

States of Exception? Sovereignty and  
counter-insurgency in British India,  
Ireland and Kenya *circa* 1810–1960

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I hereby declare that all work contained herein is my own:

For Mum & Dad  
For Norma, Jack & John  
And for Esmé

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## Abstract

This thesis is a comparative study of three different ‘crises’ of British foreign rule, spanning a 150-year period: *circa* 1810 to 1960. Arranged into three case studies, it surveys British encounters with Thuggee in early nineteenth-century India, the Irish Volunteers in early twentieth-century Ireland, and Mau Mau in mid-twentieth-century Kenya. Each crisis was figured as an extra-ordinary threat to state sovereignty. In turn, extra-ordinary legal measures—‘states of exception’—were introduced to try to suppress those seeking to contest or exit official claims of sovereignty over their lives. The intention of this thesis is closely to examine the three suppression campaigns in India, Ireland and Kenya in order to bring greater insight to the extent to which legal exceptions were foundational for British state sovereignty abroad in this period.

The thesis engages deeply with the theoretical work of two scholars (in particular) who have done much to re-think the nature of European, but not colonial, state power and social control in the post-Enlightenment period: Michel Foucault and Giorgio Agamben. As well as situating its reconsiderations of the three crises in British India, Ireland and Kenya in the context of their theoretical insights, this thesis therefore seeks substantially to reappraise the work of Foucault and Agamben in colonial and foreign contexts. To do so, it draws on a wide range of primary material, including: parliamentary debates and papers, official correspondence, administrative reports relating to crime and policing, trial records, judicial statistics, fictional works, newspaper articles, contemporary journals and other periodicals, memoirs, diaries and private papers. The ambition is to produce a wide-ranging historical survey of the ways in which departures from the posited norms of the ‘rule of law’ have articulated diverse forms of state power and social control in three markedly different British-administered polities abroad, and, moreover, to assess to what extent these ‘departures’ can be understood as exceptional.

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# Abbreviations, acronyms and glossary

## § Abbreviations and acronyms used in the main-body text

ADRIC	Auxiliary Division, RIC (also know as ‘the Auxies’)
ATC	anti-Thuggee campaign (in British India, <i>circa</i> 1829—40)
CI	Chief Inspector, RIC
CLPIA	Criminal Law and Procedure (Ireland) Act
CMA	Competent Military Authority
CO	Colonial Office
DC	District Commissioner
DDO	Delegated Detention Order
DMP	Dublin Metropolitan Police
DO	District Officer
DORA	Defence of the Realm Act
DORR	Defence of the Realm Regulations
ECHR	European Convention on Human Rights
EIC	East India Company (alternatively, Company)
GDO	Governor’s Detention Order
GHQ	General Head-Quarters
GOC	General Officer Commanding His Majesty’s Forces (Ireland)
IG	Inspector General, RIC
INV	Irish National Volunteers
IRA	Irish Republican Army
IRB	Irish Republican Brotherhood
KAR	King’s African Rifles
KAU	Kenya African Union
KKM	<i>Kiama Kia Muingi</i> (‘The Council of People’)
KPR	Kenya Police Reserve
MLA	Martial Law Area (in southern Ireland)
RIC	Royal Irish Constabulary
ROIA	Restoration of Order in Ireland Act
ROIR	Restoration of Order in Ireland Regulations

## § Abbreviations and acronyms used in the footnotes and the bibliography

Add. Mss.	Additional Manuscripts, BL
AG	Attorney General
AGG	Agent to the Governor-General
APAC	Asia, Pacific & Africa Collections, BL
Asst.	Assistant
BC	Board’s Collections
BCJC	Bengal Criminal and Judicial Consultations, APAC
BL	British Library (London)
Bodl.	Bodleian Library (Oxford)
Bodl. RH	Rhodes House (part of the Bodleian Library, Oxford)

CAB	Cabinet Papers
CBSC	Crime Branch Special Collections, INA
CMR	Confidential Monthly Report
CO	Colonial Office
Col.	Colonial
CPC	Colonial Policy Committee
CSORP	Chief Secretary's Office Registered Papers, INA
CUL	Cambridge University Library
DC	District Commissioner
Dept.	Department
DO	District Officer
GG	Governor-General
GOC	General Officer Commanding His Majesty's Forces
HC Deb.	House of Commons Debates
<i>IESHR</i>	<i>Indian Economic and Social History Review</i> (journal)
INA	Irish National Archives (Dublin)
IOR	India Office Records (held as part of the APAC)
IWM	Imperial War Museum (London)
JAG	Judge Advocate General
KNA	Kenya National Archives (Nairobi)
Magt.	Magistrate
Ms./Mss.	Manuscript/s
Mss. Eur.	European Manuscripts, BL
PC	Provincial Commissioner
PRO	Public Record Office (London)
S&NT	Sagar & Narmada Territories (central India)
Secy.	Secretary
Supt.	Superintendent
T&D	Thuggee & Dacoity (alternatively, <i>Thagi &amp; Dakaiti</i> ) Department
WO	War Office

## § Abbreviated sources used in the footnotes and the bibliography

Corfield Report	F. D. Corfield, <i>Historical Survey of the Origins and Growth of Mau Mau</i> , HC 1959—60, vol. x, Cmnd. 1030.
ER, 30 Nov. 1953	'Emergency Regulations made under the Emergency Powers Order in Council, 1939, incorporating all amendments as at the 30 <sup>th</sup> November, 1953', PRO CO 822/729.
Fairn Report	R. D. Fairn (chairman), <i>Report of the Committee on Emergency Detention Camps, With an Exchange of Despatches between the Secretary of State for the Colonies and the Governor of Kenya</i> (Nairobi: Government Printer, 1959).
Jeudwine papers	Lieutenant-General Sir Hugh Jeudwine, papers, IWM, 72/82/2.
<i>Ramaseeana</i>	William H. Sleeman, <i>Ramaseeana, or a Vocabulary of the peculiar</i>

*language used by the Thugs, with an introduction and appendix, descriptive of the system pursued by that fraternity and of the measures which have been adopted by the Supreme Government of India for its suppression* (Calcutta: G. H. Huttmann, Military Orphan Press, 1836).

- Rept. Parl. Del. 1954 *Report to the Secretary of State for the Colonies by the Parliamentary Delegation to Kenya, January, 1954*, HC 1953—54, vol. xi, Cmd. 9081.
- Strickland papers  
SRT General Sir Peter Strickland, papers, IWM 2626 P363. N. K. Sinha (ed.), *Selected Records Collected From the Central Provinces and Berar Secretariat Relating to the Suppression of Thuggee 1829—1832* (Nagpur: Government Printing Central Provinces & Berar, 1939).
- Wylie TS Typescript of unpublished autobiography in William Evelyn Wylie Papers, PRO 30/89/2.

## § Glossary

N.B. I have placed the relevant case study (relating to either British India, Ireland or Kenya) in which the foreign word is used in brackets after each definition.

- An tÓglach* ‘The Volunteer’: news-organ of the Irish National Volunteers (Ireland)
- askari* guard, soldier (Kenya)
- baraza* meeting (Kenya)
- Cumann na mBan* ‘Society of Women’: auxiliaries to the Irish Volunteers (Ireland)
- dacoit, dacoity* gang-robber or bandit, banditry (India)
- Dáil Éireann* ‘The Assembly of Ireland’: renegade parliament (Ireland)
- darogah* subordinate native police officer (India)
- foujdari* Mughal term for military executive governance (India)
- gikunia* African informants, shrouded by hoods or hessian sacking, used to identify Mau Mau suspects (Kenya)
- jemadar* leader of men, gang-leader (India)
- mbari* sub-clan, land belonging to a sub-clan (Kenya)
- mofussil* countryside or rural areas ‘up-country’ from Calcutta (India)
- naukari* military service (India)
- Nizamat Adalat* superior criminal court (India)
- nujeeb* armed horseman used as subordinate native police auxiliaries (India)
- panga* machete, widely used as an agricultural tool (Kenya)
- sati* self-immolation of widows (India)
- shamba* small plot of farmland or garden (Kenya)
- zamindar* landowner or petty-ruler (India)

\*

# Introduction

## § Departure

Recalling his journey through the East Africa Protectorate in 1907, a youthful Winston Churchill came to contemplate the nature of British colonial rule there: specifically, the nexus that seemed so readily to fasten order to law, moral reality to normative code, and thus make possible the ‘rule of law’. British order in the Protectorate was given forceful authority by adherence to lawful government, Churchill concluded—authority far more forceful than could be provided merely by possessing superior military might. To illustrate his point, Churchill imagined ‘native’ perceptions of government by the recently arrived tribe of white rulers:

The [African] tribesmen see that their ruler—to them all-powerful, the man of soldiers and police, of punishment and reward—is himself obedient to some remote external force, and they wonder what that mysterious force can be and marvel dimly at its greatness.<sup>1</sup>

Contemplating order and law then, Churchill here suggests that the latter trumps the former as a source of official authority. Indeed, the nexus between the two is enshrined as fundamental for peaceful government, appearing as the root of a paradox that Churchill believed he had solved: following the rule of law did not diminish British order in the Protectorate, but authorised it. Unjust laws and legal injustices soon emptied authority from the rule of law, Churchill noted, making it instead a ‘rough-and-ready practice dependent entirely for its efficiency and fairness upon the character and intelligence of the individual responsible’. Rule not hitched to law could be arbitrary and self-interested, its moral order non-justiciable. By contrast, rule through law was an intrinsically self-justifying basis for British dominion in east Africa.<sup>2</sup>

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<sup>1</sup> Winston S. Churchill, *My African Journey* (London: Hodder & Stoughton, 1908), p. 41.

<sup>2</sup> *Ibid.*, p. 40.

For Professor Albert Venn Dicey, the outstanding theorist of the English constitution during the later nineteenth century, the rule of law had three defining characteristics. First, men could be punished only for committing specific offences codified in law. Second, no man was above the law or the courts that applied it. Third, the constitution, such as it existed, was the agglomeration of judicial verdicts and precedents made on a case-by-case basis; it was synthetically made, by judges, not artificially, through legislation. The rule of law, then, was defined by a lack of arbitrary power, equality before the law, and a constitution produced by legal decisions that reacted to reality rather than trying to pre-empt it. An independent judiciary and an omniscient legislature would ensure that law-bound government functioned properly. For Dicey, the promise of the rule of law was that of legitimate public action by government, as celebrated by Churchill in the East Africa Protectorate.<sup>3</sup>

Churchill was by no means the first imperialist to reach the conclusion that the moral legitimacy of foreign dominion by British governments—in whatever way one might conceive of colonialism and sovereignty—was fostered by adherence to codified legal norms and unwritten constitutional injunctions. From at least the late eighteenth century onwards, British dominion abroad was repeatedly justified as a progressive force for change through references to a particular moral order of government rooted in a metropolitan constitution founded upon the rule of law. James Fitzjames Stephen, a political philosopher and barrister who served as a legal member for the Viceroy's Colonial Council in India from 1869 to 1872, was in no doubt regarding the legitimacy that government by the rule of law accorded to British dominion in the colonies. 'Government by law is the only real security either for life or property, and is therefore the indispensable condition of the growth of wealth', Stephens said, adding that:

...the establishment of a system of law which regulates the most important parts of the daily life of the people, constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical consequence which renders

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<sup>3</sup> Throughout the thesis, I will refer to Dicey's jurisprudential thinking as 'Diceyan'. A. V. Dicey, *Introduction to the Study of the Laws of the Constitution* (London: Macmillan & Co., 1889 [1885]), pp. 176–84.

it possible. ...Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.<sup>4</sup>

Stephens' evangelism about the rule of law is notable for the conviction in its ability to create a social order organised and managed by consent—hence, 'the establishment of a system of law' is a 'striking', 'durable' and 'solid' outcome of 'moral conquest'. This conviction alludes to a sense in which the rule of law operates untrammelled by, and as a corrective to, the base passions that direct the behaviour of uncivilised man: its truths are disinterested, impartial and universally valid—'it is a compulsory gospel which admits of no dissent and no disobedience'. Indeed, this notion of the 'bringing' of law to the colonies is indistinct from that of progress: exported to the colonies, Stephens argued, government by the rule of law would elevate foreign populations from the depths of anarchic disorder or liberate them from despotic authority; it would drive backward peoples into modern civil relations. Churchill's tribesmen would not forever marvel dimly: the light of the law would soon illuminate their moral worlds.<sup>5</sup>

In the course of the nineteenth century, and through the praxis of foreign dominion in diverse theatres of colonial government, the idea that British 'civilisation' was founded upon, and distinctive for, its commitment to the egalitarian tenets of the rule of law, and the endless, subtle adjustment of an unwritten constitution, became one of the most potent myths in the aetiology of the metropolitan political and social establishment. Since that time, it has been enshrined in classical conservative and liberal historiography.<sup>6</sup> Churchill's dimly marvelling tribesmen thus consent to foreign dominion because they recognise their rulers'

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<sup>4</sup> Note the imbrication of the rule of law with economic development. J. F. Stephen, 'Legislation under Lord Mayo', in W. W. Hunter, *A Life of the Earl of Mayo, fourth viceroy of India* (London: Smith, Elder, & Co., 1875), vol. 2, pp. 161, 168—9. For a later version of the arguments advanced by Stephen: Lord Lugard, *The Dual Mandate in British Tropical Africa* (London: Frank Cass, 1965 [1922]), pp. 536—69, esp. pp. 537, 546—7, 558.

<sup>5</sup> The assumptions behind the notion of British governments 'bringing' the rule of law to foreign territories falling under their administrative oversight may of course be critiqued on a number of levels—not least regarding the assumption (and historiographical construction) of a state of lawlessness prior to the colonial encounter. What matters here, however, is the particular sense of a British 'mission' to effect social change through the rule of law.

<sup>6</sup> See Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor, Mi.: University of Michigan Press, 2003), pp. 6—7.

subjugation to a still greater and more abstract economy of power, one that is ‘remote’, ‘external’ and ‘mysterious’: the rule of law. Yet—as suggested in Churchill’s musings—their consent is also marked by cognition of a visible, but latent, economy of coercive, corporeal and material power: one of ‘soldiers and police, of punishment and reward’. For Churchill, the British colonial order in the East Africa Protectorate represents a victory for the abstracted norms of law over the threatened or actual use of compelling physical force. In fact, the historical records of the institutional practices of British governments abroad during the nineteenth and twentieth centuries abound with examples of wild divergence from the idealised standards of the rule of law, of official solutions to unrest foregrounded in derogations from, or suspensions of, the law as the only viable means to maintain order, and of recourse to corporeal forms of coercive violence to defend the sovereign authority of the state against the private interests of disorderly subjects. Three such examples provide the basis of the case studies that form the main body of this thesis.

## § Thugs, the Irish Volunteers and Mau Mau

In their different ways, the criminal activities of Thugs, Irish Volunteers and Mau Mau presented not only distinct threats to British sovereignty in India, Ireland and Kenya during the nineteenth and twentieth centuries, but also seemed to threaten the very integrity of the British empire itself. This thesis examines various official responses to these challenges to British rule in India, Ireland and Kenya, *circa* 1810—1960, but focuses particularly upon the ways in which claims to sovereignty were elaborated and articulated through them. By way of introduction, the nature of the threats to British and imperial sovereignty presented by Thugs, the Irish Volunteers and Mau Mau are now outlined in greater detail.

The anti-Thuggee campaign of *circa* 1829—40 was inaugurated in India at a time when the East India Company (EIC or the Company) was becoming increasingly recognisable not as a mercantilist body, primarily concerned with opening-up the subcontinent to metropolitan trade in order to extract tribute for the Mughal Emperor and, more importantly, the British Crown, but a territorial

sovereign and an interventionist administrative power. This transformation in the political economy of the Company's presence in India was premised upon its claim to have established military and political paramountcy in the south Asian subcontinent by the late 1820s.<sup>7</sup>

From the late eighteenth century, under the governor-generalship of Richard Wellesley (1797—1805), the Company became more avowedly imperialist in India. Wellesley aimed to make the EIC the paramount political force in the subcontinent. In northern, western and central India, this brought its huge private armies into a series of conflicts with the confederation of Hindu warrior princes that had superseded the overstretched Mughal empire in the course of the eighteenth century: the Marathas. The Anglo-Maratha wars were fought over the first two decades of the nineteenth century, on the pretext of an alleged French-Maratha alliance that threatened north India with invasion by Napoleon's armies. In the period *circa* 1802—18, the Company's armies won a succession of victories and it was able both to hem the leading Maratha princes (Daulat Rao Scindia and Yeshwant Rao Holkar) into the north-western regions of the subcontinent, and to divide them from erstwhile allies further to the south, including the native rulers of Nagpur and Hyderabad. By the close of the 1810s, the Company had established itself as the paramount political formation in north India.<sup>8</sup>

As the Company established itself as the dominant political power in former Maratha regions of north India throughout the early nineteenth century, it faced the challenge of attempting to transform war-torn social and ecological landscapes into

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<sup>7</sup> The Government of India was established in 1834 by a new Charter Act (3 & 4 Will. IV, c. 85), passed in 1833. Previously—since the Regulating Act of 1773 (13 Geo. III, c. 63)—Fort William's governor-general, in Bengal, had limited supervisory powers over the presidencies of Madras and Bombay. For the elaboration of British paramountcy: 'Bentinck's minute on the defence of India', 29 June 1832, and 'Bentinck's minute on British prestige', 5 Aug. 1833, in C. H. Philips (ed.), *The Correspondence of Lord William Cavendish Bentinck, Governor-General of India 1828—1835* (Oxford: Oxford University Press, 1977), vol. II, pp. 846—7 & pp. 867—8, respectively. For the development of the Company's colonial 'state' in India, *circa* 1757—1830: C. A. Bayly, *Indian Society and the Making of the British Empire* (Cambridge: Cambridge University Press, 1988), chs 3 & 4.

<sup>8</sup> This paragraph and the next one drawing on: Bayly, *Indian Society*, pp. 94, 97—103; Sugata Bose & Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy*, 2<sup>nd</sup> edn. (Oxford: Oxford University Press, 2004), pp. 49—50, 94, 97—103; Crispin Bates, *Subalterns and Raj: South Asia since 1600* (London & New York: Routledge, 2007), pp. 37—40; C. A. Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion* (Cambridge: Cambridge University Press, 1983), esp. pp. 20, 52, 219—21, 318.

ones that could generate a stable and consistent source of land revenue. It was a formidable undertaking. In these far-flung regions of north India, the Company's representatives had to come to terms with a population skilled in the use of arms, deriving powerful identities (and thus political capital) through the use of them, and prepared to use strategies of armed conflict to negotiate with untrustworthy outsiders attempting to tie them into networks of relations with larger, external powers. Unsurprisingly, British attempts to demilitarise the politics and society of north India, and to clamp inhabitants into the role of subordinate revenue-generators met with great resistance in the early nineteenth century.

For the British, seeking to 'pacify' former Maratha-controlled regions after the defeat of the main confederacy in 1803, perhaps the most immediately menacing consequence of fracturing the militarised peasant society of central north India was the emergence of a body of horseman known as the Pindaris. To the Marathas, the Pindaris were a mercenary body of 20—30,000 cavalymen whose raiding powers were used to overawe otherwise restive villagers and bring swift financial dividends by the looting of their homes, livestock and crops. To the British, the Pindaris were hordes of predatory freebooters, 'swarms of locusts' in the words of one senior administrator.<sup>9</sup> These raiders despoiled plains communities before vanishing over the horizon, back to the comparatively inaccessible tracts of land in the Malwa and Doab regions, north of the river Narmada, the territories with which the Marathas had rewarded their chiefs' faithful service. Largely unemployed in the wake of the Marathas' defeat, bands of these irregular horsemen carried out increasingly bold attacks on domains in central India that were indirectly under British control by the early nineteenth century, before being finally disbanded during a concerted suppression campaign in the years 1816—18.<sup>10</sup> The terrain on which the suppression campaign of the Pindaris was carried out directly accords to those areas of India where the Thuggee problem appeared to be most acute, both in the 1830s, and, before that, in a period roughly between 1808 and 1812. It is open to conjecture that

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<sup>9</sup> John Malcolm, *A Memoir of Central India, Including Malwa, And Adjoining Provinces. With The History, And Copious Illustrations, Of The Past and Present Condition of That Country* (London: Parbury, Allen, & Co., 1832 [1823]), vol. I, p. 428.

<sup>10</sup> For details of Pindari raids and the British campaign to halt them, see M. P. Roy, *Origin, Growth and Suppression of the Pindaris* (New Delhi: Sterling Publishers, 1973), esp. pp. 102, 107, 110—12, 119, 129—32, 141, 181—3.

many groups who had found armed service as mercenaries with the Marathas turned to banditry as their paymasters' confederacy was dismantled.<sup>11</sup> In the Ceded and Conquered Provinces, in the period of the immediate aftermath of the Anglo-Maratha wars and during the British attempt to overcome the Pindari threat, the line between service as a mercenary soldier and membership of a bandit gang indeed seems to have been extremely hazy. It was in this context that the earliest British encounters with Thugs in north India occurred.

British investigations into Thuggee would prove as shattering to Company officials' sense of control over Indian society as they would galvanise their desire to reform it. In the early 1800s, when it was first encountered in parts of north-west India, British magistrates thought that Thuggee was a localised and specific form of highway robbery. By the 1830s, it had been re-imagined as a secret, pan-Indian conspiracy by which Thugs, murderous devotees of the Hindu goddess Kali, inveigled and strangled thousands of indigenous travellers each year. The existence of such a seemingly vast and ancient network of murderers, and the apparent impunity with which they perpetrated their crimes, severely jeopardised contemporary British claims that colonial rule under the auspices of the Company could bring Indians greater security from the violent depredations of bandit groups, and, moreover, that the apparent establishment of internal peace would now allow India to reap the benefits of a government by enlightened, progressive rulers. 'Extirpating' Thuggee, as those campaigning for its suppression described the task before them, would not only save countless Indian lives, but would allow for a deeper percolation of colonial codes for prosperous and peaceful governance into the polity of British India.<sup>12</sup>

The discovery and suppression of Thuggee was not only a sensation in British India during the 1830s, but in the metropolis too, continuing to provide a source of

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<sup>11</sup> This is the thesis advanced by S. N. Gordon in his, 'Scarf and Sword: Thugs, Marauders, and State Formation in Eighteenth-Century Malwa', *Indian Economic and Social History Review* [hereafter, *IESHR*], vol. 6, no. 4 (1969), pp. 403—29. For more on the effects of the Company's defeat of the Marathas on the military labour market of north India: D. H. A. Kolff, *Naukar, Rajput and Sepoy: the ethnohistory of the military labour market in Hindustan, 1450—1850* (Cambridge: Cambridge University Press, 1990).

<sup>12</sup> For British desire to 'extirpate' Thuggee see, for example, H. H. Spry, *Modern India; with Illustrations of the Resources and Capabilities of Hindústan* (London: Whittaker & Co., 1837), vol. II, pp. 155—73.

fascination throughout the nineteenth century and beyond.<sup>13</sup> Thus, when J. W. Kaye wrote his Whiggish opus on (what he saw as) the Company's progressive rule of India, he reminded readers that:

...after due consideration by the supreme Government of India, [it was determined] to make the case of Thuggee an exceptional case, and to sanction a relaxed application of existing laws and regulations to members of the great fraternity of Thugs. ...A few English officers, acting under the orders of the supreme administrative authorities, have purged India of this great pollution. If we have done nothing else for the country, we have done this one good thing.<sup>14</sup>

Yet if the apparent successes of the campaign to suppress Thuggee chimed with triumphalist characterisations of British imperialism in the later Victorian era—as enlightened, progressive and civilising—the existence of Thuggee also spoke to an array of bourgeois anxieties.<sup>15</sup> One Samuel O'Sullivan, a Dublin-based reviewer of the best-selling novel *Confessions of a Thug* (1839), which he took as a factual account of the special policing operations in India, worried that this 'Indian' form of crime was disturbingly familiar. To O'Sullivan, the activities of Thug gangs seemed to bear an uncomfortably close resemblance to those of the rural secret societies that had been

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<sup>13</sup> Captain William Sleeman (of whom much more later), the British officer credited with uncovering the full enormities of Thuggee during the 1830s, published several quasi-ethnographic studies of 'Thugs', which, by the early twentieth century, had been fully naturalised as the grounds for their recognition as a distinct 'tribe'. See entry under 'Thug', in R. V. Russell and Rai Bahadur Hira Lal, *The Tribes and Castes of the Central Provinces of India* (London: Macmillan, 1916), vol. 4, pp. 558–87. Sleeman's accounts were copied and republished as popular histories throughout the later nineteenth century and early twentieth century. See, for examples: Edward M. Thornton, *Illustrations of the History and Practices of the Thugs. And Notices of Some of the Proceedings of the Government of India, for the Suppression of the Crime of Thuggee* (New Delhi: Asian Educational Services, 2000 [1837]); James Hutton, *A Popular Account of the Thugs and Dacoits, The Hereditary Garotters and Gang-Robbers of India* (London: W. H. Allen & Co., 1857); James L. Sleeman, *Thug, or a Million Murders* (New Delhi: Pilgrim Books, 1998 [1933]).

<sup>14</sup> J. W. Kaye, *The Administration of the East India Company: A History of Indian Progress* (London: Richard Bentley, 1853), pp. 375–6; in general, ch. 2.

<sup>15</sup> For more: Letters to the Editor, *The Times*, 16, 17 & 19 July 1851; John Marriott, *The Other Empire: Metropolis, India and Progress in the Colonial Imagination* (Manchester & New York: Manchester University Press, 2003), esp. chs 5 & 7.

the scourge of state authority in Ireland since the late eighteenth century.<sup>16</sup>

O'Sullivan asked:

What is ribandism [Ribbonism] but a species of political Thuggee, in which the conspirators are of one religion, and bind themselves, by an oath of blood, to the extermination of all from whom opposition to their evil designs might be apprehended? These conspirators are confederated for purposes which could not be avowed without bringing down upon them the vengeance of the law; and if the Thugs are their superiors in the article of safe and expeditious murder, they are immeasurably beyond Thugs in the article of skilful perjury, by which they make the very forms of law contribute to defeat the ends of justice.<sup>17</sup>

Ribbonism is here equated to Thuggee because both conjure a specific set of concerns, which, *inter alia*, relate to scepticism about the competence of the state and its laws as a level and relation of power that can guarantee effective social control.

O'Sullivan's worry was that the codified prescriptions and procedural norms associated with the rule of law could not fully legislate in advance either for all forms of crime, or for the lengths to which some criminals might go to evade justice.

Alternatively: that in Ireland, as in India, drastic rural inequalities produced criminal acts so extraordinary that strict adherence to the rule of law in fact compromised the state's ability to punish their perpetrators.

Undoubtedly, agrarian crime preoccupied the attention and resources of the authorities in Ireland throughout the nineteenth century.<sup>18</sup> Indeed, this official preoccupation gives sharp insight into the strategic imperatives underpinning government policy in later nineteenth-century Ireland. Agrarian 'outrages', as they

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<sup>16</sup> The generic name for these youthful associations of rural rebels, 'Whiteboyism', gave way to 'Ribbonism' in the nineteenth century. Essentially preservationist in aim, such associations—which took a wide array of names—offered peasants crude insurance against the upsettingly anti-social intrusions of outsiders, whether these appeared as competitors for land access or as the extractors of tithes and dues. See G. C. Lewis, *On Local Disturbances in Ireland; and on the Irish Church question* (London: B. Fellowes, 1836), esp. pp. 212–36, 306–7.

<sup>17</sup> Samuel O'Sullivan, 'Thuggee in India and Ribandism in Ireland', *The Dublin University Magazine: a literary and political journal*, vol. 15, no. 85 (Jan. — June 1840), p. 59.

<sup>18</sup> Agrarian crimes were counted separately; statistical analyses of these data assiduously compiled; policies based on them debated at length. See, in particular, Charles Townshend, *Political Violence in Ireland: Government and Resistance since 1848* (Oxford: Clarendon Press, 2001), chs 1 & 2.

were termed, connoting the moral horror they provoked, were attributed to clandestine groups of dissident, oathbound youth. Unlike other felonies, they were held to imply challenges to extra-local and abstracted forms of state authority in the countryside. If they went unchecked, that authority might evaporate entirely, with the cost being control of the island itself.<sup>19</sup> At the behest of the British government (to which their relationship had been formalised, as one of subjugation, by the 1800 Act of Union), the Irish authorities therefore introduced a series of Coercion Acts during the nineteenth century. This sequence of legislation articulated the belief that, particularly through the intimidation of witnesses, jurors and judges, the youthful perpetrators of agrarian ‘outrages’ worked to corrupt the rule of law in Ireland, grossly undermining the state’s sovereign authority.<sup>20</sup>

The frequent enactment of repressive criminal laws set the tone for one half of the British state’s answers to the so-called ‘Irish question’ in the later nineteenth century—answers characterised then and since as a mixture of ‘kicks’ and ‘kindness’ (the latter manifested as limited religious, political and socio-economic reforms).<sup>21</sup> Rather than stamping-out either rural unrest or political violence, however, the ‘kicks’ helped persuade socially threatened and politically malcontent men to make their revolutionary vows in still greater secrecy and to adopt novel strategies of protest against the British government and the Irish authorities. The Irish Republican Brotherhood (IRB), formed in 1858 and whose members the authorities soon knew as ‘Fenians’, was among the first of Ireland’s nineteenth-century ‘secret societies’ to evolve cellular forms of terrorist organisation and to commit itself to the emancipatory politics of Republican insurrection rather than seeking to win further

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<sup>19</sup> This preoccupation was shared by the Company in early nineteenth century India. As Sandria Freitag has demonstrated, the British authorities’ insistence that colonial sovereignty must be realised as a unitary, centralised and exclusive locus of socio-political authority in India entailed their obsession with combating violent forms of ‘public crime’, such as Thuggee. See Sandria B. Freitag, ‘Crime in the Social Order of Colonial North India’, *Modern Asian Studies*, vol. 25, no. 2 (1991), pp. 227–61; ‘Collective Crime and Authority in North India’, in Anand A. Yang (ed.), *Crime and Criminality in British India* (Tucson, Ari.: University of Arizona Press, 1995).

<sup>20</sup> Though passed in 1800, the Act of Union was not implemented until the following year. The catalogue of coercive legislation used in late eighteenth- and nineteenth-century Ireland is lengthy. For sustained analysis: Townshend, *Political Violence*, chs 1–5.

<sup>21</sup> ‘Kicks and kindness’: *ibid.*, esp. chs 3–5.

concessions from Westminster.<sup>22</sup> However, by the early twentieth century, it appeared that constitutional reform—‘kindness’—had generated a broadly satisfactory answer to the Irish question, at least in the 26 counties of the island lying without Ulster Province. With the House of Lords’ veto powers having been overturned, a third bill for Irish Home Rule, granting Irishmen limited self-government, was finally passed in 1914, though its implementation was postponed until after what many expected to be a short-lived war in continental Europe.<sup>23</sup> In Ireland, the generational inheritors of the youthful energies of late nineteenth-century Fenianism voted for constitutionalism with their feet. In late 1914, around 150,000 members of the hugely popular Irish National Volunteers (INV) pledged to support Britain’s fight to defend the sovereignty of Belgium—to Irish nationalists, a fellow ‘small nation’—against German invasion, on the basis that Home Rule would follow victory over the Kaiser’s forces.<sup>24</sup>

In line with a common maxim of Irish radicals in the later nineteenth century, ‘England’s difficulty’—unexpectedly prolonged and bloody British and Irish involvement in industrialised world war—soon became ‘Ireland’s opportunity’. This opportunity appealed to both the cabbalistic IRB and its more open support-base: the Irish Volunteers, the rump of the INV that had not pledged to support what, in late 1914, had looked to its members like an imperial war that would expend Irish lives to entrench British interests.<sup>25</sup> Led by the IRB’s Military Council, the Irish Volunteers attempted to launch a nationwide insurrection in Ireland on Easter Monday 1916. For the following five years, soon acting in concert with an

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<sup>22</sup> For Irish secret societies: T. Desmond Williams (ed.) *Secret Societies in Ireland* (Dublin: Gill & Macmillan, 1973). For the genesis of the IRB and ‘Fenianism’: Owen McGee, *The IRB: The Irish Republican Brotherhood from the Land League to Sinn Féin* (Dublin: Four Courts Press, 2005), esp. introduction & ch. 1; R. Vincent Comerford, *The Fenians in Context: Irish Politics and Society 1848–82* (Dublin: Wolfhound Press, 1998 [1985]), chs 2–7.

<sup>23</sup> Government of Ireland Act (1914), 4 & 5 Geo. V, c. 90.

<sup>24</sup> Although, *inter alia*, the enthusiasm for volunteering also measured fears stirred by the growth of the Ulster Volunteer Force, formed to oppose Home Rule. By May 1914, the Ulster Volunteer Force counted 85,000 members—a third of the province’s adult male population—and had illegally imported 25,000 rifles. Drawing on: Joost Augusteijn, *From Public Defiance to Guerrilla Warfare: The Experience of Ordinary Volunteers in the Irish War of Independence* (Dublin: Irish Academic Press, 1996), pp. 43–51; David Fitzpatrick, *The Two Irelands, 1912–1939* (Oxford: Oxford University Press, 1998), pp. 46–9; Alvin Jackson, *Ireland 1798–1998: Politics and War* (London: Blackwell, 1999), pp. 195–214.

<sup>25</sup> For more: Charles Townshend, *Easter 1916: The Irish Rebellion* (London: Penguin, 2006), chs 3 & 4.

increasingly popular Republican political party, *Sinn Féin* ('Ourselves Alone'), members of the Volunteers conducted an increasingly vicious insurgency against British Crown Forces in Ireland, aiming to establish independence. This insurgency threatened to derail Home Rule and, at the very least, bifurcate Ireland<sup>26</sup>, ending the British political establishment's claims to unitary sovereignty within the UK.

Worse yet, in the post-First World War period, 'England's difficulty' was by no means confined to the challenge of crushing Irish Republican insurgency. Domestically, the British government was tackling extensive labour unrest and huge unemployment. Abroad, it was involved in profound military and diplomatic crises in Mesopotamia, Egypt and Somaliland. Extensive deployments of British troops were supporting counter-revolution in Russia and had been placed on standby in Constantinople, Syria and Germany.<sup>27</sup> Yet perhaps above all, suppressing revolt in Ireland was given greater gravity by the growing weight of support for anti-colonial nationalism in British India. The campaign to restore order and law in Ireland was not only staked on upholding the sovereignty of the Westminster executive throughout the UK, but on the preservation of British imperial dominion elsewhere.<sup>28</sup>

If the rising tide of Indian nationalism, in particular, added an imperial dimension to the British suppression of Irish Republican insurgency *circa* 1916—21, these waters had broken by 1952, when a State of Emergency was declared to help restore order in parts of colonial Kenya. 'Mau Mau' atrocities against Africans and Europeans, which had spiralled since the late 1940s, precipitated this momentous decision in October that year. From late 1952, the Mau Mau conflict escalated and,

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<sup>26</sup> If it was assumed that Republicans could only ever succeed in provincialising the sovereign claims of northern Unionists, not in conquering Ulster by force.

<sup>27</sup> See Richard Bennett, *The Black and Tans* (London: Four Square Books, 1963 [1959]), p. 18.

<sup>28</sup> For the British establishment's stress on the need to defeat the Irish Volunteers to retain imperial integrity: Keith Jeffrey (ed.), *The Military Correspondence of Field Marshal Sir Henry Wilson, 1918—1922* (London: The Bodley Head, 1985), pp. 272—3, 275—80, 286—7, 323—4, 336—9; Keith Jeffrey, *Field Marshal Sir Henry Wilson: A Political Soldier* (Oxford: Oxford University Press, 2006), pp. 234—5, 253—4, 263. Irish Republicans frequently attempted to vitalise their cause by insisting that it be seen in an imperial context. See, for examples: Erskine Childers, *Military Rule in Ireland: A Series of Eight Articles contributed to The Daily News March—May, 1920* (Dublin: Talbot Press, 1920), p. 7; 'The Imperial Road to Ruin', in *News Letter of the Friends of Irish Freedom. National Bureau of Information*, vol. II, No. 23 (Washington D.C.; Dec. 1920), Crime Branch Special Collections [hereafter, CBSC], Other Police Reports, 1882—1921, Box 5, Irish National Archives (Dublin) [hereafter, INA].

backed by the Colonial Office in Whitehall, the Kenyan government mobilised native African ‘loyalists’, European settlers and the British military to defeat the guerrilla fighters of the Kenya Land and Freedom Armies in an infamously ‘dirty’ war that lasted until late 1956.<sup>29</sup> Yet in many ways, the rapid suppression of Mau Mau was given urgency by the success of the Indian nationalist movement, which had led to a handover of power in the subcontinent in 1947 and a fear that copycat demands for independence would now be made elsewhere in the empire.<sup>30</sup> By the summer of 1952, the Kenyan government understood Mau Mau to be the militant face of Jomo Kenyatta’s Kenya African Union (KAU), advocating pan-African demands for independence ‘on the Gold Coast model’; that is, replicating the protest politics of Kwame Nkrumah’s Convention People’s Party.<sup>31</sup> To the colonial authorities, Mau Mau thus offered not only a direct challenge to state power throughout Kenya—by corralling the antipathy of Kikuyus and other ‘tribes’ to the racial inequalities of African dominion by Europeans—but a still uglier spectre: the dissolution of British interests throughout Africa.<sup>32</sup>

The desire to reassert British colonial sovereignty in Kenya by defeating Mau Mau was given further complexity by the contradictory nature of the state-formation that had evolved there, a consequence of the particular political economy of rule

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<sup>29</sup> For the guerrilla war: David Anderson, *Histories of the Hanged: Britain’s Dirty War in Kenya and the End of Empire* (London: Phoenix, 2006), esp. ch. 6.

<sup>30</sup> For more on the geo-political implications of Mau Mau for UK foreign policy: Interview of Secretary of State for the Colonies with Alfred Vincent, 31 Oct. 1952, PRO CO 822/461; A. S. Cleary, ‘The Myth of Mau Mau in its International Context’, *African Affairs*, vol. 89, no. 335 (1990), esp. pp. 229–36.

<sup>31</sup> H. E. Potter, Chief Secy. Kenya Govt., to P. Rogers, Colonial Office [hereafter, CO] Head of East Africa Dept., 17 Aug. 1952, Public Record Office (London) [hereafter, PRO] CO 822/436/23. In 1953, Kenyatta was convicted on the grounds of leading Mau Mau, which was depicted at his trial as a violent and subversive anti-colonial nationalist movement fronted by the KAU. For analysis: John Lonsdale, ‘Kenyatta’s trials: breaking and making an African nationalist’, in Peter Coss (ed.), *The Moral World of the Law* (Cambridge: Cambridge University Press, 2000), esp. pp. 221–39. For a synopsis of post-Second World War independence movements and decolonisation in British Africa: Paul Nugent, *Africa Since Independence: a comparative history* (Basingstoke: Palgrave Macmillan, 2004), pp. 23–41.

<sup>32</sup> Mau Mau’s supporters were by no means exclusively Kikuyu, while the Kenyan government was frequently anxious that Mau Mau might find constituencies among other African peoples. See, for example, E. Baring, Governor Kenya, to O. Lyttleton, Colonial Secretary [hereafter, Col. Secy.], 10 Oct. 1952; and draft letter by Rogers, CO, 11 Oct. 1952, both in PRO CO 822/443. For British fears regarding pan-Africanism: War Office, ‘Report of the Internal Security Working committee’, 12 Nov. 1951, PRO WO 276/519. See also Anderson, *Histories*, esp. introduction.

elaborated in British East Africa in the first half of the twentieth century.<sup>33</sup> From the late nineteenth century, a railway was built between Mombasa, on Kenya's eastern coastline with the Indian Ocean, and the shore of Lake Victoria, six hundred miles to the west. To generate revenues that would help service the enormous debt incurred by constructing what tabloids called the 'Lunatic Line', settlers from Britain, elsewhere in Europe and South Africa were induced to come to what was then the East Africa Protectorate (and, from 1920, the Protectorate and Colony of Kenya) throughout the early twentieth century. The majority of them staked out land-holdings on the elevated plateaus of the Rift Valley, north-west of Nairobi, and around Mount Kenya, to the capital's north. Assisted by the government's salaried, native 'chiefs', they sought African farmhands to help prepare it for cultivation, subsequently retaining them to reap its profitable fruits. Thus, Britain's colonial state-formation in early twentieth-century Kenya was marked by its deep, structural entanglement in settler politics, and its relatively poor leverage against European, as against African and Asian, communities.<sup>34</sup>

What became known as Kenya's 'White Highlands' were actually black. By the early 1950s, an estimated four hundred thousand Africans lived and worked there, more than half of them Kikuyu. The Kenyan government and the colony's thirty thousand or so European settlers alike knew these migrants as 'squatters'.<sup>35</sup> If

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<sup>33</sup> This paragraph and the next two drawing on: Carl G. Rosberg & John Nottingham, *The Myth of 'Mau Mau': Nationalism in Kenya* (New York: Meridian, 1970), pp. 11, 19–22; Tabitha Kanogo, *Squatters and the Roots of Mau Mau* (London: James Currey, 1987), chs 1–5; David W. Throup, *Economic & Social Origins of Mau Mau, 1945–53* (London: James Currey, 1987), esp. ch. 5; Bruce Berman & John Lonsdale, 'Coping with the Contradictions: The Development of the Colonial State 1895–1914', in *idem.*, *Unhappy Valley: Conflict in Kenya & Africa; Book 1: State & Class* (Oxford: James Currey, 1992); John Lonsdale, 'The Moral Economy of Mau Mau: Wealth, Poverty & Civic Virtue in Kikuyu Political Thought', in Bruce Berman & John Lonsdale, *Unhappy Valley: Conflict in Kenya & Africa; Book 2: Violence & Ethnicity* (Oxford: James Currey, 1992); Caroline Elkins, *Britain's Gulag: the brutal end of Empire in Kenya* (London: Pimlico, 2005), ch. 1.

<sup>34</sup> A simple measure of the inequality of political power is the distribution of non-government seats on Kenya's legislature, the Legislative Council (or LegCo). By 1951, where Europeans could select eleven representatives, Africans were represented by four nominees chosen by the colony's governor.

<sup>35</sup> For convenience, 'Kikuyu' is used to refer also to the related, Kikuyu-speaking, Embu and Meru peoples, concentrated in Native Reserve districts in the north-east of the Central Province during the colonial period. Estimates on the size of the Kikuyu and settler populations based on: Michael Blundell, leader of the European Elected Members in Kenya's Legislative Council (LegCo) to the Editor, *New Statesman and Nation*, 14 Dec. 1952,

that moniker consciously sought to degrade African claims to property within a capitalist framework of land ownership, it also betrayed profound ignorance of the grave social risk taken by many Kikuyus in migrating to the uplands west of their established homes. Uprooting from what British administrators demarcated as Kenya's Central Province, and transferring one's household to new sites in the Rift Valley Province, forfeited the insurance of claims to the use of ancestral *mbari* (sub-clan) land. Dramatic population growth during the first half of the twentieth century furthermore rendered these tracts formidably overcrowded, effectively weakening any returning emigrants' claims to them.

In the meantime, white dominance over black labour, secured through Europeans' monopolistic access to the machinery of the colonial state, progressively increased. By the mid-1940s, European settlers controlled the Rift Valley's district councils and thus had great autonomy in shaping the region's agricultural and labour policy. Insisting that their former co-clearers and now co-cultivators of the highlands were tenanted labourers, not landed proprietors, they kept Africans' wages low and extracted growing annual levies of compulsory work from them. Within the mainstream Kikuyu social cosmology, this led to increasingly bleak prospects for self-realisation—to be obtained by managing farmland, raising a family, and providing for dependants (be they spiritual, ancestral, or very much present). In response, some Kikuyu tried to barge their way back into the Native Reserves of the Central Province. Others evolved more radical strategies of resistance. Many younger squatters became a crucial constituency for the reactionary politics of ethnic kinsmen from Nairobi who, from the late 1940s, brought them oaths of solidarity against white oppressors. Settler communities and provincial officials were alike appalled when they learned of these oaths. The colonial state was now urgently called upon to mediate the struggles for land access and communal and personal self-mastery that had emerged between the European and Kikuyu colonists of Kenya's highlands.

In Nairobi and London, particularly in the post-Second World War period, the economic and political ambitions of Kenya's 'squatters' were by no means the only perceived threat to British sovereignty in the colony, however. If anything, the interests of white settlers offered a still more formidable and likely source of

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Sir Michael Blundell Papers [hereafter, Blundell papers], Rhodes House (Oxford) [hereafter, Bodl. RH], Mss. Afr. s. 746/12/7, f. 50.

challenge. By the mid-twentieth century, and with increasing vehemence, settler leaders were petitioning for the extension of European dominion in the colony, reviving earlier plans for a federation of Kenya, Uganda and Tanganyika, with white rulers at the helm. When Mau Mau supporters began targeting settlers for arms and ammunition in the early 1950s, Kenya's white farming communities saw in such attacks—many of them gruesome, some of them fatal—evidence of the need to extend their racialised control of the state machine as protection against the grasping hands of uncivilised Africans. Moreover, when a State of Emergency was declared in Kenya in late 1952, what looked like enlarged white settler-states had already appeared on other horizons of African geo-politics: in 1948, the National Party had been elected to govern South Africa; in 1951, it was agreed that Southern Rhodesia would be federated with Northern Rhodesia and Nyasaland. Giving Kenya's settlers a free hand in defeating Mau Mau might therefore bring to waking life the nightmare of white supremacist claims for rule in British East Africa, ending new dreams for a multiracial state underpinned by the policies of economic development. If the emergency precipitated by Mau Mau was characterised by draconian attempts to reassert state sovereignty over the lives of unruly African subjects, the Kenyan government's actions were stalked by the shadows of what frequently appeared to be over-mighty European settlers.<sup>36</sup>

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In responding to the threats to British sovereignty posed by Thugs, Irish Volunteers and Mau Mau, law and order frequently appeared as conjoined twins in the minds of British rulers: detached from law, order would wither; if order failed, the law would be unable to support itself. The relationship between these conjoined twins and a third figure was rather more ambiguous. That figure, so often recognised in this

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<sup>36</sup> For settler desires for greater political dominion in Africa, particularly in East Africa, and the British government's fears about them: Cleary, 'The Myth of Mau Mau in its International Context', p. 229; Anderson, *Histories*, p. 3. For the hopes for policies of economic development and multiracialism in post-Second World War Kenya: Throup, *Economic & Social Origins of Mau Mau*, chs 2 & 4.

way—as a single actor or locatable material entity—is commonly called ‘the state’.<sup>37</sup> The power of the state, by no means reducible to a monopoly on violence, is seen as begetting order: as it works to prevent disorder, so it guarantees situations in which lawful procedures ensure the fair government of subjects. Yet state power must be submissible to lawful oversight if the order it guarantees between subjects is to be just. The powers-that-be are faced with a set of conundrums. Does state power foster order, which spawns law, or is it the child of law, who learns orderly conduct? Is law constituent of or constituted by state power? If the former, how is it elevated to this transcendent position as a disinterested arbiter of social reality; if the latter, is it ultimately synthetic, arbitrary—indeed, dependent on force that is before the law? When order is illegally imperilled, must state power maintain it at the cost of ignoring the law, or would doing so make state power dangerously disorderly and unjust—to the point that the legitimacy of its claims to public authority vanished?

The above questions have exercised the minds of constitutional theorists for centuries.<sup>38</sup> Mapping solutions to them onto the realities of British rule abroad likewise exercised the minds of a great many of the historical actors who appear in this thesis—as individuals, and as more or less cohesive teams of individuals arranged in various government bureaucracies. Assessing the various answers produced to these questions, and examining the courses of action taken as a result, animate the central project of this essay, illuminating its forays into the historical worlds of three very different law and order projects, in India, Ireland and Kenya, *circa* 1810 to 1960. In many ways, however, a central contention of this thesis is that attempting to produce decisive answers to the aforementioned questions may foreclose deeper historical inquiry into modern triangulations of law, order and state. This thesis uses a comparative historical perspective to analyse British attempts to elaborate state sovereignty abroad in the period *circa* 1810—1960. It is contended that these cartographies of power may be glimpsed by looking through several windows on the

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<sup>37</sup> See, in particular, Timothy Mitchell, ‘Society, Economy, and the State Effect’, in Aradhana Sharma & Akhil Gupta (eds), *The Anthropology of the State: A Reader* (Oxford: Blackwell, 2006).

<sup>38</sup> For comprehensive overviews: Ian Harden & Norman Lewis, *The Noble Lie: the British constitution and the rule of law* (London: Hutchinson, 1986), esp. pp. 19—45; Pietro Costa, ‘The Rule of Law: A Historical Introduction’, in Pietro Costa & Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), esp. pp. 74—138.

past, each of which frames a different kind of criminal suppression campaign, carried out under recognisably ‘British’ auspices, at different times and in different places. Each will shed different shades of light on the aims of and techniques used to realise modern forms of state power and social control.

## § Argument and layout

The three suppression campaigns analysed in the case studies comprising this thesis have been selected chiefly because they span the broad chronology of a period commonly demarcated by historians as that of modernity. Analysis of these three suppression campaigns offers the potential to derive insight into various departures from the presumed standards of the rule of law, through the use of quasi- and extra-legal state power to confront what were located as specific and novel ‘crises’. In turn, this thesis assesses the ways in which these departures were conceived and deployed as means to re-constitute sovereign authority, though in markedly different ways and for markedly different reasons, in three foreign territories falling under British government in the period *circa* 1810—1960.

According to Partha Chatterjee, the scholar who has perhaps done most to explore the imbrication of colonialism and modernity in India, ‘colonial modernity’ is a contradiction in terms. One of the most striking pieces of evidence for Chatterjee’s thesis is a quotation from George Couper, the lieutenant-governor of the North-Western Provinces, who insisted in 1878 that the time had come to ‘stop shouting that black is white’:

We all know that in point of fact black is *not* white. ... That there should be one law alike for the European and Native is an excellent thing in theory, but if it could really be introduced in practice we should have no business in this country.<sup>39</sup>

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<sup>39</sup> Quoted in Partha Chatterjee, *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton, N.J.: Princeton University Press, 1993), p. 21. Cf. J. S. Mill: ‘Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end.’ John Stuart Mill, ‘On

Couper's claim that British rule was founded upon the unequal treatment of black and white subjects before the law is, Chatterjee argues, indicative of why the colonial state could not complete the 'normalizing mission' posited as modernity's task in India. According to Chatterjee,

...the more the logic of a modern regime of power pushed the processes of government in the direction of rationalization of administration and the normalization of the object of rule, the more insistently did the issue of race come up to emphasize the specifically colonial character of British dominance in India.

Social equality was thwarted in colonial India, Chatterjee argues, by 'the rule of colonial difference', which separated the rulers from the ruled and asserted the superiority of the former over the latter by jealously marking out the alienness of the European population. Moreover, the law (the codification of the positive norms on which official authority rested) and the juridical order (one of the primary interfaces between rulers and ruled, evaluating and punishing challenges to this authority) stand out as critical arenas for such elaborations of colonial difference and state sovereignty, as suggested by the quotation from Lieutenant-Governor Couper.<sup>40</sup>

This thesis does not deny that various administrations, bureaucracies, institutions, and their staffs were frantic producers and purveyors of what we may recognise as 'the rule of colonial difference' over peoples brought under British dominion during the nineteenth and twentieth centuries. However, it does challenge Chatterjee's assumption that modern projects of state power uniformly aimed at 'normalization'. In regard to the sphere of criminal law, it is contended—in agreement with the legal sociologist Peter Fitzpatrick and the historian Radhika Singha—that structural dividing practices did not necessarily place a limit on the 'attainment' of modernity (itself a deeply problematic idea), but were often intrinsic

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Liberty', in *Utilitarianism; On Liberty; Essay on Bentham*, ed. Mary Warnock (London & Glasgow: Collins/Fontana, 1962), p. 136.

<sup>40</sup> Chatterjee, *Nation*, pp. 10—21. See also Ranajit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge, MA & London: Harvard University Press, 1997), esp. pp. 63—72.

to the realisation of practices and techniques of rule by which it may be characterised.<sup>41</sup> Fruitful proof for this claim, it is suggested, may be found in the study of three counter-criminal suppression campaigns or counter-insurgency operations carried out by British governments in India, Ireland and Kenya *circa* 1810—1960. By extension, and following the path cut by Nasser Hussain, this thesis comprises an inquiry into the extent to which these suppression campaigns can be read as ‘iterations of the modern’ in India, Ireland and Kenya.<sup>42</sup>

Analysis of the campaign to suppress Thuggee in India during the 1830s (and beyond) allows us to consider the ways in which, *inter alia*, the production of criminal stereotypes and the existence of a decentred topography of colonial government allowed for innovations in policing, procedure and legislation, such that certain subjects and spaces of rule could be configured as exceptional, as requiring departures from ‘ordinary’ legal practice. The case study covering the anti-Thuggee campaign assesses an attempt to naturalise colonial state power in British India not by asserting and vigorously defending the rule of law, but by moving beyond it for certain ‘limit’ cases, and by periodically re-setting these limits. In closely scrutinising the ways in which criminal stereotypes regarding ‘Thugs’ were arrived at, and the politico-legal rationales for the campaign to suppress Thuggee, however, this case study points to certain limitations upon state power and the coherence of such a singular entity (‘the state’) in early colonial India.

By contrast to a dissection of the legal-sociology elaborated during the anti-Thuggee campaign of early-to-mid nineteenth-century India, the study of the campaigns to suppress insurrection by the Irish Volunteers in 1916 and the Irish Republican movement between 1919 and 1921 allows for consideration of the conceptualisation and praxis of martial law. In British jurisprudence, martial law has conventionally been located as marking the other side of the threshold of legal power, as providing a necessarily extra-legal solution to a juridical crisis by recourse to military rule. The study of martial law in the context of political violence in early twentieth-century Ireland allows the thesis to delve into the uncertain relationships

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<sup>41</sup> For more: Peter Fitzpatrick, *The Mythology of Modern Law* (London & New York: Routledge, 1992), esp. pp. 65—134; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998).

<sup>42</sup> Hussain, *Jurisprudence of Emergency*, pp. 6—7.

between constituent and constituting power, of the deep concern for state power to be legal if its sovereignty is to be legitimate, and of the ways in which states of exception may work not to reassert order, but, by re-constituting it in particular ways, to erode it.

Although the case study on the suppression of Mau Mau in 1950s Kenya is the third to be considered, in chronological order, it sits between those on the suppression of Thuggee and the Irish Volunteers in several ways. As in the campaign against Thuggee, there is much to suggest that the creation of certain stereotypes about Mau Mau as a source—even a pathology—of criminality were elaborated to justify the imposition of exceptional counter-insurgent practices and legal procedures to crush disorder. As a counter-insurgency campaign, the operations against Mau Mau in Kenya bear closer resemblance to those used against the Volunteers in early twentieth-century Ireland than the measures adopted to suppress Thuggee in early nineteenth-century India; put crudely, they principally sought to restore rather than legitimise the sovereignty of a British state-formation. Yet, in counterpoint to the suppression of the Volunteers, the attempt to reassert order in 1950s Kenya was conducted through a somewhat more carefully delineated schema of emergency powers, rather than a messy overlay of statutory and non-statutory martial law, as deployed in Ireland *circa* 1916—21. Like the analysis of the anti-Thuggee campaign, the case study on the Kenyan Emergency also focuses more closely on the use of legal exceptions in the management of sections of the civilian population, rather than on jurisprudential uncertainty and unease regarding their relationship to constitutive power, which provides a more central point of analysis in the case study on the suppression of the Irish Volunteers.

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By providing detailed and careful analysis of the three suppression campaigns outlined above, this thesis aims to take new angles on, and produce nuanced considerations of, the various implications of ‘states of exception’ in framing and repressing criminality and in articulating sovereign power in modernity. The main body of this thesis is organised into three case studies, one each for the British-led

campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau.<sup>43</sup> Each case study follows a consistent pattern. An introduction is followed by a short section outlining the main historical arguments advanced in each particular case study, positioning them within the extant field of historiographical literature directly relating to the three suppression campaigns. The most substantial portions of the case studies then examine the unfolding of the three suppression campaigns in considerable detail, focusing upon the elaboration of what were consciously conceived of at the time as exceptional juridical strategies designed to control these destabilising irruptions within each polity. Each case study closes by outlining the extent to which the extra-ordinary measures introduced in India, Ireland and Kenya were subsequently made ordinary by their incorporation within the formal legal structures of each state's executive apparatus, despite the proclaimed passing of the singular 'crises' for which they were introduced.

By treating each case study discretely, this thesis seeks to draw out the specific ways in which British sovereignty was elaborated, articulated and functioned (which, it is suggested, may also include its malfunctioning) in three markedly different spatial and temporal contexts. These juxtapositions are made starker by the immediately apparent differences between official and quasi-official appreciations of each of the three targets of state power (Thugs, Irish Volunteers, Mau Mau) and between the nature of each 'state' analysed (Indian, Irish, Kenyan). To sharpen these contrasts, emphasis is placed upon the contingency and provisionality—the 'situatedness'<sup>44</sup>—of the power-relations mapped out in each case study. This approach is taken in order to retain analytical focus and rigour; it is also intended to provide clarity for the first-time reader. More fundamentally, this approach attests to recognition of the limits to a comparative study—of the ways in which the analysis developed in this thesis must be foregrounded in, and is indeed significantly enriched by, sensitivity to the specific historical contours of state power and the forms of social control delineated in the campaigns to suppress Thugs, the Irish Volunteers and Mau Mau.

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<sup>43</sup> The case studies need not be read in any particular order—indeed, readers may find it interesting deliberately to read them out of chronological order.

<sup>44</sup> See Donna J. Haraway, 'Situated Knowledge: The Science Question in Feminism and the Privilege of Partial Perspective', in *idem.*, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Free Association Books, 1991).

By presenting the three case studies side-by-side, within the confines of a single piece of work, I intend to provoke the reader into making their own observations and connections regarding nebulous points of similarity and difference, across time and space, between the British-led campaigns to suppress Thugs, Volunteers and Mau Mau. However, the comparative perspective provided in the concluding chapter that follows the three case studies does not simply attempt to note ‘interesting’ analogies—to tutor in what has been described as the ‘fancy that’ school of history.<sup>45</sup> Rather, it aims to develop a commentary—and may be read as a meditation—upon the nexus between states of exception and realisations of state sovereignty in three spatially and temporally distinct spheres of British foreign dominion.

The comparative approach pursued in this thesis may, at first, appear counter-intuitive, for it does not attempt to provide a linear narrative of the ebbs and flows of British foreign dominion across the wide-ranging geography, and lengthy chronology, of the times and places surveyed. That is, the thesis does not attempt to demonstrate that the ways in which Thugs were suppressed in India necessarily informed the practices deployed against the Volunteers in Ireland, or, in turn, that the articulations of sovereignty to be found within the praxis of these suppression campaigns determined the techniques used to confront Mau Mau in Kenya. Rather, the comparative approach offers an opportunity to problematise a commonly-used theoretical vocabulary and to better understand what is meant by the ‘rule of law’, sovereignty, the state, ‘states of exception’ and, most fundamentally, certain ‘modern’ forms of power. Much of this labour is performed obliquely in each of the case studies, though salient observations are made throughout and in the short conclusions with which they end, before receiving sustained attention in the concluding chapter. These inquiries therefore pertain to a meta-historical agenda that seeks to provide a mobile and self-reflexive critique of the tools with which histories can be made, and the extent to which these might foreclose, as well as unlock, our cognition and explication of deep-lying power structures.

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<sup>45</sup> Keith Jeffrey’s phrase, cited in the following assessment of the advantages and disadvantages of comparative histories: Tony Ballantyne, ‘The Sinews of Empire: Ireland, India and the Construction of British Colonial Knowledge’, in Terrence McDonough (ed.), *Was Ireland A Colony? Economics, politics and culture in nineteenth-century Ireland* (Dublin: Irish Academic Press, 2005).

Related to the above-outlined agenda for the comparative project undertaken in this thesis is the ambition to produce an historical inquiry capable of analysing the systemic recurrence of the creation and normalisation of states of exception in the praxis of government during the nineteenth and twentieth centuries.<sup>46</sup> For this reason, a highly visible feature of the analyses presented in the case studies is the detailed explication of the changing juridical orders of India, Ireland and Kenya as they were directed toward suppressing Thugs, Volunteers and Mau Mau.<sup>47</sup> To use the language of Foucauldian theory, this comparative project presents a symbiotic analysis of a decentred ‘genealogy of power’—of sovereignty and of various states of exception—and an ‘archaeology of knowledge’ that uses historical methodology to foreground a study of elaborations of the ‘rule of law’ as an idealised (or even phantasmagorical) standard of governance.<sup>48</sup> In order more clearly to position the approach taken within the theoretical and historiographical context from which it springs, the opening chapter of the thesis engages more deeply with recent critical approaches to the central problematics of this thesis: sovereignty and ‘states of exception’.

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<sup>46</sup> Though this thesis’s inquiry is, of course, parochial, to the extent that it is informed by analysing elaborations of counter-criminal or counter-insurgent state power in three polities ruled according to the exigencies of British self-interest.

<sup>47</sup> ‘Juridical order’ is used to refer to the following: legal provisions (laws, regulations and ordinances, whether permanently codified or merely temporarily proclaimed to be in force); executive and judicial teams of administrators (governors and judges), as well as officials ‘in the field’ combining powers delegated from these teams (special commissioners, resident magistrates and district officers); counter-criminal or counter-insurgent agencies (including the army as well as regular and irregular police forces); and institutional sites of punishment (such as prisons and detention camps).

<sup>48</sup> For more: Michel Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith (London: Routledge, 1997), esp. parts IV and V; Michel Foucault, ‘Nietzsche, Genealogy, History’, in Paul Rabinow (ed.), *The Foucault Reader* (London: Penguin, 1991).

## Theoretical framework

### § States of exception and bare life

Throughout this thesis, the term ‘state of exception’ is used to connote the curious situation in which the sovereigns of a particular polity use the law partly or wholly to depart from or suspend the extant legal order to confront a specific crisis. As we shall see in each case study, this act of suspension is paradoxically achieved by recourse to the law; the law can be said to suspend itself. The rationale behind the creation of such states of exception is that certain unforeseen crises (such as war, invasion, widespread rioting, food-shortage, natural disaster, terrorist attack, or financial meltdown) necessitate responses that cannot be elaborated through ‘ordinary’ (cumbersome/rigorous) legal means. The state of exception is hereby figured as the temporary retreat of a polity’s juridical order, and its replacement with a decisionist (voluntarist, even) regime of social control legitimised in the name of restoring order. Once the state has been secured against a particular crisis, the normality of rule through law can resume (the executive will again be placed under judicial restraint, legal cases will be heard before juries in open courts of law, people will be tried for committing specific offences, the police will enforce order instead of the army, and so on). Recourse to exceptional measures is therefore imbued with a sense of a duty of care owed to the individual and to civic life, but, ultimately, to ‘the state’, which, as the final repository of sovereignty within and over the social body, must be defended against crisis at all costs.<sup>49</sup>

Self-evidently, ‘crisis’ signifies the inverse of the ordinary: an extra-ordinary situation that may justify recourse to similarly extra-ordinary powers to end it. It is to be wondered how this dichotomy—of rupturing ‘crisis’ and smoothly unfurling ‘normality’—is created and made to appear real. Certainly, the history of the modern West is one in which crises appear ubiquitous, distinctly unexceptional. Indeed, the

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<sup>49</sup> In the British legal tradition, the technical, legal roots of the state’s ‘right’ to self-defence are articulated by the doctrine of necessity, in turn rooted in an appreciation that ‘conventional’ legislative and judicial processes offer dangerously slow-moving procedures with which to meet crisis. This doctrine is discussed at length in the case study on Ireland.

regularity with which modern, Western states have made recourse to exceptional powers has been studied at length. Nevertheless, such scholarly endeavour has until recently continued to rely upon the framework of crisis as presenting an exception to, a departure from, normality.<sup>50</sup> By contrast, Giorgio Agamben has shown particular interest in critiquing the recurrent and increasing recourse to the enactment of special executive powers by Western governments during the twentieth century. According to Agamben, an understanding of states of exception allows us to observe the cataclysmic elaboration of sovereign dividing practices that he argues characterise Western modernity.<sup>51</sup> In analogous fashion, this thesis studies three examples of British rule during what were posited as crises endangering the life of the state, approaching these states of exception not just as narrow regulative problems (concerned with defining the necessary response to periodic crises—as a question of individual rights and liberties *vis-à-vis* that of the government as defender of ‘national interests’, for instance) but, more deeply, as constitutive of the relationships between law, order, state and sovereignty, and as indicative of the power structures shaping modern attempts to ensure social control.

Agamben’s exploration of the state of exception draws heavily on the decisionist political theory of the Weimar- and Nazi-era jurist Carl Schmitt. For Schmitt, himself deeply influenced by Thomas Hobbes, any legal system rests upon a decision that cannot itself take the form of law. At origin, Schmitt argues, the rule of law rests on a political power that exceeds legal rationalisation. At one level, Schmitt’s argument is simple humanism: the sovereign does not need the law to create law; laws do not make men, men make laws. He accordingly concluded that ‘All law is “situational law”’.<sup>52</sup> More profoundly, the sovereign’s relationship to the juridical order gives rise to a paradox: the sovereign can decide on the exception precisely because of his position outside of the law, yet the sovereign also declares that there is nothing outside of the law, in the sense that what is excluded remains related to that which is included. Schmitt therefore argued that:

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<sup>50</sup> See, in particular, Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New Jersey: Transaction, 2002 [1948]).

<sup>51</sup> See Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago & London: University of Chicago Press, 2005 [2003]), esp. pp. 2, 7, 9.

<sup>52</sup> Carl Schmitt, *Political Theology: four chapters on the concept of sovereignty*, trans. George Schwab (Chicago & London: University of Chicago Press, 2005 [1922]), p. 13.

The exception reveals most clearly the essence of the state's authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not be based in law.<sup>53</sup>

For Schmitt, the state of exception therefore has revelatory power: in rupturing normality, suspensions of the law raise the curtain on the omnipotent figure of the sovereign—'he who decides on the exception'; in a state of exception, sovereign power re-emerges from the system of positive norms appropriate to non-critical situations. Furthermore, since the sovereign may actively change the juridical order, it is his power to decide on the exception that makes possible the appearance of the 'normal' juridical order.<sup>54</sup>

Agamben argues that the figure of the sovereign, and his power to decide on the exception, ought properly to be considered as being beyond and 'before' the law. However, because of this, all decisions that the sovereign makes are necessarily 'legal'. In describing sovereignty as a power 'before' the law, Agamben claims to have exposed the '*arcantum imperii* (secret of power) par excellence of *our* time': modern Western society is defined by its lawlessness, not its lawfulness. For Agamben, this is explicitly evidenced in the sovereign production of what he calls 'bare life'—an object of politics in which what is at stake are the very terms of existence itself, terms set not in positive law but by the decisions of sovereigns excepted from law, such that life and law become indistinguishable, impossible to establish as positive norms.<sup>55</sup> Modernity, in Agamben's thought, is therefore equated with a situation in which the state of exception has become the rule, where the sovereign exception names the power to throw politically valid life itself into question.<sup>56</sup>

To elaborate on the concept of bare life, Agamben invokes an arcane figure of classical law: *homo sacer* (sacred man). Citing a treatise by the second-century

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<sup>53</sup> Schmitt, *Political Theology*, p. 13.

<sup>54</sup> See *ibid.*, esp. pp. 5—7, 12, 14, 16. See also: Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Ca.: Stanford University Press, 1998), p. 19; Oren Gross and Fionnuala Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006), esp. pp. 162—70.

<sup>55</sup> [Emphasis in original] Agamben, *Homo Sacer*, pp. 20, 111, 153, 187; *Exception*, pp. 59, 86.

<sup>56</sup> For more: Andrew Norris, 'The exemplary exception: philosophical and political decisions in Giorgio Agamben's *Homo Sacer*', in *Radical Philosophy*, vol. 119 (May/June 2003), p. 9.

grammarians Pompeius Festus, Agamben defines *homo sacer* as one whose crimes were so heinous that they were neither to be shielded by the rights of mundane law nor thrown over to judgement by the divine law of the gods. *Homo sacer* is therefore located outside any mediating or endowing law; the originating figure of 'bare life' is included in the juridical order only by exclusion from it. In short, sacred man is 'he who may be killed but not sacrificed'.<sup>57</sup> The logical structure of the state of exception, however, means that *homo sacer* is not freed from a relationship to the sovereign so much as placed in a position whereby his life is in every respect at the former's mercy:

The life of *homo sacer*... is reduced to a bare life stripped of every right by virtue of the fact that anyone can kill him without committing homicide; he can save himself only in perpetual flight or a foreign land. And yet he is in a continuous relationship with the power that banished him precisely insofar as he is at every instant exposed to an unconditioned threat of death.<sup>58</sup>

Nothing escapes the sovereign decision. The sovereign decision originates, indeed is, the threshold between political life and bare life, norm and exception, the law and violence.<sup>59</sup>

## § Sovereignty and modernity in the thought of Agamben and Foucault

For Agamben, only by understanding sovereignty as the threshold between law and violence, culture and nature, human and inhuman, can we perceive the true nature of the political order, the organisation of state power, and the situation in which the

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<sup>57</sup> Agamben, *Homo Sacer*, pp. 71—2, 82—6.

<sup>58</sup> *Ibid.*, pp. 183—4. Cf. Rousseau's classic formulation of the state's right to use juridical power legitimately to kill guilty malefactors as its enemies: Jean-Jacques Rousseau, *The Social Contract and The Discourses*, trans. G. D. H. Cole (London: David Campbell Publishers, 1993 [1762]), p. 208.

<sup>59</sup> Agamben, *Homo Sacer*, p. 19.

exception has become the rule in modernity.<sup>60</sup> Indeed, the radical content of Agamben's analysis—and its specific relevance to the objectives of this thesis—lies in his insistence that, far from being a mode of rule and social organisation discarded or superseded in modernity, 'sovereignty' is a meta-historical concept, a relation of power, though one realised in ever-widening spheres of human life in the modern period. Agamben here departs from an alternative, more parochial, analysis of modern regimes of power, most cogently expressed by Michel Foucault.

According to Agamben, Foucault reads the socio-historical experience of the modern West (more precisely, north-west Europe since the eighteenth century) as one primarily moulded by 'governmental', as distinct from sovereign, regimes of power. Foucault posited governmentality as a system of authority concerned with the art of government, and dealing in the management of the quality of life of its subjects (rather than the sovereign's right to cause their death). Whereas, for the pre-modern sovereign of Machiavelli's *The Prince*, for example, the chief goal of power is to protect and strengthen his relationship to a specific territory that he controls, Foucault argued, modern government takes as its primary aim the economical functioning of power at a new level:

at the level of the entire state, which means exercising towards its inhabitants and their wealth and behaviour a form of surveillance and control as attentive as that of a head of a family over his household and his goods.

At a societal level, Foucault suggested, the institutions of modern government take as their remit the maintenance and improvement of the general health of 'the population', a collectivity imagined and constructed by official power in peculiar ways in the modern period. Laws do not now appear as external commands, so much as 'tactics' to safeguard and facilitate the population's buoyant health and prosperous output. What is interesting from this perspective is not the law's relationship to

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<sup>60</sup> At his most extreme, Agamben offers an apocalyptic a vision of Western society collapsed into irremediable indifference as the unbridled and unbounded domination of sovereign decisions on 'bare life' take hold of all spheres of life: *ibid.*, esp. pp. 4, 111, 114, 174—6.

constituent power, or whether or not particular exceptions are rooted in law, but how these technologies of power are used.<sup>61</sup>

Foucault's descriptions of the distinguishing features of modernity are open to conflicting interpretations, however, depending upon how far one accepts his characterisation(s) of sovereignty. His oeuvre might be read as arguing that governmentality appears as the chronological successor to sovereign power; that the eighteenth-century dawning of a new 'art of government' in western Europe anachronised and extinguished sovereignty (as understood in Machiavelli's terms).<sup>62</sup> Alternatively, the concept of governmentality might be read as conceiving of a redistribution of sovereign power in modernity: of the encoding of sovereignty within governmentality and of its periodic deployment as a necessary tactic of rule.<sup>63</sup>

The Foucault that Agamben wishes to 'correct' and 'complete' is the one who suggests that the modern state is marked by the yielding of coercive, corporeal, punitive regimes of power to the inculcation of more sanitised, 'disciplinary' economies of social control as the primary mechanisms for guaranteeing order and, indeed, defining 'life' itself.<sup>64</sup> By contrast, Agamben argues that since the bio-political production of valid (and in-valid) life is the originary activity of sovereignty, modernity is distinguished not by the 'retreat' of sovereignty, but by its pervasiveness, with more and more spheres of human life made amenable to the intrusions of this form of power through the creation of states of exception.<sup>65</sup>

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<sup>61</sup> Michel Foucault, 'Governmentality', in Graham Burchell *et al.* (eds), *The Foucault Effect: studies in governmentality, with two lectures and an interview with Michel Foucault* (London: Harvester Wheatsheaf, 1991), esp. pp. 90–93, 95, 99 102–3; here quoting p. 92. This piece by Foucault was, until recently, by far the most widely circulated of a series of lectures analysing modern forms of state power and social control, and has for long been the touchstone for scholars interested in his theorisation of 'governmentality'. It is now contextualised as the fourth of a series lectures on these themes, published as Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78*, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2007).

<sup>62</sup> Foucault, 'Governmentality', pp. 102–3.

<sup>63</sup> Foucault, *Security*, pp. 1–12.

<sup>64</sup> Cf. Agamben, *Homo Sacer*, p. 9; Foucault, 'Governmentality', pp. 102–3; Michel Foucault, *Discipline and Punish: the birth of the prison*, trans. Alan M. Sheridan (London: Penguin, 1991 [1975]), pp. 89–96. However, it must be observed that Agamben's work was published prior to the aforementioned volume of Foucault's lecture cycles at the Collège de France, in which the latter presents a far more complex picture of the characteristics and relationships between sovereign, disciplinary and governmental forms of power.

<sup>65</sup> Agamben, *Homo Sacer*, pp. 5–6, 8–10, 111, 128, 148, 153, *Exception*, pp. 86–8.

In fact, in certain respects, the work of both Agamben and Foucault can be read as making an extremely similar point: that modernity is marked by a particularly invidious form of power premised on the production and separation of marginal behaviours and identities (especially, regarding this thesis, that of the criminal), which are to be excluded from the mainstream but which also help to constitute it. Agamben and Foucault agree that the dominant modes of state power in modernity are defined by making human existence and the management of life the primary object and objective of political interventions.<sup>66</sup> Furthermore, Foucault's later thought attempted to reconcile the modern functioning of sovereign (or, as he sometimes prefers, 'juridico-legal') power, which we can think of as operating 'from without', by law and punishment, with the development and efflorescence of disciplinary power, acting as it were 'from within', by technique and normalisation. His conclusions were explicitly stated:

...the powers of modern society are exercised through, on the basis of, and by virtue of, this very heterogeneity between a public right of sovereignty and a polymorphous disciplinary mechanism.<sup>67</sup>

The divergence in the thought of Agamben and Foucault is therefore evident not in terms of the existence or extinction, respectively, of sovereignty in modernity, but, obliquely, in their differing conceptions of how fundamental the presence of sovereign power is to the articulation of recognisably modern forms of state power and social control. This latter agenda—demarkating and explicating the ways in which the exceptional was bound to articulations of sovereign power in three different British-led counter-criminal suppression campaigns—provides the explicit theoretical focus for this thesis.

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<sup>66</sup> 'Bio-politics' was Foucault's neologism for political interventions that attempt to regularise a certain level of well-being across the body-politic, re-conceived in modernity as the 'population', and naming a particular target of state power. For more on 'bio-politics', see the following works by Michel Foucault: *The History of Sexuality: Volume 1, The Will to Knowledge*, trans. Robert Hurley (London: Penguin, 1990 [1976]), esp. pp. 139—45; "Society Must Be Defended": lectures at the Collège de France, 1975—76, trans. David Macey (London: Allen Lane, 2003), esp. pp. 240—71; *Security*, esp. pp. 6—12, 20—22, 70—4.

<sup>67</sup> Michel Foucault, *Power/Knowledge: selected interviews and other writings 1972—1977*, ed. Colin Gordon (London: Harvester Wheatsheaf, 1980), p. 106.

## § Foucault's blind spots and the silence of Agamben

The conceptual vocabulary created by Foucault to characterise various forms of power has provided a remarkably dextrous tool-kit with which to dismantle the historical effects of modern states' attempts to produce social control. The model of 'disciplinary' power, for instance, shows how social control can be diversely and invidiously encoded—naturalised—through the institutional constitution of self-regulating selves. From this perspective, social control appears as an historical after-effect of the organisation of disciplined bodies. 'Governmentality', meanwhile, offers a sophisticated reading of the effects of proliferating scientific and statistical recording practices by the bureaucracies of modern nation-states, which attempt ever-more extensive projects of social management. Furthermore, in suggesting that power is not confined to repressive, external threats of punishment for transgressions of authority, but also operates as a productive force, shaping social behaviours from within, these conceptual models help to decentre 'the state' as a coherent, separate and privileged actor that embodies political life and directs power downwards onto society.<sup>68</sup> Foucault's conceptualisations of 'disciplinary' and 'governmental' economies of power suggest that, in modernity, state power is distributed throughout the capillary networks of the body-politic, percolating ever-more deeply into the veins of society. By the same token, because of this capacity for diffusion, 'the state' serves as only one among many loci of power that act upon the conduct of individuals, groups and populations. As such, these models of power provide a perspective from which it becomes easier to observe the incoherence and intermittence of state power in shaping much of lived experience in various foreign theatres of British rule.<sup>69</sup>

Laying bare the functioning of disciplinary and governmental forms of power has also provided historians with tools to unpick the scarcely conceivable dominance

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<sup>68</sup> For more on 'disciplinary' power: Foucault, *Discipline*, esp. pp. 129—31, 138—94, 218—25, 301—4; *Security*, pp. 44—9, 65—6, 107—9.

<sup>69</sup> As Frederick Cooper has observed, in the context of British colonialism in twentieth-century Africa, one may further nuance Foucault's somewhat over-determined and Eurocentric model of state power. See Frederick Cooper, 'Conflict and Correction: Rethinking African Colonial History', *American Historical Review*, vol. 99, no. 5 (1994), p. 1533 and cf. Foucault, *Sexuality*, pp. 92—102.

of relatively small teams of British colonial administrators, often possessing limited, unreliable and unevenly concentrated means to impose coercive power, over enormous, potentially hostile, foreign populations in the nineteenth and twentieth centuries.<sup>70</sup> Certainly (and this is further demonstrated in this thesis), British administrations both developed and originated a vast range of institutional sites concerned to reform and reproduce the ‘humanity’ (as a sensibility and a subjectivity) of various foreign peoples falling under their dominion in the period *circa* 1810—1960; particular technologies, routines and spaces of order and control were created or modified to try to render the conquered quiescent, peaceful, ‘civilised’ subjects. Moreover, such projects were realised by the elaboration of novel practices of official information-gathering: through statistical analyses, by mapping and surveying, by the identification of material resources, and through the ethnography of colonial subjects, all of which helped frame and realise ‘the population’ as a social collectivity amenable to state intervention in novel ways.

However, uncritically to accept that disciplinary and governmental forms of power were the primary means with which British colonial state-formations achieved extensive foreign dominion around the world in the post-Enlightenment period is deeply problematic. Such an acceptance requires swallowing-whole the truth-claims of what have been successfully deconstructed by the likes of Ronald Inden and Richard King as totalising, universalistic forms of knowledge (in agreeing that they could and did achieve perfect comprehension of social reality, or that ‘reality’, as such, lay out there awaiting comprehension). It also neglects the capacity for textualised, scientific analyses of society, such as statistical returns or amateur ethnographies, to be defective, ornamental, or indeed irrelevant to the channelling of state power—in short, it may over-estimate the efficacy of ‘governmental’

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<sup>70</sup> Several scholars have explored the imbrication of the ‘disciplinary’ objectives of state-run institutions and bureaucracies with the development of a secularised pastoral form of ‘governmental’ power in different theatres of British colonialism. See, for examples: Timothy Mitchell, *Colonising Egypt* (Berkeley: University of California Press, 1991); David Scott, ‘Colonial Governmentality’, *Social Text*, vol. 43 (1995), pp. 191—220; Gyan Prakash, *Another Reason: Science and the Imagination of Modern India* (Princeton, N.J.: Princeton University Press, 1999); Satadru Sen, *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands* (New Delhi: Oxford University Press, 2000).

interventions.<sup>71</sup> Similarly, though at a more localised level of assessment, it is not at all clear how far various ‘total’ institutions (such as schools, prisons, asylums and workshops) were able to re-structure individual subjects. In the case of colonial prisons, for instance, the research of David Arnold and Daniel Branch suggests that they were frequently unable to induce remorse for crimes and rather stoked resentment or (somewhat less expectedly) a relative indifference toward incarceration. More seriously for the applicability of Foucault’s thesis to the colonies: it would appear that behavioural changes in colonial prisons were effected less by micro-techniques of physical regulation and mental introspection than coercion. The implication of these re-appraisals of Foucault’s work in the colonial context is to take care not to overstate the reliability with which ‘disciplinary’ techniques of control were transmitted to different nodes of the social body, or the extent to which they were smoothly diffused throughout it in various overseas theatres of British dominion.<sup>72</sup>

It is particularly in relation to recent colonial histories presented in or informed by such overtly Foucauldian frameworks that Agamben’s most sustained neo-Schmittian studies of modern power (*Homo Sacer* and *State of Exception*) become valuable, for two particular reasons. First, Agamben’s work implicitly calls for renewed debate on the reach, effectiveness and stability of ‘disciplinary’ and ‘governmental’ modes of power as agents of social control. Second, and of still greater relevance to this thesis, Agamben’s account of bio-politics re-emphasises the bluntness and decisionism of post-Enlightenment forms of power and of the fixation of modern states with what Achille Mbembe calls ‘necropolitics’: with the putting-to-death of their subjects as opposed to questions of how to safely manage the well-being of ‘the population’ against the ‘natural’ effects of the world.<sup>73</sup>

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<sup>71</sup> Ronald Inden, *Imagining India* (Oxford: Blackwell, 1990); Richard King, *Orientalism and Religion: Postcolonial theory, India and ‘the mystic East’* (London and New York: Routledge, 1999).

<sup>72</sup> David Arnold, ‘The Colonial Prison: Power, Knowledge, and Penology in Nineteenth-Century India’, in Ranajit Guha (ed.), *A Subaltern Studies Reader, 1986–1995* (Minneapolis & London: University of Minnesota Press, 1997); Daniel Branch, ‘Imprisonment and Colonialism in Kenya, c.1930–1952: Escaping the Carceral Archipelago’, *International Journal of African Historical Studies*, vol. 38, no. 2 (2005), pp. 239–65.

<sup>73</sup> Achille Mbembe, ‘Necropolitics’, trans. Libby Meintjes, *Public Culture*, vol. 15, no. 1 (2003), pp. 11–40, esp. p. 24.

At the same time, however, the three case studies presented in this thesis provide an opportunity critically to engage with Agamben's re-conceptualisation of 'sovereignty' and its possible relationships to states of exception. As stated, Agamben does not see states of exception as exceptional, in the sense that he presents this power-relation as the metaphysical constant of Western historical experience, the originary political act of the sovereign decision. Agamben cites a diverse range of 'modern' *homines sacri* (sacred men)—including the hopeless *Muselmann* in the Nazi death camp, the neomort or over-comatose patient, and refugees—as evidence for his argument that multifarious projects of twentieth- and twenty-first-century state power are marked by their concern with the politics of producing and managing bare life.<sup>74</sup> These disparate examples of *homines sacri* certainly point toward the dangers of unaccountable executive power, and the political nature of decisions regarding what constitutes 'the human' as an individual with rights protected by law. However, they do little to support Agamben's claim that all spheres of life are amenable to politicisation by sovereign acts of inclusion/exclusion in modernity.<sup>75</sup> This pertains to perhaps the most glaring problem in Agamben's analysis: his reluctance to engage with the questions of sovereignty and exceptionality historically; that is, to situate his discussions firmly within a framework that can take account of various temporally and spatially localised material contexts—social, political, economic and cultural—giving form and function to the power relations he purports to describe. It is in this regard that Agamben's near total silence on the imbrication of European colonialism with notions of 'modernity' and realisations of the 'rule of law' becomes

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<sup>74</sup> Agamben, *Homo Sacer*, pp. 1, 8—12. The figure and functioning of sovereignty is here reminiscent of the guard who told Primo Levi, a Jewish inmate and survivor of Auschwitz, '*Hier ist kein warum*' ('There is no why here'): Primo Levi, *If This is a Man*, trans. Stuart Woolf (London: Vintage, 1996 [1958]), p. 35. For further similarities between Agamben's account of sovereignty and Levi's reflections on the regime and effects of sovereign power at Auschwitz: Agamben, *Homo Sacer*, esp. pp. 31—5, 48—9, 57, 93—6.

<sup>75</sup> For his part, Foucault carried out far more sustained, case-specific analyses of the marginalising practices of various regimes of power than Agamben has done for his re-conceptualisation of sovereignty, and sketched in greater detail the social, institutional and epistemological economies through which they were dispersed and regulated in north-western Europe during the post-Enlightenment period. These analyses covered mental and physical health, sexuality and criminality.

deafening, an absence that also appears as a significant blind-spot in the work of Foucault's analyses of modern forms of state power and social control.<sup>76</sup>

Histories of British foreign dominion in the nineteenth and twentieth centuries are replete with instances of what Foucault might demarcate as peculiarly modern attempts to realise sovereign (or 'juridico-legal') power, imbricated as they are in 'disciplinary' and 'governmental' economies of social control, and of what Agamben might characterise as 'states of exception' and the 'politicization of bare life'.<sup>77</sup> These economies of violence—epistemic as well as physical—were, it is suggested, intrinsic to the wider economy of nineteenth- and twentieth-century European colonialism(s) as forms of rule and as a distinctive set of power relations. As the subject-matter for this thesis, three such 'states of exception' provide the means to attend to certain blind-spots in the work of Foucault and silences in that of Agamben, a way to bring their lofty theories down to earth, and to carry out a more searching inquiry into elaborations of British sovereignty in India, Ireland and Kenya at various times between 1810 and 1960.

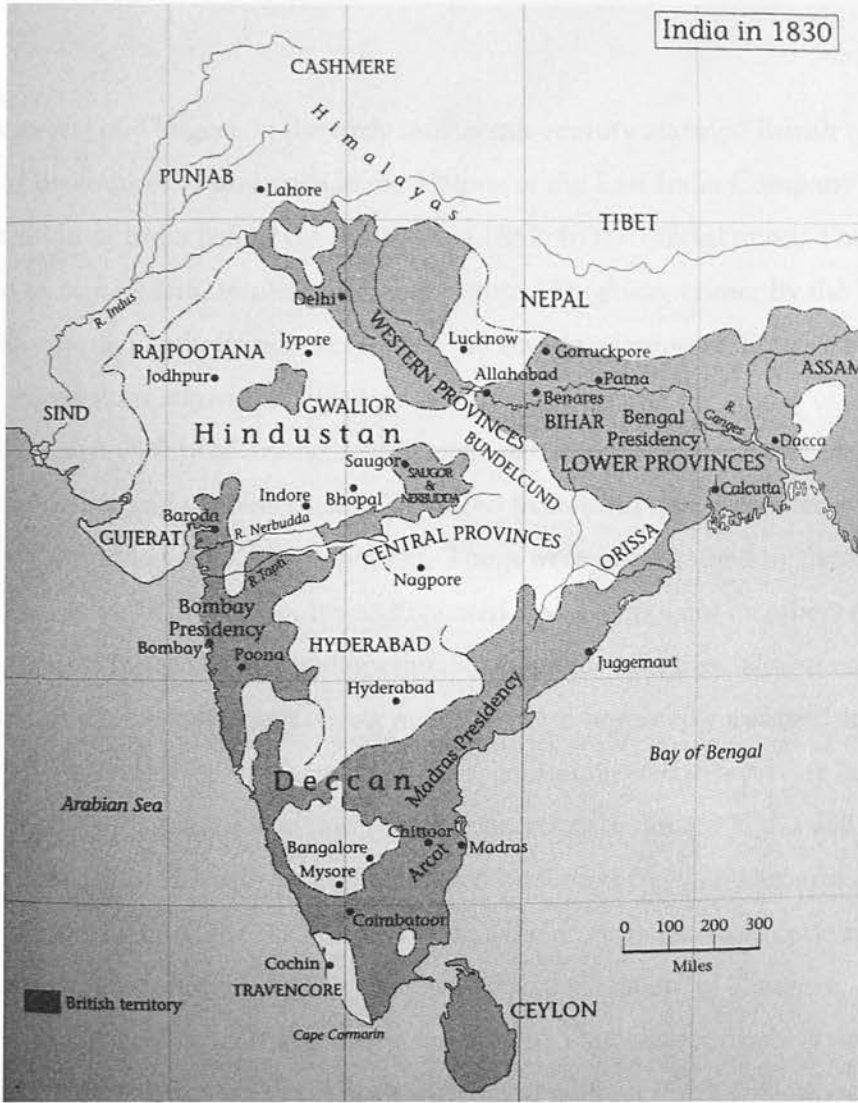
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<sup>76</sup> An exception is Agamben's brief reference to the concentration camps used in Cuba and southern Africa by Spanish and British colonial authorities in the late nineteenth and early twentieth centuries: Giorgio Agamben, *Means without End: notes on politics*, trans. Vincenzo Binetti & Cesare Casarino (Minneapolis & London: University of Minnesota Press, 2000 [1996]), p. 37; *Homo Sacer*, pp. 166—7.

<sup>77</sup> Some (hopefully) familiar examples: the production of racist discourses justifying British dominion; the use of gangs of coerced and indentured labourers; mass detentions without trial; collective punishments; the peopling of internment and concentration camps as well as penal colonies; the tattooing of prisoners; punitive raids; spectacular massacres of civilians and the extra-judicial killing of criminalised individuals.

The suppression of Thuggee  
in early nineteenth-century India

# India circa 1830



Source: Mike Dash, *Thug: The True Story of India's Murderous Cult* (London: Granta Books, 2005), xix.

## Introduction

The ‘discovery’ of Thuggee in the early nineteenth-century alarmed British colonial officials as profoundly as any crisis in the lifetime of the East India Company’s administration of India before the uprisings of 1857. In the official mind, Thuggee appeared to be a violent, virulent and pitiless form of highway crime. By the 1830s, the British colonial authorities believed that the leaders of gangs of Thugs carefully planned expeditions across the highways of northern India, in the course of which they would use a variety of strategies to inveigle parties of indigenous travellers, before murdering and robbing them. Convinced from birth that they were acting to propitiate the goddess Kali, it was thought, Thugs were unrestrained by mercy and felt no remorse for their actions. It was suggested that Thugs were members of an ancient criminal fraternity that had operated in India for centuries, almost entirely undetected by native authorities. Gang members were supposedly assigned specific roles, which determined their share of plunder, communicated in a private language, and had developed arcane ritual and symbolic practices to discern Kali’s will. Investigations revealed a subculture that prided itself on secrecy and separation from society’s mainstream. At the same time, British officials suspected that certain bankers, landowners and priests were implicated in the ‘system’ of Thuggee, advancing loans, homes, land and divine sanction to Thugs in return for a portion of their loot. Thuggee seemed to exist both within and without north Indian society, a feature of it and a menace to it. To successive British colonial administrations in early nineteenth-century India, Thuggee appeared to be an extra-ordinary criminal phenomenon.<sup>78</sup>

Thuggee threatened not only the lives of Indian travellers, but also the legitimacy of the Company’s government in north India. For, if that government could not protect travellers from violent Thug attacks, it was argued, it was failing in its duty to guarantee peace and order to the peoples inhabiting territories under its

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<sup>78</sup> See, in general, William H. Sleeman, ‘Introduction’, in *Ramaseeana* (Calcutta: G. H. Huttman, Military Orphan Press, 1836) [hereafter, *Ramaseeana*].

administrative jurisdiction. By extension, the prospect of suppressing Thuggee appeared to offer an opportunity to consolidate the legitimacy of the Company as the paramount political power in north India. In fact, the campaign to suppress Thuggee in the 1830s was framed in moral and even spiritual terms: as an act of salvation for the ruled, made by rulers drawn from a chosen people and destined to bring what they called ‘civilisation’ to India.

The broad historiographical consensus on the British colonial response to Thuggee is that the marginalisation of Thugs, as a special category of criminal posing a unique threat to colonial authority, underpinned the extra-judicial innovations introduced during the 1830s that facilitated their suppression. On the peripheries of the expanding colonial polity of British India during the early nineteenth century, this argument runs, Company officials re-worked existing anti-banditry legislation in order to suppress what they presented as a systematic, lurking menace that had until now escaped justice by exploiting the under-policed boundaries of jurisdiction throughout the decentred topography of state authority in northern and central regions of the south-Asian subcontinent.<sup>79</sup> Fundamentally, this argument is correct; some of the more nuanced elaborations of it form points of departure for this case study, and are considered at greater length below. However, this case study seeks to go beyond that conclusion by closely examining the elaboration of the dividing practices that emerged during the suppression campaign to position Thugs as decisively Other. The deeper aim is to give precision to the ways in which certain of the guiding rationalities and practices of the Company’s administration, as articulated through the ATC, elaborated claims to British sovereignty over the lives of colonised Indian subjects.

This case study examines the British-led efforts to suppress Thuggee in India between *circa* 1810 and 1840 as critical in the elaboration and normalisation of a novel juridical and government rationality in the subcontinent. The distinguishing

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<sup>79</sup> See, in particular: Gordon, ‘Sarf and Sword’, pp. 403—429; Freitag, ‘Crime in the Social Order of Colonial North India’, and ‘Collective Crime and Authority in North India’; Radhika Singha, “‘Providential’ Circumstances: The Thuggee Campaign of the 1830s and Legal Innovation”, *Modern Asian Studies*, vol. 27, no. 1 (1993), pp. 83—146, and *A Despotism of Law*, ch. 5; Martine van Woerkens, Martine, *The Strangled Traveler, Colonial Imaginings and the Thugs of India* (trans. Catherine Tihanyi) (repr. in English, Chicago: University of Chicago Press, 2002 [1995]); Kim A. Wagner, *Thuggee: Banditry and the British in Early Nineteenth-Century India* (Basingstoke: Palgrave Macmillan, 2007).

feature of these rationalities, it is argued, was their attempt to embed coercive violence and executive discretion within a legalistic framework of government (the rule of law) that accrued power by drawing and re-drawing the lines between civil society and uncivil individuals, and between the peculiarly conceived entities of the state and the population. To that end, the case study engages with the normative claims advanced by Giorgio Agamben and Michel Foucault, in their critiques of sovereignty, modernity and state power, to explore the dynamics to which the ATC ran. It is argued that the Company's claims to jurisdiction over Thugs were elaborated through forms of violence and authority that can be understood as beyond the law. This violence and authority functioned as an excess of conventional, judicial power, using procedural and punitive innovations such as indefinite detention without trial, the use of denunciations from proven criminals, and a reliance on the criminalisation of a subject-position (Thug), rather than the establishment of individual guilt for particular criminal acts. In short, it is contended that the ATC may be read as a colonial state of exception that yields telling insights into the nature and intentions of British state power and social control in early nineteenth-century India.

# 1. Thuggee in the Ceded and Conquered Provinces, *circa* 1808–29

British colonial officials first encountered Thuggee in India in the territories known as the Ceded and Conquered Provinces at the end of the first decade of the nineteenth century.<sup>80</sup> This case study later examines in detail how the figure of the ‘Thug’ took on specific characteristics that distinguished him from the more generic *dacoit* (‘bandit’) in the colonial imagination, and became an object of specific anti-Thuggee legislation. For now, it concentrates on analysing the British responses to Thuggee when understood as a specific form of banditry in north India.

Between 1808–09, more than sixty mutilated corpses were discovered in wells and ditches scattered along the busy highways of the ‘turbulent’ frontier district of Etawah.<sup>81</sup> In 1810, Thomas Perry, the district’s new magistrate, offered a one thousand-rupee reward for information about the bodies, and, following a lead from an informant, eight men were arrested on suspicion of murder. One of them, a sixteen-year old agricultural labourer named Ghulam Hussain, made a confession to a certain Imaum Cooly Beg, one of Perry’s *darogahs*. Several of Ghulam’s associates subsequently admitted to murdering travellers over many years as members of a Thug gang, describing their methods in lurid detail. For Perry, this was confirmation of the existence of Thuggee: a form of brigandage native to India, whereby unsuspecting travellers were inveigled from the roads by duplicitous highwaymen,

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<sup>80</sup> The Ceded and Conquered Provinces lay hundreds of miles north-west of Bengal, along the route of British expansion up the Ganges, and comprised adjacent territories in northern-central India, ceded to the Company by the Nawab Vizier of Awadh in 1801, conquered from the Maratha chieftain Daulat Rao Sindia in 1803, and ceded by the Maratha Peshwa of Poona the same year.

<sup>81</sup> Etawah straddled several established and significant highways taken by indigenous merchants and pilgrims, but suffered from unstable agricultural conditions, and, located adjacent to lands controlled by the Marathas, had a reputation for lawlessness among colonial writers. ‘Turbulent’: W. Hamilton, *The East-India Gazetteer*, (London: Parbury, Allen & Co., 1828 [1815]), vol. I, p. 544. For the discovery of the bodies: T. Perry, Magt. Etawah, to G. Dowdeswell, Secy. Judicial Dept., 19 Mar. 1810, Thomas Perry Papers, Cambridge University Library [hereafter, Perry papers], 5375.

before being garrotted, robbed and buried. After several weeks of interrogations, it emerged that around 1,500 suspected Thugs were living under the protection of the *zamindars* of their home villages in Etawah, venturing out in small gangs and travelling as far as Bundelkhand, Jaipur and Lucknow to commit murders.<sup>82</sup>

Following a detailed report on the Thuggee problem produced by the acting magistrate at Farruckabad in March 1810, a superintendent of police was appointed for the administrative divisions lying within the Ceded and Conquered Provinces. His 'primary object' was 'the apprehension of Dacoits, Cozauks, Thugs, Buddecks, and other descriptions of public robbers, guilty of the commission of robberies and other crimes by open violence'.<sup>83</sup> The specific assignation of the superintendent to the investigation of the activities of these groups—all of whom were here figured as different types of bandit, defined by their method of attack, who carried out pre-planned and co-ordinated raids and highway assaults—indicates the administration's desire to stamp a particular kind of authority over the countryside. As Sandria Freitag has argued, crime that was perceived as collective, violent, and public, in which an alternative locus of authority (such as a landowner or the leader of a dacoit gang) had persuaded his dependants to engage in activity inimical to British rule, was an affront to colonial state-building in India, for it indicated that unitary, central, exclusive and abstracted authority had not been properly established in rural locales.<sup>84</sup> Pushing this argument further: the processes by which the British authorities attempted to assert this authority reveal much about the nature of colonial government in early nineteenth-century India, in particular, the regularity of what

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<sup>82</sup> For the magistrate's interrogations of Ghulam Hussain and his associates: Perry, Magt. Etawah, to Dowdeswell, Secy. Judicial Dept., 19 Mar., 11 Apr., 24 Apr. & 17 May 1810, all in Perry papers, 5375; Dowdeswell to Perry, 30 Mar. 1810, Bengal Criminal & Judicial Consultations [hereafter, BCJC], P/130/14, 30 Mar. 1810 (no. 38), British Library (London) [hereafter, BL], Asia, Pacific & Africa Collections [hereafter, APAC]. See also 'Trial of Four Thugs', Bareilly Court of Circuit, 2<sup>nd</sup> session of 1810, 9—11 & 16—17 Nov. 1810, enclosed in T. Brooke, Judge of Bareilly Court of Circuit, to Dowdeswell, Secy. Judicial Dept., 21 Dec. 1810, BCJC, P/130/27, 18 Jan. 1811 (no. 46), APAC.

<sup>83</sup> For Wright's report: W. Wright, Asst. Magt. Farrukhabad, to J. Miller, Magt. Farrukhabad, 12 Mar. 1810, BCJC, P/130/14, 30 Mar. 1810 (no. 6), APAC. For the appointment of the superintendent: Reg. VIII of 1810, 16 Mar. 1810, V/8/18, 348—349, APAC.

<sup>84</sup> See Freitag, 'Crime in the Social Order of Colonial North India', pp. 237, 252, and 'Collective Crime and Authority in North India', pp. 141—2, 159—62.

were posited as exceptional practices in founding a specific conception of sovereignty as a rational form of governance.

In a letter sent to the secretary to the Company's judicial department in May 1810, the magistrate of Etawah, Thomas Perry, claimed that 'it is improbable that a person whether Hindoo or Musulman [archaic: 'Muslim'] can be justly denominated a Thug without being a notorious murderer'.<sup>85</sup> For Perry, in 1810, the figure of the Thug marked a point of departure. The Thug signified the point at which conventional judicial process, reliant on the burden of proof, could no longer apply and so ended, and the inscription of sovereign power began, dependent upon an officer's conviction ('it is improbable') that any individual thus 'denominated' was indistinct from a 'notorious murderer'.<sup>86</sup>

The etymology and usage of the word 'Thug' has been the subject of several fairly extensive historical analyses.<sup>87</sup> Kim Wagner has argued that the term existed prior to and independently of the arrival of the British colonial presence in the subcontinent: officials like Perry were simply applying a vernacular noun to a relevant case in point.<sup>88</sup> Yet this reading disregards the specific power-relations at play in colonial investigations into Thuggee: in this context, 'Thuggee' derived its meaning from its ascription to a particular kind of individual deemed to have transgressed the Company's authority in a significant way. Furthermore, as we shall see, British understanding of the 'practice' was heavily derived from the interrogations of suspects who faced severe punishment if they did not accede to the accusation that they were a Thug and agree to volunteer further information about it, or who stood to win substantial financial rewards if they did.<sup>89</sup> The modicum of

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<sup>85</sup> Perry, Magt. Etawah, to Dowdeswell, Secy. JD, 17 May 1810, Perry papers, 5375.

<sup>86</sup> Perry further pressed the case for magisterial discretion with respect to the detention of persons of 'bad character': T. Perry, Magt. Etawah, to J. Shakespeare, Regr. *Nizamat Adalat*, 22 Apr. 1811, BCJC, P/130/132, 14 May 1811 (no. 93), APAC.

<sup>87</sup> See Gordon, 'Scarf and Sword', pp. 408–9; W. Halbfass, 'Vedic Apologetics, Ritual Killing, and the Foundations of Ethics', in *Tradition and Reflection: Explorations in Indian Thought* (Delhi: Sri Satguru Publications, 1992); P. Dundas, 'Some Jain References to the Thags in the Sainsaramocaka', *Journal of the American Oriental Society*, vol. 115, no. 2 (1995), esp. pp. 281–4; Singha, "'Providential' Circumstances", p. 104; van Woerkens, *Strangled Traveler*, pp. 116–7, 299.

<sup>88</sup> Wagner, *Thuggee: Banditry and the British*, chs 2–4, esp. pp. 40–1.

<sup>89</sup> Indeed, the *Nizamat Adalat* (the Company's superior criminal court) was greatly concerned by the seemingly corrupt and brutal means by which police *darogahs* were extracting confessions from suspects arrested in the countryside, and of the credence given to them by

indeterminacy contained in Perry's assertion—that 'it was improbable', not impossible, 'that a person...can be justly denominated a Thug without being a notorious murderer'—was an indication of the problems presented by a reliance on the so-called confessions that he had obtained from Thugs, which, he warned, were 'so extraordinary that the whole [discovery of Thuggee] might be considered fabulous'.<sup>90</sup> Yet, to Perry's frustration, the methods allegedly used by Thugs—their deliberate targeting of travellers far from home who could not be identified in the locality in which they were attacked; strangulation to kill victims quickly and quietly; the mutilation and dismembering of corpses to expedite their burial and decomposition—made it difficult to produce evidence adequate to prove each man's culpability for a specific attack. 'In no[t] one of the cases which has been reported to the office has any individual been directly implicated', he wrote.<sup>91</sup> Without witnesses to the attacks, or even formal complaints from relatives of the victims, the only legal proof of a prisoner's guilt was a potentially 'fabulous' confession from other gang-members.

The first trial of suspected Thugs held under British auspices was heard at the second session of the Bareilly Division court of circuit, at Mainpuri, in November 1810. It collapsed into farce after the prosecution's sole witness, Ghulam Hussain, admitted to conspiring with the arresting *darogah* to win Perry's reward by lying about the number of Thug attacks he had witnessed.<sup>92</sup> The government now attempted to prosecute Ghulam himself, on the basis of his dubious confessions, but the *Nizamat Adalat* (the Company's superior criminal court) rejected the case, unwilling to use such unreliable testimonies as the sole proof of guilt.<sup>93</sup> Indeed, writing six years later,

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magistrates. Evidence of this concern is found in the flurry of circulars sent out to magistrates on this subject in the early nineteenth century. See J. Carrau, (ed.), *The Circular Orders passed by the Nizamat Adawlut, and Communicated to the Criminal Authorities, from 1796 to 1853 inclusive* (Calcutta: Bengal Military Orphan Press, 1855), pp. 4, 6, 14, 25–6, 29, 54.

<sup>90</sup> Perry, Magt. Etawah, to Dowdeswell, Secy. Judicial Dept., 11 Apr. 1810, Perry papers, 5375.

<sup>91</sup> Perry, Magt. Etawah, to Dowdeswell, Secy. Judicial Dept., 1 Mar. 1812, Perry papers, 5376.

<sup>92</sup> 'Trial of Four Thugs', in T. Brooke, Judge of Bareilly Court of Circuit, to Dowdeswell, Secy. Judicial Dept., 21 Dec. 1810, BCJC, P/130/27, 18 Jan. 1811 (no. 46), APAC.

<sup>93</sup> This was not, however, the last time the judges of the *Nizamat Adalat* were to come across Ghulam Hussain. Perry continued to detain him (presumably on account of his 'notoriety' and because he would be unable to find a guarantor for his bail on security of good behaviour), and used him to bring further trials, which ultimately found their way to the

the superintendent of police for the Western Provinces admitted that while 142 murders had been attributed to Thugs in his jurisdiction in between 1814 and 1815, ‘Much scepticism still prevails [here] regarding the existence of any distinct class of people, who are designated Thugs’. Consequently, he admitted, there had still not been any successful convictions for Thuggee under British auspices.<sup>94</sup>

The initial British-led attempts to suppress Thuggee therefore appear to have foundered on judicial unwillingness to endorse the procedures used to bring suspects to trial and produce the necessary evidence to convict them. In fact, as has been shown, these magisterial investigations entailed not an application of the law, but the waiving of certain procedures in regard to a particular kind of criminal. Under the Mughal system, such exceptional powers were quite deliberately kept without the judicial system, which was confined to a narrower legal expression of state power over the lives of subjects. Discretionary punishment was used to deal with those cases—such as dacoity—that seemed to challenge imperial authority but for which no specific penalty existed in the *sharia*. More significantly, *foujdari* (military executive governance) and the delegation of the sovereign prerogative of discretion to subordinate officers were recognised as the means to keep the peace in rural locales.<sup>95</sup> The failure to obtain convictions against suspected Thugs in the second decade of the nineteenth century reveal that local Company magistrates’ attempts to bring similar executive, discretionary, prerogative powers within the colonial authorities’ established judicial sphere were thwarted in their practical application in the Ceded and Conquered Provinces.

In the context of the Thuggee problem in the Ceded and Conquered Provinces, the Company found two ways around the judicial roadblock on

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superior court. In a trial of three suspected Thugs in 1812, Ghulam’s evidence was again dismissed as unreliable by the *Nizamat Adalat*, since he could not give specific details about single acts for which the accused would be culpable. Perry’s other witness was an eighty-four year old man, whom the court described as ‘almost devoid of intellect’ because of his ‘exceeding age’. See W. H. Macnaghten, *Reports of Cases Determined in the Nizamat Adawlut: With Tables of the Names of the Cases and Principal Matters, vol. I: 1805—19* (Calcutta: Baptist Mission Press, 1827—8), V/22/44/239—40, APAC.

<sup>94</sup> J. Shakespeare, Supt. Police for the Western Provinces, Annual Report (1816), 30 Aug. 1816, BCJC, P/132/44—5, para. 76, APAC.

<sup>95</sup> See, in particular, Singha, *Despotism of Law*, pp. 1—2, 12, 49, 51, 60—70. More generally: Jörg Fisch, *Cheap Lives and Dear Limbs: The British transformation of the Bengal criminal law 1769—1817* (Wiesbaden: Steiner, 1983).

convictions. First, as the police superintendent noted, the *zamindars* of the problem districts of Etawah, Aligarh and Farruckabad were ‘intimidated from affording further protection to these villains [the Thugs]’ by the razing and ploughing of the settlement of Madnai in neighbouring Maratha territory, an alleged haven for Thugs, by an army detachment in November 1812. ‘From all that I have been able to learn as well as from the communication I have had with the different Zemeedars [*sic*],’ wrote Captain Popham, who commanded the attack,

...Sindouse [bordering Etawah] will be in as tranquil a state as any of the neighbouring Districts in the Company’s Territories for a long time to come....  
...the burning of the village of Murnae has alarmed the evil disposed [people] dreadfully, and will be a warning, I am persuaded[,] to them to wish to remain in peace and quiet.<sup>96</sup>

Second, there was a widening of the legislation under which certain Indian criminal suspects could already be held in indefinite detention. ‘Although I despair of being able to convict a thug’, Perry had written in July 1812, ‘still it is better that they should remain in jail than be allowed unmolested to carry on their system of murder & depredation’.<sup>97</sup> In line with this sentiment, regulations VIII of 1808, VIII of 1818, and III of 1819 enlarged the zone of sovereign discretion so that by 1819 it applied to ‘notorious robbers of *whatever denomination*’, acquitted of specific charges but thought to be of ‘desperate or dangerous character, whom it would be unsafe to set at liberty without substantial security for their future good behaviour’.<sup>98</sup> Neither able to find

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<sup>96</sup> Western Provinces Annual Police Report (1816), para. 89, BCJC, P/132/44—5, 30 Aug. 1816, APAC. For the attack on the village of Madnai: Capt. Popham, Commanding the Military Detachment at Sindouse, to N. J. Halhed, Asst. Magt. Agra & Etawah, 13 Nov. 1812, BC, F/4/389/9872, ff. 127—9, APAC.

<sup>97</sup> Perry, Magt. Etawah, to G. D. Guthrie, Supt. Police Western Provinces, 27 July 1812, Perry papers, 5378.

<sup>98</sup> [My emphasis, quoting regulation III, 1819] Reg. VIII, 19 Sept. 1808, V/8/18, 289—92, APAC; Reg. VIII, 28 Aug. 1818, V/8/19, APAC; Reg. III, 16 Apr. 1819, V/8/19, APAC. Regulation III was soon extended to Madras (1819) and Bombay (1827). By 1850, the Regulation applied to most parts of British India. It was even used in Upper and Lower Burma in 1875. Thereafter, this freestanding provision for detention without trial was periodically amended, and used extensively during the 1930s to suppress disturbances in Chittagong. It remained in force in India until 1952, beyond the establishment of constitutional independence from British rule, by which time executive powers for the administrative detention of civilians had been enshrined in article 22 of the new constitution.

guarantors for their bail, nor convicted for murder, scores of suspected Thugs were simply left to rot in district jails across northern and central India throughout the 1820s.<sup>99</sup>

If the Company's courts were unwilling to make legal exceptions to provide for the conviction of certain 'extraordinary' Indian criminals in the first two decades of the nineteenth century, the local enforcers of colonial juridical will—magistrates such as Thomas Perry in the Ceded and Conquered Provinces—were nevertheless provided with special powers to incarcerate them indefinitely without trial. Indeed, as the next chapter shows, the suspected Thugs held at Sagar jail would go on to provide one Captain William Sleeman with much of the information used to present the government with a new, more shocking picture of Thuggee: as a secret, organised 'system' of robbery and murder.

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See A. W. Brian Simpson, 'Round Up the Usual Suspects: the Legacy of British Colonialism and the European Convention on Human Rights', *Loyola Law Review*, vol. 41, issue 4 (1996), pp. 637—8, 646—8, 658.

<sup>99</sup> For statistics on Thugs in indefinite detention in the late 1810s and in the 1820s: W. Ewer, Supt. Police Lower Provinces, to W. B. Bayley, Secy. Judicial Dept., 6 Apr. 1819, BCJC, P/134/6, 16 Apr. 1819 (no. 6), APAC; F. C. Smith, Agent to the Governor-General, Sagar & Narmada Territories [hereafter, AGG S&NT], to H. J. Prinsep, Secy. Political Dept., 19 Nov. 1830, BC, F/4/1309/52131, APAC.

## 2. The Thuggee phenomenon and the juridical exception of the EIC's non-regulation territories, circa 1829–40

### § Launching the anti-Thuggee campaign

Prior to the late 1820s, British efforts to suppress Thuggee faltered because the form of evidence used against suspects did not meet the standards necessary to obtain a conviction in the Company's supreme criminal court in India. Since it was believed that Thugs were sworn to secrecy, to commit attacks on strangers and in remote locations, to kill all the people they attacked, to conceal forensic evidence of their crimes, and to be protected by corrupt landowners who shared in the profits of their robberies and intimidated anyone who might speak out about them, it was near impossible to find witnesses to testify against Thuggee suspects. Thuggee appeared to be the perfect crime.<sup>100</sup>

In July 1829, one Captain Borthwick, the Company's political agent at Mahidpur, explained why he had offered reduced sentences to certain members of a gang of 74 bandits he had arrested in the Malwa region of western India:

[The suspect's] Deposition... was perhaps alone sufficient to establish the guilt of the prisoners, but as it was desirable to obtain all the information possible of the acts and proceedings of this band of systematic murderers, that the Government might be the better able to adopt effectual measures for their eventual extirpation, I held out the promise of a pardon to other individuals of the gang to come forward, on which five of the prisoners, whose Depositions are enclosed, presented themselves as evidence against their associates.<sup>101</sup>

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<sup>100</sup> For a concise illustration of contemporary anxiety about the difficulty of convicting suspected Thugs, see Capt. Sleeman to Capt. Benson, Sagar, 22 Nov. 1832, in Philips (ed.), *Correspondence of...Bentinck*, vol. II, pp. 948–50.

<sup>101</sup> Capt. W. Borthwick, Political Assistant to the AGG at Mahidpur, to Maj. J. Stewart, Offg. Resident at Indore, 26 Jul. 1829, in Sleeman, *Ramaseeana*, Appendix X, p. 377.

Swayed by the promise of a pardon, six members of the gang betrayed the others, describing their numerous, fatal attacks on travellers throughout western-central India to their captor. The confessing prisoners described themselves as ‘Phansigars’, but their methods matched those allegedly used by Thugs.<sup>102</sup> On 23 October 1829, George Swinton, chief secretary to the recently arrived governor-general, Lord William Cavendish Bentinck, wrote to the British resident at the Court of Indore to advise on how to prosecute the gang. ‘These murders having been perpetrated in territories belonging to various Native Chiefs,’ wrote Swinton,

...and the perpetrators being inhabitants of various Districts belonging to different authorities, there is no Chief, in particular, to whom we could deliver them up for punishment, as their Sovereign or as the Prince of the Territory in which the crime had been committed. ...The hand of these inhuman monsters being against every one and there being no country within the range of their annual excursions, from Bundelcund [Bundelkhand] to Guzerat [Gujerat], in which they have not committed murder...they may be considered like Pirates, to be placed without the pale of social law, and be subjected to condign punishment by whatever authority they may be seized and convicted.<sup>103</sup>

For Swinton, these bandit gangs transgressed the operative political boundaries in north-western and central India, significantly redrawn in the course of the Anglo-Maratha wars of *circa* 1802—18, in two ways. First, their alleged crimes were committed beyond the confines of their native districts, in jurisdictions falling under the rule of different authorities. Second, the enormity of the attacks was such that their perpetrators entered a zone of judicial indeterminacy. Conventional measures could not apply to ‘inhuman monsters’ leagued ‘against every one’: they were beyond ‘the pale of social law’. Swinton thus alluded to a space that exceeded the extant juridical order. It was in this exceptional space that Phansigars (or Thugs, Swinton’s preferred term), like pirates, beyond the reach of either a single territorial jurisdiction

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<sup>102</sup> See the following section for more on this terminological issue.

<sup>103</sup> G. W. Swinton, Chief Secy. to GG, to Stewart, Offg. Resident Indore, 23 Oct. 1829, in N. K. Sinha (ed.), *Selected Records Collected From the Central Provinces and Berar Secretariat Relating to the Suppression of Thuggee 1829—1832* (Nagpur: Government Printing Central Provinces and Berar, 1939) [hereafter, *SRT*], pp. 12—13. For the Thug-informers’ accounts of their attacks, and records of the recovered loot: Sleeman, ‘Introduction’, in *Ramaseeana*, pp. 15—40.

or conventional judicial process, would be dealt with. In short, only exceptional measures could suppress an exceptional crime like Thuggee. Sovereignty was thus invoked in two different, but related, ways. As the sovereign power ruling certain territories in the subcontinent, the British must act to stop organised, public and violent crimes occurring within these jurisdictions, even if the perpetrators were domiciled without the Company's domains. If the extant judicial system could not secure convictions, then executive power—the sovereign power to decide on the exception, in Schmitt's formulation—would be delegated to British officials who apprehended the perpetrators of these crimes. Accordingly, upon receipt of Swinton's letter in February 1830, forty leaders of the gang arrested by Borthwick were summarily executed.<sup>104</sup>

By August 1830, Swinton was agitating for a concerted 'Thugg [*sic*] hunt'. He recommended Captain William Sleeman, a political assistant stationed at Jabalpur in the Sagar and Narmada Territories in central India, as the best candidate to lead it.<sup>105</sup> Indeed, acting on the principles laid down in Swinton's letter to Borthwick, Sleeman and his immediate superior, F. C. Smith, the agent to the governor-general in the Sagar and Narmada Territories, had already initiated the trials of 72 bandits being held at Sagar jail. They were the surviving members of a gang of 103 suspected Thugs detained without trial under regulation III of 1819, following their arrest by Smith's predecessor, Molony, in 1822.<sup>106</sup> Presently, Smith hanged twenty-six of them following cursory trials. More significantly, the confessions yielded from certain captives-turned-informers, known as 'approvers' in the legal parlance of the time, who had been consulted in the course of assembling the cases for trial, would change

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<sup>104</sup> Borthwick, PAAGG Mahidpur, to Stewart, Offg. Resident Indore, 7 Feb. 1830, Extract Bengal Political Consultations, 5 Mar. 1830 (enclosed in no. 46), BC, F/4/1251/50480(1), APAC. The first Thug trial that resulted in conviction and sentencing was held in Sagar in 1826. However, these convictions were not based on the principles laid down in Swinton's letter of October 1829: that Thugs were like pirates, and amenable to punishment at the discretion of whichever authority arrested them. See Sleeman, *Ramaseena*, Appendix C, pp. 46—53.

<sup>105</sup> 'Note by the Secretary [G. Swinton]', 3 Aug. 1830, BC, F/4/1251/50480(2), ff. 621—5, APAC.

<sup>106</sup> See Smith, AGG S&NT, to Prinsep, Secy. Political Dept., 19 Nov. 1830, in *SRT*, pp. 45—8.

the terms in which Thuggee was conceived and create a new level of impetus for British intervention.<sup>107</sup>

On 3 October 1830, an anonymously published article appeared in the *Calcutta Literary Gazette*. It claimed that Thuggee was an organised religious cult directed by a grasping priesthood. ‘Kali’s temple at Vindhychal, a few miles west of Mirzapur on the Ganges,’ it claimed,

is constantly filled up with murderers from every quarter of India who go there to offer up in person a share of the booty they have acquired from their victims strangled in their annual excursions. ... The priests of this temple know perfectly well the source from which they derive their offerings and the motives from which they are made...and they promise the murderers in the name of their mistress immunity and wealth, provided a due share be offered up to their shrine, and none of the rites and ceremonies be neglected.<sup>108</sup>

Seizing upon the religious dimension of Thuggee, Swinton once again brought the matter to the governor-general’s attention. He suggested that Thuggee was a practice analogous to *sati* (the immolation of widows), which the Company had legislated to prohibit in the Bengal Presidency ten months earlier.<sup>109</sup> Governor-General Bentinck was won over and endorsed a campaign to suppress Thuggee five days after Sleeman’s letter was published.

In mid-November 1830, Smith outlined to the government a ‘Plan for the eventual destruction of the associations of Thugs’. He suggested creating a new post: the ‘Superintendent of Thugs’. This officer’s sole task would be the pursuit of Thugs living both in the Company’s territories and, having consulted with the relevant British political agent, in independent native states. He would be equipped with general warrants for the arrest of suspects, a party of native guards, and ‘a Police establishment ready to obey his injunctions’. Smith, acting in his judicial capacity as

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<sup>107</sup> See Prinsep, Secy. Political Dept., to Swinton, Chief Secy. GG, 27 Dec. 1830, BC, F/4/1309/52131/1), APAC.

<sup>108</sup> Swinton’s transcription of Sleeman’s letter to the *Calcutta Literary Gazette* can be found in ‘Note by the Secretary [G. Swinton]’, 4 Oct. 1830, BC, F/4/1251/50480(2), ff. 672—90, APAC.

<sup>109</sup> See ‘Note by the Secretary [G. Swinton]’, 4 Oct. 1830, BC, F/4/1251/50480(2), ff. 669—70, APAC.

a commissioner, would try all suspects ‘without reference to the scene and locality of the outrages’. An unmentioned but highly significant consequence of this was that Thuggee cases would not go before the *Nizamat Adalat* for review.<sup>110</sup> Since these trials were being conducted under the auspices of the Company’s Political, rather than its Judicial, Department, contentious verdicts would be considered by the secretary of that department rather than a judicial body. This was rationalised as acceptable because of the novelty and uncertainty of British authority in those spheres of Company jurisdiction in which Sleeman and Smith would conduct their inquiries into Thuggee: the Sagar and Narmada Territories. These possessions had only been brought under British control in 1818 and were classified as ‘non-regulation territories’; in that sense, they were excepted from the Company’s juridical order in the Bengal Presidency.<sup>111</sup> Here, it seems, procedural license and executive discretion, rather than judicial oversight, were sufficient to determine the fate of serious transgressors of British sovereignty in colonial north India.

## § Liminal criminals: approvers and the Thuggee conspiracy in the 1830s

In his plan for the suppression of Thuggee, Smith further suggested that rewards of up to a thousand rupees, small grants of land and honorary titles could be offered to Indians as incentives to cooperate in the apprehension of prime suspects.

Alternatively, the wife and children of a Thug *jemadar* (gang-leader) could be taken hostage until he was apprehended: ‘Thugs are generally hereditary’, Smith argued, so ‘there could be no injustice in claiming the lion’s whelps till the lion himself is disposed of’. The justification given for these unprecedented administrative and procedural demands on the government was the claim that he and Sleeman had started to unravel a ramified system of murder thanks to the interrogation of suspects offered clemency in return for information. Referring to the trial of the gang arrested by Molony in 1822, he told the government that:

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<sup>110</sup> See Smith, AGG S&NT, to Prinsep, Secy. Political Dept., 19 Nov. 1830, in *SRT*, pp. 49–55.

<sup>111</sup> The non-regulation tracts of the Bengal Presidency were Delhi (added in 1803), the Sagar and Narmada Territories (1818), and Assam, Arakan and Tenasserim (1824).

The free[,] unembarrassed and consistent manner in which the approvers have deposed the minuteness of their descriptions, and the satisfactoriness of their cross-examinations afford a moral certainty that they have related only the facts they actually saw and [that are] known to be true.

It was this aspect of Smith's plan—which placed indefinitely detained approvers at the centre of British inquiries into Thuggee—that drove the suppression campaign of the 1830s.<sup>112</sup>

According to the Anglo-Indian author and administrator Philip Meadows Taylor, who spent several years recording the testimonies of arrested suspects in the Nizam of Hyderabad's territories in the early 1830s, only 56 out of 3,437 individuals charged for Thuggee between 1826 and 1841 were 'made approvers after committed'. Furthermore, 49 of the 56 individuals made approvers had been selected by 1835, that is, before the policing agencies and procedural innovations developed to tackle Thuggee were set on a formal, institutional and legislative footing (in 1836).<sup>113</sup> These statistics indicate not only the extent to which British anti-Thuggee operations in the early 1830s rested on information derived from a small body of 'insiders', but also the reliance placed upon the understanding of Thuggee thus obtained even when the ATC had been glossed with the veneer of central oversight and codified legal provisions. As such, an understanding of the nature of approver knowledge of 'Thuggee' is critical for a deeper consideration of the dynamics to which the ATC itself ran.

Shortly after arrest, suspected Thugs thought suitable to become approvers were manacled in leg-irons and segregated from other captives. They were interrogated and required to produce a testimony, or deposition, in which they admitted to their involvement in Thuggee, recounted the attacks they had

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<sup>112</sup> See Smith, AGG S&NT, to Prinsep, Secy. Political Dept., 19 Nov. 1830, in *SRT*, pp. 49–55. To give some sense of the scale of the rewards offered for the capture of leading Thuggee suspects, it has been estimated that an Indian peasant's annual income at the time was about thirty rupees.

<sup>113</sup> 'Tabular Statement of the Results of Thug Trials held in India, 1826–41', in Philip Meadows Taylor, 'The State of Thuggee in India', *British Foreign Review*, vol. 15, no. 29 (1843), p. 293.

participated in and named other Thugs involved.<sup>114</sup> This document formed the centrepiece of evidence used in the anti-Thuggee trials of the 1830s. A certain Khaimraj phrased the prisoner's dilemma faced by those arrested and accused of Thuggee in stark terms:

I was fully resolved to keep silent, but finding that two or three of my companions had already told all, and had pointed out the spots and bodies of the different individuals whom we had murdered during the last few days previous to our being seized, I considered it would be very foolish in me to abide by such a resolution, particularly when I found I might save my life by a full and true confession, while remaining silent would not avail me or any of my companions any thing.<sup>115</sup>

As Khaimraj suggests, since the approvers initially testified under pain of death, the more deeply they incriminated themselves as past practitioners of 'Thuggee', and the more they confirmed their interrogators' perceptions of their crimes, the more valuable their testimony became—both to their British captors, who simultaneously obtained proof of their own general theories on Thuggee and of the specific guilt of other suspects awaiting trial, and to the approvers themselves, who were now more likely to be spared execution. As Meadows Taylor later observed: 'as fast as new approvers came in, new mysteries were unravelled and new crimes confessed'.<sup>116</sup>

Sleeman, Smith and their administrative supporters faced stern criticism for the practice of using approvers to generate testimonies with which to convict Thuggee suspects. Lushington, the Company's political agent at Bharatpur, complained early on in the ATC that it was dangerous, if not reckless, to allow the least trustworthy of all natives to become the heartbeat of British-led efforts to

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<sup>114</sup> Approvers were also required to show Indian police subordinates working for the Company (usually, parties of *nujeebs* led by a senior 'native' soldier) where bodies had been buried, which were then exhumed and if possible identified, and where their former associates lived. Associates brought in on the strength of approvers' accusations were identified in face-to-face parades by a succession of the informers who had been previously kept apart to prevent collusion. See H. H. Spry, *Modern India; with Illustrations of the Resources and Capabilities of Hindústan* (London: Whittaker & Co., 1837), vol. II, pp. 159–62; van Woerkens, *Strangled Traveler*, pp. 68–71.

<sup>115</sup> 'Extract from the Deposition of Khaimraj Phansigar, admitted to give evidence', in Sleeman, *Ramaseena*, Appendix X, pp. 296–7.

<sup>116</sup> Philip Meadows Taylor, *Story of My Life* (London: Zwan Publications, 1989 [1877]), p. 72.

understand and suppress the Thuggee 'system', noting the approvers' 'utter disregard...of truth and justice'. He thereby demonstrated his own awareness of the potential for deceit afforded by these particular suspects' liminality between the social reality of 'Thuggee' and the judicial power delegated to them by making their depositions the mainstay of cases against others accused of being Thugs.<sup>117</sup> Followed to its conclusion, Lushington's critique implied that the ATC was a succession of injustices, wherein unscrupulous informers, facing death, framed whoever they thought likely to be able to convict. The line of analysis taken here, by contrast, considers how the recording practices used to produce approver testimonies contributed to a new conceptualisation of the Thuggee menace during the 1830s, such that the inclusion of exceptional measures and sovereign power within the Company's juridical order was realised in the midst of the ATC.

Approvers' statements were recorded using a set formula, transcribed in Persian and subsequently translated into English.<sup>118</sup> As we shall see, the formulaic quality of approver testimonies lent an immediate coherence to the notion, which gained currency throughout the 1830s, that 'Thuggee' was a discrete practice, introducing uniformity to the diverse accounts given to British officers investigating the crime. Approver depositions began with a statement of the name, age and 'caste', of the person suspected of being a Thug, where they were born, and where they were based up to the time of arrest.<sup>119</sup> Approvers then narrated recollections of the expeditions they had participated in that featured the persons they had identified to the British authorities. Each attack was described in the following way: the approver gave a vague geographical description of the vicinity of the crime, described how the

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<sup>117</sup> G. T. Lushington, AGG Bharatpur, to A. Lockett, AGG Ajmere, June 1832, in *SRT*, pp. 94–8, quoting p. 97. For further complaints about the methods used to suppress Thuggee by Sleeman and Smith, see: W. H. Macnaghton, Secy. GG, to R. Cavendish, Resident Gwalior, 25 May 1832; A. Lockett, AGG Ajmere, to Macnaghton, in *ibid.*, pp. 88–9 & 92–3, respectively.

<sup>118</sup> Captain James Paton's papers contain references to the translation process and include a letter sent to all magistrates involved in the ATC asking them to follow a set list of questions. See 'Collections on Thuggee and Dacoitee, by Capt. James Paton', BL, Add. Mss. 41300, ff. 173, 400–1.

<sup>119</sup> 'Caste' is in inverted commas to draw attention to the disparities between colonial, indigenous, and twenty-first century understandings of the word. For more: Susan Bayly, *Caste, Society and Politics in India from the Eighteenth Century to the Modern Ages* (Cambridge: Cambridge University Press, 1993); Nicholas B. Dirks, *Castes of Mind: Colonialism and the Making of Modern India* (Princeton: Princeton University Press, 2001).

victims were identified and attacked, named the person responsible for their death, listed the possessions taken and how they were distributed among gang-members, and indicated roughly where the gang headed next.

Approvers' testimonies were not rambling recollections of the past, therefore, but accounts of isolated, specific events and the consequences of them: those details about which the prosecution wished to hear. The deposition was a deliberately condensed record of several years of a suspect's life, in which details about the precise identities of the victims, the interactions between different gangs encountered on an expedition, or the material and social circumstances of those allegedly involved in Thuggee were allowed to fade into the background. By contrast, the foreground was brilliantly illuminated by empirical details about each attack: the number of victims killed, the names of the murderers, the amount of loot taken, and (roughly) where and when the attack took place. This presented the examining officers with seemingly objective information about each crime that could then be used for the prosecution of suspects.<sup>120</sup>

What was left out of the approvers' statements is of course as significant as what was retained, not least since these 'background' details may have offered alternative insights into why people turned to what was called Thuggee or how regularised gang-relations were. Instead, the persistence of the above-described template as the formalised means of recording consistent (or repetitive) statements meant that these details were not recorded in the legal archive, in which suspects appeared as 'extraordinary' criminals whose identity was coterminous with their criminality. This decontextualising process helped produce accounts of Thuggee in which it indeed appeared as a distinctive practice and that seemed to authenticate colonial suspicions about what was a scantily understood phenomenon at the point at which the ATC was authorised.

The formula within which the testimonies were framed was designed to produce a narrative account of a suspected Thug's life as a gang-member. This process of narrativisation required the accused 'to make totalities out of scattered

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<sup>120</sup> For more analysis of the way depositions were recorded: van Woerkens, *Strangled Traveler*, pp. 60–7.

events'.<sup>121</sup> By their sequential relation of separate attacks that may have occurred years apart from one another into a temporally continuous 'career of crime', in which the only thing suspects do is murder people and rob them, the depositions gave a particular coherence and rationality to suspects' actions, in which the commission of criminal acts appeared, in their own words, to be explicable as the unfolding of destiny, the logical playing-out of a specific identity. This further reinforced the growing colonial conceptualisation of Thuggee as a full-time, 'hereditary profession' and a corporate or caste-like criminal identity from which there was no escape and for which everyday professions were merely a screen.<sup>122</sup> To cite one Rama's deposition, made to Sleeman at Jabalpur in 1832:

My family have followed exclusively the occupation of Thugs for two hundred years past and I was brought up to no other. My grandfather was a celebrated Thug Jemadar [leader] and my father who succeeded him became a leader of equal note. Omeida, my elder brother, too, became under my father's tuition an expert hand in all Thug ways and practices.<sup>123</sup>

Thus, the intentions and circumstances that led to Rama's 'career' of crime appear to need no further explanation beyond the suspect's self-acknowledgement that he was a Thug, and therefore a born murderer, 'brought up no other'.

The accumulation of hundreds of similar approver statements taken from different suspects across the subcontinent throughout the 1830s served to authenticate the colonial representation of Thuggee as a widespread 'system' practised by preordained sociopaths.<sup>124</sup> The evidence contained in approvers' depositions coagulated colonial perceptions of Thuggee, giving them a more solid form and greater consistency—as hoped by those pressing for a suppression campaign in 1829—30. The combination of the editing and narrativising processes

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<sup>121</sup> Shahid Amin, 'Approver's Testimony, Judicial Discourse: The Case of Chauri Chaura', in Ranajit Guha (ed.), *Subaltern Studies*, vol. V (Oxford & New York: Oxford University Press, 1987), p. 186.

<sup>122</sup> 'Career of crime' and 'hereditary profession' are Sleeman's phrases: Sleeman, 'Introduction', in *Ramaseeana*, p. 39.

<sup>123</sup> 'Examination of Thug approver Rama Jemadar', in *SRT*, p. 127.

<sup>124</sup> Cf. 'Examination[s] of [the] Thug approver[s] Rama Jemadar, Moty, Rama, and Mana', in *SRT*, pp. 127, 137, 142, 147.

had the effect of lifting the suspect's actions out of context and of facilitating further arrests by establishing a trope of disobedience whereby Thuggee was intelligible and condemnable as a practice. Meanwhile, the need to establish individual motivations and culpability for specific attacks was increasingly obviated.<sup>125</sup>

Occasionally, a testifying approver would make a claim incredible even to officials predisposed to believe in their accounts by the wider impression of Thuggee as 'extraordinary' crime. One Rumzam, testifying in Lucknow, told his British interrogator that he had been a Thug since the age of ten or twelve, and had witnessed 1,700 strangulations and been personally responsible for 300 of them during his twenty-year 'career'. 'The statements of this miscreant appear almost incredible', his interrogator noted, 'but they have been described in his own words', before adding that: 'It seems unlikely that they should be true to the extent to which he asserts'.<sup>126</sup> This is reminiscent of Perry's earlier alarm at the 'potentially fabulous' revelations made by the likes of Ghulam Hussain—and indeed of the eventual fury with him from Judge Brooke at the court of circuit session:

...you delivered to the Court a false narrative; you have sought to impose on the Court, and on the very Koran itself, the Deception of a Thug. In your narrative which was given five days ago, you confessed being present at fifty nine murders; in your present narrative in the short space of three years and a half you have confessed [to] being present at ninety five murders; from these contradictory statements, it is impossible to know to what further extent you have pursued your diabolical trade; and how many lives may not [?] have fallen a sacrifice to you in that period.<sup>127</sup>

Such evidence of official disquiet about the reliability of the procedures for assessing the legal culpability of Thuggee suspects marks ruptures in the smooth surface of the colonial judicial discourse, drawing our attention to the performative dimension of informers seeking to mimic the criminality imputed to them by their captors. This is not to contest the justice of these trials, rather to highlight the extent to which the

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<sup>125</sup> Cf. Amin, 'Approver's Testimony', esp. p. 187.

<sup>126</sup> 'Collections on Thuggee and Dacoitee, by Capt. James Paton', BL, Add. Mss. 41300, f. 174.

<sup>127</sup> 'Trial of Four Thugs', in T. Brooke, Judge of Bareilly Court of Circuit, to Dowdeswell, Secy. Judicial Dept., 21 Dec. 1810, BCJC, P/130/27, 18 Jan. 1811 (no. 46), APAC.

dynamics of the bureaucratised knowledge-gathering project about Thuggee helped it to appear as a ramified criminal organisation, with deep, anti-social roots and a discrete subculture. These transactions between approvers and interrogators are examined at greater length in the following chapter of this case study.

### 3. From extraordinary crime to social phenomenon:

#### Thuggee in 1830s India

##### § The performance of alterity: approvers and the Thuggee subculture

On the basis of F. C. Smith's argument that, 'like tigers[,] their taste of Blood is indelible and not to be eradicated while life exists', Thug approvers were spared death but incarcerated for life. Yet their confinement did not only serve punitive ends. Approvers were offered exemption from trial on capital charges of murder on the grounds that as *jemadars*, they could offer not only the largest number of accusations against former associates, but could also reveal most about the 'practice' of Thuggee in wider terms, and so increase the efficiency of the suppression campaign. The British officers leading the campaign to suppress Thuggee therefore attempted to create institutional arrangements that would yield a steady flow of information about the phenomenon.<sup>128</sup>

In the course of the ATC, small coterries of approvers were retained in British prison compounds, such as those maintained by Sleeman at Jabalpur and Captain James Paton at Lucknow, where they were questioned at greater length about the nature of their alleged practice.<sup>129</sup> Approvers were given stipends to 'stimulate [them] to exertion...[and] active and faithful services'.<sup>130</sup> Sleeman noted the effects of these rewards on the captives he interviewed. According to him, the approvers:

...make a virtue of necessity, and try to show that they are better informed and can be more useful than any that have been admitted as King's evidences before them, in the hope, that we may extend to them also the promise of exemption

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<sup>128</sup> See the following correspondence: Swinton, Chief Secy. GG, to Smith, AGG S&NT, 4 Aug. 1830; Swinton to Stewart, Offg. Resident Indore, 8 Oct. 1830; Smith to Prinsep, Secy. Political Dept., 19 Nov. 1830; and Smith to Swinton, 20 Jun. 1832, in *SRT*, pp. 10, 49, 53—4, 112—13, respectively.

<sup>129</sup> See Swinton, Chief Secy. GG, to Stewart, Offg. Resident Indore, 23 Oct. 1829, in Sleeman, *Ramaseena*, Appendix X, p. 383.

<sup>130</sup> William H. Sleeman, *Report on the system of Megpunnaism* (N.p.: The Serampore Press, 1839), p. 3.

from the heavier penalties of the law which they know they have incurred by the more prominent part that they [gang-leaders] have taken in all the murders perpetrated by their gangs.<sup>131</sup>

Indeed, it seems that some approvers underwent something of a transformation during their confinement: Bukhtawar explained his and others' lack of apprehension about denouncing former accomplices in terms of having become 'servants of Government'.<sup>132</sup> Meanwhile, Fanny Eden, who visited Lucknow in the late 1830s, suggested that British officers viewed the approvers 'in a most romantic light' and described Paton as a 'great Thug fancier' who 'makes positive pets of some'.<sup>133</sup> Intimacy would produce insight.

Quite clearly, the so-called 'approvers' system' attempted to place some distance between the previous lives of leading Thuggee suspects and their new role as Company employees in which informers accepted their position of instrumentality in regard to the suppression campaign. As Shahid Amin has observed, albeit about a much refined version of the system used in the 1830s, the approver is a rebel or criminal who has shifted his locus in relation to the actions being prosecuted: from a protagonist of them to an agent of the forces of counter-insurgency.<sup>134</sup> In this vein, Martine van Woerkens has suggested that in the interrogations of Thugs, 'the culprit did not respond to the explicit demand of truth, but to the secret expectations of the colonizers'.<sup>135</sup> This section of the case study considers that performative dimension of approvers' interactions with British officers during the ATC to explain how new understandings of Thuggee were produced in the 1830s, becoming the basis of an official discourse on the phenomenon that later underpinned the inclusion of exceptional measures to suppress the crime within the Company's 'regular' juridical order.

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<sup>131</sup> *Ibid.*, p. 3.

<sup>132</sup> Sleeman, 'Conversations', in *Ramaseeana*, p. 186.

<sup>133</sup> Quoted in J. Dunbar (ed.), *Tigers, Durbars and Kings, Fanny Eden's Indian Journals, 1837—38* (London: Murray, 1988), pp. 104, 120.

<sup>134</sup> Amin's research concerns the Chauri Chaura riots of the early 1920s. See Shahid Amin, *Event, Metaphor, Memory: Chauri Chaura, 1922—1992* (Berkeley & Los Angeles: University of California Press, 1994).

<sup>135</sup> Van Woerkens, *Strangled Traveler*, p. 72.

A section in *Ramaseeana* (1836) entitled ‘Substance of the Conversations held by Captain Sleeman, with different Thug Approvers, while preparing the Vocabulary’ is the most complete source of British cross-examinations with captive Thugs occurring outside a judicial context. It is likely that the thirty-eight approvers quoted in these ‘conversations’ were manacled and that guards were present throughout the exchanges. However, it does not appear that coercion was used to extract information. Rather, the more significant power-dynamic at play appears to have been that between different captives, who repeatedly bickered over the veracity of the information offered to Sleeman, the better to convince him of their value as reliable and knowledgeable informers.<sup>136</sup> Besides, there were others to impress—the exchanges sometimes took place in the ‘presence of different European gentlemen who happened to call in’, Sleeman wrote, and who felt ‘a good deal of interest in listening to them’; for the same reason, he had published the ‘almost literal translation of some’ of the ‘conversations’ to apprise his reading public.<sup>137</sup> Indeed, the apparent freedom given to approvers to divulge information was critical to the meta-narrative of the ‘conversations’ and *Ramaseeana* as a whole, whereby suspects effectively convicted themselves, and were thus seen to authenticate the colonisers’ penal truth, in affirming that the Thuggee was a distinctive ‘practice’ and that the Thug-identity was independent of, but had been brought to justice by, British colonial investigations.

Although they likely took place well after Bentinck had sanctioned the ATC, the ‘conversations’ with approvers demonstrate in particular Sleeman’s fixation upon the subcultural aspects of Thuggee—especially with the idea of Thuggee as a religious practice—and therefore provide a critical insight into the means by which he derived the basis for his sensational claims about the phenomenon.<sup>138</sup> However, Sleeman did not invent these claims *ex nihilo*. Rather, he drew together older assertions about the devotional practices of bandits and scraps of information suggesting that ‘Thugs’ conformed to them. An article written in 1816 by Richard Sherwood, a Company surgeon stationed at Fort St. George in the Madras

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<sup>136</sup> For disagreements between approvers: Sleeman, ‘Conversations’, in *Ramaseeana*, pp. 142–3, 145, 158–9, 164, 166, 196–7, 239, 261.

<sup>137</sup> Sleeman, ‘Introduction’, in *Ramaseeana*, pp. 64–6.

<sup>138</sup> Sleeman dated some, but not all, of the ‘conversations’ included in *Ramaseeana*. Those dated took place in mid-1835.

Presidency, had suggested that a group of bandits called ‘Phansigars’ were directly analogous to the Thugs in northern India.<sup>139</sup> Indeed, Sherwood’s article appeared in volume thirteen of *Asiatick Researches* in 1820, alongside another, on Thuggee, comprised of excerpts from Shakespeare’s 1816 annual police report for the Western Provinces.<sup>140</sup> It is unclear when Sleeman first read Sherwood’s article, but a full copy was included as appendix V in *Ramaseeana*, and Sleeman’s ‘conversations’ with approvers in the same text can profitably be read as his attempt to map an older set of conclusions about ‘Phansigari’ onto Thuggee.

Sherwood’s researches into Phansigari seemed to affirm earlier colonial assertions, voiced in the mid-to-late eighteenth century onwards, that ‘Indian’ bandits were not driven by material privation but by corporate identity: that they were a society apart.<sup>141</sup> As such, establishing criminal intent did not require proof of the commission of a specific act so much as proof of a suspect’s identity; proof of membership of a dacoit gang was proof of criminal guilt. In ‘conversation’ with Sleeman, the approvers readily asserted the elaborate devotional and cultural framework of their identity as ‘Thugs’. The approvers explained that they thought of the *rhumal* (the scarf or handkerchief used to strangle travellers) and the pick-axes they carried as endowed with special powers. Anxious to please Kali, their wrathful deity, Thugs took great care to carry out regular sacrifices in her name, and interpreted the movements and sounds of animals as indications of her wishes. The approvers cited devotion to Kali as the reason why they felt neither compunction for killing their victims—whom they insisted would go to paradise following their ‘sacrifice’—nor able to desist from carrying out attacks on travellers.<sup>142</sup>

Most galling of all, to Sleeman at least, was the discovery that ‘Muslim’ (as well as ‘Hindu’) Thuggee convicts professed devotion to Kali, a discovery that had

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<sup>139</sup> R. Sherwood, ‘Of The Murderers Called Phánsigárs’ (Communicated by Colonel McKenzie), *Asiatick Researches*, vol. 13 (1820), pp. 250–81.

<sup>140</sup> See J. Shakespeare, ‘Observations regarding Badhiks and T’hegs, extracted from an official report’ (Communicated by J. H. Harrington), *Asiatick Researches*, vol. 13 (1820), pp. 282–92.

<sup>141</sup> See, in particular, ‘Extracts of the Proceedings of the Committee at Kishennagur’, 28 June 1772, in W/1193, Bengal Miscellaneous Public Documents, APAC: J. E. Colebrooke, *Supplement, to the Digest of the Regulations and Laws Enacted by the Governor General in Council for the Civil Government of the Territories under the Presidency of Bengal* (Calcutta: 1807), vol. III, p. 13.

<sup>142</sup> For approvers discussing Kali: Sleeman, ‘Conversations’, in *Ramaseeana*, pp. 141–3, 147, 150–1, 176, 181–2.

likewise surprised Sherwood when he inquired into Phansigari. As a ‘practice’, Thuggee therefore seemed to dissolve the apparently hard distinction between the two creeds:

- Sleeman: Does Mahomed [*sic*], your prophet, anywhere sanction crimes like yours; the murder in cold blood of your fellow creatures for the sake of their money?
- Sahib Khan: No.
- Sleeman: Then do you fear any dread of punishment hereafter?
- Sahib Khan: Never. We never murder unless the omens are favourable; and we consider favourable omens as the mandate of the Deity.
- Sleeman: What Deity?
- Sahib Khan: Bohwani [*Bhavani*; an alternative name for Kali in Sleeman’s usage].
- Sleeman: Bohwani, you say, has no influence upon the welfare, or otherwise, of your soul hereafter?
- Sahib Khan: None, we believe; but she influences our fates in this world, and what she orders in this world, we believe that God will not punish in the next.<sup>143</sup>

For Sleeman, as for various champions of British efforts to suppress Thuggee writing throughout the nineteenth and twentieth centuries, such contradictions were evidence of neither the syncretism of popular religion in India, nor of the poverty of the term ‘Hinduism’ to encapsulate it. Rather, the ‘conversations’ offered confirmation that Thuggee was a result of the religious paroxysms typical in the practitioners of India’s indigenous religions. ‘The Hindoo religion’, Sleeman concluded in his memoirs, ‘reposes upon an entire prostration of mind, that continual and habitual surrender of the reasoning faculties’.<sup>144</sup> More pertinent to the immediate context of the suppression campaign was the apparent proof that

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<sup>143</sup> *Ibid.*, p. 146.

<sup>144</sup> William H. Sleeman, *Rambles and Recollections of an Indian Official* (repr. 1915 edn., New Delhi & Madras: Asian Educational Services, 1995 [1844]), vol. I, p. 213. Cf. J. N. Farquhar, ‘Thags’, in James Hastings (ed.), *Encyclopedia of Religion and Ethics*, vol. 12 (London: T&T Clark, 1926), p. 261.

Thuggee was driven not by the prospect of financial gain, as in the case of conventional highway robbery, but by irrational urges inspired by Kali. Like Sherwood's Phansigars, Sleeman's Thugs seemed to have developed a subculture that sanctified murder as preordained sacrifice, and had found adherents from across India, regardless of their religiosity.

A wider effect of the approvers' revelations that Thuggee was inspired by devotion to Kali was to reinforce the idea that Thugs belonged to a singular, organised criminal network that had existed in India for many centuries. During the first round of British investigations into Thuggee in the 1810s, it had been suggested that alleged Thugs living on the banks of the river Jamuna in Etawah were descended from an older group that had been expelled from Delhi. Likewise, Sherwood had suggested that Phansigars were descended from Muslim settlers in the north of India. In the course of the 'conversations' published in *Ramaseeana*, several approvers not only retraced their lineages for Sleeman, but also squabbled over the interpretations of gang-lore offered by informants claiming divergent ancestries.<sup>145</sup> In his introduction to *Ramaseeana*, however, Sleeman expanded such information to suggest that there were seven 'clans' of Thugs belonging to 'the great original trunk', who had 'emigrated into remote parts of India' after their 'flight from Delhi' and committed atrocities on travellers all across the subcontinent.<sup>146</sup>

It also emerged from the interrogation of approvers that the expulsion of Thugs from one particular locale had not immediately disrupted their activities: experienced Thugs who fled from the vicinity of Etawah had simply recruited to new gangs elsewhere. There was danger in this, however. In neglecting their duty to Kali, the approvers told Sleeman, new initiates had offended her. The indiscretions forced upon bodies of Thugs by the incorporation of polluting outsiders left them prone to detection by the British. As Zolfukar put it:

All kinds of men have been made Thugs, and all classes of people murdered, without distinction, and little attention has been paid to omens. How after this could we expect to escape?<sup>147</sup>

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<sup>145</sup> See, for example, Sleeman, 'Conversations', in *Ramaseeana*, pp. 143—5.

<sup>146</sup> [Sleeman's emphasis.] Sleeman, 'Introduction', in *ibid.*, pp. 5, 7, 11.

<sup>147</sup> Sleeman, 'Conversations', in *ibid.*, p. 157; see also pp. 143, 153—4.

Yet, in the introduction to *Ramaseeana*, Sleeman drew the opposite conclusion to Zolfukar. ‘To affirm absolutely that it has been suppressed while any seeds of the system remain to germinate and spread again over the land’, Sleeman warned, ‘might soon render all that has been done unavailing’.<sup>148</sup> Far from having been set on a course of self-destruction by disregard for Kali, Thuggee possessed a ‘principal of vitality’, Sleeman concluded, which should only add urgency to the suppression campaign.<sup>149</sup>

An additional aspect of the ‘vitality’ of Thuggee was found in the discovery that more senior gang-members socialised young boys into the ‘practice’. The lure of Thuggee was therefore seemingly so strong that it not only cut through religious difference, but also overrode claims of wealth, privilege and status. As one Feringeea told Sleeman:

... the goor [sugarcane; supposedly ingested as part of a Thuggee ritual]...changes our nature. It would change the nature of a horse. Let any man once taste of that goor, and he will be a Thug though he know [*sic*] all the trades and have all the wealth. I never wanted food; my mother’s family was opulent, her relations high in office. I have been high in office myself, and became so great a favourite wherever I went that I was sure of promotion; yet I was always miserable while absent from my gang, and obliged to return to Thuggee. My father made me taste of that fatal goor when I was yet a mere boy; and if I were to live a thousand years I should never be able to follow any other trade.<sup>150</sup>

The devotional aspects of Thuggee were therefore explained as the critical underpinning of the ‘system’; while further attacks might be prevented, the character of the perpetrators could not be altered. The larger conclusion implicit in this was that isolated drives against particular pockets of ‘Thugs’ would displace, not disband, their gangs: only a centrally directed campaign, literally to the death in the case of the worst offenders, would suffice.

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<sup>148</sup> Sleeman, ‘Introduction’, in *ibid.*, p. 21.

<sup>149</sup> Sleeman, *Rambles and Recollections*, vol. I, p. 110.

<sup>150</sup> Sleeman, ‘Conversations’, in *Ramaseeana*, pp. 216–17.

Official dogma that Thuggee was mired in secrecy was the legitimisation for a knowledge-gathering project about the phenomenon that consulted only those held to be most implicated in it. In their extra-judicial role as the primary (only) informers possessing intimate knowledge of Thuggee as a ‘practice’, the coterie of suspects who readily demonstrated their expertise—simultaneously acceding their guilt—affirmed to their British captors the conviction that they had uncovered an extraordinary criminal association. In the early 1830s, Sleeman used the information from both judicial cross-examinations and ‘conversations’ with Thuggee suspects to construct sprawling genealogies or ‘family-trees’ depicting the ancestry of the ‘system’ he believed his inquiries to have uncovered.<sup>151</sup> Although he was unable to trace captives’ lineages back further than a few generations, and even then in an unconvincing and inconclusive manner, these diagrams seemed to further corroborate the claim that Thuggee was a generational or ‘caste-like’ ‘trade’ that was passed on from father to son.<sup>152</sup> The conclusion drawn was that the ‘system’ would inevitably continue to replicate without interventions on the scale that, it was insisted, only the colonial government had the resources, commitment and technology to implement.<sup>153</sup>

Sleeman’s belief that he had decoded the Thugs’ alleged secret-language—following something of a convention established by other amateur colonial etymologists—was likewise offered as evidence suggesting that suspects shared a unique subculture that could be objectively recorded.<sup>154</sup> Indeed, the approvers’ depositions and ‘conversations’ must be seen in the broader context of various supplementary proofs about Thuggee produced by Sleeman and his assistants. Moreover, these proofs followed a circuitous route around the suspicions of

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<sup>151</sup> A sample of ten of these diagrams can be found in *Ramaseeana*. One of the ten is numbered ‘88’, which gives some indication of Sleeman’s dedication and of how large the ‘thug’ ‘conspiracy’ was believed to be.

<sup>152</sup> [Sleeman’s emphasis] Sleeman, ‘Introduction’, in *Ramaseeana*, pp. 20—1.

<sup>153</sup> *Ibid.*, pp. 21—2.

<sup>154</sup> Richardson and Sherwood both published similar, though less extensive, vocabularies of the alleged secret-languages used by ‘groups’ similar to ‘thugs’ (as Sleeman understood them) in the early nineteenth century. See D. Richardson, ‘An Account of the Bazeegurs, a Sect Commonly denominated Nuts’, *Asiatic Researches*, vol. 7 (1803), pp. 475—9; Sherwood, ‘Of The Murderers Called Phánsigárs’, pp. 266—8. Sleeman’s dictionary of ‘ramasee’ can be found in: Sleeman, *Ramaseeana*, pp. 67—140. See also van Woerkens, *Strangled Traveler*, pp. 295—315.

the colonisers, the approvers' testimonies, and the various quasi-scientific knowledge-making projects: all three were mutually reinforcing, describing Thugs as 'extraordinary' members of a massive, organised 'system' of hereditary criminals, separated from mainstream society. The co-opted voices of the approvers were therefore used as a measure of the authenticity of the British colonial authorities' findings and of the Company's administrative officers' ability to read Indian society properly.

Such 'proofs' regarding the Thuggee 'system' did not remain the private knowledge of the upper, British echelons of the Company's Indian administration, however: they were mobilised in order to facilitate the expansion of the suppression campaign. In 1831, H. S. Graeme, the resident at Nagpur, suggested releasing additional details about Thuggee 'from time to time in the public prints of trials connected with these atrocious cases of murder'.<sup>155</sup> As Máire Ní Flathuín has shown, Sleeman's special policing agency developed a symbiotic relationship with both the Bengal and *mofussil* press during the ATC.<sup>156</sup> This was useful to advertise the humanitarian claims of the ATC, as the following extract from the *Calcutta Gazette* in 1837 shows:

...the public at large may be apprized of the extent to which that atrocious crime has been carried [out] by the Thug Fraternity, and...the native portion of the community especially, may be put upon their guard against these insidious murderers.<sup>157</sup>

Since the details of the anti-Thuggee trials did not stay in the courtroom, neither did the version of Thuggee produced in the approvers' narratives. Using the press, it was promoted across the subcontinent to enforce the colonial understanding of the phenomenon throughout India, such that the author of a letter to the *Meerut Observer* in 1836 could knowingly describe Thugs as members of 'a depraved and heartless

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<sup>155</sup> H. S. Graeme, Resident Nagpur, Bengal Political Proceedings, P/517, 21 Jan. 1831, ff. 29–35, APAC. See also Swinton, Chief Secy. GG, to Smith, AGG S&NT, 25 Jun. 1832, in *SRT*, p. 92.

<sup>156</sup> On the reciprocal advantages of the creation of a Thuggee-panic to both the Bengal press and the likes of Sleeman and Smith: Máire Ní Flathuín, 'The Campaign Against Thugs in the Bengal Press in the 1830s', *Victorian Periodicals Review*, vol. 37, no. 2 (2004), pp. 124–40.

<sup>157</sup> *Calcutta Gazette*, 21 Jan. 1837, quoted in *ibid.*, p. 128.

race, unmoved by the cry for mercy; whose thirst for blood is but rendered more strong by each succeeding sacrifice'.<sup>158</sup> No wonder Philip Meadows Taylor recalled that 'the whole country was in alarm' during the 'revelations' of the 1830s.<sup>159</sup> The corollary of this alarmism about the Thuggee 'crisis' was of course an attempt to cement the authority of Sleeman's policing agency and, more widely, the nascent colonial state, as a responsible relation of power capable of intervening in social practices for the benefit of the Indian population. It was this new vision of British India to which the ATC clearly spoke and helped articulate, and it is to this wider context of the Company's efforts to suppress Thuggee that the following section of this chapter turns.

## § 'Walking in darkness and in the valley of the shadow of death'<sup>160</sup>: the ATC as social reform

The administrative context of the ATC was a period of Company government in India marked by authoritarian social reforms under Bentinck's governor-generalship (1828—35). To an extent, these reforms counterbalanced the military and fiscal retrenchment of the administration in the same period, in the aftermath of several decades of adventurist imperialist expansion and warmongering. Yet it also advertised the Company's newfound sense of righteousness as the paramount political formation in India, with complementary obligations to 'the people'.<sup>161</sup> The 1833 Charter Act had removed the Company's final trade monopolies and abolished its commercial operations, leaving it as a purely political and administrative institution in India. Moreover, Bentinck, a Whig and a Utilitarian, headed the Company in India at a time when his political contemporaries in the metropolis were likewise embarking on a series of rationalist, centralising reforms that aimed to

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<sup>158</sup> Extract from a letter entitled 'Thuggee', first published in the *Meerut Observer* and reprinted in *The Englishman*, 27 Sept. 1836, quoted in *ibid.*, p. 131.

<sup>159</sup> Meadows Taylor, *Story*, p. 54.

<sup>160</sup> E. P. Eddrup, *The Thugs; or, Secret Murderers of India* (London: Society for Promoting Christian Knowledge, 1853), p. 47.

<sup>161</sup> See 'Bentinck's minute on the defence of India', 29 June 1832, and 'Bentinck's minute on British prestige', 5 Aug. 1833, both in Philips (ed.), *Correspondence of...Bentinck*, vol. II, pp. 846—7 & pp. 867—8, respectively.

streamline administrative costs and which also showed concern for the state to acquire ever more detailed knowledge about the welfare of the population.<sup>162</sup> In India, Sleeman and his supporters were promoting their theories regarding Thuggee to an administration and an Anglo-Indian colonial society beginning not only to conceive of a more extensive, interventionist role for itself in India, but, by the late 1820s, believing it was in the process of realising it.<sup>163</sup>

Following the renewal of the Company's Charter in 1814, Christian proselytisation had been permitted again in India, with a small fund provided for the 'encouragement of education, literature and science'.<sup>164</sup> Bentinck's prohibition of *sati* in December 1829 undoubtedly encouraged British Evangelicals' sense of destiny in the colony.<sup>165</sup> Swinton, championing the ATC at the helm of the Political Department, indeed argued that undertaking the suppression of Thuggee was if anything more noble than the measures to ban *sati*, since it was believed more Indian travellers died at the hands of Thugs per year than did Hindu widows on their husbands' funeral pyres.<sup>166</sup> In 1836, at the height of the ATC, the *Calcutta Christian Observer* hailed Bentinck as 'an angel from heaven to succour and comfort suffering humanity', entitled to 'everlasting honour among men, to the gratitude of all India and of the world' for attempting to extirpate Thuggee.<sup>167</sup>

Praise for Bentinck's sanction of the ATC in India echoed in Britain, where the Evangelical lobby had become a powerful political force by the 1830s.<sup>168</sup> In the *Edinburgh Review*, C. E. Trevelyan argued that the suppression of Thuggee would help effect a 'national regeneration' in India, which would invigorate an ancient civilisation that had been led into degeneration and stasis by a corrupt priesthood

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<sup>162</sup> Historians have characterised the 1830s as 'the decade of reform' in Britain, citing such legislation as the Great Reform Act, the Municipal Corporations Act, the Factories Act, and the Poor Law Amendment Act. See, in particular, Eric Stokes, *The English Utilitarians and India* (Delhi: Oxford University Press, 1982 [1959]), pp. 1–80.

<sup>163</sup> See, in particular, Bayly, *Indian Society*, esp. pp. 108, 120–1.

<sup>164</sup> Amal Chatterjee, *Representations of India, 1740–1840* (Basingstoke: Macmillan, 1998), p. 18.

<sup>165</sup> For more: Lata Mani, 'The Production of an Official Discourse on *Sati* in Early Nineteenth-Century Bengal', in Francis Barker, et al. (eds.), *Europe and Its Others: Proceedings of the Essex Conference on Sociology*, vol. I (Colchester: University of Essex, 1985).

<sup>166</sup> See 'Note by the Secretary [G. Swinton]', 4 Oct. 1830, BC, F/4/1251/50480(2), ff. 669–70, APAC.

<sup>167</sup> *Calcutta Christian Observer*, V (1836), quoted in Flathuín, 'The Campaign Against Thugs in the Bengal Press', p. 131.

<sup>168</sup> Stokes, *Utilitarians*, pp. 42–3.

and an immoral religion. Indeed, he took the eradication of Thuggee as proof of the virtues of a reconceived British mission in the subcontinent—of the colonisers’ ability to shine a light into the ‘dark and cheerless night of superstition, which has long clouded the moral vision of India’.<sup>169</sup>

The claim that the ATC was a humanitarian project that would contribute toward the ‘civilising’ of India was rooted in the conviction that Indian social life was blighted by an irrational, cringing and violent set of superstitions, which early nineteenth-century British Evangelicals and Company officials alike called ‘Hinduism’, widely understanding a diverse array of practices as a codified creed with a scriptural basis, analogous to Christianity.<sup>170</sup> Writing in the 1810s, the Anabaptist missionary William Ward described ‘The Hindoo system’ as ‘the most PUERILE, IMPURE, AND BLOODY OF ANY SYSTEM OF IDOLATRY THAT WAS EVER ESTABLISHED ON EARTH’. ‘To know the Hindoo idolatry, AS IT IS,’ he argued, ‘a person must wade through the filth of the thirty-six pooranus...he must follow the brahman through his midnight orgies, before the image of Kalee.’<sup>171</sup> From 1830, it seems, Thuggee was located in the Anglo-Indian public’s imagination as another gruesome practice to be added to the list of terrifying visions of ‘Hindu’ religious-murder that seemed to fill British eyes at every turn. The strangled victims of Thuggee joined in the *danse macabre* of devotees crushed under the wheels of Juggernaut’s chariot, widows burned alive on their husbands’ funeral pyres, unwanted baby girls slain by their parents, and convalescents whose friends and relatives suffocated them by stuffing earth into their throats or leaving them to perish on the banks of the Ganges.<sup>172</sup>

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<sup>169</sup> C. E. Trevelyan, ‘The Thugs; Or, Secret Murderers of India’, *Edinburgh Review*, vol. 64, no. 130 (1837), p. 395. See also F. Hollick, *Murder Made Moral; or, an Account of the Thugs, and other secret Murderers of India* (Manchester: A. Heywood, 1840), esp. p. 35–6; Thornton, *Illustrations*, esp. pp. 43–58, 65–6.

<sup>170</sup> For more: King, *Orientalism and Religion*.

<sup>171</sup> [Ward’s emphasis] William Ward, *A View of the History, Literature, and Mythology, of The Hindoos: Including a Minute Description of their Manners and Customs, and Translations from their Principal Works* (repr. 3<sup>rd</sup> edn., Delhi: Low Price Publications, 1900 [1817–20]), vol. 3, pp. 103, 95 (in that order).

<sup>172</sup> See Lt. Col. Porderi to Capt. Benson, 25 Nov. 1828, in Philips, (ed.), *Correspondence of ...Bentinck*, vol. I, p. 101. More generally: James Peggs, *India’s Cries to British Humanity* (London: Seely & Son, 1830 [1828]).

Amidst this grotesquerie, Kali, the goddess of destruction, retained an iconic position for British writers throughout the nineteenth century, symbolic of the perceived depravity of ‘Hinduism’. For Alexander Duff, writing in the 1830s, Kali was pure excess:

Of all the Hindu divinities, this goddess is the most cruel...[her] supreme delight...consists in cruelty and torture; her ambrosia is the flesh of living votaries and sacrificed victims; and her sweetest nectar, the copious effusion of their blood.<sup>173</sup>

Writing forty years later, William Butler described Kali as ‘the female Moloch’, with a ‘horrid appetite for blood, and [a] hunger for human lives...that is insatiate’.<sup>174</sup> Like Duff and Butler, Sleeman was both appalled by the outrages supposedly committed in the name of Kali (whom he also referred to as *Devi*, *Durgah* and *Bhavani*) and fascinated by the goddess’s transfixing power over her devotees. Informed by his ‘conversations’ with approvers, Sleeman made similarly generalised accusations about the cruelty and delusion caused in Thugs by their worship of a ‘Hindu’ goddess of destruction:

A Thug considers the persons murdered precisely in the light of victims offered up to the Goddess.... He mediates his murders without any misgivings, he perpetrates them without any emotions of pity, and he remembers them without any feelings of remorse. They trouble not his dreams, nor does their recollection ever cause him inquietude in darkness, in solitude, or in the hour of death.<sup>175</sup>

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<sup>173</sup> Alexander Duff, *India and Indian Muslims: Including Sketches of the Gigantic System of Hinduism, Both in Theory and Practice* (Delhi: Swati Publications, 1988 [1839]), p. 265.

<sup>174</sup> William Butler, *The Land of the Veda: Being Personal Reminiscences of India; Its People, Castes, Thugs, and Fakirs etc.* (New York: Phillips & Hunt, 1871), p. 399. Hugh Urban has drawn fascinating parallels between the colonial administration’s nineteenth-century responses to Thugs and twentieth-century responses to students participating in the *swadeshi* movement after the partition of Bengal in 1905, both of which located the protagonists as deluded devotees of Kali. Steven Spielberg’s *Indiana Jones and the Temple of Doom* (1984) continued the Orientalisation (in the Saidean sense) of Kali-worship in Western popular culture. See Hugh B. Urban, ‘India’s Darkest Heart: Kali in the Colonial Imagination’, in R. F. McDermott and J. J. Kripal (eds.), *Encountering Kali: In the Margins, at the Center, in the West* (Berkeley & Los Angeles: University of California Press, 2003). See also van Woerkens, *Strangled Traveler*, pp. 278–86.

<sup>175</sup> [Sleeman’s emphasis] Sleeman, ‘Introduction’ in *Ramaseena*, p. 7.

This remorselessness made Thugs relentless killers, Sleeman suggested, mere ciphers for the bloodlust of their goddess. Devotion was the means for Thugs to abnegate responsibility for their attacks by shifting it onto the goddess; obedience to Kali was immunity from conscience. Thus, by the early 1830s Thugs had been reconceived as being not only extraordinary criminals guilty of murder and robbery, but also the bearers of a malign faith and representatives of the potential for depravity inscribed in Indian social and religious practices. Indeed, to Christians debating it at a theological level, the threat posed by Thuggee as Kali-worship was the relativist challenge it issued to religion as the basis of an ethical code, for Thuggee was a devotional practice that sanctioned murder and Thugs were ‘living proof that religion, if improperly inculcated, may be made the vehicle of the most detestable abominations which sin has introduced into the world’.<sup>176</sup>

Sleeman’s emphasis upon religious devotion as the cause of Thuggee also tapped into a rich seam of the early nineteenth-century Evangelical critique of Hinduism that saw its *brahmin* ‘priests’ as an untrustworthy and meddling anachronism. In the later eighteenth century, the first, ‘Orientalist’, generations of senior Company administrative officers had cultivated an intermediary class of literate, high-caste, native interlocutors through whom the foreign vernaculars of colonial will could be mediated and translated—and thus made intelligible to the subject population—and who would also educate their British patrons about the particularities of Indian social, cultural and religious life. By the early nineteenth century, and especially by the 1830s, however, with the Company announcing itself as the paramount political power in the subcontinent, *brahmins* appeared to dam-up reservoirs of official power, the better to aggrandise themselves, exploit their social inferiors and mislead their erstwhile masters.<sup>177</sup> It was a short step from this denigration of the *brahmin* character to the assertion, found in the memoirs of John Malcolm, recalling his time as an administrator in central India, that the majority of Thugs there were *brahmins* from Bundelkhand, and that they were directing

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<sup>176</sup> Hollick, *Murder Made Moral*, p. 18.

<sup>177</sup> See, for example, Malcolm, *A Memoir of Central India*, vol. I, pp. 67–8. For more on the particularities of early nineteenth-century colonial knowledge about India, see the essays in Carol A. Breckenridge & Peter van der Veer (eds.), *Orientalism and the Postcolonial Predicament: Perspectives on South Asia* (Philadelphia: University of Pennsylvania Press, 1993).

operations in Malwa and the adjoining provinces in western and central India, or to Sleeman's extravagant claim, made in the *Calcutta Literary Gazette* in October 1830, that the priests at Kali's temple at Vindhyaachal controlled Thug gangs working throughout the subcontinent.<sup>178</sup>

There is, then, much evidence to show that by emphasising the argument that Thuggee was a murderous, religious subculture, Sleeman was able to persuade senior Company administrators that they were obliged, even ordained, to implement an extraordinary plan to suppress the crime. Such a plan ran with the grain of previous social reform, was supported by Evangelicals, and brought together several aspects of a discourse of anti-Hinduism that had evolved in early nineteenth-century India. However, Sleeman did not originate the stereotype of Thuggee as an organised system of religiously inspired robbery and murder. Rather, he emphasised the devotional, hereditary and libidinal impulses to crime believed to exist in Thugs' warped consciousnesses. He agitated for, and succeeded in acquiring, new bureaucratic machinery and procedural provisions that allowed further, self-generating testimonies to that 'fact' to come to the fore. He did so with an eye for publicity and in an intellectual and moral climate inclined to look favourably on his assertions: at a time when the British in India were debating whether or not religion could be subordinated to culture; whether or not devotional instinct could be remade as rational obedience to the state. Appearing in the 1830s as an anti-social criminal fraternity, 'Thuggee' was the obverse of the European-style nation-based social order now imagined for India by the Company's chief administrators. The following sections of this case study explain and explore the reasons why the ATC finally heralded the inclusion of exceptional laws within the colonial juridical system in the mid-1830s, and why it can be read as both an articulation of the Company's sovereignty and the realisation of 'modern' practices of colonial statehood in nineteenth-century India.

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<sup>178</sup> Malcolm, *A Memoir of Central India*, vol. II, pp. 187—8.

## 4. The modern colonial state in India and the exception of Thuggee, circa 1829–71

### § The ATC and colonial modernity

As discussed in the introduction to this thesis, in his seminal, *The Nation and Its Fragments* (1993), Partha Chatterjee argues that colonial modernity is a contradiction in terms.<sup>179</sup> With a suitably eye-opening metaphor for his revelation of the incommensurability between colonialism and modernity, Chatterjee tells us that:

...it took an event such as the suppression...of the Great Revolt of 1857 for the various pieces of the colonial order properly to fall into place. The rebels ripped the veil off the face of the colonial power and, for the first time, it was visible in its true form: a modern regime of power destined never to fulfil its normalizing mission because the premise of its power was the preservation of the alienness of the ruling group.

For Chatterjee, it was only by fully comprehending the British colonisers' rules of difference that Indian nationalisms broke the fetters of post-Enlightenment thought and colonial dominion, and so truly appreciated the edifice through which the *Raj*-state had effectively imprisoned Indian political agency. This section of the case study does not engage with Chatterjee's critique of Indian nationalisms, but rather takes as its point of departure his injunction to revisit the history of the modern state in India, and to dissect anew certain elaborations of state power.

In 1837, Dr. Henry Spry, a surgeon in the Bengal Medical Service and a keen phrenologist, published a history book entitled *Modern India*. In it, he reflected on a criminal phenomenon that had 'for some time past [been] the wonder and astonishment of every circle in Europe'. Referring to the criminals in question, Spry anticipated that his readers might ask "'How were they ever allowed to spring into existence?'" 'The explanation is easy', he suggested:

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<sup>179</sup> Based on: Chatterjee, *Nation*, chs. 1 & 2, quoting p. 18.

a country which has been for centuries the theatre of anarchy or misrule, can offer no internal security for the protection of the property of the persons of isolated individuals. Where escape or evasion from detection is easy, crime, in its worst form, is sure to abound.<sup>180</sup>

Dr. Spry combined his role as a Company surgeon with that of jailer at several towns in the Sagar and Narmada Territories. It was thus that he came watch the hanging of a gang of prisoners outside Sagar jail in the early 1830s. The prisoners in question were a gang of convicted Thugs. Dr. Spry found the spectacle of their hanging at once a confounding and an enlightening example of the workings of ‘modern India’. ‘Every one’, he recalled,

...introduced his head into the [hangman’s] noose, drew the knot firmly home immediately behind the right ear, and amid terrific cheers jumped off the board and launched himself into eternity! Thus in the moment of death we see a scrupulous attention paid to the preservation of caste. To wait to be hung by the hands of a chumar [a tanner], was thought to be too revolting for endurance. ...therefore...every man hung himself.<sup>181</sup>

The convicted Thugs therefore seemed to have tried to appropriate and even invert the performance of Company sovereignty over their lives that was to be realised by their public hanging: a transaction of power that would mark the prisoners’ total subordination to the Company’s authority. To Spry, this measured something of the enormities of Thuggee, and indeed, of the contradictions of ‘modern India’: these criminals seemed oblivious to the moral order that the Company wished to create through the suppression of Thuggee. Rather, their gaze remained transfixed by a seemingly older and irrational economy of justice, in which upholding the codes of social honour specified by caste identity outweighed remorse for the taking of another’s life and recognition of a new, paramount political sovereign.

Three years before the executions that bemused Dr. Spry, his cousin Captain William Sleeman had, as we have seen, helped win decisive administrative support

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<sup>180</sup> Spry, *Modern India*, vol. II, p. 155; more broadly, pp. 105—49.

<sup>181</sup> *Ibid.*, vol. II, pp. 155, 167—8; more broadly, pp. 150—73.

for a campaign to ‘extirpate’ Thuggee from the Indian body politic by presenting it as a libidinous manifestation of Hindu excess, with thousands of secret murders carried out each year as sacrifices to Kali. Yet if the prospect of initiating a redemptive and ‘civilising’ social reform was critical for deriving sanction for the so-called ‘Thugg hunt’, it appears that both the specific construction of Thugs as extraordinary criminals, and the procedural flexibility afforded to the relevant authorities headquartered in the Sagar and Narmada Territories were more intrinsic to establishing this particular claim to colonial sovereignty in India’s *mofussil*. The legal exceptions that followed from this construction of Thugs’ criminality and the special institutional arrangements for colonial government on the periphery of the Company’s western territorial possessions in north India facilitated the arrests, convictions and opportunities to interrogate suspected Indians that sustained the ATC and underpinned the widening out of British-led operations in the later 1830s.

As shown, Sleeman’s decisive proof of the enormities of India’s Thugs came from suspects to whom he offered to spare the gallows in return for information about their ‘practice’. Sleeman trenchantly defended his and Smith’s judicial reliance on Thug approvers with reassurances that their methods were as rigorous as possible in the circumstances, and with assertions that the criminals pursued were so extraordinary as to necessitate similarly extraordinary measures. Above all, he suggested, such practices were justified on the basis that those leading the ATC were acting in Dr. Spry’s ‘theatre of anarchy’: that the procedures followed to interrogate suspected Thugs, at his compound in Jabalpur, and to try them before his immediate superior, at Sagar, had been necessarily excepted from the conventional juridical order pertaining in Bengal.<sup>182</sup> Indeed, as demonstrated in the following section, when anti-Thug operations were carried into Bengal itself, special legislation was immediately passed to permit the use of approvers’ testimony in trials held within the juridical domain of the ‘regulation’ territories.

To be clear: during the ATC, the rule of colonial difference was not, as in Chatterjee’s analysis of later nineteenth-century British India, functioning to preserve the alienness of Europeans against Indians, so much as to preserve the alienness of Thugs against both of these groups. According to F. C. Smith, Thugs were:

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<sup>182</sup> See, for example, Sleeman, ‘Introduction’, in *Ramaseeana*, pp. 54–6. See also Smith, AGG S&NT, to Swinton, Chief Secy. GG, 20 June 1832, in *SRT*, pp. 112–15.

...the public, avowed, but insidious enemies of mankind, and [they] wage a war of extermination with all they meet on the high ways and by ways. Mercy to such wretches would be the extreme of cruelty to mankind; and they must be met in their own ways, by a rigid adherence to the law of [vengeance]—blood for blood.<sup>183</sup>

‘Blood for blood’ it was. In late 1829 the government had authorised the executions of members of a suspected Thug gang arrested by Captain Borthwick in Malwa, abutting the Sagar and Narmada Territories, though it had moved to prevent the public execution of convicted Thugs in their native villages. However, four years later it was commending the magistrate of Varanasi for having gibbeted the bodies of six convicted Thugs executed at Ghazipur jail. This followed the sessions judge’s recommendation to enforce an ‘exemplary punishment, and an example such as shall strike terror into the minds of those who pursue a similar cause’.<sup>184</sup> Although judicial form was followed at the special sessions held before Smith at Sagar, the ATC thus had explicitly performative dimensions that went beyond the punishment of individual criminals and aimed to display sovereign might to a wider audience.<sup>185</sup> In this regard, the economy of justice to which the ATC worked aimed not only to establish a vengeful parity with convicted Thugs along the Old Testament lines of

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<sup>183</sup> Smith, AGG S&NT, to Swinton, Chief Secy. GG, 20 June 1832, in Philips (ed.), *Correspondence of...Bentinck*, vol. II, p. 845. See also Smith, ‘Plan for the eventual destruction of the associations of Thugs’, in *SRT*, pp. 49–55.

<sup>184</sup> For the order to stop executing Thugs in their own villages: Swinton, Chief Secy. GG, to Stewart, Offg. Resident Indore, 23 Oct. 1829, in *SRT*, p. 13. For the gibbeting of Thugs at Ghazipur: Sleeman, *Ramaseena*, Appendix B, esp. pp. 22, 32–5. For an earlier order to hang dacoits in their home villages: ‘General Regulations for the Administration of Justice, proposed by the Committee of Circuit, at Cassimbazar, on the 15<sup>th</sup> August, 1772; and Made and Ordained by the President in Council in Bengal, on the 21<sup>st</sup> August 1772’, in Colebrooke, *Digest*, vol. III, p. 7.

<sup>185</sup> More broadly, it has been argued that the performative element of colonial punishment of convicted Thugs was sustained through their facial tattooing with the word ‘Thug’, according to the *godna* process. This argument is largely based on illustrations of Thug convicts that are held in the British Library’s collection of James Paton’s private papers. However, earlier correspondence emanating from Bentinck explicitly instructed Smith to tattoo only parts of Thugs’ bodies (such as their back or shoulders) that would usually be concealed under clothing. See ‘Collections on Thuggee and Dacoitee, by Capt. James Paton’, BL, Add. Mss. 41300, and van Woerkens, *Strangled Traveler*, pp. 86–7. Cf. Swinton, Chief Secy. GG, to Smith, AGG S&NT, 4 Aug. 1830, in *SRT*, pp. 2–4. For more on the *godna* process: Clare Anderson, *Legible Bodies: Race, Criminality, and Colonialism in South Asia* (Oxford & New York: Berg, 1994), ch. 2, esp. pp. 25–30.

‘blood for blood’, but was also predicated on winning local investment in that economy as part of an attempt to establish the paramountcy of the Company’s colonial sovereignty.

As the conviction-rates and sentencing patterns from the ATC of the 1830s indicate, the attempted British-led ‘extirpation’ of Thuggee from the Indian social landscape was soon brought to its logical conclusion. Of more than three thousand suspects tried as Thugs during the 1830s, ninety-eight per cent were convicted. Above thirty per cent of Thuggee convicts faced a prison term of between seven years and life; over fifteen per cent were executed and more than fifty per cent were transported to penal colonies.<sup>186</sup> However, if the executions and expulsions of convicted Thugs offers striking proof of the Company’s use of the ATC as a cause with which to advance in 1830s India what the likes of Agamben and Foucault would recognise as sovereign power—violent, visible, decisionist and repressive—it must also be noted that this was complemented by what the latter would term ‘disciplinary’ and ‘governmental’ forms of power.<sup>187</sup>

To further the contemporary metropolitan sociology of Indian crime, Dr. Spry sent seven of the skulls removed from the Thugs executed before his eyes at Jabalpur to Edinburgh’s Phrenological Society. In 1834, Robert Cox, curator of Edinburgh’s phrenological collection, concluded that:

The skulls show that combination of large organs of the animal propensities with comparatively moderate organs of the moral sentiments, which predisposes individuals to any mode of self-gratification and indulgence, without restraining them by regard to the rights and welfare of others.<sup>188</sup>

Implicitly, Cox’s report validated the bizarrely performed executions at Jabalpur. Here was decisive proof of Thugs’ exceptional nature, which differentiated them

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<sup>186</sup> Calculated from ‘Tabular Statement’ in Meadows Taylor, ‘State of Thuggee in India’, p. 293.

<sup>187</sup> See, in particular, Foucault, *Security*, esp. pp. 5–6, 9–12, 20, 22, 44–5, 48.

<sup>188</sup> Robert Cox, ‘Remarks on the Skulls and Character of the Thugs’, *The Phrenological Journal and Miscellany*, vol. 8 (1834), p. 525. See also Henry H. Spry, ‘Some Account of the Gang-Murderers of Central India, commonly called Thugs; accompanying the skulls of several of them’, *ibid.*, pp. 511–24.

from all other bandits: innate criminality.<sup>189</sup> Indeed, Cox's conclusions appear to be an early affirmation of Chatterjee's assessment of the potency of rules of colonial difference as producing dividing practices intrinsic to—but in his analysis thwarting the full realisation of—modern state power in India. Ethnographic and pseudo-scientific verification of the innate criminality of Thugs was taken as a vindication of the argument that conventional codes of legal morality could not apply to them, that their 'extirpation' would have to be achieved by a departure from the rule of law. However, in line with the insights of Schmitt and Agamben, this departure may also be read as being foundational for the rule of law as a legitimisation for British colonial sovereignty in India, in the sense that sovereign power was hereby asserted through the decision that such exceptions would only apply to a dangerous minority recognised as 'enemies of mankind'.

As a later section of this case study shows, the dividing practices by which whole communities of colonial subjects were identified as being 'exceptional' criminals, seemingly 'addicted' to 'a life of crime', was given formal legal recognition in the later nineteenth century on the back of the pioneering work of Sleeman and his associates. In many ways, the various schemes to reclaim groups of so-called Criminal Tribes, which were underpinned by phrenologically 'proven', racialised notions of hereditary criminality of the kind affirmed about Thuggee by Spry and Cox, had as their template the Jabalpur School of Industry. This was established in 1837 as an institution to turn to productive work the idle hands of prisoners proved to have associated with criminal gangs of robbers and murderers on India's roads but who had agreed to turn approver. According to Captain G. R. Edwards, General Superintendent for the Suppression of Thuggee and Dacoitee in the early 1850s, the School of Industry was at first privately funded by one of Sleeman's assistants, Captain Brown,

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<sup>189</sup> An argument that held its value into the twentieth century: William Turner, *Contributions to the Craniology of the People of the Empire of India. Part III. — Natives of the Madras Presidency, Thugs, Veddahs, Tibetans and Seistanis* (Edinburgh: Robert Grant & Son, 1906). For a genealogy of phrenology particularly focused on the context of colonialism in South Asia, and the role of the suppression on Thuggee in elaborating subsequent theory and practice: Anderson, *Legible Bodies*, esp. pp. 183—9. For a deeper study of the imbrication of nineteenth-century anthropometry and racism: Stephen J. Gould, *The Mismeasure of Man* (London: Penguin, 1981), esp. pp. 51—99.

... [to give] employment to Thug prisoners and approvers, and to instruct their sons in various trades, by practising which, they might, as they grew up, gain an honest livelihood, instead of following the hereditary profession of murder, which their ancestors had so long carried on.

Although the anti-Thug campaign had been officially declared ‘victorious’ in the late 1830s, arrests and detentions had continued over the following decade. By the late 1840s, around 250 approvers, 130 of their sons, 100 Thug prisoners and their various families were employed at the School, housed in barrack-style accommodation in Jabalpur’s jail or in an adjoining village constructed by the captives. While approvers and their sons made tents and carpets, respectively, their wives were occupied by more menial labour routines such as weaving, spinning and carding. The manufactory and its produce were quickly recognised as unqualified successes. Between the years 1845 and 1865, profit grew eightfold. Thugs’ rugs were judged among the finest in India, and an enormous example of their handicraft was imported for Queen Victoria. In his inspection report of 1848, Sleeman remarked that the prisoners’ endeavours had set Jabalpur well on its way to becoming a prosperous manufacturing town.<sup>190</sup>

The ATC therefore offers decisive proof that both the gallows and the reformatory, both corporeal and sanitised economies of state-sponsored social control, were operated to ‘extirpate’ a seemingly extraordinary form of crime in 1830s India. If the ATC opened in the 1830s with curious performances of due legal process, at the quasi-trials under Smith’s commission at Sagar, and some public hangings in central India, it ended with Jabalpur’s School of Industry and, as the following section details, under the command of a policing agency equipped with special laws that codified what were earlier recognised as extra-legal procedures.<sup>191</sup>

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<sup>190</sup> Based on: ‘Report on the Jabalpur School of Industry’, in *Selections from the records of the Government of India (Foreign Department)*, No. XV (Calcutta: Calcutta Gazette Office, 1856), pp. 1–31, V/23/3, APAC, quoting p. 2. See also H. Brereton, Supt. Thuggee Investigations (Punjab), ‘Report on Thuggee in the Punjab’, 15 Nov. 1852, in *Selections from the Public Correspondence of the Administration, for the Affairs of the Punjab* (Lahore: 1852), vol. I, no. 4, article 13, p. 2699, V/23/335, APAC; and van Woerkens, *Strangled Traveler*, pp. 93, 97–8.

<sup>191</sup> Though the Jabalpur School of Industry clearly aimed at a different economy of control than execution, transportation or incarceration—one that was ‘disciplinary’, rather than ‘juridical’, in Foucauldian terminology—it was hardly a ‘total’ institution on the lines of Bentham’s Panopticon, so extensively theorised in Foucault’s *Discipline and Punish*. Indeed, the

Indeed, the ATC suggests that colonialism and modernity were not mutually exclusive in nineteenth-century India, even before 1857, but were mutually constructed—in this example, through legal performances that led to the normalising of an exceptional juridical regime and to the creation of an institutional site wherein certain convicts posited as extraordinary could be cautiously reformed. Following the Foucauldean models outlined in the introduction to this thesis, the ATC was marked by the interplay of different forms of social control and state power. ‘Disciplinary’ regimes of social control by no means dominated the juridical landscape created by the Company in regard to the suppression of Thugs, but they were a feature of it. Moreover, they were complementary to a somewhat broader, ‘governmentalist’ attempt to establish sovereignty over what became increasingly apparent as a new social unit, amenable to official interventions and state power: the Indian population.<sup>192</sup>

## § The exception becomes the rule

In November 1832, having considered the first batch of Thuggee trials held in the non-regulation territories under the auspices of Smith and Sleeman, the Company’s directors (based in London) wrote to the Bengal government with a warning:

We must particularly enjoin you in trying these offenders to adhere to the salutary practice hitherto observed in their trials, that of not convicting upon the mere evidence of accomplices unless confirmed by circumstantial evidence, and you will not fail to inculcate upon the presiding officers in such trials, that no person must ever be convicted merely for being reputed a thug or being in the

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School’s routines, regulations, and isolation from the outside world appear to have been comparatively relaxed. Older approvers were rewarded for good behaviour by being able to live among their families in the village built to adjoin their jail quarters, while younger prisoners might likewise gain allowances for prolonged periods of co-operation. When General Superintendent Sleeman visited the School, in 1848, the overseer, Mr. Williams, treated him to a performance of ‘The Forty Thieves’, staged by the approvers’ elder sons. ‘Report on the Jabalpur School of Industry’, pp. 8, 10, V/23/3, APAC.

<sup>192</sup> See, in particular, Foucault, *Security*, p. 8.

company of thugs, without satisfactory evidence bringing home to himself, individually, a participation in some specific offence.<sup>193</sup>

In short, an administration predicated on the ‘rule of law’ must not internalise, as legal procedure, extra-legal measures that threatened to undermine justice by diluting the standard of evidence used to prove conviction of a suspect’s guilt. As has been shown, in the early 1830s, Sleeman and Smith sought to reassure critics within the Company’s administration that their methods accorded to such legal standards (even if they were not a positive application of them, strictly speaking). Yet they had also taken advantage of the inchoate governmental structures in the Sagar and Narmada Territories—which Smith’s successor, John Shore, described as being ‘a theatre for the experiments of incipient legislation’<sup>194</sup>—and steered their quasi-legal proceedings away from the scrutiny of the Company’s judicial department. Most significantly, the use of their ‘approvers’ system’ had enabled the construction of an image of Thuggee as an irrational, organised criminal system—an exceptional crime to which ordinary legal provisions in fact need not necessarily apply. If Thuggee was intelligible and condemnable as a practice, it seemed, the need (so dear to the Company’s directors in London) to establish individual motivations and culpability for specific attacks was obviated.

In the mid-1830s, the Company’s government gave institutional and legal formalisation to the dominant colonial epistemology of Thugs as inherently criminal. In 1835, the Thuggee and Dacoity Department (hereafter, T&D) was formally convened as an autonomous policing agency and its expenses recognised as a ‘General charge being incurred for the welfare of the whole of India’.<sup>195</sup> Sleeman was appointed to the new post of ‘General Superintendent of the Operations for the Suppression of Thuggee’. His assistants expanded operations into the Deccan, the Doab, Rajputana, Malwa and Delhi. A permanent staff of seven assistants, commanding more than three hundred *nujeebs*, was assisted by a further seventeen

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<sup>193</sup> Court of Directors to the Bengal Government, ‘on *Thagi*’, in Philips (ed.), *Correspondence of...Bentinck*, vol. II, pp. 954–5.

<sup>194</sup> F. J. Shore, Offg. Commissioner S&NT, to Secy. Sadar Board of Revenue, Allahabad, 7 May 1836, quoted in Singha, “‘Providential’ Circumstances”, p. 90.

<sup>195</sup> The T&D’s expenses were accounted to the Sagar and Narmada Territories alone until 1835.

British officers—residents at the courts of Indian rulers based in Indore, Hyderabad and Lucknow, and agents based in territories under British control. Just as in the trials heard by Smith, those held by British residents were only submitted to the Political Department's secretary for review, while agents tried Thugs at tribunals specially convened by the T&D to evade interference from the Judicial Department.<sup>196</sup>

By the time that the ATC had been set on a statutory and institutional footing, well over half of the total Thuggee trials held under British auspices *circa* 1826—41 had been completed.<sup>197</sup> The rapid accumulation of guilty verdicts seems to have convinced senior Company administrators of the significance of the work of Sleeman and Smith. Meanwhile, as Sleeman had warned in his introduction to *Ramaseeana*, the British had by no means fully uncovered the entire Thuggee 'system'. In 1836 a new form of Thuggee was discovered. The legislative response to it marks the point at which the exceptional practices of the ATC became fully encoded within the Company's juridical order.

In September 1836, Sleeman informed the government that his agency had uncovered in the Bengal Presidency a form of Thuggee even harder to produce conventional legal evidence for than hitherto imagined. 'River Thuggee' involved the robbery and murder of passengers on boats. Victims' bodies were thrown overboard after the attacks, leaving little hope of their subsequent recovery on the basis of information from confessing suspects.<sup>198</sup> As one Shumshera told Sleeman:

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<sup>196</sup> For a selection of the correspondence explaining the expansion of the ATC in the early 1830s: Smith, AGG S&NT, to Swinton, Chief Secy. GG, 25 Mar. 1832; Smith to Macnaghten, Secy. GG, 24 Apr. and 29 May 1832; and Macnaghten to Swinton, 25 Jun. 1832, in *SRT*, pp. 73-5, 80—1, 90—1 (in that order). See also Sleeman, 'Introduction', *Ramaseeana*, p. 56—7; Singha, "'Providential" Circumstances', pp. 122, n.160. For Sleeman's appointment as General Superintendent: Macnaghten to Smith, 5 Mar. 1835, BC, F/4/1566/64217, APAC.

<sup>197</sup> 1,892 out of 3,437 (55 per cent) of Thug trials took place between 1826 and 1835 (inclusive). Calculated from 'Tabular Statement', in Meadows Taylor, 'State of Thuggee in India', p. 293.

<sup>198</sup> Sleeman, General Supt. T&D, to Macnaghten, Secy. GG, 8 Sept. 1836, BC, F/4/1685/67998, APAC. See also 'Memorandum on River Thuggee in Bengal, by Captain Lewis', Calcutta, 19 Apr. 1838, in William H. Sleeman, *Report on the Depredations of the Thug Gangs of Upper and Central India* (Calcutta: G. H. Huttman, Bengal Military Orphan Press, 1840), preface xxii—li.

After strangling them [the victims], they [the River Thugs] broke their spinal bones *thus*, by putting their knees upon their backs, and pulling up their heads and shoulders. After doing this they pushed them out of a kind of window in the side. Every boat has two of these windows, one on each side, and they put the bodies out of that towards the river. They break the spinal bones to prevent all chance of the people recovering and giving evidence against them.<sup>199</sup>

Without circumstantial evidence or supplementary witness testimonies to confirm that attacks had occurred, depositions from approvers thus became essential to securing convictions in instances of River Thuggee, being the only available evidence of a criminal assault.

To deal with River Thuggee, the principles introduced in the Company's non-regulation territories by Swinton's letter of 1830 were promulgated in law for the Bengal Presidency. The first paragraph of Act XXX of 1836 read as follows:

...whoever shall be proved to have belonged, either before or after the passing of this Act, to any gang of Thugs, either within or without the Territories of the East India Company, shall be punished with imprisonment for life, with hard labour.<sup>200</sup>

The following year, Act XIX was passed, allowing for the use of approvers as star witnesses in order to resolve the ambiguity of using confessions from guilty Thugs as evidence in the trials of their gang-members. The Act read:

...no person shall, by reason of any conviction for any offence whatever, be incompetent to be a witness in any stage of any cause, Civil or Criminal, before any Court, in the Territories of the East India Company.<sup>201</sup>

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<sup>199</sup> [Emphasis in original] Sleeman, 'Conversations', in *Ramaseeana*, p. 265.

<sup>200</sup> The third paragraph of the Act sanctioned Company courts to punish Thugs without the *fatwa* (legal ruling) of an Islamic legal officer. All anti-Thug and anti-dacoit legislation passed between 1836 and 1848 can be found in William H. Sleeman, *Report on Budhuk alias Bagree Decoits* (Calcutta: Military Orphan Press, 1849), pp. 353—62.

<sup>201</sup> *Ibid.*, p. 353. Sleeman had effectively advertised for Act XIX of 1837 in the introduction to *Ramaseeana*, pp. 51—4.

For Freitag, the introduction of special anti-Thuggee laws is emblematic of the institution of an ‘alternative’, ‘covert’ legal system for the prosecution of collective crime in early nineteenth-century India.<sup>202</sup> In fact, Acts XXX and XIX enshrined in substantive law the sovereign decisionism and the delegated executive discretion that had previously shielded Thuggee and Dacoity Department officers from legal oversight and compliance with ‘normal’ judicial procedures. Under Act XXX, T&D officers faced no legal requirement to provide proof that a Thuggee suspect had committed a specific act of murder or robbery, only that they had previously associated with a Thug gang. A subject-position, an identity—‘Thug’—was criminalised. Retroactive trials could convict those who had committed such a ‘crime’ before it had been legislated against. Under Act XIX, the denunciation of an approver was legal evidence against a suspect. The burden of proof was reversed: if additional evidence was not forthcoming, as seemed likely in alleged cases of River Thuggee, an approver’s deposition could form the basis of a conviction unless the accused could prove their innocence. As such, the anti-Thuggee legislation of the mid-1830s marked the normalisation of the exceptional procedures of the early 1830s within the colonial framework of the ‘rule of law’, their routinisation as quotidian techniques of lawful government.

Invested with discretionary powers providing for the definition, arrest and detention of suspects, T&D officers defined several new categories of Thug as well as a succession of Thug-like criminals in the later 1830s. Reports soon drew Sleeman’s attention to child-traffickers, gamblers and mendicants, all classified as different varieties of ‘Thug’ (*Megapunniastic*, *Tushma-Baz*, *Tin Naimi*, *Gosain*, *Bairagi*, *Kan Phuttie*, *Thorie* and *Panda Brahmin*) operative across India.<sup>203</sup> Indeed, the expansionist dynamic to anti-Thuggee operations in the later 1830s attests to the bureaucratisation of British responses to ‘organised’ crime in early nineteenth-century India, whereby experts created new objects for the application of their expertise and new arenas in which to apply older means for the suppression of transgressive behaviour that appeared to pose a particular threat to British colonial sovereignty.

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<sup>202</sup> See Freitag, ‘Crime in Colonial North India’, esp. pp. 231, 236—9, 261.

<sup>203</sup> For more: Sleeman, *Report on...Megpunnaism*. For the reports of T&D officials relating to religious mendicants suspected of Thuggee: Singha, ‘“Providential” Circumstances’, p. 139, n. 224—27, and p. 142, n. 242. See also van Woerkens, *Strangled Traveler*, pp. 101—4.

J. R. Lumley's harassment of Yogis provides an instructive example of the process described above. In December 1837, Lumley, one of Sleeman's deputies in the T&D, wrote to the magistrate at Ahmednuggur to inform him that he had 'the very strongest ground of suspicion for believing all the twelve tribes of Jogees to be in truth Thugs but ostensibly Beggars and Peddlars who traffic in small wares',<sup>204</sup> 'The Headquarters of the Jogees is [a temple] at Sonaree', he continued, where there are 'some fifteen or twenty Gooroos and three or four Muctiyar Jogee families I wish to seize'. Lumley subsequently arrested '50 or 60' Yogis, 'among whom more than a dozen confessed or recorded Thuggee against their accomplices'. Indeed, though he admitted that he did not think the 'Gooroos' had 'any connection with Thuggee', Lumley went on to say that he had interned 'a few of them' to try to improve knowledge of 'arcana Jogeeana'.<sup>205</sup> Despite Lumley's reservations about whether the activities that he had encountered were 'Thuggee', only a few months later, Sleeman informed the government's chief secretary that the T&D had 'always had reason to believe that a great part of the Byragees, Gosains and other religious mendicants that infest all parts of India were assassins by profession'.<sup>206</sup> A year later, he argued that:

There is one great evil which afflicts and has afflicted the country, and which no government but a very strong one could attempt to eradicate. This is a mass [around two million people, by Sleeman's estimate] of religious mendicants who infest every part of India, and subsist upon the fruits of all manner of crime.... [They] rob and steal, and a very great portion of them murder their victims before they rob them...[using] dutoora [*Datura alba*, also spelled 'dathura' in colonial accounts], or some other deleterious drug.<sup>207</sup>

Yogis were now re-figured into a representative portion of a wider section of indigenous society: a portion defined, by Sleeman, by its criminality. Indeed, 'There

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<sup>204</sup> J. R. Lumley, T&D Asst. Shorapur, to Magt. Ahmednuggur, Dec. 1837, in 'Letters from the Assistant General Superintendent at Shorapur to the General Superintendent and others between October 1836 and December 1837', quoted in van Woerkens, *Strangled Traveler*, p. 102.

<sup>205</sup> Lumley, T&D. Asst. Shorapur, to Magt. Ahmednuggur, Dec. 1837, quoted in *ibid.*, pp. 101–2.

<sup>206</sup> Sleeman, Gen. Supt. T&D, to Macnaghten, Secy. GG, 3 Feb. 1838 and Sleeman to Lieut. Reynolds, T&D Asst. Hyderabad, 6 Apr. 1838, quoted in *ibid.*, p. 102.

<sup>207</sup> Sleeman, *Report on...Megpunnaism*, p. 9.

are not anywhere worse characters than these Jogies, or greater pests to society,' Sleeman concluded, 'save the regular Thugs'.<sup>208</sup>

The ascription of criminality to religious mendicants attests to the reach and robustness of the discretionary power at the T&D's disposal by the late 1830s. Relocated outside the colonial juridical order as a certain variety of Thug, these individuals were now trapped in a relationship to those attempting to prosecute them, an ontological position fully-loaded by the politics of their criminalisation.<sup>209</sup> Accordingly, during the 1840s, the anti-Thuggee laws were widened, further empowering colonial officials to pursue ill-specified groups of alleged criminals. Act XI of 1848 laid down that:

Whosoever shall be proved to have belonged, either before or after the passing of this Act, to any gang of wandering persons, associated for the purposes of theft or robbery, not being a gang of Thugs or Dacoits, shall be punished with imprisonment, with hard labour, for any term not exceeding seven years.<sup>210</sup>

With this legislation, the colonial administration gave judicial force to the topos of the road as a place of disorder, where 'wandering persons' could escape surveillance, harass travellers, practice unregulated commerce, and—worst of all—develop what were perceived to be wild and savage cults, the antithesis of the envisioned society of sedentary, civilised, taxable cultivators.<sup>211</sup>

Sleeman's suggestion that there were 'regular Thugs' in 1839 was strikingly at odds with the diversity of people arrested on suspicion of Thuggee throughout the ATC, and the mass of heterogeneous information about their experiences of life on India's roads found in their testimonies and the records of their conversations with British officials. Rather, the lack of 'regular Thugs' appears to have been a vital source of legitimisation for the ATC. The difficulty of rationalising and categorising Thuggee in the first place—which Company officials had resolved at the level of it

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<sup>208</sup> *Ibid.*, p. 11.

<sup>209</sup> Cf. Agamben, *Homo Sacer*, pp. 183—4.

<sup>210</sup> Sleeman, *Report on...Budhuk Decoits*, p. 357.

<sup>211</sup> For more: Neeladri Battacharya, 'Predicaments of Mobility: Peddlers and Itinerants in Nineteenth-Century Northwestern India', in Claude Markovits, *et al.* (eds.), *Society and Circulation: Mobile People and Itinerant Cultures in South Asia 1750—1950* (Delhi: Permanent Black, 2003), esp. pp. 193, 195; Bayly, *Rulers, Townsmen and Bazaars*, esp. p. 219.

being an extraordinary crime—had necessitated that the phenomenon be considered exceptional and had underwritten legislation wide enough to permit the discretionary powers deemed necessary to interrogate people with fluid identities against whom little could be proved by conventional judicial process.

The consistent justification given for the experimental and, as of 1836, codified extra-legal powers accorded to Sleeman's policing agency was that, for various reasons, Thugs lay outwith the bounds of humanity itself, as defined by the colonial administration: 'abhorrent to human nature, they are the sworn and irreconcilable enemies of mankind,' Smith wrote in November 1830.<sup>212</sup> The parochial use of the term 'mankind'—paradoxically invoked here as a universal signifier to provide the fundamental justification for the suppression of Thuggee (in that this would protect 'mankind')—shows how, by figuring the Thug as an 'inhuman wretch', officers within the colonial administration helped elaborate a claim for sovereign power over the lives of Indians. By locating Thugs as beyond humanity, the T&D simultaneously advanced a definition of what constituted a human. 'Thugs' served to authenticate the sovereign power of the T&D's officers empowered to decide on where to make this cut in 'society', to the degree that institutionalised colonial policing and administrative practices could enforce definitions of Thuggee and humanity. It was crucial for the T&D not to fully rationalise Thuggee—this would have conceded a modicum of empathy, of identification with what its politics declared 'monstrous', 'wretched', and 'inhuman'. The ATC could never erase Thuggee, so much as police it, subordinate it—construe an element of 'society' as 'inhuman', sustain that construction, and re-construct it elsewhere. The state of exception created to suppress Thuggee in the 1830s provided the means by which British officials were able to do this: to inscribe and re-inscribe their politics upon the depersonalised bodies of suspected Thugs.

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<sup>212</sup> Smith, AGG S&NT, to Prinsep, Secy. Political Dept., 19 Nov. 1830, in *SRT*, p. 50.

## 5. The exceptional legacies of the ATC for colonial justice in British India, circa 1840–1904

Following Sleeman's announcement that the organised 'system' of Thuggee had been defeated in 1839, the legislation introduced to counteract the perceived threat was not withdrawn. Sleeman's vast register of Thuggee suspects at large was maintained until 1879. Although virtually defunct in British domains by 1863, the Thuggee and Dacoity Department was maintained in the independent states until 1904, when it was absorbed into the Indian police force, as the Criminal Investigation Department, to confront the growing nationalist movement.<sup>213</sup> Colonial epistemologies of 'Indian' criminality, the particular techniques of objectifying and recording it, the legislative gymnastics by which the exceptional was normalised as the routine, and the recourse to sovereign power to define and defend the welfare of the population did not die out with the cessation of the Company's investigations into Thuggee. All were encoded as enduring rationales of colonial administration in India, and the sovereign power that vitalised the ATC was extended to an ever-larger proportion of road-users and suspect communities.

The axis of British anti-banditry operations in India during the mid-nineteenth century closely followed Sleeman's personal career-path. By the late 1830s, 'Budhuk dacoity' had become the general superintendent's new preoccupation. In April 1837, Charles Metcalfe, the lieutenant-governor of the newly created North-Western Provinces, had appointed Hugh Fraser of the Bengal Civil Service as the 'Commissioner for the Suppression of Dacoity'. The appointment was a conventional piece of policing strategy in early colonial India, whereby a single official was given special responsibility for tackling banditry and equipped with co-ordinate powers as a joint-magistrate in districts comprising that administrative division (an insulting trespass of authority in the view of some indignant magistrates

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<sup>213</sup> B. R. E. LaBouchardiere, 'A Note on the Thuggee and Dacoity Department, 1829—1904', in *Forms of Crime (Some Peculiar To India)*, Part 1, Mss. Eur., F 161/172/2—20, APAC.

already stationed in them). In February 1838, Sleeman replaced Fraser, uniting his existing post with the latter's new one to become the 'Commissioner for the Suppression of Thuggee and Dacoity'. He was given nine assistants, operative across north-western and central India, each with powers of joint-magistrate in British domains, as well as direct access to the Company's residents at the courts of native rulers of the princely or independent states.<sup>214</sup>

Sleeman was appalled by his predecessor. Fraser 'had acquired and recorded no information regarding the great professional and hereditary classes' of dacoits that Sleeman believed to be operating in and around the North-Western Provinces. He promptly dispatched his assistants to collect testimonies from individuals already convicted of dacoity, had a general register of suspects drawn up, and established a colony of informers (which he nicknamed 'Budukpoora') near his Moradabad residence.<sup>215</sup> Once again, Sleeman announced that he had uncovered a vast fraternity of criminals:

Such daring attacks, by gangs from this great family of professional and hereditary robbers, were frequent in all parts of India. No district between the Berhanpooter [Brahmaputra], the Nerbudda [Narmada], the Suttledge [Sutlej], and the Himmaleh [Himalaya] Mountains, was free from them; and within this vast field hardly any wealthy merchant or manufacturer, could feel himself secure for a single night, from the depredations of the Budhuk Dacoits.<sup>216</sup>

And, once again, it appeared that these criminals were related to one another, predisposed to violence, organised and widespread across north India, prepared to attack anyone, and beyond reformation. With Act XXIV of 1843, the provisions of

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<sup>214</sup> This paragraph and the next one based on: Sleeman, *Report on...Budhuk Decoits*, pp. 5—6, 84, 116—18.

<sup>215</sup> The principal source of information that foregrounded Sleeman's suspicions about the 'organised' nature of 'Budhuk dacoity' was a certain N. J. Halhed, who, as assistant superintendent of police in the Western Provinces some twenty years earlier, had played a central role in the first British-led anti-Thuggee operations, advocating both a light revenue settlement (to prevent *zamindars* from employing gangs of bandit) and the demolition of Maratha villages (to prove that the Company was the new sovereign political force in the area). Sleeman's assistants in the T&D were posted in Jabalpur, Chupra, Agra, Murshidabad, Meerut, Ajmere, Lucknow, Gorakhpur and Indore.

<sup>216</sup> Sleeman, *Report on...Budhuk Decoits*, p. 10.

the anti-Thuggee legislation of 1836 were directly mapped onto dacoity.<sup>217</sup> As such, a government founded on the rationality of the ‘rule of law’ would uphold that system of justice by excepting from its protection those individuals not believed to be amenable to its ordinary functioning.

The supposed affirmation of the existence of collective, hereditary crime in India obtained during the ATC through the co-option of approvers, and their subsequent authentication of colonial suspicions, continued to provide an instructive and widespread model for reading indigenous criminality in the later nineteenth century. In 1852, H. Brereton, the superintendent of Thuggee investigations in the Punjab, asserted that a portion of the ‘Thugs’ in his jurisdiction was drawn from a criminal netherworld comprised of ‘Chooria thieves, Sainsee burglars, and Child Stealers, and Jat dacoits’.<sup>218</sup> Three years later, the government drew the Punjab authorities’ attention to a report by Sleeman that described how the ‘predatory tribe’ of the Baurias, who were ‘infesting the lower Doab and Southern India’, had been placed under the surveillance of landholders in the district of Kanpur, and recommended that the same measures be implemented in the Punjab for the ‘Criminal classes of “Sanses”, “Bouriahs” and “Kunjars”’. The judicial commissioner for Punjab asked the seven, subordinate, divisional commissioners for their views on the recommendation. All agreed: a widespread system of registration and surveillance should be imposed on such ‘Criminal classes’.<sup>219</sup> The judicial commissioner promptly issued Book Circular No. 18 of 1856, which compelled all Sansis, Harnis and Baurias to register at local police stations, made the headmen of villages in which they were resident responsible for their conduct, forbade registered tribesmen from sleeping away from their villages without permission from the police,

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<sup>217</sup> *Ibid.*, pp. 354—7.

<sup>218</sup> H. Brereton, Supt. Thuggee Investigations (Punjab), ‘Report on Thuggee in the Punjab’, 15 Nov. 1852, in *Selections from the Public Correspondence of the Administration, for the Affairs of the Punjab* (Lahore: 1852), vol. I, no. 4, article 13, pp. 231—85, esp. pp. 255—6, 267—8, 271, 285, quoting p. 237, V/23/335, APAC.

<sup>219</sup> ‘Report on the criminal classes of the Punjab, 1856’, in *Selections from the Public Correspondence of the Administration, for the Affairs of the Punjab* (Lahore: 1860), vol. 4, no. 5, article 4, pp. 40—43, V/23/337, APAC.

and punished those absent-without-leave to furnish security for their good behaviour or face imprisonment.<sup>220</sup>

Problems with the system soon emerged: instead of registering with the authorities, members of the criminalised 'tribes' migrated or changed their recorded identity. To overcome this, district officers suggested the forcible and wholesale relocation of communities to portions of government-owned wasteland, where, under police supervision, they would be compelled to perform agricultural labour. Here, they would be re-socialised according to the economic, social and moral rationalities of the colonial government; criminal tribesmen would become tenants-at-will. Eight such settlements were established in the later 1850s, with several thousand people confined in them.<sup>221</sup>

The Punjab police authorities believed that the initiative had successfully 'reclaimed' these criminal communities, but in 1867 the Punjab Chief Court declared that the measures were based on an executive order without legal basis (Book Circular No. 18 of 1856) and that they had been superseded by the Criminal Procedure Code. The Punjab police met the court's ruling with dismay: pre-emptive measures were the only reliable means to tackle criminal communities, it argued.<sup>222</sup> Indeed, these complaints tallied with broader attitudes towards collective crime in India, which had evolved from Sleeman's investigations into Thuggee in the mid-nineteenth century and now incorporated both European quasi-science on 'hereditary' crime as well as colonial ethnographic and anthropometric readings of 'caste'. The result was the government's introduction of the Criminal Tribes' Act (XXVII) of 1871, which enshrined collective and hereditary criminality as facts of Indian society in line with contemporary understandings of caste.<sup>223</sup>

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<sup>220</sup> See: Government of India, Legislative Dept. Progs., Nov. 1871, no. 67, P/711, APAC; and *General Report on the Administration of the Punjab Territories for the year 1866—67* (Lahore: Punjab Printing Company's Press, 1867), pp. 29—30, V/10/28, APAC.

<sup>221</sup> Andrew J. Major, 'State and Criminal Tribes in Colonial Punjab: Surveillance, Control and Reclamation of the "Dangerous Classes"', *Modern Asian Studies*, vol. 33, no. 3 (1999), pp. 665—7.

<sup>222</sup> See Government of India, Legislative Dept. Progs., Nov. 1871, no. 67, P/711, APAC. See also Major, 'State and Criminal Tribes in Colonial Punjab', p. 667.

<sup>223</sup> See, for example, C. R. W. Hervey, *Some Records of Crime (Being The Diary of a Year, Official and Particular, of an Officer in the Thuggee and Dacoitie Police)* (London: Sampson Low, Marston & Company, 1892), Vol. I. esp. p. 79. For a deconstruction of the way in which colonial ethnography constructed the Meos as a 'criminal tribe': Shail Mayaram, *Against History*,

Under the terms of the Criminal Tribes' Act, local governments were authorised to recommend to the government the proclamation of any tribe or gang thought to be 'addicted to the systematic commission of non-bailable offences'. Those proved to be thus 'addicted' were then notified and registered by the local government. 'Criminal' communities could be confined to a particular vicinity or removed to reformatory resettlements, where members of the 'tribe' had to report to local officials on a daily basis, appear at irregular roll-calls, and apply for tickets-of-leave if they wished to go elsewhere. They could be punished using fines, flogging and incarceration for breaches of a general code of discipline laid down for them. Notified 'criminals' were not permitted to lodge appeals.<sup>224</sup>

By 1875, the Criminal Tribes' Act had been applied with particular severity to the Sansis, Harnis and Baurias, as well as to three more suspect groups. By 1881, more than 16,000 people had been registered as members of Criminal Tribes in the Punjab. By 1901, that number was nearly 50,000 (even discounting children under the age of twelve).<sup>225</sup> Just as during the campaign to suppress Thuggee in the 1830s, knowledge of the various groups targeted by the Criminal Tribes' Act was therefore drawn into the larger project of policing them. As such, the voices of the Thug-approvers of the 1830s became those of ghosts haunting criminalised groups 'found' across India in the later nineteenth century.<sup>226</sup>

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*Against State: Counterperspectives from the Margins* (New York: Columbia University Press, 2003), esp. pp. 131—51.

<sup>224</sup> Criminal Tribes' Act XXVII (1871), in *A Collection of the Acts Passed by the Governor General of India in Council in the Year 1871* (Calcutta: Office of Superintendent of Government Printing, 1872), pp. 348—55, V/8/42, APAC.

<sup>225</sup> Major, 'State and Criminal Tribes in Colonial Punjab', pp. 668—71, 674—5. For more: Sanjay Nigam, 'Disciplining and policing the "criminals by birth", Part 1: The Making of a Colonial Stereotype – the Criminal Tribes and Castes of North India', *IESHR*, vol. 27, no. 2 (1990), pp. 131—41.

<sup>226</sup> The Criminal Tribes' Act of 1871 was re-enacted throughout the later nineteenth and early twentieth centuries. The legislation was not repealed until after Indian independence, in 1952, when it was replaced with the Habitual Offenders' Act, which remains in place to this day. In March 2007, the United Nation's 'Committee on the Elimination of Racial Discrimination' asked the Indian government to repeal it on the grounds that it continued to stigmatise the sixty million Indians classified as 'denotified and nomadic tribes', listed for their alleged 'criminal tendencies'. See UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination: seventieth session (19 February – 9 March 2007)*, p. 36, A/62/18, available at <<http://www.unhcr.org/refworld/docid/473424062.html>> [accessed 12 August 2009].

## Conclusions

The resilience of the Thuggee and Dacoity Department's models for reading indigenous criminality throughout the nineteenth century and beyond attests to successive British colonial administrations' perception of them as reliable and efficacious means to confront the 'extraordinary' forms of crime found 'In a country like India'.<sup>227</sup> Yet at the heart of these convictions lay the suspicions of the colonisers themselves, ingrained in the processes by which those supposedly possessing the purest knowledge about these crimes—the leading suspects accused of having committed them—were encouraged to affirm allegations made by their captors and to participate in the production of a particular penal truth that underlined not only the justness of their own suppression, but the apparent need for India to be ruled by the British. This pro-colonial metanarrative was intrinsic to the justification of the ATC: if India was to reach a renewed state of 'civilisation', Thuggee could not be tolerated.

The extra-ordinary, British-led operations to suppress Thuggee in India in the early nineteenth century yield new insights into the realisation and functioning of colonial sovereignty in the Indian subcontinent. The historiographic claim made here is that 'colonial sovereignty' names a type of power that British administrators demanded, and instituted, for the control of certain individuals whose actions transgressed the threshold of their modes of comprehension and categorisation, and the juridical system designed to prosecute them. 'Thug' was the name given to a figure located beyond the pale of 'civil' society, held to be a member of a community of irreclaimable predators upon it, who could not be socialised by the imposition of established legal norms in north India. An understanding of this discretionary process reveals how operations against banditry were both informed by, and, crucially, informed, wider efforts to constitute and enable a particular type of sovereignty in the northern and central subcontinent.

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<sup>227</sup> Sleeman's phrase: Sleeman, 'Introduction', in *Ramaseeana*, p. 52.

Once ‘Thugs’ had been deemed exceptional criminals, it followed that their prosecution necessitated the creation of a novel sphere of authority, defined by the suspension of the existing juridical order. In this state of exception, officials dealt with crimes that, it was claimed, only they could police—in all senses of the word. Through this policing, this defining and controlling, they characterised (and indeed caricatured) not only those individuals who would henceforth be considered non-subjects—Thugs, dacoits, and ‘criminal’ tribes-people—to which the ordinary procedures of British administration could not apply, but also those who would be afforded the protection of the state, the supposed benefits of the rule of law imagined and enforced by making this exception. A fuller elaboration of British colonial sovereignty in India was incipient in the prosecution of the ATC. This policing campaign marked a decisive moment in the imagination and extension of the domain of the Company’s governmental rationality in the Indian subcontinent; a point of no return in the history of the British presence in India, at which newly-imagined frontiers emerged to divide social practices and to re-conceive centralised authority over the subject population.

The suppression of the Irish Volunteers  
in early twentieth-century Ireland

# Introduction Ireland: provinces and county towns



Source: Jackson, *Ireland*, p. 467.

## Introduction

As the European conflict that began in 1914 broadened into a protracted world war, one attended by the horrors of the trenches and industrialised slaughter, popular support for Irish involvement in Britain's defence of 'small nations' quickly waned. The Irish Republican Brotherhood (IRB) sought to capitalise on this. In May 1915, Joseph Plunkett and Roger Casement, the Brotherhood's emissaries in Germany, requested that the German government land forty thousand rifles and twelve thousand troops in Limerick with a view to launching a national uprising. Insurrection in Dublin would inspire rebellion across southern Ireland. Supported by German arms and troops, a national uprising would collapse both Britain's war effort in continental Europe and her global empire. On Easter Monday (24 April) 1916, the IRB's Dublin strike force assembled at pre-arranged meeting points to commence the uprising. Over a thousand insurgents occupied important sites across Ireland's capital city. Patrick Pearse, leader of the IRB's military council, was designated commandant-general of the army. From the steps of the General Post Office, to a bewildered gaggle of Dubliners, he now announced the formation (and his presidency) of a provisional government of the new Irish Republic.<sup>228</sup>

Militarily, the Easter Rising was an abject failure. The crucial consignment of arms from Germany never materialised; the ship carrying them was scuttled off the coast of Kerry. More seriously, the IRB's leadership was profoundly divided over whether the time was right to initiate insurrection. When Eoin MacNeill, the IRB military council's chief of staff and president of the Irish Volunteers, learned of plans to commence an uprising on 23 April, he promptly published a countermanding order in the *Sunday Independent*, instructing Volunteers to stay at home. The majority of the military council overruled MacNeill, but the countermand caused the insurrection, initially scheduled for Sunday, to be postponed for a day, significantly

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<sup>228</sup> Based on: Oxford, Bodleian Library, Ms. Asquith 42; Brian Barton, *From Behind a Closed Door: Secret Court Martial Records of the 1916 Easter Rising* (Belfast: Blackstaff Press, 2002), pp. 6–10; Townshend, *Easter*, pp. 92–116.

reducing Volunteer turn-out. As the uprising unfolded, more serious defects in the Volunteers' military leadership emerged. The secrecy of the IRB's military plans, as well as their last-minute discovery (in Kerry) and contradiction (in the *Sunday Independent*), meant that effective insurrection was almost exclusively confined to the capital. Even in Dublin, crucial opportunities were missed: despite being almost undefended, Dublin Castle, the seat of executive government in Ireland, was not seized; neither were Trinity College, nor the Bank of Ireland, despite both straddling key communication routes for the city centre and abutting the river Liffey, up which British forces sailed a gunship to shell the rebels into submission. Swiftly encircled by British troops, the Volunteers spent several days defending hopelessly embattled positions. Lacking firepower, undermanned, and steadily cut off from central direction, their rising was crushed within a week. On 29 April 1916, the British military forces accepted the rebels' unconditional surrender through Pearse. The Easter Rising was over, but Ireland would spend the next five years mired in an increasingly bitter conflict over political sovereignty.<sup>229</sup>

This case study analyses the processes by which exceptional, executive responses to unrest were normalised and routinised in Ireland in the period from the Easter rising to the truce that was concluded between British Crown forces and what became the Irish Republican Army in early July 1921. This period was characterised by the British government's introduction and extension of a raft of repressive measures designed to restore order in Ireland: mass internments, juryless trials by military tribunals and courts of summary jurisdiction, the suspension of coroners' inquests, collective punishments, curfews, and a policy of 'official' reprisals against civilian targets. As such, ever-wider spheres of daily life were coloured by counter-insurgency operations. In many parts of Ireland, particularly in Dublin and in the south and west, and particularly from late 1920, wartime conditions prevailed. However, the government obstinately refused to agree that it was engaged in a war

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<sup>229</sup> Civilian losses (including rebels) totalled 318 individuals, with 2,217 wounded. 116 military personnel were killed, with 368 wounded and a further 9 missing. The police (RIC and DMP together) suffered 16 fatalities and 29 wounded. It is widely accepted that 64 rebels were killed. See Barton, *Door*, pp. 23–5. Based on: Oxford, Bodl., Ms. Asquith 42; General Courts Martial of Austin Stack and Cornelius Collins, 15–16 June 1916, PRO WO 35/68; Barton, *Door*, pp. 23–5; Townshend, *Easter*, esp. pp. 125–43, 163–4, 181, 227–68.

and persisted with the fiction that a legalistic campaign to restore order was operational until early 1921, when martial law was imposed in Munster Province.

In British jurisprudence, ‘martial law’ has been a frequently ill-understood name for the military governance of civilian life. Examining the reasons for, and the consequences of, the ambiguity surrounding the concept in its application in early twentieth-century Ireland is a central task of this case study. In the first half of the nineteenth century, martial law was applied throughout the British empire on many occasions.<sup>230</sup> It had had been used in Ireland to suppress Wolfe Tone’s rising in 1798 and Guy Emmett’s in 1803.<sup>231</sup> It would not be used there again until 1916. By then, the British jurisprudential discourse on martial law had been reshaped by two significant colonial controversies: the suppression of the Morant Bay rebellion in Jamaica, in 1865, and the suppression of the Boer Republics during the second South African War of 1899—1902. The legal inquiries and protests arising from these applications of martial law questioned the meanings of ‘minimum force’ and the doctrine of necessity, and articulated liberal anxieties regarding prolonged military authority over civilian populations. Simultaneously, they raised the question of whether substantive law could provide a legal schema for counter-insurgency adequate to meet any situation of unrest. More precisely, they asked whether imperilled British interests abroad, strategic and colonial, would be best defended by martial law applied through the somewhat antiquated notion of the monarch’s prerogative right to repel force by force, or instead by codified legislation, statutory emergency powers akin to the continental formulation of the ‘state of siege’.<sup>232</sup> In short, these worries wrenched the guts of the British constitution.

Between 1916 and 1921, the Irish Volunteers’ increasingly extreme insurgency for a Republic of Ireland provided the crucible in which the British executive attempted to forge new answers to old legal questions regarding martial

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<sup>230</sup> In Barbados (1805 and 1816), Demerara (1823), Jamaica (1831—2), the Cape of Good Hope (1835, 1849—51 and 1852), Canada (1837—8), Ceylon (1848), Cephalonia (1849) and St. Vincent (1863). The outstanding study is: Charles Townshend, ‘Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and Empire, 1800—1940’, *The Historical Journal*, vol. 25, no. 1 (1982), pp. 167—95.

<sup>231</sup> For more: Jackson, *Ireland*, pp. 17—21.

<sup>232</sup> Space prevents a re-analysis of martial law’s application in Jamaica and South Africa here. In any case, the jurisprudential and constitutional problems that arose have already been assessed in some depth and with great perspicacity: Townshend, ‘Martial Law’, pp. 169—82.

law. Colonial experience continued to prove instructive. The infamous Amritsar massacre—the killing of several hundred Indians on 13 April 1919, carried out while four districts of the Punjab were under military rule—was a particularly incendiary politico-legal controversy arising in this period. The massacre’s impact on counter-insurgency in Ireland is duly considered in the following analysis, since public and parliamentary debate on it occurred at a point when the executive was urgently contemplating the introduction of martial law in Ireland. This is not crudely to align Ireland with British imperial concerns—an argument faulty if nothing else for its need to find (or create) a pristine template of colonialism against which to compare Irish experience. Rather, it is to suggest that colonial practice and the British administration of Ireland following the Union of Britain and Ireland 1801 were mutually informing, and remained so in the early twentieth century, especially in regard to the procedures of criminal law and the suppression of political dissidence.<sup>233</sup>

The deeper aim of this case study, however, is to probe the limits of British, and indeed Irish, understandings of martial law, emergency powers and the rule of law in order to examine how states of exception were both rationalised and re-imagined as part of the government’s counter-insurgency operations in the period *circa* 1916—21. Particular emphasis is laid upon the performative dimensions of what were, as we shall see, quite consciously conceived as exceptional regimes of state coercion, for, it is contended, it was the very possibility for martial law to be misconstrued that made it at once such a potent and toxic resource of sovereign power in early twentieth-century Ireland.

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<sup>233</sup> See, in particular, the debates in: Stephen Howe, *Ireland and Empire: colonial legacies in Irish history and culture* (Oxford: Oxford University Press, 2000); Joe Cleary, “‘Misplaced Ideas’? Colonialism, location and dislocation in Irish studies”, in Clare Carroll & Patricia King (eds), *Ireland and Postcolonial Theory* (Cork: Cork University Press, 2003); Kevin Kenny (ed.), *Ireland and the British Empire* (Oxford: Oxford University Press, 2004); and Terrence McDonough (ed.), *Was Ireland A Colony? Economics, politics and culture in nineteenth-century Ireland* (Dublin: Irish Academic Press, 2005).

# 1. Ireland, 1916: uprising and repression

## § The Easter Rising and the imposition of martial laws in Ireland

The aftermath of the Easter Rising would starkly reveal to the Irish population the uneven functioning of the political economy of justice—the ‘rule of law’—in Ireland. This counter-insurgent response provides the focus for the following analysis. First, however, the technical, legal situation concerning illegal challenges to state sovereignty is explained as it stood in the United Kingdom by Easter 1916.

For the purpose of conducting the First World War, the British parliament conferred on the executive a regulation-making power principally intended to suppress domestic subversion and facilitate the speedy and unrestricted management of a war economy. This legislation, the Defence of the Realm Act (DORA), promulgated on 8 August 1914, was explicitly phrased in terms of the Crown’s prerogative powers to uphold the order of the state at all costs—even at the expense of the law—following the principle *salus populi suprema lex esto* (‘let the good of the people be the supreme law’). It empowered His Majesty (King George V) in Council to

...issue regulations as to the powers and duties of the Army Council, and of the members of His Majesty’s forces, and other persons acting on His behalf, for securing public safety and the defence of the realm.<sup>234</sup>

The semantics of this legal formulation are significant: such language would soon lend force to the widespread conviction among members of the British counter-insurgency forces operating in Ireland, as well as civilians enduring the effects of their operations, that the DORA had provided a statutory form of martial law rooted in the prerogative theory of the monarch’s right to suspend the law in order to defend the realm; that is, to repel force with force.

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<sup>234</sup> For this quotation and for a full list of the DORA as they stood at Easter 1916: ‘Home Defence, Defence of the Realm Regulations 1914, Part 3’, PRO WO 35/61/1. Defence of the Realm Act, 1914, 4 & 5 Geo. V, c. 29.

Although couched in the archaic terminology of prerogative right, the DORA in fact derived more closely from a divergent stream of British jurisprudential thought on martial law: common-law theory, as articulated by the country's foremost authority on constitutional law, A. V. Dicey, in the late nineteenth century. In this understanding, martial law was, as Wellington had remarked in the 1850s, 'no law at all': *inter arma enim silent leges*. According to Dicey, a situation requiring rule by military power could not be legislated for in advance. Rather, martial law marked the threshold of the law's ability to provide normative proscriptions of real threats: it was effectively sucked into effect by the vacuum created by the collapse of legal mechanisms in the face of a particular crisis. Yet before that critical point was reached, the jurisprudential doctrine of necessity posited that the common-law equipped peace officers and the citizenry (aided by military forces if need be) with the duty to restore serious breaches of order by whatever means necessary. Under the DORA, this common-law duty was now vested in the British parliament, not the Crown, as a statutory power, not a prerogative right.<sup>235</sup>

In keeping with the authoritarian impulse behind the DORA, serious breaches of the Defence of the Realm Regulations (DORR) could be tried by summary, juryless hearings before a court martial.<sup>236</sup> The DORA specially provided that trial by court martial could be authorised for alleged breaches of the regulations in two defined sets of circumstances:

- (a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardize the success of the operations of any of his Majesty's forces or to assist the enemy; or (b) to secure the safety of any means of communication, or of railways, docks or harbours.

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<sup>235</sup> Dicey, *Constitution*, ch. VIII. For further analysis: Townshend, 'Martial Law', esp. pp. 170–5.

<sup>236</sup> Under the terms of the DORA, both law-making and judicial powers were concentrated in the hands of those army or air force officers of the rank of field officer or above and designated by the Army Council to be a competent military authority (CMA). The CMA could, in turn, delegate any or all of his powers to any officer also of sufficient rank to be a CMA. As we shall see, the CMA became a figure of executive authority that would loom increasingly large over the Irish socio-political landscape in the years 1916–21. See, in particular, 'Instructions Regarding the Administration of the Defence of the Realm Regulations in Ireland During the Present Time', by H. A. Wynne, Chief Crown Solicitor Ireland, sent to J. Campbell, Attorney General [hereafter, AG] Ireland, 19 July 1916, PRO WO 35/62/1.

Amending legislation soon extended the powers of courts martial to try breaches of the DORR. In November 1914, these amendments were consolidated and further expanded in the form of the Defence of the Realm (Consolidation) Act, which introduced the death penalty for convictions by courts martial where the offence proved was one committed with the intention of assisting the enemy.<sup>237</sup> Early in 1915, the legitimacy of trying breaches of the DORR by court martial was reappraised and the Defence of the Realm (Amendment) Act duly introduced. A modification to section 1, subsection 7, restored the right of British citizens to trial by jury for alleged breaches of the regulations, with the proviso that this right could be suspended ‘in the event of an invasion or other special military emergency arising out of the present war’.<sup>238</sup> The latter, the government decided, was the situation pertaining in Ireland in Easter week 1916. A proclamation of 26 April, signed by King George, therefore suspended the right to trial by jury for breaches of the DORR in Ireland, re-instituting the power of courts martial to sentence to death any rebels found guilty of assisting Germany.<sup>239</sup>

The particular constructions of the DORA and its various consolidating and amending clauses had, by the time of the Easter rising, created haziness over the executive’s statutory martial law provisions. Confusing things further was the lord lieutenant’s proclamation of (non-statutory) martial law in Dublin on 24 April 1916 and across Ireland a day later. Citing the collapse of the civil administration in Ireland at the beginning of Easter week, the lord lieutenant, Baron Wimbourne, believed himself empowered to suspend the operation of the civil legal system according to his viceregal prerogative right to repel force by force. Indeed, on 26 April—the same day that it invoked the statutory right to suspend trial by jury for breaches of the DORR in Ireland—the British government extended martial law to cover the whole of Ireland, issuing a proclamation through Major-General L. B.

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<sup>237</sup> Defence of the Realm Consolidation Act, 5 Geo. V, c. 8.

<sup>238</sup> See Defence of the Realm (Amendment) Act, 5 & 6 Geo V, c. 34; Defence of the Realm (Amendment) (No. 2) Act, 5 & 6 Geo. V, c. 37; Defence of the Realm (Amendment) (No. 3) Act, 5 & 6 Geo. V, c. 42.

<sup>239</sup> Proclamation by the King, 26 Apr. 1916, received at Irish Command HQ, 4 May 1916, PRO WO 35/61/1.

Friend.<sup>240</sup> Lieutenant-General J. G. Maxwell was now formally appointed as Ireland's military governor—combining his military role as general officer commanding-in-chief His Majesty's forces in Ireland (GOC) with that of head of the country's civil administration—and sent across the Irish Sea 'with plenary powers, verbally given' to suppress the rebellion by whatever means necessary.<sup>241</sup>

Yet in the panic of the government's response to the Easter Rising, it seems, what mattered most was not the legal basis of the counter-insurgency measures so much as the pragmatic value of fearsome-sounding declarations of martial law, and the extent to which they signalled determination to quash rebellion. As opposed to the DORA's legal articulation of the state's right to self-defence, martial law connoted the extra-legal articulation of sovereign will. In the Irish popular imagination, according to the country's attorney general, it possessed both a polarising and an occult power:

...undoubtedly the average citizen has an extraordinary belief in the magic term "Martial Law" and it therefore brings home to loyal and law-abiding people a great sense of security and safety, and upon the other hand the very indefinite knowledge of its powers spreads terror among the disaffected.<sup>242</sup>

From 26 April 1916, two different regimes of special legal powers coexisted in Ireland: statutory and non-statutory martial law; the former legal, though 'necessarily' draconian, the second widely understood as decisively extra-legal. However, it was the DORA that provided the technical means by which the military would prosecute the suppression of the rebellion and punish its presumed leaders. Notwithstanding this technicality, the illusion that martial law ('no law at all') was in

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<sup>240</sup> For the proclamations of 24 and 25 April 1916: *Sinn Féin Rebellion Handbook: Easter 1916*, 2<sup>nd</sup> edn. (Dublin: Weekly Irish Times, 1916), p. 39. See also Lt. Col. H. Toppin, Asst. Adjutant General, to J. MacMahon, Under-Secy. to Chief Secy. Ireland, 20 Mar. 1920, PRO WO 35/62/1.

<sup>241</sup> For Maxwell's understanding of his powers: Lt. Gen. J. G. Maxwell, GOC Ireland, to W. Long, Col. Secy., 18 July 1916, enclosure in cabinet memo., 21 July 1916, PRO CAB 37/152/15.

<sup>242</sup> Memo. on the operation of martial law in Ireland by J. Campbell, AG Ireland, to Maxwell, GOC, 20 May 1916, Bodl., Ms. Asquith 42, f.148.

force was allowed to continue well beyond Easter week.<sup>243</sup> The resulting confusion not only left Prime Minister Herbert Asquith's administration hard-pressed to assert the legality of repressive policies imposed in Ireland—since, to many observers, the 'ordinary' juridical order was suspended if martial law was in place—but also made state power appear terroristic: unaccountable and unknowably capricious. This did much to turn broad segments of Irish public opinion in favour of the rebels of Easter.

### § 'A necessary vindication of the law': suppressing and punishing the Easter rebels<sup>244</sup>

Upon his arrival in Ireland midway through Easter week, General Maxwell initiated a combined army and police operation to encircle rebel positions and ascertain the local population's loyalties. Districts in Dublin were cordoned-off, houses searched, examination posts set up on the streets, curfews imposed and quays and ports monitored. As hostilities in the capital ceased over the course of the weekend, large numbers of civilians were rounded up for investigation and Maxwell ordered columns of troops to be sent throughout Ireland to arrest suspected leaders of the various, abortive provincial risings. In total, 3,430 men and 79 women were arrested in connection with the uprising under DORR 55 and then screened by the Dublin Metropolitan Police (DMP) and army personnel. Of 1,841 individuals not released after these peremptory examinations, about ninety per cent were interned without trial under DORR 14B, initially in Dublin, with most subsequently transferred to detention barracks in Britain.<sup>245</sup>

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<sup>243</sup> See, for example, Maxwell, GOC, to Long, Col. Secy., 18 July 1916, enclosure in cabinet memo., 21 July 1916, PRO CAB 37/152/15. According to Townshend, the illusory imposition of martial law was upheld until as late as March 1917, despite Maxwell's departure the previous November: Townshend, *Political Violence*, p. 313.

<sup>244</sup> Asquith, PM (referring to the executions that followed the Easter Rising), HC Deb., 10 May 1916, col. 624.

<sup>245</sup> Precise figures on the numbers interned vary: cf. David Foxtan, *Revolutionary Lawyers: Sinn Féin and crown courts in Ireland and Britain, 1916—1923* (Dublin: Four Courts Press, 2008), pp. 67—8 with *Rebellion Handbook*, p. 62, which suggests that 3,226 people were arrested and passed through Richmond Barracks, with 1,862 men and 5 women interned.

If mass detentions without trial suggested that Irish civilians were being subjected to the routinised use of extra-legal harassment and deprivation of liberty, still more shocking to the Irish public and damaging for the government was the fact that around ten percent of those arrested for their alleged part in the rising were put on trial before the military authorities.<sup>246</sup> Indeed, despite the rebels' unconditional surrender, the army's confidence that the rebellion had been crushed by the end of April, and the severity of the charges brought against the rising's presumed leaders, they were all tried by field general courts martial on the basis that Ireland was still in a state of military emergency.<sup>247</sup>

The field general court martial, a three-man military tribunal, was the army's most expeditious form of trial procedure. A unanimous verdict was required to impose the death penalty but the convening officers were not required to possess legal training and hearings were conducted *in camera*. The use of these tribunals, made possible by the suspension of section 1 (7) of the Defence of the Realm (Amendment) Act, became a central source of the illusion that martial law remained in force in Ireland beyond the Easter rising, convincing certain sections of the Irish population that it had been suppressed by exceptional, non-justiciable means. Although the DORA courts martial were not military tribunals, so much as a statutory form of summary, juryless trial formed on these lines, they evoked martial law. In short, they suggested that British repression of the alleged rebel leaders had no basis in law.<sup>248</sup>

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<sup>246</sup> All but four of these hearings were held in Dublin. In total, 187 civilians (only one of them, Constance Markievicz, female) were tried as rebel leaders by courts martial in connection with the Easter Rising. Foxton, *Revolutionary*, p. 68.

<sup>247</sup> The supreme military tribunal was the general court martial of at least nine officers; it required a two-thirds majority verdict to impose the death penalty. However, this was perceived to be an unwieldy instrument of military justice in times of war. When it was not possible to convene such a tribunal, a field general court martial would sit. See Gerard Oram, *Death Sentences passed by military courts of the British Army 1914-24*, ed. Julian Putkowski (London: Francis Boutle, 2005), pp. 13–14.

<sup>248</sup> Indeed, in January 1917, the Law Officers of the Crown and Sir Reginald Brade, Secretary of the Army Council, ruled that it had been illegal to hold the courts martial *in camera* (hearings from which the press and public are excluded). See Law Officers' Judgement, 30 Jan. 1917, in R. Brade, Army Council Secy., undated memo., PRO WO 141/27.

The courts martial trials of fourteen suspected leaders of the Easter Rising began on the afternoon of 2 May 1916 at Richmond Barracks in Dublin. Under DORR 50, the so-called ‘ringleaders’ were accused of having taken part

...in an armed rebellion and in the waging of war against His Majesty the King, such act being calculated to be prejudicial to the Defence of the Realm and being done with the intention and for the purpose of assisting the enemy.

In the majority of these trials, therefore, the prosecution’s case rested on the extent to which it could establish that the accused had committed offences against the DORR with the intention of assisting Germany in the war effort against Britain. Where proof that the accused had acted to assist the enemy was not certain (as in the cases of Con Colbert, Michael Mallin, James Connolly and Sean MacDermott) a secondary, though equally broad, charge was preferred: that of a breach of DORR 42, which read as follows:

If any person attempts or does any act calculated or likely to cause mutiny, sedition or disaffection among any of His Majesty’s forces, or any of the forces of His Majesty’s Allies, or among the civilian population, or to impede, delay, or restrict the production, repair, or transport of war material, or any other work necessary for the successful prosecution of the war, he shall be guilty of an offence against these regulations.<sup>249</sup>

The loose formulation of regulations 42 and 50 is indicative of the wide-ranging executive discretion that the Defence of the Realm legislation had vested in the prosecuting authorities. These tribunals were clearly designed to ensure the prompt delivery of convictions, though at the same time they attempted to retain the legitimising veneer afforded by persistence with the tropes of due legal process.<sup>250</sup>

The summary assembly of the field general courts martial, the decrepitude of the Irish administration’s intelligence agencies, and the identification process used to

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<sup>249</sup> For the charges against rebel ‘leaders’, see, for example, trial of Edward Daly, 3 May 1916, PRO WO 71/344.

<sup>250</sup> Furthermore, while serving soldiers were permitted to have a ‘prisoner’s friend’, usually a subaltern, to help them present their defence, this stipulation did not apply in the case of the Easter rebels.

pluck out men for trial from the mass of prisoners held in detention following the surrenders and arrests at the end of Easter week led, in several cases, to prosecution evidence that was inaccurate, ambiguous and slight. In the case of Willie Pearse, for instance, one Lieutenant King (held hostage in the General Post Office during Easter week) simply told the court, 'I know that William Pearse was an officer but do not know his rank'. In truth, as the defendant told the court, he was merely an attaché to his brother (Patrick Pearse) and could not be considered a leader of the uprising at all.<sup>251</sup> The Crown's evidence was particularly slender in the cases of Thomas MacDonagh, Eamonn Ceannt, John MacBride, Con Colbert and Michael O'Hanrahan. Major J. A. Armstrong, the officer who had overseen their surrender along with around four hundred comrades at St. Patrick's Park on 30 April, was the sole witness for the prosecution in all of these cases save MacBride's. Armstrong's knowledge of the accused was paltry. In some cases he could not even tell the court where the accused had served during Easter week, let alone provide specific proof of criminal activity.<sup>252</sup> Indeed, the poverty of the Crown's evidence is further indicated by the fact that when Maxwell wrote to Asquith about the fifteen death sentences eventually handed down to rebel 'leaders', the general justified his decision to confirm them by reference to intelligence documents not produced in court.<sup>253</sup>

It appears that the combination of the inscrutability of the proceedings, coupled with the visibility of the outcomes, was what caused anger among the Irish public, making the British government seem less like the knowable restorer of orderly civil society, but the disorderly bearer of unknowable, antisocial coercion. As Wimbourne warned Maxwell and Asquith on 8 May 1916, the execution of 'three comparatively unknown insurgents' that morning meant that '[i]n [the] popular estimation...nearly a hundred others are liable to the same penalty'.<sup>254</sup> William Wylie, appointed to prosecute at the first few field general courts martial, recalled

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<sup>251</sup> Trial of William Pearse and others, 3 May 1916, PRO WO 71/358.

<sup>252</sup> For these trial proceedings: PRO WO 71/346, 348, 350, 352 and 357.

<sup>253</sup> Cited in Barton, *Door*, p. 38. For more on the justifications given by Maxwell: Townshend, *Easter*, pp. 279–87.

<sup>254</sup> Con Colbert, Michael Mallin, Sean Heuston and Eamonn Ceannt—a signatory of the proclamation of the Irish Republic—were executed on 8 May 1916; Wimbourne was presumably referring to the first three as 'comparatively unknown insurgents'. Baron Wimbourne, Lord Lieutenant, to Maxwell, GOC Ireland, 8 May 1916, BL, Add. Mss. 58372/R f. 53.

meeting Maxwell in the midst of the executions. The general had received a telegram from Asquith urging him to stop them for fear of alienating the Irish people. Wylie agreed with the prime minister, but Maxwell simply convened the trial of the next suspected leader (the badly wounded James Connolly) under a different prosecutor.<sup>255</sup> John Dillon, the parliamentary leader of the nationalist Irish MPs, who had witnessed the rising first-hand, told the House of Commons that the government was ‘washing out our whole life-work in a river of blood’, that the secret trials and executions were ‘poisoning the mind of Ireland’, turning moderate bystanders who had previously opposed the rebels’ tactics into active extremists. ‘In the whole of modern history,’ his diatribe concluded, ‘there has been no rebellion or insurrection put down with so much blood and so much savagery’.<sup>256</sup> Considered in this light, the attorney general’s almost gleeful endorsement of martial law—on the basis that the ‘indefinite knowledge of its powers’ would spread ‘terror among the disaffected’—was gravely misplaced; instead, the terror of indefinite state power spread disaffection.<sup>257</sup>

## § Extra-judicial killings

In the aftermath of the Easter rising, the growing sense in which the British military forces deployed to suppress the insurrection had acted outside the bounds of the law were confirmed by the inquiries into two incidents arising from the hostilities: the killings of Francis Sheehy-Skeffington and two other civilians at Portobello barracks in Dublin on 26 April 1916, and of thirteen civilians in North King Street, in the city centre, towards the end of the week.

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<sup>255</sup> Typescript of unpublished autobiography by Wylie, p. 33, in William Evelyn Wylie Papers, PRO 30/89/2 [hereafter, Wylie TS]. During Easter week, Connolly, the founder and leader of the Irish Citizen Army, had been Commandant of the Volunteer forces in Dublin.

<sup>256</sup> HC Deb., 11 May 1916, cols. 935—51.

<sup>257</sup> For public confusion regarding, and resentment toward, martial law in Ireland after the Easter rising: Memo. from James H. Campbell, AG Ireland, to H. H. Asquith, PM, 19 June 1916, PRO CAB 37/150/4; Lt. Gen. J. G. Maxwell, GOC Ireland, to Asquith, ‘Report on the State of Ireland Since the Rebellion’, 24 June 1916, PRO CAB 37/150/18; Ernie O’Malley, *On Another Man’s Wound* (Dublin: Anvil Books, 2002 [1936]), pp. 48—52.

Sheehy-Skeffington, a committed pacifist who had been on the capital's streets trying to prevent looting during the opening days of the rising, had been shepherded into Portobello barracks for his own safety on 25 April 1916.<sup>258</sup> Here, though apparently seeking sanctuary and not placed under arrest, he was searched and later interrogated by the senior officer on duty, Captain J. C. Bowen-Colthurst. That evening, Sheehy-Skeffington was taken out as a hostage by a party of troops under the officer's command, which proceeded to raid premises in the city, and fatally shot a civilian—'a youth named Coade'—encountered in the process. The following day, in a courtyard of the barracks, Bowen-Colthurst oversaw the summary execution of Sheehy-Skeffington and two other civilians taken prisoner during the searches of the previous night. Irish Command was informed of the summary executions on the day of the murders, but Bowen-Colthurst was not placed under arrest until 6 May, instead being merely instructed to keep off Dublin's streets. On 6 and 7 June 1916, Bowen-Colthurst was tried by a court martial in Dublin and found guilty of murder but insane. Owing to the exceptional nature of the case, Prime Minister Asquith had ensured that the court martial verdict would be made public knowledge. On reading it, Sheehy-Skeffington's family—well known and widely respected in Dublin—were outraged, and the family's lawyer barraged the prime minister and the GOC Ireland with complaints about the treatment of Francis, his family, and the conduct of the armed forces. Asquith caved in and appointed a Royal Commission to inquire into Sheehy-Skeffington's death.

The Royal Commission held in late August 1916 was a whitewash. It almost entirely exonerated the army, citing the effects of stress and rumours (of massacres by the rebels and of plans for a nationwide uprising) on the under-trained staff of Portobello barracks during Easter week as mitigating factors for Sheehy-Skeffington's death. The actions of Bowen-Colthurst, by now committed to Broadmoor criminal lunatic asylum, were presented as those of a madman, though that conclusion sat oddly with the commission's unravelling of the officer's rational, if clumsy, attempts

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<sup>258</sup> Based on: Proceedings of a Court of Enquiry assembled at Victoria Barracks Belfast on the 29th of June 1916, PRO WO 35/67/1; *Report of the Royal Commission on the Arrest and Subsequent Treatment of Mr. Francis Sheehy Skeffington, Mr. Thomas Dickson, and Mr. Patrick James McIntyre*, HC 1916, vol. xi, Cd. 8376, pp. 3—12; Parliamentary Questions, Irish National Archives (Dublin) [hereafter, INA], Chief Secretary's Office Registered Papers [hereafter, CSORP] (1916), 5647/25210, 25459, 25827 and 25892. See also Townshend, *Easter*, pp. 192—5, 291—3.

to cover his tracks in the aftermath of the executions. Moreover, its findings in fact adverted to the dangerous ambiguity surrounding martial law and the delegation of its powers to soldiers in the field. In a second written report describing the executions, produced on 9 May, Bowen-Colthurst had written that on 25 April he had been ‘officially informed that martial law was declared in Dublin’ (a reference to Wimbourne’s proclamation), and that ‘believing I had the power under martial law, I felt, under the circumstances, that it was clearly my duty to have the three ring-leaders shot’.<sup>259</sup>

If Sheehy-Skeffington’s death could be pinned on one unhinged officer, those of thirteen civilians shot by the troops of the 2/6<sup>th</sup> Staffordshire Regiment in gun battles in central Dublin on 28 and 29 April 1916 appeared to show evidence of collective and systemic military indiscipline.<sup>260</sup> At the time, Maxwell explained that the civilians’ deaths were unfortunate collateral in the restoration of order in Dublin, caused by ‘active resistance to His Majesty’s troops in the execution of their duty’. Similarly, at the subsequent coroner’s inquest into the deaths, the officer commanding the unit on North King Street claimed that his troops had attacked only those civilians found assisting the rebels and in possession of arms. The jury was not persuaded by the army’s explanations, and neither were certain Irish MPs, who grilled Ireland’s chief secretary over the episode in the Commons, demanding the exhumation of the bodies and a full inquest into the killings.<sup>261</sup>

To try to avoid sustaining further political damage and exposing the army to public censure, a military court of inquiry into the North King Street killings was held, *in camera*, in late May 1916. It found that no direct responsibility for any

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<sup>259</sup> Furthermore, Lieutenant Wilson, the young officer told to guard Sheehy-Skeffington during the night-time raids in Dublin, apparently did not question Bowen-Colthurst’s order to execute the hostage should their party come under fire, likewise believing this to be justiciable under martial law. Assuming that the young officer’s belief was legitimately held, he was presumably alluding to the *post facto* legal cover ordinarily provided by an Act of Indemnity.

<sup>260</sup> The following is based on: Notes by Maxwell in PRO WO 141/21; Parliamentary Questions, INA, CSORP (1916), 5642/25280, 25302; Townshend, *Easter*, pp. 292–5; Barton, *Door*, pp. 12–17.

<sup>261</sup> The chief secretary was asked whether he knew that the men had been unarmed and without ammunition, that they were not members of any volunteer force, that the men’s wives had been ordered to leave the houses while they were searched, only to return to find their husbands dead, or that afterwards the bodies had been hastily buried. See Parliamentary Questions, INA, CSORP (1916), 5647/25892, 25896.

particular civilian death could be apportioned to any specific soldier. More parliamentary questions ensued, asking the prime minister whether he knew the results of the inquest.<sup>262</sup> Privately, Edward Troup, permanent under-secretary at the Home Office, warned Asquith that while the evidence was indeed inconclusive in most cases, in some it was not. More problematically, the soldiers had followed an order from Brigadier General W. H. M. Lowe, commanding operations in Dublin at the time, which had stated that ‘no hesitation was to be shown in dealing with these rebels; that by their action they had placed themselves outside the law, and that they were not to be made prisoners’. For Troup, the soldiers had taken this order ‘to mean that they were to shoot anyone whom they believed to be an active rebel’. That may in itself have been justiciable, the under-secretary argued, but it was a dangerously unclear command: ‘it did not mean that an unarmed rebel might be shot after he had been taken prisoner’, he continued; ‘still less did it mean that a person taken on mere suspicion could be shot without trial’. Accordingly, Troup advised Asquith against publishing the evidence presented at the military inquiry.<sup>263</sup>

The issue of publishing the findings of the military inquest into the civilian deaths on North King Street dogged Asquith to the eventual disintegration of his party and ministry towards the end of 1916. Even beyond Asquith’s replacement as prime minister by David Lloyd George, in December 1916, the British government still flatly refused to publish the evidence from the inquiry as a matter of policy. Certainly, it faced pressure not to do so from military chiefs, who insisted that publication would contradict the assurances of anonymity held out to testifying witnesses and emit the wider message that Maxwell had been wrong to hold the inquiry *in camera*. A War Office appraisal of the dilemma at the time seems unwittingly apposite: publishing the findings, the adjutant general argued, would allow Irish nationalists to ‘urge that the sole reason for trial *in camera* was that the authorities intended to execute certain of the Sinn Feiners whether there was evidence or not’.<sup>264</sup>

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<sup>262</sup> ‘Courts of inquiry into the alleged shooting of civilians by soldiers’, 19, 24, 25 & 28 May 1916, PRO WO 35/67/3.

<sup>263</sup> E. Troup, HO perm. Under-Secy., to Asquith, PM, undated memo. (late May 1916), PRO WO 141/21.

<sup>264</sup> Minute by the Adjutant General, 10 Jan. 1917, PRO WO 141/27.

Indeed, following the Easter rising, nationalist Irish MPs, already critical of the executions of rebel leaders—and voicing the privately held (but impolitic) fears of senior members of the British government—pieced together a new cosmology of the official response to the insurrection, which positioned the extra-judicial killings as symptomatic of a military overreaction given sanction by the confusion surrounding martial law and the application of the DORR. That response now seemed unaccountable in law: attempts to gain legal redress were either hopelessly inadequate or denied outright. While the government had clearly allowed the belief that martial law was operative (first in Dublin, then across Ireland) to circulate from the middle of Easter Week and beyond, the authorities now also attempted to besmirch some soldiers (like Bowen-Colthurst) who had acted as if this really was the case and to shield others (like those of the 2/6<sup>th</sup> Staffordshires implicated in the North King Street killings) from recriminations levelled at them for acting as if there was no law in force.

In mid-August 1916, the government was asked in parliament when it would withdraw martial law from Ireland. Henry Duke, Ireland's new chief secretary, replied, reading a statement prepared for the home secretary:

“The possibility of an immediate return to normal means of government in Ireland...is a question which can only be properly answered upon complete information as to the significance of the events of the past four months, the condition of the country, and the extent to which it is possible or probable that the peace may be again broken in Ireland through the contrivance of foreign enemies or the folly or wickedness of individuals at home. I am not at the moment possessed of such knowledge as would in my opinion warrant the Government in dispensing with any of the existing securities for peace and good order. At the present time martial law in the ordinary sense of the words is not in active operation in Ireland; there is no more interference there with the ordinary course of [the] life of law abiding people than there is in Great Britain under the Defence of the Realm Regulations. Less than four months, however, have elapsed since the occurrence of an outbreak which had most tragic consequences and I believe the well being of the country will be better secured by making sure that there is no needless interference with individual

freedom than by proclaiming in advance of the facts that Ireland has reverted to normal conditions.”<sup>265</sup>

Duke’s answer went to the heart of the confusion surrounding martial law and its relationship to the DORA. The former had not been resorted to in Ireland during Easter week, he insisted, but though technically correct, this observation also served to highlight the extent to which the DORA’s provisioning for the application of a statutory form of martial law in Ireland, permitting the juryless military trial of civilians believed to be assisting the enemy, was founded upon the uncertain terrain of the doctrine of necessity. As Duke observed, the factual conditions (the special military emergency) necessitating the imposition of the DORA’s extreme provisions were subjective; these could not be legislated for in advance, neither could those necessitating its withdrawal. Yet the government therefore appeared to be insisting both that martial law had not been in place and that the doctrine of necessity provided for an exceptional legal regime that entirely corresponded to the unaccountable executive decisionism associated with military government under non-statutory martial law. In short, that the DORA had legislated deference to the military authorities’ definition of ‘normality’.

Even if it was accepted that, technically, the DORA did not entail martial law, the killings of Sheehy-Skeffington and thirteen civilians on North King Street demonstrated that it had led to the imposition of a form rule in Ireland that left those caught in the crossfire of the Easter rising without hope for subsequent legal redress. The Irish nationalist MP Thomas Scanlan was unconvinced by Duke’s answers regarding the lifting of martial law. How, he asked, could either the prime minister or chief secretary expect ‘normal’ conditions to be restored so long as Ireland was under a military dictatorship? Several of Scanlan’s colleagues in the Irish Parliamentary Party agreed. Were ministers directing the Irish executive towards a policy of conciliation, Lynch inquired, or one of the ‘mass irritation of the general public’? Hazleton asked when Maxwell would be recalled. Pringle pointed out the constitutional implications of delaying an announcement on the withdrawal of military rule—since the principle of Irish Home Rule was already agreed upon, why

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<sup>265</sup> H. E. Duke, Chief Secy. Ireland, in reply to parliamentary question of 17 Aug. 1916, INA, CSORP (1916), 5643/25386.

could the government not now abrogate martial law and return to 'ordinary' law?<sup>266</sup> In all of these questions, as indeed in Duke's answer to the initial one, parliamentarians identified martial law as an extra-legal military response to unrest, granting the army sanction to use unbridled power to mete out the prerogative will. To dissenting Irish MPs, the government's insistence that martial law was not and never had been in force in Ireland during 1916 seemed like pettifogging, especially given the evident politicisation of the repression that followed the Easter Rising and of the denial of attempts to subject the methods used to searching legal examination. Worse, its simultaneous insistence that the military had acted lawfully throughout the rising left a sour taste: if recourse to the DORA had kept the authorities' response within the bounds of the rule of law, these boundaries seemed to have proved alarmingly porous. Legal 'necessity' had prevailed in Ireland during Easter week 1916, but it had apparently done so by suspending the law, not enforcing the DORA. Normality had been shattered.

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<sup>266</sup> Parliamentary Questions, INA, CSORP (1916), 5643/25386.

## 2. Counter-insurgency in Ireland, circa 1916–20: from DORA to ROIA

### § The rise of Sinn Féin

From late 1916 to the beginning of 1919, it was the wider Irish Republican movement—focused on Sinn Féin, rather than the Volunteers—which attracted anxious attention from the authorities in Dublin and London.<sup>267</sup> From June to December 1917, Sinn Féin experienced a six-fold increase in support, its organisation now dispersed across a thousand local clubs and exceeding sixty thousand members. In late October 1917, the Volunteers cemented their union with the political party and the popular Republican movement.<sup>268</sup> Before long, widespread civil disobedience had brought Ireland's judicial system to the point of collapse, putting unprecedented strain on the parallel legal structure provided for under the Defence of the Realm legislation.<sup>269</sup>

The DORA's statutory emergency powers and special courts were therefore now supplemented by the revival of an alternative source of exceptional juridical power, in the form of the Criminal Law and Procedure (Ireland) Act (hereafter, CLPIA).<sup>270</sup> Together, the CLPIA and the Defence of the Realm legislation overlaid

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<sup>267</sup> For the short-term consequences of the British repression after the Easter Rising for the Republican cause, see, in particular, memo. from Campbell, AG Ireland, to Asquith, PM, 19 June 1916, PRO CAB 37/150/4; 'Report on the State of Ireland Since the Rebellion': J. G. Maxwell, GOC Ireland, to H. H. Asquith, PM, 24 June 1916, PRO CAB 37/150/18; and O'Malley, *Wound*, pp. 48–50. See also, in general: Augusteijn, *Defiance*, pp. 56–61; Barton, *Door*, pp. 4–5, 23, 39; Piaras F. MacLochlainn, *Last Words; Letters and Statements of the Leaders Executed after the Rising at Easter 1916* (Dublin: Stationary Office, 1990), pp. 28–9; Townshend, *Violence*, pp. 282–3.

<sup>268</sup> From November 1917, Michael Collins, now president of the IRB, directed the force's overhaul. For the reorganisation of the Volunteers and alliance with Sinn Féin: Augusteijn, *Defiance*, pp. 62–3, 67, 74; Peter Hart, *The I.R.A. and Its Enemies: violence and community in Cork, 1916–1923* (Oxford: Clarendon Press, 1998), p. 56; Townshend, *Easter*, p. 334.

<sup>269</sup> CI Monthly Report, County Clare, July 1917, PRO CO 904/103. For more: Hart, *Enemies*, pp. 57–8; Charles Townshend, *The British Campaign in Ireland, 1919–21: The Development of Political and Military Policies* (Oxford: Oxford University Press, 1975), pp. 7–8.

<sup>270</sup> Criminal Law and Procedure (Ireland) Act, 1887, 50 & 51 Vict., c. 20. The CLPIA was divided into six parts, which related to preliminary inquiry, courts of summary jurisdiction,

Ireland's existing judicial order, creating two additional layers of expedited criminal procedure with which to suppress political violence. By mid-1918, three cities and fifteen counties had been proclaimed as 'disturbed areas' under the CLPIA, and Sinn Féin, the Gaelic League, the Irish Volunteers and the *Cumann na mBan* proclaimed as 'dangerous associations'. In September, Clare, Kerry and West Cork were declared Special Military Areas, entailing the arrival of additional supplies of troops and rule under a military commander equipped to impose extensive restrictions on civilian movement and assembly.<sup>271</sup>

As the military's presence in everyday spheres of Irish civil government was increased throughout 1918, parts of Ireland once again came to resemble areas in which martial law was effectively (if not technically) in place. The military exercised extensive involvement in the daily administration of civic order, an uncertain governmental situation compounded and symbolised by the appointment of the former commander-in-chief of the home forces, Lord John French, as Ireland's new lord lieutenant in May. Indeed, by June, the GOC Ireland had under his command 100,000 troops acting in aid of the civil power. While the First World War was nearing its conclusion, a fresh conflict in Ireland now seemed ever more likely.<sup>272</sup>

On 11 November 1918 the armistice came into force on the Western Front, ending hostilities between Germany and the Allies.<sup>273</sup> A fortnight later, Lloyd George's wartime administration was dissolved and, in December, the post-war general election held. Sinn Féin won 73 out of 105 Irish parliamentary seats, 25 of

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special juries and the removal of trials, the proclamation of districts, the proclamation of dangerous associations, and revised legal procedure. It empowered the lord lieutenant to enact any or all of its principal provisions in areas he scheduled as 'proclaimed districts', within which dangerous associations could be suppressed, specially appointed juries could hear summary trials or permission could be given to remove cases for trial elsewhere (where it was thought both witnesses and jurors would be less likely to withdraw for fear of the consequences of participating in them).

<sup>271</sup> For the use of the CLPIA: HC Deb., 6 May 1920, col. 2217; Foxton, *Revolutionary*, pp. 166–9.

<sup>272</sup> See *The Irish Rebellion in the 6<sup>th</sup> Divisional Area from After 1916 Rebellion to December 1921* (Compiled by General Staff Sixth Division), esp. pp. 10–11, in General Sir Peter Strickland Papers, IWM 2626 P363 [hereafter, Strickland papers, *Rebellion*, page no.].

<sup>273</sup> Though not, in legal terms, the war itself: the 1918 Termination of the Present War (Definition) Act, 8 & 9 Geo. V, c. 59, formally continued the state of hostilities until the belligerents' peace treaties had been concluded. In fact, as far as Ireland was concerned, the First World War technically lasted until 31 August 1921: INA, CSORP 1920/3765.

them uncontested and with 37 of its candidates still in jail.<sup>274</sup> Refusing to take their seats in Westminster, the newly elected Sinn Féin representatives instead formed an autonomous parliament, the *Dáil Éireann*, in Dublin on 21 January 1919. Ireland was once more declared to be an independent Republic and, over the course of the year, the *Dáil* initiated the construction of its own counter-state, attempting to establish organs of local government, policing and revenue-collection, as well as a judicial system to try civil cases. Before January was out, *An tÓglach*, the Irish Volunteers' news-organ, announced that the Republic was at war with Britain. By coincidence, on the very day of the *Dáil's* inauguration, the South Tipperary Volunteer unit assassinated two RIC constables at Soloheadbeg. These, the first casualties claimed by militant Irish nationalists since the Easter rising, marked the opening of hostilities in a conflict known to various participants and historians alike as the Anglo-Irish War, the Troubles, the Tan War, and the Irish War of Independence of 1919—21.<sup>275</sup>

Throughout 1920, the Republican assault on the extant Irish juridical apparatus intensified.<sup>276</sup> At the end of spring, the number of empty police stations destroyed by Volunteer units stood at over two hundred; after a long summer of burnings it was over seven hundred.<sup>277</sup> By then, policemen were resigning or retiring by the hundred each month: over 1,300 left the force between mid-June and mid-September 1920.<sup>278</sup> The Irish magistracy was likewise affected: between 1 May and

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<sup>274</sup> Lloyd George's National Liberal coalition won a massive landslide at the election, with 525 out of 707 seats, two-thirds of them with Conservative candidates. The Unionists won 26 Irish seats, the Irish Parliamentary Party just 6.

<sup>275</sup> Based on: Arthur Mitchell, *Revolutionary Government in Ireland: Dáil Éireann, 1919—22* (Dublin: Gill & Macmillan, 1993), ch. 2; Augusteijn, *Defiance*, pp. 200—9; David Fitzpatrick, *Politics and Irish Life 1913—1921: provincial experience of war and revolution* (Cork: Cork University Press, 1998 [1977]), pp 10—11; Townshend, *Political Violence*, pp. 328—33.

<sup>276</sup> See, for examples: 'Chief Secretary of Ireland's Weekly Summaries of Outrages against the Police and Returns of Recruitment, Retirement and Dismissal' [hereafter, Weekly Summary], 14, 18, 24, 30 Apr. & 4 July 1920, PRO CO 904/148/93, 97, 115, 121, 313.

<sup>277</sup> Inspector General's Confidential Monthly Reports, Jan., Mar., & July 1920 INA, CBSC/I[nspector] G[eneral's and] C[hief] I[nspectors' Monthly Confidential Reports], Box 15. In total, Volunteer units destroyed 709 RIC barracks in 1920, compared to just 27 in 1921. As Lowe points out, this was because almost all vulnerable targets already been hit: William J. Lowe, 'The war against the R.I.C., 1919—21', *Éire-Ireland: Journal of Irish Studies*, vol. 37, nos 3 & 4 (2002), p. 4.

<sup>278</sup> It has been suggested that pensions were a decisive factor behind this silent retreat from the RIC, with older and more experienced officers cashing-in by taking retirement, and new

17 July, 315 magistrates left their commissions; in all, one in five resigned between April and October.<sup>279</sup> The Cabinet's assistant secretary, Thomas Jones, recalled that at a meeting held in late July 1920, the chief secretary, Hamar Greenwood, had explained that there would likely be no jury list for the summer assizes across large parts of Ireland. To compensate, Greenwood continued, his legal advisors had recommended the creation of a new version of the DORA, in which the procedures of the wartime emergency powers, contingent on establishing connections with the enemy cause to inflict capital sentences, could be applied beyond breaches of the DORR: to 'ordinary' crimes of a severe nature and, principally, to offenders convicted of murder.<sup>280</sup> Escalating Republican dissidence had, by the late summer, created a seemingly irresistible need to reconfigure the statutory form of martial law provided for in Ireland by the specially modified Defence of the Realm legislation. Accordingly, the British executive now considered more extreme alternatives. Colonial practice would prove instructive.

## § The Amritsar massacre: a colonial tangent to counter-insurgency in Ireland

On 13 April 1919, 379 Indian civilians were killed and over a thousand more wounded by military forces in shooting ordered by Brigadier General R. E. H. Dyer at the Jallianwala Bagh compound in Amritsar in the Punjab, north-west India.<sup>281</sup> In

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recruits, with little invested, considering other career options. For resignations from the RIC: *ibid.*, p. 10.

<sup>279</sup> Volunteers complemented the intimidation of individuals with a broader attack on the institutions and documents of the calligraphic state, which aimed to erase the extant juridical order in Ireland. Thus, in addition to RIC barracks, Volunteer units also targeted magistrates' courtrooms, mail trains and tax offices. For resignations from the magistracy: HC Deb., 17 July 1920, col. 206 and HC Deb., 25 Oct. 1920, col. 1380. For Volunteer attacks on public institutions: Foxton, *Revolutionary*, pp. 185–6; Townshend, *Campaign*, p. 66 and esp. appendix V, 'Irish Office Statistics of Outrages, 1919–21', p. 214.

<sup>280</sup> Thomas Jones, *Whitehall Diary, Vol. III: Ireland 1918–25*, edited by Keith Middlemass (London: Oxford University Press, 1971), pp. 33–4.

<sup>281</sup> Based on: *Report of the Committee Appointed by the Government of India To Investigate the Disturbances in the Punjab, Etc.* [hereafter, *Hunter Report*], HC 1920, vol. xiv, Cmd. 681; *Statement by Brig.-Gen. R. E. H. Dyer, C.B. (Punjab Disturbances)*, HC 1920, vol. xxxiv, Cmd. 771; Derek

Britain, the story of the ‘Amritsar massacre’ became a public sensation, especially once martial law was lifted in the Punjab in June 1919, at which point General Dyer was relieved of his command and sent back to Britain, where his use of executive discretion under martial law was both vilified and lauded in parliament and the press. The House of Commons accepted the official inquest’s condemnation of Dyer’s gross conflation of military, moral and legal duty, but the House of Lords passed a motion approving of his actions. Meanwhile, the *Morning Post* organised a collection for ‘the man who saved India’, raising £26,000 towards his retirement.<sup>282</sup>

On 10 May 1920, the Cabinet met to contemplate a draft resolution on the Amritsar incident, to be announced by the Government of India, which dissented from the British parliamentary line by commending General Dyer’s actions. While it wished to avoid ‘dictating to the Government of India’ in regard to the political handling of the Amritsar massacre, in particular, to avoid provoking unrest among Europeans living there, the Cabinet did propose editing the resolution’s text. One amendment read:

In order to avoid conveying the impression that martial law had been administered generally and on a large scale “in the spirit of an army of occupation in a hostile country”, it should be made clear in line 35 that this passage applied only to “some officers in the Punjab”, in lieu of “officers”.<sup>283</sup>

The Cabinet therefore attempted to play a subtle game of manipulation regarding public perceptions of martial law. That martial law had been in force could not be questioned: this had provided the extra-legal basis of Dyer’s actions and underpinned the proposed resolution’s praise for his use of severe repression to prevent wider rebellion—‘producing a sufficient moral effect...throughout the Punjab’, as the

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Sayer, ‘British Reaction to the Amritsar Massacre, 1919—1920’, *Past and Present*, no. 131 (1991), pp. 130—64.

<sup>282</sup> Bates, *Subalterns and Raj*, p. 133. For the House of Commons’ debates, see, in particular, HC Deb., 8 July 1920, vol. 131, cols 1705—1819; 14 July 1920, vol. 131, cols. 2347—51. For the House of Lords’ endorsement of Dyer’s actions: HL Deb., 19 July 1920, vol. 41, cols 222—307; 20 July 1920, vol. 41, cols 311—77.

<sup>283</sup> ‘Report of [Lord E. S. Montagu] the Secretary of State for India’s Cabinet Committee on Indian Disorders’, discussed at cabinet meeting, 10 May 1920, PRO CAB 23/21/85.

general had put it at the time.<sup>284</sup> However, it appears that the Cabinet sought to claw back legitimacy for the application of martial law in India in three ways. First, regarding the purposes to which it was being put, by stressing its use to suppress civil disobedience, not conquer an enemy. Second, regarding the geographical scope of extra-legal rule, to be clear that it applied in the Punjab specifically, not India generally. Third, regarding the limited extent to which the army had been given discretionary license to intervene in civil affairs, to note that such powers were possessed by some, but not all, officers. As in the official debates regarding Irish counter-insurgent policy from the Easter rising onwards, the British executive was thus fixated upon the awful—both terrifying and amazing, thus ambiguous—power of martial law.<sup>285</sup> Indeed, this fixation points to a deeper unease regarding the use of martial law: by suspending the rule of law, military government of the civilian population was supposed to help reconstitute sovereign authority over it; simultaneously, it risked unhitching law and order.

On the last day of May 1920—a few weeks before the Amritsar incident received extensive debate in parliament—the British Cabinet convened with the Irish executive to discuss the restoration of order in Ireland. Walter Long, chairman of the Irish Situation Committee, advanced the military's viewpoint:

The complaints from soldiers and sailors are that owing to the non-existence of martial law they are liable to be tried first for murder and found guilty. They have no protection if they shoot first.

Earl Curzon, the foreign secretary, and General Macready, the GOC Ireland, were more forthright still. Both were in favour of martial law, plainly constructed by Macready as the supersession of the law by 'the will of the general'. However, if momentum for the introduction of martial law in Ireland was gathering within the British executive by late May 1920, less than two months later, and despite the ongoing dismantling of the Irish juridical order, it appears that parliamentary and

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<sup>284</sup> *Hunter Report*, p. 30. See also *ibid.*, Appendix C, 'Report of Brig.-Gen. R. E. H. Dyer to Genstaff Division', 14 Apr. 1919.

<sup>285</sup> Certainly, this is how Erskine Childers, heading up Republican propaganda saw it: Childers, *Military Rule in Ireland*, p. 38.

press scrutiny of its application in the Punjab had swung the consensus in the opposite direction.<sup>286</sup>

By 19 July 1920, chief secretary Greenwood had in his hands the opinion of the military's senior legal advisor, Sir Felix Cassell, regarding the imposition of martial law in Ireland. Cassell had followed Diceyan jurisprudence to the letter. The enforcement of martial law, he wrote, depended 'upon circumstances which render it necessary', such as 'the existence of [a] rebellion which cannot be dealt with under the ordinary law'. However, he reminded the chief secretary, since martial law was open to legal challenge on the grounds of 'necessity', since a form of statutory martial law was already operative in Ireland, and since—as the debate on the Amritsar massacre had shown—it was such a politically contentious step,

If it were not thought desirable to proclaim Martial Law under the Prerogative, any special additional powers required, e.g. that of inflicting death sentences by Military Courts might perhaps be obtained by Statute.<sup>287</sup>

It was now that the shadows of the Jallianwala Bagh loomed over discussions of Irish counter-insurgency policy. At another Cabinet conference with the Irish executive on 26 July, Arthur Balfour (Lord President of the Council), seconded by Lloyd George, insisted that any new bill for emergency powers must make clear that ultimate authority rested with the civil, not the military, authorities:

Balfour: It should be made clear on the face of the Bill that this would be applied only when necessity drives the Government to apply it. This is going to be attacked in this country and the Dyer debate has not helped us to govern by soldiers. It is a most tremendous power to give.

Lloyd George: I am entirely of Balfour's view. People will get shocked at the whole criminal administration being put into the hands of soldiers.<sup>288</sup>

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<sup>286</sup> Based on: comments by, *inter alia*, Long, Curzon and Maccready at a Cabinet conference with the Irish executive, 31 May 1920, quoted in Jones, *Whitehall Diary*, pp. 17–20.

<sup>287</sup> F. Cassell, Judge Advocate General [hereafter, JAG], to H. Greenwood, Chief Secy. Ireland, 19 July 1920, PRO CAB 24/109/1662.

Taking a wide historical perspective, a striking consequence of the metropolitan inquests into the Amritsar massacre is their illumination of the law as the primary mechanism through which the colonial state disarticulated the foundational nexus between sovereignty and violence in its government of India. When the law did not apply, as under martial law, this nexus was made starkly, fatally clear.<sup>289</sup> The British executive was similarly concerned that the legalistic dissection of the Amritsar massacre over the course of summer 1920 had demystified the law's masking of the true nature of British rule abroad. The upshot of this calculation was the introduction not of martial law, but of a bill proposing new emergency legislation for Ireland.

The Restoration of Order in Ireland Act (hereafter, ROIA) was guillotined through parliament and passed on 9 August 1920.<sup>290</sup> Under the ROIA, all of the DORR used for anti-Republican counter-insurgency were re-adopted as Restoration of Order in Ireland Regulations (hereafter, ROIR). In addition, 70 new Regulations were made that only applied in Ireland. Courts martial were empowered to try all serious crimes as well as breaches of the ROIR, and were given retroactive jurisdiction by being permitted to prosecute offences committed, or for which offenders had already been indicted, before the act was passed.<sup>291</sup> The introduction of the ROIA therefore marked a significant extension in the scope of a codified, statutory form of martial law powers in Ireland, widening out their application to the whole population rather than applying them only to those individuals suspected of

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<sup>288</sup> Comments by Balfour and Lloyd-George at a Cabinet conference with Irish executive, 26 July 1920, quoted in Jones, *Whitehall Diary*, pp. 33–4.

<sup>289</sup> For more: Purmina Bose & Laura Lyons, 'Dyer Consequences: The Trope of Amritsar, Ireland, and the Lessons of the "Minimum" Force Debate', *boundary 2*, vol. 26, no. 2 (1999), pp. 199–229, esp. pp. 202, 204–5, 220; Hussain, *Jurisprudence of Emergency*, ch. 4.

<sup>290</sup> Restoration of Order in Ireland Act, 1920, 10 & 11 Geo. V, c. 31.

<sup>291</sup> Other notable juridical innovations of the ROIA included: an express power to hold proceedings *in camera*; the creation of juryless courts of summary jurisdiction, comprising two stipendiary 'Resident Magistrates', to hear trials for 'minor' offences; and the replacement of coroners' courts by military courts of inquiry. Further counter-insurgency provisions permitted senior military officers empowered by the executive to suspend payment of government funds to local authorities, move the venue of court hearings, impose curfews and place restrictions on the transport of materials and the use of motor vehicles. Indeed, before the act was repealed in 1953, 199 principle and 18 supplementary Regulations had been introduced. A set of the regulations made under the ROIA on 13 August 1920 appears in PRO HO 45/19665/102519; all future citations of specific ROIR may be found using this reference, but see, in addition: PRO WO 32/5308 and WO 32/5551. For a clear example of the ROIR functioning retroactively: *R v. Maher and others* [1920] 2 Irish Reports 440.

perpetrating offences with a view to levying war against the King or to assist the enemy, as specified under the DORA. Moreover, to the extent that the decision to try a suspect through the ROIA system or through 'ordinary' legal channels rested with the relevant competent military authority (CMA), the entire Irish population was now technically subject to executive rule articulated through the discretionary powers of military officers.<sup>292</sup>

In fact, the regime of emergency powers introduced by the ROIA was not merely an extension of the DORA, but an explicit departure from Ireland's 'normal' juridical order. The first section of the act read: 'Owing to the state of disorder in Ireland, the ordinary law is inadequate for the prevention and punishment of crime or maintenance of order'. Some of the ROIR, such as 58B, reversed the burden of proof; others were formulated to remove judicial oversight by setting legal tests based on subjective criteria. Regulation 50 declared that:

If any person does any act of such a nature as to be calculated to be prejudiced to the restoration or maintenance of order in Ireland and not specifically provided for in the foregoing regulation, he shall be deemed to be guilty of an offence against these regulations.<sup>293</sup>

Yet for all that the ROIA was a departure from Ireland's extant juridical order, like the DORA, it also overlaid it. Since all 'ordinary' crimes as well as breaches of the ROIR could be tried under it, any criminal act in Ireland could henceforth be proceeded against through juryless courts of summary jurisdiction or courts martial. Colm Campbell is therefore surely right to argue that the ROIA marked the creation of a 'parallel', 'catch-all', 'judge-proof' legal system in Ireland. The Liberal MP Commander J. M. Kenworthy, a busy critic of the government in the postwar period, went further still, remarking of the new law that there was 'nothing to surpass it in

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<sup>292</sup> Certainly, this was the army's understanding: Lt. Gen. Jeudwine to GHQ Ireland, 24 Nov. 1920, Lieutenant General. Sir Hugh Jeudwine Papers [hereafter, Jeudwine papers], IWM 72/82/2; General Sir Nevil Macready, *Annals of an Active Life*. (London: Hutchinson & Co., 1924), vol. II, p. 487.

<sup>293</sup> For more on the reversed burden of proof and the reduction of judicial oversight entailed by the ROIA: 'Draft of a Bill for the Restoration of Peace and Order (Ireland)' and 'Memo by the Chief Secretary [H. Greenwood] covering a Draft Bill for the immediate extension of the jurisdiction of Court Martial', both 24 July 1920, PRO CAB 24/109.

the annals of Irish repressive legislation', adding, '[i]t admits the revival of the Star Chamber.'<sup>294</sup>

The effects of the ROIA on Ireland's malfunctioning judicial machinery were dramatic. Whereas 94 courts martial were held under the DORA between January and July 1920, there were 809 under the ROIA between 14 August and 25 December, with 655 convictions. Between 24 January and 27 June 1921, a further 1,451 individuals were tried under the same procedure, with 1,132 convictions, producing an average conviction rate of eighty per cent for the period August 1920 to July 1921.<sup>295</sup> However, as the following analysis shows, while the ROIA marked the extreme outer limit of the government's attempts to suppress Irish republicanism through legal means, it could not prevent the eventual—though partial—suspension of the law in December 1920. That analysis is foregrounded by an examination of the extent to which the ROIA-regime developed and differed from its predecessor, through the interplay of its new, more wide-reaching, emergency powers and the government's ongoing desire to suppress the Volunteers using a police-fronted but army-backed counter-insurgency campaign.

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<sup>294</sup> I direct readers to the path-breaking analysis of the ROIA in Colm Campbell, *Emergency Law in Ireland, 1918—1925*. Oxford: Clarendon Press, 1994), esp. pp. 27—9, 62—8, 72—3, 85—8, 338—40, 353—5. Kenworthy quoted in Bennett, *Black*, p. 68.

<sup>295</sup> For the returns of ROIA courts martial from 14 August to 25 December 1920: Townshend, *Campaign*, appendix 10, p. 221. For returns for the period from 24 January to 27 June 1921: Campbell, *Emergency Law*, p. 81.

### 3. Ireland, 1920: a state of exception?

§ The RIC in 1920: from protectors of the people to agents of counter-terror

Historians are in agreement that the imposition of the ROIA regime was, if not the only factor, then a highly significant one in the raised tenor of violence in the Irish countryside from late summer 1920. By ever more widely criminalising acts of political dissent, by creating greater certitude of conviction through the use of courts of summary jurisdiction and courts martial, and by imposing more draconian penalties on those convicted of serious criminal offences and breaches of the ROIR, a principal effect of the newly enlarged regime of emergency powers was to encourage Volunteers to go ‘on the run’.<sup>296</sup> These Volunteers now formed the infamous IRA ‘flying columns’: small, spontaneously created and highly mobile guerrilla units, which recruited extra-locally and operated across the administrative boundaries of Ireland’s counties and provinces. Despite attempts to better co-ordinate and maximise military resources by the likes of Michael Collins, who was particularly conscious of the Volunteers’ arms shortage, they were frequently beyond the control of the IRA’s GHQ in Dublin.<sup>297</sup> The flying columns appear to have often been shorter still on local support, being one way or another too dangerous to host in any particular locale, especially after the passage of the ROIA. In sum, by late 1920, their ‘boys’ had become, or had been left, almost irretrievably committed to the cause of extremist republicanism. The Volunteers’ assault on Crown forces now reached new levels of intensity: in the last quarter of 1920, British counter-insurgents sustained 294 casualties, as opposed to 187 in the penultimate quarter—a 57 per cent rise. The

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<sup>296</sup> See Augusteijn, *Defiance*, pp. 122–4, 311, 332–4, 337; Bennett, *Black*, pp. 122–3; Campbell, *Emergency Law*, pp. 105–11.

<sup>297</sup> Collins was by now the IRA’s director of intelligence as well as the Minister of Finance in the *Dáil*.

IRA's chief targets in this battle for rural supremacy were members of the Royal Irish Constabulary.<sup>298</sup>

At its established strength, the RIC, Ireland's centralised, carbine-carrying, 'quasi-military', provincial police force stood in excess of ten thousand men.<sup>299</sup> Many of the RIC's one thousand permanent 'barracks' were in fact isolated countryside police stations; others were packed into terraced town centres; few possessed the fortified defensive capabilities implied by the name. As unrest became war in the course of 1919 and 1920, the RIC found itself ambiguously positioned within many communities, particularly in south-west Ireland: those whom the force had as its mandate to protect now either seemed silently to resent or were actively opposed to any police presence. Moreover, the RIC's visible entrenchment within provincial Irish locales had become a source of alarming vulnerability, especially when it was being supported by, and increasingly made to resemble, an army whose 'civil aid' looked like martial law.<sup>300</sup> Working to counter this impression were the continued official attempts, notably from mid-to-late 1920, to insist that counter-insurgency was being prosecuted in Ireland under the auspices of the civil authorities—albeit with massive military support and through extended emergency powers.

Despite the debilitating effects of the popular Republican boycott of the police and acts of intimidation and assault organised by the Volunteers, the RIC still numbered its established strength of ten thousand men by October 1920. Indeed, the force's strength rose to over twelve men in December and exceeded fourteen

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<sup>298</sup> For analysis of Flying Columns: Augusteijn, *Defiance*, esp. chs 3, 4 and 7; Fitzpatrick, *Life*, ch. 6; Hart, *Enemies*, ch. 4. There are many luminous (and highly contentious) personal accounts of the 'life on the column' genre, but see, in particular, Tom Barry, *Guerrilla Days in Ireland* (Dublin: Anvil Books, 1999 [1949]) and Ernie O'Malley, *Raids and Rallies* (Dublin: Anvil Books, 1982).

<sup>299</sup> This paragraph based on: 'Reports on the value of the police in the event of an uprising or invasion and scheme of mobilisation of the RIC, 1895—1912', PRO CO 904/174; *Report of the Royal Commission on the Rebellion in Ireland*, HC 1916, vol. xi, Cd. 8279, p. 4; Galen Broeker, *Rural Disorder and Police Reform in Ireland, 1812—1836* (London: Routledge & Kegan Paul, 1970), esp. pp. 142, 219—25; Stephen Ball, 'Introduction', in *idem* (ed.), *A Policeman's Ireland: recollections of Samuel Waters, RIC* (Cork: Cork University Press, 1999), esp. pp. 2—5.

<sup>300</sup> Cf. the contemporary understanding of 'military aid to the civil power' in: *Civil Disturbances and the Employment of the Military in Aid of the Police. Notes for the use of Chief Constables*, INA, CSORP 1919/16339.

thousand members by March 1921.<sup>301</sup> This robust growth measured a successful RIC recruitment-drive pitched at two discrete pools of ex-servicemen, who formed additional police bodies known, colloquially, as the ‘Black and Tans’ and the ‘Auxies’. Their presence would have a dramatic effect on British attempts to restore order in Ireland, leading to accusations of heavy-handed and extra-legal police repression. This section of the chapter and the following one look at the ways in which the procedural license granted to these groups under the DORR and then the ROIR ramified both the Volunteers’ insurgency and criticism of the government’s counter-insurgency. Furthermore, it examines official responses to such criticism for the light these shed on constructions of the rule of law and the state of exception in Ireland during the conflict, *circa* 1920—21.

The first wave of new recruits to the RIC arrived in Ireland on 25 March 1920.<sup>302</sup> Broadly drawn from among the lower ranks of ex-servicemen, their police training was cursory (a four-week training course in Dublin, compared to the six months of instruction normally received by new recruits) and their outfits a jumble of the RIC’s dark uniforms and the army’s khaki (hence the epithet ‘Black and Tans’). From the outset, these recruits’ relationship to Ireland’s police and military forces was ambiguous, as former members of the force later recalled. ‘The army and the police were very much the same’, one recruit remembered, ‘[t]here I was walking about, half and half, half army, half policeman, with a rifle and ammunition’.<sup>303</sup> Such ambiguity led to the mutually reinforcing impressions among the British and Irish public and media that these recruits had been imported as a consciously conceived force for counter-terror. On 6 November, *The Times* reported that most of the Black and Tans were:

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<sup>301</sup> Lowe, ‘War Against the R.I.C.’, pp. 11—12; Stephen O’Donnell, *The Royal Irish Constabulary and The Black and Tans in County Louth 1919—1922* (Dundalk: Stephen O’Donnell, 2004), p. 15.

<sup>302</sup> This paragraph based on: Douglas V. Duff, *Sword For Hire: The Saga of a Modern Free-Companion* (London: John Murray, 1934), pp. 57—61; John D. Brewer, *The Royal Irish Constabulary: an Oral History* [hereafter, *Oral History*] (Belfast: Institute of Irish Studies, 1990), pp. 100—16; Bennett, *Black*, esp. pp. 28, 66, 151; O’Donnell, *Louth*, pp. 31—4.

<sup>303</sup> John Fails (ex-Black and Tan recruit), quoted in Brewer, *Oral History*, p. 102.

...strangers to Ireland and have had little inducement to behave considerately towards the Irish people. Their demeanour in many cases has been that of an invading army, and there is no doubt of the terror they have instilled.<sup>304</sup>

What worsened public and media perceptions of the so-called Black and Tans was the extent to which these meshed with those concerning the Auxiliary Division of the RIC, an intentionally élite and more discretely managed paramilitary force.

The Auxiliary Division of the RIC (hereafter, ADRIC or the Auxiliaries) was officially inaugurated on 27 July 1920.<sup>305</sup> In early August, Brigadier General F. P. Crozier was appointed to command the force. By early September, five ADRIC companies, each comprised of about a hundred men, were operational. Within two months, the number of operational companies had doubled. Company commanders were usually ex-majors or captains, and were given the rank of first district inspector in the RIC. Although operational control of the Auxiliary forces was technically the responsibility of the relevant RIC divisional commander (acting in co-operation with the military authorities), the companies were separately headquartered and acted with almost complete independence outside of Dublin. The Auxiliaries ‘weren’t Black and Tans in the proper sense of the word’, a former Black and Tan recruit explained, ‘They weren’t supposed to be under the authority of the government or anything else, not of the local government anyway’. One ex-RIC man later described the Auxiliaries as being ‘in a kind of world of their own’; another recalled the ethos of the ADRIC recruits: ‘They were on their own, hurt one and you hurt them all’.<sup>306</sup> Like the Black and Tans, it seems, the force soon displayed familiar symptoms of the confused British counter-insurgency policy in Ireland. ‘By September 1920’, General Crozier later wrote, ‘I began to wonder whether I was acting as a soldier or a

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<sup>304</sup> ‘The Administration of Ireland’, *The Times*, 6 Nov. 1920, p. 11. See also ‘The Proclamation of Anarchy’, *The Nation*, 2 Oct. 1920, pp. 4–5.

<sup>305</sup> This paragraph based on: *Outline of terms on which Cadets of the Auxiliary Division were engaged...etc.*, HC 1922, vol. xvii, Cmd. 1618, pp. 1–2; F. P. Crozier, *Ireland For Ever* (London: Redwood Press, 1971 [1932]), ch. VI; O’Malley, *Wound*, pp. 186, 230, 362; O’Donnell, *Louth*, pp. 39–45; Townshend, *Campaign*, pp. 110–12, 115, 118–21, 129.

<sup>306</sup> John Fails (ex-Black and Tan recruit), Robert Flight and Ernest Brookes (both ex-RIC), quoted in Brewer, *Oral History*, pp. 103, 114, 111, respectively. For ADRIC indiscipline: recollections of Hugh McIvor, Thomas McMenemy and William Sterrett (all ex-RIC), quoted in *ibid.*, pp. 115–16.

policeman, as at times I appeared to be one and then the other and sometimes both'.<sup>307</sup>

After a brief period of instruction in civil law, ADRIC platoons were dispatched to the most disturbed areas of Ireland. Like the Black and Tans, they quickly gained a reputation as the perpetrators of gross abuses against Irish civilians. As suggested above, the difference between the two pools of RIC recruits rapidly seems to have become indistinct in popular and media perception. The press widely accused both forces of 'Tannery' and 'Prussianism'—the latter a most profound insult, given the rawness of allegations that German troops had employed both casual 'savagery' and a premeditated policy of terrorism (*schrecklichkeit*, 'frightfulness') when invading the 'small nations' of north-west Europe in 1914.<sup>308</sup>

In particular, British and Irish newspapers' denigration of the new RIC recruits centred on the issue of their responses to attacks by Volunteer units. On 7 September 1919, a unit of the second Cork Brigade IRA shot up a party of the King's Shropshire Light Infantry on their way to a church parade at the Wesleyan chapel in Fermoy. Four soldiers were wounded and one killed.<sup>309</sup> The sixth division general staff's history of the Irish campaign, 1916—21, recorded what happened next:

Enraged at the cowardice of their assailants, and at the murder and wounding of their comrades, the troops turned out in a body the following night and damaged some shops and dwelling houses belonging to the leading members of the Sinn Fein organisation in Fermoy. This was the first reprisal.<sup>310</sup>

The destruction in Fermoy initiated an extensive sequence of military and police reprisals for attacks on their patrols by Volunteer units. Hugh Martin, special Irish correspondent for the *Daily News* at the time, recorded more than ninety such

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<sup>307</sup> Crozier, *Ireland For Ever*, p. 94.

<sup>308</sup> Even the Milnerite-imperialists' in-house journal, *Round Table*, conceded that the Auxiliaries were rough mercenaries. For allegations of 'Prussianism': D. G. Boyce, *Englishmen and Irish Troubles: British public opinion and the making of Irish policy 1918—22* (Aldershot: Gregg Revivals, 1994 [1972]), ch. 2, p. 57; Maurice Walsh, *The News From Ireland: Foreign Correspondents and the Irish Revolution* (London & New York, NY: I. B. Tauris: 2008), ch. 3, esp. pp. 76—8.

<sup>309</sup> Bennett, *Black*, p. 16.

<sup>310</sup> Strickland papers, *Rebellion*, p. 18.

‘unofficial’ reprisals between September 1919 and 1920, ranging from reckless shooting, to the vandalism of business premises, to the razing of co-operative dairies.<sup>311</sup> By late summer 1920, the subject of army and police reprisals had become an acute controversy. Once again, public, press and parliamentary scrutiny focused on the hoary issues of extra-legal acts of counter-insurgency and the confusion surrounding the difference between emergency legislation (the DORA and the ROIA) and the prerogative power of martial law.

### § The Balbriggan reprisal and the beginning of ‘the end of law’ in Ireland<sup>312</sup>

On Sunday 20 September 1920, District Inspector Peter Burke, stationed in Dublin, left the capital to visit his brother, a sergeant at the police barracks in Balbriggan.<sup>313</sup> Burke wished to celebrate his recent promotion to adjutant at the RIC depot in Phoenix Park and, accompanied by half a dozen or so colleagues, including several Black and Tan recruits, went out drinking in the town. Eventually, the barmaid in the New Bar refused to serve them any more. When members of the party began to help themselves, she called the local RIC. On arrival, they saw Black and Tans already in the pub and left. Sometime thereafter, shots rang out inside the premises; two policemen were wounded, one of them, Burke, mortally so.

On the morning of 21 December 1920, John Derham, a local publican who had been dragged from his home and detained by Black and Tans the night before, returned to the town-square, where he saw what remained of his business premises. More than twenty other premises had been likewise razed. So, too, had one of the

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<sup>311</sup> Martin’s list was mainly compiled from *The Irish Bulletin*, the Republic’s official newspaper, which appeared weekly from 11 November 1919 to 11 July 1921. See Hugh Martin, *Ireland in Insurrection: an Englishman’s record of fact* (London: Daniel O’Connor, 1921), pp. 180—5.

<sup>312</sup> Wylie TS, p. 47.

<sup>313</sup> This paragraph and the following one based on: H. Greenwood, chief secy. Ireland, ‘Weekly Survey of the State of Ireland for Week Ended September 20th 1920’, PRO CAB 27/108/184—5 and Testimony of John Derham at hearings of the ‘American Commission on Conditions in Ireland: Report of the First Hearings Held in Washington, D.C., November 18 and 19, 1920’, published in *The Nation* (New York), 15 Dec. 1920, pp. 713—15, INA, CBSC, ‘Other Police Reports, 1882—1921’, Box 5. According to *The Nation*, the commission was organised by a referendum vote among 150 ‘eminent Americans’.

town's two hosiery factories, which employed over a hundred locals and gave piecework to three hundred more. Nearing the RIC barracks, Derham was told that two of his neighbours, James Lawless and John Gibbons, had been killed in the night. According to Lawless's family, several Black and Tans had threatened both men with staged firing squads to get them to name DI Burke's murderers. The captives had kept quiet. In the morning, their bayoneted corpses were found in Quay Street. When it came to mourning their deaths, local clergy warned the community that if the planned public funerals went ahead, 'Black and Tans would come and wipe out the town'. On 20 September 1920, Derham concluded, Balbriggan had witnessed 'a night of terror'.

In his memoirs of 1924, General Nevil Macready presented an assessment of the Balbriggan raid starkly dissimilar to Derham's. 'I motored to the place a few days after the occurrence and had to look for the [hosiery] factory, a small place down a side lane', the then GOC Ireland recalled. When he found it, he could not see what the fuss was about:

One cottage in the village was destroyed, but a person ignorant of what had happened might have motored through the village without being aware that anything unusual had occurred.<sup>314</sup>

Macready's underwhelmed response to the destruction at Balbriggan was starkly at odds with its contemporary meaning for Black and Tan recruits stationed at Drogheda, eleven miles away. Several weeks after the Balbriggan raid, they posted the following notice:

#### DROGHEDA BEWARE.

If in the vicinity a policeman is shot, five of the leading Sinn Féiners will be shot.

It is not coercion—it is an eye for an eye.

We are not drink-maddened savages as we have been described in the Dublin rags. We are not out for loot.

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<sup>314</sup> Macready, *Annals*, vol. II, p. 498. See also Michael Hopkinson (ed.), *The Last Days of Dublin Castle: The Mark Sturgis Diaries* (Dublin: Irish Academic Press, 1999), entry for 1 October 1920, pp. 49–50 [hereafter: date of entry, *Sturgis Diaries*, page no.].

We are inoffensive to women. We are as humane as other Christians, but we have restrained ourselves too long.

Are to we lie down while our comrades are being shot in cold blood by the corner boys and ragamuffins of Ireland?

We say “Never”, and all the inquiries in the world will not stop our desire for revenge.

Stop the shooting of police, or we will lay low every house that smells of Sinn Fein.

Remember Balbriggan.

(By order) Black and Tans.<sup>315</sup>

The notice offers insight into many complementary aspects of the new recruits’ self-image and experience of rural policing in Ireland in late 1920, but, above all, it is suggestive of the way in which the authors had constructed the raid on Balbriggan as synonymous with an economy of justice that self-consciously went beyond the crude parity established by the logic of ‘an eye for an eye’, to transmit a more wide-ranging signal of intent, at once unapologetically extra-legal and performative. *The Times’* Irish correspondent agreed with the gist of this appraisal, but for different reasons: ‘The inevitable consequence of such raids’, he wrote, ‘is the terrorizing and infliction of suffering upon whole communities of peaceful and law-abiding people’.<sup>316</sup>

The incendiary fallout from the reprisal at Balbriggan soon travelled to Dublin Castle. In his capacity as legal advisor to the Irish government, William Wylie produced a memorandum for chief secretary Hamar Greenwood in late September 1920:

I pointed out that a policeman is also a civilian, that he is subject to the criminal law just as a civilian is, that if [the] police were able to take the law into their own hands it would mean the end of law...Hamar read it through[,] said he was sure it was good law...tore it up and put it in the waste paper basket.<sup>317</sup>

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<sup>315</sup> Quoted in Bennett, *Black*, pp. 81—2.

<sup>316</sup> ‘Ireland To-Day’, *The Times*, 13 Nov. 1920, p. 12; cf. Boyce, *Englishmen*, p. 57.

<sup>317</sup> Wylie TS, p. 47.

Wylie's memorandum drew attention to two deeper legal issues raised by the Balbriggan reprisal. Namely, its implications for the legitimacy of constituted power, and, still more fundamentally, of the constituting power of the rule of law for a 'civilised' polity. Indeed, the army and government would soon be called to account over their dismissive official responses to the incident and its apparent illegality.

The government's appraisal of the Balbriggan raid did not really differ from those of eye-witnesses on the point of the material damage sustained, yet its subsequent use of that information was startling in the public attempt to suggest that there was no possible legal remedy for it—not least given Dublin Castle's privately drawn conclusion that the police had 'executed summary vengeance' on the night of 20 September 1920.<sup>318</sup> When the incident was debated in the Commons in late October, Greenwood explained that his own 'most searching inquiry' had

... found that from 100 to 150 men went to Balbriggan determined to revenge the death of a popular comrade shot at and murdered in cold blood. I find it is impossible out of that 150 to find the men who did the deed, who did the burning.<sup>319</sup>

Official obfuscation of the Balbriggan episode did not equate to legal redress for the damage done and civilian lives lost, but the government was still insisting that the wider campaign to restore order in Ireland was being conducted through legal means. As such, it once more delicately played on the extent to which the ROIA's codified emergency powers marked both the law's farthest reach and its end.

Ominously for the army, the police and the British government, sections of the American, British and Irish press were consistently trenchant in their criticisms of non-justiciable reprisals being carried out in Ireland.<sup>320</sup> On 12 October, a letter to *The Times* complained that an earlier correspondent to the paper, Sir West Ridgeway,

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<sup>318</sup> Where Derham reported the destruction of a factory and thirty-six other premises, the chief secretary's intelligence appraisal reported that a factory and thirty premises had been destroyed: CSI Weekly Survey, 20 Sept. 1920, SIC 39, PRO CAB 27/108.

<sup>319</sup> Greenwood, Chief Secy. Ireland, HC Deb., 20 Oct. 1920, vol. 133, col. 947.

<sup>320</sup> See, for examples: *Manchester Guardian*, 22 Sept. 1920, quoted in Boyce, *Englishmen*, p. 52; 'Ireland To-Day', *The Times*, 13 Nov. 1920, p. 12; Martin, *Insurrection*, pp. 86–96, 122–8, 151–6.

had substantially misrepresented such reprisals by describing them as ‘lynch law’ and saying that they never led to civilian deaths:

The truth is that they [the Black and Tans] do take life frequently, and [the reprisals in] Galway and Balbriggan, amongst others, are instances. Nor is it even lynch law, for lynch law implies a Judge Lynch, or at any rate some sort of a trial at which the victim at least has a hearing....<sup>321</sup>

As with Wylie’s memorandum addressing the criminality of police actions at Balbriggan, public criticism of such reprisals thus opened out onto a wider examination of the legality of counter-insurgency in Ireland. New York’s *The Nation* considered that two ‘absolutely plain’ facts had emerged from Greenwood’s statement to the Commons: that the Black and Tans were ‘organised in such a way as to make it a public danger, and [that] the “searching inquiries” made by Sir Hamar Greenwood are absolutely valueless.’<sup>322</sup> Meanwhile, in the pages of *The Times*, ‘A Student of Politics’ raised the spectre of the Amritsar massacre. The correspondent noted that, in defending the Balbriggan reprisal, Andrew Bonar Law, the leader of the Commons, had emphasised that the rule of law was established by putting down disorder. If that was the case, the writer sarcastically asked:

Was there any argument used by Mr. Bonar Law to-day which was not then used by the friends of General Dyer and which the Government spokesmen then did not combat?<sup>323</sup>

Put another way, the government’s hypocrisy regarding the destruction of civilian property and civilian killings by British counter-insurgency forces in Ireland, as in India, revealed its tendency to invoke the rule of law as a universally applied

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<sup>321</sup> [Emphasis in original] ‘Facts About Reprisals’, letter by Henry Harrison, *The Times*, 12 Oct. 1920, p. 6.

<sup>322</sup> Quoted in *The Nation.*, 15 Dec. 1920, pp. 713—15, INA, CBSC, ‘Other Police Reports, 1882—1921’, Box 5.

<sup>323</sup> ‘Sir Hamar Greenwood’s Defence’, letter by ‘a Student of Politics’, *The Times*, 21 Oct. 1920, p. 10. See also the account of the ‘Experiences of an Officer’s Wife in Ireland’, in which the author recalls speaking with a woman in Dublin who aligned Lord French’s regime in Ireland with General Dyer’s in India: *Blackwood’s Magazine*, vol. 209, May 1921, pp. 555—6.

economy of justice, but also to speculate on it according to the political exigencies of rule in singular cases.

The apparent illegality of ‘unofficial’ reprisals by the RIC and its auxiliary forces allowed the army to once again push for full control of Irish counter-insurgency operations. In late September 1920, Macready enthusiastically told Greenwood that while the retaliation at Balbriggan was indefensible, it had nevertheless changed ‘the whole atmosphere of the surrounding district...from one of hostility to one of cringing submission’ (somewhat contradicting his later appraisal of the raid).<sup>324</sup> The GOC’s demands followed hard on the heels of the suggestion to Henry Wilson, the chief of the imperial general staff, by Major General Radcliffe, the director of military operations, that ‘the only solution to this problem is to institute a policy of *official* reprisals’.<sup>325</sup> Accordingly, Macready proposed destroying houses from which shots were fired at counter-insurgency forces or whose occupants knew that IRA ambushes had been laid. Extra-legalism would remove the embarrassment of legal inquests into police reprisals; indeed, if carried out under martial law, as Macready and his fellow generals had urged throughout 1920, this policy would entail finally subordinating the civil to military authorities.<sup>326</sup>

Despite the furore surrounding ‘unofficial’ reprisals, however, the Cabinet remained opposed to plunging Ireland headlong into the uncertain waters of martial law as cover for a policy of pre-planned, ‘official’ reprisals, to be conducted as regular military operations.<sup>327</sup> Sustaining the fiction that the suppression of the Volunteers was being legally conducted through a police-led campaign remained of paramount political importance. ‘Martial law’ sounded too much like actual war was raging and therefore that the Volunteers were legitimate belligerents—a bitterly unpalatable prospect to significant constituencies of the British government at home, in the USA,

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<sup>324</sup> Macready to Wilson, 28 Sept. 1920, in Sir John Anderson Papers, PRO CO 904/188/1.

<sup>325</sup> [Emphasis in original] Maj. Gen. Radcliffe, Dir. Military Operations, to Gen. Sir Henry Wilson, CIGS, 23 Sept. 1920, PRO WO 32/9537.

<sup>326</sup> Based on IG MR, 19 Nov. 1920, PRO CO 904/27/3; Macready, *Annals*, vol. II, p. 497; Fitzpatrick, *Life*, pp. 28–9.

<sup>327</sup> Shortage of space prevents analysis here of an earlier controversy over reprisals, which arose in July 1920 following press coverage and a parliamentary debate about an alleged order authorising extra-legal killings given to the RIC at the Listowel barracks in County Kerry. For more on this controversy: J. Anthony Gaughan (ed.), *Memoirs of Constable Jeremiah Mee, R.I.C.* (Dublin: Anvil Books, 1975), esp. pp. 104, 122, 129–30, 133, 137–8, 294–301.

and throughout the empire.<sup>328</sup> Lloyd George had told his Cabinet as much in late April 1920: 'You do not declare war against rebels'.<sup>329</sup> As such, on 1 October 1920, the policy of 'official' reprisals was rejected on the grounds of its potential to act to punish civilians, and so be as recklessly damaging to government legitimacy and British sovereignty in Ireland as it would be to Irish property.

Yet within a week of the decision to reject a policy of 'official' reprisals, the RIC had received orders as revealing for what they show about the official construction of 'rule of law' in Ireland by late 1920, as they were liable to accidental or wilful misinterpretation by policemen—a source of further dismay to Irish Command. Plain enough was the injunction against the 'Destruction of buildings', which, it was explained, only increased 'want and disorder', but the wording regarding the use of weapons as being 'only legitimate self-defence', not *in* self-defence, was decidedly muddy. Murkiest of all was the instruction to policemen that it was their duty 'to hunt down murderers by every means in their power'.<sup>330</sup>

Moreover, the executive's reluctance to implement a counter-insurgent policy of official reprisals, while simultaneously turning a blind-eye to the assassination of suspected IRA leaders, in fact corresponded to Lloyd George's privately favoured policy of 'gunning'. Mark Sturgis, assistant under-secretary at Dublin Castle, shared this view, noting in his diary that 'indiscriminate burning is idiotic and a little quiet shooting equally effective'.<sup>331</sup> These private disclosures further attest to the extent to which, by late 1920, the executive had been persuaded that the IRA was little more than a 'murder gang'. Indeed, this analysis tapped a long-standing official sociology of Irish political unrest as being provoked by small, cabbalistic groups of armed extremists who intimidated the broader population rather than articulating its actual opposition to British government. As the year closed, events in Dublin and Cork appeared fully to vindicate that theory; it is therefore ironic that they also finally led

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<sup>328</sup> As Townshend and Lowe note, the desired political settlement was a moderated form of Home Rule, not re-conquest nor even pacification: Townshend, 'Martial Law', pp. 185–6; Lowe, 'War against the R.I.C.', p. 3.

<sup>329</sup> 'Note of Cabinet conversation', 30 Apr. 1920, PRO CAB 23/21/23(20)A.

<sup>330</sup> Circular Orders by the Deputy IG RIC, 4 Oct. 1920, published in the *Irish Times*, 4 Oct. 1920, quoted in Townshend, *Campaign*, p. 120.

<sup>331</sup> Entry for 1 Oct. 1920, *Sturgis Diaries*, pp. 49–50. See also entries for 18 Aug., 24 Aug., 1920, *ibid.*, pp. 24, 27–8.

to the end of law in parts of southern Ireland, a situation analysed in the final section of this chapter.<sup>332</sup>

## § ‘Bloody Sunday’, the Kilmichael ambush, and the supersession of statutory martial law in Ireland

The killing of over a dozen Irish civilians and the wounding of many more attending a Gaelic football match at Croke Park set the bitter legacy of Dublin’s infamously ‘Bloody Sunday’ of 21 November 1920. The afternoon carnage at Croke Park was widely construed as a deliberate reprisal for the assassination of ten British military officers, two Auxiliaries and two civilians—all believed to be ‘G-men’ or court-martial officials—carried out by members of Michael Collin’s Dublin-based IRA ‘squad’ that morning.<sup>333</sup> Whether or not the killings at Croke Park were a premeditated act of performative justice remains historically contentious. Where pro-Republican accounts of the incident dispute the suggestion that paramilitary police merely lost control of the situation, other versions suggest that British counter-insurgent forces cordoned-off the ground in the belief that they would likely find some of Collins’ gunmen among the spectators, before being shot at by an IRA picket and responding in self-defence.<sup>334</sup> More clearly discernible in the immediate

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<sup>332</sup> Townshend’s *Political Violence in Ireland* (1983) can be read as a genealogy of this reductive yet recurrent official analysis. For the growing consensus among administrators in Dublin Castle and Whitehall over the ‘murder gang’ thesis from mid-1920: comments by Greenwood and Macready at a Cabinet conference with the Irish executive on 31 May 1920, quoted in Jones, *Whitehall Diary*, pp. 17, 19–20; entry for 18 Nov. 1920, *Sturgis Diaries*, p. 74.

<sup>333</sup> The ‘G Division’ of the DMP (or, the ‘G’) was its intelligence-gathering department: Peter Hart (ed.), *British Intelligence in Ireland, 1920–21: The Final Reports* (Cork: Cork University Press, 2002), introduction, pp. 2–15.

<sup>334</sup> It is furthermore unclear if the culprits for the civilian deaths at Croke park were members of the ADRIC, Black and Tan RIC recruits or some mixture. Cf. the following diverging accounts: ‘Chief Secretary’s Office Report [on ‘Bloody Sunday’]’, PRO CO 904/168; ‘Red Sunday in Dublin’, *The Times*, 22 Nov. 1920, p. 12; ‘Croke Park Panic’, *The Times*, 23 Nov. 1920, p. 12; Jeudwine papers, ‘Record, vol. I, Operations’, p. 25; ‘Letter from Father Dominic, Chaplain to the late Lord Mayor of Cork (Terence MacSwiney), to Finton Murphy’, 26 Nov. 1920, in Strickland papers, *Rebellion*, Appendix IV, p. 37; Crozier, *For Ever*, pp. 104–5; and the film *Michael Collins* (dir. Neil Jordan; 1996).

aftermath of the assassinations of 21 November, however, is their heralding of hitherto unseen attempts to suppress the IRA and Irish republicanism.

A dramatic consequence of the introduction of the ROIA in August 1920 had been the use made of regulations 14B and 55 to permit mass detention without trial. ROIR 14B gave authority to Ireland's lord lieutenant or chief secretary to order that a person residing in a named area be interned without charge.<sup>335</sup> ROIR 55 was pivotal to these detentions because of its provisions to permit arrest without the need to demonstrate proof that a specific offence had been committed. In fact, arresting officers were empowered to make arrests on the basis that a person's behaviour was:

...of such a nature as to give reasonable grounds for suspecting that he has acted or is acting or is about to act in a manner prejudicial to the restoration or maintenance of order in Ireland.

As Campbell observes, the conjunction of regulations 14B and 55 effectively created a screening mechanism whereby any suspect could be arrested, questioned, detained and subsequently tried by courts martial.<sup>336</sup> The events of 'Bloody Sunday' led to a decisive test for this mechanism, for the army now received orders to arrest all leaders of the IRA and other 'wanted men' and to intern without trial those 'against whom definite evidence could not be obtained to procure conviction'.<sup>337</sup> Acting on intelligence supplied by the police, military personnel made five hundred arrests across Ireland within 48 hours of the assassinations.<sup>338</sup> By 10 December, six hundred suspects had been detained at an internment camp in County Down and applications had been made for over eight hundred detention orders for 'officers' and 'prominent members' of the IRA.<sup>339</sup>

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<sup>335</sup> The latter acting on the recommendation of a CMA or a member of a quasi-judicial Advisory Committee on internment.

<sup>336</sup> Campbell, *Emergency Law*, pp. 41—4, 53.

<sup>337</sup> Based on: Jeudwine papers, 'Record, vol. I, Operations', p. 26; Jeudwine papers, *History of the 5<sup>th</sup> Division in Ireland, November 1919 – March 1922* [hereafter, Jeudwine papers, *History*], pp. 56—8, 84—5.

<sup>338</sup> Bennett, *Black*, pp. 108—9.

<sup>339</sup> Foxton, *Revolutionary*, pp. 223—5.

There is strong evidence that the powers afforded by ROIR 14B and 55 were abused in the course of the arrest and detention of leading IRA suspects in late 1920. An army intelligence summary of the Irish campaign of 1919—21 concluded that:

Brutal methods are a Mistake. Many innocent men were imprisoned because brutal interrogators, who believed that every Irish man was a Sinn Feiner, so treated them that, in the hope of escaping further ill-treatment, they confessed that they were part of the IRA.<sup>340</sup>

The implication herein was that the reduction in judicial scrutiny resulting from the use of ROIR 14B and 55 inflated official appraisals of the size and scope of the IRA's threat. This inflationary potential was doubly exaggerated in late 1920 during the arrests relating to 'Bloody Sunday': first, because military bureaucracy insisted that all internees should be attributed a rank within the IRA; second, because political intuition insisted that mass internment must be justified by the fact that the hundreds arrested were all active IRA members—that is, highly dangerous criminal suspects against whom conventional legal evidence was difficult to generate. Such concerns were of no assistance to detention camp commandants, who struggled to match the suspects forwarded for detention from the army's various divisional commands to the warrants authorising the internment of specific individuals provided by GHQ.<sup>341</sup> Yet this too supports the wider contention that the procedural dexterity generated by the implementation of the ROIA, and the ensuing delegation of policing powers to the army, created a juridical system structurally bound to enlarge official appraisals of the Republican mobilisation of support for extremism in Ireland.

If the Volunteers' 'murder gang' was beginning to resemble an army by late 1920, ramifying official perceptions of the scale of the IRA threat also sustained a spiralling dynamic within the counter-insurgency machinery whereby ever-wider procedural license appeared necessary to combat Republican dissidence in Ireland. This dynamic of British counter-insurgency operations in Ireland was manifest throughout the broader period of 1916—21 analysed in this case study, but it was

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<sup>340</sup> Jeudwine papers, 'Record, vol. II, Intelligence', p. 27; see also Lt. Col. A. D. M. Browne, CMA Dublin District, confidential circular, 'Looting and Offences against Inhabitants', 31 Dec. 1920, PRO WO 35/70.

<sup>341</sup> Campbell, *Emergency Law*, pp. 106—8.

evidenced with particular clarity soon after ‘Bloody Sunday’, when the government was finally persuaded by the army’s argument that even the extended emergency powers codified by the ROIA were inadequate to quell Republican political violence. Decisive proof was found in the wreckage of a deadly IRA ambush in County Cork.

On 28 November 1920, only a week after the ‘Bloody Sunday’ assassinations, and just days after the IRA burned down a large section of Liverpool’s docklands, the West Cork Brigade’s Flying Column ambushed a motorised ADRIC patrol near the village of Kilmichael, close to Macroom.<sup>342</sup> Seventeen cadets were killed. A single Auxiliary survived, crippled and comatose. Reports from Dublin Castle estimated that the concealed force of Volunteers had outnumbered the Auxiliaries five to one, and that they had successfully halted and attacked two lorry-loads of recruits. *The Times* cited sickening reports from Dublin, which claimed that:

...the policy of the murder gang...[was] apparently to allow no survivor to disclose their methods. The dead and wounded were hacked about the head with axes, shot guns were fired into their bodies, and they were savagely mutilated. The one survivor, who was wounded, was hit about the head and left for dead. He had also two bullet wounds. The bodies were rifled, and even the clothes taken.<sup>343</sup>

Yet for all that *The Times* saw the hand of a ‘murder gang’ behind this gruesome episode, to Dublin Castle and the British Cabinet it appeared to signal a qualitative shift in the character of IRA violence, especially when looked at in the context of the preceding week’s aggression.

The Kilmichael ambush jolted the executive into a reconsideration of counter-insurgency policy in Ireland: it did not see the incident as indicative of the unrestrained criminality of a ‘murder gang’, but as part of a preconceived, if desperate, military assault.<sup>344</sup> Fidelity to this appraisal is clearly evident in the

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<sup>342</sup> For more analysis: Bennett, *Black*, pp. 104—12; Hart, *Enemies*, pp. 21—36; Townshend, *Campaign*, pp. 133—5. Hart is particularly critical of the account presented by the Flying Column commander’s memoir: Tom Barry, *Guerrilla Days*, pp. 44—51.

<sup>343</sup> ‘Murdered Cadets’, *The Times*, 2 Dec. 1920, p. 14. See also ‘Irish Ambush’, 30 Nov. 1920, p. 14; ‘Murder Trap’, 1 Dec. 1920, p. 12.

<sup>344</sup> See recollections of a Cabinet meeting, 1 Dec. 1920, in Jones, *Whitehall Diary*, p. 41, from which the quotation in the text is taken.

wording of the lord lieutenant's proclamation of 10 December, which announced the imposition of martial law in counties Cork, Tipperary, Limerick and Kerry:

Because of attacks on Crown forces culminating in an ambush, massacre, and mutilation with axes of sixteen cadets, by a large body of men wearing trench helmets and disguised in the uniform of British soldiers, and who are still at large, now I do declare Martial Law proclaimed.<sup>345</sup>

Macready was now appointed 'Military Governor General' of Ireland, and two days later issued further martial law proclamations in this capacity. On 5 January 1921, the size of the Martial Law Area (hereafter, MLA) was extended to counties Clare, Kilkenny, Waterford and Wexford, such that it now covered the province of Munster, corresponding to the geographical reach of the army's sixth division, commanded by General Peter Strickland.<sup>346</sup>

With the imposition of martial law in parts of southern Ireland from late 1920, it would appear that the counter-insurgency operations moved into a phase and a form corresponding to a Schmittian 'state of exception'. As the following chapter argues, the reality of this infra-legal world was far more complex. Furthermore, the short-term official rationales for the introduction of martial law in Ireland, provided by the Kilmichael episode, concealed much older agonies about military rule over civilian populations. These concerned the different legal constructions of what martial law entailed, under whose authority it could be operated, and which kind of situations necessitated its imposition. It is these agonistic debates that I now turn to analyse, once the outlines of the martial law regime imposed in Ireland in the winter of 1920—21 have been drawn.

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<sup>345</sup> Jeurwine papers, 'Record, vol. I, Operations', pp. 28—9.

<sup>346</sup> For the martial law proclamations: *ibid.*

## 4. Statutory and prerogative forms of martial law in Ireland, December 1920 to July 1921

§ ‘It practically means no law’: military rule in Ireland, *circa* 1920—21<sup>347</sup>

Within Ireland’s Martial Law Area, senior army commanders proceeded to issue a number of proclamations based on those implemented during the second South African War of 1899—1902 and in the Rhineland in 1919 after the First World War. As in southern Africa and western Germany, these proclamations had severe implications for the everyday life of Irish civilians. The first, issued by General Macready, declared that any person in ‘unauthorised’ possession of firearms, ammunition or explosives was liable to suffer the death penalty, as was any ‘unauthorised person’ wearing British military uniform—a clear attempt to avoid a repeat of the Kilmichael ambush. As a further precaution, the practice of carrying Sinn Féin prisoners as hostages by police and military convoys was now initiated. Three supplementary proclamations, issued by General Strickland in his capacity as military governor in the MLA, created a vast array of additional martial law offences. The press was subjected to closer monitoring and censorship. Tighter regulations were placed on the use of motor vehicles. Existing curfews were more stringently enforced. Collective punishments, such as the closure of creameries and post offices, and restrictions on the holding of fairs and markets, were introduced.<sup>348</sup>

Ireland’s martial law regime thus marked both the fullest extent of the delegation of executive powers to British counter-insurgency forces in the period *circa* 1916—21, and the creation of an extra-legal sphere in which to govern civilian life. However, this regime continued to interact with the quasi-legal powers of the ROIA and the paramilitary policing campaign being conducted through the ADRIC.

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<sup>347</sup> Lloyd George, PM, speaking at Cabinet meeting on 1 Dec. 1920, as recalled in Jones, *Whitehall Diary*, p. 42.

<sup>348</sup> Based on: Jeudwine papers, ‘Record, vol. I, Operations’, pp. 28—31; Crozier, *For Ever*, pp. 159—63; Macready, *Annals of an Active Life*, vol. II, pp. 515—16, 522—25; O’Malley, *Wound*, pp. 318—20.

British rule of Munster Province by martial law in the period from January to July 1921 therefore continued to be shrouded by the familiar haziness that had loomed over official responses to extremist republicanism in Ireland since Easter 1916.

Following the issuing of the first martial law proclamations in southern Ireland, less than a day had elapsed when the gulf between official understandings of martial law and the actual consequences of their implementation by counter-insurgent forces believing themselves empowered to act 'beyond' the law was demonstrated. Following an ambush on police cadets near the army's divisional headquarters at Victoria Barracks, several parties of British counter-insurgent forces drove into Cork city on the evening of 11 December 1920. A series of fires were started. By the time they had been put out, five square acres of Cork had been affected, several million pounds' worth of damage had been done and the city-centre gutted. Department stores on Patrick Street, the Corn Exchange, the Carnegie Library and the City Hall all appeared to have been deliberately targeted as a reprisal for the ambush earlier in the day. Recalling the Vandals' destruction of ancient Rome, the British press called this grim episode the 'sack of Cork'.<sup>349</sup>

Cork's burning sparked the government to introduce the so-called policy of 'official' reprisals—another startling reversal by Lloyd George, given the prime minister's aforementioned preference for secret 'gunning' and the Cabinet's acceptance of the 'murder gang' thesis, which blamed a handful of extremists rather than whole communities for the unrest. Henceforth, reprisals would be pre-planned military operations lacquered with the veneer of legality. The British government and army justified the policy as the realisation of the doctrine of necessity in Ireland's MLA: official reprisals were the avowed penalty for failure to give the military or police reasonable forewarning of an intended IRA ambush, or for knowingly sheltering men on the run; martial law would force Irish civilians into openly rejecting extremist republicanism.

Throughout the first half of 1921, the army regularly conducted official reprisals across Ireland, though particularly in the south and west. By June, the army

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<sup>349</sup> Based on: 'City of Cork in Flames', *The Times*, 13 Dec. 1920, p. 12; 'Cork Enquiry: Supplementary Report by General Tudor', 11 Jan. 1921, PRO CO 904/150/1; Alan J. Ellis, *The Burning of Cork: an eyewitness account* (Cork: Aubane Historical Society, 2004), pp. 6–12, 22–3; O'Donnell, *Louth*, pp. 52–3; Townshend, *Campaign*, pp. 131, 138–9.

counted 191 houses and 20 other properties among those demolished or burned under military auspices as pre-meditated reprisals for IRA aggression.<sup>350</sup> The sixth division's general staff described such reprisals as insuring that 'the only people who suffered were those who were guilty of the [particular] outrage, or openly sympathetic with the perpetrators of it'—far preferable to unofficial reprisals, although, it added, these were 'obviously only the working of the laws of nature, and a return to the customs in vogue in savage countries before a legal code was introduced'.<sup>351</sup> However, this suggestion—that official reprisals brought regularity and certainty of punishment to known rebels and their supporters in the MLA, where previously 'unofficial' reprisals had routinised 'the working of the laws of nature'—soon conflicted with the widespread perception, shared in America and Britain, as well as in Ireland, that Munster's military regime was in fact guided precisely by the capricious sovereign power of Irish Command.

On New Year's Day 1921, Crown Forces destroyed half a dozen 'Sinn Fein' houses in Middleton, near Cork, after an IRA ambush killed three policemen. The *Daily News* described this incident, the first officially sanctioned army reprisal, as 'a savage outrage on human decency' in Ireland.<sup>352</sup> In his later account of the Anglo-Irish conflict, the newspaper's special Irish correspondent, Hugh Martin, similarly argued that:

The average [army] officer detests the unofficial reprisal, because it means indiscipline and the overthrow of his personal power, but he can see little objection under present circumstances to the official reprisal which would take the form of the punitive expedition. He bases his argument upon British experience and practice on the North Western Frontier of India and in certain parts of Africa, where the custom has been to destroy a certain number of villages or kraals as a punishment for acts of aggression on the part of the natives.<sup>353</sup>

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<sup>350</sup> 'Official Punishments Inflicted Under Martial Law, 1921', in Strickland papers, *Rebellion*, Appendix V, pp. 39–40. Using RIC reports, Townshend estimates that around 150 official reprisals were carried out across Ireland between December 1920 and May 1921:

Townshend, *Campaign*, p. 149.

<sup>351</sup> Jeudwine papers, 'Record, vol. I, Operations', pp. 30–1.

<sup>352</sup> *Daily News* quoted in Bennett, *Black*, p. 132. See also O'Malley, *Wound*, pp. 321–2.

<sup>353</sup> Martin, *Insurrection*, p. 191.

Such an appreciation of British troops' attitude towards Irish counter-insurgency policy could be dismissed as journalistic sensationalism. Yet Martin's analogy between official reprisals targeting suspected Republicans and colonial practice in south Asia and South Africa offers insight into the repressive and performative economy of justice conceived for Ireland's MLA by winter 1920.<sup>354</sup> Certainly, this was the reading of an American news-organ for Sinn Féin, which described the 'state of siege which the English government has instituted against the Irish people' as:

...the all too familiar spectacle of an oppressed race in conflict with an imperial power physically its superior. ...the British Government...has abolished all forms and safeguards of ordinary law, and has delivered the country to the terrorization and the deliberate brutality of its own hired bullies.<sup>355</sup>

Like any historical source, this appraisal is partisan; yet like the *Daily News*' assessments of official reprisals, it attests to the sense in which British counter-insurgency in Ireland was construed at the time as being informed by an imperial discourse of spectacular violence against dissident civilians as well as by equivocation with the ideals of the rule of law.<sup>356</sup>

Certainly, by late 1920, members of the government's counter-insurgent forces were conscious that state power was being deployed in ways that were both transparently clear yet subject to obscure juridical audit in the muddled legal world of southern Ireland. They demonstrated this consciousness in different ways. The

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<sup>354</sup> Similarly (though I have not found specific examples of the use of such language), Bennett claims that the army euphemistically referred to its operations in Ireland as 'pacification': Bennett, *Black*, p. 136.

<sup>355</sup> 'The Imperial Road to Ruin', in *News Letter of the Friends of Irish Freedom National Bureau of Information*, vol. II, No. 23 (Washington D.C.; Dec. 1920), pp. 2, 1, 6 (in that order), INA, CBSC, Other Police Reports, 1882—1921, Box 5. See also Childers, *Military Rule in Ireland*, esp. pp. 16—21, 37—8.

<sup>356</sup> In the context of colonial India, that discourse has recently been well sketched-out by Dipesh Chakrabarty, citing the blowing of 'mutineers' from cannons and the debate over whether publicly to hang Emperor Bahadur Shah following the 1857 uprising, as further examples of such performative violence of the Amritsar massacre. See Dipesh Chakrabarty, "'In the Name of Politics'?: Sovereignty, Democracy and the Multitude in India', in Nathalie Karagiannis and Peter Wagner (eds), *Varieties of World-Making: Beyond Globalization* (Liverpool: Liverpool University Press, 2007), pp. 111—32. I thank Dr. Markus Daechsel for directing me to this reference.

sixth division general staff, whose geographical command corresponded to the MLA from January 1921, was keen to emphasise that the imposition of military rule had greatly aided intelligence gathering, by asserting that ‘the Proclamation of Martial Law had undoubtedly frightened a large number of civilians, and made them more willing to give information to Crown forces’. By contrast, a former Black and Tan recruit remembered official reprisals as ‘a horrible a dastardly burning of houses and furniture’, a memory that provoked acute moral agony, since these had been deliberately carried out ‘with the due force of the Law’.<sup>357</sup>

Thus, by the beginning of 1921, British counter-insurgency policy in Ireland continued to be both drained and vitalised by the maintenance of an unresolved tension between actions taken with ‘the due force of the Law’ and as if there was ‘no law at all’. The British government had by now deployed 51 infantry battalions in Ireland. As military governor general, the GOC Ireland had been empowered as the supreme legal authority in Ireland’s Martial Law Area. As competent military authorities, his commanding officers were busily issuing additional martial law proclamations and posting notices advertising further restrictions on civilian life. Counter-insurgency was highly visible. Mobile units of the vast troop-deployment, the RIC and their paramilitary recruits continued to patrol Irish roads and towns, though in the MLA the army now formally directed searches and raiding operations. If it had not seemed so before—and evidence suggests otherwise—by mid-winter 1920, rule through a military regime had been established as daily reality across large tracts of southern Ireland. The following section of this chapter examines the exceptional legal challenges, remedies and controversies emanating from the British government’s attempt to restore order in southern Ireland through the imposition of a military regime, closely examining the theory and practice of rule by martial law as it was applied in Ireland in the first half of 1921.<sup>358</sup>

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<sup>357</sup> For the sixth division general staff’s views on martial law: Strickland papers, *Rebellion*, p. 97. For the Black and Tan recruit’s perceptions of official reprisals: Duff, *Sword*, p. 69; more broadly, *ibid.*, ch. 7. See also Crozier, *For Ever*, p. 180 and O’Malley, *Wound*, p. 320.

<sup>358</sup> Based on: Jeudwine papers, ‘Record, Vol. I, Operations’, p. 32, and *History*, pp. 58, 73, 81—2; ‘Restoration of Order Miscellaneous, c. 1920—21’, PRO WO 35/65/4; ‘Public Notices: Martial Law in Ireland: Curfew Laws, Transport Restrictions etc., April 1920 – June 1921’, PRO WO 35/66.

## § ROIA courts martial and military tribunals

The introduction of martial law into parts of Ireland from late 1920 immediately increased the incidence of civilian courts martial trials.<sup>359</sup> This measured both the raised tenor of Volunteer aggression against British counter-insurgent forces from late 1920 and the extended powers of arrest granted to military authorities under the ROIA's revised emergency powers. It also registered the effects of that legislation's provision that courts martial could try all serious, 'ordinary' crimes, as well as breaches of specific ROIR. Following the imposition of martial law, the incidence of such crimes further increased. The starkest record of this, the number of casualties sustained by Crown forces, rose by twenty-five per cent in the first quarter of 1921 from the final quarter of 1920, and by a further twenty-two per cent in the second quarter of the year.<sup>360</sup> Once again, however, the rising incidence of 'crime' not only marked intensified Republican hostility, but also the criminalisation of acts believed to assist the IRA's cause and the infliction of harsher penalties upon civilians found to have committed such offences.<sup>361</sup>

If recourse to civilian courts martial greatly increased during the period in which martial law was in force in parts of southern Ireland, that period was also marked by further measures to expedite these judicial hearings while retaining the form of due legal process. Under the ROIA, three types of court martial—district,

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<sup>359</sup> There were 809 ROIA courts martial between 14 August and 25 December 1920, compared to 94 DORA courts martial held between January and July 1920; whereas, between 24 January and 27 June 1921, 1,451 Irish civilians were tried by ROIA courts martial. Based on: Townshend, *Campaign*, Appendix X, p. 22; Campbell, *Emergency Law*, table 10, p. 81.

<sup>360</sup> Augusteijn, *Defiance*, Table 1.3, 'Crown Forces and IRA Casualties per Quarter and Total, January 1920—July 1921', p. 180. For more: Townshend, *Campaign*, Appendix V, 'Irish Office Statistics of Outrages, 1919—1921', p. 214. For a contemporary military perspective on the rising tenor of Republican hostilities from late 1920: Judwine papers, *History*, p. 22.

<sup>361</sup> For the criminalisation of everyday acts of support for the IRA under martial law: O'Malley, *Wound*, pp. 318—22, and *Raids*, pp. 91—6. See also the list of offences that could be tried by military tribunals in, Strickland papers, *Notes on the Administration of Martial Law for the Use of Commanding Officers* (issued by GHQ Ireland, 1921), Appendix B, 'Summary Court Class of Offences Dealt With'. For the making of all crimes punishable under martial law in the MLA: General Strickland, 'Martial Law Proclamation No. 1', 12 Dec. 1920, in Judwine papers, 'Record, vol. I, Operations', p. 29.

general or field general—could be convened to try breaches of the ROIR. The Army Act (1881) set out strict rules for the taking of a summary of evidence in cases to be tried before district or general courts martial, but this procedure was far more loosely formulated in the case of field general courts martial, which were intended to provide expedited hearings for offences against military regulations by personnel on active service (and therefore in circumstances preventing the formal preparation of such documentation, such as on the Western Front).<sup>362</sup>

Field general courts martial for civilians were used in Ireland from 17 December 1920, the week that the first martial law proclamations were issued. Local CMAs greatly welcomed their simplified procedure and this decentralisation of extra-legal power, a delegation of the ‘will of the general’.<sup>363</sup> Some measure of their success as tools for counter-insurgency is that the overall conviction rate across the three categories of ROIA courts martial ran at almost four in five between August 1920 and July 1921.<sup>364</sup> However, despite its extensions of the DORA’s emergency provisions, and despite what appeared to be a widespread murder campaign targeting members of the RIC, auxiliary paramilitary units and other agents of the Crown forces by late 1920, the ROIA system had on the whole failed to produce convictions for serious offences carrying the death penalty. As shown earlier, one of the foremost arguments for the imposition of martial law from an operational point of view was that it would provide the (necessarily extra-legal) means to the end of convicting and duly punishing the IRA’s ‘murder gang’.<sup>365</sup> ‘All the Military Authorities know’, the deputy adjutant general told Dublin Castle in February 1921,

is that Martial Law empowers them to take all such exceptional measures as are reasonably necessary for the purpose of restoring peace and order, and,

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<sup>362</sup> See Cassell, JAG, to Greenwood, Chief Secy. Ireland, 19 July 1920, para. C, PRO CAB 24/109.

<sup>363</sup> For the use of field general courts martial from December 1920: Jeudwine papers, *History*, Appendix VIII, ‘Notes on the Administration of the D.O.R.A. and R.O.I.R.’, pp. 1–2; ‘Weekly Returns of Civilians Tried by F.G. Courts Martial DD [Dublin District] from December 1920—August 1921’, PRO WO 35/93B/3.

<sup>364</sup> See Campbell, *Emergency Law*, pp. 72–3.

<sup>365</sup> See Macready, *Annals*, vol. II, p. 518; Townshend, *Campaign*, pp. 193–4.

provided their actions are done in good faith, they will not be called upon to provide any legal authority for what they do.<sup>366</sup>

Within Ireland's MLA, all legal remedies were therefore effectively suspended. There were no immediately operative legal limitations upon the military's powers of arrest, detention or trial before two kinds of special tribunal, summary courts and military courts, as distinct from the three types of ROIA court martial, which were convened according to the severity of offence committed.<sup>367</sup> These military tribunals were not only empowered to try offences against martial law regulations but also breaches of the 'ordinary' law and the ROIR. Indeed, by June 1921, the reverse situation was also possible: acts infringing martial law proclamations could be dealt with as contraventions of the ROIR, either in those civil courts capable of sitting or by ROIA courts martial.<sup>368</sup>

The legal schema for military rule in Ireland was closely derived from Diceyan jurisprudence. The former GOC Ireland's memoirs show that he was fully versed in it. 'Complete and effective martial law', General Macready wrote, 'is usually defined as "the suspension of the ordinary law and the government of a country or parts of it by military tribunals"'.<sup>369</sup> Yet this had not properly happened in Ireland between December 1920 and January 1921, Macready concluded. What he understood to be the 'the ordinary law' had not been superseded, for 'When...a form of martial law was sanctioned for Munster', he recalled, it was 'so intermixed with civil administration as to be hardly recognizable'.<sup>370</sup> This 'intermixing' produced worrying anomalies. For the army, it was unclear whether special orders issued in the MLA superseded those already in place under the ROIA. For rebels, offences such as

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<sup>366</sup> Draft answer to parliamentary question for the Chief Secretary, regarding the MLA, scheduled for 21 February 1921, PRO WO 35/66.

<sup>367</sup> For the army's understanding: 'Circular Memoranda on Martial Law: Legal Procedure and Summary Court Procedure', May 1921, PRO WO 35/66. The procedures outlined in this initial memorandum were amended by subsequent Army orders and supplemented by guidelines issued by GHQ and local units.

<sup>368</sup> Campbell, *Emergency Law*, pp. 85–6. For the instructions regarding military tribunals: Strickland papers, *Administration of Martial Law*, esp. p. 11 and Appendix B, 'Summary Court Class of Offences Dealt With'.

<sup>369</sup> It is noticeable here that Macready's understanding elides 'the ordinary law'—suspended in Dicey's formulation of martial law—with the extra-ordinary emergency powers (the statutory form of martial law) that the ROIA had provided for Ireland since August 1920.

<sup>370</sup> Macready, *Annals*, vol. II, p. 468.

possessing arms or ammunition, or wearing the uniform of HM forces without authorisation carried the death penalty inside the MLA, but not outside Munster's provincial boundary. For civilians, as Irish Command later admitted, the Crown forces' 'attitude was unintelligible'; indeed, 'the ordinary man in the street...could not be expected to understand [the] difficulties involved in our having to act simultaneously under two codes—Martial Law and R.O.I.R.'<sup>371</sup>

However, there is some evidence that the ambiguity of martial law powers was what underpinned the Lloyd-George administration's political rationale for imposing it in parts of Ireland at this time by. On 14 December 1920, Mark Sturgis noted that

The PM's idea, which they [the military authorities] have not grasped, is to have Martial Law in the distant provinces, a cloud on the horizon, leaving the seat of Government, Dublin, free for them as wants to negotiate for peace.<sup>372</sup>

If the British executive and Irish military authorities were similarly versed in Diceyan jurisprudence by 1921, their respective understandings of the application of martial law diverged. For Irish Command, its introduction would realise the long-demanded simplification of the counter-insurgents' chain of command, equip CMAs with summary extra-judicial powers, and permit 'official' reprisals, avoiding repeats of the Cork episode. For the prime minister, the imposition of martial law in parts of southern Ireland was an instrumentalist application of military force to facilitate political strategy: namely, that of pressurising Republican leaders into ending the Anglo-Irish conflict by coming to terms with his government over Irish Home Rule. For the military, implementing martial law would finally resolve the confusion surrounding Irish counter-insurgency strategy; for the executive, implementing a confused counter-insurgency strategy would finally resolve the Irish situation. Just as in the aftermath of the Easter rising, from late 1920, the British executive therefore attempted to use the threat of martial law—and the haziness over what its

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<sup>371</sup> Jeudwine, 'Record, vol. I, Operations', pp. 28—9, 55—6, quoting p. 56. See also Campbell, *Emergency Law*, esp. pp. 51—2.

<sup>372</sup> Entry for 14 Dec. 1920, *Sturgis Diaries*, p. 91. For the army's view of what martial law would entail in Ireland: Cassell, JAG, to Greenwood, chief secy. Ireland, 19 July 1920, PRO CAB 24/109; Jeudwine papers, 'Record, vol. I, Operations', pp. 30—1, 55—6; Strickland papers, 'Rebellion', p. 62.

implementation actually entailed—in order to gain political leverage against the cause of Republican extremism in Ireland.

The short-term reason for the overlay of Ireland's juridical and extra-judicial systems was more prosaic than this high-political and jurisprudential debate about the justiciability of martial law, however. By December 1920, Munster's jails were severely overcrowded, and this problem now intensified as a result of the stipulation that offenders convicted by military tribunals under the martial law regulations had to serve their sentences within the MLA.<sup>373</sup> The army therefore decided that the majority of serious offences committed therein ought to be dealt with under the ROIA, while minor offences would be tried before summary courts.<sup>374</sup> Summary courts, convened 'to effect the speedy trial of civilians...charged with less serious offences against martial law', could impose sentences of up to six months' imprisonment, with or without hard labour, and fines of up to £100. They were the most widely used form of martial law tribunal, processing over a thousand cases from December 1920 onwards. By contrast, those convicted by army tribunals of more serious breaches would take up no space in prison:

Military Courts are as a rule kept for those offences where a death sentence is likely to be awarded and which cannot be awarded according to the ordinary law of the land, e.g. possession of arms, and where, though a death sentence can be awarded for the offences under the ordinary law, it is desired to carry out the trial without delay; e.g. a man caught in an ambush under the ordinary law would have to be tried for treason or murder....<sup>375</sup>

The remaining offenders—for whom punishment fell short of the death penalty but exceeded those enforceable by summary courts—would be interned. Indeed, by June 1921, more than four thousand suspected members of the IRA had been detained in

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<sup>373</sup> See Jeurwine papers, 'Record, vol. I, Operations', pp. 38—40 and *History*, pp. 7—11, 55.

<sup>374</sup> Strickland papers, *Administration of Martial Law*, p. 11.

<sup>375</sup> *Ibid.* For further information on summary courts and military courts: 'Circular Memorandum on Martial Law', c. May 1921, PRO WO 35/66. For further analysis: Campbell, *Emergency Law*, pp. 30—4, 85—92, 108—9.

British prisons, while three camps in Ireland, modelled on those for prisoners-of-war, were full.<sup>376</sup>

Inside the MLA, military tribunals facilitated a simplified form of trial procedure similar to that in place elsewhere in Ireland at the ROIA field general courts martial. Similar, but not identical: military tribunals were, in jurisprudential theory at least, entirely removed from the extant juridical order; in practice, they could enforce capital sentences for offences such as carrying arms, possession of ammunition or harbouring rebels.<sup>377</sup> Furthermore, within a month of martial law's imposition a third, even more expedited form of tribunal was introduced. As the army's regulations explained:

A Drumhead Court does not differ in principle from any other Military Court, it only differs by reason of its greater expedition. In the following cases, *viz.*, where:—

- (1). Persons are captured in action with arms, bombs or explosives, whether in uniform or not,
- (2). Persons are captured with arms, bombs or explosives in their hands or on their person,
- (3). Persons are captured where there is clear evidence that they had arms, bombs or explosive on their person immediately before capture.

Drumhead courts, the regulations continued, would comprise three officers (of whom the president should be of field rank, if possible), would be held as soon and as near as possible to the time and scene of the offence, and would be empowered to enforce the summary execution of convicted offenders by shooting convicts on the spot.<sup>378</sup>

Drumhead courts marked the nadir of the degraded legal procedures introduced in Ireland, especially in the MLA, from late 1920. They appeared both to permit a drastically amended version of due judicial process, and to rely on the

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<sup>376</sup> Jeurwine papers, *History*, p. 44 and 'Record, vol. I, Operations', pp. 84—5 and Appendix XVI, 'Notes on the Administration of Internment Camps with particular reference to Rath Internment Camp, The Curragh'. For more on internment, including statistical data: Augusteijn, *Defiance*, pp. 180—1, 243—44, 274.

<sup>377</sup> Strickland papers, *Administration of Martial Law*, Appendix B, 'Summary Court Class of Offences Dealt With'.

<sup>378</sup> Col. J. B. Wroughton, Deputy Adjutant General GHQ Ireland, 'Drumhead Courts', 22 Aug. 1921, PRO WO 35/66.

notion that it had been suspended in parts of Ireland. Indeed, the care taken to follow legal form during these summary, extra-legal sessions—only held in the MLA, in army barracks, and *in camera*—begs the question of why these judicial charades were persisted with, especially if martial law practically meant ‘no law’. Campbell and Foxton each conclude that the purpose of such proceedings was not to weigh the guilt or innocence of the accused upon the scales of justice: the decision to hold a drumhead court prejudged the substantive issue. Rather, they argue that the legal functions of these military tribunals were, first, to burden three sets of military shoulders with culpability for the subsequent execution of convicts and, second, to prevent appeals against their decisions in Ireland’s civil courts.<sup>379</sup> Yet these incisive conclusions regarding the distribution (and dilution) of legal responsibility in the MLA, and the impossibility of convicted offenders appealing the summary verdicts and executions of drumhead courts, raise an additional issue: that of performative justice.

The sixth division general staff history documents the first trial of a Volunteer by drumhead court, following an engagement between Crown forces and an IRA flying column near Kildorrey, County Cork. On 1 May 1921, a joint police and army patrol had outflanked a party of Volunteers waiting in ambush. Two IRA men were killed, a third mortally wounded, a fourth captured and taken to Victoria barracks in Cork. Within 26 hours of his capture, Patrick Casey—‘a well-known leader from County Limerick’—had been tried and executed. ‘His trial by Drumhead Court Martial’, the Staff history recalled, ‘had a very salutary effect’.<sup>380</sup>

According to the former GOC Ireland, only two further trials by drumhead court occurred before the truce between Volunteer and Crown forces in July 1921, but, Macready added, had that agreement not intervened, he would have used such courts for all men taken in arms. For that reason, the army regulations for drumhead courts (cited above) were not drawn up until August—contingency for a broken truce—while two months earlier, Macready had urged the Cabinet to sanction the

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<sup>379</sup> See Campbell, *Emergency Law*, pp. 98–9, 340–1; Foxton, *Revolutionary*, pp. 265–7.

<sup>380</sup> Based on: ‘Trial of Patrick Casey by Drumhead Court’, 2 May 1921, PRO WO 71/381; Strickland papers, *Rebellion*, p. 102.

wider use of such tribunals.<sup>381</sup> In short, Irish Command was firmly behind the use of drumhead courts as instruments of expedited justice with which to help implement military force against the most dangerous Volunteers. The execution of IRA members following trial by drumhead courts would send out a clear, immediate and highly visible statement regarding the special economy of criminal justice now imposed in localities within the MLA.

The army was confident that drumhead courts offered uncomplicatedly worthwhile, if exceptional, performances of legality within Ireland's MLA. Politically, the justification for using them was also straightforward: Britain and Ireland were not at war; drumhead courts would punish Volunteers caught captured *in flagrante*, not *durante bello*. In this context, then, 'martial law' named an exceptional remedy for the collapse of the Irish legal machinery.<sup>382</sup> Drumhead courts therefore lent full weight to the army's interpretation of Diceyan jurisprudence regarding martial law: that it permitted enforcement of the 'will of the general', and was sucked into operation by the collapse of the ordinary judicial system. Such extraordinary—and extra-legal—remedies carried legal form, but only as a convention; the driving logic behind the imposition of martial law was the restitution of state sovereignty as the guarantor of social order. Indeed, exceptional demonstrations of the state's might carried out under martial law were part of the means by which to carry out this restitution.

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<sup>381</sup> Based on: Macready, *Annals*, vol. II, p. 518; 'Record of Meeting of the Irish Situation Committee [of the British Cabinet]', 15 June 1921, PRO CAB 27/107. *Pace* Macready, four trials by drumhead court were held before the 11 July 1921. For analysis: Campbell, *Emergency Law*, pp. 98—9; Foxton, *Revolutionary*, pp. 265, 286—92.

<sup>382</sup> For more: Townshend, *Political Violence*, pp. 352—4.

## 5. Restoring order and preventing terrorism in Ireland, circa 1921–89

On 23 December 1920, the (Better) Government of Ireland Act came into force, providing limited, ‘Dual’ Home Rule in a partitioned Ireland, through ‘Southern’ and ‘Northern’ Houses of Commons.<sup>383</sup> The former assembly would represent the 26 counties of Ireland lying outside the 6 that comprised Ulster province, which would be represented by the latter. In late May 1921, 124 Republicans and 4 ‘independent’ (but Unionist) candidates were returned at elections in the 26 counties. By contrast, the Unionist Party dominated the elections to the Northern Parliament, winning 40 out of 52 seats. A month later, King George V opened the Northern Parliament, inaugurating Home Rule in Ulster. The opening of its southern counterpart, a week later, was far less successful: only 4 of the newly elected members attended; each was an ‘independent’ candidate; all were returned by Trinity College, Dublin. In the event, the abstention of the 124 elected Sinn Féin representatives meant that the Southern Parliament was never formally convened, and the 26 southern counties now faced becoming a Crown Colony and being placed under martial law for failing to implement Home Rule. However, on 11 July, the day before this drastic step was due to be taken, representatives of the IRA reached peace terms with General Macreedy, and a truce was declared. In that sense, Lloyd George’s strategy was vindicated: before martial law—his ‘cloud on the horizon’, ‘in the distant provinces’—had spread across all Ireland, a peace arrangement had been negotiated in Dublin, and a settlement reached for Irish Home Rule.

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<sup>383</sup> Subject to constraints upon religious discrimination, each parliament would control domestic services including education, local government, justice and social welfare, economic agencies and eventually policing. Westminster would retain control over foreign policy, external trade, the armed services, coinage and the post office. Major sources of revenue—such as income tax, customs duties, and excise duties on manufactures—would continue to be paid into the consolidated fund of the UK, and an imperial contribution would be levied on each Irish province. Citing: Fitzpatrick, *Two Irelands*, pp. 100–103, 112; Jackson, *Ireland*, pp. 254, 257; O’Malley, *Wound*, p. 380.

The Anglo-Irish truce of July 1921 provided the necessary cessation of hostilities between the forces of the IRA and the British Crown as a precursor to the re-negotiation of new political arrangements to govern Ireland. With the Ulster question now seemingly resolved, the British government's revised Home Rule offer to Sinn Féin was to abolish the Irish Republic established in 1919 and instead include the 26 counties of Southern Ireland as a dominion within the Commonwealth, granting its parliament limited autonomy and retaining the King as the nominal head of state, to whom the leaders of the proposed 'Irish Free State' would swear an oath of loyalty. The second *Dáil* was established in August 1921 and de Valera now became 'President of the Irish Republic'. In early December, its delegation to London signed the 'Articles of Agreement for a Treaty between Great Britain and Ireland', which affirmed partition and the southern territory's dominion status within the Commonwealth. Simultaneously, the pro-Treaty faction of the Sinn Féin leadership constituted the Provisional Government of the Irish Free State, pledging their allegiance to the authority of the *Dáil*, which approved the Treaty by 64 votes to 57 in January 1922.<sup>384</sup>

Within six months of the *Dáil's* ratification of the Treaty, the 26 counties of southern Ireland had descended into internecine war.<sup>385</sup> The Irish Free State, backed by the British government, inherited the challenge of suppressing a violent campaign to overthrow it—in this case, one waged by pro-separatist irregulars of the anti-Treaty faction. The neotype government similarly expressed the extraordinary juridical features of its now extinguished ancestor. Indeed, before the outbreak of full hostilities in the Irish civil war (which ran from *circa* June 1922 to May 1923), Ireland's Provisional Government had already revived the British policies of both 'unofficial' and 'official' reprisals, and the execution of civilians.<sup>386</sup> As the civil war intensified, the Provisional Government likewise aped its Anglo-Irish forbear by delegating executive authority to its military forces, principally through the

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<sup>384</sup> Based on: Foxton, *Revolutionary*, p. 336; Jackson, *Ireland*, pp. 252—4, 257—61. A further source of contention during negotiations over Irish Home Rule was the British retention of so-called Treaty Ports on Ireland's south coast.

<sup>385</sup> Drawing on: Campbell, *Emergency Law*, pp. 149—71; Jackson, *Ireland*, pp. 270—4; Townshend, *Political Violence*, pp. 365—76.

<sup>386</sup> In all, the pro-Treaty National Army put to death around eighty captives during the civil war (the precise number of prisoners executed is debated): Campbell, *Emergency Law*, 'Appendix 2: National Army Civil War Executions', pp. 360—71.

introduction of the Army Emergency Powers Resolution on 27 September 1922, providing martial law powers. The following year, new legislation—the Public Safety (Emergency Powers) Act, succeeded by further ‘public safety’ legislation in 1924—equipped the Irish executive with powers to make detention orders not only for prisoners being held for violations of the martial law regulations, but also for those already held in custody for seven days and for persons at liberty. Nor did the end of the civil war herald the withdrawal of these powers: instead, they were permanently adopted under the 1926 Public Safety Act, which permitted the use of indefinite detention in southern Ireland if a State of Emergency was declared.<sup>387</sup>

The pattern observed in the Irish Free State after the truce—of the executive putting the temporary, emergency powers introduced between 1916 and 1921 on a more permanent setting—was replicated in Ulster with even greater regularity following the cessation of Anglo-Irish hostilities in 1921. In 1922, the Civil Authorities (Special Powers) (Northern Ireland) Act was introduced, permitting detention without charge under regulation 23 and internment without trial, for longer periods, under regulation 23B.<sup>388</sup> These statutory provisions survived until 1939, when they were subsumed by new wartime emergency legislation for the UK, specifically targeting acts of IRA ‘terrorism’ committed in Britain: the Emergency Powers (Defence) Act and the Prevention of Violence (Temporary Provisions) Act.<sup>389</sup>

The rhetorical shift from representing Irish Republican extremists as a ‘murder gang’ to the image of the IRA ‘terrorist’ corresponds to a sequence of legislative innovations that have sought to normalise the special provisions that the British executive codified through the ROIA’s statutory emergency powers in August 1920, particularly those concerning arrest and detention. Indeed, the ROIA was not repealed until 1953, under the Statute Law Revision Act.<sup>390</sup> Its retention for over thirty years after the cessation of Anglo-Irish hostilities is evidence of the British

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<sup>387</sup> The Public Safety Acts of 1923—26 (nos 28 and 29 of 1923, nos 1 and 15 of 1924, and no. 42 of 1926) can be accessed online at <<http://www.acts.ie>>. See also Simpson, ‘Usual Suspects’, pp. 644—5.

<sup>388</sup> Civil Authorities (Special Powers) (Northern Ireland) Act, 1922, 12 & 13 Geo. V, c. 5.

<sup>389</sup> Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, c. 62; Emergency Powers (Defence) (No. 2) Act, 1939, 3 & 4 Geo. VI, c. 48; Prevention of Violence (Temporary Provisions) Act, 1939, 2 & 3 Geo. VI, c. 50. See also Simpson, ‘Usual Suspects’, pp. 645—6, 651—3.

<sup>390</sup> Statute Law Revision Act, 1953, 2 Eliz. II, c. 5.

executive's continued reading of political violence in Ireland as necessitating the provision of exceptions to the norms of English procedural law.<sup>391</sup>

Moreover, the repeal of the ROIA in 1953 by no means denuded the British state of powers providing for exceptional governance in Northern Ireland. Detention without charge was once again used there from 1950 to 1951 and, still more extensively, from late 1956, under Emergency Regulations introduced on 15 December, following the commencement of the IRA's 'border campaign' against Ulster.<sup>392</sup> In August 1971, as part of the British army's 'Operation Demetrius', revived and modified regulations permitted the arrest of suspects without warrants, their holding for interrogation and the gathering of evidence for up to 28 days, and, for some, indefinite detention without charge or trial.<sup>393</sup> By March 1972, 2,937 suspects had been arrested for interrogation under these powers; of these individuals, 1,711 were subjected to prolonged custody, resulting in 796 government detention orders.<sup>394</sup> Extensive powers of administrative detention under executive order continued to be promulgated in Northern Ireland throughout the 1970s and 1980s.<sup>395</sup> Indeed, it is estimated that over ten thousand persons suspected of

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<sup>391</sup> And indeed of its distrust of the Stormont Parliament created in 1921: according to Foxton, the War Office saw the retention of the ROIA as keeping codified the provisions of statutory emergency powers, which could provide cover for military operations in Northern Ireland without having to rely on the Ulster legislature. See Foxton, *Revolutionary*, pp. 369–70.

<sup>392</sup> 'More Ulster Terrorism' and 'Eire to Combat Terrorism', *The Times*, 15 Dec. 1956, pp. 2, 6 (in that order).

<sup>393</sup> The fall out from Operation Demetrius included a case brought before the European Commission of Human Rights in which the British security forces were found to have used five 'sensory-deprivation techniques' to torture fourteen suspects brought in for interrogation in Northern Ireland in August and October 1971: various articles, *The Times*, 3 Sept. 1976, p. 4 & 19 Jan. 1978, pp. 1, 6.

<sup>394</sup> For the introduction, use and abuse of anti-terror legislation in Northern Ireland: Norman Dorsen, David Rudovsky & Lois Whitman, *Human Rights in Northern Ireland: A Helsinki Watch Report* (New York: Human Rights Watch, 1991).

<sup>395</sup> Namely, the Temporary Detention of Terrorists (Northern Ireland) Order (1972) and the Prevention of Terrorism (Temporary Provisions) Act (1974), which was successively re-enacted until its replacement by the 1989 Prevention of Terrorism (Temporary Provisions) Act, c. 4. See Simpson, 'Usual Suspects', pp. 679–82, 704–10; Townshend, *Campaign*, pp. 401, 412–13.

terrorism were taken into custody in Northern Ireland between 1975 and 1989, with more than half of them held for more than 48 hours.<sup>396</sup>

In Anglo-Irish legal discourse, as it was elaborated over the period *circa* 1921—89, ‘terrorist’ thus came to name in legal terminology the figure who is neither to be treated according to the protocols afforded to legitimate belligerents under international law, nor by following the procedural norms which apply to ‘ordinary’ criminals, no matter how serious their offences. The persistence with which Republican dissidence in Ireland has been framed as period irruptions of ‘Troubles’ may therefore be read as a semantic betrayal of successive British executives’ repeated disinclination to recognise extremist campaigns for separatism as political ‘wars’ while at the same time acknowledging that they present juridical, social and moral challenges that exhaust the meaning of ‘crime’.

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<sup>396</sup> ‘Table II: Detentions Under the Prevention of Terrorism Acts or Supplemental Orders 1974, 1976, 1984 and 1989 in Northern Ireland’, in Dorsen *et al.*, *Helsinki Watch Report*, p. 29. See also *ibid.*, pp. 13—14, 27—8, 30.

## Conclusions

In Diceyan terms, the Defence of the Realm Act may be read as the UK parliament's absorption of the residue of the Crown's prerogative to defend the realm at all costs. However, as shown, these fine legal arguments, their practical application, and their meanings as understood by insurgents, counter-insurgents, government legal advisers, and the bureaucrats and politicians of Dublin and London were open to much misinterpretation, accidental and wilful, in Ireland between 1916 and 1920. By extension, this reflected back onto various conceptions and constructions of the normative rules of law, and of certain circumstances—most strikingly, the imposition of martial law in parts of south-western Ireland from late 1920—that apparently necessitated the making of anti-normative, 'sovereign' exceptions to it.

Just as in the messy aftermath of Volunteers' rising of Easter 1916, British conduct in the Anglo-Irish war during the period from 10 December 1920 up to the truce of 11 July 1921 provides multifarious evidence of the confusion regarding both the relationship of martial law to statutory emergency powers, and between the civil and military authorities, which, by this time, had been dogging the government and its counter-insurgency forces in Ireland for four years. Compelled by its awful promise, the hawks and doves of the British executive circled the question of introducing martial law in Ireland with some difficulty in the summer of 1920. The looping trajectories of Whitehall's peregrinations around the issue were difficult to follow from the ground, not least when the ROIA already seemed to provide a statutory form of martial law, and when it was unclear whether the police were being aided by the military, or vice-versa.

The Crown forces most prone to condemnation for alleged abuses in this period were the RIC recruits known as the Black and Tans and the ADRIC. Certainly, their behaviour during and after reprisals for Volunteer attacks suggests that their understanding of the economy of justice in which they were being asked to invest presumed its extra-legality. The British executive did little to dispel this notion, repeatedly refusing to condone 'unofficial' reprisals until the burning of Cork in

December 1920 finally forced a rethink. By then, however, the sobering events of ‘Bloody Sunday’ and the Kilmichael ambush had caused it finally to jettison the ‘murder gang’ hypothesis, and its corollary, a police-led counter-insurgency campaign against the IRA underwritten solely by statutory powers.

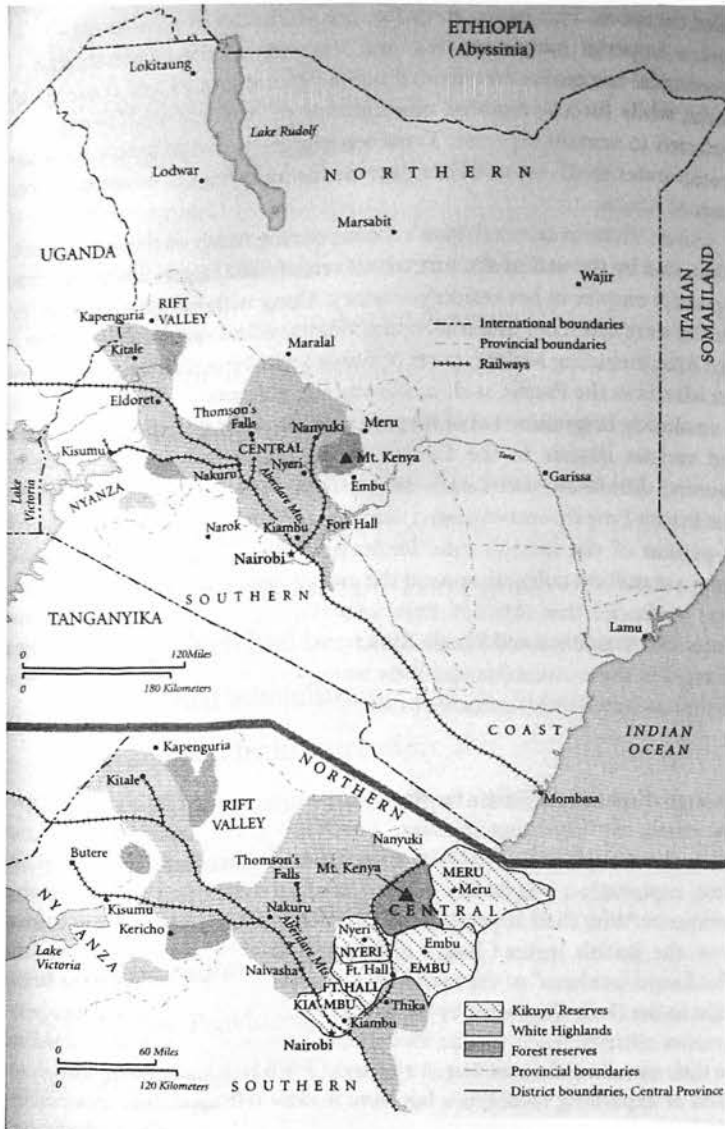
If anything, Irish Command would later conclude, rather than decisively resolving the crisis, the imposition of martial law in Munster between January and July 1921 had only demonstrated the acute difficulties of articulating the doctrine of necessity in practice. Considered from the wider historical perspective afforded by this case study, the messy interplay between the regimes of martial law and the ROIA’s emergency powers appears symptomatic of the Cabinet’s persistent hesitation, confusion and equivocation surrounding the full delegation of executive power—to the army and away from the Irish civil authorities. Conversely, while this sustained unintelligibility frustrated the army *circa* 1919–21, just as in 1916, it continued to offer the executive ‘magical powers’ with which to subdue a restive population.

In three critical arenas of British counter-insurgency actions in Ireland over the period between April 1916 and July 1921—in the high-politics of bringing about negotiations with rebel leaders, in the special tribunals convened to punish insurgents, and in the daily grind of enforcing military rule upon a civilian population—it appears that the power accruing to martial law concerned precisely the vagaries that surrounded its justiciability and the certainty of its forceful imposition of executive will. If ‘terror’ names incalculable social power, then it appears to be necessarily extra-legal, for legalism acts to codify and specify power, to channel its flows according to precedent, to submit its expenditure to account. Yet this case study of counter-insurgency in early twentieth-century Ireland also shows that, in the state’s hands, exceptional strategies to uphold sovereignty through seemingly terroristic means may also seek to find power through recourse to performances of impossible illegality.

The suppression of Mau Mau  
in mid-twentieth-century Kenya

# Kenya circa 1950

(Kikuyuland and the White Highlands inset)



Source: Elkins, *Britain's Gulag*, p. 6.

## Introduction

By the mid-twentieth century, Kenya's Kikuyu diaspora—a dispersal in no small part wrought by the political economy of British colonialism in east Africa during the first half of the twentieth century—was beset by endemic moral, political and socio-economic crises.<sup>397</sup> Recognised by the British administration as the colony's largest 'tribe', as well as its most progressive, Kikuyus occupied the majority of Kenya's Central Province, where they filled the Native Reserve Districts of 'Kikuyuland', constituted a large contingent of the African migrant labourers increasingly cramped into the slums of the capital, Nairobi, and formed the bulk of the 'squatter' farmers and workers in the European-controlled 'White Highlands' of the Rift Valley Province. In the aftermath of the Second World War—a war in which many Kenyans had fought, that had revitalised the European-dominated agricultural sector of Kenya's economy, and which had been followed by an ambitious 'second occupation' by British colonial administrators and technical staffs—Kikuyu political debate quickly became marked by its extremism. By early 1952, a spectacular campaign of arson and cattle-maiming by disaffected Kikuyus in Nyeri District had spilled over into the neighbouring European-settled districts of Nanyuki. In August, a telegram from Kenya's chief secretary informed the Colonial Office that there had been a 'progressive deterioration of law and order' in Nairobi, Mombasa and across the Central and Rift Valley Provinces; 'the Kikuyu are sullen, mutinous and organising for mischief', he added.<sup>398</sup> Days later, the settler press in Kenya led with

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<sup>397</sup> For post-war social crises among the Kikuyu, see, in particular, Kiambu District Annual Report, 1947, Kenya National Archives [hereafter, KNA] DC/KBU/1/38/1—3, 7; Fort Hall District Annual Report, 1947, KNA DC/FH1/26/1—3, and 1948, KNA DC/FH1/127/1—2, and 1951, KNA DC/FH1/30/1/1; Nyeri District Annual Report, 1947, KNA DC/NYI/1/4/2; 'Government of Kenya Administration Department, Olunguruone Settlement, 1940—44', KNA DC/KBU/4/9; 'Police Translations of "Mumenyereri"', KNA MAA/8/106/1, 4, 9, 11, 14, 52. For official perceptions of the spread of Mau Mau, circa 1948—52: F. D. Corfield, *Historical Survey of the Origins and Growth of Mau Mau*, HC 1959—60, vol. x, Cmnd. 1030 [hereafter, Corfield Report], esp. pp. 37, 77—87, 120—124, 137—8.

<sup>398</sup> H. E. Potter, Chief Secy., to Rogers, CO, 17 Aug. 1952, PRO CO 822/436/23.

the revelation of a 'White Massacre Plot in Kenya'.<sup>399</sup> The name given to this apparently genocidal face of immoderate African political debate was 'Mau Mau'.

European settlers were rightly alarmed by the emergence of Mau Mau, but the principal casualties of violence attributed to the movement in the early 1950s were not white. 59 African 'loyalists', as they would become known, ranging from government salaried chiefs and headmen in Kikuyuland to the *tai tai* (the 'tie wearers') of Nairobi, were murdered between May and October 1952. As John Whyatt, the Kenyan government's attorney general, explained to Kenneth Roberts-Wray, the Colonial Office's legal advisor:

...there are very few police in the Native Reserves and most of the administration is carried on by African Chiefs, Headmen, sub-Headmen and so forth. These men are not hereditary Chiefs and office holders but are appointed by Government...[and] are, therefore, Government servants. The Mau Mau criminals have turned their attacks on to these Government servants and the number...who have either been murdered or reported missing during September and October is alarmingly high, so high in fact that if it were to continue much longer there would be a serious risk of a complete breakdown of the administration in the Native Reserves.<sup>400</sup>

Mau Mau's violence, apparently compelled by gruesome oaths enforced on impressionable youths in intimidating circumstances, alike enraged many Kikuyu elders, African loyalists, European settlers, and British colonial officials in London and Kenya. In late October 1952, the government declared Kenya to be a State of Emergency, introducing a range of repressive powers that would allow it to detain Mau Mau suspects and crush African political dissidence. Already, guerrilla armies of young Kikuyu had begun to mass on the thickly forested slopes of the Aberdares mountains and foothills of Mount Kenya, forming the so-called Land and Freedom Armies. The lines of conflict had been drawn.<sup>401</sup>

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<sup>399</sup> 'White Massacre Plot in Kenya', *Sunday Dispatch*, 24 Aug. 1952, PRO CO 822/436/22.

<sup>400</sup> J. Whyatt, Kenya Govt. AG, to K. Roberts-Wray, CO legal advisor, 19 Oct. 1952, PRO CO 822/728.

<sup>401</sup> For 'loyalist' casualties in 1952: Potter, Chief Secy., to Rogers, CO, 17 Aug. 1952, PRO CO 822/436/23. *Tai tai* was a pejorative term for Africans belonging to a colonial sub-élite,

The point of departure for this case study is the Colonial Office's and the Kenyan government's insistence that the conflict they fought in east Africa in the 1950s was not a war, but a civil disturbance. The realities of the conflict in the forests suggest otherwise. Mau Mau's guerrilla-fighters had recognisable armies, which mimicked and even mocked the vernacular of British military rank and organisation, and created supply lines that provided them with arms, ammunition, clothing, medical aid, food and shelter.<sup>402</sup> Battalions of British troops and squadrons of the Royal Air Force were summoned to Kenya to fight them. Meanwhile, three battalions of the King's African Rifles (KAR) were recalled from Uganda, Tanganyika and Mauritius, taking the regiment's establishment in the colony to more than three thousand African soldiers. As of May 1953, Nairobi was separated from GHQ Cairo and General George Erskine brought in as commander-in-chief, with full control over military units and operational control over the police and various counter-insurgency auxiliaries. In the forests, Erskine insisted that it was essential his troops could operate on a 'straightforward war basis knowing that anybody they met must be an enemy'. From March 1954, a 'War Council' of three co-ordinated the exertions of the army, the government and the settlers (represented, respectively, by General Erskine, Governor Evelyn Baring and Michael Blundell, the settlers' leader).<sup>403</sup>

During the early 1950s, casualties mounted, and were counted. By the end of 1956, 1,920 African civilians and members of the armed forces were believed to have been murdered by Mau Mau, with many hundreds not accounted for. 95 Europeans, 32 of them civilians, the rest belonging to the armed forces, had been killed. So, too, had 29 Asians. Meanwhile, Mau Mau losses are estimated at between 11,500 and

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particularly urban petty-bureaucrats (such as clerks, cashiers and office assistants) but also Christians.

<sup>402</sup> For Kikuyu experiences of the forest war: interviews with Muthunga Kagochi, Thika, 28 Feb. 2007, and Daniel Thuku Karatu, Thika, 1 Mar. 2007; Fort Hall District Annual Report, 1954, KNA DC/FH1/33/1—3; John Lonsdale, 'Authority, Gender & Violence: the war within Mau Mau's fight for land & freedom', in E. S. Atieno Odhiambo & John Lonsdale (eds.), *Mau Mau and Nationhood: Arms, Authority and Narration* (Oxford: James Currey, 2003), esp. pp. 60—9.

<sup>403</sup> For the operations of the armed forces: General G. W. E. J. Erskine, C-in-C, 'Report on the Kenya Emergency, 7 June 1953—2 May 1955', 25 Apr. 1955, PRO WO 236/18; Anthony Clayton, *The Killing Fields of Kenya 1952—1960: British Military Operations against the Mau Mau* (Nairobi: Transafrica Press, 2006 [1976]), pp. 6—13, 21—31.

20,000 individuals, a range so broad that it attests to the authorities' difficulty (and reluctance) to gain or publish precise figures reporting the numbers killed.<sup>404</sup> As David Anderson has shown beyond all reasonable doubt, this was a dirty war.<sup>405</sup> Except, to the British and Kenyan authorities, Mau Mau was not a war. Or rather, as argued below, it was far more.

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<sup>404</sup> For casualty statistics: Corfield Report, p. 316; Rosberg & Nottingham, *Myth*, p. 303.

<sup>405</sup> See, in particular, Anderson, *Histories*, ch. 6.

# 1. Legal order and legal disorder in Kenya, circa 1950–52

## § Debating Emergency

To the administration of Phillip Mitchell, governing Kenya when ‘Mau Mau’ first pricked official ears in the late 1940s, the movement at first seemed relatively innocuous, if nevertheless worrying for its secretive nature, with recruiters working away on small communities of African ‘squatters’ in the shadows of large, European-owned estates in the Rift Valley. Initially, Mau Mau was believed to be a *dini*, a nativist religious sect, thought to betray spiritual, not political, discord among followers.<sup>406</sup> Although Governor Mitchell was sceptical about the threat to law and order posed by Mau Mau, his administration proscribed it as an unlawful society in August 1950. By the end of the year there had been 120 convictions for ‘administering an unlawful oath’ of obedience to Mau Mau. As the law and order situation deteriorated, however, increasingly severe measures were introduced to aid the security crackdown. In April 1952, a Collective Punishments Ordinance was approved for Mau Mau cases, providing for fines to be imposed on communities refusing to co-operate with police investigations. The following month, the Kenyan police began an extensive campaign against Mau Mau in the Rift Valley, detaining 150 Kikuyu and arresting ten more. To help reduce the ensuing burden on Kenya’s judicial system, district commissioners across the Central and Rift Valley Provinces were given ‘the equivalent of Supreme Court powers of punishment for certain offences...commonly committed by members of the Mau Mau society’.<sup>407</sup> These

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<sup>406</sup> See ‘extract from letter to Mr Creech Jones from Sir Philip Mitchell’, 4 July 1953, Dame Margery Perham Papers [hereafter, Perham papers], Bodl. RH, Mss. Perham 467/2, f. 5. Encounters with irredentist peasant millenarianism were certainly fresh in the official memory at this time: Rosberg & Nottingham, *Myth*, pp. 276, 325–31; Lonsdale, ‘Moral Economy’, pp. 338–9, 444.

<sup>407</sup> For these extended powers and for arrests made under them: Corfield Report, pp. 37, 88; David Percox, *Britain, Kenya and the Cold War: Imperial Defence, Colonial Security and Decolonisation* (London: Tauris Academic Studies, 2004), p. 35. Kenya’s Penal Code, introduced *circa* 1930, was based on the CO’s Model Code, itself an amalgamation of the Queensland Criminal

measures indicated the government's growing unease about Mau Mau. Nonetheless, they took the form of amendments to the framework of Kenya's existing juridical order, rather than derogations from established legal procedures.

Strong support for more radical departures from Kenya's extant judicial processes and policing powers soon emerged, with the settler lobby particularly forthright in articulating it. Settlers proved instrumental in shaping the official perspective on Mau Mau over the course of 1952, particularly during the summer, a period marked by the lengthy interregnum between the departure of Governor Mitchell, in June, and the arrival of his replacement, Baring, in September. During this prolonged handover between successive governors, Henry Potter, the new chief secretary, headed the Secretariat in Nairobi as acting governor. In August, at meetings with Potter, Whyatt (the attorney general but also the Member for Law and Order) and M. S. O'Rorke (the commissioner of police), the European Elected Members requested that the government introduce emergency powers in certain areas of Kenya, separate Whyatt's dually-held posts, detain the leaders of the Kenya African Union (KAU), and appoint a special commissioner for security. Their demands were rejected out of hand: such powers could not be invoked if there was in fact no emergency, Whyatt insisted.<sup>408</sup>

If the Kenyan government did not concede to settlers' demands that it take emergency powers, it was nevertheless now conscious of extensive and vociferous unease among this crucial constituency of the colonial state and of its potential to agitate for more draconian official responses to Mau Mau. Ominous reports now circulated, which rumoured that settlers in the highlands were forming vigilante committees for 'self-protection'. Mob-rule by Kenya's settlers would undoubtedly bring unfavourable international attention and, worse still, might cement a suspected alliance with their South African counterparts leading to *putschism* against the colonial administration. Indeed, the post-war period had already seen Kenya's settlers organise against African political enfranchisement and gerrymander the machinery

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Code of 1899 and the Indian Penal Code of 1860: J. J. R. Collingwood, *Criminal Law of East and Central Africa* (London: Sweet and Maxwell, 1967), pp. 6–7.

<sup>408</sup> For settler's demands: Michael Blundell, *So Rough a Wind: The Kenya Memoirs of Sir Michael Blundell* (London: Wiedenfeld & Nicolson, 1964), pp. 93–4. For Whyatt's response: Corfield Report, pp. 144–5.

of local government in the Rift Valley, where they controlled the district councils. It might be European, not African, revolt that would propel the colony into disorder.<sup>409</sup>

For Whyatt, trying to withstand settler pressure to suppress Mau Mau by recourse to summary judicial powers and exemplary collective punishments, the choice now seemed to be between two kinds of disorder: the illegal disorder of Mau Mau insurgents (or indeed settler vigilantes) and the legal disorder that he recognised rule by emergency decree to be. At the heart of the latter anxiety lay the governmental quandary about the consequences of maintaining order by overriding the machinery of the rule of law. Enforcing order not backed by law was the work of an arbitrary, despotic, dictatorial or tyrannical regime. In short, it was uncivilised. But if the law could not function, order would fold. Anarchy, the impotence of the state's coercive power, was uncivilised too.<sup>410</sup>

In September 1952, Whyatt and Eric Davies, Kenya's chief native commissioner, travelled to London for discussions with CO staff about the Mau Mau situation. Davies' *aide-mémoire* for the meeting is indicative of the tumult in Kenya by the end of the summer. It cited twenty-two hut-burnings, twelve assaults and nine murders since the beginning of the year, attributing all of them to Mau Mau. It noted that these attacks were directed at co-opted African government employees: chiefs and headmen, their messengers and clerks, agricultural instructors, teachers who supported the recommendations of the unpopular Beecher Report on education, and 'loyal Africans in general'. That Mau Mau were terrorists—with cause collapsed into identity, an identity defined by values antithetical to those of the rule of law—was, by now, starkly clear to the Kenyan government. Worse, the *aide-mémoire* continued, these terrorists seemed sophisticated and even systematic in their ability to exploit the vulnerabilities of the colony's judicial system, with more and more cases having to be withdrawn owing to a lack of evidence, or because prosecution witnesses 'suddenly

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<sup>409</sup> Judging by several accounts published by settlers in the course of the Emergency, demanding summary repression and advocating European control of the state, these fears were not groundless. See, for examples: Ione Leigh, *In the Shadow of Mau Mau* (London: W. H. Allen, 1954), pp. 175–7; Christopher J. Wilson, *Kenya's Warning: The Challenge to White Supremacy in Our British Colony* (No publication details given, circa 1954), pp. 3, 36, 63–70, 78, 106–7; C. T. Stoneham, *Out of Barbarism* (London: Museum Press, 1955), pp. 188–90. See also Throup, *Origins*, pp. 7–8, 24, 95, 101–11.

<sup>410</sup> See Whyatt, Kenya Govt. AG, to Rogers, CO, 2 Sept. 1952, PRO CO 852/437/1.

“disappeared” or turned hostile in court’.<sup>411</sup> A CID memorandum on ‘Mau Mau Intimidation’ soon warned that:

...unless extra-ordinary legislation is enacted to combat this insidious and vicious campaign to obstruct and pervert justice, the situation may well become intolerable. In the absence of such legislation (i.e. the submissibility of secondary evidence) the police and Courts of Justice are virtually powerless.<sup>412</sup>

Like her settlers, Kenya’s police were by now also urging the inexperienced pilots of the Secretariat to introduce extraordinary legislation to the colony as the only viable legal remedy to Mau Mau. The case for emergency rule was growing in strength.

To the Kenyan government, juridical reform remained more palatable than emergency rule, however. The immediate solution to the critical problem of witnesses’ unwillingness to testify against Mau Mau suspects was sought in the Evidence (Temporary Provisions) Ordinance, passed in the Legislative Council on 26 September 1952. This made witness statements attested by senior police officers admissible legal evidence. Witnesses would supposedly be afforded greater protection, but an important safeguard for the accused had been removed and the sanctity of live evidence violated: senior police officials could now act like magistrates, blurring investigatory and judicial roles.<sup>413</sup> As Whyatt commented, this was:

...a considerable departure from the normal principles of criminal procedure but it was considered that the serious increase in the intimidation of witnesses,

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<sup>411</sup> *Aide-mémoire*, ‘Intimidation of and Attacks on Government Servants, Crown Witnesses, Women and Children by Mau Mau’, PRO CO 822/723/90—1. Whyatt and Davies met Roberts-Wray and W. L. Gorell Barnes, an assistant under-secretary. Louis Leakey, in town at the time, was an additional, unofficial presence in the Kenyan government delegation. See Bruce J. Berman & John M. Lonsdale, ‘Louis Leakey’s Mau Mau: A study in the politics of knowledge’, *History and Anthropology*, vol. 5, no. 2 (1991), p. 144.

<sup>412</sup> CID memo., ‘Mau Mau Intimidation’, 12 Sept. 1952, PRO CO 822/438/5. CID: police Criminal Investigation Department.

<sup>413</sup> For later judicial criticism related to this: Col. Sir A. Young, Commissioner Kenya Police, ‘Report on the Joint enquiry with Mr. Justice Holmes into Criticism of Police Conduct’, 17 Sept. 1954, in Sir A. Young Papers [hereafter, Young papers], Bodl. RH, Mss. Brit. Emp. s. 486/5/6, ff. 1—8.

particularly in cases concerning the proscribed Mau Mau Society, made this temporary measure necessary and justified.<sup>414</sup>

Whyatt's comments reveal a sea-change in his thoughts on the adequate legal response to Mau Mau in the weeks of August and September 1952. Previously concerned about weakening the integrity of the colony's juridical structures by taking emergency powers, he now voiced the official conclusion that an internal insurgency threatening to collapse it altogether dictated that the 'normal principles' of the rule of law could not continue as its foundations.

In an attempt to resist the rising tide of lawlessness, a further seven new bills (in addition to that amending to the colony's laws of evidence) were submitted to Kenya's Legislative Council in late September 1952. Special powers were granted to ensure tighter control over the press, to restrict the movement of alleged Mau Mau activists, to make the registration of societies with more than ten members compulsory, to increase the penalties for sedition, and to allow police officers to make arrests without a warrant.<sup>415</sup> In hindsight, these modifications of Kenya's extant juridical system, privileging the maintenance of order over regard for due legal process, and greatly expanding the security forces' powers to intervene in civilian life, appear as staging-posts on the slide towards the declaration of a State of Emergency and the creation of a police-state in the Rift Valley and Central Provinces from late 1952. At the time, however, and despite the wishes of the police and the settler lobby, the Kenyan government and the CO were still convinced that Mau Mau could be suppressed by remaining within the—albeit drastically amended—confines of the

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<sup>414</sup> Attorney General Whyatt's report on 'The Evidence (Temporary Provisions) Ordinance, 1952', 22 Oct. 1952, PRO CO 822/723/72.

<sup>415</sup> By the end of September 1952, 412 people had been imprisoned on charges of belonging to Mau Mau. Over five hundred more, held in 'preventative detention', awaited trial on similar charges. So-called 'Mau Mau offences' against Kenya's Penal Code included: the use of unlawful oaths to commit capital offences (section 61), or other offences (62); compelling another person to take an oath (62(a)); managing, or assisting in the management of, an unlawful society (70), being a member of an unlawful society (71(a)), or knowingly allowing the meeting of an unlawful society (71(b)); and arson (327) or attempts to commit arson (328). Based on: 'Mr. Lyttleton Approves Firm Action in Kenya', *Daily Telegraph*, and 'Emergency Laws—Government to Rush Through Eight bills—Challenge to Mau Mau', *Daily Mail*, both 19 Sept. 1952, PRO CO 822/723/125—6; and Baring, Governor Kenya, to Lyttleton, Col. Secy., 3 Nov. 1952, PRO CO 822/723/71—8. See also *Keesing's Contemporary Archives*, vol. IX, July 1952 – December 1954, p. 12478.

criminal justice system. As late as 10 September, Thomas Lloyd, permanent under-secretary at the Colonial Office, told his boss that, 'We are, I hope, a long way off anything like a real emergency in Kenya'.<sup>416</sup>

On 29 September 1952, Evelyn Baring arrived in Kenya to find a colony in chaos. Two, related factors persuaded Kenya's new governor that the only way to restore order was to ditch the conventional juridical system and its investigative and judicial procedures. The first was the growing administrative consensus that the KAU was in fact little more than a front for Mau Mau.<sup>417</sup> The second, more immediate, factor was the assassination of the Paramount Chief Waruhiu wa Kungu on 7 October. Waruhiu, a formidable Kikuyu elder, a Christian, and a landowner, had spent the fortnight prior to his murder urging his dependents to oppose Mau Mau. His execution was the strongest sign yet that Mau Mau was avowedly anti-government and determined to remove 'loyalist' roadblocks obstructing the realisation of its aims. Moreover, it was alleged that senior members of the KAU had arranged his death. Baring now told the Colonial Office that emergency powers were necessary: he had to 'remove Kenyatta and his henchmen' from the political scene, otherwise loyal Africans would desert the government, trouble would spread to other 'more war-like' tribes (including those who comprised the police rank-and-file in the African reserves), and there would be pandemonium among the Europeans. The CO had to take Baring at his word: order was vaporising. Declaring a State of Emergency was a ghastly step, but an impermanent one: once Kenyatta and his cronies in the KAU were behind bars the rule of law could be restored.<sup>418</sup>

'Jock Scott' was the codename given to the police and army operation to round-up Mau Mau's prime suspects. Those targeted for arrest were senior figures in the KAU, leading trades-unionists and prominent organisers of the Kikuyu independent (non-government, non-mission) schools movement. The Kenyan

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<sup>416</sup> T. Lloyd, perm. Under-Secy., to Lyttleton, Col. Secy., 10 Sept. 1952, PRO CO 822/723/104—7.

<sup>417</sup> See, for example, Central Province Annual Report, 1952, p. 1, KNA VQ/16/89. See also Corfield Report, pp. 124, 137—8, 301—8. Lonsdale notes that Special Branch had formed a 'special bureau' to investigate Mau Mau activities in mid-1952, but, owing to the intimidation of witnesses, turned to tracing links between overt KAU activists and covert Mau Mau ones instead: Lonsdale, 'Kenyatta's trials', p. 210.

<sup>418</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 10 Oct. 1952, PRO CO 822/443. See also: draft letter by Rogers, CO, 11 Oct. 1952, PRO CO 822/443; Whyatt, Kenya Govt. AG, to Roberts-Wray, CO legal adviser, 19 Oct. 1952, PRO, CO 822/728.

government was convinced that it was acting to decapitate Mau Mau; that the detention of these ‘agitators’ would cause the secret society’s withering-away; that the emergency would last only a few months and that its departures from conventional legal standards and procedures were temporary, necessary and justified.

The detentions of the suspected ringleaders of sedition were complemented by a show of European force, not by settlers (in fact, to appease them), but by a battalion of the Lancashire Fusiliers, sequestered from the canal zone in Egypt. Their arrival in Nairobi was timed to coincide with the announcement of the State of Emergency. This military force would work to ‘aid the civil power’—this was not martial law. In fact, their overriding purpose, according the official press handout, was merely to be present; this was ‘showing the flag’. Decisive action by the authorities would send out a clear message to Mau Mau supporters, settlers and indeed foreign investors in Kenya’s economy: the government was acting first; it would rather risk the odium of association with repression than be hostages to terrorism. Half an hour into 21 October 1952, a State of Emergency was declared in Kenya. It would remain in place until 11 January 1960.<sup>419</sup>

## § Creating a colonial crisis

The technical outcomes of the proclamation of a State of Emergency in Kenya yield telling insights into the relationship between law and order there at this time. As observed above, the Kenyan government declared an emergency in the name of self-preservation, fearing that either Mau Mau or settler-responses to it would otherwise terminate legally constituted order in the colony. In effect, it was a declaration of the weakness of the colonial state, which is also partly why the authorities preferred to describe the situation as an ‘emergency’ or a ‘civil disturbance’ rather than a ‘war’. In fact, even ‘rebellion’ appeared to be too risky: Oliver Lyttleton, Secretary of State for

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<sup>419</sup> Based on: Baring, Governor Kenya, to Gorell Barnes, CO, 27 Oct. 1952, PRO CO 822/450; Whyatt, Kenya Govt. AG, to Roberts-Wray, CO, 19 Oct. 1952, PRO CO 822/728; Kenya Government Press Handout, 22 Oct. 1952, Perham papers, Bodl. RH, Mss. Perham 467/6, f. 10. For more, see the files: ‘Proclamation of State of Emergency in Kenya’, PRO CO 822/443; ‘Reports on the Mau Mau Situation by the Commissioner of Police, Kenya’, 16 Oct. 1952 — 1 Apr. 1953, PRO CO 822/447.

the Colonies, insisted that it be avoided in the wording of Emergency Regulations, haunted by the nightmare of affording settlers ‘some cover in the Common Law’ should they ‘take the law into their own hands’.<sup>420</sup> In its later report on the Mau Mau crisis, a British parliamentary delegation that toured Kenya in January 1954 to observe the counter-insurgency measures firsthand likewise offered a pointed rejoinder to settler demands for summary justice (though it euphemistically referred to these demands as coming from ‘members of various communities’), arguing that:

It is important that in the administration of justice the highest standards shall prevail in Kenya. Upon them, indeed, public confidence and support of the Government may be said to ultimately depend.<sup>421</sup>

It can be conjectured that by figuring Mau Mau as an exceptionally potent criminal organisation, to be dealt with under emergency powers, the administration echoed the sentiments of Lloyd George regarding the so-called Irish ‘Troubles’ of *circa* 1919—21: ‘You do not declare war against rebels’.<sup>422</sup> A declaration of war would have also likely brought further critical metropolitan and international attention, at a time when Britain’s formative role in the post-war construction of international conventions regarding the rights afforded to legal combatants was still recent memory.<sup>423</sup> Yet declaring an ‘emergency’ was not only an attempt to avoid giving Mau Mau political legitimacy as an uprising and the recriminations that would follow what might be seen (in the metropolis and internationally) as the overreaction of declaring ‘war’. Imposing rule through emergency powers also constituted a particularly vague, yet potent, formula for the elaboration of state power for an administration in deep crisis, trying to crush an elusive enemy by balancing the legalism of an extended policing operation with outright military coercion. Since Mau Mau’s fighters were neither rebels nor soldiers, but a special kind of criminal,

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<sup>420</sup> Lyttleton, Col. Secy., to Baring, Governor Kenya, 7 May 1953, PRO CO 822/734/14.

<sup>421</sup> *Report to the Secretary of State for the Colonies by the Parliamentary Delegation to Kenya, January, 1954*, HC 1953—54, vol. xi, Cmd. 9081 [hereafter, ‘Rept. Parl. Del. 1954’], p. 9.

<sup>422</sup> Lloyd George: Cabinet conversation, 30 Apr. 1920, PRO CAB/23/20.

<sup>423</sup> These included: the Geneva Conventions, the European Convention on Human Rights (ECHR), the United Nations’ Universal Declaration on Human Rights, the UN Convention on Torture and the (earlier) International Labour Organizations’ Forced Labour Convention. See: Elkins, *Britain’s Gulag*, pp. 96—7; Percox, *Cold War*, pp. 132—3; Anderson, *Histories*, p. 113.

they were open both to prolonged, technically illegal, detention without recourse to writs of *habeas corpus*, and to prosecution, which exposed them to the full glare of legal penalties.

The Emergency Regulations introduced in late October 1952 were defined under the Emergency Powers Order in Council of 1939, in turn largely derived from the 1939 Emergency Powers (Defence) Act, introduced in Britain as a precaution against foreign invasion before the outbreak of the Second World War.<sup>424</sup> These powers specified that:

The Governor may 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 services essential to the life of the community.<sup>425</sup>

The taking of emergency powers could thus be figured as an instrumentalisation of the law, the government's tactical deployment of it to achieve a specific objective related to biopolitical ends of governance (namely: 'securing the public safety', defending 'the territory', maintaining 'public order', or preserving the 'life of the community').<sup>426</sup> Indeed, the provisions stretched as far as equipping the governor with powers to suspend the existing juridical order itself, should he wish:

Without prejudice to the generality of the powers conferred by the preceding subsection, the Regulations may, so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned...provide for

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<sup>424</sup> Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. VI, c. 62.

<sup>425</sup> Emergency Powers Order in Council, 1939, para. 6, cited in Baring, Governor Kenya, to Lyttleton, Col. Secy., 10 Oct. 1952, PRO CO 822/443. However, the 1939 Order in Council did not allow for the governor to declare an Emergency only in part of a territory: the Emergency Powers (Amendment) Order in Council, 1952, was passed for this purpose. See Lyttleton, Col. Secy., CO Circular to all Governors, 2 Jan. 1953, PRO CO 822/725/27—8.

<sup>426</sup> Cf. Foucault, 'Governmentality', pp. 90—95, 102—3.

amending any law, for suspending the operation of any law and for applying any law with or without modification.<sup>427</sup>

The formulation of these emergency powers suggest that a Schmittian ‘state of exception’ was instituted in Kenya from October 1952, in which the truly fictitious nature of the law and the absolutist decisionism of sovereign power are made explicit by the use of a form of law to suspend existing laws. Following Agamben’s use of Schmitt, we might then see the Kenyan Emergency as revealing the sovereign’s constitutive power to create both norm and exception, and, in the latter, attempt to submit anyone subject to his sway to his immediate and total power over their life (‘bare life’, in Agamben’s phrase).<sup>428</sup> That may have been a technical possibility under the terms of the Emergency Regulations, but it is not the most accurate way to approach the immediate consequences of their introduction for the colonial administration’s attempts to suppress Mau Mau in Kenya from late 1952. Rather, the principal technical outcome of imposing a State of Emergency was the empowerment of the governor to create an additional, expedited criminal justice system that overlaid and interacted with the existing one.

The 1939 Order in Council had been used in Nigeria and Uganda in 1949, in the Gold Coast in 1948 and 1950, and in Grenada in 1951, but it was Malayan experience—the British administration had taken emergency powers there in June 1948 to head off Communist-led insurgency—that in many ways provided the template for Kenya’s emergency regime.<sup>429</sup> Of immediate interest to the Kenyan authorities in the context of the Jock Scott arrests was the introduction to Malaya’s Emergency Regulations Ordinance, which distinguished between trial and detention:

There have been complaints that there is insufficient evidence against persons detained under the Emergency Regulations to bring them to trial. This is to misunderstand the whole purpose of detention in times of Emergency. A person is detained as a measure of prevention: he is tried because there is evidence that

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<sup>427</sup> Emergency Powers Order in Council, 1939, paras. 6 and 8, cited in Baring, Governor Kenya, to Lytton, Col. Secy., 10 Oct. 1952, PRO CO 822/443.

<sup>428</sup> See Schmitt, *Political Theology*, esp. pp. 5, 12–13, 31–4; Agamben, *Homo Sacer*, esp. pp. 15–19, 64–5, 83–4.

<sup>429</sup> See A. Hall, CO Principal of East Africa Dept., to Baring, Governor Kenya, 10 Oct. 1952, PRO CO 822/443.

he has committed an offence. A person can be punished under the law only if he is proved beyond reasonable doubt by witnesses in court to be guilty of a specific offence. A person is detained not because he has committed an offence but because there are reasonable grounds to suppose that if he is not detained he will be likely to assist the enemies of society and will imperil the safety of the State. A person is in short tried for what it is believed he has done; he is detained for what it is reasonably thought he is likely to do. It may sometimes be necessary to detain a man before he has actually committed any offence at all, it might indeed obviously be dangerous to wait until he does; and it would clearly be impossible to allow a person of known subversive symptoms and association to have unfettered freedom of action until such time as he happens to be detected in an offence. Wars cannot be won nor States preserved on principles such as these.<sup>430</sup>

This distinction between trial and detention marked the significant difference between conventional and Emergency legal practice. The juridical order constituted under the latter powers did not seek to produce disinterested ‘justice’, in line with the rule of law, as a first priority of upholding state sovereignty, but sought instead to remove the suspect from circulation within society. Addressing the House of Commons in late October 1952, Lyttleton elaborated upon this principle:

Mau Mau terrorism is carefully planned, centrally directed and its object is to destroy all authority other than Mau Mau.... Action against these leaders was imperative. The ordinary process of the law is necessarily slow. In present conditions in Kenya it would have allowed time and opportunity for those behind the recent outrages to organise widespread disturbances in which numbers of innocent people might have been killed. The declaration of an Emergency has enabled the Kenya Government to detain the ring-leaders and their lieutenants, about 130 altogether.<sup>431</sup>

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<sup>430</sup> ‘Detention and Deportation During the Emergency in the Federation of Malaya’, No. 24 of 1953, PRO CO 822/728. This document, a booklet of the Emergency Regulations introduced in Malaya in 1948, contextualises the measures introduced against Mau Mau, showing that the use of screening, rehabilitation, and detention camps had all been implemented in British Malaya some years before their introduction in Kenya.

<sup>431</sup> Lyttleton, Col. Secy., to Baring, Governor Kenya, 21 Oct. 1952, relaying his statement to the House of Commons, PRO CO 822/438. Figures for the numbers on the original

As in Malaya then, the pre-emptive powers of detention provided for under the Emergency Regulations introduced in Kenya were clearly designed to uphold order, not law. Mau Mau demanded that exceptions be made to the ‘ordinary process of the law’, here constituted, and in indeed elevated, as the normative code for sound governance in colonial Kenya.

Kenyatta’s detention was quickly revealed to be a false dawn. It appears that by associating him with Mau Mau, his arrest convinced many Kikuyu, hitherto reluctant to support militants with apparently repellent methods, that this conservative elder from Kiambu District advocated the movement as one morally legitimate and socially necessary to resist the colonial authorities’ extra-local forces of oppression.<sup>432</sup> Meeting at Government House a week after the arrests, senior Kenyan administrators, police and army officials, and representatives of the CO (including Lyttleton), were informed that, since the declaration of the emergency, one European and a further seven ‘loyal’ Kikuyu had been murdered, that Mau Mau oath-taking was ongoing, and that ‘an unknown number of young Kikuyu had taken to the hills and forests’ to form the Land and Freedom Armies.<sup>433</sup> Jock Scott had backfired: rather than asphyxiating the flames of Mau Mau, the executive detentions made under emergency powers had oxygenated them. As the following chapter shows, the

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government list of targets, and the numbers actually arrested on the night of 20–21 October 1952 vary from 83 to 200 persons: cf. Corfield Report, p. 159; Blundell, *Wind*, p. 98; Donald L. Barnett & Karari Njama, *Mau Mau from Within: Autobiography and Analysis of Kenya’s Peasant Revolt* (London: MacGibbon & Kee, 1966), p. 70; Gakaara wa Wanjau, *Mau Mau Author in Detention*, trans. Paul Ngigi Njoroge (Nairobi: Heinemann Kenya, 1988 [1983]), pp. 213–18; Percox, *Cold War*, p. 49; Anderson, *Histories*, pp. 62–3.

<sup>432</sup> Historical research has since shown the fallacy of the official reckoning that Kenyatta and his closest associates had directed Mau Mau oath-taking: John Spencer, *The Kenya African Union* (London: KPI, 1985), esp. pp. 208–34, and Lonsdale, ‘Moral Economy’, esp. pp. 426–36. Greet Kershaw concludes that the change in the social composition of Mau Mau supporters after the declaration of the Emergency—which, she also points out, created a huge surge in oath-taking in Kiambu District—led to larger Kikuyu landholders appropriating the Mau Mau of the dispossessed: Greet Kershaw, *Mau Mau From Below* (Oxford: James Currey, 1997), pp. 10–11, 248–9. See also Kiambu District Annual Report, 1952, KNA DC/KBU/1/43/4.

<sup>433</sup> ‘Minutes of a meeting at Government House to discuss the Jock Scott Operations’, 29 Oct, 1952, cited in Percox, *Cold War*, p. 51. It is estimated that around a thousand Kikuyu, overwhelmingly young males, headed to the forests of the Aberdares and Mount Kenya in this period, forming the nuclei of the Land and Freedom Armies that fought the British army and the Kenyan security forces for the next four years. For more: Lonsdale, ‘Authority, Gender & Violence’, esp. pp. 60–9; Anderson, *Histories*, ch. 6.

Kenyan authorities' perceptions of Mau Mau would now radically alter. So, too, would the scope of the emergency regime.

## 2. The expansion of counter-insurgency operations in Kenya, circa 1952–56

### § Auxiliary forces and the bureaucratisation of counter-insurgency

Although Kenya's executive proclaimed a State of Emergency as a form of pre-emptive strike against crimes it anticipated that KAU members (as the agitators believed to be 'behind' Mau Mau) would commit, it in fact trailed the Provincial Administration, the police's Special Branch and CID, and, in particular, the colony's settler community in gathering intelligence about the secretive movement.<sup>434</sup>

Certainly, for African dissidents who had resolved that Europeans must leave Kenya if their communities were to be liberated from oppressive interference by white outsiders, European settlers were an obvious target: they embodied the inequalities engendered by the government's racial patronage of whites' prioritised access to land, control of labour regulations and representation on the Legislative Council. More prosaically, many lived in rural isolation, possessed weapons and ammunition, and employed Africans as domestic servants who might now be manipulated to betray their masters. The Blindloss family, the Tullochs, the Meiklejohns, Charles Fergusson and Roy Bingley, Kitty Hesselberger and Raynes Simpson, and Eric Bowyer—all attacked, most of them killed, in successive incidents occurring between October 1952 and January 1953—fitted these categories.<sup>435</sup>

The attack on Roger, Esmé and Michael Ruck, and Muthurua Nagahu, a *shamba* boy, at their farm on the Kinangop, on 24 January 1953, was different. Roger was in the Kenya Police Reserve (KPR) and had stationed extra guards on his farm because of Mau Mau. Esmé ran a clinic on the farm for ill and injured squatter-labourers. Six-year old Michael played with the children of his parents' Kikuyu employees. Young, intelligent, hard-working, vigilant and sociable families like theirs

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<sup>434</sup> Corfield Report, pp. 77–8.

<sup>435</sup> Leigh, *Shadow*, pp. 66–79. For analysis: Anderson, *Histories*, pp. 88–93.

should not fall foul to Mau Mau callousness. Hundreds of settlers marched on Government House to demand retribution when news of their murders broke.<sup>436</sup>

Partly in response to the wave of attacks on settlers in late 1952 and early 1953, particularly the Ruck murders, Kenya's security forces were rapidly and haphazardly expanded in the opening months of the emergency. This expansion was in fact a continuation of practice in the months leading up to the declaration of October 1952. From some time around early 1952, certain European settlers, increasingly alarmed by reports of Mau Mau attempts to disrupt their workforces and keen to investigate the squatter communities living on neighbouring farms run by absentee landlords ('an excellent granary for Mau Mau gangsters'), had begun to 'screen' African employees to determine where their loyalties lay.<sup>437</sup> With the declaration of the emergency, the KPR was called up for full time duty, while the further expansion of Kenya's security forces from late 1952 saw the formal incorporation of pre-existing settler commando and self-defence groups into the state's counter-insurgent machinery. As Christopher Todd, who first arrived in Kenya among a wave of five hundred European migrants on the Soldiers' Settlement Scheme after World War I, explained:

A number of farmers in the district [Naivasha] became so exasperated by the lack of action taken by Government to suppress the menace that they formed a Vigilance Committee, to take the law into their own hands for the purpose of protecting the lives of their families should the occasion arise. The Police soon got wind of this "subversive society". After discussion with the members, they persuaded them to join the K.P.R. where they would have legal protection in the event of an open revolt taking place.<sup>438</sup>

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<sup>436</sup> Ruck murders and the settlers' march on Government House: Regina versus Nderitu s/o Kikaria and 11 others, KNA MLA 1/467; Anderson, *Histories*, pp. 93—5, 102—7; Blundell, *Wind*, pp. 123—8; Leigh, *Shadow*, pp. 74—82.

<sup>437</sup> Naivasha District Annual Report, 1955, KNA DC/NVA/1/1/10.

<sup>438</sup> C. T. Todd, 'Kenya's Red Sunset' (1965), pp. 240—1, Bodl. RH, Mss. Afr. s. 917. See also 'Land of Murder & Muddle: A Report from Kenya', *Time* magazine, 30 March 1953; Col. Sir A. Young, Commissioner Kenya Police, 'Report on the Joint enquiry with Mr. Justice Holmes into Criticism of Police Conduct', 17 Sept. 1954, in Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/6, f. 8.

During the emergency, around two thousand settlers became full-time officers in the KPR, and nearly five thousand found part-time employment in the Provincial Administration. Now absorbed into the security forces, settler members of the KPR would pioneer official attempts to differentiate between loyal and disloyal African labourers working on European farms, with significant repercussions for the way the efforts to suppress Mau Mau would unfold.<sup>439</sup>

Initial settler-led inquiries, carried out by roving teams of self-appointed screeners travelling from farm to farm in their local neighbourhoods, soon produced disturbing accounts of Mau Mau oath-taking ceremonies. Kikuyu recollections of such screening sessions make it easy to understand why they generated some astonishing accounts of the functioning and intentions of Mau Mau.<sup>440</sup> Unquestionably, some of these impromptu interrogation sessions were attended by the threatened or actual deployment of bodily violence on Mau Mau suspects.<sup>441</sup> Reports about the psychological and physical intimidation of suspects interrogated in screening sessions, which question the reliability of the confessions obtained from them, appeared throughout the emergency and reached the highest levels of the colonial establishment.<sup>442</sup> Despite the wide-ranging suspicion about the methods used to

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<sup>439</sup> Laikipia District Annual Report, 1953, KNA DC/LKA 1/4/10; I. R. O. Hennings, memo, 'Reconstruction Committee Report, November 1953—June 1954', 30 June 1954, KNA MAA 7/813/65.

<sup>440</sup> See, for examples: interview with Margaret Nyaruai, from Ruguru, Mathira, Nyeri District, 21 Mar. 1999, quoted in Elkins, *Britain's Gulag*, p. 68; Robert B. Edgerton, *Mau Mau: An African Crucible* (New York, NY: The Free Press, 1989), pp. 159, 163, 184—5; Kanogo, *Squatters*, p. 142.

<sup>441</sup> For various allegations of abuse carried out by settler-led screening teams: Erskine, C-in-C, to Lyttleton, Col. Secy., 10 Dec. 1953, PRO WO 32/15834; D. H. Rawcliffe, *The Struggle for Kenya* (London: Victor Gollancz, 1954), p. 68; R. D. Fairn (chairman), *Report of the Committee on Emergency Detention Camps, With an Exchange of Despatches between the Secretary of State for the Colonies and the Governor of Kenya* (Nairobi: Government Printer, 1959) [hereafter, Fairn Report], p. 11; C. T. Todd, 'Kenya's Red Sunset' (1965), p. 263, Bodl. RH, Mss. Afr. s. 917; correspondence from E. Carey Francis (circa April 1953 – December 1954) in Perham papers, Bodl. RH, Mss. Perham 467/1, ff. 4, 6, 10—11; and the file 'Treatment of Kikuyu Prisoners During the Emergency in Kenya', PRO CO 822/489.

<sup>442</sup> See, for example, Canon T. F. C. Bewes, Church Missionary Society Africa Secy., to Baring, Governor Kenya, 26 Jan. 1953, PRO CO 822/471/88—9. Cf. Baring to Lyttleton, 11 Feb. 1953, PRO CO 822/471, and Baring to Lyttleton, Col. Secy., 10 Dec. 1953, PRO WO 32/15835. Few testimonies collected by such teams survive, but those that do follow a regularised, sanitised pattern. Translated into English, they bear evidence of their restructuring for consumption by Anglophone audiences. See, for examples: Waweru s/o Chege to R. K. S. Hendry, undated [circa late 1952], PRO WO 32/15834; Secretariat Nairobi to H. P. Hall, CO, 20 Sept. 1952, PRO CO 822/436/28—9; Rept. Parl. Del. 1954,

derive ‘confessions’ from suspect labourers, however, there is little evidence that the colonial authorities questioned the veracity of intelligence derived from these early screening sessions. In fact, they formed the centrepiece of the official hypothesis that Mau Mau was inexplicable as a purely socio-economic or socio-political crisis, and in fact understandable entirely in terms of oath-taking: as a crypto-magical criminal phenomenon particular to the Kikuyu psyche.<sup>443</sup>

In January 1954, Kenya’s chief secretary issued a ‘Memorandum on Mau Mau Atrocities and Rituals’ that endorsed many of the settlers’ most shocking findings. It quoted gruesome extracts from the confession of one Waweru to settlers in the Naivasha District of the Rift Valley Province, describing a so-called ‘higher’ Mau Mau oath in graphic detail. Such revelations, which made their way into the British parliament and press, appalled colonial sensibilities. Worse still, from a counter-insurgency perspective, was the apparently unrelenting course of criminal action that taking a higher oath committed the recipient to, notably by requiring them to promise to kill whites. Moreover, the memorandum related the following Special Branch conclusions: that ‘no Kikuyu man, woman or young person’ was exempt from the general oath of solidarity with the Mau Mau movement; that a higher oath, ‘taken only by leading political agitators, probably only at the express invitation of Kenyatta’, had been developed to guarantee even stronger fidelity to Mau Mau among a so-called ‘hardcore’; that a ‘Forest oath’ was ‘administered by forest gang leaders to their followers’; and that a “‘Batuni” or “Platoon” oath, the most recent innovation...[was] gradually being administered to all Mau Mau “soldiers” and “soldier recruits”’. ‘By taking the “Batuni”,’ the report concluded, ‘a man becomes a full-blooded terrorist’.<sup>444</sup> The memorandum therefore grimly articulated the official conviction that perverted Kikuyu oaths foregrounded

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appendix II; E. H. Windley, Secretariat Nairobi, to E. B. David, CO, 30 Jan. 1954, PRO CO 822/800/32; African Information Working Party meeting, Nairobi, Minute 61, ‘Ritual of Mau Mau oaths’, 18 Jan. 1954, PRO CO 822/800/35.

<sup>443</sup> A trope for explaining Mau Mau repeated throughout the emergency by both the colonial authorities and settlers alike: cf. Lytton, Col. Secy., HC Deb., 7 Nov. 1953, vol. 507, col. 459, and Leigh, *Shadow*, p. 222.

<sup>444</sup> Potter, Chief Secy., ‘Memorandum on Mau Mau Atrocities and Rituals’, 12 Jan. 1954, PRO CO 822/800/40—1, 44—5.

commitment to Mau Mau and made all members of that ethnic classification potential suspects.<sup>445</sup>

To verify the enormities of Mau Mau apparently revealed by European screeners' interrogations of suspect Africans, the administration consulted doctors Louis Leakey and Colin Carothers, the colony's leading white experts on Kikuyu society and 'the African mind', respectively.<sup>446</sup> They became the foremost advisors on the government's Sociological Committee, established at an early stage of the emergency to inquire into the causes underlying Mau Mau and to suggest potential remedies for the unrest.<sup>447</sup>

The opinions of Carothers and Leakey varied in scope and subtlety, but not in influence. Carothers, an 'ethno-psychiatrist', critiqued the pace and indeed justice of colonial development policy in Kenya, and attributed Mau Mau oaths to an ethnicity's desire to return to a simpler, 'tribal' past.<sup>448</sup> Leakey, born and raised among Kikuyus, expounded a conservative strain of Kikuyu thought, condemning the oaths and adding to the sensationalism of the confessions obtained by screeners.<sup>449</sup> Such nuances in the experts' thoughts went largely unregistered in official circles. Rather, the insights of Carothers and Leakey were synergised: oath-taking was intrinsic to Kikuyu society; young, male Kikuyus were classic, bewildered,

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<sup>445</sup> See, for example, 'Misbehaviour of Troops and Mau Mau Oaths', PRO WO 32/15834; and 'Confidential Running File', KNA AHC/9/136. Kikuyu perspectives on oath-taking have been extensively covered in secondary literature. See, in particular: Barnett & Njama, *Within*, chs 6 & 7; Waruhiu Itote (General China), *Mau Mau' General* (Nairobi: East African Publishing House, 1967), pp. 273—83; Gucu G. Gikoyo, *We Fought For Freedom/Tulipigania Uhuru* (Nairobi: East African Publishing House, 1979), pp. 32—8.

<sup>446</sup> Leakey wrote a compendious ethnography of the Kikuyu in the 1930s, worked as a Special Branch officer during the Second World War (carrying out surveillance on the Kikuyu Central Association, proscribed in 1939, largely thanks to information he supplied), and published two widely-read and officially-endorsed monographs on Mau Mau. Carothers was the former long-term director of Mathari Mental Hospital and was commissioned to write a report on 'the African mind in health and disease' by the World Health Organization, in 1953. See Berman & Lonsdale, 'Leakey's Mau Mau', esp. pp. 144—60, 174—8, 184—5.

<sup>447</sup> The Sociological Committee also included Sidney Fazan, H. E. Lambert, David Waruhiu, Harry Thuku, Mbira Githatu, and Chief Kibathi. For more: Rosberg & Nottingham, *Myth*, pp. 336—7; Kershaw, *Below*, p. 237.

<sup>448</sup> J. C. Carothers, *The Psychology of Mau Mau* (Nairobi: Government Printer, 1954), esp. pp. 3—12, 17—18.

<sup>449</sup> Louis S. B. Leakey, *Mau Mau and the Kikuyu* (London: Methuen, 1953 [1952]), esp. pp. 51—5, 78—81, 96—100, and *Defeating Mau Mau* (London: Methuen, 1954), esp. pp. 27—8, 34—54, 77—87.

rootless 'Africans in transition', from a traditional, communal past to a modern, atomised present; Mau Mau oath-taking, corruption of Kikuyu custom, was their awful, but predictably irrational flight from the dislocation and dispossession wrought by modernisation in colonial Kenya.<sup>450</sup> As Potter's memorandum on oath-taking put it:

...the only possible deduction to be drawn...is the horrible one that we are now faced in Kenya with a terrorist organisation composed not of ordinary humans fighting for a cause, but of primitive beasts who have forsaken all moral codes in order to achieve the subjugation of the Kikuyu tribe and the ultimate massacre of the European population of the colony.<sup>451</sup>

Screening sessions had shown, and the experts seemed to agree, therefore, that Mau Mau had bastardised Kikuyu ritual practice by administering oaths forcibly, at night, *en masse*, and irrespective of either gender or generational seniority; the oath givers were exploiting Kikuyus' fear of the supernatural, not quite extinguished by the forces of colonial modernisation, to generate fanatical sectarian commitment to its cause. The timing of the release of both Potter's memorandum and the Sociological Committee's report—in early 1954—however, gives a further indication of the extent to which the government lagged behind settlers in generating information about Mau Mau and in directing screening operations.

As settler consciousness of the severity of Mau Mau oath-taking and the instrumental violence that it inspired grew, screening operations were expanded. At an early stage in the emergency, two prominent settler pioneers of screening, Colonel Fellowes and H. E. Lambert, established 'Resistance Movement Centres' on farms at Bahati and Subukia in Nakuru District. Under the Emergency Regulations, these screening camps were classified as legal places of detention, which meant that writs of *habeas corpus* were not required in order to hold suspects for questioning. Their European supervisors were recognised as third-class magistrates, enabling them to receive confessions from suspects and to make these the basis of recommendations for

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<sup>450</sup> The Kikuyu commonly used oaths as promises to seal business transactions, compel the truth from opponents in a legal case, provide intra-generational insurance against hardship, ensure solidarity against the black-magic of venomous sorcerers, and unite warriors before combat. See, in particular, Kershaw, *Below*, pp. 181—3, 220, 311—20.

<sup>451</sup> 'Enclosure "E" to S.15/Vol.II/79', in Potter, 'Memorandum on Mau Mau Atrocities and Rituals', 12 Jan. 1954, PRO CO 822/800/45.

penal sentences or detention. Suspects brought in for screening were questioned and classified according to the perceived strength of their allegiance to Mau Mau. These interrogations might only last a few minutes; alternatively, suspects could be held for several weeks and questioned at length.<sup>452</sup> Administered by individuals whose integrity Kenya's colonial establishment broadly considered beyond reproach, and who were equipped with extra-legal powers that melded investigative duties with judicial powers, the permanent establishment of such interrogation centres marked the beginnings of the institutionalised incorporation of screening into colonial counter-insurgency against Mau Mau.<sup>453</sup> They quickly became central to it: by April 1955, Kenya's Ministry for Internal Security and Defence, headed by John Cusack, officially recognised 92 Interrogation Centres, spread throughout the colony.<sup>454</sup>

By 1953, the three main districts of the Kikuyu Native Reserve had become the central focus of the Mau Mau struggles and the security forces' counter-insurgency efforts against African civilians. In late 1952, as government awareness of guerrilla forces massing in the Aberdares ranges and on the slopes of Mount Kenya developed, as attacks on settlers increased, and as intelligence from labour-screening

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<sup>452</sup> Under Emergency Regulation 3, a police officer could arrest any person he reasonably suspected 'has acted or is about to act in a manner prejudicial to the public safety or the preservation of the peace or is about to commit an offence against [the Emergency Regulations]' and detain them for 24 hours. A magistrate or police officer of the rank of assistant inspector (or above) could extend this period for a further 48 hours. If 72 hours still did not provide enough time to carry out full inquiries, detention could be extended to a week. Under Regulation 2, a police officer of the rank of assistant inspector or above could detain anyone on suspicion of breaching a regulation for 28 days. See Emergency Regulations, 1952, PRO CO 822/728; 'Operation "new look" Screening – Nanyuki District'. DO (Screening), Nanyuki, to DC, Nanyuki, 23 Dec. 1953, and 'Minutes of meeting to decide on transfer and subsequent disposal of Mau Mau suspects', 29 May 1954, both in KNA DC/NYK/3/9/33/2–4.

<sup>453</sup> Innocence and guilt were not absolute terms in the context of screening sessions: sliding scales of justice, and appropriate gradations of a suspect's presumed militancy, were seen as a necessary feature of the juridical order instituted to cope with an enemy as slippery and invidious as Mau Mau was thought to be. In the Rift Valley, those deemed innocent (which might mean unaffected or uncommitted to Mau Mau) were released and either re-engaged on their former farms or 'repatriated' to the reserves by the Labour Department. In the reserves, those released would be expected to join or assist the Kikuyu Guard, due to the conflicts' polarisation of Kikuyu communities there. In the Rift Valley and in the reserves, those deemed highly suspect were handed over to Special Branch for further interrogation. In Kikuyuland, those deemed to be involved in Mau Mau were either arraigned before local Native Tribunals for trial (if thought to be relatively mild advocates of the movement), or passed to the police for criminal prosecution (if their alleged offences were more serious).

<sup>454</sup> See 'Temporary Places of Detention, Schedule', 10 Apr. 1955, KNA AA/45/26/3/3/36.

widened official perceptions of the aims and methods of Mau Mau, it was decided that all suspect Kikuyu living outside of the reserves were to be ‘repatriated’ to the Central Province. Transit Camps were established in the highlands to hold Kikuyu awaiting their final deportation; the largest were in Nakuru, Gilgil and Thomson’s Falls. In all, between 70,000 and 100,000 Kikuyus were either forcibly evicted from, or voluntarily departed, the Rift Valley in the first six months of the emergency. In the already pullulating reserves of Kikuyuland, this exodus created unprecedented administrative problems and greatly intensified existing social pressures. In turn, this was seen to justify an extraordinary ramification of the emergency powers and their distribution among so-called ‘loyalist’ elements of the Kikuyu population.<sup>455</sup>

The formation of paramilitary units of Kikuyu loyalist auxiliaries bears many similarities to that of the absorption of European settlers into Kenya’s security forces. Since 1951, Christian Kikuyu had voluntarily banded together to protect their congregations, and, over the summer of 1952, they had played an increasingly prominent role in opposing oathing, especially in Nyeri and Fort Hall. Yet with congregation-level political debate and activism being situated within the broader matrices of colonial governance and counter-insurgency, such ‘spontaneous’ recruitment was now encouraged and intensified at the behest of the Kenyan government. Provincial administrators across Kikuyuland were soon cajoling chiefs to organise local levies of thirty to fifty men for ‘self protection’ in their locations and sub-locations. Shortly before the emergency was proclaimed, the first units of what would become known as the Kikuyu Guard were formed. From late summer 1952

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<sup>455</sup> Three amendments to Emergency Regulation 2, 1953, provided for the removal and transit of any Kikuyu from one area of the colony to another. ‘Repatriation’ was a considerable misnomer, typical of the euphemisms for state-led dislocation and violence invented during the emergency period (such as ‘rehabilitation’ and ‘screening’). For the majority of squatters, the Rift Valley was home; extending the Kikuyu frontier westwards into the uncleared highlands had necessitated a wholesale transfer of households and the attendant spiritual claims to virtuous moral existence. There was neither room nor welcome for them in communities inhabiting heavily congested ancestral kin lands in the Central Province. For the squatter exodus: Naivasha District Annual Report, 1953, KNA DC/NVA/1/1/1; also Elkins, *Britain’s Gulag*, pp. 54–9. For squatters’ moral agonies: Lonsdale, ‘Moral Economy’, pp. 339, 383–5, 439.

until late spring 1953, they were brought more closely into the state's law and order machinery.<sup>456</sup>

The official rationale behind the government's expansion of the Kikuyu Guard was plain enough. As Fort Hall's DC put it in 1952:

The administrative organisation of Chiefs, Headmen and Kapitens is the absolutely vital basis on which the preservation of law and order depends, and without which little information is obtainable.<sup>457</sup>

Accordingly, in the course of late 1952 and 1953, the government acted rapidly to increase the number of police posts in Kikuyuland, attaching Kikuyu Guard units to them, particularly from spring 1953, and particularly in Fort Hall and Nyeri. Loyalists were offered notable incentives to join counter-insurgency operations. Chiefs and headmen were granted a fifteen-shilling monthly honorarium for leading units, while Kikuyu Guard recruits were exempted from the special emergency tax levied on all other adult Kikuyus, permitted to break curfews, and given food, clothing and contributions towards their children's school fees. Impecunious Mau Mau suspects were excused payment of the hundred-shillings' fine for having taken an oath if they joined.<sup>458</sup>

As the dimensions of Kenya's emergency changed in late 1952 and early 1953, the Kikuyu Guard was drawn more deeply into the counter-insurgency

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<sup>456</sup> This paragraph and the following one based on: Kenya Government Press Handout, 27 Dec. 1952, Perham papers, Bodl. RH, Mss. Perham, 467/6, ff. 24—5; Fort Hall District Annual Report, 1952, KNA DC/FH1/31/4—5; 'Minutes of the meeting of the Standing committee on Law and Order', 12 Feb. 1953 and 'Minutes of the meeting of the Legislative Council Committee for the Preservation of Law and Order', 1 Dec. 1952, Blundell papers, Bodl. RH, Mss. Afr. s. 746/12/5, ff. 1—3, 6, 14; Leigh, *Shadow*, p. 85; 'The Troubled Scene', *East African Standard*, 23 Oct. 1953. See also Daniel Branch, 'Loyalism During the Mau Mau Rebellion in Kenya, 1952—60' (unpublished Ph.D. thesis, University of Oxford: 2005), pp. 79—85; Kershaw, *Below*, pp. 325—8.

<sup>457</sup> Fort Hall District Annual Report, 1952, KNA DC/FH1/31/5.

<sup>458</sup> It must be noted that Kikuyu Guard recruitment was more nuanced than simply being a spontaneous response to state patronage, since access to the latter was mediated through the existing structures of African local government. Some Kikuyu Guard were effectively conscripts to local power blocs—sovereign bodies seeking a certain autonomy from the state—having been press-ganged into joining by chiefs and headmen. Others joined to evade the new penalties inflicted on those believed to be harbouring or aiding Mau Mau. For the expansion and organisation of the Kikuyu Guard: Fort Hall Annual Report, 1953, KNA DC/FH1/32/1—3, 17; Rept. Parl. Del. 1954, p. 6; Branch, 'Loyalism', pp. 71, 79—85, 107—9, 113—14, 138.

operations. Initially armed with spears and *pangas*, about one in five of the 18,000 strong Kikuyu Guard was equipped with firearms following the infamous massacre at Lari on 26 March 1953.<sup>459</sup> By mid-1953, Kenya's administration was convinced that around ninety per cent of Kikuyu living in the European-settled areas had taken an oath. However, with nearly all of them now expelled or departed to the reserves, it was feared that oath-taking would spread, certainly to other Kikuyus, possibly to other ethnic groups besides. General Erskine, the commander-in-chief, thought that the vast majority of Kikuyus supported Mau Mau through some level of involvement in the guerrilla-fighters' 'passive wing' and Kikuyu Guard units were accordingly given responsibility for overseeing the interrogation of all Kikuyu over the age of fourteen residing in their administrative locations.<sup>460</sup>

In Kikuyuland, the initial loyalist-led screening of local communities was principally conducted at the fortified Kikuyu Guard posts and chiefs' camps.<sup>461</sup> At these quasi-judicial sittings, suspects' adherence to Mau Mau and whether or not they ought to be recommended for detention was determined in cursory fashion.<sup>462</sup> As with the settler-run camps, expansion of these somewhat belatedly formalised interrogation centres was brisk: by December 1954, 210 sites in Kikuyuland were recognised as legal 'places of detention'. As with the centres controlled by settlers in the Rift Valley Province, these spaces marked exceptions from Kenya's existing

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<sup>459</sup> The Kikuyu Guard staff-level peaked at 25,600 individuals. For the arming of the Kikuyu Guard: "'Templer' Rehabilitation Plan in Use in Kenya', *Manchester Guardian*, 24 July 1953; 'Minutes of a meeting with Home Guard leaders in Nyeri District held at Nyeri on 21.2.53', and 'Address to the Home Guards, Nyeri District', in Perham papers, Bodl. RH, Mss. Perham 467/3, ff. 17—19. The Lari massacre is discussed at greater length below.

<sup>460</sup> This paragraph and the next one on: 'Secret: Operation Tripod—Summary and Progress Report', by N. Hendriks, DO Nanyuki, 11 June 1953, KNA DC/NYK/3/15/9; Naivasha District Annual Report, 1953, KNA DC/NVA/1/1/2; Erskine, C-in-C, 'Report on the Kenya Emergency, 7 June 1953 — 2 May 1955', 25 Apr. 1955, PRO WO 236/18/2; 'Tribal Police Break Mau Mau "Wing" in Raid on Farms', *East African Standard*, 16 Feb. 1955, KNA, AA/45/26/3/3/15.

<sup>461</sup> In numerical terms, Africans also dominated screening in the Rift Valley, with teams of four or five screeners led by a government chief acting under European supervision. The difference appears to be in the level of European supervision of screening in the Rift Valley and Central Provinces (it was far higher in the former). See, for instance: Nakuru District Annual Reports, 1953 and 1954, KNA DC/NKU1/6. For the expansion of the screening-camp network in Kikuyuland: W. F. B. Pollok-Morris, Secy. Defence, to Secy. African Affairs, 15 Dec. 1954, KNA AA/45/26/3/3; Stoneham, *Barbarism*, pp. 137—42.

<sup>462</sup> African-controlled screening teams could not impose detention, merely advise the relevant administrative official to do so, but they could issue fines against suspects who admitted to oath-taking but renounced Mau Mau.

judicial system, with suspects answering directly to the exactions of sovereign power without recourse to the protections of the law. As with their counterparts in the Rift Valley, allegations of violent interrogations of Mau Mau suspects at under- or unregulated screening camps in Kikuyuland were commonplace during the emergency.<sup>463</sup> In November 1954, Colonel Arthur Young, who had succeeded O'Rorke as the commissioner of Kenya's police, wrote to Baring to tell him of

the horror of some of the so called Screening Camps which, in my judgment, now present a state of affairs so deplorable that they should be investigated without delay.... An African who is unfortunate enough to suffer from the brutalities which are clearly evident has no one to whom he can complain and no one to regard his interests since the local Administrative Officer is, himself, the authority for the camp. Moreover, the injured person is unlikely to appeal to the police for redress if they are to be regarded as subordinate to the Executive.<sup>464</sup>

Indeed, throughout his short tenure as head of Kenya's police—a position he would relinquish with some bitterness over the limitations placed on his ability to direct counter-insurgency operations and improve discipline within the force—Young repeatedly bemoaned the extent to which officers of the Provincial Administration could pull rank over, or intimidate African subordinates from relaying reports of abuses to, the police.<sup>465</sup> The Kikuyu Guard, meanwhile, were the target of still more vehement police criticism, pertaining precisely to the unaccountable power they appeared to have been vested with in order to investigate Mau Mau. 'It is the opinion of many that the Tribal Authorities, including the Kikuyu Guard', wrote one of

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<sup>463</sup> For striking examples of violent 'loyalist'-led screening: 'Githinji Njaguna and Mwangi Mweru', KNA MLA 1/1098; D. Macpherson, Asst. Commr. Police (Crime), to A. Young, Commr. Kenya Police, 10 Dec. 1954, and 'Criticism of Police Conduct', Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/3, ff. 36—8 and 486/5/6, respectively. For the structural dynamics that encouraged vicious 'loyalist' screening-sessions at Kikuyu Guard posts and chief's camps, see the exposition of the Kikuyu Guard post at Ruthagathi in South Nyeri District—denounced as 'Kenya's Belsen'—in Anderson, *Histories*, pp. 296—307. See also Elkins, *Britain's Gulag*, ch. 3.

<sup>464</sup> Col. A. Young, Commr. Kenya Police, to Baring, Governor Kenya, 22 Nov. 1954, Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/3, f. 16.

<sup>465</sup> See, in particular: 'Memorandum to the Attorney General from His Prosecuting Counsel' and Young, Commr. Kenya Police, to Baring, Governor Kenya, 14 Dec. 1954, Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/6, ff. 40—44 and ff. 84—88, respectively.

Young's assistants in late 1954, 'have far too much authority; they possess the power of "life and death". Abuses of this power are a daily occurrence. Bribery and corruption are rife amongst so-called 'Loyalist' groups.'<sup>466</sup>

Loyalist-led 'screening' of Mau Mau suspects was not, however, marked solely by the rough-and-ready execution of unaccountable sovereign power. The documentary output of these investigations, processed and handled in a particular way (like the produce of the examinations conducted by settlers in the Rift Valley), in turn reinforced particular forms of knowledge of Mau Mau. As official oversight and direction of loyalist operations were progressively instituted from the beginning of 1953, European-led, African-staffed screening teams and their procedures were made the subject of bureaucratic organisation and record keeping was accordingly systematised.<sup>467</sup> Weight of numbers necessitated that initial interrogations were cursory and were supposed to follow the consistent pattern specified by the forms circulated to screening teams to denote suspects' personal details, how many oaths they had taken, where this had been done, and who had administered them. Secretaries registered admissions and releases, produced a card index of Mau Mau adherents, typed confessions, filed warrants for arrest and forwarded reports to the security agencies. This brought the appearance of orderliness and objectivity to the skein of information generated by loyalist-led screening sessions, reducing the pre-history of an individual's participation in Mau Mau to a standardised statement acknowledging their involvement, devoid of extraneous explanations of the reasons for it. Indeed, these recording practices, this proliferating documentation of 'Mau Mau' as part of state-run counter-insurgency operations, were marked by distantiation: the depersonalising creation of a gap between the human as a social subject—in this case, appearing before screening teams for interrogation—and as an object of bureaucratic inquiry—a number on a register or form, part of a consignment of criminal cargo to be shunted around the colony as befitting the traits

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<sup>466</sup> K. P. Hadingham, Asst. Commr. Police (Nyeri), to PC Central Province, 14 Dec. 1954, Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/3, f. 96.

<sup>467</sup> See 'Unrest, Oath of Allegiance and Screening, Screening of Africans, Screening Camps', KNA AA 45/26/3/3; N. Hendriks, DO Nanyuki, 'Secret: Operation Tripod – Summary and Progress Report', 11 June 1953, KNA DC/NYK/3/15/9; Anon., 'Memorandum on the Methods Used at Bahati R.M.C. on the Psychological Breaking Down of Mau Mau', 18 Jan 1954, KNA microfilm reel no. 9, file 44, 1/87.

described on the form.<sup>468</sup> Of course, the particular power-dynamics at play in loyalist-led screening sessions were not explicitly inscribed in the disinterested reports of their findings, and it is deeply uncertain that historians might hope to ‘recover’ them—at both a practical level (for one, nearly all such reports appear to have been lost or destroyed) or at a methodological one. What may be observed, however, is that shocking conclusions about the scale of Mau Mau activism appear to have been structurally encoded within, and produced out of, the bureaucratic dynamics of the rapidly enlarged screening efforts of *circa* 1953—54.

For both European and African screening teams, alike perceiving Mau Mau as a single movement with common aims sworn-to in collective oath-taking ceremonies, the overriding priority was to ensure that all potential suspects were examined and that the guilty were exposed. The results were staggering. By November 1953, official figures reported that 125,099 Africans had been screened; 64,435 of them had been released but 59,773 had been tried and a further 891 were in custody awaiting trial.<sup>469</sup> This chapter now turns to consider the judicial system developed to deal with Mau Mau criminals during the Kenyan emergency.

## § Emergency extended: summary justice and the suppression of Mau Mau

By the end of 1953, a series of amendments to the initial Emergency Regulations promulgated in October 1952 had been introduced, supplementing and interacting

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<sup>468</sup> It may be conjectured that this ‘distantiation’ effect became more marked once the relevant screening session report-forms were passed for further investigation to members of the Provincial Administration or Special Branch, a level further removed from initial cross-examinations. See, for example: J. Whyatt, AG Kenya, to E. Baring, Governor Kenya, 3 Jan. 1955, in Sir John Whyatt Papers, Bodl. RH, Mss. Afr. s. 1694, f. 42, 56—9; Nakuru District Annual Report, 1954, p. 20, in KNA DC/NKU1/6; J. M. Spence, DC Nyanza, ‘Nyakach Work Camps and Dispersal Report for July 1955’ and ‘Nyakach Work Camps and Dispersal Report for August 1955,’ KNA PC/NZA/3/15/130. ‘Distantiation’ is plundered from Bauman’s sociology of bureaucracy: Zygmunt Bauman, ‘Modernity and the Holocaust’, in A. L. Hinton (ed.), *Genocide: An Anthropological Reader* (Oxford: Blackwell, 2002), esp. pp. 112, 126—31. I thank John Lonsdale for directing me to Bauman’s work.

<sup>469</sup> ‘Emergency Statistics, from beginning of Emergency to 7 Nov. 1953’, PRO CO 822/697/23.

with the provisions of Kenya's extant criminal justice system. A variety of administrative and security officials had been empowered to detain individuals, *en masse*, without trial, at the governor's discretion. They could enforce collective punishments, control labour, impose curfews and restrict travel through the use of special passes. In specified 'Prohibited Areas'—the war-zone of the forests and forest-fringes of the Aberdares and Mount Kenya—Mau Mau suspects could be shot at on sight without the issue of a preliminary challenge. In the fittingly ugly phraseology of the Emergency Regulations, such contact might 'extend to a voluntarily causing of death'. In 'Special Areas' scheduled under the Criminal Procedure Code—including Nakuru, Naivasha and Laikipia in the Rift Valley Province, all Kikuyu districts of the Central Province, and Nairobi—anyone could be called to halt for examination and fired upon if they refused to stop. The carrying of firearms, ammunition, explosives and other weapons (including *pangas*) was forbidden without special authorisation. Further regulations prevented public meetings and processions, and censored or banned publications. The authorities were also empowered to intercept telephonic and telegraphic communications, to seize property (such as cattle and vehicles), impose special taxes and close specified schools, shops, markets, trading centres and private dwellings. The government therefore granted itself extensive powers to oversee movement, assembly, speech and commerce in designated areas of the colony, a drastic assertion of authoritarianism over civilian life.<sup>470</sup>

In Kikuyuland, now resembling a police state, the expanding maze of Emergency Regulations, overlaying and adding to the existing range of criminal offences specified under various ordinances and in the Penal Code, created a juridical system designed to ensnare guilty Mau Mau suspects rather than protect innocent colonial subjects. This skewing of Kenya's judicial system toward the suppression of Mau Mau dissidence began during the opening stages of the emergency. In late 1952, Baring had equipped magistrates with stronger sentencing powers and permitted them to hear cases relating to the administering of Mau Mau

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<sup>470</sup> See: 'The Emergency Regulations, 1952', PRO CO 822/728; 'Emergency Regulations made under the Emergency Powers Order in Council, 1939, incorporating all amendments as at the 30<sup>th</sup> November, 1953', PRO CO 822/729 [hereafter, ER, 30 Nov. 1953]; and 'Imposition of Collective Punishment – Kenya', PRO CO 822/501. See also Ralph Millner, *The Right to Live* (London: Kenya Committee, 1954), pp. 9–10, 14–15.

oaths.<sup>471</sup> The severity of penal sentences had also been increased: cattle-maiming now carried fourteen years' jail instead of two; the penalty for membership of the illegal movement was doubled from seven years' imprisonment to fourteen; and administering Mau Mau oaths was made punishable by execution. Over the course of 1953, the range of offences punishable by death was extended further still: to those freely taking Mau Mau oaths; to those known to be members of a Mau Mau gang; and to those carrying, possessing or manufacturing arms, explosives or ammunition, or consorting with such people. Indeed, in regard to the latter offences, the burden of proof was reversed: defendants had to show that they had lawful authority to carry, possess or manufacture arms, explosives or ammunition.<sup>472</sup>

A parallel process to the broadening of the range of Mau Mau offences and the increased severity of the penalties imposed for committing them was the degradation of legal procedure, which was 'streamlined', as one commentator sarcastically put it, from late 1952 and during 1953.<sup>473</sup> From December 1952, in certified 'emergency procedure cases', committal proceedings before a magistrate were dispensed with. Such cases now proceeded directly to the Supreme Court, which could award the death penalty for serious offences. In creating several exceptions to the Criminal Procedure Code, this measure systemically hobbled Mau Mau defence counsels, denying them the opportunity to arrange their own witnesses and to examine the nature of the evidence that would be brought against the accused in court until seven days before trial.<sup>474</sup>

Baring stressed to Lyttleton that expediting judicial process in Kenya was 'essential' in order to achieve the 'full deterrent effect of conviction and sentence' in Mau Mau cases.<sup>475</sup> Put another way, defeating Mau Mau legally was also about performing due process quickly enough in order to both uphold the rule of law and the image of the state (as opposed to black or white vigilante mobs) as the exclusive

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<sup>471</sup> It should be noted that in Kenya, District Commissioners and District Officers also had magisterial powers, a fairly standard colonial fusing-together of executive and judicial functions of government. See Lugard, *Dual Mandate*, p. 539.

<sup>472</sup> ER, 30 Nov. 1953. See also Millner, *Right*, pp. 20–21; Anderson, *Histories*, p. 70.

<sup>473</sup> Millner, *Right*, p. 17.

<sup>474</sup> For the speeded-up procedure: 'The Emergency (Criminal Trials) Regulations, Kenya', PRO CO 822/730/3. For the creation of Emergency Assize Courts: 'The Setting Up of Special Courts to Deal with Trials during the Kenya Emergency', PRO CO 822/734, and CO 822/735.

<sup>475</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 20 Dec. 1952, PRO CO 822/730/1.

font of sovereign power in colonial Kenya. Influential sections of the London press were outraged by what they saw as the lowered standards of legal procedure being introduced in the colony. 'Speed and certainty of apprehension', *The Times* intoned,

...should be more effective in instilling respect for the law than the rapidity with which judgement always follows on arrest.... There is need for assurance that the reduction of the delay between sentence and execution [on a capital charge] will deprive no convict of his lawful opportunities of appeal, nor take from him any chance he may have of benefiting by the prerogative of mercy. These are not only considerations for the Government or the Legislature of Kenya. The lives and liberties of East Africans are as precious as those of any other subjects under the QUEEN, and the ultimate responsibility for the protection of their lawful rights belongs to Parliament.<sup>476</sup>

In this particular interpretation of the imperial consciousness, performative justice (Baring's 'full deterrent effect of conviction and sentence') was not to be placed above the due performance of justice. There ought to be no 'rule of colonial difference' when it came to administering criminal justice; the integrity of British imperialism depended on an impartial rule of law.<sup>477</sup> This was a fine legal and constitutional argument. It was soon shattered.

On 26 March 1953, 97 African 'loyalists' were murdered at Lari in Kiambu District. Using the prose of counter-insurgency, the Kenyan government's press release described the night-time murders as an orgy of libidinal violence:

Armed terrorists stole upon the clustered huts of Lari, in the Kenya Highlands, in the dead of night. The sleeping Kikuyu people awoke to find flames roaring above them, as the Mau Mau fired the tinder-dry thatched roofs. Escape was impossible to most for the doors had been securely fastened outside by fanatical Mau Mau attackers. Men, women and children, forcing their way out of the windows, were caught and butchered. Some perished terribly in the flames; others were chopped and mutilated by the knives of their enemies—their own

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<sup>476</sup> 'A Case for Vigilance', *The Times*, 7 Jan. 1953. Similar articles appeared in *The Telegraph*, the *Daily Mirror* and the *Daily Express*.

<sup>477</sup> Cf. Churchill's observations about the rule of law in the East Africa Protectorate, *circa* 1907: Churchill, *Journey*, pp. 40—1.

fellow tribesmen. Dawn revealed the macabre scene left behind by the wave of Mau Mau; the mangled corpses, human remains literally chopped in pieces, all mingled with the smoking ashes of the burnt homesteads. The survivors, terror-stricken and helpless, told their pitiful stories to the police and government officials who rushed to Lari when the alarm was raised. They told of children being cut up with knives in the sight of their mothers; of others cut down as they tried to run and hide in the tall maize, by terrorists insatiable for blood.<sup>478</sup>

The events at Lari drew massive international and metropolitan press coverage as well as parliamentary questions.<sup>479</sup> Worse, they coincided with Mau Mau guerrilla-fighters' first successful large-scale arms raid, on Naivasha police station, also on 26 March, which smacked of deep official incompetence and caused widespread alarm. The Ruck murders had occurred just two months earlier. Though his trial had begun in December 1952, the verdict against Kenyatta, which (one way or another) would doubtless provoke further unrest, was immanent. After Lari, the Kenyan government needed swift convictions. The imperial scales of justice were quickly recalibrated.<sup>480</sup>

The Lari trials created an unprecedented challenge for Kenya's judicial system: several thousand people were implicated for multiple, serious offences in a disturbing episode with tangled social roots. On 4 April 1953, Baring told Lyttleton that:

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<sup>478</sup> Kenya Govt. Press Release, reprinted in *Time* magazine, 13 Apr. 1953. Details of the counter-massacre carried out by the Kikuyu Guard and other members of the colonial security forces on the same night are omitted from the official press release; it is thought that for every person murdered in the first attack, up to four were killed in reprisals. See Wilson, *Kenya's Warning*, p. 54; Branch, 'Loyalism', p. 97. 'Prose of counter-insurgency' is Ranajit Guha's phrase: Ranajit Guha, 'The Prose of Counter-Insurgency', in Ranajit Guha & Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (New York: Oxford University Press, 1988).

<sup>479</sup> See, for example, 'Mau Mau Massacre of Loyal Kikuyu', *The Times*, 28 Mar. 1953; HC Deb., 31 Mar. 1953, vol. 513, cols. 1107–64.

<sup>480</sup> It now appears that the massacre at Lari was a calculated attempt to eradicate immoral wealth from the community. The 'loyalists' killed were carefully identified as 'stumps' (in the Kikuyu slang), that is, obstructions to virtuous social accumulation and personal self-mastery. All were related to Catholics, chiefs, ex-chiefs, headmen, other government office-holders, or leading Kikuyu Guard. All had been expelled from Tigoni, in the White Highlands, and relocated to Lari by the colonial government in the 1930s. All were implicated in a land-grab against the existing Kikuyu inhabitants of Lari, which had followed this move. For an unparalleled dissection of both the long-term causes of the violence of 26 March 1953 and of the judicial processing of the accused: Anderson, *Histories*, pp. 122–80. See also Lonsdale, 'Moral Economy', pp. 453–5.

As a result of [the] intense police investigation during the past week into the massacre at Uplands, there are now no less than 950 suspects [being] held in cages near the scene of the crime, and it is quite likely that there will be sufficient evidence against a large proportion of these to put them on trial for murder. This situation presents problems of appalling magnitude to the police investigators, the Legal Department and the judiciary, and it is abundantly clear that if there is another similar incident on this scale in the near future the whole of the machinery of [the] administration of justice will break down. Information from intelligence sources goes [on] to indicate that there will be another attempt or attempts at a similar massacre, and since the raid on Naivasha Police Station the Mau Mau are better equipped than ever before to kill their opponents in large numbers.

To try the Lari suspects with greater alacrity, Baring asked for the CO's approval of the introduction of special courts, following the principle that 'criminal justice should be administered more speedily than is practicable by ordinary courts'.<sup>481</sup> Three days later, still awaiting a decision from the chiefs at Whitehall, Baring was back in touch with Lyttleton, bolstering his case with the latest information:

There are now approximately 2,000 suspects in cages at Uplands and neighbouring police stations and, on present estimates, from 300 to 500 of these will eventually be charged with murder. ...It is estimated...that there will be between twenty and thirty trials averaging from ten to thirty accused...before all the trials are disposed of.

In particular, Baring was concerned that the conventional judicial process for capital cases—trial before a Supreme Court judge, if necessary followed by appeals before the East African Court of Appeal and ultimately Britain's Privy Council—was dangerously slow. He warned the secretary of state that it would take several months to complete the Lari trials, adding, 'I am sure that you will agree that such a long

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<sup>481</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 4 Apr. 1953, PRO CO 822/734/1.

delay between the commission of this mass murder and the termination of proceedings is most undesirable'.<sup>482</sup>

Baring's concern about the complex and lengthy nature of the Lari trials was not simply an anxiety about the technology of Kenya's judicial system; namely, their potential to clog up the Supreme Court.<sup>483</sup> Kenya's settlers were clamouring for summary justice. Following the massacre, the European Elected Members had presented the government with a blueprint for special courts based on the model of the British army's field general court-martial, redolent of wartime or martial law government. These would entail three-man tribunals composed of an experienced judicial official and two lay members (to be selected from a list of candidates approved by the governor). Prosecutions would be conducted by police or administrative officers, defendants represented by a 'prisoner's friend' (who would not be required to possess legal training). The 'principles of natural justice' would be applied. Formal rules of procedure would not. Minimal records would be kept. Death sentences would be confirmed by the governor and carried out at the scene of the trial.<sup>484</sup>

The European community's demands for summary justice after Lari undoubtedly alarmed the Kenyan government, not least because they threatened to transfer responsibility for the trial and punishment of Mau Mau from the state to settlers (since it was assumed that their community would supply the lay members of the proposed special tribunals). As often as the governor related the technical problems created by the Lari trials to the secretary of state, then, he reminded him about the threat of settler unrest. On 27 April 1953, Baring warned Lyttleton of a meeting in Nairobi, scheduled for 29 April, at which the senior and bellicose settler spokesman Ewert Grogan, backed by leaders of 'extreme splinter parties', would

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<sup>482</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 7 Apr. 1953, PRO CO 822/734/2. In the event, there were nineteenth trials concerning the Lari murders, with more than three hundred people accused.

<sup>483</sup> Though this had unquestionably happened: in 1952, 2,800 criminal cases were filed for hearing in the supreme court, in 1953, 5,816 criminal cases were filed. In magistrates' courts, 48,025 criminal cases were filed in 1952, 56,216 in 1953. See Judicial Department Annual Report 1953, PRO CO 544/79/3.

<sup>484</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 17 Apr. 1953, PRO CO 822/734/6. See also Leigh, *Shadow*, pp. 176–7; Wilson, *Kenya's Warning*, p. 57.

demand ‘an extreme system of summary justice’.<sup>485</sup> The implication was that without a decision on the issue of creating summary courts, settlers would usurp the state’s prerogative to cash-in the symbolic currency of such visible demonstrations of repressive power. This went to the crux of the juridical questions raised by the Lari trials, which was not only about the fact that they had fouled the colony’s judicial machinery. Rather, it was that any tardiness in reaching legal verdicts would drain value from the powerful performative capital to be accumulated by a rapid, visible assertion of the state’s sovereign authority authenticated by legal (or at least quasi-legal) judicial procedure.

The Kenyan government proposed that, rather than the settler’s ‘tribunals’, special courts should be created for the trial of Mau Mau offences on the model of the Defence (War Zone Courts) Regulations, 1940. The Colonial Office retorted that those regulations had been drawn up to create a judicial system capable of functioning in the eventuality of wartime invasion. Moreover, Lyttleton argued, advertising his sensitivity to two constituencies—the imperial parliament and the metropolitan and international press—more local to his office than Kenya’s settlers:

...I see great advantage in working through the established judicial machinery. It retains the practical benefit of having existing law and procedure to supplement the emergency procedure where necessary, thus avoiding possible delays due to lacunae or uncertainty[,] and it gives the outside world the assurance that there has been no greater departure from the ordinary standards and administration of British justice than the circumstances demand.<sup>486</sup>

Indeed, throughout these discussions, the CO was as conscious of the metropolitan media spotlight as the Kenyan government was of settlers’ ire. Both nodes of official power needed to be satisfied that justice was being done in the colony; the tension between them lay in the attempt to satisfy two competing definitions of what that

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<sup>485</sup> Baring, Governor Kenya, to Lyttleton, Col. Secy., 27 Apr. 1953, PRO CO 822/734/10. In his memoirs, Michael Blundell, in London at the time of the Lari massacre, named the Colonists’ Association and United Kenya Protection Association as two such ‘splinter parties’: Blundell, *Wind*, pp. 137–41.

<sup>486</sup> Lyttleton, Col. Secy., to Baring, Governor Kenya, 7 May 1953, PRO CO 822/734/14. See also Note for the Secretary of State, ‘Kenya Special Courts’, undated (*circa* early May 1953), PRO CO 822/734/19.

meant. The CO had, nevertheless, now shifted from a position of rejecting the creation of special courts to hear Mau Mau cases outright to insisting that they ought to be kept with Kenya's extant judicial framework.

On 12 June 1953, with Lyttleton's tacit approval, the Kenyan government announced its solution to the judicial crisis wrought by the Lari massacre, in particular, and Mau Mau, more generally: 'Courts of Emergency Assize'. Under the Emergency Regulations, the governor was empowered to create 'Emergency Zones' in which expedited hearings before these courts could take place. As of 15 June, all districts of the Central Province apart from Machakos and Kitui (in other words, all of Kikuyuland) were thus scheduled. For serious offences committed there, proceedings were to commence as soon as possible after a suspect's arrest (though the assizes could act retroactively: that offence might have been committed before the area was scheduled). Extending the principle that certified 'emergency procedure cases' could be tried without committal hearings, preliminary inquiries before a magistrate were now dispensed with. A single 'Special Acting Judge'—drawn from the magistracy but given the full powers of a Supreme Court judge—would hear assize cases; a jury would not. Witnesses could testify before these courts anonymously. Defendants could be prohibited from cross-examining witnesses. A single judge of the Appeal Court would consider contested guilty verdicts in private and could summarily dismiss complaints. Mau Mau murder cases would continue to go through the Supreme Court; the assizes would concentrate on prosecuting offences for which it was deemed simpler to obtain a conviction.<sup>487</sup> The introduction of the Courts of Emergency Assize therefore marked both a decisive moment in the degradation of due legal process and a qualitative shift away from the extant juridical order in colonial Kenya, creating a parallel, extra-legal system with which to process particular Mau Mau cases.<sup>488</sup>

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<sup>487</sup> Such as: the possession of offensive weapons, or consorting with those possessing them; acting prejudicially to public safety, or harbouring persons behaving in such a way; and supplying terrorists. All of these offences by now carried the death penalty.

<sup>488</sup> 'The Emergency (Emergency Assizes) Regulations, 1953', enclosed in Whyatt, Kenya Govt. AG, to Roberts-Wray, CO, 8 July 1953, PRO CO 822/734/35. For more: Millner, *Right*, pp. 17–18; Anderson, *Histories*, pp. 6–7, 152–6, 291, 353–5.

The introduction of summary courts once again threw the Kenyan government into the spotlight of the international press. For the *Mombasa Times*, the assizes were an offence against the imperial moral economy of justice:

It is the law that the apparently vilest killer is entitled to a fair trial and the British judicial procedure has been securely anchored on fairness and impartiality. It is considered better that two wrong-doers should escape penalty than that one innocent person should be done an injustice. That is a premise that must remain untouched in whatever new short-cuts are effected to bring about accelerated and simplified processes of legal procedure...frankly, it is not enough to say that the law should 'take off its coat and go to work in its waistcoat', as one Member [of Kenya's Legislative Council] urged, unless it is meant by that that greater urgency be applied to the stages of bringing a case into court. After that the procedure is prescribed and no amount of urgency, however desirable, can alter it. The law-abiding African [in particular, Kikuyu 'loyalists'], with his understandable preference for summary justice upon his enemy—may not understand it at all, or even see the need for it but one day he will and that will be the day when the British civilisation will have made its greatest contribution to his emancipation.<sup>489</sup>

By degrading judicial procedure, this argument ran, Baring's administration risked devaluing the base metal that gave colonial governance socio-political currency: the rule of law. What that criticism ignored was official faith in the performative merits of these courts' quasi-legalism in the immediate context of the massacre at Lari, not only as a message to certain settlers, but also to Kikuyus in this part of Kiambu District and to potential Mau Mau supporters elsewhere. As Anderson points out, the Lari trials were held in a courtroom a few miles east of Lari, installed at Githunguri Teachers' Training College—emblematic of the popular Kikuyu independent schools' movement and widely believed to be the headquarters from which KAU had organised Mau Mau. Prisoners awaiting trial were kept in pens outside the courtroom; executions were carried out on gallows constructed nearby. The first took

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<sup>489</sup> 'Speedier Justice', *Mombasa Times*, 10 Oct. 1953, in PRO CO 822/734/44.

place on 15 October 1953; the same day, Kikuyu and Swahili reports of the hangings of the Lari guilty were circulated throughout the colony.<sup>490</sup>

Courts of Emergency Assize swiftly became an established feature of Kenya's judicial system, complementing the enlarged and increasingly draconian juridical powers instituted in the colony during 1952—53, which overlaid the extant apparatus with a quasi-legal counterpart dedicated to Mau Mau counter-insurgency and acted according to an expansionist bureaucratic dynamic. Between April 1953 and December 1956, Courts of Emergency Assize sat at Nairobi, Nakuru, Githunguri (in Kiambu District), Thika, Nyeri, Meru and Embu. The assizes were not used sparingly: returns for March 1954 to December 1956 show that they tried an average of 2,152 people in 983 trials each month. In 1,211 trials, 2,609 Kikuyu faced capital charges at Courts of Emergency Assize; 1,574 individuals were convicted and sentenced to death, and 1,090 of them were executed.<sup>491</sup>

The judicial system constituted to suppress Mau Mau through the departures from conventional procedure provided for under the emergency powers was therefore geared to mete out rapid punishments of the severest form. The death penalty was routinely implemented for Mau Mau offences in Kenya during the 1950s.<sup>492</sup> Amalgamated Supreme and Emergency Assize Court returns show that, of the death sentences handed out for capital offences unrelated to Mau Mau during the height of the Emergency, *circa* October 1952 to December 1956, just over forty per cent were carried out. In Mau Mau cases, the proportion of the convicted that eventually hung was over seventy per cent.<sup>493</sup> However, as the following chapter demonstrates, legal punishment (and a hotly debated form of it at that) far from exhausted the colonial state's armoury against Mau Mau during the emergency.

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<sup>490</sup> Out of 309 persons accused of involvement in the Lari massacre, 136 were convicted and 71 of them executed; 120 were acquitted; the rest discharged: Anderson, *Histories*, pp. 155—6, 174—75, 349—51. For the executions and official publicity relating to them: *ibid.*; Leigh, *Shadow*, pp. 176—7; Government of Kenya Press Releases, PRO CO 822/702/14, 65—7, 69. For suspicions about Githunguri Teachers' Training College as the headquarters of the Mau Mau movement: Corfield Report, p. 67.

<sup>491</sup> Based on: 'Capital Punishment', PRO CO 822/1256; Anderson, *Histories*, pp. 353—5.

<sup>492</sup> A matter of some concern to the colony's new police chief, Arthur Young, upon his arrival in February 1954: Young papers, Bodl. RH, Mss. Brit. Emp. s. 486/5/1, f. 20.

<sup>493</sup> 'Capital Punishment', PRO CO 822/1256; Anderson, *Histories*, pp. 353—5.

### 3. Suppressing Mau Mau, repressing Kikuyu, circa 1952–60

#### § From Anvil to Pipeline

Under the web of powers created by the Emergency Regulations, Mau Mau suspects against whom there was insufficient evidence to bring criminal charges were not necessarily released. Beyond the expiration of the maximum 28 days' detention, a sufficiently high-ranking police officer could apply for a governor's detention order, under which any individual could be held 'for the purpose of maintaining public order' for the duration of the emergency. This was the means of interning the initial 'political' suspects rounded-up by Operation Jock Scott and those subsequently arrested in further security sweeps through Nairobi in 1953. As the official perspective of the scale and extent of Mau Mau swelled, however, the executive moved to extend the use of detention, resulting in the innovation of the delegated detention order (DDO). The DDO had the same powers as the GDO but could be signed by any official of the rank of district officer or above, which, during the emergency, included those settlers drawn from the KPR who were appointed to the newly created role of Temporary District Officer (Screening).<sup>494</sup>

As early as December 1953, during discussions with Roberts-Wray at the CO regarding the establishment of some form of appeals tribunal for detainees, attorney general Whyatt had foreseen problems with the overlaying of special emergency procedures upon the existing structures of criminal justice in Kenya:

Much of this ['evidence' brought against detainees] is hearsay and cannot be said to go beyond suspicion; indeed, if it could, the persons concerned would

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<sup>494</sup> Based on: C. T. Todd, 'Kenya's Red Sunset' (1965), pp. 261—5, Bodl. RH, Mss. Afr. s. 917; PC, Rift Valley Province, to Davies, Chief Native Commissioner, 22 Mar. 1954, KNA AA/45/26/2/2/9; Pollok-Morris, Secy. Defence, memo. to all Provincial Commissioners and Officer i/c Nairobi Extra-Provincial District, 28 May 1954, KNA PC/NZA/3/15/130.

have been prosecuted instead of being merely detained under the Emergency Regulations.<sup>495</sup>

As Whyatt forecast, executive detention quickly became used to intern any suspect against whom the necessary evidence to secure a conviction could not be procured. Indeed, in 1954, one of Nakuru's district commissioners admitted that he had signed four thousand DDOs 'concerning people he knew nothing about', after it was decided that every detainee's detention should be covered by such a document; in 1955, Nyanza's district commissioner complained of their abuse by officials wanting to remove 'troublesome people for offences far removed from any form of subversion'.<sup>496</sup> By late 1953, with settler-led screening operations ever more central to the juridical structure of the Emergency regime, furnishing it with a bureaucratised intelligence-gathering procedure that formed the preliminary investigation against Mau Mau suspects, these wide-ranging powers of internment came to underpin one of the most marked assertions of authoritarianism over Kikuyus during the emergency: the massive use of detention without trial.

The single grossest articulation of the Kenyan state's counter-insurgent criminalisation of the Kikuyu during the Emergency occurred in Nairobi in spring 1954. In his handing-over report on Nairobi for 1953, the city's commissioner described Kenya's capital as being:

...regarded by the outside districts as a sink of iniquity, and there is no doubt that it is the political centre of subversive activity. It does appear too that Nairobi has been the meeting place for delegates from all the effected [*sic*] areas and that to some extent directives have been issued by a Central Mau Mau Council in the City to the districts.<sup>497</sup>

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<sup>495</sup> Whyatt, Kenya Govt. AG, to Roberts-Wray, CO, 17 Dec. 1953, PRO CO 822/725/12—14.

<sup>496</sup> Nakuru District Annual Report, 1954, p. 20, in KNA DC/NKU1/6; J. M. Spence, DC Nyanza, 'Nyakach Work Camps and Dispersal Report for July 1955' and 'Nyakach Work Camps and Dispersal Report for August 1955,' KNA PC/NZA/3/15/130.

<sup>497</sup> C. F. Atkins, Commissioner, Nairobi Extra-Provincial District, to R. D. F. Ryland, 'Handing Over Report—Nairobi District', 27 July 1953, KNA MAA 8/173/1. For an extended analysis of social conditions in, and government policy for, post-war Nairobi: Throup, *Origins*, ch. 8.

By early 1954, the army and the Kenyan government had resolved that it was time to 'clean up' Nairobi, and that detention policy would be qualitatively changed: no longer would it be used solely as a means to confine suspected Mau Mau leaders, it would now be used 'as a prophylactic measure' to permit the '[l]arge scale detention of Kikuyu on suspicion'. 'This would be particularly directed', Baring explained to Lyttleton, 'against Kikuyu loafers and spivs in Nairobi who are known to support Mau Mau or to form most of the City's criminal element'. All Kikuyu who were unemployed (and therefore not permitted to reside in the city) or believed to adhere to Mau Mau would be evacuated and detained. To temporarily incarcerate Mau Mau suspects, the army suggested creating 'inaccessible and distant detention camps with a capacity of 100,000 persons and capable of expansion'. Baring thought that excessive—a capacity of 50,000 would suffice. However, Special Branch soon reminded him that, in regards to 'Work Camps and Resettlement', the administration was not 'yet thinking in large enough terms', and that 'Kikuyu removed from Nairobi should not be loosed in the Reserves'.<sup>498</sup>

In the course of achieving the intended 'clean up' of Nairobi, the system of using mass detentions without trial in Kenya's new network of detention camps—known as the 'Pipeline'—was institutionalised as a mainstay of counter-insurgent practice to suppress Mau Mau.<sup>499</sup> Kikuyu falling under suspicion of the authorities were sent to a vast transit camp at Langata, where they were re-screened and classified into the categories black, grey, and white. Those alleged to have participated in Mau Mau as either active fighters or passive supporters were transferred to vast holding camps at Mackinnon Road and Manyani, to be screened again by both loyalist and Special Branch teams, before being finally arranged into different groups of detainee: the 'whites', the majority, whom it was believed had been compelled to take an oath and could be 'rehabilitated' relatively quickly through a combination of confession and coercion; the 'blacks' the 'hardcore',

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<sup>498</sup> Erskine, C-in-C, 'Appreciation on the Future military Policy in Kenya 1954', enclosed in Baring, Governor Kenya, to Lyttleton, Col. Secy., 27 Jan. 1954, PRO CO 822/773/1; Special Branch, 'Stocktaking January 1954', 23 Jan. 1954, PRO CO 822/773/9.

<sup>499</sup> Indeed, several historians have referred to the colony's detention camp system of the 1950s as Kenya's 'gulag': Marshall S. Clough, *Mau Mau Memoirs: History, Memory and Politics* (Boulder, CO: Lynne Rienner, 1998), pp. 204–5; Elkins, *Britain's Gulag*, pp. 121; Anderson, *Histories*, p. 311.

‘recalcitrant’ minority, who were sent to special exile camps; and the ‘greys’, somewhere in between.<sup>500</sup>

‘Operation Anvil’ was the name given to the police and military crackdown on Nairobi held during April and May 1954. For a fortnight, the capital was cordoned-off and over fifty thousand inhabitants arrested. Four investigating teams, assisted by *gikunia*—loyalist informers mainly recruited from the city’s Eastlands estates, whose bodies and faces were concealed beneath hessian sacks such that only their eyes could be seen—carried out an initial screening of Nairobi’s Kikuyus in order to identify all those illegally resident within the city and therefore infringing the strict pass laws. Baring’s later description of the procedure to Alan Lennox-Boyd, Lyttleton’s successor as colonial secretary, is revealing:

As a first step it was necessary to ensure that all those detained in these three Camps were properly documented; at the same time a series of screening operations were conducted by teams of loyalists and tribal worthies under the supervision of District Officers. This was a rough and ready method based on interrogation and the local knowledge of the screening teams, and was designed to determine each individual’s part in Mau Mau before his arrest, and to weed out those against whom nothing was known.<sup>501</sup>

Indeed, Operation Anvil may be read as both a high watermark in the government’s formal recognition of the extra-judicial function of screening, and the apogee (or nadir) of a vertiginous, Agambenian ‘state of exception’, in which a suspension of due process was institutionalised as a practice to channel an absolutist state power onto those deemed to lack all politicality beside that imputed by the authorities’ criminalisation of them: the Mau Mau suspect.<sup>502</sup> The discretionary power of the

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<sup>500</sup> This paragraph and the following one based on: anonymous memo., ‘Rehabilitation Programmes in Kenya’, undated (probably early 1954), PRO CO 822/794/250; E. C. Eiggins, Kenya Govt. Defence Secy., ‘Classification of Detainees’, 4 Mar. 1955, KNA PC/NZA/3/15/130; G. E. C. Robertson, memo., ‘Monthly Report from the Mageta and Saiyusi Classification Centres’, 10 Sept. 1956, KNA, AB 1/94/54/1; Leigh, *Shadow*, p. 199; Fred Majdalany, *State of Emergency: The Full Story of Mau Mau* (London: Longmans, Green & Co., 1962), pp. 203–9.

<sup>501</sup> Baring, Governor Kenya, to A. Lennox Boyd, Col. Secy., 27 Sept. 1955, PRO CO 822/794/121.

<sup>502</sup> See Agamben, *Homo Sacer*, esp. pp. 183–4.

loyalist African screening teams used during Operation Anvil was absolute. Accusations from *gikunia* needed no corroboration; a nod of their hooded-head, to indicate that a suspect had taken a Mau Mau oath could, in itself, lead to two years' detention without trial.<sup>503</sup>

The use of detention camps as part of Kenya's penal system in fact pre-dated the suppression of Mau Mau.<sup>504</sup> Created in the mid-1920s, these carceral sites had previously functioned as an overflow for minor offenders whose crimes involved 'no moral turpitude' (such as tax defaulting). Their productive power would be harnessed through sentences of hard labour rather than imprisonment. In the 1930s, following a one hundred per cent rise in incarcerations over the period 1911—31, prison camps were also created to house Kenya's growing recidivist convict population. However, the bureaucratic challenges presented by the official commitment to the notion that all Kikuyu were potential Mau Mau suspects, certainly requiring screening, possibly requiring detention, meant that the scope of the detention-camp system used in the 1950s was a radically enlarged version of its precursor. From late 1953, a network of 53 transit (or 'holding'), detention, work and exile camps was created for the incarceration of Mau Mau suspects.<sup>505</sup> Many of them, following established colonial practice, were constructed by the very detainees subsequently incarcerated in them, particularly after the huge surge of internments prompted by Operation Anvil. The use of detention during the emergency dwarfed previous practice: the daily average prison and detention-camp population for 1951 was

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<sup>503</sup> See Anderson, *Histories*, pp. 200—5; Elkins, *Britain's Gulag*, pp. 121—31.

<sup>504</sup> Based on: interview with Simeon Musyoki Kivati, Kibwezi District, 19 Feb. 2007; Prisons Department Annual Report 1931, PRO CO 544/34; Daniel Branch, 'Imprisonment and Colonialism in Kenya, c.1930—1952: Escaping the Carceral Archipelago', *International Journal of African Historical Studies*, vol. 38, no. 2 (2005), pp. 246—9.

<sup>505</sup> The total number of detention camps used during Mau Mau counter-insurgency is a matter of ongoing controversy. Elkins argues that there were over a hundred camps in the Pipeline: *Britain's Gulag*, p. 151. According to Anderson, there were 'over fifty', *Histories*, p. 315. I follow the conservative figure of 53 (comprising 11 prison or exile camps, for the 'worst offenders', and 42 works camps in Native Reserves) based on: Baring, Governor Kenya, to Lennox-Boyd, Col. Secy., 27 Sept. 1955, PRO CO 822/794/122, and Ministry of Defence Circular S/A.DEF.89/2, 'Detention Camps', 20 Dec. 1954, KNA PC/NZA/3/15/130/78. These camps are named and categorised in the diagram in Elkins, *Britain's Gulag*, p. 369.

11,630; in December 1954, the peak figure for the emergency period, it was 71,346.<sup>506</sup>

Qualitatively, the rationale for detaining Mau Mau suspects during the Emergency also differed in comparison to its earlier use against convicts in colonial Kenya. An ostensibly reformist doctrine of ‘rehabilitation’ was elaborated, specifying the innovative uses to which the programmatic use of incarceration, forced labour, spiritual healing and educational instruction of Mau Mau detainees would be put. Accordingly, the metaphor of the ‘Pipeline’ was evolved to capture the sense of fluid movement through the system (as detainees either advanced ‘up’ towards release into their Native Reserve districts, or were sent back ‘down’ for further ‘rehabilitation’). The term also captured the sense in which, as well as an attempt to suppress Mau Mau, the colonial state’s counter-insurgency was also a feat of social engineering targeting Kikuyu communities living in Nairobi and the reserves.<sup>507</sup>

Though not exceptional in the sense of their continuities with the earlier use of such institutions in colonial Kenya, as an instrument for the ‘rehabilitation’ of Mau Mau suspects, the detention camps developed for counter-insurgency in the 1950s were distinctive for the routinised use of violence and performative justice against detainees, which was premised upon the authorities’ steadfast belief that their inmates were enthralled by their oaths of commitment to the movement. The use of violence—corporeal and mental, inadvertent and systemic, casually sadistic and state-directed—in the Pipeline has been demonstrated beyond all doubt. African camp warders or *askaris* and European supervisors scolded and attacked detainees for all manner of offences and indiscretions. Detainees were flogged, beaten, and starved, bullied and degraded, insulted and taunted.<sup>508</sup> Gruelling communal labour demands

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<sup>506</sup> Prisons Department Annual Report 1951, PRO CO 544/75; Anderson, *Histories*, pp. 313, 356. Anderson and Elkins both observe that this peak daily average figure for the detainee population during the Emergency does not acknowledge those incarcerated in scores of undeclared places of detention left out of calculations, such as camps run by settlers and chiefs’ or at Kikuyu Guard posts. Elkins has calculated that the number of different detainees held in camps in Kenya during the emergency was upwards of 160,000 individuals. See Anderson, *Histories*, p. 311; Elkins, *Britain’s Gulag*, pp. xi. For the official figures: KNA, AH/6/4—9.

<sup>507</sup> For the Pipeline system and the aims of rehabilitation: Fairn Report, esp. pp. 1—6; Elkins, *Britain’s Gulag*, chs 4—7.

<sup>508</sup> For specific examples of the privations of the Pipeline: Wanjau, *Author*, pp. 80—1, 86, 121, 124. For disease problems: R. F. F. Owles, Community Development Officer, ‘Report on

were imposed. Some were justified as public works—clearing bush infested by *tsetse* flies for the construction of an airstrip at Embakasi, for example, or draining malarial swamps for irrigation schemes. Others were simply designed to exhaust the prisoners—digging and then filling in holes, for example, or shifting piles of earth back and forth across compounds.<sup>509</sup> Towards the end of the 1950s, the ‘dilution technique’ was developed to break ‘hardcore’ Mau Mau resistance once and for all. It involved repeatedly beating ‘recalcitrant’ detainees who refused to denounce Mau Mau.<sup>510</sup>

The causes and forms of violence against detainees were heterogeneous, but there was an undoubtedly hegemonic socio-political rationale underpinning it: namely, an official consensus on the transformative power of Mau Mau oath-taking and therefore the need to use coercion to change Kikuyu minds. Thus, defending the scandalous revelations of the abuse and murder of eleven ‘hardcore’ detainees at Hola exile camp in the late 1950s, for example, Colonial Secretary Lennox-Boyd pointed to their depravity:

Mau Mau is a conspiracy based on the total perversion of the human spirit by means of the power of the oath and by witchcraft and intimidation, all of which combined to place its followers mentally almost in another world, in which the pursuit of their twisted aims was the only important thing. ...the taking of the oaths had such a tremendous effect on the Kikuyu mind as to turn quite intelligent young Africans into entirely different human beings, into sub-human creatures, without hope and with death as their only deliverance. Yet, in the great majority of cases, these people were not irrevocably lost to decent society. They had a way back through voluntary confession, the only effective way by

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Juvenile Mau Mau Detainees (Under 16 Years) at Manyani Special Camp’, 27 July 1955, PRO CO 822/794/134.

<sup>509</sup> For labour projects: Baring, Governor Kenya, to Lennox-Boyd, Col. Secy., 27 Sept. 1955, PRO CO 822/794/124; ‘Future of Detention & Prison Camps in Nyanza’, DC Central Nyanza to PC Nyanza, 19 Oct. 1955, KNA PC/NZA/3/15/130/187; interview with Muthunga Kagochi, Thika, 28 Feb. 2007. To avoid falling foul of the International Labour Organization’s restrictions on the use of forced labour, the Kenyan government paid detainees a trifling wage: J. H. Lewis, Commissioner Prisons, ‘Payment of Wages to Detainees at Camps...’, 25 Nov. 1955, KNA PC/NZA/3/15/130/211.

<sup>510</sup> For more on the ‘dilution technique’: Elkins, *Britain’s Gulag*, pp. 319–32.

which Mau Mau adherents could cast off the power of the oath, and through the process of rehabilitation.<sup>511</sup>

The exceptional conditions of the Pipeline were therefore harmonious with the exceptional criminality ascribed to Mau Mau by the Kenyan government and the Colonial Office. If legally regrettable, the mass use of detention without trial appeared to be socially necessary: only confession and rehabilitation could eradicate Mau Mau.

The official emphasis placed on proof of having taken an oath as a litmus-test of participation in Mau Mau made the production of a detainee's 'confession' the primary object of various of the Pipeline's affiliated teams of screening and rehabilitation officials. Confession was seen as 'the first step in the rehabilitation process', the crucial sign that the detainee acknowledged their own criminality and was ready to begin the journey back to normal society.<sup>512</sup> Upon entry into the detention camps, and periodically thereafter, suspects were re-interrogated about their involvement in Mau Mau. Psychological violence was routinely used in order to 'shame' confessions out of prisoners, partly reflecting the official supposition that the majority of Mau Mau supporters had taken oaths involuntarily and furthermore felt great relief when they could reveal their misdemeanours.<sup>513</sup>

In March 1954, at Manda Island exile camp, members of a screening team led by David Waruhiu (son of the assassinated chief) addressed the detainees and made reference to the parliamentary delegation's report of February to impress upon captives the line followed by the Kenyan government's 'experts' and certain elders (that Mau Mau was a sinister, peculiarly powerful denigration of Kikuyu ritual rather than a legitimate political protest), before blackmailing them about dependents living

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<sup>511</sup> Lennox-Boyd, Col. Secy., HC Deb., 16 June 1959, vol. 607, cols. 264, 266.

<sup>512</sup> Baring, Governor Kenya, to Lennox Boyd, Col. Secy., 27 Sept. 1955, PRO CO 822/794/121—8.

<sup>513</sup> This supposition was not misplaced, but it only told half the story. Mau Mau oaths were ritually treacherous, but so too was confessing to having taken one, as was taking another, 'vomiting', oath to purge oneself of commitments: Kershaw, *Below*, p. 328. For the 'relief' of confessing detainees, see, in particular: Thomas Askwith, *From Mau Mau to Harambee* (Cambridge: African Studies Centre, 1995) pp. 104, 111, 119, and Ministry for Community Development memo., 'Report on Effectiveness of Detainees from Athi River Being Used on Rehabilitation Work at Manyani', 24 Mar. 1955, PRO CO 822/794/150.

in the reserves. Gakaara wa Wanjau, one of the detainees at Manda, recalled Waruhiu's speech:

Confess the oaths you have taken. In the Gikuyu countryside everybody else has confessed. We have come to take you home. An abomination has been committed: people have used women's menstrual blood and the organs of manhood in oathing rituals. A delegation sent by the British Government has uncovered all these things and has reported back in England on them. You people are rejecting co-operation with the authorities in fear of the dark powers of the oath. In the meanwhile Mau Mau continues to carry out murders of women and children, while you continue writing ineffectual memoranda on land rights and workers' wages. The Agikuyu [Kikuyu] people are dying on both sides, and our role is to save you and the situation. He who confesses the oath, we will go back home with him.<sup>514</sup>

Indeed, by forcing them to face their past, the camp's commandant argued, the screening team was doing the detainees a favour. Martin, the commandant, 'flared up', Gakaara wa Wanjau remembered:

"You people are hardcore Mau Mau!" he declared. "Your own people [David Waruhiu's screening team], people of integrity and good will, have come to help you—but you respond by refusing to talk to them. How in the world are you to be helped if you respond with the same mulish stubbornness you have shown to me when your own people offer help!"<sup>515</sup>

The commandant's combustion before the 'hardcore' at Manda Island was errant if it mistook 'stubbornness' for political commitment. More deeply, it appears ignorant of the grave moral transaction that detainees had undergone in vowing loyalty to a movement as socially contentious as Mau Mau.

Yet the frustration described above also betrayed the extent to which, in the Pipeline, screening was not about establishing proof of individual acts of crime. By definition, any detained Kikuyu had already committed a criminal offence by virtue

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<sup>514</sup> David Waruhiu and Permenus Kiritu, quoted in Wanjau, *Author*, p. 79.

<sup>515</sup> Wanjau, *Author*, p. 84; cf. Askwith, memo, 'recommendations for 'the Pipeline'', 6 Jan. 1954, PRO CO 822/794/263—76.

of having taken a Mau Mau oath. As shown, amended Emergency Regulations of 1953 had obviated the need to attach personal responsibility to particular criminal acts in order to detain a suspect. Rather, in the Pipeline, screening (and confession) became a further aspect in the Kenyan authorities' struggle to coerce large sections of the Kikuyu population into acquiescing to the inequalities of colonial life. 'Loyalist' chiefs and headmen, convinced that the Mau Mau suspects had erred, embodied and proclaimed the correct way for detainees to live; routines of forced labour and Christian education attempted to instil it in them.<sup>516</sup> The success of counter-insurgency and rehabilitation were therefore staked on being able to guarantee confessions of oath-taking by Mau Mau suspects. Kikuyu were expected not only to admit their culpability for Mau Mau, to affirm the screeners' penal truth, but to apologise for it, and in doing so, to affirm the validity of the colonial vision for Kenya.<sup>517</sup>

As Special Branch had suggested, the harshest detention, work and exile camps that the Kenyan government created for Mau Mau counter-insurgency were located in remote regions of the colony.<sup>518</sup> This spatial excision of suspect Kikuyu from the wider community was complemented by their precarious legal position as detainees under the Emergency Regulations. Both factors combined to create a Pipeline that lay, as far as possible, beyond the purview of metropolitan or international observers and that operated in an extra-legal administrative sphere.

Set against the overall scale of the use of detention without trial in the 1950s, Mau Mau detainees' opportunities for legal redress were nominal, minimal and cursory. By the late 1950s, an advisory committee was touring camps to hear inmates' petitions against detention, amalgamating two earlier committees to

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<sup>516</sup> See Ministry of Community Development Press Handout, 'Progress Report—Rehabilitation', 30 Dec. 1954, and Baring, Governor Kenya, to Lennox-Boyd, Col. Secy., 27 Sept. 1955, both in PRO CO 822/794.

<sup>517</sup> For the role of the confession in the production of 'penal truth': Foucault, *Discipline*, pp. 38, 251—4, and cf. Wanjau, *Author*, p. 99. The Kenyan government fed the settler and metropolitan press enthusiastic reports about the transformative effects of the 'rehabilitation' of Mau Mau suspects, though detainee perspectives diverged sharply from this triumphalist message: 'Progress in Erasing Black Magic', *Birmingham Post*, 9 Dec. 1955, Ministry of Community Development Press Handout, 'Progress Report—Rehabilitation', 30 Dec. 1954, 'Rehabilitating the Kikuyu: Work of the Athi River Camp', *East Africa and Rhodesia*, 22 Apr. 1954, in PRO CO 822/794.

<sup>518</sup> See map in Elkins, *Britain's Gulag*, p. 150.

consider the appeals of those confined under GDOs (formed in 1953) and DDOs (formed in 1956). Whyatt, the attorney general, thought it ‘an adequate safeguard against the abuse of arbitrary powers vested in the executive’ but it was not a judicial body: the governor was not legally bound to uphold its recommendations. Detainees were denied legal representation in preparing their defences and presented only with the case, not the evidence, for their detention. Of the tens of thousands of Kikuyu suspects detained without trial from October 1952, therefore, by September 1959 less than three thousand had presented appeals to the committee. Around sixty per cent of them were dismissed. For the overwhelming proportion of the rank-and-file detainees, the individual discretion of administrative officers remained the arbiter of their detention and release.<sup>519</sup>

The legal excision of Mau Mau detainees from Kenya’s conventional juridical order during the emergency is further evidenced by the fact that the commandants of the Pipeline’s camps attempted to censor or destroy their petitions to British parliamentarians and newspapers—particularly those drafted by the ‘hardcore’, many of whom were well aware of their rights and the UK government’s international obligations.<sup>520</sup> In his memoir of time spent in an exile camp, Gakaara wa Wanjau even relates an instance of an attempt to convince prisoners of their non-existence as legal persons:

All people from compounds 2A and 2B were called to the camp office. The officer berated us for our defiance.... Eight people...he charged, were responsible for the memorandum to [Apollo] Ohanga [of the Department for Community Development and Rehabilitation]. The memorandum told lies about arrangements for detainee clothing and made false insinuations about the deaths of two detainees in Manda. We should appreciate that as far as the Government was concerned we were placed below the most worthless of the

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<sup>519</sup> Based on: Whyatt, Kenya Govt. AG, to Roberts-Wray, CO, 11 May 1953, PRO CO 822/725/21; F. Crawford, Deputy Governor Kenya, to Lennox-Boyd, Col. Secy., 25 Apr. 1957, Brief for Secretary of State’s visit to Kenya, ‘Detainees and the appeals procedure’, undated (*circa* October 1957), and P. Renison, Governor Kenya, to Lennox-Boyd, Col. Secy., 30 Sept. 1959, all in PRO CO 822/1234/9, 19, 74, respectively.

<sup>520</sup> For several examples: “State of Emergency. Letters from Political Detainees, 1953—1958”, KNA MAC/KEN/33/10. See also Elkins, *Britain’s Gulag*, pp. 205—17.

land and in fact we were below the law: nobody would deign to take us to a court of law, and we had no right to accuse anybody in a court of law.<sup>521</sup>

Viewed in such a light, the institutions of the Pipeline approach the model of ‘the camp’ described by Agamben: sites in which arbitrary, decisionist authority, unencumbered by legal redress, seeks to render ‘bare’ the life of inmates, fully inscribing it according to the political ends of the sovereign power.<sup>522</sup> Certainly, that perspective helps capture the roughness of state power as it was channelled into Kenya’s detention camps during the 1950s.

By Agamben’s and Foucault’s definitions, the rough articulation of state power found in the Pipeline also suggests its ‘modernity’, since detention inside its camps was coupled to a biopolitical schema of ‘rehabilitation’, which posited that Kikuyu minds—and souls—could be re-made after they had been purged of Mau Mau sympathies.<sup>523</sup> Furthermore, the geographical arrangements of the Pipeline’s camps attest to Fred Cooper’s broader suggestions regarding the ‘arterial’ nature of state power in African colonies—‘concentrated spatially and socially, not very nourishing beyond such domains, and in need of a pump to push it from moment to moment and place to place’—as a corrective to, and juxtaposition with, Foucault’s model of the more even, ‘capillary’ dissemination of political authority among European body-politics in the post-Enlightenment period.<sup>524</sup> If colonial state power was unevenly and irregularly constituted across Kenya, then the camps of the Pipeline, largely shielded from legal scrutiny or international press coverage, and vitalised by the decisionism and coercive might of their commandants and warders, were surely the sharp-end of British sovereignty over African life in Kenya.

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<sup>521</sup> Wanjau, *Author*, p. 121.

<sup>522</sup> Agamben, *Homo Sacer*, esp. pp. 20, 154–9, 166–78. This is not to argue that the Pipeline’s camps succeeded in rendering detainees’ lives ‘bare’, or that there was no possibility of resistance to the colonial state or its detention camps. Consider, for example detainee letters to British political figures: ‘State of Emergency: Letters from Political Detainees, 1953–1958’, KNA MAC/KEN/33/10. Detainee resistance in Kenya’s Pipeline awaits a full study, though Elkins has made a concerted attempt, in the style of Scott’s model of ‘everyday resistance’. See Elkins, *Britain’s Gulag*, pp. 158–90, 205–15, 316–17; cf. James C. Scott, *Weapons of the Weak: Everyday forms of Peasant Resistance* (New Haven, CT & London: Yale University Press, 1985).

<sup>523</sup> See the sub-section entitled ‘Sovereignty and modernity in the thought of Agamben and Foucault’ in the introduction to this thesis.

<sup>524</sup> Cooper, ‘Conflict and Correction’, p. 1533; cf. Foucault, *Sexuality*, pp. 92–102.

## § Villagisation

The Pipeline's double dislocation of Mau Mau detainees—their incarceration in remote camps and their extraction from a system of legal redress—clearly offered the Kenyan government a more rigid means to enforce its political rationale for the mass use of internment: that nearly all Kikuyus had taken Mau Mau oaths; that Mau Mau oaths implied criminal proclivities; and that the detainee population would be 'rehabilitated' as much by subjection to unaccountably capricious coercion and punitive labour routines as by classes teaching literacy and the gospels. However, as the following section of this chapter shows, these camps were not the only exceptional route into the daily life of the now regrouped Kikuyu diaspora that state power took during the emergency.

Colonial efforts to remake Kikuyu bodies and minds inside the Pipeline were matched outside it by attempts to reorganise civilian lives through the process of 'Villagisation'. Once again, what began as a local initiative, led by chiefs and missionaries, who, respectively, encouraged their dependents and flocks in the Rift Valley and Central Provinces to take steps for community 'self-protection' throughout 1952, became official policy during the emergency. The parliamentary delegation that toured Kenya in January 1954 endorsed this as sound counter-insurgent strategy:

Africans in their own Land Units in Kenya live for the most part in homesteads as opposed to villages. The Emergency has shown how difficult it is to provide these scattered families with adequate protection, so that they are not easy prey to the determined terrorist. As a result there are the beginnings, in some parts of the Kikuyu country, of a village system based on, and grouped around, a Kikuyu Home Guard post.<sup>525</sup>

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<sup>525</sup> See Rept. Parl. Del. 1954, p. 19. For more on the genesis of the Villagisation policy: Naivasha District Annual Report, 1953, KNA DC/NVA/1/1/8; 'Memorandum on the Aggregation of the Population into Villages in Rural Areas', 12 Apr. 1954, KNA AB 2/53/1; and Kenya Govt. Press Office handout no. 28, 19 Mar. 1953, PRO CO 822/481/1.

The official explanation given for Villagisation presented it as a protective measure, designed to shield rural Kikuyu communities from the cross-fire of Mau Mau conflicts or intimidation and exploitation by forest-gangs in need of supplies. However, the state's rationale for it was not confined to the expedients of British military strategy. Villagisation was not only an attempt to cut the supply lines to forest-dwelling guerrillas. A complementary argument suggested that it would provide an opportunity to implement rapid changes to Kikuyu agriculture. Villagisation policy thus intersected with deep lying and long-running administrative debates over Kikuyu land rights, husbandry techniques, demographic congestion, class formation and labour migration.<sup>526</sup> It appears that the capacity for executive action and procedural flexibility afforded by the regime of emergency powers presented both the Provincial Administration and certain of the government's technical departments with opportunities to try to quickly resolve these debates and, in so doing, to strengthen state control over Kikuyuland, as well as their own control of the state apparatus.

As much as Villagisation was rationalised as a protective measure for Kikuyus, it was also seized upon to try to reframe the rural order of the Central Province. The scale of the ambition was vast. Kenya's War Council initiated the programme of Emergency Villagisation in June 1954. By October 1955, 1,077,500 Kikuyu had been resettled in 854 'Emergency villages', surrounded by barbed-wire fences, spike-filled trenches and watchtowers.<sup>527</sup> Moreover, as Tom Askwith, the then commissioner of the Kenyan government's Department of Community Development, explained in his memoirs: 'The Government took advantage of the concentration of people [in Emergency villages] to organise a land consolidation scheme'.<sup>528</sup> The Swynnerton Plan, also introduced in 1954, recommended a top-down acceleration of agrarian capitalism in Kenya, primarily through the alteration of land tenure that would fuse together 'fragmented' landholdings, placing their

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<sup>526</sup> For these debates: M. P. K. Sorrenson, *Land Reform in the Kikuyu Country: A Study in Government Policy* (Nairobi and London: Oxford University Press, 1967), part one. See also Throup, *Origins*, chs 4–7, 9.

<sup>527</sup> Based on: 'Minutes of a Meeting of Sub-Committee of the Council of Ministers set up to examine the Carothers Report...etc.', July 1954, KNA, AB 8/78/1/1; Rept. Parl. Del. 1954, p. 19; *East African Standard*, 20 Oct. 1955; Blundell, *Wind*, p. 205; Sorrenson, *Land*, esp. pp. 110–20, 140–1.

<sup>528</sup> Askwith, *Harambee*, p. 203.

ownership in the hands of a few while simultaneously creating a large rural proletariat.<sup>529</sup> The implementation of the Swynnerton Plan's land tenure reforms in Kikuyuland, especially during the period *circa* 1956—60, offers further evidence of the extent to which the Mau Mau crisis extended beyond a 'civil disturbance' and repression against suspect Kikuyus beyond the Pipeline.

Doctors Carothers and Leakey, the two most prominent members of the Sociological Committee on Mau Mau, which was in fact chaired by Askwith, were forthright supporters of Villagisation because of the opportunities it would provide for wider reform of Kikuyu life. 'Kikuyu people', Carothers argued, were 'eminently teachable' and, since they out-performed other tribes in intelligence tests, were 'best-fitted for success within our [European, capitalist] cultural mode'. He accordingly praised the 'masterly psychological insight' of Askwith's report on Villagisation, which had recommended the policy to the Kenyan government in January 1954.<sup>530</sup> Leakey supported a romantic version of the same policy, whereby Rift Valley squatting would be abandoned in favour of the return of Kikuyus to what was figured as their prelapsarian state, in newly-created, African villages 'based on the English pattern'. Culturally and psychologically, the inhabitants would effectively travel back in time in a government-sponsored return to the familiarity of their idealised 'old' lives, surrounded by the stabilising influence of elders, families, and friends, where they would no longer be prone to the machinations of political 'egotists' and vulnerable to their compelling oaths of allegiance.<sup>531</sup>

Initially, and particularly in Fort Hall, the overwhelming beneficiaries of the complementary programmes of Villagisation and land tenure reform were 'loyalist' Kikuyus. In Fort Hall, they controlled the committees appointed to measure 'fragments' of land and demarcate the consolidated holdings for which new titles were

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<sup>529</sup> The Swynnerton Plan also proposed the following economic reforms: increased access to marketing facilities, credit and education for African farmers and their families; training to improve husbandry; land reclamation and anti-erosion schemes to expand the reserves' capacity; the lifting of government restrictions on African production of cash crops. See R. J. M. Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya* (Nairobi: Government Printer, 1954), pp. 8—64.

<sup>530</sup> Carothers, *Psychology*, pp. 20—9. See also Askwith, 'Recommendations for "the Pipeline"', 6 Jan. 1954, PRO CO 822/794/263—76. Askwith had been deeply impressed by his recent visit to British Malaya, also under Emergency rule at the time, where General Templer had likewise instituted a system of villagisation that was combined with economic sanctions.

<sup>531</sup> Leakey, *Defeating*, pp. 134—41.

issued, and were therefore able to expropriate alleged Mau Mau supporters, increasingly confined in detention camps or else in Emergency Villages, in order to expand their own land-holdings.<sup>532</sup> Indeed, the Provincial Administration rationalised this as a desirable means of polarising loyalist support (and therefore unwittingly showed its reductive, binary perspective of Mau Mau adherence and enmity). As Fort Hall's district commissioner noted in 1954:

As the situation grew clearer, it became possible to distinguish between good and bad areas in the district, and to reward and punish accordingly. Kinyona and Ichichi, for example, were good, Rwathia notoriously bad. The latter area was prohibited and its entire population villaged, and in similarly "bad" areas... communal labour, for example[,] was more rigorously enforced than in "good" areas where the population was given more time on its own land. ...in the long time development of the district the loyal areas were always remembered first.<sup>533</sup>

Villagisation policy was therefore consonant with the workings of the broader colonial economy of counter-insurgency in Kikuyuland, in which rewards for loyalty provided the obverse of the collective penalties enforced against those believed to be complicit with Mau Mau. As such, both the protective and the reformist rationales for Villagisation were loaded with retaliatory intent.

As with the practice of mass detention without trial in the Pipeline, the collective enclosure of Kikuyu communities under the Villagisation policy stemmed from the official conviction that the overwhelming majority of the population had been exposed to Mau Mau oaths and were therefore at least 'passively' loyal to the movement. 'It is obviously not practical politics', Nakuru's DC wrote in 1953, 'to incarcerate a million and a half Kikuyu who are admitting freely to having taken the illegal oath'.<sup>534</sup> As Nyeri's DC explained in 1954:

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<sup>532</sup> Based on: Fort Hall District Annual Report, 1956, KNA DC/FH1/35, and Fort Hall District Annual Report, 1959, KNA DC/FH1/38; Sorrenson, *Land*, pp. 166–7, 174–7, 231; *Report of the Commission on Land Consolidation and Registration in Kenya, 1965–66* (Nairobi: Government Printer, 1966), para. 67, cited in Bruce Berman, *Control & Crisis in Colonial Kenya: the Dialectic of Domination* (London: James Currey, 1990), p. 368. For extended analysis of these expropriations: *ibid.*, pp. 369–71.

<sup>533</sup> Fort Hall District Annual Report, 1954, KNA DC/FH1/33/3–4.

<sup>534</sup> DC Nakuru to C. Owen, 1 July 1953, KNA BZ 16/1/14.

At the end of 1953, the Administration were [*sic*] faced with a serious problem of the concealment of terrorists and supply of food to them. This was widespread and, owing to the scattered nature of their homesteads, fear of detection was negligible; so, in the first instance, the inhabitants of those areas were made to build and live in concentrated villages. The first step had to be taken speedily, somewhat to the detriment of usual health measures and was definitely a punitive short-term measure.<sup>535</sup>

Villagisation was thus soon exploited by the forces of counter-insurgency as another means of detaining suspects and extracting intelligence about Mau Mau.

The punitive aspects of Villagisation began at the inception of the policy's implementation, for, like the Pipeline's detainees, would-be villagers were forced to construct the enclosed compounds and dwellings in which they would eventually be held. Moreover, the Villages were attached to Kikuyu Guard posts and guarded by 'loyalist' forces, who controlled nearly every aspect of daily life within them, overseeing the movement of 'villagers' (and their livestock) in and out of various compounds, enforcing curfews and managing communal labour gangs.<sup>536</sup> In fact, the punitive aspects of life in the Emergency Villages went beyond enforced relocation, disciplining by the Kikuyu Guard, the imposition of curfews, and the compulsory performance of construction and agricultural labour tasks. The inhabitants—mainly women, children and the land-poor elderly—were regularly assembled at 'confessional *barazas* [meetings]' to listen to neighbours admit their involvement in Mau Mau and to be purged of oaths at officially organised *gutahikio* (cleansing) ceremonies.<sup>537</sup> During the emergency, attendance at *barazas* led by the armed loyalists of the Kikuyu Guard was compulsory. Crowds were forced to sing anti-Mau Mau songs and members told to confess their oaths. Those who confessed were whisked away for private screening sessions by Special Branch and Kikuyu Guard; those who did not were, according to

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<sup>535</sup> Nyeri District Annual Report, 1954, p. 33, quoted in Caroline Elkins, 'Detention, Rehabilitation & the Destruction of Kikuyu Society', in Atieno Odhiambo & Lonsdale (eds.), *Nationhood*, p. 208.

<sup>536</sup> See: Branch, 'Loyalism', pp. 154—5; Elkins, *Britain's Gulag*, ch. 8; Majdalany, *Emergency*, p. 210.

<sup>537</sup> *Gutahikio* ceremonies had been recommended by Leakey since at least 1952. See Fort Hall Annual Report, 1952, KNA DC/FH1/31/2; Kershaw, *Below*, pp. 237—8, 250—1, 313.

dozens of Caroline Elkins' interviewees, subjected to vicious and even fatal punishments.<sup>538</sup>

As with detainees' experiences of state control in the Pipeline, therefore, it appears that unregulated decisionist rule and arbitrary violence prevailed over government policy and the goals of 'rehabilitating' Kikuyuland's civilian population in the Emergency Villages. The official faith that having taken an oath was the *sine qua non* of Mau Mau allegiance, and the need to extract a confession to justify the draconian counter-insurgency measures, shaped the word inside the barbed-wire fences of both the Pipeline's camps and the Emergency Villages. Indeed, in the latter, the distinction between their protective and punitive functions was in fact so hazy that, as Askwith concluded by January 1956, some inhabitants might have preferred detention in the Pipeline:

...in a number of villages a deterioration had set in. ...there was a natural tendency for the villagers to resent the better conditions of feeding, pay and recreation of detainees in comparison to their own lot of hardship and unpaid communal labour.<sup>539</sup>

Askwith's complaint indeed suggests that the line between the suppression of Mau Mau and the repression of the Kikuyu civilian population had been steadily eroded over the course of the emergency. The perceived challenge to the sovereignty of the colonial state in Kenya presented by the Mau Mau of Kenyatta and the KAU had widened into one believed to be endemic to Kikuyus. The corollary of that analysis was the attempt to assert authoritarian forms of social control over an ever-larger proportion of Africans figured to belong to the insurgents' 'passive wing'. This assertion of authoritarian, personalised and decisionist forms of state power over the lives of Kikuyu civilians was a defining feature of the emergency period. However, as the final chapter of this case study shows, even when Mau Mau had been crushed and the emergency powers withdrawn, this mode of governance and these departures from the rule of law were by no means decisively displaced.

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<sup>538</sup> For a harrowing account: interview with Margaret Nyaruai, 21 Mar. 1999, quoted in Elkins, *Britain's Gulag*, p. 249. For the use of information gleaned from 'confessional *barazas*' in the prosecution of Mau Mau suspects: Anderson, *Histories*, pp. 294—7.

<sup>539</sup> Askwith, 'Rehabilitation Progress Report 1955', 5 Jan. 1956, PRO CO 822/794/47.

## 4. The twilight of the Emergency, *circa* 1956–60

The Kenyan Emergency was proclaimed in the belief that it would be a short-lived affair, lasting only a few months, until Kenyatta and other leading ‘agitators’ had been disposed with. Yet almost as soon as the State of Emergency had been proclaimed, the Kenyan government and the Colonial Office began discussions regarding the retention of the effective powers of the Emergency Regulations beyond its formal duration. This was based on the awareness that these powers, and the ability to make new regulations, expired with the emergency itself: at its termination, all detainees would have to be released. To try to seal this loophole, the CO’s legal adviser, Roberts-Wray, produced a memorandum assessing various options. Under the Deportation (British Citizens) Ordinance (of *circa* 1934), ‘restriction orders’ could be introduced to prohibit persons entering or leaving specific areas of a territory. If these powers were felt inadequate, a special ordinance of limited duration, along the lines of Defence Regulation 18B, introduced in wartime Britain under the 1939 Emergency Powers (Defence) Act, could be created. However, Roberts-Wray pointed out that if a law were created to allow detention without trial in non-emergency conditions, a committee of judicial inquiry would have to be created to bring some semblance of a legal determination of cases. Moreover, he noted, to keep the regulations alive beyond the emergency’s lifespan would be ‘repugnant’.<sup>540</sup> Doing so would require a further, separate ordinance to bridge the transition between ‘emergency’ and ‘normal’ rule. A familiar set of tensions had emerged: between political exigency and legal consistency; between the perceived need to depart from legal convention and a wish to retain the emblematic power of due process as the basis of the state’s sovereign public authority.<sup>541</sup>

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<sup>540</sup> A legal criticism, referring to the doctrine of non-repugnancy, as well, perhaps, as a moral one.

<sup>541</sup> Roberts-Wray, CO, ‘Methods of Legislation for the Continued Detention of Persons After the End of An Emergency’, enclosed in Lyttleton, Col. Secy., CO Circular to all Governors, 2 Jan. 1953, PRO CO 822/725/29—30.

Ultimately, the discussions on extending the Kenyan government's emergency powers between late 1952 and the end of 1953 came to nought. As argued, short-term crises—provoked by the proclamation of the emergency, the detention of Kenyatta (in particular), the expulsions and exodus of squatters from the Rift Valley to Kikuyuland, attacks on settlers, the Lari massacre and the formation of the Kikuyu Guard—meshed with older currents of unrest and inequality in Kikuyu society to create what increasingly looked like an intra-ethnic war. Emergency policy criminalised an ever-widening sphere of the Kikuyu population; Emergency Regulations and the special judicial system underpinned a juridical order geared to penalise that criminality. This is not to argue that the colonial government was bent on a sinister conspiracy to create and retain a police state in Kenya; rather, it is to draw attention to the extent to which the technical provisions of the emergency powers appealed to an authoritarian regime uncertain of the basis of its sovereign authority, and of the potential for these apparent exceptions to become established norms of the juridical order.<sup>542</sup>

By early 1955, the major military actions of the guerrilla war against Mau Mau's forest-fighters had been completed. Several years of evading security sweeps, sheltering from Royal Air Force bombers, and foraging from the forest-floor had made the Land and Freedom Armies into resourceful, disciplined, but now disheartened and divided units. Surrenders, desertion and betrayal by the informers of Special Branch's infamous pseudo-gangs—'the government's Mau Mau'—drained troops and morale. The guerrillas' defeat was symbolised by the capture of Dedan Kimathi, Mau Mau's most notorious forest-fighter, on 21 October 1956, and his execution, as a terrorist, on 18 February 1957.<sup>543</sup>

By late 1956, there was an official consensus that the expulsion of Rift Valley Kikuyu to the reserves, the drastic civilian clampdown of Operation Anvil in Nairobi, the Villagisation of the 'passive' wing, and, above all, the forest-fighters' defeat had completed the successful military repression of Mau Mau. In June, Naivasha's district commissioner enthusiastically reported that 'Mau Mau as an effective force and

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<sup>542</sup> For more: Bruce J. Berman, 'Bureaucracy and Incumbent Violence: Colonial Administration and the Origins of the 'Mau Mau' Emergency in Kenya', *British Journal of Political Science*, vol. 6, no. 2 (1976), esp. pp. 146–59, 169–75.

<sup>543</sup> Based on: Lonsdale, 'Authority, Gender & Violence', pp. 60–9; Anderson, *Histories*, ch. 6.

organised body had ceased to exist and that thereafter we were employed in “mopping up” operations only’.<sup>544</sup> On 17 November 1956, the military operations were declared complete. Lathbury, General Erskine’s successor, announced that ‘we now therefore return to the normal state of affairs in any British territory, where the Police are responsible for law and order’.<sup>545</sup> Nevertheless, the State of Emergency remained in place, Kikuyuland remained ‘Villaged’, and tens of thousands of Kikuyus remained in Kenya’s jails, convicted of Mau Mau offences, or in the Pipeline, suspected of proclivity to subversion. Reference to the ‘normal state’ of law and order was nonsense: this was to define normality by the exceptional.

With Mau Mau defeated as a military force, the attention of the Kenyan government and the Colonial Office switched to the anxious question of how safely to release Kikuyus interned in the Pipeline. These considerations were informed by the discovery of a new radical group, the *Kĩama Kĩa Muĩngi* (KKM; ‘The Council of People’), detected among the so-called Mau Mau ‘passive-wing’ in Nairobi and Embu District.<sup>546</sup> The KKM’s organisation was attributed to former detainees who had been arrested in the early stages of the emergency and returned to find their holdings carved-up and grabbed by loyalists under the Swynnerton Plan’s land consolidations. Initially, the administration tolerated the existence of the KKM as a signal of its tolerance for protest over ‘legitimate’ political grievances.<sup>547</sup> However, as increasing numbers of suspected KKM members were arrested, more detailed information about the organisation was gathered. It was reported that the KKM oath contained a pledge to kill loyal Africans and Europeans, that the movement planned to resort to violence if non-violent means were unsuccessful, that it had attracted twenty thousand followers in the Kandata Division of Fort Hall District alone, and that it was planning for insurgency in 1960. Indeed, according to the then secretary to the Kenyan government’s War Council, Frank Corfield, the KKM was synonymous with Mau Mau:

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<sup>544</sup> Naivasha District Annual Report, 1956, KNA DC/NVA/1/1/1.

<sup>545</sup> Lt. Gen. G. W. Lathbury, ‘The Kenya Emergency: May 1955 – November 1956’, PRO WO 236/20, and ‘The Kenya Emergency, 3 May 1955 – 17 November 1956’, 14 Dec. 1956, paras. 74–80, 88, PRO WO 276/517.

<sup>546</sup> For the Kenyan government’s changing appreciations of the KKM in the later 1950s: Percox, *Cold War*, pp. 139–51.

<sup>547</sup> Crawford, Deputy Governor Kenya, to Lennox-Boyd, Col. Secy., 16 Sept 1955, PRO CO 822/789.

...the real but undeclared aims of the body were to unify the Kikuyu-speaking peoples as a first step to then strive for the acquisition of more land, the eviction of Europeans, and ultimately, self-government as a second.<sup>548</sup>

As the release rate of the Pipeline's detainees was sped-up throughout 1957, the KKM was proscribed on the grounds that it might attract the support of dissident Kikuyus returning to the reserves. Accordingly, discussions regarding the withdrawal of emergency powers were inflected by deep anxiety about the government's ability to guarantee law and order in their anticipated absence, with Baring using the KKM's appearance to suggest to Lennox-Boyd that 'important powers to replace those which we will abandon when the Emergency comes to an end' should be 'on our permanent Statute Book'.<sup>549</sup>

From late 1957, the Kenyan government and the Colonial Office began to discuss 'twilight' legislation—a new euphemism for the type of bridging ordinance contemplated by Roberts-Wray in 1953, intended to ease the passage across emergency to normality. British commitments to the European Convention on Human Rights (ECHR; signed on 4 November 1950, in force from 3 September 1953) and the International Labour Organisation's Forced Labour Convention (1930) now brought back a considerable technical headache that had been numbed, rather than cured, by the decision to take emergency powers in 1952. Disregarding these international commitments had been permitted then, and justified subsequently, by declaring a State of Emergency in Kenya, which activated the relevant derogation clauses in these agreements, thereby allowing detention without trial, restrictions on freedoms of assembly and the use of detainee-labour. The ending of a formal State of Emergency would compel the Kenyan government to free the remaining detainee population. Worse still, the majority of the detainees would be released into the Kikuyu reserves and the arms of the KKM. As the Colonial Office explained to Lennox-Boyd:

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<sup>548</sup> F. D. Corfield, War Council Secy., to W. Mathieson, CO Head East Africa Department, 17 Sept. 1955, PRO CO 822/789.

<sup>549</sup> Baring, Governor Kenya, to Lennox-Boyd, Col. Secy., 2 Apr. 1958, PRO CO 822/1347. Likewise, in July 1959, Kenya's European Minister without Portfolio, N. F. Harris, pointed to the discovery of another secret society, the *Kiama Kiā Thayu* ('The Council of Peace') as a further reason to retain Emergency powers: Percox, *Cold War*, p. 151.

First of all, no one could contemplate with equanimity the release of 20,000 detainees, or the cessation of a psychological discipline for the 50,000 already released, who are very much on probation. Secondly, the disappearance of all Emergency checks on African political life could quickly lead to a deterioration in security, so that a further Emergency would be created requiring special measures. ... In the last resort we must be prepared to sustain existing practices deemed essential for the maintenance of peace in Kenya even if we stand frankly in default of international obligations. ... The conclusion must be that for as long as possible the Emergency must be kept alive and that all attempts for its revocation should be resisted.<sup>550</sup>

This CO briefing is suggestive of the extent to which the Kenyan authorities—in Whitehall and Nairobi—felt embattled over the retention of the emergency regime. They were conscious of a growing international and metropolitan consensus that the Mau Mau ‘crisis’ was over and that exceptional powers to resolve it were no longer justified. They also believed that a serious law and order problem was latent in the Kikuyu countryside. And, it would seem, they were nervous about whether the programme of ‘rehabilitation’ had actually cured the Mau Mau pathogen among the Kikuyu, or was merely masking its worst symptoms.

By the late 1950s, the argument for prolonging the use of emergency powers was subject to growing political pressure. Lennox-Boyd had been appraised of the argument for retaining them in anticipation of his visit to Kenya, in late 1957, to negotiate constitutional reform that would facilitate the better representation of moderate African political opinion.<sup>551</sup> Emergency rule was hardly conducive to harmonious multiracialism. Nor was it cheap—at more than £55,000,000 (or £10,000 per Mau Mau fighter), according to Fred Majdalany—and this in an era in

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<sup>550</sup> ‘Brief for the Secretary of State’s Visit to Kenya, 1957’, date unclear (*circa* October 1957), PRO CO 822/1229.

<sup>551</sup> Eliud Mathu’s nomination to the Legislative Council (LegCo) in 1944 had inaugurated direct African political representation in Kenya. In 1948, the number of nominated African representatives on the LegCo was increased to four; in 1952, to six. Following the so-called Coutts Commission of 1955, certain Africans were permitted to elect eight representative members. The first elections took place in March 1957; none of the African members took office. Lennox-Boyd’s visit in October and November 1957 aimed to resolve this impasse. For more on constitutional reform in late colonial Kenya: Berman, *Control*, pp. 395–417.

which Britain was evaluating the costs of empire with anxious exactitude.<sup>552</sup> Yet the financial costs of the emergency regime soon paled against the political ones. On 4 March 1959, news reached Britain that eleven detainees at Hola exile camp had died from drinking contaminated water. Denis Pritt, an activist barrister who had represented Mau Mau detainees during the emergency, gained access to the initial autopsy findings, which he related to the Labour MP Barbara Castle. It emerged that the detainees had been beaten to death. As the dark story of the detainees' deaths emerged, the twilight of the emergency drew nigh.<sup>553</sup>

In response to the outcry over Hola, a committee was appointed to tour Kenya's detention camps and make recommendations on their future administration. The outcome of its findings—the Fairn Report—added a new dimension to the debate on 'twilight' legislation, for, as much as it can be said that they precipitated the formal end of the emergency, they also generated a renewed impulse permanently to encode extraordinary powers in Kenyan law. Published in July 1959, R. D. Fairn's report on Kenya's detention-camp system reminded its readers that the purpose of the Pipeline was social, not penal—'The object of detention is not to punish but to rehabilitate'—with one exception. Or rather, with a thousand exceptions: the captives of Hola, Manyani, Aguthi and Athi River Camps. Known to the Kenyan authorities as 'the hardcore', and called Mau Mau 'addicts' by Fairn's committee, this collective of dissidents were figured as being beyond rehabilitation and therefore unsafe ever to set at liberty.<sup>554</sup>

The political and legal conundrums posed by Fairn's findings were how to end the emergency and withdraw the regulations but continue the use of executive detention without trial, and how to avoid either international outrage or sacrificing the Kenyan state to precisely the kind of disorder that these special powers had been invoked to suppress.<sup>555</sup> The solution concocted by the CO and the Kenyan government was the 'Protection of Public Security' bill, legislation that would

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<sup>552</sup> For cost of Kenya's Emergency regime: Majadalan, *Emergency*, pp. 217, 221. For British cost-benefit analysis of its colonies: Cooper, 'Conflict', p. 1537, n.73.

<sup>553</sup> For more on the Hola scandal: HC Deb., 16 June 1959, vol. 607, cols. 247—384; Elkins, *Britain's Gulag*, pp. 343—56.

<sup>554</sup> See Fairn Report, pp. 6, 23—29.

<sup>555</sup> See I. Macleod, Col. Secy., Colonial Policy Committee [hereafter, CPC] memo. 18, 'Security Powers in Kenya', 2 Nov. 1959, PRO CAB 134/1558.

empower the government to prohibit public assemblies and refuse to register political associations. It would work in tandem with another piece of legislation, the Detained and Restricted Persons (Special Provisions) Ordinance, conferring powers to detain or restrict the movement of certain individuals without trial. Together, this legislation would provide for the suppression of any ‘subversive’ political activity and the continued detention of the ‘hardcore’ (it would also enable the creation of a ‘fugitive list’ of individuals currently in political exile, who could be rusticated should they return to Kenya).<sup>556</sup> ‘Twilight’ was an unwittingly apt euphemism for the proposed legislation: in the intended sense, it anticipated daybreak after the darkness of emergency rule; implicitly, it suggested the impending gloom of permanently inking supposedly temporary Emergency Regulation into Kenya’s statute book; lastly, it alluded to the uncertain justice of repressive action taken in the half-light between two purportedly distinct states of rule: normal and exceptional.

The formulation of the powers that would amputate certain emergency provisions and graft them into statutory legislation entailed a considerable mutilation of the sense of both concrete international legal obligations and the more abstract standards of the rule of law in colonial Kenya. A critical aspect of the planned legislative solution clung to a positioning of the ECHR’s definition of ‘Emergency’, in its derogation clause (article 15), as unrealistically absolutist.<sup>557</sup> Since it ‘did not recognise anything short of actual conditions of emergency’, the Minister of Legal Affairs argued, ‘it did not contemplate either a [“]build-up” period or a “run-down” period’.<sup>558</sup> By contrast, Kenya’s new legislation would bridge the imagined gap between substantive law and emergency powers, allowing the government in future to deal with situations of disorder that could neither be controlled by existing legislation nor necessitated the declaration of a formal State of Emergency.

According to Iain Macleod, the new colonial secretary, it would:

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<sup>556</sup> For the joint powers of the PPS and detention bills: Renison, Governor Kenya, to Macleod, Col. Secy., 27 Oct. 1959, PRO CO 822/1230/5, and Macleod, ‘Security Powers in Kenya’, 2 Nov. 1959, PRO CAB 134/1558. For the ‘fugitive list’: PRO CO 822/2091.

<sup>557</sup> For the ECHR derogation clause: Council of Europe, ‘European Convention on Human Rights’, 4 Nov. 1950, available at <<http://www.hri.org/docs/ECHR50.html>> [accessed 27 Apr. 2009].

<sup>558</sup> [Emphasis in original] Extract from Minutes of a Council of Ministers [of Kenya’s Legislative Council] Meeting, 29 Oct. 1959, PRO CO 822/1230/9.

...meet the problem...of putting reasonable and flexible powers in the hands of a Governor to deal with abnormal conditions threatening security which do not justify the use of the sledge-hammer of the Emergency Powers Order in Council.<sup>559</sup>

According to Manningham-Buller, the British government's attorney general, the proposed legislation would in fact authorise a horrifying, decisionist form of sovereign power that would collapse fact into law, blurring into indistinction the (legal) difference between exceptional and normal rule:

The conferring on the Governor of unlimited power to make at any time, and without any notice or proclamation, regulations providing for and authorising the doing of such things as appear to him strictly required by the exigencies of the situation, means that without notice the rights of individuals could be destroyed and individuals deprived of their liberty. ...The enactment of such a Bill giving a Governor the right to exercise such powers whenever he thought fit would in my opinion amount to negation of the rule of law and justify the description of the colony as a police state.<sup>560</sup>

The outcome was a compromise, of a sort. When they came into force, it was explained, the new powers would be arranged over 'two tiers': a 'less serious' one, excluding the power to use detention without trial and to order compulsory labour, and a 'more serious' one, which would include them. Before implementing the 'more serious' powers, the governor would have to make a formal, public announcement of his intentions, justifying them as necessary to counter a 'danger to public life', thereby activating the derogation clause (article 15) of the ECHR.<sup>561</sup>

The collapse of fact into law—the legalisation of the extra-legal powers of rule by emergency powers—is precisely what the 'twilight' legislation was designed to

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<sup>559</sup> Transcript of speech by Macleod, Col. Secy., to House of Commons, 10 Nov. 1959, PRO CO 822/1230.

<sup>560</sup> R. Manningham-Buller, UK Govt. AG, CPC (59) memo. 17, 'Security Powers of Colonial Governors', 29 Oct. 1953, PRO CAB 134/1558.

<sup>561</sup> For the 'two tier' concept: Meeting of CPC, 5 Nov. 1959, PRO CAB 134/1558. For the 'less serious' and 'more serious' schema: Foreign Office circular no. 384, 'Kenya: relaxation of the Emergency', 6 Nov. 1959, PRO CO 822/1230/7B. For the requirement to make a public announcement that 'more serious' powers were being taken: Manningham-Buller, UK Govt AG, 'Security Powers of Colonial Governors', 29 Oct. 1953, PRO CAB 134/1558.

achieve. By shading-in ever-subtler gradations of distinction between two states (order and disorder) posited as being pristine in law but in reality far murkier, a new legal spectrum of conditions, as it were, ‘necessitating’ rule through exceptional powers, would be created. Despite the attempts to place various riders on the creation of a system of unchecked sovereign discretion, in which any ‘legal’ definition of emergency would be merely a cipher for the political decision of the governor of the day, the ‘twilight’ legislation remained underpinned by the ability aggressively to assert the colonial executive’s will. Thus, having duly taken notice of the attorney general’s anxious advice, Macleod countered by arguing that:

It has been generally accepted that the existence of a public emergency is a matter of fact, to be demonstrated, not a matter of legal proclamation. It is also accepted that the decision whether or not an emergency exists is a matter of judgement. The decision falls to the authorities concerned and, although they may subsequently be challenged, for instance, before the Human Rights Commission, there must be a presumption that they are in the best position to assess the situation. Finally, it is accepted that, in regard to the justification of the use of enabling powers to deal with an emergency, the real question is not what the legislation might permit, but what is in fact done under it in a particular situation. On these premises, no objection in principle could be raised to the introduction of general enabling legislation which allows a Government to exercise more stringent powers than would be justified in normal times in a situation which they consider could be demonstrated to amount to an emergency within the terms of the Human Rights Convention, and to the extent strictly required by the exigencies of the current situation.<sup>562</sup>

At the opening of the Legislative Council session on 10 November 1959, Patrick Renison, Baring’s successor as Kenya’s governor, duly introduced the Prevention of Public Security bill and the Detained and Restrict Persons (Special Provisions) bill.<sup>563</sup> Several weeks later, on 11 January 1960, Kenya’s State of Emergency was technically ended and the ‘less serious’ provisions of the new powers enacted as ordinances. The

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<sup>562</sup> Macleod, Col. Secy., ‘Security Powers in Kenya’, 2 Nov. 1959, PRO CAB 134/1558.

<sup>563</sup> Transcript of speech by Renison, Governor Kenya, to Legislative Council, 10 Nov. 1959, PRO CO 822/1230.

Mau Mau crisis had passed, and the emergency regime had been lifted, but exceptional powers to curtail political activity deemed undesirable by her rulers had been enshrined in Kenyan law and remained at the state's disposal.

## Conclusions

The declaration of a State of Emergency in Kenya on 20 October 1952 appears to have exacerbated, rather than terminated, the diverse political, socio-economic and moral crises later homogenised under the rubric ‘Mau Mau’ by the colonial administration and its various auxiliary security forces in the post-Second World War period. An understanding of the particular nature of the special powers taken at that moment gives a valuable window onto the ramification of these crises. These powers—the Emergency Regulations—positioned Mau Mau as both within the law and beyond it; open to its penalties but denied many of its protections. At the same time, these powers afforded procedural space to a range of hastily expanded security force auxiliaries—drawn from groups of European settlers and African ‘loyalists’—who became deeply involved in the intelligence-gathering aspects of counter-insurgency, and whose investigations widened the scope of the official perception of Mau Mau. In particular, Mau Mau oath-taking, with its dreadful corruption of the sociology of Kikuyu ritual practice, came to underpin colonial concerns about the phenomenon during the early stages of the emergency, being cited as a marker of criminality and a barrier to certain Africans’ socialisation into peaceful and productive life within a ‘modern’ colony. Once bureaucratic organisation was applied to this pathological schema for interpreting the spread and transmission of the Mau Mau ‘disease’, the colonial authorities faced what they perceived as the awakening of a latent criminal endemic among Kenya’s Kikuyu population.

The pre-emptive dynamic of criminalisation, and the special policies enacted on the strength and in the image of it, provided for successive, upward revisions of official appreciations of Mau Mau from late 1952. Formalised control of what began as *ad hoc*, civilian-led interrogations of their African workforces to screen for Mau Mau sympathies was a somewhat belated response to the lurid claims generated by European settlers’ initial investigations into the criminal proclivities of their farm labourers. These initial investigations created an ‘information panic’ about Mau

Mau, which soon appeared to be a homogenous, well co-ordinated and hierarchically structured movement, with different oaths to guarantee varying levels of commitment to multiple socio-political agendas.<sup>564</sup> In turn, this radically enlarged the colonial authorities' visions of the threat of Mau Mau, as well as of the purposes to which emergency powers would be put: no longer simply to excise from the Kikuyu the malign influence of a clique of politically irresponsible agitators, nor even to win a colonial 'small war' against the guerrillas in the mountains, but to suppress a tribal insurrection animated by secret oath-taking. Screening thus came to fulfil several functions of the colony's centralised counter-insurgency operations: the initial identification of Mau Mau suspects to be deported from the Rift Valley (and, later, of 'loyalists' to be dragooned into service for the government); intelligence-gathering about the activities of Mau Mau forest-fighters and 'passive wing' supporters in the reserves and Nairobi; the production of evidence to be used in Mau Mau trials; and, in conjunction with the classification system, information to help decide to which type of camp those detained should be sent. The screening mechanism was therefore intrinsic to the realisation of the Kenyan emergency as a bureaucratised form of counter-insurgency, and in turn to the further expansion of exceptional institutional practices conceived to confront it.

The special juridical regime created in Kenya *circa* 1952–4 was a curious assemblage of existing powers and emergency innovations; this pattern applied to the judicial, policing and penal strategies evolved in the period. Although the 1939 Order in Council, under which the Emergency Powers were taken, provided for the sovereign figure—the colonial governor—to suspend laws, the more pertinent feature of Kenya's juridical order during the emergency was the extent to which the regulations interacted with and overlaid existing criminal offences to create a web of proscriptions that attempted to tighten authoritarian control over ever wider spheres of civilian social life and everyday activity. From an early stage in the emergency, a wide range of arresting officials was empowered to help check Mau Mau activity. This expanded the existing security and administrative forces and created new ones,

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<sup>564</sup> 'Information panic' is Chris Bayly's phrase, and a term he particularly applies to the British encounters with Thuggee in early nineteenth-century colonial India: C. A. Bayly, *Empire and Information: Intelligence gathering and social communication in India, 1780–1870* (Cambridge: Cambridge University Press, 1996), esp. pp. 143, 149, 165, 169–79.

but, more significantly, invested many of them with bespoke powers of arrest and detention that combined investigative, executive and judicial capacities. Old exigencies of colonial rule were thus re-vitalised. Similarly, the special carceral sites instituted during the period 1952—60 (the detention, work and exile camps), had deep roots in pre-emergency Kenya and indeed in wider colonial practice. Deployed as part of the counter-insurgency measures against Mau Mau, they operated according to penal logics that were simultaneously punitive and rehabilitative, corporeal and psychological, individuating and collectivised. The Emergency Villages of the Central Province became perhaps the strongest marker of this collapse of the suppression of Mau Mau into the repression of Kikuyus, as Kikuyuland's civilian population became the increasingly explicit target for ambiguously 'preventative' and explicitly performative counter-insurgency measures.

Throughout the period 1952—60, a range of concerned actors, meshed into different (but not rigidly exclusive) political constituencies concerned with the fate of colonial Kenya, carefully debated the legal and extra-legal positions created by the taking of emergency powers there. Settlers frequently articulated a desire for summary and performative justice. However, they did not do all of their own articulating: the Kenyan government found it particularly useful to present these Europeans' political interests as representing the threat of a belligerent, embattled and irascible minority that would happily trade the rule of law for the rule of the mob. Certainly, for legal officials in the CO and in the Kenyan government, and for diverse sections of the metropolitan and imperial press, the particular source of juridical tension provoked by the emergency was the trade-off between unchecked executive power and the degradation of due legal process. This debate pitted the state's socio-political self-preservation against a decisionist form of absolutist power that threatened to devalue the public authority it sought to uphold. At their most extreme, the actions of the state's various security forces and loyalist auxiliaries operating during the emergency conjured the image of the latter—the boundless sovereign—and exposed the pretensions of idealised and abstracted constructions of the rule of law as the basis of constitutive power in colonial Kenya. More broadly, one can read in this the process by which the introduction of exceptions to the posited norms of the law in turn help create 'the rule of law' as an effect of state

power, and a particularly potent emblem and standard of its ‘correct’ functioning at that—as objective, disinterested and indeed ‘civilising’.

In 1950s Kenya, the debate over executive power and the rule of law was resolved squarely on the side of authoritarian expedients, even extending to the permanent incorporation of such provisions into Kenya’s substantive law after the emergency was formally ended in 1960. However, the desire for the appearance of due process and minimum legal standards was not suppressed in this process. Quasi-legalism in fact offered the muddied, muddled, meddling space for government action against political enemies whose intentions and functioning were both poorly understood and open to hyperbolic appraisals—for example, that transformative Mau Mau oaths were irresistible spurs to criminal activity that might trigger an attempted genocide of whites in Kenya. With Mau Mau located as terrorists, with cause and intent run together, criminal action could be presumed and the burden of proof reversed. Though in this sense placed beyond the law, however, Mau Mau had to be amenable to legal process, or to processes pertaining to it: this was not a war, after all, but an emergency.

## Conclusions: sovereignty and states of exception in British India, Ireland and Kenya *circa* 1810–1960

In the introduction to this thesis, I observed the centrality of ‘the rule of law’ to the creation of legitimacy and purpose for diverse projects of British foreign dominion. In the particular context of nineteenth- and twentieth-century British colonialism, attention was drawn to the nexus between the rule of law and the articulation of authoritative claims to state sovereignty. Indeed, it was noted that law and order appear as conjoined twins, as mutually dependent social practice and reality. Upholding the rule of law was seen as an intrinsic justification for British dominion abroad: a moral underpinning for the government of foreign others, a marker of a distinctively ‘modern’, ‘civilised’ and ‘British’ polity, and an uplifting, enlightening, educating force for progress.

Throughout the three foregoing case studies analysing the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau, a wide range of British administrators, field officers, policemen, troops, magistrates, judges and civil servants have demonstrated deep consciousness of this linkage between law and order. They were sensitive to the tensions and fragility inherent in that relationship, insofar as it may constitute or jeopardise sovereign authority, and, because it is a relationship, of the need to provide it with careful maintenance if it was to endure as the basis of peaceful and consensual rule. The various states of exception that have been examined can be seen as having provided limit cases to this relationship, through which its dimensions were scrutinised and examined in markedly different contexts. That is, the debates surrounding the making of legal exceptions attempted to resolve the issues of how to formulate legislation such that it was wide enough to cover all forms of disorder, how much disorder should be tolerated before a particular case or situation was recognised as being ‘exceptional’, how far was it possible to depart from established legal practice before the order it was intended to uphold was changed,

losing the basis of its authority, and whether or not authority ultimately reposes in the force of the law or in the forces of order.

It was also suggested in the introduction to this thesis that attempting to answer the above questions directly might divert attention from a different kind of inquiry, one concerned not with how successfully British governments abroad have upheld authoritative claims to sovereignty (a study of the exigencies of rule), but rather with producing a historical cartography of the nature of state power, read through certain crises of authority in British-administered India, Ireland and Kenya. In the preceding case studies this has been attempted by analysing the imbrication of legal exceptions and ‘normal’ practice in helping to produce and channel specific forms of state power onto dissident groups that in one way or another sought to exit, evade or contest dominion by British sovereigns in the period *circa* 1810—1960.

The endeavour of this thesis has not been to assert that it is a waste of energy to pay attention to the contradictions and tensions inherent in the relations between law and order, and to the juridical and sociological debates about this relationship. Rather, the aim has been to trace historical details of the ways in which order and disorder have been framed, and the changing juridical powers and practices implemented to uphold the former when the latter has been rendered as ‘exceptional’. Indeed, by paying attention to the concerns of historical actors fearful that departing too far from the law might provoke disorder, or that established legal norms were insufficient to maintain order, we have been able to survey the relationships between sovereignty and state power, and between the rule of law and social control, in three diverse, foreign theatres of British dominion in the nineteenth and twentieth centuries.

The concluding sections of this thesis revisit certain salient aspects of the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau, placing them in comparative perspective. The aim is to produce a nuanced account of the forms and operations of power that animated official responses to dissidence in three foreign arenas of British dominion, *circa* 1810—1960. To bring greater precision to this analysis, this section expands our consideration of the vocabularies for dissecting state power and social control discussed in the introduction.

## § Sovereignty

In his recent analysis of the April 1919 Amritsar massacre in the Punjab, an incident that we earlier saw looming over the British Cabinet's decision to introduce martial law in parts of southern Ireland in late 1920, Nasser Hussain argues that this exercise of lethal force against several hundred Indian civilians should be taken as an example of the necessity for the state's sovereign authority periodically to be re-founded through spectacular acts of violence.<sup>565</sup> Significantly, as was touched on in the case study on the suppression of the Irish Volunteers, the massacre was in certain respects made possible by the fact that parts of the Punjab, including the city of Amritsar, were being ruled under martial law—a legal exception whereby 'necessity' would prevail over due process. Indeed, the incident seems to substantiate Agamben's theory of the linkage between the articulation of sovereign decisions and the production of bare life in states of exception. In the short-term context of the massacre, the most notorious evidence of such a linkage was the commanding officer's belief that martial law conferred upon him the sanction to deploy a level of violence necessary to produce 'a sufficient moral effect...throughout the Punjab'. Put another way: the state of exception—martial law—was intrinsic to the rendering of the Indians massacred at the Jallianwala Bagh as *homines sacri*—killable bodies—directly answerable to a fatal sovereign decision on the terms of their existence taken by General Dyer on 13 April 1919.<sup>566</sup>

Certainly, among the most striking features of the regimes of control elaborated in the course of the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau was their animation by the deployment of spectacular coercion and corporeal forms of punishment against criminal groups posited as internal enemies to the extant state formation and the broader subject population. Officials consciously extended these currents of repression far beyond the immediate perpetrators of

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<sup>565</sup> Hussain, *Jurisprudence of the Emergency*, ch. 4, esp. pp. 118—19, 123—4.

<sup>566</sup> Further evidence of this attitude is found in certain aspects of the military clampdown in Amritsar in the days preceding the massacre, during which a range of coercive measures sought to both corporeally punish and degrade Indian civilians, and articulated racialised notions of their otherness to legitimise these practices. For more: Sayer, 'British Reaction to the Amritsar Massacre', pp. 140—3.

specific ‘criminal’ acts. For that reason (*inter alia*), their efficacy as measures to negate criminal activity is extremely difficult to discern. It is not clear, for example, how widely the message of ‘terror’ that the British authorities intended to produce by publicly executing Thugs in certain rural locales across north India during the early 1830s was transmitted to the indigenous population, nor how deeply it was internalised by these audiences. Similar observations can be made regarding the infliction of the death penalty by drumhead courts in southern Ireland during the closing months of the Anglo-Irish conflict of 1919—21, and of the executions of the perpetrators of the Lari massacre during the Kenyan Emergency of 1952—60. What emerges far more clearly, however, is that the rationales behind such techniques of social control far exceeded that of merely punishing those culpable for specific criminal acts. Local magistrates in north India could therefore note approvingly that the public executions of convicted Thugs constituted an ‘exemplary punishment...such as shall strike terror into the minds of those who pursue a similar cause’. Meanwhile, in Ireland, in 1921, the GOC planned to extend the use of the summary powers of drumhead courts to inflict death sentences on all Republican rebels taken in arms on the basis of Irish Command’s appreciation of their ‘very salutary effect’. It appears that a similar desire to gain symbolic power from trumpeting the successful putting-to-death of ‘internal’ enemies lay behind the Kenyan government’s circulation of Kikuyu and Swahili reports of the hangings of the Lari prisoners on the day of their executions, late in 1953. The economies of state power that have been surveyed in the three case studies were performative and speculative: they were not solely concerned with specifying exact calculations of retribution or vengeance at the level of the individual, but also with articulating displays of overwhelming might to wider portions of the social body.<sup>567</sup>

The performative justice of certain manifestations of state-led suppression is also observable in various measures used against civilian populations during the conflicts in early twentieth-century Ireland and mid-twentieth-century Kenya in particular. In both cases, different types of collective punishment were used to repress dissidence if there was inadequate proof against individuals for specific acts of criminality but there was a conviction that certain local communities had either

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<sup>567</sup> A sentiment very much endorsed by Lord Lugard in his treatise on indirect rule in British colonial Africa: Lugard, *Dual Mandate*, pp. 561.

encouraged or tolerated them.<sup>568</sup> In fact, in Ireland, these less discriminating forms of retribution were ultimately formalised as the policy of so-called ‘official’ reprisals, conducted under military auspices (a response to the outcry over ‘unofficial’ reprisals, carried out with increasing vehemence in the course of 1920 by police auxiliaries).<sup>569</sup> As both the victims and the perpetrators of these reprisals—‘official’ as well as ‘unofficial’—have testified then and since, these acts of vengeance were intended not only to punish but also to intimidate. Thus, while one Irish publican, John Derham, recalled his town’s ‘night of terror’ at the hands of Black and Tan recruits anxious to avenge the death of a police inspector in late September 1920, the British GOC would remark with satisfaction how the raid on Balbriggan had produced an atmosphere of ‘cringing submission’ in the surrounding district.

Sections of the British, Irish and American press were appalled that reprisal tactics should be used against civilians in southern Ireland during the conflict of 1919—21. Some observers even saw in them the application of colonial techniques of ‘pacification’. For Hugh Martin, special correspondent at the *Daily News*, they recalled British punitive expeditions in the countryside of South Africa and India’s North West Frontier Province. He might well have cited the example of the East Africa Protectorate too, for, as John Lonsdale has shown, such raiding was extensively used there during the early twentieth century as a means to try to discipline shifting pastoralist communities into more sedentary (and less ‘criminal’) lifestyles, by depriving them of trading-stock periodically gained by cattle-rustling. As well as being a method of primitive accumulation, achieved through the destruction or confiscation of property, such raids were simultaneously spectacular articulations of the coercive might at the disposal of foreign bearers of extra-local authority.<sup>570</sup> This is surely the aspect of the reprisals in southern Ireland that so alarmed contemporary commentators and protagonists, including Prime Minister Lloyd

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<sup>568</sup> Where it had become more dangerous to disobey the dominion of conspiratorial political associations than that of the government.

<sup>569</sup> Moreover, as we saw in the case study of the suppression of the Irish Volunteers, these punishments were part of a broader economy of repression that also included the use of economic sanctions and restrictions on free movement, such as the closure of markets, the digging-up of local roads, the burning of co-operative dairies, the use of curfews and restrictions on the use of motor vehicles.

<sup>570</sup> For more: John Lonsdale, ‘The Politics of Conquest in Western Kenya, 1894—1908’, in Berman & Lonsdale, *Unhappy Valley, Book 1*, pp. 45—74, esp. pp. 54—68.

George, concerned that ‘indiscriminate burning’ was ‘idiotic’ (and advocating secret assassinations instead). Likewise, as a means to re-constitute state sovereignty within what seemed like an especially lawless rural locale, the earliest British-led anti-Thuggee operations culminated in a conventional piece of ‘pacification’: the destruction of the village of Madnai in Maratha-controlled territory on the western border of the Company’s domains in the Ceded and Conquered Provinces.

The collective punishments used as part of the campaign to suppress Mau Mau during the 1950s did not entail spectacular violence like the burning and demolishing of suspected Thuggee haunts in India or the destruction of private and communal property in settlements believed to be harbouring Volunteers in southern Ireland. Nor did they operate according to precisely the same economic logic of the punitive raids in British East Africa earlier in the century.<sup>571</sup> However, they were similarly vengeful manifestations of official frustration with communities believed to be sheltering criminals. Accordingly, and particularly in the northerly districts of Kikuyuland, where Mau Mau supporters had targeted government chiefs and headmen before retreating into the forest-fringe, Kikuyu livestock was confiscated, trading were premises closed, and the holding of markets was forbidden. Still more comprehensive was the use of Emergency Villagisation. Ostensibly a counter-insurgency strategy to bifurcate Mau Mau’s so-called ‘passive wing’ from the movement’s activists in Kikuyuland, Villagisation was introduced as a form of mass protective custody. Yet, at the time, members of Kenya’s Provincial Administration accepted that it was punitive too: ‘It is obviously not practical politics to incarcerate a million and a half Kikuyu who are admitting freely to having taken the illegal oath’, Nakuru’s district commissioner remarked in 1953. Moreover, those who lived in these ‘Villages’ have, since the emergency, provided evidence of the arbitrary nature of social control in these quasi-carceral spaces, and the harsh corporal punishments routinely meted out by members of the Kikuyu Guard overseeing them.<sup>572</sup> The

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<sup>571</sup> In that the sanctions imposed during Mau Mau had more to do with depriving certain Africans of capital rather than transferring it directly to the government or, indirectly, to rival African beneficiaries of official patronage.

<sup>572</sup> Though a fuller assessment of the performative violence used in Kenya’s Emergency Villages and the Pipeline awaits detailed study. So, too, does the extent to which Emergency Villages—enclosed by spike-filled ditches, cordoned-off by barbed-wire fences, and attached to watch-towers and Home Guard posts—attempted or managed to demarcate colonial

performative justice entailed by the policy of Villagisation is further underscored by the conjoint elaboration of the Swynnerton Plan reforms, which, it seems, offered an opportunity to further reward Kikuyu loyalism and punish suspected allegiance to Mau Mau by re-working access to land in the native reserves. British sovereignty would be re-imposed in Kikuyuland not so much by the careful legal audit of due process—the sifting-out and punishing of individuals as rational actors culpable for specific acts of crime—but by measures premised on the assumption and ascription of collective criminality.

The above examples drawn from the three case studies therefore lend much support to Hussain's contention that spectacular acts of violence and corporal punishments offer the means for state sovereignty to be re-founded in 'exceptional' circumstances; legal exceptions provide a means to articulate this violence and these punishments. However, at this juncture, it remains unclear to what extent the states of exception that we have examined entailed the production of what Agamben terms 'bare life', and what he topologically locates as the necessary corollary of the articulation of sovereign power: a decision on politically valid life that takes its form by simultaneously constituting that which is invalid (indeed, 'inhuman') as its inverse.

## § Bare life

The suppression of Thuggee in 1830s India offers examples of state coercion that in many ways approach the nexus posited by Agamben, and outlined above, between the elaboration of sovereignty and the production of bare life in states of exception. It is in the metaphors for the special policing operation referred to as the anti-Thuggee campaign, and the semantics of the legal exceptions made to facilitate it, that one finds the most compelling evidence for this: in the letter from Swinton, the secretary to the governor-general, to Stewart, the British resident at Indore, for instance, authorising the execution of Thugs captured in 1829 because they were 'inhuman monsters', 'to be placed without the pale of social law', or in F. C. Smith's

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sovereignty in Kikuyuland by effecting a highly visible re-spatialising of household, communal and social relationships to state power.

descriptions of Thugs as ‘enemies of mankind’ and in his advocacy of a ‘blood for blood’ campaign to ‘extirpate’ them. The Company executed 460 Thuggee convicts (some of them publicly) in the period 1826—41. These killings were carried out at the behest of quasi-judicial tribunals, most of them held by F. C. Smith, which, it seems, would not have satisfied the conventional legal standards applied in the regulated territories.

Furthermore, during the 1830s, the British authorities used the Bengal and the *mofussil* press in order to advance claims for Company paramountcy in India: as offering progressive rule that aimed to provide better welfare for all through the sovereign power’s ability to exclude certain enemies to society from the law, yet at the same time to punish (by killing some of) them for criminal offences. If Chatterjee’s ‘rule of colonial difference’ helped to locate Indians as fundamentally Other to Europeans during the high-season of British colonial government in the subcontinent, then it would seem that the anti-Thuggee campaign, conducted under the administrative auspices of the East India Company, marked an earlier clearing of the ground, whereby a still more alien segment of the population was demarcated. ‘Thugs’ were not merely to be divided from European communities by discriminatory laws and unequal judicial procedures, but from indigenous society as a whole, by outright exclusion from legal protection.

The legal exceptions created to suppress Thuggee in 1830s India did not, however, make all suspects and convicts entangled in them ‘killable bodies’. The establishment of the Jabalpur School of Industry in 1837, for instance, suggests that the colonial authorities somewhat belatedly wished to turn certain Thuggee convicts into productive workers rather than to strip them of all markers of politically valid human life (beyond the level of mere animal existence, as in Agamben’s explication of ‘bare life’). It should of course be countered that this institution was marginal to the wider attempt to suppress Thuggee, not least given that the overwhelming majority of the executions of convicted Thugs occurred in the early 1830s. Even so, while many Thuggee convicts were hanged during the ATC, many more, 1,100 between 1826 and 1841, were sentenced to terms of imprisonment.<sup>573</sup> Tellingly,

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<sup>573</sup> Though the fate of the 1,504 individuals sentenced to transportation for Thuggee offences in the period 1826—41 complicates this argument, since transportation often effectively entailed death, be that on the convict ships or in penal colonies (as well as constituting a form

certain convicts—namely, the 56 suspects who admitted to being Thug *jemadars* and became approvers between 1826 and 1841—were explicitly spared execution by the colonial authorities on the grounds that engaging them as informers who could explain the criminal phenomenon to their captors was of more use to the Company than killing them.<sup>574</sup> Informer relationships were cultivated between British officers and Thug-approvers precisely because the lives of the latter were seen not as ‘bare’, but in fact fully cloaked by an ethos of ‘Indian’ criminality that the former, largely numb to the ways in which their investigations may have been decisive in stitching this account of criminality together, wished to unravel.

Moreover, campaigning for the ‘extirpation’ of Thuggee was consistently pitched to the upper echelons of the Company’s administration as being in the interests of the indigenous population, but it did not seek to encourage extra-legal acts of aggression against suspected Thugs by vigilantes. This would have contradicted the argument that suppressing the crime would help establish the Company’s claim to paramount social authority over and above the wider population. Rather, Sleeman, in particular, appears to have been both a rampant self-publicist and a clear-sighted political strategist, who matched the ambitions of the anti-Thuggee campaign to the Evangelical hues of the Company’s nascent colonial state in India. The vitriol poured on the enormities of the ‘practice’ of Thuggee seems to evidence both the nature of the contemporary colonial rhetoric of social reform in India, and the extent to which banditry was seen as a mortal offence against the body politic, rather than a processes by which certain subjects of colonial rule were rendered-up as *homines sacri*, killable by anybody without this being a crime.<sup>575</sup>

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of social death in the minds of convicts). For an interesting analysis of the intersections of transportation policy, colonial political economy and the metanarratives of state power during this period of the British administration of India: Clare Anderson, ‘The Genealogy of the Modern Subject: Indian Convicts in Mauritius, 1814—1853’, in Ian Duffield & James Bradley (eds.), *Representing Convicts: New Perspectives on Forced Labour Migration* (London & Washington: Leicester University Press, 1997).

<sup>574</sup> For statistics on the punishments of Thuggee convicts *circa* 1826—41: ‘Tabular Statement’ in Meadows Taylor, ‘State of Thuggee’, p. 293.

<sup>575</sup> In making this observation, I thus again endorse Freitag’s observations regarding the colonial preoccupation with constituting sovereign authority as unitary, centralised and exclusive.

The British attempts to suppress the Irish Volunteers during and after the Easter Rising in 1916 and throughout the Anglo-Irish conflict of 1919 to 1921 were undoubtedly violent assertions of the conviction that extremist republicanism was politically invalid, hence the British government's insistence that the operations to restore order were those of counter-insurgency not war. Between 1916 and 1921, several thousand Republican suspects endured executive detention, while the death penalty was imposed on fifteen presumed leaders of the Easter Rising, in 1916, and twenty-four Volunteers, during the 1919—21 conflict. Furthermore, many of the military and police actions taken in southern Ireland in this period were non-justiciable, a result of the ambiguous formulation of statutory powers and the free reign that certain counter-insurgents, faithful to the doctrine of necessity and their 'duty' to preserve the life of the state, believed they were granted under non-statutory martial law. However, there is no evidence that the repression meted out in Ireland in this period attempted to throw the terms of humanity itself into question.

The legal exceptions elaborated in Ireland between 1916 and 1921 were attempts to negotiate the tension between forms of punishment accountable to the abstract norms of the law and those privileging decisionist impositions of coercive power, which would facilitate the swift repression of unrest. Indeed, as argued in this case study, the various counter-insurgency operations used against the Irish Volunteers and the IRA are remarkable neither for the creation of stereotypes about Irish rebels that sought to deny them a right to political life, nor for the advent of institutional sites of concentrated state power that sought to dehumanise them. Rather, they demonstrate the British executive's ongoing difficulty to define the nature of these struggles, as well as its acute sensitivity to the political dangers associated with restoring order by authorising departures from legalistic attempts to realise the sovereign will.

By contrast to the counter-insurgency in Ireland between 1916 and 1921, but like certain elements of the anti-Thuggee campaign, various aspects of the official responses to Mau Mau in 1950s Kenya are suggestive of the ways in which legal exceptions may correspond to sovereign attempts to produce bare life. In the context of Agamben's claims regarding modern forms and functions of sovereign power—and putting aside the bloodiness of the guerrilla conflicts of *circa* 1952—56,

the effective civil war in Kikuyuland, and the government's execution of 1,090 Mau Mau convicts during the emergency—the most prescient point of debate here concerns the creation of Kenya's so-called 'Pipeline' of detention camps.

The infra-legal world of 'the camp' figures largely in Agamben's analysis of the state of exception.<sup>576</sup> Taking his cues from the *campos de concentración* created by the Spanish in Cuba in 1896, the British equivalents introduced in South Africa in 1900 during the suppression of the Boer Republics, and, most infamously, the Nazi *lagers*, Agamben argues that:

The camp is...the structure in which the state of exception—the possibility of deciding on which founds sovereign power—is realized *normally*. The sovereign no longer limits himself...to deciding on the exception on the basis of recognizing a given factual situation (danger to public safety): ...he now de facto produces the situation as a consequence of his decision on the exception.<sup>577</sup>

It should be noted that Agamben is here principally concerned with the Nazi extermination camps of the Second World War, rather than with the concentration, detention and internment camps of 1930s Germany. Though he neglects to make this distinction clear, the logic of his argument is that any such site, a *space* of terror, conditional upon its extra-legality, contains within it the intention to produce bare life. Agamben's theorisation of 'the camp' therefore provides an opportunity to engage with historically concrete spatialisations of 'states of exception'—rather than with the metaphysical implications of sovereignty (formulated as decisionist will rooted in the suspension of legal norms)—as institutional sites in which legal exceptions take full and potentially fatal effect on the targets of state power.<sup>578</sup> It is in

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<sup>576</sup> Agamben, *Homo Sacer*, esp. pp. 166—80.

<sup>577</sup> [Emphasis in original.] *Ibid.*, p. 170. For more: William R. Everdell, 'Valeriano Weyler y Nicolau: Inventing the Concentration Camp, 1896', in *idem.*, *The First Moderns: Profiles in the Origins of Twentieth-Century Thought* (Chicago & London: University of Chicago Press, 1997), pp. 116—21.

<sup>578</sup> The wider implication of Agamben's argument is that the *Vernichtungslager* and *Todeslager* created in Nazi-occupied north-east Europe were sites not of irrational extermination but the steady erosion of every vestige of inmates' humanity, such that their lives were reduced to bare existence and their bodies rendered killable by the creation of a situation of guards' total indifference to their death. The taking of life thus rendered 'bare' was, as such, no crime, but the exercise of sovereign will not accountable to law (indeed, Agamben insists that the entire Third Reich was extra-legal because the Weimar constitution had been suspended by

this space of the exception, Agamben argues, that we reach a new plane of the exceptional, in which the lives of inmates are fully inscribed by the sovereign's will to deny their existence any political validity.

Kenya's Pipeline was, in many examples, an horrific, repressive and violent carceral institution. Caroline Elkins has done more than any other scholar to penetrate the world of 'Britain's gulag' in 1950s Kenya, exposing the equivocation over African life that pervaded certain camps, and the maltreatment of detainees by wardens, particularly when crushing detainee risings or when faced with severe food shortages or dire problems with controlling disease and sanitation. Many of her findings provided points of departure for the research conducted for this thesis, and, while much of her evidence is based on oral testimony, there are also significant documentary records of life in Kenya's detention camps, not least from former detainees, whose work was cited in the case study.

Racist authoritarianism over, and the dehumanisation of, detainee populations appear to have been systemic features of Kenya's Pipeline. Former detainees have attested to the casual sadism of certain *askaris* employed as guards, European wardens' fearsome reputations for brutality, and camp-commandants' insistence that they lacked any legal rights. However, colonial Kenya's detention camps did not seek to maintain the economy of power that Agamben sketches as their *raison d'être* in the example of Nazi-occupied eastern Europe and the crucial referent of sovereign power; the Pipeline does not appear to have been vitalised by the bio-political production of bare life. As argued in the analysis of the creation of 'twilight' powers towards the end of the emergency, to retain and regularise certain Emergency Regulations by incorporating them within the colony's statutory law, the Kenyan government was deeply troubled by the questions of how safely to release the detainee population. This was the case almost from the outset of the Mau Mau crisis, though it became an especially urgent question to answer once the Land and Freedom Armies had been brought to their knees by late 1956. Moreover, there was widespread conviction within the Kenyan government, supported by success-stories

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executive decree on 28 February 1933). Moreover, such acts of killing appear to have been constitutive of the Aryan body-politic in Nazi Germany. In many ways, this is not an original argument. Rather, it augments with a set of theoretical conjectures one side of an historiographical debate regarding the rationality of the German experience of National Socialism, and, ultimately, the politics of genocide.

from Malaya and corroborated by the opinion of expert advisers such as Dr. Carothers and Dr. Leakey, that the various camps' routines of labour and punishment could reform criminalised Kikuyu minds. The rhetoric of 'rehabilitation' was ultimately compromised by the exigencies of colonial rule and instead often ended up being articulated as outright coercion. Even so, the aim of the programme was neither to kill Kikuyus, nor to make detainees' continued existence reducible to a sovereign decision on the worth of their life, so much as to enforce reform. Likewise, the death of eleven of 'the hardcore' at Hola exile camp in early 1959—the gruesome episode that helped finally break open the Pipeline by bringing the abuse of Mau Mau prisoners in colonial Kenya to international attention—in fact underscores the argument that the British authorities wanted the detention camps to produce not killable bodies but broken spirits, safe to return to civilian life in Kikuyuland.

That the states of exception surveyed in the three case studies did not entail the production of bare life is not, of course, a decisive refutation of Agamben's argument. Rather than arguing that sovereign decisions in the exception entail the production of bare life, however, one would at the very least have to conclude that this formulation is not necessarily borne out by the historical records of what were very clearly articulated as more or less drastic departures from legal oversight in order to facilitate the suppression of criminal, dissident, or insurgent Others. If these states of exception were not about the production of bare life, then, what else can be observed about their aims and operation, and what typological commonalities in the elaboration of coercive authority can be found in the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau?

## § Executive discretion

Far more compelling evidence to support Agamben's theses regarding the functioning of states of exception is to be found in the three case studies' demonstrations of the extent to which departures from, or suspensions of, legal norms allowed for the wider reach and deeper suffusion of sovereign power over civilian life through expansions in the remit of executive governance. The regimes of state power

analysed in the three case studies took rather different forms. Yet despite the enormous disparity of the examples examined—regarding the ends to which the suppression campaigns were directed, the maturity of the state-formations in which they were imposed, and the technologies of power available to the relevant counter-insurgency forces—the point of departure for each of the suppression campaigns was the use of regulatory powers more or less fully exempted from the extant judicial apparatus and the normal processes for arresting, trying and punishing criminal suspects in each polity.

In the case of the anti-Thuggee campaign, the unique provisions introduced to deal with what was perceived to be an extraordinary situation took the form of a special dispensation from the governor-general, driven through by the Company's Political Department, which was given to certain officials believed to be best placed to uncover such crimes and to secure confessions from captives that could lead directly to further arrests. This kept the anti-Thuggee operations squarely within the remit of the executive branch of the Company's government, and in this sense they took on the form of prosecutions for political offences against the Indian body politic rather than criminal trials that sought to bring specific individuals to justice.

The typology of 'exceptional' powers imposed during the campaigns to suppress the Irish Volunteers and Mau Mau both derived from more formal schemas of emergency rule than the comparatively idiosyncratic solutions created to get around what were perceived as judicial roadblocks on convicting Thuggee suspects in early colonial India (as in the example of the farcical trial of Ghulam Hussain). Nevertheless, as with the anti-Thuggee operations, these suppression campaigns were likewise premised on the need to open up special channels for the transmission of executive will in order to suppress widespread criminal activity. In the case of the police and military campaigns against the Irish Volunteers in 1916 and between 1919 and 1921, a range of special powers privileged the doctrine of necessity as the basis for imposing the decisionist will of the executive upon suspects believed to be in some way imperilling 'public safety', compromising 'the defence of the realm', or preventing 'the restoration of order in Ireland'. These powers were elaborated through the framework provided by the DORA and the ROIA. A similar set of concerns underpinned the formulation of the 1939 Order in Council, the basis of the

Emergency Powers introduced in Kenya from late 1952, whereby the governor of the colony was explicitly privileged to disregard the application of the extant legal framework, as he saw fit, in order to ‘secure public safety’ and ‘maintain public order’. In all three examples—Indian, Irish and Kenyan—we therefore find the articulation of state authority to the ‘general interest’ through the drawing of a legal exception empowering the executive to override the extant judicial order, with the latter seen to be either inadequate or malfunctioning.

In accordance with the ways in which they served to promulgate executive rule, all three suppression campaigns were marked by notable extensions of various peace officers’ powers of arrest and detention. These might take the form of amendments to existing provisions—for example, a reduction in the legal basis for arrest, such that arresting officers had only to prove ‘real’, rather than ‘reasonable’, suspicion that an offence had been committed, as was the case under DORR (later, ROIR) 55 in Ireland. They might also take the form of more radical departures from extant legal practice—for example, the general warrants provided to Sleeman and his assistants in order to bring in Thuggee suspects for examination.

Furthermore, all three case studies demonstrated the way in which the reach of executive government was extended by the delegation of powers to a huge range of officials already within the formal structures of government—different types of provincial administrators, law officers, senior policemen and military authorities—as well as the empowerment of new teams of para-state auxiliaries—such as the parties of armed horsemen and Thug-approvers sent out to arrest Thuggee suspects, the Auxiliary Department of the Royal Irish Constabulary, and the Kikuyu Guard. Indeed, all three suppression campaigns ran to similarly expansionist dynamics relating to the recruitment of personnel, the growth of bureaucracy and the enlargement of the remit of counter-insurgency operations. All were a consequence of the self-allocation of executive prerogative contingent upon the exceptional practices used to facilitate investigations into Thuggee, the Irish Volunteers and Mau Mau.

As with the creation of exceptions that recognised the limits of the reach of the law, the discretionary authority ceded to certain para-state auxiliary agencies marked the attempt of British governments in India, Ireland and Kenya to extend

state authority over the civilian population in ways that inhabited and embodied legal norms but also departed from them in order to realise the executive's will. These bodies were thus included within the bureaucracies and hierarchies of official power, to which they were formally subordinate but frequently appeared unanswerable. The criticisms levelled at the Thuggee and Dacoity Department for the methods used to bring in for interrogation suspects living without the Company's domains were an attempt to address the dangers of creating irregular bodies of official actors who seemed to exceed state authority in seeking to uphold it. Likewise, the excesses of certain units of the Black and Tans and ADRIC were especially damaging to British executive authority in Ireland because they represented state power yet appeared neither to be firmly under the control of the police establishment, nor to abide by clear distinctions between legal and extra-legal procedure. Their apparent immunity to being called to account by conventional legal audits of orderly official power made the nexus between violence and state authority too clear—hence the clamour surrounding the Balbriggan reprisal in September 1920, an event whose terroristic qualities were subsequently reinforced by the lack of a proper legal inquiry into its causes. The incorporation of teams of European settlers and African loyalists into the security apparatus of the Kenyan government during the Mau Mau emergency provides, with similar clarity, an illustration of the way in which parochial, voluntarist, and often violent attempts to constitute official power may become embedded within purportedly extra-local, legally accountable and disinterested elaborations of sovereign authority during an emergency situation. The crucial sites for the exertion of such decisionist forms of sovereign might over the civilian population during the Mau Mau conflict were the Resistance Movement Centres (screening camps), the Kikuyu Guard posts and the Emergency Villages. The worst excesses committed by the various security forces and their auxiliaries during the emergency belie the sense in which a special juridical order was imposed in the name of an abstracted, centralised state-formation, neutrally acting to 'secure public safety' and restore the rule of law in colonial Kenya.

It should also be noted that the delegation of executive power outlined above carried with it an inherent tendency to inflate the scale of the criminal conspiracies encountered in India, Ireland and Kenya, and for this, in turn, to justify further

departures from legal norms in order to counteract them. This might be explained as being a result of the ‘abuse’ of discretionary powers of arrest and interrogation, or, on a related theme, as a consequence of the lack of experienced peace officers supervising arrest and interrogation, shortages entailed by hasty and mass recruitment to certain poorly-trained security agencies whose staff were nevertheless equipped with such powers. In the case of the investigations into Mau Mau, it is evident that Kikuyu suspects admitted to oath-taking in order to avoid (further) maltreatment by European settlers and African loyalists working as screening teams. There were similar problems during the investigations into Thuggee—with suspects admitting to confessing in order to escape the death penalty or win financial rewards for information—and the Irish Volunteers—with the British military authorities accepting that ‘brutal methods’ of interrogation were a ‘mistake’ and noting that these had occurred partly because troops suspected all Irishmen to belong to the IRA.

The historical records surviving these suppression campaigns make it difficult to decide how far such abuses affected official perceptions of the conspiracies: whether or not the findings obtained under duress were discounted, for instance. However, a subtler phenomenon relating to the inflation of official perceptions of the scale of dissent concerns the recording practices used by the investigating powers and the bureaucratic production of official knowledge. In the later years of the anti-Thuggee campaign, we saw how the information derived from investigations into religious groups (specifically, Yogis) falling under the suspicion of one of Sleeman’s assistants were smoothed into an established discourse of Thuggee as an extraordinary form of secretive, organised crime, which soon became the general superintendent’s justification for the pursuit of Indian mendicants as ‘Thugs’. In the investigations into Mau Mau, we saw how the criminalisation of oath-taking came to underpin the enormous programme of executive detention and the idea that Mau Mau was symptomatic of a broader malaise in ‘the Kikuyu’ psyche, to which anyone of that ethnicity might subscribe, on the basis of their mental disposition rather than their material, social circumstances. In both examples, the wider effect of such bureaucratised knowledge-gathering was to formalise diverse encounters with

subversive behaviour into cogent accounts of mass criminality amenable to intervention by the state.

Moving on from the sphere of arrest and interrogation to that of trial and judgement, the special judicial procedures created to counter Thuggee, the Irish Volunteers and Mau Mau were another means by which the will of the executive was articulated through extra-legal spheres of authority. Common features of these amended procedures were: the simplification of existing procedure and the creation of tribunals that used expedited processes; constraints placed on defence counsels or their outright absence from trials; limited record-keeping and the holding of sessions *in camera*; recourse to regulations that reversed the conventional burden of proof; summary powers of conviction and sentencing; and the foreclosure of avenues for appeal or judicial review. As suggested in each case study, these amended procedures not only sought to generate quick results, to allay fears of the spread of crime (and in the case of Mau Mau, to offset the prospects of unsanctioned retributions by settlers), but also to articulate the spectacular and performative dimensions of sovereign power as a means to uphold state authority and social order. Moreover, the operation of these various quasi-courts is notable not only for the extent to which executive tribunals and parallel systems of extra-legal power were created to prosecute various kinds of extraordinary criminal, but also for their entanglement within the extant judicial apparatuses and procedural codes in each of the three polities.

In practice, in all the cases examined, ‘exceptions’ were frequently made manifest by the grafting-on and meshing-together of judicial and extra-judicial process, rather than clear-cut ‘suspensions’ of or ‘departures’ from established legal practice and the outright occlusion of legal oversight. Hence, the Thuggee trials in India during the early 1830s took place at special sessions convened before the governor-general’s agent in the Sagar and Narmada Territories, F. C. Smith, in his judicial role as a commissioner. His sentences were submitted directly to the Company’s Political Department for review. The suppression of Thuggee was therefore facilitated by creating an extra-judicial channel of state power in which quasi-legal proceedings entailed not so much the enforcement of the Company’s regulations against suspects proven to have committed specific criminal acts, but the bypassing of them in order to render Thugs directly accountable to executive will.

Following the promulgation of specific legislation to outlaw Thuggee in the mid-1830s, trials could henceforth proceed through the more stringent judicial apparatus in Bengal. Yet by enshrining the principles that convictions could be secured through the coincidental denunciation of suspects made by approvers, and that suspects could be convicted for Thuggee despite there being no proof of their having committed specific criminal offences, these reforms regularised the extra-legal procedures of the early 1830s rather than making them accountable to legal oversight.

Likewise, during the attempts to suppress the Irish Volunteers, a range of executive provisions created an extra-legal apparatus through which to prosecute Republican extremists. This was justified as necessary because the civil courts in Ireland could not function properly during the disturbances caused by the Easter Rising of 1916 and then the Anglo-Irish conflict of 1919–21. However, the judicial order elaborated for the suppression of the Irish Volunteers in the period from late 1920 to mid-1921 was in certain, crucial, respects different to that implemented for the ‘extirpation’ of Thuggee in the Sagar and Narmada Territories during the early 1830s. Whereas the latter trials were kept entirely separate from the extant judicial apparatus in colonial India, the proceedings against the Volunteers entailed the overlaying of expedited trial procedures made possible under the provisions of the DORA and then the ROIA (whose powers derived from statutory law), as well as under martial law (more decisively located as being outside the law).<sup>579</sup> If regular judicial oversight was more or less excluded from the prosecution of Thugs, it was only more or less successfully kept at arm’s length during the suppression of the Irish Volunteers. Unlike the Thugs, the IRA could not be presented as decisively Other to the wider Irish population, nor indeed to the British, American and Irish press or the parliament at Westminster.

As in early twentieth-century Ireland, the legal hearings for Mau Mau cases during the Kenyan Emergency involved the progressive expedition of established judicial procedures. In regard to criminal trials, this initially took the form of certified Emergency Cases. Later, Special Emergency Assize Courts were convened specifically to try Mau Mau suspects. As such, a parallel legal system was arranged in

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<sup>579</sup> Indeed, legal challenges to the decisions of both courts martial and the military tribunals were made, and reached the highest civil courts in Ireland and Britain. See Foxton, *Revolutionary*, pp. 228–92.

order to prosecute offenders who had breached the various Emergency Regulations (which, as was noted in the case study, were themselves progressively expanded during the period *circa* 1952—54, with the penalties for infringing them also steadily increased). Moreover, ‘screening’ effectively named a further, and much more widely applied, quasi-judicial mechanism that permitted a form of incarceration in the Pipeline under detention orders. While the governor could overturn or terminate the application of detention orders, judicial oversight was abeyant: the relevant Advisory Committee could recommend, but had no power to enforce, the release of detainees. The State of Emergency declared in late-colonial Kenya therefore entailed the speeding-up of extant judicial process, the creation of special courts for Mau Mau trials and the imposition of a system of executive detention wholly removed from legal oversight.

Although decisionist articulations of executive will were certainly brought to the fore during the campaigns to suppress Thugs, Volunteers and Mau Mau, the extent to which they effectively ‘banished’ the law is therefore far from clear.<sup>580</sup> Moreover, the contradictions in state authority and the conflicts that effectively debated different bureaucracies’ spheres of influence during the three suppression campaigns provide a window on the official agonies provoked by the sacrificing of law for order. These agonies bore deep consciousness of the fragile basis of the rule of law but insisted upon it as the fundamental basis for state authority, and thus expressed profound discomfort at the rendering of the law as a tool of power rather than an external check upon it.

## § Governmentality and states of exception

The essential referent for the states of exception surveyed in this thesis is of course the law as the body of codified commands and procedures for discerning criminal

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<sup>580</sup> ‘Banished’ the law: see Agamben, *Homo Sacer*, pp. 27—9. It is also worth noting that the contradictions in state authority and the irruption of conflicts between different government departments caused by the mixing of ‘normal’ with ‘exceptional’ procedures during the three suppression campaigns studied did not necessarily obstruct the exercise of executive power in British India, Ireland or Kenya, *circa* 1810—1960. Public and private assurances of sufficient checks on evidence and due process could be given, internal criticisms binned.

culpability and mediating punishment for acts of crime. Schmitt argued that the norms of the law are conditional upon anti-normative sovereign decisions on the exception. As Agamben has recently emphasised, the logic of the exceptional entails that what is excluded from it is nevertheless maintained in a relation to that which is included in it. Indeed, a remarkable feature of the various departures from established legal standards, procedures and definitions of crime encountered in the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau is the extent to which the appearance of due legal process and conventional judicial arbitration remained central to attempts to constitute and restore order in India, Ireland and Kenya. In large part, this may be explained by the fact that the extant juridical orders of each polity—their criminal codes, peace officers, magistrates, judges, legal advisers, police stations, courts and prisons—provided an available apparatus that the three governments could use to attempt to re-assert their authority. However, the apparent resilience of such an apparatus against what might be seen as the encroaching exception also points to the complexity of the relationship between the legal and the extra-legal, and the instability of the thresholds marked out by the topologies of inclusion/exclusion, or norm/exception. The detailed analyses produced in the three case studies bring greater precision to our comprehension of the role of the law in the state of exception, and, by extension, of the ways in which it continued to constitute social authority during the campaigns to suppress Thuggee, the Irish Volunteers and Mau Mau.

The problem at the heart of the disorder created by Thuggee, the Irish Volunteers and Mau Mau was that these extraordinary criminal associations seemed to prevent the use of conventional legal process to discern and punish crime. The initial evidence that Thug attacks had taken place was the discovery of bodies that had suffered violent deaths, but there were no witnesses to the attacks, save the perpetrators themselves. The Irish Volunteers—especially when thought of as a ‘murder gang’—were believed to have terrorised the wider Irish population into legal silence: policemen and magistrates thus resigned, often as the result of direct intimidation by extremists, while jurors became increasingly unwilling to convict offenders in Ireland’s civil courts and witnesses reticent to appear before them. Mau Mau likewise appeared to operate according to an economy of terrorisation, swearing

its members to secrecy and targeting local African officials for attack, paralysing the government's legal machinery. The promise of the legal exception, then, was that of a means to circumvent such problems by producing the outline appearance of formal justice without reliance upon the extant legal apparatus. Conversely, to safeguard the law—and the social authority deriving from the lawful transaction of official power—certain limitations would be imposed on the exception: it would be framed as operating temporarily, for example, or as applicable only to specific types of criminal and forms of crime.

The corollary of making legal exceptions was great anxiety that what looked like lawful procedures were being politicised; that the law's authority as a disinterested arbiter of justice would be compromised and exploited by the powers-that-be. In this regard, the records of the anti-Thuggee campaign are, if anything, notable for the lack of criticism levelled at the likes of Sleeman and Smith for the methods they used to prosecute Thugs. The few dissenting voices that survive attack them on the grounds that they were abusing legal power. The example provided in the case study—an angry letter of complaint from the political agent at Bharatpur—was particularly alive to this, suggesting that the procedural system devised and applied in the Sagar and Narmada Territories privileged the information of untrustworthy individuals (Thug-approvers). It therefore had the potential to make a mockery of justice by creating a closed system in which the only evidence against suspects was testimony from former accomplices who, in giving it, were exempted from punishment for their own crimes. In the case studies of counter-insurgency in early twentieth-century Ireland and mid-twentieth-century Kenya, far more sustained and widespread criticism of the degradation of legal powers by counter-insurgents was evident. The narrative thread to these criticisms was once again that they threatened to denude the law of social power by invoking its disinterested authority and at the same time politicising its use. In the later months of the Anglo-Irish conflict of 1919–21, for example, 'official' reprisals—'horrible and dastardly burning' as one participant put it—were widely condemned not only because they were violent but because this violence was elaborated 'with the due force of the law'. It was in the same vein that William Wylie, legal advisor to Dublin Castle, warned chief secretary Hamar Greenwood that not trying the perpetrators of the police

reprisal at Balbriggan as criminals ‘would mean the end of law’. Exempting the police from legal judgement would demonstrate that the law was subordinated to the sovereign power, not the other way round; that the former could be bent to the latter’s will in a way that would undermine any claims to the law being a disinterested arbiter of justice. In early 1950s Kenya, the attempts to expedite the trials of suspects facing capital charges relating to Mau Mau offences were similarly criticised on the grounds that this threatened to instrumentalise legal process (to secure quick convictions and death sentences) at the expense of procedures designed to ensure an adequate length of time to prepare defence cases and the opportunity to appeal decisions to higher courts. The nature of these concerns, then, was that legal exceptions were neither as precise as the legal norms whose forms and process they mimicked, nor as submissible to further checks that might allow for the correction of mistakes.

Conversely, the effect of criticisms of the legal exceptions made in British India, Ireland and Kenya was to elevate the law itself: as the set of principles, procedures and codifications of authority from which exceptions departed (and which they degraded), as the guarantor of the mandate to sovereign rule, and as a way to abstract and relate state-power as coherent, external and meta-local. In fact, what the above debates and anxieties appear to have blindly groped towards is an appreciation of the role of the law in what Foucault would recognise as ‘governmentalised’ state power, which is to say the role of the law as part of an elaboration of state power concerned to manage the life of the body politic. In such a situation, the law does not appear simply as a set of external commands compelling obedience to authority. The external point of reference has vanished. Although they still operate at the level of the individual—who must face trial (though not necessarily a public trial, before a jury) and maybe suffer punishment too—legal injunctions no longer articulate the mystified will of the sovereign so much as the managerial concerns of government, acting in the name of the state. Particularly in the examples drawn from Ireland and Kenya, the external signature of legality was the precise premise for the adoption of the exceptional protocols provided by the 1914 Defence of the Realm Act (and, in 1920, the Restoration of Order in Ireland Act) and the 1939 Emergency Powers Order in Council, respectively, rather than declarations of

outright war on the Volunteers and Mau Mau. Both sets of powers permitted the extensive use of executive decision-making that was not submissible to legal audit and was validated out of a theory of action that was decidedly anti-normative. At the same time, the relationship of these powers to legalism was the intrinsic value of their claims to authority.

Still further proof for the ways in which the exceptional (and criticism of it) serves to elevate the law is to be found in the normalisation of certain special powers, as observed in the penultimate section of each of the three case studies. In each example, the passing of the singular ‘crisis’ for which legal exceptions were made in British India, Ireland and Kenya did not signal the reassertion of the three polities’ previous legal systems, so much as the inclusion of certain new provisions within them. Thus, in British India, the exceptional procedural license granted to the likes of Sleeman and Smith was formally incorporated within the Bengal Regulations during the mid-1830s. In Ireland and Kenya, following the cessation of the campaigns to suppress the Volunteers and Mau Mau, respectively, administrative powers providing for the executive detention of certain individuals were retained in order to forestall future crisis. These were not attempts to submit to legal oversight executive actions taken to restore order now that a specific ‘crisis’ had passed, but to continue to use the law to cloak extra-legal power with legitimacy.

Rather than sovereigns deciding on discrete spheres of the legal and the exceptional, constituting them as fundamentally divorced and non-porous, what has emerged in these case studies is a rather more complex overlaying, amending and expediting of existing powers, laws and procedures. Rather than its banishment during ‘exceptional’ circumstances, the retention of legal panoply in fact appears intrinsic to their authorisation of government interventions in social activity to protect the faceless subjects whose best interests are rendered as identical with deference to state authority. In each of the three case studies, the law has indeed appeared as a ‘tactic’ of authority, a tactic subordinated to the broader managerial aims of government concerned with the overall well being of the population—as in Foucault’s account of governmental power. The evidence cited in the case studies has repeatedly shown how the selective use of the authority and force of the law, and suspensions of it, have more or less successfully vitalised state power across very

different crises of sovereign authority: to punish Thugs as ‘enemies of mankind’ in British India; to invoke the ‘magic term’ martial law to spread ‘terror among the disaffected’ in Ireland; to authorise mass attempts to ‘rehabilitate’ Mau Mau or ‘Villagise’ their Kikuyu brethren in colonial Kenya.

At the same time, the case studies have shown that the operation of legal exceptions that sought to subject the law to the will of the executive did not entail the de-vitalisation of state power by sovereignty, understood here in either the Foucauldean sense—as a form of power characterised by the capacity to enforce obedience through the infliction of spectacular, corporeal punishments—or in the Agambenian sense—as a relation of power realised by deciding on where to make ‘cuts’ in the social body such that legally protected and legally unprotected life is constituted. Rather, the three states of exception that this thesis has analysed were marked by a dialectic between governmentality and sovereignty. Prerogative will was activated and made concrete by the enactment of sovereign decisions upon exceptional cases, and the setting of new and changing thresholds between the reach of the law and the facticity of disorder necessitating the imposition of forms of power external to the law. Governmental power has been evidenced by the isolation of specific ruptures perceived to be threatening the well-being of the population, demanding the suspension of the extant legal system in certain cases, while simultaneously invoking the name of the law and transacting performances of due legal process in order to uphold the legitimacy of these interventions. Moreover, by invoking the authority of the law, but departing from legal norms, the three states of exception surveyed have appeared as apparatuses through which British governments in India, Ireland and Kenya used the rule of law to disarticulate the originary and ordinary nature of the link between sovereignty and violence for upholding order in these modern polities.

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Crime Branch Special Collections [CBSC]  
Inspector General's and County Inspectors' Monthly Confidential Reports, 1898—1914

§ *Kenya National Archives (Nairobi) [KNA]*

AB              Prisons Department  
DC/FH1        District Commissioner/Fort Hall  
DC/KBU        District Commissioner/Kiambu  
DC/KMU        District Commissioner/Kisumu  
DC/LKA        District Commissioner/Laikipia  
DC/NAI        District Commissioner/Naivasha  
DC/NKU1      District Commissioner/Nakuru  
DC/NVA        District Commissioner/Narok  
DC/NYI1      District Commissioner/Nyeri  
DC/NYK        District Commissioner/Nanyuki  
MAA            Member for African Affairs  
MAC/KEN      Joseph Murumbi Collection  
MLA            Ministry of Legal Affairs  
PC/NZA        Provincial Commissioner, Nyanza Province  
RR              High Court  
VQ              Provincial Commissioner, Central Province

§ *Public Record Office (Kew, London) [PRO]*

CAB 23        War Cabinet and Cabinet: Minutes  
CAB 24        War Cabinet and Cabinet: Memoranda  
CAB 27        War Cabinet and Cabinet: Miscellaneous Committee: Records  
                  (General Series)  
CAB 37        Cabinet Office: Photographic Copies of Cabinet Papers  
CAB 134      Cabinet Papers: Miscellaneous Committees: Minutes and Papers  
                  (General Series)  
CO 544        Colonial Office: Kenya: Sessional Papers  
CO 822        Colonial Office: East Africa: Original Correspondence  
CO 852        Colonial Office: Economic General Department predecessors:  
                  Registered Files  
CO 903        Colonial Office Irish Papers  
CO 904        Colonial Office Irish Papers  
HO 144        Home Office Registered Papers, Supplementary  
WO 32        War Office and successors: Registered Files (General Series)  
WO 35        War Office, Ireland  
WO 71        War Office, Judge Advocate General's Office: Courts Martial

	Proceedings and Board of General Officers' Minutes
WO 141	War Office: Registered Papers (Special Series)
WO 236	War Office: General Sir George Erskine: Papers
WO 276	War Office: East Africa Command: Papers
30/89/2	William Evelyn Wylie Papers, Domestic Records of the PRO

## II. Interviews with Tom Lloyd, translated by Mwendwa Musyemi

<i>Interviewee's name:</i>	<i>Location of interview (district):</i>	<i>Date interviewed:</i>
Simeon Musyoki Kivati	Kibwezi	19 Feb. 2007
Mbevi Makenga	Makueni	20 Feb. 2007
Muithi Mutua Uswii	Makueni	20 Feb. 2007
David Kitundu Kamau	Makueni	21 Feb. 2007
Kinyili Kaula	Makueni	21 Feb. 2007
Samson Mwonzeza Kimei	Makueni	21 Feb. 2007
Samuel Mailu Masila	Makueni	21 Feb. 2007
Kimeu Ngomo Yalo	Makueni	23 Feb. 2007
Chengo Mumina Munube	Makueni	24 Feb. 2007
Monicah Nduki Mutava	Makueni	24 Feb. 2007
Paul Mbui Mutua	Machakos	25 Feb. 2007
Charles Mwaura Wanderi	Thika	27 Feb. 2007
Saphira Nyambura Muhwanga	Thika	27 Feb. 2007
Muthunga Kagochi	Thika	28 Feb. 2007
Tabitha Njeri Gichuche	Thika	28 Feb. 2007
John Chege Mukara	Thika	1 Mar. 2007
Daniel Thuku Karatu	Thika	1 Mar. 2007
Njogu Nuthia	Thika	1 Mar. 2007
Kariuki Mungari	Thika	1 Mar. 2007

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 House of Commons debates in *Hansard*: <<http://hansard.millbanksystems.com/>>.  
*Achtanna an Oireachtais* (legislation passed by the Irish Houses of the Parliament):  
 <<http://www.acts.ie>>.  
 UN Committee on the Elimination of Racial Discrimination (CERD), *Report of the Committee on the Elimination of Racial Discrimination: seventieth session (19 February – 9 March 2007)*, A/62/18: <<http://www.unhcr.org/refworld/docid/473424062.html>>.

## IV. Parliamentary Papers

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*The Royal Commission on the Rebellion in Ireland, Minutes of Evidence and Appendix of Documents*. HC 1916, vol. xi, Cd. 8311.  
*Report of the Royal Commission on the Arrest and Subsequent Treatment of Mr. Francis Sheehy Skeffington, Mr. Thomas Dickson, and Mr. Patrick James McIntyre*, HC 1916, vol. xi, Cd. 8376.

- Report of the Committee appointed to investigate the disturbances in the Punjab, &c (Punjab Disturbances).* HC 1920, vol. xiv, Cmd. 681.
- Statement by Brig.-General R. E. H. Dyer, C. B. (Punjab Disturbances).* HC 1920, vol. xxxiv, Cmd. 771.
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- Report to the Secretary of State for the Colonies by the Parliamentary Delegation to Kenya, January, 1954.* HC 1953—54, vol. xi, Cmd. 9081.
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## V. Periodicals

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- Daily Telegraph* (London)
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- Irish Times* (Dublin)
- Manchester Guardian* (Manchester & London)
- Mombasa Times* (Mombasa)
- The Nation* (New York)
- The Times* (London)
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