ROUTING A REBELLION OR CRUSHING A CRIME WAVE? PROCLAIMING MARTIAL LAW AND A CALL-TO-ARMS IN VAN DIEMEN'S LAND, 1828-1830

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In common law countries with Westminster-style parliaments, in jurisprudence martial law was well understood as a prerogative of the Crown, to be exercised as a matter of necessity to meet the threat of invasion or rebellion. This royal prerogative, while not frequently proclaimed, was used to effect in the colonies of the British Empire to suppress rebellions by slaves and the indigenous peoples of the colonized lands.

Such was the case in Van Diemen's Land in the years 1828 to 1830, when Lieutenant-Governor George Arthur twice proclaimed martial law against the Aboriginal inhabitants of the island, and on the second occasion issued a call-to arms of the local settlers in order to raise a civilian army to assist the military in a campaign to end the murderous clashes between the Aborigines and the settlers. The Line Campaign or the "Black Line" as it became known was not a success in its stated aim of driving the Aborigines into a confined area on Tasman's Peninsula, but it did succeed in driving them out of the settled areas.

This paper examines the jurisprudence of martial law and the call-to-arms –sometimes known as the levée en masse *– as it was in the early part of the nineteenth century, and particularly, as it was applied to the proclamations in Van Diemen's Land.*

I IMPERIALISM AND INSURRECTION: THE USE OF EXTRAORDINARY POWERS IN THE COLONIES

The histories of imperialism are replete with the narratives of indigenous peoples in colonized lands rising up against their imperial masters. In the years of the Second

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British Empire, commencing late in the eighteenth century, the colonization of lands across the globe took place from the Mediterranean to the Caribbean and from North Asia to the Antipodes. Lands were seized by conquest, acquired by cession, or often simply occupied on the basis that the indigenous peoples had no title – they were considered "savages" with no concept of private property, and their lands were a *tabula rasa* to be explored, named, surveyed and parcelled out to the invaders, settlers from other parts of the Empire. The indigenous peoples were to be civilized and assimilated if that was achievable; if not, they were to be pushed out, by force if necessary. The "savages", not unexpectedly, often vigorously resisted such treatment and colonial wars between unequal forces took place – the colonizers with superior weaponry and numbers invariably triumphing[1].

Such was the scenario in Van Diemen's Land, occupied by the British as a penal settlement from 1803, and then later developed as a colony for free emigrants who were granted lands at little or no cost. The Aboriginal bands occupying the lands were swept aside and excluded by military force or by armed settlers with their shepherds and fences, all supported by the force of British law. The lands first seized and occupied lay in the northern, north-eastern and eastern parts of the island, where the savannah grasslands and open sclerophyll forests provide excellent grazing for sheep and cattle. By 1824, the huge swathe of land between the northern settlement of Launceston on the Tamar Estuary and the southern settlement of Hobart Town on the Derwent Estuary was occupied by farmers, 441,871 acres in 1027 grants being made by the colonial government in 1823 alone.[2]

Much of this land, from the east coast littoral through the Midlands to the Central Plateau, was the country of the *Mairremmener* People, a socio-linguist group of hunter-gatherers, comprising some twenty bands with a total number of perhaps 900 to 1000, each band ranging from forty to sixty people. The lands seized by the settlers were not only the prime hunting grounds of the People, but encompassed the vital nomadic "roads" which provided access from the littoral to the highlands. These roads, used over six millennia, provided more than access to economic resources and trade: they were a part of the culture of the People, 'long distance exchange and social, ceremonial linkages' within a cultural landscape of 'ceremonial centres where groups came together for social, political or ritual events.'[3] The exclusion of Aborigines from and the effective closure of these roads by white occupation was a massive blow to Aboriginal culture. The first colonial settlements had concentrated around the river estuaries noted above, and contact and clashes between Aborigines and settlers had been limited. However, the exponential growth in settlement from the early 1820s was violently resisted by the

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1 On colonialism, see Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia*, Vancouver: UBC Press, 2002, introduction, partic. pp. xxiii, xxiv.

2 S. Morgan, *Land Settlement in Early Tasmania: Creating an Antipodean England*, Cambridge: Cambridge University Press, 1992, pp. 168, 169.

3 Isabel McBryde, 'Travellers in storied landscapes; a case study in exchange and heritage', *Aboriginal History*, v.24, 2000, p. 158.

Mairremmener bands, which the settlers had named the "Oyster Bay" and "Big River" tribes, and numerous murders, maiming and property destruction occurred on both sides. The settlers called on the colonial government to protect them, and from 1824, with the arrival of Lieutenant-Governor George Arthur as viceroy of Van Diemen's Land, a series of actions against the Aborigines were instituted.

This paper considers two of those actions: firstly, declarations of martial law; and secondly, the allied measure of the call-to-arms of civilians to aid the military – the so-called *levée en masse*. In particular, the actions are canvassed in relation to the "Black War" of Van Diemen's Land in the years 1828 to 1830.

II War by Proclamation: the "Black War" of Van Diemen's Land

The actions taken by Lieutenant-Governor Arthur in support of the settlers began with a proclamation in April 1828 of expulsion, requiring the *Mairremmener* People to vacate the settled districts, their traditional country, only able to return for annual nomadic travel between highland and coast by special permission granted through the issue of a passport to 'their respective leaders'.[4] The absurdity of that proclamation was patent: there was virtually no communication between Aborigines and settlers, as very few spoke each others' language.[5] Arthur made a token attempt at communicating the intent of the proclamation by having a pictograph distributed which, through a series of drawings, was supposed to demonstrate the benefits of black and white living in harmony, and the consequences of the reverse, with graphic illustrations of both Aborigines and settlers being hanged for murders. The pictographs, painted on boards, were nailed to trees on the extremities of the settled areas.[6] Needless to say the violence continued and the settlers began to refer to the conflict as a 'war'.[7] In early 1829, a

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4 *Van Diemen's Land: Copies of all correspondence between Lieutenant-Governor Arthur and His Majesty's Secretary of State for the Colonies, on the subject of the military operations lately carried on against the Aboriginal inhabitants of Van Diemen's Land*, Hobart: Tasmanian Historical Research Association, 1971, pp. 22-24.

5 For example, at a public meeting held in Hobart on 22 September 1830, Mr Hackett declared that 'He did not think there were 5 persons in the island who could converse with or make themselves understood by [the Aborigines].' *The Hobart Town Courier,* 25 September 1830; for a criticism of the failure to study Tasmanian languages, see Baron Charles von Hügel, *New Holland Journal, November 1833-October 1834*, (trans. & ed. Dymphna Clark), Carlton: Meigunyah Press, 1994, p. 144. However, as discussed under, Arthur's proclamation was carefully framed to complement further actions. See also Henry Melville, *The History of the Island of Van Diemen's Land from the year 1824 to 1835 inclusive ...*, London: Smith & Elder, 1835, pp. 80-82.

6 John West, *The History of Tasmania, with copius information respecting the Colonies of New South Wales Victoria south Australia &c., &c., &c.*(A.G.L.Shaw ed.), London: Angus & Robertson, 1971, p. 278; James Bonwick, *The Last of the Tasmanians or, The Black War of Van Diemen's Land*, London: Sampson, Low, Son, & Marston, 1870, pp. 83, 84.

7 But not, at this time, the government. In a despatch dated 4 November 1828, to Sir George Murray, Secretary of State for the Colonies, Lieutenant-Governor Arthur noted that 'With the regard to the alarm which ... exists among the settlers ... there is no combined movement among the Native tribes, nor ... any such systematic warfare exhibited by any of them as need excite the least apprehension in the Government. ...', *Copies of all correspondence,* p. 9.

number of 'roving parties' – bands of armed civilians and convict servants under the overall command of Oatlands police magistrate Thomas Anstey – were formed to pursue, capture and expel Aborigines found within the settled districts.[8] Perhaps as an encouragement to capture rather than kill, a reward was instituted – £5 for every adult Aborigine and £2 for every child.[9] The 'roving parties' scheme was notable for its lack of success.

The third action initiated by Arthur was undertaken in conjunction with the expulsion order: a line of military posts was set up to establish the confines of the settled districts. However, the military had no more success than the roving parties. The clashes continued and murders of women and children in particular created uproar among the settlers. The murder of a male child and wounding of the mother and daughter at Green Ponds on 9 October 1828 was a catalyst for a fourth dramatic action.[10] On 1 November 1828, Lieutenant-Governor Arthur declared martial law specifically against the *Mairremmener* People, excluding all the Aborigines and lands outside the country of the "Oyster Bay" and "Big River Tribes", the settlers' names for the *Mairremmener* bands. Again, the proclamation could not have been communicated to the Aborigines. However, its intent, taken in conjunction with the previous expulsion proclamation, was clearly more malignant. While enjoining the settlers to ensure 'that bloodshed be checked as much as possible', and 'that any tribes which may surrender themselves up shall be treated with every degree of humanity', the proclamation clearly proposed the use of force to compel the Aborigines to 'retire into the places and portions of this island hereinbefore excepted from the operation of martial law'.[11] As the settlers were empowered to assist in the expulsion, the proclamation was in effect a licence to kill without recourse. It proved equally as ineffective as the expulsion order in compelling the *Mairremmener* People to leave their country. By early 1830 the clashes had escalated, with 148 incidents occurring in 1829, including seventy-eight settlers killed or wounded. A further eleven settlers were killed or wounded up to 15 March 1830.[12]

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8 N. J. B. Plomley, ed. *Jorgen Jorgenson and the Aborigines of Van Diemen's Land*, Hobart: Blubber Head Press, 1991, p. 19.

9 N. J. B. Plomley, ed. *Friendly Mission: The Tasmanian Journals and papers of George Augustus Robinson 1829-1834*, Hobart: Tasmanian Historical Research Association, 1966, p. 31. The "great conciliator" George Robinson took advantage of the reward scheme, claiming several "captures".

10 N. J. B. Plomley, *The Aboriginal/Settler Clash in Van Diemen's Land 1803-1831*, occasional paper no. 6, Launceston: Queen Victoria Museum & Art Gallery, 1992, p. 72; *The Hobart Town Courier*, 1 November 1828.

11 *Copies of all correspondence*, pp. 11, 12. Arthur had personal experience with declarations of martial law during his time in Jamaica and as superintendent of the Belize settlement from 1812 to 1822 – see below.

12 *Copies of all correspondence*, pp. 41, 42; *The Aboriginal/Settler Clash*, pp. 26, 27. The number of Aborigines killed or wounded was never fully reported and is contested – see for example H. Reynolds, *Fate of a Free People*, Camberwell: Penguin Books, 2004; K. Windschuttle, *The Fabrication of Aboriginal History, Volume One, Van Diemen's Land 1803-1847*, Sydney: Macleay Press, 2002.

Arthur was then under intense pressure to act in defence of the settlers. While all of his proclamations had enjoined the settlers to act with humanity, and his own inclination, based on his evangelical beliefs, was to act humanely and within the oft-repeated directives of the Colonial Office 'to employ every means which kindness, humanity and justice can suggest', Arthur instituted an extreme measure aimed at finally ending the war, which he now conceded was taking place.[13] By Government Order No. 9 of 9 September 1830, he called on all settlers

> to cheerfully render [their] assistance, and to place [themselves] under the direction of the police magistrate of the district in which [their farms are] situated [so that] a sufficiently numerous volunteer force will thus be raised, that, in combination with the whole disposable strength of the military and police, and by one cordial and determined effort, will afford a good prospect of either capturing the whole of the hostile tribes, or of permanently expelling them from the settled districts.

The order was accompanied by a set of detailed instructions on the disposition of the force raised, with the intention of driving the Aborigines southwards by means of a line of men onto Tasman's Peninsula, where they could be confined by a picket across the narrow East Bay Neck.[14] This military campaign became popularly known as the "Line Campaign" or the "Black Line". Perhaps in the light of the recent history of the French Revolution, the call-to-arms became known as a *levée en masse.*[15] By a proclamation of 1 October 1830, the Lieutenant-Governor extended and continued martial law over the whole of Van Diemen's Land.

The Line Campaign employed two thousand two hundred soldiers and civilians and their assigned servants, and swept southwards more or less along a commencement line extending from the Meander River to St. Patrick's Head in the north, through the lower parts of the Central Plateau to the coast, and ending at Sorell on 24 November 1830.[16] The campaign resulted in the capture of one Aborigine and a boy. It had cost some £35,000 from the colonial treasury, and Arthur's critics, especially the colonial press, condemned it as 'a most complete failure, as any reasonable man might have anticipated.'[17] Others viewed the campaign in the light of Arthur's stated aims. While he did endeavour to capture the Aborigines within the settled districts, the second aim was to expel them, and the effectiveness of that aim can be measured by the record of clashes between Aborigines and settlers in the

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13 *Copies of all correspondence*, p. 58: George Arthur - 'the Natives attacked and plundered, in a more systematic manner than they had hitherto done, several residences in the heart of the settled districts'.

14 *Copies of all correspondence*, pp. 64-70.

15 See, for example, Melville, *The History of the Island of Van Diemen's Land from the Year 1824 to 1835,* pp. 99, 100.

16 The force included 550 soldiers and 738 convicts – *Copies of all correspondence,* p. 72; Plomley, *Jorgen Jorgenson and the Aborigines,* p. 107.

17 Melville, *The History of the Island of Van Diemen's Land,* p.117. Gilbert Robertson, in a letter marked 'Private' to Assistant Surveyor Thomas Scott (as deputy head of the Line Campaign commissary) was even more scathing, declaring that the campaign was 'the concoction of a shallow minded schoolboy, no man of sense could for one moment believe ... that such a wild scheme should be proposed ...', Thomas Scott Papers, Mitchell Library, Sydney, MS A1055.

following year, when the numbers fell to sixty-six (from two hundred and twenty-two in 1830).[18] The vast majority of these later clashes took place outside the country of the *Mairremmener* People. The Colonial Office expressed muted approval, the Secretary of State noting that 'your operations have not altogether failed in their object.'[19] The campaign also proved a great boon to the economy of the colony, especially to the merchants of Hobart Town and the farmers and millers who supplied enormous quantities of tea, sugar, shoes and other goods, and flour and meat to the campaign commissary.[20] It can be argued that, contrary to the opinions of contemporary and subsequent critics (such as the virulent criticism of surveyor and historian James Erskine Calder)[21], the campaign was also a success on other grounds. The tiny remnant of the *Mairremmener* bands – perhaps not more than one hundred people during the campaign[22] – on its abandonment ceased to be rebels and outlaws liable to be killed on sight, and once more came under the protection of the British Crown as subjects.[23] The merchants, farmers and millers and the colony as a whole benefited economically, as noted above. Arthur's career did not suffer to any extent as he remained in Van Diemen's Land until 1836, and received later appointments to more senior posts in Upper Canada and the Presidency of Bombay. Questions that remained unanswered centred on the form and legality of the declaration of martial law and the call-to-arms, and are discussed next, particularly in relation to the received laws of war at the time.

III THE LAWS OF WAR: MARTIAL LAW AND CIVILIAN ARMIES

The conduct of international wars up to the early nineteenth century was subject to a form of accepted laws not formally legislated by states, but generally observed. For example, Hugo Grotius' *De Jure Belli Ac Pacis Libri Tres* of 1625 became the

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18 Arthur, in a despatch to Sir George Murray of 20 November 1830 claimed ' I cannot, however, say that I am sanguine of success, since [the Aborigines'] cunning and intelligence are remarkable ...', *Copies of all correspondence*, p. 60.

19 *Copies of all correspondence*, p. 75, quoting Viscount Goderich.

20 John West, *The History of Tasmania*, p. 295 –'the settlers saw, with pleasure, their produce rise in the neighbourhood of this formidable band, to twice its recent value.' Also Scott papers, MS A1055, frame 104 ff.

21 For example, Calder, in an obituary for the surveyor and politician John Helder Wedge, written on his death in 1872, declared that 'Colonel Arthur opened his celebrated but silly campaign against the blacks, hoping to drive these acute and crafty savages into his snares ... [Wedge] I believe privately expostulated with [Arthur] against engaging in so wild and hopeless an enterprise.' *The Mercury*, Hobart, 29 September 1872.

22 From Plomley's records it can be ascertained that about fifty *Mairremmener* People were taken to Flinders Island after the last twenty-nine were captured by George Augustus Robinson on New Year's Eve, 1831. The last clash took place on the Freycinet Peninsula in October 1831, when a band of about forty escaped capture by local setters. Plomley, *Friendly Mission,* pp. 978-1001; see also James Backhouse Walker, *Early Tasmania: Papers read before the Royal Society of Tasmania during the years 188 to 1899*, Hobart: Government Printer, 1989, p. 239; L. Nyman, *The East Coasters*, Launceston: Regal Publications, 1990, pp. 113, 114.

23 The status of the Van Diemen's Land Aborigines as British subjects during the early years of the settlement of Australia is confused, and is discussed in the Appendix to this paper. Whether or not British subjects, the Aborigines came under the protection of the Crown.

'*tour de force*' of writings on the laws of international wars.[24] However, as Morris Greenspan noted, the conduct of wars not international in nature were regulated by the domestic laws of the states concerned.[25] The several rebellions in British colonies, perhaps with the exception of the American Revolution, were always regarded as the concern of the Empire, and the power to suppress lay with the Crown or its representative in the form of the respective colonial viceroys. As noted above, Lieutenant-Governor Arthur twice proclaimed martial law in the years 1828 to 1830. His power to do so was undisputed, the justification for the proclamation somewhat less so.[26] The question revolved around the received interpretation of the common law in the early nineteenth century, and of the status of "martial law" within the common law. Arthur was the superintendent and commandant of the Belize settlement in Honduras from 1814 to 1822, a command under the control of the Colony of Jamaica, making Arthur subordinate to the Governor, the Duke of Manchester. In this post Arthur would have observed the declaration of martial law following a rebellion in Barbados in 1816, and perhaps, from a distance, the declaration of martial law in Demerara in 1823. This latter declaration resulted in the court-martial of the missionary John Smith, who was sentenced to death for his role in the rebellion, and the case resulted in a parliamentary debate in England on the legality of declarations of martial law. A motion to reject the right of the Crown to make any such declaration was defeated, and the status quo remained. Expressed by Sir James Mackintosh, the laws of the United Kingdom held that

> The only principle on which the law of England would tolerate what is called Martial Law is necessity: that Martial Law put in force against rebels and enemies was only a more regular and convenient mode of exercising a right to kill in war, a right originating in self-defence and limited to those cases where such killing is necessary as a means of insuring that end; put in force against rebels it can only be excused as a mode of more deliberately and equitably selecting persons from whom quarter ought to be withheld, in a case where all have forfeited their claim to it: it was nothing more than a better regulated decimation, founded on choice instead of chance, to provide for the safety of the conquerors without the horror of undistinguished slaughter, justifiable only where it is an act of mercy, by the law of England it could not be exercised except where the jurisdiction of the Courts of Justice is interrupted by violence.[27]

This colourful exposition of the law, made at a time and place when it would have come to Arthur's notice – he was in England during the debate – made plain a number of preconditions required of the Crown. First, there had to be a war or a

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24 Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, Vol. two, Books I-III, trans. by F. W. Kelsey, New York: Oceana Publications, 1964.

25 M. Greenspan, 'International Law and Its Protection for Participants in Unconventional Warfare', *Annals of the American Academy of Political and Social Science*, vol. 341 (May 1962), p. 39.

26 The instructions to every governor of New South Wales and Van Diemen's Land, from Arthur Phillip onwards, included a specific power to declare martial law in the event of a war: *HRA* , Series I, vol. I, p. 2.

27 Sir James Mackintosh quoted in G. G. Phillimore, 'Martial Law in Rebellion', *Journal of the Society of Comparative Legislation*, New Series, Vol. 2, No. 1, (1900), p. 53.

rebellion amounting to war against the Crown. Secondly, the jurisdiction of the judiciary had to be 'interrupted'. Thirdly, the enemies or rebels had to have forfeited their right to 'quarter'. The exposition also made plain that the declaration conferred a right to kill enemies or rebels without quarter. Blackstone, in the *Commentaries*, confirmed that this definition reflected the state of the law at that time, when he noted that

> Martial Law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law but something indulged rather than allowed as law, a temporary excrescence bred out of distemper of the state, and not any part of the permanent and perpetual law of the kingdom. The necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not be permitted in the time of peace when the King's Courts are open for all persons to receive justice according to the law of the land.[28]

In short, martial law was not part of the common law (or of military law); it was in fact a suspension of the common law through necessity, and could only be exercised as a prerogative of the Crown 'in case of domestic danger arising from foreign invasion or native insurrection to which both civilians and soldiers are equally subject, and which is enforced by military authority'.[29] The emphasis in this definition was that "martial law" was not "military law", and that acts done as the result of its promulgation were not justiciable in common law courts *or* courts-martial. Its effect was entirely arbitrary, and at the discretion of the representative of the Crown in the district in which the law was imposed, and *habeas corpus* was suspended. This was the received law in 1824, when George Arthur assumed his post as Lieutenant-Governor of Van Diemen's Land, and he had an immediate precedent of the application of martial law. Just one month before he assumed his post, martial law had been proclaimed by Governor Brisbane over the Aboriginal peoples of the western districts of New South Wales, west of Mount York, on 14 August 1824. Over a period of four months the 40th Regiment sought to engage the *Wiradjuri* People without much success, after which Brisbane repealed the proclamation. Its tenor was similar to the later proclamations made by Arthur in Van Diemen's Land.[30]

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28 *Blackstone's Commentaries* (1765), i. 414, quoted in Phillimore, 'Martial Law in Rebellion', p. 49.

29 Phillimore, above, p. 49. Phillimore noted that the Petition of Right in 1628 and the Mutiny Act of 1702 both removed the right of declarations of martial law against military persons – in Phillimore's opinion, the right to declare martial law against the King's enemies remained a royal prerogative unaffected by that legislation.

30 *HRA* Series I, vol. XI, pp. 409-411, 430-432. There does not appear to have been any negative reaction to the proclamation and the subsequent military action, perhaps because, as Brisbane reported 'during the four Months that Martial Law prevailed, not one outrage was committed under it, neither was a life sacrificed or even Blood spilt.' p.432. The ability of the *Wiradjuri* to evade capture mirrored the later events during the Black War. The Colonial Office left well enough alone. An earlier proclamation of martial law over the bushrangers in Van Diemen's Land by Lieutenant-Governor Davey in April 1815 was declared *ultra vires* by Governor Macquarie as Governor-in-Chief. *HRA* Series I, vol. II, pp. 125, 126.

From the parliamentary debates that followed the Demerara affair noted above, it is clear that the British Parliament was uncomfortable as to the standing of martial law as a Crown prerogative, especially given the ability to suspend all common law rights without recourse or parliamentary or legal oversight. This discomfort was reflected at a later time in the case of a declaration of martial law in 1865 by Governor Edward Eyre of Jamaica, a declaration made under an Act of Indemnity, but contested as to right and limits in the High Court before a grand jury. The grand jury refused to return a bill declaring the Act of Indemnity invalid, but 'made a formal presentment that Martial Law should be more clearly defined by legislative enactment.'[31] The rebellion in Jamaica aroused considerable and extended debate on the foundations and application of martial law. The rebellion of the Jamaican slaves had been confined to a relatively small part of the island, and the proclamation of martial law made by Eyre was restricted to that area. The rebellion was rapidly suppressed by the military, but martial law was maintained for thirty days. During that time, 439 black Jamaicans were shot or executed following courts martial, and a further 600 flogged, 'in some cases with revolting cruelty'. Some twenty white settlers were killed by the rebels.[32] While the massacre of the slaves, particularly the summary executions, was the subject of criticism by 'Christian and missionary groups [and] prominent Liberal and Radical parliamentarians' (and where Eyre's actions were supported by conservatives), the primary concern was the execution of George Gordon, a 'coloured landowner-politician', accused of fomenting the rebellion.[33] The debate initially took the form of legal arguments over the jurisprudence of martial law, given that it was considered an 'obsolete' power within the kingdom proper. The debate resolved into two schools: the first holding that the Petition of Right had removed the prerogative of the Crown to declare martial law; the second that it remained a right in times of necessity. While both sides maintained a year-long argument – less over the actual declaration, given the danger posed by the rebellion, but more over the legalities of the subsequent trials and punishments by courts-martial – the Colonial Office and Secretary of State Edward Cardwell had no doubts, Eyre's action in declaring martial law being approved following opinions given by the Crown's law officers. However, there was more circumspection over the extent to which punishment might be inflicted without recourse to the common law.[34] The debate engendered considerable literature, including a weighty text by William Finlason supporting the Crown's prerogative, and arguments for and against in distinguished legal journals such as the *Law Times* and the *Solicitors' Journal.* Newspaper debate also took place, with articles for and against solicited in liberal and conservative papers. In particular, six letters written by Frederic Harrison denying the existence of a power to punish

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31 Phillimore, above, pp. 56-58.

32 R.W.Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law*, Oxford: Oxford University Press, 2005, pp. 12, 13.

33 Pp. 13-15.

34 Pp. 192-255. This extended reference covers the whole of Chapter four – 'The Tenets of Terror: Reinventing the Law of Martial Law'. The whole chapter is dedicated to sometimes convoluted legal argument, primarily between liberal and conservative lawyers outside the Whig government.

rebels under martial law, published in the *Daily News*, played an influential role. The results were inconclusive. While the debates acknowledged that 'martial law, all but moribund in England, had been resurrected in the crucible of Empire' through the necessity of suppressing rebellions of slaves or indigenous peoples, there was the fear that it may be again open to use domestically.[35] As Kostal pointed out, in the event the debate resolved into a series of polemics taking a side of politics suiting the respective case; 'the legal discourse on martial law was politics by other means.'[36]

As a product of the debate, the numerous instances of proclamations of martial law in the colonies had been reviewed, especially those where the lives of settlers had been taken: rebellions such as Demerara, noted above, and the Jamaica rebellion of 1831, where 626 rebels were tried by courts-martial, and 312 were executed. Mary Reckord pointed out that 'Violent protest against slavery had been endemic in eighteenth-century Jamaica; the outbreaks occurred on average every five years'.[37] The rebellions in Cephalonia in 1848, Ceylon in 1848, and especially during the Indian Mutiny in 1858, where the Cawnpore massacre of women and children aroused public ire, again came under scrutiny.[38] However, during this debate, the Van Diemen's Land proclamations were not discussed, unusually in the sense that Arthur had been given specific power to declare martial law in his commission, as had all governors of New South Wales, whereas this was apparently not the case in Jamaica, or in other colonies. A factor of difference in the role of the Australian colonies as penal settlements, initially under military control, probably dictated the need for delegation of the royal prerogative to the governors. As well, violent suppression of slave revolts appeared of less moral concern than actions against indigenous peoples, especially under Whig governments, where the influence of the evangelicals in their "civilizing" role demanded humane treatment of the "savages".[39] In the case of Jamaica, the enabling power given to Eyre was under an act of the Jamaica legislature, a contested delegation in the event.[40] The Jamaica controversy, in the end, had no tangible effect on the status of martial law in the corpus of British law; the status quo remained. Codification in various forms subsequently took place, primarily by way of Acts of Indemnity following specific declarations of martial law, but in British common law jurisdictions, martial law

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35 Kostal, *A Jurisprudence of Power*, p. 194. Martial law had not been proclaimed in England, Wales or Scotland since 1745 and not in Ireland since 1798.

36 P. 255.

37 M. Reckord, 'The Jamaica slave rebellion of 1831', *Past and Present*, Vol. 40, (July 1968, p. 108.

38 Kostal, p. 8.

39 The difference is evident in a despatch to Arthur from the Secretary of State for the Colonies, Lord Goderich, on 17 June 1831, in response to a report on the Line Campaign of November 1830. Goderich noted that 'In this unhappy state of things, it is most satisfactory to me to be enabled to rely so implicitly upon your energy under every emergency, as well as your humanity, towards a race entitled by the wrongs which they have suffered to much forbearance, even while it is necessary to repel their attacks'. *Copies of all correspondence*, p. 75.

40 Kostal, p. 7.

itself remained uncodified.[41] It was the agreed opinion of all sides of politics that there remained the need for an extreme punitive power such as martial law within the disparate colonies of the Empire, with their polyglot and potentially dangerous populations of convicts, slaves and indigenes – an imperial power, the use of which was to be dictated by necessity. Martial law proclamations were to be reserved for use only in the colonies; the possibility of the use of the prerogative at home was a concern and a worry to both sides of politics, and not to be considered. It was an attitude 'rooted in racial anxiety about white communities in the empire.'[42]

Arthur's government order of 9 September 1830 calling upon settlers to join the military in the Line Campaign has been referred to as a *levée en masse*, a term which acquired a legal status under the laws of war and armed conflicts in the latter part of the nineteenth century. The term was first used in France in 1793, when the new republic faced invasion by the First Coalition of Prussia, Austria and Spain. The mobilization of the civilian population – the call-to-arms – was decreed in August 1793, establishing the principle of the 'nation-in-arms', but was soon abandoned by the Convention.[43] Orville Murphy has pointed out that the French were influenced by the citizen armies raised by the colonists during the American Revolution, part of the concept of the nation-in-arms determined to preserve its liberties against an oppressor.[44] It would be likely that the raising of citizen armies was well known to Arthur, as, in a memorandum written on 20 November 1830 at the conclusion of the Line Campaign, he wrote that 'it became necessary to call upon the inhabitants to rise "en masse", and enrol themselves for this particular service ...'[45] That phrase is redolent of the call-to-arms by the Convention, noted above. While armed settlers had in the past been called upon in New South Wales and Van Diemen's Land to assist in subduing riots or hunting bushrangers, this call to rise *en masse* was unique in Australian history, and was actually the raising of a civilian army of considerable size in the contemporary context. The use of the term *levée en masse* soon gained universal currency when the Line Campaign was discussed. Jorgen Jorgenson, for example, in *A Narrative of the Habits, Manners, and Customs of the Aborigines of Van Diemen's Land*, written sometime in 1840, referred to the 'levy en masse' at length.[46] The anthropologist H. Ling Roth, writing in 1899, referred to Governor Arthur's 'general levy of the population'.[47]

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41 The exception being the United States, where the suspension of *habeas corpus* was prohibited by Article 1, Section 9 of the Constitution, and the President was authorised to use military force against rebels by the *Insurrection Act 1807*.

42 Kostal, p. 256.

43 Scott Lytle, 'Robespierre, Danton, and the Levée en masse', *The Journal of Modern History*, Vol. 30, No. 4, (Dec. 1958), pp. 325-337; A. F. Kovacs, 'French Military Institutions before the Franco-Prussian War', *The American Historical Review*, Vol. 51, No. 2 (Jan. 1946), p. 217.

44 Orville T. Murphy, 'The American Revolutionary Army and the Concept of the *Levée en Masse*', *Military Affairs*, Vol. 23, No. 1, (Spring 1959), p. 20.

45 *Copies of all correspondence*, p. 72.

46 Plomley, *Jorgen Jorgenson and the Aborigines of Van Diemen's Land*, pp. 39, 40, 99.

47 H. Ling Roth, *The Aborigines of Tasmania*, Halifax: F. King & Sons, 1899, p. 2.

The principle of the nation-in-arms was gradually codified as citizen armies were raised to fight both international and domestic wars. The term *levée en masse* was continually used in reference to the principle. An example is found in President Lincoln's General Order No. 100 – *Instructions for the government of Armies of the United States in the Field* – of 24 April 1863 (known as the 'Lieber Instructions'), where article 51 dealt with a 'duly authorized levy *en masse*'. Article 10 of the Final Protocol of the Brussels Conference of 1874 conferred belligerent status on 'the population of a territory ... who, on the approach of an enemy, spontaneously take up arms to resist the invading troops', provided they respected the laws and customs of war, a principle repeated in the *Manual published by the Institute of International Law (the Oxford Manual) on the Laws of War on Land* in September 1880. The *levée en masse* was defined and given world-wide formal status by *Convention (IV) Respecting the Laws and Customs of War on Land (the Hague Convention)* on 18 October 1907. Article 2 of the Regulations, subtitled the *Levée en masse*, provided that

> The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves ... shall be regarded as belligerents *if they carry arms openly and* if they respect the laws and customs of war.

This provision was repeated in the *Geneva Conventions* of 1949.[48] From these codes it can be seen that the interpretation of the call-to-arms under later definitions was significantly different from that intended by George Arthur.

IV Rebels or Criminals? The Justification for Declaring Martial Law.

Given the accepted requirements for declarations of martial law in the British Empire at this time, the question first to be posed is whether or not the clashes between the military, the settlers and the Aborigines constituted a war within the contemporary meaning of the term. As noted above, the settlers continually referred to the clashes as 'war'. In April 1828, Lieutenant-Governor Arthur, in a despatch to Sir George Murray, Secretary of State for the Colonies, referred to the Aborigines as 'open enemies'; in a later despatch of 4 November he referred to the 'lawless warfare which has lately been carrying on between the Natives and the settlers and stockmen'. By June 1831, after the conclusion of the Line Campaign, the then Secretary of State for the Colonies, in a despatch to Arthur, referred to the 'unhappy beings whom you were forced to treat as enemies'.[49] In a despatch of April 1830 to Sir George Murray, Arthur referred to the Aborigines 'exploits in the pursuit of plunder', a term clearly distinguished from the criminal act of robbery, and always

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48 D. Schindler & J. Toman (eds), *The Laws of Armed Conflicts: A collection of Conventions, Resolutions and Other Documents*, Geneva: Henry Dunant Institute, 1988, pp. 11, 28, 75; George H. Aldrich, 'The laws of war on land', *The American Journal of International Law*, Vol. 84, No. 1, (January 2000), p. 43.

49 A. G. L. Shaw, *Sir George Arthur, Bart. 1784-1854*, Carlton: Melbourne University Press, 1980, p. 126; *Copies of all correspondence,* pp.9, 75.

associated with warfare.[50] At this time when the clashes between settlers and Aborigines were at their height, numerous references in the colonial press and in official documents noted the plundering and burning of houses and huts and the firing of haystacks, acts associated with irregular warfare such as the guerrilla wars of the then proximate Peninsula Campaign in Spain.[51] In the years 1828 to 1830, Plomley noted twenty-one huts fired, two hundred and fifty huts plundered, thirty-eight firearms taken and three stacks destroyed by fire, as well as large numbers of stock speared or dispersed.[52] The definitive official position was expressed by the Executive Council of Van Diemen's Land in the minutes of its meeting held on 27 August 1830:

> It appears to the Council now, as it did nearly two years ago, that the wanton and barbarous murders committed by the Natives indiscriminately ... on men armed and unarmed, and on defenceless women and children, can be considered in no other light than as acts of warfare against the settlers generally ...[53]

The language used by officials and settlers in respect of the clashes, and the very nature of the organization of the Line Campaign itself – military in form, complete with a commissary, campaign mapping and battle plans – would indicate that a state of war existed by 1828.

The existence of a state of warfare was dismissed by Keith Windschuttle in *The Fabrication of Aboriginal History, Volume One.* He claimed that 'for the guerrilla warfare thesis to be credible, these acts [the clashes between settlers and the Aborigines] have to be elevated above the level of crime or revenge.' The two "elevating" qualities required were, firstly, a political objective, and secondly, a form of political organisation to achieve the political end. Windschuttle claimed that, in the absence of any statement made by the Aborigines during the Black War that expressed a patriotic or nationalistic sentiment, the clashes amounted to a series of criminal acts committed by the Aborigines.[54] Inasmuch as there are no records of the opinion of any *Mairremenner* person during the years of the Black War, apart from the conversation between Black Tom (*Kickerterpoller*) and Lieutenant-Governor Arthur in 1828, concocted by Henry Melville, Windschuttle is correct.[55] However, he overlooked or simply dismissed the role of one party to the conflict –

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50 *Copies of all correspondence,* p. 17; plunder: rob (place, person) forcibly of goods, esp. as in war, *The Australian Concise Oxford Dictionary of Current English*, 7th ed, Melbourne: Oxford University Press, 1987

51 *Copies of all correspondence*, pp. 41, 42. See also the reference to 'the "*Guerrilla*" war' in Melville, *The History of the Island of Van Diemen's Land*, p. 122. For an exposition on the origins of guerrilla warfare, see Walter Laqueur, 'The origins of guerrilla doctrine', *Journal of Contemporary History*, Vol. 10, No. 3 (July 1975), pp. 341-382.

52 Plomley, *The Aboriginal /Settler Clash,* p. 26.

53 *Copies of all correspondence*, p. 63.

54 Windschuttle, *The Fabrication of Aboriginal History*, pp. 99, 102.

55 Melville, *The History of the Island of Van Diemen's Land*, pp. 80-82, a conversation 'reported by a by-stander' after the first proclamation of martial law. The language reported, such as 'Mata Guberna', 'Pose he walk dere', 'I nebber like dat way', is redolent of the contemporary reporting of the language of the negro slaves in the United States.

the British Government in the form of George Arthur, whose actions converted the situation into a state of war, regardless of the objectives or motives of the Aborigines. The 'political objective' necessary for the 'elevation' of the conflict was Arthur's, and the clashes were taken out of the realms of criminality by Arthur's actions, particularly by the declarations of martial law. Whether or not the Aborigines had a political organisation capable of enforcing their own or even resisting an opponent's political objective is moot. The records of the settlers from the earliest times, beginning with the Risdon Cove affair in 1804, indicated the ability of the *Mairremmener* People to gather in massed numbers, which in itself implied some form of political organisation. As noted above, even after the Line Campaign the miniscule remnant of the People rallied *en masse* late in 1831, when the attempt was made to pen them on the Freycinet Peninsula. The surveyor and historian James Erskine Calder believed that the bands assembled for political purposes when he noted that Robinson had failed 'to say one word about [the Aborigines'] general assemblies of confederated tribes, which they are known to have held, probably to concert measures relating to war.' Calder cited an example of such a meeting place west of George Town, described by W. B. Walker in December 1827.[56]

The second precondition for the declaration of martial law was the existence of a rebellion, which, on British territory, constituted a war against the Crown. Leaving aside the question of the status of the Aborigines as British subjects, the common law in relation to rebellion at the beginning of the nineteenth century was summarised in the British Government's reaction to the Irish Rebellion of 1798. The open rebellion of such political groupings as the United Irishmen and the Defenders was joined by small groups of agrarian raiders in western Connacht engaged in the houghing of stock, raising uproar among the region's gentry. Their actions were considered treason, and the government was encouraged to send troops to suppress the 'outrages'. Several houghers were apprehended and tried for 'having assembled at an unlawful hour, tendering and taking unlawful oaths, and ... houghing cattle on the lands of Ballygar'.[57] The trial was by court-martial, as martial law had been proclaimed by the Lord Lieutenant on 24 May 1798.[58] In many cases of houghing the raiders 'left threatening notices demanding that the flesh of the maimed cattle be distributed to the poor'.[59] It could not be said that these raiders had a sophisticated political organisation, although it had been claimed that their actions were 'attempts to block the conversion of land from tillage to less

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56 J. E. Calder, *Some Account of the Wars, Extirpation, Habits etc. of the Native Tribes, of Tasmania*, 1875, facs. ed. Hobart: Fullers Bookshop, 1972, pp. 36, 37.

57 James G. Patterson, 'Republicanism, agrarianism and banditry in the west of Ireland, 1798-1803', *Irish Historical Studies*, Vol. 35, No. 137, (2006), pp. 27-31. 'Houghing' was the hamstringing of sheep and cattle.

58 Martial law was continued until 1806 – R. B. McDowell, *Ireland in the Age of Imperialism and Revolution*, Oxford: Clarendon Press, 1979, pp. 659, 660; *The Oxford Companion to Irish History*, S. J. Connolly (ed), Oxford: Oxford University Press, 1998, pp. 351, 352. The use of courts-martial appears to run against the exposition of martial law by Sir James Mackintosh, above.

59 Patterson, above, p. 27.

labour-intensive commercialised grazing.'[60] The raiders were nonetheless considered rebels, and treated as such under martial law. The point of difference with the Black War in Van Diemen's Land lies in the nature of the combatants. The Irish raiders could be regarded as "civilized", whereas the *Mairremmener* People, in British eyes, remained at the lowest end of the scale of human existence; that is, they were uncivilized savages.[61] The objections raised by Windschuttle in relation to warfare, namely, the absence of the two 'elevating qualities', may therefore be equally raised to a claim of rebellion. A case in a common law jurisdiction apposite to the question, decided in 1901, is that of *Montoya v United States*. The United States Supreme Court held that

> The depredations of a band of Indians, as hostile acts against the government and all settlers with whom they came in contact, constituted evidence of an act of war.[62]

As in the debate on the question of the existence of a state of warfare, the party overlooked in determining the question was the Crown itself, in the person of the viceroy. It can be argued that Arthur carefully orchestrated his actions in order to place the *Mairremmener* People in a state of rebellion, and therefore outside the law and at war with the Crown. The first action taken – the proclamation of April 1828, expelling the People from the settled districts – established a particular law directed specifically at the *Mairremmener*, a law incapable of enforcement as acknowledged by Sir George Murray, the Secretary of State for the Colonies, in his despatch to Arthur of 20 February 1829, when he noted

> the extremely difficult task of inducing ignorant beings ... to acknowledge any authority short of absolute force, particularly when possessed with the idea which they appear to entertain in regard to their own rights over the country...[63]

The legality of this proclamation, while approved by Sir George Murray and which in effect summarily banished or exiled British subjects, was questionable under the common law.[64] Nonetheless, it established a law with the severest of penalties; that

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60 Patterson, p. 27.

61 'Such practices [of the Aboriginal people of New South Wales] should not be seen as the "ancient laws" of the country but rather as "lewd practices" ... not entitled to even as much respect as the laws of the "Wild Irish"', Justice Burton (Murrell's Case, 1836) quoted in Elizabeth Elbourne, 'The sin of the settler: the 1835-1836 Select Committee on Aborigines and debates over virtue and conquest in the early nineteenth century British white settler empire', *Journal of Colonialism and Colonial History*, vol. 4, no. 3 (2003), para. 41.

62 *Montoya v United States* [1901] 180 U.S. 261, quoted in *Virginia Law Review*, Vol. 7, No. 7, (April 1921), p. 554.

63 *Copies of all correspondence*, p. 8.

64 Blackstone, on the question of the right of the Crown to banish a subject, said, 'no power on earth, except the authority of Parliament, can send any subject of England *out of* the land against his will, no, not even a criminal.' *Commentaries*, Vol. 1 (15th. ed) p. 137. The question here is whether such rule applied to internal exile or banishment. The issue, including the history of the common law respecting banishment, is canvassed in the modern case of *Queen v Secretary of State for Foreign and Commonwealth Office ex parte Bancoult* [2000] EWHC Admin 413 (3rd November 2000). The question as to whether the Aborigines were British subjects at the time of the Black War is discussed in the Appendix.

is, capture, forcible removal, or, in the last resort, deadly force. Although proved to be unenforceable, it established a ground which, upon the breach, enabled Arthur to carry out his second action towards war, the first proclamation of martial law on 1 November 1828. Following that proclamation the *Mairremmener* People were rebels and outlaws, enemies of the Crown, subject (in spite of the enjoining of the settlers to check 'bloodshed') to summary justice. The final actions – the establishment of a civilian army and the formation of the Line Campaign by Government orders of 9 and 22 September 1830, and the second declaration of martial law on 1 October 1830 – amounted to a declaration of war against the *Mairremmener* People.[65]

A course of action that Arthur may have considered at an early stage as an alternative to the drastic measures eventually taken was the use of the *Riot Act* (at that time, 1 Geo. 1, st. 2, c. 5 [1714]). While that legislation was directed at the repression of public disturbances and provided 'a particularly flexible basis for exercising authority over gatherings', its impracticability in the circumstances existing in Van Diemen's Land is easily demonstrated in the method of its application. It required the reading of a statutory proclamation by a justice of the peace, requiring a crowd to disperse within the hour, failing which the justice was able to call upon deadly force (the military) to disperse them. The legislation was clearly directed at the riotous crowds that assembled in urban areas in eighteenth century during the Industrial Revolution and was hardly relevant to the situation in Van Diemen's Land.[66] Another course of action was suggested by Frank Munger, who drew attention to the common law offence of constructive treason, proscribing gatherings which 'assaulted the prerogative of the state' in its attempt to quell disturbances, an offence punishable by death, and which thus provided a severe alternative to the *Riot Act*.[67] It was probably this part of the common law that was used to convict the Irish raiders in western Connacht. It would seem however, that neither law would have aided Arthur in the circumstances applying in 1828.

V "I HAVE A PLAN": THE MOTIVATION FOR A DECLARATION OF WAR.

The proposition that George Arthur carefully constructed a means of declaring war on the Van Diemen's Land Aborigines is based on his recognised skills as a

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65 *Copies of all correspondence*, pp. 11, 12, 64-71. The second declaration of martial law extended its effect over the whole island, encompassing all Aboriginal bands, making them all liable to summary justice. Professor Henry Reynolds (pers. comment) has suggested this may have been done to cover the acts of aggression by roving parties and settlers in other parts of Van Diemen's Land, particularly the actions taken against the north-eastern and Ben Lomond People by John Batman's party. As to the declaration of war, it was then accepted international law that no formal declaration was required – see J.B. Atlay, 'Legitimate and illegitimate modes of warfare', *Journal of the Society of Comparative Legislation*, New Series, Vol. 6, No. 1 (1905).

66 Frank Munger, 'Supression of Popular Gatherings in England, 1800-1830', *The American Journal of Legal History*, Vol. 25, No. 2, (April 1981), p. 113. However, its application at Risdon Cove in 1804 may well have provided a veil of legality over that murderous affair.

67 Munger, p. 113.

colonial administrator, together with his overweening ambition to succeed in the colonial service. John West, a severe critic of the Lieutenant-Governor, writing proximately in 1852, spent nine pages of *The History of Tasmania* laying out the faults of Arthur's character and administration, but concluded in noting that he 'cannot be withdrawn from the rank of eminent functionaries; and his administration, on the whole, is entitled to more than respectful remembrance.'[68] Shaw, in his biography of Arthur, noted that

> Supervising everything, [Arthur's] energy surpasses belief ... his watchfulness was 'Argus-eyed', for ... the success of the system 'hinges most entirely upon the zeal and efficiency of this Government; if the minutest Regulation be not observed, the most extensive mischief must follow to a measure of great national importance'.[69]

The testament to this zeal and efficiency reposes in the Tasmanian Archives: thousands of official documents there record the whole of Arthur's actions during his term as Lieutenant-Governor. Many other individuals were condemnatory of Arthur's 'zeal'. Alexander Maconochie, writing in 1838, claimed that Arthur 'was clever, but not able; a good detailed administrator, but with no breadth or compass, in his general views.'[70] James Erskine Calder, a more virulent critic (and one with first-hand acquaintance with and knowledge of the Lieutenant-Governor), noted the great energy Arthur devoted to the records of his administration, but claimed that 'These qualities [of hard work, acuteness and a zeal for religion] served the sole purpose for which he seemed to live, namely, his own advancement beyond all others, and the emergence of his family from poverty to affluence, which he achieved.'[71] This comment perhaps reflected, somewhat excessively, the ambition for success and advancement that Arthur displayed throughout his colonial service.

Outside the commission and the instructions given to them, the role of colonial governors was not the subject of a detailed description of how to perform their tasks. As Mark Francis has pointed out, while a governor received ample instructions on the need for and manner of providing routine administration, defence of imperial policies and civic facilities, he was also subject to criticism on questions of 'reform policy, democracy, monarchy, sovereignty, authority versus power, and the nature of government itself', political and legal questions requiring extensive knowledge and ability beyond administrative competence.[72] Francis noted that 'the Colonial Office possessed a few vague rules as to the type of person who was eligible to be a governor and as to their subsequent career structure ... An

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68 West, *The History of Tasmania*, pp. 136-145; p. 145.

69 Shaw, *Sir George Arthur*, pp. 69, 70.

70 Alexander Maconochie, *On Colonel Arthur's General Character and Government*, Hobart: Sullivan's Cove, 1989, p.15.

71 J. E. Calder, 'A Sketch of the Public Service Fifty Years Ago', *The Mercury*, Hobart, 5 June 1879.

72 Francis noted that the first governor of Western Australia arrived 'in his new colony in 1829 with a box of books which contained William Blackstone's *Commentaries on the Laws of England*, but nothing by Thomas Paine.' M. Francis, *Governors and Settlers: Images of Authority in the British Colonies, 1820-1860*, Hampshire: Macmillan Academic, 1992, p.11.

example of such rule was that governors were seldom chosen from "the pure colonial class"'.[73] In referring to Lower Canada, the Under-Secretary of State for the Colonies, James Stephen, considered that a governor should maintain 'a severe regard to justice, and to the constitutional rights of the King's subjects of every class, he might [then] acquire a large and legitimate influence'.[74] Early governors were, in the main, drawn from the military – examples abound in Australia, from Arthur Phillip through to Lachlan Macquarie – as were many of the subordinate officials. After 1820, fewer military men were appointed, 'Poor Law Commissioners, Oxford dons, explorers, magistrates, and Members of Parliament' receiving appointments', all having in common 'the possession of some administrative experience' receiving appointments instead.[75] There is no doubt that patronage played a major role in securing appointments, as did the need to find employment for military men who had retired on half-pay, or who were no longer commissioned.[76] It was also a useful qualification to be aligned with the ideology of the government of the day, and to the prevailing moral beliefs and teachings, particularly in the era of the anti-slavery movement and the Evangelical Revival.[77] While the 'vague rules' of the Colonial Office on appointments of viceroys provided little help in determining fitness for the position, once employed in the colonial service administrators came under close supervision, within the limitations of the time taken to confer on issues. Officials who had performed well in subordinate roles often received appointments to higher office, an example being David Collins, first Judge-Advocate, then secretary to Arthur Phillip, the first governor of New South Wales. Collins was appointed the first Lieutenant-Governor of Van Diemen's Land, in part recognition of his admirable work in the past, but also following a lengthy search for a patron, and persistent lobbying.[78]

In a similar vein, George Arthur received his appointment in part through the recognition of his good work at Belize: however, patronage played an important role. Shaw pointed out that Arthur was on good terms with William Wilberforce, 'as well as other evangelicals, such as the elder and younger James Stephen, Foxwell Buxton, and Zachary Macaulay, who had influence at the Colonial Office.' Arthur's evangelical beliefs would have been a significant and persuasive qualification for the Van Diemen's Land post.[79] In his staunch belief in Whig ideologies, such as humanitarianism, and particularly in development and progress in new colonial societies (involving both the education of the settlers and the "civilizing" of the Indigenes), Arthur , as Francis has pointed out, was 'one of a professional core of governors' such as Sir George Gipps, Sir Richard Bourke, Sir

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73 pp. 1, 2.

74 Francis, *Governors and Settlers*, p.3.

75 P. 2.

76 R. Hyam, *Britain's Imperial Century, 1815-1914: A Study Of Empire And Expansion*, 3rd ed., Hampshire: Palgrave Macmillan, 2002, p. 308. Hyam claimed that 'The Victorian idea was that good government depended on personal qualities, not training.'

77 Arthur, for example, obtained the patronage of

78 John Currey, *David Collins: A Colonial Life*, Carlton: The Miegunyah Press, 2000, pp. 156-173.

79 Shaw, *Sir George Arthur*, pp. 61, 62.

Charles Fitzroy, Sir William Denison, Sir George Grey, and others, all of whom had significant influence in the formation of the Australian colonies.[80]

Aside from the disapproval and criticism noted above, most commentary on Arthur's administration conceded that his knowledge of the role and duties of governor of a colony was profound, and that he took pains to act within the law of the land. He frequently sought the opinion of his Solicitor-General, Alfred Stephen, and also the Chief Justice of the Supreme Court Of Van Diemen's Land (and Executive Councillor), Sir John Pedder.[81] He was also careful to add weight to his decisions by conscripting influential support for them: an example being the appointment of the Aborigines Committee in 1830 to advise Arthur on the appropriate steps to counter the violent clashes between Aborigines and settlers. The appointees were all prominent officers of the administration or influential settlers, and the committee was chaired by Archdeacon William Grant Broughton, the Bishop of New South Wales and head of the Church of England in Australia, who was visiting Van Diemen's Land at the time. This committee largely rubber-stamped Arthur's decisions on martial law and the Line Campaign, and later supported his use of George Augustus Robinson on the conciliatory missions used to round up the remnant Aboriginal bands for exile to Flinders Island.

VI A Satisfactory Conclusion

As noted above, the Line Campaign and its associated actions received the approval of the Colonial Office and the British Government. It was certainly approved by the majority of the settlers, as the Aborigines were driven out of most of the settled districts. Arthur's ambitions were achieved inasmuch as he remained at his post until 1836, his twelve-year incumbency being the longest for any viceroy of Van Diemen's Land. His subsequent posts in Upper Canada and the Presidency of Bombay were considered to be promotions. Created a baronet in 1840, his personal fortune grew over the years and on his death in 1854, Sir James Stephen, 'friend and colleague for more than thirty years took great pleasure in recalling "with what courage and energy and uprightness and ability and devotion of heart" Arthur had performed his duty'.[82]

The depth of Arthur's knowledge of the law and practice of colonial administration was demonstrated in the Black War. Each step taken as described above was a calculated measure aimed at a conclusion which would pacify the settlers and expel the Aborigines from the settled districts. It was in fact a carefully constructed plan,

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80 Mark Francis, 'Colonial Political Culture and the Mentality of British Governors: 1825-1860', *Political Science*, Vol. 38, 1986, p. 135

81 It should be noted that Arthur had a difficult relationship with the Attorney-General, Joseph Gellibrand. Shaw, pp. 96-99. Pedder's often sound advice was not always heeded – especially note Arthur's failure to accept the advice on the exiling of the Aborigines on Flinders Island, where Pedder considered 'it would be followed by rapid extinction'. West, *The History of Tasmania*, pp. 311, 633 n.104.

82 Shaw, *Sir George Arthur*, p. 285.

facilitated by a knowledge of martial law, and by an appeal to the settlers in the call-to-arms. However, the actions should also be viewed in a political, rather than legal sense, in the same manner that Governor Eyre's actions in the Jamaica rebellion of 1865 were viewed in the subsequent debate: that is, while couched in legal terms, in reality the declarations of martial law and the call-to-arms were 'politics by other means'. Arthur had walked the fine line of placating his settler-subjects and satisfying his masters at the Colonial Office, while, at the same time and given the circumstances, limiting the injuries to the remnant Aboriginal bands. The 'great war in miniature' was a legal and practical success.[83]

APPENDIX
BRITISH SUBJECTS OR ENEMY ALIENS? THE LEGAL STATUS OF THE *MAIRREMMENER* PEOPLE

The question of the status of Aborigines in the Colony of Van Diemen's Land is incidental to the jurisprudence of martial law during the period of the Black War, inasmuch as the power of Lieutenant-Governor Arthur to declare martial law was founded in the commission of and instructions to Governor Ralph Darling on his assumption of the position of Governor in Chief of the Colony in 1825. Those instructions authorised Darling to

> levy, arm, muster, command and employ all persons whatsoever, residing in the said island and its dependencies ... and, as occasion shall serve, to march them from one place to another, or to embark them for the resisting or withstanding all enemies, pirates and rebels ... and being taken according to law to put to death, or keep and preserve alive at your discretion; and to execute Martial Law in time of Invasion, or at other times when by law it may be executed.

These powers were assumed by Arthur on the departure of Darling from the Colony on the 6 December 1825, as noted in a proclamation made on 12 December 1825.[84] From that date, the Lieutenant-Governor unquestionably had the power to both declare martial law and to make a call-to-arms of the civilian population. The power to proclaim martial law was, however, limited by the caveat of 'in time of invasion, or at other times *when by law* it may be executed.'[85] If the exposition of martial law made to the British Parliament by Sir James Mackintosh, as noted above, can be taken as the received law at that time, then the *Mairremmener* People would have to be regarded as rebellious British subjects, yet that status was not completely clear, and the following comments briefly state the law as it was known at the time.

The rules relating to the import of the common law into colonized lands was expressed in Chapter 4 of Book 1 of Blackstone's *Commentaries*, following *Calvin's Case*; that is

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83 Melville, *The History of the Island of Van Diemen's Land*, p. 109.

84 *HRA*, series III, vol. V, pp. 4, 5, 14, 15.

85 My emphasis.

> If an inhabited country be discovered and planted by British subjects, all the English laws are immediately there in force. But in conquered or ceded countries, that already have laws of their own, the King may indeed alter and change those laws; but till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

The difficulty that immediately presented itself in the cases of New South Wales and Van Diemen's Land came in the legal status of the Indigenous inhabitants. As Evans et al. pointed out, 'the presence of Indigenous peoples seriously confounded colonial intentions'.[86] The newly-colonized lands were not conquered, ceded or uninhabited. The question was resolved, if not legally but in a practical sense, by denying the right of prior ownership of the land to the Aborigines, and declaring that it belonged to no one – the issue discussed at the beginning of this paper in relation to colonization as a process. The "uninhabited" land therefore became the sovereign property of the Crown, and the common law was the law of the land. It would follow that all those living in the colonized lands would be subject to the common law[87]: yet, as Jean Woolmington has pointed out, that position raised 'several complicated legal questions' in the case of the Aboriginal inhabitants. These included the inability of the Aborigines to swear the accepted Christian oath before the law; their ignorance of the workings of the law and the barriers of language; and the standing of the law where Aborigines committed crimes among themselves.[88] The complications are reflected in the relatively few prosecutions for crimes committed by Aborigines under the common law, especially in Van Diemen's Land – the celebrated cases of the failure to prosecute the captured Aborigine *Eumarrah* for murder in 1828, and the inaction over the murders of Captain B. B. Thomas and his superintendent Parker at Port Sorell in 1831 being prime examples.[89]

The status of the Van Diemen's Land Aborigines was established to some extent by government order made by the first Lieutenant-Governor, David Collins, on 7 January 1805. Referring to his commission and instructions from the King, he noted that he was ordered to 'place the Native Inhabitants ... in the King's Peace, and to afford their persons and Property the Protection of the British Law', and his order

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86 J. Evans, P. Grimshaw, D. Phillips & S. Swain, *Equal subjects, unequal rights: Indigenous peoples in British settler colonies, 1830-1910*, Manchester: Manchester University Press, 2003, p. 3.

87 For example, the comment of Lord Glenelg, Secretary of State for the Colonies, to Governor Bourke in a despatch of 26 July 1837: 'Your Commission .... Asserts H. M.'s Sovereignty over every part of the Continent of New Holland ... Hence I conceive it follows that all the natives inhabiting those Territories must be considered as Subjects of the Queen.' Quoted in J. Woolmington (ed). *Aborigines in Colonial Society: 1788-1850*, North Melbourne: Cassell Australia, 1973, p. 131.

88 Woolmington, p. 127.

89 West, *The History of Tasmania*, pp. 278, 279; Melville, *The History of the Island of Van Diemen's Land*, pp. 85-88. The numerous cases of murder, plundering and other crimes committed during the years 1828-1830 were never prosecuted – a state of war existed as discussed above.

served to inform the Aboriginal inhabitants accordingly.[90] Under this order, it would seem that 'protection' was something less than the status of subject, and it certainly failed to acknowledge the rights to land ownership.[91] A further measure of the confusion as to the status of Aborigines is reflected in a despatch dated 14 July 1825, from Earl Bathurst, Secretary of State for the Colonies, to Governor Darling, which accompanied his commission as governor of New South Wales.. In referring to the clashes between settlers and the Aborigines, Bathurst directed that

> you will understand it to be your duty, when such disturbances cannot be prevented or allayed by less vigorous measures, to oppose force by force, and to repel such Aggressions in the same manner, as if they proceeded from subjects of an accredited State.[92]

This instruction was passed onto Arthur in Hobart. Its ambivalence with regard to the status of the Aborigines is patent: the inference is that they were alien enemies when committing acts of aggression, but perhaps not when they retired peaceably from the settlements.

The confused state of the law as to the status of Aborigines is also reflected in two decisions of the Supreme Court of New South Wales before the declarations of martial law in Van Diemen's Land. The first case – *R v Johnston, Clarke, Nicholson, Castles, and Crear* [1824] – before Forbes CJ, concerned assault terminating in death of an Aboriginal woman at O'Connell Plains, near Bathurst. The defence used the terms of a proclamation by Governor Macquarie of 4 May 1816, prescribing that 'no black native, or body of black natives, shall ever appear at or within one mile of any town, village, or farm, occupied by or belonging to any British subject, armed with any warlike or offensive weapon ... on pain of being deemed and considered in a state of aggression and hostility, and treated accordingly.' The implication in the proclamation is clear: the Aborigines were not British subjects.[93] In the second case – *R v Lowe* [1827] – before Forbes CJ and Stephen J, an army lieutenant was accused of summarily shooting an Aboriginal man who was in his custody. The defending lawyer, Dr. Wardell, argued that the Aborigine was not, and could not be subject to British law, as 'his tribe has not been reduced under His Majesty's subjection, and because there has been no treaty, either expressed or understood, between his country and that of the British King ..' The Chief Justice held that 'If the Act of Parliament has recognised the application of English law here, we must look to British law as established as established here *de facto* ... this native must be considered, whatever be his denomination, a British

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90 *HRA* Series III, vol. I, p. 529.

91 H. Reynolds, *Aboriginal Sovereignty: Reflections on race, state and nation*, St.Leonards: Allen & Unwin, 1996, pp. 112, 113.

92 *HRA*, Series I, vol. XII, p. 21.

93 Elbourne, 'The sin of the settler: the 1835-36 Select Committee on Aborigines', para. 35. The jury found the accused not guilty.

subject.'[94] On the other hand, two cases in Van Diemen's Land demonstrated no such confusion. In the first case – *R v Musquito and Black Jack* [1824] – two Aborigines (Musquito was a native of New South Wales) were accused of murdering a stock-keeper at Grindstone Bay. Apparently, neither accused were sworn, and neither fully understood the proceedings.[95] The jury found Musquito guilty, but acquitted Black Jack. Both were then arraigned on further charges of murder of 'Mammoa' an 'Otaheitean' companion of the murdered stock-keeper, but were both acquitted. Black Jack was later tried on 19 January 1826 for the murder of settler Patrick McCarthy on the Ouse River, and found guilty. Both Aborigines were hanged on 24 February 1826.[96] In the case of *R v Jack and Dick* [1826], before Pedder CJ, two Aborigines were found guilty by a jury of the murder of a stock-keeper at Oyster Bay, and were hanged. The cases were savagely criticised by the *Colonial Times* newspaper and others, pointing in part to the difficulties noted by Woolmington above, especially concerning language. Henry Melville, in particular, raised the point that the Aborigines were not acquainted with British laws, or of the evidence given against them. He claimed the trials to be 'a mockery'.[97] A number of contemporary observers considered the trials and hangings of Aborigines in Van Diemen's Land to be punitive, and a warning to the Aborigines engaged in the clashes with settlers.[98] However, Lieutenant-Governor Arthur always cloaked himself with the law, and clearly treated the executed men as British subjects, even though, in numerous later cases of captured Aborigines, he declined to apply those laws.[99]

Perhaps the definitive precedent of the age was established in the case of *R v Murrell and Bummaree* [1836] before Forbes C.J, Dowling J. and Burton J. in the Supreme Court of New South Wales, in the year Lieutenant-Governor Arthur was recalled from Van Diemen's Land. Two Aboriginal men, Jack Congo Murrell and George Bummaree, were accused of the murder of two other Aborigines, Pat Clary and Bill Jabinguy, the first time that a case had been brought for offences between

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94 Elbourne, paras. 40, 41; *R. Lowe* [1827], Supreme Court of New South Wales, *Decisions of the Superior Courts of New South Wales*, Macquarie University, Sydney. www.law.mq.edu.au/scnsw/, copy on file with author. Lieutenant Lowe was acquitted.

95 Melville, *The History of the Island of Van Diemen's Land*, pp. 31-35.

96 *R v Musquito and Black Jack* [1824], Supreme Court of Van Diemen's Land, *Decisions of the nineteenth century Tasmanian Superior Courts*, Macquarie University, Sydney. www.law.mq.edu.au/sctas/ , copy on file with author ; Melville, *The History of the Island of Van Diemen's Land*, pp. 31-35; 'A Correspondent' [J. E. Calder], *The Mercury*, Hobart, 27 April 1872.

97 *R v Jack and Dick* [1827], Supreme Court of Van Diemen's Land, *Decisions of the nineteenth century Tasmanian Superior Courts*, Macquarie University, Sydney. www.law.mq.edu.au/sctas/, copy on file with author.

98 Gilbert Robertson, for example, claimed that '[Musquito's] execution was the cause of subsequent murders'. *Copies of all correspondence*, p. 48; Calder, writing from a proximate view, claimed that 'it may have been thought necessary to make a few examples ... to intimidate [the] surviving brethren into submission to the superior race...', J. E. Calder, *Some Account of the Wars, Exterpation, Habits, &c., of the Native Tribes of Tasmania*, p. 54. Both men were virulent critics of Lieutenant-Governor Arthur.

99 See comments on the failure to prosecute in Reynolds, *Fate of a Free People*, pp.94, 95.

Aborigines. The lawyer for the defendant Murrell, Sydney Stephen, argued that Murrell was not subject to the laws of Britain 'because he was not a subject of the British Crown'. His argument relied on Blackstone's view, as noted above; that is, the lands inhabited by Murrell's People before the British occupation were regulated by their own usages and customs, and that their lands had never been conquered or ceded by treaty. The court's decision on this point turned on the question of sovereignty. Although it was accepted that the Aboriginal peoples were free and independent, they were not sovereign nations, as they had not 'attained to such a situation in point of numbers and civilization as a nation – and to such a settled form of government and such settled laws that civilized nations may and are bound to know and respect them.' Not possessing sovereignty, which now resided in the British crown by virtue of the rights of 'Domain and Empire' and by Acts of the Imperial Parliament, the accused was subject to British law. Demurrer was allowed, and Murrell was eventually tried. However, the evidence against him lacked the corroboration of other Aborigines who could not be sworn, and he was acquitted by a jury.[100] This precedent, confirming that Aborigines were British subjects and establishing the principle that Aboriginal tribes were not sovereign nations, was and is the law maintained to the present.

As a final comment, Marilyn Wood has noted the 'inconsistencies, ambiguities and occasional indifference found in the bureaucratic inscription of Aboriginal identities by the state and its church agencies.' In following the hypothesis of Michael Herzfeld on the processes of exclusion, she considered that 'the ambiguous and inconsistent treatment of Aboriginal people reflected the wider social perception that people who were observably Aboriginal were not acceptable as members of the wider community'[101] – a continuous policy of social exclusion provided the justification for both dispossession and inaction on humanitarian issues. It might be added that, in the case of Van Diemen's Land, it provided a justification for a war.

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100 *R v Murrell and Bummaree* [1836], Supreme Court of New South Wales, *Decisions of the Superior Courts of New South Wales.*

101 Marilyn Wood, 'Nineteenth Century Bureaucratic Constructions of Indigenous Identities in New South Wales', Nicolas Peterson & Will Sanders (eds). *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities*, Cambridge: Cambridge University Press, 1998, pp.35, 47.