamentary debates that have continued over legislative exceptionalism since then. Yet the ticking bomb scenario continues to be invoked to frame the discussion, and proffered as justification for “extra-legal” measures to be taken during an emergency; not merely underpinning arguments for the necessity or inevitability of torture in the exceptional circumstance, but extended to inform debates over recourse to emergency powers more generally. Such skewing of the discourse is not unique to the ticking bomb script but is indicative of the narratives that accompany security politics writ large. In this sense, legal scholars have largely accepted the assumptions of “time compression” presented in the ticking bomb hypothetical and the state of emergency more broadly. In such a performance of emergency, there is no time for explanation, consideration, or oversight. For this reason, it is not merely permissible but necessary for a sovereign figure to act urgently, with discretion. Although such eleventh-hour drama bears scant resemblance to emergency powers as typically invoked in practice, historically and contemporaneously, scholarly discourse has largely surrendered the temporal element of emergency to sovereign decision-makers.

11 For an example, see the remarks of Lord Neuberger, President of the UK Supreme Court, ‘Address to the Northern Ireland Judicial Studies Board: Justice and Security’, 27 February 2014.


14 Forcing such surrender of time to the sovereign is the exact point of the ticking bomb scenario. Schmitt’s version of time compression is expressed in his idea of a decision on the exception, where two distinct moments of decision in the construction of sovereignty are brought together. First, the decision on the existence of an emergency warranting the suspension of the law; second, the decision on what emergency measures should be taken. Whereas earlier Schmitt had kept these decisions separate à la the Roman commissarial
Instead, theoretical deliberations taking their lead from Schmitt have prioritised the spatial element of whether the situation arising from the emergency is (or ought to be) located within or beyond the realm of law. A binary spatial demarcation emerges between the normal legal order and an abyss of sovereign exceptionalism, pitting those who attempt to root emergency measures in law—by subjecting them to judicial checks and balances—against those who situate such special powers beyond law and the jurisdiction of courts. The running debate between David Dyzenhaus and Oren Gross, and the spin-off conferences and publications emanating from their exchanges, is demonstrative. The rule of law approach posited by Dyzenhaus holds that irrespective of the nature of the emergency, the judiciary has a crucial role to play in ensuring that the legal order is equipped to manage and regulate the crisis. Gross, for his part, presents an “extra-legalist” approach which suggests that the executive—and, in particular, individual agents of the state—may be required to act outside the bounds of the legal order (put simply, to break the law) with such action to be subject to ex post facto ratifications without altering the “extra-legal” nature of the action. By allowing for the act to be reviewed after the fact in a manner that pushes the law—and the lawfulness of the act—out of the equation, the state is absolved of the act; distanced and protected rather than implicated. In contrast to a “constitutional” approach to necessity’s relationship to law whereby ‘necessity operates as a constitutional principle that can make legal that which otherwise would have been unlawful and, perhaps, unconstitutional’, extra-legal models view necessity ‘not as an autonomous source of law, but rather as a mechanism for temporal suspension of normal legal rules without, at the same


15 See, for example, Victor V. Ramraj (ed.), Emergencies and the Limits of Legality (Cambridge: Cambridge University Press, 2008).
time, replacing those suspended norms with new ones.'

While Gross refutes claims that the extra-legal model is in the mould of Schmitt’s theory of the exception, the debate’s prevailing dialectic certainly owes much to a Schmittean renaissance. The German jurist has been brought back to life by a flurry of interest in his work from the late 1990s, gaining further traction in the post-2001 discourse. Schmitt’s realist argument that law recedes from relevance as normalcy dissolves in the face of exceptional conditions can be been to support at least that element of an extra-legal approach that endorses the discretion needed for a strong executive to act decisively and without constraint: ‘What characterizes an exception is

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17 See, for example, Bruce Ackerman, ‘The Emergency Constitution’ (2004) 113 Yale Law Journal 1019, 1043-1044, presenting Gross’s position as one that encourages state officials to ‘proclaim that the emergency requires them to act with utter lawlessness’ in order to avoid a normalisation of emergency conditions. See also David Dyzenhaus, ‘The State of Emergency in Legal Theory’ in Victor V. Ramraj, Michael Hor & Kent Roach (eds.), Global Anti-Terrorism Law and Policy (Cambridge: Cambridge University Press, 2005) 65, 69.


19 Schmitt is of course infamous for his reactionary politics, membership of the Nazi party and jurisprudential justification of fascist dictatorship. As such, it must be acknowledged that despite the merits of certain strands of Schmitt’s critique of liberalism, engagement with his work from a progressive or idealist standpoint can never be entirely unproblematic. This is something which not all appropriations of Schmitt by critical scholars on the intellectual left have been willing to concede.

principally unlimited authority, which means the suspension of the entire existing order.'\textsuperscript{21} However, while Schmitt did create a spatial frontier between the legal order and the sovereign exception, his position was more nuanced than the polarised nature of much of the contemporary debate would suggest. Schmitt’s sovereign found himself not in a space of absolute inclusion or exclusion, but in the transcendental position of standing outside the normally valid legal system, while nevertheless belonging to it.\textsuperscript{22} Where this apparently paradoxical formulation expounds the relationship between law and exception as one of irresolution, based on fluid and porous spatial partitions, much of the recent discourse emanating from Schmitt’s legacy attempts to resolve the paradox through the plotting of more static and impermeable grids. Such mapping divides those who see emergency confined to a space beyond law, and their counterparts who locate it as still within the legal order.\textsuperscript{23} The struggle of Gross and Fionnuala Ní Aoláin to place examples from John Locke to Abraham Lincoln in the correct box (inside or outside law), and the “interpretive indeterminacy” and alternate readings they provide,\textsuperscript{24} appear to be indicative of the inconclusive and, at times, futile nature of the focus placed on spatiality by so many participants in the emergency powers debate. As Austin Sarat observes, ‘it may be that existing scholarship is so caught up in the Schmitt/Agamben opposition of sovereignty and law that we have been inattentive to the myriad of ways in which law imagines, anticipates, and

\textsuperscript{22} Carl Schmitt, \textit{Political Theology: Four Chapters on the Concept of Sovereignty Sovereignty} (1922) (George Schwab trans., Cambridge, MA: MIT Press, 1985) 7.
\textsuperscript{23} Leonard C. Feldman, ‘The Banality of Emergency: On the Time and Space of “Political Necessity”’ in Austin Sarat (ed.), \textit{Sovereignty, Emergency, Legality} (Cambridge: Cambridge University Press, 2010) 143: ‘But the debate is more complicated than that. It actually breaks down into four approaches, when the legal/extralegal dimension is bisected by the distinction between one regime and two regimes’; that is, a distinction between monist and dualist regimes. Feldman thus demarcates the four approaches as: constitutional authoritarianism (monist legal); institutional reformism (dualist legal); legal traditionalism (monist extra-legal); normative extra-legalism (dualist extra-legal).
responds to emergencies, ways in which sovereign prerogative is either irrelevant or operates within the terrain of ordinary legal procedures.\textsuperscript{25}

Approaches seeking to frame emergency powers as legal or extra-legal—black or white—in a simplification of Schmitt’s thesis cast the exercise of those powers in a singular moment of exception which fails to adequately expose the true disposition of the doctrine of emergency as it has evolved; that is, as a systemic and protracted process of management and domination of a population. The intra- and extra-legal models construct a spatial metaphor of law as a ‘container’\textsuperscript{26} that stands in contrast to Michel Foucault’s theory of law as itself uncontainable.\textsuperscript{27} Insistence on a conceptualisation of the state of emergency in sovereign decision and constitution-suspending terms elides the legislated, institutionalised and dispersed modalities that it has widely assumed, and overlooks the sculpting, moulding and refining of emergency powers with the passage of time. It is belied by the lived experience of entrenched and prolonged emergencies, in that they do not surge to the constructed crest of an impending existential threat to the life of the nation, but rather consolidate to become normalised and banal.\textsuperscript{28}

The idea of a “true” state of exception in the sense depicted by Schmitt—connoting unlimited authority for the sovereign and the suspension of the constitutional order—is a vexed one. Critique comes in the form of the argument that such a state of exception is not created by every emergency measure; rather, ‘emergency powers are mainly employed in circumstances

\textsuperscript{25} Austin Sarat, ‘Toward New Conceptions of the Relationship of Law and Sovereignty under Conditions of Emergency’ in Austin Sarat (ed.), 
\textit{Sovereignty, Emergency, Legality} (Cambridge: Cambridge University Press, 2010) 3. On the nature of such forms of irresolution, the work of Michel Foucault is instructive. Golder and Fitzpatrick, for example, demonstrate the irresolute nature of ‘Foucault’s law’, where the binary approach is rejected and boundaries are not absolute. Ben Golder & Peter Fitzpatrick, 
\textit{Foucault’s Law} (Abingdon: Routledge, 2009).

\textsuperscript{26} Leonard C. Feldman, ‘The Banality of Emergency: On the Time and Space of “Political Necessity”’ in Austin Sarat (ed.), 

\textsuperscript{27} Ben Golder & Peter Fitzpatrick, 
\textit{Foucault’s Law} (Abingdon: Routledge, 2009).

\textsuperscript{28} On the normalisation of the exception, Gross and Dyzenhaus do agree; the focus of their tête-à-tête, however, has primarily been the spatial boundaries of norm and exception.
less extraordinary than total emergencies’. Schmitt did differentiate between the state of exception in extremis, however, and emergencies falling short of constituting a threat to sovereignty itself. The disjuncture arises, perhaps, in the aperture between the state of exception, in a theoretical sense, and emergency legal powers in a functional sense. Situations in which emergency regulations are implemented are ‘almost never the sort of total emergencies that … one might imagine from the theory’, as evidenced by the inapplicability of the ticking bomb scenario beyond the curiously correlated worlds of emergency legal theory and jingoistic homeland security-inspired Fox Television productions. The obvious rebuttal to the ticking bomb argument is the rarity of its occasion in practice, and the ineffectiveness of torture when it does occur. As David Luban notes, the “real” world of interrogations is not a world of once-off extraordinary decisions; ‘[t]he real world is a world of policies, guidelines and directives. It is a world of practices, not of ad hoc emergency measures.’ These practices emerge, evolve, ferment and normalise over periods spanning years and decades that long pre-date and outlast any hypothetical ticking bombs. With the temporal process of inscribing emergency measures into normalcy regimes simmering quietly along, the danger of a myopic focus on spatial exceptionalism is a reduction of the field of inquiry to extraordinary measures such as torture while ‘the routine violence of the law’ is reified and standardised.

In his work on the normalisation of emergency, Feldman argues that privileging space over time results in the neglect of the ‘constitutive role of

31 See, for example, the facts in the analogous case of Gäfgen v. Germany, No. 22978/05, Judgment, European Court of Human Rights, 1 June 2010.
political contestation\textsuperscript{34} in the production of a state of emergency. Law as a site of such contention is also revealed by Martti Koskenniemi’s “hegemonic contestation” thesis.\textsuperscript{35} Political struggle is waged on the scope and content of legal terms such as aggression, terrorism, or—for our present purposes—emergency. Engagement in such a struggle can be understood as a hegemonic technique in so far as the aspiration is to make one’s own particular understanding of a given concept appear as the dominant or universal standard. The indeterminacy that has been etched into the rendering of emergency in practice implies an understanding bereft of temporal limits. Recourse to emergency polities to buttress an ongoing governmentalist process of managing and dominating a population flows naturally from such an understanding. Acknowledging the reality of this dispersed and permeating aspect of ostensibly sovereign exceptionalism enables a better view of the performance of the state of emergency. Colonial history is particularly revealing of the use of emergency powers not merely as a reactive mechanism to avert prevailing or imminent crises, but as calculated pre-emptive measures infused into the ongoing governance of the colonies.\textsuperscript{36}

Two particular contentions can be drawn from this discussion of the key temporal dimension of emergency. First, as suggested earlier, Foucault’s postulations on governmentality are perhaps more helpful in unpacking the state of emergency than Schmitt’s representation of an exception vested entirely in princely/dictatorial sovereign prerogative. Secondly, while seamless continuities and consistencies are impossible, colonial history, discourse and practices shine a revealing light on contemporaneous configurations of emergency, not least its temporal element.


\textsuperscript{36} See, for example, Frank Füredi, Colonial Wars and the Politics of Third World Nationalism (London: I.B. Tauris, 1994) on the use of emergency for domination and control in Kenya, British Guiana, and Malaya.
In contrasting the Machiavellian conception of sovereignty, as exercised in the Middle Ages over territory and subjects, with La Perrière’s notion of government that concerns itself with a wider complex of things (of which property and territory are merely one variable), Foucault identifies within European political discourse from the sixteenth century onward a shift from sovereignty to the ‘art of government’.37 This is embodied in ‘the movement that overturns the constants of sovereignty in consequence of the problem of choices of government, the movement that brings about the emergence of population as a datum, as a field of intervention and as an objective of governmental techniques.’38 The transition that occurs in Western liberal states is away from traditional conceptions of sovereignty and toward what Foucault terms ‘governmentality’, defined as:

The ensemble formed by the institutions, procedures, analyses and reflections, the calculations and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal form of knowledge political economy, and as its essential technical means apparatuses of security.39

Herein is implied an institutionalised and temporally boundless process of managing a population, standing opposed to the singular and ephemeral moment of exception personified in Schmitt’s sovereign exceptionalism.


38  Michel Foucault, ‘Governmentality’ in Graham Burchell, Colin Gordon & Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991) 102. This echoes Foucault’s work on biopolitics and his suggestion that power evolved to operate in a fashion divergent from the juridical-sovereign model. This model came to be supplemented by a new mechanism that surfaced in Europe from the seventeenth century, that of “bio-power” or “disciplinary power”. See, for example, Michel Foucault, *The History of Sexuality Volume I: An Introduction* (1976) (Robert Hurley trans., London: Allen Lane, 1979). In this regard, Foucault identifies ‘the process by which biological life (zoe) has become included within the modalities of state power (bios) as the transition from politics to “biopolitics”.’ Nick Vaughan-Williams, ‘Giorgio Agamben’ in Jenny Eddins & Nick Vaughan-Williams (eds.), *Critical Theorists and International Relations* (New York: Routledge, 2009) 22.

Within the “tactics” and “security apparatuses” of the governmentality paradigm we may include so-called emergency powers. The Foucauldian evolution from sovereignty to governmentality is mirrored in the realm of the state of emergency by a shift from sovereign decisionism toward legislative codification/normalisation.

As Nasser Hussain notes in his reading of Foucault, a theory of sovereignty may help us to comprehend the prerogatives of kings and despots, but appears to have little bearing on our understanding of modern law and power. ⁴⁰ Hussain explicates this by pitting Foucault against Herbert Hart’s normative rule-bound universe of modern power, ⁴¹ characterised as a move at refashioning legal positivism away from Austinian conceptions of law as the command of the sovereign, toward a constitutive framework of rules. Foucault offers a sceptical critique of such modern normativity; with power relations best understood ‘not in the interdictory mechanisms of law but in the disciplinary functions of the social.’ ⁴² Here, Foucauldian concepts of biopower are advanced to supplant older juridical modes and models of power. Foucault was not, however, dismissing law altogether from relevance, as Hussain explains:

… for Foucault what is supplanted is not law but a form of sovereignty that he calls the juridical. In the new regime, law in its modern sense as a functioning of norms is pervasive. Rules are now required across an entire terrain of life, and legislation proliferates, as do the institutions of bureaucratic government. ⁴³

Indeed, an attentive reading of Foucault makes clear that neither the problem of sovereignty, nor indeed those of law more generally, are done away with entirely. Within the context of what he delineates as the ‘sovereignty-discipline-government’ triangle, Foucault emphasises not the replacement of sovereignty by discipline, nor of discipline by government in turn, but rather

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their inter-relatedness in a configuration which has the population as its primary target and security apparatuses as its essential mechanism.\textsuperscript{44}

The contention that Foucault “expelled” law is worth dwelling on briefly here, as this has been the orthodox interpretation of his stance on law. Advanced by numerous theorists, and perhaps most extensively by Alan Hunt and Gary Wickham, is the view that Foucault’s work is characterised by ‘the expulsion of law from modernity.’\textsuperscript{45} According to their reading, ‘Foucault’s project of redirecting the study of power and of exploring the part played by the disciplines in modern government has as one of its distinctive effects the displacement of law.’\textsuperscript{46} Thus, in the Foucauldian world, ‘law has been supplanted by the disciplines and by government as the key embodiments of power in modern society.’\textsuperscript{47} In essence: enter power; exit law.\textsuperscript{48}

While this image of law—as an archaic, deductive and ineffectual mechanism, receding in the face of modernity’s more productive and expansive modalities of surveying and managing populations—can be found within Foucault’s work, it is an incomplete account. In contrast to Hunt and Wickham’s “expulsion thesis”, Ben Golder and Peter Fitzpatrick offer an alternative reading of Foucault’s law. Although Golder and Fitzpatrick agree to a certain extent that Foucault often rendered law secondary to disciplinary and bio-political imperatives, they offer a more nuanced view of his engagement with law than mere marginalisation and expulsion; ‘in his work Foucault sketches two different dimensions of law: law as a determinate and contained entity, and law as thoroughly illimitable and as responsive to what


lies outside or beyond its position for the time being. Foucault ‘does not marginalize or expel law from modernity’; rather, Golder and Fitzpatrick detect a ‘certain impelling dynamic to law in Foucault’s account.’ Andrew Neal draws on this reinterpretation to argue that the illimitable process of law going beyond itself is never more the case than with the ineluctable normalisation of the exceptional through legislative security politics:

On the one hand, Parliament plays a central role in legitimating the symbolic and repressive legislation that is invariably enacted in the wake of spectacular terrorist attacks, but on the other hand, Parliament frequently expresses concerns about how the law may exceed its intentions, scrutiny, and oversight.

The duality of thinking vis-à-vis law that runs through much of Foucault’s work is discernible in his governmentality lecture. Despite the pronouncement that ‘[w]ithin the perspective of government, law is not what is important … it is not through law that the aims of government are to be reached’, law nonetheless retains a pertinence — now as part of a range of multiform governmental “tactics” rather than in its previous guise as an instrument absolutely inseparable from sovereignty. While government is now constituted through the employment of ‘tactics rather than laws’, Foucault—significantly—recognises the possibility of ‘using laws themselves as tactics’.

Returning to the shift from sovereignty to the tactics and security apparatuses of governmentality (of which emergency powers can be seen to form a part), it is possible to read Foucault as having intimated that sovereignty is supplemented, rather than supplanted by governmentality. As

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he notes, from the end of the sixteenth century with the emergence of the new problematic presented by the state and its public domain, ‘[t]he sovereign is required to do more than purely and simply exercise his sovereignty … something more is demanded from him, something different, something else. This is government.’ Thus we are reminded that ‘lawless sovereignty is shaped by something else – the norms and logics of governmentality as well as the pressure of resistant practices.’ Emergency powers in this context are not exercised in a normless void of sovereign exceptionalism, but form part of the broader, normalised security apparatuses of governmentality.

Hussain’s cautionary note about the erosion of the “juridical” but the parallel proliferation of legislation and bureaucratised government is borne out by reference to some of Foucault’s key works. Although he urges us to ‘escape from the limited field of juridical sovereignty and state institutions, and instead base our analysis of power on the study of the techniques and tactics of domination’, Foucault explains that the intention is not, as some would have it, to narrate the demise of law:

I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.

The process of normalisation that Foucault describes is opposed to juridical sovereignty, but not to law itself. Agamben follows Foucault in so far as he identifies an ostensible transition from governance through law to governance.

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through management on the one hand, while at the same time acknowledging the persistence of law:

Michel Foucault showed how security becomes in the 18th century a paradigm of government. For Quesnay, Targot and the other physiocratic politicians, security did not mean the prevention of famines and catastrophes, but meant allowing them to happen and then being able to orientate them in a profitable direction. Thus is Foucault able to oppose security, discipline and law as a model of government. Now I think to have to have [sic] discovered that both elements – law and the absence of law – and the corresponding forms of governance – governance through law and governance through management – are part of a double-structure or a system.59

For Agamben, within this double-structure, both elements co-exist while being driven to the extreme: ‘Today we see how a maximum of anomy and disorder can perfectly coexist with a maximum of legislation.’60 Framing governance through such a maximum of legislation opens up the space for us to view law and its institutions as part of the governmental apparatuses of security and domination. The proliferation of emergency laws and decrees in liberal democracies and authoritarian regimes alike is testament to this.

At this juncture, the history and discourse of colonial governance merits some review. Whilst the intersection of law and colonialism will be explored in more detail through this study, here I seek merely to connect the spaces opened up in our discussion of temporality and governmentality by reference to the historiography of colonial emergency, where law was similarly instrumental to apparatuses of security and domination.

Hussain highlights some noteworthy omissions in Foucault’s work, discerning that in his depiction of a normative conception of power, Foucault fails to expound its relationship with the decidedly anti-normative elements of sovereign power. He also fails to delineate the social field from which the norm is generated and seeks to regulate, prompting Hussain to wonder whether ‘this terrain [is] the recognizable unit of the nation-state, or a more

politico-philosophical space of the “West”?  

The analysis continues:

Here the limits of Foucault’s work for a history of emergency, particularly colonial emergency, begin to reveal themselves. Indeed, postcolonial critics who have embraced and been energized by Foucault’s work have nonetheless noted the particular omissions of colony and empire from the epistemic shifts he so assiduously sought to document. This is not to be merely tendentious—no critic, after all, can be expected to cover everything—rather it is merely to note that despite Foucault’s interest in the development of spaces of confinement, he never thoroughly investigated the construction of the epistemic space of the West itself as putatively self-contained and self-generative.

With his attention fixed on the internal apparatuses of the European state, Foucault ‘has little to say about the relation between the sovereignty of the state and the new forms of law, or the limits to the functioning of the normative itself.’ While this is a valid critique, Foucault’s writing nonetheless opens up a space for us to conceptualise emergency in temporal terms. The temporally unlimited dimension of emergency is firmly rooted in colonial legal systems. The trend away from sovereignty and Machiavellian conceptions of power towards “the art of government” coincides with rise of the state and its colonial expansion. Foucault alludes to this himself when he underlines the process of centralisation ‘which, shattering the structures of feudalism, leads to the establishment of the great territorial, administrative and colonial states’. While not interrogating it directly, he is certainly aware of the parallel trajectories of the problem of government and the rise of the state and its colonial expansion. He proceeds to assert that ‘[t]he art of government


could only spread and develop in subtlety in an age of expansion’, an expansion which we understand as both economic and territorial. With larger and increasingly resistant populations to manage in its overseas dominions, the colonial state comes to require more sophisticated means of domination than military force alone. As we shall see, it is in this context that the doctrine of emergency develops.

Antony Anghie’s argument, which grafts on to Foucault’s, is that we find in colonial and administered territories the difficulties of applying conventional doctrines of sovereignty; that is, of facilitating the ‘distillation of a single will’, ‘the unitary, singular body animated by the spirit of sovereignty’. In his discussion of the role of international law and institutions in creating and maintaining relations of domination between Western powers and non-self-governing territories, Anghie draws on Foucault’s notion of new types of control and management in the stead of a unitary sovereign: ‘It is in the non-European world that international law acquires a different form – and, indeed, creates new types of control and management.’ Indeed, we can perceive the operation of law in the colonies in terms described by Foucault, who endeavoured ‘to show the extent to which, and the forms in which, the law (not simply the law, but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination.’

The evolutionary path from the sovereign decisionism of martial law in medieval England to the normalisation and institutionalisation of emergency

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rule in the late British empire mirrors Foucault’s genealogy of the state; from a hierarchical state, ‘born in the feudal type of territorial regime which corresponds to a society of laws’, to an administrative state ‘corresponding to a society of regulation and discipline’, and finally a governmental state in which society is ‘controlled by apparatuses of security’. In this governmental state, in nineteenth century India as much as in twenty-first century Britain, the matrix of entrenched security politics reveals itself through its legislation, regulations, institutions, special powers and illiberal practices. While perhaps less initially glaring than an extraordinary order-suspending state of exception, the pervasive potential of the politics of emergency comes into focus when viewed through the panoramic lens of ongoing time.

In this regard analogies between the contemporary state of emergency and colonial history and discourse are perhaps more apt than the correlations with fascist/totalitarian executive decisionism that Agamben and others take up. Contemporary “normalised” emergency measures transcending the vicissitudes of political events can be seen as a vestige of the colonial law-making process that emerged most visibly in India and Ireland in the nineteenth century.

Examining the temporal element of emergency in the colonial context, a review of the work of John Locke—an important intellectual influence on the colonial enterprise and its agents—is informative. Locke’s concept of prerogative power—a customary point of departure for those theorising emergency powers—is formulated thus: ‘This Power to act according to discretion, for the publick good, without prescription of the law and sometimes even against it, is that which is called Prerogative.’ On the basis that the law can’t provide for all eventualities, Locke’s theory holds that many things ‘must necessarily be left to the discretion of him, that has the Executive

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70 It bears noting that while Agamben draws on Hannah Arendt’s work on Nazi racial policy in developing his theory of the exception, he notably leaves aside central elements of her writing that situate the origins of European totalitarianism in European colonialism.

Power in his hands, to be ordered by him’ … ‘there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.’

Because the law-making process is slow, and time is scarce in a moment of decision, Locke appears to favour executive power over the legislative process in situations of contingency. While he did not conceive of such power as entirely unrestrained, this aspect of Locke’s prerogative has been drawn upon extensively to inform arguments as to the necessary extra-constitutionality of emergency powers. Such an approach allows for government that is exercised by law but that nonetheless retains the flexibility to go outside the law when exigent to do so. Gross and Ni Aoláin argue that it is ‘because of Locke’s attachment to the rule of law that he is willing to recognize the possibility of going outside the law in extreme cases and acting, in such circumstances, extra-constitutionally.’

While a critique of liberalism as nothing more than a ‘treacherous form of theistic decisionism’ is equally possible through reading Locke’s prerogative theory, the salient point here is the emphasis that is again placed on the spatial modelling of emergency powers as legal or extra-legal. Feldman provides a more sophisticated analysis, arguing that prerogative is not simply a “moment” of decision for Locke but rather a process of ongoing contestation at the boundary of law; that is, whether the emergency power rests inside or outside the constitution is a matter subject to ongoing political dispute. The temporal element in Locke’s writing is significant: the idea that because society and politics are ‘in so constant a Flux’, prerogative power must have ample flexibility and latitude to respond. Locke’s description of the cycle of good princes followed by ‘Successors, managing the Government with

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different Thoughts is invoked to demonstrate ‘how Locke embeds the legal-spatial dimension of prerogative (inside or outside the law) within the temporality of contingent political developments’ and thus actually develops a more nuanced understanding of the temporal—and the spatial as a result—than the contemporary extra-legalists whom he has inspired.

This view of princely prerogative, conceived of in rolling time rather than tied to singular moments of exception, prompts Feldman to join the dots between Lockean prerogative and Foucauldian governmentality: ‘What Locke is describing in his discussion of princely prerogative is neither a legally authorized and legally constrained office nor a normless void of sovereign exceptionalism but rather the emergence of governance as a particular set of practices, knowledge, and values.’ This being the case, we can see Locke anticipating the idea of emergency as a technique of governance, rather than a temporary reaction to a crisis, which would underpin British policy in the empire. Given the quagmire arising for colonial officials disposed with a curious penchant for both imperial conquest and adherence to a rule of law, the empire was a natural and inevitable incubation zone for the evolution of emergency governance. In order to justify a reliance on the use of force for the establishment and maintenance of domination, while simultaneously bequeathing the conquered territory with the gift of British justice, emergency doctrine was invoked to circumvent constraining laws where necessary. This carved out room for manoeuvre while maintaining an overall semblance of legality.

As we will see, the genesis of codified colonial emergency powers can be traced to martial law, which continued to be used in the colonies long after its abolition in metropole Britain. The question of whether martial law—in so far as it entails “the will of the commander”—can be conceived of as law at all

implies that it gravitates towards a Schmittean state of exception, where executive authority can decide without constraint when and how to discharge extraordinary powers. The emphasis on legality in the later legislative process, however, suggests a normalisation of the emergency within law, rather than an absolute state of exception unconstrained by law. This naturalisation of regimes of emergency law, less visible on the radar than a glaring state of exception, is potentially more pervasive.

Agamben acknowledges the significance of the temporality of the state of emergency in his observation that since the Second World War, ‘the voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones’. With this move (framing it as a post-war phenomenon), however, he simultaneously excises the roots of permanent emergency that had been a feature of legal systems and governance dynamics in the colonies. Bearing this ongoing colonial resonance in mind, the question arises as to whether this now paradigmatic form of government really represents an absolute state of exception in the sense of the suspension of constitutional orders and the assumption of unlimited power by the Schmittean sovereign or, alternatively, something less blatant but in some ways more insidious.

The common perception of sovereign exceptionalism is that of emergency power wielded by a Machiavellian caricature: the executive orders decreed by George W. Bush in the wake of the events of 11 September 2001, for instance, or the state of perpetual emergency maintained by authoritarian regimes in which personalistic sovereignty has been ensconced (such as Mubarak’s Egypt and Assad’s Syria). Headline-grabbing executive action, however, tends to be buttressed by more far-reaching measures embedded in legislation, as has been the case in the United States, for instance, with the Patriot Act. While the decision on the emergency is vested in the President.

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81 See Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proc. No. 7463, 14 September 2001, 66 F.R. 48199; and annual Continuations of National Emergency...
and emergency powers such as administrative detention were introduced by executive military order.\footnote{Declared by Proc. No. 7463 by Presidents Bush and Obama. See, for example, Barack Obama, ‘Notice - Continuation of the National Emergency with Respect to Certain Terrorist Attacks’,\textit{Daily Compilation of Presidential Documents}, 9 September 2012.} Bush justified such measures by claiming that Congress had (implicitly) endorsed indefinite detention when it passed the Authorization To Use Military Force legislation\footnote{Authorization for Use of Military Force, Public Law 107-40 [S. J. RES. 23] 18 September 2001.} in the aftermath of the events of 11 September. Barack Obama’s continuation of his predecessor’s policy through a March 2011 executive order\footnote{Executive Order 13567, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, 7 March 2011.} ‘that varnishes the framework of indefinite detention without trial’\footnote{Lisa Hajjar, ‘Guantanamo is an Evolutionary Experiment’,\textit{Al-Jazeera}, 29 March 2011.} is similarly rooted in the Authorization To Use Military Force law. While Obama failed to fulfil promises to close the Guantánamo Bay detention facility in his first term, the role of Congress in maintaining and normalising emergency measures is significant. The passing of legislation that blocks funding and bars relocation of Guantánamo detainees to the US for any purpose, including trial in federal courts (following controversy over plans to try alleged 11 September conspirators in a New York court in 2010) essentially ensured—indepedent of executive action—that Guantánamo would remain open and military commissions continue.\footnote{‘Even if all other circumstances impeding closure change in the future, as long as the legislation barring prisoners from being relocated to the US remains on the books, Guantánamo’s lifespan will be at least as long as al-Bahlul’s.’ Lisa Hajjar, ‘Guantanamo is an Evolutionary Experiment’,\textit{Al-Jazeera}, 29 March 2011.}

In many other states of various constitutional stripes, from Britain (“liberal democracy”) to India (“contested democracy”) to Israel (“quasi-democracy”), emergency measures are consolidated through the parliamentary process and implemented as part of the “normal” legal system. In autocratic regimes—Egypt under Hosni Mubarak, where the ubiquitous state of emergency resulted in ‘power being usurped by the executive organ at the
expense of the judiciary’, being a case in point—the legislature retains a role in authorising the emergency, albeit one that is mere performance. While not vested with any democratic legitimacy, an Egyptian parliamentary chamber did periodically review the state of emergency in order to give ‘approval for an extension, once it has been determined that the conditions for such an extension have been met, based on evidence resulting from discussions by the elected parliamentary assembly.’ The broad substantive and temporal scope attached to the existence of such conditions resulted in the repeated extension of the state of emergency by the Egyptian parliament from 1981 to 2011. As such, even in an overtly authoritarian system, there is a process of normalisation that occurs through parliamentary endorsement. Although we can differentiate in terms of how emergency powers are distilled into law and policy—between a model of legislative normalisation (Britain) and one of executive decisionism (Egypt)—in both circumstances the emergency is normalised through a multi-faceted endorsement and utilisation of those powers. Understanding the contemporary state of emergency as an ongoing temporal process bound up in the governance of the state through multiple legal channels, distinct from the extreme of a pure state of exception in which the entire legal order is suspended, provides a more accurate insight into the politics of emergency.

The terminology of the “state of exception” and the “state of emergency” are often used interchangeably. Schmitt draws a distinction between the two concepts in terms of their gravity and breadth, suggesting that not every emergency measure entails an absolute order-suspending state of exception. In this sense, the language of emergency implies a lower threshold than a state of exception that, for Schmitt, goes beyond the parameters of the normal legal order, and, taken to its limit, connotes a departure from the realm of law altogether. Agamben’s framing of the state of exception is more

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nuanced (and ambivalent) again than Schmitt’s, presented not as a void of law, but as a shadowy space where the juridical and the political coalesce. Even in writing *State of Exception*, however, Agamben also refers to the *state of emergency*, without making fully clear how he distinguishes, if at all, between exception and emergency.

While acknowledging the prevalence of the debate on the spatial boundaries of the juridical order, and engaging with it where necessary, the primary purpose of this work is not to enter that debate directly. The central concern, rather, is with understanding the operation of the broad range of measures loosely and often tenuously united under the umbrella of emergency doctrine, from the vantage point of the lived experiences of colonised and “othered” peoples. Covered within that umbrella are the specific emergency powers and decrees promulgated by the state on the basis of circumstances presented as a threat to its “normal” functioning. Such measures are typically, but not necessarily, adopted under the auspices of a formally declared state of emergency, the specific form of which may vary across jurisdiction. The malleability of the doctrine of emergency must be stressed; it is a distinctly ‘elastic’ concept, a technique and phenomenon that developed in its current form in the context of the European colonial project. While relevant, theoretically grounded state of exception discourse does not speak fully to the aspect of the particular phenomenon—its quotidian “law-ness”—that I wish to address. Hence, this thesis emphasises the nomenclature and conceptual framework of “emergency” (states of emergency, emergency modalities, doctrine of emergency, emergency law, emergency powers), rather than those of the “state of exception”. Clarifying this differentiation helps us to identify a more mundane but pervasive politics of governmentalist emergency rather than a state of exception at the extremity of its connotation. British colonial emergencies—from the legislative codification of emergency powers in early nineteenth-century India to the extension of the official emergency in 1950s Kenya so as to lawfully avoid newly-ratified human rights obligations—were marked by an emphasis on legality that is reflected in the incorporation of the

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doctrine of emergency into the international legal corpus. The ‘legitimating project of Western legality and its strained application to colonial exigencies’ can be seen as part of a totalising complex, in which emergency powers themselves emerge out of a system of law.90 Here, the argument presented goes against elements of both legal realist and postcolonial scholarship (unlikely bedfellows) that converge to frame the colony as a space of exception, exclusion or dehumanisation; a legal “vacuum”.

II. ‘Beyond the Line’: The Colony as Space of Exception?

The idea that law can ever recede entirely is a loaded problematic. Regardless of how much credence is given to the possibility, it throws up significant conceptual questions that continue to animate debate. Does law have the capacity, through its presence or absence, to carve out territorialised zones of exception; to include and exclude; to humanise and dehumanise? In touching upon these foundational questions in the particular context of European colonialism, the work of Anghie on the Spanish conquests and Samera Esmeir on colonial Egypt—read against that of postcolonial scholars Aimé Césaire and Achille Mbembe, as well as Schmitt’s *Nomos of the Earth*—provides a useful framing for situating emergency doctrine in the discourse.

In contrast to his inter-war period work on the state of exception and political theology, Schmitt’s geographic purview in *Nomos* is global as opposed to continental, his jurisprudential concern centred on the law of nations rather than European constitutional law. Schmitt himself, however, saw the separation of international law and continental constitutional law as

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90 In the colonial space, in particular, the rule of law and the state of emergency, norm and exception, must be understood as powerfully and intimately connected. Emergency is not, as typically presented, merely episodic and interruptive, contained and containable within the otherwise smooth functioning of law. E.P. Thompson demonstrated the problem with us all too easily assuming the necessity of emergency powers, thereby putting the focus only on the proportionality of the measures (as we will see in Chapter 3, the European Court of Human Rights continues to be guilty of this), whereas ‘a closer inspection of law and emergency in general points to an even more fundamental relation between the normativity of law and the singularity of exception.’ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003) 135. In this context, distinctions such as those emphasised by David Dyzenhaus between “rule of law” and “rule by law” may not be so clear-cut.
often ‘only a matter of facade’ due to the ‘common constitutional standard of European constitutionalism’.91 He celebrated the fact that through the era of encounters and engagements with the “new world”, European public law constituted international law; a global order based on European sovereignty. Central to Schmitt’s study is the idea of spatiality and its relationship to law, through the conduit of appropriation. Every legal order is rooted in the appropriation of space (land-appropriations and, to a lesser extent, sea-appropriations). The make-up of a given legal order is dependent on the form of socio-spatial order from which it emerges but ‘[i]n every case, land-appropriation, both internally [vis-à-vis other peoples] and externally [for the ordering of land and property within a country], is the primary legal title that underlies all subsequent law. … It constitutes the original spatial order, the source of all further concrete order and all further law.’92

As evidence of his argument that different spatial dynamics and methods of appropriation produce different types of legal order, Schmitt contrasts the jus publicum europaeum (the juridical order under which European states are formally equal and war is “bracketed”, or limited, where the enemy is considered “just”) with the order governing relations between European states and “new world” territories “discovered” from the 15th century (under which European sovereigns can exercise dominion over “free space” and war may be absolute). He saw a ‘crucial distinction between European and non-European or colonial soil’ as intimately bound up with a ‘legal distinction of “beyond the line,” which separated the reach of European public law from the sphere of lawlessness.’93 Demarcating space considered

free for colonial occupation and appropriation, the “line”, in its origin, is
premised on purported amity lines determined in treaty or oral agreements
between European powers during the “Spanish Age” from 1492 to 1648. A
successor of sorts to the earlier rayα that divided the globe between Spain
and Portugal, lines of amity separated ‘the European sphere of peace and the
law of nations from an overseas sphere in which there was neither peace nor
law.’ For Schmitt, ‘[e]verything that occurred “beyond the line” remained
outside the legal, moral, and political values recognized on this side of the
line’; the line delimited areas ‘where force could be used freely and
ruthlessly.’ Such spaces are presented as analogous to a Hobbesian state of
nature (which, Schmitt notes, is located by Hobbes himself in the new world,
among other places) in which humanity is reduced to barbarity: ““beyond the
line” man confronts other men as a wild animal.” A Eurocentric nomos of
the earth thus emerges from the region’s colonial expansion, succeeding
the previous nomos under which mankind had no global concept of the planet,
and the oceans were beyond the reach of human dominion. In the customary
fashion of empire, Europe situates itself at the centre of the new order,
‘beyond which war, barbarism, and chaos ruled.’ In the distinct spaces
constructed, the legal orders digress accordingly, revealing ‘the contrast
between inter-European law and the state of nature projected onto the new
world.’ Schmitt incorporates the essence of the terra nullius doctrine,
claiming the “open” spaces of the Americas and beyond as land free for
appropriation by Europeans, where colonising activity can proceed

94 Examples cited include the Peace of Cateau-Cambrésis in 1559, the Treaty of Vervins in
1598 between France and Spain, and that made in London between England and Spain in
96 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum
97 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum
98 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum
99 Martti Koskenniemi, ‘International Law as Political Theology: How to Read Nomos der
unrestrained and where law is not in force. When such spaces are “discovered” and colonised, land-appropriation constitutes the original spatial order, preceding and producing any further concrete order. For Schmitt, the schematics of essentially different spaces and different legal orders are particularly English in their genesis:

Although the idea of designating a sphere outside the law and open to the use of force has a long history, until very recently this type of thinking had remained typically English. … The diversity of colonial possessions and the distinction between dominions and non-dominions kept alive the English sense for specific spatial orders and variations of territorial status. English law also clearly distinguished between English soil - those areas ruled by common law - and other spatial areas … The king’s power was considered to be absolute on the sea and in the colonies, while in his own country it was subject to common law and to baronial or parliamentary limits of English law. … The English construction of a state of exception, of so-called martial law, obviously is analogous to the idea of a designated zone of free and empty space. … a suspension of all law for a certain time and in a certain space.\textsuperscript{100}

From this, the idea of the colony as a distinct space of exception is clear. The lens of postcolonial theory, commonly applied to deconstruct the intents with which the exception is performed in the colony, dovetails with Schmitt’s analysis. Such postcolonial deconstruction points to the exclusion and (attempted) dehumanisation of the colonised population, the creation of zones in which political life is rendered unsustainable, and the inscription of control over native life – body, mind, and territory. The colony is conceptualised as a lawless space of exception, a zone of anomie in which the native’s humanity is effaced through a process of exclusion from the law. This raises the spectre of the type of inclusion/exclusion debates that are salient to both emergency doctrine and colonial relations.

Prominent thinkers of Western modernity—Agamben, Arendt, Butler, Derrida, Foucault, Latour, and others—have extensively constructed and deconstructed the question of the ‘human’ and the dehumanising designs of

sovereign power, but rarely with direct reference to colonial paradigms. Scholars writing in the anti-colonial and postcolonial traditions, for their part, have trenchantly theorised the dehumanising intentions of imperialism in the colony. A common impulse of such scholarship is to frame the colonies as zones of lawlessness defined by racialised power dynamics in which the native is expelled from the juridical order and excluded from humanity.

Colonisation, on this reading, dehumanises through a process of exclusion from the law.

We see this in postcolonial and anti-colonial thought going back to Aimé Césaire’s polemic, *Discourse on Colonialism*, which attacks the European capitalist colonial project as one not of civilisation, but of “thingification” and dehumanisation; it is ‘summarily barbarous’, beyond the pale of law. In this mould, contemporary postcolonial scholarship has, implicitly and explicitly, continued to build on conceptions of biopower and bare life advanced by Foucault and Agamben in order to explain the colony as a space of exception. In this regard, Achille Mbembe’s articulation of “necropolitics” is quintessential.

Mbembe reads Agamben’s framing of the political-juridical structure of the camp in very absolute terms, whereby ‘the state of exception ceases to be a temporal suspension of the state of law. … it acquires a permanent spatial

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101 Drawing on Giorgio Agamben’s notion of *homo sacer*, Judith Butler in turn unpacks in more explicit terms the functioning of sovereign power ‘to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws.’ Judith Butler, *Precarious Life* (London: Verso, 2004) 68. Agamben’s paradigmatic state of exception, marked by conceptual binaries and zones of indistinction (inside/outside, norm/exception, public/private, zoê/bios), is defined as ‘an inclusive exclusion (which thus serves to include what is excluded)’ that produces bare life through sovereign violence. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1995) (Daniel Heller-Roazen trans., Stanford: Stanford University Press, 1998) 21. This notion is applied by Michelle Farrell in her exploration of torture in Coetzees’s *Waiting for the Barbarians*. The barbarian (the excluded) is civilised (included) through subjection to torture. The act of torture ‘signifies nothing other than the Empire’s ability to render life bare and to inscribe the meaning of humanity upon the excluded body’. Michelle Farrell, *The Prohibition of Torture in Exceptional Circumstances* (Cambridge: Cambridge University Press, 2013) 249-250.


arrangement that remains continually outside the normal state of law. Deeming notions of biopower and biopolitics incapable of fully capturing modern configurations of sovereign power’s absolute control over life, Mbembe goes a step further with his theory of necropower and necropolitics. The notion of necropolitics is advanced to account for contemporary forms of subjugation of life to the power of death, and for the ways in which weapons are deployed with a view to maximising human death and destruction. More than mere biopolitical control over the body, or juridical reduction to a status less than equal, necropolitics connotes ‘new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of living dead.’

In making this move, Mbembe explicitly links necropower to both the colonial space and the state of exception. The conditions of living death, he argues, are most prevalent in the plantation and the colony, with colonial occupation combining biopolitical and necropolitical control over body and life. And in tracing the trajectories by which the state of exception entails a normative basis for the right to kill, Mbembe holds that power, in various guises, ‘continuously refers and appeals to exception, emergency, and a fictionalized notion of the enemy [and] labors to produce that same exception, emergency, and fictionalized enemy.’ Race is central to such production and to the exercise of necropower, underpinning a biological chasm between the ones and the others; those to live and those to die. This is explained with characteristic penetration; race as the ubiquitous shadow in Western political thought and practice, constantly imagining the inhumanity of foreign peoples – the colonial savages in particular. Thus, the language and logic of dehumanisation, exclusion and exception pervades Mbembe’s exegesis of the colony:

… in modern philosophical thought and European political practice and imaginary, the colony represents the site where sovereignty consists fundamentally in the exercise of a power outside the law (ab

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legibus solutus) and where “peace” is more likely to take on the face of a “war without end.”

For Mbembe, Schmitt represents the European imaginary that posits the equality of all states within the European juridical order who respect each other as civilised enemies. In contradistinction to that order, again, are the colonies and frontiers: devoid of organised human societal formations; lacking regular armies and equal sovereign enemies; inhabited by savages incapable of distinguishing soldiers from criminals or of concluding peace. Through this “gaze”,

… colonies are zones in which war and disorder, internal and external figures of the political, stand side by side or alternate with each other. As such, the colonies are the location par excellence where the controls and guarantees of judicial order can be suspended—the zone where the violence of the state of exception is deemed to operate in the service of “civilization.” That colonies might be ruled over in absolute lawlessness stems from the racial denial of any common bond between the conqueror and the native. In the eyes of the conqueror, savage life is just another form of animal life, a horrifying experience, something alien beyond imagination or comprehension.

In such a space of absolute lawlessness, colonial warfare and governance are not subject to legal rules or to institutional regulation. This is the state of exception in extremis: lawlessness, exclusion and dehumanisation.

The story of the juridical order in the colonies, however, is more complex and heterogeneous than one of absolute exceptionality. Schmitt’s construction of the sphere of lawlessness on the other side of the amity lines has been robustly challenged by Jörg Fisch, for one. The very existence of such lines in the peace treaties of the sixteenth and seventeenth centuries is disputed: ‘The sentence “No peace beyond the line” is, from the point of view of international law, a legend.’ The larger point maintained by Fisch in his

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109 Jörg Fisch, ‘International Law in the Expansion of Europe’ (1986) 34 Law and State: A Biannual Collection of Recent German Contributions 7, 11. According to Fisch, ‘these lines were an invention of the French and the English in the 17th century … as an instrument against Spanish claims. They pretended that the European peace treaties were not valid
account of the colonial encounters is the centrality, rather than the absence, of legality: ‘[t]here was probably no other empire building in history in which legal and moral justification played such an important part. The Europeans tried hard to legitimize their actions, to find a more solid legal foundation for what they did than simply refer to a right of conquest.’

Against Schmitt’s positioning of non-European territories outside the scope of any law, and his contention of a perpetual state of war, Fisch asserts that the application of one particular juridical order within Europe ‘does not mean that law, in a wider meaning, was absent from the process of expansion and from the relations between European and non-European political entities, or from the relations among the non-Europeans themselves.’ He presents an empirical rejection of Schmitt’s thesis and maintains that the European states themselves avowed the universal territorial validity of their rules. While the justifications offered for imperial outreach between the sixteenth and twentieth centuries have evolved—having comprised the missions to render the world first Christian, then civilised and now ‘legally (but not at all materially) egalitarian, in the sense of the spread of democracy and human rights’—they are marked by a recurring missionary theme and a ‘teleological view of history as a universalizing process.’

Law, as much as morality, has been integral to the articulation of those justifications and their execution outside of Europe. The role played by legal doctrines relating to trade, title, settlement and sovereignty is invoked to rebut overseas so as to be legally entitled to attack the Spanish possessions especially in America at any time. The Spaniards constantly and consistently rejected these claims – and they were right. There is not one single European peace treaty in which you can find a clause instituting something like an amity line.’ Quoted in China Miéville, Between Equal Rights: A Marxist Theory of International Law (Leiden: Brill, 2005) 180.


112 Jörg Fisch, Die europäische Expansion und das Völkerrecht (Stuttgart: Jahrhundert bis zur Gegenwart, 1984).

Schmitt’s account of non-European territories as normative vacuums in which European powers were not bound by any law. Emergency doctrine was increasingly central to the imperial governance process over time; emergency laws and powers constituted a particular form of legality rather than a lawless state of exception.

There is a final point worth making in regard to Schmitt’s construction of the European juridical order. For Schmitt, the *jus publicum europaeum* in which order, civilisation and the regulation of war prevails is not merely defined in opposition to, but is contingent for its very existence upon, a non-European spatial order into which unbridled war and conquest could be exported.

This [European] spatial order did not derive essentially from internal European land-appropriations and territorial changes, but rather from the European land-appropriation of a non-European new world in conjunction with England's sea-appropriation of the free sea. Vast, seemingly endless free spaces made possible and viable the internal law of an interstate European order.114

The civilised European spatial order is thus dependent on external “free” spaces that can be appropriated from their uncivilised inhabitants. This must be understood in the context of economic and industrial relations within Europe reaching a point where capital starts to require new markets and new resources of accumulation such that expansion into the peripheries becomes necessary. As such, appropriation is driven by capitalist social relations and structured by core-periphery bisections. Schmitt’s “free” space is thus of course not innately free in the sense of being unoccupied by humankind or untouched by social relations. It is socially constructed as peripheral space free for appropriation by the centre:

… the process of capital accumulation on a world scale necessitates the idea that certain zones be designated as “free space” … [but] rather than being an unproblematic “fact” “free space” is a unity of historical, social, political and economic determinations – space is a social relation.115

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Schmitt’s narrative of a space that naturally precedes and is free from a law that recognises it as such (lawless and free) thus falls on its own sword. Because the peripheral “free” space is integral to the particular constitution of the European order, it is entwined in political, economic and social relations with that order. Those relations inherently play out through legal forms and vocabularies. The very conceptions of a “free” spatial order, and of distinct juridical orders and standards, are intrinsically grounded in law. Rather than being absent from “free” space, law contributes to its production and is essential to its constitution.

In relation to the exclusion and dehumanisation arguments that flow from the idea of the colony as a space of exception, significant scholarship has emerged in recent years to posit alternative positions. Without engaging it directly, Anghie’s work on Vitoria and Spanish colonisation of the Americas in the sixteenth century is aligned for the most part with the thrust of Fisch’s analysis. In contrast to a dominant strand of thought among Vitoria’s contemporaries (such as Juan Gines Sepulveda, to name but one) that characterised the natives of the Americas as heathens and animals, barbarians standing outside of humanity and devoid of comparative rights, Vitoria himself recognised their humanity. For Anghie, this seemingly progressive inclusion of the indigenous peoples of Latin America within the realm of natural law, for which Vitoria is celebrated, produces a more dubious outcome. Vitoria’s ‘recognition of the humanity of the Indians has ambiguous consequences because it serves in effect to bind them to a natural law which, despite its claims to universality, appears derived from an idealised European view of the world.’

Falling short of the European standard of civilisation required to administer a legitimate state, the “Indians” would violate this law by virtue of their very existence, identity and cultural practices. On the basis of such violation, Spanish travel, trade, just war, conquest and, ultimately, sovereignty are underwritten. Vitoria’s humanising legal doctrine is thus one

that inscribes to deprive, that includes to exclude.

Samera Esmeir’s *Juridical Humanity*,117 a compelling account of the relationship between modern law and the human in colonial Egypt, points to a similar ambivalence in coloniser-colonised dynamics, this time in the context of British imperial law. Following the Urabi revolution and Britain’s military conquest of Egypt in 1882, the colonial state embarked upon a juridical venture of wholesale reform aimed at overhauling the legal system inherited from the pre-colonial Khedive. The mission was to emancipate Egyptians from the wanton and inhumane cruelties of Khedival rule, and to elevate them to a status of humanity previously lacking. Positive law was the force of modernity that would generate a rupture from the arbitrary violence of the past. Esmeir recounts how modern law engendered a concept of “juridical humanity” that was rooted in sensibilities of humaneness and operated to inscribe the native Egyptian within the colonial rule of law. Through this particular narrative, the more general relationship between law and the human with regard to history, nature, sovereignty and violence is probed.

Esmeir navigates a huge expanse of literature in the fields of colonial legal history, postcolonial theory, post-structuralist thought and more, but plots her own distinctive course through the relatively unchartered waters of legal narratives in British Egypt. The concept of juridical humanity both borrows from and departs from Hannah Arendt’s articulation of the “juridical person”.118 Whereas in Arendt’s account violence is a product of *exclusion* from law (in the form of denationalisation, or, *in extremis*, the camps’ location outside of the “normal” legal system), Esmeir’s narration of Egypt’s colonial story reads *inclusion* in the law as a hegemonic technique that facilitates its own brand of violence. The project of juridical humanity described and theorised by Esmeir thus connotes a type of inscription within the law that purports to enable a process of humanisation—as seen through a colonial lens—based on a liberal idealising of the “rule of law”. Juridical humanity

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pulls the colonised into a domain of modernity that is fetishised in contrast to the arbitrary and inhumane nature of the pre-colonial order. The effect of colonial law’s humane reforms is a process of rendering the natives—hitherto dehumanised by their own despotism—human through the law.

In a similar vein to Anghie’s exposition of Vitoria, Esmeir’s analysis shows that this inclusivity is not driven by benevolent designs at emancipation and equality on the part of the colonial state. Rather, the cultivation of juridical humanity embodies a more nuanced technique of inscribing Egyptians within the law as ‘a technology of colonial rule and a modern relationship of bondage.’ Esmeir chronicles the humanising reforms that included the attempted elimination of torture, the abolition of the use of the curbash (whip), as well as decrees for more humane treatment of criminals, prisoners and animals. Here, she says, ‘the project of juridical humanity put pain and suffering to use.’ While colonial law’s humanitarian intervention was effected through the reduction of suffering, Egypt was the subject of parallel thought processes of modernity that produced a domain of lawful, utilitarian, humane violence: ‘Humanity is truly universalized when, in the colonies, pain is properly measured, administered, and instrumentalised. Only pain that serves an end is admitted. Useless, non-instrumental pain is rejected.’

Under the imperial gaze, therefore, the inhumanity of pre-colonial violence lies not in the violence itself, but in its alleged arbitrariness. Juridical humanity, in Esmeir’s reckoning, did not seek to prevent pain and suffering per se, but to eliminate the prescription of disproportionate or unproductive pain. Such instrumental suffering would often (though not always) assume the form of less overt modes of wounding than torture and whipping. Here, Esmeir’s analysis of British reforms in Egypt takes its cue from Foucault’s

theorisation of certain features of liberal modernity—the abolition of public torture, criminal justice reforms, the architecture of the panopticon—as new technologies of (bio)power directed more at the mind than the body. Like Foucault, Esmeir is unconvinced and unsettled by law’s instrumental means-end logic, and the distinction between arbitrary cruelty and calculated productive humane violence. The impossibility of that distinction, in her final analysis, ‘reveals all of the law’s violence as arbitrary’ and signals a ‘collapse of ends into means.’

The structural contradictions within the law are thus revealed. Notably, Juridical Humanity also elucidates the emergency modalities—martial law, military tribunals, special commissions—of British rule that produced a hybrid colonial liberal legal regime, split between its ideals of humanity and its factual violence. Emergency doctrine is what allows it to straddle both.

Esmeir’s extensive reading of the British-Egyptian colonial archive does convincingly demonstrate the thrust of juridical humanity as an attempt to frame the liberalism of colonial governance in juxtaposition to the violence of pre-colonial despotism. The form that this took—British officials ordering the cessation of torture and insisting on humane treatment of prisoners—did surpass more vacuous ‘rule of law’ platitudes propounded elsewhere, and subverted the narrative of empire as dehumanising. The idea of juridical humanity thus posits a distinct thesis to Mbembe’s necropolitics or the ideas of an exclusionary state of exception.

The capacity of law to humanise or dehumanise is, however, itself contested and arguably better reflects intention than effect. Fanon, for instance, acknowledges the attempts of colonial discourse to confiscate the humanity of the native but refuses to accept that such rhetoric is performative or that the colonial subject can be stripped of its agency. While violence in the colonies ‘seeks to dehumanize’ the native, ‘he knows that he is not an animal … he realizes his humanity … he is treated as an inferior but is not

convinced of his inferiority. That is, humanity is not something that can be juridically given or taken away. The endeavours of the state to craft humanity in a certain mould, is part of a colonial discourse that—through race and power dynamics—purport, ultimately unsuccessfully, to deprive the colonised of their voice.

For present purposes, the pivotal aspect of the dialectics around spatial and juridical orders, inclusion and exclusion, humanisation and dehumanisation, is the role of law and legality. Amidst the panoply and matrices of emergency regulations promulgated by the British colonial state in particular as European imperial history wore on, the colonies emerge as zones saturated by law; emergency law, but law nonetheless. This implies a need to critically engage with the impulses of postcolonial theory that conceptualise the colonies as lawless spaces of exception. Did the deployment of emergency modalities serve, rather, as a technology of colonial governance that inscribed the native within the law, and effected control accordingly? In this reading, emergency law operates to bridge a divide that deepened over colonial time between the unfettered violence of conquest (in the colony) and an increasingly liberal idealising (in the metropole) of the rule of law as empire’s gift. The banality and minutiae of emergency law exemplify an enterprise heavily inflected by a certain type of legal discourse, rather than a legal vacuum. It is thus a question not of the (presence or) absence of law, but of what type of law, with what structural biases? A situation not of exclusion from law, but of suffocating inclusion by law.

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125 The question of whether the subaltern can speak—posed by Gayatri Spivak in the context of the banning of sati in India being narrated by (male) British colonial officials and Hindu leaders rather than the women who would themselves practice sati—remains a formative one in postcolonial studies. Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson & Lawrence Grossberg (eds.), Marxism and the Interpretation of Culture (Basingstoke: Macmillan, 1988) 271-313. See also, for example, Edward W. Said, ‘Representing the Colonized: Anthropology’s Interlocutors’ (1989) 15:2 Critical Inquiry 205.

126 The edifice projected as the epitome of the absolute state of exception in the modern context of securitisation, for example—Camp Delta, Guantánamo Bay—is in many respects a space heavily regulated by law.
That said, the material presented for both theoretical and comparative reference—and the arguments extracted accordingly—cannot be uniform across colonial space and time. They need to be contextualised with reference to the particular social and political dynamics at play, and the temporal and geographic variations of colonial relations. Room must be left for an understanding that is more complex or ambivalent than simple inside/outside binaries and that speaks also to the underlying ideological motivations and consequences. This becomes apparent when looking at the particular circumstances of states of emergency in, for example, nineteenth-century India, twentieth-century Kenya, or twenty-first century Palestine. One significant common denominator, however, and this is where the exegesis of emergency doctrine proffered perhaps does align with Mbembe’s interpretation of the state of exception, is in relation to the constitutive role played by racial dynamics.

III. The Racialisation of Emergency

The notion of emergency as a racialised component of sovereignty stems from the colonial context where the effects of a state of emergency were inherently contingent on race (platitudes regarding equality and the protection of loyal subjects of all races notwithstanding). Here, the socio-historical formation of the doctrine of emergency is important; states of emergency were not created in a void and have developed in a way that has led to the construction of “other”/suspect communities. Hussain skilfully demonstrates that in nineteenth century India, general notions of emergency—not simply specific moments of exception—were imbricated in the legal reasoning and institutions of the colonial state.\footnote{This occurred in the context of what Hussain describes as the “Manichaean racialism” of a Victorian sensibility. Nasser Hussain, \textit{The Jurisprudence of Emergency: Colonialism and the Rule of Law} (Ann Arbor: University of Michigan Press, 2003) 48.} Indeed, the contention expounded here is that emergency laws and powers—representing a pivotal cog in the machinery of the European expansionary project and its suppression of the native
“other”\textsuperscript{128}—can be located on a continuum that evolved from martial law in medieval England, through its export to the colonies and the materialisation of emergency politics and lawmaking in the empire, to the present day where similar narratives of emergency and exception have been adopted by post-colonial successor states as well as retained by global hegemonic powers. The ubiquitous motif permeating this historiography is that of the creation of otherness, the pinpointing of an “other” as the object of the emergency measures. Its ongoing legacy can be seen contemporaneously with the targeting of suspect communities in post-colonial settings framed as emergencies. Whilst the target may vary across time and context—from “criminal tribes” in colonial India to Catholics in Ireland and Muslims in Britain; from native Americans to Japanese-Americans and African-Americans; from Jews in Europe to non-Jews in Israel, non-Europeans in South Africa to non-Hindus in India—it is most often revealed by its racial element.\textsuperscript{129} And while this element may be less explicit in some contemporary settings, the substantive link to colonial attitudes is unavoidable.

As noted, an understanding of the racial element of sovereign engagement with crisis implies that the essence of the emergency is of more profound historical and social consequence than simply binary conceptions of legality or extra-legality. Even Agamben’s \textit{Homo Sacer} series, for all its insights in contesting and discrediting the inside/outside debate, is constrained by the Eurocentrism and ahistoricism of its chosen methods, and a failure to address race. While rhetorically seductive for the purposes of unpacking political dynamics across universal planes, state of exception discourse may itself obscure the very uneven ways that the violence of law tends to operate. This raises the spectre of something more than law and exception. Sumi Cho and Gill Gott, in their insightful portrait of the “racial sovereign”, imply that

\textsuperscript{128} On the ‘othering’ of the colonial native as ‘the enemy of values’, see Frantz Fanon, \textit{The Wretched of the Earth} (1961) (Constance Farrington trans., London: Penguin, 1967) 32.

\textsuperscript{129} The question of what we mean by ‘race’ and ‘racial’ is of course a loaded one. Long debunked as a scientific category, but still so heavily contested in the social sciences, it may be that the most workable tools for defining race are provided by legal norms on racial discrimination—however inadequately and superficially international law addresses the complexities of race.
the failure of the project of liberal legal management of emergency powers lies in the fact that it ‘discounts the Schmittean realist view of sovereignty, ironically, by engaging national security “concerns” at face value, irrespective of the long record of involuntary sacrifice fraudulently imposed upon racial minorities through declarations of emergency and threat.’

Although Bruce Ackerman acknowledges the identity-contingent limitations of any balancing test conducted in the face of construed security threats, in presenting his ‘emergency constitution’ he ‘stops short of offering any substantive constitutional protection against such abuses.’

In critiquing what they describe as professionally risk-averse acceptance, evasion or collective reification of suspect and contingent sovereign projections (the “war on terror”, “homeland security”, “Islamic” terrorism, and so on) in post-2001 scholarship on national security law, Cho and Gott trace the socio-legal dynamic of emergency in the American context to a racially coded discourse of sovereignty that emerged from judicial engagement with the question of native rights and sovereignty in the nineteenth century. Supreme Court decisions such as that in Cherokee Nations v. Georgia which rejected the claim of native sovereignty—casting the Cherokees instead as a “domestic dependent nation”—served to convert ‘the legal equality assumed by hundreds of treaties entered into by the United States and native nations into a hierarchical and subjugationist relationship of ward/guardian’. This racially inflected conception of sovereignty was preserved in subsequent jurisprudence relating to early US ventures into overseas imperialism. “Unincorporated territories” such as Puerto Rico were, like the Cherokee nation’s “domestic dependent nation” status, held to exist in

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a liminal sovereign space of being neither American\textsuperscript{136} (and entitled to the constitutional benefits of such) nor foreign\textsuperscript{137} (and accorded the entitlements of an independent sovereign nation).\textsuperscript{138}

As illustrated by this kind of legal history, race and sovereignty were mutually constructed, with apparently neutral legal principles devised in such a way as to effectively lock in racial hierarchies. Cho and Gott proceed to show how this backdrop illuminates the ‘imperialist-racial formation of enemy civilization peoples’ in contemporary American national security law and policy discourse. They conclude:

In rethinking the questions of sovereignty, emergency, and legality, perhaps the fundamental question to ask ourselves is how our models of emergency constitutionalism relate to the ontology of order under empire. To perceive security interests as always already racialized and imperial moves us in another direction, one that problematizes the fascistic trap door in the foundation of modern imperial state power with its violence-legitimating discourses of security and exclusion. As Benjamin suggested, we begin to conceive of something like the creation of a real state of emergency by rejecting the binary closures of security/legality, and recognizing the historical and structural dimensions of racial sovereignty.\textsuperscript{139}

Where Cho and Gott zoom in on these dimensions of racialised sovereignty within the United States, Anghie provides a trenchant analysis of the imperial origins of sovereignty doctrine in international law in the broader context of the European colonial project.\textsuperscript{140}

\textsuperscript{136} Downes v. Bidwell 182 U.S. 244 (1901).
\textsuperscript{137} DeLima v. Bidwell 182 U.S. 1 (1901).
\textsuperscript{138} It is important to note that such doctrine is not a relic of nineteenth-century jurisprudence but is replicated in contemporary situations of racial conflict and domination. Although routinely incarcerated by Israeli authorities and prosecuted in Israeli courts, Palestinian residents of the Gaza Strip, for example, are denied the protections of Israeli constitutional law, but simultaneously denied the rights of protected persons under the Fourth Geneva Convention with Israeli insisting—contrary to international consensus—that it is not in belligerent occupation of the Gaza Strip. See Shane Darcy & John Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’ (2010) 15:2 Journal of Conflict and Security Law 211.
\textsuperscript{140} Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2005).
Anghie argues that the colonial encounter was pivotal to the formation of international law’s foundational concept, sovereignty. Thus, cultural subordination and economic exploitation premised on racial discrimination were constitutive elements of sovereignty in the conquering and civilising missions. Anghie brings us back to our disciplinary beginnings where Vitoria, “the first international legal jurist”, was confronted with the problem of accounting legally for the Spanish conquest of the Indies in the sixteenth century. Using the doctrinal and jurisprudential resources of natural law, Vitoria first characterises the “Indian” as primitive and therefore lacking in full legal personality, before proceeding to outline a series of legal principles that justify Spanish intervention for the purposes of civilising the Indians.141 Going against the grain of traditional appraisals of Vitoria as having applied existing European inter-state juridical doctrines to resolve the new situation arising from the “discovery” of non-European peoples and the need to determine their legal status,142 Anghie demonstrates that ‘while Vitoria’s jurisprudence relies in many respects on existing doctrines, he reconceptualizes these doctrines, or else invents new ones, to deal with the novel problem of the Indians.’143 Rather than approaching the question of Spanish-Indian relations as the classical international law conundrum of how best to create order among sovereign states, Vitoria sought to formulate a legal system to govern relations between two very different cultural orders, each with its own ideas of property and governance. His analysis does not proceed on the basis that both parties are equally sovereign, but instead has at its root what Anghie terms a ‘dynamic of difference’144—entailing dichotomies between private and public, civilised and uncivilised, sovereign and non-

144 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2005) 40. Anghie defines this dynamic of difference as ‘the process by which a gap is postulated between European and non-European peoples.’
sovereign—steeped in a sense of European cultural superiority. Cultural difference thus illuminates how non-European societies were excluded from the realm of sovereignty at the outset of the colonial confrontation.

Over succeeding centuries, as European imperialism unfurled itself around the globe, European thinking on race shifted, with earlier cultural and territorial conceptions of race as implying nationality or tribe membership ceding ground by the nineteenth century to a scientific discourse that framed race in genetic, biological and physically observable terms, giving rise to fields of “social Darwinism” and “scientific racialism”. Non-European inferiority and subordination transcended these conceptual oscillations, however, and even with the abolition of slavery in the British empire in 1833, race persisted as a factor in British attitudes of the time toward ongoing conquest and expansion. Continuities in racial attitudes and racial violence revealed themselves, for example, through colonial perceptions of the “coolies” on plantations in India as a new breed of post-abolition slaves. Certainty over the survival of racial domination beyond the framework of slavery can also be clearly detected in the writings of liberal colonialist Thomas Macaulay in 1827, regarding the question of whether to free a substantial number of African slaves from indentured labour in Caribbean sugar plantations. As has been evocatively asserted, ‘with the nation torn between her conscience and her sweet tooth [Macaulay reassured her] that she could wash her Imperial skirts clean with Emancipation and still continue to enjoy the produce of her thriving colonies.’

Thus, in order to sustain its ‘politics of exclusion and subordination’ the British empire maintained a Victorian equivalent of Vitoria’s dynamic of

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difference to describe and reify the rulers and the ruled. As the empire’s
tentacles extended ever wider, race was the crucial yardstick that would
underpin the institutionalisation and normalisation of imperial inequality.\footnote{150} Cultural and racial distinctions became the basis for establishing a legal right
of occupation and abrogation of native sovereignty. In this regard, Stuart Hall
defines cultural difference and biological difference as racism’s ‘two logics’,
and notes the enduring constancy of British attitudes towards the empire’s
inferior “others”: ‘Britishness as a category has always been racialized
through and through – when has it connoted anything but “whiteness”?’\footnote{151}
This has arguably persisted through to the twenty-first century in the attitudes
displayed towards Asian Muslims, for instance. The malleable vision of the
other in the context of security politics also reminds us that the boundaries
of race are not fully secure or self-evident. As Stoler and Cooper observe: ‘the
otherness of colonized persons was neither inherent nor stable; his or her
difference had to be defined and maintained’.\footnote{152}

This is evident historically in the two colonies that served perhaps
most prominently as incubators for the legislative germination of emergency
powers in the British empire—Ireland and India. Given their disparity in terms
of the question of race, they merit brief discussion here. India was, in many
ways, the epitome of the racialised hierarchies created by empire. That law
was complicit in the racial stratification and segregation of the colonial space
is indisputable. Under British rule, a panoply of special exemptions and
statuses divided the legal domain, primarily on the basis of racial distinctions
between European settlers and natives (including separate courts with distinct

\footnote{150} Despite this, scholars such as Román point to race as the conspicuously “missing variable”
in discussions of colonialism. Although issues of race permeate the pervasive paternalism in
traditional international discourse, race has been ‘an all-too-often unspoken theme’ in that
context. Ediberto Román, ‘Race as the Missing Variable in Both the Neocolonial and Self-
Determination Discourses’ (1999) 93 Proceedings of the American Society of International
Law 226-228.

\footnote{151} Stuart Hall, ‘Conclusion: The Multi-Cultural Question’ in Barnor Hesse (ed.), Un/settled
222-223.

\footnote{152} Frederick Cooper & Ann L. Stoler (eds.), Tensions of Empire: Colonial Cultures in a
jurisdictions\textsuperscript{153}) and also on the basis of religion.\textsuperscript{154} As one commentator put it: ‘The goddess of British Justice, though blind, is able to distinguish unmistakably black from white.’\textsuperscript{155} The delineation and construction of race by law was a fluid but permanent feature of the colonial regime: ‘In India, the legal question of who counted as a European British subject was contested and reworked over time, offering evidence of how law participated in the determination and institutionalisation of racial difference.’\textsuperscript{156}

Proponents of imperial rule offered the standard arguments as to the civilising and modernising benefits of injecting the spirit of English law into the colony, while glossing over the fact that, in the colonial context, such a system will invariably be applied selectively and with distinctions. Hussain merely points out the obvious when he reminds us that ‘not all the elements of a rule of law are so amenable to a colonial project of justifying rule through racial hierarchy.’\textsuperscript{157} While Fitzjames Stephen insisted on the need for all colonial authority to be rooted in appropriate forms of legal administration,\textsuperscript{158} his belief—if we assume his argument was not presented in bad faith—in the efficacy and flexibility of law would prove misguided when confronted with insurgency and emergency.\textsuperscript{159} Schmitt’s narrative suggests that the immediate needs or desires of the sovereign state are often not possible to situate within a normative legality, and in a colonial setting such as India, the glare of race simply functions to illuminate the chasm between norm and exception. As we will see, the solution in India was to inscribe the emergency powers needed to fill this chasm within the statutory legal system.

\textsuperscript{153} Company courts (jurisdiction over natives in the mofussil) and Crown courts (jurisdiction over all residents of the presidency town and only over British subjects in the mofussil).
\textsuperscript{155} Bal Gangadhar Tilak, \textit{Kesari}, 12 November 1907, IOR, L/PJ/6/848, File 453.
\textsuperscript{158} James Fitzjames Stephen, \textit{Minute on the Administration of Justice in British India} (1872) IOR V/23/19 Index 115.
Although very much peripheral to Europe and possessing a distinct history, Britain’s first colony, Ireland\(^{160}\)—by virtue of its “whiteness”—presented a problem for racial theorists and ethnologists wishing to invoke chromatism to justify colonialism.\(^{161}\) In response to this anomaly, theories of the Irish as a “simianised” people were advanced in order to infuse them with an increased degree of “blackness”, such as in eminent anthropologist Dr. John Beddoe’s ‘index of nigrescence’ in his 1885 *Races of Britain* study.\(^{162}\) Nineteenth-century English newspapers were wont to describe the Irish as ‘a kind of white negroes’.\(^ {163}\) Richard Ned Lebow’s *White Britain and Black Ireland*, an examination of British perceptions of the Irish during the first half of the nineteenth century, draws on a range of historical sources to highlight prevailing stereotypes and their influence on colonial policy.\(^ {164}\) Pre-existing anti-Irish sentiment almost across the board of British society came to be increasingly couched in the language of racial differentiation during Victorian times. Caricatures of the Irish as primates were not uncommon in the media,\(^ {165}\) with the editorial outlook of *Punch* magazine unveiled by its characterisation of the Irish as ‘the missing link between the gorilla and the Negro.’\(^ {166}\) Depictions of the Irish as ignorant, indolent, alcohol-dependent and self-indulgent were not the preserve of a racist fringe element, but rather represented ‘the dominant features of the British image of the Irish’.\(^ {167}\) Lebow

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160 Ceded to Henry II by Pope Adrian IV as a feudal province in 1155, subsumed into the English monarch’s administrative jurisdiction by the Crown of Ireland Act 1542, formally annexed by the Act of Union in 1800 and governed by direct British rule from then until 1922.


162 See Hugh A. MacDougall, *Racial Myth in English History* (New England: Harvest House, 1982) 123. This finds memorable resonance in contemporary literature in the sardonic reference to the Irish as ‘the blacks of Europe’ in Roddy Doyle’s *The Commitments* (Dublin: King Farouk, 1987).


165 See also, for example, L.P. Curtis, Jr., *Apes and Angels: The Irishman in Victorian Caricature* (Newton Abbot: David & Charles, 1971).

166 *Punch*, XIV (1849), 54; XXIV (1851), 26, 231.

traces this attitude to earlier British visitors to Ireland, as exemplified by one seventeenth-century travel writer referring to the Irish as ‘these beings who seem to form a different race’. Descriptions of the ‘filth and wretchedness almost exceeding what the greatest stretch of an Englishman’s imagination can conceive’, in which the Irish were apparently perfectly content to live, served to perpetuate ‘the assumption that the Irish resembled insensitive animals more than they did human beings.’

Beyond such racial projections, cultural and linguistic dynamics of difference were used to highlight Irish incompatibilities with civilised Britain, and served to underpin colonial policy. English denunciations of the Irish regularly centred around the “barbarism” of the Irish accent, for example. A broad construction of race, incorporating culture, language and national identity, came to define both sides in opposition to one another. Thus, when the process of legislating for emergency measures to suppress agitation by the degenerate Irish peasantry was initiated by the coloniser in the 1800s, it was

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170 *Blackwood’s Magazine* went as far as to describe squalid filth and raggedness in Ireland as ‘national tastes’. LIX *Blackwood’s Magazine* (May 1846) 600, 602.


173 Because of a protracted and painful colonial history, a derivative “non-Britishness” has long been a defining feature of Irish identity. By way of illustration, we can recount Samuel Beckett’s famous “*au contraire*” moment; when a Parisian inquired of the Irish playwright as to whether he was English, Beckett’s reply was at once cryptic and telling: “On the contrary”. Almost a hundred years after independence, Ireland is still coming to terms with the effect of this colonial history on its identity, remaining troubled by a form of postcolonial “hybridity” in which typical colonial binaries are absent but a “sameness-in-difference” paradox lingers. See, for example, Colin Graham, *Deconstructing Ireland: Identity, Theory, Culture* (Edinburgh: Edinburgh University Press, 2001); Luke Gibbons, *Transformations in Irish Culture* (Cork: Field Day, 1996).

174 Agrarian discontent at rack-renting and mass evictions by predominantly Protestant landowners in Ireland in the 1800s was portrayed by mainstream media and parliamentarians in Britain as rampant lawless and indiscriminate violence, belying the selective nature of the protest and unrest. Common sentiment saw the Irish as even more savage than the savages themselves: ‘The murders of this country would disgrace the most gloomy wilds of the most savage tribes that ever roamed in Asia, Africa or America.’ James Johnson, *A Tour in Ireland: With Meditations and Reflections* (London: S. Highley, 1844) 144. The perceived differences
not bereft of a distinct racial element. Since then of course, the idea of race itself has long been shown to be more social construct than scientific actuality. A process of “racialisation”, entailing the social utilisation of the concept of race as a biological category, served to organise and distort perceptions of the world’s various populations. The nineteenth-century evolution from a tribal to a biological understanding of race came to be seen as ‘a pseudo-scientific way to categorise the human species’ that was discredited by the mid-twentieth century, since which time race has been understood as signifying socially constructed identities in a given local setting, with the term “race” falling out of common usage except in the context of racial discrimination.

The broad understanding of “race” offered by international law in the context of “racial groups” and “racial discrimination” is consonant with contemporary race theory that now sees racial discrimination as the product of a process of “racial formation”, whereby a dominant group constructs a subordinate population as racially distinct so as to marginalise it politically between the colonised and their coloniser were forcefully articulated by Benjamin Disraeli, who asserted that the Irish ‘hate our free and fertile isle. They hate our order, our civilization, our enterprising industry, our sustained courage, our decorous liberty, our pure religion. This wild, reckless, indolent, uncertain, and superstitious race has no sympathy with the English character.’ Benjamin Disraeli, ‘Letter XVI of the Runnymede Letters’, The Times, 18 April 1836. A form of west-facing orientalism can be uncovered in the work of Thomas Macaulay, where Ireland’s periodic rebellions are explained by projections of a Celtic disposition towards anarchy and violence in Irish history, and a degraded Celtic character. See, for example, Thomas Babington Macaulay, The History of England from the Accession of James II, vol. III (Philadelphia: Porter & Coates, 1855). For a more measured understanding from British commentators and elected officials who were very much in the minority, see George Poulett Scrope, How is Ireland to Be Governed? (London: James Ridgway, 1846); statement of Sharman Crawford, Hansard’s Parliamentary Debates, third series, LXIX (1843), 1010-1011 (where Crawford, a protestant landlord himself, notes the selectivity of Irish agrarian outrage, and highlights the system of oppression by landlords in Ireland and the lack of any recourse to justice as the cause of such outrage).

176 Virginia Tilley (ed.) et al., Beyond Occupation: Apartheid, Colonialism and International Law in the Occupied Palestinian Territories (London: Pluto, 2012) 109-111, noting that certain groups that in previous eras may have been referred to as “races”, such as Serbs, Bosniaks or Roma, are now generally described in terms considered to be more scientifically and socially appropriate – “ethnicity” or “nationality. On evolving concepts of race, see also Kenan Malik, The Meaning of Race: Race, History, and Culture in Western Society (New York: New York University Press, 1996); Anthony D. Smith, The Ethnic Origin of Nations (Oxford: Blackwell, 1986).
and/or entrench its economic subjugation. Emergency doctrine feeds in to this process in many instances.

Concomitant to the debates over the constitution of race and the role of law in the colonies in the nineteenth century were related debates in the realm of jurisprudential techniques of international law. A decisive realignment had taken place by the end of the century, whereby positivism had unseated naturalism as the discipline’s principal method. The outcome was the reification of the view that law was not given, as the naturalists would have it, but was rather contingent on human societies and institutions for its creation. This emphasis on institutions would underpin positivist constructions of a dichotomy between civilised and uncivilised humankind, as articulated by John Westlake:

No theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce into his picture a difference between civilized and uncivilized man, because it is just in the presence or absence of certain institutions or in their greater or less perfection, that that difference consists for the lawyer.

The connection between “law” and “institutions” and the attention given to the character of such institutions by positivist jurisprudence in turn informed ‘a shift which facilitated the racialization of law by delimiting the notion of law to very specific European institutions.’ This racialisation of law formed part of a ‘complex vocabulary of cultural and racial discrimination’ by which different standards could be applied to different categories of people and upon which determinations of sovereignty could be based. Colonised non-European

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populations, although deemed sufficiently sovereign to legally contract to unequal treaties which expedited their dispossession at the hands of European powers, were excluded by nineteenth century international law from the realm of sovereignty. The acquisition of sovereignty by conquest over non-European territories was thereby vindicated as lawful by positivist jurisprudential thought and practice. Since colonised nations did not enjoy equal legal personality, the imperial powers were not subject to the same legal constraints on the use of violence (to subjugate and pacify native populations) that bound them in their relationships with one another and their own populations. In so far as the incongruity of a conquest-based and racially stratified system of governance with the idea of a rule of law generated discomfort, particularly among some officials in Victorian Britain, one of the ways in which the quagmire was resolved was through the invocation of special powers under a state of emergency. A legal smokescreen was provided, and consciences mollified.

With colonialism, race and sovereignty so entwined in the formation of international legal doctrine, and emergency doctrine rooted in the colonial context, the racial undertones of the state of emergency become unavoidable. The policies adopted in relation to the global “war on terror” in the twenty-first century have assumed a particularly imperial character, with hegemonic securitisation discourse having advocated a reconfigured international legal system harking back to a nineteenth century colonial order of “us” and “them”. In the realm of emergency powers, this has been by no means confined to the temporal and territorial reach of the Bush administration. British practice, as noted above, long treated Catholics in the north of Ireland as a suspect community, and the use of emergency and counter-terrorism powers has been shown to target Asian Muslims and other ethnic minorities disproportionately.¹⁸³ While this is not to suggest a seamless continuity between racialised colonial policy and the increasingly broad net being cast by the contemporary security state, the echoes remain, and are particularly

¹⁸³ See, for example, Vikram Dodd, ‘Asians 42 times more likely to be held under terror law’, The Guardian, 23 May 2005, citing official British government figures.
resonant in states of emergency grounded in ongoing occupation and colonisation processes.

To understand how we arrived at this point by the twenty-first century, a historical exploration of the doctrine of emergency is informative. The next chapter chronicles, in greater detail, the regimes of emergency law—with their complex of apparatuses, institutions and regulations—that emerged as part of empire’s ‘polymorphous techniques of subjugation.’ The evolution of the doctrine of emergency is mapped along a continuum that began with martial law in England and Britain’s “first empire”. It was normalised in Ireland, India and beyond through the enactment of emergency legislative codes over the course of the nineteenth and early twentieth centuries, and culminated in governance by wholesale emergency powers during the 1940s and 1950s in a bid to suppress anti-colonial dissent as the sun began to set on the days of European empire. From this we gain insight into the political and legal context in which the state of emergency came to be embedded in the legal condition of the modern state, as well as the doctrinal corpus of the international legal system for the protection of human rights.

2. THE DOCTRINE OF EMERGENCY: A COLONIAL ACCOUNT

... it seems all clear as daylight. The white man makes a rule or law. Through that rule or law or what you may call it, he takes away the land and then imposes many laws on the people concerning that land and many other things, all without people agreeing first as in the old days of the tribe. Now a man rises and opposes that law which made right the taking away of the land. Now that man is taken by the same people who made the laws against which that man was fighting. He is tried under those alien rules. Now tell me who is that man who can win even if the angels of God were his lawyers.¹

In war everything is lawful which the defence of the common weal requires.²

The employment of exceptional measures to deal with crisis situations is not a modern phenomenon. The genesis of the idea of emergency powers can be traced as far back as the aesymneteia, the “elected tyrant” in whom the people of ancient Greece vested absolutist powers as a temporary exigency when their cities were under threat.³ Analogy is similarly drawn to the institution of the Roman “dictatorship” that spanned three centuries of the Republic,⁴ as well as to the Roman law doctrine of iustitium.⁵ Contemporary conceptions of the state of emergency are also often equated with the civil law notion of the state of siege (l’état de siège) that was spawned during the French Revolution, codified by a Constituent Assembly decree of 8 July 1791, and remains

¹ Ngũgĩ wa Thiong’o, Weep Not, Child (Nairobi: Heineman, 1964) 75.
⁴ For an overview of the functioning of the Roman Dictatorship, see Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Princeton: Princeton University Press, 1948) 15-28. The Roman dictatorship finds itself parachuted into modern popular culture when Gotham City district attorney Harvey Dent alludes to the necessity of Batman operating as a sovereign figure outside the law in Christopher Nolan’s The Dark Knight (2008): ‘When their enemies were at the gates, the Romans would suspend democracy and appoint one man to protect the city. It wasn't considered an honour, it was considered a public service.’ The riposte from his colleague Rachel Dawes captures the hegemonic predilections that have plagued the state of emergency in its various guises since antiquity: ‘Harvey, the last man who they appointed to protect the Republic was named Caesar and he never gave up his power.’
⁵ For an interpretation and analysis of iustitium, see Giorgio Agamben, State of Exception (2003) (trans. Kevin Attell, Chicago: University of Chicago Press, 2005) 41-51. Agamben (at 47-48) asserts that the iustitium, not the Roman dictatorship, is the appropriate parallel to be drawn with the modern state of exception.
embedded in the French constitution.\textsuperscript{6} The present focus, however, is on the British common law traditions of martial law and emergency legislative codes, and their consequent legacy as it relates to Western legality and contemporary international law. The relationship between the state of emergency and the rule of law demands an understanding of colonial history. Although there are commonalities between Roman law concepts and the notion of sovereign exception, the doctrine of emergency as we understand it today owes a heavier debt to more recent imperial systems. And while late French imperialism imposed \(l'état d'urgence\)\textsuperscript{7} in Algeria\textsuperscript{8} and some of its Pacific territories,\textsuperscript{9} an examination of European colonial history reveals the British empire as the site of the most established, sophisticated and pervasive system of emergency rule and legislation. Throughout that empire, the concept of emergency served as a medium through which Britain’s colonial authorities sought to reconcile the unfettered sovereign power of imperial conquest with genuine concerns over the “lawfulness” of their actions and policies vis-à-vis the natives.

While martial law in its original form is distinct from the contemporary

\textsuperscript{6} Article 36 of the 1958 Constitution enables the Council of Ministers to decree a state of siege. For historical analysis of the state of siege, see Théodore Reinach, \textit{De l’état de siège: Étude historique et juridique} (Paris: F. Pichon, 1885).

\textsuperscript{7} In addition to \(l'état de siège\), the French legal system takes in two further incarnations of emergency doctrine. Article 16 of the 1958 Constitution mandates the President of the Republic to exercise such exceptional or emergency powers (\textit{des pouvoirs exceptionnels}) as may be required when ‘the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted.’ This exists in parallel to \textit{Loi n° 55-385 du 3 avril 1955 relatif à l'état d'urgence}, which allows proclamation of a state of emergency (\textit{l'état d'urgence}) by the Council of Ministers. This law was a product of empire, passed initially in the context of the Algerian war of independence. It was later amended and applied in a number of France’s Pacific colonies, as well as in metropolitan France in response to social unrest in 2005.


state of emergency, the production over time of special powers and security maxims has allowed the essence of martial law to be retained in a form more palatable to liberal taste buds. This refinement began with the enactment of emergency legislative codes in Ireland, India and beyond from the nineteenth century, and proliferated with the rise of national security doctrine through the twentieth century. Meanwhile, a wholesale resort to emergency powers was evident in numerous British colonies during the 1940s and 1950s in a bid to suppress opposition to colonial rule as the sun began to set on a fragmenting empire. What emerges from even a brief historical excavation is a picture of the state of emergency as an institutional and often racialised technique of governance, rather than a temporary response to an isolated crisis. The historiography further suggests a variation of forms within emergency discourse, with distinctions evident between the rudimentary and sporadic invocation of martial law on the one hand, and systems of governance in the modern security state—where the emergency becomes a normalised process of managing populations—on the other. While some regimes have continued to invoke martial law in the sense of full transfer to military rule, for the most part the transition from the lexicon and substance of martial law to emergency law was complete by the mid-twentieth century. As we will see in Chapter 3, the proliferation of states of emergency at this time formed the backdrop for the drafting of the foundational international human rights treaties, allowing the response to an imperial crisis of a particular historical moment to be ensconced in liberal human rights discourse.

In the context of this account of colonial legal history, there are two enduring models that illuminate how emergency governance manifests itself today. One is a legislative model, whereby successive exceptional measures are enacted as part of the “normal” lawmaking process. In British colonies where more intricate legal systems had been implanted (Ireland and India are

especially relevant here) a cumulative legislative process emerged and continued throughout the 1800s. Emergency powers became embedded in “normal” law, creating a permanent emergency legal framework distinct from the regime in which martial law operated as an occasional and exceptional measure. This is a model that can be identified in contemporary Britain, where emergency measures have been normalised through parliamentary legislative procedures. Many of the special measures provided for in the north of Ireland in the Emergency Powers Acts of the 1970s were repeatedly renewed and extended, and eventually made permanent features of the legal system, not just in the northern Irish setting but throughout Britain itself by virtue of the Terrorism Act 2000 and subsequent wave of anti-terrorism legislation.

A second, distinct model involves the management of a population through executive decree. A (renewable) declaration of emergency or adoption of emergency law vests special powers in the executive (and/or the military) and involves at least partial suspension of the constitutional order and the regular judicial system (while at the same time often still requiring some form of parliamentary endorsement to maintain the emergency). Although distinct from martial law, this process can be seen as retaining closer ties to its martial law ancestry. This kind of emergency rule materialised in colonies where Britain did not have such an elaborate legal system or judiciary in place, leaving the colonial governor vested with a higher degree of executive discretion. The state of emergency that continued in Kenya throughout the 1950s is a prime example. In post-colonial settings, this model also best captures the regimes of emergency governance that prevailed in the decades leading up to the 2011 uprisings in Algeria, Syria and Egypt.

I. ‘Province and Purpose’: Redeciphering the Puzzle of Martial Law

David Dyzenhaus notes that the invocation of martial law combines two features of law that appear contradictory: ‘an absence of law prescribed by law under the concept of necessity – a legal black hole, but one created, perhaps even in some sense bounded, by law.’ In this context he presents the “conceptual puzzle” of martial law; that is, insofar as martial law involves the use of law to kill off law so as to preserve legal order, can it really be understood as law? Important questions regarding this normative conceptualisation continue to resonate in contemporary debates over emergency powers and anti-terrorism laws, where the traditional powers of martial law reside in less overtly violent forms. Regardless of whether we situate martial law within or beyond the pale of legality, deciphering the underlying purpose of martial law is crucial to an understanding of its enduring legacy and effect.

The official British reaction to the Jallianwala Bagh massacre in Amritsar in 1919—in which 379 Indians were shot dead and thousands more wounded by British forces in a matter of less than fifteen minutes—was to stress the exceptionality of the event and the poor judgment of commanding officer General Dyer, whose actions, it was claimed, had gone ‘beyond the province and purpose of martial law.’ This necessarily gives rise to the question of what is meant by martial law’s “province and purpose”. Implicit in the claims that Dyer went too far is an assumption that exceptional powers such as those invoked under martial law are exercised for the common good of the population, are necessary to preserve legal order, and are therefore legitimate once kept in check and subject to oversight. In practice, however, the deployment of martial law in a context such as India was more commonly aimed at preserving imperial control, rather than the security and well-being of the general population. Here we must consider the fact, for instance, that the “threat” which prompted General Dyer’s exceptional response to general

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strikes in Amritsar was principally a threat to the interests of the colonial government. Such instances, widespread in the colonies, are testament to the underlying effects of racial difference in the constitution of martial law.

The concept of martial law has its roots in medieval England, where it operated as what is now more commonly referred to as “military law” – a system of rules and regulations to maintain the order and discipline of the armed forces. From the fourteenth century, however, in addition to governing the behaviour of soldiers or sailors in active service, it was used to discipline and punish civilians: ‘rebels and traitors, discharged soldiers and sailors, thieves, brigands, vagabonds, rioters, publishers and possessors of seditious books, even poachers, were condemned or threatened with the justice of martial law.’¹⁴ Until the mid-sixteenth century, the invocation of martial law against civilians remained restricted for the most part to instances of war and open rebellion, albeit often as an offensive rather than defensive measure. During the “Pilgrimage of Grace” rebellion in 1537, for example, Henry VIII instructed one of his commanding lieutenants to ‘continue to proceed by martial law until the country was in such terror as to insure obedience.’¹⁵

From the mid-1550s, the Crown authorities gradually expanded the jurisdiction of martial law into spheres which had hitherto been the exclusive domain of regular criminal law. Martial law was invoked as a peacetime measure for the first time against the peasantry in Ireland in the 1550s, before being introduced in England to silence and intimidate those opposed to the Tudors’ religious policies, and to suppress sedition.¹⁶ Such resort to martial law in times of peace continued under subsequent monarchs, most notably the Stuart kings who imposed the “justice of martial law” as a means of punishing civilians, including by execution. Its increasingly liberal use under the Stuarts prompted vigorous debate, culminating in parliament outlawing the peacetime

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use of martial law—with Charles I asked to revoke and annul existing commissions of it—by virtue of the Petition of Right in 1628.\textsuperscript{17} While the legislation may not have been intended to preclude the use of martial law altogether, ‘[u]ndoubtedly martial law as employed in the later sixteenth century against civilians was the target of the prohibition’, and henceforth martial law was only to be applied to govern affairs within the army.\textsuperscript{18} The 1689 Mutiny Act similarly permitted the proclamation of martial law by the Crown only for the regulation of members of the military.

Following the Petition of Right, the use of martial law entailing the concession of civil power to military authorities over civilians fell into desuetude in England.\textsuperscript{19} As Britain continued to build up its colonial empire abroad, however, the government resorted increasingly frequently to martial law in the colonies. It became ‘an essential part of the security apparatus of many parts of the empire.’\textsuperscript{20} Abandoned at home because of its perceived violent and tyrannical character, the imposition of martial law against the native populations in ‘that standard locale of political experimentation, the colonies’,\textsuperscript{21} provoked considerably less reaction from the liberal English intelligentsia. The Petition of Right did not extend to Ireland, where martial law was declared by British rulers in response to the uprisings of 1798, 1803, 1916 and 1920-21.\textsuperscript{22} Martial law was similarly availed of by the British


\textsuperscript{18}See J.V. Capua, ‘The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right’ (1977) 36:1 Cambridge Law Journal 152, 171, note 77: ‘the debates in the Commons seem to suggest that the framers of the Petition did not intend to prohibit the use of martial law in the army when it was actually in the field.’

\textsuperscript{19}Whilst recollections as to when martial law was last invoked in England range from 1689 [James G. Randall, Constitutional Problems under Lincoln (Urbana: University of Illinois Press, 1926) 143] to 1800 [Rossiter maintains that martial law was last resorted to in England on three occasions during the eighteenth century. See Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Princeton: Princeton University Press, 1948) 143], it is not disputed that by the end of the eighteenth century it had been phased out of practice.


\textsuperscript{22}Martial law was kept in force for some four months in 1916 (the Easter rising was quelled in less than a week), and it was under General Maxwell’s regime of martial law that the
authorities in Canada to suppress the Quebec patriots’ rebellion between 1837-39, and routinely in South Africa through the nineteenth and early twentieth century in relation to various confrontations with both indigenous African populations and rival Boer colonialists. The matter of the use of martial law during the Boer War came before the Judicial Committee of the Privy Council in the *Marais* case. The judgment removed a major restriction on the exercise of martial rule powers in holding that the trial of civilians by military tribunals was no longer barred by the fact that the ordinary courts remained open. The *Marais* precedent was followed in the Irish context, allowing martial law to prevail although the ordinary courts continued to function.

Regimes of martial law were also regularly imposed by the Crown’s agents in India and throughout the empire to protect British interests and to suppress native protests against anything from colonial taxes and agrarian policies to maltreatment of slaves. To such various ends, martial law was declared in numerous Caribbean and Asian colonies during the nineteenth century, perhaps most famously in 1865 ‘when a servile revolt in Jamaica was put down with the severity which one might expect from planter militia’.

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28 Including Demerara (1823), Barbados (1805, 1816), Ceylon (1848), Cephalonia (1849), and St. Vincent (1863).

A comparative approach—pitting colonial martial law as it developed through the eighteenth and nineteenth centuries against the domestic response to riots in England during the same time period—illuminates the effect of racial difference on the production of legal constructs.\(^{30}\) In these various instances, the *raison d’être* of the resort to martial law was the preservation of the ‘good order and tranquillity’\(^{31}\) of British rule in the colony concerned; that is, the suppression of disobedience and silencing of dissent against colonial government. Such disobedience and dissent from the native population served to plunge the colony into ‘a state of the greatest alarm and danger’,\(^{32}\) thereby offering justification for recourse to martial law. Once invoked, the result would often be a period of violence under martial law that appeared to transgress the blurry threshold of “necessity”, but was nonetheless justified as legal.

Described as a ‘summary form of criminal justice … independent of the established processes of the common law courts’,\(^{33}\) martial law stood for a vast array of non-statutory, extraordinary powers to deal with violent crises.\(^{34}\) There has always existed a considerable lack of clarity in legal theory as to the scope of those powers and the precise status of martial law, with competing theories as to its foundations and parameters. Many English legal scholars saw martial law as deriving from a common law ‘right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or


\(^{33}\) Joshua Bryant, *Account of the Insurrection of the Negro Slaves in the Colony of Demerara* (Georgetown: A. Stevenson, 1824) 152.

generally of any violent resistance to the law.\textsuperscript{35} In this condition, it operates as a form of self-defence within the rubric of the rule of law, with no normative differentiation between the legal system applicable in normal times and in time of crisis. A.V. Dicey’s argument that it entailed the ‘power of the government or of loyal citizens to maintain public order, at whatever cost of blood or property thus may be necessary’\textsuperscript{36} can be understood as a manifestation of the common law defence of necessity. Necessity, in terms of the latitude allowed for the use of emergency measures within the normal legal system, was construed broadly in this context (‘at whatever cost’). The power to deploy such measures required ‘no special connection with the existence of an armed force’,\textsuperscript{37} and it was contended that every subject of the Crown, whether soldier or civilian, was bound to assist with the suppression of riots. Once the force used was “necessary”, it was considered to have been fully lawful. Where the force used was “excessive”, those responsible were liable to be hauled before a jury for the use of unnecessary force.

An alternative approach understands martial law as constituting a special system of military rule temporarily applicable in place of civilian rule during grave crises, but still nonetheless operating within the overall rule of law, subject to certain constitutional constraints. As such, ordinary law is abrogated ‘only to the extent required by the overriding consideration of preserving the state’,\textsuperscript{38} and the powers that are necessarily invoked, while extraordinary, are not outside the legal system. This interpretation of martial law sits closest to the civil law \textit{état de siège}, under which ‘the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army’.\textsuperscript{39} While military tribunals may supersede the jurisdiction of the courts, the suspension of law involved in the proclamation


of a state of siege is nonetheless constitutionally recognised. Dicey deemed martial law in this sense of government through military tribunals to be ‘unknown to the law of England’ (that is, under English law, authority would never pass entirely to the military), a fact that serves as ‘unmistakable proof of the permanent supremacy of the law under our constitution.’

To highlight this primacy of the rule of law, Dicey invokes the fact that prosecution or punishment of non-military personnel for riot or rebellion by court-martial would be illegal, citing the granting of a writ of habeas corpus in the case of United Irishmen leader Wolfe Tone—on the morning that he was due to be executed in 1798 under a court-martialled sentence—as the epitome of the ‘noble energy with which judges maintained the rule of regular law, even at periods of revolutionary violence’. In asserting that the power of execution rests only in the civil courts, Dicey ‘effectively banishes a form of martial law that had been used in the colonies in his own lifetime’ while reinforcing the common law interpretation of martial law that implies ‘the general prerogative of the Crown to resort to violence to check a challenge to its authority.’

It is worth noting here, however, that Dicey’s argument regarding the primacy of “regular” law is compromised by certain facts which he fails to note. First, Wolfe Tone’s brother Matthew and numerous other leaders of the Society of United Irishmen were executed after being tried by court-martial. In addition, Wolfe Tone’s case was somewhat unrepresentative in that the civil court judge who granted the habeas corpus writ for his release, Chief Justice Lord Kilwarden, was a former mentor of his, with close family connections, who five years previously as Attorney-General had helped Tone to flee to America to escape prosecution.

Dicey’s scholarship is nonetheless heavily relied upon by constitutional scholars to support arguments in favour of a full application of the rule of law and to reinforce the primacy of the judiciary over “extra-legal” executive measures. While the assertion that martial law in the sense of military rule was unknown to English law may have held purchase during peacetime within England itself, it is not just the anomaly presented by the United Irishmen that raises questions as to the applicability of this assertion to overseas territories falling under the jurisdiction of the common law. Although the reference to Wolfe Tone’s case suggests that Dicey considered that his assertion extended to Ireland, he himself added what has remained a much overlooked proviso to his oft-cited mantra on martial law, clarifying that the assertion was intended to have ‘no reference to the law of any other country than England, even though such country may form part of the British Empire.’

From this qualification a picture emerges of the colonial territories as distinct spaces under the British legal system, to which the “supremacy” of England’s rule of law does not extend. It can, in that respect, be understood as an acknowledgment by Dicey of the racially contingent nature of the rule of law in an imperial context. While an examination of the experience of colonialism ‘alerts us to the tendency of the exception to produce bare life’, the preoccupations of the British colonial officials and political classes—particularly by the Victorian era—with the ostensible lawfulness of their

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44 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co., 8th ed. 1915) 283. This disclaimer is absent from earlier editions of Dicey’s text [see, for example, A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co., 5th ed. 1897) 270]; it was presumably added after the reality of the situation elsewhere in the empire had come to Dicey’s attention. Its insertion at a later moment in time than the drafting of the original text may explain Dicey’s inconsistency in having drawn upon an extra-territorial example (Wolfe Tone) to support his point, whilst then acknowledging that the same point does not apply extra-territorially.

actions\textsuperscript{46} suggests that it is overly simplistic to regard the colonies as zones of exception entirely beyond the pale of legality. Legality in the colonies, however, typically operated in the sense of encompassing the natives as objects of sovereign power while excluding them from certain benefits and protections of law; that is, providing a veneer of legality over the exercise of racialised hegemony. The operation of martial law in the colonies in the nineteenth and early twentieth centuries can be seen as a constituent of that veneer.

Beneath the facade lies the intimation that martial law in the colonial context came to connote not law at all, but rather, as Lord Wellington put it in 1851 in relation to the suppression of anti-colonial resistance in Ceylon, the ‘will of the General who commands the army.’\textsuperscript{47} In this light, martial law is not a legal but a sovereign act, a practical means of discharging the common law duty of restoring order,\textsuperscript{48} with the General’s will (which nonetheless has force of law) constrained only by his practical judgment. The exigencies of the situation may justify (and indemnify) “extra-legal” measures, without incorporating them into the ordinary system of laws. This narrative gave rise to definitional quandaries surrounding the extent to which martial law could properly be termed “law”, prompting some to turn to alternative labels such as ‘martial rule’,\textsuperscript{49} and to draw distinction between martial law and military law.\textsuperscript{50} Although such quandaries linger, and with martial law representing in one sense ‘the force of the state at its purest’, it seems reductive to speak of martial law as a manifestation of the law’s absence, given an ‘insistence on

\textsuperscript{46} See, for example, Randy Kostal, \textit{A Jurisprudence of Power: Victorian Empire and the Rule of Law} (Oxford: Oxford University Press, 2005).

\textsuperscript{47} \textit{Hansard}, CXV 880 (1 April 1851).


\textsuperscript{49} Charles Fairman, ‘The Law of Martial Rule’ (1928) 22 \textit{American Political Science Review} 591.

rules that determine the moment of emergency—insistence that the law shall appear at its own vanishing point to determine the rules of its own failure.  

What is clear from the experience of Britain’s colonies, as well as from parallel developments in American law in the nineteenth century is a palpable shift in the logic and focus of martial law from a military to a political register; that is,

... a shift from regulation of the military within the state to regulation by the military of the social order on behalf of the state, especially in times of rebellion or for the suppression of insurrection. ‘Martial law’ moves from being a code for the internal governance of military power to being a rationalization for the use of military power across the face of society in which basic liberties and rights and possibly even the law tout court appear to be suspended.

The underpinning rationale on the part of the state is the desire to vest itself with special powers in order to preserve dominance over a dissenting population. Although martial law in the British context was proclaimed in colonial territories, the common law of England remains implicated as its source. Differences between colonial martial law (where often the entire operation of ordinary law in the territory is overridden or suspended) and responses to domestic unrest (which purport to operate within the rubric of ordinary law) are nonetheless discernible. While the logic of necessity is central to the response of any liberal-constitutional order to crisis, the racialised social settings of the colonies demanded a looser conceptualisation of necessity, one that accounted for the existence of a racially distinct conquering class.

This was the lesson of the “Jamaica affair” of 1865. Even by the looser standards of emergency rule, the proceedings against George William Gordon, a “mulatto” and Jamaican parliamentarian, were suspect. An outbreak of violence at a protest outside the courthouse in Morant Bay prompted the

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proclamation of martial law throughout the county (bar Kingston), driven by white settler fears of a native conspiracy to expel them. Under the imposed martial law regime, hundreds of Jamaicans were killed by the British authorities; some shot on the spot, some executed by court-martial. Gordon was found guilty of treason and complicity with the rebels for inflammatory remarks made before the outbreak of violence—and sentenced to death by court-martial—despite the fact that he had no direct involvement in the violence, was not in Morant Bay when it occurred, and had to be forcibly brought from Kingston into the jurisdiction of martial law.

The justification of such indulgences in this case required a conceptualisation of necessity that inherently entailed a split between the legal identity of the metropole and that of the colony. The racialised nature of the emergency in Jamaica meant that any intended common constitutional identity of metropole and colony was disrupted. The two unsuccessful attempts in England at indicting those involved in the Gordon case demonstrate the point.\(^{54}\) In \textit{R vs. Nelson and Brand},\(^{55}\) Lord Chief Justice Cockburn attempted to persuade the jury that although the circumstances in Morant Bay may have initially warranted the invocation of extraordinary measures, the prolonged continuation of martial law long after the swift subsidence of the rebellion could not be justified as legal. Since common law had been brought to Jamaica by white settlers, Cockburn argued, the emergency must be conducted subject to the standards of English common law. In both this case and the \textit{Governor Eyre} case, however, the juries refused to indict, placing faith in the logic of sovereign might, and granting a wide berth to the operation of martial law. Jurists of the time, such as W. F. Finlason, presented arguments in defence of such a position, critiquing Cockburn for failing to see the situation in its racial context—including the grave threat to the settlers arising from the natives’ numerical superiority—and for naively suggesting that English


common law standards could be applied to a colonial emergency, where a different standard of necessity arises. Unlike the recalcitrant natives, according to Finlason, ‘Englishmen never rise in rebellion.’ The implication of separate legal standards for subjects of the same sovereignty, based on racial origin, is clear.

In December 1865, John Stuart Mill formed the Jamaica Committee together with a number of prominent liberal British intellectuals calling for the relevant colonial functionaries to be held responsible for Gordon’s death. Mill alluded to the racial overtones, noting that the subjection of British officials to prosecution for abuses of power against Negroes and mulattoes would not have been palatable to the English middle classes. As such, ‘the racialism that a colonial emergency made explicit equally barred an effective check on the authority of the state.’ The validity of extraordinary measures to maintain public order, at whatever cost of blood or property may be necessary, as Dicey had suggested—in this instance embodied in the 439 people put to death, 600 publicly flogged and more than 1,000 homes burnt down by British authorities in response to the unrest in Morant Bay—was upheld.

The perceived legitimacy of adopting such measures can similarly be extrapolated from the parliamentary debate regarding the use of martial law to suppress a peasant revolt against colonial taxation and land confiscation policies in Ceylon in 1848. Robert Peel emphasised ‘the right, when the necessity arises … to proclaim martial law for the safety of the colony.’ In such instances, the safety of the colony is clearly understood as denoting the safety of the agents of colonialism and of British interests in the colony, something which Dyzenhaus is conscious of even as his focus remains on

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solving the conceptual puzzle of martial law: ‘The threat of martial law was an essential resource for the officials who maintained the British Empire, as they sought to defend imperial interests in the midst of an often very hostile local population.’

While the contemporary context and form of the emergency may differ from nineteenth-century Sri Lanka or Jamaica, this history nonetheless serves to illuminate the purpose underpinning martial law’s contemporary analogues: declarations of states of emergency, the propagation of self/other binaries to garner popular support from the dominant group for exceptional measures, legislative deference to executive authority in the context of national security, the assumption of sweeping executive powers, and so on.

Although the Jamaica affair highlighted the concerns of the establishment in Britain with the legality of imperial activity and safeguarding the rule of law, the bounds of martial law continued to be stretched in the colonies, the scope of necessity broadened. The vindication of Governor Eyre’s actions in the Jamaica affair signals an expansion of the temporal and substantive structure of martial law. The extraordinary powers invoked were not only approved despite their apparently disproportionate execution, but were allowed to outlive the disruption that triggered their initial deployment. It was in a similar vein that the Privy Council decision in Marais discarded the inability of the civil courts to function as a defining prerequisite for the initiation of martial law. With this anchor uprooted, the net of emergency could be cast wider, with the conditions justifying special powers in the colonies further divorced from the domestic framework. In this regard, the malleability, temporal expansions and changing cognitive conditions of martial law in the colonies can be seen as creating the necessary underlying conditions for atrocities such as the Amritsar massacre in 1919 to occur. In such conditions, violence is enabled by law.


At the same time, a parallel process that may be described as the liberalisation of martial law powers was underway; that is, the ‘generation of new concepts which permitted the key practices of martial law to be carried out under a conceptual form more easily defended on liberal terms.’ With the increasing excesses of martial law invariably came increasing criticism and opposition from liberal quarters. What was needed to subdue such criticism was a new language, ‘less obviously violent and without the military overtones, that allowed the exercise of martial law powers, in other words, but in times of peace.’ And from this emerged the language and logic of emergency powers.

II. Legislative Normalisation: Codifying the Emergency

Justice Blackburn’s opinion in the *Eyre* case emphasised ‘the right of a colonial legislature to statutorily permit martial law’. In contrast, a circular issued to the colonial governors by the Colonial Office in 1867 in the wake of the Jamaica affair characterised any enactment of permanent executive power to suspend the ordinary law of the colony—including ‘legalizing in advance such measures as may be deemed conducive to the establishment of order by the military officer charged with the suppression of disturbances’—as being ‘entirely at variance with the spirit of English law.’ With this, the tenor of British policy remained ostensibly committed to the belief that authority for the violence of martial law was one of unwritten prerogative that could not be stipulated or legislated for in advance.

Practice in certain colonies through the nineteenth century, however, saw the inscription of the emergency condition into permanent legislation to the extent that authorisation of special powers became more ubiquitous than

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ad hoc. The assimilation of emergency powers into written law took initial effect not in the distant corners of the expanding empire, but just across St. George’s Channel. Ireland had been formally annexed by Britain through the Acts of Union in 1800 but continued to be governed as a colonial territory for all intents and purposes. Martial law was imposed by the King’s viceroy in Ireland during the attempted rebellions of 1798 and 1803 in order to ‘punish all persons acting, aiding, or in any manner assisting the said rebellion.’ Between then and the Easter rising of 1916, however, the use of martial law as a reactive measure was foregone in favour of a more constant and pervasive, less overtly violent, framework for dealing with “disturbances” in Ireland. A steady stream of Insurrection Acts, Habeas Corpus Suspension Acts and Coercion Acts flowed across the water from the beginning of the nineteenth century, with the effect that “[d]uring the thirty-five years which preceded Catholic emancipation the ordinary laws of a peaceful country were almost uninterruptedly superseded by a course of exceptional measures.” Robert Peel remarked in the course of the parliamentary debate on the Catholic Relief Bill in 1829 that ‘for scarcely a year during the period that has elapsed since the Union has Ireland been governed by the ordinary course of the law.’

67 Union with Ireland Act 1800, 39 & 40 Geo. III c. 67; Act of Union (Ireland) 1800, 40 Geo. III c. 38. Ireland had been ruled as a feudal lordship by the King of England from 1177 until 1541, and subsequently as a separate kingdom of the English monarch pursuant to the Crown of Ireland Act 1542, 33 Hen. VIII c. 1.

68 43 Geo. III c. 117; 39 Geo. III c. 11.


70 Hansard 2, XX, 741-742, 5 March 1829. Peel’s statement provides a synopsis of the series of Insurrection Acts and Habeas Corpus Suspension Acts during that period: ‘In 1800 we find the Habeas Corpus Act suspended, and the Act for the suppression of the rebellion in force. In 1801 they were continued. In 1802, I believe, they expired. In 1803, the insurrection in which Emmett suffered broke out, Lord Kilwarden was murdered by a savage mob, and both Acts of Parliament were renewed. In 1804 they were continued. In 1805 renewed. In 1806 the west and south of Ireland were in a state of insubordination, which was with difficulty repressed by the severest enforcement of the ordinary law. In 1807, in consequence chiefly of the disorders that had prevailed in 1806, the Act called the Insurrection Act was introduced. It gave power to the Lord-Lieutenant to place any district, by proclamation, out of the pale of the ordinary law, it suspended trial by jury, and made it a transportable offence to be out of doors from sunset to sunrise. This Act continued in force in 1807, 1808, 1809, and to the close of the session of 1810. In 1814 the Insurrection Act was renewed. It was continued in 1815, 1816, 1817. In 1822 Habeas Corpus Act suspended and Insurrection Act again revived, and continued during the years 1823, 1824, 1825. In 1825 the temporary Act intended for the suppression of dangerous associations, and especially of the Roman Catholic Association, was
Formal Catholic emancipation did come with the passing of that bill into law, but ‘proved no more of a panacea than the Union before it’. The shortcomings can be understood in terms not only of the continued disenfranchisement of the Irish peasant population on economic instead of religious grounds, but also of the unrelenting enactment of repressive legislation that followed. By the halfway point of the nineteenth century, Ireland had been ruled under “the ordinary course of the law” for only five of the preceding fifty years. Writing to Karl Marx in 1856, Friedrich Engels placed this in the larger Irish historical context of ‘the English wars of conquest from 1100 to 1850’, arguing that ‘in reality both the wars and the state of siege lasted as long as that’; that is, that some conception of a state of emergency had endured throughout that period.

One of the statutes instituting the system of emergency law, the Act for the More Effective Suppression of Local Disturbances and Dangerous Associations in Ireland 1833, is described by Brian Simpson as ‘the ancestor of the modern code of emergency law.’ The Lord-Lieutenant, the King’s viceroy in Ireland, was empowered to trigger the application of the law by declaring a county to be affected by local disturbances or “dangerous” organisations to the extent that extraordinary powers not allowed for by the common law were required. In other words, the Lord-Lieutenant was essentially mandated to declare what is now understood as a state of emergency; given powers to suppress gatherings and impose curfews, with

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74 3 Will. IV, c. 4.
offences under the Act to be tried by courts-martial. Nothing done under the Act could be questioned in any court of law. On this basis, members opposing the Bill at its second reading in the House of Commons had argued that ‘no measure that had ever been brought forward in that House was so great a breach of the Constitution of this country; for, with one universal sweep, it deprived a great portion of the people of the country of their Constitutional rights.’

Ostensibly, the aim of the legislation was to stifle agitation from the Irish peasantry. There was a distinct divergence of opinion in Westminster, however, as to how much agitation or violence was actually occurring in Ireland at the time. John Key MP spoke of what was reported to him as a state of ‘disgraceful insubordination’ prevailing in Ireland. Joseph Hume MP, on the other hand, relayed accounts that Ireland was in ‘a state of perfect tranquillity.’ Such ambiguity naturally gives rises to suspicions that the degree of existing “insubordination” may have been overplayed with a view to ensuring that more profound political interests would be served by the passing of the legislation. In this regard, the comments of the Earl of Roden in the House of Lords debate shed much light. He spoke of the importance of ‘suppressing agitation in Ireland’ in order to preserve ‘the integrity of the Empire’. The protection of the Protestant interest in Ireland by the British government was essential; otherwise ‘it would be utterly impossible to prevent a Repeal of the Union, or, in other words, a dismemberment of the Empire.’ Viewed through a lens that recognises the primacy of the preservation and integrity of the wider empire, the motivation behind the deprivation of rights that the 1833 Act heralded in Ireland comes into clearer focus. Such an analysis is consonant with the imperial outlook whereby every instance of disorder or opposition in a given colony was ‘considered from an empire-wide

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76 *Hansard*, vol. 16 c. 406, HC Deb 8 March 1833.
77 *Hansard*, vol. 16 c. 450, HC Deb 8 March 1833.
78 *Hansard*, vol. 16 c. 406, HC Deb 8 March 1833.
79 *Hansard*, vol. 16 c. 1312-1313, HL Deb 1 April 1833.
The web of emergency legislation continued to be spun throughout the nineteenth century. The Crime and Outrage Act 1847 was passed during the Great Famine in response to the ‘system of terror’ that Sir George Grey claimed English landlords were being subjected to by the Irish peasantry. This law empowered the Lord-Lieutenant to proclaim districts “disturbed”, and to impose restrictions accordingly. Other notable additions included further Habeas Corpus Suspension Acts (1848-49, 1866-69), as well as the Protection of Life and Property (Ireland) Act 1871 and the Act for the Better Protection of Person and Property in Ireland 1881. Both of the latter allowed for detention of suspects without charge or any form of judicial supervision. Detention was permitted by a Lord-Lieutenant’s warrant, which was in itself considered conclusive evidence of what it stated and of the facts giving rise to the detention.

The role of emergency doctrine in curbing Fenian revolutionary activity was chronicled at the time by Jenny Marx-Longuet in the French socialist press. ‘After the Fenian skirmish’ [in 1867], she wrote, ‘the English government declared a state of general emergency in Ireland. All guarantees of the freedom of the individual were suspended. Any person “being suspected of Fenianism” could be thrown into prison and kept there without being brought to court as long as it pleased the authorities.’ In 1870, Gladstone’s Liberal government ‘introduced a new Coercion Bill for Ireland, that is to say, the suppression of constitutional freedoms and the proclamation of a state of emergency.’ Marx-Longuet emphasises the longevity of the emergency

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81 Hansard, 20 November 1847, cited in Isaac S. Leadam, Coercive Measures in Ireland, 1830-1880 (London: National Press Agency, 1886) 20. It bears noting that this peasantry was then, according to the London Times, a populace that Britain and the landlords had exploited to the point of “poverty, disaffection, and degradation without a parallel in the world.” The Times, 24 March 1847, quoted in Christopher Morash & Richard Hayes (eds.), Fearful Realities: New Perspectives on the Famine (Dublin: Irish Academic Press, 1996).
82 34 Vict. c. 25 (the “Westmeath Act”).
83 44 Vict c. 4.
paradigm in Ireland, and its nexus to both British land policy and the suppression of anti-colonial dissent.

Theoretical fiction has it that constitutional liberty is the rule and its suspension an exception, but the whole history of English rule in Ireland shows that a state of emergency is the rule and that the application of the constitution is the exception. Gladstone is making agrarian crimes the pretext for putting Ireland once more in a state of siege. His true motive is the desire to suppress the independent newspapers in Dublin. From henceforth the life or death of any Irish newspaper will depend on the goodwill of Mr. Gladstone. Moreover, this Coercion Bill is a necessary complement to the Land Bill recently introduced by Mr. Gladstone which consolidates landlordism in Ireland whilst appearing to come to the aid of the tenant farmers.86

The Prevention of Crime (Ireland) Act 188387 conferred ‘a variety of other repressive powers’ on the colonial authorities in Ireland, including the abolition of jury trial for certain offences, the ability to prohibit meetings, ban or seize newspapers and pamphlets, and make arrests without warrant of suspects found outdoors at night time.88 The trend continued through the turn of the century and amid rising cultural, political and socio-economic resistance to British rule. The last major act of legislation that allowed for emergency regulations before Irish independence was the Restoration of Order in Ireland Act 1920.89 It marked an attempt to increase convictions of Irish nationalist leaders while averting the need to impose martial law.90 Ireland from 1800 until its independence in 1922 can therefore be seen as an embryo in which the institutionalisation of emergency powers and the notion of a permanent exception were fostered.

The legislative enshrinement of emergency powers in nineteenth-century Ireland was mirrored by parallel policies in British India.

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87 46 Vict. c. 25.
89 10 & 11 Geo. V c. 31.
90 In the latter respect it was ultimately unsuccessful; the British authorities declared martial law in December 1920 as Irish resistance escalated.
Significantly, the Bengal State Prisoners Regulation 1818\(^9^1\) was an early embodiment of one of the modalities of emergency rule—detention without trial—that was subsequently transferred from India to Ireland in the latter half of the nineteenth century.\(^9^2\) With the regimes of emergency rule developing concomitantly in the two colonies, an imperial cross-pollination between the laws and policies of both is discernible, to the mutual benefit of colonial administrators in each. This notably extends well beyond the realm of emergency law itself; the extent of the parallels, affinities and connections between colonial Ireland and India across a wide socio-cultural and juridico-political spectrum is striking.\(^9^3\) The change in colonial attitudes to indigenous laws in both countries during the nineteenth century, for example, is a case in point. The British project of transcribing, translating, editing and publishing the Irish Brehon law,\(^9^4\) was influenced by the prevailing practice of codifying indigenous and religious laws in India. Where the Brehon laws had long been dismissed by English authorities as “lewd” or “barbarous” custom, the

\(^9^1\) Bengal Regulation III of 1818: ‘A Regulation for the Confinement of State Prisoners’ (17 April 1818), 1 Burma Code 209.


\(^9^3\) See, for example, S.B. Cook, Imperial Affinities: Nineteenth-Century Analogies between India and Ireland (New Delhi: Sage, 1993); Michael Holmes & Denis Holmes (eds.), Ireland and India: Connections, Comparisons, Contrasts (Dublin: Folens, 1997); Tadhg Foley & Maureen O’Connor (eds.), Ireland and India: Colonies, Culture and Empire (Dublin: Irish Academic Press, 2006), which includes essays on connections and resemblances in such diverse spheres as: the numerous high-ranking civil servants in India provided by the Anglo-Irish aristocracy; the experiences of British colonial administrators such as Charles Trevelyan and Lord Cornwallis who served in both Ireland and India, as did Catholic Irish imperialists such as Antony MacDonnell; the contribution of Irish missionaries in India to the spiritual ‘civilising’ mission; the parallels between Hinduism and Orange order loyalist ideologies and customs; the cultural connections and anti-imperial ties that grew out of the work of activists such as James and Margaret Cousins, statesmen such as Éamon DeValera and Jawaharlal Nehru, and poets such as W.B. Yeats and Louis MacNiece.

\(^9^4\) Brehon Law was the indigenous legal system that governed civil life in early Ireland. It comprised the statutes and decisions of the Brehon (judges) in the oral and customary Gaelic tradition. This secular civil code existed in parallel to canon law through the early Christian (5th–9th century) and early Medieval (9th–12th century) periods. Brehon law was partially usurped by the imposition of English law following the Anglo-Norman invasion in 1169 but endured until the 17th century, by which time it was fully supplanted by English common law. See, for example, D.A. Binchy (ed.), Corpus Iuris Hibernici (Dublin: Dublin Institute for Advanced Studies, 1988); Fergus Kelly, A Guide to Early Irish Law (Dublin: Dublin Institute for Advanced Studies, 1988); Noelle Higgins, ‘The Lost Legal System: Pre-Common Law Ireland and the Brehon Law’ in David A. Frenkel & Carsten Gerner-Beuerle (eds.), Legal Theory Practice and Education (Athens: Atiner, 2011) 193–205.
alternative imperial strategy that emerged in the 1850s of ‘governing Ireland according to Irish ideas’ and conferring the dignity of law on the newly Anglicised transcripts was informed by earlier practice in India. In this sense, correlations between a prevailing orientalism and an analogous form of “celticism” can be mapped.

By the late eighteenth century, the process of law-making as a manifestation of sovereign right was being enthusiastically pursued in India. Lord Cornwallis’ code of administrative regulations for Bengal in 1793 was followed by the substantial extension of the jurisdiction of the Bengal criminal courts, while annexed areas outside the Bengal administrative framework were becoming ‘a theatre for experiments of incipient legislation’. T.B. Macauley would subsequently begin his project to formulate a comprehensive criminal code for India. The ambitious process of legal codification generally, spanning from the 1830s through to the 1880s was an appropriate companion to the orientalist drive for power/knowledge in the sociological and cultural spheres. The gift of justice and a rule of law was put forward as a central facet of the mission to civilise India, with the notion of British “paramountcy” as the basis of a just and benevolent rule widely referred to in the context of a

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96 On the concept of orientalism as the development of Western knowledge and scholarship of the East for the purpose of exercising colonial hegemony, see Edward W. Said, Orientalism (London: Penguin, 1978). On a separate but related note, the significant Anglo-Irish scholarly contribution to the field of orientalism itself is worth recalling, particularly through the work of George Grierson and William Crooke in the fields of anthropology and linguistics. See, for example, George Grierson, Linguistic Survey of India (1903-1922); William Crooke, Popular Religion and Folklore of Northern India (1892); William Crooke, Tribes and Castes of Northern India (1894). For more on this topic, see also M. Mansoor, The Story of Irish Orientalism (Dublin: Hodges, Figgis, 1944); Joseph Lennon, Irish Orientalism: A Literary and Intellectual History (Syracuse, NY: Syracuse University Press, 2004).

97 Such as Delhi, annexed in 1803; Sagar and Narbada, annexed in 1818; Assam, Arakan and Tenasserim, annexed in 1824.


humanitarian—indeed, *humanising*—colonialism. As Elizabeth Kolsky’s study of the justice system in colonial India demonstrates, however, ultimately ‘law’s paramount purpose was to maintain Britain’s hold.’ Kolsky elaborates racial violence as an endemic rather than ephemeral part of imperial rule, exemplified as much by the quotidian acts of abuse, assault and murder by white planters and paupers as by the major military operations, mutinies and massacres that historians have tended to concentrate on. According to James Fitzjames Stephen, the two pillars supporting the imperial bridge, ‘by which India has passed from being a land of cruel wars, ghastly superstitions, and wasting plague and famine, to be at least a land of peace, order, and vast possibilities’, were force and justice. By Fitzjames Stephen’s reckoning, ‘conquest [is] an essential factor in the building up of all nations … Force without justice was the old scourge of India; but justice without force means the pursuit of unattainable ideals.’ Yet in light of the contrasting nature of these pulls, the question arises, ‘[h]ow could Britain forcibly cement its power in India while simultaneously ensuring justice?’

Kolsky’s interrogation of the justice system as it applied to natives and Europeans respectively confirms that, in one sense, it could not. The impunity afforded to the latter group reveals that ‘the scales of colonial justice were imbalanced by the weight of race and the imperatives of imperialism.’ In another sense, however, a solution to the apparent quagmire was developed by

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100 Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998) 234. Singh highlights colonial campaigns to abolish sati and to eliminate thuggee against a background of paramountcy of British values, but points out that on other issues—such as that of capital punishment—the moral high ground of humanitarianism was not so easily claimed from the natives.


Fitzjames Stephen and the British legal apparatus in India. This came through the development of a doctrine of special powers and emergency measures as a means by which the unchecked use of force by the military and police could be facilitated, yet kept within the orbit of a rule of law regime. The doctrine of emergency can thus be seen as a flying buttress linking Fitzjames Stephen’s twin pillars of force and justice. Emergency powers would become an integral element of the colonial rule of law and pivotal to the sustenance of British control in India.

The posturing of a legal system that encompassed both the constancy associated with a rule of law and the flexibility putatively required to substantiate colonial control was accentuated against the backdrop of a pre-colonial “Oriental despotism”. The figure of Eastern despotism as represented in classical works by Aristotle,\(^\text{106}\) and in the foundational Western legal canon by Montesquieu,\(^\text{107}\) is projected onto India as a counterpoint to English legality. The notion of an equitable and transparent process of law, provided initially under the British East India Company and subsequently under the colonial state, is proffered as the antithesis of the cruel, ambiguous and arbitrary nature of indigenous laws. There is, however, a convergence of opinion in the critical literature on colonial law in India as to the duplicity of such virtuous pretences. Radhika Singha shows that ‘the new rulers would also draw upon some of the discretionary powers that they had castigated as a mark of despotic arbitrariness’,\(^\text{108}\) while Nasser Hussain points to the ‘shadowy presence of despotism within the conceptualization of an English

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\(^{106}\) Aristotle’s orientalist attitudes come through in his depictions of natives of Asia as servile, willing to endure despotic rule without protest: they ‘are wanting in spirit, and therefore they are always in a state of subjection.’ He describes this difference in condition from European peoples as both legal and hereditary: ‘For barbarians, being more servile in character than Hellenes, and Asiadics than Europeans, do not rebel against a despotic government. Such royalties have the nature of tyrannies because the people are by nature slaves; but there is no danger of their being overthrown, for they are hereditary and legal.’ Aristotle, *Politics* (Benjamin Jowett trans., Kitchener: Batoche Books, 1999) 162, 73.

\(^{107}\) Of Montesquieu’s three kinds of government—republican, monarchic and despotic—it is the latter, based on fear, ‘without law and without rule’, which he suggests is most suitable for the peoples of the East where ‘domestic servitude and despotic government have been seen to go hand in hand in every age.’ Montesquieu, *The Spirit of the Laws* (1748) (Cambridge: Cambridge University Press, 1989) 10, 270.

constitutionalism.\textsuperscript{109} David Washbrook concurs; ‘British-Indian law became less a tool of liberty than an instrument of despotism.’\textsuperscript{110}

While the rule of law in British India was rife with fundamental contradictions stemming from racial privilege—including conditions of forced labour and servitude\textsuperscript{111}—such colonial despotism could nonetheless ‘be extolled as superior to the arbitrary oriental variety’\textsuperscript{112} precisely because it was rooted in and tempered by law. By consequence, Macauley could speak—without irony—of British government of India as ‘an enlightened and paternal despotism.’\textsuperscript{113} The doctrine of emergency is entwined in such a despotism of law—in the transition from a personalistic sovereign despotism to a more diffuse system of bureaucratic-regulatory despotism. By the late eighteenth century, British involvement in India had evolved from the purely commercial interests of the Company to an all-encompassing regime of governmentality; the state charging itself with a comprehensive civilising mission. Confronted with certain levels of resistance to that regime, the colonial administration justifies reliance on despotic practices on the basis that they are appropriate to India’s socio-cultural environment—Britain is merely ‘embracing despotism as a cultural necessity’\textsuperscript{114}—but are nonetheless implemented in an enlightened form through the deployment of law-based emergency powers.

Despite this narrative, Britain’s regime in India was ultimately one of conquest and the emergency regulations did entail a rule of force as much as a rule of law, highlighting perpetual tensions that pulled the colonial authorities between the two. The Janus-faced nature of British rule has prompted familiar


\textsuperscript{111} See, for example, Ranajit Guha, ‘Dominance without Hegemony and its Historiography’ in Ranajit Guha (ed.), \textit{VI Subaltern Studies} (Delhi: Oxford University Press, 1989).


\textsuperscript{113} Hansard, 1833, quoted in Radhika Singha, \textit{A Despotism of Law: Crime and Justice in Early Colonial India} (Delhi: Oxford University Press, 1998) vii.

descriptions of a “rule by law”, whereby ‘while the state may make law for its subjects, it posits itself as above that law and unaccountable to it.’\textsuperscript{115} The extent to which the jurisprudence of emergency distorts our understanding of the rule of law is highlighted by Hussain, who can neither conclude that the British failed to establish a rule of law in India, nor that they were entirely successful in doing so.\textsuperscript{116} Although the elaborate British legal apparatus in India included a well-developed court system, the Bengal State Prisoners Regulation 1818 provided for the judiciary to be bypassed altogether in the case of pressing ‘reasons of state’.\textsuperscript{117} Echoing the primary motif of colonial martial law—the interests of the empire—the law invokes ‘the security of British dominion from foreign hostility and internal commotion’ as grounds upon which it is ‘necessary to place under restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reason be unadvisable or improper’.\textsuperscript{118} Thus, the machinery of internment without charge or trial, ‘the most sought after emergency power’,\textsuperscript{119} was institutionalised in the empire. Such non-justiciable powers of detention went beyond what would have been permissible in Britain, demonstrating the effect of an “emergency” context on the so-called “non-repugnance” dictum, according to which locally enacted laws were not to


\textsuperscript{117} Bengal Regulation III of 1818: A Regulation for the Confinement of State Prisoners (17 April 1818), 1 Burma Code 209, Article 1. The colonial technique of placing certain ‘acts of state’ beyond judicial purview persists in the laws of military regimes today. See, for example, Israel’s Civil Wrongs (Liability of State) Law 1952 (amended, \textit{inter alia}, during the second Palestinian intifada in 2002), which immunises the state from liability for damages arising from “acts of war”, broadly defined. This has greatly limited the ability of Palestinians to claim compensation from the State of Israel for damages suffered during military incursions. In a civil case brought by the family of an American peace activist killed by the Israeli military forces in the Gaza Strip, the state has similarly relied on “act of state” and “act of war” defences. State of Israel, Amended Writ of Defence in \textit{Corrie v. State of Israel} [CA 371/05], filed 26 October 2008.

\textsuperscript{118} Bengal Regulation III of 1818: A Regulation for the Confinement of State Prisoners (17 April 1818), 1 Burma Code 209, Article 1.

conflict with the basic principles of English law.\textsuperscript{120} Again, in this regard, the colony is rendered as a distinct emergency zone. Significantly, though enacting exceptional measures, the 1818 Regulation was not subject to temporal limitation or review, nor to a specific threat; it was enshrined as a permanent part of the Bengal legal system.

It is significant that a host of such regulations pre-date the Indian Revolt of 1857, typically presented as a definitive paradigm-shifting event in the imperial administration of India. While profound institutional changes were certainly effected in the aftermath of 1857, the practical consequences in the sphere of special powers entailed an expansion and consolidation of existing powers, rather than the initiation of an entirely new framework. Formal sovereignty was officially transferred from the East India Company to the Crown (where it had long resided \textit{de facto}), and the Indian Councils Act 1861 enlarged the legislative and executive powers of both the governor-general and governing council appointed by the Secretary of State for India.\textsuperscript{121} This was not a radical departure from the thrust of earlier Regulating Acts, however. The State Prisoners Act 1858\textsuperscript{122} simply extended the application of the 1818 Bengal State Prisoners Regulation throughout the whole of British India.\textsuperscript{123} Significantly, it also overturned existing regulations prohibiting any detention that breached the procedures of arrest according to British law,\textsuperscript{124} directly foreclosing the non-repugnance principle. A plethora of legislation had also been passed in 1857 which authorised various forms of emergency

\textsuperscript{120} English law was not transferred directly to the colony by the British parliamentary statutes relating to India. Instead, those statutory acts bestowed lawmaking power on the colonial government itself but always with a “non-repugnance” clause. The Regulating Act 1773, for instance, authorised the governor-general to enact ordinances and regulations within his jurisdiction, with the proviso that they could not be ‘repugnant to the laws of the realm.’ 13 Geo III, c. 63, s. 36.

\textsuperscript{121} 24 & 25 Vict., c. 67 s. 22.

\textsuperscript{122} Act III of 1858 - State Prisoners Act (23 January 1858), I.O.R. V/8/36.

\textsuperscript{123} The Regulation would remain in force until after Indian independence. In addition to Ireland, other colonial territories were subject to similar legislation later in the nineteenth century. See, for example, the Native Courts Regulations of East Africa 1897, which allowed for preventive detention or internment.

\textsuperscript{124} Section 1 of the Act, for instance, repealed Regulation XXV of the Bombay Code which had provided for arrest and confinement in line with British legal principles.
action and summary justice. The State Offences Act 1857\textsuperscript{125} empowered local district executive governments to proclaim a state of rebellion, and respond accordingly. The Heinous Offences Act 1857\textsuperscript{126} provided for trials by court martial, as did the Military and State Offences Act 1857.\textsuperscript{127} This essentially rendered reliance on martial law ‘in a strict sense unnecessary, though what was involved was a form of statutory martial law.’\textsuperscript{128} Repressive emergency measures continued to be legislated for throughout the months following the suppression of the revolt, including through the revealingly titled Act for Confiscation of Villages involved in Rebellion.\textsuperscript{129}

Hussain discusses a number of cases adjudicated in the period that followed, most interesting of which, for our present purposes, is \textit{In the Matter of Ameer Khan}.\textsuperscript{130} Khan had been arrested and imprisoned without warrant and without details of any charges, the only information given to prison officials being that the detention was pursuant to special orders made under the 1818 Bengal State Prisoners Regulation. The case was a petition for a writ of habeas corpus. It bears iterating that, as legislative developments in Ireland in the early nineteenth century showed, the suspension of the right of habeas corpus is generally indicative of an emergency law framework. The technique of suspending habeas corpus had been developed in England in the seventeenth century, and subsequently exported to the colonial jurisdictions.\textsuperscript{131} Sharpe duly notes that ‘most of the habeas corpus cases challenging executive power arise in times of war and emergency, and conversely, the most significant block of cases interpreting emergency powers are the habeas

\textsuperscript{125} Act XI of 1857 - State Offences Act (30 May 1857).
\textsuperscript{126} Act XVI of 1857.
\textsuperscript{127} Act XIV of 1857.
\textsuperscript{129} Act X of 1858, An Act for Confiscation of Villages involved in Rebellion, I.O.R. V/8/36.
To consider the right of habeas corpus in a racialised colonial setting, moreover—‘to examine the writ of liberty in a regime of conquest’ as Hussain succinctly puts it—‘is to enter the quality of an oxymoron.’ From a colonial perspective, social and political conditions in the colony render habeas corpus impractical and inapplicable. At the same time, its ideological and institutional centrality to judicial power and the operation of the law itself renders arbitrary exclusion problematic. What is required, by consequence, is ‘the maneuver of suspension.’

In the context of British constitutional law, such suspension emanates from a temporary threat and accordingly must be temporary itself. Justice Norman’s ingenuity in *Ameer Khan* was to frame the vulnerable colonial condition as subject to an indefinite threat by its very nature. An indefinite suspension is the logical upshot:

... if the danger to be apprehended ... is not temporary, but from the condition of the country must be permanent, it seems to me that the principles which justify the temporary suspension of the Habeas Corpus Act in England justify the Indian Legislature in entrusting to the Governor General in Council an exceptional power.

While the necessity of suspending legal protections in the colony is equated with that which may occur in the metropole, the crucial temporal aspect of colonial emergency is revealed; it is intrinsically permanent. Highlighting this as a watershed moment in colonial jurisprudence, Hussain explains the decision as the logical conclusion, rather than abrogation, of the imperial rule of law. He rightly notes that the decision foreshadows much later British statutes which allow for the extended duration of emergency powers; the Northern Ireland (Emergency Provisions) Act 1973 and the Prevention of Terrorism (Temporary Provisions) Act 1974 can be cited by way of...

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135 In the Matter of Ameer Khan [1870] 6 Bengal Law Reports 392, 455.
example.\textsuperscript{137}

In addition to this permanence of emergency powers, the roots of another prevalent feature of contemporary emergency discourse—the notion of the suspect community\textsuperscript{138}—can be identified in the legal system of colonial India. The phenomenon of the “criminal tribe” is among the most striking features of European imperial legal history. Born of encounters between British officers and peoples whom they profiled as “born thieves”\textsuperscript{139} in the expansive countryside of northern India in the late eighteenth and early nineteenth centuries, by the time of independence in 1947 India was home to an astounding three and a half million individuals belonging to 128 tribes or castes ordained by the colonial state as collectively criminal.\textsuperscript{140} That is, one in every hundred persons in the vast sub-continent was a criminal by birth.

The process by which this point was reached can be seen as imperial law’s objectification of the colonised in extremis. Conquered and othered, the native is rendered unequal by law; the most wretched among them placed on the bottom rung of the civilisational ladder and cast as vagrants, vagabonds, thugs. Andrew Major explains the colonists’ misconstructions of native identities, and alludes to the colonial, rather than criminal justice, underpinnings of the hereditary criminal discourse:

In the mistaken belief that these tribes were directly linked to the infamous confederacies of the Pindaris (raider remnants of the Maratha armies) and the Thugs (dacoits, or highway robbers, who, the British believed, combined robbery with ritual murder in honour of the goddess Kali), the British quickly labelled them as the ‘notorious


\textsuperscript{139} As one report put it: ‘To be a Harnee, a Sansee, a Booriah,—men whose ostensible livelihood is procured by hunting and bird-catching, who have no generally fixed abode, yet who nevertheless are often chosen as watchmen, to be one of these is to be known for many miles round as a born thief and vagabond.’ \textit{General Report on the Administration of the Punjab and its Dependencies for 1858-59} (Lahore, 1859) para. 14.

tribes’ and ‘dangerous classes’ whose threat to colonial authority had to be countered. While Simpson identifies the 1830s campaign to eradicate the Thugs as the ‘starting-point’ from which the notion of criminal tribes sprung, the beginnings of the phenomenon can in fact be detected as far back as 1772 legislation under Company rule. Collective punishment of those associated with a “dacoit” was provided for: ‘the village of which he is an inhabitant, shall be fined ... the family of the criminal shall become the slaves of the state; and be disposed of, for the general benefit and convenience of the people, according to the discretion of the Government.’ The Company courts justified the construction of hereditary and collective criminality on the basis that the dacoits of Bengal:

… are robbers by profession, and even by birth; they are formed into regular communities, and their families subsist by the spoils which they bring home to them; they are all, therefore, alike, criminal wretches, who have placed themselves in a declared war with our Government, and are therefore wholly excluded from every benefit of its laws.

Singha is quick to grasp the mendacious nature of the legal discourse of Company officials, who routinely denounced Indian rulers for arbitrary interventions in the judicial process while themselves instituting a system that intrinsically vitiated the judicial process, exuding a discernible friction ‘between the premise of individual responsibility for a specific offence, and the deduction of criminal intention from membership of a particular community, or a suspect way of life.’ This tension permeated more than a

143 Article 35, General Regulations for the Administration of Justice, 21 August 1772. Such collective punishment of family and associates has found contemporary parallels in Israel’s “punitive” demolitions of the homes of relatives of Palestinian militants during the second intifada.
144 Committee of Circuit to Council at Fort Williams, 15 August 1772, J.E. Colebrooke, Supplement to A digest of the regulations and laws (1807) 13.
century’s policing of criminal communities, simmering beneath a thin mask of cultural particularity invoked to justify pre-emptive measures against the felonious ethnicities. Nomadic lifestyles and inferior socio-economic standing would trigger not just social stereotyping and associations with vagrancy and predatory crime; such associations would be enshrined in law, with incarceration not requiring the commission of any specific offence but instead flowing from affiliation with a group or class endowed with innate nefarious tendencies. Law functions as propagator of the colonial racial schema, evoking Fanonian imagery of the native, in the European imagination, as ‘a sort of quintessence of evil’; the North African as a ‘criminal by vocation’; the fellahin as ‘ambitious peasants, criminals’; the Algerians as ‘born slackers, born liars, born robbers, and born criminals.’

Codification continued with Regulation XXII of 1793 facilitating the coercion of suspect tribes into forced labour, and the sweeping Thuggee Act 1836, which criminalised membership of ‘any gang of Thugs’ with retrospective (‘either before or after the passage of this Act’) and extra-territorial (‘either within or without the Territories of the East India Company’) effect with a punishment of mandatory life imprisonment with hard labour. On the basis of the legislation, communities were ‘socialized into criminality’ as part of the broader process of colonial management:

The theme of criminal communities was also used to justify special executive powers or punitive drives of various sorts. The targets of such measures were supposed to have placed themselves outside the pale of society, thereby forfeiting their claim to the protection of regular procedure. In very general terms, such drives can be attributed

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148 ‘Regulations for the Police Collecterships of Bengal, Bihar and Orissa’.

149 Act XXX of 1836.
to the wider process of colonial pacification, to the effort to make the subjects of empire both taxable and ‘policeable’.\(^\text{150}\)

Assuming at least part of the design was the pacification of the native, it is of course far less burdensome to condemn people for membership of a vaguely-defined communal criminal enterprise than to prove individual culpability for particular offences. The case for special measures to target specific castes or tribes rested on the argument that such groups fell outside the pale of society, and were imbued with inveterate villainous tendencies: ‘The Pindaris were the ‘dregs’ of society, the thugs originated from the parties of ‘vagrant’ Muslims, the Badhaks were outcaste Hindus and Muslims.’\(^\text{151}\)

The Criminal Tribes Act 1871,\(^\text{152}\) drafted by Fitzjames Stephen, served to collate and institutionalise earlier disparate and ad hoc measures of disciplining and controlling such delinquent communities. Local government authorities received powers, in conjunction with the Governor-General, to classify as criminal any tribe, gang or class of persons considered to be ‘addicted to the systematic commission of non-bailable offences’ and to publish notification of such classification in the Local Gazette, with the added proviso such measures were immune from legal challenge: ‘No Court of Justice shall question the validity of any such notification … every such notification shall be conclusive proof that the provisions of the Act are applicable to the tribe, gang or class specified therein.’\(^\text{153}\) On the basis of this racialised typecasting, designated groups were subject to a coercive architecture of measures controlling their registration, residence, movement, labour and family lives, with the Act also entailing a presumption of the guilt of individual tribe members for the commission of an offence under the Penal


\(^{151}\) Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998) 189, and at 208: ‘The drawing of the history of thuggee into the distant past, the recording of details about this “religion of murder”, its omens, rites and prohibitions, heightened the impression of an entrenched system which only the most rigorous measures could combat.’

\(^{152}\) Act No. XXVII of 1871 (‘An Act for the Registration of Criminal Tribes and Eunuchs’).

\(^{153}\) Sections 2, 5, 6.
And so it continued. The 1911 Criminal Tribes Act delegated additional powers of classification and surveillance to local authorities. A similar legal path was followed in Burma, enabling the controlled residence or detention of entire “crime-addicted” tribes.

This facet of the colonial criminal justice system in the British Raj can be deconstructed with reference to Foucault’s power/knowledge paradigm and Edward Said’s conception of orientalism. Based on Said’s premise that all knowledge is historically and politically contingent, and in a colonial setting where the East exists as an object of Western knowledge, the development of colonial knowledge becomes entwined with colonial power itself. While domination and colonial rule in general is justified by Eurocentric assumptions as to the superiority of Western socio-cultural values and the institutions of liberal democracy and capitalism, the moral justifications advanced by colonial agents for the criminalisation of certain native groups emanates from an orientalist appropriation of the caste system and other indigenous structures and practices. A racialised discourse was certainly central to imperial domination in India. The “criminal classes” discourse in Victorian England illustrates that the construction of otherness was not a purely racial fabrication, however. Social class dynamics—more prominent in other imperial contexts where the East-West dichotomy was absent or less pronounced (without vitiating the role of race entirely)—were also germane to the exceptional persecution of members of criminal tribes as against other natives of the same

154 Sections 7, 8, 9, 13, 14, 17, 18, 20.
155 See, for example, Kachin Hill Tribes Regulation 1895, 1 Burma Code 379, Regulation I of 1895; Burma Frontier Tribes Regulation 1896, 1 Burma Code 406, Regulation II of 1896; Criminal Tribes Act 1924, 1 Burma Code 410, India Act VI of 1924.
157 See, for example, Constulary Force Commissioners, First Report of the Commissioners Appointed to Inquire as to the Best Means of Establishing an Efficient Constabulary Force in the Counties of England and Wales (London: Charles Knight & Co., 1839); Henry Mayhew, London Labour and the London Poor: A Cyclopaedia of the Conditions and Earnings of those that will work, those that cannot work and those that will not work, Vol. IV - Those That Will Not Work, Comprising Prostitutes, Thieves, Swindlers and Beggars (London: Griffin, Bohn & Co., 1862).
broad “racial” composition.

While the brutality of empire and martial law in India is etched in our historical consciousness courtesy of particularly violent eruptions such as the 1857 Revolt or the Amritsar massacre in 1919, a more insidious politics of emergency was inscribed into the ongoing policing of society by pervasive emergency regulations and the exclusion of particularly “uncivilised” tribes. In pursuit of both of the latter policies, a constant threat to colonial interests was constructed. Returning to the wider imperial panorama, the Earl of Roden’s statement emphasising the integrity of the empire is largely representative of the thinking of the British political establishment of the time, and helps to explain why such extensive measures were taken to legislate for the suppression of any form of opposition to colonial rule in Ireland, India and beyond. There was a broader empire at stake, and palpable fear of a domino effect. Ireland had been subjugated by Britain for longer than most of its colonies and this was reflected in increasing levels of anti-colonial sentiment. If Ireland were allowed to splinter, this could prompt implications for Britain elsewhere in the empire. It was primarily for this reason that Gladstone’s bill proposing “Home Rule” for Ireland in 1886 was defeated. The majority of MPs feared that a partially independent Ireland could herald the beginning of the dismemberment of the empire.

A domino effect of another sort can be identified, however, in the fanning out of emergency powers. Martial law—long abandoned on mainland Britain—had been normalised in the overseas empire and unfurled throughout its vast reach, yet it remained a somewhat amorphous concept. As the traditional common law propensity to avoid codification of laws was engulfed by a rising positivist tide through the nineteenth century, the British authorities had steadily developed the portfolio of emergency legislation in Ireland and India. This was a more refined and defined alternative to martial law, and more constant in its application. The essence was similar, however; emergency laws created ‘a form of statute-based martial law in which the will
of the executive is supreme.'\textsuperscript{158} Whereas repressive activities could be discharged under martial law not because they were explicitly authorised but because those affected had no legal remedy, the passing of emergency legislation allowed for their explicit authorisation. Such a system, it transpired, was exactly what was seen to be needed at home in Britain when the First World War broke out. The British authorities and military desired a broad and clear mandate to act decisively. The matrix of legislative emergency powers enacted in Ireland and India—most notably the Act for the More Effective Suppression of Local Disturbances and Dangerous Associations in Ireland 1833—provided a ready-made normative starting point.

While the nineteenth-century Irish legislation had gelled into a layered stockpile of special powers, it had stopped short of providing for the delegation of legislative power to the executive branch. The onset of the war, however, prompted the institution of a comprehensive code of emergency powers under the aegis of enabling ‘parent’ legislation. In such a configuration, the enabling legislation permits the executive to introduce new and unanticipated emergency regulations and to amend existing ones without the direct involvement of the regular legislature.\textsuperscript{159} In Britain, this code assumed the form of a series of Orders in Council spawned from parent Defence of the Realm Acts (DORA) 1914\textsuperscript{160} that fundamentally altered the constitutional conditions during the emergency and channelled exceptional powers to the military.

The granting of such sweeping powers informed depictions of the Defence of the Realm Act as ‘a hurriedly devised translation of martial rule

\textsuperscript{158} A.W.B. Simpson, ‘Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights’ (1996) 41 Loyola Law Review 629, 640. Simpson describes the ‘emergency codes’ arising from the delegation of emergency powers by the legislature, with the parent legislation permitting the executive to introduce new emergency regulations and amend existing ones without the direct involvement of the regular legislature. The legislature often passes the parent legislation often without knowing or prescribing what measures the emergency code will contain.


\textsuperscript{160} Defence of the Realm Acts 1914, 4 & 5 Geo. V c. 29; Defence of the Realm (Consolidation) Act 1914, 5 Geo. V. c. 8.
and prerogative concepts into statutory provisions\textsuperscript{161} that gave rise to a ‘delegated dictatorship.’\textsuperscript{162} Under the procedures provided for, powers could be assumed, amended and enhanced by the executive without reversion to parliament. Executive detention—which had not been mentioned when the parent act went through parliament—was introduced through such means in 1915 by Order in Council, prompting Simpson to conclude that ‘[t]he structure of government under DORA closely resembled the situation in those colonial territories where the Governor and executive could force through any legislation desired.’\textsuperscript{163}

Here we can see in action what Foucault describes as the boomerang effect of colonial practice on juridical and political structures in the metropole: ‘while colonization, with its techniques and its political and juridical weapons, obviously transported European models to other continents, it also had a considerable boomerang effect on the mechanisms of power in the West, and on the apparatuses, institutions, and techniques of power.’\textsuperscript{164} As soon as difficult questions of national security, race and class struggle resurfaced in Britain, it became clear that emergency measures would not be limited to the colonial domain; the narrative and justifications of emergency would invariably rebound into the domestic realm.

The Defence of the Realm Acts 1914 can be identified as the definitive ‘bridging moment’\textsuperscript{165} of the journey from martial law to emergency powers doctrine in the British legal landscape. Extraordinary measures, even those traditionally within the purview of military rule, could henceforth be promulgated under the logic of emergency powers.

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Act 1920—institution the process of ‘regularising’ emergency measures during peacetime—continued the pattern of legislating special executive powers traditionally associated with martial law through the alternative rubric of emergency.

Although martial law was declared in India in 1919 and Ireland in 1920, it had for the most part been ousted to the recesses of the legal system and was now of more symbolic than legal effect, supplementing rather than superseding the statutory system of emergency regulations. This is evident in a memo to the Chief Secretary for Ireland in 1920, in which the Judge Advocate General advises that ‘a form of Statutory Martial Law already exists in Ireland under the Defence of the Realm Acts and Regulations.’ Martial law had also been proclaimed in Ireland in 1916 with similar uncertainty as to its legal effect, and the capital trials of Irish revolutionaries were legalised by the Defence of the Realm Acts rather than by martial law. The clarity of the shift in the imperial mentality away from martial law was reflected in the warning of the Colonial Secretary in Palestine in the 1930s that it would be ‘unwise on constitutional and practical grounds to mix up with emergency powers legislation the doctrine of Martial law.’

Instead, the system of delegated emergency rule initiated under the Defence of the Realm Acts was promptly transplanted to the colonial realm. An equivalent emergency code was exported to India under the Defence of India Act 1915, whereby the Governor-General in Council was given free rein to enact rules for ‘the purpose of public safety and defence of British India’. Well and truly rooted in the legal system, emergency powers in India

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170 Acts Passed by the Governor-General in Council, No. IV (1915).
survived the end of the war and continued to branch out through myriad legislative sprigs: the Anarchical and Revolutionary Crimes Act 1919, the Criminal Tribes Act 1924, the Bengal Criminal Law Amendment Acts 1925 and 1930 and the Suppression of Terrorist Outrages Act 1932; all with significant consequences in terms of the controlled residence, forcible transfer and internment of Indians.172 A number of individuals acquitted at a trial of involvement in a raid on a British armoury in 1930, for example, were nonetheless detained until 1938 under a Bengal Emergency Powers Ordinance.173

The emergency code in India was fortified upon the outbreak of the Second World War by the Defence of India Act 1939. Under this statute, an elaborate code of emergency regulations, known as the Defence of India Rules, was introduced. While the war created the conditions conducive to the performance of an emergency, it was primarily on the domestic stage—in response to internal unrest arising from anti-colonial movements such as “Quit India”—that the repressive powers were discharged. Through 1942 and 1943, hundreds of Indians were killed by British police, thousands of whipping sentences carried out under the revived Emergency Whipping Act, and tens of thousands detained, including political leaders such as Mahatma Gandhi and Jawaharlal Nehru.174

Similar scenes were playing out elsewhere in the empire, where the Emergency Powers (Colonial Defence) Order in Council 1939 authorised the Governor (or equivalent) in numerous colonial territories to ‘make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and

173 Charles Townshend, Britain’s Civil Wars: Counter Insurgency in the Twentieth Century (London: Faber & Faber, 1986) 145-149. The Bengal Emergency Powers Ordinance was a successor of the 1818 Bengal State Prisoners Regulation.
services essential to the life of the community.

The breadth and scope of such a mandate is patent. The types of powers that may be expedient to the suppression of anti-colonial revolt are likely to be far more violent than those necessary to maintain supplies of food and medicine.

Under the Order in Council, a new code was introduced in Palestine in 1939 which built upon prior emergency regulations that had no nexus to the war. Rather, they had been aimed at emasculating Palestinian revolt during the 1930s. Under the Palestine (Defence) Orders in Council of 1931 and 1937, Britain’s High Commissioner was empowered to declare a public emergency in Palestine. He did so during the Arab Revolt of 1936, whereupon collective punishment, property destruction, movement restrictions, censorship, detention, trial by military courts and deportation became par for the course for Palestinian nationalists. In this sense, the Schmittian sovereign figure in the colony—whether given the label of Lord-Lieutenant or Governor-General or High Commissioner—is indeed he who decides on the exception.

III. Executive Exceptionalism: Emergency as Governance

When Britain’s grip over the “new world” was loosened by the loss of north American colonies, it began to divert its gaze eastwards towards the lures of a so-called second empire. Britain’s “imperial century” from 1815-1914 was marked by the assumption of direct political control over trading colonies in Asia, and successful scrambling in Africa. By the time the spoils of the First World War were distributed under the guise of League of Nations mandates, Britain had amassed an uninterrupted spine of African colonies from the Cape to Cairo and onwards through its mandate territories in the Middle East. The

175 Section 6(1), Emergency Powers (Colonial Defence) Order in Council, 1939.
empire by this point spanned approximately a quarter of the world’s land surface area. Over the course of that century, it had:

... ceased to be an empire largely composed of communities of free peoples of British origin tied to Britain by trade regulations and naval power. It was now an empire including numerous peoples who were not British in origin and who had been incorporated into the empire by conquest and who were ruled without representation.\(^{179}\)

Whilst glossing over matters of conquest and race that were certainly not absent from the earlier temporal period of Britain’s imperial enterprises (Ireland, the Caribbean, and the indigenous peoples of Australia and North America all spring to mind), this description is broadly representative of the shift in colonial paradigm that occurred as the empire’s reach was expanded throughout Asia and Africa. Here, Britain was inevitably more vulnerable to resistance to its rule because in many cases it lacked the same presence of dominant communities of British settlers to provide political support and social, cultural and economic links to the metropole.

The dissent and disobedience of the natives had always been perceived as a fact of colonial governance, long before the advent of Third World nationalism.\(^{180}\) Hence there had been strong insistence in Britain on recourse to the discretionary authority of the central executive in order to sustain a regime of conquest. With the rise of anti-colonial nationalism in Africa and Asia during the first half of the twentieth century coinciding with Britain’s declining status as the world’s dominant power, it became clear that the empire was facing a serious threat to its continuing cohesion. India was at the forefront of such resistance. The special powers measures of the 1920s and 1930s, by which the British sought to construct and counter an increasingly radical nationalism, prompted a “terrorist threat” vernacular and a shift towards special courts that would be instantly recognisable in contemporary national security discourse. Britain’s actions in this regard can be seen as


exemplifying an emergent mechanism of governance that understands, constructs and confronts a threat through an administrative rationale.\textsuperscript{181}

It was to the governmental mechanism of emergency that the British state would increasingly resort as it became embroiled in more and more political and military struggles to maintain the stability and continued sovereignty of its colonial regimes at the advent of the United Nations era. Its last major wave of colonial wars during the late 1940s and 1950s were ‘euphemistically self-styled as “emergencies”’\textsuperscript{182} so that mass resistance could be dealt with by special powers enacted in the name of the restoration of “normalcy” (rather than the competing, and less flattering, narrative of resort to force to sustain hegemonic control). The post-war British political establishment ‘had every intention of retaining the empire’, but ‘the use of force for the maintenance of the empire had become problematic … international and domestic opinion posed limits’.\textsuperscript{183} A communication from Lord Killearn in the Cairo embassy back to London emphasised that ‘the time has already gone in Egypt and in the Middle East as a whole when we can rely on force alone to maintain our position’.\textsuperscript{184} What was required now was not just force, but the force of law to suppress growing resistance to colonial rule throughout the empire. As news emerged from the UN of progression towards binding international legal instruments to give effect to the nascent international human rights movement, anxieties arose in government circles as to the compatibility of the repressive powers employed in the colonies with any potential human rights treaty. The Colonial Office expressed concern over ‘unwelcome criticism’ were it to prove ‘impossible to extend the convention to an appreciable number of colonial territories’ because of such powers, and received advice from the Lord Chancellor and Law Officers who expressed


\textsuperscript{184} Public Record Office, FO 370/895, General Correspondence: Lord Killearn to Sir Maurice Peterson, 17 January 1944.
serious misgivings over many such powers, indicating in particular that ‘detention without trial was quite unacceptable except in declared states of emergency.’\textsuperscript{185} The state of emergency was thus confirmed as a legal panacea of sorts, by which the colonial state could maintain its coercive hold over native insurrections while at the same time extricating itself from any potential pitfalls of human rights liability. This line of reasoning would underpin the performance of emergencies in an increasingly vulnerable empire, premised on a fear engendered by the construction of various avatars of native barbarism and communist subversion.

The 1948 “Panic in Whitehall”, generated by the somewhat belated realisation\textsuperscript{186} that the foundations of the empire were crumbling, resulted in colonial officials looking ‘to special powers to give them a breathing space in which they could reclaim the initiative. When the normal forms of political management failed to contain the nationalist challenge, the calling of an emergency was always a plausible option.’\textsuperscript{187} To this end Britain sought to rely on law and on the notion of emergency in order to preserve a perception of legitimacy. The state presented its use of force in the colonies as having little to do with imperialist expansion; it related rather to upholding “law and order” under the duress of emergency. Analyses of British policy during this time, such as that by Frank Füredi, have concluded that ‘every imperial


\textsuperscript{186} Frank Füredi sketches a dividing line between British government policies in the colonies pre and post 1948: ‘Whitehall’s new attitude towards the problem of order in the colonies – expressed through a willingness to use special measures, emergencies and high-profile policing to manage political opposition – becomes apparent from early 1948. Until this period, especially up until mid-1947, Whitehall was comparatively relaxed about the problem of order in the colonies. Often it was the Colonial Office that tried to curb the enthusiasm of the local administration for enacting new special powers and emergencies.’ Frank Füredi, \textit{Colonial Wars and the Politics of Third World Nationalism} (London & New York: I.B Tauris, 1994) 94-95. This final pages of this chapter are informed by Füredi’s work on colonial policy in the 1940s and 1950s; I would like to acknowledge Balakrishnan Rajagopal for first drawing my attention to this work.

response to anti-colonial protest contained elements of an informal emergency, while every formal emergency possessed a political dimension.¹⁸⁸

A shroud of administrative legality was used to conceal underlying political objectives in many of the colonies where Britain sought to suppress radical anti-colonial movements and to promote their more moderate counterparts. Hence the “Gold Coast experiment” whereby Britain sought to mitigate the challenge to its rule in Ghana through the quasi-solution of “semi-responsible government”, as opposed to actual self-government or independence.¹⁸⁹ In the late 1940s, in the Gold Coast and Malaya in particular, the state of emergency was used as a technique of governance derived from the need to re-establish control over a deteriorating situation in order that it could be managed to Britain’s advantage. States of emergency in these territories were declared by the respective colonial governors under the Emergency Powers (Colonial Defence) Order in Council 1939. Based on an expansive interpretation of the “necessary or expedient” mandate of the legislation, emergency powers were invoked not merely as a reactive mechanism to avert prevailing or imminent crises, but as calculated preemptive measures infused into the ongoing government of respective territories.¹⁹⁰

Balakrishnan Rajagopal portrays the reality of emergency as a form of ‘total rule’ as prompted by a number of undergirding factors, including an infectious fear of the masses.¹⁹¹ The political engagement of the peasant and

¹⁸⁹ For the historical context see, for example, Martin Meredith, The State of Africa (London: Free Press, 2005) 17-29. For the perspective of the British colonial governor see Charles Arden-Clarke, ‘Gold Coast into Ghana: Some Problems of Transition’ (1958) 34:1 International Affairs 49.
¹⁹⁰ See Frank Füredi, Colonial Wars and the Politics of Third World Nationalism (London & New York: I.B Tauris, 1994) 97, noting that: ‘In this climate, even relatively liberal administrators were busy integrating emergency powers into their overall strategy. So Sir John Macpherson, governor of Nigeria, passed ‘legislation conferring emergency powers on the executive’ in December 1948. Macpherson, like other governors, was planning ahead. Throughout the empire police forces and security arrangements were being reviewed and contingency plans drawn up.’
working classes, and in particular their increasing support for anti-colonial nationalist movements by the 1940s, created cause for concern. Colonial authorities sought to distort the rationale of this emergent trend by depicting the involvement of the masses in political activity as a dangerous manifestation of deluded tribal nationalism. Deployed and performed as part of the public relations machinery, fear of a carefully constructed native savage became a dominant theme in Eurocolonial discourse as it related to Third World resistance. This fear dovetailed with the prevalent distrust of nationalism that fascism had provoked in Europe, and the pejorative connotation that the term became loaded with as it gained traction in the colonies, particularly in Africa. These two elements—fear of the barbaric indigene and concern over expressions of nationalism—are exemplified in the comments of Charles Arden-Clarke, British governor in the Gold Coast, describing Ghanaian political leader Kwame Nkrumah in a letter back to England in 1950 as ‘our local Hitler’. In this vein, the derision of native nationalism was a much adhered-to colonial tactic, utterly discernible in the manner that emergencies were implemented.

Fascism was just one brush with which opposition to colonial rule was tarred. With the spill-over of the Cold War into colonial Africa and Asia very much apparent by the 1950s, national liberation struggles in European colonies were cast as evidence of the steady encroachment of communism and the rising threat to “Western values”. The catch-all slur of “terrorism” was also projected onto any dissent or resistance, with the same broad strokes applied across the colonial canvas, from Latin America to Africa and East Asia. The spectre of a transnational conspiracy was summoned. One of the arguments used by a British constitutional commission to justify the suspension of the constitution in British Guiana in 1953 (an act characterised by the American consul at the time as a coup d’état), for instance, was that its

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minister for education had created an African and Colonial Affairs Committee which ‘declared support for Mau Mau in Kenya and the Communist terrorists in Malaya.’¹⁹⁵ The use of emergency measures to repress the perceived communist threat went hand in hand with the economic objectives of colonialism. In the run-up to the declaration of the state of emergency in Malaya, for example, ‘European plantation interests were vociferous in their demand for tough action’, prompting colonial administrators to demand from London ‘special powers for crushing trade unionism.’¹⁹⁶

By consistently conjuring up images of “terror” and couching the increasing unrest in the colonies within the realm of criminality and public order, rather than as political or socio-economic resistance against the hegemony of the regime concerned, the colonial authorities sought to frame the situations as emergencies in which special powers were needed to counter subversive terrorist, communist threats. A clear desire to render the political objectives of anti-colonial nationalism invisible as a factor was manifest. Emphasis on the need to restore “order” allowed colonial agents to label and treat opponents as criminals and/or dangerous and subversive agitators firmly positioned on the wrong side of the iron curtain. Emergency regulations were rolled out, helping to create an air of legitimacy for policies of detention, curfew and censorship that were ultimately designed to maintain imperial control. The prevalent states of emergency would allow the colonial state to “normalise” its techniques of governance and to implement political and economic reforms free from constraint by liberal legal checks and balances.

Such a move is indicative of a more fundamental effect of imperial discourse, encapsulated in Anghie’s ‘dynamic of difference’,¹⁹⁷ whereby the coloniser’s world of law, state and civilisation is posited against the other’s


retrograde equivalents: custom, tribe and savagery. The assessment by M.S. O’Rorke, commissioner of police in Kenya, that the Mau Mau movement sprung from a ‘return to the savage and primitive which there is good reason to believe is the heart of the whole movement’,\(^{198}\) is indicative. Such discourse was not uncommon; the idea of racial superiority was prevalent in the Anglo-American intellectual tradition, and was tempered only by the exposure of the consequences of Nazism. For example, Füredi highlights a lecture given to colonial administrators as late as 1938 in which Oxford anatomy professor Le Gros Clark argued that although the intellectual capacity of Kenyans compared favourably with their European counterparts in early childhood, by the time of maturity their mental development was genetically ‘retarded’.\(^{199}\)

From that point of departure, Britain’s primitive and backward colonial subjects could be constructed as lacking intelligence, driven by fear and ignorance, and as such easily corrupted by the forces of evil.

Filtering colonial law through a Third World lens, it is clear that law is integral to the “civilising mission” of governing non-European peoples and exploiting their territories and resources economically.\(^{200}\) The invocation of emergency can be understood as an extension of that purpose. It functioned as a method to contain the barbarism of the natives and to facilitate the continuance of the civilising mission. In the Jamaica case, for example, ‘[o]n the pretext of crushing a dangerous rebellion, British officials had indulged in a racially charged reign of terror.’\(^{201}\) In this sense, the liberal rule of law is tainted by its own racial awareness. The state of emergency is revealed as a racialised component of colonial sovereignty; its historiography illuminating

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198 Public Record Office, CO 822/447, Commissioner of Police, ‘Situation Appreciation for the week ending 1st April, 1953’.
200 Albert Memmi reminds us that ‘the economic motives of colonial undertakings are revealed by every historian of colonialism. The cultural and moral mission of a colonizer, even in the beginning, is no longer tenable.’ See Albert Memmi, The Colonizer and the Colonized (1965) (Howard Greenfeld trans., London: Earthscan Publications, 1990) 69.
the political and legal context in which emergency came to be embedded in the legal condition of the modern state.

It was in this spirit of established colonial policy that states of emergency were proclaimed by British authorities in Jamaica in February 1946, Trinidad in January 1947 and March 1948, Aden in December 1947, the Gold Coast in March 1948 and January 1950, Malaya in June 1948, Singapore in July 1948, Zanzibar in September 1948, Uganda in April 1949, Nigeria in November 1949, et cetera. Emergency regulations imposed pursuant to the Emergency Powers (Colonial Defence) Order in Council 1939 or equivalent local legislation engendered wholesale powers of censorship, curfew, arrest, detention and deportation. These episodes were playing out concomitant to the drafting of the foundational charters of a fledgling international human rights system. The positions adopted by Britain during that drafting process in the late 1940s and early 1950s, therefore, cannot be viewed in isolation from events in the colonies at the time. The historiography of colonial emergency is, in fact, very much relevant to the story of how the emergency derogations regime came to be embedded in the international legal regime for the protection of human rights.
The international human rights project, in its formalised legal-institutional sense, was born into the lineage of an international law generally seen as ‘preoccupied with great crises, rather than the politics of everyday life’. The initial crystallisation of accountability for mass atrocity on the international stage was played out in the courtroom drama of prosecutions of a select group of individuals in Nuremberg and Tokyo, and in the positivist criminalisation of the most ‘odious’ manifestations of humanity’s inhumanity. The politics of entrenched emergency governance and the constitutional structures of the state of emergency that had facilitated persecutory practices were, on the other hand, regulated—and thus to a certain degree condoned—in the derogations schema of the international human rights treaties.

Emergency rule continued in the British empire through the 1950s, with policy unaffected by any newly ratified obligations towards the rights of those within the state’s jurisdiction. From its inception, the emergency derogations regime can be understood as foremost among the ‘techniques of accommodation’ that international law provides in entrusting the state with ultimate discretion over the degree to which they bind themselves by human rights law. The fiction of the state of emergency—insofar as it purports to

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move beyond law in order to control a situation by law—can again be seen here. In spite of extensive evidence of abuse under the epithet of exceptionalism, however, the discourse that accompanies the doctrine of emergency generally fails to deviate from or challenge the presumption that provision for such emergency measures is nonetheless legitimate; indeed, imperative. In the context of international human rights law, emergency derogations are typically accepted as a ‘necessary evil’; a ‘realistic compromise’. The inevitable consequence of bestowing universal applicability upon emergency doctrine, and separating it from its colonial and totalitarian pedigree, is the retention of the legal apparatus of emergency as an expedient utilitarian technique.

In the codification of international human rights, then, there is no definitive rupture, but rather a shift and consolidation of the paradigm of emergency within the very legal regime presented as a normative and institutional riposte to the most egregious consequences of emergency rule.\(^7\)

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\(^7\) While human rights law is my present focus, it is not alone within the field of international law in its recognition and qualified accommodation of what Robespierre characterised as ‘the holiest of laws … the most indisputable of all entitlements: necessity’. The emergency derogation regime in human rights treaties is embroidered into a broader tapestry of necessity doctrines in public international law. As Vik Kanwar notes:

In modern international law, there are four main contexts where doctrines of necessity are raised: (1) Doctrines of necessity as an excuse or exception in the law-governed relations between states (general law of treaties and state responsibility); (2) notions of self-defense based in customary law and the Charter of the United Nations; (3) standards of military necessity in the law of armed conflict; and (4) “Necessity” as a threshold for the derogation of treaty-based human rights obligations in states of emergency. And each of these is divided into more specialized branches and areas of application. In short, nearly every area of international law has, in its own development, attempted to provide doctrinal closure to unstable areas of “necessity”.

Vik Kanwar, *The Politics of Necessity: Discourses and Doctrines of Exception in International Law* (unpublished dissertation, New York University, 2006). The old maxim that necessity knows no law notwithstanding, there is a certain inevitability to a state-centric international legal system making allowance for emergency governance through doctrines of necessity. Roberto Ago’s 1980 study on necessity doctrines vis-à-vis state responsibility suggested that “the concept of ‘state of necessity’ is far too deeply rooted in the consciousness of the members of the international community and of individuals within States’, such that even if it is ‘driven out the door’ it will inevitably ‘return through a window’. Roberto Ago,
This chapter seeks to probe the historical detail of how such an apparently counter-intuitive outcome came to pass, and the consequences that have ensued. The drafting histories of the European Convention on Human Rights and the International Covenant on Civil and Political Rights provide insight into the concerns of the European powers, in particular, over the capacity of the fledgling human rights project to restrict their operations in the colonies, and the tactics adopted to alleviate such concerns. Britain’s state of emergency in Kenya, running concomitant to the adoption and entry into force of the European Convention, serves as a particularly useful prism through which to analyse state practice and engagement with evolving international norms. From there, we turn to Strasbourg, where a small but significant body of European Court of Human Rights case law has developed on Article 15 derogations. In the emergency contexts of colonial counter-insurgency and state security, this jurisprudence is revealing of the nature of the interface between international legal institutions and domestic authorities.

I. From European Empire to European Convention

Extensive emergency legislation had been introduced for the duration of the Second World War in Britain, with significant numbers of people placed in “administrative” detention. This was justified on the basis of national security. The majority of those detained were refugees from Europe—defined as “enemy aliens” for the purpose of their detention—but British citizens were also detained under Regulation 18B of the Defence Regulations. Recourse to this regulation was made extensively by Churchill’s administration in the early

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Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur—Addendum, A/CN.4/318/Add.5-7, 29 February 1980, para. 80. Varying doctrinal forms of necessity have by now established themselves in, for example, international trade and investment law (security exception regimes in the World Trade Organisation agreements and bilateral investment treaties, for instance) and regional branches of international law (for example, the Mechanism for Consultation and Co-operation with Regard to Emergency Situations (“Berlin Mechanism”) of the Organization for Security and Co-operation in Europe; Treaty Establishing the European Community, Articles 59, 64, 100).

8 For analysis, see, for example, Oren Gross, “‘Once More unto the Breach’: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 Yale Journal of International Law 437.
years of the war. As the war wore on, however, Churchill himself came to feel increasingly uncomfortable with the trampling of civil liberties in Britain. Anticipating opposition to the planned release from internment of Oswald Mosley, founder of the British Union of Fascists, Churchill reminded his Home Secretary in late 1943 that detention without charge or trial is ‘the foundation of all totalitarian government’:

You might however consider whether you should not unfold as a background the great privilege of habeas corpus and trial by jury, which are the supreme protection invented by the English people for ordinary individuals against the state. The power of the Executive to cast a man in prison without formulating any charge known to the law, and particularly to deny him the judgment of his peers, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.

The post-war movement for the international protection of human rights emerged ostensibly in response to such totalitarianism; a liberal project conceived of in order to preclude the types of abuses perpetrated before and during the Second World War. International organisations such as the United Nations and the Council of Europe went about institutionalising mechanisms to serve such an end. Major international human rights conventions formulated in response to Europe’s emergency and barbarity would somewhat ironically, however, grant signatories a pass to suspend or derogate from many of their newly-codified obligations in the event of (self-diagnosed) emergency. Churchill’s sentiments on detention without trial appear to have been quickly forgotten following victory in the war.


11 This notwithstanding, scholars such as Samuel Moyn argue that ‘there was no widespread Holocaust consciousness in the postwar era, so human rights could not have been a response to it.’ For Moyn, it was not until the 1970s, when other utopian ideologies—including socialism and revolutionary nationalism—had begun to recede, that human rights fully established emerged as praxis. Samuel Moyn, The Last Utopia: Human Rights in History (Cambridge, MA: Harvard University Press, 2010) 7.

12 Article 4 of the International Covenant on Civil and Political Rights; Article 15 of the Council of Europe Convention for the Protection of Human Rights and Fundamental
The genesis of the emergency derogation clauses of the European Convention on Human Rights and the International Covenant on Civil and Political Rights\(^{13}\)—whose drafting processes were underway by the late 1940s—demonstrate staunch British advocacy for states to reserve the discretion to deploy extraordinary measures beyond the pale of the nascent human rights system. This naturally raises questions as to why Britain, in the context of developing safeguards for civil rights, was determined to provide for the suspension of those safeguards by virtue of emergency powers, including those that its wartime leader had described as fundamental to totalitarianism. Britain’s historical reliance on martial law and emergency legislation in its overseas colonies, and the backdrop of the multiple states of emergency playing out at the time of the drafting of the conventions, suggest that the answer relates to the preservation of control in situations where government is maintained by force rather than consent. A statement made by the British representative during the drafting process of the European Convention on Human Rights that underlined the importance of deploying the Convention against threats to political stability ‘from within or without’\(^{14}\) is testament to the interrelation between the newly evolving international legal mechanisms and Britain’s wartime and colonial emergency powers.

Another particular aspect of the legal-historical context also merits note. During the drafting process for the Universal Declaration of Human Rights, the question of the application of human rights to colonies—absent entirely from initial deliberations and drafts—was raised in 1947 by the Soviet

\(^{13}\) The other component of the International Bill of Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), is not included here as it does not provide for states to derogate from its provisions in the event of a state of emergency. The rights set down in the ICESCR are subject to ‘progressive realisation’ according to the state’s available resources. As such, the obligations on states are not immediately binding, and on that basis provision for emergency derogation may have been considered superfluous.

Union, self-proclaimed leader of the world’s ‘anti-imperialist camp’.  

15 After that, ‘the British and Soviet delegations clashed more than once over the implications of the Declaration for the peoples living in the colonies’.  

16 Britain repeatedly moved to have the proposed article affirming the application of the Universal Declaration to non-self-governing-territories deleted. This would have been seen as running counter to the emerging if somewhat nebulous principles of universality, non-discrimination and self-determination, and so while the British eventually succeeded in having the “application to the colonies” provision demoted from its own separate article, it was decided to explicitly confirm, by virtue of the Preamble and as a part of Article 2, that the Declaration would apply to the colonies.  

17 A declaratory principle of the applicability of human rights law to all territories under a state’s jurisdiction was thus established.

As a result, the British authorities entered the drafting process for the instruments that would give “binding” legal force to the principles of the Declaration wary of the need to retain the latitude to use the force they felt may be necessary to contain anti-colonial revolts in the empire.  

18 As the process got underway, the Colonial Office, having faced insurrection in Palestine that led to British withdrawal and by now encountering similar confrontations in Malaya and elsewhere, was pushing for additional legislative

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17 For a concise overview of the debate on this issue, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999) 96-101. The relevant line of the Preamble to the Universal Declaration makes reference to its rights applying ‘both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction’, while Article 2 states that ‘no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.’

18 Initially, at least, Britain’s view in relation to the European Convention was that it should be aspirational, rather than binding. The British position would remain resistant to the document being infused with binding force and, later, to the establishment of complaint mechanisms.
powers to suppress native opponents even before any formal declaration of a state of emergency.\textsuperscript{19}

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As multilateral international treaties go, the drafting process of the European Convention on Human Rights was relatively swift. Stemming from an initiative of the Consultative Assembly of the newly-established Council of Europe during its August-September 1949 sitting, an intergovernmental legal Committee of Experts was formed in early 1950 to work on a draft human rights convention. It floated a number of alternative drafts for consideration by a Conference of Senior Officials in June 1950, who amalgamated the drafts and prepared the ground for the political evaluation of the wording by the Council’s Committee of Ministers. The Committee of Ministers adopted the text of a draft Convention for the Protection of Human Rights and Fundamental Freedoms in Strasbourg in August of that year; by November 1950 the Convention had been signed in Rome, entering into force in September 1953.\textsuperscript{20}

The starting point for the Convention was a draft text included in a recommendation adopted in September 1949 by the Consultative Assembly of the Council of Europe on ‘measures for the fulfilment of the declared aim of the Council of Europe, in accordance with Article 1 of the Statute in regard to the safeguarding and further relation of human rights and fundamental freedoms.’\textsuperscript{21} This, the first working draft of the European Convention, contained no reference to or provision for derogation from human rights safeguards in times of emergency or crisis. It did, however, contain in draft Article 6 a general limitation clause that echoed Article 29(2) of the Universal Declaration of Human Rights in providing that:


In the exercise of these rights, and in the enjoyment of the freedoms guaranteed by the Convention, no limitations shall be imposed except those established by the law, with the sole object of ensuring the rights and freedoms of others, or with the purpose of satisfying the just requirements of public morality, order and security in a democratic society.\textsuperscript{22}

From this we can infer that such a limitation clause was at that point considered sufficient to deal with exceptional circumstances. When the potential necessity of explicitly authorising state signatories to the proposed Convention to take ‘special measures’ to deal with incitement to violence arose, the Committee on Legal and Administrative Questions determined this to be unnecessary, with such situations already covered by the text of draft Article 6.\textsuperscript{23}

The records of the Consultative Assembly’s first session provide an early indication of Britain’s position; the purpose of enacting a human rights convention was not simply the protection of individuals, it would also function to strengthen the legal armoury of the state in suppressing opposition to its rule. The British representative, Lord Layton, stressed to the Assembly the importance of operationalising the proposed convention ‘as a means of strengthening the resistance in all our countries against insidious attempts to undermine our democratic way of life from within or without, and thus to give to Western Europe as a whole greater political stability.’\textsuperscript{24}

It was with this in mind that Britain sought to introduce a provision at the meetings of the Committee of Experts from 2-8 February 1950 allowing for derogation from the majority of the rights enumerated in the Convention during times of public emergency. In advance of those meetings, the Secretariat-General had drawn up a preparatory report on a preliminary draft convention for the collective guarantee of human rights. Part of that report was devoted to a comparison between the draft International Covenant on Human Rights in progress at the time, and the draft European Convention as

\textsuperscript{22} Council of Europe Doc. AS (1) 108, 262.
\textsuperscript{23} Council of Europe Doc. AS (1) 77, 201, para. 16.
recommended by the Consultative Assembly. Regarding the state of emergency/derogation provision being mooted for the International Covenant, the report found that ‘the inclusion of this provision in the European system appears to be unnecessary’, having regard to the existing limitation clauses in the Consultative Assembly’s draft.\footnote{Council of Europe Doc. B 22, 18.} Despite this, on 4 February 1950, Oscar Dowson submitted to the Committee of Experts on behalf of the British government an amendment to the Consultative Assembly draft to include an article allowing states to derogate from their obligations in ‘time of war or other public emergency threatening the interests of the people’.\footnote{Report of the Meetings of the Committee of Experts, sitting of 4 February 1950’, Council of Europe Doc. A 782.} Such a right of derogation in exceptional circumstances was still deemed by other states, however, to be superfluous to the requirements and aims of the Convention. Accordingly, the preliminary draft Convention developed by the Committee of Experts during its February 1950 session omitted any such clause.\footnote{Preliminary Draft Convention for the Maintenance and Further Realisation of Human Rights and Fundamental Freedoms, Council of Europe Doc. A 833, 15 February 1950. This draft retained, with slightly different wording, the Article 6 general limitation clause of the original Consultative Assembly draft of September 1949.} Britain remained unyielding in its position, and at the second session of the Committee of Experts from 6-10 March tabled a new amendment, incorporating minor clarifications but imbued with the same general thrust as its previous proposal.\footnote{Council of Europe Doc. CM/WP 1 (50) 2, 1-2.}

Following lengthy discussion on a number of contentious issues, the Committee of Experts decided to submit alternative texts to the Committee of Ministers without indicating a preference. On its proposed amendment regarding emergency derogations, Britain was insistent; having successfully secured its inclusion in the first set of alternatives, the British representative rallied for it to also be included in the second set. In response, the French and Italian representatives opposed its insertion on the basis that the kinds of instances it would relate to were already covered by the general limitations
clauses.\textsuperscript{29} Ultimately, however, Britain persuaded other members of the Committee to come down on its side, on the basis of a belief that the procedure laid down in the derogation clause ‘could prove to be useful for the protection of Human Rights in exceptional circumstances.’\textsuperscript{30} Thus, both sets of alternative drafts annexed to the Committee of Expert’s Report to the Committee of Ministers ended up containing similar emergency derogation provisions.\textsuperscript{31} Notably, that report draws attention to the importance attached by Britain to the imposition of clearly defined limitations on the rights enumerated in the Convention. While noting that all members of the Committee were in favour of drawing up a Convention aimed foremost at safeguarding human rights, the report observes that:

\begin{quote}
Certain members, however — particularly the representatives of the United Kingdom and the Netherlands — considered that the fundamental rights to be safeguarded, and, \textit{even more important}, the limitations of these rights, should be defined in this Convention in as detailed as manner as possible.\textsuperscript{32}
\end{quote}

A review of the \textit{travaux préparatoires} of the European Convention supports this suggestion that British concerns were focused more on limitations on the rights prescribed in the Convention than the rights themselves.

With the derogations clause incorporated into both sets of alternatives proposed by the Committee of Experts, its inclusion in the final text of the Convention was all but secured. The Conference of Senior Officials in Strasbourg from 6-17 June 1950 amalgamated the alternatives into a single proposed text for consideration by the Committee of Ministers. Article 14 of the draft Convention annexed to the draft report of the Conference of Senior Officials read as follows:

\begin{quote}
1. In time of war or other public emergency threatening the interests of the people, a State may take measures derogating from its obligations
\end{quote}

\textsuperscript{29} Council of Europe Doc. CM/WP 1 (50) 15, 20.
\textsuperscript{30} Council of Europe Doc. CM/WP 1 (50) 15, 20.
\textsuperscript{31} Council of Europe Doc. CM/WP 1 (50) 15 Appendix, alternatives A and A/2, p. 4; alternatives B and B/2, 5-6.
under this Convention to the extent strictly limited by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Articles 2, except in respect of deaths occurring from lawful acts of war, 3, 4 (para. 1) or 7 can be made under this provision.

3. Any State party hereto availing itself of this right of derogation shall inform the Secretary-General of the Council of Europe fully of the measures which it has thus enacted and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.\\footnote{33 Council of Europe Doc. CM/WP 4 (50) 16, Appendix; A 1445.}

Article 14 of the draft Convention annexed to the final report of the Conference of Senior Officials is identical, save for one significant amendment: the term “the interests of the people” was replaced with “the life of the nation”.\\footnote{34 Council of Europe Doc. CM/WP 4 (50) 19 annexe; CM/WP 4 (50) 16 rev.; A 1452.} No explanation for this last minute amendment is given in the report of the Conference Senior Officials. What can be surmised, however, is that such an intervention was rooted more in the interests of the state’s governing apparatus, and less in those of its people.\\footnote{35 A similar situation would also arise in relation to Article 4 of the International Covenant on Civil and Political Rights.}

The draft emergency derogation provision was adopted, without any special reference to it in the course of the Consultative Assembly’s debate,\\footnote{36 Council of Europe Doc. AS (2) 104, 1035.} as Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Minor formal linguistic changes and translation corrections\\footnote{37 Council of Europe Doc. CM/Adj. (50) 3 rev., para. 6.} were made to Article 15 by the Committee of Legal Experts before the signing of the Convention on 4 November 1950. The final text of Article 15 reads as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.\(^{38}\)

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The individual limitation clauses for specific rights, that had been proposed originally as an alternative to full powers of derogation, were nonetheless also retained in the final Convention.\(^{39}\) In respect of the application of the Convention rights to colonial territories, espoused in principle by the rationale of the Universal Declaration, Article 63\(^{40}\) of the European Convention was framed so as to waive the automatic application of the Convention to non-metropolitan territories. By that stage, in any event, the inclusion of the emergency derogation clause had been secured. European powers would thus have the choice of simply not extending the Convention to their colonial territories, or of extending it safe in the knowledge that they could fall back into the safety net of the Article 15 derogation regime whenever necessary. This latter option was the tack that Britain took, whereas Belgium opted for the former and did not extend the Convention to its colony in the Congo. France—where the discrimination that was effectively allowed for by Article 63 was met with vehement opposition from the elected representatives of the French colonial territories—chose not to ratify the Convention until 1974, after the majority of its colonies had achieved independence. It did so with a

\(^{38}\) Article 2 relates to the right to life; Article 3 to the right to freedom from torture and inhuman or degrading treatment or punishment; Article 4(1) to freedom from slavery and servitude; Article 7 to the non-retroactivity of criminal law.

\(^{39}\) See European Convention on Human Rights, Articles 8-11. Limitations to the rights to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and freedom of assembly and association (Article 11) are permissible on grounds including the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, and the protection of health or morals.

\(^{40}\) Now Article 56.
reservation to Article 15 at that.\textsuperscript{41} Portugal, similarly, did not become a member of the Council of Europe until 1976, after its major colonies had secured independence.

\textbf{II. Universalising the State of Emergency: The International Covenant on Civil & Political Rights}

The European Commission of Human Rights has noted that ‘[a]s the preparatory work clearly shows, Article 15 of the European Convention of Human Rights closely followed, at the beginning, that of Article 4 of the United Nations draft Covenant.’\textsuperscript{42} Indeed, at its initial introduction, Britain’s proposed amendment to the draft European Convention ‘appeared to be an almost textual reproduction’\textsuperscript{43} of draft Article 4 of the Covenant.

The process that would lead to the adoption of the International Covenant on Civil and Political Rights began with the Drafting Committee of the UN Commission on Human Rights in 1947, mandated to prepare an international bill of human rights.\textsuperscript{44} The proposal for an emergency clause came from a draft international bill of human rights submitted by Britain to the first session of the Drafting Committee. The Drafting Committee also had before it a number of draft outlines of an international bill of human rights prepared by the Division of Human Rights of the Secretariat, the United States of America and France, none of which made any provision for derogation or emergency measures.\textsuperscript{45} Article 4 of the British draft, on the other hand,


\textsuperscript{44} The International Bill of Human Rights would ultimately take the form of three documents: the Universal Declaration on Human Rights, adopted by the UN General Assembly in 1948, and two international treaties—the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights—both of which were adopted by the UN in 1966 and entered into force in 1976.

stipulated that ‘[i]n time of war or other national emergency, a State may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation.’ The sweeping nature of this proposed right of derogation is brought into sharp focus by the fact that Article 2 of Britain’s draft Bill provided for states’ obligations to secure and support all of the rights and fundamental freedoms set out in the Bill, as well as to provide effective remedy in cases of violation. The proposal, therefore, left every right enumerated exposed to derogation in times of emergency, allowing no exceptions in favour of non-derogable rights. The Bill was passed on by the Drafting Committee to the Commission on Human Rights, where the proposed article was rejected by a vote at the Commission’s second session in December 1947.

Britain subsequently resubmitted an almost identical draft provision to the Commission and this time successfully lobbied for its inclusion in the draft covenant, with the proposal accepted by four votes to three (with eight abstentions). This draft derogation clause thus went back to the Drafting Committee, where it was criticised by a number of states, with the United States the most vocal among them. US opposition was based principally on the belief that a single, general limitation clause in the vein of Article 29(2) of the Universal Declaration of Human Rights was sufficient, and preferable. Following the adoption of a number of special limitation clauses in relation to particular rights, the US moved to strike the entire derogation clause on the basis that it was rendered superfluous by the limitation clauses. France proposed a compromise text, which amounted to a general limitation clause that would not apply to a wide range of non-limitable rights. Britain maintained an unwavering position favouring derogation over limitation,

50 The US representative submitted an alternative text accordingly. See UN Doc. E/800.
however, and revised the French draft to include a derogation clause with a narrower range of non-derogable rights.\footnote{UN Doc. E/CN.4/188.} This was the version of Article 4 that was provisionally adopted by the Commission on Human Rights at its fifth session in June 1949.\footnote{UN Docs. E/CN.4/187; E/1371, Article 4.}

The British revision would serve as the basis for further revisions to the wording of Article 4, but despite continuing opposition from some quarters, the fundamental premise of the right of states to derogate during emergencies was not to be dislodged from the covenant. A Chilean proposal to delete Article 4 was rejected at the Commission’s sixth session in 1950.\footnote{UN Doc. E/CN.4/SR.195.} Interestingly, however, the \textit{travaux préparatoires} suggest that the risk that Britain’s proposal to permit human rights to be abrogated during emergencies ‘might produce complicated problems of interpretation and give rise to considerable abuse’\footnote{‘Annotations on the text of the draft International Covenants on Human Rights, prepared by the UN Secretary-General, UN Doc. A/2929’, 1 July 1955, 23.} was recognised at the time. Chile’s opposition to the derogation provision was based on the belief that it was ‘drafted in such indefinite terms that it would permit every kind of abuse’.\footnote{UN Doc. E/CN.4/SR.195, para. 63.} Some other global South delegations, such as the Philippines and Lebanon, were similarly opposed to the provision, with the Lebanese delegate asserting that it would be ‘difficult to determine the case in which derogations were permissible on the basis of so elastic a term as “public emergency”’, a ‘very hazy’ concept that ‘might give rise to interpretations more far-reaching than … intended.’\footnote{UN Doc. E/CN.4/SR.126, 6, 8.}

Britain ultimately did not face much robust opposition, however, in persuading enough members of the Commission that it was necessary to envisage possible conditions of emergency when derogations from the law of human rights ‘would become essential’.\footnote{‘Annotations on the text of the draft International Covenants on Human Rights, prepared by the UN Secretary-General, UN Doc. A/2929, 1 July 1955’, 23.} Somewhat ironically, ‘reference was made to the history of the past epoch during which emergency powers had
been invoked to suppress human rights and to set up dictatorial régimes in support of the position that the use of emergency powers should be formally authorised and monitored, rather than precluded.

Throughout the 1950s and early 1960s, as the drafting process continued, debates arose with respect to various aspects of the wording of Article 4. Worth noting is the discussion on whether, in order for derogation to be justified, the “public emergency” referred to in the article must pose a threat to “the interests of the people” or, alternatively, “the life of the nation”.

It was thought that the reference to a public emergency ‘which threatens the life of the nation’ would avoid any doubt as to whether the intention was to refer to all or some of the people, although it was suggested that a reference to ‘the interests of the people’ was more appropriate in a covenant which dealt with the rights of individuals and that such a phrase would also prohibit Governments from acting contrary to the interests and welfare of their people.

Again it was Britain that took the lead, replacing existing proposals that spoke of a ‘public emergency gravely threatening the interests of the people’ with a revision that related to a ‘public emergency threatening the life of the nation’. This more state-centric locution was adopted at the eight session of the Commission on Human Rights in 1952. It would remain unaltered in Article 4 of the instrument that would ultimately be enacted as the International Covenant on Civil and Political Rights in 1966.

Other issues that arose within the context of Article 4 included whether to make express reference to war as a particular category of emergency; whether an emergency must be “officially” proclaimed or “legally” proclaimed; the extent of the measures which a state may take in derogation of its obligations under the covenant; the rights that should be listed as non-derogable; and the grounds upon which discrimination ought to be prohibited.

60 ‘Annotations on the text of the draft International Covenants on Human Rights, prepared by the UN Secretary-General, UN Doc. A/2929’, 1 July 1955, 23.
61 ‘Annotations on the text of the draft International Covenants on Human Rights, prepared by the UN Secretary-General, UN Doc. A/2929’, 1 July 1955, 23.
64 UN Doc. E/CN.4/SR.331, 5.
in the exercise of emergency powers. After much debate on these points, the final text of Article 4 of the International Covenant on Civil and Political Rights as adopted in 1966 reads as follows:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.  

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

### III. The European Convention in the Colonies: Extra-territorial Application and Derogation

While the Covenant was still in gestation as the waves of decolonisation surged through the Third World during the 1950s and early 1960s, the European Convention was already effectively engaged. Intuitions that the inclusion of the emergency derogation provision would allow Britain to cast a light of lawfulness on illiberal policies overseas, as the knots binding the empire began to unravel, were borne out by practice in the early years of the Convention’s application.

The prefatory question to arise was the extent to which European signatories would be bound by the treaties in their overseas dominions. Having

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65 For a useful overview of the debates on these issues, see Marc J. Bossuyt, Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights (Dordrecht: Martinus Nijhoff, 1987) 85-99.

66 These articles relate to the right to life; the right to freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to freedom from slavery and servitude; the right to freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation; the non-retroactivity of criminal law; the right to recognition before the law; and the right to freedom of thought, conscience and religion; respectively.
lost the battle, partially at least, over the inclusion of a declaratory principle in the Universal Declaration of Human Rights that supported the application of human rights law to all territories under a state’s jurisdiction, the European colonial powers were uneasy about the cementing of that principle in legally binding instruments. In the British context, this was informed by a lack of enthusiasm in Foreign Office and Colonial Office circles for the human rights project in general.

This submission of important problems concerning Human Rights to higher authority has evoked an expression of considerable misgivings. The misgivings centred round the dangers which might flow from the coming into force of the Covenant, despite any safeguards which it might be possible to have included in the Covenant. The Lord Chancellor, for instance, has stated that he regards the whole matter with grave misgiving. The Colonial Office, at a Ministerial Level, are known to view the whole question with even greater apprehension. It is also in line with these views, which anticipate considerable political difficulties if the Covenant ever comes into force, that the Secretary of State decided to instruct the U.K. delegate to adopt Fabian tactics when the question of individual petitions comes up for discussion. Viewed in light of the political considerations … therefore, there would be every advantage in delaying the coming into force of the Covenant and even greater in postponing this event sine die.67

Indeed, volumes of internal Colonial Office correspondence and communications with the Foreign Office and the British delegation at the UN reveal that so ‘far as the Colonial Office was concerned the real belief of the officials was that British involvement in the whole human rights exercise had been regrettable and was potentially harmful to British interests.’68

However, with Britain ostensibly committed to the project (it signed and ratified the Convention in 1951 ahead of its entry into force in 1953), the Colonial Office was forced to grapple with the question of how best to manage its impact on the colonies. While eschewing any universalist pretensions with claims that ‘what may be a reasonable provision in Europe does not necessarily make sense here and now for Africa’, Colonial Office officials

67 J. Hebblethwaite, Foreign Office Minute of 8 June 1948, FO 371/72808/UNE2273.
had, by 1951, identified the ‘propaganda value’ of the European Convention and viewed it as the lesser of two evils when compared with the more ambiguous and precarious obligations provided for by the draft UN Covenant at that time.\(^{69}\) As noted, Article 63 of the European Convention gave state parties the discretion to choose whether or not to apply the Convention to territories over whose international relations it exercises responsibility. British officials disclosed that the principal reason for such a compromise ‘was to enable the United Kingdom to sign without immediately committing the dependent territories.’\(^{70}\) Article 63(3) was also considered by Colonial Office officials to have ‘provided a sufficient loophole for discrepancies we knew would arise between the practice in certain Colonies and what the Convention provided’.\(^{71}\) And with the insurance clause of the emergency derogation procedure secured, European powers would be able extend the Convention to their colonial territories while falling back on the option of derogation under Article 15 if and whenever necessary.

Following consultation with the colonial authorities throughout the empire between 1951 and 1953,\(^{72}\) this was the tack that Britain opted to take.\(^{73}\)

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\(^{69}\) Edith Mercer, Colonial Office Minute of 18 January 1951, CO 936/157. As Simpson observes, ‘the primary motive was not to improve the lot of colonial subjects [but] to present British colonial policy and practice in a favourable light, by publicly committing colonial governments to respect for human rights and to furnish an argument for not accepting a UN Covenant if one was ever adopted.’ A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001) 825.

\(^{70}\) British Cabinet Steering Committee on International Relations, Working Party on Human Rights: Record of meeting held on 13 October 1953, FO 371/72808/UNE2273.

\(^{71}\) E.C. Burr, Minute of 14 July 1958, CO 936/531.

\(^{72}\) See Confidential Circular Despatch 25526/1/51 of 30 March 1951 from the Secretary of State for the Colonies to all colonial governors; replies from colonial governors in files CO 936/156 and CO 537/7157.

\(^{73}\) As noted above, France, by contrast, did not ratify the Convention until after its empire had broken up. Denmark had been the first to act upon the provisions of Article 63, extending the Convention to Greenland. A similar process of consultation was embarked upon by the Colonial Office regarding the extension around the empire of the First Protocol to the European Convention relating to issues of property (Article 1), education (Article 2) and, most contentiously in the colonial context, elections (Article 3). Here, even the existence of a formal emergency suspending certain obligations was not considered ample insurance against liability. See, for example, Letter from Colonial Office official E.M. West to Foreign Office official E.R. Warner, 18 December 1953, in CO 936/155: ‘I think you will agree that it would be injudicious to extend the Protocol to British Guiana, at least until the emergency has ceased to exist. Kenya has said that it does not propose to consider the extension of Protocol for the present, and we agree that Kenya should also be left out of account for the time being.’
Notably, the context at the time was one in which the ripple of emergencies in the late 1940s from Jamaica to Malaya was continuing to fan out. States of emergency were declared, for instance, in Grenada in February 1951, Kenya in October 1952 and British Guiana in October 1953, straddling the coming into force of the Convention in September 1953. In October 1953, notice was given by the British government to the Council of Europe that the Convention would be extended to a large number of overseas territories. This broadened its reach to 68 million people in 42 British overseas territories (54 million of whom in Africa), more than the population of Britain itself at the time.74

A number of the colonial governments did express concerns over the implications of coming under the Convention’s jurisdiction, however, and it was not extended to all British colonies. The Aden Protectorate, Brunei, Hong Kong and Southern Rhodesia were among those excluded, for varying reasons. The governor of Hong Kong informed the Secretary of State for the Colonies that he ‘would greatly prefer that the Convention should not apply to Hong Kong for the present.’75 The reluctance stemmed from a condition of emergency, which the governor argued prevailed in the colony due to a floating alien population and violence in “Communist areas”, and the potential burden involved in reviewing the special emergency measures in place and reporting to the Council of Europe under the Article 15 derogation procedure.76 As detailed in a Colonial Office minute, the authorities in Hong Kong ‘feel that they are faced with “a public emergency threatening the life of the nation” in which a “complete negation of human rights is the order of the day” and that it would not be practically reasonable to have the extension extended to them unless and until they can examine all their legislation.’77 The archive files on this are revealing. Article 15 was viewed by the British

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74 Council of Europe, Directorate of Information, IP/643, 30 October 1953.
75 Savingram No. 71 from the Governor, Hong Kong to from the Secretary of State for the Colonies, 12 January 1952, CO 936/156.
76 Savingram No. 71 from the Governor, Hong Kong to from the Secretary of State for the Colonies, 12 January 1952, CO 936/156.
77 Note from E.C. Burr to Dr. Edith Mercer, 13 February 1952, CO 936/156.
authors not as an oversight mechanism to regulate the use of emergency measures, but rather (and explicitly) as a ‘loop-hole’ which could be used to strip the Convention of the bulk of its operation in practice.\textsuperscript{78} While concerns were raised over the disingenuousness of extending the Convention to a territory but then opting ‘to send in a list of derogations which virtually nullify the whole thing’,\textsuperscript{79} this was not enough to sway the ultimate decision that, overall, the preferable course of action would be to extend the Convention to the colonies. This would allow credit to be gained for doing so, and at the same time provide a shield from anti-imperialist critics should Britain choose not to accede to the UN Covenant.\textsuperscript{80} Therefore, the decision not to extend the Convention to Hong Kong\textsuperscript{81} was a deviation from the general policy pursued, even in relation to colonies under states of emergency.

When the Convention was extended to the rest of the empire, it did encompass a number of territories where emergency legal regimes were already in force, including British Guiana, Kenya and the Federation of Malaya and Singapore. In those contexts, the colonial authorities were prepared to accept whatever accompanying baggage would be necessary to allow special powers to remain in place:

In territories where the emergency was thought to be of a very temporary nature, as in lawyerless Sarawak, it raised no special problem. But where, as in the Federation of Malaya there was no immediate end in sight, there was going to have to be a derogation if the convention was extended. Kenya was in like case once the emergency had been declared in 1952.\textsuperscript{82}

Within the first year of the European Convention’s application, the British government had indeed submitted notice of derogations pursuant to the extant emergencies in British Guiana, Malaya and Singapore, Kenya and Uganda.\textsuperscript{83}

\textsuperscript{78} Note from E.C. Burr to Dr. Edith Mercer, 13 February 1952, CO 936/156.
\textsuperscript{79} Note from E.C. Burr to Dr. Edith Mercer, 13 February 1952, CO 936/156.
\textsuperscript{80} Minute of Dr. Edith Mercer, 13 February 1952, CO 936/156.
\textsuperscript{81} Minute of Mr. Hall, 20 February 1952, CO 936/156. This decision was taken for fear of the undue reporting workload it would have created for colonial legal offices in Hong Kong.
\textsuperscript{83} Note verbale of 24 May 1954 (1958) 1 \textit{Yearbook of the European Convention on Human Rights} 48-49.
The reasons given generally invoked some variation of a tersely worded formula pertaining to the attempted subversion of the ‘lawfully constituted Government’, or, in the Ugandan case, grounds as nebulous as the existence of ‘a constitutional crisis.’ The general policy adopted by the British authorities was one of providing as little information as possible – both in respect of the reasons for the derogation itself, and in relation to the measures deployed under the derogation. Thus, virtually no information was transmitted to inform Strasbourg as to the scope and scale of emergency powers used, nor their legal form. From the outset, an approach that avails of the derogations procedure without being overly burdened by its procedural requirements was discernible.

Article 15 was subsequently invoked to derogate from obligations in Cyprus, Northern Rhodesia, Nyasaland, the Colony of Aden, the Zanzibar Protectorate and Mauritius. Britain also notified the Council of

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84 Note verbale of 24 May 1954 (1958) 1 Yearbook of the European Convention on Human Rights 48-49. Regarding the derogation for the Province of Buganda in the Protectorate of Uganda, Simpson notes that the state of emergency was ‘of a somewhat fictitious nature’ and had already ended by the time the notice of derogation was provided. A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001) 878, 881-884.

85 Indeed, in the first case adjudicated under the Convention to address Article 15, Britain was criticised by the European Commission of Human Rights for its inattentive and disparaging approach to the derogations procedure. See Greece v. UK ['the first Cyprus case'], Application No. 176/56, Report of the European Commission on Human Rights, 26 September 1958.


90 Note verbale of 5 December 1961 (1961) 4 Yearbook of the European Convention on Human Rights 44. As Simpson points out, the election disturbances that prompted the state of emergency in Zanzibar ‘would certainly have never been handled under emergency powers in mainland Britain.’ A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001) 1071.
Europe of further derogations in respect of Kenya,\textsuperscript{92} Singapore,\textsuperscript{93} Aden\textsuperscript{94} and British Guiana.\textsuperscript{95} An evident policy choice ordained emergency as the default setting by which to side-line the Convention in the colonies, particularly as it related to detention and liberty of person. A study by Denys Holland tallied twenty-nine separate declarations of emergency between 1946 and 1960, in colonies from A(den) to Z(anzibar).\textsuperscript{96} Some of these declarations had lapsed before the Convention came in to force and not all were followed with formal derogations.\textsuperscript{97} That said, leaving Turkey aside,\textsuperscript{98} the number of derogations made by Britain in that first decade is greater than the total number derogations made by the Council of Europe’s other 45 member states combined in the six decades of the Convention’s application.\textsuperscript{99} Britain’s resort to emergency powers, however, ultimately proved incapable of stemming the tide of the empire’s fracture. Derogations that had not been revoked by the time the territories concerned acquired independence lapsed with decolonisation.

\textsuperscript{91} Undated notice in (1965) 8 Yearbook of the European Convention on Human Rights 14-17.
\textsuperscript{93} Note verbale of 11 May 1960 (1960) 3 Yearbook of the European Convention on Human Rights 75. See also FO 371/154534/WUC1735/11.
\textsuperscript{94} A state of emergency was formally declared in both the Aden colony and protectorate on 12 December 1963, while the relevant derogation notice was submitted to the Council of Europe on 30 August 1966.
\textsuperscript{97} States of emergency enforced in Sarawak and North Borneo from December 1962, for example, were not subject to formal derogations as such a step was left ‘altogether too late … such derogation would be susceptible to serious misinformation if it became public knowledge at the present time.’ See A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the European Convention (Oxford: Oxford University Press, 2001) 1061, citing CO 936/853, 854.
\textsuperscript{98} Turkey has derogated under Article 15 several times, including in 1963, 1974, 1978, 1979, 1980, and 1990. A number of these derogations relate to the situation in Cyprus.
\textsuperscript{99} Derogations include those made by Greece (1967); Ireland (1957, 1976); France (1985, in respect of New Caledonia); Albania (1997); Armenia (2008).
IV. Mau Mau & the “Achilles’ Heel” of Liberal Human Rights Law

In eventually accepting Britain’s arguments for the inclusion of an emergency derogation clause in the European Convention on Human Rights, the majority of the other members of the Council of Europe reasoned that ‘it had the advantage of excluding, even in the case of war or threat to the life of the nation, any derogation of certain fundamental rights, and … the procedure laid down in paragraph 3 could prove to be useful for the protection of Human Rights in exceptional circumstances’.100 Such an interpretation presents the provision in its positive light in the sense that certain rights are excluded from derogation and some form of accountability is entailed by virtue of the procedure to be followed when emergency powers are introduced. A more critical read suggests that the institutionalisation of a framework under which derogations can take place during a self-proclaimed emergency may serve to cast a light of legitimacy on illiberal practices themselves. Though such an eventuality may have been foreseen during the drafting process, any lingering concerns were relegated as secondary. Questions remain over the extent to which this was due to a well-intended but somewhat naïve expectation on behalf of the drafters as to how states would henceforth conduct themselves in exceptional circumstances, and, conversely, the extent to which it was due to the realities of the enduring intrinsic structures of international law, whereby states will ultimately legislate with self-preservation paramount.

The state of emergency in Kenya in the 1950s is indicative of the normative-policy turn to emergency writ large at the decline of the British empire. An unpacking of the case reveals the colonial machinery’s design and continued production run of a particular type of racialised emergency, rooted in the construction of a depraved and subhuman other. Running concomitant to the drafting of the formative international human rights instruments, it also demonstrates the ‘long shadow’101 cast by colonial legality, and the nature of

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100 Council of Europe Doc. CM/WP 1 (50) 15, 20.
the doctrine of emergency as an inbuilt ‘Achilles’ heel’ of the liberal human rights project from its inception.

IV(i) Kenya: Rehearsing the Emergency

The state of emergency in 1950s Kenya manifested, in large part, as a war waged by British forces against a peasant revolt by the Kikuyu (Gĩkũyũ) people of Kenya’s central highlands. While calling itself the Kenya Land and Freedom Army (or Land and Freedom Movement), the rebelling group was and remains commonly referred to as “Mau Mau”.


103 Neighbouring Emba, Kamba and Meru tribes were affected and involved to a much lesser degree.


105 The origins of the “Mau Mau” label are uncertain. Fred Majdalany notes that it was a word without meaning to the Kikuyu, but contends that it was most likely a code word or anagram; ‘one secret which the Kikuyu succeeded in keeping wholly to themselves.’ Fred Majdalany, *State of Emergency: The Full Story of Mau Mau* (London: Longmans, 1962) 75-76. Simpson, on the other hand, asserts that Mau Mau was a tag conferred by Europeans, although he provides no further explanation. A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) 835. There is likely an element of truth in both claims. Josiah Kariuki, a detainee for most of the emergency period, explains that linguistic anagrams were commonly used by Kikuyu children, including “Mau, Mau” for “Uma, Uma” (meaning “Go, go” or “Go out, go out”). “Mau Mau” was the code adopted at some secret oathing ceremonies to raise the alarm in the event of a British raid. From then, ‘the oath of unity was given the name “Mau Mau” [but] the members of the movement did not call the movement “Mau Mau”.’ Kariuki suggests that the British authorities embraced the Mau Mau moniker for the movement as a whole so as to elide...
the emergence of more radical elements of the mainstream nationalist Kenya African Union (KAU) and Kikuyu Central Association (KCA) during the 1940s, with its roots in the Kikuyu “Squatter Resistance” movement spawned by colonial land policies. Agitation and unrest had been simmering for decades in a context where a sizeable white settler population had occupied Kenya’s prime agricultural land, predominantly in Kikuyu territory. With Kenya experiencing the same rise of anti-imperial sentiment by the 1940s as elsewhere in the colonised world, the Mau Mau revolt involved the coming together of specific local and national interests, and the blending of some of the traits of militant nationalism with those of an underground peasant movement. While exemplifying some of the common characteristics of anti-colonial resistance, Mau Mau must be understood as possessing its own particular ideological, cultural and material thrust.

The state of emergency in Kenya was formally declared by Governor Evelyn Baring in October 1952, but had been in the making for some time before that. The legal foundations were laid in 1948 by an Emergency Powers Ordinance empowering the Governor to proclaim a public emergency and to regulate as deemed necessary to preserve order and public safety. This can be understood as a product of the “1948 Panic in Whitehall”, whereby increasing political opposition to British rule across numerous colonies unsettled the Colonial Office in London and prompted an empire-wide

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106 Initial British assumptions of Jomo Kenyatta as the leader of Mau Mau were indicative of the coloniser’s lack of understanding of the socio-political dynamics of its colonised subjects. S.M. Shamsul Alam intimates that the relationship between Kenyatta’s mainstream (and, many would argue, bourgeois) nationalist movement and the Mau Mau movement was ‘one of ambivalence and suspicion, if not outright hostility’. S.M. Shamsul Alam, *Rethinking Mau Mau in Colonial Kenya* (Basingstoke: Palgrave Macmillan, 2007) 20, 101-121.


deployment of the emergency paradigm as a technique of containment. ‘In this climate, even relatively liberal administrators were busy integrating emergency powers into their overall strategy. … Throughout the empire police forces and security arrangements were being reviewed and contingency plans drawn up.’ Colonial administrators and governors were planning ahead, prompted—in some instances—by vociferous settler populations. Parallel and somewhat naïve and tokenistic attempts to win over the hearts and minds of Kikuyu squatters were met with scorn and thus short-lived; inevitably, ‘the only option available was more repression.’

An amendment to the Emergency Powers Ordinance two years later expanded the reach of the regulations to cover powers of search and arrest, detention, movement restriction (on top of the existing kipande pass laws), curfew, censorship and restrictions on public meetings. In 1950, security measures were intensified in preparation for a turn to a full-on emergency framework. An ‘Emergency Scheme for Kenya Colony’ was circulated by Britain’s East Africa Command in March 1950 to make provision for the maintenance of law and order in Kenya ‘as may become necessary in the event of an emergency.’ The document details the factors that might trigger such an emergency, and provided for military resources and ‘special funds’ to be made available. It also created a Colony Emergency Committee (“EMCOM”) comprised of members from across the spectrum of the Kenya administration, and provided for a procedure whereby local emergency organisations were to be set up in each of the colony’s provinces and to report to the overarching Colony Emergency Committee twice daily. The Commissioner of Police was similarly instructed to furnish situation reports to the Committee every morning and evening.

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112 The kipande was a registration certificate that all African adult males were required to carry at all times.
113 Emergency Powers Ordinance, No. 5 of 8 February 1950.
This was, in effect, a contingency plan drawn up two and a half years in advance of the emergency being initiated by the British authorities. It preceded the large-scale proliferation of Mau Mau “oathing” campaigns and was developed before the colonial administration had any real understanding of what the Mau Mau society was. The idea of pre-.meditated measures inherent in such planning appears counter to the definitive elements of an “emergency” as a sudden, unexpected, urgent, exceptional and temporary occurrence. In Kenya, as noted, British administrators were sketching the contours of an emergency that had yet to manifest. At a high level meeting in November 1950, senior colonial officers and leaders of the settler communities indicated their common support for ‘far-reaching measures’ and agreed upon the introduction of practices—communal penalties, summary evictions, new pass rules regulating movement—that created an ‘increasingly harsh climate of law and order’ and anticipated the emergency legislation of 1952.\textsuperscript{116} The build-up of exceptional measures continued apace through 1951 and 1952. The Use of Collective Punishments Ordinance was put through in April 1952 and served as another precursor to the state of emergency. It was a blunt legal instrument that would be used with growing regularity over time.\textsuperscript{117} The following month, district commissioners were given further special powers, ‘the equivalent of Supreme Court powers of punishment for certain offences which are commonly committed by adherents of the Mau Mau society.’\textsuperscript{118}

Through these developments, white settlers continued to clamour for an institutionalisation of the use of force in the form of martial law or, at the

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\textsuperscript{115} A traditional Kikuyu practice. ‘The Mau Mau movement used a campaign of ritualised oath-taking to gain the support and co-operation of the Gikuyu masses. … the oathing rituals are to be understood as part of the ideological apparatus of the movement, along with rallies and songs.’ Maia Green, ‘Mau Mau Oathing Rituals and Political Ideology in Kenya: A Re-analysis’ (1990) 60:1 Africa 69.

\textsuperscript{116} Frank Füredi, \textit{The Mau Mau War in Perspective} (Nairobi: Heinemann, 1989) 111-112, citing KNA, DC, NKU 2/386, Monthly Labour Reports No. 8, 27 November 1950, Mau Mau meeting, Provincial Commissioners’ Offices.


\textsuperscript{118} Corfield report extracts from the Kenya Police Intelligence Summaries for 1952, quoted in Frank Füredi, \textit{The Mau Mau War in Perspective} (Nairobi: Heinemann, 1989) 116.
least, emergency powers. While Kikuyu resistance to the use of repressive measures ostensibly bolstered the case made by the settlers, the continuing absence of a clearly identifiable “cause” for a state of emergency meant that the Colonial Office was less vehement:

… the pressure for a state of emergency emanated from the European settler community, who were able to gain the backing of the Nairobi administration for their project. Behind the scenes, there was considerable pressure to win the acquiescence of the Colonial Office for the implementation of the emergency. … The Colonial Office did not initiate but went along with the proposal to implement a state of emergency. There is a curiously passive tone to the deliberations in the Colonial Office on this subject.  

The assassination of prominent native collaborator, Chief Waruhiu, on 7 October 1952 is generally credited as the incident that united opinion around the need for drastic action, and sparked the emergency declaration. As previously noted, however, the conditions of emergency were rooted in the increasingly severe policies that had been mounting over the preceding years. Archival histories of a variety of British colonial emergencies during this period reveal plans that were calculated to culminate in the declaration of states of emergency, rather than, as intended, a reaction to a single incident or trigger. In the specific Kenyan context, a letter from the Acting Governor regarding the need for special powers had been sent to Whitehall on 17 August 1952, while on 2 September the Attorney-General in Nairobi sent draft copies of the proposed emergency laws for approval by the Colonial Office. The killing of Waruhiu some weeks later simply provided the ‘pretext’ needed for this ‘new offensive’. It was ultimately launched with the declaration of the state of emergency on 20 October and the concomitant entry into force of a code of emergency regulations.

123 (1952) 31 Colony of Kenya Proclamations, Rules and Regulations 490.
IV(ii) *A Performative Emergency*

The bulk of historical and empirical work done on the Mau Mau revolt suggests that the direct effect of the proclamation of emergency was to aggravate conflict and resistance, and breed a spiral of violence. The exceptional powers deployed by the British authorities provoked Kikuyu militancy at least as much as they curbed it.

With reference to the formative 1950-52 period, it is clear that the political radicalisation of the Kikuyu squatter movement cannot be disentangled from the context of the laws and practices implemented by British rule. The pre-emptive measures taken against the Kikuyu community in central Kenya marked, in effect, the onset of an informal emergency, which was ostensibly aimed at reigning in subversive natives but ended up having the opposite effect, of fomenting revolt. In response to the crackdowns initiated by both colonial state and settlers in 1950, ‘for the first time, squatter resistance went beyond civil disobedience to begin deploying force and sabotage against Europeans and Asians in the Highlands’; the administration of oaths had been similarly negligible up until 1950. Mass arrest campaigns, preventive detention and increasingly indiscriminate and uncompromising police operations served only ‘to exacerbate the tension and strengthen support for Mau Mau.’

This was compounded by the declaration of the formal emergency and the arrival of British troops in 1952. Historians of the Mau Mau rebellion underline the point that armed revolt did not precede but was the consequence of the calling of the emergency. The emergency transformed dissent into revolt, pushing increasing numbers of Kikuyu to flee into the forests where Mau Mau fighting units were organising. The declaration of emergency can be understood as a catalyst which pushed the Mau Mau movement further towards armed resistance in response. In this sense, the state of emergency

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becomes self-fulfilling. Füredi notes that in Nakuru District, for instance, an area hitherto bereft of incident, violent confrontations escalated after October 1952.\footnote{Frank Füredi, *The Mau Mau War in Perspective* (Nairobi: Heinemann, 1989) 118.} Insofar as the special measures were taken to shore up British authority, the policy was unsuccessful. The imposition of the state of emergency was received by the Kikuyu as a further incitement and affront, and precipitated a groundswell of disorder and resistance to authority; thus appear the hallmarks of the emergency as an aggravator of conflict. As David Anderson notes: ‘[i]t was not until October 1952 that the war properly got going, provoked by the British decision to declare a state of emergency and to move troops into the colony.’\footnote{David Anderson, *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire*, (London: Weidenfeld & Nicolson, 2005) 4.} Anderson shows that as the emergency began, Mau Mau was barely a fighting force at all. Over the following two months however, ‘British hesitancy over how to target the Mau Mau leadership, combined with heavy-handed repression against ordinary Kikuyu, allowed the Muhimu time to gather their wits and drove many of the wavering Kikuyu majority into the rebel camp.’\footnote{David Anderson, *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire*, (London: Weidenfeld & Nicolson, 2005) 69.} Thus, the declaration of the state of emergency and the assumption of extraordinary powers by the colonial governor was performative, provoking a more direct conflict which reached a peak in intensity in 1954. Brian Simpson explains the underpinnings of the particularly severe dose of colonial violence that was meted out in response to Kikuyu demands for land and freedom: ‘Notions of white racial superiority, allied to the belief that the uprising represented a return to “barbarism,” added a special dimension to the ruthless nature of the government reaction to the uprising.’\footnote{A.W.B. Simpson, ‘Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights’ (1996) 41 *Loyola Law Review* 629, 665.}

The emergency legal framework proliferated over the course of the 1950s in the form of a matrix of emergency regulations, special ordinances and “exceptional” administrative decrees. Much of this was rooted in control over the native body, through the infliction of pain on one hand, and more
mundane but insidious controls of movement and residence on the other. The
implications of the emergency for native life and liberty were substantial, with
mass internment of Kikuyu Kenyans in prison camps, and an execution of the
death penalty on a scale unparalleled elsewhere in the empire at that time.
Capital punishment was not restricted to typically capital crimes such as
murder, however. Under the emergency regulations, the death penalty could
be imposed for lesser offences such as unlawful possession\textsuperscript{132} or trading\textsuperscript{133} of
firearms. Approximately 900 Kenyans were executed during the first two
years of the state of emergency, at least a third of whom for crimes of arms
possession or administration of unlawful oaths.\textsuperscript{134} From June 1953 onwards,
capital cases were heard by tailor-made Special Emergency Assize Courts\textsuperscript{135}
and December 1956 the Courts had sentenced 1,574 Kikuyu to hang.\textsuperscript{136}
Additionally, official figures suggest that approximately 12,000 Africans were
killed by colonial security forces during the Mau Mau emergency, while
independent research indicates that the actual figure was likely to have been
over 20,000.\textsuperscript{137}

In addition, Section 2 of the Emergency Regulations was broadly
framed in respect of liberty of person, empowering the governor to make any
order if ‘satisfied that, for the purposes of maintaining public order, it is
necessary to exercise control over any person.’ This resulted in the customary
panoply of restrictions on employment, movement and residence. Most
significantly, extensive use was made of the paradigmatic emergency power of
detention without charge or trial. Official records from the British authorities

\textsuperscript{132} Amended Regulation 8A, 15 April 1953 (1953) 32 Colony of Kenya Proclamations, Rules and Regulations 339.
\textsuperscript{133} Regulation 8AA, 14 May 1953 (1953) 32 Colony of Kenya Proclamations, Rules and Regulations 437.
\textsuperscript{134} Anthony Clayton, Counter-Insurgency in Kenya 1952-60: A Study of the Military
\textsuperscript{135} Emergency (Emergency Assizes) Regulations 1953, The Official Gazette of the Colony and
\textsuperscript{136} David Anderson, Histories of the Hanged: Britain’s Dirty War in Kenya and the End of
Empire, (London: Weidenfeld & Nicolson, 2005) 6, and at 152-176 for further detail on the
creation of the Special Emergency Assize Courts and the capital trials of Kenyan accused.
\textsuperscript{137} David Anderson, Histories of the Hanged: Britain’s Dirty War in Kenya and the End of
put the number of Kenyans interned under Section 2 by April 1957 at 73,106.\textsuperscript{138} Simpson estimates the total for the 1950s at approximately 77,000,\textsuperscript{139} while Josiah Kariuki, himself an inmate of fourteen of Kenya’s detention camps between 1953 and 1960, ascertains that there were at least 80,000 detainees during the emergency.\textsuperscript{140} These figures do not account for undocumented temporary detentions and evacuation orders. Anderson concludes that, all told, ‘150,000 or more Kikuyu spent time in detention camps during the rebellion’, with the number incarcerated at any one time peaking at 71,346 (including some 8,000 women), the majority of whom administrative detainees incarcerated on the basis of mere suspicion.\textsuperscript{141} Under “screening” procedures deployed to identify Mau Mau supporters as part of large-scale military operations, thousands of natives would be interned en masse.

\ldots in Operation Anvil in 1954 the authorities arrested something of the order of 30,000 Africans, being practically the entire male population of Nairobi; they were held in reception centres under an evacuation order made under the Emergency (Control of Nairobi) Regulations. The idea was to identify Mau Mau supporters, and send them to work camps.\textsuperscript{142}

Exceptional detention measures were supplemented by additional powers stitched into an emergency law fabric in which ‘[a]ny lack of a power was rapidly remedied, either by way of a new regulation or amendment to an existing law. \ldots The governor could do whatever he liked.’\textsuperscript{143} The upshot was a pliable patchwork of collective punishment, land confiscation and property destruction. The decision to load indiscriminate punitive measures into the

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emergency armoury was taken in advance of the formal declaration of emergency itself, and was often deployed to effect evictions of entire communities. In one specific but indicative example, 4,324 Kikuyu were evicted following the killing of a white settler in Leshau in late 1952.\textsuperscript{144} Through the emergency, arbitrary land expropriation and population transfer continued to be effected through legislation such as the Forfeiture of Lands Bill 1953 and policies involving compulsory resettlement in centralised, regulated villages that amounted to ‘little more than concentration camps to punish Mau Mau sympathizers’; between June 1954 and October 1955 a total of 1,077,500 Kikuyu (from the population of approximately 1.4 million) were resettled in 854 such villages.\textsuperscript{145}

Communalised retribution of the type implemented in Leshau was prescribed as policy, with the degree of punishment graded on the basis of the gravity of the incident. In response to a serious incident such as a murder, ‘total evacuation of squatters and seizure of crops and stock’ was to be effected on the farm in question, and 50% evacuation and seizure on ‘neighbouring farms within, say a 3 mile radius’ (the ‘say’ betraying the entirely arbitrary nature of the delineation); the collective punishment scheme determined a 25% confiscation rate in the case of ‘less serious incidents’, such as the holding of a Mau Mau meeting.\textsuperscript{146}

Although uncovered in the context of the Mutua case (judicial proceedings against the British government based specifically on torture practices during the Mau Mau emergency), the “Hanslope files”\textsuperscript{147} also

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\item \textsuperscript{144} Frank Füredi, \textit{The Mau Mau War in Perspective} (Nairobi: Heinemann, 1989) 119.
\item \textsuperscript{146} KNA, PC NKU 2/846, Provincial Commissioner, Rift Valley Province, to all District Commissioners, 23 December 1952.
\item \textsuperscript{147} Also referred to as the “migrated archives”, these are colonial government files covering 37 former British colonial territories which were concealed from historians and the public for 50 years in a secret Foreign Office archive, before being handed over to the National Archives and made available to the public in 2012. The disclosure and phased release of almost 10,000 suppressed files (thousands more files were destroyed or disposed of by colonial officials under instruction from London during the decolonisation period, in order to avoid embarrassment and incrimination) between April 2012 and November 2013 came about by court order in the Mutua v. Foreign and Commonwealth Office litigation brought by former Mau Mau detainees, when it transpired that the government’s disclosure of the documentation
\end{itemize}
contain evidence of the bureaucratic spatial-territorial and population control dynamics of colonial emergency legalities. In the first tranche of files released in April 2012, there was little revelation in terms of torture and ill-treatment in Britain’s internment camps in Kenya, with much of the material instead relating to administrative and secretarial affairs. The majority of the more substantive files, however, are catalogued under the heading of ‘Collective Punishment under Emergency Regulations’ and document the confiscation of property and sources of livelihood (land, crops, livestock) of Kikuyu suspected of supporting Mau Mau rebels.  

One representative file contains a District Commissioner’s ‘Report of Collective Punishment ordered under Regulation 4B of the Emergency Regulations, 1952’. It certifies the seizure of 100% of the livestock or property of seven Kenyan farmers in October 1954, with the ‘reasons for punishment’ given variously within the file as ‘consorting with Mau Mau’ and ‘assisting terrorists’ on grounds that an alleged Mau Mau gang’s hide-out was located within a mile of their village. On the basis of the District Commissioner’s report, a ‘Forfeiture Order’ transferring ownership of the property and livestock to the government was made by the Governor of Kenya, pursuant to powers conferred by the Emergency Regulations.

Such normalised collective punishment is symptomatic of a punitive and often indiscriminate complexion to the abuse of power perpetrated by British forces throughout the emergency. It was not just members of the Mau Mau movement that were targeted; the Kikuyu racial group as a whole was

148 FCO 141/6086-6123.
149 FCO 141/6089.
collectively framed as suspect. ‘From early November 1952,’ Füredi argues, ‘the government had in effect declared war on the Kikuyu community.’ In Colonial Office files containing weekly police reports on ‘Colony Appreciation of Crime and Subversion’, the mindset and language of M.S. O’Rorke, Kenya’s Commissioner of Police, is illustrative. Emboldened by the declaration of emergency, the Commissioner’s position hardened further from October 1952. At the end of November, he characterised the 90,000 Kikuyu males aged between 17 and 32 as ‘really dangerous’ and emphasised that there were ‘almost the same number of young women who are showing themselves to be nearly as dangerous.’ Thus, ‘[a]lmost 200,000 desperate potential criminals constitutes a most grave problem which requires such repressive measures as will produce a fear & respect for Government not yet fully felt.’ O’Rorke went on to itemise the punitive treatment meted out to the Kikuyu in the preceding week, but warns that it may not have been enough, and that ‘constructive punishment must keep pace with repressive measures’:

… the killing and wounding of over 40 in one affray alone, the arrest of 340 rioters, the breaking up of homes and the removal of nearly 3,000 back to desperation and poverty in their reserves, the seizing of large herds of their stock, the constant harassment by police and troops, the arrest of hundreds, are measures of the most repressive order which should make any people pause; whether they will do that and more than that, in the case of the Kikuyu, must remain to be seen.

Systematised collective punishment ranging from the mundane to the brutal continued through the 1950s. Torture and ill-treatment of detainees was institutionalised in a context where the “normal” rule of law was superseded by an emergency rule of law. Abuses under the state of emergency comprising ‘physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings’ have been comprehensively chronicled by

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historians five decades later on the basis of primary documents and testimony of surviving perpetrators and victims. This formed the basis of the tort claim brought by a number of former Kenyan detainees against the British authorities.\textsuperscript{153} In July 2011, the High Court issued a preliminary judgment ruling that the plaintiffs had arguable cases in law and that the case should proceed to trial.\textsuperscript{154} In the ensuing hearings in July 2012, the British government acknowledged for the first time the fact that torture had been perpetrated in Kenya: ‘The government does not dispute that each of the claimants suffered torture and other ill-treatment at the hands of the colonial administration.’\textsuperscript{155} Britain denied its legal responsibility for such facts, however. Initially, this had been on the basis that responsibility had passed to the successor state upon independence. When this was rejected by the Court, the government resorted to a statute of limitations argument under the Limitation Act 1980, claiming that too much time had elapsed for witness testimony to be reliable and that too many key witnesses and decision-makers had passed away for the full context and circumstances to be established. In October 2012, High Court presiding Justice McCombe, acting under the discretion permitted by section 33 of the Limitation Act, ruled that there should be no time bar on the hearing of the case.

I have reached the conclusion, however, that a fair trial of this part of the case does remain possible and that the evidence on both sides remains significantly cogent for the Court to complete its task satisfactorily. The documentation is voluminous, as I have said already, and the governments and military commanders seem to have been meticulous record keepers. The Hanslope material has filled gaps in the parties’ knowledge and understanding and that process is still continuing.\textsuperscript{156}

In June 2013, the British government indicated its intention to provide


\textsuperscript{156} Mutua & others v. The Foreign and Commonwealth Office [2012] EWHC 2678 (QB), 5 October 2012, para. 95.
compensation payments to the plaintiffs in the case, and to the remaining 5,000 survivors of Britain’s internment camp complex in Kenya.157

The type of disciplinary and punitive violence that underpinned the claim against the British authorities were exemplified in events such as the Hola Camp killings of 1959. There, eleven detainees were beaten and clubbed to death by British camp guards following their refusal to cooperate with uncompromising labour conditions designed to “break” the prisoners. The incident remains the most exposed—but by no means the only—culmination of policy sanctioned at the highest levels of colonial government regarding the treatment of Kikuyu detainees. The “dilution technique”, a ‘systematic approach to brutalizing detainees and forcing them to confess’,158 had been pioneered in the detention camps on the Mwea plain in central Kenya. It had resulted in deaths of detainees, leaving Governor Baring both careful to cover up the killings and cautious about the use of the technique.

Upon being appointed to oversee “rehabilitation” of “hard-core” detainees in the six Mwea camps in 1957, a young officer named Terence Gavaghan devised “Operation Progress”, ‘a systematized and well-executed program of brutality’ that would resurrect the dilution technique as central to detention policy.159 As a clear exemption from liberal rule of law standards, the emergency legal paradigm becomes central to this enterprise. Historian Caroline Elkins has chronicled the moves made by the administration in Kenya to satisfy Secretary of State for the Colonies, Alan Lennox-Boyd, of the need for what Baring described as ‘a phase of violent shock’:

Baring and his attorney general, Eric Griffith-Jones, sent numerous

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159 Caroline Elkins, Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya (London: Pimlico, 2005) 321. As Chris McGreal notes, “hard-core” did not mean the most egregious offenders, ‘merely the most defiant.’ Former inmate Epson Makanga recalls his experience of Gavaghan: ‘He was a tall man with a thin face and we soon discovered his camp was about nothing more than being beaten and tortured. They beat us from the day we arrived, with sticks, with their fists, kicking us with their boots. They beat us to make us work. They beat us to force us to confess our Mau Mau oath. After a year I couldn't take it any longer. Gavaghan had won.’ Chris McGreal, ‘Shameful Legacy’, The Guardian, 13 October 2006.
secret memoranda to the Colonial Office, outlining the plan for systematic use of brute force and asking for official approval from the colonial secretary. … At first Lennox-Boyd balked when he learned of Gavaghan’s methods. It was one thing to endorse unofficially the violence and torture that was ongoing in the camps and villages; it was another to make it officially sanctioned policy. … Griffith-Jones took charge, drafting a series of codes written in legal doublespeak, differentiating between something he termed legal compelling force from the otherwise illegal punitive force. Compelling force could be used “when immediately necessary to restrain or overpower a refractory detained person, or to compel compliance with a lawful order to prevent disorder.”

The parallels with the legal acrobatics of Israel’s state-sanctioned torture under the guise of “moderate physical pressure” and the US government’s “torture memos” (Office of Legal Counsel memoranda on the legality of certain forms of ill-treatment of detainees in the context of the “global war on terror”) decades later are manifest. Griffith-Jones’ linguistic manoeuvres were enough to convince the Colonial Secretary, who signed off on Regulation 17 of the Emergency (Detained Persons) Regulations, authorising prison officers to use discretionary, on the spot violence against detainees. Even if one were to accept the pseudo-technical distinction between compelling and punitive force, Gavaghan went on to acknowledge that ‘[p]unishment was being meted

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out which clearly skirted the edges of the quasi-legal concept of “compelling force”; punishment which he admitted was ‘visually “brutal and degrading,” but was held to be both necessary and effective.’\textsuperscript{163} The legal cover constructed was a façade; according to Gavaghan, no legal restraints were envisaged.\textsuperscript{164} Griffith-Jones himself came to describe the treatment of detainees as ‘distressingly reminiscent of conditions in Nazi Germany’.\textsuperscript{165} Despite a mounting campaign by opposition Labour MPs against such violence as the 1950s wore on and even as more information about what was happening in the detention camps in Kenya came to light, it continued to be underwritten on the basis of the unspeakable savagery ascribed to the Mau Mau movement.

**IV(iii) Mystifying Mau Mau: The Construction of a Diseased African Mind**

The standard technique of the time—branding the native political rebellion as both criminal connivance and communist conspiracy—was only part of the story in Kenya. On top of a public relations campaign presenting Mau Mau as a criminal organisation in thrall to a global communist crusade, ‘[t]he colonial government went to great lengths to portray Mau Mau as an irrational force of evil, dominated by bestial influences.’\textsuperscript{166} Attempts made to investigate and explain the possible socio-economic causes of the Mau Mau revolt were censored by authorities keen to sustain the narrative that the primary factor underlying Kikuyu resistance was not agrarian grievance but “perverted tribalism.”\textsuperscript{167} The line parroted in the Colonial Office from press officer to Secretary of State—brandishing Mau Mau with an image of irrationality and amorality—fanned the flames of the imperial racist imagination:

\textsuperscript{166} Frank Füredi, *The Mau Mau War in Perspective* (Nairobi: Heinemann, 1989) 3-4.
Like most wars, Mau Mau was as much about propaganda as it was about reality. From the start of the Emergency the colonial government was masterful in its public depiction of Mau Mau. ... The “horror of Mau Mau” stood in contrast to what the public relations officer called the “peaceful and progressive conditions” of Kenya prior to the Emergency. The “white” and “enlightened” forces of British colonialism were a stark contradistinction to the “dark,” “evil,” “foul,” “secretive,” and “degraded” Mau Mau. These descriptions spilled over into the Kenyan and British press, where sensationalist accounts juxtaposed white heroism with African, or Mau Mau, terrorism and savagery. ... It was the distinctive quality of Mau Mau oathing rituals, and methods of killing, that transformed the virulent racism that had been the cornerstone of settler racial attitudes for over half a century into something even more lethal. ... in the settler imagination, Mau Mau adherents were scarcely part of humanity’s continuum; they were indistinguishable in local thought and expression from the animals that roamed the colony.168

The equation of Mau Mau adherents with deranged, bloodthirsty beasts was common in the colonial parlance. According to one officer, most British soldiers in Kenya ‘regarded the finding and disposing of the gang members in the same way as they would regard the hunting of a dangerous wild animal.’169 Officials stationed in Kenya’s Central Province described Mau Mau as a ‘bestial’, ‘filthy’, ‘vile’ and ‘evil’ movement.170 Terence Gavaghan echoed these sentiments: ‘Mau Mau was a seething mass of bestiality.’171 In these characterisations, the line between Mau Mau and Kikuyu was blurred. Kenya’s Commissioner of Police reported that: ‘Kikuyu are showing themselves prone to insane frenzy ... added to the predilection of the Kikuyu for gangster crime, his savage cruelty, his cunning and ability to plan crime, makes him a most dangerous enemy.’172 The ‘brutality and blood lust’ of Mau Mau, he asserted, were evidence of a ‘return to the savage and primitive which

there is good reason to believe is the heart of the whole movement.’

Insofar as an emergency legal framework is seen as necessary to straitjacket this innate insanity and predisposition to sadism and criminality, law was co-opted into the pseudo-biological narratives of race that had become central to colonial discourse. In Kenya, the idea of the native rebels as both mentally diseased and possessed by evil was present not only in security apparatus rhetoric; it permeated the work of medical and psychiatric officers, whose racialised “ethno-psychiatry” theories both flowed from and complemented prevailing psychological and cultural postulations of the relationship between coloniser and colonised. Chief among European ethno-psychiatrists at this time was Dr. John Colin Carothers, and chief among his contentions, informed by and further informing colonial ideology, was the notion that difference in physical characteristics connotes behavioural and psychological difference.

Carothers was a district medical officer in Kenya who, in 1938, fell into the role of director of Mathari Mental Hospital in Nairobi (he had no special training in psychiatry), which he would end up occupying for more than a decade. Carothers was ‘the right man in the right place’, and became ‘the most important author in the field of African Psychiatry’ through the 1940s and 1950s. He returned to England in 1950 and thereafter published his seminal work on *The African Mind in Health and Disease*, courtesy of the World Health Organisation. Carothers’ delineation of a variety of African races on the basis of physical criteria including cranium shape, hair thickness and facial features fed in to a theory that correlated significant physical differences (skin colour, for instance) with disparities in mental and cognitive capacity. Due to what he presented as an idleness of the brain’s frontal lobes

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in Africans, Carothers suggested a relative underdevelopment of the African brain and a biologically fixed cognitive inferiority therein. This is based on “classical conceptions” of the African mentality as observed by European neuropsychiatrists, conceptions which Carothers finds ‘represent the truth’, namely that an ‘immaturity’ of the mental faculty ‘prevents complexity and integration in the emotional life’ of the African and gives rise to her/his inherently primitive mindset and violent ‘impulsivity’. This, in turn, provided scientific basis for the notion of Africans as intrinsically psychologically imbalanced and fuelled the tanks of colonial stereotyping. Carothers also argued that “detribalised” rural Africans became more susceptible to mental illness upon relocation from their native habitat to an urbanised setting.

Thus, when the British administration in Kenya took the telling step in 1954 of eliciting a psychological assessment of the Mau Mau rebellion and advice on potential “cures” for its proponents (the clear implication being that the movement was ‘a form of Kikuyu madness which could best be understood and described by a specialist in mental disorders’), Carothers was the natural choice. Through this manoeuvre, ethno-psychiatry was ‘commandeered to clothe the political interests of the colonists in the pseudo-scientific language of psychiatry to legitimize European suzerainty.’ Carothers duly obliged. Jock McCulloch provides a succinct summation of Carothers’ projection of prejudicial cultural assumptions and racialised conceptions of mental illness onto Kikuyu resistance:

In his account of the reasons for Mau-Mau, Carothers dismisses any suggestion that there were social, political or economic grounds motivating the Kikuyu’s protest. The Mau-Mau arose because of the inability of the African personality to adapt to change and because of the “neurotic” predisposition of the Kikuyu when faced with stress and insecurity. The violence of the Mau-Mau and their radical rejection of European authority must be traced ultimately to the childlike quality of the African personality rather than to the influence of socioeconomic conditions. The onus for the rebellion rests with the deficiencies characteristic of the native Kenyans and not with the policies of the British colonial government.\footnote{Jock McCulloch, \textit{Black Soul White Artifact: Fanon’s Clinical Psychology and Social Theory} (Cambridge: Cambridge University Press, 1983) 21.}


These narratives of mental disease and evil suffused up to the top echelons of colonial government, both in Nairobi and in London. Governor Baring, while moderate in his views relative to the fervour of much of his settler constituency, nonetheless saw Mau Mau as an ‘atavistic savage sort of affair’ that needed to be eliminated.\footnote{Rhodes House, Mss. Afr. S. 1574, Lord Howick (Sir Evelyn Baring) and Dame Margery Perham, interview, 19 November 1969. Quoted in Caroline Elkins, \textit{Imperial Reckoning: The Untold Story of Britain’s Gulag in Kenya} (London: Pimlico, 2005) 50.} Alan Lennox-Boyd’s predecessor as Secretary of State for the Colonies, Oliver Lyttelton, wrote that:

\begin{quote}
The Mau Mau oath is the most bestial, filthy and nauseating incantation which perverted minds can ever have brewed. … [I have never felt] the forces of evil to be so near and so strong as in Mau Mau. … As I wrote memoranda or instruction … I would suddenly see a shadow fall across the page—the horned shadow of the Devil
\end{quote}
himself.\textsuperscript{185}

All of this is marked by a wilful absence of socio-cultural awareness. Notwithstanding the aggressive and coercive nature of the Mau Mau “oathing” campaigns, standard colonial characterisations fail to offer even tokenistic pretences at contextualisation.

As Füredi reminds us, the oppression, economic discrimination and hostility that the Kikuyu had been subjected to since the First World War forced them ‘into a permanent state of semi-secrecy and underground organization. This was necessary even for simple operations like the movement of livestock and the disposal of produce. It was inevitable that the much more dangerous endeavour of political resistance would develop along similar lines. Like peasant movements throughout the world the Kikuyu squatters turned to mass oathing and secret organization.’\textsuperscript{186} As a counterpoint to the narrative of a subversive sorcery at play, Ngotho, father of Ngũgĩ wa Thiong’o’s protagonist in \textit{Weep Not, Child}, explains that ‘oath-taking as a means of binding a person to a promise was a normal feature of tribal life.’\textsuperscript{187}

The oath is, however, a convenient brush with which to paint the Mau Mau movement in a seditious and necromantic light. To justify their own positions, ‘[t]he British administration and its moderate African allies had a common interest in mystifying the Mau Mau revolt.’\textsuperscript{188} Even relatively empathetic British figures in the Kenyan story perpetuated a narrative whereby the ‘bestiality’ of the Mau Mau oaths meant that ‘those who used such methods ceased to be normal human beings’.\textsuperscript{189} The language of emergency is invoked to obscure the structural nature of colonial violence and explain it away as ‘random’ and ‘unsanctioned’ cruelties perpetrated by renegade


\textsuperscript{187} Ngũgĩ wa Thiong’o, \textit{Weep Not, Child} (Nairobi: Heineman, 1964) 74.

\textsuperscript{188} Frank Füredi, \textit{The Mau Mau War in Perspective} (Nairobi: Heinemann, 1989) 3.

officers in the mitigating circumstances of ‘exceptional fear and crisis’. More broadly, the demonisation of Mau Mau serves to justify the deployment of emergency powers against the Kikuyu population.

**IV(iv) A ‘Purely Political’ State of Emergency**

The obvious value of the emergency legal framework, in Kenya as elsewhere, was that for as much as it may be considered a deviation from the idea of the “rule of law”, it can pass for “law” nonetheless. The use of legal fronts provided the basis for arguments alluding to a benevolent imperial rule with ‘standards of law, justice and humanity to which [Kenyans] could appeal’. While perhaps appealing to certain liberal and lawyerly inclinations, simplistic binaries distinguishing law from the political did not and do not exist. In the Kenyan context, decisions on the state of emergency—ostensibly legal questions pertaining to the declaration, implementation and retention of the emergency—were approached and determined by political actors on political terms, with the express intention of circumventing human rights obligations under international law.

In a shifting global context in which it was becoming more difficult both militarily and politically to hold a colony through force alone, the declaration of emergency in the first place can be seen as the calculated use of force ‘designed to establish new terms on which colonial relations could be negotiated’; it was the absence of room for manoeuvre, more than the conditions requiring special powers, that necessitated the calling of states of emergency. In 1954, Arthur Young, one of Britain’s most senior colonial policemen, advocated the maintenance of the emergency as a strategic asset in

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the political process in Kenya, writing of the need ‘to hold the emergency until political reforms and development can take place.’

Internal debates regarding the legality of the emergency in its implementation surfaced regularly. In the context of policies of screening, arrest and “evacuation” to work camps under the Emergency (Control of Nairobi) Regulations during Operation Anvil in 1954, for instance, concerns were raised that the compulsory work involved may be in violation of the European Convention on Human Rights (and the 1930 Forced Labour Convention) and that Britain’s notice of derogation indicating a right for detainees to appeal to a judicial committee had been plainly misleading. The Colonial Office deflected such arguments by adopting the position that so long as the forced labour could be presented as in some way geared towards ending the emergency, suggestions of violations would be mitigated. The strategy pursued vis-à-vis the Council of Europe was to provide as little information as possible to Strasbourg.

One notable chain of internal correspondence preceding a visit of the Secretary of State for the Colonies to Kenya in 1957 highlights consensus among British officials that “normalcy” had returned to Kenya by that point. It also reveals the authorities’ explicit decision to nonetheless retain the legal state of emergency in order to facilitate continued reliance on emergency powers, free from concerns over human rights obligations. A brief prepared by the Colonial Office’s East African Department in October 1957, tellingly entitled ‘The Continuation of the Emergency’, is particularly instructive, and merits attention. Consistent with a prior ‘Note on the History of the Emergency in Kenya’ submitted to Minister of Defence Duncan Sandys in advance of his trip to East Africa in May 1957, the brief begins with a description of the ‘return to normal’ in Kenya. It notes that since the Secretary of State’s previous visit in October 1954, there was ‘a vast improvement in the

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restoration of public order’, citing a drop from ‘some 8,250 active terrorists still at large’ in 1954 to ‘fewer than 160 known terrorists unaccounted for, none of whom has been responsible for organised violence for a considerable time.’ From 47,500 held in internment in November 1954 plus 17,500 Mau Mau convicts, the respective figures three years later had fallen to less than 20,000 “administrative” detainees and 4,900 convicted prisoners.197 On this basis, it is suggested that:

The people of the colony do not, therefore, need much telling that things are back to normal as far as everyday life is concerned. … The Emergency is lucky if it gets a mention on the back pages. … It is therefore likely, especially if the Secretary of State’s visit coincides with the fifth anniversary of the declaration of the Emergency on 20th October, that such pressure as will develop will be for the termination of the legal Emergency, or at least a reduction in emergency measures.198

Notwithstanding the awareness of such pressure and the return to the “normalcy” of colonial suppression, the brief proceeds in its next section to examine the possibilities of the ‘retention of the legal Emergency’. It is highlighted that any official termination of the state of emergency would entail the automatic withdrawal of the torrent of emergency regulations adopted and emergency powers assumed over the preceding five years. From a Colonial Office perspective, this ‘would create both immediate and more distant difficulties’, including the release of administrative detainees on a large scale and the disappearance of emergency checks on African political life, potentially entailing a deterioration of the security situation.199

The brief then considers the quandary of how special powers and colonial policy on “irreconcilable detainees” could be sustained if the state of emergency were to formally come to an end. The assumption was that the powers wielded by emergency regulation would need to be transposed into permanent law to allow the Kenyan government to continue ‘to forestall would-be subversive movements, including political movements’ and ‘to

detain trouble-makers without trial’. While this may have amounted to a straightforward solution in terms of internal constitutional and security law in Kenya, it was complicated in no small sense by its relation to Britain’s international legal obligations. Repealing the state of emergency would connote withdrawal of the derogation submitted in respect of Kenya under the European Convention, thus dissolving the buffer created by the Article 15 derogations regime. Colonial officials were acutely aware of this:

The main difficulty about assuming non-Emergency powers for the purposes [of detention without trial] is the adherence of Her Majesty’s Govt to international Conventions, and particularly the European Human Rights Convention and the I.L.O. Forced Labour Convention of 1930. … Although a good deal will depend on the precise wording of any non-Emergency legislation, it looks very much as though it will be impossible to introduce such powers, even for the retention of existing detainees, without having to declare, and justify to the world, a breach of these international obligations. For as long as a legal State of Emergency continues, however, it looks as though the maintenance of these powers can be sustained despite increasing criticisms; they might, however be attenuated in scope and geography, stage by stage, to meet that criticism. In the last resort we must be prepared to sustain existing practices deemed essential for the maintenance of peace in Kenya even if we have to stand frankly in default of international obligations.

The conclusion must be that for as long as possible the Emergency should be kept alive and that attempts for its revocation should be resisted. In the meantime examination will continue in London to see whether there are any ways through the legal difficulties of maintaining Emergency powers without an Emergency. It is likely, however, that the ultimate decision will have to be a purely political one whether or not to declare and justify a breach of the Conventions.

At this juncture, then, the admittedly ‘purely political’ decision was taken to retain the legal state of emergency. The express objective was to benefit from the leeway allowed by international law in times of a threat to the life of the nation, despite that such times—even in government eyes—had abated in Kenya.

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The problematising of the dilemma over how to retain emergency powers in a “post-emergency” situation was to continue through the final years of the 1950s. It had been asserted in the 1957 Colonial Office brief that “[i]f the Emergency comes legally to an end, therefore, powers will have to be taken to enable their continued detention and also to compel them to work where necessary.” The thrust of this point is replicated in a Cabinet memo in late 1959:

[The British Government’s] main concern was now to secure special powers within the framework of normalcy. In its discussion of Kenya, a Cabinet paper suggested that the problem was one of how to end the ‘Emergency’ which had existed for seven years and yet enable the governor: (1) to continue to detain the hardcore of Mau Mau; and (2) to assume certain other powers considered immediately necessary, such as controlling the size of meetings and the formation of societies.

Through the 1950s, the British authorities felt unduly exposed by the lack of muddy waters between the instability of a state of emergency on one side, and the legal checks and balances of a state of normalcy on the other. Their preference was for a murky middle ground in which both special powers and the aura of stability could be retained.

The idea of a “twilight emergency” situation had matured with British policy in Cyprus, where the Detention of Persons Law of 1955 was enacted to give the Governor what were, in essence, emergency powers in the hope of rendering a formal declaration of emergency unnecessary. It was argued in policy circles that in the twilight zones that book-end a state of emergency, there is typically ‘a period in which it is not desirable to have a proclaimed state of emergency but in which there is a public emergency in fact for which special powers, including the power to detain without trial, may have to be

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exercised.’ 205 Yet it was, in fact, the opposite for much of the duration of the Kenyan emergency—there was no grave threat to the life of the nation. Despite this, the proclaimed state of emergency was retained and, by the latter part of the 1950s, the governing authorities were fixated with finding a way to end the formal emergency but to keep their special powers, particularly as far as detention policy was concerned. In the reappraisal of the situation in a number of African territories undertaken by the Colonial Office in 1958 and 1959, ‘it came to be agreed that the real problem in applying the Convention to African colonies was that the convention made no proper provision for the twilight periods.’ 206

The plan devised in response, for extraordinary powers to be absorbed into “ordinary” law in a number of colonies, originated with then Kenyan Attorney-General, E.N. Griffith-Jones. By late 1958, it had assumed the form of a draft Colonial Office ordinance ‘under which it would be a normal part of the law in Kenya (and other colonies) for the Governor to be able to assume emergency powers … without the need for any declaration of an emergency.’ 207 A June 1959 brief for the Foreign minister explained that ‘[t]he object of the proposal is to enable us to give the impression in Kenya that the emergency is over, whilst retaining room to argue in Strasbourg (if necessary) that it still continues.’ 208 The advice suggested that colonial governors, when revoking a state of emergency, should add a disclaimer to the effect that: ‘None the less there is a situation threatening the life of the nation.’ 209 Such contrivances seek to capitalise on the existence of the doctrine of emergency in the Council of Europe system by stretching the concept of the emergency itself. The Foreign Office was happy to go along with the Colonial Office Scheme. Britain’s Attorney-General, Reginald Manningham-Buller, although

208 FO 371/146286/WUC 1733/26.
opposed in general to ‘the premature recourse to extra legal devices’ by
governors, was sympathetic in the Kenyan instance to enshrining emergency
powers in normal law given the ‘subhuman level’ to which the Mau Mau had
descended.210

This was not enough, however, to convince the Attorney-General and
the Lord Chancellor to sign off on the Colonial Office scheme to embed
exceptional powers as a feature of regular law throughout the empire. The
compromise that was arrived at was a two-tier system dependent on the
gravity of the emergency. A first tier of emergency powers could be invoked
by the governor where considered necessary for the preservation of public
security, but would exclude regulations for detention without trial and the
direction of labour. The governor, however, was left with discretion to utilise
internment and forced labour if the first tier powers were deemed
inadequate.211 To put this scheme into law in Kenya, the Preservation of
Public Security Ordinance212 was brought into force there in January 1960, the
same month that the state of emergency was formally ended.213

This instrument provided for measures in response to future threats to
“public security”—defined expansively by the ordinance—but required an
official declaration of emergency. The repeal of Kenya’s state of emergency
proved problematic as the governor was reluctant to release the so-called
“hard-core” Mau Mau detainees that remained. In place of being made a
permanent legal feature, the agreed solution was that twilight emergency
powers, for the purposes of legalising prolonged detention, would be enacted
through temporary ad hoc legislation. In Kenya this took the form of the
Detained and Restricted Persons (Special Provisions) Ordinance. The notice of
derogation at the Council of Europe was withdrawn, but Colonial Office
officials remained cognisant of the fact that were Britain to find itself
arraigned before the European Commission on Human Rights, ‘there is

210 FO 371/146288/WUC 1733/47.
211 A.W.B. Simpson, Human Rights and the End of Empire: Britain and the Genesis of the
212 No. 2 of 1960. The ordinance adopted a very expansive definition of “public security”.
considerable doubt whether our arguments on the legitimacy of our actions would be accepted … among these doubtful topics are post-emergency detention in Kenya and Nyasaland.\textsuperscript{214}

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In the final years of British rule in Kenya, against a historical backdrop of dispossession and alienation, and of politics of a particularly racial complexion, an increasingly totalitarian condition emerged, in which power and law were intimately bound up. Violence was legally institutionalised through the emergency juridical order. The decision on the emergency was an ideological one, framed in legal nomenclature. The retention of the state of emergency—even when, by the colonial authorities’ own admissions, no actual public security threat existed—is illustrative of an approach that has been repeated elsewhere, whereby state actors are loathe to have their policy hands cuffed by international human rights obligations. The doctrine of emergency has proved itself particularly malleable in this respect.

The preeminent theory of law adhered to by thinkers and practitioners of the late British empire is one that exalts legality, but a very pliable legality that can be shaped to shield state counter-insurgency forces from liability. This standpoint is embodied in the reflections of Frank Kitson, who joined the British army as an emergency commission second lieutenant in 1948, before being promoted to captain as he went from colony to colony through the 1950s and 1960s. Having worked as an officer with the intelligence branch of the Kenya Police from 1953-1955, Kitson subsequently served in Malaya, Oman and Cyprus (being awarded various honours for his role in suppressing native resistance and eradicating communist organisations) before rising through the ranks in Northern Ireland in the 1970s and eventually being appointed Commander-in-Chief of the Land Forces in the 1982. He wrote an influential book on counter-insurgency tactics in “low-intensity conflict”,\textsuperscript{215} and in an

\textsuperscript{214} CO 936/657, Henry Steel, Minute of 3 October 1960.

autobiography set out an approach to law very much representative of liberal imperial discourse:

No country which relies on the law of the land to regulate the lives of its citizens can afford to see that law flouted by its own government, even in an insurgency situation. In other words everything done by a government and its agents in combating insurgency must be legal. But this does not mean that the government must work within exactly the same set of laws during an insurgency as existed beforehand, because it is a function of government to make new laws when necessary. … It is therefore *perfectly normal* for governments not only to introduce Emergency Regulations as an insurgency progresses, but also to … [alter] the way in which law is administered. Ways by which the legal system can be amended range from changing rules governing the giving of evidence to dispensing with juries altogether, or even to introducing some form of internment without proper trial.²¹⁶

What emerges from the Kenyan experience, as from similar instances of state practice continuing to the present day, is a picture of law as subject to capture by hegemonic forces, and of the doctrine of emergency as a cavernous hole in the armour of rights protection, colliding as it does with counter-hegemonic tendencies in international human rights law. In the illumination of the colonial shadows from which it emerged, the state of emergency is revealed as a vehicle for instrumental violence, grounded in dynamics of dispossession and domination. It operates as a form of vanishing point where rights are eclipsed by the silhouette of executive discretion. This is not something temporary or unique to post-2001 apparitions of the state of emergency, but has long been the case, in theory and in practice, described in the writings of Locke and Montesquieu and borne out in the laws of British India and French Algeria, and their post-colonial or neo-colonial successors. This normative phenomenon has also found an international institutional home at the European Court of Human Rights, most obviously in its engagement with derogations for the purposes of state security.

V. The Margin of Appreciation: Born in Colonial Emergency

The technique of accommodation fashioned by the European Court of Human Rights in response to challenges to expansive states of emergency is the “margin of appreciation” doctrine.\(^{217}\) Described by the Council of Europe as ‘the space for manoeuvre that the Strasbourg organs are willing to grant national authorities’,\(^{218}\) the margin of appreciation is, by now, well-established as a prominent and permanent feature of the Court’s jurisprudence. The term “margin of appreciation” does not appear in the text of the European Convention on Human Rights, nor in its preparatory work. It is a court-created doctrine in the European human rights system, which finds certain analogy in doctrines of administrative discretion in civil law jurisdictions. The use of the doctrine is most prevalent in cases that relate to social issues on which competing religious, cultural or moral value systems engender a lack of consensus across the Council of Europe's jurisdictional domain. In such instances—matters relating to reproductive rights, religious expression, sexual orientation, privacy, assisted suicide, and so on—the Strasbourg Court will often impose a form of self-restraint on its judicial review powers and grant varying degrees of latitude (sometimes wide, sometimes narrow) to the domestic authorities concerned as best-placed to determine the appropriate approach in the given socio-cultural context.\(^{219}\) The origins of the margin of appreciation in the European regional human rights system, however, are rooted in its state of emergency jurisprudence. The margin of appreciation has been extensively discussed in the literature, and critical scholars have provided cogent analysis on the width of the margin granted by the Court to states on matters of national security.\(^{220}\) The aim here is to supplement the existing


\(^{218}\) Council of Europe website, ‘The Margin of Appreciation: Introduction’.

\(^{219}\) For an overview of relevant case law, see, for example, Steven Greer, ‘The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights’ (Strasbourg: Council of Europe, 2000). Greer notes that from 1958 to 1998, the margin of appreciation was adopted in over 700 judgments of the European Court of Human Rights.

\(^{220}\) See, for example, Susan Marks, ‘Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights’ (1995) 15 Oxford Journal of Legal Studies 69; Kathleen A.
scholarship by placing emphasis on the margin of appreciation’s colonial origins.

While the 1976 freedom of expression case of Handyside\textsuperscript{221} is regularly cited as the original\textsuperscript{222} or seminal\textsuperscript{223} use of the margin of appreciation doctrine, its earliest traces can be located in the inter-state Cyprus case,\textsuperscript{224} lodged by Greece against the British government in May 1956 on foot of diplomatic tensions between the two parties over Britain’s increasingly heavy-handed repression of the Greek Cypriot self-determination movement. The Cyprus dispute was a preview to many of the issues that would be central to national security and derogations cases before the European Court of Human Rights over the ensuing decades. The story of the margin of appreciation’s evolution during that time maps on to a distinctly British genealogy that encompasses insurgents in colonial Cyprus, republicans in the north of Ireland, and Muslim detainees in the transnational war against non-state terrorism.\textsuperscript{225} The Commission’s approach to Article 15 and its reasoning in formulating the margin of appreciation concept in the Cyprus case was formative, and would shape the jurisprudence to come. Amidst lengthy analyses of the margin of appreciation, however, Cyprus often receives no more than a passing reference or cursory footnote as the site of inception of the doctrine.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{221}Handyside v. the United Kingdom, No. 5493/72, Judgment, 7 December 1976.
\item \textsuperscript{222}See, for example, Nina-Louisa Arold, The Legal Culture of the European Court of Human Rights (Leiden: Martinus Nijhoff, 2007) 38.
\item \textsuperscript{223}Jan Kratochvíl, ‘The Inflation of the Margin of Appreciation by the European Court of Human Rights’ (2011) 29:3 Netherlands Quarterly of Human Rights 329.
\item \textsuperscript{224}Greece v. the United Kingdom, No. 176/56 (the first Cyprus case).
\item \textsuperscript{225}The role that the margin of appreciation has played in facilitating security politics also cannot be disentangled from the colonial context in which the derogation regime more broadly was inserted in the Convention.
\end{itemize}
Existing special powers in Cyprus were bolstered in the summer of 1955 by the passing of legislation such as the Curfews Law 1955 and the Detention of Persons Law 1955. Pursuant notices of derogation from the European Convention were submitted by Britain on 7 October 1955 and 13 April 1956; a formal state of emergency was declared in the colony in November 1955 and Emergency Powers Regulations issued accordingly. Extensive use was promptly made by the British governing authorities of the regulations’ seventy-six clauses, particularly that granting expansive detention powers. For the Greek government, the tipping point was reached following the deportation of Archbishop Makarios in March 1956 and the execution in May 1956 of two young Cypriots (Michael Karaolis and Andreas Demetriou) under the emergency regulations.

Greece’s complaint to Strasbourg alleged rights violations arising from British emergency policies including: torture, whipping and other forms of ill-treatment; arbitrary arrest, detention and deportation; collective punishment in the forms of fines and movement restrictions; restrictions on privacy, expression and assembly. For the many British officials who had harboured fears over the extension to the colonies of human rights obligations under the European Convention, the Greek complaint was proof of the folly of that decision:

Thought has not yet ranged beyond Cyprus to the question whether the whole Convention is not an embarrassing nonsense if we can be put on trial over any of our colonial territories (except Hong Kong, Aden Protectorate and Brunei) by any other signatory wishing to pursue a quarrel. France and Belgium had their feet sufficiently on the ground to

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227 The Secretary of State for the Colonies told the House of Commons that such derogation ‘fully discharged Her Majesty’s Government’s obligations under the Convention.’ House of Commons Debates, vol. 552, col. 375, 2 May 1956. Emphasis added.
avoid extending the Convention to their overseas territories, indeed France has never ratified at all.\textsuperscript{228}

Common to standard appraisals of derogations jurisprudence is a bifurcation of the analysis of Article 15 into the two primary branches upon which its application turns: (i) whether there exists a state of emergency that warrants derogation, in the form of a threat to the life of the nation; (ii) whether the emergency measures taken within the context of such derogation are proportionate to the exigencies of the situation. As we will see in relation to the first limb in particular, the European Court has for the most part been consistent in its deference to the state concerned in determining that the threshold of emergency has been passed. The two constitutive elements of Article 15 were front and centre to the derogation aspects of the \textit{Cyprus} case. Before the British government had even submitted a written reply or decided whether it would oppose the admissibility of the Greek claim, its counsel made one thing clear, that ‘when a state relied upon a derogation under Article 15 the Commission ought not to entertain any enquiry whatever into the necessity for the measures taken’.\textsuperscript{229} That is, the decision to resort to a state of emergency in the first instance essentially comes within the exclusive purview of the government concerned—in this case the British government in Cyprus—and should not be subject to external judicial review.

Having held the application admissible, the Commission appointed a Sub-Commission with a mandate to try to secure a friendly resolution of the dispute between the two parties. The efforts of the Sub-Commission hinged on a hope that a settlement could be brought about if the British authorities ‘would re-examine the emergency legislation in force with a view to making the greatest possible relaxation of that legislation’.\textsuperscript{230} The British government saw the Sub-Commission’s requests for information regarding the need to maintain the state of emergency and its calls to dilute the emergency measures


\textsuperscript{230} \textit{Greece v. the United Kingdom}, No. 176/56 (the first \textit{Cyprus} case), Report of the European Commission of Human Rights, 26 September 1958, para. 85.
as unreasonable. The proposals for a resolution were thus rejected, and the state’s position remained clear; whatever about the compatibility of certain incidents with the Convention, ‘some of the conditions specified in Article 15 were for the British government alone to decide, in particular the necessity of the measures which had been taken.’\footnote{A.W.B. Simpson, \textit{Human Rights and the End of Empire: Britain and the Genesis of the European Convention} (Oxford: Oxford University Press, 2001) 999.} The governing authorities were best-placed to determine the overarching state of emergency and its legislative framework, free from interference: ‘a decision of this kind is at least prima facie one with the sovereign powers of the Government of the territory in which the emergency arises.’\footnote{\textit{Greece v. the United Kingdom}, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 118.} It was submitted by Britain that there was ‘at least a strong presumption in favour of the determination by the Government.’\footnote{\textit{Greece v. the United Kingdom}, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 118.} Given that the colonial government in Cyprus had at its disposal the full information concerning the security situation in the colony, some of it sensitive information which could not be revealed, it alone was qualified to judge. The British representative, F.A. Vallat, developed this line of argument during the proceedings, and concluded ‘that the Commission should not examine too critically what a Government has considered necessary to meet an emergency.’\footnote{\textit{Greece v. the United Kingdom}, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 118.}

That argument, tendered by a self-(pre)serving colonial government in the 1950s and endorsed by the Commission, has remained for all intents and purposes the position of the European Court of Human Rights into the twenty-first century. The British submission to the Commission cited Elihu Lauterpacht’s writings arguing in favour of discretion: ‘it is arguable that the determination of the British Government that the situation in Cyprus was one of “public emergency threatening the life of the nation” … is a matter within
their sole discretion.’ Assuming an inquisitorial form, the Commission allowed itself an expansive mandate in adopting the margin of appreciation (marge d’appréciation) approach:

Having been set up, in accordance with Article 19 of the Convention, to ensure observance of the engagements undertaken by the Contracting Parties, the Commission cannot merely restrict itself to the legal conclusions reached by the latter: it is its duty to submit ex officio, wherever necessary, such arguments as will conduce to the formation of its opinion.

The margin of appreciation concept found analogy, at the time, in established doctrine in the German legal system as it related to judicial review of decisions by administrative bodies. In relation to Britain’s emergency measures in Cyprus, the German member of the Commission, Adolf Süsterhenn, ‘had expressed the view that the Government had a certain margin of appreciation’; when another member later summarised the prevailing consensus that Britain’s deduction of a threat to the life of the nation ought not to be contested by the Commission, Süsterhenn intervened to say that it would be preferable to couch it in the terms that the state ‘had not gone beyond the limit of appreciation.’ This framing would duly underpin the majority opinion.

The Commission of Human Rights is authorised by the Convention to express a critical opinion on derogations under Article 15, but the Government concerned retains, within certain limits, its discretion in appreciating the threat to the life of the nation.

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236 Greece v. the United Kingdom, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 89.
237 The German concept of administrative discretion was, however, somewhat narrower than the margin of appreciation as it has developed in the law of the European Convention. See, for example, Georg Nolte, ‘General Principles of German and European Administrative Law – A Comparison in Historical Perspective’ (1994) 57:2 Modern Law Review 191-212.
It was held that, in the case at hand, the colonial government in Cyprus had ‘not gone beyond these limits of appreciation.’

In the heel of the judicial hunt, a number of important issues arose as regards the existence of an emergency under Article 15. Foremost among them was the question of what is meant by “the nation”, whose existential threat is required under Article 15 for emergency measures to be justified. Whilst not explicitly framing “the nation” in this context as metropole Britain or as the British empire writ large, the Commission’s understanding did privilege the colonial authorities and institutions in Cyprus.

As to the understanding of the word “nation”, the Commission finds that the Convention is based on the notion of the State as defined by international law. It must therefore be accepted that the term “nation” means the people and its institutions, even in a non-self-governing territory, or in other words, the organised society, including the authorities responsible both under domestic and international law for the maintenance of law and order.

To the extent that any “nation” can be said to exist, the nation in Cyprus is most naturally understood as comprising those who identify as belonging to some form of collective Cypriot socio-political community, regardless of which state’s jurisdictional umbrella they fall under at a given time. That the European Commission of Human Rights instead located “the nation” in the institutions of the governing state, its status as a foreign power notwithstanding, appears merely to corroborate international law’s embedded structural bias. Reflecting the discipline’s innate state-centrism, the Commission found it ‘inconceivable’ that the High Contracting Parties to the Convention could have intended or agreed to apply the Convention to colonial

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241 The Greek government, however, did raise valid arguments around the interconnected nature of Britain’s colonial emergency politics. If the nation connotes only the colony concerned, counsel for Greece asked, then how could the governor of the Seychelles derogate from the European Convention on the basis of a security threat not in the colony of the Seychelles but in the colony of Cyprus? Greece v. the United Kingdom, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 115.

242 Greece v. the United Kingdom, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 130.B.
territories were the state unable to invoke Article 15 against anti-colonial insurrection challenging ‘the established Government of the territory’. This is of course almost certainly true in terms of the intentions of the Convention’s founding state parties, several of whom were colonial powers. Through conquest and the extension of sovereignty, colonialism, in essence, usurps the nation. The Commission assumed no role for itself in challenging this position.

Typically entangled in ideological altercations over colonialism are derivative contestations over the framing of anti-colonial resistance. What the British authorities described as Cypriot “terrorism”, the Greek government categorised as “counter-terrorism” against the violence of the coloniser. What is important to note here, from the perspective of whether Britain was justified in invoking the emergency legal regime, is that while strong evidence was presented to the Commission to suggest that—as was the case in Kenya—the declaration of emergency was pre-emptive rather than responsive and that the emergency measures deployed served to aggravate the conflict, the margin of discretion again favoured the colonial authorities’ position.

With regard to the second branch of the Article 15 appraisal—whether measures taken under the state of emergency were justified—the Commission opted not to engage directly the language of Article 15 that requires a state of emergency to be ‘strictly required by the exigencies of the situation’. It again left a margin of discretion to the colonial authorities:

In general, the Commission takes the same view as it did with regard to the question of a “public emergency threatening the life of the nation”, namely that the Government of Cyprus should be able to exercise a certain measure of discretion in assessing the “extent strictly required by the exigencies of the situation”. The question whether that
discretion has or has not been exceeded is a question of substance which will be dealt with as each individual measure is examined.  

From the outset of the proceedings, and during the Commission’s investigative mission to Cyprus, the British Foreign Office and local government officials had mined as much information as possible from their staff and sources regarding the personal and professional backgrounds of the members of the Commission, speculating over the potentially anti-imperial politics of certain members. Iceland’s Jonasson: ‘We fear he will vote for Human Rights.’ Germany’s Süsterhenn: ‘emotional and likely to dislike British policy on the island.’ Ireland’s Crosbie: ‘found it difficult to disentangle emotions from facts’. Belgium’s Janssen-Pevtschin: ‘known to be strongly anti-British.’ In the end, however, the majority decision of the Commission to allow a margin of appreciation to the colonial state in determining a threat to the life of the nation was carried by a resounding ten votes to one, with only the Greek member Eustathiades dissenting. The Commission was unanimous in affording discretion to the state in assessing whether particular measures taken within the context of the self-determined emergency were strictly justified. Ultimately, it appeared to boil down to the fact that the ‘majority of the Commission seem to have principally been concerned over unease at being cast in a role which might require them to pass judgment on the decisions taken by the government’.

The Cyprus case set the tone for the general lack of judicial oversight and deference to state sovereign authority that would (with one significant exception, discussed later in this chapter) come to define the Council of Europe’s approach to declarations of national emergency. The Commission also did not reject the position held by the British Foreign Office and Colonial

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244 Greece v. the United Kingdom, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 143.
Office at the time that the limitations clauses in Articles 8–11 of the Convention could justify emergency powers being exercised even without the derogation regime being triggered. By such logic, the qualitative distinction between disruption of public order/security and an existential threat to the nation is collapsed. The effect, as Simpson notes, was that ‘after the Cyprus case many forms of emergency measure did not require the submission of a notice of derogation. A great deal of repressive activity was possible’.

This was evidenced in Malaya and numerous African colonies until independence. In one colonial conflict situated geographically and politically beyond the orbit of Third World decolonisation, the British government would continue to rely on the formal state of emergency regime as a legal technique to facilitate dominion. The north of Ireland was subject to derogation under Article 15 of the European Convention from the 1950s until 2001, with only a brief interruption. While new emergency powers had been introduced in 1954, Britain’s derogation was not submitted until June 1957, applicable specifically to Northern Ireland:

Owing to a recurrence in Northern Ireland of organized terrorism, certain emergency powers have been brought into operation at various dates between June 16, 1954, and January 11, 1957, in order to preserve the peace and prevent outbreaks of violence, loss of life and damage to property.

The derogation was not limited to special powers of detention; the British submission informed the Council of Europe that it had also reserved powers of arbitrary search and seizure, as well as a broad censorship remit ‘to prohibit the publication and distribution of certain printed matter.’

When the Irish Republican Army’s “border campaign” against British targets began skirting Ireland’s partition line in late 1956, the Irish state implemented special powers

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of detention without trial and itself submitted a derogation to the Council of Europe in July 1957. The case of *Lawless v. Ireland* followed, and was the first complaint to be referred by the Commission to the European Court of Human Rights. In upholding Ireland’s detention of an alleged IRA member under emergency powers, the Strasbourg bodies followed the “measure of discretion” rationale of the *Cyprus* case, now cementing the moniker of the decisive doctrine as that of the “margin of appreciation”:

… it is evident that a certain discretion – a certain margin of appreciation – must be left to the Government in determining whether there exists a public emergency which threatens the life of the nation and which must be dealt with by exceptional measures derogating from its normal obligations under the Convention.\(^ {252} \)

By any reasonable understanding, the idea that sporadic low-intensity operations against British targets in border areas posed an existential threat to the life of the Irish nation appears implausible; no less so by the understanding of a state of emergency articulated by the Court itself in *Lawless*, denoting ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’.\(^ {253} \) The expectation of states that Article 15 ought essentially to be beyond the purview of the Court, however, is reflected in the Irish government’s submission which argued it to be ‘inconceivable that a Government acting in good faith should be held to be in breach of their [sic] obligations under the Commission merely because their appreciation of the circumstances which constitute an emergency, or of the measures necessary to deal with the emergency, should differ from the views of the Court.’\(^ {254} \) The implication of this argument being accepted by the Commission and the Court is articulated by Simpson:

\(^ {251} \) Under the Offences against the State (Amendment) Act 1940.
\(^ {253} \) *Lawless v. Ireland*, No. 332/1957, Judgment (No.3), European Court of Human Rights, 1 July 1961, para. 28.
\(^ {254} \) *Lawless v. Ireland*, No. 332/1957, Counter-memorial submitted by the Government of Ireland, 27 August 1960.
The fact that Ireland won the case could be read as indicating that governments had little to fear from Strasbourg over the handling of emergencies, more particularly since the claim that there was at the time, in the Republic of Ireland, an emergency threatening the life of the nation was utterly ludicrous; the majority decision in the Commission and that of the court reflected a determination to back the authorities, come what may, as over Cyprus in the earlier case. ... The doctrine of the margin of appreciation, the legacy of the first Cyprus case ... enabled the majority to cover the decision with a cloak of legality.  

The British authorities, long paranoid about the possibility of a challenge under the European Convention to military and security policy in the north of Ireland, were thus reassured by the scope given to the state authorities in the *Cyprus* and *Lawless* cases vis-à-vis derogation. Elsewhere in Europe, Greece’s military dictatorship received no such grace from Strasbourg in 1969. Instead, the supposition was inverted and the margin of appreciation reined in on the basis of the regime’s presumed antipathy towards civil liberties. The emergency derogation submitted by the Greek junta was, therefore, adjudged to be invalid; the only time that such a finding has been returned under the law of the European Convention on Human Rights. This was certainly not an unwarranted decision, but it was also certainly an easier decision politically to remove the margin of appreciation from a pariah authoritarian regime in Greece than it would have been to do so against liberal democratic Britain (its own undemocratic rule in Greece’s neighbouring territory notwithstanding).


256 *Denmark, Norway, Sweden & the Netherlands v. Greece*, No. 3321/67; 3322/67; 3323/67; 3324/67 (the *Greek* case), Report of the European Commission of Human Rights, 5 November 1969. This reflects a form of cultural relativism that can be seen at play in the jurisprudence under the Convention, in the sense of perceived “human rights cultures” impacting upon decisions, something which the Commission and the Court have not attempted to mask. As a liberal democracy, Britain benefits from the assumptions of international institutions that it will generally act in good faith to uphold its human rights obligations. Hence, it has been granted wide remit in derogating from obligations. Similar patterns can be detected in relation to the leeway afforded to Britain vis-à-vis the proportionality of emergency measures under the second limb of Article 15. When, for example, the Court’s 1993 decision in *Brannigan & McBride v. the United Kingdom* (discussed below) is juxtaposed with its 1996 ruling in *Aksoy v. Turkey*, it is seen that the Court was ‘clearly more confident that the United Kingdom would apply appropriate human rights safeguards’ than its purportedly less liberal Turkish counterpart. Kathleen A. Cavanaugh, ‘Policing the Margins: Rights Protection and the European Court of Human Rights’ (2006:4) *European Human Rights Law Review* 422, 441.
The Commission and the Court in the *Cyprus* and *Lawless* cases had, at least, proclaimed ‘certain’ limits on the British state’s discretion, and asserted a competence and duty to examine a government’s pronunciation of a public emergency threatening the life of the nation under Article 15. The leeway given to Britain was subsequently to be rendered even more broadly; a *certain* margin of appreciation was stretched to a *wide* margin of appreciation. When the Irish government brought an inter-state application challenging the legality of internment, detention and interrogation in Northern Ireland between 1971 and 1975, Britain’s defence relied on its Article 15 derogation. The European Court again displayed a reluctance to critically examine the existence of an existential public emergency or to investigate the necessity of the derogation. According to the judgment, ‘[t]he limits on the Court’s powers of review … are particularly apparent where Article 15 is concerned.’ \(^{257}\) Indeed, the decision in *Ireland v. UK* expanded the margin of appreciation, both in relation to the existence of an emergency in the first place, and the appropriate measures to be taken in deviation from the Convention.

It falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 leaves those authorities a wide margin of appreciation. \(^{258}\)

The benefits afforded by this reasoning to the state in are self-evident. Civil rights issues arising from Britain’s emergency legal structures have come before the European Court of Human Rights several more times since *Ireland v. UK*. The validity of its derogations, however, has not been placed under the microscope by the Court in the sense of questioning the existence of the self-

\(^{257}\) *Ireland v. the United Kingdom*, No. 5310/71, Judgment, European Court of Human Rights, 18 January 1978, para. 207.

\(^{258}\) *Ireland v. the United Kingdom*, No. 5310/71, Judgment, European Court of Human Rights, 18 January 1978, para. 207.
ordained states of emergency. One chain of events in this regard is particularly telling. The *Brogan* case related to special powers promulgated under the Prevention of Terrorism Act 1984 that allowed persons suspected to have been involved in acts of “terrorism” to be detained for seven days without charge or judicial approval. The Court found such measures to constitute a violation of Article 5 of the Convention. Britain’s 1957 derogation to the Convention had been withdrawn in 1984, so in this instance the violation in law could not be mitigated by acceptance of an emergency in fact. The Court’s decision in *Brogan* ‘undoubtedly came as a surprise to the British government, and it quickly had to decide how to react’. Two alternative courses of action were identified and considered: to reformulate procedures such that judicial authorisation would be necessary for extensions of detention, or to reinstate the derogation under Article 15 in order to exempt the seven-day executive detention power from compliance with the Convention. Within weeks of the Court’s judgment, a new derogation was lodged under Article 15. The British argument in this regard was not that there was no emergency continuing, but that it had believed itself to be operating within the boundaries of Article 5; when the contrary was established by the Court, derogation was reverted to with the doctrine of emergency and its ancillary margin of appreciation seen as sufficient insulation from the reach of the Court.

In response to a subsequent petition that challenged the validity of the new derogation, the European Court came down on the state’s side. This decision in *Brannigan & McBride v. UK* was seen as confirmation of ‘an exceptionally undemanding standard of review by the organs where

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259 *Brogan & Others v. the United Kingdom*, No. 11209/84; 11234/84; 11266/84; 11386/85, Judgment, European Court of Human Rights, 29 November 1988.


derogations are concerned’. On the basis of the margin of appreciation doctrine, the Court upheld the derogation without any substantive inquiry into the facts on the ground at the time. Submissions to the Court by human rights organisations had argued that even if there had previously been a crisis in the north of Ireland threatening the life of the nation, this had dissipated by 1988. Without engaging directly or offering rebuttals to these arguments, the Court’s majority simply said it was not persuaded. Had the Court effectively supervised and ‘undertaken a review of the changing security situation in Northern Ireland in the decade that followed Ireland v. UK, it would have discovered a significant decline in the record of violence.’ The Court, however, ‘exhibited greater deference to government judgment than organs applying other treaties would be likely to exhibit.’ The same wide margin of appreciation was granted as had been done in the Ireland v. UK case, with the language of the judgment lifted almost verbatim:

The Court recalls that it falls to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

The use of the state of emergency as a governmental tool of choice in contemporary politics, and the continued coalescence of exception and norm is

265 Brannigan & McBride v. the United Kingdom, No. 14553/89; 14554/89, Third Party Intervention of Liberty, Interights & the Committee on the Administration of Justice.
267 Susan Marks, ‘Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights’ (1995) 15 Oxford Journal of Legal Studies 69, 76. The jurisprudence of the Human Rights Committee (see, for example, Landinelli Silva v. Uruguay, UN Doc. A/36/40, 130, para. 8.3) and the Inter-American Court is somewhat more restrictive in the width of margin of appreciation allowed.
starkly illustrated by the fact that arguably the most draconian piece of British emergency legislation—the Terrorism Act 2000—was enacted after the 1998 Good Friday Agreement heralded the tapering of overt conflict in the north of Ireland, and before the events of 11th September 2001 and 7th July 2005. The 1988 derogation from the European Convention was withdrawn in early 2001, but with the Irish republican threat superseded by a purported “Islamic terrorism” threat in the wake of September 2001, the state of emergency was swiftly re-activated by the British government at the end of that year.

In its 2009 decision in *A v. UK*—relating to Muslims “preventatively” detained in Belmarsh prison under anti-terrorism legal provisions specifically aimed at foreign nationals—the European Court of Human Rights adjudged that although certain measures implemented pursuant to Britain’s “war against terrorism” derogation were discriminatory and disproportionate to the threat posed to the life of the nation, the declaration of emergency and the derogation itself were justified. In so doing, the decision upheld the earlier ruling of the House of Lords, where eight of the nine justices accepted the claim of the Secretary of State for the Home Department that the question of the existence of an emergency is ‘pre-eminently one within the discretionary area of judgment reserved to the Secretary of State and his colleagues, exercising their judgment with the benefit of official advice, and to Parliament.’

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269 Letter from the Permanent Representative of the United Kingdom to the Secretary-General of the Council of Europe, 19 February 2001.

270 On 11 November 2001, the Secretary of State made a Derogation Order under section 14 of the Human Rights Act 1998. Human Rights Act 1998 (Designated Derogation) Order 2001 (SI 2001/3644). On 18 December 2001, the British government lodged its derogation under the European Convention with the Secretary-General of the Council of Europe, asserting that a public emergency within the meaning of Article 15 existed throughout the state by virtue of ‘foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups.’

271 *A. and Others v. the United Kingdom*, No. 3455/05, Grand Chamber Judgment, European Court of Human Rights, 19 February 2009.

272 *A (FC) and others (FC) v. Secretary of State for the Home Department* [2004] UKHL 56, para. 25.
The House of Lords had thus refrained from challenging the government’s emergency derogation from the European Convention.

In his dissent, Lord Hoffman, while acknowledging that ‘the necessity of draconian powers in moments of national crisis is recognised in our constitutional history’, had argued that the threshold for such a necessity had not been met in this case. In deconstructing the meaning of a “threat to the life of the nation”, Hoffman accepted that there was credible evidence of a risk of subversive activity in Britain, but considered it fundamentally incapable of endangering ‘our institutions of government or our existence as a civil community’. He concluded that ‘[t]he real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.’ This was a lone voice of dissent in a House of Lords otherwise unanimous in its deference to executive and legislature. Hoffman’s threshold for the existence of an emergency was likewise seen as unduly onerous by the European Court’s Grand Chamber.

…the Court has in previous cases been prepared to take into account a much broader range of factors in determining the nature and degree of the actual or imminent threat to the “nation” and has in the past concluded that emergency situations have existed even though the institutions of the State did not appear to be imperilled to the extent envisaged by Lord Hoffman.

Fifty years after the prevailing interpretation of a “threat to the life of the nation” in a manner that privileged colonial rule in Cyprus had been questioned by Eustathiades, Hoffman’s concerns were similarly side-lined by the granting of a wide margin of appreciation to the state in its conduct of anti-

273 A (FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, para. 29.
274 A (FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, para. 89.
275 A (FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, para. 96.
276 A (FC) and others (FC) v. Secretary of State for the Home Department [2004] UKHL 56, para. 97.
277 A. and Others v. the United Kingdom, No. 3455/05, Grand Chamber Judgment, European Court of Human Rights, 19 February 2009, para. 179.
terrorism policy:

As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al’Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom’s executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.278

The Court’s position in 2009 had thus not departed or progressed in any fundamental way from the position presented to the Commission by the British government in 1958:

… the Government of the territory is in the best position to judge whether an emergency threatening the life of the nation has arisen. That is a question on which governments always tend to reserve their own discretion, and … it would be very, very risky if the Commission were not at least to lean very favourably toward the opinion of the Government, because the Government has in its possession all the relevant information, much of which must, in the nature of things, be subject to security classifications.279

The decision in A v. UK echoes the permissive thrust of the Cyprus and Northern Ireland jurisprudence, and demonstrates that the breadth of the margin of appreciation with respect to the first limb of Article 15—the determination of an existential threat—extends to the point that jurisdiction over the merits of derogation is all but abdicated. The requirement of the “imminence” of the threat, so central to the reasoning by which the Court held

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278 A. and Others v. the United Kingdom, No. 3455/05, Grand Chamber Judgment, European Court of Human Rights, 19 February 2009, para. 180. The fact that other European states subject to a similar general increased risk of non-state terrorist activity did not issue derogations from the Convention was also highlighted by the Committee of Privy Counsellors established pursuant to Britain’s Anti-terrorism, Crime and Security Act of 2001. See ‘Anti-terrorism, Crime and Security Act 2001 Review: Report’, HC 100, 18 December 2003, para. 189.

279 Greece v. the United Kingdom, No. 176/56 (the first Cyprus case), Report of the European Commission of Human Rights, 26 September 1958, para. 118.
the Greek fascist regime’s emergency declaration to be invalid, has been incrementally relegated in the context of the British cases. The Court also explicitly discarded the standard refrain of liberal human rights institutions that, to be permissible, emergency measures must be temporary. No such temporal limit had ever been required by the Court itself, the judges remind us. The fiction of the norm/emergency distinction in international legal jurisprudence is, as such, reaffirmed. Without in any way intending to belittle prevailing security issues, it must be noted that it can be misleading to conflate the habitual maintenance of public order with the preservation of the very existence of the state as a social and political entity. The story of Britain’s colonial emergencies demonstrates that the state of emergency (and its constitutive language: threat, the nation, temporariness, imminence) as grounds for the lawful escalation of state violence was always sufficiently malleable and indeterminate to function as a utilitarian technology of control. Calls for preservation of the separation of emergency and normalcy miss the crucial point that the two are deeply structurally entwined, particularly in the contexts of colonial governance and anti-terrorism law.

On the second limb of Article 15, the Court did rule that the Belmarsh detention policies were not justified by the exigencies of the particular existential threat being faced by Britain. The discriminatory aspect of the legislation rendered the actions of the British authorities beyond the margin of appreciation permitted to them. The Court essentially felt it unreasonable for the emergency measures to discriminate between ‘British Muslims’ and ‘foreign Muslims’. It appeared, however, to have no issue with the unavoidable implication of that particular binary: a presumption that all individuals subjected to the emergency measures would naturally be Muslims. The anti-discrimination position expounded by the Court explicitly denounced

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282 *A. and Others v. the United Kingdom*, No. 3455/05, Grand Chamber Judgment, European Court of Human Rights, 19 February 2009, para. 188.
Britain’s detention measures on the basis of the distinction between British and foreign nationals, while implicitly condoning derogation from the Convention on the basis of a framing of the Muslim community as a whole as suspect. The Court thus failed to draw the logical conclusion that the emergency itself was discriminatory – both in law, where the derogation was specifically linked to acts of perceived “Islamic” terrorism; and in practice, through the tendency of the British security services ‘to assume that any devout Muslim who believed that the way of life practised by the Taliban in Afghanistan was the true way to follow must be suspect.’ Here, the Court’s articulation of its reasoning on the second limb of Article 15 helps us to understand its decision on the first limb.

In its use of torture and mass internment during the emergency in Kenya, as well as the more banal methods of collective punishment, the British state employed customary techniques of colonial violence in furtherance of its extended sovereignty. Sovereign actors—whether in the form of governor, administrator, solider or policeman—deployed their own form of terror against the colonised population. This was nothing extraordinary; along the arc of imperial history, the violence of colonisation was increasingly codified (and sanitised) by positive law. When certain elements of the native population sought to resist, the community at large was branded as suspect, an existential threat to the law and order of empire.

Contemporary wars against non-state terrorism—whether linked directly to ongoing settlement colonisation processes, or to other modes of state power—can be seen as similarly constitutive of sovereignty. Law, through the racial formation of emergency legislation and security powers, is ubiquitous in that arrangement. Conventional counter-terrorism discourses around appropriate “balancing”—of security and liberty, legality and

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necessity, norm and exception—tend to miss certain crucial points: that security, in an imperial context, is intrinsically premised on the very denial of liberty; that necessity becomes legality through emergency doctrine; that the norm/exception binary has long been collapsed. The state of emergency is typically characterised by the deference or subordination of the legislative and judicial branches to an executive vested with increased powers. Any such transfer, however, is generally defined by legal decree; legal powers may be reconfigured but law itself does not recede. Significantly, the emergency is not constrained by temporal limitations. Thus, a war against the very concept of non-state terrorism, conceived in such an amorphous way—particularly in the transnational context—raises the spectre of a permanent situation of emergency, in much the same way as colonial policy was founded on an assumption of the indefinite continuation of empire. And with similar constructions of emergency doctrine as the bridge between force and legality, it has been shown that ‘in the particular case of the war on terror and all it has entailed, the invocation of emergency has a peculiarly colonial character.’

In this context, the normalisation of emergency measures can be seen as a feature of the colonial past that retains a contemporary resonance in post-colonial conflict settings, as well as in a “colonial present”.

284 Antony Anghie, ‘Rethinking Sovereignty in International Law’ (2009) 5 Annual Review of Law and Social Science 291, 306. The coloniality of legal discourse in the post-2001 war against terrorism is evident not only in the parallels raised by emergency doctrine, but in multifarious ways: the construction of the terrorist as a barbarian force, who, like the savage tribe, lacks respect for the law of armed conflict and is in turn excluded from its protection; the forfeiture or absence of sovereignty in “uncivilised” nations (“rogue” states); the justification of aggression and occupation with reference to self-defence, and so on. See, for example, Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2005) 273-309; cf. Elbridge Colby, ‘How to Fight Savage Tribes’ (1927) 21 American Journal of International Law 279.

285 The policy of retaining emergency measures in a “post-emergency” context, as was done in the final pre-independence years in Kenya, remains a regular feature of the national security legal landscape. This can be seen contemporaneously, for example, with the continued detention of Tamils by the Sri Lankan government in a post-conflict environment, which manifested initially under the state of emergency that remained in force following the end of large-scale military operations in May 2009, and continued subsequently after the repeal of the formal state of emergency in August 2011. Provisions of the Prevention of Terrorism Act 1978—allowing for 180-day periods of detention at the discretion of a government minister, admissibility of confessions attained under duress, as well as restrictions on movement, association and assembly—remained in force after the lifting of the emergency, while further detention regulations were introduced under the Act in order to keep Tamil rebels in detention.
While they may be displaced, distorted and (most often) denied, the capacities that inhere within the colonial past are routinely reaffirmed and reactivated in the colonial present.\(^1\)

Israel is a normal country that is not normal.\(^2\)

In his study of the intersecting cartographies of violence in Afghanistan, Iraq and Palestine, political geographer Derek Gregory uses the events of 11 September 2001 as a fulcrum around which to map the barbed boundaries of modern imperial power, which he describes as the “colonial present”. Referring to an intrinsically colonial modernity and its performative force, Gregory relates Edward Said’s “imaginative geographies”—the self-constructions that underwrite and animate one’s constructions of the other, folding distances into differences by amplifying spatial partitions and enclosures that divide “us” from “them”\(^3\)—to the West’s attitude towards Islam and the “Orient” in the wake of September 2001. He argues that orientalist and colonial tendencies persist in Western representations of—and relations with—the Muslim world. While making it clear that his analysis does not imply that we remain confined within nineteenth century paradigms, Gregory proposes that some of the particulars of colonial history have been projected into a colonial present and continue to pervade our social and legal systems.

Gregory’s argument is advanced through a narration of the global “war on terror” as a continuum of spatial stories set in Afghanistan, Iraq and Palestine. The production of imaginative geographies is extrapolated from what he saw as a dominant question in the United States in the immediate aftermath of the September 2001 attacks: “why do they hate us?” – with the emphasis in this crude binary equation placed, crucially, on “them” rather than “us”. Gregory draws on Michael Shapiro’s writings linking geography with an


\(^2\) Supreme Court of Israel, *The Association for Civil Rights in Israel v. The Knesset and the Government of Israel*, HCJ 3091/99, judgment, 8 May 2012, para. 19. Extracts quoted from this judgment are based on an unofficial professional translation; on file with the author.

“architecture of enmity”, whereby territorially elaborated collectivities locate themselves in the world and ‘practice the meanings of Self and Other that provide the conditions of possibility for regarding others as threats or antagonists.’

By exploiting these conditions of possibility and mobilising the imaginative geographies constructed, the US justified its wars in Afghanistan and Iraq. A distinctly colonial present crystallises through those wars, Gregory argues, by virtue of an integrated machinery of geopolitics and geoeconomics, as well as the more mundane, but equally significant forms and practices of cultural imperialism. This machinery operates to ‘mark people as irredeemably “Other” and [to] license the unleashing of exemplary violence against them.’ As one commentator observed in the context of the American decision to go to war in Afghanistan, ‘[m]ore than a rational calculation of interests takes us to war. People go to war because of how they see, perceive, picture, imagine and speak of others: that is, how they construct the difference of others as well as the sameness of themselves through representation.’

The demonisation of the Oriental other, the fear-mongering and ‘mediatization of terror’ in the aftermath of September 2001, and the proliferation of false and misleading information (blurring the distinction between “Al-Qaeda” and Afghanistan; the “evidence” of Saddam Hussein’s weapons of mass destruction) all feed into the construction of a racialised us-versus-them binary. When laid bare for what they are, these narratives reveal a sharp imperial amnesia in modern animations and articulations of the international. Such animations implausibly depict the modern state as a primarily moral actor, and elide the distinct colonial mimicry emanating from the concept of “humanitarian intervention” (and its articulation through the United Nations as the “responsibility to protect”).

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4 Michael J. Shapiro, Violent Cartographies: Mapping Cultures of War (Minneapolis: University of Minnesota Press, 1997) xi.
8 For an incisive account of the imaginative geography of humanitarian intervention and the reproduction of colonial stereotypes in humanitarian narratives of the contemporary
The lens of the colonial present applied in Gregory’s primary focus on the exercise of global hegemony by the United States relies on a somewhat expansive construction of “colonial”, severed from the element of expansionary settlement inherent in its etymology. In the traditional gradations of colonialism and imperialism, “colonialism” denotes the actual conquest, occupation and settlement of a country, whereas “imperialism” suggests a broader set of practices, including those by which a great power in essence governs the world according to its own vision, using a variety of means that may or may not include actual conquest or settlement.\(^9\) While twenty-first century US foreign policy certainly lays down infrastructures extra-territorially through its military interventions and global “counter-terrorism” crusades, and through the perpetuation of aid dependency and surrogate governance apparatuses, (as well as by proxy through the reach of US multinational corporations), its dominion is more accurately framed in the broad terms of empire than the specific colonisation process of conquering and settling territory.

The paradigm of an explicitly “colonial” present, however, does remain visible within settler colonial societies and colonial-ethnic conflicts that continue to chip away the edges of supposedly smooth “post-colonial” temporal and spatial enclosures. The dynamics in Palestine/Israel entail not only conquest, militarised hegemony and exploitation of resources in the context of a racialised “othering” discourse, but civilian settlement and plantation, as well as direct political and legal institutional administration. As such, the conceptual framework of the “colonial present” is perhaps most fitting in the Palestine segments of Gregory’s work.\(^10\) While the ideological, legal and technological parallels between Israel’s national security policies

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\(^{10}\) In addition to Chapters 5–6 of *The Colonial Present*, see Derek Gregory, “Palestine and the “War on Terror”” (2004) 24:1 *Comparative Studies of South Asia, Africa and the Middle East* 183.
and the post-2001 ‘international state of emergency’\textsuperscript{11} are pronounced, Israel’s relationship with the Palestinians is distinct, evoking archetypal coloniser-colonised dynamics that are planted firmly in a struggle for control of the land. The categories and spaces that were widely presented as new on the international plane after 2001 have long resided in Israel’s legal landscape. The settler colonial and colonising Israeli state has, indeed, operated in a self-declared state of emergency since the first week of its formal existence in May 1948, spawning a complex matrix of emergency modalities that continues to flourish. It is an emergency very much marked by its temporal indelibility and its racialised anatomy. Palestine remains subject to colonial technologies of surveillance and securitisation that engirdle the colonised and foment a deep-rooted fear in the coloniser. Israel’s displacement of Palestine’s people and violation of its places and spaces has, for Gregory, splintered it into ‘a scattered, shattered space of the exception’.\textsuperscript{12} Such language evokes the particular lenses of postcolonial thought that frame the colonial space as a zone of exception unbounded by law, in which conditions of exclusion, dehumanisation and destruction are fostered. While I depart from Gregory to a certain extent in seeing this “shattered space” as a space in fact heavily populated by law, his argument remains apposite to aspects of Israel’s relationship with the Palestinians; most notably manifesting itself in recent times through the periodic discharge of mechanised violence against the Gaza Strip. The application of state of exception discourse to Palestine thus warrants reflection.

\textsuperscript{11} Phrase borrowed from Kanishka Jayasuriya, ‘Struggle over Legality in the Midnight Hour: Governing the International State of Emergency’ in Victor V. Ramraj, \textit{Emergencies and the Limits of Legality} (Cambridge: Cambridge University Press, 2008). The Israeli precedent resonates strongly, for example, with the hybrid domain of emergency governance that has opened the door to contested legal categories and carved out spaces distinct from “ordinary” law.

I. Palestine: ‘A Scattered, Shattered Space of Exception’?

The imperial-racial formations of contemporary “counter-terrorism” narratives evoke Said’s imaginative geographies; internally and externally, spaces are created between the “homeland” and an enemy population. It is against the mirror of the image projected onto the other that the self rebounds and is itself constructed. The resulting self/other dynamics are reminiscent of Victorian-era Britain’s engagement with its empire. The colonialisitic tendency to respond to perceived threats with the creation of an identifiable and targetable “native” suspect illustrates an extension of racialised states of emergency from former empire to colonial present. Such forces are well established in Israeli security politics, capturing, to varying degrees, all of the spatial zones and personal status layers into which Palestine and its people have been fragmented (citizens of Israel; residents of East Jerusalem; inhabitants of the remainder of the West Bank; besieged populace of the Gaza Strip; refugees excluded from the space of historic Palestine). The customary depiction of the Palestinians as a “terrorist” nation stems from the imaginative geographies that separate the Jewish-Israeli population from its Arab-Palestinian counterpart. This is the underpinning of the architecture of enmity that pervades much of mainstream Israeli society, playing out in multiple ways. From above, it is evidenced in calls by Israeli political leaders to block supplies to Gaza in order to ‘put the Palestinians on a diet’ and decrees by prominent religious authorities approving and inciting attacks by the Israeli army on Palestinian civilians. From below, it comes in the form of units of soldiers printing t-shirts adorned

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13 This is mirrored in a different context in Israel’s ‘othering’ of its Bedouin and nomadic peoples, as well as its African migrant and asylum-seeking communities, for example.

14 Dov Weisglass, advisor to then Israeli Prime Minister Ehud Olmert, quoted in Conal Urquhart, ‘Gaza on brink of implosion as aid cut-off starts to bite’, The Observer, 16 April 2006.

15 During ‘Operation Cast Lead,’ four leading Israeli rabbis issued a Halakhic [Jewish legal] ruling stating: ‘When a population living near a Jewish town sends bombs at the Jewish town with the purpose of killing and destroying Jewish existence there, it is permitted, according to Jewish Law, to fire shells and bombs at the firing sites, even if they are populated by civilians.’ See Hillel Fendel, ‘Top Rabbis: Morally OK to Fire at Civilian Rocket Source’, Arutz Sheva/Israel National News, 30 December 2008.

16 See, for example, Amos Harel, ‘IDF rabbinic publication during Gaza war: We will show no mercy on the cruel’, Ha’aretz, 26 January 2009; Chaim Levinson, ‘Police release rabbi arrested for inciting to kill non-Jews’, Ha’aretz, 27 July 2010.
with images (a pregnant Palestinian woman in the crosshairs of a sniper rifle, for example) and slogans (‘One shot, two kills’)\(^\text{17}\) that betray a view of Palestinian life as subordinate. The pervasiveness of such attitudes is encapsulated in their ubiquity in contemporary social media: photographs of Palestinian children taken through the viewfinder of a rifle and flippantly uploaded for global consumption with the touch of a single vintage camera icon; grandstanding statements relaying past or planned acts of racialised military violence in 140 characters or less.\(^\text{18}\) Violence against Palestinians is normalised in the banality of a daily “status update”.

Such predilections go some way to explaining the scholarly trend of applying Giorgio Agamben’s theses on “bare life” and the state of exception to Palestine. Agamben presents homo sacer, a figure of archaic Roman law, as one who can be killed but not sacrificed. As such, this was a status situated outside both divine and human law: hominis sacri could not be sacrificed as their deaths were of no additional value to the gods, but they could nonetheless be killed with impunity as their lives were equally worthless to society.\(^\text{19}\) Agamben transposes the figure of homo sacer (or ‘life that does not deserve to live’\(^\text{20}\)) to modernity through his marginalisation by the operation of sovereign power. Hominis sacri are encompassed as objects of sovereign power, but precluded from being its subjects. Socially conditioned states of suspended life and suspended death emerge to ‘exemplify the distinction that Agamben offers between bare life and the life of the political being (bios politikon), where this second sense of “being” is established only in the


context of political community." In this sense, bare life is constituted through the construction and performance of the space of the exception: a grey area between law and non-law that is conducive to exceptional practices characteristic of executive sovereign power.

The most extreme manifestation of such a space of the exception, for Agamben, is that of the “camp”. The primary site of inquiry and embodiment of this in his work are the Nazi Lager. In a rare allusion to colonial history, however, Agamben briefly cites the Spanish campos de concentraciones in Cuba and the camps into which the English herded the Boers in South Africa. In such circumstances, ‘a state of emergency linked to a colonial war is extended to an entire civil population.’ The camps are not born out of ordinary law but out of a state of exception and martial law, with the inhabitants stripped of legal status in the eyes of their captors, and so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime. They are treated as hominis sacri by the sovereign power that incarcerates them; reduced to bare life.

While Palestine carries the burden of its own particular history and circumstances, the notion of bare life is widely invoked as relevant, particularly to the Gaza Strip where the Israeli policy of keeping the population penned inside the besieged strip of land has led to the “open-air prison” analogy becoming a common refrain, whilst also evoking Agamben’s descriptions of the architecture of the camp. Within the enclosed and densely populated space, the consequences of Israeli military offensives are severe. Hermetic closure of the borders means that the default refuge of a population under bombardment—the ability to flee to neighbouring

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24 This refrain has been sounded not only by NGOs, journalists and activists, but by authorities such as the UN Under-Secretary-General for Humanitarian Affairs. See, for example, ‘UN humanitarian chief warns of disaster if Gaza siege continues’, *Ha’aretz*, 12 March 2010.
territories—is erased. The killing of civilians in Gaza is routine, with no question of meaningful accountability arising to date. With the possibility of becoming refugees elsewhere precluded, Gaza’s population is also perhaps unique in the sense that its majority are already refugees. Almost 75 per cent of its inhabitants are UN-registered refugees, approximately half of whom continue to live in refugee camps over 60 years after being forcibly displaced and legally barred from returning to their ancestral homes. The precarious existence of Gaza’s population is further highlighted by its economic suppression. Since the victory of Hamas in the 2006 parliamentary elections throughout the occupied territories, the near comprehensive siege and blockade of the Gaza Strip has obstructed movement of goods and services, and limited supplies of fuel, electricity, water and medical equipment. An impoverished society continues to be subject to “de-development”; life is rendered bare.

For Gregory, Gaza is an exemplar of the space of the exception; a zone of indistinction established by Israel’s sovereign power that asserts ‘a monopoly of legitimate violence even as it suspends the law and abandons any responsibility for civil society.’ Under such circumstances, Israel the occupier is an unrestrained sovereign, and the “temporary” nature of its occupation provides the boundless licence of the state of emergency. Even


26 As of 1 January 2012, 1,167,572 of Gaza’s estimated population of 1,657,155 are refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). See <http://www.unrwa.org/etemplate.php?id=64>.

27 Article 3 of Israel’s 1952 Citizenship Law explicitly excludes from its purview those who were residents and citizens of Palestine before the creation of the state of Israel if they were not ‘in Israel, or in an area which became Israeli territory after the establishment of the State, from the day of the establishment of the State [May 1948] to the day of the coming into force of this Law [April 1952]’. The calculated implication was that long-time Palestinian residents who were forcibly displaced during the war of 1948 were legally barred from taking up citizenship in the newly created state and returning to their homes.


Israel’s competing claim that it no longer occupies the Gaza Strip\(^{31}\) feeds into the concept of bare life, amounting as it does to an attempt to exclude civil society in Gaza from Israeli responsibility while simultaneously preventing the Palestinians from exercising their own sovereignty. This produces what Agamben might describe as ‘a zone of anomie, in which a violence without any juridical form acts.’\(^{32}\) In Gaza that we can see the very tangible effects, which, in Judith Butler’s critique, Agamben’s general claims on sovereign power and bare life fail to show:

… how this power functions differentially, to target and manage certain populations, to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws; … how sovereignty, understood as state sovereignty in this instance, works by differentiating populations on the basis of ethnicity and race, how the systematic management and derealisation of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends its own power precisely through the tactical and permanent deferral of the law itself.\(^{33}\)


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\(^{31}\) See, for example, the government position as upheld by the Israeli Supreme Court in *Bassiouni Ahmed et al v. Prime Minister*, HCJ 9132/07, Judgment of 30 January 2008, para. 12. For discussion, see Shane Darcy & John Reynolds, ‘An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law’ (2010) 15 *Journal of Conflict & Security Law* 211. The legal philosophy underpinning Israel’s position on the status of Gaza is reminiscent of that which prevailed during colonial encounter to enable the European powers to rule over non-Europeans without the administrative burdens or political accountability of formal sovereignty.


testimonies of Israeli soldiers themselves, and more broadly from the repeated executive decisions to launch wholesale attacks on a crowded, impoverished and already besieged territory. Gazans are reduced to targets haunted by the spectre of *homo sacer*; subject not only to lethal fire and home raids by troops on the ground, but to white phosphorous raining from the skies, and to surveillance and attack from above by unmanned drones. Here, Said’s portrayal of the war on Iraq as ‘imperial arrogance unschooled in worldliness ... undeterred by history or human complexity, unrepentant in its violence and the cruelty of its technology’ is evoked. For Gregory, Israeli violence against the Palestinians, much like that of the US in Afghanistan and Iraq, can be understood as a war of perceived “civilisation” against “barbarism”, within a space of the exception.

This paradigm of exception is a circular schematic in the Palestinian context. The Israeli state was born into a “national” emergency bound up in colonisation, war and dispossession. It builds a matrix of control, surveillance, and fear, which underpins narratives of the necessity of emergency powers. As heightened repression leads to mobilisation and resistance on the Palestinian side, the cycle is set in motion. The spatial developments of Israel’s control system in the occupied territories since 1967—the construction of settlements, walls, fences, roads, tunnels, watchtowers and checkpoints involved in the cantonisation of Palestinian territory into a “carceral archipelago”—are, for Gregory, the visceral physical embodiment of the exception. Agamben’s *homo sacer* ‘is constituted through the production and performance of the space of exception, but in Palestine this process assumes an ever more physical form.’

The implication is that, as territories of exception, the West Bank and Gaza

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35 See, for example, *Breaking the Silence*, ‘Soldiers’ Testimonies from Operation Cast Lead, Gaza 2009’, containing the testimonies of thirty Israeli soldiers who felt ‘deep distress at the moral deterioration of the IDF.’


emerge as zones of indistinction where, in the words of Israeli military reservists who refuse to serve in the occupied territories, ‘the legal and the lawful can no longer be distinguished from the illegal and unlawful.’

Gregory’s characterisation of the theoretical vista in Palestine, as reflective of the exception in which bare life is produced, is echoed by other prominent scholarly voices. In Palestine, China Miéville writes, ‘[u]ndesirable life is ended, and unauthorized death is banned.’ Agamben himself has asserted that ‘[t]he state of Israel is a good example of how when the state of exception is prolonged in such a situation then all democratic institutions collapse.’ This point is elaborated by a number of theorists endeavouring to apply Agamben’s ideas and offering varying and intricate accounts of the spatial and juridical optics of Israel’s state of exception. Neve Gordon, for example, focuses on events following the outbreak of the second intifada. He argues that despite its redeployment of troops in all major Palestinian cities throughout “Area A” of the West Bank and its effective disabling of the Palestinian Authority,

Israel did not reinstate any disciplinary forms of control and refused to reassert the role of managing the population’s lives. Instead, Israel emphasized a series of controlling practices informed by a type of sovereign power, which have functioned less through the instatement of the law and more through the law’s suspension. Israel now operates primarily by destroying the most vital social securities and by reducing members of Palestinian society to what Giorgio Agamben has called homo sacer, people whose lives can be taken with impunity. This helps explain, for example, Israel’s widespread use of extrajudicial executions and the use of Palestinians as human shields. These

41 Under the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (the Oslo II Accord), the West Bank was divided into three distinct temporary administrative divisions, pending a final status agreement: Area A, to be administered under full Palestinian civil and security control (comprising 2 per cent of the territory of the West Bank); Area B, placed under Palestinian civil administration and Israeli security control (26 per cent); and Area C, under full Israeli civil and security control (72 per cent). The boundaries were to be gradually redrawn but have been frozen since the 1999 Sharm el Sheikh Memorandum on Implementation Timeline of Outstanding Commitments of Agreements Signed and the Resumption of Permanent Status Negotiations at 17, 24 and 59 per cent respectively.
extralegal actions stand in sharp contrast to the approach Israel adopted during the first intifada, which was in many ways characterized by a proliferation of trials and legal interventions.\footnote{Neve Gordon, \textit{Israel’s Occupation} (Berkeley: University of California Press, 2008) 21.}

Here, then, a disjunct is constructed between the juridically-based nature of Israel’s interventions in the first intifada, and the eclipse of the juridical order through the exceptionality of its second intifada violence. While the excesses of much of “Operation Defensive Shield” and the use of force and mechanised destruction on a scale not witnessed during the first intifada do speak to this, it appears an overly simplistic distinction. The issuing of military orders to underwrite home demolitions, internment and curfews, and the military court prosecutions of demonstrators, stone-throwers and youths were as relevant in 2002 as they were in 1989.

A disjunct of a different type can be found in Sari Hanafi’s positing of the ‘imposed form’ of the Palestinian refugee camp as itself a particular ‘territory of exception’ in which not only the Israeli state, but the Palestinian authorities and UN agencies ‘involved in the different modes of governance have been contributing to the suspension of law in this space’.\footnote{Sari Hanafi, ‘Palestinian Refugee Camps in the Palestinian Territory: Territory of Exception and Locus of Resistance’ in Adi Ophir, Michal Givoni & Sari Hanafi (eds.), \textit{The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories} (New York: Zone Books, 2009) 495-496.} Interestingly, Hanafi presents the camps not—as one might have expected—as a microcosmic exceptional space within Israel’s larger state of exception, but rather as \textit{the} extra-legal exception (in which laws and planning regulations vanish) from the “normal” legal order of the West Bank and Gaza:

While the PNA and the Israeli authorities generally have exercised their presence in the Occupied Palestinian Territories by the rule of law, they have abandoned the camps and allowed them to become spaces devoid of laws and regulations.\footnote{Sari Hanafi, ‘Palestinian Refugee Camps in the Palestinian Territory: Territory of Exception and Locus of Resistance’ in Adi Ophir, Michal Givoni & Sari Hanafi (eds.), \textit{The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories} (New York: Zone Books, 2009) 506.}

Concepts of bare life and arguments around the aspirations and capacity of Israeli occupation to dehumanise are similarly prevalent in contemporary
discourse. In her reading of the gendered meanings of *homo sacer*—something upon which, she notes, Agamben dwells only momentarily—Ronit Lentin presents the female Palestinian figure as *femina sacra.* Using the example of Jawaher Abu Rahma, killed by Israeli forces at a demonstration in the West Bank village of Bil’in, Lentin relates the lived experiences of Palestinian women to Agamben’s theory of bare life as that of the excluded being, devoid of value.45 At the same time, however, both Lentin and Hanafi emphasise an important disclaimer regarding the agency of the Palestinians, echoing the discussion in Chapter 1 of this thesis around the (in)ability of conditions of exception to dehumanise. As an agent of resistance against the colonial and racial state, the Palestinian female must not be viewed as disempowered despite Israel’s best efforts to do so, argues Lentin. Similarly, for Hanafi, ‘Agamben fails to account for the agency of the actors resisting the “total institution” of the camp’; so while Palestinian refugees are constituted as bare life and placed at the limits of law, ‘by revolting and resisting these conditions, they express their agency and transgress the role assigned to them by their oppressors’.46

As we have seen in Chapter 1, Achille Mbembe’s formulation of necropolitics and necropower builds on and surpasses Agamben’s constructs in enunciating the sovereign’s absolute control over life and death. And as with Agamben citing Israel by name to illustrate his state of exception hypothesis, Mbembe explicitly invokes the contemporary colonial occupation of the West Bank and Gaza as the ‘most accomplished form’ of necropower. Such late-modern occupation differs from earlier forms of colonial occupation and is, for him, in many ways more severe, combining as it does the disciplinary, the biopolitical, and the necropolitical. This combination

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‘allocates to the colonial power an absolute domination over the inhabitants of
the occupied territory’ in which the sovereign right to kill chosen targets is not
only unrestrained by law (as per the colonial tradition), but entire populations
are the target of the sovereign.47

The Israeli colonial state, Mbembe reminds us, bases its foundational
claims of sovereignty and legitimacy on its own weighted narrative of history
and identity. Particular versions of history, geography, cartography and
archaeology are invoked to reinforce the political-theological claim of divine
right to the land of Palestine, and to exclude any competing claims to the same
space. Identity and topology are thus welded together. The result is that
‘colonial violence and occupation are profoundly underwritten by the sacred
terror of truth and exclusivity (mass expulsions, resettlement of “stateless”
people in refugee camps, settlement of new colonies).’48 Here, Mbembe
relates Fanon’s analysis of the spatial features of colonial occupation to
Palestine’s occupied territories. For Fanon, colonialism involves a process of
spatial division and compartmentalisation. The colonial world ‘is a world
divided into compartments … a world cut in two’: native quarters and settler
quarters; native schools and settler schools; opposed zones segregated by the
frontiers of military barracks and police stations.49 This segregation follows a
logic of racialised mutual exclusivity.

This world divided into compartments, this world cut in two is
inhabited by two different species. … When you examine at close
quarters the colonial context, it is evident that what parcels out the
world is to begin with the fact of belonging to or not belonging to a
given race, a given species.50

In the Palestinian context, racialised segregation plays out most obviously in
the fragmentation of the occupied territories that comes with Israeli settlement
construction and its supporting infrastructure. This is very much three-

49 Frantz Fanon, The Wretched of the Earth (1961) (Constance Farrington trans., London:
50 Frantz Fanon, The Wretched of the Earth (1961) (Constance Farrington trans., London:
dimensional in its topography, with communities separated not only “horizontally” across the territory, but also across a γ-axis as settlement control of hilltops and the elevation of settler roads over Palestinian tunnels and underpasses reinforce the ‘politics of verticality’ and the ‘symbolics of the top’. On top of (and beneath) the surface spatialities, Israel’s control extends to the additional layers of the subterranean and the skies. Occupation of the airspace has become particularly central to Israel’s policing of the Palestinian population, and the set-piece killing of targets below. Such ‘high-tech tools of late-modern terror’ are, for Mbembe, indicative of the form of necropower that stems from the racial demarcation of conqueror and native and that resides in a state of exception outside law. This creates the conditions in which the coloniser seeks to dehumanise the conquered “species”. The characterisation of the Palestinian as a form of savage or animal life that is common to public discourse in Israel also finds expression in the legal-institutional sphere. Of the four Palestinians prosecuted for the killing of six Israeli settlers in an attack in occupied Hebron, the Israeli military court declared: ‘the defendants are beasts, bereft of all humanity.’ The military judge, as such, claims an authority to pronounce who is human and who is not, much as the military commander exercises discretion as to when and whom to shoot.

Along with the infrastructural and technological violence of occupation, Mbembe includes within his framing of necropolitics the quotidian restrictions on Palestinian movement, administration and livelihoods that constitute the smaller cogs in the larger machine: ‘Movement between the territorial cells requires formal permits. Local civil institutions are systematically destroyed. The besieged population is deprived of their means of income. Invisible killing is added to outright executions.’ The emphasis

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on movement restrictions, specifically, is echoed in Yehouda Shenhav and Yael Berda’s analysis of Israel’s closure policy in the occupied territories:

… in 1993, Israel declared the first closure of the borders between the OPT and Israel. It took the form of a state of exception without declaring an end date for the closure. … The state of exception in the form of military closures took two forms: closures that brought to a halt the entrance of Palestinians to Israel and internal closures that restricted the movement of Palestinians within the West Bank itself.\footnote{Yehouda Shenhav & Yael Berda, ‘The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation of the Palestinian Territories with Colonial Bureaucratic History’ in Adi Ophir, Michal Givoni & Sari Hanafi (eds.), \textit{The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories} (New York: Zone Books, 2009) 338-339. See also Yehouda Shenhav, ‘The Imperial History of “State of Exception”’ (2006) 29 \textit{Theory and Criticism} 205.}

The focus here is not on colonialism’s overt physical violence but instead on its more mundane “bureaucratic violence”. The permit regime that controls Palestinian movement and access to livelihood is situated at the heart of the bureaucracy of Israel’s occupation. Shenhav and Berda present the permit regime as the state of exception in itself. In adopting this line, they offer a somewhat expansive interpretation of the state of exception. They imply that it is not necessarily defined by an absence or suspension of law (in the Schmittean extreme) or a liminal space between law and non-law (as Agamben argues), but can simply entail a selective or discriminatory use of law. The application of separate laws and different procedural standards to Arabs and Jews in the occupied territories, while not framed as a suspension of law or a zone of indistinction at the limits of law, are said to constitute a state of exception nonetheless.

The exception crystallises through ‘a legal and administrative patchwork’; ‘selective use of the law, an infinite number of decrees, and an abruptly changing set of rules and regulations about movement in the region.’\footnote{Yehouda Shenhav & Yael Berda, ‘The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation of the Palestinian Territories with Colonial Bureaucratic History’ in Adi Ophir, Michal Givoni & Sari Hanafi (eds.), \textit{The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories} (New York: Zone Books, 2009) 347, 350.} This state of exception as legal patchwork or selective enforcement
of law is contrasted with ‘the unified liberal rule of law.’ Such a dialectic perhaps places undue faith in the liberal rule of law, suggesting that an entirely neutral, consistent and non-selective application of law is not only possible, but prevalent elsewhere. At the same time, however, Shenhav and Berda hold the law responsible for its own suspension and maintain that the state of exception is not a form of violence beyond the pale of law, but rather a ‘violence embedded in the law’. Agamben’s model of the state of exception is invoked as ‘a space in which the rule of law is suspended under the cover of law’ – echoing Hanafi and many others who refer to ‘the suspension of law in this space under the cover of laws and regulations themselves’ and to both the ‘flexible use of law and its suspension’ at the same time. The sense of law’s ambiguous role is heightened by Shenhav and Berda’s oscillation between the language of the state of exception and that of emergency (without clarifying whether they intend the two terms as interchangeable) followed by their apparent acceptance of the premise that ‘in the colonial context, the state of emergency has become the rule rather than the exception.’ Such a

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59 Yehouda Shenhav & Yael Berda, ‘The Colonial Foundations of the State of Exception: Juxtaposing the Israeli Occupation of the Palestinian Territories with Colonial Bureaucratic History’ in Adi Ophir, Michal Givoni & Sari Hanafi (eds.), The Power of Inclusive Exclusion: Anatomy of Israeli Rule in the Occupied Palestinian Territories (New York: Zone Books, 2009) 344. Shenhav & Berda also remind us that the founding violence of law is as relevant to law in the metropole as it is in the colony, which negates the idea of the colony as an exceptional space in that particular regard.


statement appears to jar with the idea of colonial bureaucracy as the exception (rather than the rule). And, indeed, Shenhav and Berda’s central conclusion is that colonial bureaucracy is not the dysfunctional model that it is typically presented as, but is rather a form of organised chaos that intentionally departs from Max Weber’s “rational model” of bureaucracy; ‘this seeming patchwork of arbitrary policies is in fact based on a coherent and well-articulated approach to the implementation of a colonial bureaucracy … rendering it functional and effective for the exacerbation of control and domination over the colonized.’\(^6\)

The disparities between the classic liberal rational model of bureaucracy and the actual model in Palestine and other colonies should be understood, according to Shenhav and Berda, not as exceptions to the rule but as the rule itself. Again, they seem to challenge their own argument of colonial bureaucracy as state of exception. What they describe, ultimately, is a control system built on a labyrinth of legal regulation. This operationalises what Shlomo Gazit, the first head of Israel’s Civil Administration in the occupied territories, argued was its primary aim: to ‘provide law’, in contrast to unregulated military discretion.\(^6\)

These disparities and ambiguities again raise the spectre of the perennial exclusion/inclusion binary. To a certain point, as the episodic bombardments of Gaza show, Palestinians can be seen as excluded from law entirely and subjected to indiscriminate violence:

… colonisation and separation both presuppose the exclusion of the Occupied Palestinian Territories and their inhabitants from the pale of law and the normalisation of a state of exception in which the

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Palestinian population as a whole and individuals within it are exposed to arbitrary violence and coercive regulation of daily life.\textsuperscript{65} Such exclusion is qualified by Adi Ophir, Michal Givoni and Sari Hanafi as a ‘series of inclusive exclusions’ that cuts the occupied Palestinian population off from its increasingly fragmented and appropriated territory and envelopes it within the Israeli ruling apparatus.\textsuperscript{66} The concept of inclusive exclusion again harks back to questions of spatiality as they relate to law and exception. Agamben’s state of exception is ‘an inclusive exclusion (which thus serves to include what is excluded)’\textsuperscript{67} Sovereign violence, however, is founded ‘on the exclusive inclusion of bare life in the state.’\textsuperscript{68} For Agamben, the exception is an inclusive exclusion, whereas the example functions as an exclusive inclusion. He distinguishes between the two as such:

While the example is excluded from the set is so far as it belongs to it, the exception is included in the normal case precisely because it does not belong to it. … exception and example are correlative concepts that are ultimately indistinguishable.\textsuperscript{69}

In the Palestinian context, Stephen Morton speaks of both ‘the logic of inclusive exclusion’ behind Zionist settler colonial ideology and, ‘the potential logic of exclusive inclusion’ of Israel’s state of exception.\textsuperscript{70} There is no

\begin{itemize}
  \item \textsuperscript{67} Giorgio Agamben, \textit{Homo Sacer: Sovereign Power and Bare Life} (1995) (Daniel Heller-Rozaen trans., Stanford: Stanford University Press, 1998) 21. Emphasis added. This notion of including what is excluded is applied by Michelle Farrell in her exploration of torture in Coetzee’s \textit{Waiting for the Barbarians}. The barbarian (the excluded) is civilised (included) through subjection to torture. The act of torture ‘signifies nothing other than the Empire’s ability to render life bare and to inscribe the meaning of humanity upon the excluded body’. It is thus, for Farrell, ‘an act of “inclusive exclusion” enabled through a process of dehumanisation and facilitated by a distorted construction of justice and morality.’ Michelle Farrell, \textit{The Prohibition of Torture in Exceptional Circumstances} (Cambridge: Cambridge University Press, 2013) 249-251.
\end{itemize}
explicit reference to Agamben here, and it is unclear whether the term is reversed by Morton unwittingly (considered interchangeable) or intentionally (on the basis of two distinct, albeit unelaborated, meanings). The inclusive exclusion articulated by Ophir, Givoni and Hanafi, for their part, involves a severing or exclusion of West Bank and Gazan Palestinians from their own territories for the purpose of encompassing them within the Israeli control system. This is, in short, excluding to include. It is not clear exactly how this ties in with the exclusion from the pale of law that the same authors speak of.

The idea of exclusive inclusion, for our purposes, suggests—in subtle contrast—a process whereby Palestinians are included within the Israeli juridical order but in a manner in which they are legally differentiated and discriminated against. They are excluded from the privileges afforded to Jewish nationals, while Israel’s policies of segregation and apartheid are given institutional and legal grounding. The “provision” of law by Israel’s civil authorities, and the extensive use of legal discourse and institutions—even if in decisionistic form—by the military authorities, speak to a form of inclusion within the juridical order. Here, the bottom line is about including to exclude; it is a discriminating and repressive inclusion.

This conceptualisation arguably provides a fuller explanation than that of (inclusive) exclusion, with intermittent crises and moments of exception bridged and transcended by mundane everyday legal techniques of control and oppression. It also allows for a more holistic approach to Israel’s control system throughout historic (Mandate) Palestine than Ophir, Givoni and Hanafi’s analyses, which are rooted only and specifically in the Palestinian territories occupied by Israel since 1967. The effect of such compartmentalisation, as Morton notes, is to ‘separate the occupation as an object of inquiry from the contested colonial genealogy of Zionism, and the disputed ethnic cleansing of Palestine in 1948.’ This is an important point in relation to the state of exception discourse on Palestine. Mbembe, Shenhav

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and Berda are also representative of an apparent majority of scholars that base their state of exception analysis on the West Bank and Gaza. By side-lining the socio-political situation inside Israel and the foundational aspects of Israeli constitutional, immigration and citizenship law, this approach can be implicated somewhat in the legal and geographical masks that obfuscate the underlying roots and realities of the situation. The broader limitations of spatial compartmentalisation in the Palestinian context—where all Palestinians are subjected to a single totalising regime of Israeli domination regardless of any artificial lines drawn between them—are equally pertinent to the specifics of emergency law. Focusing only on the 1967 occupied territories obscures the emergency legal regimes that applied in a heavily racialised manner within Israel from 1948, as well as Palestine’s particular colonial history of emergency that preceded the state of Israel. It may also feed the illusory construction of the occupation as a temporary and exceptional situation grounded in defensive necessities of state security.

Against this backdrop, Ilan Pappé warns against bracketing Israel within the same “war on terror” frame as the north Atlantic liberal democracies, which, he argues, have degenerated from a point to which they, by contrast, can potentially return (this itself is, of course, debatable, and the historical evidence of returns from the brink of normalised exceptionalism is scant). While the traits of Agamben’s state of exception paradigm are present in Israel’s relationship with the Palestinians, Pappé argues, it is not the appropriate analytic lens as it fails to encapsulate the inherent oppression built into the concept of the Jewish state. Due to its colonial and discriminatory essence, Zionism, for Pappé, entails a state of oppression rather than a state of exception.73

The lens of exception and the effacing of law in Palestine do, as noted, materialise most tangibly in the major assaults on the Gaza Strip. It is in the longer “calms” between such fitful storms (“Summer Rains”, “Autumn Clouds” and “Hot Winter”, in the Israeli military’s operational nomenclature)

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that the more mundane state of emergency trundles steadily along in support of the colonial order, defined by a proliferation of law, rather than its absence. Central to the colonial regime is colonial emergency law. Amidst the array of emergency regulations promulgated by Israel’s executive, legislature and military, the Palestinian colonial space emerges as a realm saturated by legal regulation and control. The strands of postcolonial theory that present a dehumanisation of the native through an extra-legal exception, therefore, do not tell the full story. It is necessary, then, in the Palestinian case as much as broader colonial contexts, to explore the extent to which emergency modalities are pivotal to the construction of a juridical order that itself inscribes conquest, occupation and settlement.

II. The Law in These Parts: Settlement, Sovereignty, Emergency
The routine, everydayness of the violence—physical, psychological and administrative—of occupation reveals ‘the banality of the colonial present’.74 The filtering of this violence through (emergency) law aims to legitimise its performance for both external and internal audiences. Israeli actions are justified in regulations, statutes, commissions of inquiry and judgments. International lawyers may argue as to whether those actions and legal regimes actually uphold the “rule of law”, or comply with the strictures of the Geneva Conventions, or are permissible derogations from international human rights covenants, but they remain within the space of some form of juridical order. Here, perhaps, is where the normalised colonial state of emergency departs from the Schmittean state of exception.

In many ways, law is itself the connective tissue binding the twin colonial logic of fear and dispossession that haunts the Palestinian national and social condition. Law and legal narratives are indeed central to the story of the colonisation of Palestine. Early Zionist settlement was facilitated by

particular instruments of international law. This settlement then became the basis for the discharge of sovereignty through the establishment of the Israeli state and, subsequently, that state’s annexationist policies in the West Bank, most notably and legalistically in respect of East Jerusalem. To preserve this expanding sovereignty, the international legal doctrine of self-defence has routinely been invoked. Conquest, that is, by self-defence. Emergency laws and powers are intimately connected to this offensive defence. Emergency doctrine is an integral weapon in the arsenal with which occupation is waged, instrumentalised to foment and sustain fear so as to underwrite the measured tightening of the grip on Palestinian land, movement and thought. Settler colonial policy in Israel is, as it has been elsewhere, performed through law.

The socio-political formation under white minority rule in South Africa was characterised by the anti-apartheid movement as ‘colonialism of a special type’. Understood as a system of “internal colonialism” where there is no spatial-territorial separation between the colonising power and the colonised population, this formation may be understood as a particular manifestation of a broader process of settler colonialism. Settler colonialism is itself a category that can be distinguished on certain levels from other forms of colonialism, particularly the model of a fixed and centralised rule maintained from the metropole (which may, but does not necessarily, include settlement of the colony). The more fluid process of settler colonialism begins, naturally, with migration and settlement. Settlers are a distinct class of migrants, however, ‘made by conquest, not just by immigration.’ Generally sponsored ideologically, economically and militarily by their state of origin, they are founders of new political orders who strive to carry sovereignty with them, as

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opposed to migrants seeking to join the already-constituted order.\textsuperscript{78} Having migrated and settled, the settler society effectively indigenises, staking its government’s (or its own) claim to sovereignty in the territory that it has seized and holding the land as its just spoils by right of settlement.

The extent of the execution of settler colonialism’s ‘logic of elimination’\textsuperscript{79} for such territorial capture has varied across space and time. Settler independence movements often subsequently aim to advance their case by assuming the mantle of a self-determination struggle, concomitantly eschewing the legitimacy of any anti-colonial claim by the displaced native population. Where this finds success, settler colonies are (trans)formed and recognised as independent states, their colonial foundations effaced from international law and discourse. The displacement or eradication of indigenous sovereignty is given a retroactive seal of approval. The settler colonies successfully established as modern nation-states in North America and Australia are quintessential. The settler colonial process is also often defined by an additional trait exhibited along the way: a pattern of advancing civilian settlement across frontiers. This embodies an expansionary thirst for land and resources, and a logic of militarisation to securitise the shifting borders and quell inevitable indigenous resistance. In settler colonial situations, therefore, indigenous title was often extinguished not through a decisive moment of outright conquest, but by way of incremental advance by the settler movement.\textsuperscript{80}

Jewish migration to Palestine, as it began on a collective scale in the early 1880s, was quickly followed by the escalation of Zionist discourse aimed at the creating the ideological framework of a Jewish state. By the time of the “Second Aliyah” of 1904-1914, it was clearly constituted as a settler colonial movement whose constituents sought no part in the existing polity in


Palestine, but rather aimed to establish their own sovereignty. In the idiom of Zionist ideology, the term “settlement” (yishuv) carries a powerful resonance. Its roots lie in the phrase Yishuv Eretz Yisrael (“settlement of the land of Israel”), and the pre-state Jewish community in Palestine is still referred to in Hebrew as the Yishuv. In the Zionist psyche, settlement is inextricably linked to the procurement of sovereignty, an essential precursor to the attainment of statehood and title to territory. This epitomises settler colonial ideology, and illuminates the rationale underpinning Israel’s continuing “settlement” of the West Bank.

While anchored by certain cardinal features, every colonial encounter and every settler colonial process has its own defining idiosyncrasies. Zionist settler colonialism is somewhat unique in that in did not have a “mother” nation-state in Europe from which the settler population and other forms of logistical and political support were drawn. It was, nonetheless, in the context of the Balfour Declaration and the League of Nations Mandate for Palestine (which resolved to ‘facilitate Jewish immigration’ and ‘encourage, in cooperation with the Jewish Agency … close settlement by Jews of the land’) that Jewish settler sovereignty developed in protected space of ‘the womb of British colonialism.’ The emergence of the Israeli state from that embryonic sanctuary was a markedly less anti-colonial moment than other decolonisations throughout Africa and Asia that came soon afterwards.

Instead, a spiral of colonialisms curls through the Israeli self-determination project, connecting early Zionist settlement with British colonial foreign policy, the League of Nations Mandate, the role of the United Nations in legitimising Zionist claims to sovereignty via settlement (in the 1947 partition plan and subsequent recognition of Israel’s independence), and Israel’s continued colonisation of the West Bank today. These connections are woven deep into the fabric of political and legal discourse in Palestine, and

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point towards a conclusion that international law and institutions, far from remaining above the political fray, are profoundly compromised by their engagement in the whole affair. Palestine emerges as a victim of the coloniality in which international law’s heritage is rooted. Citing a ‘train of legal instruments which sweeps through the last century from the Balfour Declaration onwards through the League of Nations Mandate, the UK’s Order-in-Council, the United Nations Partition Resolution, Security Council Resolution 242, the Oslo Agreements and the Quartet Road Map’, John Strawson demonstrates that international law ‘has constructed the Palestinians as peripheral’, and that ‘[l]aw has played a major role in pushing Palestine and the Palestinians to the political and territorial margins.’

The language of the early instruments—the ‘Jewish national home’ promised in the Balfour Declaration; the commitments made in the League of Nations Mandate to ‘facilitate Jewish immigration’ and ‘encourage, in cooperation with the Jewish Agency… close settlement by Jews of the land’; the reduction in that same text of Palestine’s 90% Arab majority to ‘other sections of the population’ and ‘existing non-Jewish communities’—set the tone for the marginalisation of the Palestinians. The elision of Palestinian identity by the League of Nations and the British Mandate in particular contributed to the fostering of conditions in which the dispossession of Palestinian land would occur. From a pre-Mandate articulation of the ‘determination of the Jewish people to live with the Arab people on terms of unity and mutual respect and together with them to make a common home into a flourishing community’, Zionism was able to evolve into an increasingly exclusionary form of Jewish nationalism under the British protectorate.

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84 ‘The Mandate marginalized the identity of the Palestinians, enshrining this in law. Whereas the Jewish population … has a clear identity, the Palestinians (90% of the population) were merely “non-Jewish” or “other”. In this way, international legal discourse dispossessed a people of their identity which opened the way for others to dispossess them of their land.’ John Strawson, ‘Reflections on Edward Said and the Legal Narratives of Palestine: Israeli Settlements and Palestinian Self-Determination’ (2002) 20:2 Penn State International Law Review 363, 369.

85 Resolution of the Zionist Congress, September 1921.
Zionist settlement in Palestine proliferated during the League of Nations era, with the Jewish population rising from 80,000 in 1917 to 390,000 in 1939; ‘the context of the Mandate created the framework in which Jewish political and legal identity developed. It was the Mandate that gave Jews the first quasi-national political institution with legal powers – the Jewish Agency’, which would subsequently form the nucleus of the Israeli state. The UN’s 1947 partition plan and recognition of Israeli sovereignty amounted to a legitimisation of settler colonial policy and an acceptance of the idea that the territory of Mandate Palestine was legally disputed.

Since then, international law has shown itself sufficiently indeterminate to have been harnessed and sculpted by Israel’s military legal advisors and Supreme Court judges. Law is invoked to endorse colonial policies and to, among other things: deny the existence of any sovereign claims to the West Bank and Gaza concomitant or subsequent to their status as British colonial territory and prior to their colonisation by Israel; discard the “non-humanitarian aspects” of humanitarian law; afford privileges and protections to settlers; legitimise the construction of the Wall and its associated colonising infrastructure in the West Bank; sanction targeted executions; legislatively categorise Palestinian fighters as “unlawful combatants” and deprive them of the protections afforded to either civilians or


87 The Jewish Agency, along with the World Zionist Organisation and other “para-state” institutions, remains central to the continuing colonisation of Palestinian land.

88 ‘[E]ven where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors’ preferences remain unsettled. To say this is not to say much more than that international law emerges from a political process whose participants have contradictory priorities and rarely know with clarity how such priorities should be turned into directives to deal with an uncertain future. … It follows that it is possible to defend any course of action—including deviation from a clear rule—by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards. The important point I wish to make … is not that all of this should be thought of as a scandal or (even less) a structural “deficiency” but that indeterminacy is an absolutely central aspect of international law’s acceptability.’ Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Reissue with a New Epilogue, Cambridge: Cambridge University Press, 2005) 590-591.
combatants; and to legitimise the siege of Gaza and the launching of aerial bombardments and ground incursions in “self-defence”. As has been noted, ‘the historical record shows that it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted’. The attention paid to both domestic and international law by the Israeli military is politically significant.

Ra’an an Alexandrowicz’s 2011 documentary on the Israeli legal apparatus as it relates to the occupied territories, *The Law in These Parts*, provides a lucid insight into the role of Supreme Court and military court judges in the administration of the occupation, and to the function of law as an instrument for political ends. Alexandrowicz presents ‘law as an issue of language; its inefficacy and its arbitrariness, its brutality’. It is a language that most people do not understand, but also one whose meaning is contingent on its speaker. In the Israeli-occupied territories, for the film-maker, law serves as an alibi for power rather than a constraint on it, and as such has been emptied of meaning. One particularly revealing passage in the film relates to legal justifications for the seizure of Palestinian land in the West Bank for the purposes of settlement construction. Former military judge and legal advisor to the West Bank military command, Alexander Ramat, recounts how Ariel Sharon (Minister for Agriculture and head of the government’s settlement committee at the time) summoned the Israeli military lawyers for a meeting within minutes of the *Elon Moreh* judgment being handed down by the Supreme Court in October 1979. In that case, Palestinian land-owners Azat Muhamed and Mustafa Dweikat had argued that the military seizure of their land, occupied in June 1979 by a

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91 The fact that—going back to the Ottoman Land Law of 1858—much of the land in Palestine was marked as state land (*miri*) as opposed to privately owned land (*mulk*) had already been exploited by Israel, through the construction of an argument that state land in occupied territory is open to civilian settlement by the occupier (the purported temporariness of belligerent occupation notwithstanding). The British Mandate authorities had, for their part, modified the Ottoman laws to extend the reach of state land, effectively liberalising the land expropriation process, as well as making it easy for the military to seize any category of land for self-prescribed “security measures”. See further Raja Shehadeh, *The Law of the Land:*. 

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settler group in an operation directed by Sharon\(^{92}\)—for the purposes of Israeli civilian settlement had been illegal. Preceding Supreme Court jurisprudence had upheld similar requisitions of private land as permissible under the laws of occupation, on the grounds that the civilian settlements and infrastructure concerned performed valid and essential military and security functions.\(^{93}\) As Eyal Weizman explains,

> Between 1967 and 1979, on the basis of the exceptions of “temporariness” and “security” the government issued dozens of orders for the requisition of private land in the West Bank. When called upon to do so, the government and the military demonstrated their claim for the pressing security needs by inviting expert witnesses, usually high-ranking military officers or the Chief of Staff himself, to testify that a particular settlement dominated a major artery, or another strategic location, that it could participate in the general effort of “regional defence”, or in the supervision and control of a hostile population. As long as this claim was maintained, the High Court of Justice rejected all petitions of Palestinian landowners and accepted the government's interpretation of the term “temporary military necessity”.\(^{94}\)

The concepts of temporariness and security are embedded in the idea of the state of emergency, as well as that of occupation. In the *Elon Moreh* case, such defences against the claim of unlawful expropriation were less than coherently presented by the state. Then Israeli military Chief of Staff, Refael Eitan, couched the necessity of the settlement in terms of “regional defence” in the hypothetical event of an inter-state war in the region, rather than any specific

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\(^{93}\) See, for example, *Abu Hilo v. Government of Israel* [Rafah], HCJ 302/72, with Justice Vitkon explaining that although the seized land was designated for civilian settlement rather than military installations, the settlements ‘are in themselves, in this case, a security measure.’ See also *Abu Hilo v. Government of Israel* [Beit El], HCJ 258/79, with Justice Vitkon again: ‘In terms of purely security-based considerations, there can be no doubt that the presence in the administered territory of settlements - even “civilian” ones - of the citizens of the administering power makes a significant contribution to the security situation in that territory, and facilitates the army's performance of its tasks.’

or immediate security threats within the West Bank. At the same time, the
Gush Emunim movement involved in settling the land around Dweikat’s
village of Rujeib—supported by elements of the Likud government that had
come to power in 1977—was unreserved about the permanence of their
intentions. They made no claims to the settlement serving mere temporary or
security purposes. One of the settlers, Menachem Felix, made the point clear
in his testimony to the Court:

Basing the requisition orders on security grounds in their narrow,
technical meaning rather than their basic and comprehensive meaning
as explained above can be construed only in one way: the settlement is
temporary and replaceable. We reject this frightening conclusion
outright. It is also inconsistent with the government’s decision on our
settling on this site. In all our contacts and from the many promises we
received from government ministers, and most importantly from the
prime minister himself — and the said seizure order was issued in
accordance with the personal intervention of the prime minister — all
see Elon Moreh to be a permanent Jewish settlement no less than
Deganya or Netanya.95

Presented with such overtly contradictory positions to the discourse
of “temporary” security needs, the Supreme Court ordered the authorities to
return the land in Rujeib to its owners, prompting Sharon to immediately set
about devising an alternative legal premise for the project of seizing and
settling Palestinian land.96 At the meeting called by Sharon in the wake of
the judgment, Ramat offered the idea of reviving the concept of mawat land
(“dead” or “unused” land) from nineteenth century Ottoman agrarian land law.
According to this doctrine, land lying a certain distance outside a given
village, even if belonging to someone, is only owned temporarily as long as
that owner cultivates it. If it is not cultivated for three consecutive years, it is
considered “dead land” belonging to no one, and reverts to the empire.
Satisfied that this could serve the settlement project’s purpose, Sharon
gathered a team of lawyers and geographers and set about identifying,

95 Cited in B’Tselem, ‘Land Grab: Israel’s Settlement Policy in the West Bank’ (Jerusalem:
B’Tselem, 2002) 49.
96 It must be noted here that the Elon Moreh ruling did not have any bearing on the continued
settlement of “state land” in the occupied territories, nor on prior requisition orders of private
Palestinian land, which remained valid as far as Israeli law was concerned.
mapping and registering uncultivated land using aerial photometry. Elon Moreh was established on an alternative site on this basis, and throughout the West Bank swathes of land were declared state land by the regional military command. A number of techniques were then constructed around this policy, such as the reduction of water quotas to Palestinian farmers to curtail their capacity to cultivate land. The expropriation through re-categorisaton was upheld by the Supreme Court, and the scale and pace of settlement construction proliferated from the late 1970s. As Weizman notes, therefore,

Although the liberal press celebrated the Elon Moreh ruling as a victory over the Likud government, it later became clear that this ruling was nothing but a Pyrrhic victory. Not only was Elon Moreh established on an alternative site; indeed, for whoever wished to read it, the ruling’s wording itself indicated alternative methods of access to land. The court confirmed that future access to land in the Occupied Territories for the construction of settlements would be permitted on public land entrusted to the custodianship of the military power, and added that if the state adheres to this principle, the court would no longer interfere in its future settlement efforts.

The Supreme Court did this through accepting the seizure of huge quantities of state land, including private land recast as state land, as well as by holding that the legality of the settlements themselves was a “political” question and as such not justiciable before the courts. Former Chief Justice Meir Shamgar claims that the developments initiated by the Israeli military legal professionals and the decisions taken by the Supreme Court had no bearing on the manner in which Israel’s land and settlement policies proceeded in the occupied territories, arguing there was ‘no indication that the steps taken by the Court are connected to this phenomenon. … This is a political

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97 In just six years from 1979 to 1985, the cultivated land in the West Bank was reduced by 40 per cent. Eyal Weizman, *Hollow Land: Israel’s Architecture of Occupation* (London: Verso, 2007) 120.


99 According to Israeli organisation Peace Now’s Settlement Watch team, by 2006, 38.76% of the land on which settlements and settler industrial zones in the West Bank are located was privately owned Palestinian property. Dror Etkes & Hagit Ofran, ‘Breaking the Law in the West Bank: Israeli Settlement Building on Private Palestinian Property’ (Jerusalem: Peace Now, 2006) 15.

phenomenon, not connected to the Court.101 Alexandrowicz plainly exposes this constructed law/politics binary as a false and implausible separation.

Law was very much part of the political discourse and dynamic of settlement. The “dead land” concept finds obvious analogy in the common law doctrine of *terra nullius*, used to great effect in the colonisation of Australia and North America through the acquisition of land marked not by emptiness per se, but by an absence of “civilised” society capable of exercising sovereignty. It also evokes John Locke’s theory of property rights, which justified the non-consensual nature of colonial dominion and the dispossession of indigenous peoples who were not cultivating the land in question. Settlers who did mix their labour with the land to improve it gained rights to the land. Once such rights had been established, any native attempts to regain the land could be put down with force. As Alexandrowicz’s narration highlights, with Israel’s military occupation now succeeding Ottoman and British rule, ‘what the IDF says goes … the regional commander is now the empire’. This again conjures up a distinctly Lockean understanding of sovereign prerogative.

Within the broader legal discourse in Israel, the direct and concrete legacy of British colonial emergency measures occupies a central position. Israel remains in a perpetual state of national emergency and continues to apply the British Defence (Emergency) Regulations 1945 as part of the legal basis for policy as it relates to the Palestinians. In the construction of a supposedly exceptional *nomos* in Palestine, law remains integral. The state of emergency serves to frame the situation for both domestic and international consumption as one of defensive security rather than aggressive conquest. The deeper reality of institutionalised domination based on ethno-national lines, however, reinforces the notion of racialisation as a prominent component of the invocation of sovereign emergency power. As has typically been the case in colonial spaces, emergency powers are necessary to the preservation of sovereignty, serving as a bridge between the twinned pillars of liberal empire: force and justice; conquest and rule of law. The link between settlement and emergency powers is traceable. Settlement and cultivation act, for Israel, as a

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101 Quoted in Ra’anan Alexandrowicz, *The Law in These Parts* (2011).
precursor to the establishment of sovereignty. Emergency powers are subsequently discharged as an element of that acquired sovereignty in order to consolidate its supremacy over any competing claims. An array of emergency legal mechanisms converge to inscribe a form of control over the body, mind and territory of the colonised, and to suppress resistance to such control.

III. Israel’s Emergency Modalities
The Mandate-era Defence (Emergency) Regulations constitute one element of Israel’s broader, multifarious emergency legal regime. Within a region noted for prolonged use of emergency law as a governmental structure of authoritarian rule,102 Israel stands out as an exemplar of permanent emergency. In addition to the British emergency regulations, a state of emergency was proclaimed within days of the birth of the state and has persisted without interruption since 19 May 1948. Some but not all elements of Israel’s emergency modalities are dependent on this declared emergency.

The Israeli legal system includes several mechanisms of emergency law that overlap but exist independently of each other. The emergency jurisprudential situation is complex to the point of being described as ‘incoherent’ and ‘convoluted’; contrary to conceptions of this situation as the inadvertent accumulation of necessary threat-specific responses enacted at particular points in time, however, it is more revealingly understood as a concerted tool of governance whose structural ambiguity offers a convenient flexibility.103

Emergency modalities in the Israeli legal order assume three principal legal forms. The Defence (Emergency) Regulations, as noted, remain on the law books of the land long after the departure of their original British authors. While framed in the lineage of colonial emergency doctrine, their subsequent application by Israel is not tied to the declaration of a state of emergency.104

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Israel has itself constructed two further bases in law for extraordinary measures. Specific administrative emergency orders or regulations can be promulgated by the executive branch of government, and are dependent upon a declared state of emergency. Primary emergency legislation enacted by the Knesset (Israel’s parliament) can similarly be made contingent on the existence of a declared emergency, but may alternatively be worded to apply independently.105

III(i) The Defence (Emergency) Regulations

The Defence (Emergency) Regulations 1945 was the last version of the emergency code deployed by Britain in its administration of Palestine. It followed on from previous instruments that had been used suppress Arab revolt against foreign rule from the early 1930s: the Palestine (Defence) Order in Council 1931; the Palestine Martial Law (Defence) Order in Council 1936; the Palestine (Defence) Order in Council 1937; the Emergency Regulations 1936; the Defence (Military Courts) Regulation 1937; the Defence (Military Commanders) Regulations 1938; and the Defence Regulations 1939. Such texts had, between them, offered the typical panoply of emergency powers—censorship, curfew, closure, house demolition, movement restriction, detention without trial, deportation and land requisition—to the executive and military authorities. The Defence (Emergency) Regulations 1945 integrated much of what had been included in these instruments in a consolidated and more comprehensive form. The Regulations were used against both Palestinian Arabs and Jews in the post-war years before Britain abdicated its Mandate. They were condemned by Zionist leaders of the time as

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undemocratic and racist laws, to the point of being compared unfavourably to Nazi occupation standards.\footnote{106}

Following the establishment of the Israeli state, the Defence (Emergency) Regulations were adopted by Israel under Section 11 of the Law and Administration Ordinance 1948 (the first piece of legislation enacted by Israel’s Provisional State Council).\footnote{107} Proposals for the revocation of the Regulations (or their replacement by permanent legislation) were made in the Knesset in 1949, and on a number of occasions in the 1950s. Criticism voiced by Jewish-Israeli judges, legislators and religious figures routinely characterised the regulations as fascist and authoritarian. The context of this opposition was a small number of high-profile cases of administrative detention of members of Jewish paramilitary groups. In a 1951 Knesset debate over whether the provisions of the Regulations providing for detention without trial ought to be extirpated from the Israeli legal system, then opposition leader Menachem Begin challenged Foreign Minister (and, at the time, acting Prime Minister) Moshe Sharett’s defence of administrative detention and contention that ‘law is law’:

Not so! There are tyrannical laws, there are unethical laws … And an unethical law is also an illegal law. The detention is therefore illegal, and your order is arbitrary.\footnote{108}

\footnote{106} See, for example, the speech of Yacob Shimshon Shapira (later Israeli Attorney-General and Minister for Justice), Jewish Bar Association, Tel Aviv, 7 February 1946, quoted in *Ha Praklit* (February 1946): ‘The regime established in Palestine with the publication of the Emergency Regulations is quite unique for enlightened countries. Even Nazi Germany didn’t have such laws, and acts such as those perpetrated at Maidanek actually ran against the letter of German law.’ The Regulations were also condemned by the Jewish community in Palestine as indicative of a ‘police state’. Bernard Joseph, *British Rule in Palestine* (Washington: Public Affairs Press, 1948) 222.

\footnote{107} On Britain’s repeal of the Defence (Emergency) Regulations before relinquishing the Mandate in May 1948, and the subsequent legislative manoeuvring of the Knesset to profess that the regulations had not in fact been validly repealed, see, for example, John Quigley, *The Case for Palestine: An International Law Perspective* (2nd ed., Durham: Duke University Press, 2005) 103. Only Regulations 102 (which reinforced Britain’s Immigration Ordinance 1941) and 107c dealing with illegal immigration were dropped so as to allow Jews who entered Palestine illegally under the British Mandate to remain in the new state.

\footnote{108} 9 *Knesset Debates* 1807, 12 May 1951, quoted in B’Tselem, ‘Detained Without Trial: Administrative Detention in the Occupied Territories Since the Beginning of the Intifada’ (Jerusalem: B’Tselem, 1992) 24. See also, for example, Don Peretz, ‘Early State Policy towards the Arab Population, 1948-1955’ in Laurence J. Silberstein (ed.), *New Perspectives on Israeli History: The Early Years of the State* (New York: New York University Press,
Notably, however, the Regulations had also emerged by 1950 as the legal basis for the system of military government imposed on predominantly Palestinian Arab regions within Israel. As the threat of Jewish attacks against the state dissipated, the racialisation of the Regulations intensified through their use against Palestinian citizens of Israel. By the end of 1948, the main Arab population centres inside what had materialised as Israel’s de facto borders—most of which had been mapped outside of Israel’s borders in the UN partition plan—were effectively under military rule. Five military governorates were created: Jaffa, Ramle-Lod, Nazareth, the Western Galilee, and the Negev. Throughout 1949, these areas were classified as occupied territories, before an integrated system of military government was established in 1950 under the direction and coordination of the Ministry of Defence. This form of military rule of the Palestinians within Israel continued until 1966, with the Defence (Emergency) Regulations as its primary legal framework. As such, a territorial zone of emergency was carved out within Israel in a racially contingent manner, based on the demographic make-up of the zone concerned.

These laws were openly racist in that they were never used in Israel against Jews. When Israel retained them after 1948 for use in controlling the Arab minority, they forbade Arabs the right of movement, the right of purchase of land, the right of settlement, and so forth. Under the mandate the regulations were regularly denounced by the Jews as colonial and racist. Yet as soon as Israel became a state, those same laws were used against the Arabs. … Until 1966, the Arab citizens of Israel were ruled by a military government exclusively in existence to control, bend, manipulate, terrorize, tamper with every facet of Arab life from birth virtually to death.

Israeli scholars acknowledge that the regulations were used almost exclusively against Arabs, and at the time the state comptroller held there to be ‘something improper’ about a law like this being enforced against one particular group of the population. Said asserts that the purpose underlying

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the application of stringent emergency powers was ‘to pay that wretched [Palestinian population] for its temerity in staying where it did not belong’, seeing it as entwined with the “Judaisation” of those parts of Israel that retained an Arab majority.\footnote{Edward W. Said, The Question of Palestine (New York: Times Books, 1979) 103.} The discourse of Israeli leaders during this period offers little to dispute that claim, with a racialised vision of the state very much to the fore. David Ben-Gurion’s 1960 speech to the World Zionist Congress is a case in point, eliding the binational character of the country’s population:

> In Israel there are not two spheres. … Here everybody is both Jewish and universal: the soil we walk upon, the trees whose fruit we eat, the roads on which we travel, the houses we live in, the factories where we work, the schools where our children are educated, the army in which they are trained, the ships we sail in and the planes in which we fly, the language we speak and the air we breath, the landscape we see and the vegetation that surrounds us—all of it is Jewish.\footnote{‘Address by Prime Minister Ben Gurion’, New York Times 52-53, 8 January 1961.}

While military rule and the Defence (Emergency) Regulations are most commonly associated with the security provisions mandating restrictions on liberty through powers of arrest, detention and curfew, other aspects of the Regulations that have had a more profound structural impact on relations with the Palestinians. Ben-Gurion was frank about the primary function of the internal military government over Israel’s Palestinian population: ‘the military regime came into existence to protect the right of Jewish settlement in all parts of the state.’\footnote{36 Knesset Debates 1217, 20 February 1963, quoted in John Quigley, The Case for Palestine: An International Law Perspective (2nd ed., Durham: Duke University Press, 2005) 109.} The Defence (Emergency) Regulations were central to land and planning policies in Israel’s formative years, underpinning an ideology of pioneering settlement that was as central within the new state as it had been in Mandate Palestine and would be in the post-1967 occupied territories. The regulations were used to expropriate large parcels of Palestinian land inside Israel through the creation of “closed” security zones. Under Regulation 125:

A Military Commander may by order declare any area or place to be a
closed area for the purposes of these Regulations. Any person who, during any period in which any such order is in force in relation to any area or place, enters or leaves that area or place without a permit in writing issued by or on behalf of the Military Commander shall be guilty of an offense against these Regulations.115

From 1948, all of the Arab-Palestinian villages and towns in Israel, whether still inhabited or not, were declared by the military authorities as separate closed areas. This encompassed approximately 85 per cent of the Palestinians on the Israeli side of the armistice line, with only those living in predominantly Jewish urban areas not directly affected.116 Large tracts of land were closed by the military, with their inhabitants expelled or their owners denied access, and the land in turn confiscated by the state. Under Regulation 125, Palestinians were prevented from leaving their own village or town without a permit from the Israeli military authorities, even for the purposes of cultivating and harvesting their own lands, or of travelling to market towns to sell their produce. The Galilee area alone was divided into fifty-eight sectors for travel permit purposes; applying for permits was a burdensome process, with requests often rejected. Palestinians residing or travelling without a permit—or with an expired permit, or a permit for a different route—were summarily fined or imprisoned, with recourse only to military courts. The Regulations thus operated to prevent Palestinian farmers from accessing and cultivating their own land. In a similar fashion to later developments in the occupied territories, the Minister of Agriculture was in turn mandated to classify closed-off Palestinian land as “uncultivated” and thus unprotected from expropriation.117 Shimon Peres made it clear that the fundamental value of Regulation 125 was rooted not in immediate security concerns, but in facilitating Zionism’s overarching goals: ‘By making use of Article 125, on which the Military Government is to a great extent based, we can directly

continue the struggle for Jewish settlement and Jewish immigration.\(^\text{118}\)

Regulation 125 was used in tandem with other mechanisms developed in the state’s legal apparatus for the purposes of expropriating and acquiring Palestinian land, including the Abandoned Areas Ordinance 1948 and the Land Acquisition (Validation of Acts and Compensation) Law 1953.

Dispossession of Palestinians under this emergency infrastructure was sustained even where it was not condoned by the Israeli Supreme Court. Don Peretz chronicles one example relating to the Arab-Palestinian population of the northern border village of Iqrit:

After surrendering to the [Israeli military] on 31 October 1948, the villagers were asked to leave for fifteen days because of “security reasons.” Most left with only enough personal belongings for two weeks, but five years later the army still gave no indication that it would permit them to return. When the case was brought to the High Court of Justice in 1953, the court did not dispute the army’s right to evacuate a population in times of emergency. However, questioning the procedures followed by to prevent the return of the villagers after termination of the emergency, it ordered the army to permit the inhabitants to go home. The [Israeli military] responded by destroying most of the village and refusing to obey the court.\(^\text{119}\)

The Defence (Emergency) Regulations were used to extend the closure order in 1963 and again in 1972. Iqrit’s expelled villagers went back to the Supreme Court with another petition in 1981, where it was this time held that their continued displacement was justified.\(^\text{120}\) The displaced Palestinians continued their campaign to return to their village. A Ministerial Committee appointed in 1993 found that there was no security imperative for the ongoing expulsion of those evacuated in 1948, and recommended a “compromise” solution whereby approximately ten per cent of their original land would be restored to the villagers, on which each family would be entitled to build one house. In 2001, however, the Israeli cabinet issued a decision that held that the same security

\(^{118}\) Shimon Peres, ‘Military Law is the Fruit of Military Governance’, \textit{Davar}, 26 January 1962. Peres was Director-General of Israel’s Ministry of Defence in 1962.


\(^{120}\) \textit{Committee of Displaced Persons from Iqrit, Rama and Others v. Government of Israel}, HCJ 141/81.
concerns that had informed the 1972 closure under the Defence (Emergency) Regulations remained relevant, and the villagers were therefore prevented from returning. The Supreme Court deferred to this position and proposed compensation be paid instead, a solution that was unacceptable to the displaced residents.121

As the Iqrit case demonstrates, the Defence (Emergency) Regulations were retained inside Israel after the dissolution of military rule in 1966 and the transfer of government functions in the country’s Arab areas to the state’s civil authorities. Since then, the Regulations have continued to be used inside Israel, particularly in relation to land issues arising in border areas. Provisions of the Defence (Emergency) Regulations providing for the banning of ‘unlawful associations’ (Regulations 84 and 85) and censorship (Regulations 86 – 101) continue to be invoked in recent years to close Arabic-language newspapers, to ban Palestinian political parties and associations, and to disqualify their candidates from Knesset elections.122

The use of the Defence (Emergency) Regulations inside Israel was most pronounced, however, during the crucial period of military rule up to 1966, as the state went about consolidating its demographic and territorial dominance. As Said noted, ‘the best introduction to what has been taking place in the Occupied Territories is the testimony of Israeli Arabs who suffered through Israeli legal brutality before 1967.’123 The legal tools were certainly carried across, with the Defence (Emergency) Regulations assuming a significant role in the legal architecture of the occupation. The racialised use of the Regulations continues to this day in the occupied territories through almost exclusive application to Palestinian residents. They provide the basis for a profusion of military orders covering administrative detention, home

demolition, land seizure, curfew, deportation, and censorship. Defenders of Israeli security policy in this regard argue that the discriminatory application of the emergency regulations is between Israelis and non-Israelis purely on grounds of citizenship, not between Jewish-Israeli settlers and Arab-Palestinians on grounds of national or ethnic origin. Israel’s prior targeted application of the emergency regulations towards its Arab citizens in the internal military government period, however, undermines this claim. The Defence (Emergency) Regulations have now been retained in the Israeli legal system for almost seven decades, playing on the licence granted by a supposed temporariness, but deeply entangled with the ideology of the ethno-religious state.

III(ii) Emergency Measures under the Declared State of Emergency

Pursuant to Section 9 of the Law and Administration Ordinance 1948, Israel was ushered into a declared and temporally indeterminate state of emergency from the first week of the state’s formal existence. After more than forty years of the emergency as status quo, the governing legal framework was given a slight procedural makeover, with the authority to declare an emergency reconstituted in the 1992 Basic Law: The Government,\textsuperscript{124} and subjected to a condition that the declaration ‘may not exceed one year’. With the Basic Law proceeding to allow for unlimited renewals by parliament, however, the temporality of the emergency in effect remained indefinite. The Knesset has renewed the state of emergency every year thereafter, without exception, meaning that Israel’s national emergency has continued since May 1948 without respite.

A number of mechanisms are triggered by a declared state of emergency. The government is authorised to enact discrete administrative emergency regulations to circumvent “normal” constitutional guarantees. As such, while the legislature is responsible for declaring and renewing (normalising) the state of emergency, the executive has full discretion as to the nature of exceptional measures to be taken: ‘During a declared state of emergency, the government is empowered to authorise...’

\textsuperscript{124} Originally Article 49; now Article 38.
emergency, the government, and in urgent cases the Prime Minister alone, is
authorized to enact emergency regulations for the defense of the state, public
security, and the maintenance of supplies and essential services.’ Emergency
regulations propagated under this authority can and do take supremacy over
ordinary parliamentary legislation, prompting human rights organisations to
decry the fact that bestowing such a mandate to the executive serves to
‘violate the principles of the rule of law and the separation of powers.’ Executive emergency regulations have been imposed consistently from 1948.
Many of them have supplemented Israel’s land appropriation mechanisms
under the Defence (Emergency) Regulations.

The Emergency Regulations (Absentees’ Property) Law 1948 marks
the genesis of Israel’s “absentee property” doctrine. Under this doctrine, the
land of an individual deemed an “absentee” can be confiscated by the state.
This concept was moulded for the confiscation of property belonging to
Palestinians that had been killed or forced to flee to neighbouring countries in
1948, but was applied even if, as ‘in many cases, the absentees were present—
a legal fiction of Kafkaesque subtlety.’ Internally displaced Palestinians
who were barred from returning to their homes, although still in Israel, were
constructed as “present absentees”. Significantly, in terms of racialisation,
even if Jewish individuals could have ostensibly fallen within the definition,
the Absentee Property doctrine has been implemented only against Arabs. An
“absentee” is defined as any person owning land in Israel who is a citizen,
national or resident of Lebanon, Egypt, Syria, Saudi Arabia, Jordan, Iraq,
Yemen, the West Bank or Gaza, or who was a citizen of British Palestine but
left the area that became Israel in 1948. These particular emergency
regulations set the tone for the permanent legislation that superseded them in
the form of the Absentees’ Property Law 1950. Beyond the particular case of
the “absent” Palestinian population, whether refugees outside the Green Line

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or internally displaced within, the Palestinians who remained and became citizens in Israel maintained possession of substantial tracts of land. The Israeli authorities thus devised additional emergency regulations aimed at accumulating further land. As early as the summer of 1948, a series of emergency orders were introduced to underwrite large-scale land transfers on purported state security grounds.¹²⁸ The Emergency Regulations (Requisition of Property) Law 1948, for instance, was promulgated by decree to allow the provisional government to seize property. This was replaced and cemented by legislation enacted by the Knesset the following year. Significantly, the Emergency Land Requisition (Regulation) Law 1949 authorises land and housing requisition orders by the Israeli authorities not only for ‘the defense of the State, public security, the maintenance of essential supplies or essential public services’ but also to facilitate ‘the absorption of immigrants or the rehabilitation of ex-soldiers or war invalids.’¹²⁹ As such, the legislation’s thrust transcends security and defence necessities, and is explicitly linked to immigration and citizenship policies aimed at consolidating settler colonial domination. It is also important to note that land seizure under these orders was initially defined as a temporary requisition subject to certain time limitations which were eliminated in subsequent amendments, ‘effectively transforming the initial requisition into permanent expropriation.’¹³⁰

In a similar vein, a series of instruments relating to “waste” land put in train a process whereby Israel’s Minister of Agriculture could assume control of “uncultivated” Palestinian land. This originated in the Emergency Regulations (Cultivation of Waste Lands) 1948, which was amended by the Emergency Regulations (Cultivation of Waste Lands) (Extension of Validity) Ordinance 1949 and the Emergency Regulations (Cultivation of Waste [Uncultivated] Lands) Law 1949, culminating in the Emergency Regulations (Cultivation of Waste Lands) Law 1951. In addition to being empowered to

¹²⁹ *Emergency Land Requisition (Regulation) Law 1949, Article 3(a).*
confiscate uncultivated land, the Minister of Agriculture is also mandated to assume control ‘of water resources and water installations which in his opinion are not sufficiently utilised’.\(^{131}\) These measures have typically been used in conjunction with the Defence (Emergency) Regulations, whereby areas closed by the military authorities are subsequently confiscated by the Minister of Agriculture on the basis that they are no longer being cultivated.\(^{132}\)

The Emergency Regulations (Security Zones) Law 1949 gives the Minister of Defence discretion to categorise areas (within ten kilometres of Israel’s northern borders, and twenty-five kilometres of the borders in the south) as security zones that must be evacuated. This policy has been applied particularly in the Galilee region, the areas towards the Lebanese and Syrian borders, and around the Gaza Strip. Land acquired under this order has typically been sold or transferred to the Jewish National Fund, a para-state institution mandated to ‘acquire and develop lands in Palestine for the exclusive benefit of the Jewish people.’\(^{133}\) Such measures, framed in a security discourse, function to feed into the deeper structural and demographic aspects of Israel’s land policies.

The extensive grid of related emergency laws and regulations that are used in parallel and in mutually reinforcing ways is indicative of the state of emergency paradigm as a surface upon which settler colonial policies were legally inscribed from the outset in Israel. The torrent of emergency measures


\(^{132}\) See further, for example, Ian Lustick, *Arabs in a Jewish State: Israel’s Control of a National Minority* (Austin: University of Texas Press, 1980) 178: ‘Typically the process works in the following way: An area encompassing Arab-owned agricultural lands is declared a “closed area.” The owners of the lands are then denied permission by the security authorities to enter the area for any purpose whatsoever, including cultivation. After three years pass, the Ministry of Agriculture issues certificates which classify the lands as uncultivated. The owners are notified that unless cultivation is renewed immediately the lands will be subject to expropriation. The owners, still barred by the security authorities from entering the “closed area” within which their lands are located, cannot resume cultivation. The lands are then expropriated and become part of the general land reserve for Jewish settlement.

enacted for the purposes of land expropriation so soon after the state’s foundation implies a degree of premeditation, and a continuity of pre-state Zionist policies and plans aimed at the conquest of Palestinian land.\textsuperscript{134} To insulate that conquest, and Jewish-Israeli domination of state institutions, a range of emergency mechanisms also operate to obstruct Palestinian participation in the political and social life of Israel and the region. The Emergency Regulations (Foreign Travel) 1948 [an instrument authorising the Minister of Interior to prevent Israeli citizens from travelling abroad ‘as he sees fit’, and on the basis of secret evidence] and the Prevention of Infiltration (Offences and Jurisdiction) Law 1954 [an emergency law prohibiting travel, or assistance others in travelling, to a number of Arab states designated as “enemy states”] continue to be used to prosecute or impose travel bans on Palestinians. In 2002, for example, Palestinian Knesset member Azmi Bishara was indicted under these laws for helping Palestinian citizens of Israel to visit relatives in Syria. While his case was pending, the Knesset passed Amendment 7 to the Emergency Regulations (Foreign Travel) 1948, to remove diplomatic travel immunity from parliament members. From 2002, similarly, Sheikh Ra’ed Salah, a Muslim Palestinian religious leader in Israel, was prevented from travelling for annual pilgrimage by an emergency travel ban order issued by the Minister of Interior and upheld on security grounds by the Supreme Court.\textsuperscript{135}

Although ostensibly tied to national security matters, Israel’s emergency legal regime infiltrates a diversity of areas, often, as noted, without any discernible connection to perceived threats to the existence or security of

\textsuperscript{134} A series of plans and guidelines were drawn up from 1944 by the Haganah, the pre-state Jewish militia in Palestine, designed to take control of territory for the Jewish state. This process culminated in Plan Dalet in early 1948, described as a ‘master plan for the conquest of Palestine’ by Palestinian historian Walid Khalidi, and a ‘blueprint for ethnic cleansing’ by Israeli historian Ilan Pappé. Walid Khalidi, ‘Plan Dalet: Master Plan for the Conquest of Palestine’ (1988) 18:1 Journal of Palestine Studies 4; Ilan Pappé, The Ethnic Cleansing of Palestine (Oxford: Oneworld, 2006) 86. In contrast, Israeli military historian David Tal argues that while the plan did provide for the deportation of Palestinian residents and the destruction of their villages, this was not its raison d’être – rather, the primary purpose of establishing Jewish-Israeli territorial control was as a defensive safeguard in the event of invasion. See David Tal, War in Palestine, 1948: Strategy and Diplomacy (London: Routledge, 2004) 87.

\textsuperscript{135} Sheikh Ra’ed Salah v. Minister of Interior, HCJ 4706/02, judgment, 17 July 2002.
the state. In addition to underwriting land expropriation and colonisation processes, dozens of sets of emergency regulations have been enacted in spheres spanning economic regulation, labour relations, shipping practices, civil registration, fire-fighting, trade and monetary issues. It has been noted that emergency regulatory powers under Section 9 of the Law and Administration Ordinance 1948 have been invoked, for instance, in ‘an almost routine fashion’ since the Yom Kippur war in 1973 to bypass burdensome industrial dispute resolution processes ‘in situations where no special urgency was present or when other, less drastic means had been available.’

In addition to executive emergency decrees or regulations, statutory legislation—while enacted and amended by the Knesset in the same fashion as ordinary statutes—can also be framed in such a way that applicability is contingent upon the existence of a state of emergency. The Emergency Powers (Detention) Law 1979, for example, which enables administrative detention of residents of Israel, residents of territory occupied by Israel, and residents of other states, was framed so that it ‘shall only apply in a period in which a state of emergency exists in the State by virtue of a declaration under section 9 of the Law and Administration Ordinance.’ This succeeded Regulations 108 and 111 of the Defence (Emergency) Regulations and grants discretion to the Minister of Defence to issue (and renew indefinitely) administrative detention orders where he or she ‘has reasonable cause to believe that reasons of state security or public security require that a particular person be detained.’ In the context of a perpetually renewed state of emergency, this ordinance effectively functions as an ordinary piece of permanent legislation, thus normalising the exceptional powers of detention without trial in the legal system. The fact that (leaving aside the continuing use of the law against Palestinian citizens of Israel) more than 800,000 Palestinians in the occupied territories—encompassing 40 per cent of the total male population—have been detained

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since 1967 under military order is testament to this normalisation.\textsuperscript{137}

Such deprivation of liberty en masse is inimical to civil liberties and fair trial standards on the international legal plane. Upon ratifying the International Covenant on Civil and Political Rights in 1991, however, Israel submitted a formal notification stating that (since 1948) its security situation has constituted a public emergency within the meaning of the Covenant’s derogation provision in Article 4 – that is, an existential “threat to the life of the nation”. On this basis Israel declared that it was suspending certain obligations under the Covenant and derogating from Article 9 (right to liberty).\textsuperscript{138} While repeatedly questioning Israel’s reliance on the state of emergency and denouncing excessive measures enacted thereunder, the UN Human Rights Committee acknowledges that the law entitles states to derogate at their own discretion.\textsuperscript{139} As such, international law shows itself to be implicated in the perpetuation of Israel’s emergency modalities. On the domestic plane, judicial challenges in Israel to both the Defence (Emergency) Regulations and the declared state of emergency have been brought at various points since 1948, resulting in the Israeli Supreme Court repeatedly stamping its imprimatur on the government and military authorities’ use of emergency doctrine, thereby facilitating its normalisation.

IV. ‘Intent to Regularise’: Emergency on Trial

One of the first cases brought before Israel’s Supreme Court in 1948, arising from a request for revocation of an administrative detention order under the Defence (Emergency) Regulations 1945, involved a challenge to the validity of the British Regulations themselves in the nascent state’s legal order. A minority dissenting opinion in the case was expressed by Justice Shalom

\textsuperscript{138} ‘Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1991’ UN Doc. ST/LEG/SER.E/10 (1992) 149.
\textsuperscript{139} Some international lawyers, such as John Quigley, however, question the procedural and substantive validity of Israel’s derogation. John Quigley, ‘Israel’s Forty-Five Year Emergency: Are There Time Limits to Derogations from Human Rights Obligations?’ (1994) 15 Michigan Journal of International Law 491.
Kassan. Justice Kassan argued that the regulations granting broad emergency powers to the executive and military authorities were undemocratic and inapplicable:

> I cannot act and pass judgment in accordance with the defense regulations which are still on the statute book. Believing as I do that these laws are essentially invalid, I should not be asked to act against my conscience merely because the present government has not yet officially repealed them, though its members declared them illegal as soon as they were passed. … If the courts of the British Mandate did not cross these laws off the statute book, this court is honorbound to do so and to utterly eradicate them.\[^{140}\]

The positivist majority decision of the Court, however, although expressing similar misgivings about the nature of the emergency regulations, held that the judiciary ‘must accept the regulations as they are, that is as valid, legal regulations’. The outcome notwithstanding, a clear assumption that the government would annul the regulations in due course ran through the judgment. In a subsequent case of administrative detention of a Palestinian resident of Jaffa, the Defence (Emergency) Regulations were reaffirmed, although in this instance the detention order was annulled on technical procedural grounds.\[^{141}\]

Petitions challenging the validity the Defence Regulations 1939 in the early days of Israel’s existence were similarly rejected in formalistic terms by the Supreme Court, which refused to accept that the earlier Regulations had been implicitly repealed by the Law and Administration Ordinance 1948, or were inconsistent with the Declaration of the Establishment of the State of Israel.\[^{142}\]

With the precedent asserted as to the Defence (Emergency) Regulations’ standing, subsequent legal challenges sought instead to contest specific orders issued under the Regulations. In the *El-Ard* case in 1964, permission for the publication of an Arabic-language magazine in northern

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\[^{141}\text{El-Karbutli v. Minister of Defence, HCJ 7/48.}\]

\[^{142}\text{Zeev v. The Acting District Commissioner of the Urban Area of Tel Aviv (Gubernik), HCJ 10/48; Leon v. Acting District Commissioner of Tel Aviv, HCJ 5/48.}\]
Israel was denied by the authorities on security grounds under Regulation 94. The association seeking to publish the magazine petitioned the Supreme Court, claiming the decision was unfounded and discriminatory. The Court indicated its tendency to defer to the executive and military on security matters and dismissed the petition, holding that Regulation 94 does not permit the Supreme Court to conduct an investigation of the facts and that its judicial review mandate is very limited under the Regulations.\footnote{143 El-Ard v. Commissioner of the Northern District, HCJ 39/64.} In the 1979 \textit{Al-Assad} case, again arising from denial of a publication permit under Regulation 94, a Supreme Court majority this time rule that the Ministry of Interior should issue the permit. While not required to disclose evidence revealing the security concerns on which the denial had been based, the authorities in this instance had failed to fulfil their procedural obligations to provide other specified information to the Court.\footnote{144 Al-Assad v. Minister of Interior, HCJ 2/1979.} In a 1980s case arising from very similar facts, the Supreme Court upheld the decision to withhold the permit on security grounds, as no such procedural mistakes on the part of the state arose.\footnote{145 Makhoul v. Jerusalem District Commissioner, HCJ 322/81.}

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When the inherent problems in the doctrine of emergency are left to one side, two normative legal questions arise and remain in relation to Israel’s declared state of emergency. The first is whether Israel’s situation has, since 1948, continued to surpass the threshold of an impending threat to the life of the nation; whether it is sufficiently grave to warrant the imposition of an emergency legal framework. The second, given that successive Israeli governments have argued that the state of emergency has reached the necessary threshold, is whether the measures enacted in the state of emergency paradigm are a necessary and proportionate response to the perceived threat. These are legal issues that continue to plague a number of states, often marked by deficits of judicial supervision, and have preoccupied the case law and
commentary of international human rights bodies. It was concerns over both of these questions that prompted legal activists to seek judicial review of Israel’s declared state of emergency.

In 1999, the Association for Civil Rights in Israel (ACRI) submitted a petition to the Supreme Court against the legislature, challenging the constitutionality of the continued state of emergency, and seeking its annulment. The petition argued that the Knesset’s persistent renewal and extension of a state of emergency has transgressed Israeli constitutional law and international legal norms, on the basis that Israel’s security circumstances are not of such extraordinary status as to justify an extraordinary regime that subverts liberal understandings of rule of law and separation of powers. It was put forward that, in contrast to the purported intentions of the doctrine of emergency (where construed in a favourable light, detached from its own imperial history) to enable the implementation of urgent and necessary measures for a limited duration, Israel’s state of emergency was permanent in time and unlimited in scope – and thus unlawful. ACRI further submitted that the declared emergency enabled the imposition of legislation and regulations that violate property rights, that unduly hamper free expression, association and assembly, and that contravene Israel’s own Basic Laws.

As hearings proceeded following the outbreak of the second Palestinian intifada in 2000, the Supreme Court under former Chief Justice Aharon Barak suggested that the petition should be withdrawn given the exacerbated security situation. ACRI submitted an amended petition in 2003, which argued that even in a context of heightened threats to security the use of emergency powers should be minimal in time and scope, and that Israel’s state of emergency declaration was still unfounded. The state’s response (with the government of Israel now added to the Knesset as a respondent) claimed that repeal of the emergency would create a legal vacuum and deprive the authorities of the necessary means of suppressing threats to security. The government did emphasise its intention to move away from the (declared) state of emergency, and told the Court that it would continue to take steps to
amend or replace legislation that is contingent on the existence of a formal emergency.

The Ministry of Justice provided the Court with ongoing notifications regarding the revocation and replacement of certain pieces of emergency legislation. The authorities presented the seemingly contradictory position that although a state of emergency continues to exist in fact, the state of emergency in law should be gradually phased out. What can be inferred from this is both a tacit acknowledgment that the factual situation does not justify the application of exceptional emergency legalities and, at the same time, a conflicting assumption that those exceptional legalities should be subsumed into the “normal” legal order over time.

The Supreme Court essentially agreed that while the continuing state of emergency is not ideal, it is a necessary “transitional” measure. Although acknowledging in regard to the legal framework that ‘the present situation must not remain unchanged’, the Court has consistently framed the issue as a ‘complex and sensitive’ one in which the authorities must be left with a generous margin of flexibility. In an interim decision of August 2006, the Court rejected ACRI’s claim that Israel’s situation was not in fact one of an ongoing state of emergency: ‘the war with terror is raging at full force, and it is impossible to disregard this.’ At the same time, the Court noted that ‘the state of emergency has been exploited for statutory matters regarding which balanced legislation could have been enacted long ago’. The Court gave the respondents time to institute changes to civil legislation that was tied to the state of emergency, and by 2011 was satisfied that:

Progress has been made in the legislative processes. Part of the legislation that was contingent on the state of emergency was altered

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146 The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, judgment, 8 May 2012, paras. 7, 9, 11.
147 The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, interim decision, 1 August 2006.
148 The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, interim decision, 1 August 2006.
and amended, another part is in various stages of the legislative process, and there is an intent to regularise the remainder.\textsuperscript{149}

Accordingly, in May 2012, after twelve hearings over the course of twelve years, the Court issued a twelve-page judgment (half of which comprises background information and summaries of the arguments) concluding that the petition had ‘run its course’ and should be dismissed.\textsuperscript{150} Israel, according to the Court, continued to face a state of emergency, with the judgment asserting that ‘the winds of war have never ceased to blow, and unfortunately the situation remains relatively unchanged.’\textsuperscript{151} Justice Rubinstein’s opinion, on behalf of the Court, evokes Israel’s siege mentality with lengthy descriptions of ‘the unending threats of our enemies from near and far.’ He quotes an extract from a ruling of the Court in the early 1980s—roughly the half-way point of Israel’s state of emergency to date—from which it becomes clear that little has changed in the Court’s approach over the last thirty years:

As known, the state of emergency has lasted for over 30 years, and who knows how much longer it will continue. The fact that the state of emergency persists does, on the one hand, mandate the reduction of the emergency means the state employs to defend its existence so that, as much as possible, these means will not violate civil rights, but on the other hand, the continuing state of emergency, owing to well-known reasons and circumstances, points to the fact that it is difficult to compare the situation the State of Israel has been in since its foundation to that of any other state.\textsuperscript{152}

Rubinstein maintains this narrative of Israeli exceptionalism in his depiction of a normal country (in that it is an ‘active democracy in which fundamental rights … are safeguarded’) that is not normal (in that it is subject to threats of a gravity faced by no other “normal” democratic country).\textsuperscript{153} The gauntlet thrown down by this “unique” situation thus challenges Israel to construct a

\textsuperscript{149} The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, interim decision, 7 December 2011.

\textsuperscript{150} The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, judgment, 8 May 2012, para. 11.

\textsuperscript{151} The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, judgment, 8 May 2012, para. 11.

\textsuperscript{152} Kahana v. The Minister of Defence, HCJ 1/80, PD 35(2), 253, 257.

\textsuperscript{153} The Association for Civil Rights in Israel v. The Knesset and the Government of Israel, HCJ 3091/99, judgment, 8 May 2012, para. 19.
juridical order that can respond to the exceptional threat without compromising the state’s “normality”. Rubenstein commends the state for its work to date in phasing out and replacing some emergency legislation, and highlights the need to continue extricating relevant security and anti-terrorism measures from a declared state of emergency; that is, to embed them instead within the “normal” legal system. Before and until this process is complete, it is not the place of the judiciary, the argument goes, to obstruct executive or legislative renewals of the state of emergency, nor to restrict the use of necessary powers that remain dependent on the declared state of emergency. Here, the Supreme Court’s accustomed deference to the security agencies is apparent: ‘this court is not a substitute for the discretion of the authorised agencies’. 154

In his reading of the proliferation of British anti-terrorism legislation enacted since the late 1990s, Nasser Hussain describes a structural shift in the law away from traditional conceptions of emergency powers as reactive and temporary, towards an understanding of securitisation and security law as part of a larger, permanent ‘methodology of governance’. 155 Hussain emphasises certain mechanisms—the increasing use of (racialised) classifications of persons in the law, the emergence of intensely bureaucratic and administrative facets of emergency law, the use of special tribunals and commissions—that contribute to ‘hyperlegality’ at work. 156

A similar methodology can be detected in the process endorsed by Israel’s Supreme Court, which seeks to construct a framework of permanent extraordinary measures in order to preserve the control system over the Palestinians, as opposed to properly disentangling the web of emergency powers spun over the last six decades. The normalcy/emergency binary cedes part of the space of exception to a complementary paradigm in which the state of emergency is normalised in ordinary legislation (the proposed comprehensive anti-terrorism law cited by Justice Rubinstein, for example)

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and bolstered by ‘super-emergency’ measures during large-scale hostilities.\(^{157}\) The non-contingent emergency laws will of course remain in place even if the state does follow through on its promise to phase out the official state of emergency, and the fluidity of Israel’s disparate emergency legal mechanisms will continue to offer a vehicle for the execution of sovereign will.

Emergency doctrine has typically occupied a central space in the legal system of the colony. Its exceptionality and malleability facilitates the forcible imposition of sovereign control, while its legality provides the necessary veneer of legitimacy. It was, and is, an expression of law as a conduit for hegemonic practice, as the stage upon which scenes of dispossession are performed. The separate opinion of (retired) Chief Justice Beinisch in the Israeli Supreme Court decision is candid in this regard. ‘The state of emergency declared by law is, to a large extent, the result of a political outlook’.\(^{158}\)

\(^{157}\) Yuval Shany & Ido Rosenzweig, ‘High Court of Justice Rejects Petition to End Israel’s State of Emergency’, 41 \textit{Terrorism & Democracy} (May 2012), citing the 2008 Incarceration of Unlawful Combatants Law (Temporary Order and Amendment) enacted in anticipation of Operation Cast Lead.

\(^{158}\) \textit{The Association for Civil Rights in Israel v. The Knesset and the Government of Israel}, HCJ 3091/99, judgment, 8 May 2012, separate opinion of Chief Justice (Retired) D. Beinisch.
In the current economic emergency, too, we are clearly not dealing with blind market processes but with highly organized, strategic interventions by states and financial institutions, intent on resolving the crisis on their own terms.¹

Recourse by states to the paradigms of emergency and exception has never been limited solely to the sphere of “national security”. It has been integral to economic law and policy in consolidating global finance structures, and has served to salvage late capitalism from its own crises. Analysis of states of emergency in international legal scholarship has, however, primarily revolved around the resort to exceptional powers in the context of military engagement, ethnic conflict and securitisation; that is—to the extent that the two can be separated—in times of “political” rather than “economic” crisis. The typical approach acknowledges three distinct varieties of emergency—grave political crises, economic crises and natural disasters—before proceeding to focus on the first and dispense with the latter two.² As a result, the literature is left heavily weighted on the side of violent crises triggered by armed conflict, terror threats, riots and rebellions. In this regard, it is noted that ‘liberal legal and political analysts have too often ignored the seriousness of the normative and institutional problems posed by the surprisingly pervasive reliance on emergency devices to grapple with the exigencies of economic affairs.’³

The premise of an economic state of emergency is analogous to that presented to justify the invocation and entrenchment of extraordinary powers in relation to national security threats and militarised conflict. It bears a

² In their introduction to one of the seminal post-2001 texts on the law of emergency powers, Oren Gross and Fionnuala Ni Aoláin explain that they do not intend to examine all types of emergencies but will rather focus on violent crises, nonetheless conceding that ‘emergency powers have been used in times of great economic consternation and in situations of severe natural disasters as frequently as, and perhaps even more than, in the context of violent crises.’ Oren Gross & Fionnuala Ni Aoláin, Law in Times of Crisis: Emergency Powers in Theory and Practice (Cambridge: Cambridge University Press, 2006) 4. Clinton Rossiter presents similar categories of emergency, albeit in a slightly different configuration, naming war, rebellion and economic depression as his primary troika, but also acknowledging extraordinary action in situations of natural disasters, riots and strikes. Clinton L. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (Princeton: Princeton University Press, 1948) 6. Rossiter, for his part, does devote substantive attention to economic emergencies in the inter-war period.
similar relation to the concept of the purported common good; temporary
abdication of the rights of some is necessary in the greater public interest, in
order to stabilise and sustain a system seen as indispensable. In much the same
way as such narratives of necessity underpin illiberal policies and consolidate
security apparatuses in the civic sphere, however, in the socio-economic realm
they pay undue deference to capitalist institutions and subvert the notion of the
common good by reifying elitist misappropriations of the “commons”.

The general structures of international law are complicit in such
misappropriations, as B.S. Chimni notes:

Armed with the powers of international financial and trade institutions
to enforce a neo-liberal agenda, international law today threatens to
reduce the meaning of democracy to electing representatives who,
irrespective of their ideological affiliations, are compelled to pursue
the same social and economic policies. Even international human
rights discourse is being manipulated to further and legitimize neo-
liberal goals.4

Indeed, concerns over the obfuscation of the common good in human rights
discourse have deepened since the emergence of a market-friendly human
rights paradigm that ‘reverses the notion that universal human rights are
designed for the dignity and well being of human beings and insists, instead,
upon the promotion and protection of the collective rights of global capital in
ways that “justify” corporate well-being and dignity over that of the human
persons.’5 Emergency economic measures feed into this contradiction insofar
as they are couched in terms of protection of the public interest, but in
actuality function to dilute the state’s commitment to socio-economic rights,
and the West’s commitment to global equality. The language of emergency,
premised on temporariness, is invoked to institute legislative and institutional
changes whose effect will be felt far beyond the immediacy of a given crisis.
Whilst the problems of normalised and entrenched “exceptional” measures are
endemic in the history and ongoing politics of national security emergencies,

Transnational Law and Contemporary Problems 125, 163-164.
some commentators have plausibly argued that extra-constitutional responses to economic crises can ultimately degrade the interests of liberty as much as, or even more than, extra-constitutional responses to violent crises.\textsuperscript{6}

The use of emergency measures as instruments of economic regulation and class subjugation must be understood against some important and related contextual backdrops: the intimate relationship that exists between capitalism and imperialism, the function of economic governance as an apparatus of security, and the susceptibility of capitalist economies to periodic “crisis”. This chapter explores the use of emergency powers in the economic sphere, beginning with their historical entwinement in colonial law and policy. From those foundations, the economic state of emergency evolved significantly through the inter-war period in Europe and North America. Emergency discourse has subsequently been relevant to the operation of the Bretton Woods institutions in the Third World, where the Machiavellian mindset of “opportunity in crisis” comes to the fore, and emergency authority serves as a vehicle for the implementation of neoliberal policy and economic “shock therapy”.\textsuperscript{7} The doctrine of emergency has played a similarly versatile role in preserving and sustaining prevalent global capitalist structures, in such diverse guises as declarations of states of emergency to suppress protest movements, the ambiguous role of security and economic emergency exceptions in international trade and investment law, and the utilisation of emergency discourse to justify austerity measures and bank “bailouts” in the post-2008 financial environment. Even absent formal declarations of a state of emergency, the refrains and rhetoric of emergency, exception and necessity remain a constant echo.

\textsuperscript{6} See, for example, Rebecca M. Kahan, ‘Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell was a Harsher Blow to Liberty than Korematsu’ (2005) 99 Northwestern University Law Review 1279.

I. Capitalist Expansion and Emergency Doctrine

The standard narrative on economically-rooted emergencies begins by recounting an extension of codified emergency powers in Europe and North America from their First World War military origins to impact upon economic issues in times of peace from the 1920s onwards. While the inter-war period did constitute a pivotal moment in the expansion of emergency economic governance, over-emphasising the point tends to obscure the fact that resort to exceptional powers in the context of class conflict has a history that long pre-dates the First World War. Such a narrative also implies a post-war migration or “seepage” of special powers from security emergency to economic emergency that masks a deeper ideological circuit between political economy and national security discourses.

The economic state of emergency cannot be chronicled without reference to capitalist expansion in the colonial context. Until the mid-sixteenth century in England, the invocation of martial law against civilians remained restricted for the most part to instances of war and open rebellion. In the 1550s, a time of severe economic depression, martial law was invoked as a peacetime measure for the first time, deployed as a means of class and political repression against ‘those products of a depressed economy … general undesirables with no apparent means of support’,\(^8\) to stave off any inconvenient opposition to the Crown. With some initial hesitation about how it might be perceived, this shift was introduced cautiously by an establishment anxious to ensure that the first to be subjected to the new policy were not too close to home; in 1556, Mary I authorised the Marshal of the army in Ireland to proceed against ‘general undesirables’ there by martial law.\(^9\) In 1562, Thomas Radcliffe, 3rd Earl of Sussex, recommended to the Queen that an English-born ruler be appointed to govern the Irish province of Munster, with the ‘authority to execute the martial law in times of necessity, but only against

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\(^9\) Calendar of State Papers, Ireland, 1509-1573, 134.
persons that have no possessions.\footnote{Calendar of the Carew Manuscripts, 1515-1574, 336.} As such, the class element of colonial emergency doctrine is evident from the outset. The ensuing history of the British empire is replete with the use of emergency measures to support and sustain an expanding commercial interests, whether in the suppression of the 1865 peasant uprising in Jamaica, the protection of settler plantation architecture in India by consistent recourse to martial law, or the invocation of a state of emergency to crush native trade unionism in Malaysia.\footnote{The backdrop to anti-colonial agitation by the Malayan Communist Party and the invocation of the state of emergency in June 1948 was a rapid expansion of trade unionism since 1945 and a bolstered consciousness and assertion of workers’ rights, culminating in large-scale industrial conflict and repression by colonial authorities. At the meeting of colonial government officials in Malaya in May 1948 that initiated the process by which the emergency would be declared, it was decided that measures should include a ‘a simultaneous raid on the headquarters of the PMFTU [Pan Malayan Federation of Trade Unions] in Kuala Lumpur and of the Federations in each of the states.’ Anthony Short, The Communist Insurrection in Malaya, 1948-60 (London: Frederick Muller, 1975) 67. See also Michael Morgan, ‘The Rise and Fall of Malayan Trade Unionism, 1945-50’, in Mohamed Amin & Malcolm Caldwell (eds.), Malaya, the Making of a Neo Colony (Nottingham: Spokesman Books, 1977); Kumar Ramakrishna, Emergency Propaganda: The Winning of Malayan Hearts and Minds, 1948-1958 (London: Routledge, 2002).}

This use of emergency measures as a mode of class repression evolved in concert with colonial expansion, in the context of the broader, mutually interactive relationship between capitalism and colonialism. Marx and Engels show this relationship to be an organic one, in which colonialism is an outgrowth of the wider processes of capitalist transformation of European society.\footnote{The most comprehensive compendium of Marx and Engels’ writings on colonialism can be found in Karl Marx & Friedrich Engels, On Colonialism (Moscow: Foreign Languages Publishing House, 1960).} Discussion of the deeper complexities of that relationship—and the divergences, conflicts and internal contradictions of those theorising it—is beyond the present remit. Suffice it to emphasise that a wide spectrum of thinkers from classic liberal political economy\footnote{See, for example, Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (London: Ward, Lock & Co, 1776) vol. II, 25, recognising the economic benefits of colonialism: ‘By opening a new and inexhaustible market to all the commodities of Europe, [colonial expansion] gave occasion to new divisions of labour and improvements of art, which, in the narrow circle of the antient commerce, could never have taken place.’} to the Marxist tradition\footnote{Rudolf Hilferding, Finance Capital: A Study of the Latest Phase of Capitalist Development (1910) (Tom Bottomore ed., Morris Watnick & Sam Gordon trans., London: Routledge, 1981); Rosa Luxemburg, The Accumulation of Capital (1913) (Kenneth J. Tarbuck ed., Rudolf Wichmann trans., London: Penguin, 1972); Nikolai Bukharin, Imperialism and World Economy (1917) (London: The Merlin Press, 1972); V.I. Lenin, Imperialism: The Highest
postcolonial international law persuasively demonstrate the economic underpinnings of colonial expansion by capitalist powers. Put simply, ‘[e]conomization and colonization were synonymous.’ Many of the key factors in this equation are self-evident, particularly with reference to the intensification of imperial conquest in the mid-nineteenth century. They include the significant increase in the European population and its heightened capacity for overseas movement, the move to industrialism and the demand for raw materials; the supply of food, raw materials and natural resources in both the temperate ‘empty’ lands of ‘capitalist neo-Europes’ (the Americas, southern Africa and Australia) and the ‘tropical periphery’ (Asia, Africa and the Caribbean). What is also striking is the role of economic crisis at home in the proliferation of conquest abroad. Europe’s major economic depression of the nineteenth century came in the 1870s on the heels of the entrenchment of free market and free trade policies. Karl Polanyi reminds us that by this time the formation of international economic structures were predicated on a deep-seated belief in the ability of the free market to organise life. When currency fragility and falling profits threatened the stability of social

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16 As B.S. Chimni points out, however, more contemporary liberal thinkers (such as John Rawls) and theorists of capitalism (such as Milton Friedman) manage to expunge the history of colonialism entirely from their accounts of capitalism, and thus fail to acknowledge the elemental relationship between imperialism and capitalism. See B.S. Chimni, ‘Capitalism, Imperialism and International Law in the 21st Century’ (2012) 14:1 Oregon Review of International Law 17, 25.


18 Michael Williams, ‘The Relations of Environmental History and Historical Geography’ (1994) 20 Journal of Historical Geography 12.


organisation, unflinching faith in the market and conviction of the necessity of free trade meant that the only logical response was a drive for new markets and more resources. Hence a wave of major colonial expansion that encompassed the “scramble” for Africa and the Berlin and Brussels Conferences in the mid-1880s.

What of the role of law in these developments? In the colonial domain, as elsewhere, legal relations and forms of state are moulded by the material conditions of social life, of which the economic structure of society is an integral component. As Bedjaoui’s quintessential dissection of classical international law—as imbued with ‘a geographical bias (it was a European law) … [and] an economic motivation (it was a mercantilist law)’—suggests, international legal structures were shaped in their origins by European economic exploitation of the colonies. The legal form of the colonial state itself encouraged and incentivised capitalist tendencies, by coupling a framework for commercial exploitation of colonial territories, resources and labour with protectionist policies for its own planters and industrialists. As the model of colonial economic policy advanced towards a free trade template in the nineteenth century, so too did Western legal systems and, in turn, international legal norms and practice.

The part played by law in the expansion of capitalist production is elucidated in a 1987 collection of writings on *The Political Economy of Law*, which provide insight into the multiple ways in which colonial law fostered capitalist institutions, sought to facilitate the replacement of a subsistence agrarian economy with a capital/wage-labour matrix, and underpinned the integration of peripheral countries into the world economy. The volume demonstrates the influence of the expansion of European and United States enterprise on patterns of economic development and social structures in the global South, with the dominance of capital secured through vertical

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governance. Socio-economic disparities originally produced by direct rule nowadays tend to reproduce themselves through less overt forms of imperial coercion. New institutions and rules have evolved to maintain the hegemony of capitalism, including the international financial institutions and the constitution of sovereign power-wielding multinational corporations, as well as regulatory frameworks for intellectual property.

Narratives of pre-political or apolitical law and legal institutions obscure the inequalities which are intrinsic to the international legal order. Even where colonised and coloniser are framed as formally equal, the premises of the legal form and its basic concepts—such as contract and property—inherently favour those endowed with economic power, access to information concerning the law, and close ties to the state. Thus, in the Ocean Island cases, ‘classic assumptions of contract had been vitiated by the gross imbalance in the parties’ political and economic power.’ Furnivall explains such disparity with reference to the social context of the colonies – plural societies where two distinct groups interact only through commerce and are subject to no common standards except those of law as it regulates the market. This law reflects the will and economic interests of the dominant power; ‘[t]he rule of law becomes in effect the rule of economic law.’ From this perspective, the raison d’être of the rule of law in the colonies was, in essence, the fostering of commerce.

Anghie brings us back to the British East India Company as the embryo in which commercial interests and colonial governance coalesced. In exercising sovereign powers over non-European territories, the company ‘established systems of law and governance that were directed at furthering

23 Tito v. Waddell (No. 2) and Tito v. Attorney-General [1977] 1 Ch. 106. See section IV of this chapter.
26 For further elaboration see, for example, J. S. Furnivall, Progress and Welfare in South-East Asia: A Comparison of Colonial Policy and Practice (New York: Secretariat, Institute of Pacific Relations, 1941); J. S. Furnivall, Colonial Policy and Practice: A Comparative Study of Burma and Netherlands India (Cambridge: Cambridge University Press, 1948).
the commercial relations that were the very *sine qua non* of their existence. …

The governance of non-European territories was assessed principally on the basis of whether it enabled Europeans to live and trade as they wished. 27 This association between governance and commerce was augmented and refined under the direct governmental rule that succeeded the trading companies, culminating in the focus of the Berlin Conference on the efficient and orderly mercantile exploitation of Africa, with commercial development presented to the world as the means by which backward populations could enter the realm of civilisation. The role of capitalism in the civilising mission was elaborated through the colonial project’s dual mandate of civilisation and commerce, 28 which would carry through to the League of Nations’ missionary calling. It is during the League period that Anghie’s “dynamic of difference” can be seen clearly as not only a racial construct but one also infused with a class element, through characterisations of the non-European world as economically primitive. He shows that, irrespective of any rhetoric as to the humanism and well-being of colonised peoples, the commercial and trade interests of the West have remained paramount through the centuries.

The “developed” versus “undeveloped” binary, constructed during the League and consolidated in President Truman’s post-war vision of economically-driven transformative development, 29 persists today, permeating the discourse of the international financial institutions in their engagement with the global South. 30 The fundamental tension that has prevailed since the Mandate system—between political independence on the one hand and

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27 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) 252. As Anghie points out, for positivists such as Westlake, the absence outside of Europe of a regulatory system for European commercial activity was justification in itself for the imposition of colonial rule and law: “non-European states were uncivilized unless they could provide a system of government ‘under the protection of which . . . the former [Europeans] may carry on the complex life to which they have been accustomed in their homes.’” If such government was lacking, Westlake argued, “government should be furnished.” Anghie, citing John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894) 141-142.


economic subordination on the other—is constitutive of the reality that the core economic aspects of colonial relations persist in current North/South configurations. This entails the continuation of asymmetrical relationships that are predisposed to benefit the core and facilitate a steady transfer of resources from the periphery. Subsumed into those relations is now an emerging transnational capitalist class in the periphery that transcends North/South divides without challenging the existing structures.

In both the colonial and “post-colonial” setting, the rule of liberal international law functions to reinforce capitalist agendas in several ways, including through the development of a doctrine of emergency that operates in a manner that is not only racially contingent but is underpinned by class and commercial interests. Colonialism, capitalism, race and class are immensely weighty analytic categories, and it is beyond the present purview to attempt to fully capture or reconcile the profusion of intricate, unwieldy and untold ways in which they interact. The most that I venture to suggest here is that the evolution of emergency doctrine plays a notable role in those multifarious interactions; colonialism, capitalism, race and class intersect in particular ways through the doctrine of emergency.

The account and analysis of economic states of emergency presented here entails some inherent meditation on the nature of capitalist state, how it can be harnessed by certain interests and how it is wont to operate in the interest of the bourgeois classes in order to preserve and sustain itself. To continue functioning, as some of the examples elucidated below will illustrate, the capitalist state acts, for instance, to stave off or deflect internal crises, and to discipline organised labour. Such functions foreground how the state as an

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apparatus is itself central to the process of accumulation. Here, two particular features of capitalism abound, and warrant brief mention.

First, capitalism is prone to crisis, and for the purposes of self-preservation, such crises must be mitigated. Marxists, Minskyians, Keynesians and other schools of heterodox economics may vary in their diagnoses of exactly how and why capitalist systems have an innate proclivity to instability, but all essentially agree on the fundamental point: that crisis is structurally endemic in capitalism. Second, capitalism is prone to challenges aimed at redistribution or reduction of inequalities; challenges which must similarly be managed. In both regards, the versatility of emergency discourse in sustaining existing patterns of capital accumulation comes to the fore; whether in allowing economic institutions to compel states to adopt unpopular austerity measures as a technique of crisis management, or enabling the containment of domestic protest or industrial action. In other words, the emergency paradigm will surface, regardless of the rationality underpinning a particular form or “art” of government at a particular point in time. Here, we return to Foucault. Emergency doctrine purports to provide security from an impending “threat to the life of the nation”. Reliance on emergency doctrine in the economic realm can be seen as symptomatic of a particularly Foucauldian idea of economic governance as itself as an apparatus of security.

In his genealogy of governmentality, Foucault identifies an emergent and distinct form of government in which traditional institutions of sovereignty were supplemented by those of economy. The essence of the “art of government” acquired as its primary objective the economy; it became the

art of exercising power according to the model of political economy.\textsuperscript{33} Here, Foucault stresses the inter-relatedness of security and political economy; in his sovereignty-discipline-government triangular configuration, security apparatuses are essential to the control of the population, but political economy operates as the principal form of knowledge that drives the mechanism.\textsuperscript{34} Agamben sees the manner in which the move to the security paradigm occurs as related less to human security and more to economic gain:

Foucault showed how security becomes in the 18th century a paradigm of government. For Quesnay, Targot and the other physiocratic politicians, security did not mean the prevention of famines and catastrophes, but meant allowing them to happen and then being able to orientate them in a profitable direction.\textsuperscript{35}

Shifts in contexts, rationalities and approaches to governmental intervention in the market over the course of the twentieth century, from ordoliberalism to neoliberalism,\textsuperscript{36} for example, had a bearing on the manner in which emergency powers developed in relation to the market. Agamben’s point is mirrored in the contemporary “homeland security” incarnation of the security paradigm. Crises continue to provide opportunity for profit—indeed, it is often in the state of crisis and instability that profits are optimised—and are thus actively sought by market forces. In this context, economy remains inseparable from security; the military and the monetary cannot be disentangled.\textsuperscript{37} Security emergencies invariably have socio-economic implications, just as financial emergencies entail consequences in the civil and political sphere. Emergencies induced by environmental disasters are likely to


\textsuperscript{37} As Gil Scott-Heron’s ‘Work for Peace’ on his \textit{Spirits} LP (TVT Records, 1994) puts it: ‘The military and the monetary / Get together whenever they think it’s necessary / They turn our brothers and sisters into mercenaries / They are turning the planet into a cemetery.’
have political and economic ramifications that intersect with questions of security. Agamben refers us back to the state of siege declared on the occasion of the 1908 earthquake in Messina and Reggio Calabria, which he characterises as ‘only apparently a different situation’ from previous states of siege stemming from public disturbances—ultimately proclaimed as it was for reasons of public order—but which notably formed the basis for the elaboration of jurisprudential theses that distinguished necessity as the primary source of law.\textsuperscript{38}

II. The Economic-Financial State of Emergency

The flaws of Carl Schmitt’s theoretical inquiries and the perniciousness of his ideological stance notwithstanding, William Scheuerman concludes that the German jurist’s work provides a useful insight into some of the real failings of capitalist liberal democracy,\textsuperscript{39} particularly in relation to what Schmitt termed the ‘economic-financial state of emergency’.\textsuperscript{40} Schmitt accurately highlighted the tendency of liberal discourse post-First World War to equate economic and financial crises with the threats posed by military attack or armed rebellion. In this conflation, security of capital becomes entwined with the state of emergency in a similar manner to national security. Governmental assumption of emergency powers to pursue pervasive economic measures is justified on the same premise of necessity. This engenders the class component of the story of emergency.

Emergency intervention in the economy by the Western state has long been common in contexts of war or insurrection, and in contexts of race and class domination in the colonies. It was with the move to governmentality in the eighteenth century that economic emergency authority came to the fore in its own right, and the broad scope of “emergency” is fully revealed. With


labour and socialist agitation emerging as a challenge to the hegemony of
capital, constitutional emergency clauses were ready-made for legalised
 crackdowns. In *The Eighteenth Brumaire of Louis Bonaparte*, Marx describes
the use of French Revolution “state of siege” emergency provisions as a
weapon in the hands of the ‘bourgeois dictatorship’, invoked to buttress class
privilege and sideline the interests of workers and petty bourgeoisie in
nineteenth-century France. 41 Clinton Rossiter would later observe that such
devices of constitutional dictatorship as the French état de siège—as well as
Article 48 of the Weimar Constitution and the Emergency Powers Act 1920 in
Britain—are ‘ideally suited to be employed as a weapon of reaction and class
struggle.’ 42

In the twentieth century inter-war period, the use of emergency powers
to regulate the economy was an integral element of the political governance of
major Western states, 43 prompting depictions of ‘economic dictatorship’ in
Weimar Germany and the United States. 44 Scheuerman describes a
rudimentary sequential pattern in the story of emergency economic power that
we can extract in some shape or form from the experiences of Britain, the
United States, Germany and France during the two world wars. According to
this delineation, emergency powers operated in the economic realm initially to
stifle one of the most visible products of a crisis-ridden capitalist economy,
organised labour, before being invoked to manage the economy itself and later
as an instrument to preclude the return or continuation of instability. 45

Permeating this process is a fundamental conflation of economy and
security, evident on both sides of the Atlantic through perceptions of workers
as security threats and the construction of economic crises as war-like

41 Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (1852) (Moscow: Progress
Publishers, 1934) 26, 27, 42.
42 Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern
117-129 (on France), 171-183 (on Britain) and 255-264 (on the United States).
44 Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern
Review* 1869, 1875.
situations. After the Civil War, the primary function of martial law in the United States was as a ‘household remedy’ to quash the growing labour movement.\textsuperscript{46} Through the inter-war period, Western liberal democracy deployed the rhetoric and executive authority of military confrontation in its “war” against the economic crisis that threatened to annihilate finance capitalism. Franklin D. Roosevelt epitomised this in his demand for ‘broad Executive power to wage a war against the emergency, as great as the power that would be given to [him] if we were in fact invaded by a foreign foe.’\textsuperscript{47} Roosevelt’s framing of the financial crisis in military terms is explicit. Executive regulation of the economy is generally seen as having been relatively effective in the case of Roosevelt and the New Deal, but the socio-political perils of unfettered emergency power became all too real in the French and German cases, where ‘the unlimited decree-rule of a constitutional government with a dubious popular or parliamentary basis serve[d] only as an intermediate station on the road to complete authoritarianism.’\textsuperscript{48}

In Britain from the 1920s onwards, labour movements and industrial unrest were viewed and portrayed by business and political elites as a form of civil insurrection, an intemperate uprising against liberal conceptions of an ultimately flourishing and lucrative market economy. These portrayals were in turn reflected in the emergency laws and powers deployed against such movements. Such practices followed the trend that had long been set in the colonies, where strikes or protests by native workers were painted with the “security threat” brush and colonial governors would declare a state of emergency to legitimise the use of force in their suppression.

The enabling legal framework emanated from the war-time codification of emergency powers in Britain, which, as we have seen, itself brought home the colonial experience. Although the Defence of the Realm Act

\textsuperscript{46} Charles Fairman, ‘Martial Rule, In the Light of Sterling v. Constantin’ (1934) 19 Cornell Law Quarterly 20, 29.

\textsuperscript{47} President Franklin Delano Roosevelt, Inaugural Address, 20 January 1933.

1914 lapsed in 1921, the sweeping authority that the cabinet had become accustomed to during the war years would continue to inform policy and extend to a range of economic issues in times of peace. With the ‘power [that the Defence of the Realm Act] had brought them still fresh in their minds, the members of the Cabinet decided to ask Parliament for a direct grant of emergency competence, couched in terms of a permanent statute.’ Emergency powers were henceforth institutionalised in Britain in the form of legislation that Rossiter describes as ‘a revolution in English politics and government.’

The Emergency Powers Act 1920 allowed the Crown to proclaim a state of emergency under certain circumstances in relation to the supply and distribution of necessities (including food, water, fuel and light), granting special powers to the police in such regard, as well as effectively allowing for military intervention. Although presented by the government as discharging a longstanding commitment (simply rendered more urgent following the war experience) to such legislation in order to protect essential supplies, the social context in which the bill was passed is instructive. Rushed through parliament during strikes by miners and railway workers in October 1920, amidst a broader climate of escalating class conflict, it was ‘abundantly clear to everyone that the new act was intended to be used against the strikers.’

Scheuerman zooms in on the Act as a microcosm of the history of economic emergency power between the mid-nineteenth and mid-twentieth centuries:

… its proximity to the wartime context linked it to an earlier tradition in which emergency power chiefly functioned as a tool against violent uprisings and foreign invasions; its anti-strike thrust tied it closely to the widespread tendency to rely on emergency authority against the labor movement; and finally, the Act’s forthright concern with

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51 10 & 11 Geo. V., C.55.
guaranteeing the “supply and distribution of food, water, fuel, or light” clearly pointed the way towards the employment of emergency authority for peacetime economic coordination.\(^{55}\)

While ostensibly confined to the category of essential supplies, the reach of the Act would in practice ‘encompass a broader gamut of economic matters, industrial disputes and class conflict.’\(^{54}\) Enacted as a permanent but dormant piece of law, it was quickly and consistently called into life: in 1921 in response to the coal strike; in 1924 for sectional transport workers’ strikes; and in 1926 when the general strike throughout Britain was called.\(^{55}\) In the last case, the strike itself lasted only a few days, while the state of emergency continued for eight months.\(^{56}\) By this point, the pretence of a link to military conflict or armed insurrection as integral to the state of emergency had evaporated. Even outside of declared emergencies, the exception continued as the norm in Britain through the economic instability of the 1920s and 1930s, during which time ‘drastic emergency laws were enacted in the normal manner’;\(^{57}\) that is, through the regular parliamentary legislative process. Specific recourse to emergency executive authority in the form of enabling acts—delegating law-making power to the cabinet of Ramsay MacDonald’s emergency “national government”—was made during the severe depression of 1931-1932.\(^{58}\)

It was in the context of the same economic maladies that Roosevelt immediately waged war on the emergency upon election in 1933. His


\(^{55}\) Cecil T. Carr, ‘Crisis Legislation In Britain’ (1940) 40 Columbia Law Review 1309, 1312-1313.


\(^{58}\) For analysis of the wide-ranging departures from accepted British constitutional practice in MacDonald’s formation of the national government and management of the whole affair, see, for example, Harold Laski, The Crisis and the Constitution: 1931 and After (London: Hogarth Press, 1932).
inaugural address was drenched with military analogy, alluding to the 'leadership of this great army of our people dedicated to a disciplined attack upon our common problems' and 'treating the task as we would treat the emergency of a war.'59 Two days later, without recourse to Congress, the President officially declared a state of emergency, and relied on not only the language but the legal framework of war to jettison regular legislative procedures and turn to executive emergency powers for economic regulation.60

For Roosevelt, this was an emergency that related to far more than banks; ‘it covered the whole economic and therefore the whole social structure of the country.’61 Whether it could be said to constitute an impending threat to the life of the nation or the existence of the state, however, is doubtful. Regardless, Roosevelt summoned the appreciable executive prerogative provided by the Trading with the Enemy Act 1917 and passed many of the emergency banking regulations of 1933 and other early New Deal legislation under its expanded rubric.62 The result was ‘a group of emergency statutes delegating the President unprecedented power to wage war on the economic front.’63 Such legislation began with declarations of an ‘acute economic emergency’ characterising disparities in the market as detrimental to the ‘national public interest’,64 and subsequently granted the executive an essentially unfettered ability to regulate industry and to authorise monopolies

59 President Franklin Delano Roosevelt, Inaugural Address, 20 January 1933.
60 Agamben too notes Roosevelt’s strategic invocation of the ‘metaphor of war’ and how he ‘was able to assume extraordinary powers to cope with the Great Depression by presenting his actions as those of a commander during a military campaign.’ What he concludes from this situation, however, is that military and economic emergency cannot be differentiated within the history of the twentieth century; ‘from the constitutional standpoint, the New Deal was realized by delegating to the president an unlimited power to regulate and control every aspect of the economic life of the country—a fact that is in perfect conformity with the already mentioned parallelism between military and economic emergencies that characterizes the politics of the twentieth century.’ Giorgio Agamben, State of Exception (2003) (Kevin Attell trans., Chicago: University of Chicago Press, 2005) 21-22.
62 See, for example, Emergency Banking Relief Act of 1933, Pub.L. No. 73–1, 48 Stat. 1 (1933), Title 1 sec. 2.
64 See, for example, Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (1933), Title I.
and cartels in certain sectors.\footnote{See, for example, National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195 (1933).} Emergency powers also filtered through to industrial conflict; according to congressional records, there were over thirty labour disputes between 1933 and 1935 in which the military was deployed to intervene on grounds of emergency.\footnote{Mark Neocleous, ‘From Martial Law to the War on Terror’ (2007) 10:4 New Criminal Law Review 489, 505, citing 80 Cong. Rec. 2069 (1936).} Neocleous presents the New Deal as ‘emergency rule writ large’\footnote{Mark Neocleous, ‘From Martial Law to the War on Terror’ (2007) 10:4 New Criminal Law Review 489, 505. See also Michael R. Belknap, ‘The New Deal and the Emergency Powers Doctrine’ (1983) 62 Texas Law Review 67.} and situates it in the context of a nexus between emergency powers and security that had become central to political administration. Rooted as it is in a distinctly economic emergency, this nexus feeds into my argument regarding the broader relationship between security and economy:

\begin{quote}
... in conjoining the security project with the “emergency situation” faced by global capital, the US was able to gain ideological support for both the politico-strategic and economic dimensions of liberal order building: to think simultaneously about the security of capital and the American state.\footnote{Mark Neocleous, ‘The Problem with Normality: Taking Exception to “Permanent Emergency”’ (2006) 31 Alternatives 191, 196, citing Hans Boldt, ‘Article 48 of the Weimar Constitution: Its Historical and Political Implications’ in Anthony Nicholls & Erich Matthias (eds.), German Democracy and the Triumph of Hitler (New York: St. Martin’s Press, 1971) 91. Scheuerman reminds us that Carl Schmitt himself ‘was a prominent advisor to the quasi-constitutional executive regimes that ruled Weimar Germany during 1930-33. These governments (under Brüning and then Papen) relied on the emergency clauses of the Weimar Constitution (Article 48) to undertake far-reaching forms of economic and social regulation.’ William E. Scheuerman, ‘The Economic State of Emergency’ (1999-2000) 21 Cardozo Law Review 1869, 1869.}
\end{quote}

From late 1922 it was emergency ordinances and decrees of a social and economic nature that predominated. One Reich Chancellor, Luther, noted this in 1928 when he commented that Article 48 ‘proved to be very useful in cases of extreme urgency when economic measures—and especially the imposition of taxes—had to be carried out.’ It has been estimated that of the sixty-seven decrees issued between October 1922 and 1925, forty-four were devoted to economic, fiscal, and social problems. Similarly, approximately sixty emergency decrees were passed during the progressive deterioration of the economic situation in the early 1930s, virtually all of which were for economic purposes.
The embedded doctrine of emergency persisted in the US and elsewhere long beyond the conclusion of the New Deal and the ensuing emergency created by the Second World War. The end of the war may have been assumed to herald the end of any remaining threat to the life of the nation, and a return to normalcy. Yet wartime emergency powers as set out in Britain by the Emergency Powers (Defence) Act 1939 were again retained by government to facilitate broad executive control in the economic sphere, including over industrial relations and the market price of supplies and services. The Emergency Powers Act 1920 (as amended by the Emergency Powers Act 1964) was consistently invoked during strikes between the late 1940s and the 1980s, with the Crown regularly declaring an official state of emergency. In 1973, for instance, on the basis of ‘industrial disputes affecting persons employed in the coal mines and in the electricity supply industry … Her Majesty … deemed it proper … to declare that a state of emergency exists.’ Such routine exercise of emergency powers, essentially as an instrument of quotidian class struggle, embodies the image of a ‘prosaic politics of emergency.’ Many of the emergencies declared throughout the British empire, where the state of emergency remained the default response to unrest, related to economic matters and to class as well as racial subjugation in the colonies.

Likewise, in the United States, reliance on emergency powers to manage the economy continued in the post-war years, with successive presidents relying upon ‘a broad range of emergency delegations of impressive power to conclude strikes, control international trade, and even…

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69 For further detail on the immediate years after the war, see John Eaves, Emergency Powers and the Parliamentary Watchdog: Parliament and the Executive in Great Britain, 1939-1951 (London: Hansard Society, 1957). Emergency powers were applied to an expansive range of fields through temporary regulations such as the Supplies and Services (Transitional Powers) Act 1945 (extending emergency economic powers from 1946-51) and through ordinary permanent legislation such as the Exchange Control Act 1947.


reshuffle the rules of the international monetary system." Martial law was even invoked to curb labour movements in the 1950s and 1960s; President Nixon proclaimed a national emergency in order to force the discontinuation of a postal strike in 1970, and another the following year in an attempt to manage an international monetary crisis by terminating certain trade agreement clauses and imposing import duties. Based on the reality that the country had been in a state of emergency since March 1933, comprised in fact of four overlapping presidentially-proclaimed states of national emergency (three of which were economically-driven), a Special Committee on the Termination of the National Emergency had been established to examine the consequences of terminating the declared states of national emergency. Notably, this Committee reported that the plethora of emergency statutes enacted over the preceding four decades delegated to the executive not only exceptional military authority but also distinctly economic powers to ‘seize property; organize and control the means of production; seize commodities’. From the process initiated by the Committee’s report came the National Emergencies Act 1976 to regulate exceptional executive authority, and to repeal many of the emergency measures. Certain key provisions remained in place, however, and broad authority was vested in the executive by the International Emergency Economic Powers Act 1977 to restrict trade and commerce with states or classes of persons seen as providing a threat to the

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80 For example, section 5(b) of the Trading With the Enemy Act 1917, 50 App. U.S.C. §5(b) (West 2012).
A presidential declaration of national emergency in relation to the threat is required to trigger the Act, and many such declarations have been made in relation to internal issues in states such as Burma, Belarus, and Libya. How repressive internal practices, by regimes in distant corners of world, constitute national emergencies in the United States is unclear. Regardless, the effect is further “emergency” regulation of economic activity.

Emergency governance of economic affairs is not limited to Europe and North America. Emergency powers in Israel, for example, are commonly assumed to be confined to national security matters. As noted in the previous chapter, however, they are exercised ‘in an almost routine fashion’ in respect of industrial disputes, labour law, trade and monetary issues; invoked, for example, as a convenient way of bypassing onerous labour dispute resolution processes. In Sri Lanka, the long-standing state of emergency was retained and renewed until late 2011 despite an overt end to its underlying conflict in early 2009. Through the intervening period, the coalescence of political and economic emergency powers manifested in the utilisation of emergency regulations to implement economic cutbacks at the behest of the International Monetary Fund, and to suppress popular opposition to such cuts. Indeed, intervention by the international financial institutions in the Third World has frequently been entwined with emergency discourse.

III. International Financial Institutions and Opportunity in Crisis

After the collapse of the Soviet barriers to a capitalist world market, “end of history” globalisation narratives predominated. For world-systems theorists such as Samir Amin, globalisation—‘associated with the spread and

84 On the belated repeal of Sri Lanka’s 28-year-old Emergency Regulations (and incorporation of emergency powers into “normal” anti-terrorism legislation), see, for example, ‘Sri Lanka's state of emergency: repealed or rebranded?’ Sri Lanka Guardian, 10 September 2011.
deepening of capitalism—does not represent a departure from previous imperial trajectories, but rather a fine-tuning of structures that has similar objectives (market expansion and control, harnessing of natural resources and exploitation of labour in the periphery) at its heart. From the perspective of the Third World, such global market fusion connotes the consolidated management of the non-European world by international institutions in the form of the International Monetary Fund and the World Bank, through the ‘techniques and technologies generated by globalization and governance.’ Viewed through a TWAIL lens, therefore, globalisation means simply that ‘domination is global.’ What can be described as ‘the relocation of sovereign economic powers in international trade and financial institutions’ constitutes a form of ‘recolonisation’ that haunts the Third World.

Nation-state sovereignty, so long the light at the end of the tunnel for the anti-colonial emancipatory struggle, has proven illusory for Third World peoples, recalibrated and diluted by the forces of global capital flows. As such, colonial political hegemony is reincarnated in a financial-economic avatar, courtesy of the market. The thinning out of nation-state sovereignty does not denote the decline of sovereignty itself, however; it has rather assumed a more global guise in the form of a series of supranational organisms. Where nation-state imperialism involved the extension of the sovereignty of European states beyond their own boundaries, the global corporate ascendancy is rooted less in compartmentalised territorial power centres and more in the universalisation of capitalist production and trade.

While, by definition, no single nation-state can form the centre of this diffuse apparatus, the United States has for several decades occupied a privileged position. In this instance, this is down not to similarities with the

old European imperial powers, but differences; that is, US hegemony is neither based upon nor limited by territorial boundaries. As the Second World War dragged on, the empires of increasingly weakened and destabilised European powers began to appear vulnerable. The US administration had been actively planning for the implementation of a new post-war world order since as early in the war as 1940, with three priorities on the agenda: ‘reconstructing Europe, containing communism and reaping the spoils of the collapsing European colonial empires’. The latter was crucial to American access to raw materials, as well as market and capital investment expansion (much as it is to China today). Thus, in the years that followed, “colonies” would be succeeded by “underdeveloped regions” in need of international development assistance and private investment (regardless of the views of the populations concerned). The Bretton Woods institutions became the de facto managers of economic policy in numerous global South nations, imposing Western conceptions of “good governance” through structural adjustment programmes that necessitated radical economic restructuring (including liberalisation of trade and markets, increased privatisation and reduced social spending; measures conducive to the maintenance of international economic structures that prejudice the South and benefit the industrialised North) and produced a deepening vortex of debt and dependency.


92 For further discussion see Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge: Cambridge University Press, 2005) 258-263. By the turn of the millennium, in spite of any optimism that the UN’s ‘Millenium Development Goals’ may have generated, the reality was that:

Crushing debt, which the West advanced to corrupt, undemocratic regimes, now ensures that many countries in Africa, Asia, and Latin America cannot create meaningful development programs. Yet the international financial institutions refuse to do the right thing and either right off or forgive the debt.
Such involvement of the World Bank and IMF in the domestic affairs of Third World states and eastern bloc countries in post-Soviet transition has typically been premised on a form of emergency discourse that serves as a convenient conduit for the infliction of neoliberal doctrine and economic “shock therapy”. The theory underpinning the ‘the crisis hypothesis’ articulated by Mancur Olson and others is that societies that experience no major crises have a natural tendency over time to become increasingly susceptible to the influence of pressure groups (representing, for instance, cotton-farmers, steel-producers or trade unions) and the demands of ordinary workers and voters. On the basis of an argument that protectionist policies advocated by such interest groups are regressive and detrimental to economic growth, free market doctrinaires realised the benefits to interruptions of the ‘normal’ circumstances under which such policies are able to blossom. They sought to establish the need for radical policy reform to emerge from the ashes of a given national crisis, to capitalise accordingly where such crises occur, and even to consider purposely engendering real or apparent crises where they do not occur “naturally”:

If it indeed proves difficult to identify cases of the sort of extensive policy reform needed to make the transition to an open, competitive, market economy that were not a response to a fundamental crisis, then one will have to ask whether it could conceivably make sense to think of deliberately provoking a crisis so as to remove the political logjam to reform. … Is it possible to conceive of a pseudo-crisis that could serve the same positive function without the costs of a real crisis?94

Applied to structural adjustment programmes in the Third World, the idea was based on two simple elements: nations engulfed in an emergency often require financial assistance to stabilise their situation, and in the context of such emergency circumstances a sweeping overhaul of economic policy and structure will be easier for its advocates to justify, more difficult for its...

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opponents to resist. The state of emergency emerges as ‘a stabilizing political strategy; a true foundation of ‘predatory capitalism’’. Milton Friedman and the Chicago School economists were early pioneers of this philosophy in the operation of US foreign policy in the global South. Such policy was implemented through alliances with cooperative leaders in the countries concerned (often installed by undemocratic means to replace uncooperative counterparts) and through coercive loan packages that tied financial assistance to privatisation and free trade policies.

One of the first significant laboratories in which this policy was tested was Chile. In a 1970 meeting with President Nixon and National Security Advisor Henry Kissinger, CIA director Richard Helms was given the now infamous instructions to ‘make the economy scream’ in order to set in train a plan to ‘save Chile’ by overthrowing socialist President Salvador Allende. This plan was brought to successful conclusion with the US-sponsored military coup in 1973. Following General Pinochet’s assumption of power, a state of siege was declared, martial law introduced and parliament suspended. In the shadows of the upheaval and turmoil, extensive liberalisation of the economy and repeal of Allende’s social protections were quickly instituted by Pinochet’s Chicago School-trained team of economists. Chile remained under either a state of siege or a state of emergency (the latter being the less draconian of the two under Chilean law) for the majority of Pinochet’s seventeen-year rule, with the regime oscillating between these two categories of exceptional legal framework according to prevailing socio-economic conditions. Emergency measures—including 24-hour curfews, comprehensive media censorship, banning of political parties and prohibition

97 See, for example, Juan Gabriel Valdes, Pinochet’s Economists: The Chicago School in Chile (Cambridge: Cambridge University Press, 1995).
98 Diana Childress, Augusto Pinochet’s Chile (Minneapolis: Twenty-First Century Books, 2009) 70.
of trade union activities—fed into broader repressive policies of extra-judicial killings, torture, disappearances and mass displacement. Throughout the 1970s, the military junta expanded and systematised emergency powers before incorporating them into a new Chilean constitution in 1980. The state of siege had been reduced to a state of emergency in 1978 only to be reinstated in 1984 following protests against widespread unemployment and government repression of trade unions. In 1985, Pinochet hastily lifted the state of siege to ensure US support in advance of a vote on a World Bank loan to Chile, again reverting the following year. A similar state of indefinite exception was born, for example, of the crisis conditions of hyperinflation in Bolivia, which executed its own neoliberal overhauls in the 1980s under the guise of a state of national emergency.

On the back of such relatively successful dilution of democracy and introduction of emergency free-market reforms in Latin America, by the late 1980s the international financial institutions themselves—moving inexorably towards the tellingly-named “Washington Consensus” on the need for deregulation, increased privatisation and reduced social spending—were subsuming free-market requirements into the debt relief and emergency loan packages provided to crisis-ridden Third World states. A similar model was incorporated into the IMF’s engagement in the post-Soviet transition in eastern Europe, in which emergency powers were necessary to carry the type of economic reconstruction advocated by the market gurus that descended on Warsaw, Riga and Moscow. The result was that soon thereafter, “[n]eoliberalism and relatively open-ended delegations of exceptional legislative authority to the executive, justified by reference to the spectre of economic instability, are now political bedfellows in fledgling liberal

democracies from Moscow to Buenos Aires. In a climate of global economic integration, the assumption of exceptional executive discretion to administer the decisions of international financial overlords is perhaps now easier than ever for domestic governments to justify, endowed as they are with an opportune smokescreen behind which to pursue objectionable socio-economic policies. This has been seen in varying degrees from the well-documented cases of Russia and Argentina, to those of Thailand—where economic shock treatment was disbursed through the emergency medicine of executive decree—and Algeria, where Washington Consensus policies of loan dependency and domestic austerity through the 1990s were followed by further IMF-driven reforms under a 2001 Emergency Reconstruction Plan that promoted foreign exploitation of Algeria’s hydrocarbons.

It may once have been the case that ‘Western states are immune from the operations of the [international financial institutions] although they engage in forms of protectionism, for example, that have been targeted by the [international financial institutions] when present in Third World societies’. Western states that have been rendered increasingly peripheral to Europe’s core, however, appear to have lost that immunity due to the threat that their adjudged fiscal recklessness has generated for the financial centres of the global North. The IMF’s conditional loan policy has made its way up the food chain from the Third World nations of Latin America, Africa and Asia via the Second World space in eastern Europe to the fringes of the European Union. The end result for the Third World is that it was left burdened with the full debt imposed on it previously, and neglected by the IMF in a time of international economic crisis.

Although caused primarily by the sort of unsustainable policies—often administered under the guise of emergency—that have privileged market

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interests over public interest, and global finance over the real economy, the response to the post-2008 economic crisis was more emergency measures to bolster the international financial sector. UN estimates put the level of funding committed to restoring the operations of global finance by 2010 at almost ten times that devoted to the fiscal stimulus and social protection programmes that are fundamental to rescuing the real economy and preserving basic living standards.\textsuperscript{105} Having appeared to be drifting towards irrelevance beforehand, the IMF was empowered as the chief lending institution for countries afflicted by the debt crisis. Virtually all assistance given by the IMF has come in the form of further debt-creating instruments rather than grants to those in the most dire straits, with the provision of funds continuing to be conditional upon prescribed budgetary policies.\textsuperscript{106} Further, even in the early period of the crisis in 2008-2009 (i.e. before the “bailout” of Greece was on the table), the IMF had diverted its attention from the lowest-income countries in Africa and Asia to the opportunities in non-EU Europe and elsewhere: ‘by November 2009, 18 countries had drawn on emergency financing through standby programs of the IMF, totaling some $53 billion, of which about $25 billion was allocated to Iceland and countries in Eastern and Central Europe, $18 billion to economies in transition and only $10 billion to developing countries.’\textsuperscript{107}

\section*{IV. States of Emergency and the Protection of Capital}

The prevalent system of international capital (whose structural evolution has itself facilitated the expansion of emergency economic power) is marked by a diffusion of power from the once all-powerful state to corporations vested with significant control over global capital and resources. In one sense, we can see the current situation as having revolved full circle from the hegemony of the Dutch and British East Indies companies; the physical trading of spices and textiles merely substituted by the virtual trading of financial products.


\textsuperscript{106} See, for example, Bhumiwa Muchhala, ‘The IMF’s Financial Crisis Loans: No Change in Conditionalities’, \textit{Third World Network}, 11 March 2009.

Significantly, the somewhat unruly apparatus of the contemporary global economic order, despite a centred and deterritorialising character, nonetheless relies on the police and security forces of nation-states to uphold its logic and protect its performers. Law, including emergency powers, and legal discourse intersect with the operations of transnational corporations and the assemblies of international trade organisations in significant ways. Without attempting to detail such intersections exhaustively, a number of examples can be touched upon for illustration.

**IV(i) Suppression of Resistance to Globalisation**

The aforementioned volume on *The Political Economy of Law* begins with excerpts from the judgments of the *Ocean Island* cases. The small Pacific island in question was established as a British settlement after the discovery of phosphate there in 1900, and was promptly ‘denuded of its valuable phosphates and converted into an uninhabitable honeycomb of pinnacles, pits, and refuse piles during mining operations under British colonial supervision’. The story unfolds with an all too familiar gist: the circumvention of regulations protecting native land interests, the sale of exploitation rights to mining companies, the degradation of the native environment by those companies in disregard of the terms of their access, and an absence of accountability.

In the 1970s, the displaced inhabitants of the land in question—the Banabans—brought a claim before the Chancery Division of the High Court in London against the Crown and three British Phosphate Commissioners, seeking payment of royalties owed to them by the mining companies as well as restoration of the land to a condition suitable for their return. The ensuing judgment rejected the Banabans’ argument that the Crown owed them a fiduciary duty (holding the parties formally equal in law without regard to the profound imbalance in their respective political and economic power), denied

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110 *Tito v. Waddell (No. 2)* and *Tito v. Attorney-General* [1977] 1 Ch. 106.
the claim for specific performance in terms of restoration of the land and awarded damages according to English law rather than Banaban rules or principles, taking no account of the social and environmental destruction wrought. The damages were based solely on the reduced value of the land as a marketable commodity; the court equated “restoration” with “replanting”. The mining companies were thus ordered only to re-establish the land’s previous vegetation levels by replanting some coconut palms, but not to reverse the major upheaval visited on the topography of the land, or to replenish the depleted soil. Sally Engle Merry’s conclusion is an unavoidable one — the case signifies a lamentable general theme: the expansion of European and U.S. capital, in concert with colonial rule, has all too often determined the patterns of economic development and social transformation of the Third World.\footnote{Sally Engle Merry, ‘Law and Colonialism’ (1991) 25:6 Law and Society Review 889, 910-911.}

As the exploitation of Third World resources by multinational corporations continues today, so too does the use of law to facilitate such exploitation. Mimicking the policies of European colonisers, post-colonial states have turned to emergency laws and powers in order to protect the interest of foreign companies in the face of resistance from their own citizens. The use of emergency measures to criminalise social protest and resistance to major extractive industry projects in Latin America is a case in point, where civil society organisations have highlighted the role of law as a form of harassment in concert with a strategy of increased militarisation:

By maintaining overly vague definitions of concepts such as “hostile groups” or criteria for states of emergency, military forces are able to mobilise in response to protest actions that normally would not justify domestic military deployment. This is the case in for example Peru, Ecuador, Mexico and Guatemala.\footnote{Cooperación Internacional para el Desarrollo y la Solidaridad (CIDSE), ‘Criminalisation of Social Protest related to Extractive Industries in Latin America’ (June 2011) 3.}

In this context, Ecuador declared a state of emergency on 77 separate occasions between 2000 and 2006,\footnote{Fédération internationale des ligues des droits de l’Homme (FIDH), ‘La protesta social pacífica: ¿Un derecho en las Américas?’, October 2006, No. 460/3, 49.} including in response to indigenous
protests against oil production in the Amazonian provinces of Sucumbios and Orellana. In Bolivia, the Cochabamba “water wars” in 1999 (arising from protests against the granting of a concession contract for water services to a private consortium) prompted the government to declare a nation-wide state of emergency. A state of exception was likewise declared in Guatemala in 2008 to stifle protests against the activities of mining companies. A fifteen-day military occupation of the affected area ensued pursuant to the emergency framework, during which the behaviour of the armed forces prompted the submission by local communities of multiple complaints of abuse. In Colombia, such exceptional situations have been normalised in areas where extractive industries operate, with a permanent military presence often established to facilitate foreign mining companies and curb local resistance. In northern Peru, a state of emergency was declared by President Ollanta Humala in December 2011 to quash direct action demonstrations against the construction of an open-cast gold and copper mine by the US-based Newmont Mining Corporation, in what would be the largest foreign investment project in Peru’s history. Residents of the Cajamarca region are opposed to the project for fear of environmental pollution and degradation of the water supply.

These examples are not exhaustive, but what emerges in each case is a common theme: the harnessing of the state of emergency as an instrument of exclusion, to delegitimise popular protest against potentially harmful and exploitative extraction of natural resources, and to circumvent the

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117 MiningWatch Canada, CENSAT-Agua Viva & Inter Pares, ‘Land and Conflict Resource Extraction, Human Rights, and Corporate Social Responsibility: Canadian Companies in Colombia’ (September 2009). Links of this sort between multinational corporations and the military-security apparatus have become increasingly prevalent in recent years, not least in Iraq.
118 ‘Peru declares state of emergency to end protests over mine’, The Guardian, 5 December 2011.
participation of local and indigenous communities in the resource utilisation process. A discernible pattern of resistance and emergency as counter-resistance can be identified.

The expansion of the extractive industries has, as counterparts, first, the reaction of indigenous communities in the defense of their communal goods (land, water, grazing, etc.), and second, the violent counter-attack of the state through police and military repression, legitimated many times by the state of exception ... Political economy and legal policy are both relevant to this situation and both are functionally connected.  

In addition to oiling the gears of resource exploitation for the purposes of global consumption, states of emergency have also been invoked in attempts to forestall opposition to the free trade paradigm. This can be seen across a panorama that stretches from rural communities in the Third World, where free trade agreements carry an inherent threat to the livelihoods of small-scale farmers, to large cities in the West where international trade summits convene.

An indigenous uprising in Ecuador in 2006 in defiance of the government’s negotiation of a free trade agreement with the United States and the operation of American petroleum companies, for example, prompted the declaration of an emergency in five provinces and the resort to special powers by Ecuadorian authorities. In numerous African and Latin American countries, burdensome structural adjustment programmes implemented at the behest of the International Monetary Fund have triggered ‘IMF riots’ and precipitated the use of exceptional police powers.

Western cities and seats of power hosting major world trade summits have also found themselves on the fault lines of “anti-globalisation” protest and resorted to the emergency caveat to justify heavy-handed suppression of such protest, perhaps most notoriously in the form of the declaration of a state of emergency in Seattle during the 1999 ministerial meeting of the World Trade Organization.

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Trade Organisation. Indeed, as Mark Neocleous observes, ‘[w]orld summits invariably require the declaration of a state of emergency before they have even begun’; by way of example, he cites the declaration of a state of emergency in parts of the US state of Georgia in 2004, a full two weeks in advance of the G8 summit on Sea Island. Such a course of action indicates the presumption of a security threat emanating from the mere existence of individuals and groups with a desire to voice opposition and alternatives to prevailing economic structures. Advance invocations of special powers also amount to a form of auto-emergency which exemplifies how ingrained the state of emergency is in the establishment psyche.

In terms of the convergence of political economy and security discourse, the characterisation of the “Occupy” movement as a ‘terrorist/extremist’ group by City of London police is further testament to ruling class perceptions of any questioning of finance capitalism in its current guise as a national security issue. The drastic emergency law passed in a bid to suppress anti-austerity student protests in Quebec in the spring of 2012, and the blanket ban on assembly and demonstration enforced in Frankfurt (and upheld by Germany’s Federal Constitutional Court) imposed on the attempted “Blockupy” protests at the European Central Bank in May 2012 are further cases in point.

IV(ii) Security exceptions in international trade and investment law

The coalescence of security-inspired emergency discourse and international economic law is visible in the exception clauses of bilateral investment treaties, as well as international trade treaties such as the World Trade


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125 See, for example, ‘Blockupy Frankfurt Day 1: 16 May – Frankfurt effectively in “State of Exception”’, Critical Legal Thinking, 16 May 2012.
Organisation agreements (including the General Agreement on Tariffs and Trade (GATT)) and the North American Free Trade Agreement. In the trade sphere, the language used to justify to exceptional measures is often seen as ‘broad, self-judging, and ambiguous’. In addition to particular economic emergency exceptions allowed for under Article XIX of the GATT, provisions recognising security exceptions (Article XXI of the GATT, for instance) also allow emergency economic measures to be taken in the context of threats to security. That a wide margin of appreciation is granted to states in such cases has been indirectly confirmed by the International Court of Justice in the Nicaragua and Oil Platforms cases, prompting considerations of whether Article XXI permits ‘anything under the sun’. Elastic interpretations of security in the realm of international trade have shown that state security is integral, rather than tangential, to ostensibly civilian functions of the economy. National security was invoked, for example, to justify such measures as restrictions on the import of Polish clothes pegs, on grounds that domestic clothes peg-producing functions would be necessary in the event of an outbreak of hostilities with eastern bloc states.

128 In comparing Article XXI of the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Nicaragua with Article XXI of GATT, the Court emphasised the crucial subjective nature of the latter: ‘This provision of the GATT … stipulates that the Agreement is not to be construed to prevent any party from taking any action which it considers necessary for the protection of its essential security interests’. Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA) (Judgment of 27 June 1986), 1986 ICJ Rep. 12, para. 222. Emphasis added.
129 In comparing Article XX of the Treaty of Amity between Iran and the United States with Article XXI of GATT, the Court reiterated the position taken in Nicaragua as to the definitive nature of the subjective element of GATT’s security exception. Case Concerning Oil Platforms (Islamic Republic of Iran v. USA), Preliminary Objections (Judgment of December 12 1996), 1996 ICJ Rep., para. 20.
Such relatively banal security paradigms also come to the fore in the context of emergency exceptions in bilateral investment treaty law and the state of necessity, the guise in which the doctrine of emergency crystallises in customary international law. Arbitration proceedings arising from the state of emergency declared during Argentina’s fiscal crisis of 1999-2002, a paradigmatic “economic emergency”, are a case in point.

A host of claims have been made before the World Bank-affiliated International Center for Settlement of Investment Disputes (ICSID) by international investors against the Argentine state. Such claims are based on losses incurred due to Argentina’s actions during the emergency, which adversely affected foreign investors (particularly those invested in the public utilities and energy sectors) and included a sovereign debt default of $155 billion, the freezing of foreign assets, bank deposits and tariff rates, restrictions on withdrawals and transfers, and a significant currency devaluation. Argentina has sought to rely upon a defence of necessity.

132 Often signed to facilitate marriages of convenience between capital exporting states seeking investment protections and Third World states seeking increased foreign direct investment, bilateral investment treaties generally operate in that context to create obligations for the Third World states and provide protections for the investors from the capital exporting states. Some such treaties envisage an exception to the legal obligations created in the interests of national security or essential state interests. On the colonial origins of international investment law in general, and the emergence of investor-state arbitration during the era of decolonisation, see Ibironke T. Odumosu, ‘The Law and Politics of Engaging Resistance in Investment Dispute Settlement’ (2007) 26:2 Penn State International Law Review 251, 252-255.

133 The role of neoliberal doctrine and the IMF in creating the conditions that precipitated this crisis must be noted. Through the 1990s, Argentina enacted a range of liberalising economic policies at the urging of the IMF. Large-scale privatisation of public utilities, the signing of bilateral investment treaties, a transformed monetary policy that pegged the peso to the US dollar, and the introduction of free market reforms and a business-friendly regulatory climate combined to successfully attract international investment and create a rapid growth economy. While the strategy of pegging Argentina’s currency to the dollar initially helped the proliferation of this growth, the peso’s fixed value and its true value soon fell out of sync. Argentina’s public debt ballooned as borrowings increased to meet spending costs and maintain the necessary dollar reserves. The IMF continued lending regardless. Economic crises throughout Latin America led to a drying up of foreign investment in the region. By 1999, Argentina was in recession, unemployment had reached a critical level, and deflation, coupled with inflation in the United States, exacerbated the discrepancy in the currency value. Devaluations elsewhere in Latin America had an adverse effect on Argentinean exports, and predatory speculation on the overvalued peso triggered the ultimate deepening of the crisis, resulting in the flight of foreign capital and a run on Argentina’s banks in 2001, followed by formal declaration of a state of emergency, default on sovereign debt of $132 billion, and abandonment of the peso-dollar parity.

claiming the extant state of emergency justified derogation from legal obligations to foreign investors. Most relevant to such claims given the domicile of the majority of plaintiffs is the 1994 Argentina–United States Bilateral Investment Treaty, Article XI of which holds that the treaty will not ‘preclude the application by either Party of measures necessary for the maintenance of public order … or the Protection of its own essential security interests.’\(^{135}\) Argentina in its defence also cites the state of necessity exemption from international obligations under customary international law. Article 25 of the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts allows, under strict conditions, for the vindication of an internationally wrongful act where the act is necessary ‘to safeguard an essential interest against a grave and imminent peril’.\(^{136}\)

The Argentinean claim that the economic measures taken during the state’s financial crisis were essential to public order and security reinforces the idea of an indivisibility of economy and security. The five most significant arbitration tribunal awards to date in this regard\(^{137}\) reveal an indeterminacy and inconsistency of law that raise questions as to the suitability of applying the concept of emergency derogations in financial crises, and to the legitimacy of ICSID arbitration itself. Deviations between ICSID tribunals (involving the application of different bodies of law; the drawing of diametrically opposed conclusions on pivotal matters of both fact and law; and the awarding of vastly different amounts of damages) are embodied in the deeply fractured


approaches of the first two tribunals dealing with the Argentine crisis—CMS and LG&E—to the question of necessity, on virtually identical facts. The CMS tribunal held in 2005 that Argentina’s actions were not justified by a state of necessity under the meaning of international law, and thus ordered a payment of $133 million to CMS Gas by way of compensation. The following year, the LG&E tribunal found the same economic conditions in Argentina to be sufficiently grave as to justify emergency measures and reliance on a state of necessity, and accordingly awarded a much lower sum against the state.

Of the two, the CMS finding was the one that initially held sway, followed in 2007 in both the Enron and Sempra cases, where it was held that the situation in Argentina did not compromise ‘the very existence of the State and its independence’ in the sense of Article 25 of the ILC Articles, and as such that Argentina could not claim necessity for its emergency measures. The tribunal decisions of CMS, Enron and Sempra thus appear to reveal a structural bias that permeates investment arbitration law and operates to protect Western investment interests in the global South.

The 2008 Tribunal decision in Continental, on the contrary, absolved Argentina’s economic policy as ‘necessary’ to protect ‘essential security interests’ under Article XI of the bilateral investment treaty and thus awarded the US investor only $2.8 million of the $112 million claimed. From this and Annulment Committee decisions in CMS, Enron and Sempra criticising the original tribunal findings on necessity, an emerging pattern may be discerned. Although state action is not unfettered in the sense of the apparently self-judging standard written into Article XXI of GATT, the ICSID proceedings have gradually allowed a wider margin of appreciation to the state in the

140 CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8 (Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic: Sept. 25, 2007); Enron Corp & Ponderosa Assets L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (Decision on the Application for Annulment of the Argentine Republic: July 30, 2010); Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16 (Decision on the Argentine Republic’s Application for Annulment of the Award: June 29, 2010).
context of Article XI of the Argentina–United States Bilateral Investment Treaty. A two-tiered approach has evolved, whereby emergency-based derogations from obligations may be permitted under the Article XI security exception even where the higher threshold of absolute necessity under customary international law and Article 25 of the ILC Articles cannot be shown.141 The parameters of emergency or necessity under international investment law are thus wide enough to include economic instability; not restricted to a grave and imminent peril to the existence and independence of the state. An economic crisis is thus conflated with a threat to security or public order, giving legal truth to Foucault’s assertions on the economic as an apparatus of security.

The apparent emerging pattern in ICSID jurisprudence on the Argentine economic emergency suggests the possibility of investment dispute resolution as a site of resistance for Third World states. Necessity can be an important shield for unstable Third World economies as part of the trade-off involved in assuming obligations under bilateral investment treaties. While the fundamental purpose of protection of global capital still prevails, a certain responsiveness to the interests of defendant states can be detected in the recent evolution of investment dispute settlement mechanisms (not least with Western states attempting to reclaim the higher ground in state-investor legal relations given the likelihood of international arbitration on “emergency” measures undertaken by governments in 2008 and thereafter). However, such development of international investment law in broad terms remains dominated by the agenda of developed states in a manner that eludes particular Third World influence.142 Whilst any increased sensitivity to state positions

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141 Notably, however, the Enron Annulment Committee decision found that even the higher standard of the customary international law defence of necessity was met in the case of Argentina’s economic emergency.

142 For an interesting exploration of the dwindling of Third World critiques of investment arbitration during the 1980s and 1990s, see Amr A. Shalakany, ‘Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism’ (2000) 41:2 Harvard International Law Journal 419. On questions on regime bias and conflict between Western and Third World interests in international arbitration, based on the institutional make-up and final award decision of the International Chamber of Commerce arbitration tribunal regarding the Dabhol project in India, see Gus Van Harten, ‘TWAIL and the Dabhol Arbitration’ (2011) 3:1 Trade Law & Development 131.
generally cannot but contain the potential to benefit all states, Ibironke Odumosu shows that although international investment law is not being reformulated solely to protect foreign investment in the Third World (as was the case during the colonial and initial decolonisation periods), ‘it still remains largely insulated from Third World sensibilities, and does not necessarily take Third World struggles, resistances and perspectives into account.’

The Argentine emergency cases are symptomatic of this broader point. Among the technologies of exclusion embedded in ICSID arbitration is the construction of the state as an abstract, artificial entity, divorced from its population. The parties to arbitration proceedings are generally construed narrowly as the corporate foreign investor and the host state as private entities, with the arbitration itself framed as a commercial matter. Public interest considerations and the needs and desires of the people are incidental. This is the natural product of a tendency to subsume individual and community interests and social life under the universalising agent of the nation-state. In the Third World in particular, the concerns of the populace are homogenised and instrumentalised by the indicators of the economic development of the post-colonial state. Thus, when invoked, Argentina’s necessity defence is presented primarily through the prism of the health of the state’s financial system and institutions, rather than the socio-economic conditions or civil rights of its people. Popular protests and interests remain sidelined by investment dispute settlement mechanisms. This implicit reading of the state as separate from the people it represents allows a more straightforward process that elides consideration of the public interest and the broader socio-political elements underlying more purely “legal” questions. As such, the state ‘is stripped of its population with all its appendices—the public interest, dissenting voices, and needs that do not equate with global capitalist ideology—and is left with a not-so-abstract but artificial construct, known as

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government and territory.\textsuperscript{145}

Where a wide margin of appreciation is given to the state in respect of necessity, as in the Argentine ICSID cases, this may help to protect Third World state interests, but conversely lays down a negative precedent for individual and collective claims by those whose rights may be violated in the course of the emergency. The application of the margin of appreciation doctrine—granting wide latitude to states regarding measures taken in a state of emergency and, even more, regarding the existence of the emergency itself—already comes at the expense of human rights, even within the confines of the international system for the protection of human rights.\textsuperscript{146} Investment arbitration is a mechanism of the international legal system that is designed to balance the priorities of foreign investors with the interests of the state, devoid of any human rights mandate.

From the perspective of subaltern populations, the appropriateness or usefulness of such a mechanism interpreting or making law on the contentious issue of the state of emergency must be questioned. Here, anxieties over the fragmentation of international law in broad terms can be related to the haphazard international governance of states of emergency.\textsuperscript{147} In this schematic, in a case such as Argentina, disregard of state obligations in the socio-economic sphere or derogations from individual civil rights under the self-declared emergency may be accepted as necessary by an international or regional human rights body, while at the same time a mechanism of international investment law may hold that the same circumstances do not constitute an exceptional justification to negate the interests of foreign investors. The result is a distorted three-tiered hierarchy that privileges the corporation over the state, and the state over the human.

Evolving ICSID jurisprudence in respect of Argentina notwithstanding, the underlying law itself remains vague, and its overall


\textsuperscript{146} See discussion in Chapter 3.

application plagued by indeterminacy. While Annulment Committee decisions in *CMS, Enron* and *Sempra* may have reversed the legal reasoning of the original Tribunal decisions, those Committees do not serve as appellate bodies in the true sense; they cannot overturn the award decisions themselves, nor reduce the amounts awarded. Argentina accordingly remains obliged to pay the original awards, but is unlikely to do so voluntarily in light of the Annulment Committee decisions. Meanwhile, impervious to, or ignorant of, the security necessity exception and relevant ICSID developments, those in financial circles continue to assert the absolute protection of investors under bilateral investment treaties, claiming there is a ‘strong case to be made for liability of states under international investment law, a case bolstered by the critical absence of exceptions for state conduct in this area of international law.’

**IV(iii) Capitalism’s Emergency: Financial Crises in the Core**

Restrictive international economic measures that have long been imposed on developing nations found their way to the European Union’s peripheries from 2010. In the midst of sovereign debt proliferations triggered by the vacillations of finance capitalism, Greece, Ireland, Portugal and Cyprus were compelled to draw from an emergency “bailout” loan facility established by the “troika” composed of the European Commission, European Central Bank and International Monetary Fund. The principal beneficiaries of this arrangement are the European Central Bank and the financial institutions holding the bonds of the peripheral nations’ sovereign and banking debts.

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149 Here, the absurdity of projecting nationality onto financial transactions in a globalised context must be noted. This point is particularly salient with regards a European Union in which economic and fiscal policy is increasingly concentrated in a central core, and which has pushed the idea of a single European market for financial services since its inception. The removal of borders and nationality of capital is paramount. Money can move uninhibited from a German investor in Frankfurt to an English property speculator in London, via the books of a bank in Dublin. When things go wrong—and only when things go wrong—with the speculative investment, it becomes naturalised as “Irish” money; its payback now the responsibility of the Irish people. In a “post-national” economic climate where approximately $4 trillion is traded daily on foreign exchange markets alone, such sudden acquisition of
“austerity” measures upon which the loans are conditional is disproportionately visited upon marginalised socio-economic groups in the societies in question.¹⁵⁰

The dual aims of the EU and the ECB as they stumbled through the economic downturn from 2008 were to restrict the crisis to Europe’s periphery, and to placate the international financial markets so as to prevent contagion spreading to its core. Clear deference to the structures and institutions of the finance sector was shown, justified with reference to the necessity of preserving the extant system for fear of what might prevail were it to collapse. Greece, Ireland, Portugal and Cyprus were effectively forced into structural adjustment programmes involving the dilution or removal of social protections. Such conditions were imposed by the troika as debt levels continued to deepen, in order to repay and reassure private bondholders. Such vivid demonstration of the severity of European emergency rescue measures was also intended to spur larger euro-zone states into addressing their own debt problems. With the Italian and Spanish economic dominoes wobbling significantly, power in terms of European economic governance became concentrated in an ever-shrinking core, centred on a Franco-German axis. And with the protection of German and French banks held up as sacrosanct, one cannot but be reminded of Lenin’s critique of finance capitalism almost a century prior, indicting the excessive concentration of capital and power in French and German banks.¹⁵¹ The result of the crisis has been the increasing fracture and fragmentation of the European Union. The people of peripheral states labelled as irresponsible “basket cases”¹⁵² have been held responsible

¹⁵⁰ In Ireland, for example, one of the cruelly ironic results of the disproportionate diversion of public funds to service private debt amidst a climate of increasing poverty was the dismantling of the Combat Poverty Agency, the only state agency specifically dedicated to tackling poverty.


¹⁵² Culturally condescending attitudes and rhetoric—particularly in relation to Greece, instrumentalised by their northern European counterparts as lazy, nefarious and incapable of good governance and basic accounting—have been a hallmark of the euro-zone crisis.
for the reckless lending of private institutions and the poor governance of public institutions, while the political and economic powers at the core remain immune from accountability for their own questionable lending and governance practices.

Emergency authority operates as a flexible response mechanism for grappling with the exposure of modern capitalism to periodic crisis. The troika’s management of the crisis emerges as a form of international intervention couched in technical procedures that often disregard normal constitutional arrangements. The establishment of the European Financial Stability Facility to provide financial assistance to struggling member states stood in stark conflict with the “no bailout clause” contained in Article 125 of the (Rome) Treaty on the Functioning of the European Union. It is permitted, however, by Article 122 of that treaty, which allows for the conditional granting of financial assistance where a member state is ‘seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.’ In so doing, the EU for all intents and purposes declared itself to be in a state of emergency, invoking a paradigm of exception that underpinned, but has not been restricted to, the institutional “bailouts” of Greece, Ireland, Portugal, and Cyprus.

Larger debt-laden economies such as Italy and Spain became increasingly reliant on “emergency intervention” by the European Central Bank, subject accordingly to budgetary supervision, and obliged to slide down the avenue of austerity. European leaders stumbled from one “emergency” summit to the next, convening no less than sixteen such summits between 2008 and 2011. Continuing failures to resolve the situation had precipitated German calls in the run-up to the December 2011 summit for an ‘emergency, narrow treaty change’ (to Article 126 of the Treaty on the Functioning of the European Union, which regulates the economic policy of member states in respect of budget deficits) in order to grant the European Court of Justice the power to impose sanctions on indebted nations that fail to execute the

Corruption, cronyism, and clientelism—although similarly prevalent in other non-Mediterranean nations—are projected as stemming from intrinsic defects in the Greek character.
necessary budgetary adjustments. A strong institutional advocate of what might be described as increased governmentality of the European polity, the European Commission sought to further capitalise on the euro-zone crisis by pushing reforms that would allow weaker states to be placed under ‘a form of EU “administration”’, effectively rendering any such state a protectorate of the Brussels bureaucratic apparatus.

Increased budgetary supervision and centralised economic governance was indeed agreed upon at the December 2011 emergency summit, where euro-zone leaders explicitly invoked the terminology of their own ‘new deal’. The general immunity of capitalist institutions from accountability was further extended, however. The German chancellor abandoned her prior insistence that private financial institutions assume a share of the financial burden of debt servicing across Europe. Britain prioritised the financiers of the City of London over the stabilisation of the European economy, opting out of the agreement upon failing to secure the City of London as a zone of exception from any heightened financial regulation.

In the ensuing treaty agreed by twenty-five of the EU’s member states in January 2012, the elevation of finance sector interests was clear. Centralised fiscal controls were institutionalised; fiscal rectitude was to be enforced through quintessential international monetary conditionality arrangements. The treaty was not signed by all EU member states, and as such cannot be an instrument of EU law, yet staked an explicit claim for its substance to be incorporated into the legal framework of the European Union legal framework within five years of its entry into force. It also delegated signatory states’ prerogatives to the European Commission and European Court of Justice, similarly outside the “normal” legal parameters of the EU.

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154 Arthur Beesley, ‘Europe seeks power to place weak states in “administration”’, The Irish Times, 22 November 2011.

155 European Council, ‘Statement by the Euro Area Heads of State or Government’ (9 December 2011) ¶ 3.

156 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (31 January 2012).
This was done not with reference to any exceptional circumstances, but permanently. In this light, the treaty is seen as a utilitarian ‘use of the state of emergency in a way that is contrary to the democratic construction of the EU and functional to respond to the pressure of the markets.’

The path being followed illuminates the EU as a form of commissarial dictatorship, beholden to the market rather than to principles of democracy, in which the structures of European governance are revolutionised from Brussels and Frankfurt under the guise of the necessity of preserving the single currency. The troika’s second bailout package for Greece, agreed in February 2012, spoke further to the primacy of soft power technocracy to that end. Amidst the rhetoric of a monetary crisis inching ever closer to the precipice, Greece’s economic management became subject to ‘enhanced and permanent … on-site monitoring’ by European “experts.” It is measures such as this, in conjunction with ‘barely coded racialised suggestions’ around the indolence and indulgences of the periphery, that have prompted contentions that Europe is colonising itself. Requirements were placed on the Greek state to amend its constitution to prioritise debt repayments over the funding of government services, while the ‘bold structural reform agenda’ imposed on the labour market involves deep cuts to salaries, pensions and the minimum wage. With a confidential document circulated among euro-zone finance ministers in advance of the bailout negotiations having warned that such medicine would be unlikely to cure Greece’s underlying ails, questions arise as to the ideological motivations for pursuing this particular form of labour-targeting austerity in spite of the warnings.

The discourse of emergency has also permeated domestic lawmaking, justifying the socialisation of private debt by national governments and the fast-tracking of emergency finance measures through the legislative process.

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158 Eurogroup Statement, 21 February 2012.
159 See, for example, Illan Rua Wall, ‘The Irish Crisis: Europe Colonises Itself’, Critical Legal Thinking, 7 December 2011.
160 Eurogroup Statement, 21 February 2012.
In the United States, the reaction to the ailing finance sector was the passing of the Emergency Economic Stabilization Act in 2008. In Ireland, the Credit Institutions (Financial Support) Act 2008, commonly referred to as an “emergency law” (the absence of a formal state of emergency notwithstanding), was enacted to guarantee the liabilities of all banks in the state, including the particularly “toxic” debt held by speculative commercial lenders Anglo Irish Bank and Irish Nationwide. In order to make up some of the shortfall of the newly inflated national debt, a series of Financial Emergency Measures in the Public Interest Acts were adopted to, for example, amend the terms of public service pay and pensions, and to reduce the minimum wage.\textsuperscript{162} The Credit Institutions (Stabilisation) Act 2010, introducing radical reforms to the banking sector and granting sweeping emergency powers to the Minister for Finance, was rushed through both houses of parliament in a single day. For perspective, the Emergency Powers Act 1976—introducing special police powers in response to the intensification of violence by the provisional IRA, arguably a more time-sensitive matter\textsuperscript{163}—was the subject of weeks of debate and deliberation by both houses, and a Supreme Court assessment of its constitutionality, before being passed into law. Arriving into government in early 2011 on a wave of self-proclaimed “democratic revolution”, the first gesture of the Fine Gael/Labour coalition was to echo the vernacular that had accompanied previous war-time emergency powers legislation. Its programme for government thus spoke of an ‘unprecedented national economic emergency’ necessitating ‘strong, resolute


\textsuperscript{163} The position taken by Gross & Ni Aoláin on the difference between violent and economic emergencies in general is that: ‘A violent conflict often requires the executive branch of government to act immediately without the benefit of consultation with other institutions and other branches of government. Economic crises may, but do not have to, allow for longer response periods, thus enabling a more sustained inter-branch action.’ Oren Gross & Fionnuala Ni Aoláin, \textit{Law in Times of Crisis: Emergency Powers in Theory and Practice} (Cambridge: Cambridge University Press, 2006) 5. While the Irish emergency banking legislation was passed through parliament, the nature of the Irish political system produces a legislature that is in practical terms controlled by, rather than independent of, the executive.
leadership.\textsuperscript{164} In this context, a “super-cabinet” structure known as the Economic Management Council was created, comprised of four senior government ministers and their advisors. It was mandated to meet on a weekly basis to oversee ‘key economic, budgetary and banking matters.’\textsuperscript{165} Operating as ‘the equivalent of a war cabinet’,\textsuperscript{166} the Economic Management Council leaves itself exposed to obvious critique as a further concentration of executive power, utterly lacking in democratic accountability and treading on precarious constitutional terrain. It is presented by establishment commentators, however, as ‘an exceptional, but temporary, necessity.’\textsuperscript{167} In line with the tradition of the exception becoming the norm, it is then—within a matter of days in the same publication—tellingly championed as ‘so good it should be made permanent.’\textsuperscript{168} Such a position is advocated against the backdrop of the Council’s management of economic, budgetary and banking matters in a manner that has continued to strip away welfare protections in order to maintain the servicing of commercial bank debt.

The reality is that such protection of the finance sector signifies an undue but permanent deference to capitalist institutions (although not to capital’s own risk/reward logic) which serves to obfuscate the idea of the public interest. This obfuscation is starkly revealed in the 1% - 99% dichotomy that emerged as central to the narrative of the “Occupy” movement. In global terms, the hegemonic biases of the international economic order are very much in evidence. Most Third World countries are less integrated into the international financial sector, whose crisis most severely impacted the West. It was, in contrast, the spill-over effect of that financial crisis on global trade, commodity prices and the real economy that hit the Third World hardest. The priority in the response of Western

\textsuperscript{165} Department of the Taoiseach, ‘Annual Report 2011’.
\textsuperscript{168} Dan O’Brien, ‘Economic Management Council so good it should be made permanent’, \textit{The Irish Times}, 2 August 2013.
policymakers was clearly given to rescuing the financial sector rather than stimulating the real economy; restoring the status quo rather than radically overhauling the economic system to prevent another collapse. As far as the institutions are concerned, the IMF for its part can be seen as having somewhat neglected its commitment to Third World development upon more lucrative prey emerging on the peripheries of Europe.

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Historical analysis shows that the use of emergency measures to pursue an economic agenda is pervasive, and can eclipse differences of ideology and legal landscape. Civil and common law systems, colonial and post-colonial regimes, conservative and liberal governments; all have been wont to resort to states of emergency in the economic sphere, in some shape or form. While the use of emergency powers is not the exclusive preserve of institutions with a capitalist agenda, and while exceptional measures may potentially be harnessed by progressive forces to mitigate the broader social effects of economic instability, emergency doctrine has predominantly functioned in practice to favour capitalist interests. The overriding and inescapable conclusion, therefore, goes to the centrality of emergency to the entrenchment of capitalist ideology and institutions in modern political life. As such, emergency economic regulation becomes the normal and permanent state of affairs in the contemporary state. Reflecting on the permanent nature of the ongoing economic crisis in Europe, Slavoj Žižek implores us to remember that:

[W]e are dealing with political economy—that there is nothing ‘natural’ in such a crisis, that the existing global economic system relies on a series of political decisions—while simultaneously being fully aware that, insofar as we remain within the capitalist system, the violation of its rules effectively causes economic breakdown, since the system obeys a pseudo-natural logic of its own. So, although we are clearly entering a new phase of enhanced exploitation, rendered easier by the conditions of the global market (outsourcing, etc.), we should also bear in mind that this is imposed by the functioning of the system
itself, always on the brink of financial collapse.\textsuperscript{169}

Here, Žižek is responding to a mainstream establishment narrative that portrays economic crises as naturally occurring events; emergency rule is in turn presented not as a political decision but as the imperative of an apolitical financial logic. The “no alternative” mantra of “we are where we are” predominates. As such, the IMF, long seen as an ‘oppressive agent of global capital’ from a Third World perspective, appears from another perspective as a ‘neutral agent of discipline and order.’\textsuperscript{170} The lessons from the Third World experience of vicious debt cycles are disregarded. The cyclical and increasingly destabilised nature of advanced capitalism suggests that so long as the economic order is maintained in its present form, systemic crises will reoccur, and emergency measures that prejudice working classes and Third World masses will continue to be invoked as necessary to preserve the structures and institutions of global capitalism.

6. CONCLUSION: RESISTANCE & THE “REAL” STATE OF EMERGENCY

The script of resistance and liberation is a historical continuum, taken sometimes in small, localized, and painful steps.¹

Emergency doctrine is imbued with a counter-revolutionary spirit; colonial history is testament to that. It is in the shadow of that history that international law permits a wide margin of appreciation to the state to decide on both the form and substance of an emergency legal regime. This reflects—and sets a continued tone for—a promiscuous approach to any procedural requirements and substantive limitations that purport to preserve the chastity of the state of emergency. It underpins a reflex resort to emergency powers in the processes of governmentality: political administration, population management, security policy, and economic governance. Emergency modalities, as a result, are endemic in the modern state, with international law essentially permitting a margin of discretion to the preservation of colonial-style governance. Bearing in mind the differentiation between the state itself on one hand, and government as only one element of the state system on the other, it is unsurprising that coercive functions tend to become embedded in the architecture of state power in a manner that renders them distinct from government. Such machineries typically survive and transcend changes of regime or administration. Their overarching function is the preservation and consolidation of the interests of the ruling class in settler-colonial or post-colonial societies, and of the hegemony of capital in a class-structured order.²

Seeing emergency doctrine as part of this architecture reveals the nature of state power from a socio-legal perspective, and allows a diagnosis of emergency law as fundamental to a “deep state” apparatus.

The permanence of the state of emergency in contemporary contexts is a phenomenon that is refracted in particular ways through the “colonial present” and “post-colonial” prisms. While there may not be an unbroken

lineage or seamless continuity from the functions served by emergency doctrine in former European colonial legal systems, there has certainly been no definitive rupture. Normative and institutional developments across the legal landscape bear this out. States of emergency continue in different guises, often with an expanded scope and impact, but with the thrust of the imperial genealogy very much intact. While the mainstream may still view emergency derogations provisions as an unfortunate but temporary relapse to be balanced and tempered, the more fundamental quandary relates not simply to the plausibility of liberal legal management of emergency powers and the capacity of law to regulate public emergencies, but to the penetration of sovereignty in a more fundamental manner. As Rajagopal suggests, the point is not just that emergency doctrine is tainted by its colonial ancestry, but that it has been “naturalised” as an intuitive element of governance.

[T]he form in which Britain deployed [the concept of emergency] to combat anticolonialism has proved to be particularly enduring among postcolonial regimes in the Third World, but more perniciously, we do not even notice it anymore; colonial policies that were invented as ad hoc responses to mass resistance, have thus been made a “natural” part of the international legal corpus. Indeed, this culture of emergency is so “naturalized”, so deeply rooted among the governing elites that it is hard to see it being shaken fundamentally anytime soon.³

This raises the question as to whether established rights frameworks that incorporate emergency derogations on both domestic and international planes, and allow for extreme measures by state authorities without oversight or sanction, are fatally flawed. Political challenges from the masses or the “other” can be legitimately quelled with recourse to emergency powers. An important corollary question flows from this in relation to resistance. Given that emergency doctrine was developed (if perhaps not quite ‘invented’, as Rajagopal has it) to nullify popular resistance to forms of domination, what form can or should counter-hegemonic resistance to states of emergency take? Under the weight of the deep state characteristics of a doctrine with hegemonic qualities and designed to negate resistance, what is to be done?

Such questions as to the possibilities of resistance are fundamental to any alternative vision to the mutually reinforcing relationship between emergency law and traditions of oppression. They evoke themes that radical and Third World legal scholars continue to grapple with in the broader context of law’s role in political asymmetry and socio-economic inequality between various cores and peripheries, as well as its potential (if any) as an emancipatory vehicle. Law’s structural deficiencies and regressive features are, by now, well rehearsed. Legal norms and institutions are rightly critiqued as complicit in the facilitation of racialised and class-driven subjugating measures, given the extent to which—particularly in relation to sovereignty and governance—they were shaped by the political, economic and cultural backdrop of the European imperial project. The contemporary repercussions are clear: it is through reflection on ‘the history of the colonial relationship that it becomes possible to understand why these apparently liberatory projects [governance, sovereignty, rights] do not always meet with the success they promise—for they often embody power relations which are simply reproduced by their transference to the non-European world.’\(^4\) The incisive critiques that have penetrated the field of international legal theory from a Marxist perspective drive the point further, suggesting in their most acute articulation that international law as a whole is so inextricably bound up with imperialism as to be inherently incapable of opposing it on any level.\(^5\) From this viewpoint, there is no faith to be placed in the possibility of radical change through the sphere of law; resistance to global inequalities and the dominion of international institutions, as such, must occur elsewhere.

There is a substantial spectrum of critical scholarship that sees the terrain of law in more ambiguous and uncontainable terms, however. Here we may recall readings of Foucault in which is not possible for law be rendered entirely impenetrable; rather, it remains susceptible ‘to the ineradicable and importunate demands of resistance and transgression … it is the impelling

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force of such resistance which is itself formative of Foucault’s law.\textsuperscript{6} In this understanding, that is, law cannot be entirely hemmed in by power; the possibility of infiltrating or subverting the hegemonic space endures. E.P. Thomspn arrives at a similar (and, by his own admission, surprising) conclusion in his seminal \textit{Whigs and Hunters: The Origins of the Black Act}. Thompson’s historical deconstruction of a particular piece of repressive emergency-type legislation from the eighteenth century does much to confirm traditional Marxist perspectives of the rule of law as merely another front for the rule of class, implying that the ‘revolutionary can have no interest in law, unless as a phenomenon of ruling-class power and hypocrisy; it should be his aim simply to overthrow it.’\textsuperscript{7} The law is deployed—not only instrumentally but also ideologically—in the imposition and legitimisation of class power. This function of law in mediating and reinforcing class relations does not, however, represent the full picture. For Thompson, law has its own logic and evolution which are rooted—at least partly—in some notion of justice. On this basis, and in spite of his trenchant critique through the book of a political oligarchy creating malicious laws in pursuit of self-interested domination, Thompson ultimately concludes that justice cannot always amount to empty rhetoric, lest the law be exposed as sham and lose the instrumental capacity it holds for its own architects. If the law is too obviously partial and unjust, ‘it will mask nothing, legitimize nothing, contribute nothing to any class’s hegemony.’\textsuperscript{8} To function effectively as ideology, the law must appear to be just. And it cannot appear to be just, it is claimed, without occasionally fulfilling its own promise and actually being just.

We reach, then, not a simple conclusion (law = class power) but a complex and contradictory one. On the one hand, it is true that the law did mediate existent class relations to the hands of the rulers … On the other hand, the law mediated these class relations through legal forms which imposed, again and again, inhibitions on the actions of the

\textsuperscript{6} Ben Golder & Peter Fitzpatrick, \textit{Foucault’s Law} (Abingdon: Routledge, 2009) 54
rulers. … The rhetoric and rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from with that very rhetoric that a radical critique of the society is developed. ⁹

If the normative claims expressed here apply in the particular context of eighteenth-century English society—where law had displaced religion as the primary source of legitimising ideology, and was yet to be overcome by market liberalism—the question arises as to what extent they speak to colonial relations and the much deeper inequalities forged therein. Can the law even appear to be just in such circumstances? Thompson was cognisant of this question and acknowledges that, when transplanted to situations of gross inequalities on a global plane, ‘the equity of the law must always be in some part sham’ and that law is prone to ‘become an instrument of imperialism.’ ¹⁰

Again, however, he asserts that ‘even here the rules and the rhetoric have imposed some inhibitions on the imperial power’, and invokes the example of India’s anti-colonial struggle: ‘If the rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million masked supporters.’ ¹¹ From this flows the implication that for progressive and radical movements to fail to recognise and mobilise the counter-hegemonic potential in engagement with legal discourse, in order at least to resist bad laws, is to disarm themselves in the face of power and to abandon one important site of struggle.

Support for the idea of law as a site of resistance in anti-colonial struggles, based on similar understandings of its illimitable nature, can be found in colonial legal histories. In examining law as a locus of contestation in a transformed political environment, Samer Esmeir acknowledges prevailing structural counter-revolutionary impulses in the form of ‘legal technology that

functions to prevent revolution against the law and to assert state power'. At the same time, her characterisation of juridical humanity not only performing itself but also producing its own critique points to law’s repression/resistance double move: ‘[t]his is why modern law has become such a powerful technology of government and a tool of emancipatory struggles.’ Law has been both a conduit of colonial dispossession but also an arena of indigenous struggle, constituting a junction at which settler agendas and local interests collide. European law was integral to the conquest and colonisation process on the one hand, being brought to bear to expropriate native land and create a peasant wage labour force. On the other hand, however, its chameleonic features offered a mirror by which colonised groups could mobilise the ideology of the colonised ‘to protect lands and to resist some of the more excessive demands of the settlers for land and labor.’

The colony as a socio-political space in which imperialism’s legal structures have been resisted or instrumentalised—or have at least functioned as a pressure valve of sorts—points to law’s ambiguities and instabilities; to the existence of cracks in a generally hegemonic armour. The legal edifice is not a purely coercive monolith, but a disparate canvas over which counter-hegemonic contestations may also be brushed. The primary problematic here relates not to the validity of the tools themselves, but to the equality of arms in their distribution, with access to the canvas for the legal artists of the subjugated classes often heavily restricted. The colonised have traditionally been subject to sovereign power but excluded from its benefits. For all of its inherent structural flaws, however, there is a sense that law retains the potential to serve as a medium through which state power and draconian emergency and security laws can be challenged. This is consonant with the transformative drive that animates Third World Approaches to International Law. While sharply aware of the alienation of the marginalised and oppressed

masses from international law and its institutions, and deeply critical of the discipline in that respect, the TWAIL perspective is conscious of the inescapable role played by law in public international affairs. Short of any prevailing semblance of a utopia beyond law, and perhaps also on account of a lingering faith in international law as an emancipatory catalyst—rooted in the impression that ‘law’s liberal promise has lost much, though not all, of its luster’15—TWAIL voices are reluctant to vacate the field.

Yet legal nihilism cannot be the answer. A pure critique with its stress on inescapable domination loses its edge. It only disarms the poor and marginal peoples of the third world vis-à-vis the imperial project. The language of international law is not structurally apologetic, leaving no room whatsoever for the emancipation project. Such a suggestion, despite its radical tone, is status quo oriented. International law can be, and has been, to whatever degree, effectively deployed on behalf of the poor and the wretched of the earth.16

The question of a divergence between the transformative engagement and radical resistance thrusts of critique has long been cause for reflection in the TWAIL community, which is said to have retained for the most part a ‘surprisingly reformist agenda’.17 There is a sense that TWAIL’s duality of engagement with international law—of both resistance and reform—coalesces in such a way as to produce the possibility of destabilisation and transformation; to first provide the necessary rupture and to then generate a praxis of (new or unrealised) justice and universality.18 In this sense, there is a turn to what may superficially seem like the old in arguing for the emancipatory nature of law. But beneath lies a radical shift to reflect on the existing dynamics of power and politics of the everyday.

The evolution of international law has traditionally been traced and analysed by lawyers and scholars from above, with a distinct focus on formal

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sources, judicial opinions, treaties and state practice. Such “elitist historiographies”\textsuperscript{19} tend to frame human rights law, for example, as the outcome of the benevolence of north Atlantic states in response to the atrocities of the Second World War. They serve to erase the legacy of colonialism and exclude the struggles of indigenous peoples and social movements in the global South. By contrast, TWAIL scholarship (in addition to unmasking the imperial, racialised, material and gendered premises of international law, and as part of its political project to bring about a more just global legal order) implores us to consider the possibilities of influences on international law \textit{from below}.\textsuperscript{20} Rajagopal, in particular, does so by positioning local Third World and transnational social movements at the vanguard of resistance to the contemporary international legal order, and presents a case for the decentring of that order from the extant institutional and state-based power structures towards a system that is less elitist, more equitable; less global, more local; and appropriately reflects the role of social movements and quotidian struggles in the development of international norms. A “bottom-up” approach can be adopted to emphasise the use made of law as a shield of resistance by civil society, as well as its agency in impacting the normative and institutional development of international law from below.

Critiques of rights as hegemonic Western construct or newfangled civilising mission are nothing new. The privileging of human rights discourse in its individualised civil liberties guise has done much to obfuscate the underlying socio-economic roots of power dynamics and conflict in society, and to restrict our ability to combat structural inequalities. There are, however, experiences to be drawn from the progressive political utilisation of rights discourse as a counterpunch to repression, inequality and dispossession; whether in Latin America during the 1970s and 1980s, or in the Arab world where resistance stewed and simmered and eventually crystallised in popular


uprisings from 2011. In many cases, rights are invoked because they offer a mode of resistance to subjects who are abandoned by the law of the sovereign and excluded from the community to which the law gives rise.\footnote{Anne Orford, ‘A Jurisprudence of the Limit’, in Anne Orford (ed.), \textit{International Law and its Others} (Cambridge: Cambridge University Press, 2006) 15.} The counter-hegemonic force of liberal human rights remains tempered, however, by a deference to marketisation\footnote{For an account of the ‘trade-related market-friendly human rights’ paradigm, see Upendra Baxi, \textit{The Future of Human Rights} (2nd edn., Oxford: Oxford University Press, 2006) 234-275.} and conservative international institutions. Since emergency derogations serve to blunt even those limited counter-hegemonic edges, the quandary that follows is whether or how the state of emergency itself can be engaged with as a site of progressive legal and political struggle; whether the counter-revolutionary thrust of emergency doctrine can be mitigated from below.

For some political theorists, Agamben’s accounts of biopolitics and emergency present an apocalyptic perspective that ‘closes out the possibility of any worthwhile democratic politics.’\footnote{Bonnie Honig, \textit{Emergency Politics} (Princeton: Princeton University Press, 2009) xv.} Whilst this may not be his intention, such foreclosure of politics of dissent can be the outcome of Agamben’s framing of emergency where it is (mis)understood in the reductive spatial binary of a state of exception in which sovereign power operates beyond the pale of law. Where we acknowledge a more pluralistic conception of emergency, with a more ambivalent and unruly role for law and legality, cracks emerge and resistance and transformation appear possible. In the context of ongoing crisis politics, often manifesting through the tedium of prosaic and normalised emergency measures, opportunities for action exist. From a vantage point that sees emergency doctrine in contemporary international and constitutional legal regimes as the product of occidental colonial legalism emerging from the interests of state power from above, resistance to states of emergency for the purposes of destabilisation or rupture must necessarily come from below. Whether such resistance holds the potential to then transform the praxis of emergency powers—rather than merely mitigate their effects—is a vexed question.
Resistance to emergency laws and measures, and to the rationale of emergency doctrine itself, has sprung from varied quarters. It is, however, in the political struggles, civil society and social movements of the global South that we find the most concerted challenges to the state of emergency as itself constitutive of repressive sovereign power. Within the liberal democracies of the global North, opposition to emergency law has generally amounted to moderate reform or accountability initiatives from within the halls of establishment. In the United States, President Nixon’s emergency diktats prompted ‘liberal-minded American politicians in the 1970s to launch a short-lived and ultimately ineffective battle against the proliferation of emergency powers’.24 While the exceptional measures implemented in the context of Guantánamo Bay have generated sustained human rights campaigns, successive administrations responsible for those measures were reelected for second terms, and there was little popular resistance to the annual ‘Continuation of National Emergency’ declarations by George W. Bush and Barack Obama.25 The submission of the Federal Emergency Management Agency to security politics and its incorporation into the Department of Homeland Security in 2003, without meaningful opposition, further accentuates the point.

In France, there has been only sporadic and ineffectual criticism of the état d’urgence application of emergency doctrine (more draconian than the état de siège aspect laid down in Article 36 of the 1958 Constitution26) under Loi n° 55-385 du 3 avril 1955 relatif à l’état d’urgence and Article 16 of the Constitution. Initiatives from the left beginning in 1972 towards repealing Article 1627 faded out and did not form part of the agenda during the Socialist Party’s era of dominance through the following decade. Watered down reform

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25 See, for example, Barack Obama, ‘Notice: Continuation of the National Emergency with Respect to Certain Terrorist Attacks’, Federal Register, 10 September 2013.
26 See, for example, Gilles Lebreton, ‘Les atteintes aux droits fondamentaux par l’état de siège et l’état d’urgence’ (2007) n°6 Cahier de la Recherche sur les Droits Fondamentaux 81.
27 The ‘Common Program’ of the Left signed by the French Communist Party (PCF) and the Socialist Party (PS) in an alliance formed before the 1973 parliamentary elections included a proposal that Article 16 be repealed.
proposals put forward by François Mitterrand’s Vedel Commission in 1992 to give the Constitutional Council supervisory powers in respect of Article 16 were ultimately not implemented. The 2005 state of emergency in the context of social unrest in France’s “othered” banlieues thus saw emergency measures discharged under the état d’urgence framework. This prompted the submission of a complaint by the Green Party and a collective of legal academics, challenging the necessity of exceptional powers. The Council of State rejected the complaint and upheld the legality of the état d’urgence.\(^{28}\)

Mild reform came subsequently with a 2008 legislative amendment to Article 16 of the Constitution that allows for review of the conditions of a prevailing emergency by the Constitutional Council after certain time periods,\(^ {29}\) but this is hardly the embodiment of any radical subversion of emergency modalities in conceptual or practical terms. Nor is it linked to any broader political strategy beyond a nominal commitment to legal oversight of executive power.

Opposition to national security emergency measures in Britain has similarly revolved around individual liberties and judicial oversight of executive powers. More fundamental questioning of the state of emergency at a legal-political level can be seen in the post-Belfast Agreement transition in Northern Ireland, where the question of what—if any—form an emergency derogation regime should take in the country’s proposed Bill of Rights arose in the consultation process. Based on an experience of emergency powers operating in an oppressive manner and serving as an aggravator of conflict, the political factions of the republican movement have argued for the exclusion of any emergency derogation regime, with rights to be non-derogable and subjected only to limitations clauses where appropriate.\(^ {30}\) In the consultation process, ‘concern was expressed about facilitating too easy resort to derogation, particularly given the current international climate. … It was


\(^{29}\) Article 6, Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République (1).

observed that derogation clauses in existing international regimes … did not adequately protect people from human rights violations. It was argued that ‘rights should never be derogable, since derogations aggravate and prolong conflict’; on this basis Sinn Féin and the Social Democratic and Labour Party (SDLP)—as well as representatives of Northern Ireland’s ethnic minority and feminist civil society groups—took the position that the Bill of Rights should not allow for emergency derogations.

The experience in the north of Ireland that informed such opposition to establishment views in a Western liberal democracy as to the necessity of state of emergency regimes, significantly, was that of a colonial conflict. It is primarily to anti-imperial and post-colonial struggles in the global South that we must look for stories of sustained bottom-up resistance to emergency. India, for instance, has a rich history of such dissent. Resistance to the state of emergency in its various forms was, over time, a feature of anti-colonial struggle at all levels, arguably initiated and driven from below. The tea plantations in the Assam region, for example, originally annexed by the East India Company in 1826, were sustained by an indenture system of Indian peasant labourers (“coolies”) brought in to replace African slave labour following the abolition of formal slavery in 1883. They were subject to a process of penal servitude reconstituted as “exceptional” labour. Penal contracts were legitimised by ‘the “exceptional” labour legislation in Assam’ with the effect that ‘the planters’ powers were simultaneously authorized by the state and also a-legal, or outside of and uncontrolled by law.’ With private owners and landlords effectively vested with unchecked sovereign discretion, European planter violence was rife. The discharge of such exceptional powers was met with concerted resistance on the tea plantations

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‘through violent and non-violent means, using overt actions (refusing to work, labor strikes, violent confrontations) and other weapons of the weak (indolence or avoidance, threats, destruction of property)’, as well as through tactical uses of the law in ways ‘that did not simply reinforce the power of the colonial legal system’.34 This included inundating the regional authorities with complaints and mass strikes to disrupt criminal prosecutions of workers. While the workers’ acts of unruliness were typically painted as fanatical and irrational by the planters, their resistance was in fact for the most part calculated, collectively organised, and politically aware. Though such action emerged and continued during the latter part of the nineteenth century, the Indian National Congress was reluctant to adopt the case of the plantation labourers. It was seen as a provincial social issue, not of direct concern to the higher national cause, while the more elitist elements of Indian nationalism retained a distinctly paternalistic view of the peasant masses involved. As such, the everyday resistance on the Assam tea plantations proceeded for some time before any intervention or support from the Indian nationalist leadership was forthcoming.35 The level of social organisation and political consciousness in the workers’ defiance of Assam’s exceptional legal regime ultimately could not be ignored by Mahatma Gandhi, however, and by the early twentieth century was, along with other local peasant movements, incorporated by the Congress into the larger national liberation movement.36

Such mass resistance to emergency rule from below proved to be influential on the thrust of Indian emancipation as the century progressed. The immediate catalyst for the British declaration of martial law in Punjab in 1919


was, somewhat ironically, resistance to a prior piece of emergency legislation. In the Emergency Powers Bill 1919 (known also as the Rowlatt Act after the British judge who presided over the committee that recommended the retention of emergency powers), the imperial council provided for the continuation of First World War emergency measures outlined in the Defence of India Regulation Act. This amounted to an attack on civil liberties in the form of censorship and banning, arrest without warrant, indefinite detention without trial, and secretive juryless prosecutions of political dissidents. The passing of the bill into law was viewed by Indian nationalist leaders as a glaring betrayal of assurances given by Britain that autonomous political participation would be expanded upon the war’s cessation. The Act was denounced by Indian nationalists, and triggered unrest and agitation. Resistance to the emergency powers took the form of a civil disobedience movement; shops and markets were closed in protest, demonstrations were organised, and the population sought to actively disobey or refuse to adhere to the Act. This culminated in rioting in Delhi, Ahmedabad, Lahore and elsewhere. In Punjab, local leaders were arrested and interned on orders of the Governor, before officials in Amritsar called in military forces who opened fire on crowds, killing Indians in their hundreds. Gandhi was arrested attempting to enter Punjab, and martial law declared. This provoked further disorder on the part of the local population, and the repression-dissent cycle intensified. British administrators associated the breaking of one law with the potential for all law to be overthrown:

Lord Chelmsford suggests, echoing once again a thematic of despotism, [that] every law is a personal and direct manifestation of the sovereign. To call for even the nonviolent disobedience of the Rowlatt Act is to unleash a more general “disturbance” that threatens the authority of the state. Thus, the real need for martial law is not merely to put down this or that outbreak of violence but to restore this authority.  

The priority of preserving imperial sovereignty and the perceived necessity of

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37 See discussion of the Jallianwala Bagh massacre in Chapter 2.
exceptional measures to that end are clear. Lord Chelmsford’s position was based on a view of the people of India ‘in its present state of development’ as insufficiently civilised to able to distinguish between specific laws (which may appear to them to be inappropriate) and the overall authority of the state (which should not be in question). The “dynamic of difference” is clear in the implication that only more civilised people, in a higher state of development, have the capacity to selectively oppose individual (bad) laws while still respecting law, order and authority writ large. Chelmsford’s logic linking Indian disobedience of the legislation with a broader antipathy to colonial rule is actually well-founded, however, insofar as resistance to the Rowlatt Act did not occur in isolation or out of mere constitutional fidelity to the rule of law. Resistance to the provisions of this Act were part of a principled opposition to the violence of emergency law more broadly, which itself was integral to the struggle toward the overarching political goal of national liberation. Far from being too backward-thinking to be able to discern between the Rowlatt Act specifically and the benevolence of colonial law in general, the Indian self-determination movement understood very well that emergency powers were essential—rather than incidental—to the machinery of colonial rule, and ought to be resisted as such.

Resistance to emergency governance continued during the inter-war period and remained central in the build-up to the launching of the Quit India movement during the Second World War. Another civil disobedience action initiated in October 1940 came as a direct response to new wartime emergency powers. Gandhi’s tactics of non-violent resistance included resistance to emergency law; ‘[i]ndividual satyagrahis, in the beginning personally chosen by him, made public anti-war speeches in defiance of emergency orders.’ In 1944, social worker and political activist Hansa Mehta (who had herself been

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administered detained along with her husband) wrote an influential pamphlet for the All India Women’s Conference strongly indicting Britain’s use of emergency powers.\textsuperscript{41} The theme of emergency law as an integral element of the ruling structure to be overthrown was continually highlighted by liberation leaders and was a sustained part of the narrative of colonialism’s oppressive and anti-democratic nature, culminating in Indian independence in 1947.

The state of emergency also featured prominently as a weapon of choice in the legal arsenal of white domination in South Africa.\textsuperscript{42} Conscious of this, the anti-apartheid movement identified, from an early point, sustained challenge to emergency doctrine as a necessary and integral component of the liberation struggle. What began in 1960 as small, localised acts of resistance eventually resulted in the UN General Assembly demanding in 1989 that the apartheid regime unconditionally abrogate its emergency powers.

In March 1960, a state of emergency was declared by the National Party’s Minister for Justice under the Public Safety Act 1953, on the back of the Sharpeville protests and police atrocities. As has so often been the case in colonial situations, the “public safety” rationale for the necessity of emergency measures is a misnomer that serves to mask the underlying imperative of reinforcing settler sovereignty. With the white population constituting a distinct minority of the “public”, this was very much the case in South Africa. In the 1950s, the African National Congress had shifted the focal point of the anti-apartheid movement to the impoverished masses, decisively departing from the elitist approach of the Pan African Congress. Emergency regulations

\textsuperscript{41} A.W.B. Simpson, \textit{Human Rights and the End of Empire: Britain and the Genesis of the European Convention} (Oxford: Oxford University Press, 2001) 88, citing Civil Liberties, Tract No. 4 (Bombay, 1945). After independence, Mehta represented India on UN Human Rights Committee and was involved in the drafting of the Universal Declaration of Human Rights.

were imposed by the apartheid regime from 1960 to consolidate the racialised legal apparatus of pass laws, segregated education and forced evictions in the face of rising popular dissent and disobedience. The restrictions instituted under the emergency framework made the work of the defence lawyers in the ongoing “Treason Trial” of prominent anti-apartheid activists increasingly difficult. In April 1960, the lawyers proposed withdrawing from the case in protest. Nelson Mandela recalls how he and his fellow defendants discussed the proposal and—despite ‘the serious implications of such a withdrawal and the consequences of our conducting our own defense in a capital case’—decided ‘in favor of this dramatic gesture, for it highlighted the iniquities of the State of Emergency.’

Mandela and Duma Nokwe took on the work of preparing the defence themselves in the absence of the legal team. It was a tactic that created no tangible threat to the authorities, but amounted to a symbolically significant act of defiance, demonstrating the liberation movement’s acute awareness of the nature of the role played by emergency legal doctrine. In its founding manifesto in 1961, the armed wing of the African National Congress, Umkhonto we Sizwe (MK), made explicit reference to the state of emergency: ‘virtual martial law has been imposed in order to beat down peaceful, non-violent strike action of the people in support of their rights.’

Umkhonto we Sizwe was formed, in essence, to resist the state violence that the emergency served to legitimise.

Formal states of emergency were suspended and reinstated through the subsequent decades of apartheid, bridged by an unbroken chain of security legislation. Political violence, repression and mass detention reached a nadir under the 1985-1986 and 1986-1990 emergencies. Resolute resistance from below to the state of emergency continued, and ultimately came to shape the basis for negotiations within South Africa—as well as international policy—toward the dismantling of apartheid. During this period, channels of communication were opened between the leaderships of the ANC and the

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44 ‘Manifesto of Umkhonto we Sizwe’, issued by the Command of Umkhonto we Sizwe, 16 December 1961.
National Party. Still imprisoned and in a position of ostensible weakness as such, Mandela—‘a lawyer who discovered that the law was the barrier to change and so moved to politics’—was relentless in his opposition to the state of emergency. Revocation of the emergency was—along with the release of political prisoners, the unbanning of the ANC and the removal of apartheid troops from the townships—an imperative precondition to any negotiation process. For the ANC, there was an ‘onus on the government to eliminate the obstacles to negotiations that the state itself had created.’ The 1989 Harare Declaration, which articulated the ANC’s charter for negotiations, reaffirmed the movement’s longstanding position on the state of emergency.

We recognise the reality that permanent peace and stability in Southern Africa can only be achieved when the system of apartheid in South Africa has been liquidated and South Africa transformed into a united, democratic and non-racial country. We therefore reiterate that all the necessary measures should be adopted now, to bring a speedy end to the apartheid system … Accordingly, the present regime should, at the very least:

 [...] 

End the state of emergency and repeal all legislation, such as, and including, the Internal Security Act, designed to circumscribe political activity.

The Declaration proved to be a striking example of the shaping of international law from below. Stemming from a grass-roots popular liberation movement, this statement of principles on the establishment of a post-racial democratic South Africa was adopted by the Organisation of African Unity’s Ad Hoc Committee on Southern Africa. It was then endorsed by the Non-Aligned Movement in Belgrade in September 1989. It was invoked with approval by the UN General Assembly in November 1989, in a resolution in which the Assembly ‘strongly demands the lifting of the state of emergency’. The following month, the principles laid down in the Harare Declaration formed the basis of the UN Declaration on Apartheid and its

45 Vijay Prashad, ‘Mandela, the Unapologetic Radical’, Colorlines, 6 December 2013.
47 Declaration of the Organisation of African Unity Ad Hoc Committee on Southern Africa on the question of South Africa (Harare, 21 August 1989), sections 5, 19.
Destructive Consequences in Southern Africa. The language on the state of emergency as it appeared in that document was almost identical to the ANC’s original declaration.

The present South African regime should, at the least:

[…] End the state of emergency and repeal all legislation, such as the Internal Security Act, designed to circumscribe political activity. 49

Mandela continued to demand the revocation of the state of emergency in his meetings with F.W. de Klerk and the National Party’s secret negotiating team. On 2 February 1990, de Klerk announced the lifting of the bans on the ANC and the South African Communist Party, the freeing of political prisoners, and ‘the lifting of various restrictions imposed by the State of Emergency’. 50 The following week Mandela was released, but the ANC was unsatisfied with the qualified revocation of the emergency measures. ‘The international community applauded de Klerk’s bold actions. Amidst all the good news, however, the ANC objected to the fact that Mr. de Klerk had not completely lifted the State of Emergency or ordered the troops out of the townships.’ 51 In his speech in Cape Town on the day of his release, Mandela reiterated this position.

Mr. De Klerk has gone further than any other Nationalist president in taking real steps to normalise the situation. However, there are further steps as outlined in the Harare Declaration that have to be met before negotiations on the basic demands of our people can begin. I reiterate our call for, inter alia, the immediate ending of the State of Emergency and the freeing of all, and not only some, political prisoners. 52

The ANC continued to agitate for the absolute termination of the emergency. In June 1990, more than thirty years after it had declared its first formal state of emergency, the apartheid regime relented and fully lifted the state of emergency in all provinces bar Natal, where the emergency was revoked four

49 UN General Assembly Resolution A/RES/S-16/1, 14 December 1989.
months later. Mandela described this as a ‘most important event’\textsuperscript{53} in the dismantling of apartheid. The ANC saw the revocation of the emergency in pragmatic, tactical terms: as a “normalisation” that allowed for the commencement of negotiation. The significance of the resistance to the state of emergency as a sustained element of the broader revolutionary struggle cannot be underestimated, however. Emergency powers and the apartheid legal system were identified as central agents of white domination; the strategic objective of emancipation from such domination thus necessitated the tactics of legal and political resistance to the state of emergency.

The central problem with entrenched states of emergency is that exceptional measures are normalised in the process of maintaining a larger control system. Resistance to such measures in abstraction from the ideological and institutional system which they serve to reinforce is, by definition, superficial. The Indian and South African examples provide a glimpse of how emergency legal regimes may offer a site of effective resistance where framed as part of a broader radical movement. The languages of law and rights can be instrumentally useful in challenging hegemonic modes of governmentality but, given the centrality of emergency doctrine to colonial legal systems—and now to constitutional and international human rights regimes in which some of the dynamics and biases of colonial governance are reproduced—they must serve to complement other languages of resistance. Here, the distinction between strategy and tactics—concepts which are too often conflated in the language of lawyers and legal activists seeking to intercede in fundamentally political debates—is crucial to bear in mind. The compulsive desire for “strategic” intervention in such debates results in the widespread incorporation of tactical considerations as strategy. This collapses the distinction between the two concepts, as originally articulated in military theory and subsequently translated into political vocabulary, whereby ‘strategy refers to the achievement of long term,
structural (or organic) goals, whereas tactics refers to the achievement of short term, conjunctural ones.\textsuperscript{54}

The repeal of an entrenched state of emergency is not a strategic end in itself, but rather one of many potential tactical goals aimed at weakening the foundations of the racial or class power structures that the emergency serves to reinforce. Where emergency governance has become the normal and permanent state of affairs, the norm/emergency divide is blurred beyond distinction and exposed as illusory. The implication that flows from this is that rather than simply demanding a return to the “normal” rule of law and regulation of capitalism, what is needed is a ‘counter politics’\textsuperscript{55} not only against the permanent emergency but against the normality of racialised governance and socio-economic inequality, and their underpinning legal structures. For Walter Benjamin, where emergency powers are a normalised feature of the law, the necessary task is not to restore an illusory or usurped historical normalcy, but to ‘brush history against the grain’ by bringing about ‘a real state of emergency’.\textsuperscript{56} Resistance to historically embedded emergency doctrine must create a rupture definitive enough to ‘blast open the continuum of history’\textsuperscript{57} and carve out a real alternative to normalised emergency governance. Liberal constitutional oversight mechanisms that review the methods by which sovereign power is exercised, but that leave the relationship between the sovereign and its others fundamentally intact, are insufficient in and of themselves. A more radical challenge to the conditions that perpetuate emergency politics is required, one that seeks not mere checks and balances on


the permanent emergency, but an overhaul of the system that fosters it.

The rationale behind the reliance on emergency doctrine by sovereign authorities is conservation of the pre-crisis status quo. Where necessary, it underpins the state’s exercise of its claimed monopoly on legitimate violence. As Žižek emphasises in alluding to the idea of a “real”, or “true”, emergency: ‘When a state institution proclaims a state of emergency, it does so by definition as part of a desperate strategy to avoid the true state of emergency and return to the “normal course of things.”’\(^{58}\) In order to garner sufficient leverage to effectuate progressive and lasting systemic change, a sustained challenge to entrenched emergency discourses and crisis politics in civil and economic life is needed. This can bring about a “true” state of emergency for centres of institutional power, and offers a potential springboard towards the radical transformation of local and global governance structures.

Neocleous argues that the generation of a real emergency as articulated by Benjamin necessitates a turn to violence; a violence that exists outside the hands of the law. He rightly points out that the fact that the possibility of violence ‘is so often omitted when emergency powers are discussed is indicative of the extent to which much of the left has given up any talk of political violence for the far more comfortable world of the rule of law’,\(^ {59}\) but is overly prescriptive in suggesting the necessity of revolutionary violence in this context. Under certain conditions, popular resistance to emergency rule does hold the capacity to bring about the kind of real emergency that the ruling class seeks to avoid, without employing armed struggle among its range of tactics. Much hinges here on the scope of what is encompassed by “violence”—a concept that is broadly construed in Benjamin’s own work\(^ {60}\) — but that is a debate which extends beyond the present discussion. Regardless of the extent to which (perceived) violence is deployed, its role will be often

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ambiguous and invariably heavily contested. Contrary to the retrospective sanitisation of the anti-colonial and anti-apartheid struggles in mainstream Western eulogies of Gandhi and Mandela, for example, what was achieved in India or South Africa was certainly not achieved without violence (nor, obviously, through violence alone).

The extent to which even cathartic revolutionary processes are capable of fully uprooting state of emergency structures that have been firmly implanted in political and legal systems remains debatable, however. India and South Africa do provide examples where some semblance of the type of real emergency envisaged by Benjamin was created in the context of liberation struggles, but these remain in many respects ongoing struggles. In India, the legacy of colonial emergency doctrine is keenly felt, particularly in the country’s north-eastern regions through the application of the Armed Forces (Special Powers) Act 1958, a permanent emergency statute that vests the military with unmitigated powers and is symptomatic of the violence of the state against its others. Significantly, the states of the north-east amount to ‘India’s very own quasi-colony’, defined by a ‘history of forceful and illegitimate appropriation of entire lands and communities’ (and their natural resources) by a paternalistic Indian state, and by racial, ethnic and cultural tropes that operate to construct people from the north-east as fundamentally

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different to “mainland” Indians.\(^\text{62}\) Manipur, described even by Indian
government officials in diplomatic interactions as ‘less a state and more of a
colony of India’,\(^\text{63}\) has been home to a particularly severe and racialised
application of emergency powers in the context of ethnic conflict. Mainstream
political actors in India have remained silent on the matter, with resistance to
the measures again being driven from below, most visibly and physically
embodied by Irom Sharmila (a Manipuri activist on hunger strike since the
killing of ten civilians by Indian paramilitary forces in November 2000) and
the Meira Paibi (a grass-roots women’s association in Manipur who use ‘their
bodies as weapons of protest against a violent and marginalising state’).\(^\text{64}\) The
Armed Forces (Special Powers) Act is the axis around which their politics of
resistance revolves. Their persistent but unanswered calls for the repeal of the
legislation highlight the rootedness of repressive security discourse in Indian
law and have garnered solidarity from national social movements and
international rights organisations.\(^\text{65}\) This has filtered up to the UN Committee
on the Elimination of Racial Discrimination, which in 2007 criticised the
Armed Forces (Special Powers) Act in racial terms, noting the impunity it
grants to the military for acts committed against “tribal peoples” and urging
India to revoke it.\(^\text{66}\)

In the wake of the experience under apartheid in South Africa, the
Constitution does still provide for executive emergency regulations but makes

\(^{62}\) Gaikwad Namrata, ‘Revolting Bodies, Hysterical State: Women Protesting the Armed

\(^{63}\) See Wikileaks Cable #76968: U.S. Consulate General Calcutta, ‘Northeast Indian State of
Manipur Experiences Escalating Violence’, 1 September 2006, para. 10. The Consulate
General noted that: ‘The general use of the AFSPA meant that the Manipuris did not have
the same rights of other Indian citizens and restrictions on travel to the state added to a sense
of isolation and separation from the rest of India “proper.”’

\(^{64}\) Gaikwad Namrata, ‘Revolting Bodies, Hysterical State: Women Protesting the Armed
has been detained and force-fed through her nose since 2000.

Amnesty International, ‘India: Authorities Must Release Irom Sharmila Chanu’ AI Index:
AI Index: ASA 20/042/2013, 8 November 2013.

\(^{66}\) Committee on the Elimination of Racial Discrimination, ‘Concluding Observations: India’,
UN Doc. CERD/C/IND/CO/19, 5 May 2007.
it more difficult for them to be sustained.\footnote{A state of emergency declared under by the President under section 37 of the Constitution is limited to a duration of 21 days. It may be extended by the National Assembly for a period of at most three months at a time. The extent and scope of emergency measures under the state of emergency are subject to a range of limitations.} On the international plane, the lead taken by the UN General Assembly in echoing demands that originated from grass-roots social and political activism in apartheid South Africa, including the dismantling of the state of emergency, demonstrates the ontological possibilities of international law from below. This engenders the broader question as to the extent to which Third World resistance can be written or absorbed into international law, through the lived experiences and traditions of the oppressed.

The legacy of colonial emergency rule on the African continent cannot be disregarded when reflecting on the fact that, in contrast to other regional and international human rights instruments, the African Charter on Human and Peoples’ Rights makes no allowance for emergency derogations from any of its provisions. Following the formulation of the Charter and its entry into force in 1986, it was argued by jurists in the global North that, despite the absence of any emergency derogation clause, the Charter did not portend the exclusion of the capacity of states parties to invoke established state of necessity or emergency doctrines under international law.\footnote{Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (Oxford: Clarendon, 1989) 218-219. Meron was conscious that such an exclusion would ‘undoubtedly serve the effective protection of human rights’.} It has also been asserted that the exclusion of a derogation regime in the African system is simply a reflection of a differing conception of sovereignty to that in, for example, Europe;\footnote{Frederick Cowell, ‘Sovereignty and the Question of Derogation: An Analysis of Article 15 of the ECHR and the Absence of a Derogation Clause in the ACHPR’ (2013) 1 Birkbeck Law Review 135.} one not bracketed by a common political project comparable to Europe’s post-war rallying against (internal) totalitarianism. Provision for emergency derogation is absent, it is argued, not to preclude states imposing emergency measures, but rather to avert any external oversight or regulation. This oppositional thinking belies the drafting and applied experience of the European Convention on Human Rights, however, where the staunchest
advocates of the emergency derogations regime were concerned primarily with the preservation of sovereign emergency prerogative, rather than its limitation. The jurisprudence of the African Commission on Human and Peoples’ Rights has held, in contrast, that a state of national emergency cannot be invoked under any circumstances to allow the suspension of state obligations. As such, ‘limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances.’

Even situations of civil war ‘cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.’ Emergency doctrine does not apply to allow for derogations, whether from rights that are traditionally non-derogable (such as freedom from torture) or derogable (fair trial, freedom from arbitrary detention) in other systems.

The African Charter does attach some standard limitation or “clawback” clauses to certain rights (such as freedom of assembly and freedom of movement) for the purposes of protecting ‘national security, law and order, public health or morality.’ On foot of this, Mutua, interestingly, argues that a (higher threshold) general state of emergency derogation clause is unnecessary because the limitation clauses allow for the effective suspension of the particular rights to which they pertain. The Commission explicitly distinguishes the African human rights system in this regard, however, emphasising that the ‘African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations’. The extent to which this is a direct product of African experiences of European colonial states of emergency is unclear from the travaux préparatoires of the Charter. With the

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conceptualisation of the African Charter originating in the first Congress of African Jurists in 1961, and the drafting process concluding in 1981, however, it cannot be easily decontextualised from the recent history of colonial emergency rule across the continent, and the contemporaneous impact of, and resistance to, emergency law in apartheid South Africa.

Whether the elimination of emergency derogations from African regional human rights instruments is viewed as a progressive normative international legal development that departs from the influence of colonial legal doctrine or not, recourse to repressive state of emergency measures has, in any event, not been eliminated in ‘the modern African state, which in many respects is colonial to its core’.75 As such, struggles from below continue against emergency governmentality in Africa and throughout the global South.76 In Egypt, the protest movements that culminated in the occupation of Tahrir Square in 2011 were very much cognisant of the centrality of emergency law to the repressive functions of the Mubarak regime.77 It is not mere happenstance that the termination of Egypt’s longstanding state of emergency was placed second on lists of protestors’ demands, a neat segue between the primary objective of the fall of the regime and the more nebulous demands of freedom and justice.78 A variety of factors combined over time for

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75 Makau Mutua, ‘The African Human Rights Court: A Two-Legged Stool?’ (1999) 21 Human Rights Quarterly 343. ‘Although the African Charter makes a significant contribution to the human rights corpus’, the postcolonial state in Africa has been ‘such an egregious human rights violator that skepticism about its ability to create an effective regional human rights system is appropriate.’

76 Social movements and indigenous peoples in Latin American continue to be at the vanguard of resistance to states of emergency in the context of large-scale extractive industry projects. A 2013 study of protests around the world in the preceding seven years highlights a number of movements that were explicitly confronting state of emergency laws in contexts as diverse as lawyers’ dissent against mass dismissal of judges in Pakistan, and student actions against university corruption in Bangladesh. Isabel Ortiz, Sara Burke, Mohamed Barrada & Hernán Cortés, ‘Working Paper: World Protests, 2006-2013’ (Initiative for Policy Dialogue & Friedrich-Ebert-Stiftung, September 2013).

77 As one commentator put it: ‘If protesters viewed Mubarak as the ultimate villain in their conflict with the regime, then the state of emergency was the dark cloak in which he draped himself.’ Evan Hill, ‘Scorecard: Egypt’s army and the revolution’, Al-Jazeera, 30 June 2011.

this awareness of a somewhat technical legal issue to be etched into the Egyptian public consciousness, from the consistent use of emergency law against Mubarak’s political opponents to the mobilisation of social movements, trade unions and the human rights community around the rallying call of ending what had become a seemingly “endless” emergency. It remains to be seen whether the revolutionary process initiated in Egypt’s public squares will be recognised as the beginnings of a “real” emergency for the authoritarian ruling classes. What is clear and acknowledged is the influence of the Arab popular uprisings on the “indignados” and “Occupy” movements that emerged in response to the effects of the economic state of emergency in the global North. The south-north flow of such modes of resistance to emergency politics, from below, epitomises the abiding potential for a subversion of historical patterns of dominance.


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