Kenya’s Camp Archipelago, 1953-1960

Focusing on mid-20th century detention camps in the British colony of Kenya, this chapter illuminates a colonial history that was deeply buried in a Foreign and Commonwealth Office building for many years. As such, the analysis supports the revelatory work of David Anderson and Caroline Elkins who have exposed the violence that underpinned British detention and interrogation practices in Kenya.¹ However, the point of departure is distinct in this comparative analyses of the politico-legal underpinnings of mass detention, which here interrogates the reflex to emergency ordinances in removing recalcitrant ‘natives’ from the political scene. It is possible to map out the level of coordination between local agents and the establishment in Whitehall through the Hanslope files on Kenya. Against the hypothesis that detention laws create an architecture of destruction and concomitant custodial violence, the chapter establishes that an accountability deficit is the historical legacy of detention without trial as it was practised in colonial Kenya. By untangling a complex web of colonial records and government papers, the study reveals the often insurmountable pressure that was exerted to conceal evidence of detainee violence, and indeed the role of a highly sophisticated propaganda machine that controlled the public narrative of a violent incident when outright denial was impossible.

Several British colonies experienced insurgencies prior to independence, and, as a response, emergency laws and ordinances were enacted which targeted indigenous peoples, and, more specifically, groups that would not demonstrate loyalty to the British Crown. This was all too true in Kenya, where detention of enemy suspects in an expansive network of camps,² underpinned by laws passed by the Governor or approved by an unelected Executive Council, was part of the military strategy designed to tackle the Mau Mau insurgency.³ At the centre of the Mau Mau rebellion was a struggle against a system of racial discrimination which maintained white Europeans at the top of the hierarchy in Kenya, having access to and ownership of the best lands, control over government and administrative structures, while many Kenyan tribes, such as the Kikuyu, laboured and

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² Kenya, with a complex of over 100 camps, had a greater number of detainees per target population (Kikuyu) than any other British colony where detention without trial was used, see David French, The British Way in Counter-Insurgency, 1945-1967 (Oxford; New York: Oxford University Press, 2012): 111.
toiled in substandard lands and plots of ever decreasing size. During the Second World War, white settlers in Kenya experienced an economic boom due to the market demands for agricultural produce caused by shortages in Europe. When new crops were introduced to the colony, accompanied by intensive farming methods and increased mechanization, many African “squatters,” some of whom had lived there for generations, were forced off European farms into homelessness and destitution in urban areas. Fabian Close elucidates the multifactorial causes of African protest in Kenya, including, “the deterioration of African living standards, the disappointment over unfulfilled expectations raised during the war, the worsening of the squatter problem,” and, in particular, frustration with increased colonial involvement in all facets of Kenyan life. The deterioration in living conditions disproportionately affected the Kikuyu and in his book, The Kenya Question: An African Answer, Tom Mboya described “the situation in his homeland as socially and politically unjust in light of the pressing problem of land distribution, open racial discrimination, and the total hegemony of Europeans.” Mboya, one of only eight African members elected to the Legislative Council in 1957, concluded that the development of the Mau Mau movement was a direct “consequence of years of frustration and bitterness among the African population.”

Fiona Mackenzie notes that an agricultural crisis developed in the Kikuyu reserves as a result of overpopulation. The Kikuyu were disaffected by evictions, forced labour, unemployment and landlessness, with consequent urban pressures, and these factors galvanized a rapidly growing movement with an intricate “oathing” process at its core. Unlike their moderate counterparts, Mau Mau adherents promoted the use of violence to eradicate British colonial rule. From the outset, the colonial administration and metropolitan government portrayed the conflict in Kenya as a “clash of progress and atavism, of good and evil,” rooted in the “collective insanity” of the Kikuyu. However, Bruce Berman maintains that Mau Mau violence was a response to the pre-emptive or “incumbent violence” of the colonial state, thus showing the complicity of the authorities in

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5 For more on the powerful influence of the white settler in British politics, see Frank Kitson, Bunch of Five (London: Faber, 1977), 6-7.
6 One of the most authoritative texts on this process is David Throup’s, Economic and Social Origins of Mau Mau 1945-53 (London: Currey, 1987). See also Klose, Human Rights in the Shadow of Colonial Violence, 65-66.
9 Mboya referenced in Klose, Human Right in the Shadow of Colonial Violence, 197.
11 Elkins, Imperial Reckoning, 22-28. Frank Kitson also describes the significance of oathing amongst the Kikuyu tribe and remarks that “Despite the fact that some Christian influence had been disseminated in the half-century preceding the outbreak of the Emergency, nearly all the Kikuyu believed in the power of oaths in the same way as mediaeval Englishmen believe in witchcraft,” in Bunch of Five, 8.
12 Klose, Human Rights in the Shadow of Colonial Violence, 68.
“shaping the origins and intensity of conflict.”14 To the network of prison and labour camps already in existence prior to the emergency,15 Florence Bernault estimates that approximately fifty detention camps were added.16 From 1953 to 1960, between 80,000 and 150,000 Mau Mau suspects were detained without trial in a variety of camps; some pre-existing, others hastily built “temporary” structures, and many characterized by poor living conditions.17 An elaborate detention system was created, infused with theories of Kikuyu psychopathology, underpinned by psychologically rehabilitative measures to “cure” detainees of their infected minds.18 The concept of rehabilitation through confession permeated the system, and those who resisted this approach were variously labelled “recalcitrant,” “irredeemable,” and “irreconcilable.” Camps were put under the administration of the Department of Community Development and Rehabilitation; the system conceptualized as a “pipeline” with “hardcore” Kikuyu labelled as “Z” or “black” detained in remote high security encampments, eventually to be relabelled as “white,” and pass through the pipeline to open camps before release and reintegration into society. To become “white” and successfully exit the detention pipeline the detainee had to confess to taking the Mau Mau oath, to provide details of the alleged crimes committed, and to further demonstrate that he or she was once again a “useful citizen” through hard work and labour.19 Detainees were excluded from the public sphere and were prevented from commenting on extant conditions within the camps.20 Nevertheless, occasionally information emerged which testified to a severe regime controlled by European officers and “loyalist” warders, who subjected detainees to violence with impunity.21


17 The figure of 80,000 detainees is propounded in the official record, while David Anderson estimates that the maximum number who may have been detained as 150,000 persons, *Histories of the Hanged*, 5. Anderson later clarified this figure, by stating that the actual numbers detained was probably between 100,000 – 110,000 (personal correspondence with David Anderson). Elkins claims that between 160,000 and 320,000 Kikuyu were detained during the Emergency, in *Imperial Reckoning*, xiii, but this statistic has been called into question, see Guardian article by John Willis, “External Ombudsman’s decision on David Elstein’s complaint,” 7 April 2008, at <http://www.guardian.co.uk/theguardian/2008/apr/07/opendoor> (accessed 11 July 2016).


19 Whilst detainees were allowed to send and receive one letter per month, the officer in charge of the detention camp could confiscate “any book or paper which, in his opinion, contains any objectionable matter,” *The Emergency (Detained Persons) Regulations 1954*, s 14(2).

20 Eileen Fletcher resigned her post in charge of female “rehabilitation” facilities in Kenya after a mere seven months, in protest against the extant conditions and Fletcher subsequently made statements to the press about what she had witnessed, see “Conditions in Kenya Detention Camps,” *The Times*, 7 June 1956.
material largely corroborates the biographical narratives of former detainees, but also illuminates the contemporary colonial attitude to detainee protest and contestation.

A claim for “alleged torts of assault and battery and negligence” was submitted to the UK High Court by five elderly Kenyans (Ndiku Mutua and Others v The Foreign and Commonwealth Office), in which the complainants alleged they had been tortured and mistreated by “officers and soldiers of the Kenya police force, the Home Guard and/or the Kenya Regiment” while detained in British camps between 1954 and 1959. The injuries suffered by the former detainees resulted from “physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings.” On the one hand, the British government rejected the argument that it had “played a material part in the creation and maintenance of a system for the suppression of the rebellion, in part by means of torture and other mistreatment of detainees.” Yet on the other, the British Foreign Secretary, William Hague, accepted the need for an examination of colonial-era abuses. At any rate, the case was fought tenaciously by the British government, resorting to detailed technical arguments at an early stage of proceedings; a standpoint described by Justice McCombe as “dishonourable” given the serious nature of torture. Therefore, the unexpected announcement by the Foreign Secretary in June 2013 that a settlement of £19.9 million would be granted to 5,228 Kenyan camp survivors appears to have been a complete reversal of the government’s earlier position. It must be borne in mind that the settlement came after the British government had experienced a number of setbacks at the High Court, and evidence of systematic and widespread abuses in detention was mounting.

Fletcher’s claims were later denied by the administration. The Colonial Secretary was deeply critical of Fletcher’s allegations, “I am quite satisfied that Miss Fletcher’s charges are based in the main on hearsay, on partisan opinion and personal prejudice. The negligible amount of criticism which could be levelled has proved to be wholly disproportionate to the impression that she has contrived to create. I would ask all fair-minded people to read carefully the documents in the Library of this House and to make up their own minds,” see Hansard 31 October 1956, vol 558, cc 1418-21. See also TNA CO 822/1236: Memoranda prepared by Colonial Office on reports by Eileen Fletcher on detention and imprisonment of children in Kenya, 1957.


23 For example, see the government’s response to Victor Shutter’s exposition of the brutality he witnessed in the Kenyan “rehabilitation” camps in Elkins, Imperial Reckoning, 340-344. Also, Huw Bennett notes that one settler (Denning) complained about screening teams beating up his employees – the authorities dismissed Denning’s allegations, accusing him of being a man with “a rather unsavoury past,” Bennett, Fighting the Mau Mau, 37.


27 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], para. 154.

as historians analysed the declassified files and other sources. Hague stressed, however, that the government was not accepting legal liability in the case, and he attempted to shut the door on prospective claims from other former colonies:

We continue to deny liability on behalf of the Government and British taxpayers today for the actions of the colonial administration in respect of the claims, and indeed the courts have made no finding of liability against the Government in this case. We do not believe that claims relating to events that occurred overseas outside direct British jurisdiction more than fifty years ago can be resolved satisfactorily through the courts without the testimony of key witnesses that is no longer available.

Aside from pointing out that the settlement was not precedent setting, Hague also vigorously defended the government’s right to fight such claims. Considering Nazi concentration camps, Giorgio Agamben seeks to carefully investigate “the juridical procedures and deployments of power by which human beings could be so completely deprived of their rights and prerogatives that no acts committed against them could appear any longer as a crime.” This question can be applied to a retrospective inquiry of Kenyan detention camp abuses, whereby British politicians and colonial officials readily abandoned fundamental legal principles when the abrogation affected an “undesirable other.” Amnesties, such as the one applied to Kenya pardoning all violence that occurred prior to 18 January 1955, and ex post facto regulations which legalised foregoing criminal acts, effectively gave the accountability deficit a façade of legality. The “self-preserving violence” of the state was shielded by impunity in government, which was also fostered by the judiciary, even where evidence existed that ill-treatment, torture and unlawful killings had occurred in British custody.

To no small extent, this was a reaction to a post-war atmosphere which supported anti-colonial struggles and self-determination, sponsored by the United States and enshrined in the UN Charter. Frederick Cooper identifies tensions that arose between American and British policy makers as they attempted to agree on a self-governing framework for African states. The Colonial Office was forced to present a “progressive colonial policy,”

30 Hague, “Statement to Parliament on settlement of Mau Mau claims.”
31 Ibid.
34 See, for example, Elizabeth Kolsky’s study of white violence in colonial India: E. Kolsky, Colonial Justice in British India (Cambridge: Cambridge University Press, 2010).
35 Klose, Human Rights in Shadow of Colonial Violence, 199. See also Burke, Decolonization and the Evolution of International Human Rights, 39.
36 Following on from the UN Charter, an UN Commission was tasked with drafting the Universal Declaration of Human Rights, which came into being in 1948.
37 Cooper, Decolonization and African Society, 112.
promulgated in the Colonial Development and Welfare Act, which purportedly aimed to raise socio-economic and labour standards of indigenous peoples preparing for self-government. Cooper argues that it did nothing of the sort, and highlights the Colonial Secretary’s rationalisation for maintaining the colonial status quo: “I am not basing my argument on material gains to ourselves, important as I think these may be. My feeling is that in these years to come without the Commonwealth and Empire, this country will play a small role in world affairs, and that here we have an opportunity which may never recur, at a cost which is not extravagant, of setting the Colonial Empire on lines of development which will keep it in close and loyal contact with us.” Moreover, the colonies had proven useful during the war, and the economic significance of these acquisitions extended as certain promises made to British consumers were to be redeemed after the war. Another factor that may have ironically pushed colonial abuses underground is that the British government was heavily involved in drafting the European Convention on Human Rights. Winston Churchill had argued that the Strasbourg institutions “would exist to draw attention to violations of human rights through a ruling that represented a ‘judgment of the civilized world’.” Indeed, the British jurist, Sir David Maxwell-Fyfe, is considered a founding father of the European Convention.

In order to reconcile the dissonance between European Convention ideals and the actual situation in many colonies, the colonial administration had to hide evidence of abuses and this created a culture of denial which has contemporary resonance. A massive propaganda campaign was launched against Mau Mau, “one of the most intensive propaganda attacks on an African national movement,” that sought to delegitimize the movement, while at the same time details of colonial and administrative violence were withheld from public scrutiny. Fabian Klose describes the development of an “effective information machine,” which underpinned military endeavours in Kenya. He elucidates a two-pronged British propaganda strategy, with the internal element directed towards manipulating public opinion within the colony, whereas the external strand, managed by the Kenya Government Press Office, “filtered information on the situation in the crown colony to the national and international media.” An additional public relations hub was established in London, the Kenya Government Public Relations Office, which was “chiefly responsible for the international public image of the Kenya question.” This concern with appearance and concealing security force violence continued during decolonization and within the Hanslope files it is possible to identify significant directives issued by the Colonial Office in the late 1950s that were central to the framework of official denial and amnesia regarding the colonies, as detailed in the introduction. The new information documented in this chapter may well be comprehended against the inscription of Kenyan peoples as subjects of British colonial law, and the constitutional arrangements in which an emergency detention regime would flourish without meaningful oversight mechanisms.

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38 Colonial Development and Welfare Act 1940.
39 Cooper, Decolonization and African Society, 120, Cooper references TNA PREM 4/43A/8: WP (44)643.
40 Ibid, 123.
42 Ibid, 61.
43 Wunyabari Maloba quoted in Klose, Human Rights in the Shadow of Colonial Violence, 199.
44 Ibid, 200.
45 Ibid.
The Birth of Sovereignty - Kenya

The British government formally assumed control over the Protectorate of East Africa, a territory covering modern day Kenya and Uganda, in 1895. Under the Protectorate dual systems of law were established, whereby customary laws and native courts were preserved to arbitrate certain matters, while something similar to English common law, but drawing from Indian penal and criminal codes, worked alongside the customary system. In general, native sovereignty over legal issues was granted if not in conflict with European interests, but “in cases where vital issues were at stake, European states simply assumed sovereignty over the issues.” The vital issues in Kenya were land and political representation. All political and policy decisions, both at regional and international level, occurred to the exclusion of the indigenous population most adversely affected by them. The East Africa Order in Council of 1902 was a legal instrument which derived its power from the royal prerogative. British jurisdiction was extended to the territory by virtue of the 1902 Order, which established the office of a Commissioner “empowered to make Ordinances for the administration of justice, the raising of revenue and generally for the peace, order and good government of all persons in the Protectorate.” Local law making powers were centred in this office until 1906 when the Legislative Council was created. It was not until 1944, long after the most fertile highlands had been alienated to European settlers, that the first African was elected to the Legislative Council.

In 1920 the East African Protectorate was annexed by the Kenya (Annexation) Order in Council, 11 June 1920 under section 2 of the British Settlement Act 1887 to create the colony of Kenya. The British Settlement Act further enabled the Crown by Letters Patent or a similar instrument “to delegate to any three or more persons within the settlement” the powers conferred by Parliament. A Letters Patent (1920) fleshed out details of the

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46 The British government took over from the Imperial British East Africa Company, because it was unable to fulfil its charter obligations due to financial difficulties, see C.W. Hobley, *Kenya from Chartered Company to Crown Colony* (London: Frank Cass Publishers, 1929), 124.
51 Section 2 outlines that “It shall be lawful for her Majesty the Queen in Council from time to time to establish any such laws and institutions, and constitute such courts and offices, make provisions and regulations for the proceedings in the said courts and for the administration of justice, as shall appear to Her Majesty to be necessary for the peace, order and good government of Her Majesty’s subjects and others within any British settlement,” The British Settlement Act 1887, s. 2.
52 The Kenya (Annexation) Order 11 June 1920.
new colony’s governmental institutions. Article 1 set out the Office of the Governor General, while Article 3 conferred powers upon the Governor General’s Office, provided these were not repugnant to other provisions of the Letters Patent. Law-making powers passed to the Legislative Council; provisions and regulations were to correspond to the laws of England and local law-making powers were delegated such as were “necessary for the peace, order, and good government of the Colony.” The Governor had the power to veto legislation drafted by the Legislative Council, and a subsequent document affirmed the status of the Governor as the “single and supreme authority responsible to, and representative of, Her Majesty” and so entitled to the aid and assistance of military and civilian servants within the Colony. It was through this office that emergency powers, such as executive detention and warrantless arrest, were realised.

**Emergency Laws & Detention Ordinances**

Following an upsurge in violence against settler farmers and the assassination of the paramount chief for Central Province, Chief Waruhiu, on 7 October 1952, the Governor of Kenya, Sir Evelyn Baring, declared a State of Emergency in the territory on 20 October 1952, which lasted until 12 January 1960. It is notable that the wartime Emergency Powers Order-in-Council 1939 was invoked, which provided the Governor with complete discretion to introduce any regulation he thought “necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.” Notwithstanding these general powers, 6(2)(a) of

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54 Letters Patent of 11 September 1920. The 1920 Letters Patent were “repealed by the Kenya Constitution Order 1958, section 1(3) and the First Schedule. However, section 3 of the 1958 Constitution re-produced a statement of the powers and duties of the Governor in closely similar terms to Article 3 of the old instrument,” see Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], para. 23.

55 Letters Patent of 11 September 1920, s. 10


58 Political authorisation for the proclamation had been given by resolution of the UK Cabinet of 14 October 1952, see Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], para. 8. Proclamation reads as follows: “IN EXERCISE of the powers conferred on me by section 3 of the Emergency Powers Order in Council, 1939, and of all other powers enabling me in that behalf, I DO by this Proclamation bring into operation the provisions of Part II of the said Order in Council with effect from the date of this Proclamation,” The Emergency Powers Order in Council, 1939, Proclamation No. 38 of 1952.

59 “His Majesty, by virtue and in exercise of the powers vested in Him by the British Settlements Act, 1887, the Foreign Jurisdiction Act, 1890, and of all other powers enabling Him in his behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:

3. The provisions of Part II of this Order shall have effect in any territory in which they shall from time to time, in case of any public Emergency, be brought into operation by Proclamation made by the Governor, and shall continue in operation until a further Proclamation directing that they shall cease to have effect is made by the Governor, and shall then cease to have effect except as respects things previously done or omitted to be done.” The Emergency Powers Order in Council, 1939, part I, s. 3.

60 The Emergency Powers Order in Council, 1939, 9 March 1939, Part II – Regulations, s. 6(1).
the order specified that the regulations could “make provision for the detention of persons and the deportation and exclusion of persons from the territory.”\textsuperscript{61} It was on this authority that the Governor passed a number of detention ordinances during the 1950s, providing the legal basis for the incarceration of Mau Mau suspects without trial.\textsuperscript{62} According to a Colonial Office memorandum, “the Governor may make a detention order against any person over whom he is satisfied that it is necessary to exercise control for the purpose of maintaining public order.”\textsuperscript{63} Detention without trial became a cornerstone of counterinsurgency operations in Kenya and enemy suspects were held in facilities ranging from detention camps to Home Guard stations, screening centres, transit camps and makeshift units on white settler farms.\textsuperscript{64}

As it turns out, detention regulations were ratified the same day that the emergency was proclaimed. Section 2(1) of the Emergency Regulations 1952 read: “[w]henever the Governor is satisfied that, for the purpose of maintaining public order, it is necessary to exercise control over any person, the Governor may make an order (hereinafter called a detention order) against any such person directing that he be detained, and thereupon such person shall be arrested and detained.”\textsuperscript{65} Operation Jock Scott was launched in Nairobi the following day when 180 alleged Mau Mau leaders were arrested, including the moderate politician, Jomo Kenyatta, who was a central figure in the Kenya African Union.\textsuperscript{66} Although he publicly rejected Mau Mau violence, Kenyatta was sentenced to seven years imprisonment after a highly politicized trial.\textsuperscript{67} Operation Anvil, launched on 16 April 1954,\textsuperscript{68} gave rise to a new wave of arrests, and by December 1954 some 71,346 Mau Mau suspects were being detained in camps across Kenya.\textsuperscript{69} In Kenya and in Britain, the detention camps

\begin{footnotesize}
\begin{enumerate}
\item Ibid, s. 6(2)(a).
\item The Governor passed the first emergency regulation pertaining to detention in 1952 drawing from powers contained in section 3, part 2, 6 (2) (a) of the Emergency Powers Order-in-Council, 1939, which conferred upon the Governor of Kenya powers to detain individuals in an emergency context. The 1939 Order-in-Council was replaced by the Emergency Powers (Amendment) Order-in-Council 1952 to deal with the exigencies of the colonial situation, see TNA CO 822/725. Detention ordinances included: Emergency Regulations 1952, Detention Orders and Power to Detain Suspected Persons; The Emergency (Detained Persons) Regulations 1954; The Emergency (Detention Camps) Regulations 1959.
\item TNA CO 822/725: Note on Detainees in Kenya, Colonial Office.
\item Anderson, Histories of the Hanged, 5.
\item Klose, Human Rights in the Shadow of Colonial Violence, 70.
\item Caroline Elkins observes that 16,500 were detained in Nairobi during Operation Anvil, Mutua & Others v Foreign & Commonwealth Office [2011], para. 42. Cooper points out that during Operation Anvil all Kikuyu inhabitants living in Nairobi were detained, purely on the basis of ethnicity and this led to a labour shortage in the city, Cooper, Decolonization and African Society, 355. However, Klose maintains that half of Kikuyu inhabitants in Nairobi were detained following Operation Anvil, while the other half (mainly women and children) were returned to the (already overpopulated) reservations, Human Rights in the Shadow of Colonial Violence, 75.
\item Anderson, Histories of the Hanged, 313.
\end{enumerate}
\end{footnotesize}
were promoted as places of rehabilitation so as to relieve the Kikuyu of their Mau Mau “psychopathology.”

Essentially, however, the camps were sites of intelligence gathering underpinned by abusive methods, sites of cheap or free labour, and locations where sovereign power atomised communities, families and villages in the production of dehumanised individuals. Emergency codes and ordinances merely gave the violent architecture a façade of legality.

In her study on the history of confinement in Africa, Bernault argues that the colonial penitentiary merely supplemented the “public violence” endemic to African colonial societies. Corporal punishment as a penal sanction was abolished in England and Wales in 1948, and shortly afterwards the Colonial Secretary James Griffiths announced that the colonies should follow suit. However, in the 1950s, “sentences of corporal punishment increased in [...] Kenya.” A detailed punishment regime prescribed by detention regulations was applied in Kenyan camps. Minor offences were punishable by one or more of the following: solitary confinement and reduced diet, removal of privileges and reprimand. A similar punishment regime could be invoked for major offences, such as mutiny, assault on a prison worker or aggravated assault on another detainee, and could also attract corporal punishment. Regulation 17 of the Emergency (Detained Persons) Regulations 1954 stipulated that corporal punishment should not exceed twelve strokes and that the officer-in-charge of the camp was to be present while the punishment was being meted out. In Discipline and the Other Body, Anupama Rao and Steven Pierce argue that colonial “corporeal violence,” such as flogging, bodily violence and torture, was applied to individuals or ‘bodies’ increasingly deemed irrational, even as they “simultaneously emerged as [...] targets of humanitarian reform.” This pattern was evident during the Kenyan Emergency, whereby the use of corporal punishment proliferated with the introduction of Mau Mau detainees into what Daniel Branch terms the “carceral archipelago,” yet was underpinned by Christian concern for these damaged subjects. In particular, an experiment was launched at Athi River Rehabilitation Camp by the Moral Rearmament Army (MRA), which offered “Christian and democratic alternatives” to the

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74 Ibid, 109-110.

75 Minor offences included, inter alia, spitting, malingering, refusing to eat, and making excessive noise, the Emergency (Detained Persons) Regulations 1954, s. 17.

76 Ibid, s. 17(a).

77 Pierce and Rao, Discipline and the Other Body, 6.

Mau Mau “disease of the mind,” with the promise of curing “thousands of KEM [Kikuyu] now infected,” demolishing “their present faith” to substitute it with “a superior one.”

Substantively, there were two means through which detainees could challenge the basis of detention. Firstly, every detainee had the right to make a representation in writing to the Governor in respect of his or her detention order. As the population was largely illiterate, this made access to justice difficult and it is unclear from the surviving records how many detention orders were revoked as a result of these petitions. A three-person “Advisory Committee on Detainees,” chaired by Justice C.P. Connell was established in 1953 to review detainee appeals. It was the chairman’s duty to “inform the objector of the grounds on which the order [had] been made against him and to furnish him with such particulars as are, in the opinion of the chairman, sufficient to enable him to present his case.” Detainees were not entitled to legal representation before the Committee and only received a summary of the charges in advance, with more detail being provided during the oral hearing. As such, the Advisory Committee was not a judicial fact-finding body, but had a mandate to assess the risk that a detainee posed to public security if released. Caroline Elkins maintains that fewer than 250 appellants secured their freedom through this procedure, but a letter dated 4 January 1960 from the Colonial Secretary Iain Macleod to Dingle Foot, MP outlines the number of appeals made to the Advisory Committee during the Emergency and out of 2,604 submissions, 1,088 were successful, representing a 41% success rate. Detainees were not immediately released following the Advisory Committee’s recommendations, but passed up through the “pipeline” to “open camps” for eventual reintegration into the community. Whilst the recommendations were not binding upon the Governor, in a letter to the Secretary of State for the Colonies, Governor Baring asserted that he had never overruled a decision made by the Committee.

Violence in the Detention Archipelago

The emergency was a time of violent upheaval in certain regions of Kenya, notably so in the Rift Valley and Central Provinces, and none were more affected by violence than the Kikuyu, who were generally deemed untrustworthy by the administration due to suspected involvement with the Mau Mau movement. The Kikuyu experienced “undesirable atrocities and tortures” in their engagements with the security forces and the Kenya Regiment. Composed of several battalions, the territorial Kenya Regiment was staffed by British Army officers, whereas the rank and file were mainly European settlers. It adhered to the normal army chain of command. By March 1953, Home Guards units comprised of

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79 TNA FCO 141/5670: Working Party on Future of Athi River Detention Camp, 11 May 1955, various government ministers were in attendance.
80 Emergency Regulations, 1952, s. 2(3)(b).
81 Ibid, s. 2(3)(c).
82 TNA CO 822/1234: Letter from Dingle Foot to John Profumo, 25 November 1957.
83 TNA CO 822/1234: Letter from Ian Macloed, Colonial Secretary, to Dingle Foot, 4 January 1960.
84 Elkins, Imperial Reckoning, 111, 120, 237.
85 TNA CO 822/1234: Letter from Governor Baring to the Secretary of State for the Colonies, 24 June 1958.
86 Bennett, Fighting the Mau Mau, 8.
87 TNA FCO 141/5667: A petition from more than 1,000 detainees, Athi River Internment Camp to all party Parliamentary delegation, c/o Government House, Nairobi, 20 January 1954.
loyalist Kikuyu, Meru and Embu had been formed.\textsuperscript{88} Huw Bennett submits that while initially the Home Guard were charged with protecting village chiefs and headmen, their role evolved over time as units began to “patrol large areas and fight in combat.”\textsuperscript{89} Home Guard posts, located in fortified buildings in the new villages,\textsuperscript{90} became increasingly implicated in violence as the Emergency unfolded.\textsuperscript{91} By 1955, approximately 800 Kikuyu “new villages” had been established through the forcible relocation of over a million people living across the Kikuyu reserves.\textsuperscript{92} A petition from “more than 1,000 detainees” who were being held at the Athi River Internment Camp alludes to the violent destruction of Kikuyu homesteads by the British Army.\textsuperscript{93} Homes were burnt to the ground, leaving families destitute, while under-aged girls “were raped by […] unscrupulous members of the KAR [King’s African Rifles]\textsuperscript{94} and Home Guards.”\textsuperscript{95} Following arrest, detainees held in police cells and barbed wire encampments on the reserves were often tortured by the police, security forces or members of the Kenya Regiment.\textsuperscript{96} Indeed, this brutality included the “castration of men by beating the sexual organs or by electrifying,” and Paulo Muoka Nzili, party to the \textit{Mutua & Others} claim, was castrated while detained at the Embakasi detention centre in 1957.\textsuperscript{97} As noted in the Athi River petition, Mau Mau suspects were hung upside-down by their ankles for days on end, and their money, livestock, property, motor vehicles and other possessions were confiscated.\textsuperscript{98} Life in the camps was severe, as illuminated by letters smuggled out of detention facilities. A letter of protest from “more than 2,000 detainees” incarcerated on Mageta Island in Lake Victoria describes unsanitary living conditions, in which detainees were not allocated soap for personal hygiene. On Mageta Island there were no professional health workers, whilst at the Athi River Rehabilitation Camp medical negligence allegedly led to the death of Stephen Kiunjuri, whose raging fever was dismissed as “malingering.”\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{88} The Embu and Meru people were closely linked to the Kikuyu tribe and also targeted by emergency regulations.
\item \textsuperscript{89} Bennett, \textit{Fighting the Mau Mau}, 16.
\item \textsuperscript{90} Villagisation was a counterinsurgency strategy adopted in Malaya, and transposed to the Kikuyu reserves where it was portrayed as a security measure designed to protect the Kikuyu population from Mau Mau “infection,” see Carothers, “The Psychology of Mau Mau,” 20. See also TNA FCO 141/5666 for a detailed report on Detention and Rehabilitation in Malaya, compiled by the Community Development Organisation following a visit to Malaya, with recommendations for Kenya, 27 August 1953. The creation of these new villages was “an unprecedented opportunity for the introduction of liberal reform and British civilising values” according to one influential settler, see Elkins, \textit{Imperial Reckoning}, 236. The strategy’s true purpose was to destroy the supply lines issuing from bases of Kikuyu support to active Mau Mau fighters and Elkins believes that the villages were “detention camps all but in name,” and were punitive in nature, 237.
\item \textsuperscript{91} Bennett notes that there were 18,000 Home Guards in Central Province, \textit{Fighting the Mau Mau}, 13, 16.
\item \textsuperscript{92} \textit{Mutua & Others v Foreign & Commonwealth Office [2011]}, para. 42.
\item \textsuperscript{93} The petition dates from January 1954.
\item \textsuperscript{94} The King’s African Rifles was a battalion of the territorial Kenya Regiment.
\item \textsuperscript{95} TNA FCO 141/5667: A petition from more than 1,000 detainees, Athi River Internment Camp to all party Parliamentary delegation, c/o Government House, Nairobi, 20 January 1954. See also David Anderson and Julianne Weis, “Rape as a weapon of war? Sexual violence in Mau Mau Kenya,” \textit{Law and History Review} (forthcoming).
\item \textsuperscript{96} Ibid.
\item \textsuperscript{97} Ibid, and see \textit{Mutua & Others v Foreign & Commonwealth Office [2012]}, para. 37.
\item \textsuperscript{98} Ibid.
\item \textsuperscript{99} TNA FCO 141/5671: Letter from more than 2,000 detainees, Mageta Island to Argwings Kodhek, 20 November 1956. TNA FCO 141/5667: A petition from more than 1,000 detainees, Athi River Internment Camp to all party Parliamentary delegation, c/o Government House, Nairobi, 20 January 1954.
\end{itemize}
medical treatment for several days. In contravention to the basic safeguards set out by Regulation 17, floggings occurred without medical supervision. Three separate petitions testify to a culture within the camps of casual beatings where “ribs, legs and arms” were targeted by camp officers and warders. On Saiyusi Island Camp warders used “clubs and sticks, knives and whips” against detainees and a petition urged the administration to send an investigation team, so detainees could show investigators the “wounds, bruises and teeth cracks” they acquired as a result of beatings. These petitions were ineffectual because violence was authorised by the colonial administration and associated with government sanctioned detention policies, including: “screening,” “dilution,” forced labour, and the “Mwea procedure,” discussed below.

Screening

Screening was a procedure organised by the district administration, working with the British Army, the Kenyan police reserves, loyalist chiefs, and the Special Branch, through which entire villages were rounded up into cordoned off enclosures and “screened” - in other words, questioned by a screening team (usually the local police), who used the information for a variety of purposes, including to arrest the “interrogatees.” In essence, screening entailed “the extraction of information from suspects” on the assumption that “everyone was guilty until proved innocent.” To that end, startlingly high arrest rates were achieved by some screening teams; for example, 87% of 3,800 suspects screened in Nanyuki were subsequently arrested. In mid-1954 a massive screening operation dubbed “Operation Rat Catcher” was launched in Nairobi which resulted in 17,000 individuals being screened. Screening also formed an important cornerstone of the confessional system that operated within the detention camps. As mentioned, it was imperative for detainees to make full confessions in order to progress through the rehabilitative “pipeline” that buttressed the network of camps.

Klose notes that British counterinsurgency techniques of this period depended on “systematic mass torture to extract information about the covert operation of the enemy,” and that all available means were operationalised in the “battle for information.” He highlights some of the violent methods utilised during screening and interrogation in Kenya. The death of Kabebe Macharia on 15 September 1958 occurred as a consequence of an “extremely severe” beating at the hands of two Embu screeners. Following Macharia’s interrogation he was removed to the camp dispensary where he died later that evening. A post-mortem revealed the cause of death and the two screeners were

100 TNA FCO 141/5671: Letter from more than 2,000 detainees, Mageta Island to Argwings Kodhek, 20 November 1956.
101 Bennett also refers to the security forces flogging Mau Mau suspects in “Fighting the Mau Mau,” 161.
102 TNA FCO 141/5671: Letter from more than 2,000 detainees, Mageta Island to Argwings Kodhek, 20 November 1956.
103 TNA FCO 141/5667: Letter from Saiyusi Island Camp, petition to the Chief Secretary Nairobi, 22 January 1956.
104 For more on screening, see Elkins, Imperial Reckoning, 76-90.
105 Bennett, Fighting the Mau Mau, 15, 162.
106 Ibid, 163.
subsequently arrested and charged with murder. Ahead of the trial, the Governor conceded that “it seems clear that brutality was used” against Macharia. It was therefore important that rehabilitation staff were sent the message that government “will not tolerate improper methods and where these occur the most rigorous action will be taken to punish offenders.” No European officer was present during the screening, and transcripts from the disciplinary proceedings suggested that two “uncivilized African assistants” were solely responsible for the murder. These two were charged with murder, but found guilty of manslaughter and sentenced to three years imprisonment. Against this and indicative of the racialization of justice, in 1953 two European officers responsible for the death of Elijah Gideon Njeru “were acquitted of manslaughter and only fined fifty and one hundred pounds, respectively, for battery.”

A judgment from 1954 noted with concern the evidence that defendants had been subjected to torture during screening: “[f]rom this case and others that have come to our notice it seems that it may be a common practice when a person is arrested in the commission of a terrorist offence, or on suspicion of such offence, for the police to hand him over to the custody of one of these teams where, if the accounts given are true, he is subjected to a ‘softening up’ process, with the object of obtaining information from him.”

In short, the judge disclaimed confessions extracted by “unlawful violence,” and whilst several branches of the colonial administration denied responsibility for screening teams, the court found that: “[s]uch methods are the negation of the rule of law which it is the duty of courts to uphold, and when instances come before the courts of allegations that prisoners have been subjected to unlawful criminal violence, it is the duty of such courts to insist on the fullest enquiry with a view to their verification or refutation.”

Klose highlights the exemplary prosecution and conviction of a British army captain, G.S.L. Griffith, who offered incentives to his soldiers for killing Mau Mau, and had “verifiably tortured then executed prisoners,” however, as Klose observes, brutality during interrogation and detention continued unabated. In response to persistent allegations, an “Inquiry into Screening Camps and Interrogation Centres” was launched in 1954. Sir Vincent Glenday, who chaired the inquiry, interpreted his terms of reference narrowly, as signifying the creation of prospective recommendations, rather than a retrospective examination of the allegations that had already come to light. In the event, Glenday completely glossed over the violence of screening:

“Screening” is a process to obtain or extract a confession by intensive interrogation from a multiple of facts and based on a promise of clemency if the confession be judged full and a veiled threat of reprisal if it be not so considered. To avoid any possible misinterpretation of this I should explain that whereas in the beginning considerable and often undesirable pressure

111 TNA FCO 141/6332: Draft telegram from Governor (undated).
112 Ibid.
113 Even though, as Elkins points out, it is likely that the officer in charge, Hugh Galton-Fenzi, who was physically present elsewhere in the compound heard Macharia’s screams during interrogation, Elkins, Imperial Reckoning, 340.
114 Ibid.
115 Klose, Human Rights in the Shadow of Colonial Violence, 176.
117 Ibid.
118 Klose, Human Rights in the Shadow of Colonial Violence, 178.
was applied in some Camps, to-day it has generally been reduced to what is terms “the psychological fear of being arrested and taken to the Camp as a detainee.”

Glenday assumed that screening was successful due to efficacious threats and psychological pressure, but even the Commander-in-Chief of the British Army in Kenya, General George Erskine, recognised that it was a violent process, “I am quite certain prisoners were beaten to extract information.”

Invoking the diseased mind thesis, Glenday reported: “our Screening Camps are now mainly used for redemption or cleansing purposes so that a contaminated person may once again be accepted by his people as clear and ready to assist the Government if called upon to do so.” Effectively sidestepping any evidence testifying to the violence of screening, Glenday largely supported the procedure, although he questioned the validity of “re-screening,” which entailed repeated screenings (one detainee could be screened three or four times), while accepting its purported cathartic effects.

Screening continued and in a letter to Governor Baring dated November 1954 the Chief of Police, Colonel Arthur Young, highlighted the horrors of “some of the so-called Screening Camps” and that the deplorable state of affairs “should be investigated without delay.” Young suggested that “elementary principles of justice and humanity” were not being observed in these camps, however, his letter was ignored by the Governor.

“Dilution”

“Dilution” was a technique whereby a small number of “hard-core incorrigibles” were housed with cooperating detainees, who were tasked with “convincing” the non-cooperating detainees to accept the “rehabilitative” regime of the works camp and to confess their Mau Mau activities. In the surviving records, the first reference to its usage is in May 1956, when a rehabilitation officer, Major James Breckenridge, wrote to senior officers at the Gathigiriri camp, drawing attention to an allegation that “Jasiel Njau [a rehabilitation assistant] had been putting detainees in the cells for refusing to confess to their Mau Mau activities and that he had either beaten them himself or instructed Warders to do so.”

Matters came to a head when a detainee, Muchiri Githuma, succumbed to the violence meted out by Njau and a number of “cooperating” detainees on 25 January 1957. Initially charged with murder, Njau and the detainees were later convicted of assault causing actual bodily harm, and the event was portrayed as “an isolated incident” stemming from “the excessive and misguided zeal of the Rehabilitation Assistant.”

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120 TNA WO 32/15834: Letter from Erskine to Secretary of State for War, 10 December 1953.
122 For more detail on Colonel’s Young position in relation to detention violence, see s. 3 below.
123 Klose, Human Rights in the Shadow of Colonial Violence, 179.
124 Ibid.
125 TNA FCO 141/6301: Thomas Askwith, on behalf of Minister for Community Development to Attorney General, 11 February 1957.
126 TNA FCO 141/6301: Letter from Governor Baring to MCD regarding the death of detainee called Muchiri at Gathigiriri Works Camp, 4 February 1957.
127 TNA FCO 141/6301: Letter from Governor Baring to Minister for Community Development regarding the death of detainee called Muchiri at Gathigiriri Works Camp, 4 February 1957.
128 Elkins, Imperial Reckoning, 333.
129 TNA FCO 141/6301: B.A. Ohanga, Minister for Community Development letter to Baring, 7 February 1957.
Thomas Askwith, the Secretary of Community Development and Rehabilitation, wrote to the Attorney-General regarding the Githuma case, calling attention to a previous complaint raised by Major Breckenridge regarding the camp’s Community Development Officer, C.G. Hirst, and the officer in charge of Gathigiriri, Commander Rowe.\textsuperscript{130} Writing to the Colonial Secretary, the Governor indicated that Hirst was directly involved in the Githuma case, as he did not attempt to stop the improper use of force. Indeed, Hirst admitted that after Githuma “had been revived from unconsciousness,” he forced Githuma to “run up and down pursued by another detainee with a rubber strap shortly before he finally collapsed and died.”\textsuperscript{131} In any event, the Attorney General advised Governor Baring that no criminal charges could be supported by the evidence against Hirst and Rowe, but that “disciplinary proceedings... are being considered.”\textsuperscript{132}

As a method of dilution, sometimes “a bucket of water [was] thrown at the man,” which acted as “a form of shock treatment,” having a “most salutary effect.”\textsuperscript{133} On one occasion, a detainee, Kariuki Muriithi, died from hypothermia following water “shock treatment” during an attempted conversion at Athi River Detention Camp on 18 July 1957.\textsuperscript{134} The coroner revealed that Muriithi had died from exposure to the cold and seven detainees were charged with manslaughter. The accused informed the court that they were acting under the orders of the Camp Commandant and Major Breckenbridge, the Camp Rehabilitation Officer. Breckenridge admitted authorising the defendants to sprinkle water on the detainee’s face if he appeared to be falling asleep. The judge deemed the authorisation to be unfortunate, but in any case, no charges were preferred against the British officers. While following orders was not a valid defence in law, the judge concluded that it was as a mitigating factor and in judgment six of the accused were found guilty and sentenced to one month’s imprisonment.\textsuperscript{135}

\textbf{The Mwea Procedure}

Writing to the Colonial Secretary on 25 June 1957, Governor Baring commented on the “very hopeful results” that were being achieved from the dilution technique, but noted that in its application on a “small number of very difficult men [...] risks are unavoidable.”\textsuperscript{136} Apart from the Githuma killing, other incidents, such as a riot at Athi River Camp, had slowed down the progression of detainees through the “pipeline,” and to overcome these difficulties an administrative officer, Terry Gavaghan, introduced a modified dilution procedure, known as the “Mwea technique.” By this method, “hard-core” detainees arriving from Manyani camp were brought from the station in batches of twenty, with each group staggered at 15-minute intervals. Cooperating detainees accompanied the new intakes at a ratio of ten to one, and all steps “to deal with refractory detainees” were taken by staff instead of cooperating detainees. While some success had been achieved in

\textsuperscript{130} TNA FCO 141/6301: Askwith correspondence to Attorney General, 11 February 1957.
\textsuperscript{131} TNA FCO 141/6301: From Governor to the Secretary of State for the Colonies, 21 March 1957. On another occasion, Hirst discovered a detainee hanging upside-down by his ankles, and while he ordered his staff to cut the detainee down, he took no further action, ibid.
\textsuperscript{132} Ibid, and see TNA CO 1017/535: C.G. Hirst, Community Development Officer, Kenya: termination of contract, 1955.
\textsuperscript{133} TNA FCO 141/6301: Undated memo on the Rehabilitation of “Zs” by unnamed Government Ministry.
\textsuperscript{134} FCO 141/6304: Judgment of seven men charged with manslaughter of Kariuki Muriithi, 18 July 1957.
\textsuperscript{135} Ibid.
\textsuperscript{136} FCO 141/6303: Letter from Governor Baring to the Colonial Secretary, dated 25 June 1957.
securing detainee compliance, Baring considered that additional regulatory powers were required. To this end, he explained:

The resistance of these men breaks down quickly in the great majority of cases under a form of psychological shock… Gavaghan has been perfectly open with us. He has said that he can stop secret beatings such as that which occurred in the case of Jasiel Njau. He has said that he can cope with a regular flow in of Manyani “Zs” and turn them out later to the district camps. We believe that he will be able to go on doing this a very long way down the list of the worst detainees. But he can only do it if the hard cases are dealt with on their first arrival in a rough way. We have instituted careful safeguards, a medical examination before and after the arrival of the intake, the presence of the officer in charge all the time, the force being used by European staff only.¹³⁷

Either the whole procedure crafted by Gavaghan must be abandoned, argued Governor Baring, or “alternatively, we must give him and his staff cover provided they do as they say they are doing.”¹³⁸ In consequence, the Attorney General, Eric Griffith-Jones, drafted a detailed memo outlining the Mwea procedure and an associated regulation to cover the violence planned under the scheme. Undoubtedly, this legally dubious framework gave the Colonial Secretary cause for concern.¹³⁹ A draft memo in the Hanslope files refers to a ministerial visit to the Mwea camp; the visiting party included the Attorney General, the Minister for African Affairs, the Minister for Community Development, the Special Commissioner (CM Johnston), the Commissioner of Prisons, the Acting Secretary for Defence, and the District Commissioner of Embu, and the party witnessed at first hand the Mwea intake procedure.¹⁴⁰ Gavaghan accompanied the party, explaining the full particulars of the operation.¹⁴¹ After the new arrivals were hustled off the trucks by European prison and rehabilitation staff and through a barbed wire cul-de-sac catwalk:

The detainees were ordered to squat in two rows, one at each said of the catwalk. The “receptionists” from the last intake then handed out the camp clothing to each man and set about shaving their heads with the hair clippers and razors, talking to the new arrivals as they did so. The detainees were ordered to change into the camp clothing. Any who showed any reluctance or hesitation to do so were hit with fists and/or slapped with the open hand. This was usually enough to dispel any disposition to disobey the order to change. In some cases, however, defiance was more obstinate, and on the first indication of such obstinacy three or four of the European officers immediately converged on the man and “rough-housed” him, stripping his clothes off him, hitting him, on occasion kicking him, and, if necessary, putting him on the ground. Blows struck were solid, hard ones, mostly with closed fists and about the head, stomach, sides and back. There was no attempt to strike at testicles or any other manifestations of sadistic brutality; the performance was a deliberate, calculated and robust assault, accompanied by constant and imperative demands that the man should do as he was told and change his clothes.¹⁴²

¹³⁷ Ibid.
¹³⁸ Ibid.
¹³⁹ A draft of this document is contained in the Hanslope files under the new catalogue reference: TNA FCO 141/6303.
¹⁴⁰ TNA FCO 141/6303: Details of the ministerial visit are omitted from the final draft sent to the Colonial Office, see TNA CO 822/1251.
¹⁴¹ TNA FCO 141/6303: ““Dilution” Detention Camps. Use of Force in Enforcing Discipline.”
¹⁴² Ibid, exactly the same text appears in final document.
Some “defiant” individuals attempted to raise the “Mau Mau moan,” and it was reportedly essential to “prevent the infection of this ‘moan’ spreading through the camp,” and therefore the “resistor who started it was promptly put on the ground, a foot placed on his throat and mud stuffed in his mouth. A man whose resistance could not be broken down was in the last resort knocked unconscious.”143 Thereafter the new intakes were forcibly shorn, and those who resisted were beaten, similar to the violence at reception. In addition, when detainees were asked if they intended to obey the camp regime, if the detainee said “no” or “did not answer, he was immediately struck and, if necessary, compelled to obey by the use of force in the manner described above.”144 Out of this cohort, “about a dozen needed minor ‘persuasion’ and 4 or 5 pretty rough treatment.”145

The concept of integrating the technique into the intake procedure was “to compel immediate submission to discipline and compliance with orders, and to do so by a psychological shock treatment which throws off balance and overcomes any disposition towards defiance or resistance.”146 Shock treatment was justified because those “Z” category detainees arriving from Manyani were “particularly ugly customers” who were impervious to “orthodox methods of non-violent persuasion,” according to the Attorney General 147 Indeed, he added, they were the type who understood violence, when there was no appreciable response to “gentler treatment.”148 Serious injury was to be avoided, and to this end, the Attorney General explained how violence should be delivered in practise.149 Placing responsibility for Mwea procedure beatings in the hands of European officers was supposed to mitigate the consequences of dilution. Griffith-Jones was concerned about the impact the administration of violence would have on the European officers involved, and urged the Colonial Secretary to support these officers “charged with this most difficult, dangerous and unenviable task.”150 To convey his point, the Attorney General referred to the Prison Rules of England, 1949, and read an implied power to violence in rule 34(1) of the English code, to frame the following draft regulation:

Discipline and order shall be maintained with firmness. Force shall not be used in dealing with detained persons save when necessary to enforce discipline and preserve good order, and no more force than is necessary shall be used. Moreover, save by or under the personal direction of the officer-in-charge or, in the case of his absence or incapacity, the senior prison officer present in the camp, force shall not be used under this regulation except when immediately necessary to restrain or overpower a refractory detained person, or compel compliance with a lawful order or to prevent disorder.151

Thomas Askwith witnessed the moderated intake procedure on 11 July 1957, which was based on the Attorney General’s draft regulation. A number of the procedures were “substantially the same,” however, there were some additional and troubling practices

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143 Ibid.
144 Ibid.
145 Ibid, Exactly the same text appears in final document.
146 Ibid.
147 Ibid.
148 Ibid.
149 “Serious injury must be avoided; kicking with boots or shoes should not be permitted; vulnerable parts of the body should not be struck, particularly the spleen, liver and kidneys; accordingly any blows should be confined to the upper part of the body and should avoid any area below the chest, front or back,” Ibid.
150 Ibid.
151 TNA CO 822/1251: “‘Dilution” Detention Camps. Use of Force in Enforcing Discipline.”
which violated the Attorney General’s direction that injurious force should not be used, and Askwith “saw one man lifted up by an Officer to shoulder height and thrown down on the ground on his back three times.”\footnote{TNA FCO 141/6303: Rehabilitation – Mwea Camps, report by Thomas Askwith, Provincial Secretary for Community Development, 12 July 1957.} Blows to the head were frequent, a practice which was explicitly prohibited in the Attorney General’s directive: “one detainee at Mwea resolutely refused to respond in spite of a most drastic beat-up. He was thereupon dragged to the cells where Mr. Gavaghan informed me he would be subjected to third degree methods until he did, in fact, obey all orders given. The measures adopted were to be kept awake all night, having water thrown at him and to be beaten up on a variety of pretexts.”\footnote{Ibid.} Against this, it is notable that Askwith’s report, warning about the dangers of the Mwea procedure, was written only six days before Kariuki Muriithi died in his Gathigiriri cell after being subjected to water “shock treatment.” Askwith remained unconvinced of the technique’s purported “successes,” questioning whether a state of “cowed submission” could be long-lasting and adding that “the methods employed are the negation of everything that rehabilitation has stood for so far.”\footnote{TNA FCO 141/6303: Rehabilitation – Mwea Camps, report by Askwith, 12 July 1957.} Given the number of staff and detainees involved in the procedure, Askwith warned that it might become public knowledge, which would clearly be disagreeable to the British public.\footnote{Ibid.} There is no evidence that Askwith’s report ever reached the Colonial Office in Whitehall, as he was quickly and quietly marginalised by the Kenyan administration.\footnote{As a result of going against the tide Askwith’s colonial career was over and his contract terminated in December 1957, see From Mau Mau to Harambee: Memoirs and Memoranda of Colonial Kenya (Cambridge: Cambridge African Monographs, 1995).} Terry Gavaghan wrote a robust defence of his techniques, contesting the substance of the report and accusing Askwith of encouraging his “dirty work,” because he allegedly made the following comment, “[d]on’t think I am squeamish at all about this,” during the camp visit.\footnote{TNA FCO 141/6303: “Report on Mwea Intake by Secretary for Community Development,” addressed to FA Loyd, Provincial Commissioner, Nyeri, 22 July 1957.}

In the meantime, the Colonial Secretary was reluctant to approve Griffith-Jones’s regulation and the matter triggered great debate amongst colonial legal advisors in London. Shortly afterwards, Governor Baring discussed the matter with senior legal advisors at the Colonial Offices and signalled the possibility that he would accept an amended version of the Mwea procedure. Firstly, detainees who refused a lawful order, such as the requirement to move from one compound to another or to change their clothing, could be compelled to do so by means of “overpowering force,” for which regulatory powers were already in existence. Secondly, committing a major offence, such as defying a lawful order could attract on the spot corporal punishment (caning not exceeding twelve strokes).\footnote{TNA CO 822/1251: Note of a meeting by J.I.F. Buist, 16 July 1957.} Extant summary punishment procedures for dealing with recalcitrant detainees could be invoked.\footnote{The Emergency (Detained Persons) Regulations 1954, s. 17(a).} When the Colonial Secretary questioned whether these powers would be sufficient in light of the critical task of maintaining the flow of detainees through the rehabilitation system, the Governor responded that while the “treatment proposed would not administer the same psychological shock to the detainees,” it was “adequate to be
A telegram was duly dispatched to Kenya, and the Acting Governor, Richard Turnbull, circulated instructions for the modified procedure to the Commissioner for Prisons, the Ministry for Defence, the Ministry for African Affairs, and the Attorney General, specifying that the use of “beating force” was to be abandoned forthwith and “overpowering force” used instead. Power to confirm corporal punishment was additionally delegated to the Assistant Commissioner and the Deputy Commissioner of Prisons, one of whom had to be present at each new intake. In this manner, the sentence of corporal punishment could be confirmed on the spot. In a sense, modifying the regulatory framework of detainee “corporeal violence” was an experiment with disciplinary techniques and technologies of governance that aimed to maintain colonial power in the camps.

On the whole, the modified Mwea procedure had the unintended consequence of slowing down the passage of detainees through the pipeline because the officer in charge had to formally confirm and oversee the execution of corporal punishment on individual detainees. To expedite the process, non-cooperating detainees were physically separated from cooperating detainees and punished en masse. The Governor met with Gavaghan, John Cowan (the senior prison officer in charge of the Mwea camps), and several government ministers at Government House on 6 August 1957 to tease out the finer details of the modified procedure. The Governor highlighted the following points, “the force to be used should be overpowering force only,” and that “in order to defend the position it was very important that over a period of, say three months, the percentage beaten following orderly room proceedings should not exceed about 10%,” and finally, that “we should keep up-to-date each month a dossier showing the results obtained with all detainees taken into the Mwea and particularly with those who at the time of intake had been beaten.” Cowan affirmed the implementation of the procedure, describing the intake of detainees at Mwea camp: “the first batch of 20 arrived at Mwea camp at approximately 12.15pm and immediately offered strong resistance to being shaved and clothed. Considerable overpowering force was necessary in probably 15 cases out of 20 and the final instruction to proceed to the compound was only accepted after frequent and aggressive repetition.” “Rough methods” were similarly required in dealing with three subsequent batches, but only two men received the official punishment. There was a gradual disjuncture between some of the safeguards that were supposed to be applied to the modified technique, and their actual implementation in practise. A Special Branch Officer, I.P. Kelloway, noted that detainees who wished to make a confession were immediately screened, while:

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160 TNA CO 822/1251: Note by W.A.C. Mathieson, 18 July 1957.
162 Ibid.
164 TNA FCO 141/6303: Meeting at Government House, 8 August 1957. In attendance at this meeting were Governor Baring, John Cowan, Terry Gavaghan and government ministers.
165 Ibid.
166 TNA FCO 141/6303: Letter to Commissioner of Prisons from Cowan dated 10 Aug 1957.
167 Ibid, in a subsequent report from Cowan, the Commissioner of Prisons, “No resistance was encountered from the Gathigiriri intake with the exception of the first man into the compound who instantly fought like a fanatic. This man was dangerous, striking both officers and warders, and had to be severely restrained apart from receiving twelve strokes.” The man who received the beating remained “uncompromising,” 16 August 1957.
The remainder are asked individually if they have taken an oath. If they deny having taken an oath they are given summary punishment which usually consists of a good beating up. This treatment usually breaks a large proportion. If this treatment does not bear fruit the detainee is taken to the far end of the camp where buckets of stones are waiting. These buckets are placed on the detainee’s head and he is made to run around in circles until he agrees to confess the oath.\footnote{168}

Kelloway observed that approximately 80 per cent of the new detainees confessed on the day of their arrival, while others took a day or so to comply. He further remarked that: “at Thiba Works Camp the treatment usually consists of beating the man with the regulation baton which to date and to my knowledge, has resulted in one person being placed in hospital with broken arms and a leg, and another person suffering a perforated ear-drum. At Gathigiriri one person received injuries but to what extent I have been unable to ascertain as I was not present. Any other injuries that may have been caused have not been brought to my notice.”\footnote{169} When the Provincial Commissioner learned of Kelloway’s report, he advised against investigating the matter, because “an investigation would have a strong adverse effect on the morale of officers at the Mwea Camps, who, in any event had a most difficult and distasteful job to perform and that the report was untrue or at best greatly exaggerated in certain essentials.”\footnote{170} In the end, “overwhelming force” was in practice no different from “beating force,” the only difference was semantic; on 12 September 1958, a detainee arriving at Agathi camp from Nyeri Prison died after undergoing the modified Mwea procedure. A post mortem revealed significant external injuries and the cause of death was recorded as a pulmonary embolism.\footnote{171}

**Forced Labour & the Cowan Plan**

The United Kingdom was instrumental in garnering support for the 1930 ILO Forced Labour Convention, which had the effect of immediately prohibiting all forms of forced labour for private purposes.\footnote{172} The primary task of the 1930 Forced Labour Convention was to eliminate the conditions under which individuals were coerced into slavery or slave-like situations.\footnote{173} Daniel Maul notes that there were loopholes in the Convention, such as with respect to military service, with regard to penal servitude following criminal conviction, and service that could be considered as part of the “normal civic obligations of citizens.”\footnote{174} The following exemption to the prohibition on forced labour found in article 2(2)(d) of the 1930 Convention was relied upon by the British government in rationalising its forced labour...
policy “any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population.”  

Indeed, the limited impact of ILO norms to the colonies has been critiqued by Maul who suggests that separate and less stringent rules applied to the colonies before the Second World War, and further that “neither the internal power structures of the ILO nor the thinking of its officials permitted the application of the regular canon of norms to the colonies.” Following the war, the self-determination ambitions of colonial states were, in principle, supported by the United States, and therefore post-war exploitation of the colonies had to be carefully justified by the United Kingdom. During a Governor’s emergency meeting on 16 April 1953, a finance official highlighted the twin effect of making detainees work “from the point of view of morale, as well as finance.” The Colonial Secretary, Oliver Lyttelton, quickly authorised a regulation which permitted the extraction of labour from detainee suspects held in camps across the colony, powers which were contained in the Emergency (Detained Persons) Regulations 1953. The ordinance was subsequently modified in an effort to comply with international law, but on the whole these efforts were cosmetic and completely disregarded the illegal violence used to compel detainees to work. Forced labour became a flashpoint of violence between uncooperative detainees refusing to work and the camp authorities who used “compelling force” to enact the policy. Indeed, the implementation of the scheme resulted in detainee deaths, most notably the notorious 1959 Hola Massacre when eleven detainees were killed. A closer examination of declassified migrated archives reveals several other violent incidents associated with forced labour prior to the events of 3 March 1959.

Serious allegations contained in a detainee petition from Manyani Special Detention Camp were addressed to the Secretary of State for the Colonies, which called on the government to investigate: “the many deaths which occurred among the detainees who catered for the digging of the Embakasi Air Field. It is a fact that while the detainees performed the task they suffered malicious and brutish beatings by the warders, and this brought about an average of three ‘on the spot’ deaths per day, during 1953-1954.”

H.F.H. Durant, the Officer in Charge of Manyani Special Detention Camp, categorically denied the allegations of brutality, which, in his estimation, were a “collection of wild and misleading generalities without support by any concrete evidence” and “gross and unjustified allegations” against European officers. As it turns out, a 1955 memo by the Ministry of Defence on the “Movement of Detainees from Reception Centres to Works

175 CO29 - Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour, (Entry into force: 01 May 1932) Adoption: Geneva, 14th ILC session (28 Jun 1930), article 2(2)(d).
176 Maul, Human Rights, Development and Decolonization, 27.
177 Cooper, Decolonization and African Society, 112.
178 TNA FCO 141/5666: Governor’s Emergency Meeting, Memo for the Member of Legal Affairs, 16 April 1953.
179 TNA FCO 141/5666: Memo on the forced labour regulation by R.I. Guthrie, Assistant Legal Draftsman, 30 April 1953.
180 TNA FCO 141/5667: Petition sent from J.G. Kariuki and S.M. Macharia from Manyani Special Detention Camp to the Secretary of State for the Colonies, April 1956.
181 TNA FCO 141/5667: HFH Durant to the Commissioner of Prisons, 12 May 1956.
Camps” unequivocally states that certain development projects were “planned on the assumption that free convict labour [would] be available,” and the Embakasi airport development was one such project.\(^{182}\) The memo went on to note that in order to maintain the labour force for “essential projects such as Embakasi airport, it will be necessary in the next few months to transfer convicts from a number of the more remote prisons and prison camps.”\(^{183}\) That is to say, having served their sentences ex-prisoners were issued detention orders and forced to work on these projects for nominal remuneration, “paid from Emergency funds.”\(^{184}\) It was estimated that about half of the 6,500 Kikuyu prisoners due to be released in 1955 would be served detention orders, and immediately re-assigned to these “essential projects.”\(^{185}\) A letter composed by Mageta Island detainees in November 1956 remarked that “50 detainees were charged of refusing accepting [sic] work at the pay of 8/- per month and were sentenced to 2 years hard labour,” and while the Commissioner of Prisons contested other allegations contained therein, this specific accusation was ignored.\(^{186}\)

There may have been some truth to the allegation that detainees who refused to work at Mageta Island were criminalised for disobedience and thus received additional penal servitude. There was one such reported incident at the camp in June 1956 when detainees refused to work at bush clearing.\(^{187}\) Up until that point, refusing to work was deemed a minor offence, a violation which could only be punished by a verbal reprimand, reduced diet, denial of privileges, or solitary confinement for up to seven days. The Kenyan administration sought to re-define disobedience as a major offence, punishable by corporal punishment.\(^{188}\) Repeat offences, under Section 23 of the Regulations, could result in “prosecution before a subordinate court and on conviction [...] imprisonment for a term not exceeding two years.”\(^{189}\) W.A.C. Mathieson, a senior legal advisor with the Colonial Office, realised that “in effect, therefore, the Governor is asking for authority to employ corporal punishment to break this strike.”\(^{190}\) He sought counsel from Colonel Heaton, a member of the Colonial Office’s Advisory Committee on the Treatment of Offenders and a former Commissioner of Prisons in Kenya, who, while doubtful as to whether punishment would expedite the forced labour scheme, considered that “discipline must be reasserted and that it would be wrong to withhold the use of this weapon from those in Kenya who have the

\(^{182}\) An allegation submitted by Captain Law, a former officer in the prisons systems refers to “alleged beatings of Embakasi convicts in March 1958 and implies that convicts were merely refusing to come out and were not violent and that excessive forces was used by Turner, Haig-Thomas, Carnie, Bird and Morton. There was no resistance and prisoners could not defend themselves – “it was just a murderous onslaught”.” It is not clear whether Law was referring to detainees working on the Embakasi project, see TNA FCO 141/6307: Telegram from Colonial Secretary to Governor, 29 September 1959.

\(^{183}\) TNA FCO 141/6520: Movement of Detainees from Reception Centres to Works Camps, Council of Ministers on the Resettlement Committee. Memo by Ministry of Defence, 5 May 1955.

\(^{184}\) It is unclear from the Ministry of Defence memo whether these individuals had been convicted of ordinary crimes or terrorist related offences, see ibid.

\(^{185}\) Ibid.

\(^{186}\) TNA FCO 141/5671: A letter on behalf of 2,000 detainees at Mageta Island, 20 November 1956.

\(^{187}\) TNA FCO 141/6322: War Council, the Emergency (Detained Persons) Regulations, 1954, Memo by the Minister for Defence.

\(^{188}\) The new regulation covered: “Disobedience in such manner as to show wilful defiance of authority, of any order lawfully given,” in Ibid.

\(^{189}\) Ibid.

\(^{190}\) TNA CO 822/802: Memo by W.A.C. Mathieson, 27 August 1956.
Mathieson accepted this view, and advocated for the “authority to use this weapon.” The next day the Colonial Secretary sent Governor Baring a telegram authorising the creation of the additional major offence; the amending regulation was published on 4 September and on 10 September strikers at Mageta Island were informed of the new powers. Disciplinary action was taken against the detainees who persistently refused to work, and a telegram from Governor Baring to the Colonial Secretary indicates that fifty Mageta Island detainees who refused to work were to be prosecuted under Regulation 23, corroborating the detainees’ complaint mentioned above.

The matter did not end there. The Mageta Island petition alluded to a violent incident during which detainees were beaten, “shorts [sic] were fired in one of the camps holding 800 men, and 13 people were wounded.” By contrast, the official version recounted a story of violent detainees armed with “stones and other materials” attacking a prison party, and in this narrative, Greener guns were only discharged so that the party could withdraw. The “belligerent” detainees were deprived of water and food for a number of days, after which point a military squad went into the compound to “disarm” them, and during the course of the operation “some 30 to 40 detainees suffered from minor superficial injuries, of whom some 22 had their cuts subsequently stitched by the Medical Officer. At the same time 15 ringleaders were extracted from the compounds and placed in the small cells where disciplinary action under Section 17 of the Emergency (Detained Persons) Regulations, 1954 is to be undertaken.” The Commissioner of Prisons sanctioned the use of corporal punishment, not only on the “ringleaders,” but he also authorised its use on the remaining 860 detainees.

A letter written by Mbirua Githua smuggled out of Aguthi camp to a British MP alleged that 87 detainees had been badly beaten upon reception to the camp on 24 October 1958. A former officer in charge of the camp wrote a most forthright account of the intake when “some Kikuyu detainees started to boo and taunt those who had submitted confessions to the Screening teams,” and he realised that “something had to be done,” and that they had “to be brought under control, and as they would not listen to commands from me or the camp staff I called in the Special Platoon to deal with them. These warders used batons on the more aggressive detainees, and inevitably some were badly bruised. The doctor considered that a few men, (I think, four), should be treated at the camp dispensary.” Men who refused to work the following day “received” light blows with batons, while on the third day the “recalcitrants” were put on half rations. The strike lasted until 22 November 1958 when thirteen “non-cooperating detainees” were sent to Karaba.

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191 Ibid.
192 Ibid.
193 TNA CO 822/802: Telegram from Colonial Secretary to Governor of Kenya, 28 August 1956.
194 TNA CO 822/802: Telegram from Governor Baring to Colonial Secretary, 19 September 1956.
195 TNA CO 822/802: Telegram from Governor Baring to Colonial Secretary, 3 October 1956.
196 TNA FCO 141/5671: A letter on behalf of 2,000 detainees at Mageta Island, 20 November 1956 [the date on the letter precedes an event described therein].
198 Ibid.
199 Ibid.
200 TNA FCO 141/5662: This letter is mentioned in a memo by D.W. Conroy, Attorney General, 27 May 1959.
201 TNA FCO 141/5662: Letter from Brooks to the Minister of Home Affairs, 13 May 1959.
Nine of these detainees “confessed” and were returned to Aguthi, where they subsequently retracted their confessions. Permission was granted to cane these nine men; eight of whom were caned on 16 December. The officer in charge of the camp admitted certain irregularities as regards the punishment:

I must also testify to the fact that in some cases more than the stipulated numbers of strokes were given. Moreover, previous experience had taught me that punishment with the regulation prisons case had no effect other than to make the detainees mock at the authorities and deliberately try to incur more punishment to show how little they cared. I mentioned this to my superior officers on occasions before this incident occurred and suggested that, if corporal punishment was approved, it was presumably intended to make some real impression and therefore something other than the kind of cane which was used to punish me at school should be employed, namely a “kiboko.” I gathered the impression that everyone agreed with me and that is why a “kiboko” was used and not the regulation cane ordered in the signal from the SSP. A member of the staff entered the punishment as twelve strokes in the register before the beating. When I went to sign the register after the beating it was agreed not to alter the entry.202

The Attorney General instituted a Criminal Investigation Department (CID) probe into the caning because there was no inquiry prior to sentencing, a regulation cane was not used, and excessive strokes had been delivered.203 However, instead of criminal charges being taken against the officer who authorised the use of the “kiboko,” “severe disciplinary action” was instituted by CM Johnson, the Minister for African Affairs.204 In a sense, defining the action as a “disciplinary violation” sabotaged the CID inquiry and the criminal investigation was subsequently abandoned.205

The violence of the state in enforcing the forced labour policy was laid bare when detainees persistently refused to work at Hola detention camp. In a meeting at Government House, the Permanent Secretary of the Ministry for African Affairs stated that Hola received “the dregs of the Mau Mau barrel.”206 In receiving these “violent men from Manyani” and “persons unacceptable in the Central Province,” the Permanent Secretary reminded D.A. Marsden, the District Officer in charge of the settlement camps at Hola, that “certain persons are always ready to listen to complaints from detainees, even though the statements made are false and exaggerated. It is essential that there should be no grounds for any legitimate complaint. Prisons rules and detention camp regulations must be followed precisely.”207 However, in August 1958 a number of detainees were “beaten because they refused duty,” resulting four detainees being hospitalised.208 This incident would have been assigned to the annals of historical amnesia, were it not for the killings at the camp later in March 1959.

202 Ibid.
204 Ibid.
205 TNA FCO 141/5662: Letter from C.M. Johnston to the Minister for Legal Affairs, 3 June 1959.
206 TNA FCO 141/5653: Ministry of Defence minute of a meeting held at Government House, 1 December 1958.
207 TNA FCO 141/5653: Directive from Permanent Secretary to the District Officer i/c Settlement Camps, Hola, D.A. Marsden.
208 TNA FCO 141/5662: The medical register at the hospital recorded that Mutai Theuri, Mbuthia Thairu, Ndeqwa Gacheo, Mwema Kinuthia were: “Beaten by squad for refusing duty.” This incident occurred towards the end of August 1958.
From the declassified archives, it appears that there were two key factors which led to the creation of the Cowan plan, the forced labour policy implemented at Hola on 3 March 1959. Firstly, the Commissioner of Prisons, J.H. Lewis, noted with frustration on 5 February 1959 that there were a number of “apparently able-bodied men” “malingering” about Hola, refusing to work outside the camp.\(^{209}\) A second source of frustration for camp officials was that even the detainees who were working (“out on *shamba*”) were adopting a “go slow” policy and were not achieving their designated labour targets.\(^ {210}\)

The Cowan plan would tackle both of these problems; summary punishment, that is on the spot corporal punishment, was the preferred solution for dealing with the “go-slow” policy, but ensuring “absolute obedience from the 66 recalcitrant” detainees refusing to work required a more sophisticated strategy.\(^ {211}\) On the selected day “difficult cases” were to be divided into four smaller groups and each group locked into an A-frame building. A special platoon was to target the first group, enter their compound and usher them into the catwalk, at which point the officer-in-charge would order the detainees to work on a labour scheme “requiring no tools or implements... it is assumed that the party would obey this order but should they refuse they would be man-handled to the site of work and forced to carry out the task.”\(^ {212}\) Each group in turn would be removed “until all were working,”\(^ {213}\) and Cowan insisted that “obedience must be maintained by more firmness on the part of the staff,” but that this did not “imply a brutal and harsh regime but a high standard of personal example and insistence always on immediate obedience.”\(^ {214}\)

Not everyone supported Cowan’s plan, and less than a week later, the Commissioner of Prisons wrote to the Kenyan Minister of Defence, warning that the plan: “would mean the use of a certain degree of force in which operation someone might get hurt, or even killed.”\(^ {215}\)

### The Hola Massacre

Despite the warnings, on 3 March 1959 a group of “hard-core” detainees who persistently refused to work were savagely beaten by warders implementing the Cowan plan at Hola detention camp. Eleven detainees were killed, and dozens more were hospitalised with severe injuries.\(^ {216}\) A coroner’s inquest revealed some of the injuries sustained, such as: “one received a fractured skull... another’s brains were damaged, one had a fractured jaw and two had fractured forearms.”\(^ {217}\) The first official account to emerge can be seen as a complete whitewash. W.M. Campbell, Assistant Commissioner of the Prison Service, reported that it was “the opinion of all with whom we spoke that the compelling exercise was in no way connected with the cause of death of the detainees,”\(^ {218}\) and the government

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\(^{209}\) TNA FCO 141/5658: Discipline – Hola Closed Camp, letter from J.H. Lewis, Commissioner of Prisons to Officer in Charge at Hola, 5 February 1959.

\(^{210}\) TNA FCO 141/5658: Situation Report from Hola camp to the Commissioner of Prisons, 13 February 1959.

\(^{211}\) TNA FCO 141/5658: Notably, the work scheme manager, Mr. Filgate, “asked to be dissociated entirely” from Cowan’s plan, Situation Report from Hola camp to the Commissioner of Prisons, 13 February 1959.


\(^{213}\) Ibid.

\(^{214}\) Ibid.

\(^{215}\) TNA FCO 141/5658: Note from Lewis, Commissioner of Prisons to Minister of Defence, 17 February 1959.

\(^{216}\) Elkins, *Imperial Reckoning*, 347.

\(^{217}\) TNA CAB 129/97 C92: Memo from the colonial secretary to the Cabinet, 2 June 1959, para. 13.

\(^{218}\) TNA CAB 128/33/CC32: Cabinet minutes, 20 June 1959.
issued a press statement claiming that “the deaths occurred after [the detainees] had drunk water from a water cart.”\textsuperscript{219} When W.H. Goudie, the inquest magistrate, revealed that the deaths “were due to shock and haemorrhage due to multiple bruising caused by violence,” the official press release was exposed as untrue.\textsuperscript{220}

Despite the gravity of the case, the magistrate was unable to identify those responsible, and he expressed the view that some of the violence directed at the detainees was justifiable and lawful.\textsuperscript{221} In deciding not to prosecute, the Attorney General relied on similar arguments, citing numerous ordinances and standing orders that permitted the use of force against detainees in limited circumstances.\textsuperscript{222} He argued that unlawful violence could not be established in this case due to the lack of reliable evidence and the failure of witnesses to cooperate with the CID investigation. Blame shifted to the survivors, who were categorised as uncooperative, unreliable, and their testimony regarded as “valueless.”\textsuperscript{223} Unsurprisingly, the investigation stalled and the European officers and African sub-wardens avoided criminal prosecution.

A disciplinary commission, the Conroy Committee, was subsequently established and it reported that the Governor was concerned that “a further formal enquiry might have damaging effects on the morale of the Kenya Prison Service,” and advised that no further judicial action was needed.\textsuperscript{224} The only resulting “sanction” was that the camp commandant, G.M. Sullivan, was forced to retire without any loss of gratuity, the Commissioner of Prisoners, John Lewis, was forced to retire six months early, while Walter Coutts, Sullivan’s deputy, was absolved of any wrongdoing in the matter.\textsuperscript{225} Several British MPs argued that responsibility for the events lay above Sullivan and Coutts, with the government of Kenya, Governor Baring, and ultimately with the Secretary of State for the Colonies. The failure of the enquiry to “pin down responsibility all along the chain of command” was criticised by Ronald Robinson, MP, who believed that it was a breach of ministerial responsibility to permit junior officers to shoulder the blame for this atrocity.\textsuperscript{226} Criminal charges were not pursued, he argued, because “quite instinctively, sincerely and genuinely, without even being aware of it, hon. Members opposite do not believe that an African life is as important as a white man’s life.”\textsuperscript{227} This sentiment was echoed by the Conservative MP Enoch Powell, who departed from the Tory party line, and criticised the

\textsuperscript{220} TNA CAB 129/97 C92: Memo from the colonial secretary to the Cabinet, 2 June 1959, para. 15.
\textsuperscript{221} Ibid, para. 14.
\textsuperscript{222} “Section 18 of the Prisons Ordinance authorises the use of weapons, where necessary, by prison officers against detainees escaping or attempting to escape, engaged in a combined outbreak or using violence to any prison officer or other person. Prison Standing Orders forbid the striking by prison officers of persons in custody save to the extent necessary in defence or to overcome violence or resistance to escort. The Emergency (Detained Persons) Regulations, 1954, prescribe the circumstances and manner in which corporal punishment may be applied to detainees for offences against discipline,” Secret memo detailing the attorney general’s reasons for deciding not to prosecute, TNA CAB 129/97 C92, annex I, para. 9.
\textsuperscript{223} Secret memo detailing the attorney general’s reasons for deciding not to prosecute, TNA CAB 129/97 C92, annex I.
\textsuperscript{224} TNA CAB 128/33/CC32.
\textsuperscript{225} Walter Coutts was a district commissioner and deputy to Sullivan, the Camp Commandant. Hansard, House of Commons, vol. 610, col. 181, July 27, 1959.
\textsuperscript{226} Ibid, col. 216.
idea of African standards for Africa or lower standards of justice than those applicable in Britain. Powell argued that it was inappropriate to:

[...]pick and choose where and in what parts of the world we shall use this or that kind of standard… We must be consistent with ourselves everywhere. All Government, all influence of man upon man, rests upon opinion. What we can do in Africa, where we still govern and where we no longer govern, depends upon the opinion which is entertained of the way in which this country acts and the way in which Englishmen act. We cannot, we dare not, in Africa of all places, fall below our own highest standards in the acceptance of responsibility."228

Finally, Barbara Castle, a great advocate of detainee rights in Kenya, recognized that to accept the government’s recommendations would result in "one of the gravest miscarriages of justice in British colonial history."229 In the end, the opposition made a tactical error when it failed to submit a motion on the question of holding an independent enquiry into the massacre, and thus no vote was taken after the debate allowing the government to evade accountability.230 While an internal review (the Fairn Commission) was established to investigate the procedures along the pipeline, similar to the Glenday Inquiry, it had no mandate to investigate past incidents, but could only make prospective recommendations.231

Accountability for Abuses?

Recently, in the Mutua & Others case, the Foreign and Commonwealth Office claimed that security force indiscipline and allegations of ill-treatment during the Emergency has already been investigated.232 The government argued that there were no outstanding issues with respect to state sponsored violence in British Kenya, so, providing the court with a list of historic prosecutions. In March 1954, Colonel Arthur Young, on secondment from the city of London, was instated as Police Commissioner of Kenya to tackle the culture of impunity. Young, together with Donald MacPherson, head of the CID, attempted to prise open a space for CID enquiries into abuses committed by the police, the army and the Kenyan Home Guard.233 The first of these cases, the Wamai case, which Young and MacPherson prosecuted, is worth examining in more detail because it points to executive interference in what should have been a matter for the judiciary.

The case against Muriu Wamai, a Home Guard headman, and his five co-defendants stemmed from the deaths of two Kikuyu farmers who were beaten and tortured at the Ruthagathi Home Post. In short, the two Kikuyu refused to confess Mau Mau allegiance and were taken outside the town and executed.234 Initially Wamai claimed their deaths occurred as a result of a shootout between Home Guards and Mau Mau insurgents, although evidence given by former detainees indicated that detainees were routinely beaten at the

227 Ibid, col. 220.
228 Ibid, col. 237.
229 Ibid, col. 222.
232 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], witness statement of David Anderson.
Home Guard post. At any rate, the European officers compelled to give evidence supported Wamai’s account of events. But, on the third day in the witness stand Wamai dramatically changed his plea and gave a full confession. The British officers were well aware that the Home Guard post was a “screening centre” where torture was institutionalised and, indeed, Wamai had been encouraged to cover up the incident by a British District Officer. Alterations to the Home Guard post logbook concerning the prisoners were made after the killings. Wamai’s confession implicated five British officers and an African chief in the subsequent conspiracy.

Issuing his judgement on 4 December 1954, Justice Cram found Wamai and his co-defendants guilty of murder and the judge, a former prisoner of war, criticised the conduct of European officers in the South Nyeri district. Justice Cram stated that unchecked arbitrary powers contributed to a barbaric detention and interrogation system that was illegal. Contrary to the officials’ claim that the allegations of murder were part of a Mau Mau plot to discredit loyalist Home Guards, Justice Cram found “the only plots revealed by their evidence [the European officers] is a plot to execute innocent prisoners, and then a plot to defeat the ends of justice, and maintain the barbarous tortures of Ruthagathi... They were a prey [sic] on the countryside...” Justice Cram recognised that it was a short step from brutalised beatings and torture to “taking life without qualm.” Governor Baring attempted to suppress publication of the judgment; however copies were leaked, causing quite a stir in the United Kingdom. An enquiry resulted, presided over by the conservative judge, Justice Holmes, who concluded that Justice Cram had “grossly exaggerated the problems.” Many were dissatisfied with the Holmes report, including the President of the East African Court of Appeal, who wrote to Governor Baring to request that the first section of the report, which gave the impression that outstanding issues from the Wamai case had been settled, be withheld. The Governor agreed to this proposal, which, according to Anderson, was a “tacit admission that the matters raised by Justice Cram in his judgment in the Ruthagathi case had not in fact been properly investigated by the Kenya administration, despite the establishment of a full judicial enquiry.”

At every level the CID experienced obstruction in their attempts to further criminal prosecutions against colonial staff. The colonial government’s approach was to maintain the detention pipeline and security force morale, even at the expense of justice in individual cases. Colonel Young sent Governor Baring a series of communications

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235 Ibid, 301.
236 Ibid, 302.
237 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], appendix C, para. (i).
238 Two European officers committed perjury and one gave a false statement to the court, Anderson, Histories of the Hanged, 303.
239 Criminal Case No. 240 of 1954 of HM Supreme Court of Kenya at Nyeri.
240 Ibid, 8.
241 Ibid.
242 Ibid.
243 Ibid.
244 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], appendix C, para (i).
246 Ibid.
247 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], witness statement of David Anderson, s. 16.
248 Ibid.
between November and December 1954, highlighting the difficulties he was encountering, but this correspondence was unacknowledged and in frustration he resigned from his post pointing to “the continuance of the rule of fear rather than that of impartial justice.”

At the centre of his predicament, were “malpractices committed against Mau Mau suspects” which were “condoned by officers of the Provincial Administration,” and in his resignation letter Young stated that the Governor Baring himself had attempted to interfere in the prosecution of one of these cases. Young’s letter was not made public and he was forced to tone down the language contained therein. Later, Young recalled how he had sent:

 [...] an official report to HE [His Excellency] expressing my apprehensions in writing, with the belief that supporting evidence would soon be forthcoming. I also requested that he should take an initiative in administration of action which would indicate his own repugnance of brutality committed by security forces and do what he could to bring this to an end. I received no acknowledgement of this appreciation, far less an answer to it, in spite of a number of reminders.

On 18 January 1955, the government announced a general amnesty for all violent actions committed by both the security forces and “Mau Mau surrenderers” up until that point. On paper the amnesty was accessible to insurgents, however, to avail of it the rebels had to emerge from hiding and surrender their arms. Overall, it had the effect of preventing CID investigations into security force malpractice from coming to trial. The amnesty perpetuated the lack of security force accountability, and according to Elkins: “the blanket pardon left little doubt that the colonial government, including Churchill and his cabinet, who discussed and approved the amnesty, were wholly willing to abandon the enforcement of law and order and to subordinate the basic human rights of Mau Mau adherents in order to maintain the support of the security forces and, ultimately, uphold British colonial rule in Kenya.”

Today blanket amnesties are inimicable to international law principles, such as the duty to prosecute and punish gross human rights violations and the fulfilment of a right to a remedy. However, at that time, acts of indemnity had historical precedent in England, with Dicey admitting that while “it is the legalisation of illegally,” such a statute essentially is law, and could only be questioned if indemnification pertained to, for example, “reckless cruelty to a political prisoner,” or “the execution of a political prisoner.” However, there is a deep ambivalence in Dicey’s legal scholarship, whereby he largely abandoned the principles of non-discrimination and equality before the law in his

249 Ndiku Mutua and Others v The Foreign and Commonwealth Office [2011], appendix C, para (j).
250 This case was the attempted prosecution of Home Guard Chief Mundia, Klose, Human Rights in the Shadow of Colonial Violence, 179-180.
252 Bennett, Fighting the Mau Mau, 27.
253 Anderson, Histories of the Hanged, 308.
254 Elkins, Imperial Reckoning, 280.
255 Louise Mallinder, “Can Amnesties and International Justice Be Reconciled?” The International Journal of Transitional Justice 1 (2007): 210, 213. Mallinder recommends prosecuting the most guilty perpetrators of the worst atrocities, while conditional amnesties for lower level offenders may be commensurate with international law, treaty and custom.
wholehearted support of Irish coercion laws, so his exceptions to indemnification probably would not have stretched to colonial counterinsurgency law-making.\textsuperscript{257}

Several judgments of the East African Court of Appeal queried whether the unlawful violence of detention could have continued “without the condonation [sic] of the authority.”\textsuperscript{258} Corruption was pervasive, and the appeals court protested against “the ill treatment of captives.”\textsuperscript{259} Judicial recommendations for security force prosecution were ignored and the lack of consequences for criminal violence resulted in the police force of Kenya becoming “a law unto itself.”\textsuperscript{260} Convictions were few and far between, and in any case, punishment was often perfunctory.\textsuperscript{261} A memo prepared by the Colonial Secretary defending the administration’s response to security force violence referred to six cases, none of which resulted in a custodial sentence for the European officers involved.\textsuperscript{262}

The foregoing discussion raises the question of whether the detention regime instituted by the British government in the colony of Kenya was permissible under international law. Article 3 of the Universal Declaration of Human Rights (1948) holds that “[e]veryone has the right to life, liberty and security of person,” while article 5 provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”\textsuperscript{263} Although the Declaration was not a legally binding instrument,\textsuperscript{264} there was unanimity between the diverse member states involved in legislating “on behalf of all peoples and all nations” regarding the importance of human rights norms after the war.\textsuperscript{265} Colonised peoples were not represented in these negotiations, although third world activists, according to Roland Burke, played a more significant role in human rights discourse after decolonization.\textsuperscript{266} While there was an assumption that the Declaration would apply to all colonies and dependencies,\textsuperscript{267} “screening,” “dilution,” and the “Mwea procedure” as practiced in detention facilities across Kenya were contrary to the spirit of the

\textsuperscript{257} Dicey, \textit{England’s Case Against Home Rule}.  
\textsuperscript{258} Criminal Appeals 988 and 989 of 1954 (from Emergency Assize Criminal Case No. 584 of 1954 of HM Supreme Court of Kenya at Nairobi), KNA: MLA 1/1098. See witness statement of David Anderson for a list of relevant cases.  
\textsuperscript{259} Criminal Appeal No.818 of 1954 of Criminal Case No.289 of 1954 (Nyeri).  
\textsuperscript{260} Criminal Appeal 549, 550, 551 and 552 of 1954 (from Emergency Assize Criminal Case No. 330 of 1954 of HM Supreme Court of Kenya at Nairobi) KNA: MLA 1/905.  
\textsuperscript{262} A Commandant of Mara River detention camp, L.W. Lemon, was charged of causing actual bodily harm, but he was convicted of the lesser offence, common assault, and fined Sh.500. Jasiel Njau, an African rehabilitation officer in the Gathigiriri Works Camp, was acquitted of murdering a detainee in January 1957, but convicted and sentenced to 12 months imprisonment for manslaughter. The Attorney General decided not to prosecute the senior European officers associated with this case, although they were subject to disciplinary charges. In October 1957, Mr C.R. Harrison and two of the European officers were acquitted of the charge of causing actual bodily harm, when using force to extract labour from detainees. And finally, another case of the unlawful killing of a detainee during interrogation in the Gathigiriri camp resulted in the acquittal of two African interrogators on murder charges with the imposition of a three-year sentence for manslaughter, while the camp supervisor, Mr D.D. Luies, who was absent from the camp at the time of the incident, got off with a reprimand. TNA CAB 129/97 C92.  
\textsuperscript{263} There are several other interlocking articles (articles 2, 7, 8, 9, 10, 11, 12, 13, 19, 20 etc.) that were contravened in Kenya during the Emergency.  
\textsuperscript{264} Many of the provisions of the Universal Declaration are now part of customary international law.  
\textsuperscript{265} Burke, \textit{Decolonization and the Evolution of Human Rights}, 1.  
\textsuperscript{266} Ibid.  
Declaration. The emergency in Kenya began shortly after crimes against humanity were first prosecuted by the International Military Tribunal at Nuremberg and international humanitarian law was already an established body of law. Mau Mau insurgents would not have met the strict criteria for “irregular forces” set out by customary humanitarian law, which would have allowed them to benefit from prisoner of war protections. Whilst jurisdiction was lacking, humanitarian law offered states a powerful normative framework for upholding standards in the treatment of detainees and prisoners, especially when considering that Nazi concentration camps were liberated by British and American soldiers. These ideals, alongside other obligations of international law that extended to the colony, should have elicited moral abhorrence at what was occurring in the Kenyan camps. However in the 1950s, Britain and other colonial states took a minimalistic approach to international law obligations vis-à-vis the rights of their colonial subjects, and Klose regards the colonial response to demands for national independence as a combination of measures incorporating rule by emergency laws, an “emphasis on the new military doctrine of antisubversive warfare,” and the “refusal to recognize the validity of international humanitarian law,” and that these factors underpinned “the unleashing of colonial violence.”

The United Kingdom government signed the 1930 ILO Forced Labour Convention on 3 June 1931 and it was accepted into Kenya without modification. Yet on 17 February 1954 the British Cabinet approved a forced labour policy for the Kenyan detention camps in the following terms:

…the regulation authorising compulsory employment should contain words to the effect that any person detained in a special detention camp might be usefully employed in work which, in the opinion of the officer in charge, would assist in bringing the Emergency to an end. He [the Colonial Secretary] proposed to instruct the Governor to make the regulation in this form. In these circumstances it would probably be unnecessary to pay market rates of wages for work undertaken by prisoners in the detention camps.

Therefore, regulation 22 of the Emergency (Detained Persons) Ordinance was worded so as to bring it within the meaning of the 2(2)(d) emergency clause. Notwithstanding these efforts, the ILO Committee of Experts criticised the government’s use of forced labour in Kenya:

The committee has noted that in response to the observation that was made in 1956 the government declares that the forced or compulsory labour exacted under the laws and

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270 The Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, which applied to conflict not of an international nature, was only extended to the colonies in 1959. Humanitarian law instruments applicable in the colony before that time were the Hague Conventions and the Geneva Convention of 1929.


272 Ibid.

273 See above, note 197. TNA CO 822/1420: Regulation 22 denotes that the officer in charge should be satisfied that the work “will assist in bringing the Emergency to an end.”
regulations in force falls within the exception covered by article 2, paragraph 2(d) (cases of Emergency) and 2(e) (minor communal services). With regard to the regulations relating to a state of Emergency the committee considers that it may assume that the disappearance of the exceptional circumstances which justified the adoption of those regulations will enable the government to apply the letter of the Convention as well as the spirit.  

Descriptions of coerced labour depicted in detainees’ testimonies are entirely at odds with the idea of purposeful work contributing to the end of conflict. Some of the tasks were manifestly designed to be cruel or punitive, as one detainee reported: “at Takwu Detention Camp detainees are working in sea-water, breaking stones along a canal for a continuous period of four hours, clearing mangrove forest trees in water and road making through where canal surface was to be broken with picks... We consider that removing of sanitary buckets for the Officer in charge and warders is purely punitive.” These testimonies suggest there was a violation of the ILO Forced Labour Convention 1930 when the labour exacted did not fall under the treaty’s emergency clause, and in instances where the forced labour policy continued after the emergency officially ended. Could there be an actionable tort arising from the use of forced labour in the Kenyan camps? Whilst there may have been a violation of the 1930 Forced Labour Convention, ultimately allegations of unlawful killing and torture are much more compelling, with the latter forming the backbone of the Mutua & Others claim.

The claimants in Mutua & Others v the Foreign and Commonwealth Office (FCO) submitted an action to the UK High Court for alleged torts of “assault and battery, and negligence.” Civil actions of the sort rely on a balance of probabilities test. As highlighted in Justice McCombe’s summary of the 2011 judgment, the relevant tort law pertaining to the case is the 1980 Limitations Act, and through Article 33 of that Act judicial discretion may extend the usual three-year limitation clause for personal damages. Public interest may be a factor in issuing judicial discretion, and triggering the state’s duty to investigate allegations of torture. At the same time, claimants must have a reasonable chance of success, to outweigh the huge costs associated with historic actions. Surviving historical documentation may illuminate the “aims and purposes” of the British government in relation to the colonial emergency, which could establish responsibility for torts. A factor which could influence judicial discretion in waiving the limitation is evidence that the UK government and the colonial administration had inhibited investigations into camp abuses and restricted the remit of contemporary inquiries. However, no action in tort may be brought for wrongs that occurred prior to 23 June 1954. Claims arising from other colonies would need to furnish a UK court with compelling reasons for a prolonged delay in submitting such a claim. It is notable that in the Kenyan case, the Mau Mau organisation was proscribed until 2002-2003, and many of the elderly survivors of abuse resided in remote and rural areas.

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274 Ibid.
275 TNA CO 822/402: Petition detailing conditions in the camps and presented to Dingle Foot MP upon his inspection of various camps in September 1956.
276 Negligence being a common law duty to intervene or stop systematic abuses once that became known, see Ndiku Mutua and others v the Foreign and Commonwealth Office, 21/07/2011, Summary of Judgment.
277 Ibid.
278 Mutua & Others v Foreign & Commonwealth Office [2012], para. 140.
Justice McCombe had to decide whether the claimants had a “viable claim in law,” and if they had any realistic chances of success with their claim. As defendants, the FCO argued that acts committed by the colonial government essentially were not acts of the UK government, and that legal liability for these acts passed to the successor state at independence. This was unchartered legal territory, as counsel for the claimants explained, “neither the Kenya Independence Act 1963, nor any other UK statute or instrument, addresses the question of the succession of liabilities of the Colonial Administration for assaults against the Claimants.” In such a case the matter must be decided at common law, but common law has to incorporate international customary law into its decision-making. Following consideration of arguments, including the claimants’ reliance on post-colonial Algerian jurisprudence against France and the defence drawing from the Quark case, Justice McCombe decided that the liabilities of the old colonial regime did not transfer to the United Kingdom at Kenyan independence in 1963. However, under the principle of “joint liability for torts,” the UK government named as a joint tortfeasor could still have a case to answer for historic wrongs committed by the Army or the Colonial Office, and such matters were fit for trial. Justice McCombe further examined General Erskine’s role in the emergency and he concluded that there was sufficient documentary evidence to suggest Erskine’s involvement in the detention system, and therefore the issue was triable. He made similar conclusions in respect of the Colonial Secretary and the Colonial Office: “all these matters are, in my judgment, properly triable issues on the evidence before me, including the evidence of the continuing and still incomplete disclosure by the defendant of previously unseen materials. The evidence shows that those new materials were removed from Kenya upon independence precisely because of their potential to embarrass the UK Government.” A significant point of dispute between the parties pertained to the role played by the UK government in the development and control of the detention camps. Both the Kenyan colonial government and the UK government were very much aware of the “extent of continuing misconduct in the treatment of detainees,” and by not making a concerted effort to stop the abuses, the UK government neglected their duty of care and could have been found guilty of negligence. However, the role of the UK government may have went beyond simple negligence through acts of omission, and if the facts of the case presented by the Mutua claimants could be established, it suggested to Justice McCombe “the distinct possibility of an active direction of policy and an active part in its implementation on the part of Her Majesty’s Government” which could only be clarified if the matter went to trial. Given the gravity of the matters being considered, Justice McCombe criticized the UK government for relying on technical constitutional legal theory so early in the proceedings (in an effort to get the case struck out), in a way the judge described as “dishonourable.”

The British Prime Minister, Harold Wilson, first accepted the optional clauses to the European Convention (pertaining to individual petitions and the compulsory jurisdiction of the Court) in 1966 for an initial three-year period. At the time it was considered that

280 Ndiku Mutua and Others, Summary of Judgment, para. 2.
281 Mutua & Others v Foreign & Commonwealth Office [2011], para. 81(a).
283 Ibid, para. 130.
284 Ibid, para. 154.
acceptance would apply only to prospective cases, which was a response to litigation taken by the Burmah Oil Company against the UK government for the destruction of its oil refineries in 1942. Lord Lester’s examination of the period leading up to acceptance tellingly reveals little or no discussion of the possibility of colonial legacy issues. In the event, a temporal limitation was incorporated into the “U.K.’s declaration of acceptance a limitation making it clear that acceptance applied only to matters arising after its effective date, thereby excluding a once-and-for-all action of the kind taken in connection with the Burmah Oil claims, occurring before that date.” This declaration effectively annulled approximately eighty applications that had been received by the Commission in anticipation of Britain’s acceptance of the optional clauses. But equally, the declaration “did not extend to petitions relating to matters arising in any dependent territory, or to anything done or occurring in the United Kingdom in respect of any such territory or of any matters arising there.”

The 2014 “Practical Guide on Admissibility Criteria,” produced by the European Court of Human Rights, notes that where countries have drafted declarations with temporal limitations, “the Commission and the Court have accepted temporal limitations of their jurisdiction with respect to facts falling within the period between the entry into force of the Convention and the relevant declaration.” However, the evolving jurisprudence of the Court has provided for exceptions to the test criteria on admissibility per ratione temporis, and such consideration can occur when the right to life (article 2) is violated or breaches of the prohibition on torture (article 3) are alleged. It is significant that the Court in Silih v Slovenia elaborated the concept of procedural detachability applying to the right to life. In essence, this means that the state’s investigation into a death may be examined by the Court even if the substance of the claim occurred prior to the Court assuming jurisdiction in that member state’s territory. The criteria outlined in Silih v Slovenia are not unlimited and must be in accordance with the principle of legal certainty:

162. First, it is clear that, where the death occurred before the critical date [entry into force of the Convention], only procedural acts and/or omissions occurring after that date can fall within the Court’s temporal jurisdiction.
163. Second, there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by Article 2 to come into effect.

Thus a significant proportion of the procedural steps required by this provision – which include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account… – will have been or ought to have been carried out after the critical date.
However, the Court would not exclude that in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner.

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287 Ibid, 252.
289 Practical Guide on Admissibility Criteria, 47, para. 199.
290 This test criteria is set out in Blečić v. Croatia, (Application no. 59532/00), 8 March 2006, para. 67.
Of these, perhaps the latter Convention values test is most significant to the current discussion, but it is also notable that the detachability principle has been invoked by the Court to examine investigations into torture and ill-treatment, where, in the main, proceedings occurred after the entry into force of the Convention, while the actual violation preceded that critical date. So whilst the United Kingdom only accepted the individual petition mechanism in 1966, applicants to Europe could argue that they were prevented from accessing a remedy for these most serious violations, not merely due to the temporal limitation on the state’s declaration, but due to historic, structural and evidentiary legal obstacles, but that fresh evidence coming into the public domain via the Hanslope Disclosure casts a new light on the circumstances of historic violations. Claimants in the Mutua & Others case argued that the coming into being of the Human Rights Act, and the unearthing of voluminous documentation in 2005 and 2011, triggered a duty upon the state to investigate allegations of torture, and that the procedural obligation attached to this article was “revived.”

Another possibility would be to argue the Convention values test, as a short period in between the violation and the entry into force of the Court’s jurisdiction was established in the Silih judgment. The Court may depart from this rule and permit a “further extension of the Court’s jurisdiction into the past... if the triggering event has a larger dimension which amounts to a negation of the very foundations of the Convention (such as in cases of serious crimes under international law), but only to events which occurred after the adoption of the Convention, on 4 November 1950.” Torture was “institutionalised and systematic, but also casual and haphazard” during the Emergency in Kenya. Practices associated with “screening” or the interrogation of Mau Mau suspects included whipping, beatings, use of electric shock, administering cigarette burns, Chinese water treatment, sexual violence and sterilisation. The claimants in Mutua and Others experienced “physical mistreatment of the most serious kind, including torture, rape, castration and severe beatings” while in detention. In this light, the scale of the abuses that occurred within a network of extrajudicial camps established not ten years after the liberation of Nazi concentration camps might be considered as a negation of the very values enshrined in the European Convention on Human Rights, which encapsulated the post-war abhorrence of violence and human degradation.

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This chapter examines the legal regime which facilitated the detention without trial of somewhere between 80,000 and 150,000 people during the Kenyan emergency. In general terms, the detention laws and ordinances examined appear far removed from the dreadful

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293 Janowiec and Others v Russia, (Applications nos. 55508/07 and 29520/09), 16 April 2012, para. 139.
294 Mutua & Others v Foreign & Commonwealth Office [2012], paras. 142, 147.
296 Ibid, 214.
297 Elkins, Imperial Reckoning, 293.
299 Mutua & Others v Foreign & Commonwealth Office [2011], para. 1.
environment which facilitated torture, mistreatment, starvation, and forced labour. Yet, as Samera Esmeir points out, a condition of rightlessness does not necessarily mean “expulsion from the law.” The emergency regulatory framework in Kenya facilitated the “lawful” confinement of Kikuyu subjects, and the bare violence of the system was translated into a language of euphemism, through the invention of nomenclature such as “dilution,” “screening,” and “the Mwea procedure.” These techniques occurred in camps that represented the “spatialization of the colonial state of emergency,” and this architecture dehumanised detainee suspects, and it is therefore essential for the essential humanity of those affected to be finally recognized. It is doubtful whether William Hague’s “apology” achieves this:

On behalf of Her Majesty’s Government, that we understand the pain and grievance felt by those who were involved in the events of the Emergency in Kenya. The British Government recognises that Kenyans were subject to torture and other forms of ill treatment at the hands of the colonial administration. The British government sincerely regrets that these abuses took place, and that they marred Kenya’s progress towards independence.

It is submitted that this “recognition” falls short of fully accepting responsibility for colonial era abuses in Kenya, especially as a foregoing paragraph alludes to Mau Mau “guilt” for 2,000 emergency related deaths, whereas no comparable figure is given for state sponsored killings: “during the Emergency Period widespread violence was committed by both sides, and most of the victims were Kenyan. Many thousands of Mau Mau members were killed, while the Mau Mau themselves were responsible for the deaths of over 2,000 people including 200 casualties among the British regiments and police.” Violence was used to elicit intelligence and enforce compliance with detention regimes in other colonies. In practise, the pernicious fusing of a “civilizing mission” with counter-insurgency strategy underpinned by a racist ideology resulted in deadly violence against detainees in the Kenyan camps: this unholy convergence demands a reassessment of the historical narrative regarding the “defeat” of the Mau Mau insurgency in Kenya. Moreover, the chapter clearly delineates how colonial officials in Kenya and London responded to the allegations of abuse that surfaced; the culture of whitewash and denial was certainly not unique to the colony of Kenya, and will be examined in subsequent chapters considering other British colonial contexts. In essence, mechanisms of control in detention contexts occurred within the wider counter-insurgency umbrella, but were underpinned by an intricate web of quasi-legal ordinances and regulations that stripped detainees of all rights and made them vulnerable to the violence of colonial governmentality.

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300 Esmeir, Juridical Humanity, 93.
301 Klose, Human Rights in the Shadow of Colonial Violence, 236.
303 Ibid.
304 French, The British Way in Counter-Insurgency. See also Klose, Human Rights in the Shadow of Colonial Violence.