

# Open Research Online

---

The Open University's repository of research publications and other research outputs

## Law transformed: Guantanamo and the 'other' exception

### Journal Item

How to cite:

Aradau, Claudia (2007). Law transformed: Guantanamo and the 'other' exception. Third World Quarterly, 28(3) pp. 489-501.

For guidance on citations see [FAQs](#).

© [\[not recorded\]](#)

Version: [\[not recorded\]](#)

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.1080/01436590701192298>

<http://www.informaworld.com/smpp/content content=a777230595 db=all jumptype=rss>

---

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

---

[oro.open.ac.uk](http://oro.open.ac.uk)

# Law Transformed: Guantánamo and the ‘other’ exception<sup>1</sup>

Claudia Aradau

## Abstract

Guantánamo Bay is almost unanimously seen as an exceptional space inhabited by ‘bare life’. This article unpacks the double rendering of the exception in Carl Schmitt’s work and argues that the conceptualisation of the exception in *The Nomos of the Earth* can help us understand the form of exception that is at work in the ‘war on terror’. The *nomos* as the junction of order and orientation appears as a way of closing off the space of political decision from his earlier concept of the political. The constitution of order is no longer dependent upon the sovereign decision on the exception, but upon the division and appropriation of space, upon the geopolitics of uncontested spatialisations and a philosophy of concrete life. Therefore, Guantánamo will be exposed not as a singular and exceptional occurrence, but as symptomatic of the transformation of law. Law is moulded onto the order of *what is*; it is sustained by the situational characteristics of spaces and people at a distance from the contingency of sovereign decisions.

## Introduction

‘The detainees of Guantánamo do not have the status of Prisoners of War, they have absolutely no legal status. They are subject now only to raw power; they have no legal existence’.<sup>2</sup> Giorgio Agamben’s analysis of Guantánamo as an exceptional space inhabited by ‘bare life’ and set outside the limits of law will not surprise anybody.

Human rights lawyers and activists have been arduously challenging the ‘anomaly’ of Guantánamo. Guantánamo exists in the state of exception, in the lawlessness declared by a sovereign decision.<sup>3</sup> Judith Butler has suggested that the US position towards Al-Qaeda has created a ‘black hole’ in the world, amounting to what she has called the ‘Guantánamo Limbo’. In Guantánamo, Butler argues, the law has been suspended in both its national and international forms.<sup>4</sup>

European leaders and NGOs have also joined the voices of critical intellectuals in a consensual condemnation of Guantánamo. Tony Blair has described the military prison at Guantánamo Bay in Cuba as an ‘anomaly’ that should be closed down.<sup>5</sup> The director of Amnesty International has famously called it ‘the Gulag of our times’.<sup>6</sup> Similarly, a UN report has contended that the ‘legal regime applied to these detainees seriously undermines the rule of law and a number of fundamentally recognised human rights, which are the essence of democratic societies’.<sup>7</sup>

The consensus about the exceptionality of Guantánamo has led, however, to a series of problematic positions. On the one hand, we have witnessed an increased endorsement of the norm, of international law and the rule of law generally against the sovereign practices of the US. The norms that have been suspended, e.g. *habeas corpus*, the Geneva Conventions, the right to a fair trial and, more generally, international human rights law are to be reinstated as the limit of sovereign practices. The recent declaration by the Pentagon that the Article 3 of the Geneva Convention is to be applied to the Guantánamo detainees is an instance of law prevailing over sovereign exceptional practices.<sup>8</sup> On the other hand, there has been a sustained engagement with what the ‘state of exception’ means. As the exception is constitutive of law, some have followed

Agamben in the proposal to reduce the exception to the temporary status it had in modernity.<sup>9</sup> In this argument, what differentiated fascist regimes from liberal democratic ones was not the absence of the exception in the latter, but its temporal expansion in the former. Others still have claimed the re-judicialisation of law against its suspension ‘in order to heighten the discretionary power of those who are asked to rely on their own judgment to decide fundamental matters of justice, life and death’.<sup>10</sup>

Yet, all these well-meaning strategies are aporetic, as Butler has already noted in her analysis of Guantánamo and the US exceptional practices in the ‘war on terror’. If the state of exception is triggered by the ‘suspension of law’ due to the ‘extraordinary character of terror’, reinstating law is an aporetic answer. The Geneva Conventions, Butler argues, have already regarded ‘terrorists’ as ‘outside the protocols’ and even ‘outside the law’ by extending “universal” rights only to those imprisoned combatants who belong to “recognizable” nation-states, but not to all people’.<sup>11</sup>

Thus, the Convention gives ground for a distinction between legal and illegal combatants. Human rights law has its own exceptions and its own space of exceptional categorisations which are constitutive of the order it delimits: non-state persons, spies, saboteurs or partisans. The category of ‘unlawful combatant’ has always been foundational to the laws of war, being applied to ‘spies’ or other irregular participants in an armed conflict.<sup>12</sup> As Schmitt presciently warned, law cannot regulate irregular combatants, some categories remain ‘exceptional’ to the normative realm.<sup>13</sup>

However, the exception of international humanitarian or domestic constitutional law is not the same as the exceptional space of Guantánamo or the exceptional practices of the ‘war on terror’. This article explores the difference between these forms of

exception and argues that, rather than constitutive of law, the space of current exceptions is indicative on an ongoing transformation of law.<sup>14</sup> Law transformed allows us to gauge the impact and extent of another exception, a concrete exception rather than a decisionistic one, which cannot be reduced to the exceptional status of Guantánamo, but which is implicated in a particular functioning of law.

To this purpose, I shall unpack the relation between the space of the camp and *nomos*, a term coined by Carl Schmitt and used by Agamben to refer to exceptionality of the camp in modernity. *Nomos* as the understanding of law as both order and orientation of space undergirds a different understanding of the exception, the ‘other’ exception that reveals the political consequences of the transformation of law. As the ‘other’ exception, Guantánamo will be considered in the context of law transformed for the purposes of governing the social. I start by sketching out the understanding of law as *nomos* in Schmitt and the correlate definition of the exception. I move on to explore the implications of this ‘other’ exception for Guantánamo and the transformation of the function of law. Guantánamo is not the constitutive outside of law, but is itself governed through detailed rules and norms. Finally, I consider the political effects of law transformed and the concrete exception associated with it.

### **The camp and the *nomos***

The exception, developed by Schmitt in relation to sovereign authority – ‘Sovereign is he who decides on the exception’<sup>15</sup> – has gained renewed significance in the ‘war on terror’. The exception appears as an anomaly, a limbo state between law and non-law, the realm

where law is suspended. The camp is a hybrid of law and fact in which the two have become indistinguishable.<sup>16</sup> Although Schmitt's insight on the arbitrary decision at the heart of law could become a tool for critical thought inasmuch as it made norms contestable and exposed their reliance on an initial decision and foundational violence<sup>17</sup>, the new discussions of the exception vs. the norm rely on different assumptions. Labelling Guantánamo as the space of exception has led to the endorsement and fortification of the legal space of the norm. Yet, Schmitt made explicit the inextricable dependence and co-constitution of norm/law and exception.

To understand the specificity of the new forms of exception in relation to the norm, I consider the camp as an object of governmentality. What matters in the governing of space is not the distinction between exception and law, but what practices are deployed and how. Law is not suspended in Guantánamo, but its function is changed. In an analysis of the changing function of law with the rise of disciplinary and biopolitical power, François Ewald has argued that law does not disappear any more than sovereignty does; it becomes a technique of government, no longer constituted with respect to universal principles but 'with reference to the particular society it claims to regulate'.<sup>18</sup> Foucault's well-known example concerns laws that do not just punish crimes, but take into account the psychological profile of the delinquent.<sup>19</sup> Law would therefore relate to the nature of that which is given, it would be formulated in relation to its description and essence rather than universally and formally Tony Blair's ASBOs are just one illustration of ever-expanding laws that attempt to govern conduct and set down a rule that is expressive of the desires of society.

Schmitt's concept of the *nomos* places the problematique of law as a technology for governing society in relation to the question of the exception. Although Schmitt's genealogy of the *nomos* would be the opposite of Foucault's inasmuch as *nomos* precedes more universal forms of law such as humanitarian law, politically Schmitt favours the *nomos*. Although the concrete order of the *nomos* of the earth has been made defunct by technological and political developments, Schmitt's defence can be read as a political and normative statement for law as *nomos* and an attempt to derive the political implications of the transformation of law and its related exception for our current situation.

*Nomos* is not simply law, but is the immediate form in which the political and social order of a people becomes spatially visible.<sup>20</sup> Order is sustained through the concreteness of spatial divisions and orientation. Therefore, law is not contingently oriented by the sovereign decision, but essentially legitimated through the concrete orientation of space. 'In its original sense', Schmitt has pointed out, '*nomos* is precisely the full immediacy of a legal power not mediated by laws; it is a constitutive historical event—an act of legitimacy, whereby the legality of a mere law is first made meaningful'.<sup>21</sup> Law gains full validity only through the combination of order and orientation, through the substantive support that *Ortnung* confers upon *Ordnung*.

In this double constellation of law as order and orientation, the relation to the other is ordered through the primary distribution and qualification of spaces. *Jus Publicum Europaeum*, Schmitt's paradigmatic *nomos* of the earth, was based on the distribution of the earth that defined the space to be colonised as essentially a 'free space'. The exception was a space carved within the colonial global space. The loss of these territorial boundaries in the process of decolonisation, the subsequent

universalisation of space and the emergence of humanity as a global subject have reinforced Schmitt's belief that boundary drawing, the division of space or territory is the fundamental act of constituting a stable order. *Nomos* is thus the legitimation of order through the concreteness of territory and the division of space.

The exception constitutive of *nomos* is to be equally understood in spatial terms, as the 'free space' to be colonised, where atrocious wars among the 'equal sovereigns' of Europe could unfold without destroying the European balance of power. The New World was not the enemy, a potentially equal contender, but a 'free space' which could be appropriated by the more powerful. Here Schmitt draws a distinction between the decision on the enemy and the spatial exception. The exception is the New World, the 'beyond the line' that makes possible the order of *Jus Publicum Europaeum*.<sup>22</sup>

What is left out of the concrete determination of the New World as a 'free space' is its genealogy in a Lockean understanding of the subject, a subject who achieves autonomy through property and labour. 'Laziness', for example, as a characteristic of the colonial subject requiring intrusive and pervasive colonial practices could become naturalised through the mediation of spatial descriptions.<sup>23</sup> Without the concreteness of space, order cannot achieve its validity. One can reverse the statement and say that any constitution of a particular order depends on the imaginary redistribution of spaces, on enclosures and limits.<sup>24</sup> A new order is constituted by the spatialisation of practices that govern disorder and order; law needs the concrete embodiment of space to sustain its ordering function.

Is therefore the camp not the '*nomos* of modernity' as Agamben has argued? The camp would appear to embody the 'free space' where anything can happen so that order



can be preserved outside its confines. From refugees camps relegated at the margins of Europe to the space of Guantánamo, we encounter the dialectic of inside/outside, of order/disorder. Yet, Schmitt's conceptualisation of the *nomos* takes us beyond this type of analysis that reveals the spectral kernel of disorder at the heart of order or the outside from which the inside can never be totally dissociated or purified. The constellation of law as *Ordnung* and *Ortnung* suspends Schmitt's earlier conceptualisation of the political and of the exception.<sup>25</sup>

With *The Nomos of the Earth*, the sovereign decision on the enemy as the exceptional horizon of law is brushed aside. The constitution of order is no longer dependent upon the contingent sovereign decision on the exception, but upon a spatial division of the earth. The other exception is 'rooted' in a naturalised geopolitics, a spatial order that apparently solely owes to technological inventions and historical discoveries rather than any sovereign decision. Grounding the exception in a geopolitical distribution of space attempts to obscure and keep at a distance the decisional moment of the classification of the New World as a 'free space'.

Although the dissociation of a decisionist and spatialised exception might have been motivated by the impossibility of an international sovereign and the plurality of sovereigns in the international realm, there is a more dangerous political consequence in this reconfiguration of the exception. The conjunction of *Ordnung* and *Ortnung* in the concept of *nomos* implies the legitimation of the existing order, of its social and power relations as rooted in the division and appropriation of space. The sovereign decision can be withdrawn from the 'weight' of spatial divisions and the necessity of territorial appropriations, it can be kept at a distance from the concrete necessity of space.

Schmitt's definition of the *nomos* is an attempt to shift the exception from sovereign decisionism to a question of spatial division and appropriation. The political becomes subordinated to the necessity of spatial distributions and concrete characteristics putatively independent of the political decision on friend/enemy<sup>26</sup>. Even if Schmitt thinks this order of the earth has been replaced by a new one, politically he favours the *Jus Publicum Europeaum* and the concept of the *nomos* as *Ordnung/Ortnung*. If this other exception theorised by Schmitt is not derelict, as a reading of Foucault's disciplinary and biopolitical power would suggest, but rather a new form of governmentality in our societies, we need to understand its political implications.

### **Guantánamo and the concrete exception<sup>27</sup>**

Guantánamo appears as paradigmatic for the continuity of the camp as an exceptional space and its role in the constitution of political order. The camp is a piece of land placed outside the normal juridical order, but it is nevertheless not simply an external space to this order.<sup>28</sup> Guantánamo also evinces a continuity between the forms of 'bare life' that have constituted the internal/external boundary of the modern state form. In the early nineties, Haitian refugees were taken to Guantánamo for 'processing' and were later on denied the right to appeal for asylum. Many were held up to three years in makeshift barbed wire camps, exposed to heat and rain in spaces infested with rats and scorpions, with inadequate water supplies and sanitary facilities.<sup>29</sup> Between 1994 and 1996, 50,000 refugees were held in camps at the military base.

After September 11, Guantánamo changed its inmates to ‘suspected terrorists’ to be soon categorised as ‘enemy combatants’. From asylum-seekers to suspected terrorists, we are in the continuity of the exceptional practices of modernity. Echoing Agamben’s analysis of the camp, Guantánamo appears as the space where political life becomes ‘bare life’, suspended in an anomic space and abandoned to the mercy of ‘sovereign police who temporarily act as sovereign’.<sup>30</sup> The people in Guantánamo Bay have been abandoned by the law and are facing sovereign violence. An astute reader of Schmitt argues that Guantánamo is the realm of ‘normless... decision making in which the executive powers possess fully discretionary authority’.<sup>31</sup>

Yet, rather than a space invested by sovereign decision, Guantánamo is as a space from which the sovereign decision has withdrawn under the necessity of spatial considerations. The withdrawal of the decision does not mean its disappearance or inexistence, but rather its dissimulated mode of existence. Subsumed under the necessity of the concrete description of spaces, the decision effaces itself. Thus, it is not primarily the decision of the Bush administration to name the prisoners ‘illegal enemy combatants’, but the necessity of a new form of war, a war different from all previous war. As John Reid has also remarked in the UK context, unless the international law framework is adapted, ‘we risk continuing to fight a 21<sup>st</sup> century conflict with 20<sup>th</sup> century laws’.<sup>32</sup> The existing legal rules are deemed to no longer be adequate for the situation at hand.

The concept of *nomos* attempts to give validity to the political and social conditions of a particular historical moment through a spatialised and concrete reconfiguration of the decision. The withdrawal of the decision is what we have seen with Guantánamo Bay. After all, George Bush has repeatedly denied any allegations as to the

‘exceptional’ status of Guantánamo or its lawlessness. Even when American officials agree that the Geneva Convention should apply to the detainees, they argue that they have always been treated humanely. Moreover, the administration has constantly upheld that it is the Republic of Cuba that has ‘ultimate sovereignty’ over this territory and therefore that US jurisdiction does not apply.

The other exception obscures the locus of decision, by separating political decision from factuality, from the ‘concrete life’ intrinsically related to the characteristics of space. If one can speak of decisions on Guantánamo Bay, these can only be traced back to legal and historical precedents, as well as to different institutions. The withdrawal of the sovereign decision does not mean that the space of exception is ‘emptied’ of governing practices. As any space, Guantánamo is to be made governable. Yet, governing practices are to be subsumed to the realities of space and the characteristics of ‘concrete life’.

Thus, Guantánamo cannot be thought as the place of absolute arbitrariness, of sovereign police, where everything is possible. Fleur Johns has remarked that one finds in Guantánamo Bay a space filled to the brim with expertise, procedure, scrutiny and analysis.<sup>33</sup> Even before the 28 June 2004 rulings of the US Supreme Court in *Hamdi v Rumsfeld* and *Rasul v Bush* affirmed the entitlement of Guantánamo Bay detainees to ‘contest the factual basis for th[eir] detention before a neutral decision maker’, the Department of Defense (DOD) had produced a panoply of regulations concerning the status and handling of detainees. These included mechanisms for annual administrative review of the necessity of each detainee’s detention and procedures for their trial before specially convened Military Commissions.

In the wake of *Rasul v. Bush*, which declared that the US courts had jurisdiction to hear claims from the detainees regarding their detention, the DOD decided that each detainee would be notified of the review of his detention as an ‘enemy combatant’, of the opportunity to consult with a personal representative, and of the right to seek review in US courts.<sup>34</sup> According to the DOD, each detainee would have a formal opportunity each year to appear before a board of three military officers and explain why he believes that he should be released. He would be provided with a military officer who is not a lawyer to assist him in his appearance. In addition, the review board would accept written information from the family and national government of the detainee.<sup>35</sup>

Although at a distance from the prescriptions of international law, the space of the camp is governed by norms and is not a space of arbitrary decision and discretionary power. The administrative practices deployed in Guantánamo are, however, seen to undermine the principles of liberal law.<sup>36</sup> Butler has warned against the disarticulation of the state into a set of administrative powers and the privilege of government officials, not elected ones, over members of the judiciary.<sup>37</sup> Her discontent with the governmentality of Guantánamo is manifestly a discontent with extra-legal bureaucratic decisions, decisions made by government officials who believe that certain persons represent a danger, or an existential threat, to the state.<sup>38</sup> Guantánamo is therefore not lawless or normless, but is filled with rules and regulations deployed under the imperative of governing the social and ‘taming the future’.<sup>39</sup>

As Bonnie Honig has rightly remarked, the exception is linked with the more fundamental issue of the ‘(re-)distribution of governing powers and the mechanisms by which they may or may not be held accountable’.<sup>40</sup> Although she is careful not to

associate administrative law with the ‘baddie’ of law, Honig points to the existence of two elements within it: discretion and the avoidance of responsibility. Administrative practices do not displace general and formal law through the ‘sovereign decision on the exception’, but by the withdrawal of decisions which can no longer be traced through the division of institutions and the demand of particular situations.

Schmitt’s concept of the *nomos* adds a crucial point to Honig’s insight about exceptional practices. The withdrawal of decisions is legitimated through the naturalisation of essential descriptions and the concreteness of space. Schmitt had noted the linguistic and conceptual relationship between naming [*Name*] and space appropriation [*Nahme*]: ‘with them abstractions cease, and the situation becomes concrete’.<sup>41</sup> The space of Guantánamo is filled by governmental practices that administrative authorities deploy when they deal with specific categories of people. Thus, Guantanamo shares with asylum retention camps or the Belmarsh prisons the continuity of ‘illiberal practices’ of surveillance and administrative decisions that govern particular spaces.<sup>42</sup>

Guantánamo is governed by multiple authorities, without clear responsibilities and without clear accountability. It is legitimated through the necessity of the singular characteristics of a space and concrete modes of ‘naming’. In this sense, Guantánamo is symptomatic of an exception that infuses a body politic increasingly governed according to its essence, its concrete characteristics and specific situations. What happens to law when we think the exception in its ‘concrete’ rather than ‘decisionistic’ form?

## **The transformation of law**

The governance of Guantánamo is harnessed to the characteristics of the ‘new’ war on terror and to the concrete descriptions of subjects involved in it. The law that governs Guantánamo functions through administrative practices from which decision has retreated not only in a maze of institutions but also in the naturalisation of naming and the description of what is at stake. Therefore, Guantánamo needs to be understood in a continuum of practices in the ‘war on terror’ that are formulated under the necessity of spatial representations, of the partitioning of subjects and spaces.

Guantánamo is governed under the imperative of *what is*, of the situational characteristics of spaces and people at a distance from the sovereign decision. It is not the result of discretionary power or contingent sovereign decision, but the necessary consequence of naming the war on terror a different war and categorising terrorist suspects as ‘illegal enemy combatants’. The governmental practices deployed there are not new; bureaucratic and other administrative authorities have emerged not just to apply the law, but to provide better responses to situations defined as radically new. Law itself has become ‘materialised’, subsumed to concrete situations and representations of spaces and subjects.

The transformation of law through the specific characteristics of situations defined by new forms of terrorism and subjects defined as posing a terrorist risk leads us away from easy endorsements of judicial power *contra* administrative authorities. The difference between the exception and the norm does not reside in the agents of law, as Butler has suggested, given that both courts and administrative authorities can reinforce

exceptional practices in the ‘war on terror’. Judges have often accepted the concrete description of the war on terror as a new war. Butler’s hope that the rule of law means decision by elected representatives or courts *contra* the decisional governance of administrative institutions does not stand.

In *Hamdi v. Rumsfeld* for example, Justice O’Connor accepted Bush’s position that the nation is at war and that the ‘war on terror’ gives the president and the executive branch sweeping powers to jail anyone they accuse of being an ‘enemy combatant’. The ruling also endorsed the administration’s position that such ‘enemy combatants’ are not entitled to the protections either of the Geneva Conventions or to full due process rights accorded to criminal defendants in the U.S. courts.<sup>43</sup> Moreover, only after having been categorised as an enemy combatant taking part in ‘an armed conflict against the United States’ could Hamdi challenge his detainment and be entitled to ‘notice of the factual basis for his classification’ and a ‘fair opportunity to rebut the government’s factual assertions before a neutral decision-maker’.<sup>44</sup>

The other exception is deployed at the horizon of a transformed function of the law that Schmitt’s opponents and critics have also noted. Franz Neumann’s insight that law has been changing from formal and general rules to non-formal, situation-specific decisions is highly relevant in the current context.<sup>45</sup> William Scheuerman has argued that Neumann anticipates many of the legal attributes and changes at the core of globalisation processes.<sup>46</sup> Thus, the constant forms of state intervention in accordance with the dictates of economic life have led to a hand-over of decisions to executive and administrative bodies seen as best suited to the tasks of quick and immediate action.<sup>47</sup> Beyond forms of economic legislation, situational and ad-hoc jurisprudence manifests itself in the social



and political sphere, making decisions dependent on standards of efficiency and appropriateness ‘naturally’ contained in the characteristics of the situation.

Taking away the politically constitutive decision reduces law to the unchallengeable necessity of the status quo.<sup>48</sup> Although Neumann has castigated sovereign decisionism for being simply ‘a technique for transforming the political will into legal form’, an ‘arcanum dominationis’<sup>49</sup>, decisionism is also the point of rupture, the non-closable politics of law. The contingent decision constitutive of law and the related practices of author-isation could still be contested. When decisions withdraw in favour of ‘order as orientation’, this contestation is no longer possible. Decisions are subordinated to the materiality of the *nomos*, they are ‘determined’ by the concreteness of naming and spatialisation. Judges, the police or government officials can all agree on the necessities of a situation if its concrete description is taken for granted.

If the decision on the exception could be politicised by exposing the arbitrary decision at the heart of any particular order, the concept of *nomos* is an attempt at de-politicisation, at a nostalgic reification of the existing social and political order. The governmentality of Guantánamo is deployed at the horizon of adequacy between law and concrete descriptions of situations. Law now decides on ‘which acts of intervention and which type of regulation of institutions are “appropriate to the situation”’ and ‘what the “concrete status of the group member” is to be’.<sup>50</sup>

Jacques Rancière has also noted the transformation of the relation between law and fact.<sup>51</sup> Law is nowadays supposed to conform to the realities of a socio-economic situation, thus having closed down the potential for contestation of decisions. Law is now adapting to and anticipating all the movements of society.<sup>52</sup> Through the concrete

exception, the gap between law and fact, between law and the necessity of the socio-economic order is closed off and the moment of political decision, of indeterminacy and contestation is left out. The interval between the abstract literalness of law and the polemics over its interpretations is closed when law is only supposed to record the way of life of a community or respond to the imperatives of a socio-economic situation.<sup>53</sup> Once law needs to govern the realities of society, it becomes the embodiment of its taken-for-granted essence. In adjusting law to concrete situations and concrete spaces, we lose the possibility of contesting political decisions.

Therefore, arguing that we should avoid the administrative aspect of law, its situation-dependent decisions, or subject it to forms of review and restraint (judicial review, ombudsman, etc.) does not contest the ‘other’ exception. Reinstating other forms of law as well as democratic procedures can be consonant with the concrete exceptions entailed by the necessities of a situation. What we need to contest is sovereign practices that are effacing the contingency of their own decisions by rooting themselves in concrete realities, the necessities of the given situation and incontestable renderings of what the ‘war on terror’ is.

In this sense, Lord Hoffman’s comments on the House of Lords’ judgement in the *Belmarsh* are suggestive of the need to contest the concrete description of the situation of war. In the *Belmarsh* case, the House of Lords had to decide on the legality of section 21 of the Antiterrorism, Crime and Security Act of 2001 which allowed for detention without charge of foreign terrorist suspects. The government’s derogation from the European Convention on Human Rights could only be lawful if there was a case of ‘war or other emergency threatening the life of the nation’ (Article 15). The judgement is so

interesting in this context as eight out of the nine judges agreed that there was situation of public emergency, but still considered the measures to be disproportionate and discriminatory.<sup>54</sup> Lord Hoffman's position was exceptional inasmuch as he rejected the very description of the situation as an emergency. 'Whether we should survive Hitler hung in the balance', he argued, 'there is no doubt that we shall survive Al-Qaeda...Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community'.<sup>55</sup> Thus, Lord Hoffman challenged the very possibility of subsuming law to concrete descriptions of situations and opened a polemic around *what is*.

## **Conclusion**

This paper has questioned the endorsement of the 'rule of law' by human rights lawyers, activists and even politicians against the exception of Guantánamo. Not only does law in its international or constitutional forms create its own exceptions, but the existence of exceptional spaces becomes necessary if the description of the war on terror as a new and different war is accepted by courts and administrative authorities. Administrative law is not the 'exceptional' other at the heart of universal and formal law, but is indicative of the transformation of law when it becomes a form of governing the social. I have shown that Schmitt's concept of the *nomos* exposes a desire for the transformation of the law from the politically constitutive decisions to its subsumption to spatial and concrete necessities. Law as *nomos* obscures the locus of sovereign decision and its contingency.

Thus, the exception of Guantánamo needs to be placed in the continuity of practices that have configured the *nomos* of the earth, i.e. colonial practices. Just like colonial spaces in history, Guantánamo is a space whose existence is subsumed to the concrete definition of the new ‘war on terror’ and its subjects. Moreover, as the other, concrete exception, Guantánamo is symptomatic of the transformation that law undergoes when it governs the ‘realities’ of society. When law is harnessed to the governmentality of the social, the contingent sovereign decision is withdrawn under the ‘weight’ of concrete descriptions and spatial distributions. The responsibility for the practices (abuse or torture) that have taken place in Guantánamo is refused or at most left indeterminate, as in Condoleezza Rice’s remark, ‘Mistakes can happen’<sup>56</sup>.

Decisions are effaced through the concrete conditions of necessity. Schmitt’s move from the ‘political decision on the exception’ to the embedding of law in the spatial order of the world and concrete descriptions can be seen as an attempt to distance the possibilities of contesting decisions. The enemy of Schmitt’s understanding of law is not a more universal or formal law, but law as *nomos*. As law becomes adjusted to the imperatives of necessity and records the social, political decisions can no longer be contested as ‘arbitrary’ or particularising. Yet, as Lord Hoffman’s intervention in the Belmarsh case makes clear, it is this very imaginary of concrete descriptions and spatialised situations that needs to be challenged today.

- 
- <sup>1</sup> The research for this article was undertaken as part of the Challenge programme (<http://www.libertysecurity.org>). The argument was first tried out at the ISA Annual Convention in San Diego, 22-25 March 2006 and at a workshop on 'Law, Politics and the Challenge of Exceptionalism post-9/11' at King's College London, 5-6 May 2006.
- <sup>2</sup> Agamben, Giorgio and Raulff, Ulrich, 'Interview with Giorgio Agamben - Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life', review of Reviewed Item, *German Law Journal* (2004), <http://www.germanlawjournal.com/article.php?id=437>.
- <sup>3</sup> Andrew Neal, *Review of the literature on the 'state of exception' and the application of this concept to contemporary politics* (Challenge, 2004 [cited 30 November 2005]); available from <http://www.libertysecurity.org/article169.html>.
- <sup>4</sup> Judith Butler, 'Indefinite Detention', in *Precarious Life. The Powers of Mourning and Violence*, ed. Judith Butler (London: Verso, 2004), pp. 50-100, p. 51.
- <sup>5</sup> The Guardian, 'PM Denies Knowledge of 'CIA Torture'', 7 December 2005.
- <sup>6</sup> Irene Khan, *Amnesty International Report 2005. Speech by Irene Khan at Foreign Press Association* (2005 [cited 20 February 2006]); available from <http://web.amnesty.org/library/Index/ENGPOL100142005>.
- <sup>7</sup> UN, *Situation of Detainees at Guantanamo Bay* (Commission on Human Rights, 2006 [cited 20 February 2006]); available from [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16\\_02\\_06\\_un\\_guantanamo.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf).
- <sup>8</sup> The Guardian, 'Pentagon Breaks with Bush on Detentions', 12 July 2006.
- <sup>9</sup> Michael Ignatieff, *The Lesser Evil* (Princeton: Princeton University Press, 2004).
- <sup>10</sup> Butler, 'Indefinite Detention', p. 54.
- <sup>11</sup> *Ibid.*, p. 86.
- <sup>12</sup> Scott Michaelson and Scott Cutler Shershow, 'Beyond and Before the Law at Guantánamo', *Peace Review* 16, no. 3, 2004, pp. 293-303.
- <sup>13</sup> Carl Schmitt, *The Theory of the Partisan. A Commentary/Remark on the Concept of the Political*, trans. A. C. Goodson, *CR: The New Centennial Review* (Michigan: Michigan University Press, 2004), p. 25.
- <sup>14</sup> I rely here on the relation between exception and law. For how the exception relates to political leadership and popular will, see Jef Huysmans, 'Minding Exceptions: Politics of Insecurity and Liberal Democracy', *Contemporary Political Theory* 3, no. 3, 2004, pp. 321-341.
- <sup>15</sup> Carl Schmitt, *The Concept of the Political*, trans. Tracy B. Strong (Chicago: University of Chicago Press, 1996).
- <sup>16</sup> Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), p. 170.
- <sup>17</sup> Jacques Derrida, 'Force of Law: the "Mystical Foundation of Authority"', *Cardozo Law Review* 11, 1990, pp. 920-1045.
- <sup>18</sup> Francois Ewald, 'Norms, Discipline and the Law', *Representations* 30, 1990, pp. 138-161.
- <sup>19</sup> Michel Foucault, *Les Anormaux. Cours au Collège de France. 1974-75*. (Paris: Gallimard/Le Seuil, 1999).
- <sup>20</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (London: Telos press, 2003).
- <sup>21</sup> *Ibid.*, p. 73.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> Simon Philpott has insightfully discussed the construction of 'lazy natives' in the mid-19<sup>th</sup> century Dutch colonial discourses Simon Philpott, 'The Natural Order of Things? From 'Lazy Natives' to political sciences', *Inter-Asia Cultural Studies* 4, no. 2, 2003, pp. 249-263.
- <sup>24</sup> Martin Coward has analysed the motif of the threshold in the governmentality of empire Martin Coward, 'The Globalisation of Enclosure: interrogating the geopolitics of empire', *Third World Quarterly* 26, no. 6, 2005, 855-871.
- <sup>25</sup> Alberto Moreiras has also noted that Schmitt's position in *The Nomos of the Earth* appears contradictory to his earlier definitions of the political: 'the notion of a *nomos* of the earth, of an order of the political, accomplishes, perhaps against Schmitt's own will, a deconstruction of his notion of the political' Alberto Moreiras, 'A God Without Sovereignty. Political Jouissance. The Passive Decision', *CR: The New Centennial Review* 4, no. 3, 2004, pp. 71-108, p. 82.
- <sup>26</sup> Thus pirates become unjust enemies only when the *nomos* of the earth has changed from the relationality of the sea/free space and land/space of sovereigns. The disappearance of the decision on the enemy (*hostis*) does not mean the lack of unjust enemies or foes (*inimicus*) Schmitt, *The Concept of the Political*, p. 26..

- <sup>27</sup> Mika Ojankangas persuasively makes the case for the importance of the (non-)concept of the ‘concrete’ in Schmitt. Mika Ojankangas, 'Philosophies of 'Concrete Life': From Carl Schmitt to Jean-Luc Nancy', *Telos* 132, 2005, pp. 25-45. Although I also consider the ‘concrete’ to be directly linked to the *nomos* as ‘concrete order’, I differ in the analysis of the role of the concrete in Schmitt’s theory.
- <sup>28</sup> Agamben, *Homo Sacer. Sovereign Power and Bare Life*, p. 170.
- <sup>29</sup> Amy Kaplan, 'Where is Guantánamo?' *American Quarterly* 57, no. 3, 2005, pp. 831-858, p. 839.
- <sup>30</sup> Agamben, *Homo Sacer. Sovereign Power and Bare Life*, p. 174.
- <sup>31</sup> William E. Scheuerman, 'Carl Schmitt and the Road to Abu Ghraib', *Constellations* 13, no. 1, 2006, pp. 108-124, p. 118.
- <sup>32</sup> John Reid, *Lecture at the Royal United Services Institute for Defence and Security Studies 'Twenty-first Century Warfare – Twentieth Century Rules'* (2006 [cited 20 November 2006]); available from <http://www.rusi.org/events/ref:E442BBE1E9CEF3/>.
- <sup>33</sup> Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception', *The European Journal of International Law* 16, no. 4, 2005, pp. 613-635, p. 618.
- <sup>34</sup> Human Rights Watch, *Making Sense of the Guantánamo Bay Tribunals* (2004 [cited 20 December 2005]); available from <http://hrw.org/english/docs/2004/08/16/usdom9235.htm>.
- <sup>35</sup> Ibid.
- <sup>36</sup> Law which relies on situation-specific decrees moves away from consistent and universal legal rules. William E. Scheuerman, *Between the Norm and the Exception. The Frankfurt School and the rule of law* (Massachusetts: MIT Press, 1994).
- <sup>37</sup> Butler, 'Indefinite Detention', p. 59.
- <sup>38</sup> Ibid., pp. 58-59.
- <sup>39</sup> The temporal element is important in the governmentality of the social which is harnessed to the future. For a discussion of how temporality and the concept of risk function in the ‘war on terror’, see Claudia Aradau and Rens van Munster, 'Governing Terrorism through Risk: taking precautions, (un)knowing the future', *European Journal of International Relations* 13, no. 1, 2007 forthcoming.
- <sup>40</sup> Bonnie Honig, *Bound by Law? Alien Rights, Administrative Discretion, and the Politics of Technicality: Lessons from Louis Post and the First Red Scare* (2005 [cited 29 December 2005]); available from <http://www.princeton.edu/~uchv/whatsnew/Bound%20by%20Law.pdf>.
- <sup>41</sup> Carl Schmitt, 'Nomos, Name, Name', in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, ed. Carl Schmitt (London: Telos Press, 2003).
- <sup>42</sup> See particularly Didier Bigo’s writings for the Challenge programme (<http://www.libertysecurity.org>) and Didier Bigo, 'Globalized (In)Security: the Field and the Ban-opticon', in *Illiberal Practices of Liberal Regimes: the (In)Security Games*, ed. Collection Cultures & Conflits (Paris: L’Harmattan, 2006), pp. 5-50.
- <sup>43</sup> Kaplan, 'Where is Guantánamo?', p. 851.
- <sup>44</sup> Center on Law and Security, *Enemy Combatants* (2005 [cited 28 December 2005]); available from <http://www.law.nyu.edu/centers/lawsecurity/trials/combatants.html>.
- <sup>45</sup> Franz Neumann, 'The Change in the Function of Law in Modern Society', in *The Democratic and the Authoritarian State. Essays in Political and Legal Theory*, ed. Herbert Marcuse (New York: The Free Press, 1957), pp. 22-68.
- <sup>46</sup> William E. Scheuerman, 'Franz Neumann: Legal Theorist of Globalization?' *Constellations* 8, no. 4, 2001, pp. 503-520.
- <sup>47</sup> William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: The John Hopkins University Press, 2004), p. 124.
- <sup>48</sup> For a reading of Schmitt that supports decisionism against governmental practices, see Prozorov Sergei Prozorov, 'X/Xs. Toward a General Theory of the Exception', *Alternatives* 30, 2005, pp. 81-112.
- <sup>49</sup> Franz Neumann, *The Rule of Law* (Leamington Spa: 1986), p. 285.
- <sup>50</sup> Neumann, 'The Change in the Function of Law in Modern Society', p. 66.
- <sup>51</sup> Jacques Rancière, *Chroniques des temps consensuels* (Paris: Editions du Seuil, 2005), Jacques Rancière, *Disagreement. Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999).
- <sup>52</sup> Rancière, *Disagreement. Politics and Philosophy*, p. 111.
- <sup>53</sup> Rancière, *Chroniques des temps consensuels*, p. 129.
- <sup>54</sup> Elspeth Guild, *Constitutional Crisis in the UK over Detention of Foreigners* (2004 [cited 28 November 2006]); available from <http://www.libertysecurity.org/article83.html>, Thomas Poole, 'Harnessing the Power

---

of the Past? Lord Hoffman and the *Belmarsh Detainees Case*, *Journal of Law and Society* 32, no. 4, 2005, pp. 534-561, p. 536..

<sup>55</sup> Clare Dyer, Michael White, and Alan Travis, *Judges' verdict on terror laws provokes constitutional crisis* (17 December 2004 [cited 16 February 2005]); available from <http://www.guardian.co.uk/terrorism/story/0,12780,1375827,00.html>.

<sup>56</sup> The Guardian, 'PM Denies Knowledge of 'CIA Torture''.