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Emergency, Colonialism and Third World Approaches to International Law

It is, by now, a familiar mantra: we live in a permanent state of emergency. When the French government declared a state of national emergency in November 2015, following mass shooting and suicide bombing attacks in Paris, this was no dramatic new departure. In the larger scheme of things, it represented a continuance of established state security policy. Following the lead set by the British government over decades of habitual practice, France issued notices of derogation from its legal obligations to protect civil rights and political freedoms.[1] The mainstream human rights view suggests that such formal derogation from an international treaty sends 'a credible signal that rights restrictions are necessary and temporary, and that the government has publicly committed itself to returning to full compliance with its treaty-based pledge to respect civil and politics liberties'.[2] The rolling French derogations, however, are couched in typically vague and open-ended terms which fail to specify with any degree of precision the nature or scope of the derogation. This unveils the hollowness of those liberal legalist

[1] The emergency was extended and renewed by the French parliament in November 2015 (for three months), in February 2016 (for a further three months), in May 2016 (for a further three months), in July 2016 (for a further six months) and in December 2016 (for a further six months, and likely to be extended again). France submitted according notices of derogation from the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Notes Verbales from the Permanent Representation of France to the Council of Europe, dated 24 November 2015, 25 February 2016, 25 May 2016, 22 July 2016 and 21 December 2016, respectively. Depository Notifications from the Permanent Representation of France to the United Nations under Article 4(3) of the International Covenant on Civil and Political Rights, dated 23 November 2015, 25 February 2016, 22 July 2016 and 21 December 2016, respectively. UN Docs. C.N.703.2015.TREATIES-IV.4 (31 December 2015), C.N.538.2016.TREATIES-IV.4 (29 July 2016), C.N.565.2016.TREATIES-IV.4 (1 August 2016), and C.N.984.2016.TREATIES-IV.4 (9 January 2017), respectively.

[2] Emilie M. Hafner-Burton, Laurence R. Helfer and Christopher J. Fariss, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65:4 *International Organization* 673, 681.

rationales of necessity, balance, temporariness and judicial oversight. A French parliamentary commission of inquiry had concluded by July 2016 that the state of emergency's initial 'limited impact' on public security had 'quickly dissipated'.[3] And yet 'France's addiction to its state of emergency' continued.[4] For a bourgeois racial state apparatus, the point of the emergency paradigm lies not so much in its practical efficacy as it does in its capacity to perpetuate a sense of siege that justifies domination of its marginalised others.

From the outset, the state of emergency in France was swiftly (and unsurprisingly) characterised by its repressive function. Emergency powers were mobilised to shut down street demonstrations during the United Nations Conference on Climate Change in December 2015 and to issue assigned residence orders against environmental activists without charge or conviction. Coercive measures were also imposed under the emergency to restrict the activities of groups designated as 'radical left' by the French authorities, even where those authorities acknowledged that the targeted groups and their members did not present any threat to national security.[5] French administrative courts and the Council of State rejected appeals by environmental and left-wing activists against the unjustness of these emergency measures. The government proceeded to cast the net of emergency powers widely enough to shut down labour rights demonstrations, as well as to introduce drastic counter-terrorism provisions into the permanent criminal codes.

The predominant effect of the emergency law, however, has been the discriminatory and intimidatory persecution of Muslims in France: 'young people belonging to Arab or African minorities, particularly Maghrebis in low-income areas and housing projects'.[6] For those subjected to the widespread and invasive house raids, searches and arrests without warrants under the state of emergency, the 'emergency measures follow a blindfolded strategy. They primarily target Muslims, often

[3] Assemblée Nationale, 'Rapport fait au nom de la commission d'enquête relative aux moyens mis en œuvre par l'État pour lutter contre le terrorisme depuis le 7 janvier 2015', N° 3922, 5 juillet 2016.

[4] Nadim Houry, 'Breaking France's Addiction to its State of Emergency', *Open Democracy* , 13 March 2017.

[5] Amnesty International, *Upturned Lives: The Disproportionate Impact of France's State of Emergency*, AI Index EUR 21/3364/2016 (London: Amnesty International, 2016) 18–19.

[6] Didier Fassin, 'Short Cuts', 38:5 *London Review of Books* 23 (March 2016). Fassin highlights the fact that the 'selective application of the state of emergency' by French security forces is paralleled by a rise in far-right aggression against Muslims and mosques.

without any foundation.'[7] In this, and in the related French military interventions in Iraq and Syria, the echoes of empire continue to reverberate. The roots of the particular emergency legal framework mobilised by the French state in 2015 are located in Algeria in 1955,[8] and in the colonial emergency powers there which were imported back into mainland France by 1961. Arab Muslims in France were similarly the target then – of curfews and other emergency measures initially, and ultimately of the police massacre of those who defied the curfew to demonstrate in Paris on 17 October 1961.[9] In the post-colonial dynamic that has pertained since then, the continued marking out of racialised communities in France (like in Britain and elsewhere) as suspect is nothing new. Yet the narrative of newness resonates through the post-2001 language of the globalised war on terror and the repeated depictions of France's 'new normal'.[10] I invoke France here as my point of departure for the broader analysis in this book simply as the latest instance in which this 'new normal' paradigm has been projected. In thinking about what a global history of emergency rule might look like, however, the scenario of expansive emergency powers being used to stifle political movements and civil liberties is best understood more as normal, less as new.

On the Concept of History

The state of emergency, as a juridical–political form, can take on a range of different technical and ontological characteristics depending on the constitutional and epistemological tradition in which it is located. There has been much work done analysing and theorising martial law, the state of exception, emergency legislation, *l'état de siège* and other forms as they have manifested in various contexts – from Roman law doctrine to the response to the 1908 earthquake in Reggio Calabria; from the Weimar

[7] *Ibid*., 7. Of 3,289 searches recorded by February 2016, only five resulted in referral to the anti-terrorism prosecutor. Commission Nationale Consultative Des Droits De l'Homme, 'Statement of Opinion on the State of Emergency', 18 February 2016, §.16.

[8] *Loi n° 55-385 du 3 avril 1955 relatif à l'état d'urgence*. The full range of France's emergency law regimes are detailed further at the beginning of Chapter 3.

[9] Jean-Paul Brunet, *Police Contre FLN: Le drame d'octobre 1961* (Paris: Flammarion, 1999); Jean-Luc Einaudi, *La bataille de Paris: 17 octobre 1961* (Paris: Seuil, 1991).

[10] Letta Tayler, 'France's Emergency Powers: The New Normal', *Human Rights Watch*, 2 August 2016; Nic Robertson, 'Europe on the Edge: The New Normal', *CNN*, 28 July 2016; Martin Reardon, 'Paris and the New Normal', *Al-Jazeera*, 14 November 2015.

Constitution in inter-war Germany to the Patriot Act in 'forever war' USA, and so on. And within this analysis come the recitals of the permanent state of emergency: the amorphous wars against non-state terrorism; the cyclical crises of global capitalism; the series of 'natural' disasters that become ever more unnatural as we continue to mangle the planet's ecology; the migrant crisis, so-called, that fortress Europe has constructed for itself. As such, Walter Benjamin's description of the state of emergency as the rule rather than the exception is as relevant today as when he wrote it more than seventy-five years ago. But with each iteration, the perpetual emergency is reincarnated as something unprecedented – as the *new* paradigm, the *new* normal – thereby giving rise to the need for new (more repressive) legal powers for the state apparatus.

This sense of newness is misplaced. Benjamin's aphorism, from his eighth thesis on the concept of history, has been cited regularly in the post-2001 homeland security context to illustrate the idea of the exception *becoming* the rule with each new crisis event. The permanent emergency is typically framed as a novel paradigm shift in which traditional normalcy/emergency lines of distinction have now become blurred. This is often done, however, without sufficient appreciation of the full ambit of Benjamin's exegesis. It is the particular experiences and struggles that constitute the *tradition of the oppressed* which teach us that the state of emergency is convention, not exception – and that the supposedly new normal is in fact part of a continuing historical constellation of emergency control mechanisms. The widespread 'amazement that the things we are experiencing are "still" possible' is not grounded in historical consciousness or philosophical thought.[11] The permanence of the emergency is revealed to us not through the prevailing situation – whether that of capitalism's Great Depression and fascism's states of exception in Benjamin's inter-war context, or the global counter-terrorism paradigm, environmental disasters and periodic fiscal crises of our early twenty-first-century context – but through the tradition of the oppressed, who have been consistently subject to emergency rule as a form of political, cultural and economic subordination. Benjamin's concept of history is history not as linear sequence of past events, but as catastrophic constellation, as ever-blowing storm that continually infuses and reconditions our present and future. In this sense, the structural nature of the state of emergency is best understood through a historical

[11] Benjamin, 'On the Concept of History', 392.

materialist analysis of imperial and state power as embedded racial and class rule, rather than through any reactive and reductive analysis of 'new' contemporary events. To get to the nub of emergency power, we must immerse ourselves in the ongoing history of the oppressed and the generational struggles of the downtrodden as '[t]he subject of historical knowledge'.[12]

In seeking guidance from such history and its subaltern voices, this book offers an argument for the deconstruction of emergency governance as a colonial legal technique that has been absorbed into the lexicon of international law. It aims to make a contribution to the struggle against normalised emergency repression by recuperating scripts of resistance from traditions of the oppressed. The book sets out to situate emergency doctrine – as it applies across the institutional and constitutional planes of international relations, national security and political economy through to the more mundane registers of material existence – in colonial historical context, and to highlight the particular relevance of this for international law and for still-evolving settler colonial environments. I seek to show that emergency law has been (and remains) deeply implicated in settler coloniality and related processes of occupation, dispossession and discrimination. The precedent of concerted emergency rule under European colonialism demonstrates, in this context, a certain historical myopia within those assumptions and narratives of novelty that have permeated early twenty-first-century debates. In probing the nature of the relationship between imperialism, race and emergency legal regimes, however, the story told here does not purport to speak definitively to every aspect of the state of emergency. No account of such a pervasive doctrine and multifarious practice can reasonably claim to do so. Emergency doctrine, that 'mixture of history, politics and emotion',[13] cannot be reduced to any single lineage or linear narrative. The contribution of this book will be to expound on particular colonial constellations in the historiography of the state of emergency, to drill down into its constitutive racial components and to highlight it as a widespread and normalised, often banal, experience.[14]

[12] *Ibid*., 394.

[13] Joseph B. Kelly and George A. Pelletier, 'Theories of Emergency Government' (1966) 11 *South Dakota Law Review* 42.

[14] 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, even while much of its traditional apparatus remains present.

On Perpetual Emergency

With the attacks of 11 September 2001 and the ensuing onset of an expanded and globalised 'war on terror', the world was ushered into what was painted as an unprecedented scenario in modern history. Against that backdrop, South African writer J.M. Coetzee reflected on the political nature of his early novels, in particular the extent to which his depiction in *Waiting for the Barbarians* 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: 'All 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.'[15]

One's place in the sequence of history as linear time 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 concurrent to similar special powers deployed by the British government in the north of Ireland, to Israel's consolidation of emergency measures in Palestine, and to the Pinochet regime's use of state of emergency mechanisms to wage free-market war on Chile's social structures. And those measures were themselves following in the footsteps of a larger series of continuities and correlations, particularly in colonial legal systems. 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.[16] From the perspective of some critical Third World international lawyers, 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.'[17] It also belies the diagnoses of the state of emergency as an unprecedented new paradigm attached to 'counter-terrorism' and security discourses *after* 2001. Emergency powers were universal and endemic, a standard

[15] J.M. Coetzee, *Diary of a Bad Year* (London: Harvill Secker, 2007) 171.
[16] 'The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency', Report of Special Rapporteur Leandro Despouy, UN Doc. E/CN.4/Sub.2/1997/19, 23 June 1997, 44, paras. 180–181.
[17] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) 177.

instrument of coercion and control, well before 2001. When it comes to international legal regulation of emergencies, the sceptical view is that states typically 'do not hew to the oversight mechanisms demanded by human rights treaties'; they invoke emergency powers, but in a manner of 'disguised emergency'.[18] Emergency doctrine and the language of crisis have been purposefully deployed by the security state to whittle away civil rights protections, to shrink the space for political dissent and to erode anti-discrimination norms.[19]

By grounding the thinking and theorising of emergency, exception and necessity in social and historical context, therefore, we begin to understand emergencies as wide-ranging, dynamic, managed and layered processes that unfold and evolve over time, rather than as sudden and short-lived anomalous moments. In models of emergency that demonstrate the normalisation of special powers over time through ongoing and proliferating lawmaking processes – as opposed to sporadic sovereign suspensions of law – we come to see the 'prosaic politics of emergency' and the 'banality of emergency'.[20] State and imperial violence is not exceptional. It is simply an expression of the association between sovereign power and its discourses of security, rooted in the claimed monopoly on legitimate violence. In the colonial arena, the function of the state of emergency was to maintain the legitimacy and legality of that violence where it was intensified, and to frame the grievances of anti-colonial resistance as irrational and illegitimate violence. Emergency powers were not only about detention and curfews; their socio-economic function is revealed through complicity in dispossession and (settler) colonial sovereignty: the alienation and expropriation of land that was initiated by conquest was in many instances continued and consolidated by (often banal)

[18] Fionnuala Ní Aoláin, 'The Cloak and Dagger Game of Derogation', in Evan Criddle (ed.), *Human Rights in Emergencies* (Cambridge: Cambridge University Press, 2016).

[19] Benjamin Authers and Hilary Charlesworth, 'The Crisis and the Quotidian in International Human Rights Law' (2014) 44 *Netherlands Yearbook of International Law* 19, 30.

[20] Leonard C. Feldman, 'The Banality of Emergency: On the Time and Space of "Political Necessity"' in Austin Sarat (ed.), *Sovereignty, Emergency, Legality* (Cambridge: Cambridge University Press, 2010) 138. This terminology, of course, borrows from Hannah Arendt's *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking, 1963). Arendt's theory of the nature of totalitarian government and her description of individual 'cogs' in the administrative machinery of bureaucratised violence remain prescient. In a similar vein to the idea of the banality of emergency, Didier Fassin refers to 'petty states of exception' in the context of the policing of the urban poor in the French banlieues. Such petty states of exception are 'more numerous but also more threatening for democracies than is the grand state of exception in its Schmittian or Agambenian definition.' Didier Fassin, 'Petty States of Exception: Contemporary Policing of the Urban Poor', in Mark Maguire et al (eds.), *The Anthropology of Security* (London: Pluto, 2014) 104, 116.

emergency measures. Colonial sovereignty and emergency governance are connected in a blueprint for implementing control over land and resources, for disciplining labour and for discharging power over native body and life itself. On this basis, and borrowing from Patrick Wolfe's canonical explication of the structural nature of invasion and settler colonialism,[21] I suggest that the state of emergency is similarly better understood as structure rather than as event.

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'[22] – 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. The extent to which extraordinary powers should be allowed for in law, or proscribed by law, remains a point of friction. Do such powers compromise the integrity of law by crossing a legal rubicon of sorts, or, conversely, do they 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 Antony Anghie noting that the 'enduring and perhaps unresolvable problem arises from the paradox that the sovereign is both within and outside the law'.[23]

A historiography of emergency powers reveals their inscription over time into law. British colonial emergency measures, in particular, were marked by an emphasis on legalism that only deepened over the course of the imperial project: the early export of martial law to the plantations; the legislative codification of emergency powers in the nineteenth-century colonies; the default declaration of states of emergency around the empire in the 1940s and 1950s in a bid not to end, not to die, to prolong its era. Colonial emergency doctrine lives on through its

[21] Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999) 2–3.

[22] A.W.B. Simpson, 'General Editor's Preface' to R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005), vii.

[23] 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.

incorporation into the international legal corpus through various derogation regimes. The 'legitimating project of Western legality and its strained application to colonial exigencies'[24] can be seen as part of a totalising complex, in which emergency powers are not merely episodic and exceptional, but themselves form part of the legal order. In reflecting on how we have arrived at the point where the language, logic and process of emergency are so embedded, therefore, I explore how emergency doctrine – as it is now understood – crystallised within colonial legal systems from the early nineteenth century onwards. Its enduring implications are substantiated by the continuities and mimicries we see in various 'post-colonial'[25] 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 certain rights are facilitated by international law in contexts of self-declared public emergencies, derogation measures should 'not involve discrimination solely on the ground of race, sex, language, religion or social origin'.[26] Lived experiences and state practice, by contrast, show that emergency measures and race often continue to remain intimately entwined.

The policy of retaining emergency measures in a 'post-emergency' context also remains a regular feature of the national security legal landscape. I will show later in the book how this was done in the final pre-independence years in Kenya, and how this process is currently underway in Palestine and Australia. 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'.[27] Hussain emphasises certain mechanisms – the increasing use of (racialised) classifications of persons in the law, the emergence of intensely bureaucratic and administrative

[24] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003) 135.

[25] This terminology is adopted with reservation, wary of the over-simplification inherent in the implied temporal break from the colonial, discussed further below. '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 intellectual movements and scholarship.

[26] Article 4(1), International Covenant on Civil and Political Rights.

[27] Nasser Hussain, 'Hyperlegality' (2007) 10 *New Criminal Law Review* 514, 515.

facets of emergency law, the use of special tribunals and commissions – that contribute to 'hyperlegality' at work.[28] This hyperlegality typifies the contemporary security state and its 'multiplication of laws and legal categories'.[29] Related to this is the militarisation of policing and the seepage of armed conflict categorisations into domestic legal contexts via the counter-terrorism paradigm. Judith Butler shows that, in settings from Gaza to Ferguson, where the category of civilian is eviscerated and if civilians 'are now recast as security risks, or threats, or if their bodies are understood as weaponised, the sphere of civic protection is displaced by the protocols of war'.[30] Measures conceived and deployed in a wartime context are absorbed into domestic law enforcement. The policing of black lives, as well as the management of borders and economies, becomes militarised. Heightened security powers are normalised, urban police forces are kitted out in full riot gear with military-grade weapons, constitutional protections are abrogated and the legal regime systematically endeavours to retract the rights it is ostensibly obligated to defend.[31] Through all of this we can trace a process whereby emergency/military doctrines which developed in colonial/conflict contexts to control native/enemy bodies are written into international law and ultimately universalised and localised as acceptable.

On the Spectre of Colonialism

The question of whether, and in what ways, colonial history is germane to contemporary international political and legal debates remains a point of contestation.[32] For many, colonialism is an anomaly of the past, now corrected by processes of universalism and of no further relevance as a conceptual category. Brad Roth, for example, describes colonialism as a 'legal aberration' and argues that critiquing contemporary norms as

[28] *Ibid.*
[29] David Lloyd, 'Settler Colonialism and the State of Israel: The Example of Palestine/Israel' (2012) 2:1 *Settler Colonial Studies* 59, 75.
[30] Judith Butler, 'Human Shields' (2015) 3:2 *London Review of International Law* 223, 238.
[31] *Ibid.*, 239.
[32] Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Emmanuelle Jouannet, Hélène Ruiz-Fabri and Mark Toufayan (eds.), *Droit international et nouvelles approaches sure le tiers-monde: entre répétition et renouveau* (Paris: Société de Législation Comparée, 2013) 97–118.