Imperial Injustice: On the Imperial Features of the Guantánamo Military Commissions[1]

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Abstract 1
I. Introduction 3
II. Emergency Powers and Military Courts in the British Empire 8
III. The Imperial Features of Emergency Powers 12
IV. The U.S. Military Commissions: From War to Emergency 22
A. Pre-9/11 History 22
B. The Post-9/11 Transformation 26
C. From Wartime Tribunals to Emergency Courts 30
V. Conclusion 36

ABSTRACT

Over the twenty years since the September 11, 2001 terrorist attacks, the Guantánamo military commissions transitioned from exceptional wartime tribunals to regularly constituted courts, defying familiar legal doctrines. This article argues for an imperial turn – both empirical and theoretical – in analyzing the Guantánamo commissions. By comparatively analyzing the emergency military courts of the late British Empire and the U.S. military commissions, I show how the United States ultimately reproduced an imperial model of emergency military courts. Wartime military tribunals and criminal courts represent two well-known models for wartime and terrorism related prosecutions: the armed conflict model and the criminal law model. I argue that emergency military courts represent a third model – emergency powers – a hybrid model between wartime tribunals and criminal courts, and these three models together comprise a new comprehensive framework for the study of military courts. The article analyzes the hybridity of the military commissions as manifested in their territorial, temporal, personal, and organizational features: operating beyond sovereign borders, beyond

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wartime, over "enemy aliens", and combining civilian and military institutions.

Just like the threats against empire, the "war on terror" transcended sovereign borders, combining the danger of organized violence with fear of a racialized "Other." Shifting from a state-centered perspective to an imperial one demonstrates the relevance of empire as a transnational category of analysis for contemporary law and security, extending beyond domestic law and sovereign borders.

I. INTRODUCTION

When the U.S. military commissions were established shortly after the 9/11 attacks, all branches of the U.S. government framed them as wartime tribunals.[2] The government famously declared a "war on terror," and the courts drew on legal cases and historical precedents from the Second World War and the Civil War.[3] The purpose of the commissions, known as the Guantánamo military commissions, was to incarcerate and prosecute detainees deemed to be enemies of the United States, predominantly Muslims or those of Middle Eastern descent, away from the public eye and fundamental legal protections.[4] In subsequent years, the use of the war vocabulary in the "war on terror" fell out of favor and the military commissions' legal status changed. Following U.S. Supreme Court decisions, the Bush administration replaced the presidential order that had established the commissions with an Act of Congress: The Military Commissions Act ("MCA") of 2006.[5] The MCA of 2006 authorized the commissions as a permanent judicial body.[6] The Obama administration sought to close the commissions, but instead further institutionalized them with the MCA of 2009, which enhanced some due process guarantees while integrating the commissions into the civilian justice system through appellate review.[7]

However, despite these changes, legal scholarship has not offered an alternative concept to explain the transition away from wartime tribunals and define this new configuration; scholars of American constitutional law and military law are perplexed by multiple inconsistencies representing a "fundamental departure from the principles that had previously constrained the military exception."[8] If the military commissions are no longer wartime tribunals, then what are they? The answer, I believe, lies in shifting from a state-centered perspective to a perspective centering on empire.

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[2] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833.

[3] *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[4] *See* Sharon Weill & Mitchell Robinson, *Military Courts and Terrorism: The 9/11 Trial Before the Guantanamo Bay Military Commissions*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 256-71 (Ben Saul ed., 2nd ed. 2020).

[5] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended at 10 U.S.C. §§ 948a-950t).

[6] *See* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 945-48 (2015).

[7] *See* Melanie Garunay, *President Obama Presents the Plan to Close Guantanamo: "This Is About Closing a Chapter in History"*, WHITE HOUSE BLOG (Feb. 26, 2016, 12:11 PM), https://obamawhitehouse.archives.gov/blog/2016/02/23/president-obamas-plan-close-guantanamo-about-closing-chapter-history; *see also* Vladeck, *supra* note 6, at 947.

[8] Vladeck, *supra* note 6, at 968. *See also* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2007) (discussing changes in detention models without offering an alternative explanation for those changes).

In the scholarly debate over emergency and legality that ensued the "war on terror," scholars holding what I would call the "exception" view analyzed emergency measures as a temporary exception to the rule of law in liberal democratic nation-states when responding to a *state of emergency* as an unforeseen crisis.[9] On the other hand, scholars holding the "empire" view conceptualize *emergency powers* – given to the executive by the law – as ubiquitous and embedded in an imperial rule of law that is structured around the difference and hierarchy of rulers and subjects.[10] To understand the difference, it is useful to distinguish a *state of emergency* from *emergency powers*. The exceptional view of emergency focuses on *states of emergency* as situations of unexpected crisis triggering a set of extralegal and legal governmental responses. *States of emergency* typically bolster the powers of the executive branch at the expense of the legislature and the judiciary, favoring prompt action and decisionism, and thus tend to legitimize extreme governmental measures which are ostensibly temporary but are often normalized over time.[11] By contrast, *emergency powers* stand for legal powers enshrined in emergency statutes.[12] As such, *emergency powers* are not an immediate response to an unforeseen event but a legal technology of political control that extends well beyond an immediate response to a crisis.[13]

Relying on imperial history and postcolonial theory, scholars in the "empire" view trace the unexceptional and ubiquitous ways in which emergency has been used in colonial domains against the constant fear of resistance and political violence that is a product of ruling by excessive power, and their relevance to contemporary articulations of empire.[14] Subsequently, these scholars conceptualize emergency as an imperial tool of governance.[15] Drawing on self-portrayals of the U.S. antiterrorism

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[9] *See generally* OREN GROSS & FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE (2006); BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL RIGHTS IN AN AGE OF TERRORISM (2006); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2002); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 UNIV. PA. J. CONST. L. 1001 (2004).

[10] *See, e.g.*, NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 16-25 (2003); LALEH KHALILI, TIME IN THE SHADOWS: CONFINEMENT IN COUNTERINSURGENCIES 66-67 (2012); JOHN REYNOLDS, EMPIRE, EMERGENCY AND INTERNATIONAL LAW 12-20 (2017); Smadar Ben-Natan, *The Dual Penal Empire Emergency Powers and Military Courts in Palestine/Israel and Beyond*, 23 PUNISHMENT & SOC'Y 741, 742-47 (2021).

[11] *See* GROSS & NÍ AOLÁIN, *supra* note 9, at 8.

[12] *See* Mark Neocleous, *From Martial Law to the War on Terror*, 10 NEW CRIM. L. REV. 489, 502-04 (2007).

[13] *See id.*

[14] *See* JOSEPH MCQUADE, A GENEALOGY OF TERRORISM: COLONIAL LAW AND THE ORIGINS OF AN IDEA 23-28 (2021); *see also* Shai Lavi, *The Use of Force Beyond the Liberal Imagination: Terror and Empire in Palestine, 1947*, 7 THEORETICAL INQUIRIES L. 199, 205-06 (2006).

[15] *See* Nasser Hussain, *Hyperlegality*, 10 NEW CRIM. L. REV. 514, 515-20 (2007); *see also* REYNOLDS, *supra* note 10, at 14-17.

campaign as a clash between the civilized West and the uncivilized East, they analyze the "war on terror" as part of an imperial project.[16]

In this article, I argue that we should not view these perspectives as static and mutually exclusive but instead look at possible *interrelations* between them as modalities of state power and dynamics of *change*.[17] I contend that over the twenty years of their existence, the military commissions have transitioned from temporary and exceptional *wartime* tribunals to regularly constituted *emergency* military courts, typical to empire as a genre of rule. While originally the commissions were established as wartime tribunals by a presidential decree, they were subsequently authorized by an Act of Congress, which is a permanent statute, subjected to the U.S. civilian court system through an appeals court, have been granted jurisdiction over domestic crimes, and their jurisdiction was limited exclusively to non-citizens, all of which characterize imperial military courts.

Through a comparative historical analysis of British emergency courts and U.S. military commissions, I identify the existence of an imperial form of military courts and argue that these changes reflect a transition away from the initial model of wartime tribunals into a new model of emergency courts. By drawing an analogy between military courts used by the British Empire to suppress resistance in the colonies and the U.S. post-9/11 military commissions, I suggest an "imperial turn" in the study of the Guantánamo Bay military commissions, framing them as one of the imperial sites of the "war on terror."

The late British empire used military courts extensively during the 20th century in various colonies such as Palestine, Ireland, India and Kenya.[18] Emergency powers were established by permanent statutes and used to suppress anti-colonial resistance in various imperial domains, imposing summary military prosecutions and extreme punishments.[19] Analyzing the British emergency legislation in Palestine in the context of other imperial domains, I trace the doctrine of *emergency powers*, arguing that it developed into a *model* for the military prosecution of civilians, which has so far been undertheorized. This model for military prosecution of civilians operates beyond wartime, while targeting specific

[16] *See, e.g.*, DEREK GREGORY, THE COLONIAL PRESENT: AFGHANISTAN, PALESTINE, IRAQ 5-11 (2004); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 273-81 (2005); Nasser Hussain, *Beyond Norm and Exception: Guantánamo*, 33 CRITICAL INQUIRY 734, 737-38 (2007); KHALILI, *supra* note 10; MCQUADE, *supra* note 14.
[17] *See generally* Stephen J. Collier, *Topologies of Power: Foucault's Analysis of Political Government Beyond "Governmentality"*, 26 THEORY, CULTURE & SOC'Y 78, 88-90 (2009).
[18] *See* Ben-Natan, *supra* note 10, at 742, 749-51.
[19] *See id.* at 747-49.

populations under a distinct legality that constructs and excludes them as enemies.[20]

I situate this new model within a new analytic framework, offering a typology of models used by states for military prosecutions. It builds on the familiar models – *armed conflict* and *criminal law* – while adding *emergency powers* as a third and hybrid model.[21] The current literature that views armed conflict and criminal law as complementary models remains confined to a state-centric approach.[22] On the other hand, emergency powers combines elements of these two traditional models, while blurring distinctions between wartime and peacetime, sovereign and non-sovereign territories, crime and security.[23] I show the hybrid nature of emergency powers by analyzing the territorial, temporal, personal and organizational aspects of the three models, highlighting the political resonance of armed conflict and criminal law with the state, and that of emergency powers with empire. The *multiple-models framework* that I suggest combines the "exception" and the "empire" perspectives to comprise a comprehensive account of forms of military prosecutions, allowing us to see the differences, similarities, and interrelations between them, conceptually and over time. Moreover, this framework demonstrates how emergency powers fragment the supposed unity of the rule of law within the state, constituting hierarchical classifications of people and scales of rights and wrongs that are typical to empire.

Using this new analytic framework, I conceptualize the transformation of the military commissions from wartime tribunals, according to the armed conflict model, into the emergency powers model of empire. This transformation contributes empirical evidence and theoretical insights to the exception/empire discussion. While the U.S. government neither inherited the British emergency model nor consciously adopted it, I argue that it *reproduced* a model of military prosecution that is

[20] *See* Günther Jakobs, *On the Theory of Enemy Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW (Markus D. Dubber ed., 2014); *see generally* Susanne Krasmann, *Enemy Penology*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (2018); Ben-Natan, *supra* note 10.

[21] For more analysis of the armed conflict and criminal law models, *see* Chesney & Goldsmith, *supra* note 8, at 1082-87; *see also* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT'L L. 593, 600-02 (2009) (This article was originally published under the same title in the YALE J. INT'L L. 33, no. 2 (2008) 369-416). The typology of war, crime, and emergency has been explored in constitutional debates. *See* sources cited in *supra* note 9. For discussions of emergency in international law, *see* Oren Gross & Fionnuala Ní Aoláin, *Emergency, War and International Law: Another Perspective*, 70 NORDIC J. INT'L L. 29 (2001); REYNOLDS, *supra* note 10, at 111-23.

[22] Chesney & Goldsmith, *supra* note 8, at 1082-87; Hakimi, *supra* note 21, at 600-02.

[23] *See* KHALILI, *supra* note 10, at 78 (describing the legal regime in Guantánamo: "Somewhere in the liminal zone between criminal law and the collection of customs and treaties that make the corpus of the international laws of war, thousands of detainees have been held under an ad hoc legal regime…"). I describe the institutionalization of that legal regime from an ad hoc response to regular courts.

surprisingly similar to the legal response of the British Empire to insurgencies. This reaffirms the relevance of empire to contemporary critical security studies and legal theory.[24] Furthermore, when the model of emergency powers appears in two different historical moments and legal traditions, it evidently has its own political resonance with imperial formations as a genre of rule: using excessive power unevenly through constantly producing and normalizing exceptions.[25]

The theoretical move is one of conceptualizing the current imperial features of legal institutions and doctrines.[26] Using an imperial framework of analysis facilitates the study of forms of control and political and legal strategies, such as the *imperial emergency powers* model, that cannot be captured by a state-centered perspective. In the words of Paul A. Kramer, "the imperial refers to a dimension of power in which asymmetries in the scale of political action, regimes of spatial ordering, and modes of exceptionalizing difference enable and produce relations of hierarchy, discipline, dispossession, extraction and exploitation."[27] Ann Laura Stoler uses the term "imperial formations" to aptly describe macropolities governed by a scaled degrees of rights over non-citizen populations. Indeed, Guantánamo features "…harboring and building on territorial ambiguity, redefining legal categories of belonging and quasi-membership, and shifting the geographic and demographic zones of partially suspended rights. […Imperial formations] thrive on turbid taxonomies that produce shadow populations and ever-improved coercive measures to protect the common good against those deemed threats to it."[28] The current structure of the Guantánamo commissions is emblematic of imperial rule, and this framework allows us to conceptualize them and see how they became part of the U.S. legal system, rather than an exception to it.

The structure of the article is as follows: Section II describes the features of British imperial emergency powers and military courts in Palestine and other British colonies and domains. Section III conceptualizes the *imperial emergency powers* and outlines the *multiple-models framework*, characterizing the three ideal-type models by four aspects: territorial, temporal, personal, and organizational, and positioning them in

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[24] *See* Paul A. Kramer, *Power and Connection: Imperial Histories of the United States in the World*, 116 AM. HIST. REV. 1348, 1350 (2011). Kramer stresses that empire should be regarded as "a category of analysis, not a kind of entity… Far more is to be gained by exploring the imperial as a way of seeing than by arguing for or against the existence of a 'U.S. empire.'"

[25] *See* ANN LAURA STOLER, DURESS: IMPERIAL DURABILITIES IN OUR TIMES 56-62 (2016).

[26] *See* Antony Anghie, *Towards a Postcolonial International Law*, *in* CRITICAL INTERNATIONAL LAW: POSTREALISM, POSTCOLONIALISM, AND TRANSNATIONALISM 123 (Parbhakar Singh & Benoît Mayer eds., 2014).

[27] Kramer, *supra* note 24, at 1349.

[28] Ann Laura Stoler, *On Degrees of Imperial Sovereignty*, 18 PUB. CULTURE 125, 128 (2006); *see also* STOLER, *supra* note 25, at 56.

the context of current literature. Section IV examines the history of U.S. military commissions and the changes they have undergone since their establishment after 9/11, focusing on five issues: their establishment by law; their territorial location; their temporal aspects; their jurisdiction over domestic crimes; and their application to noncitizens. The conclusion draws on this analogy to offer further insights on the imperial features of the "war on terror."

II. EMERGENCY POWERS AND MILITARY COURTS IN THE BRITISH EMPIRE

During the first half of the 20th century, the British Empire changed its arsenal of legal instruments devised to suppress resistance and prevent decolonization and the collapse of the Empire. In the 18th–19th centuries, Britain imposed martial law and used extensive violence over colonized populations to quell resistance.[29] However, in late-19th century England, the use of martial law – extralegal powers that suspended civilian law and imposed military rule over civilians – stirred fierce criticism as an arbitrary and cruel use of force.[30] Subsequently, British rulers abandoned the doctrine of martial law and transformed it into emergency statutes that were enforced across the crumbling empire.[31]

During World War I, Britain adopted the Defence of the Realm Act ("DORA") and subsequent emergency legislation in Ireland (starting in 1914) and in India (starting in 1919).[32] Regulations under DORA in Ireland proscribed offenses triable by military courts, and the Restoration of Order in Ireland Act of 1920 ("ROIA") extended military trials to criminal offenses, which thereby came under the concurrent jurisdiction of civilian and military courts.[33] India saw the hyper-legislation of both temporary and permanent statutes between World War I and its 1947 independence: alongside detentions without charge, acts such as the 1919 Anarchical and Revolutionary Crimes Act ("Rowlatt Act") and the 1939 Emergency Powers Ordinance criminalized particular offenses and created special courts applying special procedures, operating in-camera

[29] HUSSAIN, *supra* note 10, at 108-18.
[30] *See* Charles Townshend, *Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940*, 25 HIST. J. 167, 185-87 (1982); *see also* David Dyzenhaus, *The Puzzle of Martial Law*, 59 UNIV. TORONTO L.J. 1, 2-13 (2009).
[31] *See* Neocleous, *supra* note 12, at 491-508.
[32] *See* REYNOLDS, *supra* note 10, at 90-93*; see also* Neocleous, *supra* note 12, at 500; SHIRA ROBINSON, CITIZEN STRANGERS, PALESTINIANS AND THE BIRTH OF ISRAEL'S LIBERAL SETTLER STATE 33-35 (2013); Yael Berda, *Managing "Dangerous Populations": How Colonial Emergency Laws Shape Citizenship*, 51 SEC. DIALOGUE 557, 560-62 (2020).
[33] *See* LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000, at 17 (2001).

and without recourse to appeal.[34] Thousands of India's nationalist militants were convicted under emergency laws *and* ordinary criminal law.[35]

The declared emergency in Kenya, suppressing the Kikuyu people and the Mau Mau (The Land and Freedom Army), lasted between 1952 and Kenya's independence in 1963.[36] This was one of the bloodiest colonial operations, with mass torture, detention camps, and killings. The Emergency Powers Ordinance was enacted in 1948 and subsequent regulations, ordinances, and decrees proliferated; capital punishment was applicable not only for crimes against life and body but also firearms offenses.[37] They were tried in special emergency Assize Courts, where defendants were tried *en masse* without due process or access to evidence, where over a thousand Kenyans were executed and many others imprisoned for life.[38] In all of these cases, emergency penal legislation instituted systems of special courts, summary trials, convictions, and harsh punishments. Despite their promulgation as "emergency" measures, these new statutes were *permanent*: they did not require an official declaration of a state of emergency before taking effect and contained no "sunset clause" that set the terms of their expiration.[39]

To dive deeper into the structure and uses of emergency legislation, this article examines such legislation in Palestine, which is a fair representation of how emergency powers were used in other parts of the British empire.[40] Palestine was conquered by British forces in 1917, and in 1922, the League of Nations assigned Britain a mandate to govern Palestine as a protectorate.[41] Responding to a Palestinian uprising in 1929, the British established military courts and prosecuted hundreds of Palestinian rebels, some of whom were condemned to death and executed.[42] These courts operated alongside the civilian legal system, for which the

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[34] Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Law in India*, 20 COLUM. J. ASIAN L. 93, 126-31 (2006).

[35] *See* DURBA GHOSH, GENTLEMANLY TERRORISTS: POLITICAL VIOLENCE AND THE COLONIAL STATE IN INDIA 1919-1947, at 18 (2017).

[36] REYNOLDS, *supra* note 10, at 138-49. *See generally* CAROLINE ELKINS, IMPERIAL RECKONING: THE UNTOLD STORY OF BRITAIN'S GULAG IN KENYA (2005).

[37] *See* REYNOLDS, *supra* note 10, at 144-56. *See also* Lizzie Seal & Roger Ball, *The Howard League and Liberal Colonial Penality in Mid-20th-Century Britain: The Death Penalty in Palestine and the Kenya Emergency*, 62 THE HOWARD J. OF CRIME AND JUST. 149, 161-62 (2023).

[38] ELKINS, *supra* note 36, at 88, 132 (2005).

[39] Ben-Natan, *supra* note 10, at 747; *see generally* Neocleous, *supra* note 12, at 504.

[40] *See* Defence (Emergency) Regulations 1945, *Palestine Gazette* 1442 suppl. 2, 1058 [hereinafter Emergency Regulations]. The Emergency Regulations are still being used by Israel in the West Bank today and were in use in Israel until they were largely replaced by a new antiterrorism law in 2016. *See* Berda, *supra* note 32, at 558.

[41] *See* NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 33-36 (2019).

[42] *See* HILLEL COHEN, YEAR ZERO OF THE ARAB-ISRAELI CONFLICT 1929, at 109, 181, 234 (2015); Irit Ballas, Variations on Sovereignty: Emergency Courts in Israel, 1948-1966, 16 (2020). (Ph.D. dissertation, Tel Aviv University) (on file with author).

colonial government enacted the Penal Law Ordinance–1936, enforced by magistrate and district courts, subject to appeals to the Supreme Court.[43] The courts system in Palestine was subject to appeal to the British Privy Council in civil matters,[44] as was the case for other British colonies.[45]

Following the 1936 outbreak of a large-scale rebellion against British rule and policies, known as the "Arab Revolt," the government enacted the Defence (Emergency) Regulations–1937, which were amended several times and finalized in 1945 ("Emergency Regulations").[46] The Emergency Regulations comprised a vast piece of legislation that gave the government almost unlimited powers over individuals.[47] They authorized the declaration of closed zones and the appointment of military governors, permitted house demolitions and property confiscation, deportation and indefinite detention without charge, imposed curfews, and proscribed organizations, censorship, restrictions on individual movement, detention without trial, and stop- search-and-seizure authorities.[48] They also constituted a penal regime, in which they declared a wide set of broadly defined security offenses, subject to extremely harsh punishments, and triable by military courts with no recourse to appeal.[49] Military commanders were authorized to establish military courts by decree.[50] In the military courts, the more serious offenses could only be tried by a three-judge panel, while the lesser offenses could be adjudicated by a single military judge; minor offenses were under the concurrent jurisdiction of military or civilian courts, and grave offenses were under the exclusive jurisdiction of military courts.[51] However, because many serious offenses involving harm to life, body, and property had

[43] Criminal Code Ordinance, 652 *Palestine Gazette* (1936), suppl. 1, 285.

[44] *See* G.W. TREADWELL, MILITARY COURTS MANUAL 51-52 (1945); Palestine Order in Council, art. 44, 1922. Proceedings under the Emergency Regulations, however, were final and not subject to any appeal, *see* Emergency Regulations, *supra* note 40, art. 30: "There shall be no appeal from any judgment, sentence, order, decision or direction (whether given, passed or made before or after the coming into force of the Defence (Emergency) (Amendment No. 8) Regulations, 1947) of a Military Court, or of the General Officer Commanding in relation to any proceedings, conviction or sentence of a Military Court, and no such judgment, sentence, order, decision or direction shall be called in question or challenged, whether by writ or in any manner whatsoever, by or before any Court."

[45] *See* ALBERT VENN DICEY, THE PRIVY COUNCIL 11-15 (1887).

[46] *See* Emergency Regulations, *supra* note 40; TOM SEGEV, ONE PALESTINE, COMPLETE: JEWS AND ARABS UNDER THE BRITISH MANDATE 415-25 (2000); *see generally* RASHID KHALIDI, THE HUNDRED YEARS' WAR ON PALESTINE: A HISTORY OF SETTLER COLONIALISM AND RESISTANCE, 1917-2017 (2020).

[47] *See* Emergency Regulations, *supra* note 40.

[48] *See* A.W.B. Simpson, *Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights*, 41 LOY. L. REV. 629, 631 (1996); Neocleous, *supra* note 12, at 502.

[49] Ben-Natan, *supra* note 10, at 747-48.

[50] Emergency Regulations, art 12.

[51] Emergency Regulations, arts. 15, 56, 57, 68.

equivalents in criminal law, many additional offenses were triable in civilian *or* military courts.[52] Authorized by the Emergency Regulations, British military commanders responded to the revolt by establishing military courts that condemned many to imprisonment and dozens to death sentences.[53] The same Emergency Regulations were later applied against members of the Jewish resistance movement in the 1940s.[54]

Such emergency powers were enacted in response to insurgency, but – despite their name – were promulgated as permanent statutes regulating a system of prosecutions and courts devoted entirely to security-related issues.[55] They did not require an official declaration of a state of emergency before taking effect and were not designated to expire. They also did not suspend ordinary criminal law, but created a parallel and complimentary system of civilian and military jurisdictions, in which some offenses were triable in military courts alone and some were under concurrent jurisdiction of civilian and military courts.[56] Legislated by an imperial power over colonial subjects, the Emergency Regulations did not assume a duty of allegiance by the subjects, and hence did not include offences such as treason and desertion from the military, typical to state security law. However, they did impose prohibitions on contact with and aid to others who are acting in violation of the Emergency Regulations.[57] They did not proscribe violent offenses like murder, assault, or injury (those were included in the parallel Penal Law Ordinance); instead, the prohibitions focus on the use of firearms and participation in unlawful organizations. The focus of the Emergency Regulations on prohibiting organized military resistance demonstrates that they did not primarily aim to protect the life and body of individuals (already protected under civilian criminal law), but aimed to protect the imperial government's rule and monopoly over armed violence. Compared to the civilian system, the Emergency Regulations imposed harsher punishments, including the death penalty for several offenses and life imprisonment for many others.[58] They provided far less procedural and institutional guarantees for individual rights than the civilian system.[59] Rebellious colonial

[52] *See generally id.*
[53] *See* Matthew Hughes, *The Banality of Brutality: British Armed Forces and the Repression of the Arab Revolt in Palestine, 1936-1939*, 124 ENG. HIST. REV. 313, 319 (2009); *see also* SABRI JIRYIS, THE ARABS IN ISRAEL 10 (1976); Shai J. Lavi, *Imagining the Death Penalty in Israel: Punishment, Violence, Vengeance, and Revenge*, *in* THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVE 219-28 (Austin Sarat & Christian Boulanger eds., 2005).
[54] *See* SEGEV, *supra* note 46, at 477; Berda, *supra* note 32, at 563; *see generally* Lavi, *supra* note 14.
[55] *See* Emergency Regulations; *see also* Neocleous, *supra* note 12, at 498-504.
[56] *See* Emergency Regulations, arts. 57, 68.
[57] *See id.* art. 66.
[58] *See, e.g.*, Emergency Regulations, arts. 18, 58, 66.
[59] *See* Emergency Regulations.

subjects were thus subject to harsher punishments, less procedural protections, and wider criminalization.[60] Typical offenses and respective maximum punishments were, for example, up to ten years for Membership in an Unlawful Association;[61] life imprisonment or death for Membership in a Group that Commits Offenses (equivalent to conspiracy);[62] life imprisonment for damaging a military facility;[63] and life imprisonment for Unauthorized Wearing of a Uniform.[64] " Offences Relating to Firearms, Explosives, Property, etc.," the most serious capital offense, prohibited shooting at a person or a group and using explosives, but was not limited to acts that caused death or bodily harm.[65] Since emergency military courts operated concurrently with the civilian court system, the decision where to prosecute offences under concurrent jurisdiction determined the level of punishment to which the defendant was subject.[66]

The Emergency Regulations specified arrest and detention powers but did not detail any criminal procedure for military trials.[67] Instead, they mostly referred to the civilian criminal procedure, while leaving many issues to the military judge's discretion and sense of justice.[68] Indeed, they were not intended to be an exclusive arrangement for criminal matters. The military judges, however, were in fact military officers and not required to have any legal qualifications.[69] Placing so much discretion on legal-procedural matters in the hands of military officers created an institutional preference to the interests of security over the interests of justice and a relaxation of the demands of the "rule of law." As the next section demonstrates, this is emblematic of the hybrid nature of emergency powers, combining criminal law and armed conflict.

III. THE IMPERIAL FEATURES OF EMERGENCY POWERS

Emergency powers are largely absent from the scholarly debate on the U.S. military commissions. This section addresses and explains this gap in the literature, offering a multiple-models framework that positions emergency powers in relation to the familiar models of armed conflict and criminal law. I combine three types of literature to theorize this

[60] *See id.*
[61] Emergency Regulations, art. 85.
[62] *Id.* art. 58.
[63] *Id.* art. 59.
[64] *Id.* art. 60.
[65] *Id.* art. 58.
[66] *Id.* arts. 57, 68, 69.
[67] *Id.* arts. 16, 17, 72.
[68] *Id.* arts. 18, 20, 21. According to art. 21 of the Emergency Regulations, in any procedural matter that is not determined by the Emergency Regulations, the court should follow such procedural rules as to satisfy the requirements of justice.
[69] *Id.* art. 13.

model: military justice, international law and security, and legal imperial history.

In the military justice literature, the discussion remains confined to the war discourse – that is, the conduct of military operations regulated by the international law of armed conflict. Military justice scholars identify three types of military courts and tribunals used to prosecute civilians: *war crimes tribunals*, *military courts of occupation*, and *military courts under martial law*.[70] *War crimes tribunals* (or commissions) are used to prosecute enemy combatants for violation of the laws of war, as part of or following armed conflict.[71] *Courts of occupation* operate in an occupied enemy territory, after it has been taken over and a military government has been established to rule over the civilian population of that territory.[72] Both types of courts and tribunals are connected to armed conflict and are thus regulated not only by military authorities but also by the international law of armed conflict.[73] *Martial law*, on the other hand, is used internally and is not necessarily connected to war or armed conflict, but to an internal emergency or security crisis.[74] Following a declaration of martial law, military rule temporarily replaces ordinary government, and military courts replace civilian courts.[75] As the previous section showed, martial law has fallen out of use and has been replaced by emergency powers.[76] However, that transformation had no significant effect on the categorization of military courts in this literature. According to this traditional classification, the military commissions still fall within war crimes tribunals, as they are presumably prosecuting combatants (albeit unlawful ones) for breaches of the laws of war.[77]

Scholars examining regimes of detention and counterterrorism prosecutions following the "war on terror" take a broader view that includes civilian courts as well as military courts.[78] These scholars conceptualize

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[70] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 798-846 (2d ed. 2000); *see generally* TREADWELL, *supra* note 44; *see* Rain Liivoja, *Military Justice*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 326, 348 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Martin S. Lederman, *On Spies, Saboteurs, and Enemy Accomplices: History's Lesson for the Constitutionality of Wartime Military Courts*, 105 GEO. L.J. 1529 (2017); Vladeck, *supra* note 6.

[71] *See* WINTHROP, *supra* note 70, at 831-46; *see also* Liivoja, *supra* note 70, at 340-43.

[72] *See* WINTHROP, *supra* note 70, at 798-817; Liivoja, *supra* note 70, at 344-47.

[73] *See* WINTHROP, *supra* note 70, at 798-817; Liivoja, *supra* note 70, at 328-29.

[74] *See* WINTHROP, *supra* note 70, at 817; Liivoja, *supra* note 70, at 347-48.

[75] *See* Townshend, *supra* note 30, at 177-87; *see generally* Max Radin, *Martial Law and the State of Siege*, 30 CALIF. L. REV. 634 (1942).

[76] *See* Neocleous, *supra* note 12, at 508.

[77] *See* Liivoja, *supra* note 70, at 340-44.

[78] *See, e.g.*, Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457 (2002); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and Law of Armed Conflict in the Age of Terror*, 153 UNIV. PA. L. REV. 675 (2004); Chesney & Goldsmith, *supra* note 8; Hakimi, *supra* note 21; Lucia Zedner, *Securing Liberty in the Face of Terror: Reflections From Criminal Justice*, 32 J. L. SOC'Y 507 (2005);

the choice between military courts and civilian courts as a choice between two models: the *criminal law* model and the *armed conflict* model.[79] In this scheme, prosecuting terrorism offenses in civilian courts follows the criminal law model, while using military war crimes tribunals applies an armed conflict model. According to this typology too, the military commissions fall within the armed conflict model.[80]

However, in the age of international terrorism, the dichotomy between peacetime and wartime in the military justice literature, which translates to the distinction between criminal law and armed conflict in the counterterrorism literature, has long been outdated. Subsequently, scholars dealing with prosecutions in military commissions have identified multiple inconsistencies with the wartime model, such as its extension to non-military offenders and offenses: jurisdiction over civilians and domestic offenses that are not war crimes.[81] In attempting to reconcile the armed conflict paradigm with the new statutory framework of the MCA and practice of the military commissions, scholars concluded that these were anomalies without offering an explanatory thesis.[82] Some scholars exploring security measures and regimes more broadly have suggested that in the post-9/11 era, the criminal law and armed conflict models are undergoing convergence or that a new paradigm is emerging, but have not conceptualized this new paradigm.[83] Hence, these types of scholarly literature fail to account for the new configuration of the military commissions.

The answer to this puzzle lies, I believe, in integrating insights from legal history and postcolonial literature. Scholars studying British colonial legalities have studied the emergency powers described above, proliferating in the interwar period of the 20th century when the crumbling British empire aimed to quell insurgency and resistance.[84] The development of emergency powers transformed the earlier doctrine of martial law into permanent statutes, turning them from a reaction to an event into a form of governance in various imperial domains. These statutes proscribed criminal offenses and were applied for extended periods over

Lucia Zedner, *Security, the State, and the Citizen: The Changing Architecture of Crime Control*, 13 NEW CRIM. L. REV. 379 (2010).

[79] *See, e.g.*, Feldman, *supra* note 78; Brooks, *supra* note 78; Chesney & Goldsmith, *supra* note 8; Hakimi, *supra* note 21.

[80] *See, e.g.*, Feldman, *supra* note 78; Brooks, *supra* note 78; Chesney & Goldsmith, *supra* note 8; Hakimi, *supra* note 21.

[81] *See, e.g.*, Vladeck, *supra* note 6, at 968; Lederman, *supra* note 70; Stephan I. Vladeck, *Terrorism Prosecutions and the Problem of Constitutional "Cross-Ruffing"*, 36 CARDOZO L. REV. 709 (2014). Vladeck and Lederman offer insightful discussions on U.S. Supreme Court historical case law on military commissions.

[82] *See, e.g.*, Vladeck, *supra* note 6; Vladeck, *supra* note 81; Lederman, *supra* note 70.

[83] *See generally supra* note 8 and accompanying text.

[84] *See, e.g.*, HUSSAIN, *supra* note 10; Neocleous, *supra* note 12; Dyzenhaus, *supra* note 30; KHALILI, *supra* note 10; REYNOLDS, *supra* note 10, at 68-108.

colonized civilian populations.[85] I argue that imperial emergency powers thus created a distinct model for security prosecutions and have become a new doctrine replacing martial law. This model combines civilian and military law and functions as a hybrid between the criminal law and the armed conflict models.

Here, I offer a classification of models for security prosecutions in a comprehensive and synthetic framework. Methodologically, I follow the Weberian notion of ideal-types.[86] Ideal-types serve as a tool for critical analysis of the empirical phenomena in question – security-related legal systems – on a more concrete level, by highlighting and juxtaposing their essential traits, interrelations, and mutual influences.[87] They do not exactly correspond to their objects of inquiry, but facilitate comparative and historical analysis by offering generalized accounts of "families" of phenomena.[88] Here, ideal-types help to elucidate the imperial emergency powers model by juxtaposing it to the more established criminal law and armed conflict models.

In constructing these court systems as ideal-type models, I offer four main aspects that distinguish each model from the others: *territorial*, *temporal*, *personal*, and *organizational*. The *territorial* aspect is concerned with sovereign territory and territorial limits on jurisdiction; the *temporal* aspect concerns whether each model is considered temporary or permanent, and whether it is intended for peacetime or wartime; the *personal* aspect deals with specifications of the population it is meant to adjudicate; and the *organizational* aspect pertains to the management of security-related prosecutions under the military or civilian justice systems, and the exclusivity or complementarity vis-à-vis the civilian criminal system.[89] These elements facilitate the characterization of each model, as schematically presented in the following table:

[85] *See generally* Neocleous, *supra* note 12; REYNOLDS, *supra* note 10, at 68-108; Ben-Natan, *supra* note 10.
[86] *See* MAX WEBER, METHODOLOGY OF SOCIAL SCIENCES 90-92 (1949).
[87] *See* Markus D. Dubber, *Paradigms of Penal Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 1017-39 (Markus D. Dubber & Tatjana Hörnle eds., 2014).
[88] *See id.*
[89] On the temporal and spatial elements of security regimes and the interrelations between them as "chronotopes", *see* Irit Ballas, *Chronotopes of Security Legal Regimes*, 73 UNIV. TORONTO L.J. 88 (2022).

Table 1: Models

Aspects	Criminal Law	Armed Conflict	Imperial Emergency
Territorial	State territory and extraterritorial exceptions	Non-state territory	All or part of state territory, ambiguous territories
Temporal	Permanent	Temporary: During Armed conflict	Permanent
Personal	All persons	Enemy combatants and civilians	All or some of state/out-of-state populations
Organizational	Civilian courts	Military courts	Complementary: Military and/or Civilian

In order to understand the differences between the models and their respective court systems, I suggest an abbreviated overview of these models. Under the *criminal law model*, the ordinary, general criminal law and civilian courts are used to prosecute all offenses, including security-related and terrorism offenses, using the same criminal mechanisms.[90] The central limitation in this model is territorial: like any domestic legal system, its jurisdiction is confined to the sovereign territory of the state, unless specifically extended extraterritorially in accordance with principles of international law.[91] Within these territorial limits, this is the most inclusive model: in terms of time and population, it applies to almost anyone at any time.[92] Any suspension or limitation of ordinary criminal law under one of the other models does not derive from inherent limitations of this model.

The criminal law model in its liberal ideal form is concerned with assigning individual responsibility for past harmful behavior.[93] At the center of the liberal conception of criminal law lies the individual as a rights bearer and individual action as the subject of criminal law.[94] The intervention of criminal law and the penal system is limited in two principal ways: (1) it can rightly intervene only when harm is done to an

[90] *See* Zedner, *supra* note 78.
[91] Such as the protective principle that allows the state to assert criminal jurisdiction over a person whose conduct outside the state threatens state security.
[92] International Humanitarian Law prohibits the criminal prosecution of prisoners of war for acts of combat, *see* Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950). 75 U.N.T.S. 135.
[93] *See generally* GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE AND INTERNATIONAL (2007).
[94] *See generally id.*

individual or to protected and narrowly defined social interests; and (2) its intervention is limited by procedural rights that protect the accused against the power of the state.[95] Within this framework, the principle of legality requires that criminal acts be strictly defined by law in advance of assigning criminal responsibility.[96]

International law and military law offer a different model for criminal prosecution in a situation of *armed conflict*.[97] This model was developed in the context of military operations in remote geographical areas and under unusual and extreme conditions.[98] In such situations, the military prosecutes enemy combatants or enemy civilians. Both categories are protected by International Humanitarian Law, primarily the Third and Fourth Geneva Conventions of 1949.[99] The prosecution of combatants (in "war crimes tribunals") is limited to acts internationally viewed as war crimes, while the prosecution of civilians (in "courts of occupation") is limited to an occupied territory and to offenses defined by the occupying power as harming its security.[100] Under this model, the military replaces the power of the ordinary government and judicial system where it holds control.[101] It is thus limited to times of war and to enemy populations, and is dominated by a concern for security, order, and control.[102] I refer to both types of tribunals – war crimes and courts of occupation – as "wartime tribunals."

The *imperial emergency powers* model originated in the common-law tradition of *martial law,* paralleled by the French doctrine of a "state of siege" (*état de siege*).[103] Martial law and state of siege were both

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[95] *See* FLETCHER, *supra* note 93, at 162-75.

[96] *See id.* The liberal ideal of criminal law has seen a transition in recent years to prevention and management of risk. *See* Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, *in* CRIME AND THE RISK SOCIETY 375 (1998); Lucia Zedner, *The Concept of Security: An Agenda for Comparative Analysis*, in 23(1) LEGAL STUDIES 153-75 (2003); *see generally* ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE (2014). For an interesting discussion concerning related features of globalization, *see generally* Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23 SOCIO. THEORY 197 (2005).

[97] *See* WINTHROP, *supra* note 70, at 798-846; *see also* Liivoja, *supra* note 70, at 340-47; Feldman, *supra* note 78. International Humanitarian Law protects all categories of persons once they are "*hors de combat*" – not involved or no longer participating in hostilities, such as in situations where people are detained and prosecuted in military courts. *See* Nils Melzer, *The Principle of Distinction Between Civilians and Combatants*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT 296, 299 (2014).

[98] *See* WINTHROP, *supra* note 70, at 45-56.

[99] *See* Third Geneva Convention, *supra* note 92; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 (Fourth Geneva Convention).

[100] *See* Liivoja, *supra* note 70, at 344-47.

[101] *See* Lederman, *supra* note 70, at 1565-66.

[102] *See id.* Lederman deals with the exception for this rule regarding prosecutions of enemy accomplices in military courts.

[103] *See* GROSS & NÍ AOLÁIN, *supra* note 9, at 17-35; *see also* Radin, *supra* note 75; Kim Lane Scheppele, *Legal and Extralegal Emergencies*, *in* THE OXFORD HANDBOOK ON LAW AND

designed for extraordinary circumstances and have been used by many countries.[104] Both originally referred to the law governing members of the military during wartime but were broadened to describe the law used by the military against civilians to suppress internal disquiet and rebellion.[105] As Mark Neocleus aptly shows, martial law until 1830 governed armed forces on the battlefield, with jurisdiction over soldiers and alien enemies; it did not apply to citizens.[106] In the first half of the 19th century, with the growing use of martial law in occupied territories and colonial domains,[107] it spread to the empires and metropoles via the "boomerang effect" (from the colonies back to the metropolitan centers).[108] A new understanding emerged: martial law could also be used by the military to "maintain order" among civilians.[109] Consequently, martial law came to be understood as a temporary declaration that transfers governmental powers over civilians to the military.[110] The wide array of government powers that martial law conferred to the executive included the replacement of civilian courts by military courts.[111] This transfer of powers was regulated by legislation in France, and remained non-statutory in England and other common law jurisdictions like the United States and Canada, where it was not considered a legal doctrine.[112] It was considered "no law at all," since it suspended the ordinary legal system and transferred rule-making powers and law enforcement to the military.[113] In fact, it enabled the use of extralegal powers, subject to the military's discretion, in a limited time/space framework. Martial law could be declared over any domestic population, but it was typically limited to a certain area where disturbances or rebellions were taking place; it is thus not so easily distinguishable from criminal law in terms of territory and population. Martial law was also typically imposed for a limited time, as

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POLITICS 166 (Gregory A. Caldeira, R. Daniel Keleman, & Keith E. Whittington eds., 2008).

[104] *See* GROSS & NÍ AOLÁIN, *supra* note 9, at 17-35; *see also* Radin, *supra* note 75.

[105] *See* Townshend, *supra* note 30; Neocleous, *supra* note 12.

[106] Neocleous, *supra* note 12, at 491-95.

[107] *See* WINTHROP, *supra* note 70, at 819; Neocleous, *supra* note 12, at 492.

[108] *See* MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975-1976, at 103 (2003) (describing the "boomerang effect" to illustrate how the colonial experience shaped practices in European centers.); *see also* Neocleous, *supra* note 12, at 493.

[109] *See* Neocleous, *supra* note 12, at 491-95.

[110] *See id.*

[111] That "menu" was described by Mark Neucleuos as "the usual mish-mash of martial law powers" and included censorship, curfews, appointment of military commanders, movement and travel restrictions, detentions without charge, unlawful associations and more. Neocleous, *supra* note 12, at 502. Military courts were a typical component of that menu, *see* GROSS & NÍ AOLÁIN, *supra* note 9, at 28-31.

[112] *See* WINTHROP, *supra* note 70, at 817-20; Radin, *supra* note 75, at 635-37; Kim Lane Scheppele, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213, 215-16 (2006).

[113] *See* Dyzenhaus, *supra* note 30, at 27; REYNOLDS, *supra* note 10 at 72-74; Radin, *supra* note 75, at 635.

deemed necessary by the government to respond to external events, and thus was strictly temporary, such as the suspension of habeas corpus.[114]

However, imperial emergency powers developed by the British replaced the older models of martial law and state of siege.[115] They could be invoked by the government without any official declaration of a state of emergency, and even in the absence of an evident temporary necessity.[116] Beyond their permanent legal nature, emergency powers also embody an organizational hybridity: they can be used either by the military or by civilian administrations and judiciaries.[117] Emergency statutes do not explicitly suspend or replace ordinary law and are not limited to a specific timeframe or population; they are only territorially bound to areas under the control of the state, creating an alternative legal framework that coexists with the ordinary criminal legal system.[118] Within the state, emergency statutes can be applied either generally or only to certain "disturbed" areas, where certain population groups reside, or to ambiguously defined territories under imperial control.[119] Because of their coexistence with criminal law, they can be applied only to some residents of the state through prosecutorial discretion.[120]

Thus, imperial emergency powers provide the executive branch with immense flexibility and discretion on almost all fronts: time, space, persons, and organizations. Once emergency legislation was enacted, it was far more versatile and more politically acceptable than martial law.[121] Consequently, the latter was largely abandoned.[122]

The imperial emergency model is different from the other models in creating a hierarchical scale of rights through a *dual system of law*.[123] Due to the coexistence of the emergency and ordinary criminal systems, criminal emergency powers create a duality of powers (often military and civilian systems) within criminal law, and enable a two-tier, double-standard legal system.[124] As evident from the delineation of the different

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[114] *See* Neocleous, *supra* note 12, at 491-92.
[115] *See* REYNOLDS, *supra* note 10, at 68-108.
[116] *See* Neocleous, *supra* note 12, at 499-502; Dyzenhaus, *supra* note 30, at 12-13; REYNOLDS, *supra* note 10, at 77-82. Neocleous makes a broader claim about the transformation of martial law not only to emergency powers but to national security discourse and legislation more generally.
[117] *See* Ben-Natan, *supra* note 10, at 747-48; REYNOLDS, *supra* note 10, at 84; *see also supra* text and accompanying footnotes 56, and 66 (relating to concurrent civilian/military jurisdictions in articles from the emergency regulations in Palestine).
[118] *See* Ben-Natan, *supra* note 10, at 747-49.
[119] *See* Ben-Natan, *supra* note 10, at 747-49*;* KHALILI*, supra* note 10, at 66-67.
[120] *See* Ben-Natan, *supra* note 10, at 747-49.
[121] *See* Neocleous, *supra* note 12, at 508.
[122] *See id.*
[123] *See* YOAV MEHOZAY, BETWEEN THE RULE OF LAW AND STATES OF EXCEPTION: THE FLUID JURISPRUDENCE OF THE ISRAELI REGIME 17 (2016); DONOHUE, *supra* note 33, at 316, 342 (calling this "a hierarchy of rights"); *see generally* Ben-Natan, *supra* note 10.
[124] *See* DONOHUE, *supra* note 33, at 316, 342; Ben-Natan, *supra* note 10, at 755-56.

models in Table 1, this duality is absent in other models. The criminal law and armed conflict models are theoretically mutually exclusive and are premised on clear definitions relating to territory, time, people, and organizational capacity.[125] The liberal criminal law model adopts the idea of the rule of law as one rule for all, at all times, and formally applies to the entire territory and population of the state. The armed conflict model allows for the exercise of jurisdiction extraterritorially and includes offenses typical of a war context and belligerent relations between sovereign and enemy. Both armed conflict and criminal law are aligned with the Westphalian concept of exclusive sovereignty over territory and population, and an adversarial relationship with other sovereigns.

On the other hand, imperial emergency powers and martial law are based on the fragmented sovereignty of colonial states and empires.[126] They suggest that under certain conditions, or at certain times, some regions or groups within state territory could be governed differently than others. Unlike what we think of as the rule of law, they constitute a form of power that can be used in uneven and non-continuous ways.[127] Developed in colonial settings and in times of internal rebellion or civil war, imperial emergency and martial law are designed to protect contested sovereignty and to counter resistance. But while martial law demanded that such exceptional times or places be clearly distinguished from the routine management of the state via a declaration of martial law, the emergency powers model relinquished this declaratory demand.[128] Similarly, martial law transferred the powers of government exclusively to the military, while the emergency powers model enables the use of both civilian and military authorities.[129] The prism of empire thus provides the tools to explain the disappearance of martial law, conceptualize the emergency powers model, and account for new forms of military courts diverting from the armed conflict model.

Martial law was constructed as a response to a state of emergency. In a state of emergency, typically, the temporal and organizational aspects of law change: temporary measures are introduced, and responsibility shifts to executive agencies.[130] *Imperial emergency powers*, on the other hand, are part of a form of governance not limited to a state of

[125] While the two models have different territorial and temporal purviews, they are not completely mutually exclusive: criminal law does not exclude enemy nationals, nor does it completely exclude acts committed outside the state; it is thus inclusive enough to include at least some extraterritorial cases and even war crimes cases and allows for criminal prosecutions of other national security offenses. The criminal law model is thus more inclusive, but not dual as the emergency model is.

[126] *See* KHALILI, *supra* note 10, at 65-73; REYNOLDS, *supra* note 10, at 77-93.

[127] *See* KHALILI, *supra* note 10, at 65-73; REYNOLDS, *supra* note 10, at 77-93.

[128] *See* Neocleous, *supra* note 12, at 501.

[129] *See* Ben-Natan, *supra* note 10, at 747-48; REYNOLDS, *supra* note 10, at 84; *see supra* text, and accompanying footnotes 56, 66.

[130] *See* GROSS & NÍ AOLÁIN, *supra* note 9, at 8.

emergency. They are used to introduce other changes in the territorial and personal aspects, creating the legal hierarchy and territorial ambiguity that characterize imperial rule.

While imperial emergency powers' existence is evidently part of our legal world, their existence on the level of legal doctrine and practice of prosecution and punishment has been ignored or denied. The primary reason for this absence is the emergence of emergency powers from colonial contexts.[131] Anthony Anghie's explanation on the absence of colonialism from international law should be complemented by the broader epistemological-sociological explanation provided by Frenkel and Shenhav about the creation of "purified canons" of academic disciplines. Anghie provides a dual explanation: first, traditional international lawyers concerned themselves with the question of the law applying between sovereign states while denying colonized peoples the status of sovereignty.[132] Thus, military courts of armed conflict between states were considered part of international law, while military prosecutions of colonized people were not seen as falling within the realm of "international."[133] Second, following decolonization, scholars of international law saw the acknowledgement of the right to self-determination of peoples as rectifying imperialism, thus looking at colonialism and imperialism as phenomena of the past: as historical rather than legal phenomena.[134] Post-World War II, the international law of occupation was thus framed as dealing only with temporary occupation of one state over another's territory, acknowledging temporary military courts of occupation, while sidelining hundreds of years of conquest and colonization as belonging to the past.[135] Emergency powers courts, again, escaped conceptualization as belonging to the past. Frenkel and Shenhav discuss the exclusion of texts and practices that were produced as part of the colonial encounter from their field of knowledge.[136] Offering a hybrid epistemology, they, like Anghie, identify how the colonial encounter produced specific forms of organizational knowledge and texts and analyze how they were later excluded from the canon of the discipline of organization studies by orientalist assumptions, producing a "purified canon."[137] I thus argue that the canonical literature of international law and criminal law alike

[131] *See* ANGHIE, *supra* note 16; Michal Frenkel & Yehouda Shenhav, *From Binarism Back to Hybridity: A Postcolonial Reading of Management and Organizational Studies*, 27 EUR. GRP. FOR ORGANIZATIONAL STUD. 855 (2006).
[132] ANGHIE, *supra* note 16, at 127-30.
[133] *See id.*
[134] *See id.*
[135] *See* ELIAV LIEBLICH & EYAL BENVENISTI, OCCUPATION IN INTERNATIONAL LAW (2022); AEYAL GROSS, THE WRITING ON THE WALL (2017).
[136] *See* Frenkel & Shenhav, *supra* note 131.
[137] *See id.* at 861.

continues to exclude these penal regimes originating in colonized territories despite their persistence into the present.

Another factor that contributes to the absence of emergency powers from U.S. military justice literature is the parallel process of the "civilianization" of military law.[138] Civilianization signifies a convergence in the standards of military and civilian justice systems and has been a global trend since World War I and the subject of a large body of scholarship by military lawyers. While civilianization has been thoroughly discussed with relation to courts martial and the disciplining of soldiers, its impact on military courts adjudicating civilians has not been explored to the same extent. Nevertheless, it serves as the principal framework through which transformations in military justice have been interpreted, thus obfuscating other transformations such as the abandonment of martial law.[139] The framework I propose here suggests otherwise: the main historic transformation that occurred in military courts prosecuting civilian non-combatants is the abandonment of martial law in favor of statutory emergency powers. The same trend appeared in the United States after 9/11, with the MCA's *statutory authorization* to establish military commissions that adopted additional features of the emergency powers model, as Section IV details below.[140] Civilianization may have contributed to the ease with which military justice has been increasingly applied to civilians, but it cannot explain the broader trend.

IV. THE U.S. MILITARY COMMISSIONS: FROM WAR TO EMERGENCY

Following the typology of models, this section looks into the history of military commissions in the United States, setting the stage for understanding the recent transitions and the differences between British emergency powers and the path that U.S. emergency powers have taken.

A. Pre-9/11 History

The use of military courts and tribunals in U.S. history is grounded in military law and constitutional doctrines.[141] Article III of the U.S. Constitution grants the right to a jury trial in all criminal cases, presided over by a judge who enjoys the security of tenure.[142] Military law pertaining to enemy combatants and civilians has been practiced outside the scope

[138] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); *see* Matthew Groves & Alison Duxbury, *The Reform of Military Justice*, *in* MILITARY JUSTICE IN THE MODERN AGE 1-4 (Alison Duxbury & Matthew Groves eds., 2016).
[139] *See* Vladeck, *supra* note 6.
[140] *See supra* subsection C, *From Wartime Tribunals to Emergency Courts; see supra* text, accompanying footnotes 204-43.
[141] *See* Lederman, *supra* note 70, at 1532-33; Vladeck, *supra* note 6, at 934-37.
[142] U.S. CONST. art. III.

of Article III in three situations that have been incorporated into the traditional military justice doctrines: following a declaration of martial law, in a military government following occupation, and under the laws of war for offenses against the law of nations (in more contemporary terms, war crimes).[143] The domestic prosecution of terrorism acts and even war crimes has usually been dealt with under Article III, within the ordinary criminal justice system.[144] This division reflects the traditional distinction between the armed conflict and criminal law models.

The U.S. initially followed the common law tradition, in which martial law originally referred to the law governing members of the military during wartime.[145] Until 1830, martial law governed armed forces on the battlefield, with jurisdiction over soldiers and alien enemies; it did not apply to citizens.[146] In this form, it was employed before and during the Civil War.[147] However, in the first half of the 19th century, martial law was increasingly used in occupied territories and colonial domains.[148] Subsequently during the second half of the 19th century, the use and understanding of martial law shifted from a military encounter with the enemy, to a military response to internal and colonial insecurity, and was used by the United States in the expansion of the early 20th century.[149] Parallel to developments in Britain, then, it was broadened to describe the law used by the military to suppress internal disquiet and rebellion amongst civilians.[150]

Seminal decisions of the U.S. Supreme Court reflect these changes. A notable decision from the Civil War era, *Ex parte Milligan* (1866), limited the extent of martial law to active wartime by ruling that U.S. citizens cannot be prosecuted by military courts if civilian courts are operative.[151] However, in *Luther* (1849), the Court upheld a new understanding of martial law as a prerogative of the government in self-defense against internal insurrection.[152] The decision of the British Privy Council in *Ex parte Marais* (1902), originating in the Boer War, reversed prior constraints on the use of martial law and made it applicable even when ordinary courts were operative; albeit not binding in the United

[143] *See* WINTHROP, *supra* note 70, at 798-846; Hamdan v. Rumsfeld, 548 U.S. 557, 595-96 (2006).
[144] *See* Sudha N. Setty, *The United States*, *in* COMPARATIVE COUNTER-TERRORISM LAW 49–77 (Kent Roach ed., 2015); Vladeck, *supra* note 6, at 965-66.
[145] *See* GROSS & NÍ AOLÁIN, *supra* note 9, at 30-31; Scheppele, *supra* note 112, at 213-15; Neocleous, *supra* note 12, at 491-97.
[146] Neocleous, *supra* note 12, at 491-97.
[147] *Id.*
[148] *See id.* at 492.
[149] *See id.* at 493-95.
[150] *See id.* at 493-97.
[151] *See* Ex parte Milligan, 71 U.S 2, 126 (1866). *See* discussion in Lederman, *supra* note 70, at 1565-66.
[152] *See* Luther v. Borden, 48 U.S 1 (1849); Neocleous, *supra* note 12, at 495.

States, this decision was adopted as precedent by the Supreme Court.[153] The U.S. Supreme Court's ruling in *Moyer v. Peabody* (1909), affirming military trials of citizens in Colorado, further broadened the use of martial law to include responses to crisis, rebellion, and insurrection.[154] These decisions extended the use of martial law to peacetime and to the prosecution of civilians. Martial law has spread into the empires and metropoles via the colonial "boomerang effect" – from the colonies back to the metropolitan centers – and emerged with a new understanding: it could also be used by the military to "maintain order" among civilians.[155] This new meaning of martial law was useful at a time when the United States was expanding and incorporating new territories and populations.[156]

The particular character of American imperialism involves an ambiguity of being born out of revolt against British colonialism and having its own imperial aspirations, which led to forging new imperial strategies and denial of imperialism.[157] This anti-colonial sentiment might explain in part why the United States never intended to formally control colonial territories.[158] As Jenny Martinez writes, "…the United States never made a habit of permanently occupying new foreign territories as a colonial power. Instead, the United States chose to exercise its extraterritorial influence through business, diplomacy, and military force – including episodes of transient military occupation."[159] The United States used martial law transiently in newly occupied and unincorporated territories, such as the Philippines and Puerto Rico, including the powers to proclaim martial law and suspend fundamental liberties such as habeas corpus, which were justified on grounds of necessity.[160] However, and unlike the British, the United States never transitioned from martial law to permanent colonial control and emergency powers and instead either incorporated these colonies into the union or governed them through imperial forms such as trusteeship and free association.[161] The use of military

[153] *See* Ex parte Marais (1902) A. C. 109, 85 L.T. 734 (stemming from the use of martial law during the Boer War in South Africa). *See* Neocleous, *supra* note 12, at 497.
[154] *See* Moyer v. Peabody, 212 U.S. 78 (1909). *See* Neocleous, *supra* note 12, at 497.
[155] *See* Neocleous, *supra* note 12, at 492-93.
[156] *See id.* at 493-95.
[157] *See* ANGHIE, *supra* note 16, at 279-80.
[158] *See* DANIEL IMMERWAHR, HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES (2019); ANGHIE, *supra* note 16, at 282.
[159] Jenny S. Martinez, *New Territorialism and Old Territorialism*, 99 CORNELL L. REV. 1387, 1389 (2013).
[160] *See* GARY GERSTLE & DESMOND KING, *Spaces of Exception in American History*, *in* STATES OF EXCEPTION IN AMERICAN HISTORY (Gary Gerstle & Joel Isaac eds., 2020).
[161] *See* ANGHIE, *supra* note 16, at 283-86. Other examples include the pacific islands Palau, the Marshall Islands and Micronesia. *See* BARRY E. CARTER ET AL., INTERNATIONAL LAW 489-94 (7th ed. 2018).

courts has thus remained under the extralegal framework of martial law and has not received statutory authorization.

Martial law, on the other hand, became more problematic with the rise of ideas of liberal democracy.[162] It came to be seen as too undemocratic, and its declaration was inflammatory for new classes of citizens.[163] Consequently, martial law has hardly been used in the U.S. since the end of World War II.[164] However, the demise of martial law has not been integrated into most of the U.S. legal literature on military justice, which still considers martial law a relevant model.

The legal regulation of emergency in the United States has been forged against British forms of rule: emergency statutes are diffused in multiple (as opposed to single) statutory authorizations relating to a wide range of topics, are mostly framed as civil law, and cover areas from the economy to immigration.[165] It has been supplanted by emergency legislation that encompasses various aspects of public life, such as the powers given to the Federal Emergency Management Agency ("FEMA").[166] A declaration of emergency under FEMA was issued, for example, immediately following the Boston Marathon attack.[167] This form of emergency powers in the United States *does not* employ military courts or commissions. Instead, emergency powers are mostly exercised within states in the internal spaces of colonial domination.[168] Extreme forms of racial segregation, criminalization, and punishment using combative vocabulary like the "war on crime" and the "war on drugs" have been employed using criminal law enforcement and sentencing, not through emergency measures.[169] These features, along with the fact that other emergency powers are so diffuse, makes them particularly invisible to military law scholars and criminal law scholars.

The U.S. has continued to use military commissions as wartime tribunals, a practice upheld during World War II in *Ex parte Quirin* (1942). In *Quirin*, the Supreme Court affirmed that German spies and saboteurs were lawfully prosecuted by a military commission, because they were

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[162] *See* Neocleous, *supra* note 12, at 498.
[163] *See id.* at 498-99.
[164] *See id.* at 490.
[165] *See id.* at 504-13; Scheppele, *supra* note 112, at 225-29.
[166] *See* Neocleous, *supra* note 12, at 504-08.
[167] *See* Massachusetts Emergency and Related Determinations, 78 Fed. Reg. 27413 (Apr. 17, 2013).
[168] *See* Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes: The Case of the United States*, 17 ANN. REV. L. & SOC. SCI. 483, 487 (2021).
[169] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); James Forman Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331 (2009); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

charged with offenses against the international laws of war.[170] The *Quirin* decision is notable not only for restricting the jurisdiction of wartime tribunals to international crimes, but also because it allowed for the military prosecution of *U.S. citizens and non-citizens alike* in such circumstances, reasoning that a U.S. citizen who aligns himself with the enemy would still be considered an enemy belligerent.[171] As we see below, both of these aspects – the limitation to violations of the laws of war and the jurisdiction over U.S. citizens who joined enemy forces – have changed dramatically since the "war on terror" was declared.

B. The Post-9/11 Transformation

The history of the military commissions suggests that while initially after 9/11 the United States sought to implement the wartime model, with time and the persistence of the (real or perceived) terrorist threat, U.S. legislation came to resemble the model of the British Empire. Immediately after the 9/11 attacks, the government framed the "war on terror" as a war, and the sole vocabulary used in the context of military commissions has been that of armed conflict.[172] The post-9/11 military commissions were established by presidential order to try enemy combatants.[173] Detainees were captured in conflict zones outside the United States, primarily from the Middle East and predominantly Muslim countries.[174] They were collectively designated in the presidential military order as non-citizens subject to indefinite military detention without charge or access to counsel, and subject to trial (if one was initiated) before a military commission.[175] The United States denied the rights of detainees to independent determination of their status under the laws of armed conflict, and to be treated as prisoners of war until such determination is made, under the Third Geneva Convention.[176] The government tried to exclude enemy combatant detainees from the protection of U.S. domestic law as well by holding them in detention facilities outside

[170] *See* Ex parte Quirin, 317 U.S. 1 (1942).
[171] *Id.* at 37.
[172] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Brooks, *supra* note 78, at 676-80.
[173] *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).
[174] *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 39-46 (2005); Setty, *supra* note 144, at 50.
[175] *See* COLE, *supra* note 174, at 39-46; Setty, *supra* note 144, at 50; DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE WAR ON TERROR, 140-45 (2008).
[176] *See* Third Geneva Convention, *supra* note 92, art. 5; Setty, *supra* note 144, at 69.

formal U.S. sovereign borders.[177] The principal facility was the U.S. naval base at Guantánamo Bay, Cuba.[178]

The rules set by the presidential order, which were later revoked, were meant to incarcerate and prosecute detainees away from the public eye and fundamental legal protections, and obscure the use of torture.[179] This scheme allowed the commissions to rely on evidence obtained through coercion, torture, and hearsay; detainees did not have the right to remain silent as a guarantee against self-incrimination; they had no access to counsel or right to challenge the legality of their detention.[180] No appeal procedure was instated, even in capital punishment cases.[181] Even today, despite several Supreme Court decisions (discussed below) and the MCA of 2009, military commissions still do not grant the right to remain silent and can still accept coerced confessions.[182] They do not afford a right to a speedy trial, and severely limit access to classified information.[183] The government's complete control of the procedure is largely designed to conceal the torture of detainees and coerced confessions, shielding CIA officials responsible for the agency's infamous torture program.[184]

In a series of legal challenges decided between 2004 and 2008, the U.S. Supreme Court held that constitutional constraints, and specifically the right to due process, are applicable to the legal process in military commissions.[185] In the *Hamdi* case (2004), the court ruled that a U.S. citizen held as an enemy combatant is nevertheless entitled to all the protections conferred by the U.S. Constitution, including habeas corpus, access to the U.S. courts, and due process.[186] In the *Hamdan* case (2006), the court decided a petition challenging the military commissions established by the presidential military order.[187] According to the ruling, the use of military commissions instead of the ordinary criminal justice system is constitutional only if authorized by an Act of Congress. This was not an obvious decision, and the court was divided on this question, but

[177] *See* Third Geneva Convention, *supra* note 92; Setty, *supra* note 144, at 69; MOECKLI, *supra* note 175, at 140-45.
[178] *See* Third Geneva Convention, *supra* note 92; Setty, *supra* note 144, at 69; MOECKLI, *supra* note 175, at 140-45.
[179] *See* LISA HAJJAR, THE WAR IN COURT: INSIDE THE LONG FIGHT AGAINST TORTURE 178 (2022); Weill & Robinson, *supra* note 4, at 256, 259-60.
[180] Weill & Robinson, *supra* note 4, at 258-59; MOECKLI, *supra* note 175, at 142-45.
[181] Weill & Robinson, *supra* note 4, at 258-59; MOECKLI, *supra* note 175, at 142-45.
[182] Weill & Robinson, *supra* note 4, at 258-61; MOECKLI, *supra* note 175, at 142-45.
[183] Weill & Robinson, *supra* note 4, at 261.
[184] Weill & Robinson, *supra* note 4, at 258-61; MOECKLI, *supra* note 175, at 142-45.
[185] *See* Setty, *supra* note 144, at 69-72; Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004); Boumediene v. Bush, 553 U.S. 723, 798 (2008).
[186] *Hamdi*, 542 U.S. at 538.
[187] *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

it was the binding ruling in the case.[188] The decision meant that the military commissions overstepped the boundaries of the armed conflict model when applying war powers, instead of ordinary criminal law, to civilians.

In response, the government enacted the MCA of 2006.[189] The MCA entrenched the military commissions in a statute but limited their jurisdiction only to alien non-citizens.[190] It established a legal process for judicial review of the "enemy combatant" designation by the military commissions but denied enemy combatants' access to habeas corpus proceedings in U.S. courts, which is the only avenue for challenging their detention in front of an independent court.[191] The military commissions were authorized to determine their status as enemy combatants and subject them to indefinite detention or try them if they are charged by the military prosecuting authorities.[192] The MCA of 2006 also provided for an appeal over the military commissions to the newly created Court of Military Commission Review and then to the D.C. Circuit Court of Appeals.[193]

In *Boumediene v. Bush* (2008), the denial of habeas corpus to Guantánamo detainees was challenged. The court ruled that Guantánamo detainees have a constitutional right to habeas corpus proceedings in U.S. courts, and therefore the MCA of 2006 cannot deny them that right.[194] Following *Boumediene*, many detainees were transferred to other facilities further away from U.S. shores, where the courts have not extended similar protections, such as the Bagram prison in Afghanistan.[195] The *Boumediene* decision prompted Congress under the Obama administration to enact the MCA of 2009, as well as other legislation precluding the executive branch from transferring detainees from Guantánamo Bay to the United States for federal criminal trials.[196]

The treatment of non-citizens merits some further attention, since it was the first time that the U.S. government limited the jurisdiction of

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[188] *See id.* at 622-35.
[189] *See* Military Commissions Act of 2006, *supra* note 5, at § 950; Vladeck, *supra* note 6, at 947 (noting decisions of the D.C. Court of Appeals are subject to additional review in the U.S. Supreme Court if granted certiorari).
[190] MOECKLI, *supra* note 175, at 142-45.
[191] *See* MOECKLI, *supra* note 175, at 140-43; *see also* Setty, *supra* note 144.
[192] *See* Military Commissions Act of 2006, *supra* note 5, at § 948; Vladeck, *supra* note 6, at 946.
[193] Vladeck, *supra* note 6, at 947.
[194] *See Bush*, 553 U.S. 723.
[195] *See* Setty, *supra* note 144, at 69-70; Al Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010); Saurav Ghosh, *Boumediene Applied Badly: The Extraterritorial Constitution after Al-Maqaleh v. Gates*, 64 STAN. L. REV. 507 (2012).
[196] *See* Lederman, *supra* note 70, at 1532-33 (also referring to the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1031, 129 Stat. 726, 968 (2015)).

military commissions to non-citizens.[197] As mentioned above, while the government initially sought the possibility of designating citizens as enemy combatants, the Supreme Court in *Hamdi* held that U.S. citizens could be tried in military commissions (consistent with *Quirin*) but were nevertheless entitled to due process under the U.S. Constitution, including the right to challenge their designation as enemy combatants before an impartial authority.[198] In the MCA, where the jurisdiction of the military commissions was explicitly limited to non-citizen aliens, the government clearly distinguished citizens from non-citizens.[199] The MCA thus altered the course of terrorism prosecutions of citizens by precluding them from the jurisdiction of the military commissions (contrary to *Quirin*) and conducting their prosecutions in criminal courts. In principle, according to the criminal law model which applies to all persons present in state territory regardless of citizenship status, non-citizens could also be prosecuted in domestic courts for terrorism and other offenses.[200] Similarly, enemy aliens could have been prosecuted in criminal courts and the MCA does not preclude that possibility, although that was not the government's policy.[201] Legally, then, the MCA *maintains concurrent jurisdiction of military commissions and civilian courts* in terrorism cases against aliens but precludes the prosecution of U.S. citizens in military commissions.[202] The MCA thus created a scale of rights for citizens and non-citizens by excluding citizens from the military commissions.

The jurisdiction of the military commissions was challenged again more recently, this time regarding subject matter jurisdiction. In the case of *al-Bahlul* (2017), the D.C. Circuit Court of Appeals rejected the argument that the MCA was unconstitutional in allowing military commissions to try domestic crimes that do not constitute war crimes under international law.[203] The petitioners argued that "enemy combatants" should be tried for domestic crimes, like conspiracy, in an ordinary criminal court. The decision, however, confirmed the constitutionality of the prosecution of domestic crimes in military commissions, while also

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[197] *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 953-55; MOECKLI, *supra* note 175, at 128.
[198] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004). Lederman, *supra* note 70, at 1582, 1545, 1550.
[199] *See* Vladeck, *supra* note 6, at 946.
[200] *See* Markus D. Dubber, *Citizenship and Penal Law*, 13 NEW CRIMINAL L. REV. 190, 190-91 (2010).
[201] David D. Cole, *Against Citizenship as Predicate for Basic Rights*, 75 FORDHAM L. REV. 2541, 2545 (2007) (explaining concurrent civilian and military jurisdiction which Stephan Vladeck referred to as "Cross-Ruffing"); Vladeck, *supra* note 81, at 711.
[202] MOECKLI, *supra* note 175, at 128; Cole, *supra* note 197, at 953-55.
[203] *See* Al-Bahlul v. U.S., 792 F.3d 1 (D.C. Cir. 2015); Al Bahlul v. U.S., 840 F.3d 757, 759 (D.C. Cir. 2016) (en banc).

remaining within the jurisdiction of criminal courts, thus subject to concurrent civilian and military jurisdiction.[204]

To sum up, the military commissions were established as wartime tribunals by a presidential decree but have undergone significant changes: they were authorized by an Act of Congress which is a permanent statute, they are still in an offshore location but are linked to the U.S. domestic civilian court system through an appeals court, and they have been granted jurisdiction over domestic crimes, limited to non-citizens only. The meaning of these changes can better be analyzed within the multiple-models framework.

C. From Wartime Tribunals to Emergency Courts

Legal scholarship has featured two principal interrelated criticisms of the military commissions. The constitutional theory and human rights discussion has revolved around states of emergency, exception, and limits on executive powers, as well as on due process and fair trial guarantees.[205] From this perspective, the military commissions have been seen as a type of exception legitimized by claims of necessity that threaten both constitutional checks and balances, and the rights of individuals in the administration of justice. Taking a different and more radical line of criticism, scholars have argued that military courts have *targeted specific populations*, often along ethnic and racial lines, othering groups of suspects using bureaucratic classifications such as "enemy races" and "enemy combatants."[206] While I agree with these criticisms, I believe that

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[204] *See* Al-Bahlul v. U.S., 792 F.3d 1 (D.C. Cir. 2015); Al Bahlul v. U.S., 840 F.3d 757, 759 (D.C. Cir. 2016) (en banc) (petition for certiorari in the Supreme Court was denied.). Al-Bahlul's life sentence was confirmed by the Court for Military Commissions Review in 2019 and then by the Court of Appeals for the District of Columbia in 2023. *See also* Lederman, *supra* note 70, at 1536-37.

[205] *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Lederman, *supra* note 70, at 1643-45; Liivoja, *supra* note 70; MOECKLI, *supra* note 175, at 145-49; Gerald Neuman, *Understanding Global Due Process*, 23 GEO. IMMIGR. L.J. 365 (2009); David S. Weissbrodt & Joseph C. Hansen, *The Right to a Fair Trial in an Extraordinary Court*, *in* GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 305-19 (Fionnuala Ní Aoláin & Oren Gross eds., 2013); Fionnuala Ní Aoláin, *Lawyers, Military Commissions and the Rule of Law in Democratic States*, *in* COUNTER-TERRORISM, CONSTITUTIONALISM, AND MISCARRIAGES OF JUSTICE (Genevieve Lenon & Colin King eds., 2018); U.N. Hum. Rts. Comm., General Comment no. 32: Right to Equality Before Courts and Tribunals and to a Fair Trial (Art. 14), CCPR/C/CG/32 (2007); Inter-Am. Comm'n H.R., *Report on Terrorism and Human Rights*, 2002 OEA/Ser.L/V/II.116, doc. 5 rev. ¶ 1 (2002)**;** U.N. ESCOR, Comm'n on Hum. Rts., *Civil and Political Rights, Including the Question of Independence of the Judiciary, Administration of Justice, Impunity, Draft Principles Governing the Administration of Justice through Military Tribunals*, E/CN.4/2006/58 (Jan. 13, 2006); U.N. CCPR, General Comment no. 29: States of Emergency (Art. 4), CCPR /C/21/Rev.1/Add.11 (Aug. 31, 2001).

[206] *See, e.g.*, COLE, *supra* note 174; MOECKLI, *supra* note 175, at 145-49; Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1366, 1370-78 (2007). For more arguments about racialization and terrorism after 9/11, *see* Marie Breen-Smyth, *Theorising the "Suspect Community": Counterterrorism, Security Practices and the Public*

their state-centric and liberal logics miss the structural and political imperial logics. A primary feature of imperial forms is the *multiplicity* of legal instruments that apply different legalities to the same people.[207] The permanent status accorded to the military commissions alongside the federal courts system enables the imperial rule over different populations, in ambiguously defined territories, through scaled degrees of status and rights.

I conceptualize the transformation of the U.S. military commissions from war to emergency by drawing on the typology and characteristics of the three models and focusing on five aspects of the military commissions: territorial location, temporal aspects, establishment by law, jurisdiction over domestic crimes, and personal jurisdiction over non-citizens. The jurisdiction of military commissions over domestic crimes signifies its departure from a war model and is also relevant to the organizational aspect: it is indicative of the concurrent application of military and civilian law. Their establishment by law similarly indicates their hybrid juridical-executive nature.

Territory: Wartime tribunals traditionally operate outside state territory, where military operations take place; emergency powers courts typically operate within state territory or in ambiguously defined territories and imperial domains.[208] The military commissions reside in Guantánamo Bay, Cuba, which is outside de jure U.S. sovereign territory, but under its complete de facto control since 1903, when the U.S. government obtained a perpetual lease from the Cuban government.[209] The lease secured full and eternal control over the land, without formally incorporating it into U.S. sovereign territory and law, creating a liminal status that would allow the government full control of detainees while stripping them from the legal protections of the Constitution and reach of the courts.[210] However, in the *Rasul* case, Justice Kennedy's concurrence noted that Guantánamo "is in every practical respect a United States Territory, and it is one far removed from hostilities…"[211] and in *Boumediene*, seven years into the detention program, the Court reiterated that

Imagination, 7 CRITICAL STUD. TERRORISM 223, 229-235 (2014); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 32-46 (2002); Leti Volpp, *The Citizen and the Terrorist*, U.C.L.A. L. REV. 1575, 1576-86 (2002); WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 4-9 (2015).

[207] *See* Lauren Benton & Richard Ross, *Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, *in* LEGAL PLURALISM AND EMPIRES, 1500-1850, at 1-17 (2013). Hussain, *supra* note 15, at 521-23; HUSSAIN, *supra* note 10, at 738-40; KHALILI, *supra* note 10, at 65-67.

[208] *See* Table no. 1 and following text, and accompanying footnotes 79-89.

[209] KHALILI, *supra* note 10, at 75.

[210] *See* Setty, *supra* note 144, at 69; *see also* MOECKLI, *supra* note 175, at 140-45.

[211] Rasul v. Bush, 542 U.S. 466, 487 (2004).

Guantánamo was "under the complete and total control of our government."[212] This liminal location – being formally outside state territory but under complete control and removed from hostilities – is hardly aligned with the armed conflict model. It is far more consistent with the imperial model of emergency powers. Additionally, according to the MCA, the military commissions are subject to military and civilian appellate courts that reside in the Washington D.C. Circuit: The Court of Military Commission Review, the Court of Appeals for the District of Columbia Circuit, and the U.S. Supreme Court.[213] These appellate courts establish a connection between the military commissions and the domestic court system inside the United States,[214] which is similar to appellate proceedings of the courts martial system, and to the appeals from British Colonies to the Privy Council.[215] The military commissions, then, represent territorial ambiguity that is typical of imperial formations and colonial legal systems, residing in a quasi-sovereign territory while maintaining an institutional connection to the domestic legal system.

Establishment by law: One of the most crucial aspects of the replacement of martial law with emergency powers was the transformation from extralegal measures to statutory powers. This not only made military courts permanent, but transferred them from the domain of executive action to the legal domain and integrated them into the state judicial system. It created the imperial dual structure of criminal law/emergency powers, as part of the U.S. legal system.[216] Wartime tribunals, on the other hand, are traditionally established by military or executive orders and proclamations, often in a remote territory, and not by a domestic legislature.[217] The U.S. military commissions were first established through a presidential military order.[218] However, in *Hamdan v. Rumsfeld*, the Supreme Court struck down this presidential military commissions system and stated that it could only be authorized through an Act of Congress.[219] The MCA established for the first time "a general statutory foundation for (and arguably sought to 'regularize') military

[212] *Boumediene*, 553 U.S. at 771.
[213] Vladeck, *supra* note 6, at 947.
[214] *See id.* The mixing of military and civilian institutions and judges is not only indicative of an abandonment of a strictly armed conflict model, but also indicates the civilianization of military justice systems more generally since World War II. However, what I am analyzing here is the territorial aspect (inside/outside sovereign territory) and not the organizational aspect (military/civilian), which is dealt with separately. These aspects are not contradictory; they are both aspects of the increased regularity of military courts. *See also* Sherman, *supra* note 138, at 59-65.
[215] *See* TREADWELL, *supra* note 44, at 51-52; DICEY, *supra* note 45, at 11-15.
[216] *See* Vladeck, *supra* note 6, at 946.
[217] *See* WINTHROP, *supra* note 70, at 835.
[218] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).
[219] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 655 (2006).

commissions," creating "a new set of courts … with a detailed framework of statutory rules."[220] The MCA authorizes the President to establish military commissions and the Secretary of Defense to convene them, just like the British emergency statutes. The statutory basis in the MCA thus characterizes the military commissions as emergency courts and not as wartime tribunals.

Temporality: The MCA also altered the temporal aspect of the military commissions. While the presidential military order justified the commissions in the context of "an extraordinary emergency [that] exists for national defense purposes,"[221] the MCA of 2006 states that "[a] military commission established under this chapter is a regularly constituted court."[222] This might sound like it is moving away from emergency, but if you have followed my argument so far, the *emergency powers* model (unlike martial law or a "state of emergency") in fact signifies the transition *from temporary to permanent*; *from extraordinary to regular*. Far beyond formal language, the mere fact that the military commissions have persisted for over twenty years so far, under four different presidential administrations – an unprecedented period in the history of U.S. military commissions – and are not going anywhere in the foreseeable future, speaks for itself. Although originally conceived as an emergency measure for wartime exigency, the commissions have become a permanently constituted institution.[223]

Jurisdiction over domestic crimes: The issue of military commissions' jurisdiction over domestic crimes also changed over time. Wartime military commissions limited their jurisdiction to war crimes recognized under international law, while emergency powers legislation has created its own "menu" of security-related offenses that are also domestic crimes, possibly under concurrent jurisdiction of civilian and military courts.[224] In the United States, the MCA of 2006 diverged from the wartime limitation, as expressed in *Quirin* (1942) and *Hamdan* (2006), by allowing the prosecution of domestic crimes that are not recognized as war

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[220] Vladeck, *supra* note 6, at 946. *See also* Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtue of Court Specialization*, 51 VA. J. INT'L L. 231, 238 (2010-2011). Aronson also contends that the MCA institutionalized the military commissions. However, as my article shows, I do not embrace the argument that this is a symptom of "court specialization."

[221] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001), *supra* note 1, at § 1(g).

[222] 10 U.S.C.A. §948b(f) (2006) (current version at 10 U.S.C.A. §948b (2014)). The MCA states this in the context of the Third Geneva Convention's demand that the status of Prisoners of War be determined by a "regularly constituted court" and the criticism in the *Hamdan* case over the blanket presidential determination of the enemy combatant status of detainees. *Id.* However, this also represents an institutional change in the constitution of the commissions.

[223] Aronson, *supra* note 220, at 233.

[224] *See* Vladeck, *supra* note 81, at 709-12.

crimes.[225] It thus made a significant number of terrorism-related offenses triable in both a military commission *and* in a civilian court under Article III, again creating the same duality as the emergency powers model, and authorizing the military commissions to impose punishment over a larger number of offenses.[226] In the case of *al-Bahlul* (2017), the Court of Appeals in the D.C. Circuit affirmed the constitutionality of the prosecution of domestic crimes in military commissions.[227] The jurisdiction over domestic crimes signifies a departure from the armed conflict model, and the concurrent jurisdiction of civilian and military systems follows the emergency powers model by creating a double-standard criminal justice system that allows for forum shopping and procedural manipulation by the state, and for allocation of jurisdiction according to racialized criteria.[228] On this front as well, therefore, the U.S. military commissions are on the trajectory from war to emergency.

Exclusion of citizens: Wartime tribunals typically prosecute enemy combatants.[229] The distinction between "friendly" and "enemy" forces is not one of formal citizenship status, but rather of allegiance in the war: whether one served or belonged to enemy forces. As history and experience show, people may have multiple citizenships and alliances, and may choose to join enemy forces. In wartime, one does not check which identity cards or passports people are carrying; one looks only at which uniform they are wearing and which flag they are carrying.[230] That was also the position of the U.S. Supreme Court in *Quirin*, upholding the prosecution of spies and saboteurs in military commissions for violations of the laws of war, regardless of their U.S. citizenship status.[231] Conversely, the MCA stipulates that military commissions shall have jurisdiction over "alien unprivileged enemy belligerents" – that is, *only over non-U.S. citizens*.[232] Indeed, if the distinction were based on allegiance, the term "alien" would be redundant.[233] The exclusivity to non-citizens is made possible by the fact that federal trials are available for U.S. citizens in terrorism cases, the criminal courts are operative, and the entire

[225] Vladeck, *supra* note 6, at 959.
[226] *See* Lederman, *supra* note 70, at 1535.
[227] Al Bahlul v. U.S., 840 F.3d 757, 758-59 (D.C. Cir. 2016).
[228] *See* Vladeck, *supra* note 81, at 709-12.
[229] *See* Table no. 1 at 16, along with following text, and accompanying footnotes 79-89.
[230] With relation to irregular forces like militias, insurgent or terrorist organization, to which organization they plead allegiance.
[231] Lederman, *supra* note 70, at 1580-84 (citing the *Yamashita* and *Ex parte Quirin* cases.) Lederman argues that *Quirin* was erroneously based on international law and wrongly interpreted later. *Id.*
[232] Vladeck, *supra* note 6, at 946; Lederman, *supra* note 70, at 1535. On the concept of enemy aliens, *see* COLE, *supra* note 174, at 39-46.
[233] *See* COLE, *supra* note 174.

situation is far removed from active hostilities.[234] The explicit exclusion of U.S. citizens *presumes* the parallel operation of the federal criminal courts, and at the same time prefers them above non-citizens in a scale of rights, while non-citizens are placed under concurrent jurisdiction of both military commissions and criminal courts – a dual legal system typical of emergency powers courts.

Imperial emergency powers courts in the British Empire did not explicitly distinguish between groups of people; formally, they had jurisdiction over all subjects.[235] In colonial settings, however, emergency provisions were special to the colonies and not to the imperial center, and therein they were typically applied to the colonized and subordinate, often racialized populations, and not to the nationals of the colonizing power.[236] In the case of the military commissions, the distinction between groups of people was made formal and explicit, building on the modern category of nation-state citizenship status, constituting a seemingly legitimate category for unequal treatment.[237] By excluding U.S. citizens from their jurisdiction, the military commissions exercise the same type of racialization typical of colonial emergency powers, substituting the outdated categories of colony/metropole with the currently accepted ones of alien/citizen.

Categories of citizenship, ethnicity, and race often conflate and obfuscate one another.[238] Prominent scholars have convincingly argued that constitutional rights, and especially due process rights, should not be contingent upon formal U.S. citizenship, and that such rights have been consistently extended not to all citizens but mostly to white citizens.[239] Indeed, the "war on terror" and other contemporary counter-terrorism policies have adopted racial profiling and other colonial and imperial modes of governance and rule.[240] Following a similar pathway, the military commissions have been used exclusively to detain and try alien men from predominantly Muslim and Middle Eastern countries.[241] All these five aspects, then, point to a transition from wartime tribunals to emergency powers.

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[234] Ex parte Milligan, 71 U.S 2, 126-27 (1866); Lederman, *supra* note 70, at 1565-66. For a description of terrorism trials in federal courts, *see* SAID, *supra* note 206.
[235] *See* Table no. 1 at 16 along with following text, and accompanying footnotes 113-19.
[236] *See* COLE, *supra* note 174, at 88-104.
[237] MOECKLI, *supra* note 175, at 152-60; Cole, *supra* note 201, at 2541-42.
[238] Volpp, *supra* note 206, at 1592-99.
[239] *See, e.g.*, Gerald Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 940 (1990); Neuman, *supra* note 205; Cole, *supra* note 201, at 2541; COLE, *supra* note 174; MICHAEL MCCANN & GEORGE I. LOVELL, UNION BY LAW: FILIPINO AMERICAN UNION ACTIVISTS, RIGHTS RADICALISM, AND RACIAL CAPITALISM (2020); McCann & Kahraman, *supra* note 168.
[240] ANGHIE, *supra* note 16, at 289-95 (2005); Neocleous, *supra* note 12, at 492.
[241] COLE, *supra* note 174, at 39-46.

The multiple-models framework helps to articulate the coexistence, interrelations, and transitions between these three models – theoretically, in practice, and over time. The British case thus demonstrates not only the existence of a third model – emergency powers – in its original imperial form and its coexistence with the other models, but also the transitions from martial law to emergency powers, while the U.S. military commissions demonstrate a similar transition from wartime tribunals to emergency powers. Both the British and the United States cases demonstrate that without the temporal, territorial, personal, and organizational limitations of the armed conflict model, emergency powers create a permanent and discriminatory criminal justice system, which not only affords lower standards of justice, but also enables targeting specific populations. The armed conflict model – after becoming entrenched over time and applied concurrently with criminal law – has lost its distinctiveness and transitioned from war to emergency.

V. CONCLUSION

What was it then about the "war on terror" that ignited the specter of empire? Globalization introduced a "paradigm of suspicion" that conflates perceived threats of crime, immigration, and terrorism, feeding into global risk-management strategies.[242] However, the conflation of inside and outside, subjects and aliens, peacetime and wartime, crime and security, was present in empire long before globalization and international terrorism struck Western nations. Just like the threats against empire, the "war on terror" transcends sovereign borders; it combines the danger of organized violence with fear of a racialized Other, who is foreign and illegible. Terrorism triggers the colonial imaginary of the "primitive" violent Other.[243] Laws created to target Others remove the self-serving limitations of the rule of law, since the racial differentiation resolves the tension between liberal ideas and illiberal practices.[244] Therefore, imperial racialized concepts of security and risk allow the use of a more oppressive toolkit, both within and outside the state. The re-introduction of *imperial emergency powers* enables and fosters the construction and mistreatment of "enemy populations." While emergency courts are embedded in the legal systems of the Global South as a legacy of empire,[245] they were re-introduced in the United States as a response to the

[242] Shamir, *supra* note 96, at 199-203.
[243] MCQUADE, *supra* note 14, at 24-25.
[244] KHALILI, *supra* note 10, at 3-5, 65-67.
[245] *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Law in India*, 20 COLUM. J. OF ASIAN L. 93 (2006); Kanishka Jayasuriya, *Struggle over Legality in the Midnight Hour: Governing the International State of Emergency*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 360–84 (Victor V. Ramraj ed., 2008); Berda, *supra* note 32, at 560-62.

globalization of terrorism due to the similar nature of imperial control and resistance.

The transition of the military commissions over the last twenty years has presented a conundrum that the existing exception/empire debate and the armed conflict/criminal law binary could not disentangle; their persistence defied their understanding as exceptional. By shifting to empire, this article conceptualized imperial emergency powers as the commissions' model for counterterrorism prosecutions, while offering a more comprehensive theoretical framework of crime-war-emergency that is widely applicable to other contexts and explains the dynamics between exceptional war powers and constant imperial emergencies.

While both models of war and emergency authorize the use of extreme legal powers over civilians and do not afford liberal protections of individual rights, the scope of the armed conflict model is limited by time, space, organization, and population. The changes introduced to the military commissions show how they overstepped these boundaries. Imperial emergency powers, on the other hand, include no such limitations, and structurally change the function of the rule of law, fragmenting the judicial system and institutionalizing long-lasting coercive powers. Imperial emergencies include a built-in duality with the ordinary criminal justice system. As such, they can coexist with criminal trials in federal courts, enabling the prosecution of U.S. citizens for terrorism offenses in civilian courts, while non-citizens, primarily Muslim and Middle Eastern, are tried by military commissions. This dual system epitomizes "the dual penal empire"[246] as "scaled genre[s] of rule that produce and count on different degrees of sovereignty and gradation of rights."[247]

The criminal law and armed conflict models, as ideal types, are aligned with the Westphalian concept of exclusive and unitary sovereignty over territory and population. On the other hand, the emergency powers model, originating in colonies where populations were governed along a sliding scale of status and rights, belies a unitary concept of sovereignty or government. The similarity to the British emergency courts is striking. This repetition without conscious adoption only reaffirms the relevance of empire as a category of analysis to critical security and legal studies of our present times.

The state-centered analytical perspective that puts a unitary justice system as its premise necessarily excludes multiple forms of law which shape the current landscape of empire. Shifting to the framework of empire broadens our purview to see how they became part and parcel of the U.S. judicial system that now extends beyond its geographical boundaries. Nothing shows that more clearly than the jurisdictional expansion

[246] Ben-Natan, *supra* note 10, at 743.
[247] Stoler, *supra* note 28, at 128.

of the D.C. Circuit Court of Appeals and the U.S. Supreme Court over the Guantánamo Bay commissions. These legal institutions lay in the stitches between the international law of armed conflict and state criminal law, therefore often escaping the eyes of scholars, and excluded from the purified canon of legal doctrines. The overreach of the military commissions beyond their wartime limits makes it possible to exclude some people from the protections of the criminal justice system, and to extend penal practices to the imperial realm, beyond what is ordinarily perceived as the state's law, territory, and population.