Colonial encounters in modern [international] law

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Introduction

The United States Supreme Court has now decided that enemy combatants detained in the Guantanamo Bay facility have the right to appeal to civilian courts in the U.S. in order to seek their freedom. 1 This decision can be seen as a final victory of activists, detainees and lawyers in order to apply fundamental human rights to the suspects detained in this facility. This can be read as the beginning of the end of a phase that started in 2002 with the approval of the Patriot Act, and similar actions in other countries, in which different human rights guarantees were curtailed in the framework of the “war against terror”.

However, there is an alternative reading of the limitations of diverse rights that occurred with the counter-terrorist measures in different countries after 2002. It is that, as long as modern international law maintains its colonial rhetoric, these victories are ephemeral and it is a matter of time before a new limitation of ethical standards for another group of population will occur. What this article aims to show is the way by which the “enemy” is created by legal and political rhetoric in the framework of modern international law. This article will analyze the discursive creation of the “enemy” by law and politics in order to denaturalize some assumptions that this rhetoric takes for granted. I believe this is an important step in order to accept that political dissent is fundamental in contemporary politics and is not a sickness of the system that inevitably leads to violence.2

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2 This paper is not particularly worried about the specific legal provisions approved by different States in order to deal with this problem. I am concerned about the way by which the enemy is
Therefore this article sustains that modern law, legal theory and international law have a colonial foundation in which they see that their main aim is to civilize primitive cultures by any means necessary. This was evident in colonial periods but it has taken a renewed impulse in the last years due to Al-Qaeda attacks in 9/11. Thus the article is divided into four main parts: in the first one I take a broad and fast look to the project of modern law trying to establish some of its main characteristics. In the second part, having established some colonial characteristics of modern law I offer an explanation of why international law can be read as a colonial project since it is particularly worried about building an “us” and a “them”. In the third part I argue that modern law carries on this colonial encounter especially through the states of emergency understanding by them not only their formal declaration but also informal measures by which sovereigns place subjects outside the ordinary legal order. I analyze the cases of the U.S., the U.K., India, and Colombia, all of them after 9/11, in order to demonstrate how political and legal rhetoric place people outside the legal realm in order to be colonized. In the fourth part some concluding remarks are offered.

I. The project of modern law

Modern law has shaped the present beliefs of our society, as well as the possibilities of change and political transformation. The project of law in the modern world has been a very problematic issue for legal history. Some see that the project of modern law starts in the Middle Ages when canonic law was established by the Catholic Church with the purpose of making law applicable to a vast territory. Some assert that this project was not accomplished before Absolutism concentrated political power establishing that the sovereign was the created by legal and political rhetoric in the framework of modern international law. My political aim is not to justify actions that end the life of civilians through violent attacks. Rather, arguing from a left/critical position the article wishes to analyze the discursive creation of the enemy by law and politics in order to denaturalize some assumptions that this rhetoric takes for granted. This is a step forward in order to think the problem of political dissent as something fundamental in contemporary politics and not as a sickness of the system that inevitably leads to violence.


unique source of law. Meanwhile, others argue that the project of modern law in Continental Europe was achieved in a period between the uprising of Absolute Monarchs and the bourgeois Revolutions. The Absolute Monarchs were able to do so by the principle of sovereignty that erased the possibility of legal pluralism; in the meantime, the bourgeois Revolutions did so by establishing Civil Codes that were seen as complete pieces of legislation in which there was no gap in the law. This clearly set a main feature of legal formalism in the uprising of the liberal modern state in Continental Europe.

The dispute about the origins of the first system of modern law has a strong political entity, especially if one bears in mind that the effect of placing the origins in one or another historical moment has the effect of erasing whatever happened before. In history, and especially in legal history, the struggle for the origins is the fight to control the past and the peoples to which a particular culture feels indebted with. However, what all the discussions about the origins of modern law take for granted are the characteristics that a legal system should have in order to be reputed as “modern”.

In general terms, it can be stated that a system of modern law is understood as a series of commands issued by the sovereign that has to be obeyed by the people that inhabit a particular territory in which the sovereign rules, and that in case of disobedience a punishment for the noncompliance can be established. In furtherance, law is gapless meaning that there is not a single conduct outside the will of the sovereign or any territory uncovered by it. This latter characteristic was ensured, as mentioned above, especially by Civil Codes that included provisions asserting that all conducts that were not explicitly prohibited in the rules enacted by the Code should be understood as permitted.


7 Id. at 21-22.


by the legal system.\textsuperscript{12} In the other hand, the connection between the sovereign’s will and a particular territory is a modern law characteristic that helps to explain the bonds between modernity and international law. One of the main characteristics of law in medieval times was pluralism of legal orders, which made an individual accountable against the Court of law that corresponded depending on his or her status.\textsuperscript{13} Thus noblemen, clergy, feudal lords, vassals, bourgeois, were judged by different Courts that applied diverse legal provisions regardless of the territory where the offense or the legal problem had arisen.\textsuperscript{14} Bearing in mind this situation, one of the purposes of modern law was to eliminate these different forums by establishing connections between the person and the territory,\textsuperscript{15} so that jurisdiction was no more a question of the status of a person, but an issue that depended on the place where someone inhabited. Some see that this process of elimination of forums was fully accomplished in the ‘Age of the Revolution’\textsuperscript{16} when the Civil Codes and the declarations of rights established the idea of “equality before the law”, making it possible for sovereigns to judge all of their subjects according to the law of a Nation State\textsuperscript{17}. The promise of equality was sold out as an emancipation process, but was also a way by which the sovereign ruling a territory ensured that his will would be applied to all of his subjects without distinction. A system of control of the territory and their inhabitants was established in which the promise of equality was a tool to concentrate power.\textsuperscript{18} Up to now, a broad panorama of these characteristics shows that modern law has been a product of the sovereign’s will and that the ideas of gaplessness in the legal system, as well as the connection with the territory, are an absolutist or totalitarian project in the sense that its purpose is that no part of the territory where the sovereign rules nor a conduct of his subjects should be uncovered by his will.

Although this definition of modern law has been drawn out especially from the history of Continental Europe, it is striking that a well spread notion of law in these

\begin{footnotes}
\footnote{12}{Fioravanti, supra note 6, at 21.}
\footnote{13}{Berman, supra note 5, at 94.}
\footnote{14}{See Michael Tigar, LAW AND THE RISE OF CAPITALISM 23-58 (2\textsuperscript{nd} ed., 2000).}
\footnote{15}{Id.}
\footnote{16}{By the Age of Revolution I am borrowing a term used by historian Eric Hobsbawm to describe the historical period between 1789 and 1848. See Eric Hobsbawm, LA ERA DE LA REVOLUCIÓN, 1789-1848 (Felipe Ximénez de Sandoval trans., Crítica 1997) (1962).}
\footnote{17}{Fioravanti, supra note 6, at 22.}
\footnote{18}{About the purposes of the absolutist state see: Perry Anderson, LINEAGES OF THE ABSOLUTIST STATE (1974).}
\end{footnotes}
terms was also characteristic in British jurisprudence. In John Austin’s severely criticized by Hart definition of law, known as the imperative theory, he argued as well that law was essentially a command issued by the sovereign\textsuperscript{19}; this theory was a dominant view in British jurisprudence until H.L.A. Hart consistently criticized it in the twentieth century. According to Hart, Austin was missing a big part of the problem when he did not define law as a set of rules –and not commands– that were to be obeyed not only by the subjects of a particular State, but also by the sovereign authority that created the law. Hart sustained that Austin’s imperative theory failed to describe the way in which modern legal systems worked, since the latter did not derive their authority from the will of a sovereign but from the acceptance and use of a rule of recognition by the subjects and public officials of a State.\textsuperscript{20} Even though one can dig in these well known differences between the two of these philosophers, it is quite interesting that when Hart arrived to the problem of formulating the content of the rule of recognition, he affirmed that in England it could be stated as “what the Queen enacts in Parliament is law”.\textsuperscript{21} Hart pretended to move the validity of law from the idea of the sovereign’s will to that of the acceptance of a rule of recognition, and it must be said that he accomplished partly this purpose. He said that law was not valid because it was the will of the sovereign, but because the people and citizens accepted that what the “Queen enacted in Parliament” was law. However what is always necessary in modern law, even in Hart’s critique of Austin’s theories, is the action of a sovereign whose main goal is to apply his or her will –whether in the form of commands or rules– in a particular territory where he or she claims to exercise sovereignty.

Further on, it has also been argued that Hart’s theory was also problematic in a different sense. He focused in the fact that legal systems were made by rules and not only by commands, and he also argued that these rules were of two types: primary and secondary.\textsuperscript{22} Primary rules are also called rules of obligation, which generally impose a duty to a person or threaten him or her with a sanction in case of non-compliance.\textsuperscript{23} Hart says that primitive communities are the ones that only have this primary kind of rules, making it impossible for them to answer

\textsuperscript{19} H.L.A. Hart, \textit{The Concept of Law} 14 (2\textsuperscript{nd} ed. 1994).
\textsuperscript{21} Hart, supra note 19, at 107.
\textsuperscript{22} Id. at 79.
\textsuperscript{23} Id. at 90.
questions such as why certain rules are valid, how can they be changed or who are the ones in charge of resolving conflicts when they arise.\textsuperscript{24} Therefore, Hart states that developed legal systems are the ones that have secondary rules, which are the ones that do not impose obligations but rather help to solve the previous questions (about validity, change and adjudication).\textsuperscript{25} This introduction of secondary rules makes communities to go from the “pre-legal to the legal world”.\textsuperscript{26} As “neutral” as this narrative appears to be it can have a very politicized meaning when read in colonial territories especially when the clauses “primitive cultures” and “developed legal systems” are stressed. In other words,

“Hart’s developmental narrative, interestingly enough, matches the tale of progress so fundamental to colonial discourse and so ubiquitous in its archive. In India this story is told as one of overcoming the sovereign excess of despotism in favor of a rule-bound, bureaucratic form of government”.\textsuperscript{27}

It can be said that reading Hart’s theory from India stresses the fact that this territory before the English rule was seen as a primitive community not capable of developing a civilized rule of law. Therefore, the colonial presence of the British was necessary in order to drive them through the development path. In legal terms primitive communities that only have primary rules need the secondary ones to enter into the legal world; colonial bureaucratic administration in charge of colonizers is the key aspect that can make these communities take steps towards progress. The main problem for colonized territories is that as long as the colonizer is the one that unilaterally determines underdevelopment as a feature of the colonized the presence of the former will be rendered as ‘necessary’.

These three ideas that are present in modern law were also mixed in a very particular way in the case of the ‘discovery’ of America by Spain. Law’s gaplessness, the idea of a sovereign ruling in a complete manner all the situations and every part of a particular territory, and the necessity of a colonial bureaucracy were features that were feeding the colonial encounter. Modern foundations of international law that were shaped by this encounter show how

\textsuperscript{24} Id. at 92-93.
\textsuperscript{25} Id. at 94-99
\textsuperscript{26} Id. at 94.
\textsuperscript{27} Nasser Hussain, \textit{The Jurisprudence of Emergency, Colonialism and the Rule of Law} 38 (2003).
the theoretical stakes described in this section were already present then. The next section will deal with this issue of colonialism and modern international law.

II. The colonial encounter in modern law: international law as a colonial project

Some have said that colonialism has to do with "the annexation and occupation of non-European territories by European States". However, this is a sort of narrow definition; this is so because this article sustains that colonialism is not a thing that solely happens in a Europe-Non-Europe dynamics. Thus from now on when the text mentions colonialism or colonial encounter it wants to include in general terms "the conquest and control of other people’s lands and goods". In this sense it would be sustained that ‘international law is a colonial enterprise.

Recent scholarship has argued that the primitive origins of international law should be traced back to the works of Francisco de Vitoria when America was discovered by the alliance Castile-Aragon, and Europeans started dealing with different peoples that were called Indians or Barbarians. It is a very important issue that when Columbus arrived to America –thinking he had arrived to the Indies– his expedition was not only on behalf of Castile-Aragon but also on the Pope’s name. It was understood that all the land in the world was God’s creation and that God’s representative on earth, i.e. the Pope, should rule it. Therefore, the Pope Alexander VI subscribed a Papal Bull in which he conceded Castile-Aragon the right to conquer, in the name of God, the territories ‘discovered’ by Columbus. According to the bull, the Pope recognized that he had power over every land on earth and that it was discrentional for him to give any right over the land to anyone he pleased. In that sense, the Papal Bull of 1493 stated the following:

"Being authorized by the privilege of the Apostolical grace, you may the more freely and boldly take upon you the enterprise of so great matter, we of our own motion, and not either at your request or at the instant petition of any other person, but of our own mere liberality and certain science, and by the fullness of Apostolical power, do give, grant, and assign to you, your heirs and successors, all the main lands and islands found or to be found, discovered or to be discovered,

29 Ania Loomba, COLONIALISM/POSTCOLONIALISM 8 (2005).
toward the west and south, drawing a line from the Arctic pole to the Antarctic pole, that is, from north to the south”.

Thus the Pope had the apostolical power to give rights over the land discovered by Castile-Aragon to monarchs that were truly Christians according to the Pope criteria. However, granting the territories was not an act of mere liberality, as this abstract of the bull seems to assert. In exchange, the Pope demanded that the peoples that inhabited the newly discovered territories should be “brought to the embracing of the Catholic faith and to be imbued with good manners” so he assumed that “if they be well instructed, they may easily be induced to receive the name of our Savior Jesus Christ”. There was no liberality in this Inter Caetera Bull, for the Pope was conceeding some rights to Castile-Aragon under the condition that the new territories were catholicized by the conquerors.

If it is asserted that international law’s seminal documents are the ones issued by Vitoria about the relations between the Spanish and the Indians, then it could be affirmed that the foundations of international law are rooted in a modern project, in the sense that its purpose is the expansion of the sovereign’s will (the Pope’s) in order to make peoples in his realms legally bound by provisions issued by him. The purpose of modern law is to impose a duty to obey the sovereign’s will under the idea that there is no part of the territory where it cannot be applied, nor any part of the population outside of the realms of the law of the sovereign. The Bull, therefore, ordered the application of law to the newly discovered territories; the law and the bureaucracy derived from it was based in some of the Church’s hierarchical organisms that were blended with some of the Spanish state structure for America. These institutions created by the Spaniards in America were the ones in charge of expanding the project of modern law that suited perfectly the colonial desires; the gapless and permanent imposition of a sovereign’s will to a particular territory was guaranteed with the establishment of religious and secular institutions that were in charge of applying the law. Thus it can be stressed that the problem of how to apply the will of the


32 Id.


sovereign to peoples and territories that were, probably, outside of its imagined realm started to shape the discipline of international law.\textsuperscript{35}

Bearing in mind what has just been said, the colonial domination was not only established through the ideas of a gapless legal and divine order and a Church/Spaniard bureaucracy; Vitoria also developed some philosophical arguments that were apparently necessary to make European law (and also the Pope’s will) legally binding for the Indians. This analysis apparently untied up to some extent the validity of law from authoritarian foundations and bound it with reason. For Vitoria, there was a universal law that should be followed by every human being for it was inspired in rationality; any human being was bound to act within some particular parameters of universal rational law (\textit{jus gentium}), so the point was to determine whether the Indians were human beings that could use reasons to identify the valid legal norms for them. This universal rational law was seen by Vitoria as the principal source of international law.\textsuperscript{36} At this point it could be said that this argument drawn by Vitoria shatters the idea of law as merely the will of the sovereign; however it could also be read as a way in which the sovereign evaded any sort of accountability for his actions since he was only doing what rationality ordered. It was a way to dilute his personal responsibility by attributing it to an abstract entity called reason. Also, it was interesting how Vitoria’s argument had no distinct consequence for the Indians since evangelization was not under discussion;\textsuperscript{37} what was implicit now in his thesis was that the evangelization was not a mere order from the Pope but also a command from rationality that the Pope was following.

Therefore, Vitoria carried on his reflections about just war saying that Indians were human beings that possessed reason; in consequence, Indians had the ability to distinguish a lawful act from an illegal one. If the Indian carried on acting illegally, i.e. against reason, then the conqueror had the right by any means, even war, to re-conduct the Indigenous to rationality\textsuperscript{38}. The Indians were seen as uncivilized to the point that some legends of cannibalism were used to picture the savagism attributed to them by the conquerors.\textsuperscript{39} Further on, the Indian and the territories inhabited by them were seen as lawless lands before

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\item \textsuperscript{35} Rajagopal, supra note 33, at 49.
\item \textsuperscript{36} Anghie, supra note 30, at 20.
\item \textsuperscript{37} Toni Negri & Michael Hardt. IMPERIO 142 (Eduardo Sadier trans., 2001) (2000).
\item \textsuperscript{38} Anghie, supra note 30, at 23.
\item \textsuperscript{39} Josep Fontana. EUROPA ANTE EL ESPEJO 107, 108 (2000).
\end{itemize}
\end{footnotesize}
the colonial encounter; the presence of the conqueror was necessary to civilize the peoples and the territories, and to drive them again towards the rational *jus gentium* (or international law).\textsuperscript{40} The colonial encounter made it possible for international law to develop as a legal system that appeared to be beyond the will of a particular sovereign, but by the fiction of rationality it was also oppressive for the peoples of the Americas. Since the Indians were uncivilized, until their civilization (through evangelization) was ensured by the conqueror they were not able to be sovereigns (thus subjects) in the realm of international law; if this was a system based in reason, it was impossible to admit in it sovereigns and peoples that were rational but acted in an irrational way.\textsuperscript{41} It is not strange that in this encounter the population of the New World was divided into two broad kinds of population: in one hand there were the “Indians”, the original inhabitants of the lands and the category was used to name all of them regardless their differences. In the other hand, there were the original conquerors and their heirs, as well as some Spaniards that came afterwards to America, which were called “peoples of reason” (*gentes de razón*).\textsuperscript{42}

The colonial encounter characteristically divided the society between “them and us” and that was accomplished thanks to a vision of modern law present in the seminal writings that gave birth to modern international law in which the application of a gapless law was possible by excluding the different. The other (or the ‘them’) is a part of the colonial political order by means of exclusion, making this exclusion a repeated feature of the colonial sovereignty built in modern law.\textsuperscript{43} What is extremely complex at this point is that thanks to this colonial discourse in modern international law the construction of the other is performed, meaning that what law does is not just simply an abstract description of reality or of a pre-legal world, but rather a builder of that reality.\textsuperscript{44} Our own ways in which we see reality and society are also created by the legal discourses we produce. This has lead some analysts to affirm that the violent colonial encounter that produces the “other” (the “them” or the non-European) is a necessary step for the colonizers in order to see themselves as powerful subjects

\textsuperscript{40} Anghie, supra note 30.
\textsuperscript{41} Id. at 54.
\textsuperscript{42} Wolf, supra note 34, at 165.
\textsuperscript{43} Negri & Hardt, supra note 37, at 152.
that are constantly reaffirmed by the use of violence.\textsuperscript{45} For instance, in discussions about the colonial rule in India, some British officers sustained that repression towards the primitive population that disobeyed particular laws was justified in order to remember them where civilized authority came from.\textsuperscript{46}

It may be argued that this was true in the early days of international law when the colony was a reality, but as of the twentieth century, the discipline involves a totally different dynamic. In furtherance, United Nations covenants as the ICCPR guarantee the right to self-determination in article 1 (1) by stating: “all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

However, the ICCPR contains another provision that can be understood in an open contradiction with the right to self determination; that is the states of emergency. States of emergency in the ICCPR\textsuperscript{47} is the recognition of the possibility that a State has to suspend fundamental rights by the declaration of a state of emergency. The provision that rules this figure states the following in article 4 (1):

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

This possibility of emergency or exceptionalism is the tool by which the totalitarian project of modern law is still possible through international law. In the

\textsuperscript{45} Negri & Hardt, supra note 37, at 153.
\textsuperscript{46} Hussain, supra,note 27, at 127.
\textsuperscript{47} It must be noted that status of emergency is not an exception in the ICCPR. It must be said that it is almost a common rule that international human rights covenants expressly rule the possibility declaring a state of emergency in which some fundamental rights are suspended. See, for instance, article 15 of the European Convention of Human Rights and article 27 of the American Convention of Human Rights. However, the African Charter has no express mention to this possibility.
next section I will argue that the state of emergency is the way by which particular Nation States deal with colonial encounters inside their territories, just as the Spaniards did in the sixteenth century.

**III. States of emergency and colonialism**

The fact that states of emergency have a very close relationship with colonial rule is not a new statement. Indeed, Rajagopal has argued that article 4 of the ICCPR was proposed by the United Kingdom in the drafting process of the treaty with the purpose of suspending civil liberties in cases of mutinies and popular uprisings, which were common by the mid twentieth century in British colonies. The article, thus, was a way by which the nationalist liberation movements in the colonies were controlled in order to erase the more radical ones and promote the moderate ones. The British and Europeans in general, argued that radical movements could be a return to the savage and primitive past of the colonies that were already civilized by white men’s intervention. Therefore, the doctrine of emergency was a means to a particular end: perpetuate colonial rule with the excuse of the necessary control of law and order. Colonizers, then, had the authority to out rule any anti colonialist movement that could rise by establishing that they were obnoxious for the existence of civilization. Therefore, primitive as these radical movements could be, no rule of law was to be applied in controlling these savage uprisings, apparently generating a gap in law’s application.

This birth of the doctrine of emergency in the Human Rights’ system puts forward two main problems that are going to be addressed in this section. The first idea to be discussed is the one that argues that exceptionalism (or states of emergency) is a gap of law in which legal rules are not applied. If this were to be true, then exceptionalism is the crack of modern law which, as it was shown above, had the purpose of applying the will of the sovereign in a consistent fashion in every part of the territory under his or her jurisdiction. The second point which can be discussed is the relationship between exceptionalism and colonial rule since, as it is argued by Rajagopal, the doctrine of emergency is understood as an appropriate tool used by the colonizer to control population’s discontent. It must be stressed at this point that this article includes exceptionalism not only

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48 See Rajagopal, supra note 33.
49 Id. at 212.
50 Id. at 214.
as the formal declaration of a state of emergency but also the measures sovereigns take in order to exclude from the application of ordinary law some groups of peoples and/or territories.\textsuperscript{51}

In order to analyze these two highlighted ideas, the section will be divided into two separate parts. In the first one it will be argued that exception is not the crack of modern law, but rather, one of the way by which the project of modernity is fulfilled. In the second part, it will be shown how different States that were under terrorist attacks after 2001 used this rhetoric of emergency consistently. These discourses have perpetuated the colonial encounter characteristic of modern international law making it impossible to sustain that the end of colonial rule has ended the colonial foundations of modern law. In the present, the colonial encounter has merely transformed making it impossible for exceptionalism to disappear from modern law; as long as the colonial encounter continues to exist, exceptionalism continues to be one of the ways by which the project of modern law is enshrined.

A. Exceptionalism and the project of modern law

States of emergency is the name by which international law recognizes the possibility of declaring a state of exception. In recent times, some have seen that the abuse of this instrument has been one of the causes that explain why some societies have not been able to achieve social justice.\textsuperscript{52} Therefore, the argument goes, state of exception should not be a tool of easy use by the executive but a mechanism controlled by the judiciary, in order to be used under strict scrutiny of the latter so that the exception does not turn to be the rule.\textsuperscript{53} Under this analysis, the problem is not exceptionalism as a particular structure, but the arbitrary use of it; the State has to have a tool in order to defend itself from extraordinary situations and its particular attribution is the suspension of some guarantees.


\textsuperscript{53} Mauricio Garcia & Rodrigo Uprimny, El Control Judicial de los Estados de Excepción in ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA 565 (Mauricio Garcia-Villegas, Rodrigo Uprimny & César Rodríguez eds., 2006).
The idea that exceptionalism should be an extraordinary tool only to be used in times when the situation is really a threat to the existence of the State, as well as the view that the rights limited in these times of emergency should be limited to the minimum extent, is shared by General Comment No. 29 of Article 4 of the ICCPR adopted in 2001. In terms of General Comment No. 29,

“A fundamental requirement for any measures derogating form the covenant, as set forth in article 4 paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of this situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restriction or limitations allowed even in normal times under several provisions of the Covenant”.

In this quote, it is clear how the United Nations have tried to restrict the measures of derogations establishing a difference between restrictions of some rights and the limitation which proceed in normal times. Therefore, it is understood under international law that the realm of exceptionalism only appears when there is a formal declaration of a state of emergency, while other situations are merely restrictions or limitations but not exceptions of the legal order. This formalistic view appears to be a very restricted one; it can be argued that as long as international instruments continue to limit in this way states of emergency, States will not declare the exceptional situation, but rather show breaches of rights as a “limitation of them”. Therefore, limitation is also a use of exceptionalism in the sense that there is no full commitment to the protection of an ethical minimum represented by rights, making it possible for the sovereign to make non-declared exceptions in different cases for particular rights.

For instance, a particular right that can be limited is liberty of movement. According to article 12 of the ICCPR everyone lawfully within the territory of a State shall have the liberty to move inside the territory, subject to restrictions necessary to protect national security and public order. There are some important limitations in this right that can be understood as an exception to the broad idea of liberty of movement. Since the right only protects people that

54 CCPR/C/21/Rev. 1/ Add. 11, 31 August 2001, para. 4.
55 See Agamben, supra note 51.
move lawfully refugees and economic immigrants have been placed in a very
difficult situation in the countries where they arrive. The first ones have to put up
with administrative requirements of the ‘receiving’ country and in some places it
is the will of a public official the one that determines whether a person is to be
recognized as a refugee, and as a consequence, can have his or her rights
recognized in that particular country. Refugees personify the idea of
exception, in the sense that the gapless system of legal provisions is not applied
to a particular human being, but rather suspended in order to deal with him or
her. Human rights are seen thus as a creation that protect citizens but not all
persons. In this sense, some recent debates of exceptionalism have stated:

“Modern totalitarianism can be defined, in this sense, as the
instauration, by means of the state of exception, of a legal civil war,
which permits the physical elimination not only of political opposition,
but of broad categories of citizens that, for any reason, cannot be
integrated to the political system. Thereafter, the deliberate creation
of a permanent state of exception (even though not declared in a
technical way) has turned to be one of the essential practices of
contemporary States, including the self-called democratic”.

This idea is useful for the purposes of this article since it argues that in recent
times states of exception have become a common trend in Western legal
politics and they are not necessarily declared. It is a way by which the legal
order and its guarantees are not applied to people that cannot be integrated to
the system. The exception is a way to maintain the differences between several
kinds of citizenship that cover two opposite extremes: one citizenship with all
rights and guarantees to be enjoyed, and the other one is the idea of a void
citizenship in which the person holds no possible right at all. The latter is what has
been called the bare life in which not even the right to life can be spared. Thus
the ICCPR has been a coherent legal frame with the idea of limitations and
derogations of rights—or ethical minimums– which have had the result of erasing
from the phase of the earth, both legally and physically, large groups of

56 In Colombia, article 13 of the Decree 2450 of 2002 states that the recognition of the refugee
condition is a discretional decision by the Foreign Affairs Ministry.
58 Agamben, supra note 51, at 11 (free translation).
59 Giorgio Agamben, HOMO SACER. EL PODER SOBERANO Y LA NUDA VIDA. (Antonio Gimeno Cuspinera
population. The way in which states of exception are not anymore a formal declaration but a particular suspension of rights is the case not only of refugees, but also of enemy combatants, prisoners of war, kidnapped persons in armed conflict, among others.

If the last ideas are correct, then producing a gap in the application of law is not a defeat of modern law’s project since, even though a gap is produced in the application of law, it is produced by the will of the sovereign and not by the nature of legal order. There is always a decision to put someone or some territory in a state of exception whether declaring it or just taking decisions that have the same practical effect as if it was formally declared. Thus the sovereign produces the gap although it has a very particular entity. It has been argued that the state of exception does not represent the inexistence of the legal rule; the latter exists nonetheless it is not applied directly, but suspended. That is why it is not to be said that the legal rule does not exist where and when the exception appears; the legal rule exists in the place and in the time of the exception but the decision of the sovereign is the non-application of it.\(^{60}\) In terms that can be clearer, it has been said:

“It would be an error to consider the state of emergency as categorically outside the rule of law. After all, even in legal systems with a constitutional provision for the exception, such as the German case of Notrecht, we should not move too quickly over the peculiar way in which law contemplates and provides for its own failure. Indeed, whether one considers the word emergency and the way it contains within itself the interior sense of the emergent or one considers the exception (ex capare (taken outside)) that attempts to spatialize the situation of danger as outside the rule, there is always a question of relation”.\(^{61}\)

It could be shown that the gap is created by the sovereign’s will and the way by which the same gap is filled is by a decisional moment of the same sovereign, leaving no place or time with the absence of law as we defined above, i.e. the will of a sovereign. There is no gap in the existence of states of emergency or exception, but rather the permanent possibility for the sovereign to express a particular will, which helps to deal with the integration of people who are

\(^{60}\) Agamben, supra note 51, at 55-62.

\(^{61}\) Hussain, see supra note 27, at 20.
apparently in contradiction with a political system. It is a way of reaffirming sovereignty under the idea that no land or peoples can be outside the realm the will of the sovereign. The resemblance with the colonial project is striking.

B. The persistence of the colonial encounter

The experience of colonialism has not been of a particularly localized kind; most of the world has endured diverse phases of this phenomenon since it occurs in different modes and at different times. It has been present in different eras of world’s history and it has also been formed by dissimilar processes depending the time and geographical location one chooses to analyze; recent scholarship has centered its view especially in the colonial process that started in the seventeenth century by England, France, and Germany on Southern and Eastern territories, making the expression Orientalism a wide accepted term in Postcolonial studies. The common trend by which seventeenth century colonialism has been analyzed, as well as the analysis about the earlier one that started in the sixteenth century in Spanish America, have shown that colonialism is narrowly bond to a regime in which the political and legal bureaucracy designed by a metropolis is established abroad in a colonial territory. This can be an explanation why, in some Latin America’s recent debates about an agenda for critical studies, some academics state that in order to understand this part of the world’s legal field it is important to establish its origin in the nineteenth century when the independence process began in many of the countries of the region, and the colonial legal field had its crisis.

Even though this last view is an important effort to identify what is law for Latin America, the problem that can be found in it is that it identifies the formation of Latin American legal consciousness with the end of the colonial regime, without being aware that the end of colonial dynamics and colonial encounter is not a clear consequence of the overthrowing of Spanish rulers. The dynamic of colonialism, that is, the permanent construction of politics and law under the basis of the distinction between “us and them”, and in the case of Spanish

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62 Loomba, supra note 29, at 23.
colony based on the premise of ancestors and pureness of blood, was not abolished by the newly independent regimes. The idea of a complete crack between colonialism and the new republics was an idea especially sponsored by criollo elites –heirs of Spanish but born in America– that controlled the government during the nineteenth century. This can be proved by the fact that in the times of independence in some countries of South America, public officials carefully marked a clear breakpoint in the history that can be told with official documents: 1810 is a breakpoint year in the sense that official documents before that year are alleged to be “colonial”, whilst from that date on are reputed as “republican”. This formal evidences show that the word colonial was erased from official discourses, but the dynamic in which the differences were established by criollos and the rest of the population were still carried on in a colonial fashion. For instance, it has been shown how, even in the beginning of the twentieth century, central elites from Bogota (Colombia) saw a clear difference between the people who inhabited the center of the country and those who were living in coastal areas. The former were seen as the civilized population while the latter were the primitives and savage ones, who could only be cultured eliminating the “black” element of their peoples; this was to be achieved, according to nineteenth century Colombian intellectuals, with the migration of white Europeans that could culturize these primitive territories. This was especially the case of Panama which was always despised by Colombian elites and seen as a territory inhabited by savages; that is why negotiations with the French and the United States ended in the building of the inter-oceanic channel and the independence of Panama in 1903.

Therefore, this shows that the end of colonial regime is not the end of colonial dynamics in the sense that the project of civilizing primitive communities has been common in different parts of the World. That is why it is argued that,

65 It is to be noted that in a research of official files in the times of independence in the Americas, there is a clear division between the colonial rule, ended in 1810 approximately, and the beginning of a republic beginning from that year on. This shows how the ones who directed the independence project pretended to establish a clear breakpoint between the monarchy and the republican regime. Cfr. Annick Lempériére, Revolución y Estado en América Hispánica (1808-1825) in LAS REVOLUCIONES EN EL MUNDO ATLÁNTICO 55 (María Teresa Calderón & Clément Thibaud eds., 2006).

66 See Jose María Samper, SOBRE LAS REVOLUCIONES POLÍTICAS Y LA CONDICIÓN SOCIAL DE LAS REPÚBLICAS COLOMBIANAS (1861).

67 Alfonso Munera, FRONTERAS IMAGINADAS 89 (2005).
“The newly independent state makes the fruits of liberation only selectively and unevenly: the dismantling of colonial rule did not automatically bring about changes for the better in the status of women, the working class or the peasantry in most colonized countries. ‘Colonialism’ is not just something that happens from outside a country or a people, not just something that operates with collusion of forces inside, but a version of it can be duplicated from within”.

The colonial encounter is not over once independence is granted for the new regime; it merely involves the recognition of a new sovereign, which, in the realm of modern law, also wishes to apply his rules in a gapless way to the territory. The ones who gain power after independence entail themselves in this colonial dynamic getting engaged in a process of inclusion and exclusion; it can be sustained that what happens in Latin American independence is the substitution of the ruling ‘class’, which after the independence decides to carry on the civilizing project that was engaged before by the Spanish in those territories and peoples reputed as primitive.

According to Vitoria, as it was shown in the third section, the primitive should be civilized by evangelization, and if they resisted, then it was possible to endure just war against them. The question that arises is if those primitive peoples are inside the legal order or rather they are put outside of it, making it possible for the colonizer to breach their guarantees and rights. The latter are issued to be applied in peace time, or to put in other terms, in times of normality; therefore if a territory and/or population is put under exception or emergency it can be sustained that they are people outside the legal order, even outside universal international law. As argued above, the peoples are put outside the legal order by a legal decision, which leads us to assert that the exclusion of “primitive peoples” is common to the project of modern law; exclusion is the way of including in a violent way.

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68 Loomba, supra note 29, at 16.
69 See Samper, supra note 66.
70 See Anghie, supra note 30.
This persistence of the colonial encounter is particularly evident after 2001 when a consciousness of exceptionalism was globalized. On September 20, 2001 while addressing a Joint Session of the Congress President George W. Bush officially declared the War on Terror. His address was interrupted several times when the members of Congress repeatedly clapped after the remarks in which he emphasized that the country was at war and that there was no other possible outcome that the victory of justice, democracy and freedom:

“Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done (...). Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. And you know what -- we’re not going to allow it. (...) As long as the United States of America is determined and strong, this will not be an age of terror; this will be an age of liberty, here and across the world. (...) The course of this conflict is not known, yet its outcome is certain. Freedom and fear, justice and cruelty, have always been at war, and we know that God is not neutral between them”.

Up to some extent in more or less similar terms, Prime Minister Tony Blair in an address to the Labour Party also commented about the extent of the threat and announced the decision to confront directly the perpetrators of the WTC terrorist acts from 9/11:

“There is no compromise possible with such people, no meeting of minds, no point of understanding with such terror. Just a choice: defeat it or be defeated by it. And defeat it we must. (...) So I believe this is a fight for freedom. And I want to make it a fight for justice too. Justice not only to punish the guilty. But justice to bring those same

71 It has been recently asserted that legal thought has gone through processes of globalization and that therefore local conditions are not so relevant for the shaping of law. In this sense I argue that a consciousness of exceptionalism was globalized after 2001. Cfr. Duncan Kennedy_Three Globalizations of Law and Legal Thought: 1850-2000 in THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 19 (David Trubek and Alvaro Santos eds., 2006).

values of democracy and freedom to people round the world. And I mean: freedom, not only in the narrow sense of personal liberty but in the broader sense of each individual having the economic and social freedom to develop their potential to the full.”.73

These discourses of the two main Western political leaders show how a moral justification for the legal instruments that came afterwards was built. In these deep addresses from Bush and Blair it is possible to find how a moral consciousness was systematically built;74 this consciousness was going to be useful afterwards to give some justification for the legal provisions that were enacted,75 especially the Patriot Act and the Terrorism Act, both in 2001. One issue must be highlighted from the excerpts of the addresses transcribed above; both, Bush and Blair, emphasize justice and freedom as particular values of the Western world, which must be imposed to inferior and uncivilized cultures. It is meaningful how the sides are immediately formed as the “good ones” and the “bad ones”, as the ones that are in God’s side and those who are not. This is deeply embedded in a moral and political consciousness that sees the other as the primitive, the savage one76, that is, the one that does not respect some necessary standards that are essential for everybody. It is Blair who says that there is no point of understanding between the parties in conflict and therefore the only solution77, as in the case of indigenous population in the Spanish colony, is to apply lawful force or evangelization. The Spaniards saw in Christianity a factor of civilization, while in the war on terror justice and freedom are the essential aspects.

However, at this point I am not wishing to argue how the West was (or is) wrong and that it is impossible to justify the post-9/11 actions taken by many Western legal systems. The point is to notice how these beliefs of abstract notions as justice and freedom are useful to create some sense of security and protection when the very foundations of the social order are at stake. In other words, the

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74 I borrow the term consciousness in the sense used by Duncan Kennedy to analyze classical legal thought in the United States legal history. Duncan Kennedy, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).
75 Here I agree with Ronald Dworkin’s assertion in the sense that any legal decision has to be justified in moral and political terms. Ronald Dworkin. JUSTICE IN ROBES (2006).
76 Said, supra note 63, at 27.
77 See supra note 73.
insistence in justice and freedom can be seen as a means to identify some discourse that can bring order to a society that is threatened by a chaotic experience. Both of the addresses can be seen as an attempt to build a myth that has the main aim of reconstructing “the social as objectively given; its operation is nothing other than endeavour to reconstitute the absent unity of society via the naturalization of its divisions and a universalization of the demands of a particular group”. According to these theories of discourse analysis it could be argued that the main effect sought by the addresses post-9/11 of political leaders was to bring a sense of social unity to a community that had to be gathered around some abstract notions, such as justice and freedom, which are generally seen as positive/good values. The strategy was, to certain extent, successful at least in the U.S.; some post 9-11 commentators noticed that since the 1970s the United States had been a nation that had progressively lost its own culture due to immigration. This increasing immigration in the second half of the twentieth century did not feel particularly identified with the American culture and was not able to break the ties with their preceding culture –like Latinos and Muslims– and was cracking down American culture. Paradoxically the 9/11 events had raised again a feeling of united national identity that had to be protected and defended against external aggression that could be in or outside the territory of the United States. The myth of freedom and justice, with some specific meanings that represented the political ideology of a particular group, operated as a significant moral justification in support of measures that, such as the Patriot Act, were taken with small opposition in Congress and academy.

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78 Aletta Norval. Review article: The things we do with words – Contemporary approaches to the analysis of ideology in 30 BRITISH JOURNAL OF POLITICAL SCIENCE 313 (2000).
79 Id. at 329
80 Samuel P. Hunttington, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY 6-10 (2004).
81 Id. at 3-4.
83 Among scholars the opposition to the policies was difficult to sustain because the ones who did so were stigmatized. See Karen Engle, Constructing good aliens and good citizens: legitimizing the war on terror(ism). 75 U. COLO. L. REV. 59 (2004). From a cultural point of view, opposition was also banned when some radio stations decided not to play Rage against the Machine’s songs in the radio by that time.
Taken what has been said into account, immigration policies in the U.S. have been a place where the colonial encounter has been particularly evident. Since the purpose of this myth is to show a strong and united us and a weak them, it built the us as a homogenous group that held good/positive/civilized values such as justice and freedom, and the them as an also homogenous group but a one that had to be defeated because they sustained bad/negative/primitive values. In Bush’s words:

“Afghanistan’s people have been brutalized -- many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough. (...) Americans are asking, why do they hate us? They hate what we see right here in this chamber -- a democratically elected government. Their leaders are self-appointed. They hate our freedoms -- our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other”.84

In this quote Bush expressly states that freedoms are hated by America’s enemy giving a sensation that this is a fight that has no mid-terms, no dialogue, and no agreement; either it is us or them. This division has had a particular effect in the U.S. especially because of a marked division between aliens and citizens and also between good and bad aliens and citizens.85 In Karen Engle’s words,

“United States immigration law and policy have drawn lines between good and bad aliens to distinguish nationals of friendly states from those of enemy states, those identified with races and ethnicities seen as capable of assimilating to a country comprised largely of northern Europeans from those considered incapable of such assimilation, and those who are willing to profess loyalty to the United States and denounce anarchy and Communism from those who either refuse to do so or do not credibly. Thus, enemy aliens, unassimilable aliens and undetectable transnational movement-sympathizing aliens have at

84 See Bush, supra note 72.
85 See Engle, supra note 83.
different times occupied the space of bad alien against which good aliens were defined”.

Engle notes that the difference between citizens and aliens and between good and bad aliens is not new in the history of the U.S. What has changed is the population group that has been, in different times, destined to occupy either category. It has not been either a practice exclusively used in the twentieth century by the United States. The United Kingdom has also used some of this kind of differentiation during its history of counterterrorism measures. In fact, in a 1976 Act for The Prevention of Terrorism there was the possibility of sustaining an extended detention in order to gather information that could prevent future terrorist attacks (section 12 of the Act). However, this power for extended detention was available for international terrorists (bad aliens) but not for domestic terrorists (citizens), unless they had any sort of connection with Northern Ireland (bad aliens and citizens).

In a similar way, after the 9/11 attacks, the U.K. undertook some legal measures that also showed how a dichotomy between an us and a them was built after the terrorist attacks of 9/11. According to Section 21 (1) of the 2001 Anti-terrorism Crime and Security Act, the Secretary of State was allowed to indefinitely detain foreign nationals if that person had

“(a) been concerned in the commission, preparation or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group”.

This measure was reputed to be against the European Convention of Human Rights and thus the U.K. derogated from article 5(1) of this Convention; this was due to the fact that detainees held suspicious for committing acts of terrorism, according to the 2001 Act, were indefinitely arrested without a justification as

86 Id. at 64.
87 Id. at 70-78.
the ones provided by the ECHR.\textsuperscript{90} What must be stressed at this point is the fact that in the drafting of the provisions of the 2001 Act the U.K. had in mind that terrorist actions were going to be committed by aliens members of international terrorist groups: this can be confirmed by the fact that the provisions of extended detentions were not to be applied to British citizens.\textsuperscript{91} Also, when the U.K. government decided to implement these policies of extended detentions and high standards in the examination of British citizenship applications, commentators recalled that this was not much different of the way the U.K. had handled the Irish conflict back in the twentieth century.\textsuperscript{92} The only thing that changed back there was that the them were the Irish and now it is the Arabs/Muslims. Fatally paradoxical was the fact that in the 2005 terrorist attacks against London the perpetrators were British Muslim citizens of second or third generation that lived in Leeds. This caused some uneasiness in the Leeds community which was shocked that people they knew for some years were involved in the attacks;\textsuperscript{93} the clear frontier that politicians and legal instruments had drawn between an us and a them was not so easy to sustain in day to day actions.

Nevertheless this perpetuation of some sort of the colonial encounter by which the them (or ‘the other’) is included through the negation of its most fundamental rights and liberties has been especially strong in the U.S. and the U.K., some other countries reacted in a very similar way to terrorist attacks. For

\textsuperscript{90} According to article 5 (1) of the ECHR there are only some justified reasons to detain a person which are the following: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants; (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

\textsuperscript{91} See Michaelsen, supra note 89.

\textsuperscript{92} Paddy Hillyard, The ‘War on terror’ – Lessons from Northern Ireland. 15 STATEWATCH 19 (2005).

\textsuperscript{93} UK Resilience, \url{http://www.ukresilience.gov.uk/response/recovery_guidance/case_studies/y6_y9_london_bombings.aspx} (last visited June 16, 2008).
instance, in 2002 India passed also the Prevention of Terrorism Act as a response not only to 9/11 but also to the terrorist attack to the Indian Parliament in December of 2001 by Pakistani nationals.\textsuperscript{94} Bringing into effect this emergency legislation, the Indian government targeted some special groups of the population just as it happened in the U.S. and the U.K. It has been argued that

“extraordinary laws such as TADA and POTA have been used to target political opponents, human rights defenders, religious minorities, Dalits (so-called “untouchables”) and other “lower caste” individuals, tribal communities, the landless, and other poor and disadvantaged people”.\textsuperscript{95}

These antiterrorist measures taken in India warns the reader that the colonial encounter is not necessarily an interaction that takes place between a white civilized European or North American and a non-white Asian, Latino or African that is primitive. That is merely one of the expressions of the colonial encounter, which has been mostly regarded. The colonial encounter takes place also within the legal and political communities of the so-called “south” as a feature very closely related to the dynamics of the liberal modern Nation State.\textsuperscript{96} In other words, the dynamics of the modern State make the rhetoric of unity prevail to the point that it is deeply embedded in the consciousness of legal and policy makers. Thus the empire of uniformity rules and there is almost no possibility of coexistence among ‘friends and foes’.\textsuperscript{97}

Colombia is another Southern example, besides India, that the colonial encounter is still present in the emergency powers that the government assumed in 2002. In this year a state of exception was declared in Colombia with the approval of the Constitutional Court providing that the executive needed extraordinary means in order to attack the guerrillas and criminal organizations that operated countryside.\textsuperscript{98} Besides the global context of transnational terrorism

\textsuperscript{95} Id. at 101.
\textsuperscript{96} Roberto Vidal. Propuestas para una ciencia social del derecho in DERECHO Y SOCIEDAD EN AMÉRICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURÍDICOS CRÍTICOS 127 (Mauricio García-Villegas, & César Rodríguez eds., 2002).
\textsuperscript{97} James Tully, STRANGE MULTIPlicity. CONSTITUTIONALISM IN AN AGE OF DIVERSITY 58 (1995).
\textsuperscript{98} See Decree 1837 of 2001 and the judgment of the Constitutional Court C-802/2002, with Justice Cordoba delivering the opinion of the Court.
that led many countries in 2002 to assume emergency or extraordinary powers to repel international terrorism, the particular situation in Colombia on that year was also an explanation for this decision. For nearly 40 years there has been a sustained armed conflict between the government and the guerrilla group FARC\(^99\) that has shed a pitiful shadow over many Colombians. However, when in 1998 President Pastrana took office he offered to start a peace negotiation with this group in order to bring an end to armed conflict; thus he ordered to demilitarize a considerable portion of the Colombian territory to carry on these peace talks.\(^{100}\) At the beginning of 2002 the negotiations came to an end when President Pastrana, in a television address to the country, proved that the FARC had used the demilitarized territory to hide kidnapped civilians—in fact they kidnapped a commercial flight and made it land in the demilitarized zone—and to build drug processing laboratories to finance their war actions.\(^{101}\) The response of the public was almost immediate; three months after the end of the peace negotiations right-wing candidate, Álvaro Uribe, won the election for President by a wide margin. Uribe had promised a hard-hand policy against the FARC which was carried out by a slogan that still is part of his policies called “Democratic Security”.\(^{102}\) When in August 2002 Uribe took office the Presidential House was under attack by some rockets that were fired from nearby; several were injured and killed in this attack, especially because some of the rockets made target in a popular neighborhood close to the Presidential House.\(^{103}\) Bearing in mind these actions the President did not hesitate to declare a State of Exception four days after the attack through Decree 1837 of 2002.

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\(^99\) This is a Spanish acronym for Revolutionary Armed Forces from Colombia.

\(^100\) This demilitarization was legally done through Presidential Resolution No. 9 of 1999, according to some statutory faculties that the President had acquired through Law 418 of 1997.


\(^103\) 14 civilians were killed that day according to the Human Rights Observatory of the Colombian government. See: Observatorio de derechos humanos en Colombia. Atentados contra la población civil, 2003 (available at: http://www.derechoshumanos.gov.co/observatorio/indicadores/octubre/atentadosoct.pdf.) (Last visited June 11, 2008).
Two interesting things can be noticed in this situation. The first one is the fact that the terrorist action perpetrated by the FARC had a similar target than the ones in India and the United States. In all three situations buildings that represented political power were under siege.\textsuperscript{104} In other words these were buildings with a high symbolic power to the different States where the terrorist actions were perpetrated, depicting an image that the 9/11 attacks not only were a landmark for future antiterrorist policies but also for terrorist attacks. The second thing that can be stressed is the rhetoric of the government that surrounded the declaration of a state of exception. Different from Blair and Bush, Uribe was cautious in his first day as President and tried to elude the topic of the terrorist attacks to the Presidential House in his first public addresses; the rhetoric of the “other” or the “them” was placed in the Presidential Decree 1837 of 2002 where in the reasons that justified the declaration of the state of emergency the government stressed the following:

“That the infamous attacks (of recent days) against the Colombian peoples have their origin in the action of groups that are armed, organized and sponsored (...) by drug trafficking, kidnapping and black mailing, essential sources of this collective tragedy and its (...) efficient cause. (...) The almost endless financial power of these groups makes them more fearful because of their growing technological capacity for terror, their rejection of the most essential values of mankind and society, and their doubtless connection with the destructive power that their alliance with some similar groups of other countries and regions offers them”.\textsuperscript{105}

In these excerpts from the text of the Decree it can be noticed how the exceptional powers taken in Colombia also built the rhetoric of an us and a them. The attack, according to the Decree, was not just directed to the President and other officials; it was an attack against all Colombians. Secondly, this text also makes the other (the them) acquire some primitive categories that can support its extermination. These terrorists, as well as Osama Bin Laden and Al-Qaeda, reject the essential values of mankind, according to this decree.

\textsuperscript{104} In India the Congress, in Colombia the Presidential House and in the U.S., besides the WTC, the Pentagon and the White House were under siege.

\textsuperscript{105} This is my own translation. The original Spanish version of the Decree is available at: http://www.secretariasenado.gov.co/leyes/D1837002.HTM (Last visited June 11, 2008).
rhetoric is not so different to the one that was developed by Bush or Blair. It is either us or them; they do not tolerate our values, then why should we tolerate them?

At this point it is useful to recall that my aim in this particular article is to uncover how a rhetoric very similar to the one of the colonial encounter is still at work in our actual legal consciousness. It can be stressed that in all of the measures after violent attacks in 2001 and 2002 in different countries, the structuring of an us and a them is a sort of ‘natural’ reaction of governments that find themselves under siege. What is particularly interesting of the Colombian case is that it is strongly colonial also in a territorial sense. In fact, using the attributions conferred by this emergency declaration, the President declared as “Rehabilitation Zones” two parts of the Colombian territory. One of them was a department (territorial division) called Arauca. This territory is in the eastern part of Colombia a zone that has traditionally been reputed as a place where the armed conflict is (and has been) fought; these territories, at least before the Colombian Constitution of 1991, were considered of second class. In fact they were not called departments as the major portions of the territory, but intendencias. These territories were understood as not fully developed in order to be sustainable without active intervention of the central State. It was argued that zones as Arauca were the periphery of the central government and some analysts during the last decades of the twentieth century stated that this zone was slowly integrating to the central dynamics of the country lead by Bogota but that they still had a long way to go. The point of bringing up this issue is the fact that the consciousness of Arauca as a second class territory –as long as other parts of the Colombian territory– is something that has certainly affected the decision of declaring it as a rehabilitation zone.

106 By territorial I mean the fact that the domination to the population has not only an ideological or impersonal foundation (as economic blockades or legal provisions) but also an actual territorial presence of the central state in a province (or department). It is colonial in the sixteenth or seventeenth century sense and no merely imperial in the sense of impersonal domination. See Gathii, supra note 28.

107 In the 1980’s Alfredo Molano tried to build the history of some of the territories South and East from Bogota that have been traditionally reputed as primitive and violent zones. See for instance his book Alfredo Molano, SELVA ADENTRO (1987). This is a story of the colonization of the Guaviare, another department that, just as Arauca, has been in the focus of violence from guerrilla and drug cartels.

108 Arauca was expressly considered as a second class territory from 1953 to 1991.

“Rehabilitation Zones” were established can be found in Decree 2002 of 2002 and their bonds with colonial dynamics are evident. The decree stated that,

“There are special areas of the Country particularly affected by the actions of criminal organizations, making it necessary to name those areas as “Rehabilitation and Consolidation Zones”, aiming to apply to them the specific measures in order to end the causes of the perturbation of public order and hinder the extension of its effects”.

Notice how the concern of the government was the extension of the effects of the crisis to other parts of the Colombian territory. It could be read that for the colonialist it is unbearable that the project of primitive peoples ends up defeating the civilizing mission of the colonizer; thus this example shows how exceptional measures can justify not only the civilization project, but also the means to avoid the extension of what is called primitive. It must be emphasized that this is not a judgment of the measure as convenient or not, but rather an analysis of the persistence of the colonial language to justify the exclusion of a territory and the peoples from the legal order.

For Amnesty International, the measures taken in Arauca were clear violations of Human Rights and thus accused the Colombian government for treating this territory as a ‘war laboratory’ violating fundamental human rights; Amnesty International argued that it was necessary for the Colombian government to respect human rights in Arauca and to fulfill the requirements of the rule of law in Colombia establishing a clear policy about the protection of Human Rights coherent with the requirements of the UN.\textsuperscript{110} Amnesty International stressed the fact that illegal and massive captures were carried on in the basis of the declaration of Arauca as a Rehabilitation Zone. Most of the people captured had to be freed after no charge was found against them, but paramilitary groups understood that the captured persons were sympathetic to guerrilla groups and ended up killing them in strange circumstances. According to Amnesty International report, even when the state of emergency ceased to be in effect,

“paramilitary groups have strengthened their hold over the department of Arauca in an apparent attempt to defend the interests of powerful domestic and international economic actors and to act in conjunction with the Colombian security forces in order to pursue these aims. The guerrilla groups, primarily the FARC, have responded to the government’s security measures and to the strengthened presence of paramilitarism in Arauca by accelerating their drive to intimidate and attack sectors of the civilian population, especially local state officials”.

Even though AI saw the human rights provisions as a promising vocabulary to protect the life of civilians, it is striking that the promise of the government when the state of exception was declared and Zones of Rehabilitation were formed was that these measures were necessary in order to fulfill the obligations of the protection of human rights. As a matter of fact, Decree 1837 of 2002, which declared the state of exception in the Colombian territory, stated that it was necessary to do so because,

“The President is in charge of leading the necessary actions on behalf of public authorities against these savage forms of pressure against the Colombian society, reestablishing the public order, guaranteeing the premises of the Social State and the rule of law, and struggling to reaffirm the essential principles of respect of human rights and International Humanitarian Law”.

It is significant that Human Rights discourses pretend to include freedom and justice in their vocabulary, building the image that the ones who are against these values are uncivilized justifying the need for civilization. Paradoxically these arguments of the disrespect of Human Rights by the uncivilized have also been the legal and political justification for their violations. Thus human rights’ arguments have been an important part of the colonization projects according to these examples due not only to its wide and opened terms but

111 Id.
113 See a similar view in David Kennedy. THE DARK SIDES OF VIRTUE. REASSESSING INTERNATIONAL HUMANITARIANISM. (2004).
also due to the civilizing rhetoric they carry along from modern international law. Rights can be used in different ways in order to achieve, in some times, completely opposite results. That can be the case if it is considered that human rights law is not only an emancipating vocabulary for social movements and different subjects, but also roots its very origins in colonial international law; the latter is a project that uses exceptionalism in order to draw a limit where an opposition to the colonial dynamics is unbearable for the sovereign (or colonizer).

IV. Concluding remarks

This article has been an effort to connect different kinds of literature about the colonial foundations of modern law and legal theory, international law and the actual problems that arise in political discourses regarding the issues of counter-terrorism measures. The text is also directed to think about how legal and political discourses not only describe objective reality but also how it shapes our perception of it. Law, in many areas, is not just the mirror of society but also a creative enterprise of the latter. In this sense it can be said that modern law as a whole (including international law and some dominant positivist versions of legal theory) can be read as a colonial enterprise that seeks to impose some sovereign’s will in a particular territory. The main problem arises when one asks if political dissent to the sovereign will can be treated by other means different from violence. In this article I have described how this has not been possible due to some of the alleged colonial foundations of modern law that perpetuate what has been called in this article the colonial encounter.

In other words, since modern law has had a strong root in colonialism, it thus carries on the idea of exceptionalism through the figure of states of emergency making it, up to now, impossible to think in a political state of affairs where dissent can be canalized through non-violent means and also, the response to this dissent can be different from institutionalized physical violence. Showing how these violent institutional discourses are built I would like this article to be a step towards reconsidering our present political choices taken in legal arenas that have made some portions of the population violently excluded by rendering their lives as disposable. Unveiling these choices is a useful way to start working in

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different possibilities that we have not been able to think of, perhaps because of the idea that our actual legal choices are deemed as necessary.