The World of Small States 4

Stephen Allen
Chris Monaghan *Editors*

Fifty Years of the British Indian Ocean Territory

Legal Perspectives

Springer

The World of Small States

Volume 4

Series editors
Petra Butler
Wellington, New Zealand

Caroline Morris
London, United Kingdom

More information about this series at http://www.springer.com/series/15142

Stephen Allen • Chris Monaghan
Editors

Fifty Years of the British Indian Ocean Territory

Legal Perspectives

Springer

Editors
Stephen Allen
Faculty of Law
Queen Mary University of London
London, United Kingdom

Chris Monaghan
School of Law, Institute of Humanities
University of Worcester
Worcester, United Kingdom

The World of Small States
ISBN 978-3-319-78540-0 ISBN 978-3-319-78541-7 (eBook)
https://doi.org/10.1007/978-3-319-78541-7

Library of Congress Control Number: 2018937642

Printed on acid-free paper

This Springer imprint is published by the registered company Springer International Publishing AG part of Springer Nature.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Contents

About the Contributors

Stephen Allen is a Senior Lecturer in Law and a Co-Director of the Centre for European and International Legal Affairs at Queen Mary University of London. He is a qualified Barrister and has recently become a Door Tenant at 5 Essex Court Chambers, Temple, in London. His main scholarly interests lie in the fields of Public International Law and Public Law and, more specifically, the areas of jurisdiction, statehood, territoriality, self-determination, the rights of indigenous peoples, cyber-space and maritime disputes. His major publications include: Allen, *The Chagos Islanders and International Law* (Hart Publishing, 2014); Allen & Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011); and Castellino & Allen, *Title to Territory in International Law: A Temporal Analysis* (Ashgate, 2003). He is Editor in Chief of *The Oxford Handbook of Jurisdiction in International Law* (OUP, 2018, *forthcoming*). He was a member of the International Law Association's Research Committee on the Rights of Indigenous Peoples (2009–2012).

T. T. Arvind is a Professor of Law at Newcastle University where he teaches legal history. His research explores the use of evolutionary and historical approaches to the analysis of current legal problems. He has published extensively in leading law journals, including *Public Law*, the *Law Quarterly Review* and *Legal Studies*. He has previously written a historical critique of the House of Lords' decision in *Bancoult (No. 2)* ('"Though it Shocks One Very Much": Formalism and Pragmatism in the *Zong* and *Bancoult*' (2012) 32(1) OJLS 113–151). He has recently co-authored a paper on the origins of judicial review, 'The Curious Origins of Judicial Review' (2017) (133) *Law Quarterly Review* 91–117.

Sue Farran is a Professor of Law at Northumbria University. Her research interests are in human rights with a particular focus on the rights of women and children, and the laws that govern land and intellectual property. Her research uses South Pacific states as case studies to demonstrate how the law operates, the protection of human rights and *inter alia* the impact of globalization and legal colonialism. Her research has been published in edited collections and in leading peer-reviewed journals.

Tom Frost is a Lecturer in Legal Theory at the University of Sussex. His research interests include continental philosophy and the relationship between European Empires and the law and justice. His co-authored article (with CRG Murray) 'The Chagos Islands Cases: The Empire Strikes Back' (2015) 66(3) *Northern Ireland Legal Quarterly* 263–288 was cited by Lady Hale in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth and Foreign Affairs (No. 2)* [2016] UKSC 35.

Richard Gifford is a solicitor and consultant at the law firm Clifford Chance. Prior to joining Clifford Chance he was a Partner at Sheridans. He has acted as Mr. Olivier Louis Bancoult's principal solicitor during the course of the domestic litigation. In 2013, he was shortlisted as the Law Society's Solicitor of the Year, Private Practice, with the citation acknowledging his work in the *Bancoult* litigation and in championing pro bono work.

Thomas D. Grant is a Senior Research Fellow at Wolfson College and a Fellow of the Lauterpacht Centre for International Law at the University of Cambridge. His research interests include stare immunity, comparative constitutional law, diplomatic history, international dispute settlement and land and maritime frontier disputes. The Supreme Court of the United Kingdom and the Court of Appeal of England and Wales have cited his research. He has published extensively in peer-reviewed journals and has authored books including *Aggression Against Ukraine* (Palgrave Macmillan, 2015) and *Admission to the United Nations Charter Article 4 and the Rise of Universal Organization* (Leiden: Martinus Nijhoff, 2009).

Stuart Lakin is a Lecturer in Law at the University of Reading. His research considers the relationship between legal theory, political theory and constitutional theory. He also researches in UK constitutional, administrative human rights law. His research publication include 'The manner and form theory: a Nelson's eye view of the UK constitution' (2018) 38(1) OJLS and 'Legality as separation of powers' (2017) 8(3) *Jurisprudence* 653–659. He has also published in leading journals such as the *Modern Law Review*.

Chris Monaghan is a Senior Lecturer in Law at the University of Worcester where he teaches and researches in Public Law, Legal and Constitutional History. Chris has written on various aspects of the *Bancoult* litigation in journals such as *Judicial Review* and the *European Human Rights Law Review.* He is the co-editor of *Dissenting Judgments in the Law* (Wildy, Simmonds and Hill: 2012).

C. R. G. Murray is a Senior Lecturer in Law at Newcastle University. His co-authored article (with T Frost) 'The Chagos Islands Cases: The Empire Strikes Back' (2015) 66(3) *Northern Ireland Legal Quarterly* 263–288 was cited by Lady Hale in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth and Foreign Affairs (No. 2)* [2016] UKSC 35. His work has been

published in leading peer-review journals including *Public Law* and *International and Comparative Law Quarterly*.

David M. Ong is a Professor of International and Environmental Law at Nottingham Trent University. His research interests focus on the International Law of the Sea and International Environmental Law. He has published in leading journals and has co-edited three edited collections, including *Global Project Finance, Human Rights, and Sustainable Development* (Cambridge University Press, 2011).

Amy Schwebel was the Legal Fellow at Minority Rights Group (MRG) International in 2017. Amy joined MRG with experience developing and implementing strategic advocacy focused on systemic change in the areas of children's rights and gender-based violence in Australia as well as research and advocacy with a focus on labour rights and decent work, international trade, climate change and poverty alleviation in the Asia-Pacific region. Amy holds a Master of Laws (Juris Doctor) from Monash University and a Master of Arts (Political Science) from the University of Melbourne.

David Snoxell spent has career working for the UK Foreign and Commonwealth Office. During this time he served as the High Commissioner to Mauritius (2000–2004) and the Ambassador to Senegal, Guinea, Guinea Bissau and Cape Verde (1997–2000). He has also been the Deputy Commissioner for the British Indian Ocean Territory. He is currently chair of the All Party Parliamentary Group on the Chagos Islands (BIOT).

Adam Tomkins is John Millar Professor of Public Law at the University of Glasgow. He researches in UK and comparative constitutional law and has served as a legal advisor to the House of Lords Select Committee on the Constitution. Since 2016 Adam has been a Member of the Scottish Parliament as the Shadow Cabinet Secretary for Communities, Social Security, the Constitution and equalities. He has published leading texts on the UK constitution, including *Public Law* (Oxford University Press, 2003), as well publishing extensively in leading peer-reviewed journals. He has recently co-edited *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, 2015).

Ralph Wilde is a Reader in Law at the Faculty of Laws at University College London. He is an expert in public international law and has published extensively in leading peer-reviewed journals. His current research considers human rights beyond borders. His 2008 monograph, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, 2008), was awarded the Certificate of Merit of the American Society of International Law.

Chapter 1
Introduction

Stephen Allen and Chris Monaghan

1.1 Introduction

The British Indian Ocean Territory ('BIOT') or Chagos Islands, is situated in the Indian Ocean. It is located immediately below the Maldives and is flanked by Africa to the West and the South East Asia to the East. The BIOT was created on 8 November 1965 by the 1965 BIOT Order in Council, a piece of UK primary legislation which excised the inhabited Chagos Archipelago from the British colony of Mauritius along with three uninhabited atolls from the colony of the Seychelles. The partitioning of Mauritius on the eve of independence; the involuntary displacement of the Chagos Islanders (pursuant to the construction of a US naval facility on Diego Garcia); and their subsequent chronic impoverishment in Mauritius have all remained highly controversial in the intervening years. It seems inconceivable that almost 20 years after the end of the Second World War, and the creation of the United Nations, that the UK government would, in effect, exile the population of the entire Chagos Archipelago and then deny to the United Nations that the Islands had ever had a permanent population. However, as the government records quoted in a number of *Bancoult* judgments show,[1] this is precisely what happened. Since the early 1970s, the UK government has fought hard to prevent the Chagos Islanders from returning to their ancestral homeland by rejecting their right of abode in the BIOT/Chagos Islands and by refusing the demands for adequate compensation for all those affected.

[1] See cases cited at footnote 4 below.

S. Allen (✉)
Queen Mary, University of London, London, UK
e-mail: s.r.allen@qmul.ac.uk

C. Monaghan
Worcester University, Worcester, UK
e-mail: c.monaghan@worc.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_1

The legacy of the UK's post-war conduct in respect of its colonies is contentious, with recent litigation brought by those who suffered at the hands of the British colonial administration during the Mau Mau uprising in Kenya,[2] and in the communist insurgency in Malaysia.[3] These cases are stark reminders of the many shortcomings in British imperial policy during the era of widespread decolonisation. At one level, the tragic experiences of the Chagossians may be understood against a background of imperial callousness, decline and withdrawal but it is clear that the UK government persisted in its mistreatment of the banished inhabitants of this controversial British Overseas Territory in the decades that followed. Consequently, it would be wrong to label the Chagos travesty as merely a legacy of Empire rather it constitutes an ongoing site of injustice that reaches into the present and into the structures and norms of the contemporary British State.

Notwithstanding the pursuit of a concerted policy of deracination against them, the Chagos Islanders themselves have played a central role in asserting their claims. In particular, they have used litigation as a highly effective means of articulating their rights and identifying the binding obligations imposed on the UK government by municipal law, the European Convention on Human Rights and international law more generally. For instance, the removal of the Chagossians right of abode in respect of the BIOT prompted a number of high profile public law and private law challenges before the UK Courts and the European Court of Human Rights.[4] In addition, Mauritius has long contested the UK's exercise of sovereign authority over the BIOT/Chagos Islands. This sovereignty dispute has been advanced in various UN fora in recent decades. It culminated in litigation, instituted by Mauritius, under the auspices of Annex VII of the 1982 UN Convention of the Law of the Sea (LOSC),[5] concerning the UK's unilateral declaration of a Marine Protected Area in 2010—a 200 square mile exclusion no-take zone—surrounding the BIOT ostensibly on the ground of environmental protection.[6] The Tribunal's 2015 arbitral Award, which was favourable to Mauritius, carries major ramifications for the future governance of the BIOT and, indirectly, for the UK's sovereignty over the Territory in the longer term. In addition, in the last couple of years, there has been an appeal to the UK Supreme Court challenging the House of Lords' contentious decision in *R (on*

[2] *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB).

[3] *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2445 (Admin).

[4] See the public law challenges in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No,1)* [2001] 1 QB 1067; *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2006] EWHC 1038 (DC); [2008] QB 365 (CA); [2008] 3 WLR 955 (HL). And the private law action in *Chagos Islanders v Attorney General and HM BIOT Commissioner* [2003] EWHC QB 2222 (HC); [2004] EWCA Civ 997 (CA). Also see *Chagos Islanders v UK*, App 35622/04, Fourth Section Decision, 2013 56 EHRR SE15.

[5] 10 December 1982, (1982) 21 ILM 1261, (1994) 1833 UNTS 3.

[6] *Chagos Marine Protected Area Arbitration* Award *(Mauritius v UK)*, 18 March 2015: http://www.pca-cpa.org/showpagea579.html?pag_id=1429.

the application of Bancoult) v Secretary of State for Foreign Affairs (No. 2).[7] The Supreme Court's decision in *R (on the application of Bancoult) v Secretary of State for Foreign Affairs (No. 2)*[8] has allowed a new panel of judges to reconsider one of the most divisive judgments in recent memory and this development is considered in a number of the essays included in the present volume.

It is worth stressing that the Chagossian litigation is still ongoing. In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)*, the Chagos Islanders challenged the validity of the BIOT/Chagos MPA in the UK courts.[9] Their appeal was heard by the UK Supreme Court in June 2017 but judgment has yet to be delivered in this case. Moreover, Mauritius is also determined to find ways of bringing about the return of the Chagos Archipelago to Mauritian sovereignty. To this end, on 23 June 2017, the UN General Assembly requested an Advisory Opinion from the International Court of Justice concerning the extent to which the excision of the Chagos Archipelago from the Mauritian colonial unit undermined Mauritius' subsequent decolonisation and the consequences of the alleged failure to complete this process have generated for international law with specific regard to the UK's continued administration of the Chagos Islands.[10] We will have to wait and see how the legal arguments underpinning this request evolve during the forthcoming legal proceedings and, ultimately, how the ICJ responds to it.

1.2 The Aim of This Collection

This collection of essays grew out of a number of presentations delivered at two related conferences which explored different aspects of the Chagossian situation. One was held at the Law School at Queen Mary, University of London on 12 November 2015 to mark the fiftieth anniversary of the creation of the BIOT. It was organised by Stephen Allen under the auspices of the Centre for Small States. Chris Monaghan convened an earlier conference, *The Chagos Litigation: A Socio-Legal Dialogue,* which was held on 29 June 2015. This conference was held at the University of Greenwich's Maritime Greenwich Campus and was supported by the School of Law. The broad purpose of the book is to brings together a wide range of legal scholars, practitioners and other experts in order to provide a comprehensive

[7] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61.

[8] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2016] UKSC 35.

[9] The decision of the Supreme Court is pending. See *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2013] EWHC (Admin) 1502; and [2014] EWCA Civ 708.

[10] See UN General Assembly Resolution A/RES/71/292, 22 June 2017. It has not been possible to include discussion of the latest developments at the UK Supreme Court and in the UN General Assembly in the present volume.

and authoritative account of the salient legal issues affecting the BIOT/Chagos Islands from a range of different legal perspectives including: human rights law, international law, the rights of indigenous peoples, UK constitutional and administrative law. The marking of fifty years since the BIOT was first constituted provides us with a timely opportunity to reflect upon the various legal disputes which concern the BIOT/Chagos Islands and to advance understanding of the legal issues involved. However, as noted above, these legal disputes are still ongoing. Consequently, it will be the job of future scholarship to investigate the impact of the very latest developments concerning the BIOT/Chagos Islands and the Chagos Islanders in particular.

1.3 The Contributors

A number of contributors explore the public law dimension of the *Bancoult* litigation before the domestic courts. **Stuart Lakin**, in his essay 'Justifying *Bancoult (No 2)*: Why Justice Hercules Must Sometimes Disappoint Us', seeks to shine a light on the judicial disagreements between the majority and dissenting Opinions delivered by members of the Judicial Committee of the House of Lords in *Bancoult (No.2)*. He argues that Justice Hercules—a fictitious figure representing Ronald Dworkin's 'anti-positivist, interpretative theory of law'—may well favour the majority judgment in that case. Lakin provides the reader with an opportunity to reflect on this controversial judgment; to consider the role of judges and the conflict between their role and our expectations of justice. **Adam Tomkins**, in his contribution, 'Environmental protection versus the right of abode: a case-study in the misuse of power', considers the legality of the decision, taken by the Secretary of State for Foreign and Commonwealth Affairs in 2010, to establish a Marine Protected Area (MPA) around the BIOT/Chagos Islands. Tomkins examines the rationale for the decision concluding that it was partly made in order to prevent the Chagossians from returning to the Chagos Archipelago. His view as to the legality of the decision is at odds with the approach adopted by the Court of Appeal in *Bancoult (No. 3)* and his essay attempts to establish why the decision was unlawful. In his essay, 'How Public Law has not been able to provide the Chagossians with a Remedy', **Richard Gifford**, Olivier Bancoult's principal solicitor, draws on his first-hand experience of the Chagossians' litigation in the UK courts. His contribution sets out the background to the House of Lords' decision in *Bancoult (No.2)* and the recent Supreme Court decision in that case. A hard-hitting essay, it considers the different approaches adopted by the judges involved and the courts' failure to uphold the Chagos Islanders' right of abode and to provide compensation for its withdrawal.

In his chapter, 'The Subject as a Civic Ghost: Law, Dominion, and Empire in the Chagos Litigation', **T.T. Arvind** steps back from the task of assessing the formalistic justifications offered by the UK courts for denying the applicability of key constitutional principles and human rights norms invoked by the Chagossians in their domestic public law challenges. Instead he examines the extent to which these decisions represent a dramatic re-conceptualization of relations between the individual and the

State with particular regard to understandings of the notion of the common good, the availability of citizenship entitlements and the contours of civic personality. While this shift may have been most keenly felt at the constitutional periphery in the *Bancoult* cases, Arvind shows us that it has profound consequences for the functioning of the modern constitutional State at a general level. In 'An imperfect legacy: the significance of the *Bancoult* litigation on the development of domestic constitutional jurisprudence' **Chris Monaghan** considers the deficiencies in the majority judgment in *Bancoult (No. 2)* against the historic constitutional role of the courts in ensuring that the executive does not abuse its prerogative powers. Moreover, the essay addresses the problems in ensuring that there is accountability in how the prerogative of colonial governance is exercised and it considers how legislative reform might be achieved in this area. **C.R.G. Murray** and **Tom Frost** argue in 'The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism' that the UK constitution drew a distinction between how the Chagossians were treated compared to those colonial subjects who inhabited settler colonies, such as the Falklands. Their chapter explores the residual influence of Empire over contemporary UK constitutionalism.

In "Anachronistic as colonial remnants may be…": Locating the Rights of the Chagos Islanders as a Case Study of the Operation of Human Rights Law in Colonial Territories', **Ralph Wilde** assesses the rights of the Chagos Islanders by reference to the key human rights treaties, most notably, the European Convention on Human Rights (ECHR). In his essay, Wilde considers both the 'territorial' and 'extra-territorial' applications of the ECHR's jurisdictional provisions and those contained in international human rights treaties more generally. He pays particular attention to the jurisdictional challenges presented by 'colonial clauses' when contrasted with the contemporary human rights model of jurisdiction. Wilde uses these competing models to analyse the approach adopted by the European Court of Human Rights in its 2012 judgment in the *Chagos Islanders v UK Case*.[11]

The collection then turns it focus to the international legal disputes concerning the BIOT/Chagos Islands. In 'The Once and Future King: Sovereignty over Territory and the Annex VII Tribunal's Award in *Mauritius v United Kingdom*' **Thomas Grant** examines closely the way in which the Tribunal treated the question of sovereignty in connection with the Republic of Mauritius' challenge, pursuant to Part XV of the LOSC, to the BIOT/Chagos Marine Protected Area (MPA), which was declared by the UK in 2010. Although the arbitration case was widely viewed as a proxy for this sovereignty dispute the Mauritian government was careful not to assert, directly, Mauritius' sovereignty claim in the proceedings on the ground that LOSC's dispute resolution provisions do not cater for the compulsory adjudication of sovereignty disputes. Nevertheless, Grant scrutinizes the Chagos Award in an effort to discern the Tribunal's standpoint on the BIOT's future and the latent sovereignty dispute. In 'The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*', **Stephen Allen** examines the way in which the Tribunal harnessed the 'Lancaster House Undertakings' in support of its finding that the Marine Protected Area was created

[11] *Chagos Islanders v United Kingdom* (2013) 56 E.H.R.R. SE15.

in violation of international law. In particular, it analyses the doctrinal significance of the Tribunal's decision to invoke the principle of estoppel as a means of upholding the Undertakings as though they amounted to some kind of binding international agreement. The essay uses the *Chagos Award* to demonstrate the extent to which estoppel's normative authority continues to be misunderstood by international courts and tribunals notwithstanding the contribution that the Award makes to the principle's slow substantive evolution in international law.

In 'Implications of the Chagos Marine Protected Area Arbitral Tribunal Award for the Balance between Environmental Protection and Maritime Freedoms', **David Ong** assesses the implications of the *Chagos Award* in terms of its contribution to international environmental law at a general level. In this regard, Ong's essay addresses the manner in which LOSC's provisions concerning environmental protection triggered the compulsory and binding dispute settlement provisions contained in Part XV of the Convention. The contribution also interrogates the Tribunal's interpretation and application of LOSC's consultation provisions and their significance for the future designation of Marine Protected Areas. The content, shape and designation of Marine Protected Areas is analysed by **Sue Farran** in her contribution to this volume. In, 'Learning from Chagos, Lessons for Pitcairn?' she compares the experiences of the Chagossians with those of the inhabitants of another British Overseas Territory, the Pitcairn Islands with special reference to the development, and declaration of massive Marine Protected Areas. In these similar contexts, Farran examines the broader motives behind the creation of MPAs which stem from the appeals of international NGOs, and other lobby groups, for the promotion of 'world habitat', the development of 'global commons' and the galvanizing of the 'responsibilities of mankind'. She assesses the impact that such narratives and sites of action have on the costs, viability and/or sustainability of remote island peoples in situations where Marine Protected Areas are being contemplated or established.

In 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians', **Amy Schwebel** explores the extent to which the Chagossians can invoke the rapidly evolving jurisprudence of indigenous peoples' property rights in support of their right to return to the BIOT/Chagos Archipelago. Specifically, Schwebel evaluates the resonance of key normative and institutional developments—including the concepts of restitution, reparations and the notion of Free, Prior and Informed Consent and the forging of international fora (e.g. the United Nations Permanent Forum on Indigenous Issues) and regional human rights mechanisms committed to the task of realizing indigenous rights—for the Chagos Islanders and their efforts to resettle their ancestral homeland. **David Snoxell** considers the role of Parliament and individual parliamentarians in the final chapter of the book, 'The Politics of Chagos: Part played by Parliament and the Courts towards Resolving the Chagos Tragedy'. Snoxell draws upon his experience as a UK diplomat—he was formerly the UK's High Commissioner to Mauritius and the BIOT's Deputy Commissioner—to provide a thorough overview of the diplomatic reasons for the BIOT's creation and the impact that the relationship between the UK and US governments has had on UK policy concerning the BIOT and the Chagossians. As the co-ordinator of the Chagos Islands All-Party Parliamentary Group, Snoxell pro-

vides an account of how parliamentarians have sought to resolve the dispute surrounding the Chagos Islands. Snoxell cautions that while the litigation has achieved much only a political solution, grounded in compromise and negotiation, can, ultimately, resolve the various disputes concerning the BIOT/Chagos Islands. Consequently, in his essay, Snoxell surveys the latest political developments in the Chagossian saga and he considers the future of the BIOT in this context. The book generally takes account of developments up to November 2017.

Acknowledgments We wish to express our deep gratitude to the contributors to this volume for agreeing to develop their conference presentations into fully-fledged essays, for their firm commitment to this publishing project and for their cooperation and collegiality in finalizing the collection. It would not have been possible to produce this book without the help of many other scholars. In particular, we wish to recognize the contributions made by Professor Malgosia Fitzmaurice (Queen Mary), Dr Paul Gragl (Queen Mary), Dr Edward Guntrip (Sussex), Professor Peter Jaffey (Leicester), Professor Satvinder Juss (KCL), Dr David Keane (Middlesex), Mr Sebastian Payne (Kent), Professor Thomas Poole (LSE), Mr Remi Reichhold (5 Essex Court Chambers) and Mr Peter Sand (LMU). We also wish to record our appreciation of the unstinting advice and support provided to us by Dr Petra Butler and Dr Caroline Morris, the General Editors of the Springer Book Series, *The Word of Small States* (and the co-directors of the Centre for Small States). Stephen Allen would like to thank Professor Valsamis Mitsilegas, Head of the Law Department at Queen Mary, for generously supporting the Queen Mary Conference. Chris Monaghan wishes to thank Professor Sarah Greer, formerly Dean of the School of Law, University of Greenwich and now Deputy Vice-Chancellor, University of Worcester and Sandra Clarke, Head of the School of Law, University of Greenwich, for supporting the Greenwich Conference.

References

Chagos Islanders v Attorney General and HM BIOT Commissioner [2003] EWHC QB 2222 (HC); [2004] EWCA Civ 997 (CA)

Chagos Islanders v United Kingdom (2013) 56 E.H.R.R. SE15

Chagos Islanders v UK, App 35622/04, Fourth Section Decision, 2013 56 EHRR SE15

Chagos Marine Protected Area Arbitration Award (Mauritius v UK), 18 March 2015: http://www.pca-cpa.org/showpagea579.html?pag_id=1429

Mutua v Foreign and Commonwealth Office [2011] EWHC 1913 (QB)

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No,1) [2001] 1 QB 1067

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2006] EWHC 1038 (DC); [2008] QB 365 (CA); [2008] 3 WLR 955 (HL)

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2016] UKSC 35

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2013] EWHC (Admin) 1502; and [2014] EWCA Civ 708

R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2445 (Admin)

UN Convention on the Law of the Sea, 10 December 1982, (1982) 21 ILM 1261, (1994) 1833 UNTS 3

UN General Assembly Resolution A/RES/71/292, 22 June 2017

Chapter 2
Justifying *Bancoult (No 2)*: Why Justice Hercules Must Sometimes Disappoint Us

Stuart Lakin

2.1 Introduction

In *Bancoult (No 2)*,[1] Mr Bancoult, a Chagossian national, challenged the legality of an Order in Council, the Constitution Order 2004.[2] The purpose of the Order was to prevent resettlement on the Chagos Archipelago or (as it later became) the British Indian Overseas Territories (BIOT) in order to make way for a US military base. In enacting the Constitutional Order, and removing the Chagossians from BIOT, the UK government claimed to be acting under a prerogative power to 'make laws for the peace, order and good government' of BIOT. The applicant challenged the legality of section 9 of the Constitution Order on three bases. First, that he had a fundamental right of abode which the Crown could not remove without first consulting Parliament. Secondly, that the Order did not in fact conduce to the 'peace, order and good government' of BIOT, and that the removal of the Chagossians was therefore irrational on ordinary judicial review grounds. Finally, that he had a legitimate expectation that he could return, based on a press release by the then Foreign Secretary.

I presented a paper with a passing resemblance to this one in the workshop, Fifty Years of the British Indian Ocean Territory Conference Queen Mary, University of London, November 12, 2015. I am very grateful for the questions and comments I received at this event. I also extend my thanks to Thomas Fairclough, Dimitris Kyritsis, Neville Filar, Chris Monaghan, Stephen Allen, Trevor Allan and an anonymous reviewer for their extremely helpful comments and criticisms.

[1] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2008] 3 WLR 955.

[2] British Indian Ocean Territory (Constitution) Order 2004.

S. Lakin (✉)
University of Reading, Reading, UK
e-mail: s.j.lakin@reading.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_2

By a majority of three to two, the House of Lords ruled in favour of the Government, reversing the Court of Appeal and Divisional Court.[3] All judges agreed that Orders in Council were properly subject to judicial review, despite being a form of primary legislation.[4] All judges except Lord Hoffmann thought that the Chagossians enjoyed, at least in principle, a fundamental right of abode. Lord Bingham and Mance, in the minority, held that this right could not be removed by the prerogative power of colonial governance; it could only be removed by Parliament. Lords Rodger and Carswell, in the majority, held that judicial review of the Constitutional Order for breach of 'fundamental principles'—including a right of abode— was excluded by the Colonial Laws Validity Act 1856 (CLVA), ss 2 and 3 of which made colonial law challengeable only on the ground of repugnancy to an Act of Parliament extending to the colony. Lords Hoffmann, Bingham and Mance ruled, by contrast, that the CVLA did not apply to Orders in Council: it applied only to laws passed by colonial legislatures. Lord Mance and Bingham, in the minority, held that the removal of the Chagossians was irrational and therefore unlawful. Lords Hoffmann, Rodger and Carswell, in the majority, found that the removal was rational and lawful, and that, given the subject matter, the courts were not institutionally equipped to assess the reasons for it. Lords Hoffmann, Rodger and Carswell, in the majority, all found that there was no legitimate expectation, since there was no clear and ambiguous promise. The minority ruled that the Government had acted in breach of the applicant's legitimate expectation, not least by its failure to consult the Chagossians before enacting the Constitution Order.

The majority judgments in *Bancoult (No 2)* have attracted near universal criticism.[5] For Allan, the judges reached a 'dismal conclusion… contrary to the rule of law'.[6] For Elliott and Perreau-Saussine, the applicants won a Pyrrhic victory—establishing the right to challenge Orders in Council before the highest courts in the land, only to meet absolute judicial deference to the executive.[7] For TT Arvind, the judgments of the majority '[were] so without basis as to be unsustainable on any formalist or legalist account [of law].'[8] In this article, I shall attempt to swim against these tidal waves of criticism to explore a possible defence of the majority decision.

---

[3] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] QB 365.

[4] Lord Hoffmann said: '[T]he fact that Orders in Council in certain important respects resemble Acts of Parliament does not mean that they share all their characteristics. The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone.' [35].

[5] A rare but highly influential argument in support of the reasoning adopted by Lord Rodger and Carswell is found in Finnis (2008).

[6] See Allan (2013), p. 291.

[7] Elliott and Perreau-Saussine (2009), PL 697–722.

[8] Arvind (2012), p. 113–151.

In Sect. 2.2, I set out a critics' narrative of the judgments in *Bancoult (No 2)*, focusing on three areas of legal argument. In Sect. 2.3, I suggest that this narrative assumes a broadly legal positivist picture of law. It assumes that the content of the law depends solely on empirical facts about what law-makers and judges have said or intended in legal texts and past decisions, or on the settled rules of the constitution. I then consider whether this understanding of law can make sense of certain key features of the *Bancoult (No 2)* judgments—and, more broadly, whether it can make sense of English common law practice as a whole. One significant explanatory obstacle, I suggest, is accounting for the depth of disagreement between the judges. If law is a system of empirically ascertainable rules; and if, as many critics imply, there were settled rules on the legal questions in *Bancoult (No 2)*, then it is difficult to fathom why *all* judges did not apply those rules. I explore a range of possible positivist answers to that objection, but find them all wanting. I then turn to an alternative answer, one that sees the majority judgments as pragmatic, policy-based, decisions rather than decisions of law. That answer I contend, is also inadequate. To begin with, it *assumes* the correctness of a positivist-style approach to doctrinal analysis, without answering any of the objections to that approach. Further, it assumes in a question-begging manner that judges' use of *moral* standards—as opposed to absolute, empirically determined rules—cannot count as legal reasoning.

In Sect. 2.4, having rejected the positivist and pragmatist explanations for judicial disagreement in *Bancoult (No 2)*, I adopt an *anti*-positivist, interpretivist explanation. Drawing on the work of Ronald Dworkin and Trevor Allan, I suggest that we should understand the disagreements, not in terms of the what judges and law-makers have said, but in terms of the principles of justice and institutional responsibility that best justify what they have said.[9] Two competing moral theories of executive power, I suggest, underpin the different judgments. The first theory supposes that there is no moral difference between prerogative powers and other executive powers. Judges have a duty to ensure that any exercise of executive power is justified according to a defensible vision of the common good. The second theory, by contrast, gives justification for a distinct sphere of prerogative power. Within this scheme, judicial and parliamentary oversight legitimately extends only so far: it must be alert to the reasons for governmental action, but sensitive to the needs for 'acts of state'. I contend that the second theory, embodied in the majority judgments, arguably better captures the prevailing settlement between the Crown and the courts in relation to prerogative powers. If so, then we may say that the majority decision was correct decision in law—notwithstanding the many positivist-inspired objections to the judges' reasoning.

I close the article, in Sect. 2.5, by briefly addressing two potential responses to an interpretative reading of *Bancoult (No 2).* First, that even if the majority judgment was interpretatively correct as a matter of law, the judges could and should have disregarded the law, and adopted the view of the minority. Secondly, that the second scheme of principle, purportedly justifying the majority decision, is too oppressive and illiberal to count as genuine law. In rejecting both objections, I

[9] See Dworkin (1978, 1986a, b, 2006, 2011) and Allan (2013).

emphasise the sense in which legality does and should track the moral principles embedded in the institutional practices of a particular community. Following Kyritsis I contend that we should view judges as participants in a 'joint project of governing': a collaborative effort on the part of each branch of government to fashion, through law, a shared vision of justice and institutional responsibility.[10] That shared vision may fall short of what judges, and we, think justice and institutional responsibility ideally requires; but I contend that we can legitimately expect no more of legality and adjudication.

2.2 *Bancoult (No 2)* and Its Critics

In a powerful critique of the decision in *Bancoult (No 2)*, TT Arvind hails the dissenting decision of Lords Bingham and Mance a model of 'principled, formalistic reasoning',[11] and condemns the majority decision of Lords Hoffmann, Rodger and Carswell as being 'obviously weak and flawed'.[12] In common with other commentators on the case, Arvind effectively treats *Bancoult (No 2)* as an 'easy' or 'regulated' case: one in which the answers to the legal questions could be found without much difficulty in established precedents and constitutional rules.[13] The effect of his critique, we might say, is that the dissenting judges duly applied the settled law to the question like a first class student, while the legal reasoning of the majority judges barely warranted a pass. As we progress through this article, we shall try to make sense of this supposed difference in accuracy and quality between the reasoning of the majority and minority. We shall see that our assessment of the reasoning—both of the minority and majority—depends greatly on our underlying commitments in legal philosophy. Once we get the abstract philosophy right, we will find that the majority judgments—in common with the minority judgments—have much to commend them. Or so I shall argue.

To launch this inquiry, it will first be helpful to outline three selected areas of the judgments where, according to Arvind and other critics, the dissenting judges got things clearly right and the majority got things clearly wrong. First, on the question of whether the prerogative power of colonial governance was limited by a fundamental right; second, on the question of whether the formulation 'peace, order and good government' connoted a limited or plenary prerogative power; and, finally, whether the judges could review the reasons given by the Government for removing the Chagossians islanders. No attempt will be made, at this stage, to comment on, or answer these critiques. These outlines will instead serve as a reference point for later discussions.

---

[10] Kyritsis (2015b).

[11] Arvind (2012), p. 138.

[12] ibid 135.

[13] As oppose to a 'hard' or 'unregulated' case in which the law is clearly in dispute. See e.g. Raz (1979), pp. 181–194.

2.2.1 Was the Prerogative Power of Colonial Governance Limited by a Fundamental Right?

According to Lords Bingham and Mance, there was no authority to support a prerogative power to exile an indigenous population from its homeland, therefore no such power existed.[14] As Lord Bingham said: 'If it is law, it will be found in our books'.[15] It followed that, for them, Art 9 of the Constitution Order was void. Both judges relied on Lord Mansfield's sixth proposition in *Campbell v Hall* as authority for the rule that the Crown could exercise plenary legislative power in a conquered or ceded territory (into which category all judges agreed BIOT fell) but that it could not make laws that were contrary to fundamental principles without the authority of Parliament.[16] Both judges ruled that the common law recognised a fundamental right of abode, relying primarily on Lord Mansfield's second proposition in *Campbell v Hall*.[17] Lord Mance, following Sedley LJ described the right as 'one of the most fundamental liberties known to human beings, the freedom to return to one's homeland, however poor and barren the conditions of life'.[18] The opinions of Lord Bingham and Mance, Arvind says, stand as a 'meticulous examination of the legal principles which justify the grant by common law to one power over another, and which must be shown to be satisfied when the existence of an unprecedented power is asserted'.[19]

The decision of Lords Rodger and Carswell that the CLVA ousted the jurisdiction of the courts to review the Constitution Order for breach of Lord Mansfield's 'fundamental principles', by contrast, was 'profoundly flawed'.[20] The cases on which their Lordships relied 'made it unambiguously clear that *Campbell v Hall* and the CLVA were not connected, and that the Act did not apply to powers of the type exercised in *Bancoult*'.[21] In relation to *Campbell v Hall* itself, Lord Mansfield was clearly not dealing with the relationship between the Crown in Council and colonial legislatures, as the majority ruled, but with the Crown's power vis-a-vis Parliament. This was manifest, Arvind suggests, from his sixth proposition.[22] His 'fundamental principles' limitation, Arvind emphasises, is entirely clearly distinct from the 'repugnancy' ground of challenge in the CLVA. 'Even a perfunctory reading of

[14] *Bancoult* (HL) (n 1) [70]–[71] (Lord Bingham); [150] (Lord Mance).

[15] ibid [69] citing *Entick v Carrington* (1765) 19 State Tr 1030, 1066.

[16] *Campbell v Hall* (1774) Lofft 655, 741–42; 98 ER 848.

[17] ibid 'Under the King's protection… subjects and are to be universally considered in that light, not as enemies or aliens'. Lord Mance found further evidence for a right of abode in section 4(3) of the Immigration Ordinance 2000, which allowed the Chagossians to return to the outer islands of BIOT.

[18] *Bancoult* (HL) (n 1) [172]; and see *Bancoult* (CA) (n 3) [71] (Sedley LJ).

[19] Arvind (2012), p. 138.

[20] ibid 126.

[21] ibid.

[22] Above (n 16).

Campbell v Hall' would have shown this…'[23] The former limitation, he insists, deals with broad constitutional principles about the separation of powers and parliamentary sovereignty within the British constitution; the latter limitation only concerns whether local colonial law, otherwise valid according to the constitutional requirements of the colony, is 'repugnant' to the terms of an imperial statute applied to the colony.[24] The repugnancy question is one of *vires*, where Lord Mansfield's 'fundamental principles' limitation is one of the *powers* of the Crown to enact legislation. This distinction is 'perfunctorily dismissed'[25] by Lord Rodger and Lord Hoffmann yet, Elliott and Perreau-Saussine note:

> [S]uch a distinction shapes classical accounts of English administrative law built on a constitutional principle of parliamentary sovereignty (which it is assumed will be exercised in accord with other constitutional principles unless explicitly indicated otherwise) while treating executive action incompatible with such principles as void ab initio.[26]

Other cases cited by Lord Rodger and Carswell similarly provided no authority for their conclusion on the CLVA. *Philips v Eyre*, Elliott and Perreau-Saussine note, was not based on the CLVA, but a discretion 'to extend to colonies with a colonial legislature a private international law principle of comity or respect for foreign legislation on acts within that foreign jurisdiction'.[27] Nor was the CLVA directly in point in the *Liyanage* decision.[28] This case concerned limits to the powers of the Ceylonese Parliament implied by the Privy Council into the colonial constitution rather than Orders in Council.[29] Arvind expresses bemusement at how Lords Rodger and Carswell 'against the express words of the very authorities they cited in support of their decision, chose to interpret the law in a way that conferred upon the executive an unprecedented amount of power at the expense of Parliament'.[30] The principal basis on which Lord Rodger and Carswell found the CLVA to be relevant, Arvind and other critics note, was the view of Colonial Office lawyers on why the Act was necessary.[31] Apart from the fact that these views did not support the use made by the judges of the CLVA,[32] this use of originalist interpretation in the context of the British constitution, Elliott and Perreau-Sassau contend, 'is to invoke

[23] Arvind (2012), p. 129.

[24] ibid 126, following the reasoning in *Bancoult* (HL) (n 1) [40] (Lords Hoffmann) and [142] (Lord Mance).

[25] Arvind (2012), p. 132. '[The distinction is] too fine to be serviceable', *Bancoult* (HL) (n 1) [39] (Lord Hoffmann).

[26] Elliott and Perreau-Saussine (2009), p. 704.

[27] ibid. *Philips v Eyre* (1870) L.R. 6 Q.B. 1., cited by Lord Rodger in *Bancoult* (HL) (n 1) at [97].

[28] *Liyanage v The Queen* [1967] 1 AC 259.

[29] Elliott and Perreau-Saussine (2009), p. 703.

[30] Arvind (2012), p. 132.

[31] *Bancoult* (HL) (n 1) [95]–[96] (Lord Rodger).

[32] Arvind (2012), p. 127–128.

a startling new principle of statutory interpretation',[33] and one that is incompatible with the existing rule in *Pepper v Hart*.[34]

In Lord Hoffmann's judgment, there was no fundamental right of abode within the BIOT constitution because section 9 of the Constitution Order abrogated any ordinary legal right of abode that may have existed. As he put it, 'the language [of the Order] could not be clearer'.[35] The power of the Crown did not extend, however, to sanctioning torture in a ceded colony.[36] The ordinary principles of judicial review, he said, would be sufficient to prevent this.[37]

Arvind objects to Lord Hoffmann's reasoning in several ways.[38] First, he suggests that he mistakenly made the right of abode referable to the constitution of BIOT—as contained in the Constitution Order—rather than the *British* constitution, contrary to the clear authority of in *Campbell v Hall*. Secondly, as a consequence of this error, he failed to consider any relevant English case law on whether the Crown prerogative encompassed a power to remove an indigenous population. Thirdly, he drew an analogy with 'no basis in authority' between the Crown's prerogative powers over ceded colonies and the powers of Parliament over England. Fourthly, he gave no authority for ruling that the ordinary principles of judicial review would be sufficient to preclude Crown legislation authorising torture.[39] Arvind concludes that Lord Hoffmann's decision '…in effect eliminates the restrictions on the prerogative imposed by *Campbell v Hall*' with no authority for doing so.[40] He notes, more generally, that the contrasting conclusions of Lord Hoffmann (with Lords Bingham and Mance), on the one hand, and Lords Rodger and Carswell on the applicability of the CLVA meant that the majority judgments contain two 'mutually incompatible' sets of reasoning.[41]

2.2.2 *Did the Formulation 'Peace, Order and Good Government' Connote a Limited or Plenary Prerogative Power?*

According to the critics, the dissenting minority applied the settled constitutional principle that the power of the Crown is necessarily limited, and that the courts will review secondary legislation to ensure that it is exercised in line with the

[33] Elliott and Perreau-Saussine (2009), p. 702.

[34] ibid, footnote 19. *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 HL, setting out the limited conditions under which courts can have recourse to Hansard.

[35] *Bancoult* (HL) (n 1) [45] (Lord Hoffmann) 'The law gives it and the law may take it away'.

[36] ibid [35].

[37] ibid.

[38] Arvind (2012), p. 135.

[39] ibid. See also Elliott and Perreau-Saussine (2009), p. 720.

[40] Arvind (2012), p. 135.

[41] ibid 125.

purpose for which it exists. The purpose of the prerogative of colonial governance—and therefore the Constitution Order—was manifest from the words 'peace, order and good government'. The Crown would only act *intra vires* the Constitution Order if it acted in a way such as to further these ends. Hence Lord Mance was correct to rule that the formulation was 'intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory's inhabitants is a contradiction in terms'.[42]

For the majority, the formulation 'peace, order and good government' was merely the customary way in which in which Her Majesty's reserved legislative powers were described'.[43] The authorities showed that power was 'equal in scope to the legislative powers of Parliament'.[44] This meant, Lord Hoffmann said, that "[prerogative] legislation made for the colonies is in the same position as legislation made by Parliament for this country".[45] Elliott and Perreau-Saussine object that:

> This analysis goes a considerable distance towards in de facto terms precisely the sovereignty law-making power that it rightly lacks in the de jure sense. One of the hallmarks of subordinate legislation – into which category, it is generally accepted, Orders in Council fall—is that it may be enacted only for limited purposes. In this sense, the standard principle that no executive (including legislative) power can be purposeless applies with just as much force as it does to statutory powers. As Laws L.J. pointed out in *Bancoult (No 1)*, "peace, order and good government may be a very large tapestry, but every tapestry had a border.[46]

Similarly Arvind objects that the majority reasoning:

> [O]verruled centuries of settled jurisprudence that Parliament alone has unlimited sovereignty and that, in consequence, the prerogative power of the Crown-in-Council as a subordinate power, is necessarily subject to substantive bounds.[47]

[42] *Bancoult* (HL) (n 1) [157] (Lord Mance) supporting the reasoning of the Court of Appeal that 'the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective well-being cannot have [the] character [of governance] and accordingly cannot be lawfully accomplished by use of the prerogative power of governance' *Bancoult* (CA) (n 3) [67] (Sedley LJ).

[43] *Bancoult* (HL) (n 1) [107] (Lord Rodger).

[44] Most notably *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 C.L.R. 1. Lord Hoffmann also cites (at *Bancoult* (HL) (n 1) [31]) an entry from *Halsbury's Laws of England*, 4th ed reissue, vol 6 (2003), para 823, which refers to the 'full power' of the Crown.

[45] *Bancoult* (HL) (n 1) [108] (Lord Hoffmann).

[46] Elliott and Perreau-Saussine (2009), p. 708.

[47] Arvind (2012), p. 132.

2.2.3 *Did Judges Have the Power to Review the Reasons Given by the Government for Removing the Chagossians Islanders?*

All judges accepted that they had the power to review the Constitution Order on ordinary public law grounds, clarifying the decision in *GCHQ*.[48] Elliott and Perreau-Saussine remark that this conclusion, while welcome, was logically inconsistent with the finding by Lord Rodger and Lord Carswell that, by the terms of the CLVA, an Order in Council could only be challenge for repugnancy to an imperial *statute*.[49] Their Lordships also failed to explain, in their 'bemusing account' of the CLVA, why, if it was not appropriate for judges to review an Order in Council or breach of 'fundamental principles', it was appropriate for them to do so 'for some other reason'[50] including review under the ordinary heads of judicial review.[51]

All judges accepted that the correct standard of review was the heightened 'anxious scrutiny' standard. The majority decided that the Constitution Order was rational given that any right of abode that existed was 'largely symbolic',[52] the outer islands of BIOT had no infrastructure, the Government had not offered any funding for resettlement, the costs would be prohibitive, and full control over the territory was needed for the security of the military base. Further, the courts were not institutionally equipped to look into the reasons for the Constitution Order. Lord Hoffmann said that the Order lay in the 'macro-political field' and 'particularly within the competence of the executive'.[53] Lord Rodger said the decision was for Parliament not courts because it raised 'a political, not judicial' question.[54] Lord Carswell said that '[h]owever distasteful they may consider [the Constitution Order]…the rule of abstinence should remain unqualified and the courts should not pronounce on the validity of [the Constitution Order] on the ground that it is not for the peace, order and good government of the colony in question'.[55] Elliott and Perreau-Sassau suggest that the refusal by the majority to question the Government's reasons amounts to making the prerogative power 'non-justiciable per se' without any justification. As they put it:

---

[48] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ('*GCHQ*'). On one reading, the ruling in *GCHQ* permitted review of powers exercised under an Order in Council (the type of power involved in the *GCHQ* itself) but did not permit a direct attack on an Order in Council.

[49] Elliott and Perreau-Saussine (2009), p. 704. The point made by Elliott and Perreau-Saussine here is that the principles of judicial review cannot derive from statute where prerogative powers are in question. For the classical argument to this effect, see Oliver (2000), pp. 3–27.

[50] *Bancoult* (HL) (n 1) [103] (Lord Rodger).

[51] Elliott and Perreau-Saussine (2009), p. 703.

[52] *Bancoult* (HL) (n 1) [15] (Lord Hoffmann).

[53] ibid [58].

[54] ibid [109].

[55] ibid [130].

> It is difficult to resist the conclusion that a measure of unnecessary and obfuscatory deference lives on in relation to the prerogative merely because it *is* the prerogative. It is disappointing to see that, in this sense, our highest court remains in thrall to what Lord Roskill referred to as "the clanking of mediaeval chains of the ghosts of the past.[56]

The minority found that the Government had not justified the removal of the Chagossians. As Lord Bingham put it: 'there was, quite simply, no good reason for making it'.[57] Reasons for this conclusion included: very little regard had been had for the interests of the Chagossians; there was no genuine security risk at the time when the Foreign Secretary made provision to allow resettlement[58]; and there was 'no credible reason to think that the situation had changed'; the cost of funding resettlement was 'unconvincing'[59] given that the Government had no duty to fund resettlement; and the fact that a the right to return might have been 'only symbolic'[60] did not detract from the importance of the right.[61] For Elliott and Perreau-Saussine, the House of Lords minority, with Sedley LJ, exercised the correct function of the court. They asked whether the prerogative legislation was "rationally and legally capable of providing for a territory's well-being"[62]; and they rightly concluded that it was not.

2.3 Positivism and Pragmatism in *Bancoult (No 2)*

To continue an earlier analogy, if the judgments in *Bancoult (No 2)* were student answers to a problem question, and the critics above were marking their separate scripts, the minority scripts would be adorned with an abundance of ticks in green pen, very goods, accurate and well explained, well researched, and so on. The majority scripts, by contrast, would be marred by crosses and no! in red pen with 'contradictory', 'what is your authority?' 'This is not what Lord Mansfield says – please read the actual judgment'. How can we explain the critics' confidence in the minority judgment being correct and the majority judgment being incorrect on the law? The answer, I suggest, depends on the criteria of success applied to the legal reasoning by the critics. Note that the defects they find in the majority reasoning centre on *legal texts*, *clear authority*, and *established, widely accepted, standards*: discrepancies, logical inconsistencies, obscurities, absence of clear authority, contradictions,

---

[56] Elliott and Perreau-Saussine (2009), p. 704. Similarly, Allan comments that the standard of review applied by the majority judges 'render[ed] the Constitution Order impregnable' and reduced '[r]ationality… to whatever the Crown thought fit as regards the need of defence or expediency…' See Allan (2013), p. 290.

[57] *Bancoult* (HL) (n 1) [72].

[58] The provision made for resettlement was the Immigration Ordinance No 4 of 2000.

[59] *Bancoult* (HL) (n 1) [168] (Lord Mance).

[60] ibid [15] (Lord Hoffmann).

[61] ibid 172] (Lord Mance).

[62] *Bancoult* (CA) (n 3) [51] (Sedley LJ).

and instances of not adhering to the settled rules of the constitution. The virtue they find in the dissenting judgments, conversely, is 'meticulous' textual reasoning, and the faithful application of judicial dicta and settled rules. We see this pattern of analysis in each of the three areas of discussion about the case above. For example, the error of Lord Rodger and Lord Carswell in relation to the CLVA was not following the *express words* of Lord Mansfield in *Campbell v Hall*, and in not following the settled rules on the separation of powers between Parliament and the executive. The error of the majority in finding that the formulation 'peace, order and good government' connoted plenary legislative powers was a failure to appreciate the '*logical implications*…of the modern British constitution' and the '*hallmarks* of subordinate legislation'.[63] The error of the majority in the majority in finding that they could not examine the reasons for the Constitution Order was a failure to appreciate the 'correct function of the court' in judicial review, and a failure correctly to apply the anxious scrutiny standard of review.

The character of these types of objections, I suggest, points firmly towards a particular picture of law, which we will loosely call a legal positivist view.[64] Legal positivism holds that the content of the law depends solely on empirical facts about what law-makers and judges have said, intended or otherwise practised.[65] Law is a system of ascertainable and settled *rules*, including rules about how to identify rules. Proponents of postivism point to a variety of virtues in understanding law in this way.[66] If it is easy to identify the law, then judges can decide whether or not to enforce the law, and they can appreciate if there is a need to create a new legal rule for a new situation; citizens can decide whether or not obey it; society can coordinate its activities; individuals can plan their lives with reasonable certainty about what the law allows and disallows. For many practising lawyers or 'black-letter' doctrinal lawyers, this positivist understanding of law—and the textual style of legal analysis it entails—will be so familiar and intuitive as to be beyond question. It is against this background, I think, that we must understand the critics' confident use of red and green pen. That brings us to our hypotheses for this article. If the positivist understanding of law is correct, then the critics' objections to the majority judgments in *Bancoult (No 2)* are highly convincing. The judgments admittedly do display many of types of textual shortcomings referred to above (discrepancies, logical inconsistencies, obscurities, absence of authority, contradictions, and so on). But if, as I shall now argue, the positivist understanding of law is incorrect, then the critics will either need to reconstruct their objections in light of the correct understanding of law, or else abandon their objections. Indeed, what they initially took to be unsustainable legal reasoning may prove to be *correct* legal reasoning.

---

[63] Elliott and Perreau-Saussine (2009), p. 706.

[64] I say 'loosely' because legal positivism is notoriously difficult to pin down as a single theory of law. For a brilliant attempt to do so, see Gardner (2001), p. 199.

[65] See Raz (1979), *passim*.

[66] See, for instance, Gordon (2015), chapter 1; Waldron (1994) and Campbell (2004).

2.3.1 What's Wrong with Positivist Textual Analysis?

Notwithstanding its popularity and intuitive appeal, legal positivism is a contested view of law. Those who embrace the theory cannot simply assume its correctness. We shall be mainly concerned in this article with the challenge to positivists made by *anti*-positivist, interpretivist theorists.[67] What makes one theory of law correct and another theory incorrect? A full attempt to answer that question would take us into the very deep waters of methodology in legal philosophy.[68] A short and superficial answer, which will be acceptable to many but not all legal philosophers, is that a legal theory must be able to account for the main features of a *particular* legal practice: for instance, its institutional structures, the patterns of legal reasoning among lawyers and judges, and the bulk of the proposition of law held to be correct.[69] At the heart of the theory of legal positivism, we have said, is the claim that the law depends on empirical tests about what law-makers have said or intended, and what judges and officials believe to be the settled rules of the constitution. A defence of legal positivism must therefore show that lawyers and judges *do in fact* share such common tests for determining the content of the law. If the practice does not bear out the theory, then we may need to question the theory.

In my view, one prominent feature of English legal practice, epitomised by the *Bancoult* litigation, is fatal to the positivist commitment that there are widely shared empirical tests for identifying the law. This is the way in which judges and lawyers frequently *disagree* about how to identify the law, and (hence) frequently disagree about the content of the law. Anyone who reads the judgments of different courts in *Bancoult (No 2)*, read alongside the reasoning of Laws LJ in *Bancoult (No 1)*,[70] will be struck by how senior judges differed on how to approach the legal questions, and on how to decide the case. Consider one specific way in which the judges disagreed. As the critics very ably point out in the critical narrative above, different judges applied very different legal tests or very different understandings of the same test in their reasoning. On the legal relevance of the CLVA, Lord Roger and Carswell looked at what the original drafters intended the scope of that Act to be, and concluded that it applied to the power of the Crown in Council. Lord Hoffmann, Lord Bingham and Lord Mance reasoned purposively about the Act, concluding that it was only relevant to the limits of the powers of colonial legislatures. On the legal effects of *Campbell v Hall*, Lords Rodger and Carswell interpreted Lord Mansfield's

[67] For an excellent overview of legal interpretivism, see Stavropolous (2017). See, generally, Dworkin (1978, 1986a, b, 2006, 2011); Allan (2013), especially chapter 1 and the appendix. Kyritsis (2015b).

[68] There is copious literature on this topic. For a helpful and insightful overview, see Dickson (2004), p. 117.

[69] It will be unacceptable to those philosophers who propound a universal theory of law for *all* legal systems at all times. The seminal rendition of this approach is Hart (1994). For a critique of Hart's universalist ambitions from within the positivist framework, see Cane (2013), p. 1–26. For a critique from the perspective of legal interpretivism, see Dworkin (2006), chapter 6.

[70] *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067.

'fundamental principles' narrowly, and in line with the facts of the case itself, to mean 'dispensing powers'.[71] Lords Bingham and Mance interpreted it broadly to include a fundamental right of abode. On whether there were any limits to the prerogative power in ceded colonies, Lord Hoffmann, Rodger and Carswell applied a customary test 'it had always been taken to confer plenary powers', citing judicial dicta to that effect, along with a supportive entry from *Halsbury's Laws*. The minority read the words 'peace, order and good government' as confining executive power to those specific purposes. The power therefore had to be exercised 'for the benefit of the people inhabiting it.' On whether judges could review the exercise of the prerogative of colonial governance, the minority applied the 'anxious scrutiny' test to allow judges to check whether the Constitution Order had an objective legal basis; the majority ruled that the same test meant that the court should not look into the reasons for the Order.

We could go on highlighting similar differences in the judgments, and we shall discuss other examples below. On the face of it, these differences threaten to undermine legal positivism. They suggest that the judges were plainly not following the same tests for identifying the law.[72] To the contrary, they were applying starkly contrasting legal tests to the same statute, judgments and doctrines. The challenge for the critics, then, is to show that notwithstanding such differences, law is nonetheless a system of rules based on shared empirical criteria. They must show, that is, that judges in *both* the minority and majority were searching for the extant legal rules of the system. Unless positivism can explain how judges in the majority failed in this search, then it cannot explain how the minority succeeded.

Can the critics answer this challenge and explain—or explain away—the fact of judicial disagreement in English courts from within the positivist framework? They may be tempted to respond straightaway that the disagreements in *Bancoult (No 2)* were so extreme as to be an aberration within English legal practice. Most judicial disagreements, they might insist, take place within the stable confines of positivist rules. This response is too quick. Any English lawyer will be able to point to a raft of cases in which judges in different courts, or judges on the same panel of the same court have reasoned in similarly divergent ways. Radical disagreement is the norm, not the exception in English common law practice—much to the puzzlement of many continental lawyers. So the critics must confront deep judicial disagreement rather than discount it. The immediate difficulty they face is this: if, as legal positivists argue, law is a system of easily identifiable rules; and if, as the critics contend, there were clear rules governing the legal questions in *Bancoult (No 2)*; then it is difficult to fathom why *all* judges did not apply those rules.

Can the critics say in response to this difficulty that the judges in the majority simply disagreed with judges in the minority (and with each other) about which rules governed the prerogative of colonial governance? Not really. Legal positivism holds that judges can disagree around the *edges* of the relevant rules, but they cannot

[71] *Bancoult* (HL) (n 1) [90] (Lord Rodger); [125] (Lord Carswell).

[72] This is a simplified version of Ronald Dworkin's 'semantic sting' argument. See Dworkin (1986b), pp. 45–46.

disagree fundamentally about which rules arise out of past cases and constitutional practice.[73] Thus, there may have been disagreement about whether, in finding that Orders in Council are amenable to judicial review, the judges were *applying* the rule in *GCHQ* or *extending* it. But there could not be disagreement about, say, whether the power of the Crown in Council in relation to ceded colonies is limited or absolute, or about whether the CLVA does or does not apply to Orders in Council. Such fundamental disagreement would mean that judges were not following the same criteria. It would mean that the legal and constitutional rules were not doing their job.

There is a possible variation on the last possibility. Can the critics say that different judges identified and applied two or more valid but *conflicting* rules? For instance, there may have been a rule that required judges to find Orders in Council amenable to judicial review, but another (inconsistent) rule that required judges to find Orders in Council concerning colonial governance non-justiciable. To give another example, there may have been a valid rule that made the relevance and meaning of all statutes, including the CLVA, depend on the intentions of the drafters of the bill; but another (conflicting) rule that made the intentions of drafters only applicable in limited circumstances. The difficulty here is that if such conflicts of rules were in play, then, on the positivist picture, it would have to have been the case that *all* judges identified, or could easily have identified them, not least with the assistance of leading counsel. The task for the court would then have concerned whether a meta-rule existed to resolve the conflicts.[74] This analysis is far from the reasoning in *Bancoult (No 2)*. All judges agreed that Orders in Council were subject to judicial review, but that is where the agreement ended. There was clearly no common acceptance about the existence of a rule requiring non-justiciability; and it is clear that only Lords Rodger and Carswell considered an originalist mode of interpretation in respect of the CLVA to be an appropriate one.

A third possible way of explaining how the majority in *Bancoult (No 2)* got it wrong may lie in a familiar positivist distinction between law and adjudication. In so far as we can group legal positivists together by some common intellectual aim, they collectively attempt to explain what makes a rule a valid legal rule.[75] As we have said above, the explanation they give is that valid rules are exhausted by the utterances, intentions or practices of an institutional law-maker. But positivists are careful to isolate their—as they see it—empirical concern with the grounds of legal validity, from evaluative concerns about how judges should decide cases (adjudication) and whether judges and citizens should obey the law (political obligation).[76] Thus, for Joseph Raz, the fact that valid legal rules exist on some issue is not decisive

[73] As Hart puts it, there will often be a 'penumbra of uncertainty' surrounding the core of certainty of legal rules, see Hart (1994), pp. 134–135.

[74] On the possibility of conflicts of rules, see Raz (1999), pp. 146–148.

[75] See Gardner (2001), pp. 199–200.

[76] This is not to say that legal positivists do not acknowledge many important connections between law and morality. See, for instance, HLA Hart, 'Positivism and the Separation of Law and Morals' in Hart (1983), pp 54–56.

of how judges or citizens should act. Law, on his view, is designed to perform a distinctive service to its subjects: it helps them to do what they ought to do as a matter of rationality or morality.[77] But law may fail to perform this service.[78] If so, then judges or citizens may decide that, all things considered, they should act contrary to law. So, returning to the judgments, can the critics say that the minority obeyed the law by following the clear rules on rights and the separation of powers, while the majority decided that the law was outweighed by other reasons—for instance, the need for judicial deference in the area of 'acts of state'.[79] This law-adjudication explanation is perhaps implicit in Elliott and Perreau-Saussines conclusion (above p. 8) that the majority conferred on the executive *'de facto* [i.e. extra-legal] absolute powers…' The implication here is that the majority made a choice not to enforce the correct *de jure* powers of the executive, while the minority did the opposite.

There are at least two difficulties with this law versus adjudication explanation for the judgments in *Bancoult (No 2)*. First, before judges can decide not to enforce the law, they must first have identified the correct legal rules, following the same shared legal criteria. This is something that, according to the critics, the majority judges in *Bancoult (No 2)* spectacularly failed to achieve. Secondly, if we were to look past the difficulty just mentioned, and allow that the majority judges identified the law, but chose not to enforce it, this would significantly alter the complexion of the critics' objections to the majority judgements. Rather than being about 'fundamentally flawed' *legal* reasoning, the objection would now be that the majority were wrong to favour extra-legal considerations over the (correctly identified) legal considerations, or that the majority favoured the wrong extra-legal considerations. For many positivists, these types of points raise the spectre of incommensurability of values, leaving little or no scope for meaningful criticism.[80]

2.3.2 A Pragmatist Way Out?

We now comes to an intriguing fourth and final attempt to explain the disagreements in *Bancoult (No 2)* from within a positivist framework. According to Arvind the 'manner in which the [majority judges] applied the rules they claimed to be applying is so fundamentally and obviously flawed that the decision are hard to explain on any formalist [positivist] account'.[81] Instead, he argues, the judges gave 'pragmatic

[77] Raz (1986), chapters 2–4.

[78] As Raz puts it, while exclusionary reasons are necessarily legally *valid*, such reasons are not always *conclusive*. See Raz (1999), pp. 27–28.

[79] See Kavanagh (2010), pp. 23–40, arguing that judges may on occasion decide that (say) the reputation of the court gives reason for the court not to enforce the law.

[80] On the incommensurability of values, see Raz (1986), chapter 13; Da Silva (2011), pp. 273–302.

[81] Arvind (2012), p. 117. Legal formalism and legal positivism are distinct but related theories. See footnote 90 below. Schauer (1988), p. 509, footnote 81 and *passim*. Nothing hangs on the distinction for the purposes of the article, hence the terms where they appear may be read interchangeably.

responses' to the legal questions in the case. They *pretended* to decide the case on the law by 'cloaking their reasoning in formalist rhetoric',[82] when in reality they were making a 'outcome-focused' judgment about how best to decide the case.[83] He finds evidence for his pragmatic explanation in two particular places. First, in the judges' use of 'standards'. Following Posner, he defines standards as: '…broad, loosely defined principles that give judges considerable latitude in relation to the factors they take into account – over more narrowly defined 'rules'.[84] Whilst a pragmatic approach to adjudication can, and not infrequently will, find pockets where a rule-based approach is useful, its general preference is for the scope to take the greater variety of facts into account that standards give.[85] 'Proportionality', 'legality' and 'reasonableness' are canonically standards, whereas absolute limits on powers are rules. A pragmatic court will almost inevitably favour the former at the expense of the latter.'[86]

Secondly, in the 'Impressionistic assertions', (for instance) by Lords Rodger and Carswell about what Lord Mansfield meant by 'fundamental principles', rather than proper engagement with what he said[87]; and in the drawing of 'impressionistic parallels' loosely grounded in authority by the majority between the absolute power of the executive to legislate by prerogative and the power of parliament to legislate by statute.[88]

Note the structure of this argument from pragmatism. Correct or genuine legal reasoning, Arvind contends, involves the strict application of absolute legal rules, judicial dicta and strict authority; incorrect or spurious legal reasoning, on the other hand, involves the fact-sensitive application of 'standards' and impressionistic reasoning. Put differently, judicial reasoning other than by strict rules is by default non-legal or pragmatic.[89] The problem with this argument is that it is entirely question-begging. Rather than attempt to show that legal positivism explains the main features of English legal practice, Arvind *assumes* that any feature of the practice that is incompatible with legal positivism is by definition not law: judicial reasoning other than by clear rules is not law; 'standards' of morality and justice are not law; the use of analogies without authority is not law. This gets things the wrong way round. Judges *routinely* use what Arvind calls 'standards' in their reasoning.[90] The whole of public law, and much of private law, is dominated by concepts such as reasonableness, legality and proportionality along with countless other non-rule-

[82] Arvind (2102), p. 117.

[83] ibid.

[84] Posner (2003), pp. 61–71 cited by Arvind (2012), footnote 114.

[85] Posner (1993), pp. 42–61 cited by Arvind (2012), footnote 116.

[86] Arvind (2012), p. 137.

[87] ibid.

[88] ibid 111.

[89] This binary understanding of legal reasoning is far stricter than the view taken by most legal positivists. Hart warned against the extremes of legal formalism (the view that Arvind embraces) and rule scepticism. It is neither the case, Hart said, that all questions of law are governed by clear rules, nor that there are no legal rule at all. See Hart (1994), chapter 7.

[90] See Dworkin (1978), Model of Rules I and II.

based principles of justice and institutional responsibility.[91] And judges very often reason analogically, borrowing concepts from different doctrinal areas of law, or from precepts of political or interpersonal morality without summoning specific authority.[92] If legal positivism cannot account for the salience of these features in English legal practice, then we must question whether legal positivism gives the best legal theory of the practice.

The problem with Arvind's pragmatist explanation becomes clearer when we consider its implications for English legal practice. First, we would have to accept that judicial decision-making does not involve much law. Such law as exists is the only the 'pockets of rules' in the 'sea of pragmatic standards'.[93] This would mean that litigants in court would invariably be left to the mercy of judges' discretion; they would have very few existing genuine rights or duties.[94] The very rationale for having independent judges hear disputes would dissolve. Secondly, we would have to accept that judges are oscar-worthy masters of disguise. We see in *Bancoult (No 2)* that even if the majority were not applying absolute rules, they nonetheless reasoned in a recognisably legal manner, citing and analysing cases, addressing the specific points raised by counsel (even where the points were 'makeweight'),[95] addressing specific statutes, and producing reasoned judgments. If this legal-looking reasoning was in reality pragmatic, policy making, then one wonders why the judges went to such lengths to pretend otherwise. Such reasoning would be at best unnecessary, and at worst disingenuous.[96] Arvind's reply is that such pseudo legal reasoning 'makes compliance easier'[97]; but it is difficult to see how the intricate, discursive and sometimes abstract reasoning by the majority, for instance, on the nature of fundamental rights or the nature of Orders in Council, aids compliance. Equally, if, as Arvind suggest, judges were reasoning in terms of consequentialist goals rather than backward looking legal precedent, it is difficult to imagine what pragmatic goal the judges may have in mind. Arvind's suggestion is that courts were concerned with separation of powers considerations: that they were:

> [D]isinclined to set absolute boundaries on the power of the executive, or to establish clear rules as to when executive action will require specific parliamentary authorization. The preferred route in reviewing executive action is to review that specific instance of the exercise of a power using broad 'standards-based' tests such as reasonableness or proportionality, rather than examining the question of the constitutional limits of the executive's powers vis-a-vis Parliament – or, indeed, the principles undelying the constitutional understanding of their respective powers.[98]

---

[91] Arvind's concedes as much in his survey of recent case law. See, Arvind (2012), pp. 144–146.

[92] For a fine illustration of this phenomenon, see Oliver (1999).

[93] Arvind (2012), p. 146.

[94] For this same type of argument in a different context, see Dworkin (1978), Model of Rules I and II.

[95] *Bancoult* (HL) (n 1) [106] (Lord Rodger).

[96] See Dworkin (1986b), chapter 5; (2006), chapter 1.

[97] Arvind (2012), footnote 115.

[98] ibid 145.

It may well be correct that separation of powers considerations were among the drivers of the majority opinions; but there is no automatic basis for ascribing a *pragmatist, goal-orientated* theory to such reasoning. Such an ascription, once again, assumes without argument that the laying down of 'clear rules' is the correct form of legal reasoning and that 'standards-based' tests is not legal reasoning at all. In the next section we shall argue, to the contrary, that legal reasoning only makes sense when understood as a form of moral reasoning.

The final reason to doubt Arvind's pragmatist explanation is the fact that the majority judges express regret about *the law* mandating their decision. This regret comes through most clearly in Lord Carswell's judgment:

> For the reasons which I have given I would allow the appeal and make the order proposed by Lord Hoffmann. I do not do so through any lack of sympathy with the Chagossians. They were undoubtedly treated very shabbily when they were removed from the islands. They were paid some compensation, but very tardily, while they suffered considerable privations after their removal. No one could fail to feel distressed about the plight at that time. It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to a party who had been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially – in the word of the Book of Common Prayer, truly and indifferently minister justice. It is that imperative which has taken me to the conclusion which I have reached.[99]

Arvind refuses to take these sentiments at face value. Rather, he takes them to be part of the pragmatist ruse. But we must surely be slow to impute to the majority judges such a level of deception or self-deception, particularly once we recognise that the (undoubted) absence of absolute rules in the majority judgments does not necessarily mean an absence of *law*. In the final section of this paper below, I shall offer an entirely different explanation for the passage above. The sense of regret on the part of Lord Carswell, I shall say, is predicated on a gap between two forms of justice: *justice according to law* and *ideal* justice. Only the latter form of justice, I shall argue, may legitimately guide judicial decisions. This means that some decisions, perhaps including *Bancoult (No 2)*, may fail against the first form of justice, while succeeding against second.

We are now in a position to conclude this section. We began by identifying a positivist theory at work beneath the critics' objections to the majority reasoning in *Bancoult (No 2)*. We said that the criticisms will only bite if positivism can explain the salient features of the judgments collectively, and of English legal practice as a whole. Three particular features the theory needs to explain, we have seen, are deep disagreements of the sort seen in *Bancoult (No 2)*, the characteristic use by judges of moral standards instead of absolute rules, and reasoning by analogy without any explicit textual authority for doing so. In order for positivism to stand—and, by extension, for the positivist-inspired criticisms of the majority judgments to stand—we said that it must explain or explain away these features. We have seen that it cannot do so. The recurring difficulty is that positivism cannot allow for a failure by judges (or indeed citizens) to identify the extant legal rules. If judges and lawyers

[99] *Bancoult* (HL) (n 1) [136]. One finds similar sentiments in the other majority judgments. The 'brutal realities of global politics' [24], 'callous disregard' [10], 'unhappy-indeed, in many respects, disgraceful-events' [75].

share the same criteria for identifying law, then divisions of reasoning of the type seen in *Bancoult (No 2)* should be impossible. Arvind's pragmatic explanation for the majority judgments runs into a variety of difficulties. Above all, it *presupposes* the correctness of legal positivism by insisting that non-ruled-based forms of reasoning are necessarily non-legal. But this assumption begs the question about law and the English legal system. *Bancoult (No 2)* and the wider practice of which it forms part, we said, points away from the positivist theory of law. In order properly to understand their Lordships judgments, we need to look elsewhere within legal theory.

2.4 Enter Justice Hercules

It is time to call Justice Hercules belatedly to the bench in *Bancoult (No 2)* (he has been lurking in the wings during the arguments of the previous section). We can assume that he has read all of the judgments from the *Bancoult* litigation; and, being omniscient, we can assume that he is familiar with all of the other judgments and constitutional practices of the UK constitution. His starting point for understanding English legal practice is to embrace—rather than fight against—the features of English legal practice discussed above: the phenomenon of deep disagreement between judges about the content of the law; the use by judges of moral standards in their reasoning; and the use of analogies without clear authority. Like Arvind (above), Hercules finds these features to be ubiquitous in English law. But for him, these features are not subsumed within a theory of legal positivism; nor are they evidence of a trend towards extra-legal pragmatism.[100] Rather, they gesture towards quite different philosophical truths about the nature of law. They tell him that legal reasoning is a form of *moral* reasoning; and that when judges disagree about the correct form of reasoning, they are disagreeing about which moral principles, understood in which way, best *justify* one or other form of reasoning.[101]

Within this model of law as principle, a judge has an important and onerous responsibility. She must attempt to identify the *scheme* of justice and institutional responsibility embedded within English law.[102] That is, she must try to understand the general and particular moral principles which account for, and determine, the distribution of individual rights, duties and responsibilities and institutional powers, both within particular doctrinal areas of law, and across English legal and constitutional practice as a whole.[103] A proposition of law or the constitution is only correct,

[100] Contrary to the view of Arvind (2012), pp. 138 et seq.

[101] In more philosophical language, these features tell him that law is an *interpretative* concept rather than a *criterial* concept. For this distinction, see Dworkin (2006), chapter 8.

[102] See Dworkin (1986b), chapter 7.

[103] This is a simplified version of Ronald Dworkin's theory of law as integrity: '[a]ccording to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural process that provide the best constructive interpretation of the community's legal practice'. ibid 225.

on this view, if it provides the best understanding of these principles. At every turn, we must resist reverting back to the positivist view of law rejected above. There is no positivist-style 'master rule' to which judges can turn to identify the correct scheme of principle or particular principles.[104] Nor is it the case that judges must all agree about which principles are the legal ones. Rather, each judge has an individual responsibility to decide for herself which scheme of principle provides the most compelling justification for the practice. This admittedly means that judges are likely, where possible, to identify a scheme that chimes with their own convictions about justice and institutional responsibility[105]; but, as I shall emphasise below, judges are nonetheless constrained *by the practice*. Reasoning by principle is not a licence for judges to impose their own moral or institutional preferences.

This model of law as principle (as opposed to rules) makes far better sense of judicial disagreement than the positivist model. Judicial disagreements of the sort seen in *Bancoult (No 2)*, we argued above, are fatal to their theory; such disagreements show that judges and lawyers do not share common empirical tests for what counts as law. For Justice Hercules, on the other hand, the different tests employed by judges merely underline the protestant, moralised character of legal reasoning.[106] He takes judges to be moral theoreticians or philosophers rather than mechanical rule-appliers.[107] Armed with this new understanding of law and adjudication, and with Justice Hercules as our avatar, it is now time to return to the judgments in *Bancoult (No 2)*, and the critics' analysis of them.

2.4.1 Interpreting Bancoult (No 2)

Consider, to begin with, the way in which legal positivism (superficially) dictates the very structure of the judgments in *Bancoult (No 2)*, together with the critics' analysis of them. We see a separation between two broad grounds of challenge to the Constitution Order: one based on the infringement of a fundamental right; the other based on ordinary administrative law grounds of irrationality and breach of a legitimate expectation. For the critics, at least, the implicit assumption here is that there are separate bodies of rules and jurisprudence about fundamental rights, on the one hand, and ordinary judicial review on the other. There are rules contained in judgments and judicial practice, telling us which rights count as fundamental and how fundamental right operate (for instance, by the operation of the presumption of legality)[108]; and there are rules telling us which ground of review applies, which standard of review applies, and what makes an issue justiciable or non-justiciable.

[104] See Dworkin (1978), Model of Rules I and II.

[105] Dworkin (1986a), chapter 6.

[106] See Postema (1987), pp. 283–319.

[107] See Allan (2013), *passim*.

[108] For a good example of this type of rule-based reasoning about rights and judicial review, see Elliott (2015), pp. 85–117.

The former set of rules, the critics may tell us, belong to constitutional law; the latter set of rules belong to administrative law.[109] The critics' objections to the majority judgments, and endorsements of the minority judgments rest on the correct or incorrect application of these rules.

Justice Hercules begins his analysis by removing this positivist scaffolding from the judgments and critics' narrative. For him, familiar public law terms and concepts such as fundamental rights, rationality, justiciability and so on are nothing more than labels or conclusions about the interaction of moral principles in a specific case.[110] There is no independent, fixed standard of decision-making to which such terms refer.[111] As Allan puts it, we cannot identify legal rules 'conceived in abstraction from concrete instances of dubious state action'.[112] On this view, then, it is not necessarily objectionable, as the positivist critics maintain, that Lords Rodger and Carswell allow judicial review on ordinary grounds, but not for breach of fundamental principles; or that Lord Carswell gives 'opaque' reasoning on the nature of fundamental principles[113]; or that Lord Hoffmann fails to explain why the sanctioning of torture alone limits the prerogative of colonial governance. The focus for Justice Hercules is the principles underlying these decisions taken together, rather than the text of the judgments taken one by one. Where the critics search for 'absolute rules' on rights and judicial review, and find only contradictory 'double-think',[114] 'two-step' obfuscation,[115] and gaps in reasoning, Hercules attempts to extract from the contributions of different judges a single thread of principle. It matters not whether that thread is expressed in terms of fundamental rights or rationality.[116] The structure of the moral arguments will remain the same.

It is similarly no longer objectionable—or necessarily the case—that the judgments of the majority contain 'mutually incompatible' reasoning in respect of the CLVA. This objection only holds if we assume, with positivists, that statutes apply in an all or nothing fashion: that the finding that a statute does apply, cannot logically co-exist with the finding that it does not apply. So much is assumed by the critics in their formalistic distinction between vires and powers. By dint of immu-

[109] For this type of compartmentalisation in public law, see, for instance, Cane (2016), chapter 6.

[110] Allan (2013), p. 289.

[111] Allan rejects the conventional judicial review labels as being 'misleading, indeed conceptually confused'. Ibid 287. See further Allan (2003), pp. 563–584, 567 and 572, objecting to the distinction between the grounds of review and their application. Cf. Craig (2004), p. 237.

[112] Allan (2013), p. 287.

[113] Elliott and Perreau-Saussine (2009), p. 706 referring to Lord Carswell's reasoning in *Bancoult (*HL) (n 1) [125].

[114] Ibid 718, citing Orwell (1992), p. 223. Elliott and Perreau-Saussine define "double-think" as a 'self-consciously irrational preparedness to hold two contradictory beliefs in one's mind simultaneously and accept both'.

[115] Poole (2010), pp. 81 and 103.

[116] So much is suggested by both Sedley LJ and Lord Hoffmann by their flexible understanding of the *Wednesbury* review. *Bancoult* (HL) [35] (Lord Hoffmann) and *Bancoult* (CA) [38] (Sedley LJ). For a positive argument that the judicial assessment of prerogative powers should be referable to a rationality standard of review, see Sales (2015), chapter 14.

table constitutional logic and the express words of Lord Mansfield, they say, the statute *only* applied to the former. But Hercules does not view statutes (or common law judgments) in this binary way. For him, the legal relevance of a statute, if any, depends on the principles that determine its relevance.[117] Statutes may have a principled *impact* on the law, even if they do not squarely answer the legal question. And we cannot determine that impact without making arguments about the web of common law constitutional principles in which a statute sits.[118]

There is more positivist scaffolding in need of removal. A broad theme running through the critics' narrative is that the majority judges reasoned without authority, or used authority which did not *expressly* support their position, or used 'impressionistic parallels'. The positivist assumption here, we have said, is that a precedent or authority only exists where a judge finds an explicit rule in a past decision: 'if it is in our books'. This is the sense in which judges must consider the 'previous mode of exercise' of the scope of the royal prerogative of colonial governance.[119] Within Justice Hercules's theory of law as principles, by contrast, it is not the case that law is that which is in our books. To the contrary, law is the principles that are *presupposed or entailed* by what is in the books.[120] This means that there may be true legal principles which appear nowhere explicitly in our books, and which even seem to run contrary to what is in our books. Legal reasoning may proceed by hypothesis and extrapolation rather than strict adherence to legal texts.[121] It was not decisive, then, that no judge had explicitly *said* that the Crown in Council had the prerogative power to remove a population from a ceded colony; or that no judge had *said* that the prerogative power of colonial governance could not be used to sanction torture; or that no judge had *said* that the ordinary principles of judicial review would prevent such use; or that no judge had directly applied the CLVA in the cases cited by Lords Rodger and Carswell in support of its application. Nor was it determinative of the law that judges in previous cases had recognised a fundamental right of abode, no matter how explicitly and forcefully they may have done so. For Hercules, legal rights and powers neither depend on the presence of absence of express words, but on the deep, often unstated moral principles that make the presence of absence of words legally relevant or irrelevant.[122]

---

[117] See Allan (2013), chapter 5.

[118] ibid.

[119] *Bancoult* (HL) [149] (Lord Mance), applying a dictum of Lord Reid in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101D.

[120] See Dworkin (1986b), chapter 7. For an insightful comparison of positivist and anti-positivist theories of common law reasoning, see Hershovitz (2008).

[121] See, for instance, S Hurley, 'Coherence, Hypothetical Cases, and Precedent' in S. Hershovitz *Exploring Law's Empire* op. cit, Stavropolous (2017).

[122] This, I suggest, is how Justice Hercules would explain the contrast between the majority approach to precedent in *Bancoult (No 2)* and that taken by Nourse LJ in *R. v. Secretary of State for Home Department, ex p. Northumbria Police Authority* [1989] Q.B. 26. In the latter case, the judge (at p 58) said that the absence of clear precedent on whether a prerogative power to keep the peace existed may suggest an assumption that is does (the reverse of Lord Bingham's approach in *Bancoult (No 2)*. See, Moules (2009), p. 14 at 16.

2.4.2 *Two Competing Schemes of Principle: 'Moral No-Difference' and 'Moral Difference'*

We are now at the point where Justice Hercules can examine the majority and minority opinions in *Bancoult (No 2)*, free from positivist encumbrances. His aim, he has said, is to identify the moral scheme that underpins the judgments collectively. He discerns two rival schemes as follows:

2.4.2.1 Moral No-Difference

The first scheme, embodied in the minority judgments, holds that there is no moral difference between prerogative and other executive powers. Prerogative powers, whether in the form of an Order in Council, powers exercised under such an Order, or powers conferred by statute, are all 'run of the mill'.[123] Any executive power may engage justiciable issues of legal principle.[124] And all executive power, regardless of its form or source, is limited in the sense that there must be some objective justification for its exercise.[125] The phrase 'peace, order and good government' states an essential truth about the relationship between government and the 'body politic', namely that a government 'must act for the public good'.[126] This means that any assessment of whether an action conduces to the 'peace, order, and good government' of a territory must begin with—or at least have consideration of—the common good of the territory itself.[127]

A necessary aspect of the common good is that individuals enjoy fundamental rights against the state, the rights that are 'implicit in the rule of law'.[128] As Allan puts it:

> Fundamental rights inhere in the very nature of a parliamentary democracy that embodies the rule of law: such arrangements are intended to enable every citizen to enjoy the maximum autonomy, for leading a life of his or her own choosing, compatible with the same freedom for others.[129]

These right must include those that define the 'reciprocal duties of allegiance and protection and the duty of protection' between the citizen and the state,[130] irrespective

---

[123] See Cohn (2009), pp. 260–286.

[124] See *Bancoult* (CA) (n 3) [44] (Sedley LJ). See further Allan (2013), p. 77.

[125] See, generally, Dyzenhaus (2006) *passim*, but especially chapter 3.

[126] Allan (2013), pp. 292–293.

[127] *Bancoult* (CA) (n 3) [Sedley LJ [67]–[68] ruling that the 'governance of each colonial territory is in constitutional principle a discrete function of the Crown…' Cf. *Bancoult* (HL) (n 1) [49] (Lord Hoffmann): 'No doubt [Her Majesty in Council] is also required to take into account the interests of the colony…'

[128] Allan (2013), pp. 294 and 296.

[129] ibid 299.

[130] *Bancoult* (HL) [72] (Lord Bingham).

of whether the 'belonger' is from a settled or ceded colony.[131] The right of abode is one such right. Such rights are meaningless unless judges have the power to prevent the executive from interfering with rights merely for the sake of marginal gains.[132] Rights may only be legitimately overridden for exceptional reasons such as 'a natural or man-made disaster' where removal would be for the safety of the population.[133] An exercise of power that abrogates such rights is, by definition, not a legal exercise of power, and is therefore void.

It follows that judicial review must involve a detailed examination of the reasons given for an executive decision. Judicial review of the rationality of an executive decision *entails* a proportionality assessment.[134] It is for judges, through the common law, to identify fundamental rights, to ensure that the executive never has the power to abrogate such rights, and, to the extent the parliament has the power to abrogate such rights, to demand the clearest evidence of their intention to do so. Executive decisions, including Orders in Council, should be visible, transparent and open to question. Any executive intention to interfere with a right demands full consultation and Parliamentary authorisation. So much is required to reduce or eliminate the 'democratic deficit' ingrained in such powers.[135] Prerogative powers, to the extent that a distinctive category of such powers subsists, should be interpreted narrowly, and gradually replaced by legislation.[136] The power to legislate by Orders in Council, in particular, should be seen as a 'anachronistic survival',[137] with little or no contemporary constitutional purchase.

2.4.2.2 Moral Difference

The second scheme, embodied in the majority judgments, recognises distinct 'domains of executive responsibility'.[138] These domains relate to 'acts of state': acts that require judgement under pressure, and which involve judgements about the long-term, essential public interest.[139] Obvious examples are deploying the armed forces, signing and withdrawing from treaties, and the protection of the realm. This second justification recognises and accepts the reality of prerogative powers: that it is the executive and not the Crown that exercises them.[140] But the emphasis is on the extraordinary need for such powers rather than on the historical provenance of such

[131] See Tomkins (2001), p. 571 describing this distinction as an 'ancient and formal nicety' (at 579), quoted in *Bancoult* (HL) (n 1) [40] (Lord Rodger).

[132] Dworkin (2003), chapter 2; Waldron (2003) p. 191; and Allan (2013), p. 294.

[133] ibid. *Bancoult* (CA) [67] (Sedley LJ).

[134] Allan (2013), chapter 7.

[135] Cohn (2009), p. 262.

[136] ibid 278–280.

[137] *Bancoult* (HL) [69] (Lord Bingham).

[138] See Finnis (2015), p. 12.

[139] See Poole (2016).

[140] *Bancoult* (CA) (n 3) [86]–[89] (Waller LJ).

powers. If the ancient prerogative powers were to be abolished, other powers would and should replace them.[141] The principal justification for extraordinary executive powers is not democracy, but knowledge, expertise and the ability to act swiftly and decisively in the public interest.[142] Such powers are governed by *law* in so far as law confers on the executive a broad—but not unlimited—area of political judgment.[143] This is the way we should read Locke when he says:

> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*.[144]

In the colonial context, the 'publick good' of a single dependent territory should be seen as inextricably tied to the common good of the greater realm.[145] Any right of abode must be understood in light of the 'overriding executive duty to act in the interests of trade, defence, international obligations etc. of empire as a whole.'[146] As 'the most public and most corporately responsible kind of prerogative act',[147] it is right that decisions about the realm should be effected by executive Orders in Council. Parliament itself has underlined this division of institutional responsibility by including within the definition of 'colonial law' in section 1 of the CLVA, laws made by Her Majesty in Council.

The prerogative power of colonial governance, then, is *par excellence* an area primarily entrusted to the executive. Judges lack institutional competence to assess such polycentric decisions.[148] As Finnis remarks:

> [A]lthough the judicial protection of rights and the rule of law are indispensable elements of the common good, litigation--particularly when it invites judges to consider directly whether 'overriding and sufficient reasons' exist for some legislative act--can involve a loss of perspective inimical to the common good of a realm so large and complex as the empire was and even the United Kingdom with its dependent territories remains.[149]

However, the prerogative power of colonial governance should not be free from judicial scrutiny. Judges should require prima-facie reasons and evidence for executive action without second-guessing the weight given by the executive to those reasons or evidence.[150] They must be alert to the reasons given for governmental action, but sensitive to the needs for acts of state. In this respect, such powers should be

---

[141] Poole (2010), pp. 86–87.

[142] See Locke and Laslett (2003), chapter XII.

[143] See Dyzenhaus (2006) and Poole (2016), Cf. Vile (2012), p. 67.

[144] Locke (2003), op.cit. Chapter XIV, para 160. For Locke, executive power, all political power is based on trust and consent, rather than continuous democratic approval for each and every governmental action. It is only if there is an egregious breach of trust that people have a duty to revolt. See Hampshire-Monk (1992), pp. 104–108.

[145] Finnis (2008), p. 11.

[146] ibid 14.

[147] ibid 4.

[148] On the concept of polycentricity, see Fuller (1978), p. 353.

[149] Finnis (2008), p. 16.

[150] See, for instance, Lord Irvine (1996), p. 63; Lord Sumption (2011).

neither wholly 'unreviewable' (non-justiciable); nor are they properly subject to a heightened level of review. The function of judicial review in this context is to facilitate rational decision-making rather than block irrational decision-making.[151] To the extent that a branch of government should hold government to account for the use of such powers, it should be Parliament, rather than courts. Political accountability through Parliament may be imperfect, but it is both available and constitutionally appropriate in areas touching the widest public interest.[152] It is not for courts to plug any holes left by insufficient parliamentary oversight. It is for politicians and citizens to press for reform to make such oversight effective.[153]

This is nothing more than a snapshot of the complex and comprehensive moral inquiry that Justice Hercules will undertake in trying to understand the *Bancoult (No 2)* judgments. Nonetheless, we can use it to make three important observations about his approach to legal reasoning, and about the implications of his approach for the case. First, notice that neither moral scheme is, or needs to be, *explicit* in the text of the judgments. Rather, the schemes are the moral back-story to the judgments: the principles *presupposed* or *entailed* by them. These principles are sensitive to the texts of statutes and precedents, but they are not slaves to these texts.[154] Secondly, once we understand the judgments in this moralised way, we can appreciate that there is not the gulf in quality of legal reasoning between the minority and majority opinions suggested by the positivist critics towards the start of this article. It is not the case that the majority judges clearly got the law wrong, while the minority clearly got it right. For Justice Hercules, the correctness of one or other scheme will involve a controversial, nuanced moral judgment rather than a slam-dunk declaration of rules. The critics will need to revisit their use of red and green pen.

Thirdly, we can appreciate that the judgments are not the uncompromising 'clash of legal cultures' between liberty and authority suggested by many critics.[155] It is not the case that the majority judges conflated executive and legislative power, subverted the classical constitutional distinction between primary and secondary legislation, overturned centuries of established constitutional history and jurisprudence, and rendered the prerogative power of colonial governance non-justiciable per se. Once we divert our gaze from the majority judges' express *utterances* about absolute executive power and non-justiciability, to the moral substance of their judgments as outlined in the two schemes above, we see something far more subtle going on. We can extract from the minority and majority judgments two *competing models* of judicial review in relation to the Constitution Order. For the majority, the correct role of judges was to subject the Constitution Order to a

[151] Harlow and Rawlings's helpful metaphor of red and green light review is helpful here. See Harlow and Rawlings (2009), chapter 1.

[152] See Endicott (2016).

[153] See, for instance, Tomkins (2005), chapter 4.

[154] For a stark contrast between positivist and anti-positivist approaches of statutory interpretation, compare Ekins (2012) and a review of that book in Kyritsis (2015a), pp. 164–175.

[155] See Allen (2009), pp. 119–128 and 125.

'light-touch' standard of review.[156] They examined the reasons given by the Government for the Order, ensuring that there was some substance to them, but they stopped short of making their own independent assessment of them. For the minority, the correct role of judges was to subject the Constitution Order to a more robust standard of review, judging for themselves whether the reasons given by the Government for the Order were made out. Beneath these competing views we find rival understandings of the same moral considerations, closely pushing and pulling against each other—considerations, for instance, of fundamental rights, the separation of powers, acts of state and colonial history.[157] We find, in other words, that *all* judges were engaged in a common endeavour to understand their correct role in the case according to British legal and constitutional practice. If the critics' narrative outlined in part 1 is to bite against the majority judgments, then, it can only be in the sense just described. We must understand them as arguing that the 'no moral difference' justification for British constitutional practice better captures the history and traditions of the constitution than the 'moral difference' justification. That is a long way from the black and white positivist critique with which they began.

Which scheme does give the better justification for British constitutional practice? One or other justification may accord with Justice Hercules's personal sense of the point and value of law, judicial review, politics and myriad other considerations. But he does not have the luxury of choosing according to his own moral preferences. It is only to the extent that the practice is capable of supporting his preferences that he can realise them. Again, space, time and a lack of divine ancestry prevents us from following Hercules in his wide-ranging survey across British constitutional practice. However, we can pick out some of the different markers he identifies in support of each scheme. As he conducts his survey, he sees that the 'moral no-difference' scheme has a strong foothold in British constitutional practice. He notices that Parliament has imposed statutory conditions on the exercise of some key prerogative powers.[158] He sees a prominent 'fundamental rights' philosophy in judicial decisions and (especially) academic work.[159] He sees that prerogative powers are subject to deep principles of UK constitutional law, such as the need for Parliament to authorise the removal of a fundamental source of law.[160] He sees that Orders in Council are subject to the Human Rights Act 1998.[161] He sees some judicial misgivings about the effectiveness of political control of the prerogative.[162] However, he notices that the 'moral difference' scheme also has deep roots within

[156] *Bancoult* (HL) [52] (Lord Hoffmann).

[157] See Poole (2010), p. 91.

[158] E.g. the Constitutional Reform and Governance Act 2010.

[159] For an overview of this trend see, for example, Elliott (2015).

[160] *R. (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 (SC), [80]–[81].

[161] HRA s 21(1) paragraph f(i) includes Orders in Council within the definition of primary legislation.

[162] *Miller* op. cit. [92]–[94].

legal and constitutional practice. Parliamentary interventions on the royal prerogative preserve, rather than remove, the distinction between prerogative powers and ordinary executive powers.[163] And in many areas of prerogative governance, Parliament has either made no intervention, or, as with the CLVA, expressly retained the primacy of prerogative rule.[164] He sees that in many other cases involving special executive powers, the courts have been willing to examine the reasons given by the Government, but unwilling to impugn its decision.[165] He sees that judges have used interpretative techniques to preserve or recognise prerogative powers, even where statutes appears to occupy the same ground.[166] To his mind, these techniques signify a continuing constitutional tension between democracy, acts of state and judicial oversight.[167] This tension is all the more acute, he observes, in a period of intense concern for national security, where English courts have historically tended to defer to the authority of the executive.

While Justice Hercules, with members of the majority, finds the 'no moral difference' scheme attractive as a matter of moral and political philosophy, he, like them, is minded to decide that the majority opinions are correct as a matter of law. These opinions, taken together, he judges give a better understanding of British legal and constitutional history and practice than the minority judgments. The Constitution Order, the prerogative of colonial governance and the CLVA should be interpreted in a way that complements rather than erases the wider place of prerogative powers and Orders in Council, judicial and parliamentary accountability within the constitution. Mr Bancoult should lose his case.

---

[163] The Constitutional Reform and Governance Act 2010 leaves many key prerogative powers untouched, for instance, the power to deploy the armed forces.

[164] Section 1 of the CLVA includes Orders in Council within the definition of colonial law. This was crucial for the House of Lords. See *Bancoult* (HL) [97] (Lord Rodger) and for Finnis. See Finnis(2008), p. 4. Cf. *Bancoult* (CA) [26] (Sedley LJ), ruling that Orders in Council were merely 'included by the parliamentary draftsman ...for completeness, since they too were a source of colonial law'.

[165] See, for example, *GCHQ* above (n 48), *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs,* [2002] EWCA Civ 1598, *R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWCA Civ 1279, *R v Secretary of State for the Home Department, ex party Bentley* [1994] Q.B. 349 DC. For criticism of the judicial role in these cases, see Poole (2010), pp. 103–104. See further, Elliott and Perreau-Saussine (2009), p. 717.

[166] See Cohn (2009), pp. 272–274 criticising decisions such as *Laker Airways* [1977] 1 Q.B. 643 CA (Civ Div) and *Northumbria Police Authority* above (n 122) that, in her view, 'dodge' the residuality principle set out in *De Keyser's Royal Hotel Ltd* [1920] A.C. 508 HL at 528. Cohn falls into the positivist trap here of assuming that judges were avoiding the clear legal rules. For Justice Hercules the judges in these cases made a moral judgment that something like the 'moral-difference' scheme of principle gave the best account of the case law and constitutional practice as a whole.

[167] For the ongoing tension between these types of values, see Sales (2015).

2.5 Isn't It Justice Hercules's Job to Do Justice?

As we said at the start of this chapter, the decision to disallow Mr Bancoult's challenge to the Constitution Order strikes many people, including the majority judges in the case, as deeply regrettable and unjust. Will anything that Justice Hercules has said about the connection between law and morality have assuaged the critics? Most likely not. Even if, as Justice Hercules has reasoned, the majority decision can be justified according to a defensible moral scheme, embedded within British constitutional practice, critics of their decision will insist that the judges should have preferred the 'no moral difference' scheme supported by the minority. The minority judgment, they will say, is more attractive from the point of rights and the separation of powers; and, most importantly, it would allow Mr Bancoult and other Chagossians—at least in principle—to resettle on BIOT, undoing (universally accepted) wrongs committed against them by the British Government. If Justice Hercules is the superhuman judge he claims to be, then he will not deny the Chagossians their rights.

Before committing to his decision, Justice Hercules must unpack this objection, and reply to it. He finds that the objection may take one of two forms. The first form is that judges must sometimes disregard the law in order to do justice. If necessary, they must lie about their duties. The second form is that the very concept of law implies the rights and institutional powers reflected in the no-moral-difference scheme. It follows that any (purported) statute or judicial decision that falls short of that scheme, cannot have the status of law. As ever, we do not have the space to reproduce Justice Hercules's full reply to these challenges. It will take him into highly contentious philosophical debates about the relationship between legality and justice.[168] The most we can do is to give the thrust of his reply.

He finds in these arguments a common underlying error. They each ignore the special constraint of legal and constitutional history on judicial decision-making, and the special duty of a judge to decide a case according to law. He has adverted to these features of law and adjudication above, but he must now give a justification for them. Officials within different branches of government, along with citizens, he notes, disagree about the best theory of justice and institutional responsibility. They disagree about which rights individuals do and should possess; and they disagree about which institutions should decide those things. So much is apparent from the controversies surrounding *Bancoult (No 2)*. Even though *all* judges agreed that the British Government had treated the Chagossians very badly, they disagreed about whether it was for law and judges to rectify this situation, or for parliament and the people to do so. This is a question on which people, including expert academics, could and did reasonably disagree.[169] In these circumstances of disagreement, Justice Hercules replies, there is a value in institutions and citizens working together

[168] These are among the key questions that animate anti-positivist debates about law. This is not the occasion to attempt any contribution to these debates. For a sophisticated attempt to reject the first form of objection to Hercules' reasoning and support the second, see Allan (2016a), p. 705; Allan (2016b), pp. 58–82.

[169] See the footnotes accompanying the two moral schemes above.

to forge a moral scheme to which all members can lend their allegiance, *even if they think justice requires some other right or power in a given case*.[170] On this view, judges deciding cases must see themselves, not as monopolisers of questions of rights and justice, but as *collaborators* with other judges, other members of government, and citizens on these questions. The actions and decisions of courts, as one 'agent of governance', must be taken in a way that respects the role assigned by the constitution—as gleaned from Hercules's historical survey of institutional decision-making—to other agents of governance.[171] Judicial decision-making, on this view, is merely one element of what Kyritsis calls a 'joint project of governing'.[172]

However attracted he may be, then, to the 'no moral difference', Justice Hercules replies that it is not his institutional role with the joint project of governing to give effect to this view, even if it is a view held by many people. The legitimacy of law, and his constitutional legitimacy as a judge, depends on him suppressing his own sense of what justice requires, and giving effect to the moral scheme developing within British legal and constitution practice. Were he to disregard this moral scheme, he would no longer be acting as Justice Hercules applying the law, but as one citizen imposing one set of convictions about justice and institutional responsibility on a community—or, at least, having a good chance of doing so should he persuade other judges or judge-citizens of his views. To conclude his reply, Justice Hercules returns to the sentiments of Lord Carswell in *Bancoult (No 2)* when he says:

> It is the function of the courts, however, to adjudicate upon legal rights, and no matter how sympathetic they may be to a party who had been badly treated in the past, they are required to apply the law in the present and apply it properly and impartially – in the word of the Book of Common Prayer, truly and indifferently minister justice.

These sentiments, Justice Hercules emphasises, reflect precisely the distinction he has drawn above between on the one hand, justice *according to law*—constitution-specific justice—justice wearing the 'work clothes'[173] of a particular legal and constitutional order—and, on the other hand, one judge or individual's view of ideal justice. Put more succinctly, they reflect the difference between legality and justice. Once we recognise this distinction, then we must also recognise the inevitability that some judicial decisions will satisfy the demands of legality, but fall short of what a judge, or we, may consider to be the optimal decision from the point of view of justice. It is in this sense that Justice Hercules may *legitimately* disappoint Mr Bancoult; and it is in this sense that judges may legitimately disappoint some of us all of the time.

[170] See Dworkin (1986b), chapter 6, Kyritsis (2015b), chapter 4–6.

[171] Kyritsis (2015b), p. 69.

[172] ibid.

[173] Postema (1997), pp. 821–855.

2.6 Conclusion

Our aim in this article was threefold. First, we sought to demonstrate the way in which different theories of law recommend different methods of doctrinal analysis and criticism. We saw that the same set of judgments in *Bancoult (No 2)* appear very differently depending on whether one adopts a positivist, pragmatist or anti-positivist view of law. The article argues, taking *Bancoult (No 2)* as a paradigm of judicial decision-making, that the anti-positivist view gives the best understanding of British legal and constitutional practice as a whole. It is for this reason that we should understand *Bancoult (No 2)* in light of this theory rather than the other legal theories discussed. Secondly, we attempted to analyse the judgments in *Bancoult (No 2)* through the eyes of Justice Hercules, the personification of Ronald Dworkin's anti-positivist, interpretivist theory. We identified in the judgments two competing schemes of principle, both of which have a foothold in British constitutional history and contemporary practice. We tentatively came down on the side of a scheme that supports the majority decision in *Bancoult (No 2)*. Thirdly, we offered an outline justification for the fact that a correct decision in law may fall short of what a judge, or we, consider to be required as matter of justice and institutional responsibility. We suggested that there is an important distinction between justice according to law, and justice according to the views of a particular judge or citizen. This means that judges, including Justice Hercules, must inevitably make decisions that they, and we, will find disappointing, but which nonetheless rightly command our allegiance.

References

Allan TRS (2003) Constitutional dialogue and the justification for judicial review. Oxf J Leg Stud 23:563–584

Allan TRS (2013) The sovereignty of law freedom constitution and common law. Oxford University Press, Oxford

Allan TRS (2016a) Interpretation, injustice and integrity. Oxf J Leg Stud 36:58–82

Allan TRS (2016b) Law, justice and integrity: the paradox of wicked laws. Oxf J Leg Stud 29:705

Allen S (2009) Reviewing the prerogative of colonial governance. Judic Rev 14:119–128

Arvind TT (2012) Though it shocks one very much: formalism and pragmatism in the Zong and Bancoult. Oxf J Leg Stud 32(1):113–151

British Indian Ocean Territory (Constitution) Order 2004

Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75, 101D

Campbell T (2004) Prescriptive legal positivism: law rights and democracy. Routledge-Cavendish, Oxford

Campbell v Hall (1774) Lofft 655, 741-42; 98 ER 848

Cane P (2013) Public law in the concept of law. Oxf J Leg Stud 33:1–26

Cane P (2016) Controlling administrative power an historical comparison. Cambridge University Press, Cambridge

Cohn M (2009) Judicial review of non-statutory executive powers after Bancoult: a unified anxious model. Public Law 2:260–286

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 ('GCHQ')

Craig P (2004) The common law, shared power and judicial review. Oxf J Leg Stud 24:237

Da Silva VA (2011) Comparing the incommensurable: constitutional principles, balancing, and rational decision. Oxf J Leg Stud 31(2):273–302
Dickson J (2004) Methodology in jurisprudence: a critical survey. Legal Theory 10(3):117–156
Dworkin R (1978) Taking rights seriously. Duckworth, London
Dworkin R (1986a) A matter of principle. Clarence Press, Oxford
Dworkin R (1986b) Law's empire. Fontana, London
Dworkin R (2003) Is democracy possible here. Princeton University Press, New Jersey
Dworkin R (2006) Justice in robes. Harvard University Press, Cambridge
Dworkin R (2011) Justice for hedgehogs. Harvard University Press, Cambridge
Dyzenhaus D (2006) The constitution of law legality in a time of emergency. Cambridge University Press, Cambridge
Ekins R (2012) The nature of legislative intent. Oxford University Press, Oxford
Elliott M (2015) Beyond the european convention; human rights and the common law. Curr Leg Probl 68:85–117
Elliott M, Perreau-Saussine A (2009) Pyrrhic public law: Bancoult and the sources, status and content of common law limitations on prerogative power. https://doi.org/10.2139/ssrn.2199349. Accessed 3 Jan 2018
Endicott T (2016) This ancient secretive royal prerogative. UK Constitutional Law Association. https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/. Accessed 19 July 2017
Finnis J (2008) Common law constraints: whose common good counts? Legal studies research paper No. 10. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628. Accessed 22 July 2017
Finnis J (2015) Judicial power, past, present and future. Lecture delivered at the relaunch of Policy Exchange's Judicial Power Project, Gran's Inn Hall, October 20, 2015. https://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/
Fuller L (1978) The forms and limits of adjudication. Harv Law Rev 92:353
Gardner J (2001) Legal positivism: 5 1/2 myths. Am J Juris 46:199
Gordon M (2015) Parliamentary sovereignty in the UK constitution. Hart, Oxford
Hampshire-Monk I (1992) A history of modern political thought. Blackwell, Oxford
Harlow C, Rawlings R (2009) Law and administration, 3rd edn. Cambridge University Press, Cambridge
Hart HLA (1983) Essays in jurisprudence and philosophy. Oxford University Press, Oxford
Hart HLA (1994) The concept of law, 2nd edn. Oxford University Press, Oxford
Hershovitz S (2008) Integrity and stare decisis. In: Hershovitz S (ed) Exploring law's empire. Oxford University Press, Oxford
Kavanagh A (2010) Judicial restraint in the pursuit of justice. Univ Tor Law J 60:23–40
Kyritsis D (2015a) Intending to legislate. Mod Law Rev 78(1):164–175
Kyritsis D (2015b) Shared authority courts and legislatures in legal theory. Oxford and Portland, Oregon
Liyanage v The Queen [1967] 1 AC 259
Locke J, Laslett P (eds) (2003) Two treatises of governmen. Cambridge University Pres, Cambridge
Lord Irvine (1996) Judges and decision-makers; the theory and practice of Wednesbury review. Public Law 59
Lord Sumption (2011) Judicial and political decision making: the uncertain boundary. F.A. Mann lecture 2011. http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf
Moules R (2009) Judicial review of prerogative orders in council. Camb Law J 68:14
Oliver D (1999) Common values and the public private divide. Butterworths, London
Oliver D (2000) Is the ultra vires rule the basis of judicial review. In: Forsyth C (ed) Judicial review and the constitution. Hart, Oxford
Orwell G (1992) 1984. Random House, London, p 223 (Everyman edition)

Poole T (2010) Judicial review at the margins: law, power and prerogative. Univ Tor Law J 60:81–108
Poole T (2016) Reason of state: law, prerogative and empire. Cambridge University Press, Cambridge
Posner R (1993) The problems of jurisprudence. Harvard University Press, Cambridge, pp 42–61
Posner R (2003) Law, pragmatism and democracy. Harvard University Press, Cambridge, pp 61–71
Postema GJ (1987) "Protestant" interpretation and social practices. Law Philos 6:283–319
Postema G (1997) Integrity: justice in workclothes. Iowa Law Rev 82:821–855
R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598
R (Al-Rawi) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWHC 1038 (Admin)
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWCA Civ 498, [2008] QB 365
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2008] 3 WLR 955
R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office [2001] QB 1067
R v Secretary of State for the Home Department, ex party Bentley [1994] Q.B. 349 DC
R. (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2017] 2 W.L.R. 583 (SC), [80]–[81]
Raz J (1979) The authority of law: essays on law and morality. Oxford University Press, Oxford
Raz J (1986) The morality of freedom. Oxford University Press, Oxford
Raz J (1999) Practical reason and norms. Oxford University Press, Oxford
Sales P (2015) Crown powers, the royal prerogative and fundamental rights. In: Wilberg H, Elliott M (eds) The scope and intensity of substantive review traversing Taggart's rainbow. Hart, Oxford. chapter 14
Schauer F (1988) Formalism. Yale Law J 97:509
Stavropolous N (2017) Legal interpretivism. In: Stanford encyclopedia of philosophy. https://plato.stanford.edu/entries/law-interpretivist/. Accessed 22 July 2017
Sumption L, 'Judicial and Political Decision Making: the Uncertain Boundary' F.A. Mann lecture 2011 available at http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1C-Sumption-article.pdf
Tomkins A (2001) Magna carta, crown and colonies. Public Law:571
Tomkins A (2005) Our republican constitution. Hart, Oxford
Union Steamship Co of Australia Pty Ltd v King (1988) 166 C.L.R. 1
Vile MJC (2012) Constitutionalism and the separation of powers, 2nd edn. Liberty Fund, Indianapolis, p 67
Waldron J (1994) Normative (or ethical) positivism. In: Coleman J (ed) Hart's postscript: essays on the postscript to the concept of law. Oxford University Press, Oxford
Waldron J (2003) Security and liberty: the image of balance. J Polit Philos 11(2):191

Chapter 3
Environmental Protection v the Right of Abode: A Case-Study in the Misuse of Power

Adam Tomkins

3.1 Introduction

In the dying days of the last Labour government—on April Fool's Day 2010—Foreign Secretary David Miliband announced the creation of a new no-take marine protected area ("MPA") covering some 250,000 square miles of the British Indian Ocean Territory ("BIOT"). Mr. Miliband's decision was no surprise. It had been foreshadowed by a British Government consultation exercise that had run from November 2009 until March 2010. The decision to create the MPA has been challenged in the English courts. To date, the challenge has been unsuccessful, but an appeal to the UK Supreme Court remains pending at the time of writing.[1]

The background is as follows: in 2001 the High Court in London ruled that the exile of the Chagossians from the Chagos Islands (otherwise known as the British Indian Ocean Territory) was unlawful.[2] That verdict was initially accepted by the incumbent (Labour) government, although there was little practical change for the Chagossians—their right to abode was restored in law only, and not in fact. Even the legal restoration proved short-lived, however, as it was curtailed in 2004. More litigation ensued, which the Chagossians ultimately lost: *R (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Office (No. 2)*.[3] *Bancoult (No. 2)* divided the UK's highest court by three votes to two, the narrowest

[1] See *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2013] EWHC 1502 (Admin) (High Court) and [2014] EWCA Civ 708 (Court of Appeal).

[2] *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Bancoult* [2001] QB 1067; for my reflections on that decision, see A Tomkins, 'Magna Carta, Crown and Colonies' [2001] *Public Law* 571.

[3] [2008] UKHL 61, [2009] 1 AC 453.

A. Tomkins (✉)
Glasgow University, Glasgow, UK
e-mail: adam.tomkins@glasgow.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_3

of decisions overturning earlier verdicts of both the High Court and the Court of Appeal (where the government had lost). With further legal action threatened in the European Court of Human Rights and in the European Union, the government's wafer-thin victory in *Bancoult (No. 2)* did not look particularly secure. The Chagossians were once again exiled, but the Foreign Office was in search of a way to make permanent what they feared—despite *Bancoult (No. 2)*—was only temporary.[4]

A solution was offered by international environmental law, of all things. If fishing could be outlawed in BIOT in the name of marine preservation, prospects (already remote) of the Chagossians being able to return to any sustainable livelihood on the islands would be eliminated completely. And an argument against their return made in the name of environmental protection would be much more appealing, would it not, than one made in the image of imperial exigency, international defence and security, and the war on terror. After getting mixed up in all that torture,[5] what cleaner waters to wash one's ministerial hands in than the pristine reefs of the Great Chagos Bank?

Sceptical readers may consider this too cynical a view, but it is supported by documents released to the High Court in 2013. In May 2009 a briefing note was prepared for the Foreign Secretary, informing him about the proposal to declare an MPA in BIOT. As summarised in the High Court judgment, the note explained that the creation of an MPA would 'bring an end to fishing and … legislate for the protection of seas and atolls in BIOT, while leaving the military base on Diego Garcia unaffected'.[6] The note expressly recorded that the creation of an MPA 'would redound to the credit of the United Kingdom and offset negative associations with Diego Garcia in the public mind' and it further stated that 'we should be aiming calm down the resettlement debate. Creating a reserve [ie an MPA] will not achieve this, but it could create a context for a raft of measures *designed to weaken the movement*'.[7] That is to say, creating an MPA would help to weaken the claims of the Chagossian people to return and would assist the Government in winning the public relations battle, both at home and in the UN.

This short paper is in two parts. The first sets out my reasons for believing in 2009–2010 that the decision to create a no-take MPA in BIOT was unlawful; the second sets out my reasons for continuing to believe this now, despite the High Court and Court of Appeal ruling to the contrary in 2013 and 2014.

---

[4] See, eg, *R (on application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2013] EWHC 1502 (Admin), at [55], [57] and [62]. A Foreign Office note from March 2009 reveals concern inside Government at how the 'pressure being mounted' by various sources (including Bancoult and his legal team) 'to try to get HMG to change its policy on resettlement is gaining in intensity': cited at para. [62] of the High Court judgment.

[5] See, eg, 'Diego Garcia' (*Reprieve*) http://www.reprieve.org.uk/case-study/diego-garcia/. Accessed 20 August 2017.

[6] *Bancoult (No. 3)* (n 4) [55].

[7] ibid [57] emphasis added.

3.2 The Legal Flaws in the 2009 Consultation

It was never made clear in the consultation document the Foreign Office issued in November 2009 what exactly a marine protected area is. The document explained that BIOT had already been declared an Environmental (Preservation and Protection) Zone and that it 'is also subject to further levels of internationally binding legal protection'.[8] The consultation document did not specify precisely what environmental protection would be added were a MPA to be declared in BIOT. It talked in general terms about strengthening 'conservation of the reefs and land areas' but did not offer details as to what this would entail.[9]

One possibility, of course, was that fishing in BIOT would be limited or perhaps even eliminated. Yet, as the consultation document conceded, 'only one company presently fishes on the reefs'.[10] The income from the licensing of this business was insufficient even to cover the BIOT Administration's annual costs. Given the minimal fishing activity in BIOT, declaring an MPA in BIOT would have only very limited benefits, environmentally. Yet, it could have considerable adverse consequences for the Chagossian people, raising the question of whether a decision to declare BIOT to be an MPA would be either fair, reasonable, or proportionate.

It was not clear from the consultation document what the legal authority would be for declaring BIOT to be an MPA. Annex D of the document, entitled "UK policy on MPAs", cited the Marine and Coastal Access Bill (now Act) and an EC Directive on Wild Birds and Habitats as sources of authority. The Marine and Coastal Access Act 2009 appears neither to extend to nor to be extendable to BIOT (see s. 323 of that Act). Nor does it appear that the UK Government may exercise powers under the Act to declare an MPA in BIOT. There seems to be no single agreed definition of MPA in international environmental law. Even within the UK the term is an umbrella one which covers a variety of different schemes.

It was clear from the consultation document that declaring an MPA in BIOT was intended to be enforced. The document talked (albeit only in rather general terms) about the 'need to develop an administrative framework from within the BIOT Administration to oversee the management of the MPA'.[11] But what this would this entail beyond the 'surveillance duties' which were already undertaken by the Administration, was unspecified.

The consultation document said nothing at all about what the implications of declaring an MPA in BIOT would be for the Chagossian people. The only reference to the Chagossian people was on p. 13, where it was claimed that the House of Lords decided in *Bancoult (No. 2)*[12] that 'there is no right of abode' in BIOT and

[8] Foreign and Commonwealth Office, *Consultation on whether to establish a marine protected area in the British Indian Ocean Territory* (2009), p. 9.

[9] ibid, p. 9.

[10] ibid, p. 10.

[11] ibid.

[12] *Bancoult (No.2)* (n 3).

that, under these circumstances, 'the creation of a marine protected area would have no *direct*, *immediate* impact on the Chagossian community'.[13] But what of its indirect effects? Or its eventual effects? Even if the law had for the time being been declared to be that there was no right of abode in BIOT, would declaring an MPA in BIOT not have the effect of entrenching or seeking to entrench that position? The consultation document was silent on this matter. Hence, in part, one's suspicions that international environmental law was being used (that is to say, misused) to seek to secure indefinitely an absence of a right to abode which, by the Government's admission, was but temporary (it being dependent upon the continuing perceived need for Diego Garcia to be used for defence purposes).

The Government stated in the consultation document that its policy on MPAs is 'committed to … minimising socio-economic impacts and maximising the benefits'.[14] It remains to be seen how these goals are intended to be secured with respect to the Chagossian people.

What the consultation document said about the decision of the House of Lords in *Bancoult (No. 2)*[15] was partial to the point of being misleading and, indeed, inaccurate. Contrary to what was stated, their Lordships did not simply decide that 'there is no right of abode' in BIOT. On the contrary, the House ruled that the decision to remove the right of abode in BIOT could not be struck down on grounds of rationality or legitimate expectation. Even their Lordships in the majority in that case recognised and accepted the importance of the right of abode.[16] Lord Hoffmann stated that such is its importance that 'general or ambiguous words … will not readily be construed as intended to remove' the right.[17] The majority ruled that it was not irrational, *in the circumstances*, for the right of abode to be removed and for stringent immigration controls to be re-imposed. In so ruling, their Lordships in the majority expressly recognised that 'there is no reason why … the controls should not be lifted' if circumstances should change at some time in the future.[18]

The prevailing circumstances, of course, pertain to defence, to the US Government's desire to continue to use Diego Garcia as a military base, and to the diplomatic relationship between the UK and the US. Lord Carswell, another of their Lordships in the majority in *Bancoult (No. 2)*, explained that 'the United Kingdom's interests in co-operation with an important ally in maintaining a secure defence installation' was a factor "looming over all considerations" in the case.[19] The circumstances raised in the consultation document, in contrast to those pertaining in *Bancoult (No. 2)*, do concern defence or diplomatic relations. Rather, they pertain to environmental protection. Properly understood, *Bancoult (No. 2)* is therefore no authority for a proposition to the effect that it would be lawful for the UK Government (or for the BIOT

[13] Consultation Document (n 9) 13 (emphasis added).

[14] ibid, Annex D.

[15] *Bancoult (No.2)* (n 3).

[16] See, e.g. ibid [45] (Lord Hoffmann).

[17] ibid [45] (Lord Hoffmann).

[18] ibid [56] (Lord Hoffmann).

[19] ibid [132] (Lord Carswell).

Administration) permanently to exclude all Chagossians from BIOT in the interests of environmental protection.

On the contrary, even the opinions of their Lordships in the majority suggest that using international environmental law to keep the islands de-populated would be contrary to the right of abode. This is for three reasons. First, the right of abode is sufficiently important that it could be adversely affected only clearly, specifically, and unambiguously.[20] Secondly, in making decisions with regard to BIOT the UK Government is '*required* to take into account the interests of the colony'.[21] Thirdly, even if the right of abode may lawfully be displaced for the time being in the interests of defence, it is clear that their Lordships placed great weight on this factor in ruling in the Government's favour. This factor is immaterial in the 2009 consultation: the Foreign Office was proposing to act not in the name of defence, but in the name of the environment. The House of Lords had accepted that, given the fundamental nature of the right of abode, an interference with that right could be shown to be rational at common law only if it satisfied the heightened test laid down by the Court of Appeal in *R v. Ministry of Defence, ex parte Smith*[22] (see, e.g. Lord Carswell[23]). This test requires that, as Sir Thomas Bingham MR expressed it, 'the more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable'. Additional environmental protection that amounts to the cancelling of (at most) a handful of fishing licences does not seem to be a particularly weighty consideration when compared with a matter as fundamental as exile and the right of abode.

It is elemental to the rule of law that public authorities may use their legal powers only for proper purposes. This rule applies to powers in connection with foreign policy.[24] Equally, it applies to exercises of prerogative powers as well as to statutory powers.[25] In the *World Development Movement*[26] case, the Divisional Court held that Government overseas aid for the Pergau Dam project in Malaysia was unlawful on the ground that it did not fall within the purpose, properly construed, of the Overseas Development and Co-operation Act 1980, s. 1. In his judgment Rose LJ explained that the rule was that 'statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper'.[27] On the basis of the 2009 consultation document alone it would have been difficult to make a detailed argument that declaring an MPA in BIOT would be unlawful on grounds of improper purpose. This is for the reason that, as

[20] ibid [45] (Lord Hoffmann).

[21] Ibid [49] (Lord Hoffmann) (emphasis in the original).

[22] [1996] QB 517, 554.

[23] *Bancoult (No. 2)* (n 3) [131] (Lord Carswell).

[24] See *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement* [1995] 1 WLR 386.

[25] See *R v. Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

[26] *World Development Movement* (n 24).

[27] ibid 398 (Rose LJ).

set out above, the consultation document was silent as to the legal basis upon which the Foreign Office proposed to act. But, as we saw in the introduction above, digging a little deeper into the Foreign Office's background and supporting documentation revealed the true story.

It is equally well established that if a public authority either takes into account irrelevant considerations or fails to take into account relevant considerations, its decision can be quashed and/or declared to be unlawful. Taking into account irrelevant considerations overlaps with the doctrine of improper purpose. There is a strong argument that any decision to declare an MPA in BIOT would be unlawful if it failed adequately to take into account the interests of the Chagossians who have clearly demonstrated their desire to enjoy the right of abode there. That the consultation document failed to take the Chagossians' interests into account is (at least) strongly suggestive that the Foreign Office's decision-making was vitiated by its failure to take into account a relevant consideration. Indeed, one may go further to say that, viewed in this light, it seems to be a continuation of what Lord Hoffmann described in *Bancoult* as the 'callous disregard of their interests'.[28]

The consultation process is regulated by law. First, it is governed by the common law. The UK Government's code of practice on consultation is also relevant. Additionally, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998) may be relevant.[29] The following remarks about the adequacy, fairness and legality of the consultation process are focused primarily on the common law. In 2009 Cranston J held that 'the common law duty of consultation is well-established'.[30] As Sullivan J held in *R (on the application of Greenpeace) v. Secretary of State for Trade and Industry*[31] (on which decision see further below), 'whatever the position may be in other policy areas, in the development of policy in the environmental field consultation is no longer a privilege to be granted or withheld at will by the executive'.[32]

The Court of Appeal ruled in *R v. North and East Devon Health Authority, ex parte Coughlan*[33] as follows: 'To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the

[28] *Bancoult (No. 2)* (n 3) [10] (Lord Hoffmann).

[29] While the Convention has not been extended to BIOT, the United Kingdom is bound by it as a matter of international law; the consultation was a British Government (Foreign Office) document, the responsible Minister being the United Kingdom's Foreign Secretary. As I understand it, the Convention had not at the material time been given domestic legal effect within the UK, although it was in large measure given legal effect by force of EU law: see, eg, Directive 2001/42, Article 6 of which is concerned with 'effective' consultation.

[30] *R (on the application of Crompton) v. Wiltshire Primary Care Trust* [2009] EWHC 1824 (Admin), [104].

[31] [2007] EWHC 311 (Admin), [2007] Env LR 29.

[32] ibid [49].

[33] [2001] QB 213.

ultimate decision is taken'.[34] For the avoidance of doubt, it is to be noted that the Court of Appeal ruled that any consultation embarked upon must satisfy these requirements, even if there was no legal obligation to engage in a consultation exercise. This important principle has been re-affirmed numerous times: see, e.g., *R (on the application of Eisai) v. National Institute for Health and Clinical Excellence*.[35]

To this authority must be added the important decision of Sullivan J in *Greenpeace,*[36] in which it was claimed that a consultation would not be fair (and would therefore be unlawful) if 'consultees were not told in clear terms what the proposal was to which they were being invited to respond' or if 'consultees were not provided with enough information to enable them to make an intelligent response'.[37] Sullivan J proceeded on the basis that these claims were correct in law; and his approach has been accepted and adopted in subsequent decisions (eg, *Bard v. Secretary of State for Communities and Local Government*[38]). In *Eisai*[39] the Court of Appeal ruled that a consultation was unlawful at common law for the reason that, as Dyson LJ summarised it in a later case, the claimant 'could not comment on crucial aspects of the evidence on which it wished to comment'.[40] The Court of Appeal in *Eisai*[41] accepted the submission that consultees were 'entitled to check and comment on the evidence relied on by the decision-maker, rather than having to take the decision-maker's work on trust'.[42]

The 2009 consultation on declaring an MPA in BIOT manifestly failed to satisfy these requirements. The consultation document failed, for example, to explain what would be the consequences for the Chagossians of any declaration of an MPA in BIOT. Without a clear understanding of such consequences, how could the Chagossian people make an intelligent response to the proposals? *Greenpeace*[43] is far from being the only case in which the courts have held that consultation has been inadequately and unlawfully conducted. Another example from 2009 is the unanimous decision of the Court of Appeal in *R (on the application of Breckland DC and others) v. Boundary Committee,*[44] in which the Court ruled that 'in order to enable effective representations to be made, it is necessary to publish not just "the proposal" in a narrow sense, that is *what* is proposed by way of … change, but also a summary of the reasons why that change is proposed in particular…'[45] This is an

[34] ibid [108].

[35] [2008] EWCA Civ 438, [24].

[36] *Greenpeace* (n 32).

[37] ibid [44].

[38] [2009] EWHC 308 (Admin), [65]–[67].

[39] *Eisai* (n 35).

[40] *R (on the application of Easyjet) v. Civil Aviation Authority* [2009] EWCA Civ 1361, [48] (Dyson LJ).

[41] *Eisai* (n 35).

[42] *Easyjet* (n 40) [48] (Dyson LJ).

[43] *Greenpeace* (n 31).

[44] [2009] EWCA Civ 239.

[45] ibid [44] (emphasis in the original).

important and powerful ruling, the Court of Appeal insisting that it is *necessary* as a matter of the common law to publish in a consultation document not only the Government's bare case that (in this instance) an MPA should be declared in BIOT, but also a summary of the reasons for and consequences of this decision, the all-important goal being to enable *effective* representations to be made. More graphically—and in terms accepted by the Court of Appeal—consultees ought not to be 'left making shots in the dark, in circumstances where the light could so easily be switched on'.[46]

The rules of natural justice, including obligations as to consultation, are flexible in their application: as Lord Mustill expressed it in the leading case of *R v. Secretary of State for the Home Department, ex parte Doody,*[47] 'what fairness demands is dependent on the context of the decision'.[48] In *Easyjet*[49] the Court of Appeal held that the facts of that case placed it at 'the "soft" end of the spectrum' of what the law requires by way of fairness in consultation exercises.[50] This was because that case 'does not impact on personal liberty, a person's home, the use which a property owner may make of his property or the right to conduct a business'.[51] For these reasons, the Court of Appeal ruled that the Civil Aviation Authority's consultation was not unfair, even if it was imperfect. The case of the Chagossians, by contrast, is properly placed at the very other end of the spectrum identified by the Court of Appeal. Here, the decision is one which impacts adversely and directly on the Chagossians' personal liberty, their home, their property and their livelihood. It is precisely in these sorts of circumstances that the rules of natural justice generally, and the obligation in particular to ensure that consultation is as full and fair as possible, are at their sharpest. As the Court of Appeal recognised in *Easyjet,*[52] the more intrusive the decision, the higher the level of protection that will be afforded by the law of procedural fairness.

3.3 The Position Today

The previous section sets out my views in 2009 when I read the consultation document. I submitted these views as a response to the consultation exercise and I shared them with Bancoult's legal team as they prepared their legal challenge to Mr Miliband's April 2010 decision that an MPA should be created in BIOT. All the legal authorities referred to in the previous section date from 2009 or earlier—the views outlined in that section are based on the law as it stood at the time the

[46] *Eisai* (n 35) [50].

[47] [1994] 1 AC 531.

[48] ibid 560.

[49] *Easyjet* (n 40).

[50] ibid [75].

[51] ibid [74].

[52] ibid [75].

consultation document was published. Eight years on, I have not changed my mind, despite the 2013 and 2014 judgments of the High Court and Court of Appeal (which I shall analyse in a moment). My views are fortified by the 2015 decision of the International Law of the Sea Tribunal. Before coming to that judgment, however, I must first address the failure (to date) of Bancoult's challenge in the domestic courts.

The exile of the Chagossian people from their homelands and their subsequent neglect was one of the worst human rights abuses committed by the United Kingdom in the twentieth century. After a remarkable early win,[53] the English courts have, on the whole, let the Chagossians down. This sad pattern has continued in the two most recent decisions, of 2013 and 2014, in which Mr Miliband's decision to create an MPA in BIOT was upheld.

In the High Court,[54] Bancoult's legal team put forward five arguments as to why, in their view, Mr Miliband had acted unlawfully. These arguments overlap with, but go beyond, those summarised in the previous section of this chapter. In brief, Bancoult's five contentions were: (1) improper motive, in that the MPA was intended to create a long-term way to prevent the Chagossian people from resettling in BIOT; (2) failure to reveal in the 2009 consultation document that the Foreign Office's consultants had advised that resettlement of the islands was feasible; (3) failure to disclose relevant environmental information in the consultation; (4) failure to recognise, in the public consultation exercise, that the creation of an MPA would adversely affect the historical rights of the Chagossian people to fish in the waters of their homeland; and (5) breach by the United Kingdom of EU law obligations pertaining to overseas territories.

The Court dismissed all five arguments. The claim of improper motive became entangled in a conflict over sources of information. Bancoult's legal team placed at the centre of their submissions on this point an unlawfully obtained 'cable' (diplomatic communication) leaked by the notorious WikiLeaks website founded by the fugitive Julian Assange. The Court ruled that the document was inadmissible as evidence due to what are undoubtedly important rules of national and international law that protect the confidentiality of diplomatic communications. In my view it was a mistake on the part of the legal team to place such weight on the WikiLeaks source, not least because Bancoult did not need to do so. The May 2009 briefing note prepared for the Foreign Secretary (referred to in the introduction to this chapter, above) tells us everything we need to know about the motivations of the Foreign Secretary and the officials advising him. That should have been their (and the court's) focus, not the illegally obtained WikiLeaks cable.

The Court was no more receptive to Bancoult's various arguments about the consultation process. It ruled that the issue of the feasibility of resettlement was irrelevant to the MPA consultation, so did not have to be included within it; it ruled that the environmental information included in the consultation exercise was sufficient for the purposes of the exercise; and it ruled that there was no ten-

[53] *Bancoult (No. 1)* (n 2).

[54] *R (on application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2013] EWHC 1502 (Admin).

able basis for arguing that the Chagossian people enjoyed legally recognised (or enforceable) fishing rights in BIOT's waters. The Court noted that Mauritius may enjoy such rights—but that that question would be one for an international court, not for the High Court in England. The Court also dismissed the argument based on EU law.

Bancoult appealed to the Court of Appeal,[55] but unsuccessfully. The only material point of difference between the Court of Appeal and the High Court is that the appeal court ruled the WikiLeaks cable to be admissible. It then stated, however, that even if the cable had been admitted as evidence, it would have made no difference, as the High Court would still have ruled that the creation of the MPA was not actuated by improper motive.

The relevant passage of the Court of Appeal's judgment is, with respect, even less persuasive than was the High Court. There is no attempt to take seriously the claim that Mr Miliband's decision was vitiated by improper purpose or bad faith. The court is deferential to the Foreign Office's decision-making process, rather than (as it should have been) searching in its scrutiny of that process. The intensity of judicial review in this case is as light-touch as could be imagined—as if the court was dealing with a matter of high policy rather than the right of abode. Case law tells us that judicial review should be all the more vigorous when fundamental rights are at issue. Sadly, that is the very opposite of what happened here.

At the time of writing the most recent chapter in this sorry saga is the decision of 18 March 2015 of an Arbitral Tribunal constituted under the UN Convention on the Law of the Sea ("the Convention"). Mauritius initiated legal proceedings under the Convention, arguing that the UK's establishment of the Marine Protected Area in BIOT was in breach of certain of its provisions. Article 56 of the Convention provides that states must, when exercising rights under the Convention, have due regard to the rights and duties of other states. Mauritius was successful in arguing that Mr Miliband's decision to create an MPA in BIOT violated this provision. As summarised by the Tribunal, the crux of Mauritius' complaint was that 'the UK did not inform Mauritius of its plans; it provided Mauritius with inaccurate information; [and] it ignored Mauritius' repeated calls for bilateral consultations', instead proceeding with what Mauritius called a 'fundamentally flawed' public consultation exercise.[56]

The Tribunal found that the UK had undertaken in 1965 and had repeated numerous times since (including in 1976, 1980, 1992 and 1997) that BIOT would revert to Mauritius as soon as it was no longer required for defence purposes. (The Chagos Archipelago was detached from Mauritius in 1965 whilst Mauritius was still a British colony; it then became the British Overseas Territory of BIOT; Mauritius became independent in 1968 and since the early 1980s has asserted its rights to sovereignty over the Chagos Archipelago.) Importantly, the Tribunal found that this

[55] *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2014] EWCA Civ 708.

[56] *Mauritius v United Kingdom* [457].

oft-repeated undertaking is a matter of international law—i.e., is an internationally enforceable legal obligation on the part of the United Kingdom.[57] The Tribunal further held that Mauritius did in fact and was entitled in law to rely on this undertaking and that the United Kingdom was therefore estopped from denying its binding effect.[58]

With this essential legal context in mind, the Tribunal found that Mr Miliband's unilateral declaration of the MPA in April 2010 was in breach of the UK's obligations under Article 56 of the Convention. The following is an indicative list (given by the Tribunal) of the UK's failures. Mauritius was not formally notified of the proposal to create an MPA in BIOT, but learnt about the proposal from an article in a London newspaper. There were no bilateral meetings to discuss the proposal until July 2009 and, even then, there was only one such meeting. At the meeting the UK explained that many details of the MPA proposal had yet to be developed. All of this was in stark contrast with the way the UK's Foreign Office behaved with the US. During 2009 there was considerable correspondence between the UK and the US over the details of the MPA proposal. Finally, the Tribunal noted, no explanation was ever offered by the UK as to why the MPA was so urgently proclaimed in April 2010, when there should have been 'significant further engagement' with Mauritius following the public consultation.[59]

The Tribunal concluded as follows: '[we] do not accept that the United Kingdom has fulfilled the basic purpose of consulting, given the lack of information actually provided…' and the absence of a reasoned exchange between the parties.[60] What goes for Mauritius, in my view, goes also for the Chagossian people. The Tribunal further concluded that 'the United Kingdom failed properly to balance its own rights and interests with Mauritius' rights … Not only did the United Kingdom proceed on the flawed basis that Mauritius had no fishing rights in the territorial sea of the Chagos Archipelago, it presumed to conclude—without ever confirming with Mauritius—that the MPA was in Mauritius' interest'.[61] I respectfully agree. And everything said here about the UK's disregard for Mauritius goes also for its ongoing disregard for the interests of the Chagossians. 'They were undoubtedly treated very shabbily when they were removed from the Islands' said Lord Carswell with imperious under-statement in the House of Lords in 2008.[62] Shamefully, that's how Britain still treats them.

[57] ibid [428].

[58] ibid [448].

[59] ibid [533].

[60] Ibid [534].

[61] ibid [535].

[62] *Bancoult (No . 2)* (n 3) [136].

References

Mauritius v United Kingdom ICGJ 486 (PCA 2015)

R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2013] EWHC 1502 (Admin) (High Court) and [2014] EWCA Civ 708 (Court of Appeal)

R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2014] EWCA Civ 708

R (on the application of Crompton) v. Wiltshire Primary Care Trust [2009] EWHC 1824 (Admin), [104]

R (on the application of Easyjet) v. Civil Aviation Authority [2009] EWCA Civ 1361, [48] (Dyson LJ)

R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Bancoult [2001] QB 1067; for my reflections on that decision, see A Tomkins, 'Magna Carta, Crown and Colonies' [2001] *Public Law* 571

R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement [1995] 1 WLR 386

Foreign and Commonwealth Office, *Consultation on whether to establish a marine protected area in the British Indian Ocean Territory* (2009) 9

R v. Secretary of State for the Home Department, ex parte Fire Brigades Union [1995] 2 AC 513

Chapter 4
How Public Law Has Not Been Able to Provide the Chagossians with a Remedy

Richard Gifford

4.1 Introduction

In November 2017 it will be 52 years since the Chagos islands were detached from the colony of Mauritius and the population subsequently deported to make way for a US military base. Many lawyers since that date have tried to construct a remedy, and this task has fallen to me for the past 20 years in company with Clifford Chance, with whom I am now a consultant and for 10 years before that as a partner with Sheridans. Over such a long period, with successes and failures along the way, this litigation has become a cat and mouse struggle between a government and its citizens in which the courts have played an important part. As a legal campaigner, I should point that out whilst I believe all the facts and comments in this talk are accurate I cannot pretend that all of what follows is agreed, and may not represent the views of the government, of some of the judiciary, or indeed of my firm.

I therefore now describe some elements of this political and legal struggle. I will tease out some public law principles as pointers on the way to what I still hope will be a successful outcome, but which is, as yet, beyond our grasp. I will interpose a few sub-headings as we go. The law and facts are stated as at 31 December 2017.

An earlier version of this essay was originally delivered as an oral presentation by Richard Gifford to the Public Law Project on 5 October 2015. It has since been revised and updated to incorporate later events and in particular the Supreme Court's most recent decision in June 2016. In this latter task Richard Dunne, a scientist and lawyer who was also involved with the case, is to be thanked for his assistance.

R. Gifford (✉)
Clifford Chance, London, UK
e-mail: Richard.gifford@cliffordchance.com

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_4

4.2 Background

At the height of the Cold War, in the 1960s the Russians were understood to be seeking defence facilities in the Indian Ocean.[1] Britain's power east of Suez was at the time in decline following crippling economic problems back home, and faced with the possibility that the Indian Ocean might fall under Russian influence, the US approached Britain with a proposal to develop a military facility in the Chagos Archipelago. The islands were at the time part of the British colony of Mauritius, which was negotiating its independence from its colonial master. In order to satisfy the US request, the United Kingdom detached the Chagos from Mauritius, in breach of specific UN resolutions, and the British Indian Ocean Territory (BIOT) was created on 8 November 1965. Britain then signed an Exchange of Notes with the USA on 30 December 1966 effectively handing over the entire Chagos Archipelago of 65 islands to the USA for 'defence purposes'.

The construction of a US naval and military base on the island of Diego Garcia soon followed and Britain deported (euphemistically 'resettled') the population. This involved the removal of some 1500 souls from islands which had been their homeland for 200 years.[2] Government agents, who had continued to run the coconut plantations after their land had been compulsorily purchased, were instructed to kill in excess of 800 pet dogs, but save the horses and deport the natives into exile.[3]

There was no resettlement plan and the Islanders were callously dumped[4] in Mauritius and Seychelles, over 1000 miles distant, without homes, jobs, or any compensation thus condemning them to a life of poverty. Only several years later in 1978 did any form of compensation reach the islanders deported to Mauritius, when disbursements were made from a sum of £625,000 given by the UK to the Mauritian Government, but it was too little, too late. Nothing was given to those deported to Seychelles.

The new colony had to be reported to the United Nations Decolonisation Committee. The UK informed the Committee that there were only contract labourers on the islands. It concealed the existence of a permanent population which had in fact been, settled for five generations, and was thus entitled to the 'sacred trust' of Article 73 of the Charter of the United Nations.

---

[1] E.g., 'refueling facilities': Telegram from the US Embassy in the United Kingdom to the Departments of State and Defense. US National Archives, RG 59, Central Files 1967–69, DEF 15 IND–US. Secret; Immediate.

[2] Gifford and Dunne (2014), p. 37.

[3] *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs (No. 1)* [2000] QB 1067. Statement of Marcel Moulinie dated 22 November 1999 at [14].

[4] 'The Chagossians alone were made to pay a personal price for the defence establishment on Diego Garcia, which was regarded by the UK and US Governments as necessary for the defence of the West and its values. Many were given nothing for years but a callous separation from their homes, belongings and way of life and a terrible journey to privation and hardship' per Ouseley J in *Chagos Islanders v Attorney General* [2003] EWHC 222, [154].

Thus the only body that might have saved the Islanders was misled. Mauritius and Seychelles were paid £3 m and the cost of an airport respectively. The Foreign and Commonwealth Office (FCO)'s lawyers advised that since Britain had not ratified the fourth protocol to the European Convention on Human Rights (ECHR), there was no legal right of return and accordingly the FCO could '*make the rules up as we go along*'.[5] An Immigration Ordinance was enacted in 1971 making it a criminal offence for anyone other than those connected with the US military base to be on the islands. This unique set of legal and political circumstances is the first, and only, occasion when an entire population of British subjects was removed from the whole of its British homeland as a deliberate act and policy of the UK government.

But over the period of 40 years that the Chagossian community has endured its exile, it has proven almost impossible to construct a legal remedy in *such an intensely political case*.

But why has this been so difficult? After all, it was 800 years ago, that Magna Carta condemned the practice of exiling British subjects from the realm:

> Chapter 29: No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, **or exiled**, or any other wise destroyed; nor will We not pass upon him, nor condemn him**, but by lawful judgment of his Peers, or by the Law of the Land.** We will sell to no man, we will not deny or defer to any man either Justice or Right.

But this broad statement of principle, relied upon by the Chagos islanders in both public law and private law actions against the FCO has been held to provide no remedy at all.[6] Such gains as there have been have been met by officials determined to keep the islanders from their homeland, and tactics adopted which lack integrity.[7] Unfortunately these stratagems have often taken years to understand or unravel.[8]

---

[5] AI Aust (Legal Adviser) Memorandum dated 23 October 1968 'Legal Aspects of BIOT Immigration'; Folio 2 in File FCO 32/490 'BIOT Social Status and Citizenship of Diego Garcia Inhabitants', National Archives, Kew, London.

[6] See the series of cases led by Olivier Bancoult and the Chagos islanders *infra*.

[7] Historical illustrations of these tactics are many. These are summarised in Gifford (2009), Accessed 10 October 2017.

[8] For example (a) the misleading of the UN in 1965 did not become known until 2007, by our own researches, (b) the denial of the Feasibility Study file conducted between 2000 and 2002, which was requested from FCO in 2005–2008, was not discovered until 2012, years after the House of Lords had relied on it to deny Chagossians right of abode (c) records of meetings between UK and Mauritian representatives concerning traditional fishing rights were discovered in the National Archives which contradicted the FCO accounts after appeals had been defeated, (d) Statements of determination to keep Chagossians from their homeland, made to US officials were not known until revealed by *WikiLeaks*.

4.3 First Attempts at a Remedy: The Vencatassen Case

The first action was brought in 1975 by the London law firm Sheridans on behalf of one deported islander Michael Vencatassen. It was necessarily a strange pleading in tort based on intimidation, deprivation of liberty, assault by a British Naval Officer and conspiracy to prevent return. With half-hearted support from the Legal Aid Authorities, it defeated an attempt by the FCO to block discovery of documents by claiming Public Interest Immunity. But the action went no further. Having recently suffered the opprobrium of the courts in another case involving colonial subjects,[9] and anxious to avoid the publicity for what had happened to the Chagossians the FCO offered a settlement of £1.25 million. My predecessor Bernard Sheridan was required by the FCO to involve all the islanders in the settlement. This he did with some alacrity, but before he could complete his mission, the terms of settlement, which included renunciation of all rights arising from the deportation, were excoriated and the deal fell flat.

After Bernard Sheridan returned from Mauritius in 1979, Legal Aid was not extended so the action did not proceed. However, other Chagossians in Mauritius agitated for settlement, and in 1982, just as the Falklands War was about to begin, a renewed offer of settlement was made by the UK directly to the Mauritian government. A bilateral conference took place in Mauritius, with some Chagossians looking on. The legal firm of Bindmans and John Macdonald QC were requested to attend on behalf of the Chagossians.

4.3.1 Settlement Terms Are Mis-Described

The UK representative opened the meeting (which was conducted throughout in English, a language not understood by Chagossians who speak Creole) by saying there was now £3 million on the table and that the UK would no longer insist on individual renunciations, thus stating for the first time that the islanders could expect to return to the islands. Negotiations proceeded over an extended period. The offer was eventually raised to £4 million and the Mauritian government agreed to provide £1 million worth of land for building of flats.[10]

4.3.2 Chagossians Are Misinformed

A mass meeting was held at which a Mauritian minister informed the Chagossians that whilst the amount of compensation was final they would retain their right to

[9] The Banaban Islanders Case—*Tito v Waddell (No 2)* [1977] 3 All ER.

[10] Now Known as the "Cité Ilois" at Roche Bois, built by the Mauritian Government.

return to the islands.[11] Bindmans and leading counsel returned home. Despite this assurance, a draft bilateral agreement, which had been circulating, suddenly acquired a new clause. Article 4 required:

> [T]he government of Mauritius is to use its best endeavours to procure from each member of the Ilois[12] community in Mauritius a signed renunciation of the claims referred to in Article 2 of this agreement and shall hold such renunciations of claims at the disposal of the government of the United Kingdom.

The FCO simply could not prevent themselves from abandoning their introductory promise and slamming the door on Chagossians and rubbing in the insult to the Mauritian government.

It was not specified in the bilateral agreement which Government was to be exonerated by these yet-to-be-drafted forms of renunciation (as both Mauritius and the United Kingdom were held responsible by the Chagossians, particularly Mauritius).

One might have thought that given the UK delegation's statement that individual renunciations would no longer be required by the UK government, this ambiguity might have been resolved in favour of the Chagossians. In fact it was worse than that because the FCO actually informed us, in a later affidavit[13] by their Director of the Americas, Peter Westmacott, that:

> It was intended that waivers should be obtained from individual Ilois, which were to reflect at an individual level the settlement reached at community and government level. In fact waivers were only obtained in respect of the claims against the Mauritius government and not the UK government.

And so both the judicial review of 2000[14] and the group litigation of 2003[15] were prepared on the basis that the Chagossians had not renounced any rights against the UK government, a fact supported by the press report stating that they retained their rights to return to Diego Garcia. You can imagine my shock, therefore, when at the opening of trial of the group litigation in October 2002, I was confronted with a pile of 1344 renunciation forms, thumb-printed by every compensated Chagossian, albeit without any form of explanation or translation. They certainly had not been produced by the FCO during pre-trial procedures as they should have been. Did I

---

[11] It was reported in Le Mauricien dated 23 March 1982 that Minister Bérenger informed the meeting of Chagossians that 'L'accord était total entre les délégations anglaise et mauricienne. En ce qui concerne le montant compensatoire à etre accordé et le non-renoncement des Ilois à leurs droits de retour a Diego Garcia, a expliqué M. Bérenger'. This contemporaneous report was finessed by Ouseley J who said, merely, that 'There was a mass meeting at which the outcome of the 1982 negotiations were explained, and the 1982 Agreement received widespread publicity. But it is not easy at this stage, indeed I doubt very much whether it will ever be possible, to be sure how well known it was in 1982 that there was a provision in the Agreement for some renunciation form, which individuals would have to sign' *Chagos Islanders v Attorney General*, [528].

[12] Ilois ('islanders') was the former term used for Chagossians.

[13] *Bancoult (No. 1)* (n 3) affidavit of Peter Wesmacott dated 25 August 1999 at [79].

[14] *Bancoult (No. 1)* (n 3).

[15] *Chagos Islanders v Attorney General* [2003] EWHC 2222.

complain to leading counsel, who had already agreed to their admission without demur? I will leave that answer to your imagination.

So the settlement had taken place in 1982, with the Chagossians ignorant of the oppressive conditions imposed. Each islander received an average of £2795, sufficient for some to acquire housing and for others merely to pay off the debts incurred during a decade or more of absolute poverty. The Vencatassen action was stayed on the basis of a Tomlin Order and all disclosed documents were returned to Treasury Solicitor. These concealed settlement terms have cast a long shadow over subsequent attempts to achieve a just solution.

4.4 The Judicial Review in *Bancoult (No. 1)* and Its Evolution

So when I came to review what was left of Chagossians' rights in 1997 the position was extremely unclear. On reviewing the Vencatassen file there were no government documents there, merely some pleadings, a *Sunday Times* report from 1975, and a few miscellaneous documents and records. The Chagossians were adamant that they had not given up any rights in the 1982 settlement, that they had not been asked to do so and if asked would have stoutly refused. They retained their social position at the very bottom of a stratified society as a poverty-stricken group in Mauritius and Seychelles. By demonstrating on the streets of Mauritius against the British authorities and petitioning the USA, they had hoped to raise the profile of their case.

4.4.1 Procedural Reform

Protests proved ineffective, but two things came to their aid. First, following the Law Commission report in 1976[16] (the year after the Vencatassen case was launched) the remedy of judicial review had been instituted and for the first time permitted, at least in theory, a claim for damages in public law. Judicial review had developed much procedure and case-law over the intervening decade.

4.4.2 Do Your Homework First

Second, the passage of 30 years meant that records covering the establishment of BIOT in 1965 and the agreement with the USA in 1966 should now be available in public records. Searches were made and revealed a stream of correspondence

[16] Report on Remedies in Administrative Law, Law Commission No 73 Cmnd 6407, 1976.

between Whitehall and the UK representative at the United Nations, instructing him to mislead the Decolonisation Committee about the permanence of the population which it was proposed to remove. With this limited insight into the decision-making process, a judicial review was launched in 1998 challenging Clause 4 of the BIOT Immigration Ordinance 1971 which prevented the return of the population and gave cover for its unlawful removal. In granting leave to move for judicial review, Scott Baker J. observed that 'Someone is trying to pretend that the population does not exist'.[17] Jurisdictional objections were dismissed and leave granted. It led directly to the production of internal documents which fully explained much of the whole sorry and shameful saga.

4.4.3 How Did the High Court Declare the Exile Unlawful?

I will highlight a couple of aspects of the judgment. It was held that Magna Carta did apply to the colonies but its effect was surprisingly limited. What chapter 29 provided was that if such rights as freedom from exile were to be cut down, all that was necessary was for the law of the land to make provision for it, ie Magna Carta only guaranteed a procedure not a right. The Immigration Ordinance 1971 providing for the banishment of the population was nonetheless the law of the land. The question was whether it was a valid law and in order to answer that question the court had to look elsewhere.

Second, the court addressed the *ultra vires* argument that the colonial power of governance was limited to the welfare of the inhabitants and did not permit its exile. The court recognised that there was a long line of cases such as *Ibbralebbe,*[18] *Sekgome*[19] and *Winfat*[20] saying that a colonial legislature was sovereign in its territory and was not an agent of the Crown. Nonetheless the phrase 'peace, order, and good government' (POGG) must mean something since it was not an infinite power which the Commissioner (the Governor of the Territory) had to exercise. Although POGG was a large tapestry, the tapestry nonetheless had borders.[21] In this case POGG required that subjects were to be governed and not removed and the clause in the BIOT Immigration Ordinance providing for the exile was therefore *ultra vires*. A narrow interpretation was justified by the unusual factors of an unrepresentative legislature and a breach of fundamental rights, despite previous authority.

On the day of judgment, 3 November 2000, the then Foreign Secretary, Robin Cook, accepted the court's decision and announced the new urgency in the Feasibility Study which he had set up to investigate the implications of return. In court we

[17] Arguendo.

[18] *Ibbralebbe v R* [1964] AC 900, 923.

[19] *R v Sekgome* [1910] 2 KB 576.

[20] *Winfat Enterprises (Hong Kong) Co Ltd v Attorney General of Hong Kong* [1985] 1 AC 733, 747.

[21] Per Laws LJ 'peace, order and good government may be a very large tapestry, but every tapestry has a border'. *Bancoult (No. 1)* (n 3) [55].

struggled to create some sort of remedy out of the decision. We asked for the case to be held over to enable the court in effect to supervise what the Foreign Secretary immediately promised, namely a restoration of the right to return and an acceleration of the Feasibility Study. The court was having none of it, complimented the FCO on its candour in volunteering the historical record, and left it entirely to government as to how a remedy should be fashioned. Ironically, this was to be the last time that the FCO was to meet its Duty of Candour in disclosing its records to the court or to Chagossian litigants as will become apparent.

Although damages were a theoretical possibility in judicial review, we were not within shouting distance of making any such claim. It would need several more years of litigation of the heaviest sort and involved the most vigorous resistance from government. This resistance was ultimately successful and Chagossians again were denied a remedy.

I observe here that, the court did in fact decide that there was a breach of Magna Carta.[22] Since the law of the land (the challenged Immigration Ordinance 1971) required by chapter 29 was invalid, then the exile must be a violation. Magna Carta was to become an important platform when it came to seeking compensation in the group litigation.

4.5 The Group Litigation: *Chagos Islanders v Attorney General and HM BIOT Commissioner* [2003] EWHC 2222 (QB)

On 23 April 2002 the group litigation was issued. It had taken over a year to enrol 4287 Chagossians and to identify a sufficient cause of action to enable proceedings to issue. Compensation proceedings necessarily had to be a private law claim and based in tort. You will readily appreciate that the law of tort has more to do with snails in bottles than it has with exiled populations. Considerable ingenuity was required, just as it had been in pleading the Vencatassen case. But we had one advantage. In public law the removals had been declared unlawful and in effect a breach of Magna Carta established. So the headline claim was for "*the tort of exile*". In fact the claim was broadly based comprising six causes of action. In addition to the tort of exile, there was misfeasance in public office, negligence, deceit, property rights arising under the law of Mauritius, and breach of human rights (not arising under the Human Rights Act 1998, but from the Mauritius Constitution 1964 which contained a Human Rights chapter). The FCO relied on two defences, the finality of the 1982 settlement, and, of course, limitation of actions, denying any continuity in any of these torts.

[22] Per Laws LJ in *Bancoult (No. 1)* (n 3) [59] 'In my judgment, for all these reasons, the apparatus of s.4 of the Ordinance has no colour of lawful authority…. S.4 of the Ordinance effectively exiles the Ilois from the territory where they are belongers and forbids their return' a breach of Magna Carta by another name?

The trial judge, Mr. Justice Ouseley, dismissed all six causes of action as unarguable and upheld both of the FCO defences.[23] The Court of Appeal was asked to rule. It concentrated on the three principal torts of exile, misfeasance and deceit.[24]

The Court of Appeal's judgment shows in the starkest possible way that no-one gets damages against the State unless they can prove individual officials personally responsible for an identified civil wrong. Not only can the State do no wrong in civil law, it simply has no liability. Sedley LJ acknowledged, without apology, the lack of a remedy in such a case, contrasting English public law with the civil law system in France where the judicial review judgment in November 2000 would in France have entitled Mr Bancoult and his compatriots to claim damages directly against the UK.

4.5.1 Misfeasance, What Misfeasance?

But even the secondary proposition that the vicarious responsibility of the Crown for individual torts which was provided by section 2 of the Crown Proceedings Act 1947 was not enough. It was necessary for each individual official or minister to be identified and particulars served of his state of knowledge. As the trial judge had observed, no doubt with some satisfaction, most of the main players here had long since passed away. In any event there was no kind of corporate responsibility which would enable a claim based upon the underlying illegal plan comprising the combined knowledge of the FCO and its ministers. Misfeasance, if restrictively interpreted, can apply only to police officers and corrupt officials and is totally inadequate to deal with an unlawful policy decided at the highest level. Faced with this undue restriction we were not allowed to amalgamate the knowledge of different officials and ministers who together conspired to cheat the Chagossians of their homeland.

We did not invent this more expansive interpretation. We had relied upon the House of Lords' decision in *Three Rivers v Bank of England,*[25] where Lord Hutton had said:

> It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority **or a government ministry**[26]

But Sedley LJ disagreed. He said:

> What Dunlop set out self-evidently concerned a local corporation. The claim against the nominated department of State in Burgoin depended on proof that the 'minister's motive was to further the interest of English turkey producers by keeping out the produce of French turkey producers' – an act which must necessarily injure them.

---

[23] *Chagos Islanders v Attorney General* (n 15), per Ouseley J [737–748].

[24] ibid.

[25] [2001] UKHL 16.

[26] *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. (emphasis added). The court cited *Dunlop v Woolahra* and *Burgoin v Ministry of Agriculture*.

...

> In other words, if the necessary knowledge and motive could be brought home to the minister, the Crown, in the nominal form of the MAFF would be vicariously liable. It is in that sense that Lord Hutton was speaking of departmental liability for misfeasance in public office.[27]

Well that is very strange. That is exactly what the Chagossians' case was, namely that officials and ministers right up to the Prime Minister intended to remove the Chagos islanders, and to dump them 1000 miles away without provision for homes or jobs. Normally a person is taken to intend the normal and probable consequences of his actions. But not, it seems, when ministers and officials of the Crown are involved. Sedley LJ continued:

> Faced with this inescapable difficulty (Counsel) submits that he's able to implicate officers of State in the tort so as to make the Crown vicariously liable … (refers to the evidence) … What he cannot point to however, is evidence that they or any of their subordinates (who constitutionally are their alter ego) **knew that it was illegal.** Such case law as there was … confirmed that the power to make Ordinances for governments of dependencies went extremely wide. It was not until the divisional court decided in Bancoult 1 that a line was drawn.[28]

So there we have it. Ministers and officials can do anything they like, closing their eyes to the obvious inhumanity involved, not bothering with Common Law, International Law or indeed Magna Carta, and claim that they did not know it was illegal. This was a judicial assumption, untested by evidence, that none of the participants were aware that to exile the Chagossians was unlawful. It was not good enough that they all knew that it was an outrageous breach of the practice of nations, a breach of the common law right of abode, a direct breach of a raft of international law instruments from the Universal Declaration of Human Rights (1948) to the United Nations Charter, etc., etc. What was held to be decisive was the assumption that they did not know that they were acting unlawfully in English public law terms. They thought that they had the power to pass the Immigration Ordinance 1971, and it was held reasonable that they thought they could rely on the private ownership of land by the Crown (following compulsory acquisition).

Do we know any other area of the law where ignorance of it is a complete excuse? In any event there were clear legal rights being breached. The simple fact is that the FCO knew that what they were doing was wrong (it involved lying to the United Nations and misrepresenting the case to the public). They certainly should have known about Magna Carta. The Common Law Right of Abode had been declared by the House of Lords in *DPP v Bhagwan,*[29] a case that started in 1970, before the unlawful Immigration Ordinance of BIOT was enacted. Even after the Immigration Ordinance 1971 was held unlawful in 2000, the High Court and Court of Appeal

---

[27] *Chagos Islanders v Attorney General* [2004] EWCA Civ 997, per Sedley LJ, [27].

[28] ibid, [28] (emphasis added).

[29] *DPP v Bhagwan* [1972] AC 60. This merely declared the right of abode in one's homeland. It did not create new law.

were prepared to exonerate an entire department plus its ministers upon an unproven assumption that they did not know it was illegal.[30]

The judgment is open to the objection that it failed to understand or follow what the House of Lords had held in *Three Rivers v Bank of England*, and failed to understand the ground of appeal directed to what was called 'Institutional Misfeasance'. The appeal made a direct challenge to the judge's excusal of the FCO on the grounds that every single participant in the unlawful removal would have to be pinned down and his knowledge identified:

> The judge wrongly held [276-287] that the Claimants had to identify an individual or individuals for whom a Defendant was responsible of whom it could be said that all the necessary ingredients of the tort of misfeasance could be shown to have been fulfilled by that individual, and wrongly in the circumstances of this case characterized the tort as one of personal bad faith [281], when the Claimants' case was one of institutional misfeasance over a long period of time.[31]

By holding, almost in passing that Misfeasance was an 'individual' tort, Sedley LJ stated a conclusion that was at variance with authority, and in so holding, failed to deal with misfeasance by a Department of State (which had already been upheld in the *Burgoin* case). In *Three Rivers v Bank of England*[32] Lord Hutton had held that in charging the Bank of England with Misfeasance in Public Office, the Claimant need not particularise all of the acts nor the state of knowledge of all participants in the alleged misfeasance.[33] Lord Hutton put it thus:

> Mr Stadlen QC, for the Bank, submitted that the pleadings were defective because they did not allege that identified or identifiable bank officials took conscious decisions to do acts or to refrain from doing acts with the requisite guilty state of mind. I do not accept that submission. It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry (see *Dunlop v Woollahra Municipal Council* [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716). **Therefore I consider that the plaintiffs are entitled in their pleadings to allege in the manner they have done misfeasance in public office against the Bank without having to give particulars of the individual officials whose decisions and actions they claim combined to bring about the misfeasance alleged.**[34]

By ignoring the vital passage highlighted, Sedley LJ failed to understand the concept of institutional misfeasance. His effort was clearly an exercise in judicial policy, which went off the rails by making misfeasance a purely individual tort which only a rogue official could commit, rather than an entire department for which the Crown was vicariously liable for all of its officials from top to bottom. His method of getting to this unfortunate conclusion was threefold:

---

[30] No witness from the FCO gave evidence, since they had secured pre-trial directions to obviate this.

[31] Appellants' Argument on Appeal.

[32] [2001] UKHL 16.

[33] [126].

[34] [126] (emphasis added).

First, he mischaracterised the attack based on 'Institutional Misfeasance; as one claiming to 'Implicate the State as a primary tortfeasor', which was not what was alleged by Mr Bancoult's appeal. This was based throughout on the vicarious liability of the Crown under s.2 Crown Proceedings Act 1947.

Second, it was wrong to hold that Misfeasance was a purely individual tort—*Burgoin* had pointed in the opposite direction, while Lord Hutton had decided that a claimant need not particularise every individual involved in the unlawful policy.

Third, there appears to be an unspecified assumption that misfeasance by a Corporation is a different case from misfeasance by a Government department. Whilst of course a corporation can be a 'primary tortfeasor' unlike the Crown, both a corporation and the Crown have vicarious liability for the acts of its relevant agents and officers. So since the appeal was based on the vicarious liability of the Crown, it was not relevant to distinguish *Dunlop v Woolahra* and *Burgoin v MAFF* on the ground that *Dunlop* concerned a local corporation, while MAFF was a body Corporate (established under Board of Agriculture Act 1889). Since the essence of Misfeasance is the abuse of power by a public official, the fact that a corporation such as the Bank of England can commit Misfeasance in a public office, is an extension of the concept deriving from the public functions performed by some corporations. It is certainly not a different type of tort requiring different pleadings.

4.5.2 Magna Carta: The Fountain of All Liberty?

The great legal commentator Maitland described Magna Carta as a 'sacred text … the nearest approach to an unappealable fundamental statute that England has ever had'.[35] Moreover chapter 29 contains a negative injunction—'thou shalt not exile'—and there could not be a clearer breach than to remove an entire population from its entire homeland and dump it 1000 miles away. Of course a breach of statutory duty requires further ingredients—the intention to benefit a particular class, and the absence of any other remedial provision. For reasons which I cannot explain, none of these issues was explored by the trial judge or the Court of Appeal, in a case which clearly required 'anxious scrutiny'. The Court of Appeal was willing to make all sorts of speculation on unpleaded matters (such as the speculation about a alternative cause of action based upon trespass to the person—for which evidence never existed), but to examine a breach of Magna Carta as a breach of statutory duty does

[35] See e.g. Lord Sumption 'Magna Carta then and now Address to the Friends of the British Library', 9 March Lord Sumption (2015) available at https://www.supremecourt.uk/docs/speech-150309.pdf.

Maitland's assessment was relied on also by Laws LJ in *Bancoult (No. 1)* at [35]. It is ironic that the word 'sacred' is the word that describes the 'trust' obligation in Chapter 11 UN Charter to protect the right of self-determination of non-self-governing peoples. This sacred trust was easily evaded by the simple pretext of misleading the UN Decolonisation Committee about the permanence of the population.

not seem to have occurred to the judicial mind—despite finding that Magna Carta had been breached.

4.5.3 Deceit: Does It Matter?

Well there was one consolation prize in the Court of Appeal's judgment, paradoxically in the case of the tort of deceit. Whereas the trial judge had held that deceit must be practised on the plaintiff and not on a third party, the Court of Appeal considered it arguable that deceit of a third party, in the person of the United Nations, (the only body that could have rescued Chagossians at the time) was, at least arguably, a recognisable tort.

This limited decision did not avail Chagossians because all arguments deployed to overcome the statute of limitations—poverty, remoteness, lack of education and access to advice, the concealment practised by the UK, etc., etc.—were all swept away in a rigid application of the 6 year time bar from the date of the 1982 settlement. And finally it was considered unarguable to seek a declaration of the right to return to all islands of the archipelago.

And so the Chagossians' quest for some form of remedy was finally disposed of. The European Court of Human Rights[36] subsequently held the case inadmissible, largely on the basis that there was no jurisdiction to consider human rights in a territory to which the convention had not been extended.

4.5.4 You Can't Take That Away from Me, Can You?

So Chagossians were denied compensation by the Courts for their exile. But even then, one precious thing remained to the Chagos islanders—their inherent right of abode recognised in Bancoult (1) and given effect by Robin Cook's Immigration Ordinance 2000 which restored their right of return. But even that was to be snatched away from them in 2004.

In July 2002 the Feasibility Study which Robin Cook had promised to be the means of returning the population, managed to conclude that resettlement was not feasible. It was claimed that a resettled population would be vulnerable to both current and future predicted climatic conditions, that these already involved 'regular overtopping events, flooding, and erosion of the outer beaches', and that 'as global warming develops, these events are likely to increase in severity and regularity'. Stated with alarming certainty: 'The extent and severity of storm impacts, including storm surge floods and shore erosion are predicted to increase'. The cost of sea

[36] *Chagos Islanders v the United Kingdom* [2012] European Court of Human Rights Application no 35622/04.

defences to protect against these dire predictions was deemed prohibitive and futile. Curiously none of this seemed to make the US military base unviable.

Although seemingly unchallengeable, the conclusions of the Feasibility Study gathered dust in the FCO until 2 years later in 2004, the US and UK declared war on Iraq, and the US base on Diego Garcia became a crucial staging post. Alerted to a public statement that the Chagossians intended to exercise their declared rights and actually return to the islands, the FCO then sprang into action. Enacting a Prerogative Order-in-Council[37] without prior notice or consultation, the Foreign Secretary Jack Straw passed a new constitution for BIOT, one which expressly excluded and indeed abolished the Chagossians' precious right of abode. This solemn farce was later admitted by Mr Straw to be one which exchanged legitimacy for speed. One wonders what kind of panic must have been caused by a Chagossian indicating that he would like to go home in exercise of his hard-won rights. Amongst the dark secrets that perhaps 1 day disclosed records will cast light upon, we may count the abolition of the Chagossians' right of abode as amongst the darkest.

4.6 Bancoult (No.2) 2004–2008

To defend their precious Right of Abode, Chagossians were plunged into another 4 years of litigation, culminating in the House of Lords in 2008. During this epic battle seven judges in three courts ruled that the 2004 Order-in-Council was unlawful on a multiplicity of grounds—ultra vires, irrationality, abuse of process, legitimate expectation, all of which were held to have limited the Crown's prerogative to abrogate fundamental rights. The FCO's appeal to the House of Lords in 2008 was expressly justified by the Secretary of State on the basis that it was necessary to clarify whether the Prerogative in the Overseas Territories was subject to these limitations. On that ground they lost, and the Crown's Prerogative can now be judicially reviewed wherever it is deployed in the Overseas Territories. However on the ground of the rationality of its exercise, a narrow majority held that given the contents of the Feasibility Study (which had not been considered by any of the previous judges in the courts below) it was not unreasonable to terminate the right of abode.[38]

4.7 Were the Law Lords Misled?

So the conclusion solemnly set out by 'independent' consultants in the 2002 Feasibility Study that resettlement was not feasible had won the day for the

[37] The governance of the BIOT as a British Colony (now called 'Overseas Territory') ceded by another State (France in 1814) is by the Royal Prerogative. Parliament plays no part. The Foreign Secretary exercises the Prerogative which is then 'rubber stamped' by the Sovereign.

[38] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61.

government. We had our doubts, but as always with contested litigation you have to have the basic facts at your fingertips before you can contemplate a legal challenge. Throughout the entire judicial review from 2004 to 2008 we had asked for the underlying papers relating to the Feasibility Study. Not only were we refused but a claim was made that the papers no longer existed. But 4 years later, as our complaints got louder, suddenly in 2012 the file was found and the papers disclosed. Where were they found? In the archive of the Treasury Solicitor, the very person who had formally denied the existence of the file, on behalf of the FCO.[39]

There followed not a word of explanation or apology, but the contents of the file were damning enough. They revealed the pressure placed on consultants throughout the study, particularly when the draft report was reviewed internally by the FCO. They and additional documents obtained from the consultants under a court order also revealed the inexperience of the consultants tasked with examining the crucial aspects of oceanic and coastal processes and climate change. The work had been rushed, mistakes made, and the critical underlying science was flawed. It also became clear that the FCO peer review process was also hurried and inadequate, relying on just one reviewer for the critical sections, who himself acknowledged that he was not suitably qualified.

Moreover, the critical conclusion that storminess would increase and lead to overtopping and flooding was shown to be entirely unsupported by any evidence and ultimately wholly fictitious. On this point the original draft report had been cautious and equivocal but following the FCO review any doubt expressed by consultants vanished to be replaced by statements of certainty. This was bad science at its worst. Finally we instructed a real world-class expert on coral islands who filed a report to say that coral islands react to wave action, storms, and rising sea levels by remodelling themselves from the sediment supplied by the surrounding coral reefs.[40] Thus they remain dynamic features which do not simply sink under the waves, indeed they are reliant on storms for their very existence.

Based on these revelations we applied to the Supreme Court, which had by now replaced the House of Lords, to set aside the earlier 2008 decision.

4.8 The Supreme Court 2015

The Supreme Court[41] (Lord Neuberger, President; Lady Hale, Deputy President; Lord Mance; Lord Kerr; Lord Clarke) heard the application in June 2015. We invited the court to consider four areas in particular:

[39] Contrast this to the FCO's willingness to fulfil its Duty of Candour in *Bancoult (No. 1)* which at the time drew praise from the court.

[40] A report prepared by Professor Paul Kench of Auckland University, New Zealand.

[41] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2016] UKSC 35.

> the degree of editorial control by the FCO over the Feasibility Study report which cast doubt on the claimed "independence" of the study;
>
> the hitherto undisclosed criticism of parts of the study by the FCO appointed peer reviewer, Dr Sheppard, revealing his concerns for the quality of some of the science;
>
> the apparent lack of objectivity by Dr Sheppard, particularly given his active engagement and known views on ecosystem conservation of the Chagos Islands;
>
> the alterations made to the text of the report which had replaced the cautious views of consultants concerning future climate change by statements of certainty. Thus a statement that 'a small northward shift of [the active cyclone belt] could lead to frequent cyclones' which if it occurred 'would lead to more frequent flooding of the islands' was replaced by 'most islands will experience increased levels of flooding, accelerated erosion, and seawater intrusion into freshwater sources'. Storminess thus became the key factor underlying the overall conclusion by consultants that resettlement was unfeasible.

Mr Bancoult's submissions were that:

> had the documents been disclosed before or during the litigation, as was required by the government's duty of candour,[42] they would have caused the claimant's representatives to challenge the reliability of the Feasibility Study in that litigation;
>
> that it was highly likely that a challenge based on the above four principal areas would have led to a different decision by the House of Lords on the issue of the rationality of the decision to abandon planned resettlement of the northern Chagos Islands;
>
> that it was highly likely that if the application to set aside judgment were granted, a new hearing would reach a different conclusion.

The judges were unanimous in their condemnation of the failure of the FCO to produce the relevant documents in the earlier proceedings. In the absence of any explanation by the FCO as to how this happened it was not possible for Mr Bancoult to allege that the non-disclosure had involved anything more than an oversight. Accordingly, judicial opprobrium was muted, with Lord Mance describing the failure as 'culpable' but 'not intentional and did not involve any bad faith'.[43]

As to the effect of the documents upon the decision of the House of Lords, the court divided, just like the House of Lords itself, three to two against the Chagossians. Unusually, the dissenting judgment by Lord Kerr (with whom Lady Hale agreed) did not just raise areas of disagreement with the majority judgment, but went further to restate the background and facts of the case and was thus of equal length to the majority judgment of Lord Mance. The judgment was not released for over a year, on 29 June 2016.

---

[42] To reflect accepted practice, in January 2010 the Government Lawyer, the Treasury Solicitor, published 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings'. The guidance is explicitly for 'departments and litigation case handlers intended to help you to discharge your duty as a public servant to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide'.

[43] *Bancoult (No. 2)* (n 41) [3].

4.8.1 The Views of the Minority (Lord Kerr and Lady Hale)

Lord Kerr and Lady Hale were satisfied that the undisclosed papers might well have made a difference to the decision of the House of Lords. Having reviewed the impact of the Feasibility Study report on the right of abode in the earlier judgments in the House of Lords, they concluded that: 'Against that background, any reservations about the veracity of the claims made in the report assume an unmistakable significance. Unless the report was compelling and irrefutable in its conclusions, its capacity to act as the sole justification for the denial of such an important right was, at least, suspect.'[44]

They then examined the effect of the new documents before the Supreme Court, first acknowledging that changes to an earlier Preliminary Feasibility Study report (2000) made at the instigation of the FCO might now 'be regarded as heralding a reluctance on the part of the government to countenance any return of the Chagossians to Peros Banhos and the Salomon Islands'.[45] They concluded that at a meeting between consultants and FCO officials shortly before the final revision of the 2002 report: 'consultants were being given an unmistakable steer as to what FCO wanted the outcome of the report to be and, … this at least raises questions about the independence and impartiality of the judgment that the consultants ultimately made. Those questions in turn play into the validity of the scientific analysis made by the consultants'.[46] Addressing Dr Sheppard's undisclosed criticisms of the report: 'in light of Dr Sheppard's general criticisms of the consultants' report and his endorsement of some of Mr Jenness' disparagement of it, it is at least questionable that such heavy reliance would have been placed by the majority [of the House of Lords] on its [the report] conclusions'.[47]

Finally on the question of the changes that had been made between the consultants' draft report and the final published version, Lord Kerr and Lady Hale having opined that the revision was to 'a supremely important passage',[48] concluded that:

> The significance of translating the prediction of possible consequences of climate changes into a positive statement that these will occur lies, of course, in the impetus that it gives to the notion that there really was no practical means of resettling the islands…. the essential message of the final report that these consequences would occur cannot but have influenced the decision of the majority of the House of Lords that the perceived need to enact the 2004 Order was not irrational. It is one thing to say that it is rational to forbid Chagossians to return to their homeland if the dire consequences that were spoken of were going to occur. It is quite another to say that it was reasonable if it was merely possible that they might happen.[49]

[44] ibid, [132].

[45] ibid, [137].

[46] ibid, [140].

[47] ibid, [145].

[48] Ibid, [146].

[49] ibid, [149].

Recognising that the issue in the House of Lords had not been about whether or not it was reasonable for the government to meet resettlement costs[50] but that, properly, it concerned the right of abode, they observed that:

> People were told that they could not go back to live where they and their ancestors had lived. Moreover, that denial took place against a background that they had been evacuated from the islands in circumstances which were plainly unjustified. When the decision came to be made in 2004 whether they should be allowed to return to live in the outlying islands, the fact that their removal from them had been organised with "callous disregard of their interests" was a plainly relevant circumstance. It could not have been properly left out of account by a conscientious decision-maker. There is no evidence that regard was had to that factor. Irrespective of whether it was or not, however, the circumstances in which the Chagossians were originally removed from their homeland rendered any subsequent decision to refuse to allow them to return all the more difficult to justify.[51]

They concluded that the newly discovered facts made a powerful argument that the Feasibility Study was no basis on which to justify such a serious step as the abrogation of a fundamental right:

> [T]he collective effect of these revelations is that the appeal might well have been decided differently…If the members of the House of Lords knew that much of the science of the report was considered to be suspect by the scientist retained by the FCO; that the consultants had been given a clear indication of what the government hoped the report would deliver; that the changes to the conclusions of the preliminary study (which were known) proved to be a mild herald of the more radical changes to the Phase 2B report; that the Chagos Islands were not in an active cyclone belt and that this had a direct bearing on the predictions contained in the report, is it likely that the speeches of the majority concerning the anticipated consequences of an attempt to resettle would have been expressed in such emphatic terms? In my judgment it is not. And if the majority felt compelled, as it surely would, to recognise the lack of certainty in some of the central predictions, is it likely that they would have been prepared to hold as rational a decision to completely deny the Chagossians the right to return to their homeland, simply because a failure to do so would give rise to a campaign that the government should fund resettlement, when it had already been held that they were under no obligation to do so? In my opinion, it is at least distinctly possible that a different view would have been taken by the majority and that the outcome of the appeal would have been different. I would therefore grant the application to re-open the appeal.[52]

In a brief addition to the minority judgment, Lady Hale emphasised the critical importance of fairness in this case: 'the decision to exile a people has to be taken in accordance with the law; and the people to whom it is of such momentous importance are entitled to expect the highest standards of decision-making and the most scrupulous standards of fairness from the institutions of imperial government.'[53] And that: 'It was deeply unfair to the applicant, and to the court, that these

[50] ibid, [165].

[51] ibid, [166].

[52] ibid, [168].

[53] Ibid, [189].

documents were not disclosed. This was all the more unfair, given the sorry treatment of the Chagossians in the past and the importance of what was at stake for them.'[54]

As to the effect of the undisclosed documents she was unequivocal:

> [T]his court should not take much convincing that their disclosure might have made a difference to the decision in the case. What light they do cast upon the rationality of the decision under challenge will be a matter for the court which does reconsider the case. To my mind, it is quite obvious that they might have made a difference and we certainly cannot be satisfied that they would not.[55]

And equally forthright in her condemnation of the Feasibility Study report:

> They [the undisclosed documents] showed that the science of the report had been severely criticised both by the government's own expert and by an expert on behalf of the islanders; it matters not in what direction those criticisms had tended; what they did was cast doubt upon the authority of the report. They showed that the government had made it plain to the consultants what it wanted the conclusions to be. They showed that important changes had been made to the conclusion. They showed that the central findings about climate change had been changed. They showed that the islands were not in a cyclone belt. The question whether this might have made a difference has to be made objectively rather than by reference to the particular judges who were then sitting on the case…justice to my mind demands that the applicant be given a fair chance to satisfy this court, that the decision to re-impose the denial of the islanders' right of abode was not a rational one.[56]

4.8.2 The Majority Judgment (Lord Mance, Lord Neuberger, Lord Clarke)

For the majority, there was one detailed judgement, that of Lord Mance. Lord Neuberger is simply recorded as agreeing with Lord Mance. Lord Clarke confessed considerable sympathy with Mr Bancoult's case, both as a former member of the Court of Appeal which had decided in his favour and also because he agreed with the minority in the House of Lords, nonetheless he 'reluctantly' preferred Lord Mance's judgment on the issues in the present case.

Of particular significance to Lord Clarke's decision, however, was that there had been a new resettlement feasibility study (2014–2015) conducted by the government which had concluded that resettlement was possible.[57] Citing this as one of the

[54] ibid, [192].

[55] ibid, [193].

[56] ibid, [193].

[57] In 2012 the coalition government decided to redo the whole resettlement feasibility process. The new consultants, KPMG, filed their report in January 2015, in which all the bad science and preconceived conclusions were excluded, and no obstacle to resettlement identified. Despite this new advice (and after the Supreme Court hearing in 2015 and judgment in 2016) the government have concluded their 'Policy Review' of the future of the Chagos with the announcement on 16 November 2016 that resettlement would not be permitted. Coincidentally in December 2016 the US/UK Exchange of Notes for the use of the Chagos islands by the US for defence purposes was automatically renewed without any revision for a further 20 years until 2036.

factors that had led him to dismiss the present appeal Lord Clarke took the view that:

> [it] is not the end of the road. I agree with Lord Mance's conclusion in para 72 that there is a critical factor which is in any event conclusive. The background to much of the debate between the parties had been the feasibility of the Chagossians returning to the Chagos Islands. The 2014-2015 feasibility study considers, among other things, the possibility of resettlement on Diego Garcia. Given that new factor, the study concludes that there would be scope for supported resettlement. As Lord Mance puts it, the background has now shifted and logically the constitutional ban needs to be revisited. The outcome of the new (and ongoing) feasibility study will no doubt consider the prospects of resettlement…[58]

But Lord Kerr and Lady Hale had adamantly disagreed that the new Feasibility Study was relevant:

> The respondent has argued that events occurring since the decision of the House of Lords and a further review of the feasibility of resettlement render this application unnecessary.[59]

> …These developments do not render the re-opening of the appeal of merely academic interest. If the original judgment of the House of Lords is not set aside, the starting point for all future consideration of the resettlement issue will be that section 9 of the Constitution Order is valid, and that the removal of the Chagos Islanders' right of abode was lawful. If it proves that there would have been a different outcome in the appeal before the House of Lords if the material from the Rashid documents had been before their Lordships, it would obviously not be right that the position concerning the Chagossians' right to return to their homeland, recognised first by the Divisional Court, should not be retrospectively vindicated, with whatever legal consequences that this might entail.[60]

> They [Lord Mance and Lord Clarke] both suggest that 'the background has now shifted' and that 'the constitutional ban needs to be revisited'. With respect, whatever the outcome of the 2014/5 feasibility study, it cannot be right to suggest that this is relevant to a decision whether the appeal should be re-opened, much less that it is conclusive of that issue.[61]

And they went on to elaborate on why Lord Mance and Lord Clarke's suggestion was a fallacy.

Thus, the second detailed judgment of Lord Mance in this case is the reason why Chagossians have once again been denied a remedy by a public law tribunal. Interestingly, it was Lord Mance who gave a detailed fact-based judgment in the House of Lords in 2008 *in favour* of the Chagossians agreeing with Lord Bingham, together they were in the minority. In the Supreme Court he again repeated his earlier view that the Chagossians should *not* have lost their right of abode, supported now by Lord Clarke, and by implication by Lord Neuberger. Accordingly, all five of the judges in the Supreme Court in 2015/16 were united in their view that Chagossians should either have retained their right of abode in 2008 or that the House of Lords decision permitting its abolition should itself be reopened. But of

[58] *Bancoult (No. 2)* (n 41) [78].

[59] ibid, [176].

[60] ibid, [177].

[61] ibid, [178].

course these views of principle carry no weight against the asperity of the appellate system. To lose 3–2 twice is final, even though most of the judges in the higher and lower courts considered the elimination of the right of abode to be wrong.

In answer to the three submissions by Mr Bancoult above. Lord Mance firstly expressed doubt that that disclosure would have led claimant's representatives to challenge the feasibility study. His reasoning was that FCO lawyers had written to Mr Bancoult claiming that it was not necessary for the Secretary of State to produce the documents that had been requested but denied, because the claimant's advocate had said he was not at that early stage challenging the study.[62] This was curious logic indeed. Counsel's statement had been made in 2006 before disclosure, but it could only have been the disclosure of the requested file (6 years later) which made such a challenge viable. Moreover was it right for him to ventriloquise for the appellant?

Lord Mance was then curt in his rejection of the remaining submissions (the probability of a challenge to the conclusions of the study leading to a different decision by the House of Lords, and the likelihood that if the present application was set aside a new hearing would reach a different conclusion):

> There is no probability, likelihood or prospect (and, for completeness, in my view also no real possibility) that a court would have seen or would see, in the process of preparation, redrafting and finalisation of the Stage 2B Report and in the associated material which can now be seen to have existed, anything which could, would or should have caused the Secretary of State to doubt the general conclusions or which made it irrational or otherwise unjustifiable to act on them in June 2004.[63]

4.8.3 Lord Mance Examines the New Contemporaneous Evidence

Reviewing the effect of the note taken by consultants of a meeting with the FCO on 6 March 2002, where officials had expressed the hope that the section on climate change would 'resolve its difficulties', ie, negate the need to progress to the next stage of the study and thus potentially resettlement, Lord Mance could see nothing of importance and merely concluded that: 'There is no suggestion that the FCO was inviting changes to bolster any sort of findings or conclusions in either the draft and the final report, and no basis for regarding Posford [the lead consultants] as susceptible to any such invitation. The express purpose of the 6 March meeting was, as stated, to 'provide a de-briefing' on Posford's recent field studies on Ile du Coin and Ile Boddam'.[64] This haste to exculpate FCO from any influence was the opposite of

[62] ibid, [62].

[63] ibid, [65].

[64] Ibid, [33].

how the minority viewed this intervention; '…consultants had been given a clear indication of what the government hoped the report would deliver.[65]

Dealing with the alterations between the draft and final report which had become evident from the disclosed documents, Lord Mance was emphatic from the outset that:

> A fundamental point which risks being overlooked in discussion about differences elsewhere in the executive summary or body of the text is that the "General Conclusions" can now be seen to have been in identical terms in both their draft and their final versions. …. They represent the critical conclusions, on which the majority in the House of Lords relied as justifying the Secretary of State's decision to make the 2004 Constitution Order, and they were unaltered between the original draft and final versions.[66]

There appears to be an assumption here that the House of Lords (and the Secretary of State) had only read, or at least 'relied on' a mere four lines of the report's Executive Summary without giving the remainder any further scrutiny or thought. Nevertheless, he also went on to emphasise that the preceding 3 paragraphs under the heading 'Vulnerability' were also unchanged, concluding that: 'The identity of these core sections of the Executive Summary in the draft and final reports raises obvious problems for the present application'.[67]

Crucially he implicitly ignored the fact that even if the House of Lords had only relied upon these short excerpts from the 23 page Executive Summary, nonetheless the real nature of the non-disclosure had been to deprive Mr Bancoult and his advisers of the opportunity to challenge the scientific basis and therefore soundness and rationality of the 'General Conclusions' as made plain in an Analysis Note prepared by Mr Bancoult's advisers and presented as a key document in the case. And he also appeared to ignore the fact that just such a challenge was now being mounted. His emphasis on what he decided were the 'core sections' of the Executive Summary and the fact that these had not changed was apparent denial of what the Analysis Note had argued, namely:

> We have already established that neither the 'General conclusion' nor the 'Vulnerability conclusion' changed between the original draft and the final Report. However, the changes to Section 1.8 "Climate Change" which directly supported both of these vital conclusions were significantly altered in a way which resulted in a much more robust impression being given of the way in which climate change was said to make resettlement unfeasible. Examples of these changes, their effect, and whether they were supported by the detailed report, and the science are summarised below.[68]

Turning to the changes that had been made to the Executive Summary, Lord Mance first stated that: 'It is worth emphasising their limited extent in the overall context of the report' as if weighing the number of changes and word count rather than their effect. He then approached the relevance of the changes, watering down their impact, namely that they cast real doubt on the robustness of the 'General

[65] ibid, [168].

[66] ibid, [43].

[67] Ibid, [45].

[68] *Bancoult (No. 2)* (n 41) Case Bundle E 1209.

Conclusions', by a 'suggestion' of his own making which he then dismissed: 'Whatever the suggestion—whether it is that the alterations were the product of undue executive influence or that they in some way demonstrate that the final report was unreliable or that the Secretary of State would have reached a different decision regarding the making of the 2004 Constitution Order if he had only been shown the draft rather than the final report—the limited extent of the alterations in the overall context of the report points to my mind sharply against giving it credence or weight'.[69] It is a starkly different assessment to that made by Lord Kerr and Lady Hale who formed the view that not only did these changes occur to 'a supremely important passage' but also that they were significant.[70]

Not content with this summary dismissal, Lord Mance nonetheless wished to 'examine the amendments more closely'.[71] Taking issue with the case presented by Mr Bancoult's counsel that:

> The effect of this change is to delete from the feasibility study the important fact that the Chagos Islands are not within the cyclone belt at present, but to the North of it. There is no information anywhere in the Phase 2B study to indicate that (1) the cyclone belt has moved, either northward or in any other direction, in the past; or (2) that it is likely to move in the future; or (3) that if it were to move it would move closer to the Chagos Islands as opposed to moving further away from them.[72]

He purported to dismiss this in its entirety as incorrect because 'the passage removed from the draft executive summary remained in the body of the report'.[73] Should he have interpreted this reference by counsel to be to the entirety of the 529 page report (where mention of the cyclone belt can be found in Volume III), or more specifically to the influential Executive Summary which Lord Mance had already acknowledged was all that the Secretary of State or the House of Lords would realistically have consulted? Certainly not by reference to the Analysis Note which made it abundantly clear: 'Thus, in the draft report the prospect of more frequent flooding of the islands is predicated on a movement in the position of the cyclone belt, although the detailed sections of the report produce no evidence that this will occur (see Volume III Section 8.3.3). **In the final report, mention of the cyclone belt has disappeared from the Executive Summary** …'.[74]

Addressing the addition to the Executive Summary of the new prediction that the 'extent and severity of storm impacts … will increase', Lord Mance concluded that this was merely a natural extension of what was written earlier in both the draft and final report that the: 'most significant and immediate consequences of climate change for the Chagos Archipelago are likely to be related to changes in sea levels, rainfall regimes, soil moisture budgets, prevailing winds and … wave action'.[75]

---

[69] *Bancoult (No. 2)* (n 41) [48].

[70] Ibid, [146].

[71] Ibid, [49].

[72] ibid, [49].

[73] ibid, [49].

[74] *Bancoult (No. 2)* (n 41) Case Bundle E 1210 (emphasis added).

[75] *Bancoult (No. 2)* (n 41) [50].

There is however nothing whatsoever in that sentence to suggest that climate change may cause increases as opposed to decreases in any one of these factors, and certainly nothing concerning storminess. Lord Mance merely substitutes his own 'intuition' for fact.

Moving on to Mr Bancoult's specific criticism that there was no evidential support for the new predictions of increased storminess and the consequential flooding and inundation, Lord Mance cannot have considered what is said in the Feasibility Study report because it was not produced to the Supreme Court, but turns instead, and places much reliance on, the unsupported and unsubstantiated 'opinion' contained in Dr Sheppard's reviews, confident that this must be correct because Dr Sheppard had been 'at the time Head of Biological Sciences at Warwick University … and an acknowledged expert on climate change and marine science in general...'[76] Neither of these qualifications was, or has ever been true, as had been pointed out to the court.[77] Dr Sheppard when confronted with the models used by the consultants to make their crucial predictions on wave climate and overtopping had himself frankly admitted: 'I am unqualified to judge on the different models used'.

His dismissal of the evidence based therefore on quicksand, Lord Mance contentedly concludes that: 'The upshot is in my opinion that there is no basis for regarding as suspicious or actually or potentially significant in any way either (a) the removal in the final version of paragraph 1.8 of the reference to the possibility of a small northward shift of the cyclone belt or (b) the inclusion of (1) a reference to increased levels of flooding, accelerated erosion and seawater intrusion into freshwater sources or (2) the predicted increase in severity of storm impacts, including storm surge floods and shore erosion'.[78]

This is all quite extraordinary, no more so given the starkly contrasting views of Lord Kerr and Lady Hale at paragraphs 146 to 149 of the judgment and their conclusion that:

> The significance of translating the prediction of possible consequences of climate changes into a positive statement that these will occur lies, of course, in the impetus that it gives to the notion that there really was no practical means of resettling the islands … the essential message of the final report that these consequences would occur cannot but have influenced the decision of the majority of the House of Lords that the perceived need to enact the 2004 Order was not irrational. It is one thing to say that it is rational to forbid Chagossians to

[76] ibid [51].

[77] Lord Mance's confidence in Dr Sheppard's qualifications and therefore abilities would appear to have been misplaced notwithstanding that Mr Bancoult's challenge on this point was unrefuted: 'Dr Sheppard was (and is) a biologist, and is not an oceanographer, hydrodynamic modeller, coastal process expert, or sea-level expert. Nor was he a "climate change expert", as described in the [Secretary of State's] Grounds of Objection (at paragraph 143 of the Annex)…. It is also fair to note that the Grounds of Objection considerably exaggerate Dr Sheppard's professional standing. In particular he was never Head of Biological Sciences at Warwick University, as stated at Grounds of Objection, paragraph 143, although he was based at Warwick.' (Case Bundle E584 & 585—Claimant's Rejoinder to Defendant's Grounds of Objection dated 23 January 2015).

[78] *Bancoult (No. 2)* (n 41) [56].

> return to their homeland if the dire consequences that were spoken of were going to occur. It is quite another to say that it was reasonable if it was merely possible that they might happen.[79]

Moreover Lord Mance and the majority were quite content to take a dispositive decision concerning the new evidence rather than to leave such matters to be fully argued before a fresh hearing as concluded by Lord Kerr and Lady Hale. Whereas a fresh hearing would have permitted Mr Bancoult to challenge the errors of the type which have since emerged in Lord Mance's judgment, the present decision deprives him of this.

4.8.4 Conclusions to Be Drawn from the Supreme Court's Split Decision

Lord Mance thus reversed almost every probable implication arising from the discovered facts of this extraordinary case, exonerated the Secretary of State from improper interference, concluded that even if all the changes had been known to the Secretary of State, it would have 'made no difference' and finally criticised Mr Bancoult's representatives for not mounting a full-scale challenge to the feasibility study prior to disclosure of the incriminating file.

A further interesting divergence of approach between the majority and the minority is this. Whereas the appellant's case, and the reasoning of the minority were both focused on whether *the court* would have placed less reliance on the Feasibility Study had they known the full facts, the majority looked at it differently. Lord Mance held that it was rational for *the Secretary of State* to rely on the Feasibility Study conclusions.[80] This is a different test. Indeed, he saw this as a binary choice for the judges. If the conclusions of the study could be relied upon, the fundamental nature of the right which the decision would destroy did not matter. It was not a question of balancing the strength of the conclusions against the fundamental character of the right denied. This gives the benefit of the doubt, however strong those doubts may be, to the FCO. Surely a more difficult test for the Chagossians to satisfy?

A further question which arises is whether, given the stark judicial disagreements that have occurred in Bancoult, no more so than in this instance, did the majority decision simply reflect a reluctance to refer the matter back to the lower courts once again, with all the time and expense involved, and the possibility of yet further appeals? If in the alternative a decision of the Supreme Court in favour of Mr Bancoult had been dispositive would the outcome perhaps have been different? Ultimately it may be that this and the earlier decision by the House of Lords simply reflects the conservatism of the judiciary faced with a challenge of this magnitude to the State's power and discretion.

---

[79] ibid, [149] (emphasis in the original).

[80] ibid, [64].

4.9 Resettlement Revisited

In December 2012 the Secretary of State for Foreign and Commonwealth Affairs announced his decision to commence a policy review and new resettlement feasibility study. It is perhaps no coincidence that the criticisms of the Feasibility Study report by Mr Bancoult's advisers which became the basis for the present challenge had been submitted to the FCO a few weeks prior to the announcement. Thus by the time the Supreme Court came to consider the matter in June 2015, but before a final decision had been taken by the government, the fresh report (by KPMG dated 31 January 2015) had abandoned altogether any objection to resettlement based on climate change and had effectively given it the 'thumbs up'.

It would seem that the 'intervention' of the new Feasibility Study and conclusions by new consultants offered an 'escape' to the unpalatable decision faced by the majority judges in the Supreme Court. They appeared to place emphasis on the new findings, in so far as it 'assessed the risks differently', and thus, 'logically the constitutional ban [on the right of abode] should be revisited'. The majority thus expressly stating that if the government now reached a decision negative to resettlement, it would be open to any Chagossian to return to court to argue that such decision was irrational or otherwise invalid public law.

Unfortunately, the court's invitation has been ignored by the government. On 16th November 2016 the Prime Minister decided that there should be no resettlement. There was no consideration given to restoring the right of abode either. Accordingly judicial review challenges both by Mr Bancoult and by a separate group of Seychelles Chagossians were lodged in the High Court in February 2017, and have every prospect of progressing to the Supreme Court in due course.

4.10 Should the New Resettlement Feasibility Study Have Even Been Considered by the Supreme Court?

A further curious twist to this extraordinary case concerns whether the new evidence of the conclusions of the 2014/15 KPMG Feasibility Study submitted by the Secretary of State should have been admitted by the Supreme Court at all. If it was wrong to do so then 'the critical factor which is in any event conclusive'[81] namely that the new report had concluded that resettlement was feasible, should not have been a factor in the decision by the majority.

Lord Kerr and Lady Hale were quite clear that new evidence of an expert report by Professor Kench drawn up in 2012 and presented by Mr Bancoult was inadmissible and would remain so at any new hearing. Lord Kerr defined the principles behind this:

> It is not open to an applicant for a re-opening of an appeal to adduce evidence solely for the purpose of retrospectively impeaching the decision of the court whose judgment he seeks to

[81] ibid, [78].

> have reviewed. This would, in effect, allow an appeal against the decision based on information acquired for the purpose of undermining the judgment. An application to re-open an appeal must be based on the contention that if the original appeal had been conducted in the way that it ought to have been, it is probable or at least distinctly possible that there would have been a different outcome.[82]
>
> … The essence of an application to re-open an appeal, in so far as it relates to evidence, is that evidence which should have been before the original court was not.[83]

Lord Mance, for the majority, reached the same conclusion for similar reasons although expressed slightly differently: 'this material does not go to any issue relevant to the question whether the Secretary of State acted rationally in the light of the material to be treated as available or within his or the executive's knowledge in June 2004'.[84]

Had Mr Bancoult submitted that the KPMG study as to the feasibility of resettlement in support of his appeal, would the court have admitted it? On the basis of the judgment concerning other new evidence the answer must be an unequivocal no. What then permitted the majority to rely on the conclusions of the new study in such a manner? It may have been a pragmatic approach but was it justified?

4.11 What Became of the Marine Protected Area?

Somewhat surprisingly, at the same time as dismissing the challenge to the House of Lords decision, the Supreme Court gave permission, in June 2016, for an appeal to be brought in relation to the Marine Protected Area, following an earlier dismissal by the Court of Appeal on 23rd May 2014. The Court of Appeal[85] had held that (1) although evidence of apparent bad faith appeared from a US cable published by *WikiLeaks*, on the part of the BIOT Commissioner, and that cable was admissible in evidence, nonetheless it made no difference to the court's acceptance of the evidence of that official that he did not say what was attributed to him, and accordingly he did not have an ulterior motive in promoting the MPA. A further ground of rejection was (2) that there were no traditional fishing rights exercisable by Mauritius or by Chagossians despite the UK having undertaken to preserve such rights in its pre-independence discussions with the colony of Mauritius in 1965, and a continuous exercise of those rights thereafter. The latter issue had been thrown into sharp relief by a decision of an international law tribunal dated March 2015,[86] in which

[82] ibid, [170].

[83] ibid, [171].

[84] ibid, [70].

[85] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2014] 1 WLR 2921.

[86] In the Matter of the Chagos Marine Protected Area Arbitration, between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland 18 March 2015.

five senior international law judges held that Mauritius did hold such legally enforceable rights, and the UK had wrongly ignored them in its prior consultation. Additionally, two of the five judges went further and said that sovereignty of the Chagos Islands was retained by Mauritius, and the UK's action in detaching them prior to independence was unlawful.

Further research at the National Archives revealed previously undisclosed documents[87] which showed (a) that the BIOT commissioner had misunderstood or misrepresented the claim by Mauritius to assert enforceable fishing rights and (b) the validity of these rights had been universally accepted by the FCO until recent times. Clearly these cast light on the credibility of the commissioner and, tend to undermine his claim that he did not say what was attributed to him in the *WikiLeaks* cables.

That appeal was heard by the Supreme Court in June 2017 and judgment is currently awaited. In the meantime a wholly new judicial review is at the starting post in which the islanders' right of resettlement and its denial by the present government is being fully examined.

4.12 Concluding Remarks

In this unfortunately politically charged case, two distinct strands of judicial thinking have emerged over the issue of the rights of subjects who are in the way of military planning. Several judges have been prepared to uphold the right of abode in one's homeland, even go so far as to extend the common law so as to strike down a specific *ad hominem* piece of delegated legislation. But to grant an enforceable remedy is a step too far even for the liberally-minded judges who view fundamental rights as having a special character. Other judges have had no truck with displaced islanders and have been content to wring judicial hands at inhumane treatment while savaging the case on which legal challenges are brought. Thus in the Group litigation the trial judge dismissed all six causes of action as unarguable, while upholding the FCO's two defences, and treating as liars all the Islanders who darkened the door of his court.[88] Similarly Lord Hoffmann in the House of Lords in 2008 was prepared reverse unanimous decisions of the High Cort and court of Appeal and to hold the right of return as hopeless and even to mischaracterise the legal chal-

[87] Mr Bancoult's counsel again argued before the Supreme Court in *Bancoult (No. 3)* that this represented a further failure by the FCO to discharge its Duty of Candour.

[88] Per Ouseley J *Chagos Islanders v Attorney General* (n 15), [531] 'I regard as wholly unreliable or as positively untrue most of what the Chagossian witnesses said about the correspondence in 1979–1982 which referred to money being paid in full and final settlement.'…'Mrs Talate was… unreliable and at times untruthful' ([518])_,... 'Rita Elyse, Olivier Bancoult's mother, her later claims were not credible…''Mrs. Jaffar's evidence was not credible…'([521]). 'Mrs Kattick was an intelligent witness but not always honest or reliable' ([517])… 'Rita David was similarly unreliable' ([519]). 'Mr Laval was not credible…'. Thus the united front of Chagossian evidence as to the non-renunciation of their rights was dismissed.

lenge as '*the conduct of protest by other means*'—a savage attack on a wronged population, indeed.

For a period of years between 2000 and 2008, a delicate balance emerged in which the fundamental right of abode was upheld, but the judges left it up to Government as to whether any remedy or possibility of return was to be made available. Laws could be struck down, but a symbolic right, devoid of reparation, was all that the asperity of the law would allow.

However, even that equilibrium was shattered by the 2004 Orders-in-Council which took away the right upheld by the Court and accepted by the Government of the day in 2000. The High Court and Court of Appeal upheld the balance struck in 2000, and dismissed the Orders for a number of good reasons. Only in the highest court was the FCO able to persuade three judges to overrule the seven who took the opposite view. And so the Chagossians were left deprived of any sort of remedy, and even their inherent right of abode was eliminated.

We hear quite a lot these days from government about a generational struggle against the forces of darkness that threaten our civilisation. Tell that to the Chagossians and they will know what you mean. Sadly, Judicial Policy has played its part in this injustice. As a result of holding that ignorance of illegality was an excuse for Misfeasance, and deciding there was no tortious remedy for a breach of Magna Carta, English Public Law has failed to provide compensation to the Exiles from the Chagos Islands. Thereafter when again stripped of their right of abode by the government, a legal challenge has failed because the Chagossians were deprived of documents which the government should have disclosed. Although those documents clearly undermined the Feasibility Study and cast doubt on the FCO's reasons for abolishing Chagossians' Right of Abode, some curious judicial reasoning has been deployed to support the FCO's case, thus denying justice once more to the Chagossians.

References

AI Aust (Legal Adviser) Memorandum dated 23 October 1968 'Legal Aspects of BIOT Immigration'

Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716

Chagos Islanders v Attorney General [2003] EWHC 222

Chagos Islanders v Attorney General [2004] EWCA Civ 997

Chagos Islanders v the United Kingdom [2012] European Court of Human Rights Application no 35622/04

DPP v Bhagwan [1972] AC 60

Folio 2 in File FCO 32/490 'BIOT Social Status and Citizenship of Diego Garcia Inhabitants', National Archives, Kew, London

Gifford R (2009) The Chagos islanders do they exist. University of Southampton, Southampton. Full paper available on request See: https://www.southampton.ac.uk/law/news/2009/11/05_the_chagos_islanders_do_they_exist.page

Gifford R, Dunne RP (2014) A dispossessed people: the depopulation of the Chagos Archipelago 1965–1973. Popul Space Place 20:37–49

Ibbralebbe v R [1964] AC 900
Lord Sumption (2015) Magna Carta then and now; Address to the Friends of the British Library. In: Lord Sumption at the friends of the British Library AGM. UK Supreme Court, London. Available via supremecourt. https://www.supremecourt.uk/docs/speech-150309.pdf. Accessed 8 Jan 2018
R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs (No. 1) [2000] QB 1067
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2008] UKHL 61
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2016] UKSC 35
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2014] 1 WLR 2921
R v Sekgome [1910] 2 KB 576
Report on Remedies in Administrative Law, Law Commission No 73 Cmnd 6407, 1976
Tito v Waddell (No 2) [1977] 3 All ER
US National Archives, RG 59, Central Files 1967–69, DEF 15 IND–US. Secret; Immediate
Winfat Enterprises (Hong Kong) Co Ltd v Attorney General of Hong Kong [1985] 1 AC 733

Chapter 5
The Subject as a Civic Ghost: Law, Dominion, and Empire in the *Chagos* Litigation

T. T. Arvind

5.1 Introduction: Constitutions and Rightlessness

In legal thought, constitutions are typically seen as sources of legal rights, which protect basic personal interests and secure certain minimum safeguards to all members of a polity. But constitutions, throughout history, have also served the opposite purpose: of instituting and legitimising states of rightlessness where constitutional principles and structures work not to *confer* the members of a polity with rights but to *deprive* them of the protection of law. Constitutions in this role simultaneously empower the governing power to act with partial or total disregard for their subjects' interests and turn those subjects into mere civic ghosts,[1] powerless to politically or legally alter their state of rightlessness.

Legal history provides us with several examples of constitutional principles whose primary purpose was the institution of a state of rightlessness, ranging from the *atimia* of the classical Greek world in which individuals faced a complete civil death, in effect ceasing to exist as legal persons in the eyes of the state,[2] to the 'political theology' of Carl Schmitt,[3] and the modern phenomenon which Thomas Nagel has vividly described as 'ruthlessness in public life'.[4] A key issue for the critical study of a constitutional system is, accordingly, considering not just the basis of the rights which that constitution confers, but also the basis on which, and circumstances in which, it places individuals and groups in a state of rightlessness.

[1] The phrase is adapted from Edward Peters' work on the loss of civil status in mediaeval law—a condition he described as becoming a 'civil ghost'. See Peters (1990).

[2] For an overview, see Manville (1980), pp. 213–221.

[3] Schmitt (1985 [1922]).

[4] Nagel (1978).

T. T. Arvind (✉)
Newcastle University, Newcastle-upon-Tyne, UK
e-mail: t.t.arvind@newcastle.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_5

The Chagos cases[5] provide a particularly vivid illustration of the role which states of rightlessness play within constitutional law, and the consequences of their invocation. The governmental interest at stake in the cases was on its face a strong one. The expulsion was justified as being necessary to pursue defence interests which were said to be intimately linked to national security and the transatlantic alliance. This had a particularly strong resonance in the context of the cold war and the shifts in military capabilities brought about by the end of empire. Yet the extent of the harm wrought upon the population of the islands—forcible displacement and exile from their homeland, and reduction to penury—was also extraordinarily severe, and arguably without precedent in relation to a people as vulnerable to government action as the Chagossians were. The effect of placing the Chagossians in a state of rightlessness was to render them voiceless in the processes through which their fate was determined: the government took no account of their interests in making its decision, nor was it subject to legislative constraints on its decision-making power.[6] Equally, placing the Chagossians in a state of rightlessness enabled the United Kingdom to disclaim any responsibility for the welfare of the Chagossians after their expulsion, as well as any obligation to play a role in establishing a proper scheme of rehabilitation and resettlement for the displaced islanders,[7] despite the government's acknowledgment that the Chagossians were British subjects at the time of their expulsion, and had a continuing right to claim citizenship.[8]

The aim of this chapter is to examine how and why the UK's judiciary came to accept that the constitution placed the Chagossians in such an extreme position of rightlessness. Much of the commentary around the cases has taken the view that the cases present a contrast between two understandings of the constitution.[9] The purpose of this chapter is to examine in more detail the specific understanding of the constitution underlying the decisions in the public law and private law cases brought by the Chagossians in the UK's courts, and the doctrinal devices it deployed in order to create and justify placing the Chagossians in a state of rightlessness.

---

[5] This chapter focuses on three strands of the Chagos litigation: (a) the private law action seeking compensation (*Chagos Islanders v The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 (QB) and [2004] EWCA Civ 997), (b) the public law challenge to the validity of the British Indian Ocean Territory (Constitution) Order 2004 (including the initial decision of the House of Lords in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] AC 453 and the decision of the Supreme Court on the subsequent application to set aside the House of Lords' decision in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 35, [2016] 3 WLR 157), and (c) the human rights litigation brought before the European Court of Human Rights (*Chagos Islanders v United Kingdom* (2013) 56 EHHR SE15).

[6] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453.

[7] This last point contrasts sharply with other displaced people, notably the Banabans, whose unsuccessful attempts to recover their homeland were the subject of *Tito v Waddell (No 2)* [1977] Ch 106. Unlike the Chagossians, the Banabans were resettled on a nearby island (Rabi Island) for the express (and largely successful) purpose of mitigating the effects of their displacement.

[8] See the discussion in Sect. 5.3 of this chapter.

[9] See e.g. Stuart Lakin's contribution to this volume (Chap. 2).

As this chapter will show, three theoretical and doctrinal elements lie at the heart of the understanding of the constitution seen in the Chagos cases. The first is an account of the relationship between the citizen and the state which diminishes the importance of rights (and, for that matter, of ordinary legal conceptions of wrongs) in determining the bounds of state power over the individual. The second is a fragmentation of responsibility, where the law places the focus on judging the legality of *individual* actions taken at *individual* moments, rather than on judging the state's actions in relation to a particular group as a whole and over time. The third is a general retreat of the law away from the post-war idea of a core of inviolable fundamental rights, towards a new understanding where the state is free to act in disregard of the rights of individuals, unless specifically restrained by a rule of positive law.

Underlying these is a legal representation of the state as a complex system, pursuing irreducibly complex purposes and, hence, of being infinitely vulnerable to disruption by the actions of individuals. The common good of the polity, in such a conception, is understood as requiring and justifying the subordination of individuals and groups to those systemic interests. The conferral of rights accordingly becomes a privilege of citizenship, to be withheld at the state's discretion from particular classes of its subjects. As this chapter will show, this understanding of the constitution is not new, but has deep roots which can be traced back to Diceyan constitutionalism. Its role in the Chagos litigation, accordingly, is not an anomalous exception, but points to fundamental conceptual limitations that are deeply entrenched in the UK's system of public law.

This chapter begins by elaborating on the contrast between the two understandings of the constitution at issue in the Chagos cases, and drawing out the implications of the understanding that ultimately informed the Chagos decisions (Sect. 5.2). Section 5.3 moves on to considering the doctrinal underpinnings of this decision. It takes its starting point in the contrast between the decisions of the English judiciary in relation to the Chagossians, and the archival record of the late 1970s and early 1980s, when a new, post-expulsion generation of government lawyers and civil servants were faced with the question of what responsibility, if any, and what liability, if any, the UK owed to the Chagossians. As this chapter shows, the manner in which these lawyers and civil servants working in the 1970s assessed the legal position of the Chagossians, and the UK's possible obligations and liabilities to the expelled population of the islands, differs radically from the framing and assessments that would dominate the litigation in the 2000s. It is also of significance that these discussions occurred in the 1970s, in an era when private law had not yet been wholly exiled from the task of regulating the state,[10] and when public law had not yet come to assume its modern form.[11]

Contrasting the two is instructive in relation to understanding not just how contingent the modern way of viewing the problem is, but also in diagnosing the

[10] *O'Reilly v Mackman* [1983] 2 AC 237 (HL).

[11] The modern action of judicial review only came into being in 1977, with the passage of the Rules of the Supreme Court (Amendment No 3) 1977, SI 1977/1955 (L 30). For a more complete discussion of this point, see Arvind and Stirton (2017), p. 91.

understanding of the nature and purpose of state power, and the bounds on its exercise, that underlie the judicial acceptance of the Chagossians' state of rightlessness. Section 5.3 argues that when read in this light, the decisions can be seen to avoid the broader question of the nature and extent of the continuing obligations owed by the state to the Chagossians, by fragmenting the Chagossians' grievance into a series of disconnected actions, each focused on a single aspect of the broader grievance. The effect is to preclude courts from considering the lawfulness of the cumulative impact of the government's actions over an extended period of time. These changes form part of a more fundamental divergence of approaches in the way in which the courts approach questions of the limits of governmental power, in which judges are increasingly willing to take as their starting point the premise that the government has an *unconstrained* power to act in disregard of the interests of private persons, unless their power to act is expressly fettered by law.

The next section (Sect. 5.4) considers the nature of this understanding in fuller detail, by examining the relationship between citizen and state that is implicit in the decisions. It argues that the decisions are grounded in a view of state power that sees the interests of the state as having primacy over the interests of the citizen, and conceives of the state in a manner that makes ordinary legal conceptions of wrongs irrelevant when it comes to determining the boundaries of state power over its subjects. There are, in particular, strong parallels with Carl Schmitt's theory of the theological basis of ideologies of state power. The chapter concludes by pointing to the deep roots in the English constitutional tradition of the tendency to countenance rightlessness, and puts forward an explanation as to why this approach to the constitution had so much traction in relation to the Chagossians.

5.2 Creating Civic Ghosts: Rights, Authority, and Managerialism in the Chagos Litigation

All constitutions necessarily contain a particular understanding of the relationship between those who exercise authority and those who are subject to authority, as well as of the purposes for which, and constraints subject to which, authority is conferred and legitimately exercised.[12] Identifying precisely what that understanding is can, however, be challenging, particularly when dealing with an unwritten, or largely unwritten constitution, such as the constitutions of the UK, the BIOT, and the British Empire as a whole. Here, unlike in a wholly written constitution, the underlying understanding can neither be inferred from a definite text; nor is there any constitutive moment, situated within a definite historical context, which can be drawn upon to reconstruct the broad contours of that underlying understanding.[13] This means that the nature of that underlying constitutional understanding is inher-

[12] Holmes (2012), pp. 189–190.

[13] It should be noted that the mere fact that a constitution is written does not make it immune from this particular issue. See e.g. Gardner (2011), p. 162.

ently contestable, such that multiple visions—or, more accurately, recensions—of the constitution may coexist at any given time.

A common theme in the literature analysing the Chagos decisions is the idea that the decisions represent precisely such a phenomenon, namely, a clash between two recensions of the constitution, which are variously characterised as 'a culture of authority' and 'a culture of justification',[14] or between 'liberal imperialism' and 'utilitarian imperialism'.[15] A better way of characterising the dichotomy, however, is in terms of a distinction between *liberal* constitutionalism and what might be termed *managerial* constitutionalism. The key distinguishing feature between the two lies in the manner in which they conceptualise and resolve conflicts between the public interest defined and pursued by agencies of the state, and the private interests of those subject to the state's authority. Where liberal constitutionalism tends to focus on natural *rights*, and hence errs on the side of limiting state authority, managerial constitutionalism focuses on natural *authority*, and hence tends to take a more permissive approach in relation to determining the boundaries of state authority.

Traditional 'liberal' constitutionalism is grounded in the idea of a balance between public and private interests, and regards that balance as something to be tightly policed. A fundamental principle of liberal constitutionalism is the rejection of a role for the government in determining what constitutes a better or worse life: instead, individuals should be respected 'as free and independent beings, capable of choosing their own values and ends.'[16] The breadth of the power the state wields, and the extent of the resources it has at its disposal, necessitate a high degree of protection, in which the level of scrutiny and the strengths of the constitutional fetters on state action increase in proportion to the impact of the state's actions on the citizenry, and in which the law serves both to protect individuals against the abuse of power and to uphold the dignity and integrity of individuals and groups.[17] These restraints are justified because their effect is not simply to constrain the state, but rather to increase its capacity to focus on specific problems by directing its officials away from arbitrary power.[18]

Managerial constitutionalism, in contrast, takes its starting point in a doctrine of the state rather than in a doctrine of balance. It prioritises the state's ability to act in pursuit of its sovereign goals, and to manage potential threats to those goals.[19] It accordingly takes a sceptical attitude towards rights to the extent they interfere with the ability of governments to further the sovereign goals of the state, even if the end result is (in theory) to give state agents a very broad discretion to disregard the interests of individual citizens without violating the law. Achieving state ends requires

[14] Allen (2017), pp. 21–22.

[15] Frost and Murray (2015), p. 263.

[16] Sandel (1996), p. 4.

[17] Selznick (1999), p. 26.

[18] Holmes (1995).

[19] In this, managerial constitutionalism is very closely related to the theoretical position that has been called the 'German view of the state'. For a discussion (in the context of Carl Schmitt's thought), see Müller (2003), pp. 245–249.

giving the state not merely the power to define and pursue those goals, but also the ability to engage in strategies of *demobilisation*—a process by which political institutions work to diminish the capacity of groups within a polity to independently define and pursue collective goals which might thwart or interfere with the ends defined by the state.[20] The result is a model of the state which is both substantial and authoritarian, which grounds the legitimacy of state action not in a theory of justice (as liberal constitutionalism does) but in the legitimacy of the purposes to realise which state power is exercised, and which tends to assign primacy to the executive rather than to the legislature or the judiciary.[21]

It is this latter understanding of managerial constitutionalism that lies at the heart of the judicial endorsement of the Chagossians' rightlessness. The constitution of the UK and its dependant territories are not inherently prone to placing groups in a state of rightlessness. Constitutions, in the liberal understanding, can restrain state powers either directly through the creation of basic or constitutional rights,[22] or indirectly, by making the state's power contingent on compliance with specific procedures.[23] Constitutional rights operate in a relatively transparent way, by setting absolute limits on the ability of political institutions to subordinate or override a set of identified interests.[24] Procedures, in contrast, operate in a more subtle way. At one level, procedural requirements—such as the requirement to obtain legislative sanction for particular types of acts—restrain the arbitrary exercise of authority.[25] More fundamentally, however, procedures operate as a check on institutional cultures and provide an avenue to challenge entrenched administrative constructions of constitutionalism. Operative organisations within political systems—bureaucratic agencies, legislative committees, and even courts—tend, over time, to develop their own institutionally entrenched ideas of priorities, goals, and hierarchies of interests,[26] as well as their own 'thought styles'—ways of defining and processing problems and solutions.[27] Procedures act as a check on these tendencies by enabling affected individuals to contest determinations affecting them,[28] and by widening circles of participation, requiring inter-institutional dialogue and consultation. The common constitutional requirement that certain types of action can only be taken by a legislature, and that

[20] The classic historical example is the policy of Metternich in the Habsburg Empire immediately after the Napoleonic Wars. See Deutsch (1961), pp. 493 and 505. For a more recent example, see Remmer (1980), p. 275.

[21] Müller (2003), p. 248.

[22] It should be noted that to the extent that these operate as restrictions on the *power* of the state to legislate, they are, in a Hohfeldian sense, *immunities* rather than *rights*. See Hohfeld (1913), pp. 44–58.

[23] Sandel (1997), p. 1.

[24] MacCormick (1977).

[25] Waldron (2011).

[26] March and Olsen (1984), p. 734.

[27] Douglas (1986).

[28] MacCormick (2005), p. 14.

certain acts are subject to judicial review, are the clearest examples of this form of restraint on state power.

A central characteristic of the courts' decisions in the Chagos cases was their dismantling of both doctrinal tools which liberal constitutionalism uses to limit authority and centre the institutions of state around the idea of a constitutional balance between public and private interests. The decision of the House of Lords in *Bancoult (No 2)*[29] provides a good example. As I have argued in detail elsewhere,[30] the decision of the majority in *Bancoult (No 2)* made a number of fundamental categorical errors, whose cumulative effect was to erase the role of the Imperial Parliament by conflating the powers of Parliament with the powers of the Executive,[31] and to elide the distinction between principles regulating colonial officials and those regulating imperial power.[32] Given the above discussion in relation to the constitutional role of procedures, it should be evident that this distinction is not a trivial one. As the dissenting judges in *Bancoult (No 2)* recognised,[33] conferring a power upon Parliament, to be exercised after debate, discussion, and voting, acts as a check on insular institutional cultures that develop within the administration. Conferring the power upon a minister or government functionary, exercisable without discussion outside the executive, in contrast, does not.

The same approach was taken by the majority in relation to the argument that the Chagossians had rights that could not be abridged without legislative sanction. Ministers, according to the majority in *Bancoult*, have plenary legislative authority in relation to a conquered colony. They can make the law, and they can unmake it. They can grant rights, or they can deny them. Any right the Chagossians might have had can be abolished at the stroke of a ministerial pen:

> the right of abode is a creature of the law. The law gives it and the law may take it away. In this context I do not think that it assists the argument to call it a constitutional right. The constitution of BIOT denies the existence of such a right. I quite accept that the right of abode, the right not to be expelled from one's country or even one's home, is an important right. General or ambiguous words in legislation will not readily be construed as intended to remove such a right… But no such question arises in this case. The language of section 9 of the Constitution Order could hardly be clearer.[34]

Whilst much has been made of the recognition by the House of Lords of the Chagossians' right to judicial review, it logically follows that what applies to the right of abode also applies to the right to judicial review. The right to judicial review is as much a creature of the law as the right of abode, and there is little basis in constitutional doctrine to suggest that it has any higher, or any more fundamental,

---

[29] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, [2009] AC 453.

[30] Arvind (2012a), p. 113.

[31] Arvind (2012a), pp. 129–132.

[32] Arvind (2012a), pp. 126–129. This was particularly pronounced in the judgments of Lords Roger and Carswell. See *Bancoult (No 2)* (n 6) [102] (Lord Rodger), [126] (Lord Carswell).

[33] *Bancoult (No 2)* (n 6) [70] (Lord Bingham), [159] (Lord Mance).

[34] *Bancoult (No 2)* (n 6) [45] (Lord Hoffmann).

status as a legal right. If the right to abode can be abolished by a constitution made through the prerogative, it is hard to see why the right to judicial review cannot. If, as a matter of law, it is open to the government to make a constitution for the BIOT denying the right to abode, then it is also open to them to make a constitution denying the right to judicial review. It would, therefore, seem to follow as a necessary consequence of the rationale advanced by Lord Hoffmann in *Bancoult (No 2)* that there would have been no right to judicial review if the Constitution of the BIOT had abolished it.

The position of the Chagossians, as the House of Lords imagined it, is therefore not simply one of control by the imperial power, but one of abject dependence on the decisions of the government of the day. To be in a position where they have no rights beyond what the government of the day chooses to give them—where *all* rights can be erased by ministerial decree, with no broader debate as happens in Parliament, and where all fora for the redress of grievances can be removed likewise—is to be in a state of utter subjecthood; a subject in the literal sense of being *subiectus*, cast under, with no claims whatsoever in relation to what the law should say, and no right to a forum in which to have their views heard.

Subjecthood, in this sense, turns the subject into a 'civic ghost',[35] because it entirely deprives the subject of any semblance of civic status. The Chagossians have no protection of the law beyond that which the executive authorities choose to give them; and if they choose to give them nothing they can claim nothing. Equally, as civic ghosts they have no basis to articulate their grievances in any legal forum—whether constitutional courts, legislative assemblies, or human rights fora—unless those who exercise dominion over them choose to grant such a forum. All the subjects have is derived from the goodwill of the rulers, and subsists only so long as the rulers continue to will it.

In Sect. 5.4, this chapter will examine in more depth the question of the understanding of the nature of the state, and the relationship between it and its subjects that underlies and informs such a constitutionalism. Before that, however, it is necessary to study in some more detail the doctrinal underpinnings of this particular conception of subjecthood. As the next section demonstrates, the Chagos cases' approach to assessing the legality of the actions of the United Kingdom in relation to the Chagossians is characterised by a clear reluctance to view the actions as a whole, and a marked tendency to instead view it in a fragmentary and individuated way, with actions viewed in isolation rather than as part of a single course of conduct. The result of this approach to assessing legality is to enable the courts to avoid judging the legality of the governments' acts with reference to its *cumulative* effect, instead placing the burden on the Chagossians to demonstrate the unlawfulness of each individual action—including, in some instances, by identifying an individual wrongdoer within the administration.

[35] Peters (1990).

5.3 Avoiding Obligation: Fragmentation and the Legitimation of Subjecthood

A striking feature of the Chagos litigation is that the only non-transient success enjoyed by the Chagossians was the settlement they secured in the 1980s. Much emphasis was placed by the various courts on the fact that the Chagossians had successfully secured this settlement, and that through doing so had exhausted their rights of action against the United Kingdom, even though it was also accepted by every court hearing the matter that the amount of compensation paid was not adequate. Thus Sedley LJ, in dismissing the action brought by the Chagossians seeking compensation, accepted that:

> [W]hat they have received has done little to repair the wrecking of their families and communities, to restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record.[36]

Similar statements are seen in the decision of the House of Lords in *Bancoult (No 2)*. Lord Hoffmann acknowledged that the government had acted 'with a callous disregard' of the Chagossians' interests,[37] that the problems were caused by the Government's refusal to acknowledge that it owed responsibilities to the Chagossians,[38] and that the effect was to leave the Chagossians in miserable conditions.[39] Nevertheless, he took the view that 'however badly' previous governments had behaved in removing the Chagossians, the settlement meant that 'a line could be drawn under this unfortunate episode.'[40] Similarly, the European Court of Human Rights, too, accepted that the treatment of the Chagossians was 'callous and shameful, and that their expulsion had given rise to hardships.[41] Nevertheless, the settlement was definitive, and meant that they could no longer claim to be victims.[42]

Yet the settlement was not in itself a vindication of the Chagossians' rights. It was, rather, an act of grace on the part of the United Kingdom; and because it was an act of grace could be undertaken without thereby acknowledging any obligations to the Chagossians.[43] Departmental records in the National Archives clearly demonstrate that that is how it was seen within the Government. Internal discussions about the possibility of settlement, and the quantum of compensation to be paid, were not based on the extent of the harm done to the Chagossians, nor was there any attempt

---

[36] *Chagos Islanders v The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner* [2004] EWCA Civ 997 [54].

[37] *Bancoult (No 2)* (n 6) [10].

[38] *Bancoult (No 2)* (n 6) [10].

[39] *Bancoult (No 2)* (n 6) [11].

[40] *Bancoult (No 2)* (n 6) [14].

[41] *Chagos Islanders v United Kingdom* (2013) 56 EHHR SE15 [83].

[42] *Chagos Islanders v United Kingdom* (n 41) [78]–[81].

[43] On the distinction between rights and grace in administrative redress, and the debates around the adequacy of redress based on grace, see Arvind (2012b).

to calculate or prepare a genuine estimate of the amount they would require in order to alleviate their penury and restore stability to their lives in Mauritius: although token note was taken of the fact that any payment would have to address the needs of the Chagossians, there was little interest in determining what meeting those needs would actually require. Decisions around the quantum to be paid in a settlement were, rather, based on considerations of public image, and the possibility of 'criticism and moral censure on the part of the courts'[44] (a consideration which, apparently, had more traction in the 1970s than it does in the present day):

> In considering what amount would be appropriate, it is clear that it must be seen to be reasonable in the eyes of the outside world… If the offer were rejected we would propose to declare it publicly, thus strengthening our position with the courts.[45]

A key motivation was the negative impact a settlement would have on the islanders' legal position: it was anticipated that it would leave the Government in an 'immeasurably stronger' position to counter any future claims that the Chagossians might bring.[46]

The desire to avoid assuming further obligations, frequently for financial reasons, had a profound influence on the conduct of the UK government in relation to the Chagossians throughout the 1970s. The original plan for the removal of the Chagossians only envisaged their forcible displacement from some of the islands of BIOT: the other islands would remain populated, and the copra plantations there developed. The total evacuation of the BIOT, with the disastrous consequences for the islanders that flowed from it, was undertaken only because:

> Treasury would not agree to finance the development programme and it became necessary to evacuate all the islands. If Treasury had agreed, the Copra Industry could perhaps have been made profitable and the probable consequences of Mr Vencatassen's case would have been limited because less islanders would have needed resettlement.[47]

Similarly, the archival record also shows that the government amended the draft Mauritian Independence Constitution 'at short notice' to give the Chagossians Mauritian Citizenship, largely 'to free us from the need, which we would have had if the islanders had remained mono-UK citizens, either to let them remain on BIOT or to permit them to enter Britain.'[48]

The nature of the settlement—in particular, the fact that it was expressly contingent on the Chagossians' agreeing to extinguish their rights—must be seen in the context of the UK government's desire to disclaim all responsibility for the continued welfare of the Chagossians. There was a deep concern in the FCO about possible reactions to the manner in which the Chagossians were removed, both in relation to moral criticism and in relation to whether the government had a right to remove

[44] FCO 31/2192, Owen to Chief Secretary, 2 June 1977, para 3.

[45] FCO 31/2192, Owen to Chief Secretary, 2 June 1977, para 4.

[46] FCO 31/2192, Ewans to Rowlands, 13 May 1977.

[47] FCO 31/2191, Steggle to Jewkes, 4 February 1977.

[48] FCO 31/2192, Ewans to Rowlands, 13 May 1977, para 3(b).

them at all.[49] The argument that the Crown was entitled to remove people who had had roots in the BIOT for two or three generations 'was likely to be unattractive to the Courts.'[50]

Underlying this was concern about the legal obligation of the Crown to pay compensation. In 1975, one of the deported islanders, Michel Vencatassen, brought an action in tort, prompting a detailed analysis by the Treasury Solicitor.[51] The defence based on the prerogative—which was ultimately successful in *Bancoult (No 2)*—was expressly rejected on the basis that, by analogy with the *De Keyser*[52] and *Burmah Oil*[53] cases, compensation would almost certainly be payable.[54] Concern was also expressed that the entire argument rested on the assumption that 'the islanders were moved without force and with their agreement.' If that assumption did not hold, the government might not be left with any defence in law, save the 'unattractive proposition' that:

> [T]he owner of an island in the absence of any contraindication in the local law (which in this case he made), is entitled to turn everyone off it at his whim, using whatever means (including force) he chooses.[55]

The importance of the renunciation of rights in the settlement, thus, was central to this broader concern of obtaining evidence that would enable the government to argue that the Chagossians had consented to their removal. As with other aspects of the government's action, this too was largely motivated by the government's desire to obtain support for its position, of distancing itself from any sense that it owed any continuing obligations to the Chagossians.

When the subsequent decisions of the UK's courts in relation to the Chagossians are examined against this backdrop, it is striking how little consideration is given to the *continuing* harm being done to the Chagossians, or the broader question of whether the government owes any continuing obligations to them. The cases focus, rather, on specific actions, each seen in isolation as a perfectly individuated action, rather than as part of a broader course of conduct. The lawfulness of each action, similarly, is judged in isolation and with reference to narrow principles, rather than with reference to the broader question of how a state, as a matter of constitutional doctrine, ought to conduct itself when dealing with its most vulnerable citizens.

Lord Hoffmann's speech in *Bancoult (No 2)* instantiates how this fragmentation enables the courts to avoid considering the government's responsibility for the

---

[49] FCO 31/2912, Bickford to Garter, 20 April 1977, para 6; see also the reference to 'the much broader constitutional issue of the Crown's authority to cause the removal of its subjects from their place of abode.'

[50] FCO 3/2192, Minutes of a meeting on 10 March 1977, para 1.

[51] FCO 31/2193, Vencatassen v Attorney General: Note by the Treasury Solicitor's Department, 5 August 1977.

[52] *Attorney General v De Keyser's Royal Hotel* [1920] AC 508.

[53] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.

[54] FCO 31/2193, Vencatassen v Attorney General: Note by the Treasury Solicitor's Department, 5 August 1977, para 2.46.

[55] Ibid., para 3.5.

continuing harm done to the Chagossians. The Chagossians argued that the profoundly intrusive effects of the measures perpetuating their exile meant that those measures should be subjected to an anxious degree of scrutiny, Lord Hoffmann held this argument to be without merit:

> I think it is very important that in deciding whether a measure affects fundamental rights or has "profoundly intrusive effects", one should consider what those rights and effects actually are. If we were in 1968 and concerned with a proposal to remove the Chagossians from their islands with little or no provision for their future, that would indeed be a profoundly intrusive measure affecting their fundamental rights. But that was many years ago, the deed has been done, the wrong confessed, compensation agreed and paid. The way of life the Chagossians led has been irreparably destroyed. The practicalities of today are that they would be unable to exercise any right to live in the outer islands without financial support which the British Government is unwilling to provide and which does not appear to be forthcoming from any other source.[56]

This passage displays a peculiar combination of regarding the government's actions as perfectly individuated and fragmented, while regarding the Chagossians' actions as a unified whole. The reasoning advanced by Lord Hoffmann's depends entirely on the supposition that the government's initial decision to exile the Chagossians is *entirely* distinct and separate from the ongoing refusal to permit resettlement, such that the rights and wrongs of one have no bearing on the other. Equally, both of these are represented as being entirely distinct and separate from the question of the adequacy or inadequacy of the compensation paid to the Chagossians, and the legality of the manner in which they were induced to accept it. In consequence, the British government's refusal to provide financial support for resettlement can also legally be presented as entirely detached from, and unconnected with, the ongoing harm suffered by the Chagossians, rather than being an important source of the harm, and a clear continuation of the unified course of conduct towards the Chagossians that began in the 1960s.

Nor is this an isolated example. The approach of the English courts to the civil litigation launched by the Chagossians further illustrates the manner in which this approach operates to entrench the rightlessness of the Chagossians. Neither in the High Court, nor in the Court of Appeal, was there any discussion of whether the state has a special duty in private law, when settling a case involving the violation of fundamental constitutional rights of a vulnerable population, to ensure that its subjects have a full and proper understanding of the nature of the settlement, and of the rights they are renouncing. The contrast with the ordinary principles of private law applied to (for example) banks accepting security from a third party is striking. Here, banks are under a special duty to ensure that the third parties have had independent legal advice, not just in general terms, but with specific reference to the terms of the instruments that they are asked to sign.[57] Given the conditions under which the Chagossians signed the instruments of renunciation, not least the fact that they were in a particularly technical form of a language that most Chagossians nei-

[56] *Bancoult (No 2)* (n 6) [53].

[57] See *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 41, [2002] 2 AC 773.

ther spoke nor read, it is unlikely that a bank following such a procedure would be held to have met the relevant legal standard, and certainly not on the basis of the presumptive conclusions drawn by the High Court that the Chagossians must have been aware of what was in the documents they were asked to sign.[58] Similarly, it is at least arguable that a party in the position of the Chagossians would have had a defence of *non est factum*,[59] on the basis that they were, through no fault of their own, unable to have any understanding of the particular document they were asked to sign, and in consequence made a fundamental mistake as to its contents. Against this background, it is striking that the courts held the government to a lower standard than a private party, taking action that affected far less serious interests, would have been held.

A similar point can also be made about the manner in which the Court of Appeal dismissed the attempt by the Chagossians to argue that their action should not be time barred because they were under a disability—and, for that matter, the similar approach of the European Court of Human Rights to the question of the Chagossians' status as victims. All three courts placed considerable emphasis on the 1983 settlement. In Sedley LJ's reading, if one of the islanders (in this case, Vencatassen) had been able to obtain legal representation, then it followed that none of the islanders was under a disability.[60] Ouseley J, in the High Court, additionally placed considerable weight on the supposition that Mauritian politicians would have explained the nature of the settlement to the Chagossians.[61] The ECtHR held that the acceptance of the settlement ended the Chagossians' status as victims, even if it ultimately proved to be inadequate to redress the harm they had actually suffered.[62] Yet in each of these cases, the wrong arguably consisted not just of the initial act of exile, but of the entire course of conduct of the government of the UK in the decades thereafter—including, in particular, the great lengths to which they went to disclaim and avoid any recognition that they may owe continuing obligations to the Chagossians. Equally, the disability suffered by the Chagossians, and the source of their status as victims, arguably ought to be recognised as encompassing not just the initial act, but also their ongoing state of deprivation and penury, and their inability to take action to halt or reverse the state in which the actions of the UK government have placed them. The judicial unwillingness to deal with the Chagossians' complaint in terms of a continuing wrong thus demonstrates the troubling consequences of viewing the relationship between a state and its subjects as a series of isolated actions.

The Chagos litigation also demonstrates the difficulties created by the fragmentation of governmental duties between private law and public law. The nature of this fragmentation was most clearly expressed by Sedley LJ in the Court of Appeal in

---

[58] *Chagos Islanders v The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner* [2003] EWHC 2222 [250] (QB).

[59] *Saunders v Anglia Building Society* [1971] AC 1004; *Petelin v Cullen* (1975) 132 CLR 355 (HCA).

[60] *Chagos Islanders v Attorney General (CA)* (n 36) [48].

[61] *Chagos Islanders v Attorney General (HC)* (n 58) [250].

[62] *Chagos Islanders v UK* (n 41) [81].

the civil action brought by the Chagossians. The Crown, he held, could owe no duties at all in tort: it could only be vicariously liable for the acts of its employees. It was only in public law that it could owe duties.[63] But in the realm of public law, outside the Human Rights Act 1998 (which does not apply to the BIOT), there is very little that enables the Chagossians to assert duties owed to them by the state. It is a fundamental tenet of public law that its task is to enforce duties owed to the public, not duties owed to the individual claimant. The Chagossians, in such a system, cannot bring a claim on the basis that the 'pauperisation and expulsion of the weak in the interests of the powerful' affected them adversely.[64] Their claim could only be brought on the basis that the state failed in its duty to the realm as a whole. Given that the duties towards the realm as a whole were, in *Bancoult (No 2)* expressly held to permit the government to disregard the rights of the Chagossians, it should be self-evident that these cumulatively establish the Chagossians in a state of rightlessness and voicelessness.

A similar argument can be made in relation to the approach of the European Court of Human Rights to the question of jurisdiction in the action brought by the Chagossians against the UK, and in particular with the manner in which the Court rejected the Chagossians' argument that it had jurisdiction under the rule in *Al-Skeini v United Kingdom*.[65] The UK Government had objected to the Court's jurisdiction, relying on Article 56 of the European Convention on Human Rights which provides that the Convention does not automatically apply to colonies unless expressly extended. The UK had not expressly extended the Convention to the BIOT. The Chagossians, however, argued that the Convention did apply under the *Al-Skeini* principle.

Al-Skeini arose out of the UK's military invasion of Iraq in 2003. The case was brought on behalf of applicants who, between 2003 and 2007, had either been killed by the UK's military forces, or had been forcibly detained. The UK argued that the European Court of Human Rights did not have jurisdiction to hear the case, as the actions took place in Iraq where the Convention did not apply. The Court held that the Convention applied to the UK's occupation of Iraq. Although its application was ordinarily only territorial, it also, exceptionally, applied where a contracting state's agents exercised 'authority and control'[66] over individuals outside its territory, and where a state exerted 'effective control' over an area.[67]

The Chagossians argued that the second of these exceptions applied, because the UK exercised total domination over the Chagos Islands. The European Court of Human Rights, however, rejected this argument. They placed heavy reliance on *Quark Fishing v United Kingdom*,[68] a case decided before *Al-Skeini*, in which the

[63] *Chagos Islanders v Attorney General (CA)* (n 36) [20].

[64] *Chagos Islanders v Attorney General (CA)* (n 36) [6].

[65] *Al-Skeini and others v United Kingdom* (2011) 53 EHRR 18.

[66] *Al-Skeini* (n 65) [134]–[137].

[67] *Al-Skeini* (n 65) [138]–[140].

[68] *Quark Fishing Co v United Kingdom* (2007) 44 EHRR SE4.

Court had held that the Convention did not apply to the South Georgia and South Sandwich Islands, because it had not been extended to them under Article 56.

Quark Fishing related to a decision not to grant a fishing license to a commercial company. The analogy the Court drew between that case and the decision to exile the Chagossians is both troubling and revealing. The case brought by the Chagos Islanders presented a situation in which a conquering power had used its overwhelming military might to forcibly depopulate a territory it had acquired by conquest, then proceeded to continue to use that overwhelming might to prevent the population from returning, purported to make a law excluding the population from returning, and asserted that it did all this purely in exercise of its right as a military conqueror (as the House of Lords was at pains to point out in *Bancoult (No 2)*). The grounding of the exercised authority in what were claimed to be the inherent powers of a military conqueror, the constant use of physical force to legitimate this authority, and the character of the rights that this force was used to deny, all show striking parallels not just with the situation in *Al-Skeini* but with the situations that gave rise to the 'acts of authorities' doctrine in a chain of decisions stretching back to *Drozd and Janousek*[69] and *Loizidou*.[70] The European Court of Human Rights explained its decision in the following terms:

> [T]he Grand Chamber [in *Al-Skeini*] not only cited the *Quark* decision as an authority but in fact adopted the reasoning in that decision that the situations covered by the "effective control" principle were clearly separate and distinct from circumstances falling within the ambit of Article 56.[71]

Yet whilst *Al-Skeini* says that the two principles are 'separate and distinct', it does not say that they are mutually exclusive. It is useful to examine the precise wording of the ruling in *Al-Skeini*:

> The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.[72]

To say that two principles are 'separate and distinct' does not mean that the existence of one rules the application of the other out. It means, as a literal reading would suggest, that the fact that one applies (or does not apply) does not in any way influence the question of whether the other principle applies (or does not apply). Whilst Article 56 does provide that the Convention does not automatically apply to colonies, nothing in that Article, or in *Al-Skeini*, suggests that it creates a black hole, making lawful in a colony what would be unlawful in a third country. It is important to note, in this context, that the government of the UK was not merely exercising 'a degree of control' over the affairs of the BIOT, nor did the argument that it was exercising control arise out of its responsibility for the international relations of the

[69] *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745.

[70] *Loizidou v Turkey* (1995) 20 EHRR 99 (Preliminary Objections); (1997) 23 EHRR 513 (Merits).

[71] *Chagos Islanders v UK* (n 41) [73].

[72] *Al-Skeini* (n 65) [140].

BIOT. It arose, rather, out of the fact that the ordinary system of government of the BIOT, as was in force at the time of the UK's accession to the Convention, had been suspended and replaced by direct rule from London, with all powers exercised directly by officials under ministerial control. It is difficult to see how this can be dismissed perfunctorily on the basis of Article 56.

Even more fundamentally, the effect of the European Court of Human Rights' decision in *Chagos Islanders v United Kingdom* is to banalise the idea of human rights by treating the exceptional—the forcible expulsion of an entire native population in exercise of a conquering power's right—as being in principle indistinguishable, and no different from, everyday civil administrative decisions on the allocation of fishing rights. The court in *Al-Skeini* placed considerable emphasis on the fact that the new head of extraterritorial jurisdiction it created only applied in exceptional circumstances. The tenor of the decision in *Al-Skeini* strongly suggests that the nature of the wrong involved in *Al-Skeini* was an important contributory factor in the court's extraterritorial application of the Convention. It is doubtful, to say the least, that the case would have been decided in the way it was if it had merely involved (for example) the allocation of fishing licenses in Basra. The equation of the two is significant, because it demonstrates the normalisation of exceptionality. Article 56, on its face, deals with the *normal* conduct of colonial affairs where the colonising power exercises a degree of control, whereas *Al-Skeini* is expressly confined to *exceptional* circumstances. The expulsion, and ongoing exclusion, of the Chagos Islanders clearly went beyond this ordinary degree of control (unlike *Quark Fishing*), involving the supersession of the ordinary government of the colony, and the exercise of absolute control by the government of the UK. If the starting point for the decision in *Al-Skeini* is that there is a duty to respect certain fundamental human rights everywhere where a state exercises effective control, the starting point in *Chagos Islanders v UK* is that states are free to act in complete disregard of rights, and to cause grave harm through doing so, without incurring any obligation to redress that harm in the absence of an express duty imposed by law.

5.4 Understanding the State: Empire, Dominion, and Administrative Grace

What, then, explains the willingness of the courts to treat the Chagossians as civic ghosts, and to recognise the state of rightlessness in which they had were placed? This section argues that the answer lies in the understanding of the state which underlies managerial constitutionalism of the form seen in the Chagos cases. But before proceeding to consider that argument in detail, it is useful to first consider two other possible explanations which have been advanced, but which do not survive a closer examination.

Firstly, the House of Lords in *Bancoult (No 2)* suggested that the rightlessness of the Chagossians flowed directly from principles of the UK's constitution. Lord Hoffmann, for example, placed considerable weight on the fact that the restraint on

exiling a subject from his homeland only applied in England, because in conquered colonies unlike in English law the Crown possessed the plenary power to 'make or unmake the law of the land.'[73] This argument, however, only holds if the executive's power to legislate by prerogative is in fact unfettered in conquered colonies. In coming to the conclusion that the prerogative was unfettered, the House of Lords relied in large part on a narrow reading of eighteenth century precedent suggesting that the prerogative had limits even in relation to conquered colonies and, in particular, *Campbell v Hall*.[74] Yet, if one examines *Campbell v Hall* in its eighteenth century context, it becomes clear that the reading adopted by the House of Lords cannot be supported. *Campbell v Hall* held that the prerogative did not permit the Crown to make laws 'contrary to fundamental principles.' What was meant by 'fundamental principles' was never fully defined in that case, but contemporary sources suggest that the phrase was given a wide reading, even being cited in arguments in one case (also involving a conquered colony) to encompass Magna Carta and all laws that Blackstone and Coke termed 'fundamental laws'.[75]

More fundamentally, *Campbell v Hall* was not an isolated constitutional case in the eighteenth century. It formed part of a broader set of cases, including both *Entick v Carrington*[76] and *Leach v Money*,[77] all holding that the executive's powers only extended so far as authorised by law, that clearer evidence was needed of the existence of a power the greater its claimed extent—'the Power ought to be as clear as it is extensive'[78]—and that usage could not by itself create a power if it was opposed to law: 'Usage, no doubt, has great weight, but usage against clear principles and Authorities of Law, never weighs.'[79] The fact that the power claimed by the government in relation to the Chagossians was a particularly extensive one would, therefore, have meant that very clear evidence would have been needed that the power actually existed. It could not simply be assumed (as the House of Lords did) that the power existed because nothing suggested that it did not. Rather, the burden would have been on the government to establish that precedent recognised the existence of a power to exile in peacetime.[80]

Equally, the cases cannot be explained merely with reference to imperialism. British liberalism in its imperial history was marked by several rival conceptions of empire, but the two most prominent among these are one which we can broadly call imperial cosmopolitanism, and the other which we can broadly call imperial paternalism. Imperial cosmopolitanism drew upon those Greek and Roman philosophers who saw in empire an instantiation of the Stoic notion of a *koinos nomos*—a universal order for all mankind. It was through empire that the *oikoumene*—the inhabited

[73] *Bancoult (No 2)* (n 6) [44] (Lord Hoffmann).

[74] (1774) 1 Cowp 204, 98 ER 1045; Lofft 655, 98 ER 848.

[75] *Case of Thomas Picton*, 30 ST 833, 937–942.

[76] (1765) 19 ST 1029.

[77] (1765) 19 ST 1001.

[78] *Entick v Carrington*, manuscript report, BL Add MS 36206, f 85.

[79] *Leach v Money*, manuscript report, TNA TS 11/293, f 4.

[80] For a fuller discussion of this point, see Arvind (2012a).

world—would evolve to becoming a brotherhood of all peoples, a cosmopolitan order in the literal sense of a single, universal body politic, under the rule of a universal law.[81] Such idealistic understandings of empire were powerful in the early days of British imperialism, represented particularly strongly by imperial officials like William Jones and, possibly, Mansfield himself. It is on this conception of empire, and on the resulting relationship between colonial government and colonised peoples, that Lord Bingham drew in his powerful and cogently reasoned dissent in *Bancoult (No 2)*—in particular, in his endorsement of the proposition that 'the relationship between the citizen and the Crown is based on *reciprocal* duties of allegiance and protection'.[82] It also underlies Lord Mance's dissent in *Bancoult (No 2)*, most clearly in his rejection of the idea that the government could ever make a constitution exiling a population from its home:

> A colony, whether conquered, ceded or settled, consists, first and foremost, of people living in a territory, with links to a parent state. The Crown's "constituent" power to introduce a constitution for a ceded territory is a power intended to enable the proper governance of the territory, at least among other things for the benefit of the people inhabiting it. A constitution which exiles a territory's inhabitants is a contradiction in terms.[83]

The other conception of empire is a paternalistic one, deriving from Cicero's conception of Roman rule over formerly barbarian provinces as a *patrocinium*—a state in which the rule is exercised by the imperial power for the benefit of the colony as the result of a near-sacred trust and duty. In the British imperial tradition, it is this conception that is most associated with the basis of empire. In the Chagos litigation itself, we see this reasoning in the decisions of Laws LJ in *Bancoult (No 1)*[84] and Sedley LJ in *Bancoult (No 2)*[85] on the meaning of the words 'peace, order and good government' In *Bancoult (No 1)* Laws LJ in striking down the original ordinance made by the BIOT Commissioner explained the meaning of these words in language reflecting the central tenets of imperial paternalism:

> [T]he Queen has an interest in all her subjects, who rightly look to the Crown today, to the rule of law which is given in the Queen's name, for the security of their homeland within the Queen's dominions.[86]

In *Bancoult (No 2)*, Sedley LJ, in contrast to the majority on the House of Lords, read the power to make laws 'for the peace, order and good government' to impose real restrictions on the prerogative. It meant that the presence of a human population, and the interests of that population, must 'make a fundamental difference to the proper concerns and actions of government', and that the prerogative could only be used to enact measures which were 'rationally and legally capable for providing

[81] See generally Pagden (2015), pp. 7–9.

[82] *Bancoult (No 2)* (n 6) [70] (emphasis added).

[83] *Bancoult (No 2)* (n 6) [157].

[84] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

[85] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498, [2008] AC 365.

[86] *Bancoult (No 1)* (n 85) [57].

for a colony's well-being.'[87] To exile a population 'for reasons unconnected with their collective well-being' was an abuse of power, and as such was not lawful.[88]

This does not mean that the behaviour of the government in relation to the Chagossians has no connection with empire: as Frost and Murray have demonstrated,[89] it clearly does. What understanding of the relationship between ruler and ruled, then, underlies the decision of the majority, if neither imperial cosmopolitanism nor imperial paternalism can justify or sustain a deprivation of juridical personhood? Understanding the answer to this question requires us to shift our perspective slightly, from studying how these cases conceptualise the individual under the state's authority to seeing how they conceptualise the state itself. Maitland pointed out that English law had never formulated a corporate idea of the state, but saw it in terms of the Crown as a corporation sole, and the servants of the Crown.[90] Such a conception of the state may have been adequate in the era of *Entick v Carrington* but it was clearly inadequate to describe the complex network of ministerial and non-ministerial departments, commissions, technocratic regulators, public corporations and so on that had already begun to emerge in Maitland's day and that have grown by several orders of magnitude in our day. The regulatory, controlling state is not a corporation sole, and not even the most orthodox theorist would argue that the law today treats it as one. So how, then, is the state conceptualised in the eyes of law?

The answer is that if the law cannot see the state as a corporate entity, encompassing those with authority as well as those under authority, then it is driven to identifying it as a system. This flows from the fact that if the law cannot conceptualise of the whole, then it can do no more than think in terms of the parts of the whole; and it is to precisely such a conceptualisation that the idea of a complex system lends itself. A complex system, in Herbert Simon's classic definition, is a collection of a large number of parts—each a sub-system—which interact in ways that are not straightforward.[91] In dealing with the system one is always primarily facing a particular subsystem, but one is always conscious that behind this is the larger system, which is more than the sum of its parts in that one cannot adequately capture the whole merely by representing its parts: its complexity ensures that there is far more to it than merely its parts and the manner in which they interact.[92] This complexity also creates vulnerability, however; and a complex system is infinitely vulnerable to disruption unless it is rightly managed in a way that contributes to its overall resilience.

Such a conception of states is inherently managerial, and it will almost inevitably confer the governing power with ability to exercise high dominion in relation to its subjects: a state vulnerable to disruption is both entitled and obligated to take steps to demobilise those whose actions render it vulnerable. There is much to sug-

[87] *Bancoult (No 2) (CA)* (n 85) [66]–[67].

[88] *Bancoult (No 2) (CA)* (n 85) [51].

[89] Frost and Murray (2015).

[90] Maitland (1901), p. 131.

[91] Simon (1996), p. 170.

[92] Simon (1962), p. 467.

gest that it is precisely this understanding of the state and its relationship with those it rules that underlay the decision in the Chagos cases. A striking feature of the Chagos cases is the emphasis placed by the courts on what they believed to be the 'true' purpose of the Chagossians in pursuing legal action—namely, placing political pressure on the UK government's policies in relation to the BIOT, rather than actually seeking to have their rights recognised. Thus in *Bancoult (No 2)*, Lord Hoffmann found that the 'subtext' of the case was about 'a campaign to achieve a funded resettlement.' The objective of establishing a legal right of return, in his view, was to establish 'a vanguard of Chagossians' on the islands 'in poor and barren conditions of life' with a view to making a claim under Article 73 of the UN Charter.[93] Sedley LJ, similarly, held that the right to return 'is a function of economic resources and political will, not of adjudication.'[94] The European Court of Human Rights, too, took the view that the Chagossians' suit was 'part of an overall campaign to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention.'[95] Under the circumstances, protecting the State against disruption mandates that these attempts be defeated.

That the legal system finds it so easy to treat the Chagossians as threatening the United Kingdom with disruption, and that it responds through a greater willingness to recognise a state of rightlessness, are troubling in and of themselves. Yet the story does not end here, for, the conception of the state one sees in the Chagos cases has a further dimension, in that it has strong resonances with what the German jurist Carl Schmitt described as 'political theology' and with the Schmittian account of the state in general. Carl Schmitt was a strong critic of liberal constitutionalism. His specific target was the Weimar Constitution, which was in force during the period when his major works were written. The conception of the State which Schmitt presented put sovereignty and sovereign authority at its heart.[96] In sharp contrast to liberal theory, which begins with the law, Schmitt's theory of the state posits a sovereign who is prior to the law[97] and who has the authority to decide where the limits of the law lie.[98] A central feature of Schmitt's argument in support of this theory is his notion of 'political theology.' Schmitt argued that the manner in which constitutions conceptualise the sovereign are directly derived from theological understandings of God, and that the key concepts of theories of the state are in reality 'secularized theological concepts.'[99] The omnipotence of the lawgiver is substantively, and not just etymologically, derived from theology. Similarly, the phenomenon which Schmitt terms the 'inexplicable identity' between lawgiver, executive power, police, pardoner, and welfare institution is a consequence of the

[93] *Bancoult (No 2)* (n 6) [55] (Lord Hoffmann).

[94] *Chagos Islanders v Attorney General (CA)* (n 36) [54].

[95] *Chagos Islanders v UK* (n 41) [83].

[96] Schmitt (1985 [1922]), pp. 5–35.

[97] Schmitt (1985 [1922]), pp. 29–35.

[98] Schmitt (1985 [1922]), p. 5.

[99] Schmitt (1985 [1922]), p. 36.

transference to the state of the idea of the 'graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws.'[100] The result is that it is power, rather than democratic consent, that is the fundamental characteristic of the sovereign.

It is this understanding of the state—as an entity that is almost a secularized deity—that one sees most clearly in the Chagos litigation. A notable feature of *Bancoult (No 2)* is its use of religious imagery. Lord Carswell cites the Book of Common Prayer in his speech,[101] but the religious imagery in Lord Hoffmann's speech is even more striking. Speaking of the right of abode in the BIOT, Lord Hoffmann declared it to be a creature of the law, and went on to describe it in these words: 'the law gives it and the law may take it away.'[102] The imagery powerfully implicit here is that of the Book of Job, with 'the law' substituted for 'the Lord' in Job 1:21: 'the law gave and the law hath took away, blessed be the law'. And there is, in point of fact, a Job-like rhetorical structure throughout Hoffmann's speech: a people who were righteous and committed no offence; who were subject to tribulations for no fault of their own; but who, ultimately, are too minor in the grand scheme of things to demand more, as parts of too insignificant a subsystem. As with Job, they are asked to display endurance: endure this, as you must, and the state will reward you with a restoration—indeed, the paltry compensation and the conferment of the right to reside in the United Kingdom are portrayed as precisely such a restoration by the English and European courts.[103] Job could not demand that his original children be brought back to life; he must content himself with the substitutes, and so it is with the Chagossians.

Equally fundamental to both is the unfathomability of the purposes of the one exercising dominion—in Job, the deity, in the Chagossians' case, the state—springing from its role in creating and maintaining order. The deity in the Book of Job cannot be judged by human standards—and, indeed, classical commentators such as Maimonides[104] and Aquinas[105] treated this as one of the most important insights emerging from the Book of Job. Divine action, even if its results seem unjust to us, is not in fact so: the error lies in our attempt to judge it by the yardstick we apply to human action because human wisdom cannot comprehend divine wisdom.

The resonance between the language of the Chagos decisions and the theology of the Book of Job points to a second point underpinning the constitutional vision of the Chagos cases: namely, their close parallels to the idea of the relationship between sovereign and subject that was implicit in Carl Schmitt's constitutional theory. In his essay on Carl Schmitt's *Political Theology*, Paul Kahn points out that Schmitt's theory of the state, and its relationship with its subjects, is grounded not in the classical

[100] Schmitt (1985 [1922]), p. 38.

[101] *Bancoult (No 2)* (n 6) [136] (Lord Carswell).

[102] *Bancoult (No 2)* (n 6) [45] (Lord Hoffmann).

[103] *Chagos Islanders v UK* (n 41) [43].

[104] *Guide* III:23, Maimonides (1963), pp. 496–497.

[105] Aquinas (1989), pp. 167–176.

idea of a social contract, but in the idea of sacrifice. The central image is not the compact made by members of a society emerging from the state of nature. It is:

> [T]he image of Abraham sacrificing Isaac before the incomprehensible command of a sovereign god. Politics, on this view, begins with an act of willing self-destruction that rests on faith, not reason. There is no reasoning with God when He demands sacrifice, for there can be no ambition to reach a common understanding. This is a God whose truth is expressed in his self-description: 'I am that I am.' The same expression of existence over essence is proclaimed in the readiness to sacrifice: 'Here I am.'[106]

In such a conception, to focus on law, rather than the sovereign act, is to misunderstand the state. The essence of the state lies not in being a 'forum for debate over the conditions and character of justice', but in its ability to demand the citizen's total allegiance.[107] It is precisely this combination of a demand for a readiness to sacrifice, and a demand for unquestioning trust that we see in the Chagos cases. It is hard not to see a theme of sacrifice in the discussion by the courts of the settlement agreement that ended the Vencatassen litigation. The same theme appears in subsequent cases. Thus, for example, Lord Hoffmann in *Bancoult (No 2)* acknowledged that the Orders in Council prevented the Chagossians from visiting the island in such all-encompassing terms, that even visits to end graves would now require immigration consent. Yet this sacrifice by the Chagossians of their rights was unproblematic and should be made in a spirit of trust in the state:

> [T]he Government have made it clear that such visits, to tend graves and so forth, will be allowed, and since in practice they are funded by the BIOT administration, immigration consent will be no more than an additional formality. Furthermore, there is no reason why, if at some time in the future, circumstances should change, the controls should not be lifted.[108]

That the Government was also entirely unwilling to grant the Chagossians any actual rights in relation to any of these matters is neither noted nor remarked on by Lord Hoffmann, as indeed it would not be in the Schmittian conception of the relationship between the citizen and the state. And the Schmittian parallels run deeper. Fundamental to Schmitt's theory was the distinction he drew between the friend and the enemy. While external enemies had always been recognised, Schmitt extended the friend-enemy distinction into *domestic* politics and put forward a theory permitting the sovereign to identify and take action against the state's *internal* enemies.[109] The progression from the era of *Campbell v Hall* to *Bancoult (No 2)* reflects a very similar shift. In *Mostyn v Fabrigas*,[110] the power to exile inhabitants of a conquered colony by prerogative was recognised, but only in wartime in a situation of 'real and genuine expediency.'[111] In *Bancoult (No 2)*, that principle has come to be extended

[106] Kahn (2012), pp. 154–155.

[107] Kahn (2012), pp. 155–157.

[108] *Bancoult (No 2)* (n 6) [56].

[109] Schmitt (1996), p. 46.

[110] (1774) 1 Cowp 160, 98 ER 1021.

[111] Ibid, 174.

to the exile of loyal subjects, in peace time with no pressing urgency. A degree of ruthlessness that, in the eighteenth century, could only be deployed against an enemy people is thus in *Bancoult* held to be deployable against the sovereign's own subjects, in precisely the manner discussed by Schmitt.

A full discussion of how this particular approach to constitutionalism entered UK constitutional thought is beyond the scope of this paper, but it bears noting that it is not new. On the face of it, it might appear to run counter to the idea that 'a man's rights against a Government Department should depend on the law and not on favour', and be a matter of right rather than grace, which motivated much of the development of remedies against the state in the twentieth century.[112] This position was never universal, however, and the contrary view was held by many constitutional theorists, including AV Dicey. Dicey's popular writings display many signs of a prioritisation over law and even over Parliamentary processes of the sovereign's grace—which, in Dicey's case, in practice meant the good will of the educated classes whose opinions he held to be of fundamental importance to the English tradition of government and 'the maintenance of wise government under democratic institutions.'[113]

Dicey argued that changes for the better in the condition of the weaker sections of society came not because of Parliamentary processes, but because of the 'benevolence or public spirit' of the educated classes, arising from their 'capacity for sympathetic emotion'[114]:

> Constitutional changes have their importance – an importance which some writers and thinkers decidedly overrate; but after all, the institutions of a country are on the whole the effect rather than the cause of the sentiments of opinions which prevail there… Classes whose voice cannot be heard are neglected not because they are disliked or because any one wishes to oppress them, but because their existence is forgotten… [In] modern England, to know that a class exists is with many… a sufficient reason for sympathizing with their sufferings, and for wishing to remove them.[115]

Remedies grounded in appeals to this benevolence were far likelier to succeed than those in legalised conceptions of rights and duties. In an essay on the Irish question, Dicey said that it was the sentiments of English electors, rather than the strength of the Irish Home-Rulers in Parliament, that was the most important check on the power of the Government to establish martial law in Ireland:

> Humanity and a sense of justice would, one may hope, make it impossible for the English democracy to tolerate courses of action which would be repudiated by the very advisers who now recommend them, the moment when the actual results of such courses became visible to all observers.[116]

[112] Mellor (9 July 1928), p. 17.

[113] Dicey (1886), p. 463.

[114] Dicey (1884), pp. 49 and 50.

[115] Dicey (1884), p. 51.

[116] Dicey (1883), pp. 72 and 73.

Contrawise, appeals to legal principles would not in any way restrain the use of martial law if there were to be a 'growth of a general conviction that justice had been tried with Irishmen in vain, and that there was nothing left for England but to show her power.'[117]

Dicey articulated these ideas most forcefully when writing of the Empire[118] and the debates around Irish Home Rule, and it is accordingly unsurprising that they find their strongest expression in modern case law dealing with one of the last remnants of Empire.

5.5 Conclusion

Constitutional theorists have remarked on the peculiar modern attraction which Schmitt's critique of liberalism holds in modern constitutional thought. The ideology behind this vision is powerful and, at least in some contexts, attractive. But the consequences of its invocation in the Chagos cases point to its limitations, and the need to fundamentally reconsider the place it—and the managerial constitutionalism that springs from it—play in modern constitutional thought in the UK.

Schmitt's constitutional thought took its starting point in his observation that much of the conceptual apparatus used to discuss the State in his day had its origins in the theology of the deity. Yet, in the ultimate analysis, the practical effect of its application in the Chagos cases was to subordinate the powerless and superordinate the powerful—contrary to the claims made by proponents of this approach to constitutionalism.

The reason is not difficult to discover. The apparatus of the state consists of people, and the ability to make one's voice heard rests in the ability to influence the bureaucratic process by virtue of having the greatest ability to exercise voice. Those with political capital or social capital will always find far greater avenues to do so, whilst those who lack such capital will necessarily also lack voice. In the Chagos cases itself, this is instantiated by the far greater regard shown by the UK government to the interests of the native birds and fish of the Chagos archipelago than to the interests of the native people of the Chagos archipelago. As the example of the Chagossians demonstrates, the 'sacrifice' that lies at the heart of this vision of the constitution is typically demanded of the powerless and the voiceless. Once we dismantle the philosophically attractive ideal types that it constructs, and look beyond the rhetorical resonances of its quasi-theological imagery, it is this that makes the vision of constitutionalism underlying the Chagos cases so problematic, and so hard to justify on any normative basis.

[117] Dicey (1882), pp. 95 and 97.

[118] See Dicey (1901), p. 203.

References

Allen S (2017) The Chagos Islanders and international law. Hart, Oxford

Al-Skeini and others v United Kingdom (2011) 53 EHRR 18

Aquinas T (1989) The literal exposition on job: a scriptural commentary concerning providence (trans: Damico A). Oxford University Press, Oxford

Arvind TT (2012a) "Though it shocks one very much": formalism and pragmatism in the *Zong* and *Bancoult*. Oxf J Leg Stud 32:113

Arvind TT (2012b) Restraining the state through tort? The crown proceedings act in retrospect. In: Arvind TT, Steele J (eds) Tort law and the legislature: common law, statute, and the dynamics of legal change. Hart, Oxford

Arvind TT, Stirton L (2017) The curious origins of judicial review. Law Q Rev 133:91

Attorney General v De Keyser's Royal Hotel [1920] AC 508

British Indian Ocean Territory (Constitution) Order 2004

Burmah Oil Co Ltd v Lord Advocate [1965] AC 75

Case of Thomas Picton, 30 ST 833, 937–942

Chagos Islanders v The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner [2003] EWHC 2222 (QB) and [2004] EWCA Civ 997

Chagos Islanders v United Kingdom (2013) 56 EHHR SE15

Deutsch K (1961) Social mobilization and political development. Am Polit Sci Rev 55:493

Dicey AV (1882) What is the state of English opinion about Ireland? Nation 36:95

Dicey AV (1883) Notes on the relation between home rule and English politics. Nation 37:72

Dicey AV (1884) The social movement in England – II. Nation 38:49

Dicey AV (1886) The home-rule movement II: its weaknesses. Nation 40:463

Dicey AV (1901) The causes of imperialism in England. Nation 55:203

Douglas M (1986) How institutions think. Syracuse University Press, Syracuse

Drozd and Janousek v France and Spain (1992) 14 EHRR 745

Entick v Carrington, manuscript report, BL Add MS 36206, f 85

Frost T, Murray C (2015) The Chagos Islands cases: the empire strikes back. North Irel Leg Q 66:263

Gardner J (2011) Can there be a written constitution. In: Green L, Leiter B (eds) Oxford studies in the philosophy of law, vol 1. Oxford University Press, Oxford, pp 162–194

Hohfeld W (1913) Some fundamental legal conceptions as applied in judicial reasoning. Yale Law J 23(16):44–58

Holmes S (1995) Passions and constraint: on the theory of liberal democracy. University of Chicago Press, Chicago

Holmes S (2012) Constitutions and constitutionalism. In: Rosenfeld M, Sajó A (eds) The Oxford handbook of comparative constitutional law. Oxford University Press, Oxford, pp 189–216

Kahn P (2012) political theology: four new chapters on the concept of sovereignty. Columbia University Press, New York

Leach v Money, manuscript report, TNA TS 11/293, f 4

Loizidou v Turkey (1995) 20 EHRR 99 (Preliminary Objections); (1997) 23 EHRR 513 (Merits)

MacCormick N (1977) Rights in legislation. In: Hacker PMS, Raz J (eds) Law, morality, and society: essays in honour of HLA Hart. Clarenden Press, Oxford, pp 189–210

MacCormick N (2005) Rhetoric and the rule of law: a theory of legal reasoning. Oxford University Press, Oxford

Maimonides M (1963) The guide of the perplexed (trans: Pines S). University of Chicago Press, Chicago

Maitland FW (1901) The crown as corporation. Law Q Rev 17:131

Manville B (1980) Solon's law of stasis and *atimia* in archaic Athens. Trans Am Philol Assoc 110:213–221

March J, Olsen J (1984) The new institutionalism: organizational factors in political life. Am Polit Sci Rev 78:734

Mellor JP (1928) Equality in legal disputes. The Times, London, 9 July 1928
Müller JW (2003) A dangerous mind: Carl Schmitt in post-war European thought. Yale University Press, New Haven
Nagel T (1978) Ruthlessness in public life. In: Hampshire S (ed) Public and private morality. Cambridge University Press, Cambridge, pp 75–92
O'Reilly v Mackman [1983] 2 AC 237 (HL)
Pagden A (2015) The burdens of empire. Cambridge University Press, Cambridge
Petelin v Cullen (1975) 132 CLR 355 (HCA)
Peters E (1990) Wounded names: the medieval doctrine of infamy. In: King EB, Ridyard SJ (eds) Law in medieval life and thought. The University of the South, Sewanee, pp 43–89
Quark Fishing Co v United Kingdom (2007) 44 EHRR SE4
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2007] EWCA Civ 498, [2008] AC 365
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] AC 453
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 35, [2016] 3 WLR 157
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453
Remmer K (1980) Political demobilization in Chile, 1973–1978. Comp Polit 12:275
Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 41, [2002] 2 AC 773
Sandel MJ (1996) Democracy's discontent: america in search of a public philosophy. Harvard University Press, Massachusetts
Sandel MJ (1997) The constitution of the procedural republic. Fordham Law Rev 66:1
Saunders v Anglia Building Society [1971] AC 1004
Schmitt C (1985 [1922]) Political theology: four chapters on the concept of sovereignty (trans: Schwab G). University of Chicago Press, Chicago
Schmitt C (1996) The concept of the political (trans: Schwab G). University of Chicago Press, Chicago
Selznick P (1999) Legal cultures and the rule of law. In: Krugler M, Czamota A (eds) The rule of law after communism: problems and prospects in East-Central Europe. Routledge, London, pp 26–33
Simon HA (1962) The architecture of complexity. Proc Am Philos Soc 106:467
Simon HA (1996) The sciences of the artificial. MIT Press, Massachusetts
Waldron J (2011) The rule of law and the importance of procedure. In: Fleming J (ed) Getting to the rule of law. NYU Press, New York, pp 3–31

Chapter 6
An Imperfect Legacy: The Significance of the *Bancoult* Litigation on the Development of Domestic Constitutional Jurisprudence

Chris Monaghan

6.1 Introduction

The decisions in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Office (No. 1),*[1] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2),*[2] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2),*[3] and *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)*[4] represents one of the most controversial and constitutionally important attempts to challenge the use of the prerogative by the British government. The decisions are of considerable interest to academics concerned with constitutional law, human rights and post-colonialism, and to those with a general interest in the United Kingdom's treatment of its remaining colonial subjects.[5] The claimant, Mr. Louis Olivier Bancoult is a Chagossian and had been an inhabitant of the Chagos

School of Law, University of Worcester. I am extremely grateful to Stephen Allen and my two anonymous peer reviewers for their helpful feedback and commentary on a previous version of this essay. It goes without saying that the usual disclaimer applies and that all errors remain my own.

[1] [2001] QB 1067; [2001] 2 WLR 1219.

[2] [2008] UKHL 61; [2009] 1 AC 453; [2008] 4 All ER 1055; [2008] 3 WLR 955.

[3] [2016] UKSC 35; [2017] 1 All ER 403; [2016] 3 WLR 157.

[4] [2014] EWCA Civ 708; [2015] 1 All ER 185; [2014] 1 WLR 2921.

[5] See Doward (2014). See also Foreign Affairs Committee, *The use of Diego Garcia by the United States* (HC 2014–2015, 377) and Foreign Affairs Committee, *The use of Diego Garcia by the United States: Government Response to the Committee's First Report of Session 2014–2015* (HC 2014–2015, 646).

C. Monaghan (✉)
University of Worcester, Worcester, UK
e-mail: c.monaghan@worc.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_6

Archipelago. The Chagossians had had been compelled by the United Kingdom's government to leave the Chagos Archipelago between 1965 and 1973.[6] The reasons for this expulsion will be explored below.

The Chagossians were inhabitants on the Chagos Archipelago, a territory administered by the then British Colony of Mauritius. With the creation of the British Indian Ocean Territory (hereafter 'BIOT') on 8 November 1965 (which incorporated the Chagos Archipelago after it had been detached from Mauritius and also several islands which had been part of the then British colony of the Seychelles[7]) the Chagossians became colonial subjects of a new territory, one which was, and is still, administered from London by the Foreign and Commonwealth Office.[8] The BIOT is not an insignificant administrative entity, as it is comprised of 58 islands and covers 640,000 square miles of the Indian Ocean.[9] The BIOT has a Commissioner, Deputy Commissioner and an Administrator, who are based at the Foreign and Commonwealth Office in London. For a territory without a 'permanent population', other than the US and UK personnel who live on the military base located on Diego Garcia (the largest island in the archipelago), the BIOT has its own constitution, flag, coat of arms and post office which has recently released a first day set of stamps celebrating the marine life that live within the territory.[10] The reason for the existence of a joint UK and US military base and how this goes to the root of the *Bancoult* litigation will be addressed below.

Although, the creation of the BIOT transferred the ultimate authority to administer the territory from Mauritius to London, this did not change the fact that there had been a distinct community living on the islands. The controversial diplomatic efforts undertaken to persuade Prime Minister of Mauritius, Sir Seewoosagur Ramgoolam, to consent to the loss of the archipelago and to accommodate the Chagossians, did

[6] According to PH Sand 'the best recent estimate puts the number of Chagossians involuntarily moved to Mauritius at between 1328 and 1522; and the number so moved to the Seychelles at 232', see 'Sand (2013), p. 132.

[7] The islands detached from the Seychelles to be included as part of the BIOT were the Farquhar Islands, the island of Desroches and the Aldabra Group. Since 1903, the Seychelles had been administered as a distinct British colony from Mauritius. These islands were eventually returned to the Seychelles.

[8] In *Chagos Islanders v United Kingdom (Admissibility)* (2013) 56 E.H.R.R. SE15 the applicants had attempted to argue that the fact that the Chagos Archipelago was administered from London brought the islands within the jurisdiction of the European Court of Human Rights for the purposes of Article 1 of the European Convention on Human Rights. See Monaghan (2013b), p. 314.

[9] See 'British Indian Ocean Territory' (*British Indian Ocean Territory*) http://biot.gov.io accessed 28 June 2017.

[10] See 'Governance' (*British Indian Ocean Territory*) http://biot.gov.io/governance accessed 28 June 2017 and 'BIOT Megafauna Stamp Issue 08.06.17' (*British Indian Ocean Territory*) http://biot.gov.io/news/biot-megafauna-stamp-issue-08-06-17 accessed 28 June 2017.

not camouflage the removal of this community and its transplantation to a foreign territory.[11]

6.1.1 The Disputed Status of the Islanders

The status of the islanders remains highly debatable. The story of the creation of the BIOT and the status of those who lived on the islands is briefly outlined on the official governmental website for the BIOT:

> As for the population of the islands, after emancipation some slaves became contract employees; the population *changing over time* by import of contract labour from Mauritius and, in the 1950s, from Seychelles, so that by the late 1960s, *those living on the islands were contract employees of the copra plantations*. Neither they, nor those permitted by the plantation owners to remain, owned land or houses. They had licences to reside there at the discretion of the owners and moved from island to island as work required.[12]

The Chagossians viewed themselves as a distinct community and the archipelago as their homeland.[13] From the outset the United Kingdom had denied that the 'Chagossians' were anything other than migrant workers employed by a privately owned copra plantation. In terms of private law, the archipelago had belonged to a commercial enterprise and the islanders had no private law ownership rights. According to Laws LJ, 'As a matter of private law, title to the islands had been vested in the plantation company, Chagos Agalega Ltd; but the Crown purchased the company's rights in 1967'.[14] The official position that there was no permanent

[11] Sir Stephen Sedley has provided an example of how the UK government negotiated with Mauritian politicians: 'In the mid-1960s, when Mauritius was due to be accorded full independence, the leader of its largest party, Sir Seewoosagur Ramgoolam, came to London to see the Colonial Secretary, Anthony Greenwood, about the terms of the independence constitution. To his surprise he was received at the Colonial Office not by Greenwood but by a senior official, who took him into a room, closed the door and said: "Look, old chap, you have a problem and we have a problem. Our problem is that the Americans want the population of the Chagos Islands removed, and we need somewhere to put them. Your problem is that you don't yet know what system of government you're going to get. Now, you have a choice. You can be sensible and take the Chagos Islanders, and we'll give you some money to help. In that case you can have a first-past-the-post electoral system and you'll be prime minister for ever. Or you can be difficult and refuse to take them, in which case we'll give your proportional representation, and nobody will ever be able to form a stable government. It's a matter entirely for you"'. (Sedley 2009, pp. 191–192).

[12] 'History' *British Indian Ocean Territory* http://biot.gov.io/about/history accessed 28 June 2017 (emphasis added).

[13] Laura Jeffery observed that '… the Chagos Archipelago was unpopulated prior to European colonial expansion in the region… French and British colonialists populated the Chagos Archipelago with slaves and contract workers; mostly from East Africa and Madagascar via Mauritius'. (Jeffery 2007, pp. 951, 953–954). David Vine is clear 'that the Chagossians' historical and ancestral connection with the Chagos Archipelago as its first inhabitants dates to at least the 1780s… anthropologists consider them indigenous to Chagos'. (Vine 2008, p. 26, 27).

[14] *Bancoult (No.1)* (n 1) [7] (Laws LJ).

population was clearly articulated by the government; firstly, in its representations to the United Nations, and secondly, in statements made to Parliament. One civil servant had observed, 'Unfortunately along with the Birds go a few Men Fridays or Tarzans whose origins are obscure'.[15] *Hansard,* the official record of the proceedings of the UK Parliament, contains a number of examples of the UK government's official position that the Chagos Archipelago did not have a permanent population.[16] The creative interpretation of whether there had been a permanent population by officials, had led ministers to effectively mislead Parliament in response to direct questions from parliamentarians. In *Bancoult (No.2)* Lord Mance made the following observation about the status of the Chagossians and to which territory they had belonged: 'After 1965, the only constitutional unit to which Mr Bancoult's and other Chagossians' citizenship and right and abode related was BIOT. As [was pointed] out in a confidential memorandum on the Status of the inhabitants of BIOT dated 4 September 1968… if such Chagossians applied for a United Kingdom passport, "presumably the Colonial endorsement could only reveal that they belonged to BIOT since there was no other British colony to which they could belong"'.[17]

6.1.2 A Question of Accountability

Notwithstanding that the litigation relates directly to the United Kingdom's colonial legacy (albeit a legacy which is still omnipresent[18]), the *Bancoult* decisions are of considerable constitutional significance and *ought* to be more widely known beyond the Chagos supporter groups, academics and interested parliamentarians.[19] This essay will address the theme of accountability, and the deficit of accountability, that these decisions ultimately represent. The parliamentarian Tony Wright has written that: 'Accountability has recently been described as "the *uber*-concept of modern times". In politics it has certainly become ubiquitous. There are daily demands for someone or something to be "held to account"… So pervasive has the language of accountability become—and so synonymous it now is with every desirable attribute of democracy and good government—that the concept is in danger of losing all critical meaning'.[20] Similarly, Richard Mulgan has observed 'That "accountability"

[15] *Bancoult (No.1)* (n 1) (Laws LJ).

[16] See the exchange between Lord Brockway and Lord Trefgarne in 1980 (HL Deb 31 January 1980, vol 404, cols 987-9).

[17] *Bancoult (No.2)* (n 2) [155] (Lord Mance).

[18] Those who alleged that they were tortured in the 1950s by British military personnel in Kenya have sued the UK (see *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913 (QB). Similarly, there has been legal action in connection to the killings of Malaysian nationals in 1948 (see *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 2445 (Admin)).

[19] There is an All-Party Group on the Chagos Islands: https://www.publications.parliament.uk/pa/cm/cmallparty/register/chagos-islands-british-indian-ocean-territory.htm accessed 28 June 2017.

[20] Wright (2014), p. 96.

is a complex and chameleon-like term is now a commonplace of the public administration literature'.[21]

In this essay accountability is used within a constitutional context, as the power to legislate for British Overseas Territories needs to be accountable. It is clear that in 2004, the Secretary of State for Foreign and Commonwealth Affairs sidestepped the limited parliamentary oversight for Orders in Council, and therefore Parliament was deprived of any opportunity to debate the contentious nature of the orders.[22] The decision in *Bancoult (No.2)*[23] effectively abdicated the historic and constitutional role of the courts to restrict the use of the prerogative beyond constitutionally appropriate limits.[24] Judicial control of the prerogative is an important constitutional principle, one that safeguards the operation of the rule of law, the historic concept of a limited monarchy that made law through the King in Parliament and a respect for the rights of the subject. A key aspect of judicial control is preventing the executive from claiming new prerogative powers, or using the powers which they have in a situation, or manner, which has never been used before. Therefore, the question is one of evidence, namely, is there a precedent.[25] The decision in *Bancoult (No.2)*[26] has been criticised for the majority's acceptance that there was lawful authority for

[21] Mulgan (2000), p. 555.

[22] After the Orders in Council had come into force, the Chairman of the House of Commons Foreign Affairs Committee had been informed that the draft orders had not been shown to the committee, because '[the government] needed to preserve complete confidentiality if we were to avoid the risk of an attempt by the Chagossians to circumvent the Orders before they came into force'. Quoted in *Bancoult (No.2)* (n 2) [27] (Lord Hoffmann). Lady Hale has observed that 'for reasons that are still obscure and controversial, they changed their minds and decided to reinstate the ban'. 'Magna Carta: Did she die in vain?' (Gray's Inn, 19 October 2015) https://www.supremecourt.co.uk/docs/speech-151019.pdf accessed 28 June 2017.

[23] *Bancoult (No.2)* (n 2).

[24] Prior to the landmark decision in *Council for Civil Service Unions v Minister of the Civil Service* [1984] UKHL 8; [1985] AC 374; [1984] 3 WLR 1174 ('GCHQ') the courts had policed the purported existence of the prerogative. This approach has its roots in the important concept of a monarch limited by the law. See the commentary on the constitutional writings of Sir John Fortescue in the fifteenth century in Wilkinson (1964). See also *Burmah Oil Company (Burmah Trading) Ltd v Lord Advocate* [1964] 2 WLR 1231; [1965] AC 75, 101 (Lord Reid), and *BBC v Johns* [1964] 2 WLR 1071; [1965] Ch. 32, 79 (Diplock LJ).

[25] In *Burmah Oil* Lord Reid had stated that, 'The prerogative is really a relic of a past age, not lost by disuse, but only available for a case not covered by statute, So I would think *the proper approach is a historical* one: how was it used in former times and how has it been used in modern times'. (emphasis added), 101. In that case, 'As regards modern times, extensive investigation in connection with the *De Keyser* case failed to disclose a single instance of taking or interfering with land without payment. and if movables had been taken with compensation at any time after 1660 I feel sure that *historians would have found evidence* of that'. (emphasis added), 101. Cf. see *R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority* [1988] 2 WLR 590; [1989] QB 26, 58 (Nourse LJ). Nourse LJ had observed that, 'I have already expressed the view that the *scarcity of references* in the books to the prerogative of keeping the peace within the realm *does not disprove that it exists*. Rather it may point to an unspoken assumption that it does'. (emphasis added). For commentary on how the prerogative has been historically defined see Chitty (1820), Tanner (1961), pp. 4–9, and Dicey (1982), pp. 20, 311–315.

[26] *Bancoult (No.2)* (n 2).

the Orders in Council, especially, as the minority observed, there were no precedents to support what the 2004 orders had attempted to achieve.[27] As a final point which will be addressed below, whilst the exercise of the prerogative has been reviewable by the courts since *Council for Civil Service Unions v Minister of the Civil Service.*[28] In his judgment Lord Roskill had been adamant that some types of prerogative powers ought 'not to be amenable to the judicial process' on the basis of their subject matter and the inherent political considerations.[29] The decision in *Bancoult (No.2)* saw a division between the majority and minority over their respective willingness to review the Orders in Council and the degrees of deference shown to the executive.

It is clear that the power in question is not an insignificant one, however small the original population of the Chagos Archipelago, or the rather obscure role of the Privy Council.[30] In a parliamentary system those exercising power *ought* to be accountable to Parliament, not least given the centrality of ministerial responsibility within the Westminster system.[31] The prospect of actually holding ministerial use of the prerogative to account is a moot point, and taps into the debate over the ability of the House of Commons to hold the government to account, with academics, parliamentarians and members of the judiciary divided over the adequacy of the House of Commons in this respect.[32] It is interesting to gauge how accountability of the prerogative fits within this broader debate. The research undertaken by Meg Russell *et al.* focused on the legislative process and found that the evidence did not show

[27] For an interesting discussion on the different approaches to the Orders in Council see Tucker (2014), p. 614. Tucker observed that '*Bancoult* is sometimes seen not as an instance of the historical-precedent test in operation, but rather as a repudiation of that test… [however] it does not illustrate that the historical-precedent test does not exist. It illustrates that its application depends on the level of generality with which a purported prerogative power is characterised'. Lord Bingham engaged in a 'historical enquiry' to find a 'precedent for the existence of a very narrow power', whereas Lord Hoffmann 'was satisfied with a much broader characterisation of the power in question'. (Tucker (2014), p.622).

[28] *Council for Civil Service Unions v Minister of the Civil Service* [1984] UKHL 8; [1985] AC 374; [1984] 3 WLR 1174 ('GCHQ').

[29] ibid 418 (Lord Roskill).

[30] At least to the public. See Smith (2009), p. 212.

[31] See Flinders (2002b), p. 73; Flinders (2002a), p. 23.

[32] The classic exposition of this view is Lord Hailsham (1978) or Sir Scarman (1974). Cf. Griffith (1979), p. 1.

However, the view that the House of Commons' lacks the ability to hold the government to account still persists. Lord Steyn's opening paragraph in his judgment in *R (on the application of Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 made explicit reference to executive dominance in the House of Commons. Therefore, it was perhaps not surprising that in *obiter* Lord Steyn argued that there are limits on Parliamentary Sovereignty, which would enable the courts to restrain the executive ([102]). Writing extra-judicially, Lord Steyn observed that 'Lord Hailsham's remarks in 1978 may be even more relevant to Westminster today'. (Steyn 2005, p. 347). In 2011, Jonathan Sumption QC rejected Lord Steyn's interpretation ('Judicial and Political Decision-Making the Uncertain Boundary', FA Mann Lecture, 2011). See also Monaghan (2013a), p. 388. A recent article by Meg Russell, Daniel Glover and Kristina Wollter has rejected the argument that Parliament is weak against the executive (Russell et al. 2016, p. 286).

that Parliament was powerless against the executive[33]; although in terms of the prerogative, there have been considerable developments since 2003.[34] These can be classified as self-directed executive reform of the prerogative, namely Gordon Brown's Labour government's *Governance of Britain*[35] and the Constitutional Reform and Governance Act 2010, the Coalition government's introduction of the Fixed-Term Parliaments Act 2011, and reform prompted as a result of pressure from backbenchers in the House of Commons, namely the acceptance that there is now a constitutional convention that governs the use of military force.[36] Adam Tomkins' observations regarding the problematic nature of reforming the prerogative still rings true today.[37] It was the nature of the controversy surrounding the Iaq War that led Robin Cook, the Leader of the House of Commons and Jack Straw, the Secretary of State for Foreign and Commonwealth Affairs to persuade Tony Blair, the Prime Minister (1997–2007) to permit the House of Commons to vote before the commencement of military action. David Cameron, the Prime Minister (2010–2016) submitted the decision to take military action in the Middle East (first in Libya in 2011,[38] then subsequently in Syria in 2013 and 2015, and in Iraq in 2014) to be approved by the House of Commons.[39] It is submitted that the circumstances which

[33] Russell et al. (2016), p. 286.

[34] In addition to the examples listed below, there has been the high-profile legal challenge to the government's power to trigger Article 50 of the Lisbon Treaty using the prerogative, see *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583.

[35] Ministry of Justice (2008).

[36] See G Phillipson, '"Historic" Commons' Syria Vote: the constitutional significance. Part I′ (*UK Constitutional Law Blog*, 19 September 2013) https://ukconstitutionallaw.org/2013/09/19/gavin-phillipson-historic-commons-syria-vote-the-constitutional-significance-part-i accessed 28 June 2017.

[37] See Tomkins (2005). Tomkins had observed, 'The starting principle for executive government should be the same for central government as it is already for local government: namely, that the government may exercise only those powers which are expressly (or by necessary implication) conferred upon it by statute… To achieve this it is necessary for Parliament to pass legislation revoking all prerogative powers…' (132). However, even the limited reform that was proposed by the House of Commons Public Administration Select Committee (*Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 2003-04, 422)) is 'self-evidently not going to happen. The principal *beneficiary* of prerogative power is the government of the day' and it will not 'volunteer to surrender such powers'. (Tomkins (2005), p.134).

[38] Unlike the vote in 2003 the vote in 2011 took place after military action had commenced.

[39] See Strong (2015), p. 604. Strong observed that 'In contrast to Blair, Cameron did not need to be forced into allowing parliament a say. In contrast to Blair, he quickly confirmed that parliament would get a substantive vote. These were differences of style rather than substance; both leaders gave MPs the chance to veto their decisions. Cameron simply did it less grudgingly than Blair' (613). Strong contrasted the background factors that led to Blair permitting a vote in 2003 and Cameron in 2011, 'While political circumstances pushed Blair to grant parliament an extraordinary say over the Iraq war in 2003, they meant Cameron could follow suit in more routine fashion over Libya in 2011 without significant risk… He was able to differentiate himself from his controversial predecessor, and keep his coalition partners onside. It mattered, too, that Cameron's approach was more open than Blair's, that he offered MPs a vote as a matter of course rather than trying to avoid a discussion' (614).

led to the reform of this particular prerogative power were exceptional. Indeed, as will be argued below, parliamentary and governmental proposals to reform the prerogative have been silent on this particular power[40] (although, in the case of the government, to expressly state in a footnote that there will be no reform of the power to make colonial legislation).[41]

6.2 A Historical Sketch of the Litigation and the Principal Decisions

The *Bancoult* litigation is in many ways a direct consequence of three of the most significant wars of the last 215 years, the Napoleonic Wars, the Cold War and the War on Terror. Until 1965, when it was detached from Mauritius to create the BIOT, the Chagos Archipelago had been administered as part of the British Colony of Mauritius. As a consequence of the Treaty of Paris in 1814 France ceded Mauritius to the United Kingdom. Prior to 1814, Mauritius had played an important role for French attempts to challenge the British's commercial and military interests in South East Asia.[42] From what was described in the House of Commons as the 'most important colony of France',[43] the French could attempt to check the commercial and military supremacy of the English East India Company. In 1810, British forces had occupied Mauritius and its strategic importance was deemed too important to be returned to France upon the cessation of hostilities.[44]

The geographic location of the Chagos Archipelago proved to be of significant strategic importance during the Cold War.[45] The 1960s was a period in which the British government undertook a policy to withdraw east of the Suez.[46] The Soviet-United States rivalry during the 1960s, led the United States government to request

[40] See House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 2003-04, 422) and Ministry of Justice (2008).

[41] See Ministry of Justice (2007) [49], fn 19.

[42] See Ingram (1969). In a letter dated 7th October 1800, the Marquis of Wellesley, who was the Governor-General of Bengal, informed Henry Dundas, the President of the Board of Control, that although a force of 3000 men could conquer Mauritius, 'In the meantime the Isle of France covers our coast with privateers, and infests every track of the trade of India'. (*Two Views of British India*, 305).

[43] Mauritius was described as the 'most important colony of France' (HL Deb 24 July 1811, vol 20, cols 1118-20).

[44] Britain's policy was to occupy the French overseas colonies, which including Mauritius, were 'a persistent and costly threat to Britain's India trade…' (Muir 1996, p. 18).

[45] The reason as to why the United States wished to use the Chagos Archipelago is its strategic location. See the description provided by Baroness Lee of Asheridge (HL Deb 19 March 1975, vol 358, cols 748-75).

[46] This policy was necessitated by financial constrains. Jean Houbert outlines the changing UK policy towards its position in the India Ocean and Anglo-American cooperation from 1958 onwards in finding suitable islands to use as military bases. (Houbert 1992, p. 465).

the use of Diego Garcia, the largest island in the Chagos Archipelago, as a military base.[47] In light of the fact that Mauritius would receive independence (which it eventually did received in 1968), it was 'desirable' that the Chagos Archipelago was detached from Mauritius to ensure that the United States could continue to use the archipelago post Mauritian independence.[48] According to a Foreign Office document from 1964, 'It would be unacceptable to both the British and the American defence authorities if facilities of the kind proposed were in any way to be subject to the political control of a newly emergent independent state…'.[49]

The way in which this transfer was achieved is significant for a number of reasons. Firstly, the United Kingdom preferred to seek the approval of Mauritius and Seychelles. The way in which the British government persuaded the Mauritian authorities and the inequality in their respective negotiating positions has proved controversial. The current interpretation of the negotiations, which took place at the Lancaster House Conference in 1965, differs according to the position of the United Kingdom or Mauritian government.[50] Secondly, the United States required the Chagos Archipelago for defence requirements and this meant that the population had to be removed. The United Kingdom government's official position (domestically and at the United Nations) was that there was no population. This ensured that the UK's obligations under Article 73 of the UN Charter were not being overtly breached. However, official notes betray the reality, 'I agree that there is an awkward problem here which the Secretary of State should know about…. the territory *is a non-self governing territory* and *there is a civilian population* even though it is small. In practice, however, I would advise a policy of "quiet disregard"—in other words, let's forget about this one until the United Nations challenge us on it'.[51] Crucially, this ensured that the anticipated Soviet interference, had the existing population been acknowledged, could be avoided and the construction of the military facilities would not be impeded by international attention. Thirdly, the United Kingdom government used the prerogative to initially create the BIOT, to introduce then the Immigration Ordinance in 1971 (which in effect exiled the Chagossians) and after the 1971 Order in Council was quashed by the Divisional Court in 2000,[52] to introduce two additional Orders in Council in 2004 to prevent the Chagossians from having a right of abode. This raises a question of fundamental constitutional importance: could the prerogative be used to enact colonial legislation to remove an entire

[47] David Snoxell has provided a comprehensive history of the discussions between the United Kingdom and United States governments over the Chagos Archipelago (Snoxell 2009, p. 127).

[48] See the witness statement of Robert Culshaw, who was the Director for the Americas and Overseas Territories at the Foreign and Commonwealth Office (30 September 2005), which is quoted in Snoxell (2009), p. 129.

[49] *Bancoult (No.1)* (n 1) [11] (Laws LJ).

[50] See written submissions from the UK and Mauritian governments in *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* 2011–2003, https://pcacases.com/web/view/11 accessed 28 June 2017.

[51] Colonial Office Note, 15 November 1965. *Bancoult (No.1)* [12] (Laws LJ) (n 1) (emphasis added).

[52] *Bancoult (No.1)* (n 1).

population and prevent their subsequent return?[53] It is from this question of law that the *Bancoult* litigation arose.

Once the BIOT was created on 8 November 1965 (by the British Indian Ocean Territory Order 1965) the process of removing the population commenced and was completed by 1973. In official correspondence British officials had referred to the islanders in disparaging terms, such as 'man Fridays'.[54] The decision to remove the population has been criticised for the impact that it had on the Chagossians. In the *Chagos Islanders v Attorney General,*[55] Sedley LJ observed that, 'It is difficult to ignore the parallel with the Highland clearances of the second quarter of the nineteenth century. Defence may have replaced agricultural improvement as the reason, but the pauperisation and expulsion of the weak in the interests of the powerful still gives little to be proud of'.[56] The impact on the Chagossian community was undeniably traumatic. This extract from the decision in *Olivier Bancoult v Robert S. McNamara*[57] outlined the alleged impact on the islanders:

> [R]esidents were threatened with death if they did not leave, and all the cats and dogs on Diego Garcia were slaughtered…. Alexis claims the Chagossians were not fed during the six-day sea voyage in harsh conditions; she states that her mother was pregnant at the time of the journey but miscarried the day after arriving in Seychelles… Appellants contend the Chagossians were stranded in Mauritius and Seychelles without housing, employment, or other assistance, and have been denied the right to return to Chagos ever since… Bancoult states that his brother committed suicide due to the frustration of not being able to provide for his family in Mauritius…[58]

The language used in *Bancoult (No.2)*[59] demonstrates the judiciary's awareness of how the islanders had been treated: 'The whole sad story',[60] 'this sad case',[61] 'the

[53] The judges who presided over the litigation answered this question differently.

[54] This term was allegedly used recently by a civil servant in connection to the creation of the Marine Protected Area in *Bancoult (No.3)* (n 4). *WikiLeaks* had released a document that purported to be a US diplomatic record of a meeting at the US Embassy. According to Lord Dyson MR, 'The text… it is claimed, purports to record observations made by British officials to US Embassy officials on 12 May 2009 about a proposal to declare an MPA. It is common ground that there was a meeting between US officials and Mr Colin Roberts, then Foreign and Commonwealth Office ("FCO") Director for Overseas Territories and HM Commissioner for the BIOT, and Ms Joanne Yeadon, then the BIOT administrator, on 12 May 2009 at the FCO… If the document is a true copy of a US Embassy "cable" it is the only near-contemporaneous record of the meeting known to exist' (*Bancoult (No.3)* [10] (Lord Dyson MR) (n 4)). The document contained the following: "'7. …Roberts stated that according to the HGM's [sic] current thinking on a reserve, there would be no 'human footprints' or 'Man Fridays' on the BIOT's uninhabited islands. He asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents …"'. (*Bancoult (No.3)* (n 4) [11] (Lord Dyson MR).

[55] *Chagos Islanders v Attorney General* [2004] EWCA Civ 997.

[56] ibid [6] (Sedley LJ).

[57] 455 F.3d 427 (D.C. Cir. 2006).

[58] ibid, pp. 3–4.

[59] *Bancoult (No.2)* (n 2).

[60] ibid [9] (Lord Hoffmann).

[61] ibid [150] (Lord Mance).

unhappy—indeed, in many respects, disgraceful—events of 40 years ago',[62] 'unhappy saga'[63] and 'unhappy story'.[64] However, John Finnis has put forward a contrary interpretation.[65] Finnis criticised the 'loss of perspective' in *Bancoult (No.1)*[66] and also in the decisions of the Divisional Court[67] and Court of Appeal in *Bancoult (No. 2)*[68]:

> In legal and moral substance the people in question were at all relevant times inhabitants and belongers to the longstanding colony of Mauritius, and citizens of it from the moment of its independence, some years before their expulsion… I am inclined to think there is more truth in the following statement by a Commonwealth Office official in 1966 than in the judicial rhetoric about loss of homeland: "Birth has not conferred more right to remain in BIOT to the 100 or so second-generation inhabitants than several generations of occupation might confer on the inhabitants of a village about to be inundated to build a dam; the scale in fact is somewhat less than usual".[69]

Finnis' criticism on the loss of perspective by the courts is interesting, but it is inherently flawed as it rests on the assumption that the Chagossians were Mauritian and the islands were part of the wider Mauritian state. Whilst technically accurate, in the sense that the Chagos Archipelago had been administered as part of the Colony of Mauritius, it fails to take into account the distinctiveness of the inhabitants as a people, who have been viewed as indigenous to the islands by social-anthropologists,[70] which would therefore distinguish the Chagossians from those communities in the United Kingdom who had been involuntarily relocated from their historic communities by reason of war or economic necessity.[71] It would be possible to relocate a displaced community within the same region that the village had been located, that had a shared language, culture and a sense of identity.[72] This was not true of the Chagossians. It is dangerous to start to compare the respective sufferings of two communities in order to seek to justify, or to downplay, the impact of their treatment by the United Kingdom.

---

[62] ibid [75], (Lord Rodger).

[63] ibid [186] (Lord Mance).

[64] ibid [119] (Lord Carswell).

[65] Finnis (2017).

[66] *Bancoult (No.1)* (n 1).

[67] *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2006] EWHC 1038 (Admin).

[68] *R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] QB 365.

[69] Finnis (2017), pp. 16–17.

[70] See Vine (2008), pp. 26, 27.

[71] A recent example includes opposition to the expansion of Heathrow Airport.

[72] For a brief discussion of the legacy of the flooding of Derwent in the 1930s see Mantel (2017).

6.2.1 The Issue of Compensation

The United Kingdom had agreed to provide £650,000 in compensation to the Chagossians. However, this was only eventually paid out in 1977–1978 and in *Chagos Islanders v Attorney-General*[73] the Court of Appeal had held that the initial compensation was inadequate to the needs of the displaced islanders.[74] In 1975, Michael Vencatessen, a former inhabitant of the Chagos Archipelago, sued the British government for intimidation, loss of liberty and assault. In 1982, the United Kingdom government settled out of court and agreed to pay an additional £4,000,000 in compensation. The money was paid into a trust fund and the compensation scheme was for full and final settlement of all claims and was open to any of the Chagossians. Some 1344 of those Chagossians living on Mauritius entered into the settlement agreement with the United Kingdom and signed quittance forms.[75] Subsequently, the Chagossians were unsuccessful before the domestic courts and the European Court of Human Rights in seeking additional compensation.[76] In *R (Bancoult) (No.2)* Lord Hoffmann had observed that the applicant was bringing the litigation in order to embarrass the United Kingdom and United States governments in order to receive additional compensation.[77]

At this stage it might be useful to refer to two points that will be addressed later on in this essay. The first, is that Lord Hoffmann viewed the litigation as merely undertaken as part of a broader campaign and that it was wrong to use the courts for this purpose,[78] the second, that even if Mr Bancoult had been successful, the House of Lords would not have ordered the United Kingdom and United States governments to award the compensation that the islanders had failed to achieve back in 2004. A right of return, albeit one which would be prohibitively expensive to exercise without the financial and practical assistance of either government, might have resulted in Parliament being asked to legislate for the BIOT to in effect reverse the House of Lords' decision,[79] or if the government had been willing to provide some practical assistance in funding limited resettlement, then those returning to the outer islands might have been found employment on the military base. This however, is a moot point.

---

[73] *Chagos Islanders v Attorney General* (n 55).

[74] ibid [9], [19] and [54] (Sedley LJ). According to Sedley LJ the compensation 'was distributed in 1977–1978 to a total of 595 displaced families then in Mauritius. It did little if anything to relieve their massive problems of rudimentary housing, unemployment and social isolation' ([9]).

[75] ibid [10] (Sedley LJ). Crucially, it has been argued that many of those who did settle were illiterate and did not have sufficient advice. This settlement in 1982 was key to the decision of the European Court of Human Rights in *Chagos Islanders v United Kingdom* (2013) 56 E.H.R.R. SE15, [81]. The court held that 'accepting and receiving compensation, those applicants have effectively renounced further use of these remedies' and therefore were not victims for the purposes of Article 34 of the European Convention on Human Rights.

[76] *Chagos Islanders v Attorney General* [2004] EWCA Civ 997 and *Chagos Islanders v United Kingdom* (2013) 56 E.H.R.R. SE15.

[77] *Bancoult (No. 2)* (n 2) [25] (Lord Hoffmann).

[78] ibid [15], [25] (Lord Hoffmann).

[79] ibid [161] (Lord Mance) (n 2). Lord Mance observed that even though there was no prerogative power to remove the right of abode, it 'would not prevent the Crown legislating by United Kingdom statute in any terms which proved *acceptable* to Parliament, a process which would involve *open debate*' (emphasis added). The issue of accountability will be discussed below.

6.2.2 *The Legal Challenges to the Orders in Council*

6.2.2.1 *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth office (No.1)* [2000] EWHC 413 (Admin)

In *Bancoult (No.1)*[80] the Divisional Court had held that the court could adjudicate upon the use of the prerogative to legislate for peace, order and good government where the colonial legislation went beyond what was meant by this classic formulation. There were limits on how this power could be used and the Immigration Ordinance 1971 fell outside of the court's interpretation of the scope of what was meant by peace, order and good government. Laws LJ held that 'The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require… But the colonial legislature's authority is not wholly unrestrained; peace, order and good government may be a very large tapestry, but every tapestry has a border'.[81] Therefore, s.4 of the Immigration Ordinance 1971 was *ultra vires* as it 'effectively exiles [the Chagossians] from the territory where they are belongers and forbids their return. But the "peace, order and good government" of any territory means nothing, surely, save by reference to the territory's population. They are to be *governed*; not removed'.[82]

In *Bancoult (No.1)*[83] the Secretary of State for Foreign and Commonwealth Affairs successfully argued that in terms of the legal rights enjoyed by inhabitants of British colonies, that there should be a distinction between whether the colony was initially ceded or settled. This distinction meant that only those colonies originally populated by settlors from the British Isles, were deemed in law to automatically enjoy all the rights and liberties enjoyed in English law. However, a ceded colony, which was one typically conquered by Britain and then ceded as part of the peace treaty, i.e. Mauritius, did not automatically enjoy these rights and liberties. Adam Tomkins criticised the Divisional Court's acceptance of the argument that there should be a distinction between settled and ceded colonies: 'it is a timely reminder that the evils of this country's imperial heritage are not exclusively of the past. Both the colonial control and the mischief of the typical imperial "one rule for us but an inferior one for them" continue – even into the twenty-first century'.[84] An analogy can be drawn here with Edmund Burke's criticism of the East India Company in the eighteenth century.[85] Burke had referred to a concept of geographic morality, which was being used to act as a defence or in order to justify the conduct of the company's servants:

[80] *Bancoult (No.1)* (n 1).

[81] ibid [55] (Laws LJ).

[82] ibid [57] (Laws LJ).

[83] ibid.

[84] Tomkins (2001), pp. 571, 580.

[85] See generally Lock (2006), Marshall (1965), O'Brien (2002) and Monaghan (2011), p. 58.

> [T]hese gentlemen have formed a plan of *geographical morality*, by which the duties of men, in public and in private situations, are not to be governed by their relation to the great Governor of the universe, or by their relation to mankind, but by climates, degrees of longitude, parallels, not of life but of latitudes; as if, when you have crossed the equinoctial, all the virtues die… This geographical morality we do protest against. Mr. Hastings shall not screen himself under it… the laws of morality are the same every where…'[86]

Following the decision of the Divisional Court, the then Secretary of State for Foreign and Commonwealth Affairs, Mr Robin Cook MP, had announced on 3 November 2000 that the British government would not appeal the decision and that the Immigration Ordinance of 1971 would be repealed. The new ordinance, which was introduced to replace the Immigration Ordinance of 1971, permitted the Chagossians to return to the Chagos Archipelago, with the sole exception of Diego Garcia, which was occupied by the United States. The announcement by Robin Cook is significant for two reasons. Firstly, the announcement was made during a period in which the government was undertaking a feasibility study concerning the resettlement of the islands[87]; and secondly, in the subsequent House of Lords' decision in *Bancoult (No.2)*[88] the majority and minority were divided over whether the announcement had created a substantive legitimate expectation, which the Chagossians were able to rely upon. The majority's view was that it did not.

The subsequent attempt by the Chagossians to seek additional compensation from the British government was unsuccessful.[89] Additionally, the attempt to sue the United States for its role in removing the islanders and preventing their return was held by the United States Court of Appeal for the District of Columbia Circuit in *Olivier Bancoult v Robert S. McNamara*[90] to be non-justiciable for political questions.[91]

6.2.2.2 *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2008] UKHL 61

In 2004, the decision was taken to once again remove the right of abode using prerogative Orders in Council. The introduction of the British Indian Ocean Territory

---

[86] *The Works of Edmund Burke*, Volume 7 (Charles C Little and James Brown: 1839), 110. See also O'Brien (2002), pp. 195–196. Edmund Burke had delivered this speech during the impeachment trial of Warren Hastings, who had been the first Governor-General of Bengal. Hastings' impeachment trial before the House of Lords in Westminster Hall (1788–1795) had been preceded by numerous attempts to reform the East India Company and to hold its servants to account. The most controversial of these attempts had been Fox's India Bill in 1783, which led to King George III, using his influence in the House of Lords, to defeat the government's legislative reforms.

[87] In 2002, the feasibility study concluded that it would be infeasible to resettle the outer islands.

[88] *Bancoult (No.2)* (n 2).

[89] *Chagos Islanders v Attorney General* (n 55).

[90] *Olivier Bancoult v Robert S. McNamara* (n 57).

[91] ibid 7 (Brown, Circuit Judge).

(Constitution Order) 2004 and the British Indian Ocean Territory (Immigration Order) 2004 prevented the Chagossians from returning to Chagos Archipelago. Mr Bancoult successfully challenged the introduction of the two new orders before the Divisional Court[92] and the Court of Appeal.[93] The majority of the House of Lords in *Bancoult (No.2)*[94] held that the orders were lawful and that the decision of the Secretary of State could not be successfully challenged by way of judicial review. Their Lordships unanimously rejected the Secretary of State's submissions that an Order in Council was not amenable to judicial review.[95] Therefore, it was open to the House of Lords to review the decision to introduce the two orders. The deference showed by the majority to the subject matter of the orders and the reluctance to hold that there was a legitimate expectation, contrasts sharply with the willingness of the minority to review the orders. The appropriate of judicial deference in such matters will be discussed below. The minority held that the orders were illegal from the outset, as the prerogative power to legislate for the peace, order and good government of a colony did not extend to removing the right of abode of an entire population.[96] In their majority judgments, Lord Hoffmann,[97] Lord Carswell[98] and Lord Rodger,[99] refused to accept the argument that the courts should be able to determine what was meant by peace, order and good government. Their Lordships held that this was a political decision and not something to be determined by the courts. This approach shows considerable deference to the executive, even where the subject matter of the orders is arguably unconstitutional and denies fundamental rights. Indeed, Lord Rodger acknowledged the deficit in parliamentary control over the Orders,[100] although it is submitted that the relative ineffectiveness of parliamentary oversight should not, as a general rule, justify judicial intervention.

The majority's decision has been heavily criticised by legal academics.[101] I have previously argued that Lord Mance's minority dissent should be preferred to the

[92] *Bancoult (No.2)* (n 67).

[93] *Bancoult (No.2)* (n 68).

[94] *Bancoult (No.2)* (n 2).

[95] ibid [33] (Lord Hoffmann).

[96] ibid (Lord Mance and Lord Bingham).

[97] ibid [50] (Lord Hoffmann). Lord Hoffmann held that, '[t]he courts will not inquire into whether legislation within the territorial scope of the power was in fact for the "peace, order and good government" or otherwise for the benefit of the inhabitants of the territory. So far as Bancoult (No 1) departs from this principle, I think that it was wrongly decided'.

[98] ibid [127]–[130] (Lord Carswell). Lord Carswell warned against the courts attempting to determining whether a particular order was, or was not for the 'peace, order and good government' as this would be political judgment' and 'the rule of abstinence should remain unqualified' [130].

[99] ibid [107]–[109] (Lord Rodger). His Lordship held that question was one of political judgment (i.e. ministerial) and not a question of law to be adjudicated by the courts. He also noted the lack of parliamentary accountability.

[100] ibid [109] (Lord Rodger).

[101] The literature is well served by highly persuasive criticisms of the decision. See Moules (2009), p. 14. Moules view is clear: 'In a powerful and convincing dissenting judgments Lord Bingham and Mance denied that there was a prerogative power to legislate by Order in Council to exile an

approach that was adopted by the majority.[102] The different approaches of their Lordships are of significant constitutional and legal importance. Their Lordships approached the treatment of the right of abode differently.[103] Importantly, whilst Lord Hoffmann questioned the legitimacy of the litigation, Lord Mance defended it.[104] There are clear differences in the approach to basic constitutional law and the historic judicial control of the prerogative, with the minority's position clearly rooted in English constitutional history and the jurisprudence and commentary of Sir Edward Coke, Lord Mansfield and Sir William Blackstone. I have previously argued that the decision struck a blow against the judicial accountability of the prerogative.[105] This lack of accountability over the content of the colonial legislation for the BIOT was further exacerbated by the government's decision to sidestep the only parliamentary 'control' in the process, namely, by refusing to consult the Foreign Affairs Committee before introducing the orders.[106] The justification for this decision was national security and the fear that the Chagossians may pre-empt the introduction of the 2004 orders by exercising their lawful right of abode. Lord Mance's dissent was alive to the question of accountability and His Lordship (along with Lord Bingham) viewed Parliament as being the correct forum to legislate for the BIOT in such a manner.[107] The majority's decision has generated considerable academic interest and this interest has not diminished over the past decade. The decision is explored in Professor Alan Paterson's invaluable empirical research[108] on how the Law Lords operated and reached decisions. Paterson's account provides a unique perspective on the Bingham court at the time of the decision in *Bancoult (No.2)*.[109] The anonymous interviews that Paterson conducted with the Law Lords and the observations that could be drawn about the House of Lords' decision are of particular interest.

entire indigenous population', 16. See also Arvind (2012), p. 113. TT Arvind was critical of the decision and argued that 'Lords Rodger and Carswell held, in effect, that the Crown had unlimited powers to legislate in relation to conquered colonies—that, in relation to these colonies, the British government, could rule as it pleased without needing to obtain the consent of Parliament and without responsibility to Parliament—or, indeed, any elected body. By doing so, they took the British constitution back to *Calvin's Case* and the reign of James I′. Arvind (2012), p. 132. See also Poole (2010), p. 146; Yusuf (2014).

[102] Monaghan (2012).

[103] ibid.

[104] ibid.

[105] See Monaghan (2012).

[106] *Bancoult (No.2)* (n 2) [170] (Lord Bingham), [159] and [161] (Lord Mance).

[107] ibid.

[108] Paterson (2013).

[109] *Bancoult (No.2)* (n 2).

6.2.2.3 In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3)* [2014] EWCA Civ 708

The decision of the then Secretary of State for Foreign and Commonwealth Affairs, David Miliband, to create a Marine Protected Area around the Chagos Archipelago was unsuccessfully challenged by Mr Bancoult in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3).*[110] The Court of Appeal *inter alia* rejected the argument that the Marine Protected Area (MPA) had been created for an improper purpose, i.e. to prevent the Chagossians from returning.[111] The Court of Appeal had to rule on the admissibility of the purported diplomatic cables that had been published by the *WikiLeaks* website. The appellant, Mr Bancoult, had submitted that the *WikiLeaks* cables were an account of a meeting on 12 May 2009 between US embassy officials and Colin Roberts, the Director for Overseas Territories and HM Commissioner for the BIOT, and Joanne Yeadon, the BIOT administrator.[112] The Court of Appeal held that the *WikiLeaks* cables should be admissible in evidence, even if it did not rule on their authenticity.[113] The *WikiLeaks* cables had been relied upon by Mr Bancoult to establish that the creation of the MPA had been motivated by an improper purpose on the part of the Secretary of State for the Foreign and Commonwealth Affairs.

Permission was granted by the Supreme Court to appeal the decision and the hearing took place on 28 June 2017 before Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Sumption and Lord Reed. The appellant appealed *inter alia* on the finding by the Court of Appeal that the then Secretary of State was 'was not personally motivated by the alleged improper purpose and relying on that fact to conclude that the decision of the court below on admissibility would have made no difference'.[114] This is important, as the Court of Appeal had accepted the Divisional Court's finding that the creation of the Marine Protected Area was a personal decision of the Secretary of State and 'that there was no evidence that *he* was motivated to any extent by an intention to prevent Chagossians and their descendants from resettling in the BIOT. It said that there was no ground to suspect, let alone to believe or to find, that the Secretary of State was motivated by the alleged improper purpose'.[115] Lord Dyson was clear that 'even if the cable had been admitted

[110] *Bancoult (No.3)* (n 4).

[111] See Monaghan (2014), p. 151.

[112] *Bancoult (No.3)* (n 4) [10]–[11] (Lord Dyson MR).

[113] ibid [65] (Lord Dyson MR). Lord Dyson MR held that 'we would allow the appeal on the admissibility issue on the narrow basis that admitting the cable in evidence in the instant case did not violate the archive and documents of the US mission, since it had already been disclosed to the world by a third party'. Lord Dyson MR was of the opinion that during the original hearing 'The fact that the cable was not admitted in evidence as an authentic document did not prevent Mr Pleming from pursuing such a line of cross-examination if that was what he wanted to do', [91].

[114] 'Case Details' (UK Supreme Court) https://www.supremecourt.uk/cases/uksc-2015-0022.html accessed 28 June 2017. See *Bancoult (No.3)* (n 4) [90]–[91] (Lord Dyson MR).

[115] *Bancoult (No.3)* (n 4) [91] (Lord Dyson MR).

in evidence, the court would have decided that the MPA was not actuated by the improper motive of intending to create an effective long-term way to prevent Chagossians and their descendants from resettling in the BIOT. In other words, the court's ruling that the cable was not admissible had no effect on the proceedings and is not, therefore, a ground for allowing the appeal'.[116]. Finally, the Secretary of State is appealing *inter alia* to challenge the admissibility of the *WikiLeaks* cables by the Court of Appeal.

6.2.2.4 *R (on the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2016] UKSC 35

In *Bancoult (No.2)*[117] the Supreme Court had to determine whether the decision of the House of Lords in *Bancoult (No.2)*[118] 'should be set aside, not on the grounds that it was wrong in law, but on grounds that the Secretary of State failed, in breach of his duty of candour in public law proceedings, to disclose relevant documents containing information which it is said would have been likely to have affected the factual basis on which the House proceeded'.[119] The documents whose non-disclosure Mr Bancoult argued amount to a breach of a duty of candour, were known as the Rashid Documents, after Ms Rashid, from the Treasury Solicitor's Department, who as part of her witness statement had initially produced the documents in 2012.[120] Mr Bancoult also sought to challenge the reliability of the report, known as the stage 2B report, (that had been prepared by Posford Haskoning Ltd and had concluded that resettlement was 'infeasible, other than at prohibitive cost') on the basis of new evidence.[121] The Rashid Documents contained a draft version of the stage 2B report, which Mr Bancoult's legal team had first requested back in 2005.[122]

As one of those who had dissented in *Bancoult) (No.2)*[123] Lord Mance was clear that, 'I have not changed my opinion as to what would have been the appropriate outcome of the appeal to the House of Lords. But that is not the issue before us'.[124] In determining this issue the Supreme Court was 'bound by the legal reasoning which led the majority to its conclusion - indeed, strictly bound without possibility of recourse to the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, since this is an application in the same proceedings'.[125] Lord Mance, who gave the

[116] ibid [93] (Lord Dyson MR).

[117] *Bancoult (No.2)* (n 3).

[118] *Bancoult (No.2)* (n 2).

[119] *Bancoult (No.2)* (n 3) [2] (Lord Mance with whom Lord Neuberger and Clarke agreed).

[120] ibid [3] (Lord Mance).

[121] ibid [2]–[4] (Lord Mance).

[122] ibid [20]–[23] (Lord Mance).

[123] *Bancoult (No.2)* (n 2).

[124] *Bancoult (No.2)* (n 3) [2] (Lord Mance).

[125] ibid.

leading majority judgment held that there was no breach of the public law duty of candour. His Lordship observed that the Secretary of State accepted that the Rashid Documents ought to have been disclosed when first request, but as His Lordship stated that whilst this had been a 'highly regrettable' failure, it had not been motivated by 'any deliberate misconduct' and therefore 'The question is what significance would or might have attached to, and what consequences would or might have flown from, their disclosure'.[126] Lord Mance held that the attempt to set aside the House of Lords' decision should fail.[127] This was because as both the draft and final stage 2B report shared *inter alia* the same unaltered general conclusions, the availability of the Rashid Documents would not have altered the court's view as to whether it would have been rational for the Secretary of State to be guided by the stage 2B report.[128]

Lady Hale and Lord Kerr Dissent

Lord Kerr dissented and held that had the Rashid Documents been available to the House of Lords, then 'the appeal might well have been decided differently'.[129] However, His Lordship did not believe that there had been a breach of the duty of candour.[130] Nonetheless, His Lordship held that majority decision 'should be set aside and the appeal re-opened'.[131] Lord Kerr was critical of the justification for the 2004 Orders in Council:

> What motivated the decision to categorically forbid the Chagossians the right to go back to live in their homeland was an anticipated campaign that might have been politically embarrassing for the government. When this apprehended harm is pitted against the importance of the right to be denied, it is not difficult to recognise how severe the challenge to justify the 2004 Order truly was.[132]

The conclusion of Lady Hale's dissenting judgment is crystal clear: 'Justice to my mind demands that the applicant be given a fair chance to satisfy this court that the decision to re-impose the denial of the islanders' right of abode was not a rational one'.[133]

---

[126] ibid [24] (Lord Mance).

[127] ibid [65] (Lord Mance).

[128] ibid [65] (Lord Mance).

[129] ibid [168] (Lord Kerr with whom Lady Hale agreed).

[130] ibid [186] (Lord Kerr).

[131] ibid [187] (Lord Kerr).

[132] Ibid [166] (Lord Kerr).

[133] ibid [194] (Lady Hale).

Had Lady Hale and Lord Kerr been able to convince a sufficient number of their colleagues so that their judgment had been the majority, then the outcome would have been that the decision in *Bancoult (No.2)*[134] would have been set aside. It is important to note that only the question from the original appeal that was relevant here was 'whether there had been any contravention of [the ordinary principles of judicial review]… and it is this ground which underpins the current application'.[135] Therefore, the question as to whether the Secretary of State had the power to remove the right of abode, or, whether there was a legitimate expectation was not relevant.[136] Lord Kerr, was clear that 'The findings of Lord Bingham and Lord Mance in relation to the rationality of the decision to make the 2004 Order most certainly are [relevant to the application]'.[137] His Lordship considered the different positions adopted by Lord Hoffmann and Lord Mance as to the whether the right could be dismissed as being 'purely symbolic' due to the impracticalities of financing the Chagossians to return to the outer islanders.[138] The differences in their Lordships' approach in *Bancoult (No.2)*[139] will be explored below. Furthermore, Lord Hoffmann and Lord Mance had disagreed over whether the Chagossians could be regarded as bringing the challenge as part of 'a mere campaign' to obtain funding for resettlement, wither the later denying that the claim could be regarded as such.[140] Lord Kerr observed:

> Does the decision of the majority on the issue of irrationality preclude any re-examination of the question of whether the right of the Chagossians to go and live where they were born was merely symbolic or, if it was, that its importance was thereby devalued? Is the second question set out above (whether the purpose of the Chagossians' challenge was to advance a campaign to obtain financial support from the UK government and to embarrass the UK and US governments) forever settled by the decision of the majority? In my opinion, the answer to these questions is a conditional "No". The conclusion that the decision to enact the 2004 Order could withstand the charge of irrationality was multi-factorial. If it now transpires that one of the bases for that conclusion was reliance on information that has now proved to be wrong or incomplete, this inevitably reflects on the cogency of the other grounds on which the conclusion was based.[141]

Lord Kerr was clear that in order for the decision of the House of Lords to be set aside, it 'is enough that it be established that there is a real possibility that a different outcome would have occurred had the information been available at the time of the

---

[134] *Bancoult (No.2)* (n 2).

[135] *Bancoult (No.2)* (n 3) [112]–[115] (Lord Kerr).

[136] ibid.

[137] ibid [115] (Lord Kerr).

[138] *Bancoult (No.2)* (n 3) [119] (Lord Kerr) and *Bancoult (No.2)* (n 2) [138] and [172] (Lord Mance); [15] and [53] (Lord Hoffmann).

[139] *Bancoult (No.2)* (n 2).

[140] *Bancoult (No.2)* (n 3) [120]–[121] (Lord Kerr) and *Bancoult (No.2)* (n 2) [138] (Lord Mance); [15] (Lord Hoffmann).

[141] *Bancoult (No.2)* (n 3) [122] (Lord Kerr).

original hearing'. His Lordship was of the opinion that an injustice had arisen as a result of being denied the Rashid Documents, as any applicant denied the chance to rely on material that is relevant to their case has been 'denied the opportunity of securing the outcome that they sought', as this material might have led to a different decision being reached.[142] Lord Kerr held 'that it is not necessary to show that it was probable that a different outcome would have been brought about; it is enough that there exists a distinct possibility that this would be so'. His Lordship disagreed with the approach adopted by the majority:

> Furthermore, the formulation whether "it was irrational or unjustified for the Secretary of State to accept and act on the General Conclusions" does not focus on the essential issue here. It was not simply a question of the Secretary of State accepting the conclusions; it was a matter of using those conclusions as a basis for denying a right of abode to the Chagossians *solely in order to deter a campaign by the Chagossians to be allowed to return to their homeland.* The House of Lords was not addressing in the abstract the question of the "rationality or justifiability of the Secretary of State's decision to rely on such conclusions" … What it was about was an examination of the sufficiency of his reliance on those reasons as a basis for denying the Chagos Islanders' entitlement to return to live in their homeland, when there was no question of any legal obligation on the part of the government to fund that return.[143]

It is submitted that this approach is to be preffered given the significance of the Rashid Documents, as it shifts the focus from the Secretary of State's acceptance of the stage 2B report, to having to justify the logical outcome, which was to remove the right of abode. Lady Hale endorsed Lord Kerr's approach in her dissenting opinion.[144]

Lady Hale was critical of the failure to adduce the Rashid Documents when originally required, 'This is scarcely a good advertisement for the quality of government record keeping…. It was deeply unfair to the applicant, and to the court, that these documents were not disclosed. *This was all the more unfair, given the sorry treatment of the Chagossians in the past and the importance of what was at stake for them*'.[145] Her Ladyship was adamant that the administrative failings of the government had been unfair on Mr Bancoult. It was Her Ladyship's opinion that, 'this court should not take much convincing that their disclosure might have made a difference to the decision in the case. What light they do cast upon the rationality of the decision under challenge will be a matter for the court which does reconsider the case. To my mind, it is quite obvious that *they might have made a difference* and *we certainly cannot be satisfied that they would not*'.[146]

[142] ibid [160] (Lord Kerr).

[143] ibid [161] (Lord Kerr).

[144] ibid [189] (Lady Hale).

[145] ibid [192] (Lady Hale) (emphasis added).

[146] ibid [193] (Lady Hale) (emphasis added).

Returning to the proposition above, what would have been the significance had Lord Kerr and Lady Hale's view been supported by a majority? Firstly, the rationality and reasonableness of the Secretary of State in relying on the stage 2B report to remove the right of abode would have been determined by the Supreme Court at a new hearing. Secondly, the dissent's approach is based essentially on an undercurrent of fairness (and also as in Lady Hale's dissent, strong criticism of the administrative failings of the Foreign and Commonwealth Office); especially in light of the context of the litigation, namely, the historic mistreatment of the Chagossians and the sense, that the approach of the Supreme Court ought to be mindful of the need to do justice by allowing arguments to be made based on the Rashid Documents. This is not say that the majority were not seeking to achieve justice, rather the majority, led by Lord Mance, were not oblivious to the context of the litigation, nor the controversy surrounding the majority's decision in *Bancoult (No.2),*[147] but approached the question differently and in the Secretary of State's favour. Finally, had the Lord Kerr and Lady Hale been in the majority, then it would have reopened one aspect of the House of Lords decision and provided for a reassessment of the then Secretary of State's decision to remove the right of abode. There would have been a new Supreme Court hearing and the majority and dissenting judgments in *Bancoult (No.2)*[148] re-examined not by academics critical of the decision, but by the Justices of the Supreme Court.

6.3 The Constitutional Importance of the *Bancoult* Litigation

So far this essay has considered the history of the litigation and has provided an outline and brief commentary on the key decisions. It is now necessary to return to the most significant decision, that of the House of Lords' in *Bancoult (No.2)*.[149] It is argued that from a constitutional perspective, the House of Lords' decision in 2008 was imperfect even if the legal decision must be divorced from the appalling treatment of the Chagossians, in which international norms and presupposed principles of legality and respect of the rule of law were circumvented (or rather flouted) in order to accommodate the needs of the United States. In the House of Lords, the majority was comprised of three judges, and it is not being submitted here that the reasoning and justification from their decisionsis devoid of any legal reasoning. On the contrary, they provide an alternative approach to the role of the courts in approaching the question of what is meant by peace, order and good government,

[147] *Bancoult (No.2)* (n 2).

[148] ibid.

[149] ibid.

and the deference that ought to be shown for matters concerning foreign affairs and national security.

The majority's position is not unattractive as it asserts a strong separation of powers between the role of the executive in determining what was in the national interest in terms of national security and foreign policy considerations, and refusing to usurp the role of the politician in determining whether something was for the peace, order and good government of the territory. Indeed, the majority's approach, which was at odds with the earlier decisions of the lower courts, would no doubt find support from the commentary of John Finnis, who was critical of the lack of balance taken in the earlier decisions which, 'is compounded, it seems to me, by the Court of Appeal's contemptuous, legal-logic chopping treatment of the defence interests which are responsibly said by HMG (in accord with our principal ally) to require the exclusion from residence in the Islands of people who would reside in the condition of vulnerability regarded with some complacency in the London courtroom'.[150]

TT Arvind has observed that, 'the decision in *Bancoult* cannot simply be treated as an instance of the courts deferring to the judgment of the executive on a matter of national security. The House of Lords did not uniformly defer… in matters of national security, as is amply demonstrated by cases such as those relating to the Belmarsh detainees… And, in any event, the extent to which *Bancoult* actually raised issues of national security is questionable'.[151] This observation as to the willingness of the House of Lords to provide accountability in other areas concerning national security is interesting, as it arguably goes to the root of why the majority judgment is difficult to accept as being based upon constitutionally appropriate foundations.

However, it is argued that the approach taken by the majority in *Bancoult (No.2),*[152] by declining any tangible oversight over whether the orders were *prima facie* lawful, could be perceived as an abdication of the constitutional role of the judiciary. This abdication, or according to Lord Carswell, 'abstinence',[153] is in my opinion dangerous, as it adds a justification for heightened judicial deference to executive decision making, not as to how a power is exercised (as that is a question of judicial review, which will be discussed below), but rather, whether there is such a power in the first place. It could be argued, that such a view is simplistic, and naïve, and inherently suspicious of the dominant role played by the elected decision makers, yet it is submitted that it is the constitutional and historic role of the courts to 'police' the power which is claimed by the executive. Circumstance, or persuasive justification, might encourage the panel to take a 'benevolent approach', as in

[150] Finnis (2017), pp. 17–18.

[151] Arvind (2012), pp. 113, 140.

[152] *Bancoult (No.2)* (n 2).

[153] ibid [130] (Lord Carswell).

Liversidge v Anderson[154]; however, in hindsight such a decision contrasts sharply with Lord Camden's reasoning in *Entick v Carrington.*[155]

At the very core of *Bancoult (No.1)*[156] and *Bancoult (No.2)*[157] was the relationship between the common law and the prerogative, a relationship which *ought* to have imposed limitations upon the Crown. The most famous proposition to this effect was that of Sir Edward Coke in the *Case of Proclamations*[158]; although, Coke's view as to the role of the common law was not universally accepted.[159] The prerogative is best described as 'a relic of a past age, not lost by disuse, but only available for a case not covered by statute'.[160] The power in question is not a 'relic' in the sense of how it is used in relation to the Chagos Archipelago. Indeed, the power should not be viewed as an irrelevant relic for a wider host of extra-parliamentary powers, *inter alia* foreign policy, the deployment of armed forces and declaration of war, and the choice of Prime Minister.

The question of the appropriateness of deference in judicial review has been the subject of considerable debate, both between academics and the judiciary. For example, Lord Steyn was critical of Lord Hoffmann's approach in the early 2000s, and writing extra-judicially he cautioned against undue deference to the executive, observing that:

> The limits of deference observed in practice are of fundamental importance to the proper functioning of our democracy. It is a controversial subject. Even in the highest court in the land there are divergent views on the subject. The differences of view should be a matter of public discussion. I hope to give some focus to such a debate.[161]

---

[154] [1942] AC 206; [1941] 3 All ER 338. Lord Atkin's dissenting judgment in *Liversidge v Anderson* was critical of judges showing too much deference to the executive on the basis of the wartime nature of the case: I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive', (p.244). There can be no mistaking Lord Atkin's negative view as to the disposition of other judges when adjudicating in such an appeal. His Lordship was equally critical of counsel: 'In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I'(,p. 244). In order to appreciate the severity of His Lordship's criticism it is important to consider the low regard that contemporaries of Charles I's judges held them in during the king's attempt to rule without Parliament. For an authoritative account of Charles I's judiciary see Jones (1971).

[155] (1765) 2 Wilson, KB 275; (1765) 19 St Tr 1029.

[156] *Bancoult (No.1)* (n 1).

[157] *Bancoult (No.2)* (n 2).

[158] (1611) 12 Co. Rep 74.

[159] To understand the context see Usher (1903), p. 664. See also Smith (2014).

[160] *Burmah Oil* (n 25) 101 (Lord Reid).

[161] Lord Steyn (2005), p. 346. Commenting on the ability to challenge executive decisions by way of judicial review, Lord Steyn observed, 'Although the vast majority of judicial review decisions go in favour of the executive, ministers sometimes find it hard to stomach adverse decisions. So be it. Nobody is above the law', 348. See also 354–355 for a discussion on the differences between the approach of Lord Hoffmann and Lord Steyn.

The decision in *Bancoult (No.2)*[162] is to be welcomed in as much as the court held that Orders in Council were amenable to judicial review. However, the approach of the majority appeared to cling to the idea that certain powers were non-amenable, which was an approach that had been previously advocated by Lord Roskill in the landmark decision in *Council for Civil Service Unions v Minister of the Civil Service*.[163] This light-touch review undertaken by the majority was again unfortunate.

6.3.1 An Inherent Want of Accountability

I have previously criticised the decision of the majority for refusing to adopt a proper treatment of the prerogative. Hence, the undeniable lack of a precedent and the refusal to accept that the courts had a role in determining whether an Order in Council was for the 'peace, order and good government' of a colony, and the acceptance that these matters were to be determined by executive, even if the result, and one which was explicitly recognised, was the wanton lack of accountability. Margit Cohn has observed that the use of the prerogative, over the option to enact parliamentary legislation, undermines accountability:

> [T]hree basic values of proper administrative practice are threatened when non-statutory powers are invoked. Not only is participation curtailed, visibility and accessibility to the rules determining government action is highly compromised; therefore, prospects for accountability are low, due to the inherent vagueness of these rules, especially when unpublished, as in the case of the 2004 order in council challenged in *Bancoult*… The choice of a non-statutory (power over a statutory power)… enables the government to act freely without passing the cumbersome legislative process… thereby evading subjection to accountability mechanisms.[164]

Adam Tucker has commented on how the majority and minority differed in their approach as to the question of the lawfulness of such a power; with the latter adopting a wider approach, and the former a narrower approach based on the need for a clear precedent.[165] According to Cohn, the minority's approach was based on 'an anxious review' because of the importance of the right at stake, even if they did not declare 'that they were doing [this]'.[166] TT Arvind has observed that, 'the majority in the House of Lords in *Bancoult* – unlike the minority – refused to be drawn into the question of the limits of the executive's authority to act by prerogative, going to the extent of denying that this was really at issue in the case…'.[167]

If the starting point is that a government should be held to account for how it uses the powers conferred on it (and that this form of accountability will depend on the

[162] *Bancoult (No. 2)* (n 2).

[163] *Council for Civil Service Unions* (n 28) and (n 29).

[164] Cohn (2009), pp. 260, 265.

[165] Tucker (2014).

[166] Cohn (2009), p. 283.

[167] Arvind (2012), p. 143.

circumstances, as often the correct method may be one, or both: parliamentary (political) or judicial (legal)), then the question to be asked is whether the proposition that the majority's decision resulted in an inherent and avoidable want of accountability can be justified. It is submitted that the deficit in terms of accountability was not a by-product (Lord Rodger acknowledged that there was weak parliamentary control[168]), but rather was a result of the majority's approach. A traditional focus on the need for a precedent would have negated the lawfulness of such a power claimed by the government, and the House need not have even explored the appropriateness of deference and judicial activism in reviewing such orders.

Within a broader context the prerogative does attract controversy as to the ability of Parliament to scrutinize its use. However, freedom from parliamentary control is regarded by Noel Cox as a reason for the importance of such powers:

> The value of the royal prerogative is that it can be exercised free of parliamentary control… There is no clear argument, however, as to why majoritarian representative democracy, operating through Members of Parliament, should necessarily provide a greater mandate for executive government action than the legitimacy derived from the ancient prerogatives of the Crown.[169]

On the other hand, Robert Blackburn has observed that, 'There is a growing dissatisfaction among parliamentarians with important elements of our constitutional law, such as the arbitrary nature of the Crown prerogative powers… and a lack of clarity around the working of certain areas of government…'[170] The solution to this is 'A written constitution [which] would address these concerns, codifying the prerogative powers and making them subject to parliamentary or other controls…'.[171]

6.3.2 Ineffective Parliamentary Oversight and Recommendations for Reform

Furthermore, the *Bancoult* litigation raises issues of the normative purpose of accountability of the prerogative. If there is uncertainty about judicial willingness to impose restraints, then the forum for accountability must be Parliament, and not the courts. Attempts to reform the prerogative, by both Parliament and the government, have not sought to alter this particular power. Colin Warbrick noted that '…the government has specifically said that it intends no change in the way that the prerogative is used for the administration of the Dependent Territories, a particularly troublesome conclusion in the light of the way the power has sometimes been used

[168] *Bancoult (No. 2)* (n 2) [107]–[109] (Lord Rodger).

[169] Cox (2012), pp. 1, 7.

[170] Political and Constitutional Reform Committee, *A new Magna Carta?* (HC 2015-15, 463), para 17.

[171] ibid.

in the past, a prominent example… being the treatment of the Chagos Islanders and the arrangements with the United States for its occupation of Diego Garcia'.[172]

Sir Stephen Sedley's critique of Orders in Council provides incentive for reform: 'Perhaps the most remarkable survivor of the centuries of constitutional conflict and vicissitude has been the Privy Council… whose powers derive in part from statute and in part from the royal prerogative, [which] continues to be used by governments as a means of introducing laws without scrutiny or vote'.[173] Sedley observed that Orders in Council, 'made under non-statutory prerogative powers, which include the entire governance of Britain's remaining colonial territories, are subject to no such legislative control. This was how Jack Straw, as Foreign and Commonwealth Secretary, was able, without the knowledge of Parliament and without any consultation with those affected, to take away the right of the exiled Chagos islanders to return to their home'.[174] Furthermore, 'Judicial review in this area, however is a longstop. At departmental level, a Secretary of State can put a draft Order in Council before the Queen for signature without either the public or Parliament knowing about it until it is signed and sealed'.[175] This is significant as it removes any prospect of real-time accountability or an opportunity for Parliament, and in particular the Foreign Affairs Committee, to examine the proposed Order in Council and to undertake sufficient steps to ensure that it is satisfied with the rationale given for enacting the proposed legislation—even, if in reality, there would be little prospect of derailing government action.

Sedley observed that when the Privy Council legislates via an Order in Council, it is only ministers that are present to advise the Queen, which means that 'there is no participation at any stage by privy counsellors from the opposition or by the large number of non-political privy counsellors who might well have useful contributions to make. It is possible to regard the continued existence of such as narrowly constituted body, empowered to make legally binding enactments behind closed doors without public notice or debate, as an affront to the rule of law'.[176] It is clear that the exercise of the prerogative in this manner is anti-democratic[177] in its lack of transparency and opportunity to review the proposed orders, notwithstanding the fact that the United Kingdom is a parliamentary democracy and these powers are exercised by a government which enjoys the confidence of the House of Commons. Ronan Cormacain argues that, 'An anti-democratic theme underlies many of the points made… The 2004 Order is legislation without a legislature. It was not voted upon or assented to by the British parliament. It was not the subject of a referendum among the Chagossians. It was not voted by any representatives of the Chagossians'.[178] It is not *just* the lack of transparency and a negligible role for Parliament to provide

[172] Warbrick (2009), p. 548. See also Ministry of Justice (2007) [49].

[173] Sir Sedley (2015), p. 132.

[174] ibid 133.

[175] ibid 134.

[176] ibid 134.

[177] This is a point which has also been made by Cormacain (2013), p. 487.

[178] ibid 488.

some form of accountability that concerns commentators. Ronan Cormacain has criticised the BIOT (Constitution) Order 2004 as amounting to 'bad law because it is of low quality and inaccessible'.[179] Cormacain criticised the lack of clarity, accessibility, precision, ambiguity and the misleading title used in the 2004 Order.

Therefore might a solution be for Parliament to introduce legislation that would transfer the power to enact colonial legislation from the prerogative to a statutory footing?[180] Margit Cohn has alternatively proposed a unified model of anxious review, which would place five restrictions on the use of non-statutory powers.[181] Whilst the restrictions would be applied by the courts, thereby negating the need for statutory reform, Cohn noted that her proposed 'model encourages the judiciary to intensify its role as constitutional reformer a path that not all participants in the debate over the future of executive powers are ready to take'.[182] This would not be the wholesale abolition of the prerogative as previously advocated by Adam Tomkins.[183] Rather, it would be an acknowledgement of the seriousness of the subject matter, namely Britain's remaining colonies, and the dangers (constitutional, democratic, the exploitation of colonial subjects, and reputational) of leaving this power dangerously unregulated. Such an Act would extend to all British Overseas Territories and could be introduced as a private members bill (with cross-bench support in the Commons and the assistance of the Back Bench Committee), or perhaps as part of government sponsored constitutional reform. It is proposed that this statutory reform need not be dismissed as wholly unrealistic, even if it is unlikely that the current government would support this proposal. The political and legal practicalities of law reform need not negate the legitimacy of making a proposal for such reform, albeit one that is not the subject of a private members bill, or indeed in a party political manifesto, but rather is outlined in an academic essay.

It is important to consider that the Chagossians have received support from parliamentarians in highlighting their cause and that the Labour party's 2017 manifesto contained a pledge supporting the right of the Chagos islanders to return to their

[179] ibid 487.

[180] The prerogative power to enact colonial legislation would be expressly abolished, rather than going into abeyance. Note the debate over the status of the prerogative power to dissolve Parliament in light of the enactment of the Fixed-Term Parliaments Act 2011. See Craig (2017a, b). See also Phillipson (2016), p. 1064 for an interesting discussion on when the prerogative is expressly abolished by statute and when it goes into abeyance.

[181] Cohn (2009), p. 286.

[182] ibid.

[183] Tomkins argued that 'In the seventeenth century Parliament significantly curbed the Crown's prerogative. What Parliament should do now is to finish the job and remove the prerogative entirely from the British constitutional order'. (Tomkins 2005, p. 134). Tomkins' solution is that 'Parliament should pass a Prerogative (Abolition) Act' and subsequent Acts would expressly cover specific powers that were once exercised under the prerogative (Tomkins 2005, p.133-4). This followed the earlier recommendations proposed by the House of Commons Public Administration Select Committee (*Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 2003-04, 422)).

homelands.[184] It is not inconceivable that at some point in the future a programme of funded resettlement on the outer Chagos islands could be announced. If this were to occur then it should be accompanied by legislation designed to reform the power to create the Orders in Council that originally removed the Chagossians' right of abode. If this were not to be the case, then any resettlement would do little to remedy the accountability deficit; rather it would be a legitimate exercise in rectifying the wrongs of previous UK governments, yet without identifying and the tackling the root cause of the problem. In light of the controversial exercise of this particular prerogative power, any proposal that would increase accountability (yet without unduly fettering the ability to introduce the necessary colonial legislation) may find support from a future government that is committed to rectifying a historical (and a contemporary) injustice.

Finally, it is submitted that any argument that the proposed reform might restrict the United Kingdom's ability to respond to foreign policy, or national security, considerations, can be countered by the fact that David Cameron's willingness to allow the House of Commons to vote on military action in Syria, had more of a significant impact on United States' defence and national security policy,[185] than the 'risk' that greater parliamentary scrutiny might make it more difficult to introduce Orders in Council like those that were introduced in 2004.

If there were to be reform of the prerogative power to enact colonial legislation, then this raises questions as to how the reform might look and what the proposed bill could seek to achieve. It is proposed that a draft Colonial Legislation Bill might resemble the following:

1 - Primary Legislation for British Overseas Territories

1. The sole power to legislate for British Overseas Territories, save where there is a statutory exception, falls to the Parliament of the United Kingdom.
2. Where a British Overseas Territory has a legislature, or other representative body, Parliament shall not legislate without the consent of that legislature, or the representative body.
3. The prerogative power to enact colonial legislation is hereby abolished.
4. Schedule 1 of this Act defines British Overseas Territories and lists those territories falling within the scope of this Act.

[184] The manifesto stated that 'We will always stand up for the rights, interests and self-determination of Britain's overseas territories and their citizens, whether protecting the sovereignty of the Falkland Islands against anyone who would seek to challenge it, or supporting the right of the Chagos islanders to return to their homelands'. (Labour Party Manifesto, 2017) http://www.labour.org.uk/page/-/Images/manifesto-2017/Labour%20Manifesto%202017.pdf accessed 28 June 2017. Interestingly, the manifesto also supported the rights of the Falkland Islanders for self-determination, whose treatment by the UK government and the willingness to protect their right to self-determination, is so often contrasted with how the Chagossians have been treated by successive governments.

[185] See Smith (London, 5 January 2017).

2 - The Power to Delegate to the Secretary of State for Foreign and Commonwealth Affairs

1. Parliament may delegate to the Secretary of State for Foreign and Commonwealth Affairs the power to enact secondary legislation.
2. Where such delegation as stated in subsection (1) above occurs, the Secretary of State for Foreign and Commonwealth Affairs must lay the draft secondary legislation before the Foreign Affairs Committee at least 30 days prior to the secondary legislation taking effect.
3. Where it is not possible to give such notice as outlined in subsection (2) above, then the Secretary of State must within 30 days of the secondary legislation taking effect:

   (a) Write to the Chair of the Foreign Affairs Committee outlining the reasons for not providing notice as required by subsection (2); and
   (b) Confirm that the secondary legislation complies with the Human Rights Act 1998 and the general principles of Public Law.
   (c) Confirm that the secondary legislation complies with principles of International Law and the United Kingdom's international obligations.

4. Secondary legislation enacted under this section is judicially reviewable by the courts.
5. A judicial declaration may be sought by the Foreign Affairs Committee as to the conformity of the secondary legislation with subsection (3)(b) above.

3 - The Obligation to Consult with any Inhabitants of the British Overseas Territory[186]

1. The Secretary of State is under a statutory obligation to consult with the inhabitants of the British Overseas Territories in which he seeks to enact secondary legislation for.
2. The period of time during which consultation shall take place will depend on what is reasonable under the circumstances.
3. Administrative and financial support must be provided to assist any person who is entitled to be consultation to take part in the consultation.
4. Where it is not possible to give such notice as outlined in subsection (1) above, then the Secretary of State must within 30 days of the secondary legislation taking effect:

   (a) Write to the Chair of the Foreign Affairs Committee outlining the reasons for not undertaking a consultation.
   (b) Indicate what efforts will be taken to undertake a retrospective consultation.

5. Where subsection (4) applies, the Foreign Affairs Committee may seek a judicial determination as to the lawfulness of the secondary legislation.

[186] The inclusion of the consultation requirement was based upon the criticism made by Ronan Cormacain of the 2004 Order in Council and the lack of consultation, Cormacain (2013), p. 487.

4 - The Extension of the Human Rights Act 1998 to All British Overseas Territories

1. The Human Rights Act 1998 shall apply to all British Overseas Territories.
2. For the purposes of subsection (1), this shall also apply to any territory, whether land, sea or air, where the United Kingdom, or its armed forces, diplomatic or other administrative personnel have *de jure*, or *de facto*, control.
3. The Secretary of State for Foreign and Commonwealth Affairs shall inform the Council of Europe that Article 56 of the European Convention on Human Rights shall be invoked for all British Overseas Territories within 30 days of this provision coming into force.

Schedule 1
This would contain a complete list of British Overseas Territories.

The *Bancoult* litigation represent an important contribution to domestic constitutional jurisprudence, specifically in the courts' treatment of the prerogative Orders in Council, the judicial control of the prerogative, the distinction between conquered and settled colonies and the limitations of substantive judicial review. Furthermore, it has raised questions regarding the historical and the more recent treatment of the United Kingdom's colonial subjects.[187] From a legal and constitutional, as well as from a lay, perspective the *Bancoult* litigation and the United Kingdom's treatment of its colonial subjects is found wanting.[188] Furthermore, the infrastructure of protection afforded to the United Kingdom's colonial subjects (at least within the context of the BIOT), both at a domestic and international level, is inadequate. In terms of human rights, the Human Rights Act 1998 does not extend to the BIOT, and neither does the jurisdiction of the European Court of Human Rights, as the United Kingdom has not extended the protection of the European Convention on Human Rights by the notification required by Article 56.[189] It is dispiriting to note, that Lord

[187] For example see Frost and Murray (2015), p. 263.

[188] The United Kingdom's treatment demonstrates the problems of seeking to draw a clear line between the 'colonial' and 'post-colonial' periods, as the mistreatment of the Chagossians occurred at a time that the metropolitan United Kingdom was seeking to divest itself of the remaining parts of the empire. The irony is that the expulsion of the Chagossians from the BIOT (being the last colony created by the United Kingdom) coincided with Mauritian independence in 1968. For an interesting commentary on the 'post-colonial' see Shohat (1992), p. 99. Shohat observed that '[t]he term "post-colonial" carries with it the implication that colonialism is now a matter of the past, undermining colonialism's economic, political, and cultural deformative-traces in the present. The "post-colonial" inadvertently glosses over the fact that global hegemony, even in the post-cold war era, persists in forms other than overt colonial rule', 105.

[189] For example see the pointed criticism of Moor and Simpson (2006), p. 121. See also Monaghan (2013b) for a commentary on *Chagos Islanders v United Kingdom* (2013), which explores the reasons for why the Court ruled that the application was inadmissible. In particular see fn 54 for a discussion on the limited application of the Convention Rights and the legal black hole that exists as a consequence, with reference to the Court's jurisprudence in decisions such as *El-Masri v former Yugoslav Republic of Macedonia (App. No.39630/09)*. See also Allen (2016), p. 771 and Ralph Wilde's contribution to this collection, '"Anachronistic as colonial remnants may be…'" Locating the rights of the Chagos Islanders as a case study of the operation of human rights law in colonial territories' (Chap. 8).

Mance was of the opinion, that had the decision been before Lord Mansfield in the eighteenth century, that a different outcome would have been reached as to the lawfulness of the orders.[190]

6.4 Conclusion

The *Bancoult* litigation highlights the omnipresent legacy of colonialism. A number of issues have been addressed in this essay, with reference to the views of the decision makers (be they judicial or governmental): whether the Chagossians were a people who had a distinct homeland, was the right of return anything more than symbolic and eroded by the passage of time, could the litigation be dismissed as being part of a wider campaign to procure additional compensation and to cause embarrassment, and did the United Kingdom government have the lawful authority to remove the right of abode. This essay has sought to explore the constitutional context of the decision, *inter alia* how the litigation fits within the broader debate over the problems of ensuring that there is a base line of adequacy in terms of the accountability of the executive, the future of the prerogative and the role of the courts and possible parliamentary reform, the limitations on human rights protection and the ability of Parliament to hold the government to account.

The recent decision of the Foreign and Commonwealth Office to renew the agreement with the United States over its continued use of Diego Garcia and to provide £40 million 'support package over the next decade to help exiled islanders improve their lives', appears to be an attempt to draw a line under the litigation.[191] However, the question of the motivations behind the litigation, namely was it a question of procuring increased compensation, or a genuine, albeit largely symbolic, attempt to regain the right of abode, has influenced the jurisprudence both domestically and at Strasbourg? If the *Bancoult* litigation does draw to a close after the hearing before the Supreme Court in *Bancoult (No.3)*, then constitutional scholars and the actors within the constitution are left with serious questions, namely, what should become of the prerogative power to enact colonial legislation and how

[190] *Bancoult (No.2)* [159] (Lord Mance) (n 2). Lord Mance stated that 'Had the present issue arisen 225 years ago when Lord Mansfield was developing and examining the principles governing overseas colonies, the reasoning in *Campbell v Hall* leaves no real doubt about his answer'. In *Campbell v Hall* (1774) 1 Cowper 204 Lord Mansfield had set out six propositions concerning the law and the inhabitants of a newly acquired British colony. Lord Mansfield's sixth proposition was 'that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a *conquered country*, this legislation being subordinate, that is, subordinate to his own authority in Parliament, *he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion*; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put', 209 (emphasis added).

[191] See Bowcott (2016). Accessed 28 June 2017.

willing are the courts to hold its use to account? However, it is now clear that the Chagossians may never get the outcome that they seek from the domestic courts.

References

Allen S (2016) The scope of third-party responsibility for serious human rights abuses under the European Convention on human rights: wrongdoing in the British Indian Ocean Territory. Hum Rights Law Rev 16(4):771

Arvind TT (2012) "Though it shocks one very much": formalism and pragmatism in the Zong and Bancoult. Oxf J Leg Stud 32(1):113

BBC v Johns [1964] 2 WLR 1071; [1965] Ch. 32

Bowcott O (2016) Chagos islanders cannot return home, UK Foreign Office confirms. The Guardian, London. 16 November. https://www.theguardian.com/world/2016/nov/16/chagos-islanders-cannot-return-home-uk-foreign-office-confirms. Accessed 5 Jan 2018

British Indian Ocean Territory. http://biot.gov.io. Accessed 28 June 2017

Burmah Oil Company (Burmah Trading) Ltd v Lord Advocate [1964] 2 WLR 1231; [1965] AC 75

Chagos Islanders v Attorney General [2004] EWCA Civ 997

Chagos Islanders v United Kingdom (Admissibility) (2013) 56 E.H.R.R

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) 2011-03. https://pca-cases.com/web/view/11. Accessed 28 June 2017

Chitty J (1820) A treatise of the law of the prerogatives of the crown and the relative duties and rights of the subject. Joseph Butterworth and Son, London

Cohn M (2009) Judicial review of non-statutory executive powers after Bancoult: a unified anxious model. Public Law 260

Cormacain R (2013) Prerogative legislation as the paradigm of bad law-making: the Chagos Islands. Commonw Law Bull 39(3):487

Council for Civil Service Unions v Minister of the Civil Service [1984] UKHL 8; [1985] AC 374; [1984] 3 WLR 1174 ('GCHQ')

Cox N (2012) The gradual curtailment of the royal prerogative. Denning Law J 24:1

Craig R (2017a) Zombie Prerogatives should remain decently buried: replacing the Fixed-term Parliaments Act 2011 (Part 1). UK Constitutional Law Association Blog, 24 May 2017. https://ukconstitutionallaw.org/2017/05/24/robert-craig-zombie-prerogatives-should-remain-decently-buried-replacing-thefixed-term-parliaments-act-2011-part-1. Accessed 28 June 2017

Craig R (2017b) Zombie Prerogatives should remain decently buried: replacing the Fixed-term Parliaments Act 2011 (Part 2). UK Constitutional Law Association Blog, 25 May 2017. https://ukconstitutionallaw.org/2017/05/25/robert-craig-zombie-prerogatives-should-remain-decently-buried-replacing-the-fixed-term-parliaments-act-2011-part-2. Accessed 28 June 2017

Dicey AV (1982) Introduction to the study of the law of the constitution, 8th edn. Liberty Fund, Indianapolis

Doward J (2014) Diego Garcia guards its secrets even as the truth on CIA torture emerges. The Guardian, London. 13 December. https://www.theguardian.com/world/2014/dec/13/diego-garcia-cia-us-torture-rendition. Accessed 28 June 2017

Finnis J (2017) Common law constraints: whose common good counts? University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628. Accessed 28 June 2017

Flinders M (2002a) Shifting the balance? Parliament, the executive and the British constitution. Pol Stud 50:23

Flinders M (2002b) The enduring centrality of individual ministerial responsibility within the British constitution. J Legis Stud 6(3):73

Foreign Affairs Committee, The use of Diego Garcia by the United States (HC 2014–2015, 377)

Foreign Affairs Committee, The use of Diego Garcia by the United States: Government Response to the Committee's First Report of Session 2014–2015 (HC 2014–2015, 646)
Frost T, Murray CRG (2015) The Chagos Islands cases: the empire strikes back. N Ir Legal Q 66:263
Griffith JAG (1979) The political constitution. Mod Law Rev 42(1):1
Hailsham (Lord) QH (1978) The dilemma of democracy. Collins, London
Houbert J (1992) The Indian Ocean Creole Islands: geo-politics and decolonisation. J Mod Afr Stud 30(3):465
House of Commons Public Administration Select Committee, *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (HC 2003–2004, 422)
Ingram E (1969) Two views of British India: the private correspondence of Mr Dundas and Lord Wellesley: 1798–1801. Adams and Dart, Bath
Jeffery L (2007) How a plantation became paradise: changing representations of the homeland among displaced Chagos islanders. J R Anthropol Inst 13(4):951–968
Jones WJ (1971) Politics and the bench: the judges and the origins of the English civil war. Allen and Unwin, Crows Nest
Lock FP (2006) Edmund Burke, Volume II: 1784–1797. Oxford University Press, Oxford
Mantel H (2017) 'Reith Lecture 2: The Iron Maiden' (BBC Radio 4, 20 June 2017). <http://downloads.bbc.co.uk/radio4/reith2017/reith_2017_hilary_mantel_lecture2.pdf>. Accessed 28 June 2017
Marshall PJ (1965) The impeachment of Warren Hastings. Oxford University Press, Oxford
Ministry of Justice (2007) The Governance of Britain. Green Paper, Cm 7170
Ministry of Justice (2008) The Governance of Britain: Constitutional Renewal. White Paper, Cm 7342-I
Monaghan C (2011) In defence of intrinsic human rights: Edmund Burke's controversial prosecution of Warren Hastings, governor-general of Bengal. Law Crime Hist 2:58
Monaghan C (2012) Show me the precedent! Prerogative powers and the protection of the fundamental right not to be exiled: Lord Mance's dissent in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61. In: Geach N, Monaghan C (eds) Dissenting judgments in the law. Wildy, Simmonds and Hill, London. chapter 13
Monaghan C (2013a) Judicial discretion, parliament and executive accountability in the twenty-first century: *R (Lord Carlile of Berriew and others) v Secretary of State for the Home Department*. Judicial Rev 18(4):388–402
Monaghan C (2013b) The Chagossians go to Strasbourg: convention rights and the Chagos Islands. Eur Hum Rights Law Rev 3:314
Monaghan C (2014) The marine protected area and WikiLeaks: R (Bancoult) v secretary of state for foreign and commonwealth affairs (No. 3). Judicial Rev 19(3):151–159
Moor L, Simpson AWB (2006) Ghost of colonialism in the European convention on human rights. Br Yearb Int Law 76(1):121
Moules R (2009) Judicial review of prerogative orders in council. Camb Law J 68:14–17
Muir R (1996) Britain and the defeat of Napoleon 1807–1815. Yale University Press, New Haven
Mulgan R (2000) "Accountability": an ever-expanding concept? Public Adm 78(3):555–573
Mutua v Foreign and Commonwealth Office [2011] EWHC 1913 (QB)
O'Brien CC (2002) Edmund Burke. Vintage, New York
Paterson A (2013) Final judgment: the last law lords and the Supreme Court. Hart, Oxford
Phillipson G (2016) A dive into deep constitutional waters: article 50, the prerogative and parliament. Mod Law Rev 79(6):1064
Poole T (2010) The royal prerogative. Int J Const Law 8:146–155
R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2006] EWHC 1038 (Admin)
R (on application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2008] QB 365
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Office (No. 1) [2008] UKHL 61; [2009] 1 AC 453; [2008] 4 All ER 1055; [2008] 3 WLR 955

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2014] EWCA Civ 708; [2015] 1 All ER 185; [2014] 1 WLR 2921
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2016] UKSC 35; [2017] 1 All ER 403; [2016] 3 WLR 157
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2001] QB 1067; [2001] 2 WLR 1219
R (on the application of Jackson) v Attorney General [2005] UKHL 56; [2006] 1 AC 262
R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2445 (Admin))
R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2017] 2 WLR 583
R v Secretary of State for the Home Department, Ex parte Northumbria Police Authority [1988] 2 WLR 590; [1989] QB 26
Russell M, Gover D, Wollter K (2016) Does the executive dominate the Westminster legislative process? Six reasons for doubt. Parliam Aff 69(2):286–308
Sand P (2013) The Chagos Archipelago cases: nature conservation between human rights and power politics. Glob Community Yearb Int Law Jurisprud 1:125–149
Scarman L (1974) English law- the new dimension: the Hamlyn lectures, twenty-sixth series. Stevens & Sons, London
Sedley S (2009) The long sleep. In: Andenas M, Fairgrieve D (eds) Tom Bingham and the transformation of the law: a liber amicorum. Oxford University Press, Oxford, pp 183–192
Sedley S (2015) Lions under the throne: essays on the history of English public law. Cambridge University Press, Cambridge
Shohat E (1992) Notes on the "post-colonial". Third World Post-Colon Issues 31:99
Smith D (2017) John Kerry links Britain to derailing of Obama's plan for intervention in Syria. The Guardian. https://www.theguardian.com/world/2017/jan/05/john-kerry-us-syria-intervention-plan-britain-obama. Accessed 28 June 2017
Smith DC (2014) Sir Edward Coke and the reformation of the laws: religion, politics and jurisprudence, 1578–1616. Cambridge University Press, Cambridge
Smith R (2009) Beyond satirical debate? NLJ 159:212
Snoxell D (2009) Anglo/American complicity in the removal of the inhabitants of the Chagos Islands, 1964-73. J Imperial Commonw Hist 71(1):127
Steyn J (2005) Deference: a tangled story. Public Law 346
Strong J (2015) Why parliament now decides in war: tracing the growth of the parliamentary prerogative through Syria, Libya and Iraq. Br J Polit Int Relat 17(4):604
Tanner JR (1961) Constitutional documents of the reign of James I 1603–1625. Cambridge University Press, Cambridge
Tomkins A (2001) Magna Carta, crown and colonies. Public Law 571–585
Tomkins A (2005) Our republican constitution. Hart, Oxford
Tucker A (2014) Press regulation and the royal prerogative. Public Law 10:614–623
Usher R (1903) James I and sir Edward Coke. Engl Hist Rev 12:664
Vine D (2008) Decolonizing Britain in the 21st century? Chagos islanders challenge the crown, house of lords. Anthropol Today 24(4):26–28
Warbrick C (2009) Who calls the shots? Defence, foreign affairs, international law, and the governance of Britain. In: Andenas M, Fairgrieve D (eds) Tom Bingham and the transformation of the law: a liber amicorum. Oxford University Press, Oxford, pp 533–562
Wilkinson B (1964) Constitutional history of England in the fifteenth century 1399–1485. Barnes and Noble, Michigan
Wright T (2014) The politics of accountability. In: Elliot M, Feldman D (eds) The Cambridge companion to public law. Cambridge University Press, Cambridge, pp 96–115
Yusuf HO (2014) Colonial and post colonial constitutionalism in the commonwealth: peace, order and good government. Routledge, London

Chapter 7
The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism

C. R. G. Murray and Tom Frost

7.1 Introduction

The British Empire's continuing influence over constitutionalism within the United Kingdom's (UK's) contemporary governance order is easily underestimated. Few UK constitutional theorists continue to dwell on the distinction between settled, ceded and conquered colonies,[1] upon how the relationship between the Empire's colonies and the UK ultimately came to be conditioned by a 'mid-Victorian web of statutes',[2] or even upon the European Convention on Human Rights' colonies clause.[3] It is not simply that the imperial constitutional project, given effect by such

Senior Lecturer, Newcastle Law School and Lecturer, Sussex Law School. Our thanks to Henry Jones (Durham), Aoife O'Donoghue (Durham), Tanya Palmer (Sussex) for their encouragement and assistance with this contribution. A special note of thanks is due to the editorial team and anonymous reviewer for their detailed comments upon earlier drafts of this contribution. Any errors remain our own.

[1] For a previous generation of constitutional scholarship the Empire was very much regarded as a constitutional laboratory, see Jennings and Young (1938). Malgoldi's re-examination of Jennings' work flags up how coverage of Jennings' work on constitutionalism in colonial contexts has been 'almost completely absent from accounts of his life and work' by UK constitutional scholars; Malagodi (2015), pp. 102, 103.

[2] McHugh (2014), pp. 300, 306. See, for late nineteenth-century discussion of a range of the UK's colonies Anson (1908), vol. II, pt. II, pp. 58–96.

[3] European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953), Art. 56. This provision was examined Kritsiotis and Simpson (2009), pp. 93, 126.

C. R. G. Murray (✉)
Newcastle University, Newcastle-upon-Tyne, UK
e-mail: colin.murray@newcastle.ac.uk

T. Frost
University of Sussex, Brighton, UK
e-mail: t.m.frost@sussex.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_7

measures, has lost much of its contemporary relevance since the winding up of much of the British Empire; from the nineteenth century onwards the Empire was deliberately developed as a constitutional project which was substantially offset from 'domestic' UK constitutionalism as an 'external dimension' to its constitutional order.[4] But the Empire's distinct manifestation of 'transnational' constitutionalism has never completely gone into abeyance.[5] Indeed, with regard to the remaining British Overseas Territories, the imperial constitution continues to provide an awkward counterpoint to prevailing domestic constitutional orthodoxy.[6]

In this contribution we examine how the Chagossians' legal campaign against their expulsion from the British Indian Ocean Territory (BIOT), and the Crown's subsequent denial of their rights of return in light of the defence interests generated by the military base on Diego Garcia, has exposed and challenged some of the most controversial aspects of imperial constitutionalism.[7] Our previous work on the Chagos litigation sought to explain some of the more supine judicial responses to the Crown's actions as being a function of their imperial rationalisation of the Chagossians' treatment.[8] In this contribution we turn to address how the Chagos litigation was shaped by, and has in turn reshaped, the nature of imperial constitutionalism. We first unpack the clash of constitutional paradigms inherent within the Chagossians' treatment, examining the precepts of the imperial constitutional order applicable to the BIOT. As we demonstrate, the Crown came to rely upon the leeway granted by imperial constitutionalism to justify the Chagossians' treatment in the 1960s and 1970s. But as the second part of this contribution highlights, this approach exacerbated tensions within the imperial constitutional order, and became difficult to sustain in light of how differently the Falklanders were treated by comparison to the Chagossians. Although the Foreign and Commonwealth Office (FCO) would continue to exploit the imperial constitution to prevent the Chagossians' return, these antimonies obliged officials to re-evaluate and repackage the Crown's actions. This shift was, however, more presentational than substantive. The need for substantive change may yet catch up with the FCO, for the final part of our contribution demonstrates the crucial role played by the Chagossians' campaign in the UK Courts' subsequent (and ongoing) reshaping of the imperial constitution.

[4] For a careful analysis of some of these connections, see Poole (2015), p. 17.

[5] See Lino (2016), pp. 752–753.

[6] See McLachlan (2014), p. 21.

[7] Many of the contemporary sources refer to the settled population of the Chagos islands up to the 1970s and their descendants as the Ilois, but this term attracted 'pejorative connotations' following the islanders' expulsion and subsequent poverty in Mauritius (See *Chagos Islanders v Attorney-General* [2003] EWHC 2222 (QB), [10] (Ouseley J)). We therefore use the label Chagossians for this community, which many of the islanders have adopted to maintain a direct association with the Chagos Islands, except were original sources discussing the 'Ilois' are directly quoted.

[8] Frost and Murray (2015), p. 263.

7.2 The Divide Between UK Domestic and Imperial Constitutionalism

The differentiation of the arrangements covering an imperial centre and its colonies is an established, if not celebrated, theme within constitutional discourse on empire.[9] It is as old, at least, as Thucydides account of Pericles' warnings to democratic Athens about the consequences of holding its wider empire 'like a tyranny'.[10] Even in the British Empire's prime, amid concerns over the fate of the ancient empires of Athens and Rome, the impetus to separate and delimit the imperial project from the UK Constitution loomed large in statecraft.[11] The assertions of raw power permitted under imperial law were marginalised and circumscribed within more refined accounts of the UK's constitutional order. Little of Dicey's *Introduction to the Study of the Law of the Constitution*, for example, is devoted to the relationship between the UK and the colonies, beyond repeated assertions of Parliament's sovereignty over the colonies.[12] Later editions of his work glanced over the self-governing colonies in their introduction, in an avowed effort to promote a civilising and liberal vision of the Empire.[13] Beyond the predominantly white-settler populations of those colonies, however, his account of the interplay between enabling and disabling features within the UK's governance order was largely 'irrelevant' in other colonial governance contexts.[14] The Crown Colonies were addressed in *Law of the Constitution* only indirectly, for example in the context of Dicey's coverage of martial law.[15] This focus demonstrates the degree to which Dicey, like many other nineteenth-century theorists, sought a 'vast, secure and strong empire but one with a relaxed legal accountability of authority'.[16]

The constitutional order within the British Empire was thus bifurcated (even as it claimed to be 'undivided'[17]); in Seeley's famous dictum the UK found itself acting

[9] See Fitzpatrick (1992), p. 107 and Hussain (2003), p. 35.

[10] Thucydides, *History of the Peloponnesian War* (C.F. Smith, trans., Heinemann, 1980) 2.63. See Teegarden (2013), pp. 15–56.

[11] See, for example, Morley (1879), p. 361, as discussed in Bell (2016), p. 126. For further examples of the concern of imperial practices polluting the legal systems of the 'home countries' see Kostal (2005), p. 473.

[12] See Cosgrove (1982), p. 150. For discussion of more recent examples of quintessentially 'English' constitutional narratives, see Poole (2015), p. 10.

[13] Dicey (1915/1982), pp. xlii–liv.

[14] Lobban (2015), pp. 27, 54.

[15] Dicey (1915/1982), p. 185. Although Lino establishes, through a painstaking evaluation of Dicey's thinking on the Empire as a constitutional order in his other writings, that 'Dicey was never entirely clear about the constitution's territorial bounds', the differences between these writings and the more influential *Law of the Constitution* only serves to emphasise the distinction between the Empire and the UK Constitution; Lino (2016), p. 760.

[16] Kostal (2005), p. 482. Dicey's support for empire was conditioned by what he saw as the need for the UK to have the capacity to respond to external threats; 'In an age … of huge military States … [t]he day of small States appears to have passed. We may regret a fact of which we cannot deny the reality.' Dicey (first published 1914, 2008), p. 323.

[17] Ekins (2013), pp. 396, 404.

in a manner which was 'despotic in Asia and democratic in Australia'.[18] The UK and its settler colonies, in other words, maintained constitutional systems underpinned by a range of fundamental principles 'as the birthright of every subject, so wherever they go they carry their laws with them'.[19] Depending on the ethnic and racial make-up of such a colony, these principles could be reduced in practice to a little more than a tincture of the UK's domestic constitutionalism.[20] This 'birthright' was not replicated within conquered or ceded colonies. In such territories the early phases of British imperialism were managed under the principle laid down in *Calvin's case*[21] and affirmed in *Campbell v Hall*,[22] whereby the pre-existing legal order persisted after the UK claimed sovereignty over a territory, but was liable to be overlaid by new laws imposed by imperial administrators.[23] Within Crown Colonies a common feature of their governance remained 'the irresponsibility of the executive to a representation, in any form, of the people of the colony'.[24] Indeed, granting a Crown Colony a representative assembly changed its character, curtailing the Crown's ability to legislate by Order in Council.[25] It was sufficient that colonised peoples gained the 'protection' of the British Empire, under imperial constitutionalism allowed the Crown to define the nature of that relationship.[26]

How the Crown should use its sweeping legal powers within Crown Colonies was debated at length between the seventeenth and twentieth centuries.[27] Many of the major protagonists in this debate were, nonetheless, united by their chauvinistic regard for the UK's modes and institutions of governance. Part of the vision of adherents to liberal imperialism was to "civilise" the legal orders of Crown Colonies by outlawing practices which they condemned as barbarous and imposing in their place a common law system and rules which they regarded as self-evidently superior.[28] More utilitarian voices emphasised instead that common law rules were more familiar to colonial administrators than the pre-exiting legal order, and emphasised that alterations to a legal order should facilitate administration of a colony for the benefit of the Empire as a whole.[29] Neither of these accounts held out the prospect of the Crown Colonies being governed in accordance to the constitutional values prevailing

[18] Seeley (first published 1883, 1971), p. 141. See Bell (2009), pp. 108–113.

[19] Blackstone (first published 1765–69, 1979) Introduction, ch 4, pp. 104–105. See Anson (1908), p. 76.

[20] See Benton and Ford (2016), p. 51.

[21] *Calvin's case* (1608) 77 ER 377, 398.

[22] *Campbell v Hall* (1774) 98 ER 848, 897 (Lord Mansfield).

[23] See Loughton (2004), pp. 143, 159–161 and Poole (2015), pp. 11 and 152.

[24] Anson (1908), p. 64.

[25] See *Campbell v Hall* (n.22), p. 898.

[26] See Benton and Ford (2016), p. 85. As our earlier work addresses, the expulsion of the Chagossians from the BIOT sunders any notion that their relationship with the UK involves reciprocal obligations; Frost and Murray (2015), pp. 285–286.

[27] See Bell (2009), pp. 211–362.

[28] See Young (2005), p. 27; Mantena (2010), pp. 22–30.

[29] See Benton and Ford (2016), pp. 77–78.

within the UK; '[t]he British Constitution was to be found in no other part of the world but in this country'.[30] As subsequent constitutional developments have enriched the UK's domestic constitutional order its divergence from the remnants of the imperial constitutional order has become ever more apparent. In the domestic context executive action became increasingly constrained by respect for a range of fundamental principles, whereas in the imperial context a 'thinner rule of law' often persists.[31] As a result, although UK governance came to be channelled through liberal and democratic constitutional mechanisms, its remaining colonies (or British Overseas Territories, as they have been re-badged[32]) were preserved as a constitutional space apart, permitting the Crown to more freely pursue imperial interests.

The expulsion of the Chagossians from the BIOT and their legal campaign for a right of return therefore exposes ingrained paradoxes within the UK's intertwined and yet divergent constitutional orders. One landmark moment in the Chagossians' litigation, the 2008 House of Lords' majority decision in *Bancoult*, is regularly presented as an affront to the principles underpinning the UK Constitution.[33] The majority judges were not, however, hoodwinked into neglecting key tenets of the UK Constitution by clever advocacy on the FCO's behalf.[34] Nor were they manoeuvred into a position of determining the case according to the precepts of imperial constitutionalism, under which ministers hold all of the cards. Instead this case saw the House of Lords attempt to meld the two streams of constitutional jurisprudence. With the Court riven by divisions over this task, the resulting judgment does not provide a coherent account of a combined constitutional order. Some of the firewalls established by imperial constitutionalism to minimise the exposure of the colonial authorities to legal challenge were breached, but enough remained in place to thwart the Chagossians. This outcome requires us to examine why imperial constitutionalism proved so resilient, even in the face of twenty-first century constitutional values.

7.3 The Falkland Islands Dilemma

The late imperial conduct of successive UK Governments is characterised by many unedifying contradictions. A matter of days after the UK Government concluded a belated and mean-spirited deal to compensate the Chagossians for their enforced expulsion in early 1982, Argentina invaded the Falkland Islands. Comparison

[30] H. Brougham MP, HC Debs, vol. 20, col. 616 (13 Jun 1811). See Epstein (2012), pp. 275–276.

[31] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] 1 QB 1067; [2000] EWHC 413 (Admin), [56] (Laws LJ).

[32] British Overseas Territories Act 2002, s.1(1).

[33] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453. See Juss (2017), pp. 239, 253.

[34] Paterson (2013), p. 55.

between the UK's dealings with the two groups of islanders became inevitable. Even as fighting raged on the Falklands, UK diplomats warned that Argentina was seeking to capitalise on the comparison. In the words of one urgent telegram from the UK Embassy in Madrid, '[t]he Argentinian claim that in contrast to the Falkland Islands case, 1200 people were removed from Diego Garcia and not consulted is gaining currency'.[35] In response the Foreign Secretary, Francis Pym, recapitulated the justifications for the Chagossians' treatment which had been developed in the 1960s.[36] The Chagossians 'were essentially transit workers on copra plantations employed on a contract basis', on the closure of the plantations they 'were given the choice of having their contracts terminated and being returned to Mauritius or being transferred to plantations on other islands in the British Indian Ocean Territory' and 'the British Government helped financially over their settlement'.[37]

These were old lies and half-truths, reheated by force of necessity. The employment status of the islanders said nothing about the fact that the islands had been home to many of them for generations, and did not disclose that ministers had simply ordered the islands cleared; officials had neither sought the islanders' agreement nor overseen the manner of their removal by the plantation managers.[38] Even as Pym responded to these concerns, little of the putative financial assistance had been paid out to the Chagossians, more than a decade after the last of them had been expelled from the BIOT. The Foreign Secretary at least had the good grace to recognise the false premise underpinning this for-public-consumption account of the Chagossians' treatment. Indeed, the FCO continue to be so unsettled by Pym's lack of equivocation that the final paragraph of his archived diplomatic note remains redacted on grounds of the risk it poses to the UK's international relations.[39] The note is, however, repeated in a later file which the FCO's assessors only partially redacted, revealing Pym's unvarnished appraisal of the Crown's actions:

> During the period in question, no British officials were resident on Diego Garcia, which was administered from Seychelles. No reliable records exist on what transpired between the local plantation managers and the Ilois when the plantations were closed and we doubt if any consultation that took place went beyond offering the Ilois a choice of destination. Certainly, remaining on Diego Garcia would not have been an option offered to them, since HMG had adopted a policy that Diego Garcia should be cleared of people.[40]

---

[35] UK National Archives, FCO 31/3461, Telegram Number 313 of 1 June 1982 (Madrid 011545Z to Priority FCO).

[36] For an explanation of the original justifications for the expulsions from the BIOT, see Frost and Murray (2015), pp. 268–272.

[37] UK National Archives, FCO 31/3461, Restricted Telegram from Francis Pym (FCO) to Immediate Certain Missions and Dependent Territories (Guidance Telegram Number 117 of 3 June 1982).

[38] See Snoxell (2008), pp. 119, 124.

[39] Freedom of Information Act 2000, s.27(1).

[40] UK National Archives, FCO 31/3462, Restricted Telegram from Francis Pym (FCO) to Immediate Certain Missions and Dependent Territories (Guidance Telegram Number 117 of 3 June 1982) para. 8.

Despite the FCO's success in concealing these facts in the decade since the expulsions concluded, this fabrication was on the cusp of unravelling. In the summer of 1982 the London-based Minority Rights Group revisited the uncomfortable issue of how the Chagossians' enforced expulsion could be justified when an armada had been sent to defend the Falklanders' right to self-determination. Their report offered a damning explanation for this disparity in treatment; '[i]t is difficult to escape the conclusion that the chief reason for the "paramount" treatment offered to the Falkland islanders is simply that their skins are white'.[41] The parallel attracted uncomfortable headlines and parliamentary attention.[42] The archival records indicate genuine apprehension as civil servants scrambled to brief ministers; although officials could quibble over particular details, the Minority Rights Group had exposed the FCO's falsehoods regarding the connection between the Chagossians and the islands, over the enforced nature of their removal and over the manifest failures in the financial assistance scheme.[43] The FCO's hurried initial response was simply to state that, in light of the 1982 compensation agreement, there was now '[l]ittle point dwelling on the past'.[44] When that hopeful line failed to stem the tide of questions, the civil servants responsible for the review felt obliged to recognise that official efforts to distinguish between the treatment of the Chagossians and Falklanders 'have been a bit facile and are insufficiently grounded in fact'.[45] They therefore set out to reinvent the FCO's dealings with the Chagossians, starting by 'quietly drop[ping] arguments based on the proposition that the majority of the Ilois were migratory labourers'.[46] But publically accepting the Chagossians' existence as a distinct community living within the BIOT created a conundrum; 'since the Ilois were *not* consulted about their wishes, other grounds *must* be added for the decisions taken'.[47] In short, internationally palatable justifications for the Chagossians' treatment needed to be generated, no matter how ahistorical they would be.

To respond to the new criticisms, these new justifications would have to enable the Crown to distinguish its treatment of the Falklanders and the Chagossians. The official account therefore came to emphasise factors which pointed towards the Falklanders, but not the Chagossians, enjoying a right to self-determination. The essence of this account was twofold, and it would go on to form much of the official justification for the Chagossians' treatment in subsequent litigation. The first limb

[41] Madeley (1982), p. 3. The Falklands comparison was also highlighted in a Granada Television documentary; World in Action, *Britain's Other Islanders* (21 Jun 1982).

[42] See P. Brown, 'Britain's "Savage Treatment of Island People"' *The Guardian* (9 Aug 1982); Editorial, 'We were not all Chagans then' *The Times* (10 Aug 1982).

[43] UK National Archives, FCO 31/3462, W.N. Wenban-Smith, *Draft Submission: The Ilois and the Falklanders* (29 September 1982) para. 5.

[44] UK National Archives, FCO 31/3462, Anonymous Note, 'Minority Rights Group Report: Defensive Points' (undated).

[45] UK National Archives, FCO 31/3462, W.N. Wenban-Smith (East African Department) to N.C.R. Williams (Head of UN Department) (29 September 1982) para. 1.

[46] ibid., para. 2.

[47] UK National Archives, FCO 31/3462, W.N. Wenban-Smith, *Draft Submission: The Ilois and the Falklanders* (29 September 1982) para. 5 (emphasis in the original).

of this justification asserts that the Chagossians were not a "people" for the purposes of the law of self-determination 'because they did not possess a sufficiently clear identity and a sufficient number of common characteristics to make them an *identifiable social entity*'.[48] To advance this claim the FCO had to skirt the Chagossians' unique status as citizens of both Mauritius and citizenship of a British Overseas Territory, by virtue of their continued residence after the BIOT's creation.[49] Instead, the UK's commitment to return the islands to Mauritius once they were of no further defence use was used to intertwine the Chagossians interests with those of Mauritius.[50] Self-determination attaches to a people as a whole, and the FCO was effectively maintaining that the Chagossians did not amount to a people but a minority group within the Mauritian people (who had already attained independence).[51]

This approach was bolstered by a new variation upon the old "migrant labour" canard. The FCO accepted that a settled community of Chagossians existed on the islands, but maintained that they had few of the trappings of society which they would expect of a people; they 'were not a settling and self-sustaining community with its own institutions and civil administrations such as were built up over many years in the Falklands'.[52] Ironically, the Falklands colony was so sparsely populated that these institutions were slow to emerge; until the 1970s the Legislative Council was dominated by appointed members and much of the economic life on the islands was controlled by the Falkland Islands Company.[53] In any event, international law accords little weight to a colonising state's perception of a people's readiness to exercise self-determination. Instead the UN Charter imposes the 'sacred trust' upon a colonising state to develop self-government within non-self-governing territories.[54] The UK, of course, had short-circuited these aspirations through the Chagossians' enforced removal. This opportunistic reliance upon the UK's own failures as a colonising power to develop institutions on the Chagos further undermines contentions that the FCO was ever seriously engaged with the UK's Charter responsibilities towards the BIOT's populace.[55]

The second justification for the Crown's conduct was that even if the Chagossians did enjoy a right to self-determination it was trumped by defence interests:

---

[48] UK National Archives, FCO 31/3464, P.J. Roberts (UN Department) to W.N. Wenban-Smith (East African Department) (29 September 1982) para. 5 (emphasis in the original).

[49] Mauritius Independence Act 1968, s.5. UK National Archives, FCO 31/2768, A.D. Watts (FCO Legal Counsellor) to M.W. Hewitt (East African Department) (16 April 1980).

[50] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982), para. 6(i).

[51] See Thornberry (1989), pp. 867, 876.

[52] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982), para. 10(i).

[53] See Jenkyns (1902), p. 5.

[54] Charter of the United Nations (1945) 1 UNTS XVI, Article 73.

[55] See Allen (2007), pp. 441, 446.

> HMG, like other sovereign governments, has a primary obligation to ensure the security of its population as a whole; and this consideration must on occasion take precedence over the immediate interests of particular small groups of individuals.[56]

Defence concerns and "the greater community good" were therefore dominant in these evolving official justifications for the Chagossians' treatment. This assertion of imperial interests to the exclusion of the interests of the BIOT's populace was not universally convincing even within the FCO. Legal advice warned that '[i]t is far from clear … that the right to self-determination is subordinate to the defence needs of the central government'.[57] Authorities dating back to Blackstone denied the existence of any executive power of exclusion which is not explicitly provided for by statute.[58] Such an assertion of imperial interests would, moreover, seemingly apply no differently to the Falklanders. If this really was the essential criteria upon which the treatment of the Chagossians turned, then the Falklanders could equally be removed from their homeland against their wishes on this basis if doing so advanced general defence policy. Some additional ground would therefore be needed to justify this very different treatment.

7.4 Imperial Constitutionalism: To Colonise and Divide

In the course of crafting responses to the Minority Rights Group Report no official came close to conceding that racism was at work in the FCO's very different approaches to the community wishes of the Chagossians and Falklanders. FCO officials would subsequently express horror when they were eventually confronted with documentary evidence of the senior mandarins who had authorised the expulsions of the 1960s and 1970s dismissing the Chagossians as 'Men Fridays'.[59] But the imperial constitutional order which they administered nonetheless served to institute and reinforce a narrative of the superiority of settler communities over colonised groups.[60]

Imperial constitutionalism first distinguished between different types of colony based on the manner in which they were created. As we have seen, settled colonies saw the common law accompany settlers overseas, whereas in conquered or ceded colonies the bulk of local law operative at the date the colony became part of the British Empire remained in effect.[61] By the middle of the nineteenth century, however, this supposed common-law inheritance was already being marginalised. The

---

[56] ibid., para. 10(ii).

[57] UK National Archives, FCO 31/3462, D.H. Anderson (FCO Legal Advisor) to W.H. Wenban-Smith (East African Department) (29 September 1982).

[58] See Blackstone (1979) Bk 1, ch 1, pp. 137–138.

[59] See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2013] EWHC 1502 (Admin), [59]–[60].

[60] See Knox (2016), pp. 81, 104–108.

[61] See Twomey (2009), p. 47.

Colonial Laws Validity Act operated to prevent legal challenges through the London courts to colonial legislation.[62] In the early twentieth century some commentators continued to insist, in spite of this legislation and the 'inheritance' concept only having been explicitly linked to settled colonies, that the common law did have some immediate impact in conquered and ceded colonies, to the effect that 'any laws contrary to the fundamental principles of English law, eg torture, banishment, or slavery, are *ipso facto* abrogated'.[63] This would imply that although much of the law applicable in the Chagos Islands was French in origin right up until the 1980s, some historic precepts within English law (and in particular Magna Carta's prohibition of banishment[64]) were spliced into the legal order as soon as it was ceded to the Crown in 1814. The Chagossians would, however, ultimately be denied even this limited common-law inheritance.

The distinct arrangements for legal orders in settled, as opposed to ceded or conquered, colonies were intended to ensure that the populations in question continued to be governed by familiar law (also maintaining the fiction that settler colonies were always occupying *terra nullius*). But the distinction fostered a profoundly different approach to colonial governance; settlers 'had a strong sense of their rights and liberties as transplanted Englishmen', and within the settled colonies they expected a concomitant degree of self-government.[65] In settled colonies, therefore, the Crown did not enjoy the power to legislate by Orders in Council and many successful settler colonies had, by the mid-Victorian era, developed into self-governing dominions.[66] In Crown Colonies, by contrast, governance was in the first instance conducted under the royal prerogative by Orders in Council. This system of governance could, however, be displaced. The Falkland Islands, for example, had been recognised as a Crown Colony soon after it was created, but in 1887 the UK Parliament passed legislation authorising the delegation of the Queen's law-making powers to institutions within a settled territory which had previously enjoyed 'no civilised government'.[67] The terms of this legislation expressly excluded conquered or ceded colonies[68]; which would have to be specifically granted some self-governing representative legislature by Parliament. If such a grant was made (as in the case of the Falkland Islands), the Crown's power to legislate by Order in Council would be displaced, unless explicitly reserved.[69] If it was not, then Orders in Council would almost invariably provide that within a Crown Colony the colonial authorities were permitted broad powers to make regulations for the peace, order and good government (as would be the case in the BIOT).[70]

---

[62] Colonial Laws Validity Act 1865, s.2 and 3.

[63] Jenkyns (1902), p. 6.

[64] Magna Carta 1297, art.29.

[65] Petley (2011), pp. 393, 396.

[66] Jenkyns (1902), p. 95.

[67] British Settlements Act 1887, s.3 and preamble, replacing earlier Falklands-specific legislation.

[68] ibid., s.6.

[69] *Campbell v Hall* (n.22) 898.

[70] British Indian Ocean Territory Order 1965, s.11(1).

Case law indicates how little these legal powers over Crown Colonies were constrained by constitutional principles at the height of Empire. In the *Sekgoma* case a tribal chief from the Bechuanaland Protectorate was indefinitely detained outside the Protectorate by proclamation of the colonial authorities who claimed to be concerned about the possibility of violence between rival tribal factions if he was allowed to remain free.[71] Although the territory in question was a protectorate and not a colony, legislation granted the High Commissioner comparable powers to those operative within a ceded or conquered colony.[72] Sekgoma's legal representatives argued that even under the broad rubric of powers for 'peace, order and good government' the colonial authorities had no power to act contrary to fundamental constitutional principles by denying habeas corpus. The Court of Appeal, however, refused to find that any such principles constrained official action in the context of a Protectorate (by extension the same approach would apply to a Crown Colony). Kennedy LJ insisted that the High Commissioner's ability to act as he thought was required by peace, order and good government was 'especially just and necessary where, as is the case here, the trustee has to govern a large unsettled territory, peopled by lawless and warlike savages, who outnumber the European inhabitants by more than one hundred to one'.[73] For Michael Lobban;

> The judges' very formalistic interpretation of the law … is perhaps to be explained by their confidence in the probity of the colonial officials, and in their racially informed understanding of the colonial context, which made them think such draconian measures were necessary.[74]

Just as in the self-governing settler colonies, the role played by overarching constitutional principles derived from long-standing statutes and common law rules within the UK's domestic legal orders was therefore being downgraded in Crown Colonies in the late-nineteenth and early-twentieth centuries. The developments in self-governing colonies, however, were intended to limit the interference of London's institutions in the governance of the emerging dominions.[75] The denial of UK constitutional principles in Crown Colonies and Protectorates furthered very different ends; it was intended to free colonial governance from constraints which were increasingly regarded as unsuited to the demands of maintaining imperial domination of conquered or ceded lands.

---

[71] *The King v The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576.

[72] Foreign Jurisdiction Act 1890, s.1.

[73] *The King v The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576, 627. Similar concerns motivated Vaughan Williams LJ who, at 609–610, characterised the Protectorate as a territory in which 'a few dominant civilized men have to control a great multitude of the semi-barbarous' and Farwell LJ who, at 615, insisted that 'acts [such as the Habeas Corpus Act], although bulwarks of liberty in the United Kingdom, might, if applied there, well prove the death warrant of the whites'.

[74] Lobban (2015), pp. 27, 47.

[75] This shift responded to a particular strain of constitutional thought long-prevalent in settler societies, which prioritised a governance order which did not mirror that of the UK, but instead provided for 'the same guarantees of government by consent and rule of law enjoyed in the home islands'; see Greene (1994), pp. 16, 48.

Imperial constitutionalism had developed to categorise conquered or ceded colonies which had not been explicitly granted a measure of self-governance as spaces in which the Crown's control was under sustained existential threat. It operated to ensure that colonised populations could be governed as the colonial authorities chose, safe in the knowledge that the courts in London would not intervene and that the colonised population would not have the same access to supportive lobbies in Westminster as settler communities. Writing shortly after the *Sekgoma* decision Dicey felt obliged to admit that 'it may turn out difficult, or even impossible, to establish throughout the Empire that equal citizenship of all British subjects which exists in the United Kingdom'.[76] In short, given the imperative of maintaining control over colonised peoples, equality before the law was being acknowledged as off the imperial constitutional agenda. If there was subsequently a single overriding difference between the Chagossians and the Falklanders it was therefore that only the latter were, in the words of one *Times* editorial, treated as 'kith and kin' by Whitehall and Westminster.[77] This factor determined the very different development of the structures of colonial government in both territories, which in turn allowed officials to treat one group as a people deserving of self-government and to grant no say to the other. By the 1980s these distinctions had become so entrenched that the FCO could close its eyes to the underlying role that race played in their creation.

Little of the FCO archival material from 1982 explicitly conceives of the distinction between the Falklanders and the Chagossians in terms of the divide between settled and ceded colonies. The imperial constitution was out of keeping with the spirit of decolonisation and justifications needed to be developed which better reflected the demands of the contemporary international law of self-determination. Imperial constitutionalism was, in short, being airbrushed out of the picture by a generation of FCO officials for whom its tenets had become something of an embarrassment. The history of colonial governance could even be shrewdly presented as having led astray a previous generation of FCO officials. The department's 1982 advice sought to present those authorising the Chagossians' removal as not having been alive to the implications of the right to self-determination when they acted. Scorn not their simplicity, this excuse goes, for they did not fully appreciate the application of international law to their actions.[78] They were of a different era, and the FCO could now present itself as being 'more sensitive' to issues of self-determination.[79] The FCO need not, as a result, dwell on failings which occurred in an imperial epoch which had passed.

This argument amounted not simply to the introduction of retrospective justifications for FCO actions, but to doctoring the history of the Chagos dispute. In the 1960s imperial constitutionalism and concerns over international law, in the guise of the law of self-determination, had meshed in official thinking after the creation of

[76] Dicey (1915/1982), liv.

[77] Editorial, 'We were not all Chagans then' *The Times* (10 Aug 1982).

[78] Pre-Charter accounts of international law advanced by many nineteenth-century commentators certainly gave little protection to the interests of 'uncivilised natives'; Westlake (1894), p. 47.

[79] UK National Archives, FCO 31/3463, P.L. Hunt (East African Department), *Draft Submission: The Ilois and the Falklands Islanders* (7 October 1982) para. 9(a).

the BIOT. The colony could be administered with scant regard for the Chagossians' interests because it was treated as a ceded colony. And as FCO officials recognised in 1982 their predecessors had explicitly concluded that the Chagossians had to be expelled or else the UN Special Committee on Decolonisation would have had the responsibility for overseeing the UK's governance of the BIOT's colonised population.[80] The ministers and officials who had ordered the islanders' expulsion were therefore acutely aware of the law of self-determination, and of how imperial constitutionalism offered a means to circumvent it. And much as their successors at the FCO might resent it, the precepts of imperial constitutionalism would thereafter become central to their evolving legal justifications for the continued exclusion of the Chagossians.

7.5 The *Bancoult* Litigation: Reviving Imperial Constitutionalism?

Imperial constitutionalism framed the facts on the ground in the *Bancoult* litigation. It explained why the settled Falkland Islands had their own institutions, whereas the ceded colony covering the Chagos Islands could still be ruled by executive fiat with regard to no more than the interests of 'peace, order and good government'. In these circumstances it can hardly be surprising that when the Chagossians took their fight for a right to return to their homeland to the UK courts the disparity between the distinct constitutional paradigm applicable to ceded colonies and the UK's contemporary constitutional arrangements was thrown into stark relief. In this litigation imperial constitutionalism came to play an overt role in the Crown's justifications for its decisions. This section of our account does not attempt to systematically recount the successive rounds of litigation which began in the late 1990s, a task undertaken by others in this volume. Instead we focuses upon how the Crown resorted to imperial constitutionalist arguments to bolster its case for maintaining the Chagossians' exclusion.

The first instalment of the *Bancoult* litigation saw the Chagossians launch a judicial review challenging the legality of the Immigration Ordinance 1971 which excluded them from the Chagos archipelago. Acting on the FCO's behalf David Pannick QC relied upon multiple aspects of imperial constitutionalism in his defence of this measure. His first argument was that the 1971 Ordinance had been promulgated under the BIOT Order 1965 and was therefore the work of the BIOT authorities and not the UK Government.[81] Second, as the BIOT is a ceded Crown Colony, legislative authority derived from the prerogative, supposedly further limiting the scope for judicial review.[82] Third, questioning this legislative authority on

[80] ibid., para. 6(i).

[81] *Bancoult* (No 1) (n.31), 1072–1073.

[82] ibid., 1073.

the basis of fundamental constitutional principles applicable within the UK would run contrary to the legislative autonomy granted to colonial law makers under the Colonial Laws Validity Act (provided they did not breach an Act of Parliament in their law making).[83] Fourth, Pannick maintained that the standard imperial formula of authorising legislative acts for 'peace, order and good government' was sufficiently broad to enable the enactment of the Immigration Ordinance.[84] Fifth, human rights grounds were excluded from consideration because the UK had not extended its membership of the ECHR to cover the BIOT.[85] So comprehensive was this panoply of imperial firewalls against the Chagossian claims that the FCO's legal team relegated any discussion of the economic viability of settlement, of national security concerns or of treaty commitments to the United States to the tail end of their argument.[86]

This confidence was to prove misplaced, for the Laws LJ and Gibb J proceeded to displace some of what they perceived to be the outdated precepts of imperial constitutionalism. They first rejected the FCO's attempt to assert the doctrine of the divisibility of the Crown to persuade the Court not to entertain the case. Having identified competing strains in the jurisprudence relating to habeas corpus claims from the Empire reaching the London courts the judges were satisfied that 'this court owns ample jurisdiction to make the order sought in this case'.[87] This refusal to leave the issue to the BIOT Supreme Court was spurred by the recognition that the record established that 'the making of the Ordinance and its critical provision—s.4—were done on the orders or at the direction of Her Majesty's Ministers here, Her Ministers in right of the government of the United Kingdom'.[88] The Court's second departure from imperial constitutionalism was more abrupt than exercising a discretion to hear a case that some historic jurisprudence called into question. Successive Privy Council decisions had maintained that the formula of granting powers for 'peace, order and good government' should be taken to 'connote, in British constitutional language, the widest law-making powers appropriate to the sovereign'.[89] Gibb J faced down this account, refusing to interpret this wording as 'a mere formula conferring unfettered powers on the Commissioner'.[90] For Laws LJ such a law-making power 'may be a very large tapestry … every tapestry has a border', and good government could not be interpreted to include the exclusion of an entire people subject to its authority.[91]

---

[83] ibid., 1073.

[84] ibid., 1073–1074.

[85] ibid., 1074.

[86] ibid., 1074.

[87] ibid., [28] (Laws LJ).

[88] ibid., [28] (Laws LJ) and [66] (Gibb J).

[89] *Ibralebbe v The Queen* [1964] AC 900, 923 (Viscount Radcliffe) (PC). See also *Riel v The Queen* (1885) 10 App Cas 675, 678 (Lord Halsbury).

[90] *Bancoult* (No 1) (n.31), [69].

[91] ibid., [55].

Some elements of imperial constitutionalism could not, however, be undone by the High Court. Although the division of settled and ceded colonies amounted to an 'arcane distinction',[92] the Court ultimately accepted that it was so embedded in the statutes underpinning the imperial constitution that it could not simply be wished away. Magna Carta, as a consequence, did not extend to the Chagos,[93] and settled interpretations of the Colonial Laws Validity Act which the High Court did not consider itself to be in a position to question furthermore blocked claims based upon fundamental constitutional principles (and, by implication, common law fundamental rights).[94] Cautious that 'we are in this case treading in the field of colonial law'[95] the judges explicitly refused to extend the precepts of liberal constitutionalism into any of these aspects of the dispute:

> We should … ourselves affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing.[96]

These aspects of imperial constitutionalism would return to haunt the *Bancoult* litigation.

It is simplistic to draw a direct connection between this decision and that of the House of Lords in *Bancoult (No 2)* 8 years later.[97] The second round of *Bancoult* litigation, after all, involved different legal measures and questions which had not previously been litigated, in particular the feasibility of resettlement on the Chagos archipelago's outlying islands, and national security claims that had only been touched upon in the earlier decision. Nonetheless, in many respects the judges hearing this subsequent litigation had to re-tread the debates over the nature of imperial constitutionalism. The second round of litigation commenced when the FCO asserted that, following studies which had been instituted in response to the decision in *Bancoult* (No 1), resettlement on the outer islands was not feasible. The FCO therefore promulgated a new constitution of the BIOT and immigration ordinance blocking any right of abode on the Chagos islands.[98] The High Court and Court of Appeal accepted the Chagossian contentions that these new Orders in Council should be struck down, but by a three-to-two majority the House of Lords upheld the Chagossians' continued exclusion. A range of reasons has been advanced for this outcome, from slick advocacy on the FCO's behalf by Jonathan Crow QC,[99] to suggestions that the majority of the panel of judges were ideologically predisposed

[92] ibid., [68] (Gibb J).

[93] ibid., [36] (Laws LJ) and [68] (Gibb J).

[94] ibid., [44] (Laws LJ).

[95] ibid., [42] (Laws LJ).

[96] ibid., [43] (Laws LJ).

[97] Some commentators have been unable to resist the temptation to label the outcome of *Bancoult* (No 1) 'right', and *Bancoult* (No 2) 'wrong'; see Juss (2017), p. 270.

[98] BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004.

[99] Paterson (2013), p. 55.

towards limited constraint upon official action.[100] There would even be a 2016 challenge on the basis that the Court had been denied access to information important to its decision.[101] We contend that far from the FCO's legal team 're-defining the merits' of the case,[102] the official arguments remained remarkably consistent across the litigation. This case was distinctive because it concerned ground which had not been fully traversed in *Bancoult* (No 1) and because the Crown was able to reinforce its submissions in light of newly published research on the imperial constitution. Moreover, although the make-up of the panel was undoubtedly significant, the imperial constitutional background to the decision makes it particularly difficult to apply understandings of judicial behaviour derived largely from the domestic constitutional context. And the Supreme Court, as we shall see, ultimately rejected contentions that the material not put before the House of Lords would have made such a material difference to proceedings as to require the case to be reheard.

To explain the outcome of *Bancoult* (No 2) we therefore need to evaluate how the panel of Law Lords engaged with claims predicated upon imperial constitutionalism. As the new immigration restrictions were embodied in a distinct Order in Council the dispute could no longer be boiled down to the determination of whether a colonial official had exceeded his powers. The Divisional Court and Court of Appeal therefore found themselves obliged to wrestle with the Colonial Laws Validity Act in a way that the High Court in *Bancoult* (No 1) had avoided in the *ultra vires* basis for its judgment. In the Court of Appeal Sedley LJ jumped straight into the fray with a contentious[103] assertion that the 1865 Act only protected validly made colonial law against challenge.[104] But he thereafter devoted considerable effort to circumventing the effect of the Act. Sedley LJ insisted that because the ability to challenge the exercise of a prerogative power was not existent when the 1865 Act was enacted,[105] it was therefore open to question whether it should apply in such circumstances.[106] Under the UK's Constitution the 'courts are reluctant to construe any but an unequivocal statutory provision as denying people access to them for the redress of justiciable wrongs'.[107] For the Court of Appeal imperial constitutionalism

[100] Arvind and Stirton (2016), pp. 418, 430.

[101] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2016] UKSC 35; [2017] 1 AC 300.

[102] Paterson (2013), p. 55.

[103] Anne Twomey settled on the description 'inadequate'; Twomey (2009), p. 71.

[104] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] 3 WLR 768; [2007] EWCA Civ 498, [22] (Sedley LJ). This approach to the construction of an unwelcome statutory exclusion of jurisdiction seems to have been conditioned by the efforts of the House of Lords in *Anisminic* to interpret an ouster clause out of existence; *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, 170 (Lord Reid).

[105] The general reviewability of the prerogative would not be confirmed until *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[106] *Bancoult* (No 2) (CA) (n.104), [24].

[107] ibid., [25].

had been superseded by contemporary domestic constitutionalism,[108] and the time had come to neuter some of its core tenets. When the case reached the House of Lords two of the Law Lords cleaved closely to this approach of applying core constitutional values to invalidate the exclusionary provision in the Immigration Order.[109] Lord Bingham did not so much as pause to deal with the Colonial Laws Validity Act argument; for him it sufficed that he could find no prerogative power to exclude individuals from their homeland.[110] Lord Mance followed suit by summarily dismissing arguments about the significance of the 1865 Act. Freed from the shackles of this legislation he maintained that fundamental constitutional values provided a basis for finding the Order invalid; 'the common law position must in my opinion be that every British citizen has a right to enter and remain in the constitutional unit to which his or her citizenship relates'.[111] His own twist on imperial constitutionalism was to maintain that such public law principles should be taken to apply in full to the BIOT, as they would in a settled colony.[112]

Imperial constitutionalism had, however, struck back against this approach, in the shape of John Finnis' critique of the Court of Appeal decision.[113] Finnis' working paper exerted a profound influence over the decisions of the three other Law Lords hearing the UK Government's appeal.[114] On the interpretation of the 1865 Act Lord Rodger[115] and Lord Carswell[116] bought into Finnis' central contention that Sedley LJ's decision 'rhetorically takes but rationally fails the test of history and logic'.[117] Finnis had maintained that on the basis of the 1865 Act the courts could not assert that the Orders in Council were repugnant in light of constitutional principles.[118] Drinking deep from this well of imperial constitutionalism both judges made short work of claims that colonial administrators had acted *ultra vires* the concept of 'peace, order and good government' which had been reaffirmed in the new Constitutional Order as the basis for law-making in the BIOT.[119] Lord Rodger

[108] In particular an implicit allusion to the principle of legality derived from *R v Secretary of State for the Home Department, ex parte Simms* [1999] 3 All ER 400, 412 (Lord Hoffmann).

[109] BIOT (Immigration) Order 2004, s.9.

[110] *Bancoult* (No 2) (n.33), [71].

[111] ibid., [154].

[112] ibid., [155].

[113] Finnis (2008).

[114] The research paper would go on to underpin one of Oxford University's Research Excellence Framework Impact submissions; http://impact.ref.ac.uk/CaseStudies/CaseStudy.aspx?Id=14595.

[115] *Bancoult* (No 2) (n.33), [98].

[116] ibid., [126].

[117] Finnis (2008), p. 10.

[118] The speeches of Lord Rodger and Lord Carswell are difficult to follow on this precise issue. Lord Rodger accepted that the 1865 Act prevented the courts from finding a colonial law repugnant to constitutional principle, but asserted, at [103], that this interpretation did not exclude judicial review. This position was, however, muddied by his claim, at [105], to be following Lord Hoffmann on the issue of the 1865 Act. Lord Carswell asserted the applicability of the 1865 Act despite, at [122], accepting that the orders were reviewable, without reconciling these statements.

[119] BIOT (Constitution) Order 2004, s.15.

and Lord Carswell were so respectful of Finnis' articulation of imperial constitutionalism that they did not pause to consider whether it was within their capacity to alter its terms by reinterpreting the 1865 Act. Lord Carswell, indeed, went so far as to cloak his decision to strictly apply the terms of the 1865 Act in religious garb as a 'rule of abstinence'.[120] If Sedley LJ consciously side-lined precedents which he considered to have been rendered inappropriate by intervening shifts in constitutional values, these two Law Lords, who formally had much greater scope to innovate, were rather more hidebound in their approach.

With the court split, Lord Hoffmann found himself in a decisive position. He was also influenced by Finnis' arguments regarding the Colonial Laws Validity Act, going so far as to repudiate much of the Court of Appeal's language.[121] But he nonetheless concluded that in this instance the UK courts were engaged in reviewing Orders in Council passed under prerogative powers, and that in such circumstances they were not 'colonial law' protected by the 1865 Act.[122] He therefore found that the Orders were subject to judicial review.[123] Ultimately, however, he refused to accept that they were invalid. In reaching this conclusion he skipped over the historic abuses inflicted upon the Chagossians in the interests of focusing on the 'practicalities of today'.[124] This was an approach directly influenced by Finnis' assault upon the Court of Appeal decision for a 'loss of perspective'; in short that 'quasi-factual' assertions about the Chagossians' loss of homeland had distracted the Court from Crown's responsibility to secure the defence interests of the imperial whole.[125] Lord Hoffmann set out to right what Finnis called this 'evil',[126] categorising the Chagossians' current interests as no more than those of public protest and unsurprisingly finding such interests outweighed by 'the defence and diplomatic interests of the state'.[127] Community life on the Chagos islands offered no additional counterweight to support their claims (as it had for Sedley LJ in the Court of Appeal[128]); 'The Chagossians have … shown no inclination to return to live Crusoe-like in poor and barren conditions of life'.[129] The mirroring of the language of the FCO's infamous dismissal of

[120] *Bancoult* (No 2) (n.33), [130] (Lord Carswell); see also [109] (Lord Rodger).

[121] ibid., [39].

[122] ibid., [40].

[123] Twomey questions whether this approach is reconcilable with Parliament's intention in enacting the Colonial Laws Validity Act; Twomey (2009), pp. 67–69.

[124] ibid., [53]. When the case returned to the Supreme Court in 2016 Lord Kerr was particularly critical of this approach; 'The fact that their removal, when it in fact occurred, was unreasonable cannot, in my opinion, be left out of account in assessing whether the subsequent decision to perpetuate the Chagossians' exile was rational'. *Bancoult* (No 2bis) (n.101), [117].

[125] Finnis (2008), p. 16.

[126] ibid., 16.

[127] *Bancoult* (No 2) (n.33), [53]. The other majority judges made it clear that they also accorded overriding weight to the defence and security issues at stake in this case; [113] (Lord Rodger) and [132] (Lord Carswell).

[128] *Bancoult* (No 2) (CA) (n.104), [71].

[129] *Bancoult* (No 2) (n.33), [55]. In light of the dismissal of the Chagossians as "Men Fridays" in the 1960s this turn of phrase is singularly ill-considered.

the Chagossians in the late 1960s as 'Men Fridays' underscores how Lord Hoffmann was prepared to just as readily dismiss their interests. Later judges may have emphasised the richness of the Chagossians' community life, but Lord Hoffmann's marginalisation of these interests was, at this juncture, decisive.[130]

The House of Lords majority thereby 'affirmed the utilitarian importance of the imperial interests at stake' in the case.[131] The FCO's 1980s reworking of the official justifications for the Chagossians' enforced exclusion, drawing upon the supposedly backward nature of society on the Chagos Islands and the primacy of imperial defence interests over countervailing community claims, had triumphed. Not that those anguished officials need have bothered to reconstruct the official justifications on these grounds to win over John Finnis. He had formed his view of the sentimentality of the decisions in *Bancoult* (No 1) and the Court of Appeal based on his reading of the original justifications offered for the expulsions in the 1960s and released in the course of litigation. He found 'more truth' in one 1966 explanation which he endorsed 'than in the judicial rhetoric about loss of homeland'.[132] In doing so Finnis' account of the *Bancoult* litigation became more executive-minded than that of the executive; he reiterated and gave credibility to debunked claims that the Chagossians amounted to no more than '100 or so second-generation inhabitants' and declared the Chagossians to be no different from other Mauritians long after the FCO had abandoned this conceit.[133] Summarily ending an entire people's way of life so as to avoid UN scrutiny of their treatment as a colonised population became, for Finnis, no different from relocating a village in Wales to make way for a dam.[134] And once this false premise had taken root in the minds of the majority judges deciding the case then it is little wonder that they could see no place for international law in their thinking[135] and even conclude that no active legal rights were at stake.[136]

7.6 The *Bancoult* Litigation (and Its Aftermath): Side-Lining Imperial Constitutionalism?

Bancoult (No 2) has been called 'pyrrhic public law', with a House of Lords' majority asserting principles (especially that executive actions are reviewable even when taken under prerogative powers) which are not ultimately employed to constrain

[130] *Bancoult* (No 2bis) (n.101), [84].

[131] Frost and Murray (2015), p. 287. Endorsed by Baroness Hale in *Bancoult* (No 2bis) (n.101), [188].

[132] Finnis (2008), p. 17.

[133] ibid., 17.

[134] ibid., 17.

[135] *Bancoult* (No 2) (n.33), [66] (Lord Hoffmann) and [116] (Lord Rodger). This approach stands in contrast to Lord Mance, who drew upon the Article 73 of the UN Charter in his judgment at [145]. The majority's brusque dismissal of the relevance of international law on colonisation stands as testament to how close their own imperial constitutionalism cleaved to nineteenth-century visions.

[136] ibid., [136] (Lord Carswell).

executive action in the Court's decision.[137] But one of the great agonies of this case is that even if such principles were fully applied, the Chagossians would have gained no more than a pyrrhic victory in legal terms. The UK Government remains the sole owner of all of the property on the Chagos islands and can exercise its title in an exclusionary manner.[138] No matter the manifest weaknesses of the majority decision in *Bancoult* (No 2), imperial constitutionalism provided no more than a supplementary basis for maintaining the islanders' exclusion. That issue notwithstanding, the impact of the *Bancoult* litigation on subsequent litigation arising from the imperial context is worth examining, especially as factual context of the Chagossians' exclusion continues to shift, opening new opportunities for legal challenge.

The supposed divisibility of the Crown was an important issue in *Bancoult* (No 2). If the Crown was not 'one and indivisible' within the UK and its overseas territories,[139] and ministerial actions could as a consequence only be justified with regard to the specific colony to which they related, then broader "imperial" defence and security concerns could not have counterbalanced the Chagossians interests. But imperial constitutionalism had fashioned divisibility as a tool which could be invoked at the FCO's discretion; in many cases (including *Bancoult* (No 1)) ministers insisted that the London courts should reject actions on the basis that the divisibility of the Crown meant that they lacked jurisdiction. This development had its roots in tort. Challenges to colonial abuses which had involved actions for damages in tort could be excluded under the Crown Proceedings Act 1947 if they did not involve the Crown as it is constituted in the UK Government.[140] In one such case Megarry V-C went so far as to assert that 'it seems that for some purposes there are as many Crowns as there are independent realms'.[141] In *Bancoult* (No 1), with David Pannick QC's unsuccessful arguments that the court lacked the jurisdiction to hear the case,[142] these "divisibility of the Crown" arguments began leeching into public law challenges to the Crown's actions in the UK's remaining Overseas Territories. Thereafter, in *Quark Fishing*, a majority of Law Lords had relied upon divisibility of the Crown to deny that the removal of a fishing licence applicable to South Georgia and the South Sandwich Islands was an act by UK public authorities (even though all actions had been undertaken by the FCO).[143] In her dissenting judgment Baroness Hale consciously echoed Laws LJ in *Bancoult* (No 1) by characterising official efforts to shield actions taken by the FCO from litigation on the basis that

[137] Elliott and Perreau-Saussine (2009), p. 697.

[138] *Bancoult* (No 2) (CA) (n.104), [71] (Sedley LJ).

[139] See *In re Johnson* [1903] 1 Ch 821, 833 (HC) (Farwell J); *Theodore v Duncan* [1919] AC 696, 706 (HL) (Viscount Haldane).

[140] Crown Proceedings Act 1947, s.40(2)(b).

[141] *Tito v Waddell* (No 2) [1977] Ch 106, 231.

[142] *Bancoult* (No 1) (n.31), [28].

[143] *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529, [65] (Lord Hoffmann).

they were done in the name of a particular overseas territory as an 'abject surrender of substance to form'.[144]

Bancoult (No 2) curtailed the FCO's ability to invoke the divisibility of the Crown at will. Influenced by Finnis' writings (which crucially recognised that divisibility of the Crown hindered claims based upon imperial defence), Lord Hoffmann repudiated the position that he had advanced in *Quark Fishing* (that the measures in question in that case had been made solely by the Crown in right of South Georgia and the South Sandwich Islands).[145] As we have seen, he departed from Finnis in subsequently accepting that because such legislation was imperial and not colonial in character, it was therefore reviewable by the London courts notwithstanding the Colonial Laws Validity Act,[146] but his stance on this issue nonetheless provided a basis for advancing the paramountcy of imperial 'security and diplomatic interests'.[147] His reappraisal of *Quark Fishing* has had lasting significance in and of itself, with the courts now accepting that 'even if Her Majesty's government is acting in right of the colony or dependency in question, the courts of the United Kingdom have jurisdiction judicially to review its decisions'.[148] The importance of this shift was demonstrated in the Supreme Court's refusal to accept that claims regarding the divided nature of the Crown restricted its jurisdiction in *Keyu*.[149] This case involved an effort to use the courts to oblige the UK Government to establish a public inquiry into the killings of 24 unarmed civilians by a Scots Guards patrol during the Malaya Emergency in 1948. The FCO invoked *Quark Fishing* and maintained that the Court had no jurisdiction to hear the case because the Scots Guards were operating under the governing authority of the then Federation of Malaya, regardless of the extent to which the High Commissioner was taking direction from London.[150] Lord Mance applied such claims to the facts of the case, and noting that the Crown was not sovereign within the Federation of Malaya he concluded that the powers at issue 'must have been given to the King wearing the Crown of, and in the interests of, the United Kingdom'.[151] But he also took the time to debunk the *Quark* position, even though doing so was not necessary to the outcome of the case, expressly affirming Lord Hoffmann's position in *Bancoult* (No 2):

> Lord Hoffmann's revised views about the Crown's position when exercising powers on the advice of United Kingdom ministers in relation to dependent territories and his views about the potentially "amphibious nature" of an order in council relating to such a nature

[144] ibid., [95].

[145] *Bancoult* (No 2) (n.33), [48]–[49].

[146] ibid., [40].

[147] ibid., [58].

[148] *R (Barclay) v Secretary of State for Justice* [2014] UKSC 54; [2015] 1 AC 276, [57] (Baroness Hale).

[149] *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69; [2016] AC 1355.

[150] ibid., [181].

[151] ibid., [187].

> reinforce my conclusion that there is no reason to attempt to justify the Crown's military involvement in the Federation of Malaya in 1948 solely in terms of the Federation's Constitution.[152]

In short, the majority position in *Bancoult* (No 2) provided a foundation for Lord Mance's assertion in *Keyu* that, 'had the other conditions for ordering an inquiry been satisfied, there would be no jurisdictional obstacle to doing so'.[153]

Even after the discouraging outcome of *Bancoult* (No 2) few judges seem to have abandoned the idea of applying UK public law principles to public law cases arising out of overseas and dependent territories, and thereby narrow the gap between domestic and imperial constitutionalism. The boatload of refugees from Iraq, Sudan, Ethiopia and Syria who arrived at the UK Sovereign Base Area on Cyprus in 1998, and who have remained there in 'increasingly squalid' conditions ever since, found themselves drawn into a legal struggle akin to that of the Chagossians both in duration and in its terms being set by imperial constitutionalism.[154] The UK Government acknowledges that the group is made up of refugees, but has spent two decades fighting the application of the Refugee Convention and the ECHR on the basis that they do not cover the Dhekelia base.[155] As with the *Bancoult* litigation, the Crown insists that a desiccated constitutional order, shorn of any such international obligations, has applied since the base areas came into being as part of the treaty granting independence to Cyprus.[156] On this basis the Home Secretary refused to admit the group to the UK, a decision which was subsequently challenged by judicial review. The *Bashir* case[157] turned on whether the international legal obligations applicable to Cyprus as a colony were extinguished on the island's independence or continued to apply to the Sovereign Base Areas. The decision therefore turned on whether *Bancoult* (No 2)'s position, that the creation of the BIOT as a 'new political entity' broke the link to any treaties previously applicable to its parent colonies of the Seychelles and Mauritius, was equally applicable to the Cyprus base.[158] Irwin LJ led the Court of Appeal in ruling that *Bancoult* (No 2) could be distinguished. Whereas the BIOT had been 'created by grafting together portions of territories from two different existing colonies'[159] no such break point had existed on Cyprus;

---

[152] ibid., [187].

[153] ibid., [202]. This majority position is, of course, most clearly expressed in the speeches of Lords Mance, Bingham and Hoffmann.

[154] See the UK Borders Agency's own assessment of the conditions experienced by the group; *R (Bashir) v Secretary of State for the Home Department* [2016] EWHC 954 (Admin), [2016] 1 WLR 4613, [163] (Foskett J).

[155] UN Convention Relating to the Status of Refugees, 189 UNTS 150 (1951).

[156] In contrast to earlier examples of treatment of people seeking asylum at UK overseas territories to which the Refugee Convention did not apply, notably at Hong Kong, the UK's commitment to acting in accord to the spirit of the Convention (see A. Ingram MP, HC Debs, vol. 384, col. 744W (30 Apr 2002)) has waned as the Dhekelia dispute wore on.

[157] *R (Bashir) v Secretary of State for the Home Department* [2017] EWCA Civ 397.

[158] *Bancoult* (No 2) (n.33), [64] (Lord Hoffmann).

[159] *Bashir* (n.157), [52].

independence had shrunk the previous colony to the territory of the sovereign base areas.[160] By this neat expedient the Court of Appeal prevented the Crown from once again following a path made possible by the position adopted by Lords Rodger, Carswell and Hoffmann in *Bancoult* (No 2).

The House of Lords' recognition in *Bancoult* (No 2) that the reviewability of prerogative powers extends to 'prerogative legislation in the form of an order in council', is now accepted as a general principle of public law.[161] Drawing upon the 'unanimous' acceptance in *Bancoult* (No 2) that 'the Orders in Council were amenable to judicial review in the courts of England and Wales'[162] Baroness Hale would recognise in *Barclay* (No 2), that even where Overseas Territories or Crown Dependencies are at issue, 'the courts of the United Kingdom do have jurisdiction judicially to review an Order in Council which is made on the advice of the Government of the United Kingdom acting in whole or in part in the interests of the United Kingdom'.[163] That the Court declined to strike down the Order in Council at issue in *Barclay* (No 2) speaks to its respect for the 'careful balance between the legislature, the executive and the judiciary' which existed on the Channel Islands in question.[164] Such assertions, even if made in the context of a Crown Dependency rather than an Overseas Territory, do tend to showcase imperial constitutionalism's continuing capacity to divide Overseas Territories based on their levels of institutional development. Those, like the Falkland Islands, which are granted some semblance of internal governance can use these levers to thwart excessive imperial demands.[165] This inexorably brings with it greater levels of self-governance, to the point where (if the colony does not gain independence) the Crown can no longer legislate by Order in Council and the London courts adopt a stance of distant guardian. Those which are not granted such governance structures, including the BIOT, remain yoked to the 'wintry asperity' of colonial law-making by the UK's executive branch.[166] Baroness Hale was nonetheless at pains to note that 'in an appropriate case'[167] even concerns over respect for the remit of the institutions operating in Crown Dependencies would be overridden. This caveat does not speak to a further retreat from applying the principles underpinning the UK's domestic constitution within external settings.

If they are to repair the damage to constitutional values inflicted by the 2008 *Bancoult* decision the London courts have to harness the jurisdictional unity of the "Empire" (which successive cases have now affirmed) and recognise that within the UK's Overseas Territories imperial interests do not trump any and all countervailing community and individual interests. Of all the judges who grappled these issues in

[160] ibid., [62].

[161] *Rahmatullah v Ministry of Defence* [2017] UKSC 1; [2017] 2 WLR 287, [56] (Baroness Hale).

[162] *Barclay* (n.148), [44].

[163] ibid., [58].

[164] ibid., [47].

[165] See Anson (1908), p. 65.

[166] *Bancoult* (No 1) (n.31), [28] (Laws LJ).

[167] ibid., [57].

the context of the *Bancoult* litigation, Clarke MR (as part of the Court of Appeal panel in 2007) came closest to such a reconceptualisation of the imperial constitution's operation:

> I would not accept that it [the Crown] must have sole, or perhaps even primary, regard for the interests of the Chagossians. As I see it at present, it should have regard to the interests of both the Chagossians and of the United Kingdom and reach a rational decision on any question which arises for decision.[168]

And the courts will likely still get a further opportunity to reconsider such a course, even after the Supreme Court's refusal, in 2016, to reopen the 2008 decision. This challenge saw the Chagossians claim that the FCO had not disclosed relevant documents containing information likely to have affected the factual basis on which the House of Lords proceeded.[169] The documents in question related to the studies of feasibility for resettlement, and cast doubt on the impartiality of expert reports relied upon by the House of Lords in 2008. All three majority judges had emphasised the finding that resettlement was unfeasible in their judgments.[170] Even the FCO accepted that the failure to disclose these documents was a breach of the duty of candour,[171] a failure in stark counterpoint to the judicial praise for the 'wholly admirable conduct' of officials in *Bancoult* (No 1) in disclosing all material documents even if they were 'embarrassing and worse'.[172] Although the Supreme Court has the power to reopen its own judgments, the majority refused to countenance this course of action in this case as there was 'no probability, likelihood or prospect (and, for completeness, … also no real possibility)' that consideration of the drafting documents could have caused the court to regard the Secretary of State's reliance on its final conclusions as irrational.[173]

This further setback for the Chagossians needs to be seen in the context of the limited nature of this challenge. Two Supreme Court justices considered that the documents in question 'illustrated the distinct change in emphasis in the prediction of climate changes … [which] bore directly on the question of the feasibility of resettlement'.[174] They champed at the bit to reopen the case and reexamine the lawfulness of the 2004 Orders, but even they acknowledged that '[t]he question for us is not whether the majority got the answer to that question wrong'.[175] For the majority, neither Lord Mance or Lord Clarke had much time for the 2008 outcome; Lord Mance maintained that he had not changed his 'opinion as to what would have been the appropriate outcome of the appeal',[176] and neither had Lord Clarke (having seen

[168] *Bancoult* (No 2) (CA) (n.104), [122].

[169] *Bancoult* (No 2bis) (n.101), [2] (Lord Mance).

[170] *Bancoult* (No 2) (n.33), [53] (Lord Hoffmann), [114] (Lord Rodger) and [121] (Lord Carswell).

[171] *Bancoult* (No 2bis) (n.101), [24] (Lord Mance).

[172] *Bancoult* (No 1) (n.31), [63] (Laws LJ).

[173] *Bancoult* (No 2bis) (n.101), [65] (Lord Mance).

[174] ibid., [164] (Lord Kerr).

[175] ibid., [190] (Baroness Hale).

[176] ibid., [2] (Lord Mance).

the Court of Appeal decision to which he had contributed reversed by the House of Lords in 2008).[177] Instead, they disputed the use of the expedient of re-opening the case on the basis of disclosure issues. Both accepted that the findings of a 2014–2015 resettlement study[178] changed the dynamic of the dispute and opened up the possibility of a fresh challenge to 'the government's refusal to permit and/or support resettlement as irrational, unreasonable and/or disproportionate … by way of judicial review'.[179]

The 2016 decision is therefore not 'the end of the road' for the Chagossians.[180] Indeed, any future litigation will benefit from the weakening of claims that within the Empire distinct constitutional principles predominate. *Bancoult* (No 2) was therefore a watershed moment. Following the furore surrounding that decision, later cases have seen the courts re-evaluate claims predicated upon imperial constitutionalism. If not all have been swept aside, the courts at least appear more wary of such claims than the majority in *Bancoult* (No 2). And as for the key legal instrument employed in the imperial management of the BIOT, legislation issued under the prerogative, subsequent cases have consistently reinforced *Bancoult* (No 2)'s message that it is subject to challenge on the basis of whether it adheres to constitutional principles. The majority judgment in *Miller* relied upon Lord Hoffmann's decision to affirm that '[e]xercise of ministers' prerogative powers must … be consistent both with the common law as laid down by the courts and with statutes as enacted by Parliament'.[181]

7.7 Conclusion

If the prospect of further interminable rounds of litigation (including, potentially, before the International Court of Justice[182]) cannot be a welcome prospect for the Chagossians, their litigation strategy will remain vitally important for as long as the UK Government continues to spurn other avenues for addressing the dispute. In November 2016, the UK Government announced that even in light of the new resettlement study there would be no pilot resettlement of the Chagossians on the BIOT's outer islands on the basis of cost, feasibility, defence and security interests. Ministers also confirmed that the US lease on the Diego Garcia airbase has now been renewed

[177] ibid., [77] (Lord Clarke).

[178] KPMG, *Feasibility Study for the Resettlement of the British Indian Ocean Territory* (31 Jan 2015).

[179] *Bancoult* (No 2bis) (n.101), [75] (Lord Mance) and [78] (Lord Clarke).

[180] ibid., [78] (Lord Clarke).

[181] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 WLR 583, [50] (Lord Neuberger).

[182] The Chagossians are supporting Mauritius' efforts to secure an ICJ Advisory Opinion over the legality of separating the BIOT from the colony of Mauritius prior to its independence. See Bowcott (2017).

until 2036.[183] These activities demonstrate that an explicitly imperial mind-set has persisted in the FCO through the entire Chagossian saga, dominated by conceptions of protection and the imperial good.[184]

Notwithstanding the apparent intractability of the dispute, the legal backdrop provided by imperial constitutionalism has undoubtedly shifted since 2008. The courts will thus remain a key arena in which the Chagossians can contest their treatment. The jurisdictional issues are now settled and the dubious factual underpinnings of the majority position in 2008 have been exposed. Many of the once-distinct aspects of imperial constitutionalism have been side-lined by courts in recent decisions. Freed from these distractions the Chagossians' litigation will, all but inevitably, return to the core issues of whether law-making in the interests of 'peace, order and good government' can encompass the enforced exclusion of an entire population and of the balance struck between Chagossian interests and the public (meaning imperial) interests asserted by the Crown.[185] In resolving this clash of interests, the assertion of fundamental constitutional principles within what remains of the imperial constitutional order is now long overdue.

References

Allen S (2007) Looking beyond the Bancoult cases: international law and the prospect of resettling the Chagos Islands. Hum Rights Law Rev 7:441

Anisminic v Foreign Compensation Commission [1969] 2 AC 147

Anson W (1908) The law and custom of the constitution, 3rd edn. Clarendon Press, Oxford

Arvind T, Stirton L (2016) Legal ideology, legal doctrine and the UK's top judges. Public Law 2016:418–430

Bell D (2009) The idea of greater Britain: empire and the future of world order, 1860–1900. Princeton University Press, New York

Bell D (2016) Reordering the world: essays on liberalism and empire. Princeton University Press, New York

Benton L, Ford L (2016) Rage for order: the British empire and the origins of international law, 1800–1850. Harvard University Press, Cambridge

Blackstone W (1979) Commentaries on the laws of England. University of Chicago Press, Chicago

Bowcott O (2017) EU members abstain as Britain defeated in UN vote on Chagos Islands. The Guardian. 23 June. https://www.theguardian.com/world/2017/jun/22/un-vote-backing-chagos-islands-a-blow-for-uk. Accessed 5 Jan 2018

British Settlements Act 1887, UK

Calvin's case (1608) 77 ER 377, 398

Campbell v Hall (1774) 98 ER 848

Chagos Islanders v Attorney-General [2003] EWHC 2222 (QB)

Charter of the United Nations (1945) 1 UNTS XVI

[183] A. Duncan MP, HC Debs, vol. 617, col. 11-12W (16 Nov 2016).

[184] See Benton and Ford (2016), pp. 190–191.

[185] It is beyond the scope of this contribution, but such issues raise the prospect of the application of proportionality outside the context of rights incorporated under the Human Rights Act 1998; see *Youssef v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] 1 AC 1457, [55] (Lord Carnwath).

Colonial Laws Validity Act 1865, UK
Cosgrove RA (1982) The rule of law: Albert Venn dicey, Victorian jurist. University of North Carolina Press, North Carolina
Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374
Crown Proceedings Act 1947, UK
Dicey AV (1915) An introduction to the study of the constitution, 8th edn. Liberty Fund, Indianapolis
Dicey AV (2008) Lectures on the relation between law and public opinion in England during the nineteenth century, 2nd edn. Liberty Fund, Indianapolis
Ekins R (2013) Constitutional principle in the Laws of the commonwealth. In: Keown J, George RP (eds) Reason, morality, and law: the philosophy of John Finnis. OUP, Oxford, p 396
Elliott M, Perreau-Saussine A (2009) Pyrrhic public law: *Bancoult* and the sources, status and content of common law limitations on prerogative power. Public Law 697
Epstein J (2012) Scandal of colonial rule: power and subversion in the British Atlantic during the age of revolution. CUP, Cambridge
European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953)
Finnis J (2008) Common law constraints: whose common good counts? Oxford Legal Studies Research Paper No 10/2008. Available via SSRN. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100628. Accessed 5 Jan 2018
Fitzpatrick P (1992) The mythology of modern law. Routledge, London
Foreign Jurisdiction Act 1890, UK
Freedom of Information Act 2000, UK
Frost T, Murray CRG (2015) The Chagos Island cases: the empire strikes back. N Ir Legal Q 66:263
Greene J (1994) The Jamaica privilege controversy, 1764–66: an episode in the process of constitutional definition. J Imp Commonw Hist 22:16–48
Hussain N (2003) The jurisprudence of emergency: colonialism and the rule of law. University of Michigan Press, Ann Arbor, p 35
Ibralebbe v The Queen [1964] AC 900, 923 (Viscount Radcliffe) (PC)
In re Johnson [1903] 1 Ch 821, 833 (HC)
Jenkyns H (1902) British rule and jurisdiction beyond the seas. Clarendon, London
Jennings I, Young CM (1938) Constitutional laws of the British Empire. Clarendon Press, Oxford
Juss S (2017) *Bancoult* and the royal prerogative in colonial constitutional law. In: Juss S, Sunkin M (eds) Landmark cases in public law. Hart, London, pp 239–253
Knox R (2016) Valuing race? Stretched Marxism and the logic of imperialism. Lond Rev Int Law 4:81–108
Kostal R (2005) A jurisprudence of power: Victorian empire and the rule of law. OUP, Oxford
Kritsiotis D, Simpson AWB (2009) The Pitcairn prosecutions: an assessment of their historical context by reference to the provisions of public international law. In: Oliver D (ed) Justice, legality and the rule of law: lessons from the Pitcairn prosecutions. OUP, Oxford, pp 93–126
Lino D (2016) Albert Venn Dicey and the constitutional theory of empire. Oxf J Leg Stud 36:751
Lobban M (2015) Habeas corpus, imperial rendition, and the rule of law. Curr Leg Probl 68:27–54
Loughton G (2004) *Calvin's Case* and the origins of the rule governing conquest in English law. Aust J Leg Hist 8:143–161
Mauritius Independence Act 1968, Mauritius
Madeley J (1982) Diego Garcia – a contrast to the Falklands. Minority Rights Group, London
Malagodi M (2015) Ivor Jennings's constitutional legacy beyond the occidental-oriental divide. J Law Soc 42:102
Mantena K (2010) Alibis for empire: Henry Maine and the ends of liberal imperialism. Princeton University Press, New York
McHugh P (2014) "The most decorous veil which legal ingenuity can weave": the British annexation of New Zealand (1840). In: Grotke K, Prutsch M (eds) Constitutionalism, legitimacy, and power: nineteenth-century experiences. OUP, Oxford, pp 300–322

McLachlan C (2014) Foreign relations law. CUP, Cambridge
Morley J (1879) The life of Richard Cobden, vol II. Chapman & Hall, London
Paterson A (2013) Final judgment: the last law lords and the Supreme Court. OUP, Oxford
Petley C (2011) "Devoted Islands" and "that madman Wilberforce": British proslavery patriotism during the age of abolition. J Imp Commonw Hist 39:393
Poole T (2015) Reason of state: law, prerogative and empire. CUP, Cambridge
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] 1 QB 1067; [2000] EWHC 413 (Admin)
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61; [2009] 1 AC 453
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2007] 3 WLR 768; [2007] EWCA Civ 498
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2016] UKSC 35; [2017] 1 AC 300
R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2013] EWHC 1502 (Admin)
R (Barclay) v Secretary of State for Justice [2014] UKSC 54; [2015] 1 AC 276
R (Bashir) v Secretary of State for the Home Department [2016] EWHC 954 (Admin), [2016] 1 WLR 4613
R (Bashir) v Secretary of State for the Home Department [2017] EWCA Civ 397
R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355
R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5; [2017] 2 WLR 583
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57; [2006] 1 AC 529
R v Secretary of State for the Home Department, ex parte Simms [1999] 3 All ER 400
Rahmatullah v Ministry of Defence [2017] UKSC 1; [2017] 2 WLR 287
Riel v The Queen (1885) 10 App Cas 675
Seeley JR (1971) The expansion of England. University of Chicago Press, Chicago
Snoxell D (2008) Expulsion from Chagos: regaining paradise. J Imp Commonw Hist 36:119
Teegarden D (2013) Death to tyrants!: ancient Greek democracy and the struggle against tyranny. Princeton University Press, New York
The King v The Earl of Crewe, ex parte Sekgome [1910] 2 KB 576
Theodore v Duncan [1919] AC 696, 706 (HL)
Thornberry P (1989) Self-determination, minorities, human rights: a review of international instruments. Int Comp Law Q 38:867
Tito v Waddell (No 2) [1977] Ch 106
Twomey A (2009) Fundamental common law principles as limitations upon legislative power. Oxf Univ Commonw Law J 9:47
UK National Archives, FCO 31/2768
UK National Archives, FCO 31/3461
UK National Archives, FCO 31/3462
UK National Archives, FCO 31/3463
UK National Archives, FCO 31/3464
UN Convention Relating to the Status of Refugees, 189 UNTS 150 (1951)
Westlake J (1894) Chapters on the principles of international law. CUP, Cambridge
Young RJC (2005) Colonial desire: hybridity in theory, culture and race. Routledge, London
Youssef v Secretary of State for Foreign and Commonwealth Affairs [2016] UKSC 3; [2016] 1 AC 1457

Chapter 8
‘Anachronistic As Colonial Remnants May Be…’ Locating the Rights of the Chagos Islanders As a Case Study of the Operation of Human Rights Law in Colonial Territories

Ralph Wilde

8.1 Introduction

One of the major geopolitical developments of the twentieth century was the delegitimization, as a matter of political ideas, and international legal principles, of the idea of trusteeship over people as a basis for introducing and maintaining colonial rule.[1] This was effected through the post-Second World War self-determination entitlement, which became enshrined in Common Article 1 of the two global Human Rights Covenants, agreed in 1966 and entering into force in 1976.[2] In a complementary move, the universality of human rights affirmed in the Covenants, which came out of the earlier Universal Declaration of Human Rights of 1948, was a repudiation of the notion of civilizational difference understood in terms of aptitudes for rights that had provided the rationale for trusteeship-over-people.[3] According to this vision, all people were equal in their capacities not only for self-rule, but also as rights-bearers more generally.

The research for this piece was supported by the European Research Council as part of the Human Rights Beyond Borders project, on which see https://www.laws.ucl.ac.uk/research/centres-institutes/human-rights-beyond-borders/. Warm thanks are due to Dr Karen da Costa and Dr Lorenzo Gasbarri for excellent research assistance. This piece was published on the basis of double-blind peer review.

[1] See Wilde (2008b), Ch. 8, and sources cited therein.

[2] International Covenant on Civil and Political Rights (hereinafter ICCPR) (16 December 1966, entry into force, 23 March 1976); International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) (16 December 1966, entry into force 3 January 1976).

[3] Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948. See the discussion in Wilde (2008b), Chapter 8.

R. Wilde (✉)
University College London, University of London, London, UK
e-mail: ralph.wilde@ucl.ac.uk; https://www.ucl.ac.uk/laws/people/dr-ralph-wilde

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_8

Ideas and associated concepts and practices of trusteeship and colonialism survived through different means, from other forms of economic exploitation to the concept of 'development assistance,' sometimes referred to as neo-colonialism.[4] Trusteeship-over-people even continued through the same means, in its internationalized manifestation of international territorial administration.[5] But as a practice conducted by states, in what is arguably the single most transformatory event of the twentieth century—decolonization—such arrangements were largely dismantled, usually through liberation in the form of independent statehood.[6]

However, in a few places in the world, formal state colonial rule has endured. This chapter addresses one such place: the Chagos Islands, an archipelago in the Indian Ocean, which at the time of writing was administered by the UK as the British Indian Ocean Territory (BIOT).[7] The fate of the Islands and their population, the Chagossians, did not follow the general decolonization path after the Second World War. At this time, the archipelago and its inhabitants were administered by the UK as part of the larger Mauritius grouping. The UK excised the Chagos archipelago from that grouping, allowed Mauritius to become independent, and retained control over the Chagos islands, which were named the BIOT and included, for a time, some islands excised from the Seychelles archipelago which were later returned to that state. In the run-up to the independence of Mauritius and the Seychelles, the UK engineered the transfer of the indigenous population in the Chagos archipelago to the other islands in Mauritius, and to the Seychelles, an action that was initially officially denied. No islanders remained. In a related move, the UK leased (in the sense of ceding plenary administrative control) the largest island in the Chagos archipelago, Diego Garcia, to the US, for that state to establish and operate a military base on the island, an arrangement mirroring the more well-known example of the US base in Guantánamo Bay, Cuba.

The displaced Chagossians and their descendants have sought to use various different legal strategies to challenge their displacement, including claims for compensation and the right of return. A central feature of these challenges has been the disputed question of whether and to what extent international human rights law obligations were and are applicable to the UK in the Chagos Archipelago. Such application would provide the basis for entitlements on the part of the Chagossians, which would in turn pave the way for some of the remedies they seek.[8]

Overlaying this has been a further question about the application of human rights law to the US base in Diego Garcia in particular. It has been alleged that this base has been used to transfer and possibly even hold individuals suspected of being either threats and/or perpetrators of prior terrorist acts in the context of the 'war on

[4] See Wilde (2008b), Ch. 8, n. 44 and sources cited therein.

[5] ibid.

[6] ibid, Ch. 8.

[7] In general, for full detail on what is set out in this paragraph, see e.g. Allen (2004) and sources cited therein. For a history of the creation of the BIOT see David Snoxell's contribution to this volume (Chap. 14).

[8] See Richard Gifford's contribution to this collection (Chap. 4).

terror' of the President George W. Bush-era and the policy of a similar nature of President Obama. This raises the question of whether, as with Guantánamo Bay, the human rights obligations of the US apply to that state extraterritorially and also what legal obligation, if any, the residual authority, the UK, bears in relation to this situation, for example in being required to seek assurances that the base is not used for the commission or enabling of torture.[9] The factual picture here has shifted, from initial US assurances of no such flights, to an official admission of one transit rendition flight, which led to a UK government statement in parliament, to subsequent allegations being made of other flights and transfers that have not been officially admitted.[10]

As far as the UK legal position on these two related issues, a further human rights treaty is in play in addition to the aforementioned two global human rights Covenants: the European Convention on Human Rights (ECHR) adopted before them, in 1950 (entering into force in 1953), as well as its relevant Protocols.[11]

The ECHR and its relevant Protocols are distinctive instruments because of the unusual way the Convention conceives the locations where it is to apply, including, as in the case of the Chagos Islands/BIOT, colonial locations, and how its approach in this regard is bound up in the broader normative climate of the time at which it was adopted. One hand, it contains a 'colonial clause', Article 56 (previously Article 63) enabling a colonial state to extend the operation of the rights contained in the treaty from the metropolis to its colonial territories. This brings the colonial location in to the normative frame on the basis of a discretionary decision by the imperial state. On the other hand, the ECHR contains a general 'jurisdiction' clause, Article 1, determining the scope of applicability, which has been understood to cover a state's sovereign territory automatically, and to operate extraterritorially on the basis of the factual exercise of control, irrespective of the view of the state concerned as to applicability. All subsequent human rights treaties, including the aforementioned two global human rights Covenants, only contain this latter regime of applicability, and/or equivalents to it, lacking also a 'colonial clause'.[12]

As will be explained further below, the 'colonial clause' model of applicability reflects the trusteeship concept that was in the process of being repudiated at the time the ECHR was adopted, in that it enables the colonial state to judge whether or not colonial people are 'ready' for human rights, rather than having human rights law automatically applicable. By the time the two Covenants—which, as mentioned,

[9] On the issues in relation to Guantanamo Bay, see e.g. Wilde (2005), p. 739 and sources cited therein.

[10] See Allen (2016), p. 771.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), ETS, No. 5, in force 3 September 1953 (hereinafter ECHR); ECHR Protocol No. 1, 20 March 1952, Entry into force: 18 May 1954, ETS 9 (hereinafter ECHR Protocol 1); ECHR Protocol No. 6, 28 April 1983, Entry into force: 1 March 1985, ETS 114 (hereinafter ECHR Protocol 6); ECHR Protocol No. 13, 3 May 2002, Entry into force: 1 July 2003, ETS 187 (hereinafter ECHR Protocol 13).

[12] This is set out below.

enshrine the right of self-determination (as the ECHR does not)—there was no place for this approach. But when the Convention continues to be in force, and the colonial clause has not been amended (other than, for different reasons, the treaty article containing it being renumbered) what is and should be the significance of the regime of applicability enshrined in it in the 'post-colonial' era?

As will be explained, the standard view adopted in the jurisprudence relating to the ECHR is that the position as a matter of the colonial clause is exclusively determinative of the question of applicability. Thus if a declaration of applicability has not been made, then the Convention cannot be applicable through the alternative, 'jurisdiction' basis. This is an issue for the Chagossians, because the UK has not made a declaration under the colonial clause extending the rights under the Convention or its Protocols to the Chagos Islands/BIOT. The operation of the standard view here, then, means that just as formal state-conducted colonial arrangements have endured in certain places, so too the trusteeship-era concepts of civilizational difference and trusteeship-over-people have endured as the basis for determining whether or not human rights standards will operate.

However, in the 2012 decision of the European Court of Human Rights in the *Chagos Islanders* case, the Court suggested, for the first time in the jurisprudence on this issue, that the position taken as a matter of declarations under the colonial clause may no longer be exclusively determinative of applicability.[13] This is the most recent and important decision on the general question of the application of European human rights law to colonial territories. However, in the decision, the Court dismissed the application on other grounds, and did not explore whether or not the new position it suggested might be possible would be sustainable and, if so, on what basis. The present piece seeks to do this, by situating the applicability question within the broader normative framework of the ideas of trusteeship-over-people which legitimated colonialism, and ideas of self-determination which repudiated this practice. It argues that when the colonial clause is situated within this broader framework, the standard view of exclusive determinacy must fall away, and European human rights law can and should be applicable also on the basis of the alternative 'jurisdiction' basis in circumstances where colonial clause declarations have not been made.

8.2 Legal Provisions on Applicability Generally

Some of the main international human rights treaties, including the ECHR and the ICCPR, do not conceive obligations simply in terms of the acts of states parties. Instead, responsibility is conceived in a particular context: the state's 'jurisdiction'. For example, under Article 1 of the ECHR and equivalent provisions in some of its Protocols, the state is obliged to 'secure' the rights contained in the treaty within its

[13] *Chagos Islanders v UK*, Application no. 35622/04 (Admissibility decision of 11 December 2012) (hereinafter *Chagos Islanders* decision).

'jurisdiction.'[14] In the case of the ICCPR in particular, applicability operates in relation to those 'within [the State's] territory and subject to its jurisdiction.'[15]

As the Grand Chamber of the European Court of Human Rights stated in the 2011 *Al-Skeini* decision about the applicability of the ECHR to the activities of UK forces in Iraq:

> "Jurisdiction" under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.[16]

Certain other international human rights instruments, such as the two main anti-discrimination Conventions, do not contain a general provision, whether using the term 'jurisdiction' or something else equivalent, stipulating the scope of applicability of the obligations they contain.[17] Also, the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not include a dedicated stipulation concerning the scope of application.[18]

---

[14] ECHR (n 11), Art. 1; ECHR Protocol 1 (n 11), Art 4; ECHR Protocol 6, (n 11), Art. 5; ECHR Protocol 13 (n 11), Art. 4. This is echoed in the American Convention on Human Rights, (22 Nov. 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, O.A.S. Off. Rec. OEA/Ser. L/V/II.23, Doc. 21, Rev. 6, (entry into force 18 July 1978)), Art. 1. Under the Convention Against Torture, the State is obliged to take measures to prevent acts of torture 'in any territory under its jurisdiction.' Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, Dec. 10, 1984, entry into force 26 June 1987, 1465 U.N.T.S. 85 CAT, Art. 2. Under the Convention on the Rights of the Child, states parties are obliged to 'respect and ensure' the rights in the treaty to 'each child within their jurisdiction'. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49 (20 Nov. 1989) (entered into force 2 Sept 1990), 1577 U.N.T.S. 3, Art. 2.1.

[15] ICCPR (n 2) Art. 2.

[16] *Al-Skeini v UK*, Application No. 55721/07, Judgment of 7 July 2011 (hereinafter *Al-Skeini* (ECt. HR)), [130].

[17] The 1948 (Inter-) American Declaration of the Rights and Duties of Man (not a treaty) (adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948, OAS Res. XXX (1948)), the 1981 African Charter on Human and Peoples' Rights (OAU Doc. CAB/LEG/67/3 rev. 5, 27 June 1981), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD or CERD) (Adopted by General Assembly Resolution 2106 (XX), 21 December 1965, entry into force 4 January 1969); the International Convention on the Elimination of All Forms of Discrimination Against Women, New York, 18 December 1979, UNTS, vol. 1249, 13, entered into force 3 September 1981 (CEDAW); the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000); Convention on the Rights of Persons with Disabilities [CRPD] (13 December 2006, entry into force 2008). The International Court of Justice has treated the African Charter and the Optional Protocol to the CRC as if they contained 'jurisdiction' clauses determining the scope of their application. See *Case Concerning Armed Activities on the Territory of the Congo* (DRC v. Uganda), 2005 I.C.J. 116 (19 December 2005), [216]–[217].

[18] See ICESCR (n 2) Art. 2 para. 1. The International Court of Justice has treated the ICESCR as if it contained a 'jurisdiction' clause determining the scope of its obligation. See Legal Consequences of the *Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 163 (9 July 2004), [112].

8.3 Scope of Application

It is assumed that human rights treaties apply to a state within its territory. Thus when 'jurisdiction' alone is the relevant treaty provision, as in the ECHR, this term is understood to cover the state's territory. Even when a state may not have full or even any control over part of its territory, for example due to the presence of a foreign state there, it has been held in relation that this does not alter the applicability of the host state's human rights obligations.[19] Rather, it leads to different substantive requirements insofar as that state is practically incapable of securing rights due to the actions of the foreign state.[20] Similarly, the aforementioned formulation of the ICCPR, determining applicability to those within the state's territory *and* jurisdiction (emphasis added), has also been held not to suggest that even within a state's territory, if the state lacks practical jurisdictional capacities, its obligations are inapplicable. Rather, this is understood only to have implications for the substantive requirements that the state will have.

For those treaties that use the 'jurisdiction' conception of applicability, notably the ECHR, there is now an established jurisprudence affirming that this can have an extraterritorial dimension.[21] Despite the position of refusenik states such as Israel, Russia, the UK and the US, this position on extraterritorial applicability has included the ICCPR, thereby rejecting the view (advanced by some of these states) that the aforementioned provision on applicability referencing the position 'within [the State's] territory and subject to its jurisdiction' limited things to the state's territory.[22] The word 'and' in the provision has, in effect, been understood to be an 'or', combined with a definition, as with the other treaties, of 'jurisdiction' having an extraterritorial as well as a territorial meaning.

In general, the term 'jurisdiction' has been defined in the extraterritorial context as a connection between the state, on the one hand, and either the territory in which the relevant acts took place—commonly referred to as a *spatial* or *territorial* connection—or the individual affected by them—commonly referred to as a *personal, individual* or, because of the type of State action involved, *state-agent-authority* connection.[23] More recent jurisprudence under the European Convention on Human Rights has also suggested looser, potentially broader tests of 'effective authority,' 'decisive influence,' and support that affects survival, as also constituting extraterritorial jurisdiction.[24]

Thus, certain foreign locations have been brought within the scope of application of human rights obligations for the states involved. A wide range of activities have

[19] *For example, Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, European Court of Human Rights [Grand Chamber], Reports 2004-VII (8 Jul. 2004).

[20] ibid.

[21] See e.g. the following, and citations therein: Wilde (2005, 2013).

[22] ibid. On the refusenik position of the US, see e.g. Wilde (2005).

[23] Ibid.

[24] ibid. See e.g. *Ilascu* (n 19).

been implicated in this, from the use of military force to the conduct of occupation, extraordinary rendition, the operation of military bases and the interception and detention of migrants, including at sea.

Given what was said earlier about territorial application, this requirement of some sort of determinative role over the situation before the jurisdiction test is met extraterritorially would not seem to be necessary in the territorial context where, as mentioned, the absence of such a role has not been understood to render obligations inapplicable. The level of control or influence exercised by the state has a different legal significance territorially and extraterritorially, then. In the former situation, it mediates the nature of the substantive requirements of the applicable law. In the latter situation, it determines whether the law is even applicable in the first place.

For present purposes, an essential feature of this 'jurisdiction' test for extraterritorial applicability is that it is concerned with the existence of a certain arrangement, called 'jurisdiction' and defined factually as the exercise of control/influence. If this arrangement exists, the obligations are triggered. The state in question has no role in deciding this question once it has become a party to the treaty. Existing extraterritorial activities might be in operation; future such activities might arise. All will be automatically covered by the state's obligations in the treaty, assuming they fall within the contours of the 'jurisdiction' test. It is from the moment the state accedes to the treaty, then—when it takes on the substantive obligations—that it is subject to a dynamic model of applicability operating automatically based on the factual occurrence of any extraterritorial activity.

8.4 Colonial Territories: Territorial or Extraterritorial? Applicability in the Two Situations

The present piece is focused on colonial territories understood to denote arrangements, mostly based on post-Renaissance European colonialism, classified under the League of Nations Covenant as Mandates and the UN Charter as Trust Territories (in both cases covering the colonies of the defeated powers in the two World Wars) and under the UN Charter as 'Non-Self-Governing Territories.'[25] There is no overall common characteristic as far as the nature of the sovereign link between the territories concerned and the colonial states was and is concerned. Just as there were and are varying degrees of practical, administrative, political and legal integration/separation between the two, so also in some cases the colony was/is assimilated into the sovereign territory of the colonial state, whereas in other cases the colony was/is treated as somehow distinct, in terms of territorial sovereignty. Moreover, arrangements were often unclear on this point, and varied over time, due to a broad range

[25] The contents of this paragraph are based on Wilde (2008b), Ch. 5, section 5.3 and Ch. 8, sections 8.2.2 and 8.2.3, and sources cited therein.

of factors ranging from deliberate ambiguity to unresolved disagreements, competing claims, changes in the nature of control exercised and authority claimed by the colonial state, etc.

Thus deploying the terminology of a state's 'metropolitan' territory/ies and its 'non-metropolitan' or 'overseas' territory/ies does not itself indicate whether the situation at issue is one of a distinction between the territorial and the extraterritorial, or two different zones of the territorial, when the territorial/extraterritorial distinction is being used to denote the enjoyment or lack of title by the state concerned.

Depending on the particular situation at issue, then, a state's relationship to its colonies can, therefore, be either territorial or extraterritorial, and sometimes difficult to establish. Given this, for the present objective of addressing such relationships generically, it is necessary to address situations that might fall into either category. They will be referred to herein as 'territorial' and 'extraterritorial' colonial arrangements.

Revisiting the rules on the applicability of human rights law, it might be thought that 'territorial' arrangements would fall within the regulatory regime as a given. Similarly, 'extraterritorial' arrangements would seem to involve the kind of activity that might qualify as falling within the contours of a test concerned with the extraterritorial exercise of control/decisive influence over territory and/or individuals.

For the UK in relation to the Chagos Islands, if the view is taken that they form part of UK sovereign territory, then the assumption of territorial applicability would render the obligations in operation. In the case of Diego Garcia in particular, this would not be altered by the lease of administrative control to the US; it would, rather, vary the substantive obligations the UK would be subject to as far as the situation on the base was concerned.

If the view is taken that the UK-Chagos Islands connection was extraterritorial, then an enquiry would need to be made into the level of substantive control and influence exercised by the UK there. Clearly this has altered significantly, for example as between the period of the excision from Mauritius and forced depopulation, actions obviously involving direct effective control, to the period now, where the UK exercises a looser form of authority over an area that is either entirely depopulated or, in the case of Diego Garcia, where exclusive administrative authority has been ceded to another state. In general, it would not seem difficult to bring things into the contours of the extraterritorial 'jurisdiction' test so as to trigger obligations, whether on the basis of effective control or the looser test of decisive influence, in a variegated fashion depending on the particular time period and also accounting for the distinctive situation in Diego Garcia in particular.

However, this is all further complicated because of the colonial nature of the arrangement, which brings into the frame the *sui generis* regime of human rights applicability.

8.5 Colonial Clauses

In one of the many ways in which the practice and policy of colonialism was enabled by international law, states would sometimes include in treaties provisions determining the operation of the rights and obligations contained in the treaty to their colonial territories.[26] This approach was followed in some of the early human rights treaties.

8.5.1 1926 Anti-Slavery Convention

The 1926 Convention on the Abolition of Slavery and the Slave Trade stipulates that:

> At the time of signature or of ratification or of accession, any High Contracting Party may declare that its acceptance of the present Convention does not bind some or all of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage in respect of all or any provisions of the Convention; it may subsequently accede separately on behalf of any one of them or in respect of any provision to which any one of them is not a Party.[27]

The phrase 'territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage' reflects the broad range of terminology deployed to classify different types of colonial territories at the time the Convention was adopted.

This approach seems to assume the automatic applicability of the obligations in the Convention to colonial territories. In the case of territorial arrangements (colonies forming part of the sovereign territory of the colonial state), this follows the general model outlined above, with automatic applicability. What is different is that the state is given the opportunity to depart from this default and vary the arrangement to remove applicability (with a subsequent right to restore this if the state so chooses).

In the case of extraterritorial arrangements (colonies not forming part of the sovereign territory of the colonial state), here, unlike the 'jurisdiction' test, it is not a matter of whether the nature of the state's presence meets a certain factual threshold of control/influence; rather, the mere existence of a formal legal tie of a certain character is sufficient. At the same time, unlike the 'jurisdiction' model, which gives no role to the state's own view as to applicability, here the state can decide that the default approach of applicability will be departed from, and the obligations will not apply.

---

[26] See Grant and Barker (2009). See 'colonial clause' and 'territorial application clause' entries, at 107 and 596–597 respectively.

[27] International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 25 September 1926, LNTS, vol. 60, 253, as amended by the Protocol Amending the Slavery Convention, approved by GA Res. 794 (VIII) of 23 October 1953, entered into force on 7 December 1953, Art. 9.

8.5.2 1950 European Convention on Human Rights

In the 1950 European Convention on Human Rights, a provision entitled 'Territorial Application' in what was originally Article 63, later renumbered Article 56 in 1998, and followed in the relevant provisions of Protocols to the Convention, states that:

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.[28]

The phrase 'territories for whose international relations it is responsible' reflects another euphemistic turn in the international legal terminology used to refer to colonial territories. The approach to applicability is the reverse of the 1926 Convention; here the default is inapplicability, unless the state decides otherwise. Comparing this with the general regime above, there is no automatic applicability for territorial arrangements, or applicability if a test of control or influence is met for extraterritorial arrangements. Instead, obligations are triggered on a different basis: a declaration to this effect by the state concerned.

This essentially renders the operation of human rights obligations a two-stage process. For all areas of territorial and extraterritorial application other than in the context of colonial arrangements, this occurs in consequence of accession to the treaty. For colonial arrangements, this occurs if a separate declaration is made (whether on accession or at some other point).

8.5.3 1956 Supplementary Anti-Slavery Convention

The Supplementary Convention to the 1926 Anti-Slavery Convention, adopted in 1956, states that:

[28] ECHR (n 11) Art. 56 (formerly 63). See also ECHR Protocol No. 1, (n 11), Art. 4; ECHR Protocol No. 6 (n 11), Art. 5; ECHR Protocol No. 13 (n 11) Art. 4. Article 63 was renumbered article 56 by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 11 May 1994, entry into force 1 November 1998, ETS 155.

> This Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any State Party is responsible.[29]

As mentioned above, the term ‘non-self-governing’ references, in again a shift in the euphemistic international legal nomenclature deployed for colonies, the Non-Self-Governing Territories arrangements in the United Nations, which covered colonial territories in 1945 other than the colonial territories of the defeated powers in the Second World War, and the remaining Mandated territories, both of which were to be transferred to the Trusteeship arrangements, referred to by the term ‘trust’ in the extracted provision, to be administered by the victorious powers in the Second World War as internationally-supervised colonies.[30]

This arrangement follows the model of automatic applicability from the 1926 Convention, with the equivalent similarities and differences in this regard to the general regime as in that earlier treaty. However, unlike the 1926 Convention where a state can depart from the default of applicability through a declaration, the 1956 Convention actually requires any given party to declare which of its colonies are to be covered by the application of the Convention, in a provision which states:

> [T]he Party concerned shall […] at the time of signature, ratification or accession declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.[31]

The effect of this provision is that it is down to the metropolitan state to decide whether and to what extent the provisions will operate in its colonies as a matter of the provision. If a state makes no declaration of applicability, then the obligations will not apply on the basis of the provision. The approach in 1956 is the reverse of that taken in the 1926 Convention, where applicability was the default; 30 years earlier, the role of declarations by states parties was to terminate, not accept applicability (or to accept applicability subsequent to earlier terminations).

The nature and the effect of this provision is essentially the same as the 1950 European Convention on Human Rights and its associated Protocols: a separate declaration by the state is required in order for obligations to be applicable. That said, here applicability is being asserted from the start, albeit to be filled in entirely through the requirement that states designate which if any territories will be covered.

---

[29] Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956, Art. 12(1).

[30] On Non-Self-Governing Territories, see United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (hereinafter ‘UN Charter’), Chapter XI, and the text, extracted provisions and citations in Wilde (2008b), Chapter 5, section 5.3; Chapter 8, section 8.2.2; Sources List, section 5.3. On the Trusteeship System, see UN Charter, Chapter XII and the text, extracted provisions and citations in Wilde (2008b), Chapter 5, section 5.3; Chapter 8, section 8.2.3; Sources List, section 5.3, and Wilde (2018, forthcoming).

[31] Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956, Art. 12(1).

In the European Convention, by contrast, the starting point is an absence of any reference to applicability.

What these three arrangements have in common is that they allow for a separate process of state determination when it comes to applicability in colonial territories, in contrast to the general regime of applicability, which lacks this. That said, the 1926 arrangements come close to the general regime, in that the separate process only involves the state modifying a default of applicability; absent any state action in this regard, applicability operates automatically as in the general regime. The 1950 and 1956 arrangements, by contrast, vest the triggering of applicability in the separate process; if the state does not make declarations of applicability (1950) or stipulations of territories covered (1956) under the process, then as a matter of the process the obligations will not apply (and so the automatic applicability under the 1956 arrangement is a dead letter).

8.6 The Disappearance of the Colonial Clause and the Emergence of Extraterritorial 'Jurisdiction'

Apart from the relevant Protocols to the ECHR, all the human rights treaties adopted after the 1956 anti-slavery Convention—constituting all the main human rights instruments apart from the ECHR and its relevant Protocols—lack 'colonial clauses' determining the scope of application in colonial territories.

The aforementioned extraterritorial 'jurisdiction' test for extraterritorial applicability emerged on the basis not of an express stipulation as in the case of 'colonial clauses', but as a matter of interpretation by expert interpretation bodies, notably the European Commission (as it was) and Court of Human Rights.[32]

As most human rights treaties lack a colonial clause, and many extraterritorial activities take place outside contexts classified as 'colonial' as a matter of international law (even if, as will be discussed further in due course, they attract this designation in broader discourse), this different approach to applicability, based on the existence of factual conditions of control, influence etc., and without any determinative role given to the state, has become the most significant in practice. So in the so-called 'post-colonial' era, where the projection of power by states outside their metropolitan territories has continued (challenging, of course, the meaningful nature of understanding colonialism as having ended), a 'post-colonial' conception of what should trigger legal regulation through international human rights law has taken over from the colonial clause model of before.[33]

[32] See the sources cited above, especially Sect. 8.2.

[33] On post-colonialism generally, see the sources cited above in Sects. 8.4 and 8.5.

8.7 Colonial Clause As Appendix?

In the case of people living in and/or originating from colonies of contracting parties to the ECHR and its relevant Protocols, just as the colonial arrangements themselves and/or their legacies continue, so too the colonial clause model for determining when such arrangements will be regulated by international human rights law still prevails in the sense that the clauses still remain in the treaties. But does the model prevail absolutely, in being entirely determinative of the question of human rights law applicability to colonial territories, in the so-called 'post-colonial' era?

For human rights treaties without colonial clauses—most of them—the standard general regime of applicability, as reviewed above, operates for colonial territories. Thus for territorial and extraterritorial colonial arrangements, applicability is arrived at according to the general basis for applicability in each case. In consequence, colonial arrangements are covered on the basis of either territorial application, or being brought within the 'post-colonial' jurisdictional trigger for extraterritorial applicability.

But the ECHR and its relevant Protocols have a special significance in situations such as that involving the Chagos Islanders and the UK, where the only means individuals have to bring legal claims directly against the state without its consent are in jurisdictions—in this case, the domestic UK courts, and the European Court of Human Rights—that are tied to these particular international legal instruments.[34] More broadly, as one of the earliest human rights instruments, the ECHR was in force when formal European colonialism was still in existence in many places, and the treaty was in operation during periods of colonial abuse. The entry into force of the global UN Covenants in 1978, for example, was too late for many colonial abuses that took place during the ECHR's operation, including the Mau Mau rebellion Kenya from 1952 to 1960 and, of course, the transfer of the Chagossians from their islands, from 1968 to 1973.[35]

Within the range of international human rights treaties, then, the European Convention and its Protocols has a special place when it comes to the human rights situation relating to the colonies of its contracting states, a grouping, of course, which includes most of the world's former colonial powers.

But what if the contracting state has not made a declaration under Article 56, and/or the relevant provisions of the Protocols, extending the rights to the colony? The position of the Chagos Islands raises this question, since as mentioned the UK

[34] In the case of the UK, see the Human Rights Act 1998 c. 42, as amended by The Human Rights Act 1998 (Amendment) Order 2004 (S. I. 2004/1574), art. 2(1), introductory text, section 1 (on the Convention rights), section 2 (on taking into account Strasbourg jurisprudence in particular when interpreting the rights), and Schedule 1 (containing the list of Convention rights). I have previously argued that the received wisdom on the proper international law basis for interpreting the Act, linking the meaning of the Act to Strasbourg jurisprudence exclusively, rather than the UK's international human rights obligations generally, is mistaken. See Wilde (2006), pp. 47–81.

[35] On the Mau Mau abuses, see e.g. Elkins (2005).

has not made an Article 63/56 declaration with respect to BIOT.[36] Is the operation of the colonial clause exclusively determinative, in the negative, of applicability for colonial territories?

8.8 Colonial Clause As Exclusively Determinative: Hong Kong, Macao and South Georgia

The Chagossians are not the first people in European colonies who have sought to bring their grievance before the European Convention of Human Rights system on the basis that the colonial locations of contracting parties are within the scope of the Convention's application.

This issue came before the European Commission and Court of Human Rights in two cases related to Hong Kong and Macau before the handovers to the People's Republic of China, when these territories were subject to UK and Portuguese sovereignty respectively.

The *Bui van Thanh* decision of 1990 concerned Vietnamese asylum seekers in Hong Kong.[37] The applicants sought to invoke the *non-refoulement*-type obligation which had been read into the ECHR in the *Soering* decision of 1989.[38] They argued that for the UK to send them back to Vietnam would breach the prohibition on inhuman and degrading treatment in the Convention, because they would be persecuted by the Vietnamese government.[39] They also made other complaints relating to their detention in Hong Kong.[40] However, as with BIOT, the UK had not made a declaration under the colonial clause, then numbered Article 63, extending the Convention to Hong Kong.[41] The European Commission of Human Rights held that a declaration under Article 63 was the only way that the situation in Hong Kong could be brought within the UK's obligations in the Convention.[42]

The *Yonghong* decision of 1999 concerned a Taiwanese national held in prison in Macau in 1999, pursuant to a request by the PRC authorities to the Governor of Macau for Mr Yonghong to be extradited to the PRC to stand trial for fraud. Portugal had not extended the Convention and its Protocols to Macau under what at the time of that case had been renumbered Article 56. Macau was not handed over to China until December of that year. The PRC authorities had given an assurance to the Governor that the death penalty would not be applied in the trial, but the applicant

[36] See *Chagos Islanders* case (n 13) [61].

[37] *Bui Van Thanh and Others v United Kingdom*, Application No. 16137/90, European Commission of Human Rights, decision of 12 March 1990, DR 65-A, p. 330 (hereinafter *Bui Van Thanh*).

[38] ibid, 3. See *Soering v. United Kingdom*, Application No. 14038/88, European Court of Human Rights, Judgment, 7 July 1989, Series A Vol. 161.

[39] *Bui Van Thanh*, 3.

[40] ibid, p. 3.

[41] ibid, pp. 2–3.

[42] ibid, pp. 4–5.

argued that the assurance could not be relied upon, and that the death penalty could be sought for the arrest in question. For the same reason as the earlier decision concerning Hong Kong, the European Court of Human Rights held that Portugal's obligations in the Convention did not apply to it with respect to Macau.[43]

This position was later affirmed in a case in the English courts, *Quark*, concerning the application of the UK Human Rights Act to South Georgia, a UK overseas territory next to the Falkland Islands.[44] The case concerned the operation of the property right under Article 1 of Protocol 1 to the ECHR in South Georgia.[45] Protocol 1, which supplements the Convention with three rights—education in Article 2 and free elections in Article 3 in addition to property in Article 1—is a separate treaty from the ECHR, and its applicability fell to be determined separately from the Convention itself. The Protocol does not contain an equivalent to the 'jurisdiction' clause in Article 1 of the Convention, determining the scope of application. However, its Article 4 contains a colonial clause equivalent to Article 56/63 of the Convention, and Article 5 more broadly seeks to incorporate the three rights and the colonial clause within the overall Convention framework, thereby potentially implicating the general jurisdiction regime of applicability in Article 1 of the Convention:

> Article 4 – Territorial application
>
> Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.
>
> Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
>
> A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
>
> Article 5 – Relationship to the Convention
>
> As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.[46]

The UK had made a declaration under Article 56/63 of the ECHR, extending the Convention to South Georgia, but had not also made a declaration under Article 4

---

[43] *Yonghong v Portugal*, case number 50887/99, European Court of Human Rights, Judgment of 25 November 1999, 3.

[44] *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [2006] 1 AC 529 (hereinafter *Quark*); *Quark Fishing Ltd v United Kingdom* (dec.) (Application No. 15305/06), ECtHR, 19 September 2006, Reports of Judgments and Decisions 2006-XIV, 22 *BHRC* 568; (2007) 44 *EHRR* SE4. I was involved in this case as a consultant to the legal team of the applicant, Quark Fishing.

[45] ECHR Protocol 1 (n 11).

[46] ibid.

of Protocol 1, extending the rights it contains to the island (by contrast, extensions under both instruments had been made with respect to the nearby Falkland Islands, which had earlier been administered with South Georgia by the UK as a single juridical unit). In *Quark* it was assumed that as far as applicability triggered by colonial clause declarations was concerned, for the rights in Protocol 1, a separate declaration had to be made on the basis of Article 4 of that Protocol. It was not possible simply for a state ratifying the Protocol to have the rights contained in it then rendered automatically applicable to its colonial territories on the basis a declaration it had made under Article 56/63 of the general Convention, despite what is said in Article 5 of the Protocol incorporating its provisions into those of the Convention.

The applicants in *Quark* thus had to argue, initially in the English courts and then at the European Court of Human Rights, that the Protocol could apply in South Georgia even if a colonial clause declaration had not been made. As in *Bui Van Thanh* and *Yonghong*, this was rejected on the basis that for colonial territories applicability could only be arrived at through a colonial clause declaration.[47]

8.9 Existence of Colonial Clause Places Alternative 'Jurisdiction' Basis for Extraterritorial Applicability into Question

As mentioned, the 'post-colonial' regime of extraterritorial applicability of human rights law to activities in non-colonial territories has been widely affirmed in the jurisprudence on the topic, although some of the states whose activities would be covered continue to challenge this position.

One interesting challenge here, made by the UK in the aforementioned *Al-Skeini* case, involved invoking the existence of the colonial clause as a basis for challenging extraterritorial applicability in other, non-formally-colonial contexts.

Al-Skeini concerned the 'post-colonial' regime of extraterritorial human rights applicability based on the fact of territorial control to 'post-colonial' extraterritorial imperial activity, the occupation of Iraq from 2003. The UK was advancing an argument, itself with significant colonial era-resonances as will be discussed further in due course, that although it accepted the ECHR could apply extraterritorially on the basis of territorial control, this was only the case if the location in question was within the territory of another contracting party to the Convention, and thereby within the 'legal space' or '*espace juridique*' of the Convention. As Iraq was not such a party, it was outside this legal space, and the UK's obligations were therefore inapplicable. Over the course of the *Al-Skeini* litigation, various arguments were made to support this contention.[48]

[47] See the sources cited above, see Sect. 8.5.

[48] *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2004] EWHC

One such argument formed the basis for the Strasbourg Court's treatment of the colonial clause in its judgment in the case. The UK suggested that, in the light of the earlier case law, notably *Quark*, that if:

> [T]he "effective control of territory" exception [to an exclusively territorial application of the Convention] were held to apply outside the territories of the Contracting States, this would lead to the conclusion that a State was free to choose whether or not to extend the Convention and its Protocols to a non metropolitan territory outside the Convention "espace juridique" over which it might in fact have exercised control for decades, but was not free to choose whether to extend the Convention to territories outside that space over which it exercised effective control as a result of military action only temporarily, for example only until peace and security could be restored.[49]

This observation underscores the fundamental difference between the colonial clause declaration model, and the model for triggering human rights obligations otherwise. The former involves a special determination by the state; the latter does not. Given the broader context in which the statement is made, as part of an effort to challenge the applicability of the ECHR to it in Iraq, the UK is suggesting that its lack of freedom in the latter arrangement is problematic, given the freedom it is given in the former arrangement, and the ironic contrasting consequences of having relatively short-lived activities regulated by human rights law, but arrangements that are more long-standing (and often conceived to continue indefinitely) left outside legal regulation.

Setting aside the important matter that if the 'effective control' model for extra-territorial applicability were not to apply to non-colonial extraterritorial arrangements outside the territory of Council of Europe member states (e.g. in Iraq), then there would be no possibility of applicability at all to such arrangements (so not the same—including as a matter of the UK's freedom of choice—as the colonial clause model, where applicability can happen, if the UK so wishes),[50] as a matter of principle the contradiction identified by the UK can be resolved in two different

---

2911 (Admin), 14 December 2004, (hereinafter *Al-Skeini* (DC)); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence* [2005] EWCA (Civ) 1609 (21 Dec. 2005) (hereinafter *Al-Skeini* (CA)); *R (on the application of Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26; [2007] 3 WLR 33 (hereinafter *Al-Skeini* (HL)) and the review in Wilde (2010), and sources cited therein.

[49] *Al-Skeini* ECtHR (n 16) [111].

[50] The argument is misleading in using the terminology of freedom of choice in the context of the 'effective control' model of human rights applicability outside colonial contexts in territory outside that of the member states of the Council of Europe, and positing this as a direct comparison to the colonial clause model. The UK argued that it is not 'free to choose' whether or not its obligations would apply in such contexts under the 'effective control' model, when compared to what it can do under the colonial clause model. But if the effective control model did not operate in such contexts, it is not as if the colonial clause model would operate in the alternative. Rather, no model of applicability would operate. Actually, then, the UK's freedom of choice would not be as wide as it is under the colonial clause model, where it can choose to extend (as it has done in practice), because it would not have the choice to have its obligations applicable. The only way this assertion makes sense is if the UK does not wish its obligations to be applicable at all, and therefore sees no value in the option of being able to render them operative.

directions. An argument can be made the other way around from what is suggested: the fact that states do not determine whether their obligations are applicable to their extraterritorial activities outside the colonial context, and yet these activities might be shorter in duration than continuing colonial arrangements, might call into question the continuing validity of the older, discretionary model operating for colonial territories.

However, this alternative argument has to reckon with the continued existence of colonial clause provisions and the received wisdom up to *Quark* that for overseas territories the question of a colonial clause extension is exclusively determinative. The UK could make its submission, in favour of one of the two possible means of resolving the contradiction, because this legal settlement necessarily rules out a challenge to the continued validity of the colonial clause model.

The Strasbourg Court effectively rejected the UK's argument, stating in its judgment of 2011 that the existence of the colonial clause:

> [W]hich was included in the Convention for historical reasons, cannot be interpreted in present conditions as limiting the scope of the term "jurisdiction" in Article 1.[51]

The court prefaced its remarks above with the observation that:

> The "effective control" principle of jurisdiction…does not replace the system of declarations under Article 56 of the Convention […][52]

Since this 'principle', as the Court puts it, relates to *extraterritorial* jurisdiction in particular (as discussed above, jurisdiction is presumed to operate territorially, even if the state does not exercise effective control), this statement could be interpreted as suggesting that in colonial territories where the nature of the state's presence would meet the effective control test for extraterritorial jurisdiction, but an declaration has not been made, applicability cannot be effected through the jurisdictional model. In addition, or in the alternative, the statement could be interpreted as underlining the mismatch between, on the one hand, a regime of extraterritorial applicability and, on the other hand, the issue of declarations with respect to territorial colonial arrangements: the former cannot address the situations covered by the latter because they each address zones that are by definition opposites (respectively, extraterritorial and territorial).

The Court continued in this vein after the earlier remarks, stating that:

> The situations covered by the "effective control" principle are clearly separate and distinct from circumstances where a Contracting State has not, through a declaration under Article 56, extended the Convention or any of its Protocols to an overseas territory for whose international relations it is responsible.[53]

Describing the two situations are 'separate and distinct' is somewhat ambiguous: on the one hand, the words are not tight enough to rule out any overlap (a qualifier such as 'entirely' would be needed), on the other hand, using two words that are in

[51] *Al-Skeini* ECtHR (n 16) [140].

[52] ibid.

[53] ibid.

this context effectively synonymous is a tautology, which might be taken as an effort to indicate a somewhat more rigid separation than is suggested by either word alone. It is unclear, then, what exactly the import of this statement is on the crucial question of whether or not the two situations are mutually exclusive.

Bearing in mind the context of the statement, though, which is to address the UK submission about the extraterritorial application of the Convention to non-colonial territories outside the 'legal space' of the Council of Europe, we might see the Court here speaking not so much about direct interplay between the two situations (and so addressing the question of whether extraterritorial 'jurisdiction' could somehow trigger obligations in colonial territories as an alternative to the operation of a colonial declaration) but, rather, what the relevance the existence of colonial clause model has for the meaning of the other model *outside the colonial context* (e.g. in Iraq). On this, the contradiction highlighted by the UK is to stand: it cannot be resolved, as the UK had suggested, by reducing and even eliminating the 'effective control' basis for applicability in non-colonial territories outside of the 'legal space' of the territory of Council of Europe States so as to bring things closer to the colonial-clause approach whereby applicability in any given situation is not applied without the state's specific consent.

That said, a year later in the decision about the Chagos Islands, the Court revisited this statement, and while acknowledging that it was made in the context of the relevance, if any, of the colonial clause arrangements for the scope of the extraterritorial meaning of jurisdiction to non-colonial territories, it insisted that:

> [T]he Court's judgment on the point was cast in general terms: the Grand Chamber not only cited the *Quark* decision as an authority but in fact adopted the reasoning in that decision that the situations covered by the "effective control" principle were clearly separate and distinct from circumstances falling within the ambit of Article 56.[54]

Cast in general terms, it may have been (how could it have been otherwise?); however, its determinative significance in the reasoning was still specific to the consequence for the scope of the extraterritorial jurisdiction test for non-colonial territories outside the Council of Europe. And the issue remains that, as mentioned, the way it was significant in this reasoning is itself less than clear when it comes to the significance of 'separate and distinct' for the question of whether the two regimes are mutually exclusive as a matter of generality. In other words, the statement may have been general enough, but it was not specific enough, for present purposes.

8.10 Contradictory Situations Created by the Exclusive Determinism Model for Colonial Clause Declarations

Not only, of course, does the exclusive determinacy of 'colonial clause' extension or non-extension as far as applicability is concerned lead to contradictory results when two similar situations, one formally colonial, the other not, are compared, and

[54] *Chagos Islands* decision (n 13) [73].

a formal declaration has not been made in relation to the former situation (e.g., the UK was not bound by its obligations under the ECHR in Hong Kong pre-handover, but was in Iraq during the occupation, because of the difference in the legal status of the two territories and the absence of a colonial clause declaration in relation to Hong Kong). Also, it is contradictory, creating a divergent situation, when the *same* situation is considered under a treaty with a colonial clause, like the ECHR and its Protocols, and other human rights treaties where such clauses do not exist, like the ICCPR.

Given the overlap in the rights covered as between the ECHR and its Protocols, on the one hand, and some of these other treaties, on the other, a situation may arise impacting on the enjoyment of a particular right common to both sets of treaties, but only the obligation in the latter applies (either because of territorial application, or because of meeting the test for extraterritorial jurisdiction), because the state has not made an express extension of the relevant part of the ECHR or its Protocols. As mentioned already, this is potentially the situation in BIOT. It was also the position for the UK in Hong Kong, and Portugal in Macau, pre-handover. It did not prevail in the *Quark* case, since the right at issue in the case—the right to property—is contained only in ECHR Protocol No. 1, not also in other human rights treaties. More broadly, as indicated earlier, although there might be overlaps in rights between the instruments, other key differences, such as in the historical periods covered by the treaty obligations, and the availability of remedies, might diminish the significance of the contradiction in the sense that the other treaties, although covering the same rights, are for other reasons less important.

8.11 'Colonial Relic' Challenged: *Chagos Islanders v United Kingdom*

In their case before the European Court of Human Rights that led to an admissibility decision in 2012, mentioned above, the Chagossians sought to challenge, as had been attempted in the *Bui Van Than, Yonghong* and *Quark* cases, the exclusive determinacy of the colonial clause provision as far as the operation of the UK's obligation in the Chagos Islands were concerned. Significantly, this decision came one year after the Court's decision in *Al-Skeini*, where the Court made its aforementioned remarks on the colonial clause in response to the UK's submissions as to the supposed significance of this clause for the regime of 'effective control' applicability, and more broadly purported to articulate the general contours of the jurisdiction test both territorially and extraterritorially, before applying this test in its latter manifestation to the facts of the UK presence in Iraq.[55]

The Chagossians attempted to persuade the Court to depart from an approach that would render a declaration under the colonial clause exclusively determinative

[55] For its articulation of the jurisdiction test and applying it to the UK in Iraq, see *Al-Skeini* (ECtHR) (n 16) [130]–[150].

of applicability. They made their case for such a departure on a two-pronged principled basis: in the first place, that it would remedy a legal black hole that would operate otherwise; in the second place, that the colonial clause can be bypassed as far as it is exclusively determinative because it is an objectionable 'relic'.

The Court rejected these arguments, stating that it could not agree that 'any possible basis' of jurisdiction such as that set out in its earlier decision in *Al-Skeini*:

> [M]ust take precedence over Article 56 on the ground that it should be set aside as an objectionable colonial relic and to prevent a vacuum in protection offered by the Convention. Anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court in order to reach a purportedly desirable result.[56]

Where arguments of principle, including those of an anti-colonial nature, would not work, however, the Court's own prior statement about the contours of territorial and extraterritorial jurisdiction, made in the *Al-Skeini* judgment issued after all the previous colonial clause decisions (including *Quark*), was possibly to have a different effect on its reasoning.[57] The Court remarked that the 'question remained' as to whether this prior statement:

> [I]ndicates that there must now be considered to be alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue, namely, that the United Kingdom can be held responsible for its acts and omissions in relation to the Chagos Islands, despite its exercise of its choice not to make a declaration under Article 56, if it nonetheless exercised "State agent authority and control" or "effective control" in the sense covered by the Grand Chamber judgment. This interpretation is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.
>
> § However, even accepting the above interpretation, the Court finds it unnecessary to rule on this particular argument since, in any event, the applicants' complaints fail for the reasons set out below.[58]

The Court, then, did not ultimately have to make a determination on applicability, because the case was deemed admissible for a different reason (concerning the requirements of the victim test).[59] But it is striking that the Court took the trouble to make this statement, given that it left open the possibility that, somehow, the position under the colonial clause may no longer be exclusively determinative of applicability.

Given that the *Al-Skeini* statement mentioned by the Court is about both territorial and extraterritorial jurisdiction, it might be said that the 'alternative bases for jurisdiction' that could apply to trigger the applicability of human rights obligations

---

[56] *Chagos Islanders v UK* (n 13) [74].

[57] ibid. The Court describes the statement in paragraph 70 citing paragraphs 130–141 of the *Al-Skeini* judgment (cited above, (n 16).

[58] ibid [75]–[76].

[59] See ibid [77]–[83].

to colonial territories in the absence of an extension declaration under the colonial clause would potentially cover such applicability to both 'territorial' and 'extraterritorial' colonial arrangements. That said, when the Court goes on explain how this would play out as far as the UK in the Chagos Islands is concerned, it utilizes, exclusively, the tests for *extraterritorial* jurisdiction in particular (state agent control [over individuals]/effective [territorial] control). Either, then, this implies that the Chagos Islands are extraterritorial as far as the UK is concerned, or a new form of *territorial* jurisdiction is being speculated about, specific to colonial territories, which operates in an equivalent manner to extraterritorial jurisdiction, and so different from other forms of territorial jurisdiction, in that applicability is not an automatic given, but dependent on the existence of effective control.

Why, then, does the Court's review of applicability according to the jurisdiction regime set out a year earlier in the *Al-Skeini* case create the possibility of something that was not held in earlier decisions on the question? We are not given an explanation for this, and so can only speculate. Obviously the *Al-Skeini* review is not directly about the question at issue (there, is of course, the ambiguous invocation of the 'separate and distinct' idea in another paragraph). Moreover, although it covers both territorial and extraterritorial applicability, on the former issue, it does not contain anything new, nor, then, comes at a particularly significant moment in the Court's jurisprudence in that regard. On extraterritorial applicability, things are very different. The Court rejects, for the first time, the doctrine, which had been held by the English courts to be operable to a certain extent, that the Convention does not apply extraterritorially to the actions of contracting states taking place outside the 'legal space' of the territory of other contracting states. Although this doctrine had never actually been clearly adopted previously by the Court, it was 'in the air' because of an ambiguous statement it made in the *Banković* decision ten years earlier, which is reviewed below, which the UK then relied upon to advance the doctrine, with some success, in the English courts.[60] The doctrine would have ruled out the possibility that obligations can be triggered with respect to extraterritorial colonial territories (other than, perhaps, such territories that form part of the sovereign territory of another Council of European state, not something that has been at issue in any of the 'colonial clause' cases to date) as a matter of extraterritorial jurisdiction, even assuming such a trigger could operate as an alternative to colonial clause declarations.

More broadly, the significance of the *Al-Skeini* decision has to be appreciated in the context it was made. The Court's jurisprudence on extraterritorial applicability developed piecemeal, with the contours of the test emerging in stages as particular elements of it came to be defined as needed by the facts of particular cases.[61] In the *Banković* decision of 2001 about the NATO bombing of Belgrade, the Court attempted a general review of the situation, but the review provided created great disagreement and confusion on the topic rather than clarifying matters.[62] The

[60] See below, text accompanying (n 75) et seq.

[61] See the review in the sources cited above.

[62] *Banković v. Belgium and others*, 2001–XII Eur. Ct. H.R. 333, Grand Chamber, European Court

following assertions in that review can be highlighted in this regard, all of which having implications for the extent of applicability, but failing to clarify what these implications were: the supposed link with the general public international law concept of jurisdiction[63]; a narrow definition of extraterritorial jurisdiction exercised by state agents[64]; the 'control over territory' test including the exercise of public powers[65]; the idea that the Convention was never intended to apply throughout the world, even in respect of contracting states[66]; and the related idea—the ambiguous statement mentioned earlier—that the Convention applied 'notably' in the 'legal space' of the territory of contracting states.[67]

The hostages to fortune contained in the implications of these statements were exploited by the UK in the *Al-Skeini* litigation in the English courts, to make a wide array of arguments that narrowed the scope of applicability, or eliminated applicability entirely, of the Convention to the UK in Iraq (e.g., as mentioned, the 'legal space' statement being used to underpin the aforementioned idea that the Convention does not apply extraterritorially outside the territory of contracting states).[68] When that litigation ended up in Strasbourg, then, the Court had to deal, in essence, with the consequences of its earlier statement in having created so much uncertainty and potential for dispute on the fundamental question of whether and to what extent the Convention is applicable extraterritorially. Whatever one might think about whether the Court successfully cleared up this mess with its second general effort, in *Al-Skeini*, to define the contours of extraterritorial applicability, this effort, as is the nature of general statements on the legal framework, can certainly be viewed as an attempt to provide clarity, and resolve uncertainty, on the topic. If the Court views itself as having succeeded here, which presumably it did—the *Chagos* decision is only one year later, and references the previous general statement multiple times—then perhaps the significance of this for the present subject is that the Court was taking the view that the timing was now right, as it was not previously, for the regime of jurisdictional applicability to be potentially transferrable to colonial territories, because the contours of the regime that would operate have been clarified after a period of acute uncertainty and dispute. So although the *Al-Skeini* review was not, of course, about the question of whether this transfer could happen, it supposedly cleared up (or at least resolved some issues relating to) the prior issue—what extraterritorial jurisdiction means—necessary in order for the transfer to be possible.

There is also a further general implication of the timing that might explain why the Court concludes that the matter must 'now be considered'. When human rights law and its enforcement modalities follow states into the extraterritorial arena, there

---

of Human Rights Judgment (hereinafter *Banković*).

[63] ibid, [59]–[61].

[64] ibid, [73].

[65] ibid, [71].

[66] ibid, [80].

[67] ibid, [80].

[68] See e.g. Al-Skeini (DC), Al-Skeini (CA), Al-Skeini (HL) (n 48); the reviews in Wilde (2010), Wilde (2008a), p. 628 and sources cited therein.

is a move outside the 'comfort zone', as it were, of the usual territorial focus. The subject matter is always controversial, and sometimes even of existential significance for the states involved if it relates to the use of military force. Usually other areas of international law are co-applicable (e.g. the laws of war), and sometimes states act together, raising difficult issues of overlapping responsibility, especially if one or more of the partners is not bound by the same human rights obligations and/or takes a different view on the scope and meaning of obligations held in common.

The *Banković* case epitomized these issues, given that it related to the NATO bombing of Belgrade in 1999, implicating the controversial issue of the legality of so-called 'humanitarian intervention', concerning action where IHL was also applicable, and relating to joint action with a coalition of states with notable members—the US and Canada—who were not party to Convention, and with one of which, the US, taking the view that its own human rights obligations in the ICCPR did not apply extraterritorially or in situations of armed conflict where the LOAC applied only.[69]

It can be speculated that the Court's decision in that case, that the Convention did not apply to situations of aerial bombardment, was in part influenced by a broader reluctance to move into such complicated, contested and politically sensitive terrain.[70] Moreover, the decision came just after the attacks on the US on 9/11, which precipitated an exceptional international climate of sympathy and support for the US in general, including NATO invoking its collective self-defence provision, and for the actions the US and its allies took in response in Afghanistan in particular. It can be speculated that a view prevailed that this was not the right time to pronounce upon the legality, in the sense of human rights compliance, of a US-led NATO military action.

What happened in the intervening 'war on terror' decade between this moment and the Court's decision in *Al-Skeini,* of course, was a profound shift in the normative climate in response to US-led actions extraterritorially and the general terror-related restrictions on and violations of human rights.[71] Controversy on these issues was at its apex where they intersected: the indefinite detentions and torture in the US base in *Guantánamo* and the initially secret so-called 'black sites', and the egregiously incompetent occupation of Iraq in general, with its widespread negative impact on the population of that state, and the abuses of detainees in the *Abu Ghraib* prison in particular. These developments led to a greater critical engagement with the impact of state actions on human rights extraterritoriality, with a greater call, within this, for law to play a role in providing checks and balances. When the concern was raised that such situations actually constituted legal 'black holes' in this regard, the pressure was on courts and other human rights bodies to assert the rule

[69] See *Banković* (n 62). On the US position in the ICCPR, see Wilde (2005).

[70] On the decision of inapplicability, see *Banković* (n 62) [74]–[76].

[71] See the discussion and sources cited in Wilde (2005).

of law as a protective device, and so to affirm the extraterritorial applicability of human rights law when this was challenged.[72]

This was the context when the *Al-Skeini* case came before the Court. The case involved all the main controversial elements of *Banković* a decade previously, if anything in more exaggerated form: an especially controversial use of military force and occupation, the respondent state being a junior partner in a coalition led by another state, the US, not even party to the same treaty let alone to the case at issue, and a situation where other areas of law—LOAC and occupation law—were also applicable. But the Court takes the opposite position from *Banković*, not avoiding the substance of the case and restricting extraterritorial applicability, but addressing this substance and affirming this applicability. The shift taken a decade later, then, is not only in attempting to clarify applicability, as mentioned earlier, but also to do so in an affirmative fashion in the sense of extending its scope. It is difficult not to understand this in part as a confident assertion, in the light of the 'war on terror' backdrop, of the rule of human rights law extraterritorially in the face of the practice of human rights abuses in that context. It might have been felt that the lessons of the previous decade were that international human rights bodies had to grasp the nettle of all the difficult and contested issues bound up in extraterritorial situations, because of the clear track record of abuses in such situations. Avoidance, as happened in *Banković*, was no longer tenable. One also wonders whether the lesson of the *Al-Skeini* litigation for the Court was that national legal systems could not be relied upon to provide effective redress for such abuses. Even a national jurisdiction with a redress mechanism tied to the Convention and a legal profession and judiciary supposedly exceptionally well-versed in the general subject could not be relied upon to get things right (as will be elaborated on further below).[73]

Clearly the logic of all this is transferrable to human rights abuses in colonial territories. Even though, as discussed, in some cases these are not 'extraterritorial' to the colonial state as far as legal title is concerned, in a broader sense they are treated as geographically, legally, politically and socially distinct. Abuses of people in territories other than the 'metropolitan' territories of north American and Council of Europe states, and Israel, perpetrated by these states, share a commonality whether or not the arrangements are formally constituted as 'colonial' or not (hence, of course, the continued use of the 'colonial' tag outside the formal context, e.g. to the occupation of Iraq). The need for the international rule of human rights law in the colonial context derives greater impetus, then, from what has happened extraterritorially outside this context, and the similarity between the two. Indeed, of course, the Chagos situation epitomizes the overlapping nature of the two in a literal sense, with the non-formally-colonial US base at Diego Garcia, and its use to house rendered 'war on terror' detainees, grafted onto one the islands of the colonial BIOT.

But would the imperative to assert the rule of international human rights law not amount to trying to avoid a 'vacuum in protection offered by the Convention'

[72] ibid.

[73] On the redress mechanism being tied to the Convention, see (n 34) above.

and a response to the 'perceived need to right an injustice', things which the Court rejected as a basis for utilizing the jurisdiction model of applicability in circumstances where a colonial clause extension has not been made?

The avoiding-a-vacuum-in-protection argument has a history in the Strasbourg jurisprudence on extraterritoriality, having been invoked as a beneficial consequence by the Court after it affirmed the applicability of the Convention to Turkey in northern Cyprus in its decision in the *Cyprus v Turkey* case.[74] The applicants in *Banković* and *Al-Skeini* in the English Courts tried to use it unsuccessfully as a stand-alone basis, i.e. in addition to the 'effective control' tests, for applicability in general.[75] Following what the Court said in its response to this in *Banković*—the aforementioned 'legal space' idea[76]—in *Al Skeini* the UK government made its unsuccessful argument about extraterritorial applicability being limited to the territory of Council of Europe states on the basis that only when a vacuum in protection within this 'legal space' would otherwise prevail should the Convention apply extraterritorially.[77]

This history is helpful in illuminating how the vacuum-avoidance argument can be deployed in the context of questions of applicability, including as far as the colonial clause is concerned. What has to be appreciated here are two distinct aspects of such questions. On the one hand, applicability is seen as requiring some sort of theory about the existence of a power relationship between the state and the situation in question. As discussed, this existence is assumed as a given in state territory; extraterritorially, the jurisprudence has developed the tests about effective control and influence. The vacuum-avoidance argument, by contrast, is not concerned with defining the contours of the power relationship; it is addressing the consequences of this, which is that there should be a regime of protection wherever it exists, or, put negatively, there should be no absence of protection—no 'vacuum'—where it is present. Put more simply, it is the idea that where there is power (the jurisdiction test) there should be accountability (the applicability of human rights law).

It might be said, then, that the principle of avoiding a legal vacuum requires a separate theory of power in order to find its context of operation. There needs already to have been established some sort of power relationship between the state and the situation in question, from which flows, as a necessary consequence, the requirement of accountability. Accountability has no meaning outside of this. To say that a particular situation has to be regulated by human rights law in order to avoid a vacuum in protection, then, is to have already concluded that a power relationship exists between the state and the situation so as to require the regulation of human rights law.

But if this power relationship is being defined as that which requires accountability, then the accountability consideration is necessarily bound up in the definition

[74] *Cyprus v. Turkey*, European Court of Human Rights, Grand Chamber, Case, no. 25781/94, Judgment, 2001 (hereinafter *Cyprus v Turkey*), [78]. See e.g. the review in Wilde (2005) and sources cited therein.

[75] For *Banković*, see *Banković* (n 62) [79]–[80]. For *Al-Skeini*, see *Al-Skeini* (DC), *Al-Skeini* (CA), *Al-Skeini* (HL) (n 48), and the review in Wilde (2008a) and sources cited therein.

[76] Banković (n 62) [79]–[80].

[77] See Al-Skeini (DC), Al-Skeini (CA), Al-Skeini (HL) (n 48), and the discussion in Wilde (2008a) and sources cited therein.

of the power relationship. So the trigger for applicability should be defined to ensure that nothing requiring accountability is left outside its scope—there should be no vacuum in protection. However, this is a matter of reading the accountability/vacuum avoidance consideration into the power definition, rather than conceiving the consideration as an autonomous basis for applicability.

This is perhaps the difference between how the idea was invoked by the Court in the *Cyprus v Turkey* decision and how it was raised by the applicants in *Banković*. In the former decision, it is being associated with, as a normative underpinning, the particular definition of the power relationship that triggered obligations: effective control over territory. In the latter situation, by contrast, it is being invoked as a definition of the trigger itself. What is missing is the theory of the power relationship. It is the difference between, in *Banković*, saying that the Convention should apply to the act of bombing, so to avoid a vacuum in protection (what the applicants argued) and saying that the definition of extraterritorial jurisdiction triggering obligations should encompass bombing so as to avoid a vacuum in protection (not what the applicants argued).

These arguments amount to the same thing in substance—an act of bombing involves a causal relationship that plays a determinative role over human rights so as to require the regulation of human rights law. But the difference between them is significant because the Convention has its regime of jurisdiction—its theory of the determinative power relationship—triggering applicability with a test, extraterritorially, of 'effective control' (and also, later, 'decisive influence'). In consequence, arguments about avoiding legal vacuums have to be made within discussions of this test (i.e. what 'effective control' means), not outside of it.

Revisiting what the Court said in *Chagos*, here it discusses the vacuum-avoidance norm in a negative way, as something that could be invoked to remove the exclusively determinative role of colonial clause declarations. Necessarily, this goes only so far, doing away with one regime of applicability. Although the argument presumes that the alternative jurisdiction regime would operate—removal of the role of one is intended to enable the operation of the other—nonetheless the next step, establishing in a positive manner the case for the alternative regime of applicability—via the general jurisdiction provisions—is required. The Court's invocation of the vacuum-avoidance consideration, then, can be viewed as rejection of this being used as a means of bypassing one regime of applicability in the negative, without also making the case in the positive for the operation of the other regime.

The Court then goes on to do this in the following paragraph, as discussed. Although it does not invoke the vacuum-avoidance consideration expressly as the basis for this (no express normative basis is invoked), the Court's invocation of the position taken in *Al-Skeini* on jurisdiction can be seen, as explained above, as relevant to the issue of extending this concept of applicability to colonial territories because of vacuum-avoidance considerations. By rejecting such considerations when considering only in the negative whether or not the colonial clause regime should be abrogated, the Court is not ruling out their significance when turning to the other side of the analysis and considering in a positive way whether the jurisdiction regime can operate with respect to colonial territories.

8.12 'Anachronistic As Colonial Remnants May Be…'

8.12.1 Objectionable Colonial Relic

As the Court points out, the notion that there are 'alternative bases of jurisdiction which may apply even where a Contracting State has not extended application of the Convention to the overseas territory in issue…is strongly rejected by the respondent Government and would indeed render Article 56 largely purposeless and devoid of content since Contracting States generally did, and do, exercise authority and control over their overseas territories.'[78]

Given, then, that the issue is fiercely contested, and involves the potential redundancy of an article in the Convention, is there anything to bear in mind when considering this issue in addition to the Court's focus on its jurisprudence on the meaning of jurisdiction as summarized in *Al-Skeini*?

As mentioned, the Court held that 'it could not agree' that applicability to colonial territories on a jurisdictional basis:

> [M]ust take precedence over Article 56 on the ground that it should be set aside as an *objectionable colonial relic…Anachronistic as colonial remnants may be*, the meaning of Article 56 is plain on its face and it cannot be ignored *merely because of a perceived need to right an injustice*. Article 56 remains a provision of the Convention which is in force and cannot be abrogated at will by the Court *in order to reach a purportedly desirable result*.[79]

The colonial clause model of applicability is characterized as a 'relic' and 'anachronistic'. This foregrounds the way the model is from an earlier point in history, which has passed. The model is also characterized as 'objectionable', the indications of which seem to be the effect it has, when a declaration is not made, in preventing an injustice being righted and so enabling a desirable result.

Whereas of course the model is all of these things, characterizing its colonial heritage exclusively in this manner ignores the broader significance of this heritage, and its political and legal implications, which is actually of acute relevance to the question at issue, raising additional 'objectionable' features from the ones invoked by the Court. When these broader implications are brought into the frame, the nature of the model, as a 'relic', is indeed the reason why it should be set aside.

The Court was able to miss this, and, indeed, reach the opposite conclusion as to the relevance of the colonial clause model as a 'relic', because it failed to interrogate the nature of its objectionable status as such (another objectionable feature, concerned with ensuring accountability, is considered, as discussed above). Instead, 'objectionable colonial relic' is invoked gratuitously, to be dismissed before its possible meaning and significance have even been considered. How, then, might this gap in the necessary reasoning proceed?

---

[78] *Chagos Islanders* decision (n 13) [75].

[79] *Chagos Islanders* case (n 13) [78] (emphasis added).

8.12.2 Colonialism Legitimated

In separate work, I trace the connection between a range of different practices which I term 'foreign territorial administration', covering colonialism, occupation, administration under the League of Nations and UN Trusteeship systems, and the administration of territory by international organizations.[80] I explore how the international legal concept of 'trusteeship over people' can be identified across these practices as a means of justifying their existence and regulating their concept. In essence, this concept of trusteeship-over-people is based on the idea that there are certain people in the world who are deemed incapable of self-administration, according to the 'standard of civilization', and that this deficient level of development justifies the exercise of authority over them by the other, relatively 'advanced', 'developed', 'civilized' people in the world. This exercise of authority is supposed to be performed by the latter on the basis of 'trust', in the interest of the former, not themselves. In its later manifestations, certain arrangements included improvements in the developmental level, and consequential enhancements in local self-governance, as the objectives of trusteeship administration, in some cases allied to the notion that the realization of such improvements and consequential enhancements could lead eventually to independence. The entitlement to independence, then, is ostensibly bound up in capacities in this regard. It is contingent on developmental improvement as the end point in a progressive enhancement of self-administration.

8.12.3 Colonialism Delegitimated

After the Second World War, as mentioned above, the trusteeship-over-people concept was repudiated as a basis for foreign territorial administration, not only politically but also in international law, via the notion of self-determination.[81] Under this new paradigm, there are no advanced and less advanced people in the world when it comes to the question of whether or not foreign territorial administration can be legitimated. All are entitled to freedom and self-determination as equal people.[82] Existing arrangements of foreign territorial administration were dismantled; no new such arrangements were supposed to be created.[83] Moreover, independence is now an automatic right, not something that is earned depending on the level of development. As articulated in the seminal formulation by the United Nations General

[80] Wilde (2008b), Chs. 8 and 9 and sources cited therein.

[81] ibid, Ch. 8, section 8.5 and sources cited above.

[82] ibid. Of course, as mentioned earlier, such ideas continued in other forms.

[83] ibid. But, as mentioned above, trusteeship continued in its internationalized form. See Id, passim.

Assembly: 'inadequacy of preparedness should never serve as a pretext for delaying independence.'[84]

8.12.4 Human Rights and the End of Empire[85]

Significantly, international human rights law emerged during the period when this broader transformation in the normative character of foreign territorial administration was happening. It is in its heritage both colonial and post-colonial. Although the writing was on the wall for colonialism as the 1950 European Convention was being drafted, the Convention does not, of course, include a right of self-determination in its provisions, and the colonial clause assumes the existence of colonial arrangements. By the time of the adoption of the two global human rights Covenants in 1966, by contrast, self-determination is in both Covenants as a common first article, and there are no colonial clauses, nor indeed are any such clauses contained in any subsequent human rights treaties.

How does the operation of human rights law in colonial territories look according to these two normative models, of trusteeship-over-people, on the one hand, and self-determination, on the other hand?

8.12.5 Trusteeship-Over-People and the Application of Human Rights to Colonial Territories

Under the trusteeship-over-people model, the implications of the standard of civilization are that the people of the metropolis, as advanced and civilized, are immediately 'ready' for human rights law, both as rights-holders, and as those who have to govern in a human-rights-compliant fashion. Territorial applicability as an automatic given reflects this idea.

By contrast, the implications of the standard of civilization are that the people of the colonies are necessarily at an inferior developmental level, and so not yet necessarily ready in the same way for human rights law as rights-holders, unless it is decided otherwise. Moreover, because of this civilizational difference, insofar as administrative authority in colonial territories is exercised by local officials, and transfer of authority to them is progressively enabled and, even, there is independence, there is no automatic fit between them and the norms they would have to comply with. To have them subject to these norms in the absence of this fit would be to impose a normative regime where it has no purchase.

[84] United Nations General Assembly Resolution 1514 (XV) of 1960, para. 3.

[85] See Simpson (2004).

As for the colonial administrators, although this model presupposes their fitness to perform the task, the unsuitability of the local population to be rights-bearers in the same fashion as people in the 'metropolis,' unless decided otherwise, means that colonial governance should not itself be subject to the regulatory mechanism of human rights law. Trusteeship as an idea requires accountability, because of the profound power imbalance between the 'trustee' and the 'beneficiary'.[86] But human rights law in particular cannot necessarily serve as a accountability device, insofar as something crafted to fit automatically with the advanced societies of the 'metropolis' does not work in the differently-conceived societies of the colonies.

Thus according to the logic of the trusteeship-over-people model, there cannot be automatic applicability to colonial territories, whether territorially or extraterritorially, as with the general model adopted within most human rights treaties, for example the ICCPR. A judgment is needed in each case as to the developmental level, and the suitability of the normative regime to both the local population and the local governance structures. The colonial clause declaration requirement enables this. In giving the decision to the colonial state, it reflects the general approach taken in international law and institutions towards the conduct of trusteeship-over-people, crafting very general principles and leaving considerable discretion to 'trustee' states in terms of their interpretation, application and implementation.

The equivalent of this approach can be seen in some of the dicta in the English court decisions in the *Al-Skeini* case about the applicability of the ECHR to the UK occupation of Iraq, based on suggestions made by the UK government in its submissions.[87] At the Court of Appeal stage, Lord Justice Brooke raised, as a problem, the idea of applying the Convention in a 'predominantly Muslim country'.[88] In the House of Lords decision, Lord Rodger stated that it would be 'absurd' to apply the law of the European Convention in the 'utterly different' society of Iraq, and Lord Brown disputed that application of the Convention in Iraq would be 'reconcilable with the customs of the resident population'.[89] These considerations were deployed to undergird the notion that the Convention should not apply extraterritorially outside the 'legal space' of the territories of Convention Contracting states. A relatively more drastic approach is therefore arrived at, compared to the colonial clause model, for the same underlying reason: automatic and unalterable inapplicability.

[86] See e.g. Wilde (2008c), p. 93 (Nijhoff), and sources cited therein.

[87] For a more detailed discussion, see Wilde (2010).

[88] *Al-Skeini* (CA) (n 48) [126] (Brooke LJ).

[89] *Al-Skeini* (HL) (n 48) [7] (Lord Rodger,); *Al-Skeini* (HL) (n 48) [129] (Lord Brown).

8.12.6 Self-Determination and the Application of Human Rights to Colonial Territories

With the repudiation of civilizational differences between people comes the idea of the universality of human rights, and so the idea that people in colonial territories are just as 'ready' for human rights, as rights-holders and, when they are involved in self-administration, obligation-bearers, as people in metropolitan territories. Necessarily, then, a regime of applicability based on civilizational differences between metropolitan and colonial people has not only lost its rationale (and so is arbitrary, and unjustified in consequence) but is, indeed, objectionable.

Revisiting the aforementioned later incarnation of the trusteeship-over-people ideas to undergird the supposed unsuitability of European human rights law to the people of Iraq in the *Al-Skeini* litigation, a counter argument here would invoke the fact that Iraq was already a party to the ICCPR, containing the same general spectrum of rights as the ECHR, and that (as the Iraq case illustrated as far as the ICCPR was concerned) both treaties actually already had 'predominantly Muslim countries' (for the ECHR, Albania and Turkey; also, Bosnia and Herzegovina is a majority-Muslim country) and countries with significant Muslim minority populations, as parties.[90]

Turning back to the relevance of self-determination to the colonial clause model, as the legitimacy of the trusteeship relationship between the colonial state and people in colonial territories has been repudiated, the former no longer has any entitlement to assess the level of development of the latter, and judge whether and if so to what extent they are 'ready' for human rights law.

A trigger of applicability determined by the view of the colonial state is necessarily in contradiction to this new normative position. As such, it is a violation of the right of self-determination of the local population. That said, just because under this vision colonial people are now deemed to be just as ready for human rights law as the people of the metropolis, does it necessarily follow that there should therefore be automatic applicability?

8.12.7 Human Rights Imperialism?

The following questions present themselves: Does the right of self-determination not require that colonial peoples consent to human rights law before it is applicable in their territories? If independence is on the horizon, at which point enabling the newly independent state to decide which, if any, international human rights obligations to accept, is a prior extension of human rights law to the territory not prejudging this issue, creating a situation where the newly independent state is set up in a manner that creates formidable practical and political challenges in its ability to

[90] I make this counter argument in Wilde (2010).

freely determine the operative normative regime? Might the continued absence of necessary checks and balances operating during what is supposed to be short-lived final period of colonial rule a price worth paying for the ability of the post-colonial state to be freed from any prior arrangement that prejudges the decisions it will have the right to make as an independent state? Given the typical failure of colonial authorities to build up local capacities for self-administration, and their own establishment of institutions of good governance in colonial territories being poor relative to the situation in the metropolis, would instant applicability be practicably difficult? Finally, would the obligations of human rights law, if applicable, require the colonial state to maintain its authority until it is in a position to hand over a system that is fully compliant (with a concomitant obligation to make reforms to enable this), thereby impeding the precipitous transfer of authority to local people? This would have the effect of perpetuating the trusteeship-over-people model of colonial administration, whereby people only get independence when development has reached a certain level. In doing so, the self-determination entitlement is violated; as discussed above, the realization of independence is supposed to be automatic, not contingent on the state of local preparedness. Paradoxically, then, the application of human rights law would violate self-determination; put differently, an absence of human rights law is needed to ensure colonial liberation.

Similar questions arose in the context of the aforementioned ideas invoked in the *Al-Skeini* litigation making the case for the application of European human rights law to the UK in Iraq as inappropriate. Much of Strasbourg case law has been developed by surveying general trends across the national practices of contracting states in particular. Necessarily, when substantive positions are crafted in part based on such surveys, their normative legitimacy is necessary tied specifically to such states, and not necessarily transferrable beyond that context without further analysis. Thus in the House of Lords judgment Lord Rodger characterized the law of the European Convention on Human Rights as 'a body of law which may reflect the values of the contracting states, but which most certainly does not reflect those in many other parts of the world.'[91] In consequence, if the European Court of Human Rights were to hold that the Convention applied outside the territory of Contracting states, it would 'run the risk of…being accused of human rights imperialism.'[92]

Moreover, outside the interpretation of particular rights, more generally the patchwork of applicable international human rights law of course varies significantly on which rights are covered, and how they are defined when they are covered, even as a matter of treaty provisions. So, for example, there is a general ban on the death penalty as a matter of European human rights law, whereas under the ICCPR the issue is covered by a separate Protocol which many parties to the Covenant have not accepted. Insofar, then, as there are these differences as between the law applicable to the state acting extraterritorially, and the law applicable in the state in whose territory the former state is acting, is the operation of that state's obligations not 'human rights imperialism'?

[91] *Al-Skeini* (HL) (n 48) [78] (Lord Rodger).

[92] ibid.

In *Al-Skeini* it was also asserted by Lord Justice Brooke in the Court of Appeal that having the Convention applicable during the occupation of Iraq would impede the transfer of authority to local people, since the law would require the UK to exercise full civil administration, thereby 'to build up an alternative power base capable of delivering all the rights and performing all the obligations required of a contracting state under the ECHR'.[93] Bearing in mind the aforementioned ideas from the judges in that case about how at odds Convention law was with the 'utterly different' society of Iraq, a 'predominantly Muslim country,' the process of realizing this would therefore presumably require a profound, time-consuming transformation of the entire legal, political and social system in order to render things fully Convention-compliant beforehand. As with the equivalent issue in the colonial context, the requirements of human rights law are therefore seen as preventing the realization of self-determination.[94]

Questions like these can be raised, whether in the context of the application of human rights law to colonial territories, or to other, non-formally-colonial extraterritorial activities, because the matter of regulating the foreign authority in its conduct of local administration cannot be separated from the general legal regime operative in the territory, with implications for foreign and local authorities alike.

8.12.8 The Different Meaning of Human Rights Law Extraterritorially, in Part Because of Self-Determination

As I have argued in more detail elsewhere in the context of the foregoing arguments about the extraterritorial application of the European Convention to the UK in Iraq, much of what has been said so far makes sense only if the following key features of the legal framework are ignored.[95] In the first place, beyond the context of the few core non-derogable rights, most human rights obligations are conceived, via limitation clauses and the like, to be context-specific. The same obligations may apply in different situations, then, but their substantive meaning is tailored to accommodate the differences. In the second place, as is well accepted in Strasbourg jurisprudence, the general meaning of a particular human rights instrument has to be determined by placing it into the wider international law context, taking into account the totality of a state's obligations. The main 'other' obligations relevant to the present issue are those relating to self-determination, which exist as a matter of customary international law as well as the aforementioned common articles to the human rights Covenants.

[93] *Al-Skeini* (CA) (n 48) [125] (Brooke LJ). See also ibid [126].

[94] Although what was supposedly being prevented was not being characterized in this way.

[95] See further the discussion in Wilde (2010).

As will be recalled, according to the law of self-determination, the foreign state, whether in a formal colonial context or a 'non-colonial' extraterritorial situation like Iraq, has no entitlement to govern, and has an obligation to enable the self-administration of the local population, including, ultimately, to withdraw from its exercise of authority over them. This state is, necessarily, in a profoundly different normative position compared to the situation in its own territory.

If, then, the meaning of human rights law has to be understood in light of the broader international law framework, and interpreted to be context-specific, then the foregoing normative picture, derived from the law of self-determination, suggests that the substantive meaning of a state's human rights obligations is considerably different in a colony or other extraterritorial territory, compared to the 'home' location. In particular, the requirements of general human rights law must be in step with the foreign state's obligation to respect the will of the local population and local traditions, and to hand over authority to these people in a precipitous manner. Because of this, most of the aforementioned 'problems' are illusory.[96] Moreover, an obligation to consult the local population on any areas of normative divergence could be seen as a requirement of the self-determination obligation. On non-derogable rights, where limitations, and so context-specific variations, are not possible in the same way, the example of the CPA suspending the operation of the death penalty in Iraq during the occupation period (the UK was subject to an obligation not to exercise this penalty, but Iraq was not) illustrates the possibility of pragmatic get-arounds.

But this can all be missed, and, indeed, the complete opposite conclusions be drawn, if one disregards the law of self-determination. As mentioned, although the European Convention does not, of course, contain an article on this right, unlike the global human rights Covenants, the meaning of the Convention is supposed to be interpreted in the light of the general international law picture. Despite this, judicial discussions of the extraterritorial application of the European Convention on Human Rights before the English Courts and at the European Court of Human Rights have never considered the law of self-determination when it comes to interpreting the meaning of the obligations under evaluation, even when ideas which clearly implicate self-determination are being discussed.

Thus, as mentioned, in *Al-Skeini* before the English courts the spectre of imperialism is raised, as objectionable, as merely a political consideration, without reference also to the law of self-determination. Similarly, the imperative to hand over power to the Iraqi people is described only with reference to an 'over-arching policy…to encourage the Iraqis to govern themselves', and the supposed effect of European human rights law in building up 'an alternative power base' being characterized as something that 'would have run right against the grain of the Coalition's policies'.[97] Thus the imperative is a policy only, not also a legal obligation. These misconceived approaches fail to appreciate that ideas of self-determination are not entirely 'other' than the law they are addressing but, rather, in their legal manifestation need to be

[96] See further the discussion in Wilde (2010).

[97] *Al-Skeini* (CA) (n 48) [125] (Brooke LJ). See also ibid [126].

read into the substantive norms in order to arrive at the correct import of those norms. Instead, this import—that the substantive law in general requires local traditions to be respected, and that power is handed over to local people precipitously—is missed and, indeed, the complete opposite conclusion is reached.

8.12.9 The Different Picture if Self-Determination Is Not Realized

What has been observed so far presumes that the state will implement its obligation to realize self-determination through its own act of withdrawal. Special considerations for the above issues present themselves when the state does not do this, and retains authority and control. Clearly such action is itself a violation of self-determination. Within this, what are the implications for the regulatory regime applicable to the conduct of administration? It would be to put theoretical future issues ahead of actual day-to-day needs for a state not to be subject to human rights obligations in order not to prejudice a decision to be taken about the normative system to be in operation on liberation, if that liberation is being postponed in a prolonged and even indefinite fashion.

And given the circumstances of a denial of self-determination, clearly the rights of the local population are of particular significance, given that their treatment as a matter of the conduct of administration may be bound up in their treatment as a matter of the denial of independence. Beyond the way that the latter treatment may reflect a broader position that is transferrable to the former treatment, the two can also be linked more directly, whereby the former enables the latter, whether through preventing the development of a sustainable local administration and associated capacities on the part of local people, or, as in the Chagos case, effecting a complete depopulation of the territory so as to sever the link, as a matter of facts on the ground, between the people and their land.

This brings back to the general idea of trusteeship requiring accountability, but in an exaggerated form, given that there is a breach of trust, and in circumstances where, unlike before, the notion that the standards which would apply are not of local purchase, because of civilizational differences, has been repudiated.

8.12.10 'Anachronistic as Colonial Remnants May Be…'

Because of the foregoing analysis, the rationale for having the Convention inapplicable to colonial territories, and/or to territories outside the 'legal space' of contracting states, no longer operates and, indeed, is objectionable. Just as colonial arrangements themselves are egregious throwbacks that have been legally and politically repudiated, so too the colonial era idea of how human rights law regulation should operate is offensive and has been superseded.

But as the Court points out, the colonial clause remains in the Convention and its Protocols. It may be anachronistic, then, but it is still in force. Should the model for applicability it reflects continue, then, despite being at odds with how applicability generally now looks in the light of self-determination?

The clause itself simply enables states to make declarations of applicability. It does not also stipulate that such declarations are to be exclusively determinative on the matter, i.e., that in their absence, there cannot be some other route to applicability. But, as the Court pointed out, looking at the provision on its own, it might be said that there seems little point giving states a role in determining applicability if actually the Convention will apply anyway on an alternative, factual basis (other than in narrow circumstances where a state does not exercise any control over the territory but wishes to have its obligations applicable). The existence of the clause presupposes exclusive determinacy.

But the foregoing observations about the need, as a matter of interpreting the Convention, to take into account the general international law picture, discussed in the context of the substantive meaning of human rights law, are equally applicable here. The role of the colonial clause provision has to be interpreted by situating the provision within the law of self-determination. It is legally incorrect, then, simply to look at the provision on its own terms, and draw a conclusion about the role of the clause simply on the basis that its existence, in isolation, must have substantive significance, or not, only on those terms. The question of whether or not it should have significance cannot be answered from looking at the provision on its own if the actual legal position is to be appreciated.

Earlier, it was observed how in certain judicial dicta from the English courts it was possible to adopt positions on the substantive meaning of human rights law extraterritorially that amounted to the precise opposite of the actual position, by failing to take into account the law of self-determination. In the *Chagos* decision the European Court of Human Rights, in a similar act of failure, although without the same consequence of a perverse result (the Court ultimately leaves the issue of applicability open) characterizes understanding the colonial clause as not exclusively determinative as a matter of abrogating 'at will' the 'meaning of Article 56' because the article is an 'objectionable colonial relic.' Thus the idea that something is objectionable on anti-colonial grounds is something to be understood outside, not as a part of, interpreting the 'meaning' of the Article. Moreover, as a consideration, it is characterized simply as one of policy or principle, and not also of law. To take it into account, then, would involve the Court doing something 'at will', i.e. as a matter of extra-legal fiat.

Unlike the dicta from the English courts, the Court's failure to appreciate the significance of the law of self-determination does not lead it to a substantive position on applicability; that matter is, as discussed, left open. Rather, it constitutes a missed opportunity to acknowledge and address what, it is submitted, is an essential normative consideration for the issue. Abrogating the determinative role of the clause because of the import of the law of self-determination would be to take a position on the meaning of the clause, and to do so on the basis of legal considerations.

This would not be the first time, of course, that treaty provisions have been rendered, in effect, 'dead letters', because of the impact of broader normative

developments, whether as a matter of the overall operation of the treaty, or external legal changes. For example, the entire international system of collective security in the United Nations Charter has operated, as far as the use of force to promote international peace and security is concerned, on the basis not of the express, detailed Charter provisions concerning the deployment of UN forces under the command of the Security Council Military Staff Committee, but of the Council granting authority to use force to member states.[98]

It is submitted, then, that the link between the colonial clause model of applicability, and an underlying concept, trusteeship-over-people, which international law repudiated after the ECHR was adopted, means that the colonial clause model itself has been constructively repudiated by the law of self-determination. Just as the notion of the Convention not applying extraterritorially outside the 'legal space' of contracting states was ultimately rejected by the Strasbourg Court in *Al-Skeini*, despite its earlier statement in *Banković*, so too the Court should take the step of rejecting the notion that, since the advent of the modern self-determination entitlement, states have lost their right to determine at will whether the human rights obligations they have accepted as a matter of generality do or do not apply to them in their colonial territories.

8.13 Conclusion

In its 2012 decision in the *Chagos Islanders* case, the European Court of Human Rights left open the possibility that, despite what had been held in earlier cases on the issue, the position taken on applicability as a matter of declarations made under the colonial clause of the European Convention on Human Rights should not be determinative of the issue. At the same time, the Court failed to acknowledge the significance of the self-determination entitlement in international law, choosing to mischaracterize the 'colonial relic' aspects of the issue as exclusively political and not also legal. When the self-determination entitlement is, as it should be, brought into the normative frame, a basis for realizing the possibility raised by the Court is provided.

References

Al-Skeini v UK, Application No. 55721/07, Judgment of 7 July 2011

Allen S (2004) The Chagos Islanders in international law. Hart, Oxford

Allen S (2016) The scope of third-party responsibility for serious human rights abuses under the European Convention on human rights: wrongdoing in the British Indian Ocean Territory. Hum Rights Law Rev 16(4):771

[98] On the Military Staff Committee, see UN Charter (n 30) Articles 43–47. On the system of Security Council authorization to member states, see e.g. Sarooshi (1999), and sources cited therein.

Banković v. Belgium and others, 2001–XII Eur. Ct. H.R. 333, Grand Chamber, European Court of Human Rights Judgment
Bui Van Thanh and Others v United Kingdom, Application No. 16137/90, European Commission of Human Rights, decision of 12 March 1990, DR 65-A
Chagos Islanders v UK, Application no. 35622/04 (Admissibility decision of 11 December 2012)
Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Supplementary to the International Convention signed at Geneva on 25 September 1926, Geneva, 7 September 1956
Cyprus v. Turkey, European Court of Human Rights, Grand Chamber, Case, no. 25781/94, Judgment, 2001
ECHR Protocol No. 1, 20 March 1952, Entry into force: 18 May 1954, ETS 9
ECHR Protocol No. 6, 28 April 1983, Entry into force: 1 March 1985, ETS 114
ECHR Protocol No. 13, 3 May 2002, Entry into force: 1 July 2003, ETS 187
Elkins C (2005) Imperial reckoning: the untold story of Britain’s Gulag in Kenya. Holt, New York
European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), ETS, No. 5, in force 3 September 1953
Grant JP, Barker JC (2009) Parry & grant encyclopaedic dictionary of international law. Oxford University Press, Oxford
Ilascu and Others v. Moldova and Russia, Appl. No. 48787/99
International Covenant on Civil and Political Rights (16 December 1966, entry into force, 23 March 1976)
International Covenant on Economic, Social and Cultural Rights (16 December 1966, entry into force 3 January 1976)
International Convention with the Object of Securing the Abolition of Slavery and the Slave Trade, Geneva, 25 September 1926, LNTS, vol. 60, 253, as amended by the Protocol Amending the Slavery Convention, approved by GA Res. 794 (VIII) of 23 October 1953, entered into force on 7 December 1953, Art. 9
Quark Fishing Ltd v United Kingdom (dec.) (Application No. 15305/06), ECtHR, 19 September 2006
R (on the application of Al-Skeini and others) v. Secretary of State for Defence [2004] EWHC 2911 (Admin), 14 December 2004
R (on the application of Al-Skeini and others) v. Secretary of State for Defence [2005] EWCA (Civ) 1609 (21 Dec. 2005)
R (on the application of Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26; [2007] 3 WLR 33
R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57, [2006] 1 AC 529
Sarooshi D (1999) The United Nations and the development of collective security: the delegation by the UN Security Council of its Chapter VII Powers. Oxford University Press, Oxford
Simpson AWB (2004) Human rights and the end of empire. Oxford University Press, Oxford
Soering v. United Kingdom, Application No. 14038/88, European Court of Human Rights, Judgment, 7 July 1989, Series A Vol. 161
United Nations General Assembly Resolution 1514 (XV) of 1960
Universal Declaration of Human Rights, GA Res. 217 A (III), 10 December 1948
Wilde R (2005) Legal “Black Hole”?: extraterritorial state action and international treaty law on civil and political rights. Mich J Int Law 26(3):739
Wilde R (2006) The extraterritorial application of the human rights act. In: Holder J, O’Cinneide C (eds) Current legal problems 2005. Oxford University Press, Oxford, pp 47–81
Wilde R (2008a) Case Note, R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening). Am J Int Law 102(3):628
Wilde R (2008b) International territorial administration: how trusteeship and the civilizing mission never went away. Oxford University Press, Oxford
Wilde R (2008c) Understanding the international territorial administration accountability deficit: trusteeship and the legitimacy of international organizations. Int Peacekeeping 12:93

Wilde R (2010) Compliance with human rights norms extraterritorially: 'human rights imperialism'? In: de Chazournes LB, Kohen M (eds) International law and the quest for its implementation/Le droit international et la quête de sa mise en œvre, Liber Amicorum Vera Gowlland-Debbas. Brill/Martinus Nijhoff, Leiden, Chapter 16

Wilde R (2013) The extraterritorial application of international human rights law on civil and political rights. In: Rodley N, Sheeran S (eds) Routledge handbook on human rights. Routledge, Oxford, chapter 35

Wilde R (2018, forthcoming) The trusteeship council, Chapter 8. In: Weiss TG, Daws S (eds) The Oxford handbook on the United Nations, 2nd edn. Oxford University Press, Oxford

Yonghong v Portugal, case number 50887/99, European Court of Human Rights, Judgment of 25 November 1999

Chapter 9
The Once and Future King: Sovereignty Over Territory and the Annex VII Tribunal's Award in *Mauritius v United Kingdom*

Thomas D. Grant

9.1 Introduction

As other contributors to the present volume remind us, the British Indian Ocean Territory (BIOT) involves more than one legal controversy, and the controversies over the BIOT concern more than two parties. Unsurprisingly in view of the multiple relationships involved, the BIOT concerns more than one source of law. The municipal law of the United Kingdom has been important in particular disputes heard in court in connection with the BIOT.[1] International human rights law has been relevant to the BIOT as well.[2]

The case between Mauritius and the United Kingdom resulting in the Award of 18 March 2015 was instituted by Mauritius under Part XV of the 1982 United Nations Convention on the Law of the Sea (UNCLOS or 'the Convention'). Mauritius' case against the United Kingdom called for the interpretation and application of certain provisions of UNCLOS. The Convention, however, was not the only source of law to which Mauritius referred in the proceedings. In particular, in its fourth submission

Wolfson College; Fellow, Lauterpacht Centre for International Law, University of Cambridge. This chapter is adapted from my remarks at the QMUL Centre for Small States Conference: 'Fifty Years of the British Indian Ocean Territory,' Thursday 12 November 2015, Colette Bowe Room, Queen's Building, QMUL (Mile End Campus). It does not necessarily reflect any views other than my own.

[1] See Richard Gifford's contribution to this collection, How Public Law has not been able to provide the Chagossians with a Remedy' (Chap. 4) and Chris Monaghan's contribution to this collection, 'An imperfect legacy: the significance of the *Bancoult* litigation on the development of domestic constitutional jurisprudence' (Chap. 6).

[2] See Ralph Wilde's contribution to this collection, "Anachronistic as colonial remnants may be…' (Chap. 8).

Locating the rights of the Chagos Islanders as a case study of the operation of human rights law in colonial territories'.

T. D. Grant (✉)
Cambridge University, Lauterpacht Centre for International Law, Cambridge, UK
e-mail: tdg20@cam.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*, The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_9

in the case, Mauritius asserted that the United Kingdom had made undertakings in 1965 at Lancaster House (Lancaster House Undertakings) in respect of a number of matters. These matters included certain fishing rights. They also included rights concerning the eventual disposition of the Chagos Archipelago as a territory. Mauritius further asserted that the United Kingdom, having adopted these undertakings, ignored them in 2010 when it created a Marine Protected Area around the BIOT—the MPA. According to Mauritius, the United Kingdom, having ignored the 1965 undertakings, breached certain provisions of UNCLOS. That is to say, on Mauritius' fourth submission, Mauritius started with the proposition that the 1965 Lancaster House Undertakings created certain legal obligations on the United Kingdom; that these legal obligations are in some fashion imported into the UNCLOS regime; that the United Kingdom by adopting the MPA in 2010 breached those obligations; and the alleged breach is a matter that an UNCLOS Annex VII tribunal might address.

The Tribunal accepted this fourth submission at least in part. In accepting Mauritius' fourth submission however, the Annex VII Tribunal implied much wider conclusions—in particular in respect of sovereignty over the territory comprising the BIOT. It is with what the Tribunal's award implied that this chapter is concerned.

9.2 Sovereignty Over the BIOT and the Jurisdiction of the Tribunal

Famously, the Award of 18 March 2015 disclaims having anything to do with sovereignty over territory. Sovereignty over territory is a subject matter that the Tribunal concluded it could not address. Taking the Award at face value, we see that Part XV of UNCLOS confers little or no power on an Annex VII Tribunal to address a question of sovereignty over territory. The question of sovereignty nevertheless arose in the case. The question arose in connection with Mauritius' claim to be the 'coastal State' in the BIOT for purposes of UNCLOS.

Mauritius' claim to be the 'coastal State' came in two parts. In its first submission, Mauritius asked the Tribunal to declare that the United Kingdom is not the coastal State in the BIOT.[3] In its second submission, Mauritius asked the Tribunal to declare that Mauritius is the coastal State.[4] This brief summary elides certain nuances in Mauritius' first two submissions, but both placed the question of sovereignty in the foreground. To say that a given State is the 'coastal State' in a given territory presumptively entails that it is that State that is sovereign over that territory.

This, at any rate, is how the Tribunal saw it. Relying on the power of a tribunal to identify the claims before it, the Annex VII Tribunal in *Mauritius v United Kingdom* characterized the first two submissions in effect to constitute challenges against the sovereignty of the United Kingdom over the territory of the Chagos

[3] *Chagos Marine Protected Area (Mauritius v United Kingdom)* PCA Case No 2011-03, Award (2015) 162 ILR 59 [158].

[4] ibid.

Archipelago.[5] It proceeded under the proposition that the State that is not the coastal State for purposes of UNCLOS is not the sovereign over the territory behind the coast.

It would be a mistake to think however that this conclusion was entirely self-evident. Jurisdiction over maritime areas and sovereignty over land are subject to different rules and methods of analysis.[6] The relationship between the geography and the law is usually like this: a State with lawful title to a territory, holding the coast of the territory, in turn holds a potential entitlement to maritime areas that extend from the coast in accordance with the rules concerning maritime entitlements embodied in UNCLOS. But there are States that from time to time have not viewed the relationship quite that way,[7] and States may agree, though they seldom do, to arrangements under which maritime entitlements and the territories the coasts of which generate them are not in the hands of the same State.[8] Who is the 'coastal State' under such an arrangement? It would surprise nobody to say that the coast and the territory are in the same hands, but if the law of the sea allowed the coast to be treated differently, then that would not be the first concept that that law treated as severable for certain purposes from closely related others.[9] There is also the quality of 'coast' as a distinct juridical concept in the law of the sea, which would seem relevant if one asked for it to be treated distinctly.

Perhaps reflecting the subtlety of the question of how to treat the relationship between coast and territory, it instigated a three-to-two split on the Tribunal. The dissenting minority disagreed with how the Tribunal characterized Mauritius' submissions. The arbitrators in dissent would not necessarily have treated Mauritius' submissions as requiring the settlement of the territorial question.[10] If the Tribunal as a whole had taken the view that Mauritius' first two submissions did not raise the territorial question, then it would not have needed to say whether Part XV of UNCLOS provides jurisdiction to deal with that question.

---

[5] See especially ibid [230]: 'Accordingly, and notwithstanding the difference in presentation, the Tribunal concludes that Mauritius' Second Submission is properly characterized as relating to the same dispute in respect of land sovereignty over the Chagos Archipelago as Mauritius' First Submission. The Tribunal therefore finds itself without jurisdiction to address Mauritius' Second Submission.' Cf ibid [208], quoting *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction [1998] ICJ Reports 423 [30].

[6] See, e.g., *Maritime Delimitation and Territorial Questions (Qatar* v *Bahrain)* [2001] ICJ Reports 40; *Territorial and Maritime Dispute* (*Nicaragua* v *Colombia)* [2012] ICJ Reports 624.

[7] For example, it appears to have been constitutional doctrine of Ireland that the Irish Free State held the territorial waters around the whole of Ireland, even as, to some extent, the sovereignty of the United Kingdom in the northern counties of Ireland had been conceded: *Barlow &Ors* v *Minister of Agriculture, Food and the Marine & Ors* [2016] IESC 62, 17 October 2016 (O'Donnell J), citing Casey (2000), pp. 40–41.

[8] See *Maritime Dispute (Peru* v *Chile)* [2014] ICJ Reports 3 [175]; Declaration of Judge Gaja, [2014] ICJ Reports at 113. About which see Graham (2015), pp. 361, 367.

[9] *Philippines* v *China,* PCA Case No. 2013-19, Annex VII Tribunal (Mensah, Presiding; Cot, Pawlak, Soons & Wolfrum, Arbitrators), Award on Jurisdiction and Admissibility, 29 October 2015, para. 156.

[10] *Chagos* (n 3) Dissenting Opinion [14].

An alternative approach would have been to say that Mauritius *was* asking about territory; but then to give an interpretation of UNCLOS Part XV that gives an Annex VII tribunal jurisdiction to answer. It is that approach indeed that the dissenting minority would have preferred. One finds sophisticated lines of reasoning in the parties' pleadings, in the Award, and in the dissenting opinion about what exactly Part XV allows a tribunal to do about territorial disputes. *Mauritius v United Kingdom* has been identified as the final word on Part XV and territorial questions.[11] The Award of 18 March 2015, on the better view, does not necessarily close the book on the matter. The present chapter leaves the question of the scope of Part XV jurisdiction, territorial disputes and coasts for another day.

The question to be asked here is this. Notwithstanding the Tribunal's understanding, under which the territorial question between Mauritius and the United Kingdom could not be settled under UNCLOS Part XV, was the Award of 18 March 2015 truly silent about the territorial question?

The Tribunal concluded that Mauritius' first two submissions in truth asked for an award effectively declaring that the United Kingdom is not the sovereign State in the BIOT. Having placed that interpretation upon the first two submissions, and having arrived at the understanding that Part XV does not confer jurisdiction to address the merits of submissions such as those, the Tribunal did not address them. The question of sovereignty over territory virtually permeates the Award however. That question is central to the two rejected submissions—the submissions that the Tribunal rejected because they called on the Tribunal expressly to deal with the dispute over territory. Sovereignty, I would like to submit, also involves the one submission—Mauritius' Fourth submission—that the Tribunal, at least in part, did conclude that it had jurisdiction to address.

9.3 Mauritius' Submission Number 4

It is Mauritius' Submission Number 4 that provided the basis for a limited, but not insubstantial, award in Mauritius' favour. Submission Number 4 merits scrutiny. Here is what Mauritius asked for under Submission Number 4:

> Mauritius respectfully requests the Arbitral Tribunal to adjudge and declare, in accordance with the provisions of the 1982 Convention, in respect of the Chagos Archipelago, that…
>
> (4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including *inter alia* Articles 2, 55, 56, 63, 64, 194, 300, as well as Article 7 of the 1995 Agreement [Fish Stocks Agreement].[12]

[11] Or at least as having determined the matter '[r]ightly': Whomersley (2016), pp. 239, 247.

[12] Mr Dheerendra Kumar Dabee Gosk SC, Solicitor-General and Agent of the Republic of Mauritius, in *Chagos Marine Protected Area (Mauritius v United Kingdom)* PCA Case No 2011-03, Hearing on Jurisdiction and the Merits (6 May 2014) 1141, quoted in *Chagos* (n 1) [158].

The qualifier 'purported' in front of 'MPA' was deliberate. Mauritius believed that it had good evidence that the 2010 enactment of the MPA by the UK was not really for the purpose of protecting a marine area. In Mauritius' understanding of the evidence, it could be shown that the UK's real purpose in enacting the MPA was to entrench the UK's presence in the BIOT. I will return to that point below.

Also noteworthy in this submission was the scope of the obligations that Mauritius invoked. Mauritius invoked both substantive and procedural obligations. It is under some seven UNCLOS provisions, plus the 1995 Fish Stocks Agreement, that those obligations are found.

Here is what the Tribunal said in response to the Fourth Submission:

> B. In relation to the merits of the Parties' dispute, the Tribunal, having found, *inter alia,*
>
> > (1) that the United Kingdom's undertaking to ensure the fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea;
> > (2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and
> > (3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding;
>
> DECLARES, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.[13]

UNCLOS is a general instrument for the governance of the world's oceans. It does not say anything about the Chagos Archipelago in particular. So, when the Annex VII Tribunal decided that the United Kingdom had breached obligations about the Chagos Archipelago, the Tribunal evidently was applying some other law source. That law source was the series of undertakings adopted in 1965 at Lancaster House in connection with the decolonization and independence of Mauritius and to which I now turn.

9.4 How the Tribunal Determined That the United Kingdom Was in Breach and What It Implies About Sovereignty

The Tribunal understood Mauritius, in making its Fourth Submission, to have asked the Tribunal to give a decision about how, if at all, the Lancaster House Undertakings might be applied under UNCLOS. The Tribunal's decision on that question was in two parts. The first was to reject Mauritius' argument that the Undertakings are incorporated into UNCLOS as 'other rules of international law' as UNCLOS Articles 2(3) provides or as 'rights and duties' to which the United Kingdom is obliged to 'have due regard' under UNCLOS Article 56(2). Those articles entail the application of the rules of general international law when their own rules are applied. The Tribunal concluded

[13] *Chagos* (n 1) [547(B)].

that the Undertakings are not part of general international law; and so they are not part of UNCLOS in the same way as are the rules of general international law.[14] The United Kingdom prevailed in that skirmish about general international law.

However, in regard to Article 2(3), 'The Tribunal *does*… consider that general international law requires the United Kingdom to act in good faith in its relations with Mauritius, *including with respect to undertakings*'.[15] In regard to Article 56(2), the Tribunal concluded that the United Kingdom must 'have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights'.[16]

Summarizing its findings on Articles 2(3) and 56(2), the Tribunal considered 'that the United Kingdom's obligation to act in good faith and to have "due regard" to Mauritius' rights and interests arising out the Lancaster House Undertakings… entails, at least, both consultation and a balancing exercise with its own rights and interests'.[17] As for Article 194(4), the Tribunal found that this contains a requirement of having 'due regard' much the same as that contained in Article 56(2).[18] So, applying 'the obligation to act in good faith', the Tribunal concluded that the United Kingdom is obliged to consult with Mauritius; and it is obliged to balance Mauritius' 'rights and interests' with its own 'rights and interests', and the 'rights and interests' here involved are those 'arising out of the Lancaster House Undertakings'.

The Tribunal's reasoning on these points provided the basis for Mauritius' main success in the case: this is where the Tribunal held that the United Kingdom had breached Articles 2(3), 56(2), and 194(4). The United Kingdom's breaches did not entail breaches of the Lancaster House Undertakings as such. The Undertakings did not enter into UNCLOS in the way that a general international law rule might. Instead, the Undertakings created rights *outside* UNCLOS, to which the United Kingdom, *inside* UNCLOS, was under a good faith obligation to give due regard.[19] The Tribunal found that the United Kingdom had not given those rights due regard. So the United Kingdom had breached that obligation. It was a modest win for Mauritius, but a win to be sure.

9.5 The Sting in the Tail

Wins sometimes come with a sting in the tail, however. The sting in the tail for Mauritius, one may submit, is rather sharp. The sting for Mauritius is that, looking at the Award as a whole, it is hard to avoid the conclusion, at least by inference, that the Chagos Archipelago belongs to the United Kingdom.

[14] ibid [517].

[15] ibid (emphasis added).

[16] ibid [519].

[17] ibid [534].

[18] ibid [540].

[19] For comment on the 'indirect' approach to applying the Undertakings, see Talmon (2016), pp. 927–951.

The problem for Mauritius is exposed by considering, *first*, the structure of the Award; *second*, the reasoning behind the Tribunal's decision concerning the UK's obligations to Mauritius; and, *third*, what the terms of the Award suggest about the legality of the act separating the Chagos Archipelago from Mauritius.

9.5.1 Structure of the Award

To recall, the Annex VII Tribunal, in paragraph B of the dispositive part of the Award of 18 March 2015, before it set out its determination in that paragraph that the UK is responsible for a breach of several UNCLOS provisions, set out three considerations that furnish the basis for the determination. Two of those considerations concern rights to living or non-living resources. The Tribunal considered that the UK has undertaken to ensure fishing rights in the territorial sea (B(1)); and the UK has undertaken to preserve the benefit of minerals or oil discovered in or near the archipelago (B(3)).

It became the received wisdom some time ago that sovereignty is a bundle of rights—a series of distinct incidents, each in principle being separable from the others.[20] The Tribunal in paragraph B might have restricted its reasoning to fish and minerals. However, it went further than that. The Tribunal also considered that the United Kingdom made an 'undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes'. That was in paragraph B(2). To talk about fish is, perhaps, to talk just about fish. To talk about a final disposition of territory in terms like paragraph B(2) is to talk about sovereignty *grosso modo*. It is to talk about the entire kettle of fish.

The Tribunal talked about sovereignty more than in passing. The Tribunal's reasoning about the return of the Archipelago is integral to the dispositive part of the Award. Parties have taken divergent views as to how much weight should be conferred on reasons set out in the body of an opinion.[21] But when a court or tribunal embeds certain reasons in the dispositive part of its opinion, those reasons are structurally impossible to sever from the decision reached.[22] In the *Chagos* Award, the Tribunal incorporated into the dispositive part an express reference to the return of the Chagos Archipelago. It referred to the return as an undertaking from which legal obligations of the United Kingdom have arisen. This was in terms common to all

[20] See, e.g., Maine (1888), p. 58.

[21] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand)* [2013] ICJ Reports 281, pleadings, and related jurisprudence.

[22] In this way, the 'having found' clause in the *chapeau* of Part B of the operative part of the *Chagos* Award, where it ties the three reasons given in Part B to the determination in Part B, is analogous to the phrase 'finds in consequence' that ties the first operative clause to the second and third operative clauses in the original *Temple* case: *Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Reports 6, 36–7. That Cambodia has sovereignty over the Temple was a disposition; it was also the reason for the further disposition that Thailand was to withdraw.

three parts of dispositive paragraph B: 'the United Kingdom's undertaking… is legally binding'. The declaration at the end of paragraph B, taken in isolation, concerned a rather remote obligation—one or two steps removed—to act in good faith and to give 'due regard' to certain 'rights and interests' of Mauritius. But taking paragraph B as a whole, as one must, this is a statement about sovereignty over the Archipelago as a whole.

A future return is predicated on the proposition that the party that is to carry out the return has possession—which leads to the next point: certain conclusions about sovereignty are difficult to avoid in view of the Tribunal's understanding of the events that led to the separation of the Chagos from Mauritius.

9.5.2 Sovereignty Over the Territory as Necessary in the Tribunal's reasoning

It is true that an obligation to 'return' a territory does not in itself necessarily entail that the State at present in possession holds legal title. A State that unlawfully occupies a territory might be described as obliged to 'return' the territory. The act of 'returning' in that setting however would mean the act of relinquishing effective control, not the act of transferring lawful title. On examination, the Annex VII Tribunal's reasoning is hard to reconcile with an unlawful occupation. For one thing, it would be strange to say that a State that unlawfully occupies a territory has the discretion to remain in the territory until the territory is 'no longer needed'. That is not how the modern law concerning territory and unlawful occupation works. Other considerations point to a similar conclusion about the UK's presence in the Chagos.

Here is what the Tribunal said, when considering Mauritius' claim under UNCLOS Article 56:

> [A]ll of the rights of a coastal State, inherent in the United Kingdom's undertaking to return the Archipelago to Mauritius, are potentially implicated and entitled to due regard pursuant to Article 56(2).[23]

So Mauritius' claim is about '*all* of the rights'. Those are the rights that are implicated. And those rights are 'inherent' in the United Kingdom's undertaking. That is the undertaking, contained in the Undertakings adopted in 1965 at Lancaster House, on which the sole disposition in Mauritius' favour is based. Take away the Undertakings, and there is no disposition. But give Mauritius the Undertakings, as the Tribunal concluded that the United Kingdom did, and inherent in them are 'all of the rights of a coastal State'. Nothing in those words qualifies the scope of the rights that the United Kingdom eventually is to transfer to Mauritius.

Further on, the Tribunal said that the Lancaster House Undertakings came into effect as a matter of international law '[w]hen Mauritius became independent—*and*

[23] *Chagos* (n 1) [304].

the United Kingdom retained the Chagos Archipelago'.[24] The Tribunal's observation that the United Kingdom retained the islands is not trivial or incidental. At the very least, the act of independence and the retention of the archipelago took place together. That is explicit in the sentence here quoted from the Award. But there is more to their linkage than their timing. The Undertakings were inseparable from the act separating the archipelago from Mauritius. The linkage between the Undertakings and the separation of the Chagos Archipelago is evident in several passages of the Award.

For example, the Tribunal referred to the 'the Lancaster House Undertakings made *in connection with* the detachment of the Chagos Archipelago'.[25] Elsewhere, '…the Tribunal consider[ed] that the undertakings… formed part of the *quid pro quo* through which Mauritian agreement to the detachment of the Chagos Archipelago from Mauritius was procured'.[26] Here, the Tribunal stated, in terms, that the undertakings and the agreement on separation were part of the same exchange of promises—i.e., part of one agreement. Later still in the Award, the Tribunal said this: 'All told, the Tribunal is faced with undertakings given *as part of an agreement concluded in 1965 between the United Kingdom and one of its colonies*'.[27] Again, the Undertakings are not separate from the agreement; they are part of it. And…

> [T]he Tribunal considers the Lancaster House Undertakings to have been an *essential condition* to securing such Mauritian consent to the detachment of the Archipelago as was given.[28]

Not only are the Undertakings part of the agreement. They are an 'essential condition' in the agreement.[29]

The integral character of the Undertakings and the agreement separating the archipelago may be inferred as well from the Tribunal's conclusion about fishing rights. The Tribunal concluded that Mauritius has fishing rights that originate in the modern law of the sea. The United Kingdom had asserted maritime jurisdiction step by step, from 3 nautical miles, to 12 nautical miles, out to the full 200 nautical mile entitlement of the EEZ in line with the development of that law.[30] The Tribunal observed that '[o]n each occasion, the United Kingdom has "ensured" that fishing rights would "remain available" on the same terms, even as other States' rights were

[24] ibid [425] (emphasis added).

[25] ibid [417] (emphasis added).

[26] ibid [421] (emphasis added).

[27] ibid [434] (emphasis added).

[28] ibid [422] (emphasis added).

[29] The phrase 'as was given' here is hard to understand except as a formalistic conceit. The Tribunal needed to insert a qualifier such as this, because it had considered at length whether it had jurisdiction to address the legal effects of the separation and had concluded that it could not, because it could not reach a decision about territorial sovereignty. However, the qualifier does not change the purport of what the Tribunal elsewhere concluded: Mauritius gave consent, and the Undertakings were the 'essential condition' to that consent.

[30] ibid [453].

being curtailed'.[31] It is hard to understand from the Award how the United Kingdom would have successfully asserted fishing rights if the United Kingdom had not retained the archipelago. In turn, it is hard to understand how, without having successfully asserted those rights, the United Kingdom would have been in a position to 'ensure' them to Mauritius. The Award determined that, in the Undertakings, the UK had promised Mauritius that fishing rights in the territorial sea of the Chagos would remain available as far as practicable. Without having given any other indication as to how the UK came to hold those fishing rights, the Award implies that this happened in the usual way—i.e., as a manifestation of sovereignty over the land territory appurtenant to the maritime zone involved. The Award in this way is further enmeshed in the agreement that separated the archipelago.

The Tribunal's observations about the 'connection to the United States Government' are consistent with the linkage between the Undertakings and the separation of the archipelago. The Tribunal referred to that 'connection' as 'inescapable'—in view of '*the totality of the arrangement* to detach the Archipelago for the promotion of defence purposes as requested'.[32] The Undertakings and the act of separation are part of a unitary transaction—an arrangement that is to be considered in its totality. When a tribunal understands an arrangement in that way, it accepts the arrangement as a whole. If it is to reject some part of the arrangement, it does so with reasons why.

From these considerations, it follows that, without the totality of the arrangement, there would have been no Undertakings, the Undertakings having been 'part of' and an 'essential condition' of the agreement reached between the United Kingdom and Mauritius at that time. And without the Undertakings, Mauritius would have had no case in 2015. Mauritius' case was based upon Undertakings that are inseparable from the arrangement that separated the Chagos.

To recall, the Tribunal in the *Chagos* case was emphatic (as against the strong dissenting position of two of its members) that it had no jurisdiction to determine sovereignty. According to the Tribunal, it did not determine sovereignty. In the Tribunal's defence, one could say that the Tribunal did not determine sovereignty *as such*. As the Tribunal stated:

> [A] dispute… exists between the Parties with respect to the manner in which the MPA was declared and the implications of the MPA for the Lancaster House Undertakings, made by the United Kingdom in connection with the detachment of the Archipelago. This dispute is distinct from the matter of sovereignty…[33]

So the Tribunal was careful to distinguish between two distinct *disputes*. There was a dispute about the relation between the MPA and the Lancaster House Undertakings. And there was a dispute about title to the Chagos Archipelago ('the matter of sovereignty'). Divisible though the two disputes might have been, the legal basis for the settlement of the one dispute that the Tribunal said it was settling

[31] ibid.

[32] ibid [452] (emphasis added).

[33] ibid [210].

was part and parcel of the act that had detached the Archipelago. The Tribunal accepted and applied the Lancaster House Undertakings, having repeatedly affirmed that the Undertakings were inseparable from the detachment. These, in the words of the Tribunal, constituted a single *quid pro quo.* To say that one half of a transaction like that forms the basis for the settlement of the dispute but then to deny that the other half has legal effect is unconvincing.

An oft-related episode in the history of New York City is that of George C. Parker, the con man who offered to sell the Brooklyn Bridge to a newly-arrived immigrant for a pittance. When we hear of Parker and his offer to sell the bridge, we know with the benefit of common sense (or hindsight)[34] that he was a fraudster. The newcomer, being naïve, accepted the offer and handed over his last few dollars. The newcomer thus becomes the object of our ridicule (or empathy)—because we know that Parker did not own the Brooklyn Bridge.

Mauritius in its transaction with the United Kingdom, by contrast, received something of real value. Mauritius came to independence and received a range of commitments by the administering power. The story of Parker and the Brooklyn Bridge would have entailed no fraud, if Parker actually had owned the bridge. Conversely, Part B of the *Chagos* Award, in effectuating the Lancaster House Undertakings, would have been giving force of law to a fraud (or at least a serious breach of international law), if, through the Undertakings, the United Kingdom had not retained sovereignty over the Chagos Archipelago. The Award, if the United Kingdom does not have the power today to give Mauritius what the Tribunal says it is obliged to give, is devoid of effect. The Tribunal disclaimed and reserved about jurisdiction to determine sovereignty under UNCLOS Part XV. But one is at a loss to understand the Tribunal's decision, if the Tribunal did not in truth have in view an answer to the question about territorial sovereignty—the question that it says it did not have power to address. If the Undertakings that the United Kingdom made to Mauritius are to be applied in the way that the Tribunal called for them to be applied, then the United Kingdom is in lawful possession of the archipelago.

9.5.3 Undertakings, Separation, and the Agreement as Applied

A third and final point concerns the obligations of a tribunal like the Annex VII Tribunal under general international law.

When the Annex VII Tribunal applied UNCLOS Articles 2, 56, and 194, it concluded that the Lancaster House Undertakings were not part of general international law. That conclusion by no means excluded the application of general international law entirely. Certain rules of general international law cannot be excluded. At a minimum, the peremptory rules of international law continue to operate, regardless

[34] He was convicted and sentenced to Sing Sing on 17 December 1928: 'Forger Gets Life Term: G.C. Parker, Confidence Man, Once "Sold" Brooklyn Bridge' *New York Times* (18 December 1928) 33.

of the particular terms of a jurisdictional instrument and regardless of the scope of the dispute submitted for settlement. This is not to propose that the peremptory character of a rule overrides the limitations of jurisdiction; the ICJ in *Germany v Italy* was clear that it does not.[35] However, in part for the very reason that the limitations of jurisdiction and the identification of applicable law are different things,[36] generally applicable legal rules continue to apply at least for certain purposes.

The implications of peremptory rules of international law for the *Chagos* Award come to light if we consider an *a contrario* position. Let us say, for purposes of analysis, that the separation of the BIOT had been a breach of the territorial integrity of Mauritius. That is to say, the separation had been a breach of right of the Mauritian people, as a matter of the law of self-determination, to decide the fate of the territory they inhabit.[37] That, in simplified form, is what Mauritius had argued happened.[38] Self-determination constitutes one of the general values of public order in the international community. If an agreement purported to effect a territorial change, and that change violated self-determination, then the agreement should not be applied, for to apply such an agreement would be tantamount to recognizing as lawful a situation created by a serious breach of an obligation arising under a peremptory rule of general international law.[39] Under the *a contrario* position, the proper course for the Annex VII Tribunal would have been to decline to apply the Undertakings; adopting that course, the Tribunal would have avoided reinforcing the breach constituted by an unlawful seizure of territory.[40]

A tribunal under Part XV might reach effectively the same result in more than one way. The tribunal might reason, as suggested immediately above, that an unlawful act of separation in breach of the law of self-determination must be refused recognition or support. The tribunal then would decline to apply the agreement under

[35] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Reports 99 [92]–[97].

[36] ibid [93].

[37] *Western Sahara*, Advisory Opinion [1975] ICJ Reports 12; *East Timor (Portugal v Australia)* [1995] ICJ Reports 90; Case C-104/16 P *Front Polisario v European Commission* (CJEU Grand Chamber, 21 December 2016) [88].

[38] See, e.g., *Chagos Marine Protected Area (Mauritius v United Kingdom)* PCA Case No 2011-03, Memorial of the Republic of Mauritius (1 August 2012) vol 1 [6.8]–[6.30].

[39] See Articles on Responsibility of States for Internationally Wrongful Acts [2001] 2(2) ILC Ybk 26, Arts 40(1), 41(2). Cf Articles on Responsibility of International Organizations [2011] 2(2) ILC Ybk, Art 42 and commentary [8]: the duty not to recognize the situation as lawful applies to international organizations as well as to States, and the International Law Commission did not 'exclude that similar obligations also exist for other persons or entities'.

[40] Non-application of agreements to the extent that they fail to respect self-determination was the course that the CJEU took in *Front Polisario* (n 36). The Court of Justice declared the General Court to have been in legal error for having said that the Association and Liberalisation Agreements between the EU and Morocco applied in Western Sahara: ibid [81]–[127]. The CJEU's reasoning was, *inter alia,* that 'the purported intention of the European Union [to apply the agreements in Western Sahara]… would necessarily have entailed conceding that the European Union intended to implement those agreements in a manner incompatible with the principle[…] of self-determination…': ibid [123].

which the unlawful act had been instituted. Viewing the matter as one of jurisdiction, the tribunal might instead conclude that the case in truth concerns the territorial dispute and to apply the agreement would exceed the scope of jurisdiction. The reasoning there would be this: UNCLOS Part XV does not extend jurisdiction to territorial disputes; to apply the agreement would entail deciding that the territorial situation is lawful; the tribunal thus has no power to apply the agreement. The Annex VII Tribunal in the *Chagos* case made clear that it was mindful of the limits of its jurisdiction under Part XV. The extended colloquy about territorial disputes reflects this. The Tribunal nevertheless applied the agreement.

And make no mistake about it. The Annex VII Tribunal was mindful as well that it had a duty to give effect to certain public order values. Consider what the Tribunal said about the WikiLeaks cable. This was the cable suggesting that the real purpose of the MPA was to entrench the United Kingdom in the Chagos Archipelago—not to protect a marine area. This evidence would have been damaging for the United Kingdom. The Tribunal, however, did not 'consider it appropriate to place weight on a record of such provenance'.[41] Why was it not 'appropriate to place weight on a record of such provenance'? What was there about placing weight on a leaked diplomatic cable that was not 'appropriate'? The answer is that the Annex VII Tribunal was highly sensitive to considerations of propriety. It was so sensitive to such considerations that it refused to accept a leaked cable as evidence in its proceedings. To have done so would have been damaging to public order values.

In view of that conclusion, considerations of general public order, such as those entailed by a breach of a peremptory rule of international law, must apply here as well. They apply *a fortiori*. If an inappropriate diplomatic cable had to be expelled from the ambit of the Tribunal's sight, then it is insupportable to contend that the Tribunal could give effect to an agreement that breached a fundamental international law right.

There is also, as noted above, the assertion by the United Kingdom of maritime jurisdiction in and around the archipelago—the assertion made 'even as other States' rights were being curtailed'.[42] The Award says nothing about third States' rights other than to note that they were being curtailed. Yet the disposition of a third State's rights, including rights to maritime jurisdiction, would have raised difficulties for an international tribunal, if a serious question had been raised whether a legal basis for the UK's maritime claims had existed. The land of course dominates the sea,[43] and so the United Kingdom's progressive establishment of maritime jurisdiction in and around the Chagos Archipelago could rest on no more solid foundation than the United Kingdom's rights in the archipelago. Mauritius' success in pleading that the United Kingdom had guaranteed its fishing rights under the Lancaster House Undertakings is hard to reconcile with a view that treats the origin of the United Kingdom's fishing rights as invalid.

---

[41] *Chagos* (n 1) [542].

[42] ibid [453].

[43] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* [1969] ICJ Reports 3 [96] (and its progeny).

Again, serious doubts exist as to how a court or tribunal under UNCLOS Part XV should deal with territorial disputes. The *Chagos* Annex VII Tribunal, following strong academic opinion, concluded that Part XV entails little or no jurisdiction to deal with territorial disputes. However, it does not suffice to say that the Tribunal simply left the question of the lawfulness of the act of separation for another day. You do not talk the way the Tribunal did about a State giving back a thing if you believe that the State never lawfully had the thing. Nor, sitting as an arbitrator under international law, do you apply an agreement adoption of which constitutes a serious breach of a fundamental international law rule. Arbitrators dealing with less serious breaches have refused to apply the unlawful agreement.[44] According to the Annex VII Tribunal, the obligation of the United Kingdom to give the Chagos back on the terms as indicated was justiciable; and the obligation was inseparable from the agreement that separated them. The separation of the islands, by inference, was valid.

The sting in the tail for Mauritius therefore is this. The United Kingdom remains in the Chagos Archipelago; and the Tribunal accepts that the MPA continues in force in the Chagos Archipelago and may do so for a 'potentially extended period'.[45] The full extent of that period is in the hands of the United Kingdom. This means that the return of the Chagos Archipelago will be when the United Kingdom decides that military considerations no longer require its retention. The Tribunal's interpretation therein places the future of the territory on an unpublished calendar subject to the discretion of the State that holds it. Nothing in the Award suggests that the transactions of the 1960s that led to this situation were invalid. To the contrary, the Tribunal's readiness to interpret and apply the agreement reached at that time implies that the separation of the Chagos Archipelago was lawfully performed and has legal effects to this day.

9.6 The Future as an Uncertain Country

So to return to sovereignty and the future prospects of the BIOT, we can conclude that the BIOT certainly has prospects: the Annex VII Tribunal protected some of these in its decision in respect of Mauritius' Fourth Submission. The earlier act of separation did not break off the BIOT's future from that of the Republic of Mauritius. To this extent, the two have a shared fate, and the Tribunal recognized this.

Moreover, the Tribunal understood that the Lancaster House Undertakings were adopted to safeguard future uses, not just the uses that existed in 1965 at the time of

[44] *ICC Case No 1110* (Lagergrens sole arbitrator, 1963) [20], reprinted with redactions in [1994] *Arbitration International* 282. Cf *World Duty Free Co Ltd v Republic of Kenya* ICSID Case No ARB/00/7 (Guillaume president, Veeder and Rogers arbitrators, Award, 4 October 2006) [137]–[138], [157]; *Plama Consortium v Bulgaria* ICSID Case No ARB/03/24 (Salans president, van den Berg and Veeder arbitrators, Award, 27 August 2008) [143].

[45] *Chagos* (n 1) [298].

separation. This was Mauritius' argument.[46] And the Tribunal largely seems to have accepted it. The Undertakings have a future orientation when it comes to the development of the archipelago. '[T]he United Kingdom's undertaking to return the Chagos Archipelago to Mauritius gives Mauritius an interest in significant decisions that bear upon the possible future uses of the Archipelago. Mauritius' interest is not simply in the eventual return of the Chagos Archipelago, but also in the condition in which the Archipelago will be returned'.[47]

As for the obligation to return the islands, this is a very significant future obligation. The Tribunal affirms this obligation; it does not merely mention it in passing or as a supporting consideration. The Tribunal incorporates it into the dispositive part of the Award. Reasons that a court or tribunal incorporates into the *dispositif* are essential to the disposition of the case. One cannot elide the 'undertaking to return the Chagos Archipelago' if one is to make sense of the award that follows. To this extent, the Award is a success for Mauritius.

The temporal qualifier nevertheless remains. The return of the archipelago is prospective. It is an act for the future. And it is a discretionary act, because the conditions that trigger its obligatory character are conditions that the United Kingdom has the discretion to ascertain. And, so, for Mauritius and the Chagos as places with a common future, that future remains an indeterminate place. One is reminded of the novelist who said that 'The past is a foreign country'.[48] The Annex VII Tribunal did not say explicitly whether, for Mauritius, the BIOT was a foreign country after the act of separation in the 1960s. The Tribunal did say that the United Kingdom has an obligation at some future time to give it back; and by applying the Lancaster House Undertakings as a source of law—even only through the filter of good faith and 'due regard'—the Tribunal made it hard to avoid the inference that the separation of the territory under those undertakings was a valid international act.

As for Mauritius, the BIOT of the future seems likely *not* to be a foreign country. We well may have to wait a while to get there though. Like the once and future king—*Hic iacet Arthurus, rex quondam, rexque futurus*—we know that he once was; we have it on authority that he will be again; but, given only what we know today, we cannot say for sure when that will be. The sovereign of the day continues, even as another is guaranteed an eventual return.

References

Barlow &Ors v Minister of Agriculture, Food and the Marine & Ors [2016] IESC 62, 17 October 2016

Casey J (2000) Constitutional law in Ireland, 3rd edn. Round Hall Sweet and Maxwell, Dublin, pp 40–41

[46] ibid [274].

[47] ibid [298].

[48] Hartley (1953), p. 1: 'The past is a foreign country: they do things differently there'.

Chagos Marine Protected Area (Mauritius v United Kingdom) PCA Case No 2011-03, Award (2015) 162 ILR 59
Chagos Marine Protected Area (Mauritius v United Kingdom) PCA Case No 2011-03, Memorial of the Republic of Mauritius (1 August 2012) vol 1
East Timor (Portugal v Australia) [1995] ICJ Reports 90
Fisheries Jurisdiction (Spain v Canada), Jurisdiction [1998] ICJ Reports 423
Front Polisario v European Commission (CJEU Grand Chamber, 21 December 2016)
Graham K (2015) Ocean order in South America. Int J Mar Coast Law 30:361
Hartley LP (1953) The go-between. Hamish Hamilton, London
ICC Case No 1110 (Lagergrens sole arbitrator, 1963) [20], reprinted with redactions in [1994] Arbitration International 282
Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Reports 99
Maine HS (1888) International law: lectures. John Murray, London
Maritime Delimitation and Territorial Questions (Qatar v Bahrain) [2001] ICJ Reports 40
Maritime Dispute (Peru v Chile) [2014] ICJ Reports 3 [175]; Declaration of Judge Gaja, [2014] ICJ Reports at 113
Philippines v China, PCA Case No. 2013-19, Annex VII Tribunal (Mensah, Presiding; Cot, Pawlak, Soons & Wolfrum, Arbitrators), Award on Jurisdiction and Admissibility, 29 October 2015
Plama Consortium v Bulgaria ICSID Case No ARB/03/24 (Salans president, van den Berg and Veeder arbitrators, Award, 27 August 2008)
Responsibility of International Organizations [2011] 2(2) ILC Ybk
Responsibility of States for Internationally Wrongful Acts [2001] 2(2) ILC Ybk 26
Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) [2013] ICJ Reports 281
Talmon S (2016) The Chagos marine protected area arbitration. Int Comp Law Q 65(4):927–951
Territorial and Maritime Dispute (Nicaragua v Colombia) [2012] ICJ Reports 624
Western Sahara, Advisory Opinion [1975] ICJ Reports 12
Whomersley C (2016) The South China Sea: the award of the tribunal in the case brought by the Philippines—a critique. Chin J Int Law 15:239
World Duty Free Co Ltd v Republic of Kenya ICSID Case No ARB/00/7 (Guillaume president, Veeder and Rogers arbitrators, Award, 4 October 2006)

Chapter 10
The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*

Stephen Allen

10.1 Introduction

The Chagos Islands were detached from the British colony of Mauritius in 1965 to form the British Indian Ocean Territory (BIOT), a step that was intimately connected with the achievement of Mauritian independence, which occurred in 1968. Mauritius' consent to the act of excision was negotiated during the Constitutional Conference on Mauritius, held at Lancaster House in September 1965. In particular, during this Conference, a series of commitments—the 'Lancaster House Undertakings' ('LHUs')—were hammered out by the UK government and certain high level Mauritian delegates.[1] The pivotal Lancaster House Undertakings invoked in the *Chagos Arbitration Case* concerned the UK government's commitment to: (1) retrocede the Chagos Archipelago to Mauritius when it was no longer needed for defence purposes; (2) to respect Mauritian fishing rights in the Archipelago's waters; and (3) to revert the benefit of any minerals or oil found in the Chagos Islands to Mauritius. These commitments subsequently formed the basis of the '1965 Agreement',[2] which was formally approved by the Mauritian Council, comprised of the British Governor and the elected Mauritian Ministers, on 5 November 1965.

In its *Chagos Award*, the Tribunal understood that determining the nature and effect of the 1965 Agreement and the Lancaster House Undertakings was of central

Stephen Allen: Department of Law, Queen Mary, University of London.

[1] See *Chagos Marine Protected Area (Mauritius v. United Kingdom)* Final Award, 18 March 2015 (available on the website of the Permanent Court of Arbitration <www.pca-cpa.org> accessed 19 August 2017), [77].

[2] ibid [418].

S. Allen (✉)
Queen Mary, University of London, London, UK
e-mail: s.r.allen@qmul.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_10

importance to the task of settling the dispute.[3] Ultimately, they facilitated the Tribunal's finding that the manner in which the BIOT Marine Protection Area (MPA) was established amounted to a violation of international law.[4] The Tribunal viewed the Agreement as an ambulatory arrangement, which was valid as a matter of UK constitutional law while Mauritius remained a British colony, but which acquired international legal validity once Mauritius achieved independence. This essay will show how and why the Tribunal's assumption that the 1965 Agreement—an agreement concluded between a colonial power and one of its Non-Self-Governing Territories—was some sort of proto-treaty is deeply problematic.[5] However, the essay's main focus will be on the role that the Lancaster House Undertakings played in the *Chagos Award* and, specifically, the manner in which they were used in support of the Tribunal's conclusion that the UK was under an international legal obligation to give effect to Mauritius' rights via the principle of estoppel.

The essay will advance the thesis that estoppel's application does not result in the enforcement of the Respondent State's representation, or promise, as though the principle was meant to give effect to that State's intentions (in a similar fashion to the way that binding unilateral declarations work); nor does estoppel seek to uphold the shared intentions of the parties, in cases where they have entered into a non-treaty arrangement. The essay will embrace the established view that estoppel arises from the Respondent State's representation, made by words or conduct, which induced the Applicant State's detrimental reliance, but it will concentrate on the way in which the Respondent State's behaviour should be assessed for this purpose. In particular, it will argue that the Respondent State's representation and subsequent conduct should be determined from the Applicant State's perspective (subject to the test of reasonableness), as estoppel functions in a way that endeavours to give effect to the legitimate expectations of that State. While, at various points in its Award, the Chagos Tribunal acknowledged estoppel's normative basis and its sphere of operation, it did not apply the principle consistently when considering the legal significance of the Lancaster House Undertakings. Against this background, the essay will examine the manner in which the Tribunal harnessed estoppel in order to uphold the Lancaster House Undertakings as though they, collectively, amounted to something akin to a binding international agreement in international law, despite the generally accepted view that estoppel derives its normative authority from an independent source of international legal obligation, one that flows from the interplay of informal modes of behaviour. The essay will also consider the ramifications of the Tribunal's understanding of estoppel's operation and its assessment of the 1965 Agreement's character for the processes of international decision-making more generally.

[3] ibid [417].

[4] ibid [534], [535], and [536].

[5] In Allen (2014), I argued that the 1965 Agreement was an unmediated treaty as a matter of international law. This argument is not pursued in this essay.

10.2 Historical Background

On the afternoon of 23 September 1965, at the end of the Lancaster House Constitutional Conference, a series of commitments were agreed between the UK government and the Mauritian delegation. They were set out in the final record of the Lancaster House Meeting. Given its importance it is worth quoting the material paragraph of the record in its entirety at this stage:

> Summing up the discussion, the [British] Secretary of State asked whether he could inform his colleagues that Dr. [Sir Seewoosagur] Ramgoolam, Mr. Bissoondoyal and Mr. Mohamed were prepared to agree to the detachment of the Chagos Archipelago on the understanding that he would recommend to his colleagues the following:
>
> (i) Negotiations regarding a defence agreement between the UK and Mauritius would be undertaken;
> (ii) In the event of independence, an understanding would exist between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;
> (iii) Compensation totalling up to £3 million should be paid to the Mauritian Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
> (iv) The British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;
> (v) That the British Government would do their best to persuade the American Government to use labour and materials for Mauritius for the construction work in the islands
> (vi) The British Government would use their good offices with the US Government to ensure that the following facilities in the Chagos Islands would remain available to the Mauritian government as far as practicable:
>
> (a) Navigational and meteorological facilities;
> (b) Fishing rights; and
> (c) Use of an Air Strip for in the event of emergency landings and for refuelling civilian planes without disembarkation of passengers;
>
> (vii) If the need for the facilities on Chagos Islands should disappear the islands should be returned to Mauritius;
> (viii) The benefit of any minerals or oil discovered in or near the Chagos Islands should be reverted to the Mauritian government.[6]

The Chagos Tribunal noted that, on 6 October 1965, the British Colonial Secretary instructed the British Governor of Mauritius to bring about the 'early confirmation that the Mauritius Government is willing to agree that Britain should now take the necessary legal steps to detach the Chagos Archipelago from Mauritius on the conditions enumerated [the Lancaster House Undertakings]'.[7] In addition, the Secretary of State indicated, in paragraph 5 of his dispatch, that in respect of paragraphs (iv), (v) and (vi) of the Undertakings, the British Government would make appropriate representations to the US Government and, in paragraph 6, that

[6] Paragraph 22 of Final record. Cited in the Chagos Award (n 1) [77].

[7] ibid [78].

the Chagos Archipelago will remain under British sovereignty but it took 'careful note of the Undertakings contained in paragraphs (vii) and (viii)'.[8]

The detachment of the Chagos Islands from the colony of Mauritius was formally considered by the Mauritian Council of Ministers on 5 November 1965.[9] A memorandum, written by the Chief Secretary to the Council, containing the terms of this Agreement,[10] was prepared in advance of the meeting.[11] It included the Lancaster House Undertakings along with an additional term, which had previously been assumed by both sides, namely that 'the Chagos Archipelago should be detached from Mauritius and placed under British sovereignty by Order in Council'.[12] The Mauritian Council of Ministers decided to approve this version of the Agreement on this occasion.[13] Nevertheless, the Governor advised the Colonial Office that:

> Council of Ministers today confirmed agreement to the detachment of the Chagos Archipelago on the conditions enumerated on the understanding that the British government has agreed that
>
> (1) statement in paragraph 6 of your dispatch 'HMG have taken careful note of points ((vii) and (viii)' means that HMG have in fact agreed to them.
> (2) As regards (vii) undertaking to Legislative Assembly excludes
>
> (a) sale or transfer by HMG to third party or
> (b) any payment or financial obligation by Mauritius as a condition of the return…[14]

On 8 November 1965, the Secretary of State cabled a response. In addition to reiterating the relevant parts of his dispatch of 6 October 1965—set out above—he stated that the British government did not intend to allow prospecting for oil and minerals in the BIOT as it was being set aside for defence purposes. Accordingly, he expressed the view that this particular undertaking would not be triggered while Britain exercised sovereignty over this Overseas Territory.[15] In response to this query, in a telegram dated 19 November 1965, the Colonial Secretary stated:

> [T]he assurance can be given provided it is made clear that a decision about the need to retain the islands must rest entirely with the United Kingdom Government and that it would not (repeat not) be open to the Government of Mauritius to raise the matter, or press for the return of the islands on its own initiative.[16]

---

[8] ibid.

[9] Mauritian Legislative Assembly, 'Report of the Select Committee on the Excision of the Chagos Archipelago (No 2 of 1983)' (Port Louis, Mauritius, Mauritian Legislative Assembly, 1983) (The 'Excision Report'), Appendix N, 61.

[10] Chagos Award (n 1) [418].

[11] 4 November 1965. See the Excision Report (n 9), Appendix M, 59–60.

[12] ibid 59–60.

[13] ibid. Appendices O and P, 62–63.

[14] Chagos Award (n 1) [79].

[15] ibid [82].

[16] Excision Report (n 9) Appendix R, 65.

In the meantime, the BIOT was created by the enacting of the British Indian Ocean Order in Council on 8 November 1965.[17] Section 3 provided that:

> As from the date of this Order –
>
> (a) the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius, and
> (b) the Farquhar Islands, the Aldabra Group and the Island of Desroches, being islands which immediately before the date of this Order were part of the Colony of Seychelles,
>
> shall together form a separate colony which shall be known as the British Indian Ocean Territory.

In the aftermath of independence, the Mauritian government accepted the validity of the 1965 Agreement. However, during the 1970s, the legality of the detachment of the Chagos Islands became a major source of tension in Mauritian domestic politics.[18] Against this background, a Select Committee of the Mauritian Legislative Assembly held an inquiry into the excision of the Chagos Archipelago in 1982.[19] The Committee's report concluded that the consent of the Mauritian Ministers had been procured by duress in violation of the applicable rules and principles of international law. Specifically, it found that the loss of the Chagos Islands amounted to the price of Mauritian independence and that such an arrangement was consistent with the most elemental form of blackmail.[20] Mauritius began to assert its sovereignty claim to the Archipelago more strenuously from this point onwards and the 1965 Agreement and the Lancaster House Undertakings together have constituted the foundations for Mauritius' demand for the immediate and unconditional return of the Chagos Islands ever since.

10.3 The Character of the 1965 Agreement

10.3.1 The Status of the 1965 Agreement in UK Law

Having reached the conclusion that it had jurisdiction to decide the case,[21] the Tribunal had to consider the character and effect of the 1965 Agreement, and the Lancaster House Undertakings contained therein, at the merits stage. At the outset,

---

[17] SI 1965/1920.The Sovereign in Council had the authority to make such an Order by virtue of the Colonial Boundaries Act 1895.

[18] See Allen (2014).

[19] See the Excision Report (n 9).

[20] ibid [36]. Paragraph 5 of the Colonial Declaration, UN General Assembly Resolution 1514(XV) (1960), condemns the imposition of conditions and/or reservations regarding the achievement of independence and paragraph 6 decries the dismemberment of a territorial integrity of colonial units in advance of independence.

[21] On the basis of Mauritius' fourth submission—that the BIOT MPA was incompatible with the substantive and procedural obligations set out in the Law of the Sea Convention. Chagos Award (n 1) [323].

the Tribunal signalled that the Agreement played a decisive role in the process of detachment.[22] In its view, the LHUs constituted the essential basis—the *quid pro quo*—by which Mauritian consent was procured.[23] However, the Tribunal's initial observations regarding the importance of the Agreement and the Undertakings did not address the issue of their character and effect. Did they give rise to legally binding rights and obligations for the parties or did they simply have political resonance? Mauritius claimed that the Mauritian Ministers' consent to the detachment of the Chagos Islands from the Mauritian colonial unit, via the Agreement, was vitiated by duress in contravention of the right of colonial self-determination in international law.[24] Further, it argued that the parties did not intend for the 1965 Agreement to be legally binding as it did not qualify as a treaty as a matter of international law. Instead Mauritius argued that the Lancaster House Undertakings amounted to legally binding obligations as a matter of international law by reference to the principle of estoppel.[25] The UK asserted that neither the Agreement nor the LHUs had effect at the level of UK constitutional law. Instead, it contended that the LHUs amounted to significant political commitments, rather than legally binding rights and obligations at either the level of national law or international law.[26]

The Tribunal followed the thrust of Mauritius' argument on this issue. It distinguished the 1965 Agreement from the LHUs for the purpose of analysing their character and effect. Further, it took the view that the Agreement could not have acquired international legal validity in November 1965 because it was an arrangement entered into between a Colonial Power and one of its Non-Self-Governing Territories. Consequently, the Tribunal held that the Agreement was governed by UK constitutional law during the period in which Mauritius remained a British colony.[27] To this end, it quoted Hendry and Dickson's view that:

> [B]ecause internationally [British Overseas] Territories are not legal entities separate from each other or from the United Kingdom. […] [R]egardless of the form that they take, probably, the most that these instruments could be is a contract binding upon the Parties under domestic law.[28]

This assertion is questionable, especially in the light of the corpus of international law relating to decolonisation, which holds that a Non-Self-Governing Territory possesses international legal personality for certain purposes and has a separate identity from its Administering Authority as a matter of international law.[29]

---

[22] ibid [418].

[23] ibid [421–422]. Here the Tribunal adopted Mauritius' argument in this respect.

[24] ibid [391] and [393].

[25] ibid [394] and [397].

[26] ibid [391] and [400].

[27] ibid [424].

[28] Hendry and Dickson (2011), p. 261. Chagos Award ibid.

[29] For example, the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation Among States recognised that the people of a Non-Self-Governing Territory have a separate status that is distinct from that Territory's the metropolitan colonial power which administers it. UN General Assembly Resolution 2625(XXV)(1970). This argument is

After a close examination of the words and phrases used in the LHUs the Tribunal concluded that the UK's commitments were expressed in the language of obligation and it considered that this interpretation was supported by the way in which the UK government itself understood them.[30] Accordingly, it decided that the Undertakings were intended to have legal effect, presumably at the level of UK constitutional law. In its view, the UK undertakings: 'were not the words of voluntary intent to assist Mauritius to the extent of political feasibility, but of an offer made on the basis of an intent to be bound'.[31] Notwithstanding the Tribunal's apparent willingness to treat the Agreement as a national law instrument it appreciated that the circumstances had changed since 1965: 'Had Mauritius remained part of the British Empire, the status of the 1965 Agreement would have remained a matter of British constitutional law'.[32] Consequently, the Agreement's initial domestic character could not endure in the postcolonial reality.

Against this background, the Tribunal chose to focus on the future importance of the 1965 Agreement, and the LHUs which underpinned it. It observed that while the UK and Mauritius: 'were committed to honouring the Agreement in their post-independence relations, they were legally disabled from expressing that commitment as a matter of international law for such time as Mauritius remained a colony'.[33] In the Tribunal's view, 'the commitments made by the United Kingdom were not aimed at the narrow window of time between detachment and independence, but at future relations between the United Kingdom and an independent Mauritius'.[34] In this regard, the Tribunal took the view that the Agreement was intended to generate legal effects for the UK and Mauritius during both the colonial and the post-colonial era because the UK had committed itself to a future course of conduct with an independent Mauritius in return for the detachment of the Chagos Islands.[35]

The Tribunal treated the Agreement's future orientation as being a decisive factor with regard to the task of determining its legal character. Although it may not have been completely sure of the Agreement's status as a matter of UK law the Tribunal was convinced that it exhibited an international legal character once Mauritius had acceded to independence. As a result, the Tribunal felt justified in directly addressed the significance of the Agreement as a matter of international law. It accepted that the parties had not considered the issue of the Agreement's character during the process of its negotiation, adoption, or on the occasion of Mauritian independence.[36]

---

developed in Allen (2014), chapters 5 and 6.

[30] The Chagos Tribunal attached considerable significance to the UK government's instructions to the British Governor to secure the detachment on the 'conditions' negotiated at the Lancaster House Conference. See Award (n 1) [423]. However, it is hard to surmise from this statement that this term is indicative of the creation of an instrument giving rise to legal rights and obligations.

[31] ibid [424].

[32] ibid [425].

[33] ibid [424].

[34] ibid [423].

[35] ibid [425].

[36] ibid [427].

Nevertheless, it made the general observation that if, during the process of finalizing an international agreement, *States* have not signalled whether the agreement in question is intended to be legally binding, in cases of dispute, it falls to a court or tribunal to determine an agreement's status by reference to its provisions and the circumstances surrounding its conclusion.[37] Accordingly, the Tribunal turned to the task of determining the Agreement's character. In its own words:

> The Tribunal, […] does not consider the circumstances in which the Agreement was initially framed—as a matter between the United Kingdom and its colony—to be determinative of the Parties' intent with respect to its eventual status. Objectively, the Tribunal considers the subject matter of the 1965 Agreement—an agreement to the reconstitution of a portion of a soon-to-be-independent colony as a separate entity in exchange for compensation and a series of detailed undertakings—to be more in the nature of a legal agreement than otherwise. And, as set out above, the Tribunal sees no hint in the course of negotiations or in the language used in 1965 that anything less than a firm commitment was intended.[38]

As a result, the Tribunal decided that Mauritian independence, 'had the effect of elevating the package deal reached with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement'.[39] To this end it, 'conclude[d] that, upon Mauritian independence, the 1965 Agreement became a matter of international law between the Parties'.[40]

10.3.2 Elevating the 1965 Agreement to the International Plane

There are several difficulties with the Tribunal's assertion that the 1965 Agreement could be elevated from the realm of municipal law to the domain of international law on the occasion of Mauritian independence. First, this approach would appear to presuppose that the 1965 Agreement had municipal legal validity before it was transformed into international law. However, the position of the UK government was clear at the time of the Lancaster Constitutional Conference—as a matter of UK constitutional law the Chagos Islands would be detached from the colony of Mauritius by Order in Council.[41] In this context, it would appear that the consent of the Mauritian Ministers to the excision of the Chagos Islands was an important source of political legitimacy for the BIOT's creation, but it was not required for the purposes of the operation of UK constitutional law. Consequently, at the time it was

[37] ibid [426]. In support of this approach the Tribunal invoked the ICJ's decision in the *Aegean Continental Shelf Case (Greece/Turkey)* (1978) ICJ Reps 3, [96]. Mauritius was not a State at the time the 1965 Agreement was concluded.

[38] Chagos Award ibid [427].

[39] ibid [425].

[40] ibid [428].

[41] See Allen (2014), chapter 3.

concluded, the Agreement could be characterised as a domestic political agreement rather than an instrument of municipal law.

One challenge arising from the political character of the Agreement at the domestic level is bound up with the idea of elevation itself—how could it be viewed as ambulatory and acquire an international legal character if it did not have legal status as a matter of UK law to begin with? This would appear not to be a purported instance of transferring a legal instrument from one legal system to another, but an attempt to alter its character too (from a political arrangement to a legal agreement). This apparent conundrum can be resolved by considering the way in which international law treats national law for its own purposes. In this context, it is worth recalling the observation made by the Permanent Court of International Justice in the *Certain German Interests in Polish Upper Silesia Case*, namely that: 'national laws are merely facts which express the will and constitute the activities of States'.[42] In this well-known passage, the PCIJ may have understated the importance of national legal provision for the purposes of the operation of the international legal order, but the national laws as facts approach does have special resonance in the context of the process of decolonisation, as the principle of *uti possidetis juris* amply illustrates.

The international legal principle of *uti possidetis juris* sought to avoid fratricidal struggles and external territorial claims by ensuring that: 'new States will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power'.[43] And, as the ICJ noted in the *Frontier Dispute (Burkina Faso/Mali) Case*, 'the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term'.[44] This principle, therefore, has the effect of freezing the territorial status quo at the moment of independence for the purpose of determining the postcolonial State's territorial entitlements as a matter of international law. As a result, *uti possidetis* demonstrates how the municipal legal position can be elevated to establish the position as a matter of international law. Nevertheless, it is important to appreciate that the relevant municipal laws are not accorded the status of laws for the purpose of the act of transformation; instead they are treated as facts. The ICJ appreciated this distinction in the *Frontier Dispute Case*, when it observed that:

> By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. This is part of the ordinary operation of the machinery of State succession. International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the 'photograph' of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands. Hence international law does not effect any *renvoi* to the law established by the colonizing State, nor indeed to any legal rule unilaterally established by any State whatever; French law – especially legislation enacted by France for its colonies and *territories d'outre-mer* – may play a role not in itself (as if there

[42] *Certain German Interests in Polish Upper Silesia Case*, (1926) PCIJ, Series A, No. 7, 19.

[43] Shaw (1996), pp. 75 and 97.

[44] *Frontier Dispute (Burkina Faso/Mali) Case* (1992) ICJ Reps 554, 566, [23].

> were a sort of continuum juris, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of what has been called the colonial heritage', i.e., the 'photograph of the territory' at the critical date.[45]

In the above excerpt, the ICJ acknowledged that there is not necessarily continuity between national law and international law, rather national law provisions are treated as facts, which may be interpreted by an international court or tribunal, along with other material considerations, in order to determine the colonial heritage at the critical date. Consequently,[46] the fact that the 1965 Agreement did not qualify as a national law instrument does not prevent it from being transformed into an international legal instrument by virtue of Mauritius' accession to independence.

But while it is clear that, in principle, the Agreement could be transformed from a domestic political agreement into an international legal instrument a remaining difficulty regarding any process of transformation is the question of what was the effect of this elevation process? If the Agreement supposedly acquired an international legal character what did it become? The Tribunal simply noted that it was elevated to the international legal plane for the parties on the occurrence of Mauritian independence without any authority for this proposition and without any discussion as to the consequences of this change.

10.3.3 The 1965 Agreement: Treaty or Memorandum of Undertaking?

As discussed above, the Tribunal concluded that the 1965 Agreement was more in keeping with a legal agreement than a political one. However, it is apparent that the opposite conclusion is just as plausible. International agreements, concluded between two actors in possession of a sufficient degree of international legal personality, do not necessarily have the status of treaties as a matter of international law: the parties must manifest an intention to create international legal rights and obligations inter se.[47] But if an international agreement does not qualify as a treaty, could it still possess a meaningful degree of normativity for the purposes of international law? There has been a substantial debate about whether a category of international agreements exists that manifest a lesser degree of normativity than fully fledged treaties but which exhibit an international legal character which is sufficient for

[45] ibid 568, [30].

[46] Berman and Bentley (2016).

[47] Article 2(a) of the Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 provides that: '"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

them to have direct legal effects.[48] However, the current consensus seems to be that no such hybrid category is recognised by international law.[49]

In the light of the above, it is clear that the 1965 Agreement is best characterised as a non-treaty agreement or a Memorandum of Understanding (MOU). According to the UK government's own guidance on such arrangements, '[a]n MOU records international "commitments" but in a form and with wording which expresses an intention that it is not to be legally binding'.[50] The guidance adds that in order to determine whether an MOU, or an international treaty, has been concluded regard must be had to the words and phrases used in the instrument. This guidance does not purport to offer an exhaustive analysis but it mentions that if the instrument in question refers to 'governments' or 'participants' rather than 'parties'; or it uses the word 'understanding' instead of 'agreement'; or 'provisions' rather than 'terms' then it will be apparent that the instrument was not intended to create international legal rights and obligations.[51] In any event, it has been widely acknowledged that the commitments contained in an MOU are still politically significant and they may have indirect legal consequences in certain situations by virtue of the principle of estoppel.[52]

As a matter of textual construction, it can be argued that the words and phrases used in the LHUs show that the parties did not intend to create legally binding rights and obligations through the 1965 Agreement. For instance, the UK's commitment to using its 'good offices' with the US government to ensure that any fishing rights 'would remain available […] as far as practicable' is heavily qualified; the undertaking to retrocede the Chagos islands is not expressed in mandatory language and the same can be said for the commitment to revert the benefit of any oil or mineral deposits found in the Archipelago to Mauritius.[53] In any event, if it is accepted that the Agreement could not manifest a legal character as a matter of UK law, it is hard

[48] See Fawcett (1953), pp. 381 and 399; Schachter (1977), p. 296; Klabbers (1996), pp. 105–118; Hillgenberg (1999), pp. 499 and 502; Raustiala (2005), p. 581; Aust (2007), chapter 3; and Berman and Bentley (2016), p. 616.

[49] Hillgenberg believes that the creation of international legal rights and obligations through international agreements is a matter of choice; consequently, he endorses the existence of a clear division between treaties and non-treaty agreements by reference to the intentions of the parties. Ibid., 502–503. However, it is clear that this argument has limited resonance in the present context: Mauritius had no meaningful choice with regard to the decision to conclude the 1965 Agreement. Moreover, it had very little influence concerning the form and character of the Agreement. And, in any event, Mauritius had not acceded to independence at time the Agreement was entered into and, as such, it did not enjoy full international legal personality—it was not a State—at the material time.

[50] *Satow's Diplomatic Practice* (n 47) [33.21].

[51] ibid.

[52] Schachter (1977), pp. 303–304; *Satow's Diplomatic Practice*, ibid. [33.23]. The significance of estoppel in this context will be explored in Sect. 10.4 below.

[53] Although such a conclusion attaches no weight to the political dynamics that informed this arrangement concluded between a colonial power and one of its Non-Self-Governing Territories. See Allen (2014).

to arrive at the conclusion that its component parts could generate legal rights and obligations at that the level simply through an act of interpretation. Notwithstanding these apparent shortcomings, it appears that the Tribunal viewed the 1965 Agreement as a kind of proto-treaty but even if this could be assumed, how could it be used to determine the postcolonial relations between the UK and Mauritius?

By recognising the Agreement's nascent international legal character, the Tribunal was implicitly accepting that the Mauritian Ministers had sufficient legal capacity to conclude the 1965 Agreement, and that it possessed a latent international legal quality which emerged once independence was achieved.[54] Nevertheless, as Mauritius was a British colony at the time of the Lancaster House Constitutional Conference, it is indisputable that the LHUs and the 1965 Agreement fell within the preserve of the UK's exclusive jurisdiction, as a matter of traditional international law. The view that the Agreement could simply be transposed into international law by virtue of the achievement of Mauritian independence shows a failure to appreciate the manner in which it was negotiated. The Mauritian Premier, and other Mauritian representatives argued, during the Lancaster House Conference, that Mauritius should be granted its independence before the question of the excision of the Chagos Islands and the formation of the BIOT were determined. In their view, such an approach would allow a newly-independent Mauritian government the opportunity to negotiate the terms of any arrangement, concerning the detachment of the Chagos Archipelago, freely.[55] However, the UK government was not prepared to countenance such an argument. Independence was used to entice the Mauritian delegates at the Lancaster House Conference, and subsequently, the Mauritian Ministers, to agree to the detachment of the Chagos Islands.[56] In the circumstances, the Agreement's content could only be interpreted through the lens of the parties' extant colonial relations. The simple act of elevating the Agreement to the international plane would have had the effect of preserving and reinforcing the asymmetrical nature of this relationship ensuring that (purportedly) legally binding rights and obligations, which would not have been negotiated if the parties were not the responsible colonial power and one of its Non-Self-Governing Territories. It is notable that, in the end, the Tribunal was not prepared to endorse the idea that the Mauritian Ministers possessed a degree of international legal personality for the purpose of concluding the 1965 Agreement. Instead it preferred to follow the

[54] See Allen (2014). It is well known that the lack of legal capacity to conclude to conclude a treaty is often cited as one of the motivations for entering into an MOU rather than a treaty. See Hillgenberg (1999), p. 501.

[55] In a meeting, held on 20 September 1965, between the British Prime Minister and the Mauritian Premier, Ramgoolam suggested that the best way forward would be for the UK government to grant Mauritius its independence and then allow it to negotiate directly with the US and UK governments regarding the detachment of the Chagos Islands from Mauritius. TNA PRO 20 September 1965, Letter and Note for the Record from JO Wright, Prime Minister's Office to JW Stacpoole, Colonial Office. TNA PRO 20 September 1965, Record of a conversation between the Prime Minister and the Premier of Mauritius, at Downing Street, FO 371/184528 Z4/172. See Allen (2014), chapter 3.

[56] See Allen (2014).

orthodox view that the processes by which the Agreement was produced, and its content, were matters which fell within the UK's exclusive jurisdiction until the moment Mauritius acceded to independence. Given these difficulties, it is not at all surprising that the Tribunal chose to base its decision on the legal effects of the LHUs, rather than on any arguments that might flow directly from the 1965 Agreement.

10.4 The Lancaster House Undertakings and Estoppel

10.4.1 Satisfying Estoppel's Requirements in the Chagos Award

As noted above, the Tribunal was clearly conscious of the shortcomings arising from categorizing the Agreement as a proto-treaty. It remained sensitive to Mauritius' argument that any consent to the detachment of the Chagos Islands was vitiated because it was procured by means of duress.[57] Consequently, it understood that this state of affairs had the ability to compromise any potential legal validity which the Agreement might possess. It was, therefore, prepared to consider Mauritius' claim that the LHUs should be separated from the Agreement for the purpose of determining the parties' rights and obligations in relation to this dispute and, specifically, whether the LHUs could underpin a plea of estoppel.

The Tribunal began its assessment of the applicability of estoppel on the facts by pointing out that the LHUs had been repeated by authorised representatives of the UK government over a period of some forty years, both individually and on a collective basis.[58] Accordingly, the Tribunal was prepared to play down the importance of the Agreement itself in favour of: 'undertakings given as part of an agreement concluded in 1965 between the United Kingdom and one of its colonies, that became a matter of international law upon the independence of Mauritius, and that were reaffirmed [by] the parties in the decades since independence'.[59] It considered the parties' subsequent behaviour, the UK government's statements and its legislative measures and administrative practices, combined with Mauritius' reliance on such conduct, to be legally significant.

The Tribunal acknowledged estoppel's normative basis—its grounding in, 'the general requirement that States act in their mutual relations in good faith [in order] to protect the legitimate expectations of a State that acts in reliance upon the representations of another'.[60] To this end, it observed that a Respondent State, acting through duly authorised representatives, must have made a clear and consistent

[57] Chagos Award (n 1) [428].

[58] ibid.

[59] ibid [434].

[60] ibid [435].

representation to the Applicant State, either by words or conduct, which induced the latter to act to its detriment as a result (or which conferred a benefit on the Respondent State).[61] In general, the Tribunal followed an orthodox formulation of the fundamental requirements for a finding of estoppel.[62] However, its rendition of the core characteristics of estoppel varied in one material respect. It noted that, unlike its municipal law variant, the international legal principle of estoppel does not distinguish between representations of fact and future promises.[63] In contrast, Bowett emphasized that the principle could only be triggered by representations of fact.[64] But while this requirement has been consistently followed by international lawyers for many years, the prospect of the principle's reach being extended to encompass promises of future action has been anticipated for some time.[65] The Tribunal was clearly sympathetic to this argument and with good reason. In principle, there seems to be no reason why a promise as to a future course of action should be treated as amounting to anything less than an actionable representation. Estoppel is concerned with conduct that occurs after the initial trigger—the material representation—and so it is future oriented by its very nature; consequently, promises should be considered to be just as important for a finding of estoppel as statements relating to established facts.

The Tribunal went on to identify the various ways in which the authorised representatives of the UK government had repeated the terms of the LHUs across the decades. For this purpose, it referred to a number of statements made by the UK government in connection with the LHUs. It reported that the LHUs were reiterated, collectively, in a letter written to the Mauritian Prime Minister, on 3 May 1973, on behalf of the UK government.[66] The conditional undertaking to retrocede the Chagos Archipelago to Mauritius was repeated by the British Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs in a letter addressed to the Mauritian High Commissioner in London, dated 23 March 1976[67]; by the British Prime Minister in a statement made in the House of Commons, on 11 July 1980[68]; by the British High Commissioner in Port Louis to the Mauritian Prime Minister in a letter dated 1 July 1992[69]; in a letter from the British Foreign Secretary to the Mauritian Prime Minister, dated 10 November 1997[70]; and by the British Parliamentary Under Secretary of State in a letter written to the Mauritian Minister for Foreign Affairs,

[61] ibid, [438].

[62] Its approach in this regard largely reflected Bowett's classical articulation of the requirements for a finding of estoppel. See Bowett (1957), pp. 176 and 188–194; and Thirlway (1990), pp. 36–45.

[63] Chagos Award (n 1) [437].

[64] Bowett (1957), pp. 189–190.

[65] For instance, Brownlie claimed that there was no normative basis for limiting estoppel's application to statements of fact: Crawford (2012), p. 421.

[66] Chagos Award (n 1) [429].

[67] ibid [430(a)].

[68] ibid [430(b)].

[69] ibid [430(c)].

[70] ibid [430(d)].

on 12 December 2003.[71] Further, the Tribunal noted, with regard to the LHU concerning the retention of the benefit of any oils or mineral discovered in the Archipelago, that—in addition to the collective reaffirmation made to the Mauritian Prime Minister in 1973—this commitment had been repeated by the British High Commissioner in Port Louis to the Mauritian Prime Minister in a letter dated 1 July 1992[72]; and by the British Foreign Secretary in a letter written to the Mauritian Prime Minister, dated 10 November 1997.[73]

Regarding statements made by the UK government, pursuant to the LHUs, in respect of Mauritian fishing rights in the waters of the Chagos Archipelago, the Tribunal only referred to one occasion when this particular commitment had been repeated on an individual basis. Specifically, on 1 July 1992, in a letter written to the Mauritian Prime Minister, the British High Commissioner in Port Louis had reconfirmed the UK government's intention to honour this undertaking.[74] However, the Tribunal took the view that it was clear that the UK government had upheld this commitment through its conduct during the period in question.[75] In this context, it alluded to a host of legislative measures and practices adopted by the BIOT administration which evidenced this ongoing commitment. Specifically, it referred to the 1971 BIOT Fisheries Limits Ordinance, which had established a general prohibition on commercial fishing within the BIOT's territorial and contiguous waters.[76] However, the Tribunal pointed out that section 4 of this Ordinance empowered the BIOT Commissioner to permit the continuation of traditional fishing activities by nationals from designated States.[77] Subsequently, the 1984 BIOT Fishery Limits Ordinance devised a regime for the purpose of identifying which States were permitted to engage in fishing activities within this zone and it also established a licensing requirement.[78] In 1985, Mauritian flagged vessels were formally declared to be eligible to fish in this zone and they were issued with licences free of charge.[79] On 1 October 1991, the BIOT Commissioner established a Fisheries Conservation and Management Zone (FCMZ), which extended to 200 miles around the Chagos Archipelago.[80] Prior to the FCMZ's creation, the British High Commissioner in Port

[71] ibid [430(e)].

[72] ibid [431(c)].

[73] ibid [431(d)].

[74] ibid [433].

[75] ibid [439].

[76] This limit was fixed at 12 miles from the lower waterline by BIOT Proclamation No. 1 of 1969.

[77] Chagos Award (n 1) [114]. At this point in time, Mauritius was not formally designated as a State for this purpose but the parties' agree that Mauritian vessels were, in effect, designated to fish within this maritime zone at [116].

[78] ibid [118]. BIOT Ordinance 11 of 1984.

[79] BIOT Notice No. 7 of 1985.

[80] Via BIOT Proclamation No. 1 of 1991. The UK claimed that the FCMZ did not amount to an EEZ but the Tribunal viewed them as equivalent mechanisms. It was accompanied by the 1991 Fisheries and (Conservation and Management) Ordinance, which extended the licensing regime to cover this new zone. The 1991 Ordinance repealed the corresponding 1984 Ordinance.

Louis wrote to the Mauritian government to give advance notice of this planned legislative measure and to reassure it that the practice of issuing free fishing licences to Mauritian vessels, would continue.[81] This reassurance was repeated again by the British High Commissioner on 1 July 1992, as mentioned above. However, on this occasion, it was specifically tied to the corresponding LHU, which underpinned Mauritius' fishing rights within the BIOT's waters. The High Commissioner also confirmed that the fishing activities of Mauritian vessels would be allowed within the FCMZ's extended maritime zone as long as the licensing regime continued to be respected.[82]

The Tribunal observed that a considerable gap existed between the parties' respective position regarding the nature and extent of Mauritius' fishing rights in the Archipelago's waters.[83] It noted that the UK government's view was that any such entitlements were more in keeping with privileges than enforceable rights.[84] In support of this argument, it pointed to the way in which the LHUs were formulated with their clear qualifications.[85] In contrast, Mauritius claimed that, through the LHUs, the UK had recognised that Mauritius possessed tangible fishing rights in the Archipelago's waters extending to the Territory's entire EEZ.[86] It argued that the UK government had acknowledged this position through its statements and its policy of enacting legislation which had given effect to Mauritian fishing rights in these maritime zones. Consequently, it claimed that such practices had demonstrated that any qualifications made in the LHUs themselves had been removed by the UK government's subsequent conduct.[87]

In its Award, the Tribunal accepted that Mauritius' fishing rights were not unqualified but it decided that Mauritius possessed concrete rights and its vessels were entitled to free licences to engage in fishing activities within the Archipelago's waters.[88] The Tribunal decided that the UK's legislative policy toward Mauritian

[81] Chagos Award (n 1) [119].

[82] ibid [121]. Subsequently, on 13 August 2003, the UK government informed the Mauritian High Commissioner in London that the FCMZ was being transformed into an Environmental Protection and Preservation Zone (EPPZ). It was created pursuant to BIOT Proclamation No. 1 of 2003, on 17 September 2003. This newly declared zone had the same geographical reach as the FCMZ that it replaced.

[83] ibid [407].

[84] ibid [411].

[85] The UK had committed itself to using its 'good offices' with the US government to ensure that any fishing rights 'would remain available […] as far as practicable': ibid [412] and [449]. The UK argued that Mauritian fishing activities in the BIOT's maritime zones could be categorised as minimal. It pointed out that, in some years, no applications for fishing licences had been made by Mauritian flagged vessels. Ibid [413]. Even if fishing activities were gauged by the Mauritian government's preferred method of measuring the size of the catch it is hard to argue that Mauritian fishing activities in the Archipelago's waters were significant: at [125]. However, the Tribunal took the view that the scale of Mauritian fishing activities in the BIOT's maritime zones was not decisive at [450].

[86] ibid [408] (with the exception of the territorial waters immediately surrounding Diego Garcia).

[87] ibid [408–409].

[88] ibid [451].

fishing vessels could only be explained by a recognition, on the part of the UK, that it was bound to respect Mauritius' fishing rights, as expressed in the LHUs.[89] Moreover, the Tribunal pointed to the fact that the UK government had honoured its apparent obligation to protect Mauritius' fishing rights in the Archipelago's waters since Mauritius had acceded to independence and that Mauritius' rights in this regard had been enhanced, in keeping with the incremental extension of the BIOT's maritime zones.[90] In the light of the above, the Tribunal decided that the UK's 'consistent and unvaried practice of permitting Mauritian fishing' in this maritime zone generated an expectation that such rights would endure, in the absence of a radical change of circumstances.[91] And, in relation to all three LHUs together, the Tribunal reached the conclusion that the UK government, acting through duly authorised representatives, had repeated the terms of the LHUs over a 40-year period and this subsequent practice had the effect of confirming the commitments contained therein.[92]

The Tribunal then turned to the question of whether Mauritius had been induced to rely upon the UK's representations to its detriment. It noted that Mauritius had foregone numerous opportunities to press its sovereignty claim to the Chagos Archipelago and that such inaction 'constitutes one of the clearest forms of detrimental reliance'.[93] The Tribunal referred to several instances when the Mauritian government had chosen not to assert its claim as a direct consequence of the commitments contained in the LHUs. In particular, it observed that the Mauritian government had remained silent on the Chagos Question from the moment of independence until 1980, a period when demands for decolonisation were at their strongest in many parts of the world. Further, in a clear illustration of the Mauritian government's belief in the binding nature of the LHUs, it chose to decline the UK government's offer, made in January 2009, to incorporate the undertaking to retrocede the Chagos Islands to Mauritius, into a bilateral treaty.[94] The Tribunal also noted that, despite pursuing its sovereignty claim, the Mauritian government still maintained a good working relationship with the UK government, engaging in cooperative bilateral arrangements concerning the Chagos Archipelago, under a

[89] ibid.

[90] The Tribunal made it clear that it was only concerned with Mauritius' claim, in relation to fishing rights, to the extent that it involved the Archipelago's territorial sea, see ibid. at [455]. This is because Article 297(3)(a) of the LOSC provides that a coastal State is not obligated to submit to section 2 procedures in the case of a dispute relating to the exercise of its sovereign rights in respect of those living resources located in its EEZ. See Allen (2017).

[91] Chagos Award ibid [439]. The Tribunal decided that the UK government retained a discretion to maintain a balance between Mauritius' fishing rights and the defence needs of the US government, at [452].

[92] ibid [439].

[93] ibid [440].

[94] ibid [442]. Thirlway observed that the principle of estoppel often involves a situation where the Applicant State has failed to do something when it might have been expected to act to protect its rights or at least to speak out. See (n 61) 37.

sovereignty umbrella.[95] In sum, the Tribunal took the view that: 'Mauritius' entire course of conduct with respect to the Chagos Archipelago was undertaken in full reliance on the full package of undertakings given at Lancaster House'.[96] It also accepted that Mauritius' overall approach to the Chagos Question conferred a clear benefit on the UK government; the Tribunal was convinced that Mauritius would have withheld such co-operation, if it had thought that the LHUs were not binding upon the UK.[97] In the Tribunal's view, the subsequent conduct of both parties had the effect of ensuring that such commitments, 'stand apart from the legal status of the undertakings at the time they were first given.[98] In other words, it found that not only could the LHUs be treated separately from the 1965 Agreement, the subsequent practice of Mauritius and the UK in response to them underpinned the existence of an independent source of international legal obligation.[99]

Finally, the Tribunal addressed the issue of whether the UK would be entitled to revoke the LHUs at its discretion.[100] In this respect, it sought to draw a distinction between unilateral declarations and estoppel on the ground that the former concept derives its binding effect directly from the will of the declaring State, whereas estoppel focuses on the expectations generated for the Applicant State by the Respondent State's behaviour.[101] The Tribunal considered the way in which Mauritius had understood the LHUs by reference to its actual conduct. It decided that the UK's behaviour in relation to the LHUs, since Mauritius had acceded to independence, suggested the existence of a legally binding commitment on the part of the UK 'which [was] clearly understood in such a way'.[102] Accordingly, the Tribunal concluded that Mauritius was entitled to rely upon the UK's representations, as expressed through the LHUs, and subsequently reiterated and by its statements and conduct during the intervening period. The Tribunal added that, in the LHUs, the UK had committed itself to a clear course of conduct in its relations with Mauritius and it had continued to follow that course in the knowledge that Mauritius was relying on those commitments in its postcolonial relations with the UK.[103] Consequently, the Tribunal held that Mauritius *and* the Tribunal were entitled to presume that the UK did not consider the LHUs to be freely revocable in accordance with the axiom that bad faith is not to be presumed in international relations.[104] The

[95] Chagos Award, ibid.

[96] ibid.

[97] ibid [443].

[98] ibid [444].

[99] Mauritius advanced this argument, ibid [397].

[100] ibid [445].

[101] ibid [446]. See the *Nuclear Tests Cases* (*Australia* v. *France/New Zealand v. France*), (1974) ICJ Reps 253 and 457; and Saganeki (2016).

[102] ibid [447].

[103] ibid.

[104] ibid. The notion of bad faith was considered in the Whaling in the *Antarctic Case (Australia/New Zealand v Japan)* (2014) ICJ Reps 226. For analysis, see Fitzmaurice and Tamada (2016).

Tribunal, therefore, decided the UK was estopped from denying the binding effect of the LHUs, which the Tribunal held to be binding upon the UK.[105]

10.4.2 Estoppel as an Independent Source of Legal Obligation

A key issue for the Chagos Tribunal concerned the forms that a representation may take for the purpose of engaging the principle of estoppel in international law. In this context, it invoked Judge Fitzmaurice's seminal treatment of estoppel in his Separate Opinion in the *Temple of Prear Vihear Case*.[106] In particular, it quoted from the following passage of his Opinion:

> The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.[107]

The Tribunal harnessed Judge Fitzmaurice's incisive assessment of the nature and scope of estoppel in support of the view that the principle is: 'concerned with the grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law'.[108] Specifically, it noted that: 'estoppel is most at home in situations in which the existence of a formal agreement may be in doubt, but the course of the Parties' subsequent conduct has consistently been as though such an agreement existed'.[109]

However, the Tribunal's understanding of Judge Fitzmaurice's interpretation of estoppel is susceptible to criticism on this point because it does not acknowledge the extent to which the principle depends on the subsequent behaviour of the parties to establish the content of the obligation. In cases where estoppel is engaged, it is the Respondent State's representation, coupled with the Applicant State's detrimental reliance, which precludes the Respondent State from exercising the full range of its legal rights in a given situation. Consequently, it is the conduct of the parties in response to the initial representation that generates a claim of estoppel rather than the agreement of the parties. The significance of the parties' conduct for the purpose of establishing the content of any rights and obligations that arise as a result of estoppel's application, is evident from Mauritius' claim that any qualifications expressed in the LHUs regarding the extent of its fishing rights, in the waters of the Chagos Archipelago, were removed as a consequence of the UK's conduct in the

[105] Chagos Award, ibid [448].

[106] *Temple of Prear Vihear Case (Cambodia/Thailand)* (1962) ICJ Reports 39.

[107] Fitzmaurice's Separate Opinion in the *Temple Case*, 52, 63; cited in the Chagos Award (n 1) [437].

[108] ibid [446].

[109] ibid [444].

decades since Mauritius acceded to independence.[110] Accordingly, in this respect, Mauritius argued that the subsequent conduct of the parties contributed, substantially, to its entitlements and the corresponding obligations created for the UK. Further, it follows from this claim that Mauritius' fishing rights did not originate in the LHUs alone, they were not wholly derived from the parties' agreed commitments.[111]

It is clear that a key difference exists between the act of interpreting an international agreement and the operation of estoppel. In relation to an agreement, the purpose of construction is to establish the parties' shared meaning at the time the agreement was concluded.[112] In general, the role of any subsequent practice followed by the parties is significant to the extent that it confirms this meaning.[113] However, as far as estoppel is concerned, the Applicant State's conduct in response to the Respondent State's representation, establishes more than the existence and content of the material representation.[114] It also proves that the Respondent State has assumed responsibility for the Applicant State's conduct as a result of its representation.[115] As a consequence, the Respondent State is estopped from asserting its strict legal rights in a given situation, rights that it would have been able to exercise *but for* the combination of its representation and the subsequent conduct it triggered. The fine distinction was appreciated by Judge Fitzmaurice, when he observed that:

> [I]t may be said that A, having accepted a certain obligation, or having become bound by a certain instrument, cannot now be heard to deny the fact, to 'blow hot and cold'. True enough, A cannot be heard to deny it; but what this really means is simply that A is bound, and, being bound, cannot escape from the obligation merely by denying its existence. In other words, if the denial can be shown to be false, there is no room or need for any plea of preclusion or estoppel.[116]

The Chagos Tribunal understood that, if the Respondent State had created a legal obligation for itself via an agreement, then the source of the obligation would originate from that agreement; consequently, it would not be open to the Respondent State to deny its binding effect. But, as discussed above, estoppel is engaged in

---

[110] ibid [408–409].

[111] It should be noted that the Tribunal was not prepared to accept that Mauritius' fishing rights were unqualified. It preferred to stick closely to the commitments as they were expressed in the LHUs. See ibid [452].

[112] Bowett (1957), pp. 177–178.

[113] Article 31(3)(b) VCLT acknowledges that subsequent practice in the application of a given treaty may establish the agreement of the parties as to its interpretation. It should be acknowledged that a subsequent practice which is at odds with the meaning attributable to a treaty provision pursuant to Article 31(1) can lead to a new interpretation of the provision in question. However, in order for this to occur the practice would need to be sufficiently extensive and consistent to support the parties' agreement as to the meaning of that provision. This amounts to a very high threshold and, of course, such a change must exist in relation to a valid treaty.

[114] Bowett (1957), pp. 177–178.

[115] ibid 178.

[116] Fitzmaurice's Separate Opinion (n 106) at 63; Also see Sinclair (1996), pp. 104 and 107.

cases where there may be some doubt about whether the Respondent State made a clear representation, the content of which caused the Applicant State to behave in a manner that would support a claim of estoppel.

Notwithstanding Bowett's perceptive analysis of the different role that subsequent conduct plays in situations where an international agreement requires interpreting and those cases in which a claim of estoppel is advanced, it has been pointed out that the ICJ has not been sensitive to this distinction. In the *Land and Maritime Boundary (Cameroon/Nigeria) Case*, one of Nigeria's contentions was that Cameroon had agreed to settle any boundary dispute between the parties through bilateral channels alone and that, as a result, it was estopped from taking the dispute to the ICJ.[117] However, in response to this argument, the Court observed that:

> An estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice.[118]

Thirlway has questioned the accuracy of this interpretation of estoppel's scope and operation.[119] He argues that if Cameroon had agreed to settle any such dispute by bilateral means then there would have been no need for Nigeria to plead estoppel: it could have simply invoked the agreement and its breach instead.[120] For estoppel to be engaged on the facts of this case, Nigeria's claim could not have been based on the fact that Cameroon had actually agreed to a particular course of conduct, instead it would have needed to show that Cameroon acted as though such a commitment had been agreed, when assessed from Nigeria's perspective.[121] There may be a subtle distinction between the act of interpreting an international agreement and behaviour which generates a reasonable expectation that something had been agreed; however, it is an important one because it reveals the source of the obligation involved. In a situation where no agreement has been concluded, but where the requirements for a finding of estoppel have been satisfied, the obligation flows from the conduct of the parties by reference to a representation, when viewed from the Applicant State's point of view (as measured on an objective basis) rather than directly from the will of the parties to a dispute, as would have been the case if an agreement had been concluded between them.

It should be added that claims of estoppel may also arise in cases where non-treaty agreements have been concluded even though they do not manifest international legal normativity per se.[122] In this regard, Aust claims that it is the agreement concluded by the parties, as expressed in an MOU, which gives rise to legal consequences, rather than the MOU itself, because an MOU can only generate indirect

---

[117] *Land and Maritime Boundary (Cameroon/Nigeria) Case* (1998) ICJ Reps 303.

[118] ibid. [57].

[119] Thirlway (2005), pp. 1 and 22.

[120] ibid 23.

[121] ibid.

[122] Schachter (1977), p. 301; and Aust (2007), pp. 54–55.

legal effects.[123] However, in the light of the foregoing discussion, it is clear that Aust's understanding of the connection between non-treaty agreements and estoppel is open to question. It is the representation, contained in an MOU, rather than the agreement as expressed therein, which is significant because estoppel derives its normative force from a source that is independent of any agreement, either in form or in substance.

The notion that estoppel derives its legal validity from a source, which is independent of any agreement reached between the parties, is supported by the reading of this general principle offered by Judge Fitzmaurice in his Separate Opinion in the *Temple Case*. As discussed above, he recognised that estoppel operates in cases where there may be some doubt as to whether Respondent State has given an undertaking or accepted an obligation. Nonetheless, he understood that its subsequent conduct may have prompted certain legal consequences, which then precluded it from denying that it was bound.[124] But Judge Fitzmaurice went further by adding that a plea of estoppel, 'is essentially a means of excluding a denial that might be *correct* – irrespective of its correctness. It prevents the assertion of what might in fact be *true*'.[125] Consequently, his assessment of estoppel's operation encompasses a situation where the Respondent State has behaved in a manner that is consistent with the giving of an undertaking and with the assumption of an obligation to the Applicant State, when things are viewed from that State's perspective (and measured by the standard of reasonableness).[126] Thus, it may be that the Respondent State did not actually make a material representation, the content of which evinced an intention to assume an obligation vis-à-vis the Applicant State, but it will be deemed to bear responsibility as though it had.[127]

In the light of the above discussion, it is evident that estoppel has the capacity to generate curious legal effects—it precludes the Respondent State from denying what might be true. As a result, that State may be prevented from exercising its legal rights in a particular context as a consequence of its own conduct. In Thirlway's words: 'Estoppel elevates a sort of legal fiction to the status of a fact for the purpose of the relations between the parties'.[128] In relation to the *Chagos Arbitration Case*, it is clear that the UK government made a series of representations to the Mauritian delegation attending the Constitutional Conference, via the LHUs, which were then incorporated into the 1965 Agreement. However, it did not think that it was assuming

[123] Aust, ibid p. 55.

[124] Fitzmaurice, (n 106), p. 63. This conception of estoppel was cited with approval by the Chagos Tribunal (n 1) [437] and [444]. The meaning of this passage has been considered by legal scholars during the last few decades. See Thirlway (1990); Sinclair (1996); and Kulick (2016), p. 107.

[125] Fitzmaurice, ibid. (italics in the original).

[126] See Thirlway (1990), pp. 29–30 and his analysis of the ICJ's *decision Gulf of Maine Case (Canada v USA)* (1984) ICJ Reps 246. In this case an ICJ Chamber discussed estoppel's normative basis. It observed that, 'preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle' [130].

[127] See Bowett (1957), p. 178; and Thirlway (1990), p. 29.

[128] Thirlway (1990), p. 38.

any specific legal obligations to Mauritius as a result—either as a matter of UK law, or via international law—at the time they were made. Accordingly, while there is no doubt that a series of representations were made by the UK government there is uncertainty as to their combined effect (i.e. whether they show that the UK had assumed a set of international legal obligations to Mauritius in relation to the Chagos Archipelago). While the UK did not believe that it was restricting its sovereign authority in respect of the BIOT, or its sovereign rights and jurisdiction in relation to its EEZ,[129] the LHUs, along with the UK's subsequent conduct, created the impression that it had conferred legal rights on Mauritius and that it had assumed corresponding legal duties for itself as a consequence.

10.4.3 The Ramifications of Estoppel's Source of Obligation

Claims of estoppel depend upon patterns of informal State behaviour being deemed to be legally significant.[130] It has long been accepted that estoppel gives effect to the notion that States should not be allowed 'to blow hot and cold' in their international relations—*allegans contraria non audiendus est*.[131] More recently, Koskenniemi has suggested that estoppel constitutes a specific manifestation of a wider principle of non-contradiction which is grounded in considerations of reciprocity and justice in international affairs.[132] Further, Cottier and Muller observe that the requirements of estoppel, 'are not simply addenda; they trigger the very justification for specific protection of legitimate and settled expectations'.[133] The role that such expectations play in estoppel's functioning raises the question of whose expectations count for this purpose. It has been suggested that estoppel works by reference to an objective assessment of whether the Respondent State has made a clear and unambiguous representation.[134] Consequently, the Applicant State must be able to show that the representation in question is capable of supporting the meaning attributed to it by that State via to the standard of reasonableness.[135] The use of an objective approach in such cases has been endorsed by the International Law Commission (ILC). In this respect, it has observed that: 'the most characteristic element of estoppel is not the conduct of the [Respondent] State, but rather the confidence that is created in the [Applicant] State'.[136] Koskenniemi's also reckons that estoppel's application is

[129] In accordance with the scope of a costal State's authority in its EEZ. See Article 56(1) of the UN Convention on the Law of the Sea ('LOSC') (1982) 21 ILM 1261, (1994) 1833 UNTS 3.

[130] Koskenniemi (2005), p. 356.

[131] The Chagos Tribunal reiterated Arnold McNair's classic standpoint in this regard. See Award (n 1), at [435].

[132] Koskenniemi (2005), p. 357.

[133] Cottier and Muller (2007) [3].

[134] Sinclair (1996), p. 107.

[135] ibid.

[136] See the ILC's 'Seventh Report of Special Rapporteur Víctor Rodríguez Cedeño on Unilateral

determined by considerations which must be assessed from an objective standpoint: whether the Applicant State has been induced to act to its detrimental as a result of the Respondent State's statements and/or conduct cannot be assessed by reference to the subjective intentions of the parties.[137] For him, estoppel's non-subjective quality must be contrasted with other intent-based forms of international legal obligation, such as treaties, which derive their normative force from the shared intentions of the parties to the agreement.[138]

But, by harnessing the principle of estoppel, on one level, the Chagos Tribunal not only undermined the 1965 Agreement's potential normative significance it also diminished the importance of the LHUs themselves in favour of an approach that was necessarily based on the subsequent conduct of the parties in response to these initial expressions of commitment. This approach enabled the Tribunal to overcome the theoretical difficulties in elevating a political instrument, negotiated during the colonial era, to the international legal plane, problems which—to a lesser extent—threatened to undercut the legal resonance of the LHUs too. But, by relying upon the principle of estoppel, the Tribunal should have been compelled to concentrate on the behaviour of the UK and Mauritian governments after 1968. One particular challenge in determining estoppel's application in such circumstances is that the rights and obligations of the parties cannot be deduced from their declared intentions as would have been the case if an agreement had been entered into. Instead, estoppel's operation should be informed by a much wider range of legally relevant behaviour.[139] Clearly, practical benefits flow from the enumeration of legal rights and obligations in a treaty as the intentions of the parties are more readily discoverable via discrete acts of interpretation.[140] However, a significant difficulty in relation to estoppel's operation is that the legally relevant conduct may be largely informal in nature and extend over a considerable period of time; this has a tendency to create uncertainty as far as the content of the resultant rights and obligations are concerned.[141]

The sheer variety and historical breadth of the legally relevant behaviour, initiated by the LHUs, was considered to be a positive feature by the Chagos Tribunal because it allowed the Tribunal to straddle the colonial and postcolonial epochs in an effort to develop a plausible argument in favour of the continuity of legal obligations. However, this approach also has its drawbacks: when a court or tribunal makes a decision about the extent to which rights and obligations are established, through the application of estoppel, it does not operate in a vacuum. Judges and arbitrators have to balance the Respondent State's sovereignty—its freedom to exercise the rights that it possesses—against the legitimate expectations which its

Acts of States', in the ILC's 2004 Yearbook, Vol. 2, Part 1, 250, [103], cited in Kulick (2016), p. 109.

[137] Koskenniemi (2005), p. 358.

[138] ibid 356. Koskenniemi uses the example of unilateral declarations to illustrate this point.

[139] Hillgenberg (1999), p. 505.

[140] In accordance with the requirements set out in Article 31(1) VCLT.

[141] Hillgenberg (1999), p. 506.

behaviour has generated for the Applicant State.[142] Moreover, this difficult balance must be struck predominantly by interpreting the overall behaviour of the parties over time, without the benefit of determining their intentions directly as would be the case if an agreement had been concluded between them.[143] This task is heavily dependent on assessments about the interplay of facts, facts which may not necessarily be considered to be legally significant by the parties themselves at the material time.

Cottier and Muller appreciate that estoppel's essential ambiguity—its prioritizing of informal types of behaviour over formally declared acts and agreements for the purpose of generating legal rights and obligations—means that its limits must be fully recognised. In their view:

> A rule or principle which would easily prohibit any modification of conduct, statement, or representation vastly overestimates the potentials of law. This is neither suitable nor desirable in effectively promoting protection of good faith, reliance, and confidence in international relations between sovereign nations.[144]

Consequently, estoppel remains a difficult principle to apply in practice and, as a result, pleas of estoppel have rarely been successful, especially in the ICJ's jurisprudence. Sinclair, writing in 1996, observed that the ICJ 'has been extremely cautious in upholding arguments founded on an alleged estoppel'.[145] Notwithstanding the adoption of a more relaxed attitude towards estoppel by certain specialized quasi-judicial bodies in recent years, the ICJ's reluctance has endured.[146]

Against this background, Kulick argues that, in practice, international courts and tribunals have required pleas of estoppel to satisfy a higher evidential threshold than other claims.[147] In his view, such as approach is justified because a claim of estoppel is not necessarily premised on the recognition that a Respondent State has created new obligations for itself, unlike in situations where it may have accepted an obligation by way of a treaty, or through a binding unilateral declaration.[148] Instead, as previously stated, estoppel prevents a Respondent State from asserting its legal rights in a situation where it has not made a material representation or accepts that it owes an obligation to the Applicant State. Nevertheless, as a result of its subsequent

---

[142] ibid.

[143] ibid, 505.

[144] Cottier and Muller (2007).

[145] See Sinclair (1996), 108 and 116. These cases include Temple Case (n 105); the *North Sea Continental Shelf Cases (FR Germany/Denmark; FR Germany/Netherlands)* (1969) ICJ Reps 3; the *Gulf of Maine Case* (n 125); the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Jurisdiction) Case* (1984) ICJ Reps 392; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application by Nicaragua to Intervene)* (1990) ICJ Reps 92; and the *Land and Maritime Boundary Case*, (n 116).

[146] See, for example, the cases of *Middle East Cement v Egypt, ICSID Arbitration Award*, 12 April 2002; and *CME v Czech Republic UNCITRAL Award*, 14 March 2003; and *Kardassopoulos v Georgia (Jurisdiction) ICSID Decision*, 6 July 2007. See Kulick (2016), pp. 117–119.

[147] Kulick (2016), pp. 124–125.

[148] Kulick (2016), p. 124.

conduct—combined with the Applicant State's behaviour in response—the Respondent State is held to be responsible as though a material representation had been made.[149] Kulick argues that this amounts to an unusual 'magic trick' because estoppel stops a State from asserting what may, in fact, be true; therefore, it is prevented from establishing the legal status quo as part of its defence.[150]

10.5 The Lancaster House Undertakings and the Law of the Sea Convention

10.5.1 The Undertakings and the Tribunal's Jurisdiction

The Chagos Tribunal acknowledged that the job of determining the nature and effect of the LHUs provided the means by which the parties rights and obligations in the BIOT's Territorial Sea and its EEZ could be established in accordance with the provisions of the 1982 UN Convention on the Law of the Sea (LOSC).[151] In the Award's *Dispositif*, the Tribunal concluded that:

> In relation to the merits of the Parties' dispute, the Tribunal, having found, inter alia,
>
> (1) that the United Kingdom's undertaking to ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable is legally binding insofar as it relates to the territorial sea;
> (2) that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes is legally binding; and
> (3) that the United Kingdom's undertaking to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius is legally binding;
>
> Declares, unanimously, that in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention.[152]

Before the merits of its decision can be analysed the question of the Tribunal's jurisdiction must be considered. Article 288 of the LOSC provides that: 'A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part'.[153] Further, Article 288(2) states that such a court or tribunal 'shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement'. Article 288(1) seeks to restrict a court or tribunal's jurisdiction to disputes which directly involve the LOSC. In addition, Article 288(2) recognises that a Part XV court or tribunal shall

[149] As envisaged by Judge Fitzmaurice in his Separate Opinion in the *Temple Case* (n 106).

[150] Kulick (2016), p. 125.

[151] Chagos Award (n 1) [417].

[152] ibid [547B].

[153] Article 287 sets out a choice of settlement procedures for the purposes of Part XV of the LOSC.

have jurisdiction by virtue an agreement that: (1) is legally binding on the parties to the dispute; (2) is related to the purposes set out in the LOSC; and (3) confers jurisdiction on such a court or tribunal to settle the dispute in question.

Talmon argues that the Chagos Tribunal had no jurisdiction to decide the dispute by reference to the LHUs because they were not engaged by the terms of Article 288(2) of the LOSC.[154] He points out that the Tribunal could not hold that the UK had breached the LHUs because it lacked the jurisdiction to make such a declaration. However, Talmon suggests that this lack of jurisdiction, 'did not prevent the Tribunal from "finding" that Mauritius possessed legally binding fishing rights and other rights in the territorial sea and the EEZ of the Chagos Archipelago on the basis of those Undertakings'.[155] Talmon's first jurisdictional argument is evidently incorrect. It is clear that the Tribunal derived its jurisdiction from the general jurisdictional clause, set out in Article 288(1) rather than by way of Article 288(2). In this regard, it invoked the principle of estoppel, as a means of interpreting the provisions of the 1982 Convention, and thus mediating between the Convention and the LHUs. Further, while estoppel's application was triggered by the LHUs,[156] it did not derive its normative effects directly from the Undertakings. Accordingly, it cannot be said that the LHUs were 'breached' as if they constituted some kind of binding international agreement.

Further, pursuant to his wider claim regarding the applicability of Article 288(2) in the instant case, Talmon also asserted that: (1) the LHUs did *not* contain a clause conferring jurisdiction upon an Article 287 court or tribunal to settle a dispute involving the interpretation or application of the Convention; and (2) they did *not* implicate the Convention at all.[157] It is clear that Talmon has misunderstood the nature and character of the LHUs in certain respects. He seems to equate the LHUs to a treaty arrangement, in effect. Article 288(2) LOSC anticipates that the jurisdiction of a Part XV court or tribunal can be engaged by virtue of a material treaty that explicitly authorizes it. However, as discussed above, neither the 1965 Agreement nor the LHUs, which were enumerated therein, could be said to qualify as an international agreement for the purposes of this particular provision.

10.5.2 The Undertakings and the Tribunal's Interpretation of the LOSC

The Tribunal decided that the LHUs implicated the Convention's provisions but rather than reaching the conclusion that they had direct application by virtue of Article 2(3), in relation to the Archipelago's territorial sea, and/or via Article 56(2)

[154] See Talmon (2016), p. 18.

[155] ibid 18.

[156] Chagos Award (n 1) [534] and [535].

[157] Talmon (2016).

with regard to the Territory's EEZ, it chose to give effect to the Undertakings indirectly through the notion of good faith and the duty to consult, respectively.[158] Article 2(3) of LOSC provides that: 'The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law'. The Tribunal accepted that this provision placed limits upon the sovereignty exercisable by a coastal State in this maritime zone.[159] But, after examining the drafting history of the corresponding provision in the 1958 Geneva Convention on the Territorial Sea,[160] the Tribunal held that such limits could only be imposed by the *general* norms of international law.[161] In the circumstances, it concluded that, as the LHUs did not form part of the general corpus of international law, they did could generate an obligation on the UK which could be read into Article 2(3) of the Convention.[162] Nevertheless, the Tribunal did acknowledge that general international law requires that States act in good faith in their international relations and, as a result, it held that the UK was bound to honour the LHUs in its dealings with Mauritius in the context of the BIOT's Territorial Sea.[163]

However, in their Dissenting and Concurring Opinion, Judges Kateka and Wolfrum (the Minority) reached the opposite conclusion.[164] They harnessed the ILC's Draft Articles concerning the Law of the Sea and its 1956 Commentaries, in support of a much more extensive reading of those international legal norms which could be read into what became Article 1(2) of the 1958 Convention, and, in time, Article 2(3) of the 1982 Convention. Specifically, the Minority alluded to the fact that the ILC anticipated that any such rights and obligations could arise, 'by reason of some special relationship, geographical or other, between two States, rights in the territorial sea of one of them are granted to the other in excess of the rights recognised in the present draft'.[165] Consequently, the Minority's concluded that the reference to 'other rules of international law' in Article 2(3) encompassed international legal obligations that could be created by means of bilateral, or unilateral,

[158] Chagos Award (n 1) [519] and [520].

[159] ibid [514].

[160] Article 1(2) of the 1958 Convention which found its origins in the ILC's Draft Articles. See ILC's Draft Articles on the Law of the Sea and Commentaries, Eight Session (1956) UN Doc. A/3159, 265.

[161] Chagos Award (n 1) [515–517].

[162] ibid [517].

[163] ibid [517] and [520]. The Tribunal's decision to use the notion of good faith as an interpretative device for the purposes of giving effect to estoppel is credible given that estoppel is underpinned by this meta-norm of international law. However, good faith possesses a mercurial quality and, as a consequence its content and application remain an uncertain affair. Consequently, the extent to which is can be a reliable guide to the act of interpretation is not at all clear. See Thirlway (1990), pp. 21–25; Thirlway (2005), pp. 7–10.

[164] Dissenting and Concurring Opinion appended to the Chagos Award, ibid. [94].

[165] ILC's 1956 Report, 265, [5], quoted in the Dissenting and Concurring Opinion, ibid [93] and discussed in [94].

commitments: as a result, its view was that the LHUs must 'be read directly into Article 2(3) of the Convention'.[166]

The Majority's position—that the LHUs could not be read into Article 2(3) because they amounted to a bilateral arrangement rather than a general norm of international law—is clearly flawed. First, this approach ignores the view that the LHUs were not legally binding per se: that the international legal obligations which bound the UK were grounded in the claim of estoppel and, as such, the LHUs were incapable of being read directly into Article 2(3). Secondly, it can be argued that estoppel is a general principle of international law just as much as the principle of abuse of rights which was offered as an example by the Majority in this regard.[167] Moreover, any assumption that estoppel generates bilateral rights and obligations in a specific context could not be deemed to be significant in the Chagos Arbitration Case: it is well-known that, in practice, international law invariably is applied in the context of bilateral disputes. In this respect, it is evident that the Minority's standpoint on this issue is much more persuasive notwithstanding its ultimate weakness—the conclusion that the LHUs can be read directly into Article 2(3) cannot be correct because they did not have the character and effect of an international agreement in international law. At various points in its Award, the Tribunal clearly appreciated that estoppel constitutes an independent source of international rights and obligations and that the LHUs were not legally binding per se. However, by the time it came to task of interpreting the LOSC's provisions both the Majority and the Minority were willing to overlook any legal deficiencies the LHUs may have had and, in effect, they treated them as a proxy for a legally binding international agreement.

In contrast, the interpretation of Article 56(2) of LOSC was a more straightforward affair. Article 56(2) provides: 'In exercising its rights and performing its duties under this Convention in the Exclusive Economic Zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention'. As the Tribunal noted, the rights and obligations of a coastal State in the EEZ are expressly qualified by the requirement to 'have due regard to the rights and duties of other States'.[168] The Tribunal was reluctant to establish a universal standard of conduct for coastal States in this context but it indicated that what would qualify as a duty to have due regard would depend on the circumstances. Notwithstanding this standpoint, it expressed the view that, 'in the majority of cases [the obligation] will necessarily involve at least some consultation with the rights-holding State'.[169]

---

[166] Dissenting and Concurring Opinion, ibid.

[167] Chagos Award, ibid [516].

[168] ibid [519].

[169] ibid. It should be noted that the Tribunal did not have jurisdiction in respect of any fishing rights Mauritian vessels might enjoy in the BIOT's EEZ as a result of the terms of Article 297(3)(a). Accordingly, the Tribunal was only concerned with Mauritius' fishing rights to the extent that they related to the BIOT's territorial sea. This was acknowledged by the Tribunal at [455].

The Tribunal expressed the view that, in the circumstances, the requirements imposed on the UK in its dealings with Mauritius, by virtue of Articles 2(3) and 56(2) of the Convention, were of equivalent effect.[170] The Tribunal concluded that:

> There is no question that Mauritius' rights have been affected by the declaration of the MPA. In the territorial sea, Mauritius' fishing rights have effectively been extinguished … [T]he Tribunal considers that the United Kingdom's undertaking for the eventual return of the Archipelago gives Mauritius an interest in significant decisions that bear upon its possible future uses. The declaration of the MPA was such a decision and will invariably affect the state of the Archipelago when it is eventually returned to Mauritius. The Tribunal considers Mauritius' rights to be significant and entitled, as a matter of good faith and the Convention, to a corresponding degree of regard.[171]

However, the Tribunal decided that, on the available evidence, the UK's efforts to consult with Mauritius regarding the MPA's creation had fallen woefully short of the standard required and it had failed to balance its own rights and interests with those belonging to Mauritius.[172] These manifest shortcomings led the Tribunal to the conclusion that the MPA was incompatible with the Articles 2(3) and 56(2) of the Convention.[173]

10.6 Conclusion

This essay began by examining the shortcomings in the Chagos Tribunal's interpretation of the nature and effect of the 1965 Agreement. In this context, it drew attention to the general ambiguities which persist in the interpretation of non-treaty agreements. While such agreements do not manifest international legal normativity per se courts and tribunals are often prepared to treat them as though they possess this quality for the purpose of resolving legal disputes, which involve the determination of the legal consequences which flow from such arrangements. The essay also focused on the approach adopted by the Tribunal in relation to LHUs. Clearly, its application of estoppel was fully justified on the facts of the case and, in this respect, the Chagos Award has made a substantial contribution to the slow evolution of this substantive principle of international law. However, the extent to which estoppel constitutes an independent source of obligation in the jurisprudence of international courts and tribunals remains under-appreciated. The essay revealed that the Chagos Tribunal used estoppel as a means of treating the Undertakings as though, together, they possessed the character of a binding international agreement for the purpose of establishing the rights and duties of the parties. This approach betrayed a misunderstanding as to estoppel's function and its normative origins. Estoppel is established

[170] ibid [520].

[171] ibid [529].

[172] ibid [534] and [535]. On the duty to consult in international law see Kirgis (1983) and de Chazournes et al. (2012).

[173] Chagos Award, ibid [536].

by recourse to the way in which the parties to a dispute respond to a representation made by the Respondent State (or attributed to it): its operation is determined by interpreting their subsequent conduct, from the Applicant State's standpoint (subject to the test of reasonableness) rather by relying on the parties' shared understandings, or the Respondent State's intentions. Estoppel is a hard principle to apply in practice and with good reason, after all, it exhibits a high degree of indeterminacy. Notwithstanding these challenges, an approach which has the effect of treating estoppel as a proxy for the existence of binding international agreements fails to take into account the extent to which the principle's normative basis is grounded in the recognition afforded to informal modes of behaviour, and especially the conduct of the parties to a dispute in response to representations made, or perceived to be made, by a Respondent State.

References

Aegean Continental Shelf Case (Greece/Turkey) (1978) ICJ Reps 3
Allen S (2014) The Chagos Islanders and international law. Hart, Oxford
Allen S (2017) Article 297 of the United Nations Convention on the law of the sea and the scope of mandatory jurisdiction. Ocean Dev Int Law 48(3):313
Antarctic Case (Australia/New Zealand v Japan) (2014) ICJ Reps 226
Aust A (2007) Modern treaty law and practice, 2nd edn. CUP, Cambridge
Berman F, Bentley D (2016) Treaties and other international instruments. In: Roberts I (ed) Satow's diplomatic practice, Book VII, Treaties and treaty-making, Section 33, 7th edn. OUP, Oxford
Bowett D (1957) Estoppel before international tribunals and its relation to acquiescence. Br Yearb Int Law 33:176–194
Certain German Interests in Polish Upper Silesia Case, (1926) PCIJ, Series A, No. 7, 19
Chagos Marine Protected Area (Mauritius v. United Kingdom) Final Award, 18 March 2015
CME v Czech Republic UNCITRAL Award, 14 March 2003
Cottier T, Muller J (2007) Estoppel. In: Max Planck Encyclopedia of Public International Law. OUP, Oxford, pp 671–676
Crawford J (2012) Brownlie's principles of public international law, 8th edn. OUP, Oxford
De Chazournes LB, Kohen MG, Viñuales JE (2012) Diplomatic and judicial means of dispute settlement. Brill, Leiden
Fawcett J (1953) The legal character of international agreements. Br Yearb Int Law 30:381
Fitzmaurice M, Tamada D (2016) Whaling in the Antarctic; significance and implications of the ICJ judgment. Brill, Leiden
Frontier Dispute (Burkina Faso/Mali) Case (1992) ICJ Reps 554, 566
Hendry I, Dickson S (2011) British overseas territories law. Hart, Oxford
Hillgenberg H (1999) A fresh look at soft law. Eur J Int Law 10:499
Kardassopoulos v Georgia (Jurisdiction) ICSID Decision, 6 July 2007
Kirgis FL (1983) Prior consultation in international law: a study of state practice. University of Virginia Press, Charlottesville
Klabbers J (1996) The concept of treaty in international law. Kluwer Law International, The Hague
Koskenniemi M (2005) From apology to Utopia: the structure of international legal argument. CUP, Cambridge
Kulick A (2016) About the order of Cart and Horse, among other things: Estoppel in the jurisprudence of investment arbitration tribunals. Eur J Int Law 28:107
Land and Maritime Boundary (Cameroon/Nigeria) Case (1998) ICJ Reps 303

Land, Island and Maritime Frontier Dispute (El Salvador v Honduras) (Application by Nicaragua to Intervene) (1990) ICJ Reps 92

Mauritian Legislative Assembly, 'Report of the Select Committee on the Excision of the Chagos Archipelago (No 2 of 1983)' (Port Louis, Mauritius, Mauritian Legislative Assembly, 1983) (The 'Excision Report'), Appendix N, 61

Middle East Cement v Egypt, ICSID Arbitration Award, 12 April 2002

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (Jurisdiction) Case (1984) ICJ Reps 392

North Sea Continental Shelf Cases (FR Germany/Denmark; FR Germany/Netherlands) (1969) ICJ Reps 3

Nuclear Tests Cases (Australia v. France/New Zealand v. France), (1974) ICJ Reps 253 and 457

Raustiala K (2005) Form and substance in international agreements. Am J Int Law 99:581

Saganeki P (2016) Unilateral acts of states in public international law. Brill, Leiden

Schachter O (1977) The twilight existence of non-binding international agreements. Am J Int Law 71:296

Shaw MN (1996) The heritage of states: the principle of Uti Possidetis Juris today. Br Yearb Int Law 67:75

Sinclair I (1996) Estoppel and acquiescence. In: Lowe V, Fitzmaurice M (eds) Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings. Grotius Publications, Cambridge, pp 104–120

Talmon S (2016) The Chagos Marine Protected Area arbitration: a case study of the creeping expansion of the jurisdiction of UNCLOS Part XV Courts and Tribunals (June 16, 2016). International & Comparative Law Quarterly 65, Forthcoming; Bonn Research Papers on Public International Law No 9/2016. https://ssrn.com/abstract=2796685. Accessed 5 Jan 2018

Temple of Prear Vihear Case (Cambodia/Thailand) (1962) ICJ Reports 39

Thirlway H (1990) The law and procedure of the International Court of Justice: 1960–1989 part one. Br Yearb Int Law 60(1):36–45

Thirlway H (2005) The law and procedure of the International Court of Justice: 1960–1989 supplement 2005: parts one and two. Br Yearb Int Law 1 76:22

UN Convention on the Law of the Sea ('LOSC') (1982) 21 ILM 1261, (1994) 1833 UNTS 3

Chapter 11
Implications of the Chagos Marine Protected Area Arbitral Tribunal Award for the Balance Between Natural Environmental Protection and Traditional Maritime Freedoms

David M. Ong

11.1 Introduction

This paper will examine the implications of the Chagos Marine Protected Area (MPA) Arbitral Tribunal Award in terms of its contribution to the development of international law in general, and international environmental law in particular,[1] before considering its specific implications for the future designation and management of UK marine protected areas (MPAs),[2] especially in relation to traditional maritime freedoms enjoyed by human communities in neighbouring countries. The treatment of issues will proceed along the following lines: First and prior to the two substantive sections of this contribution, a background discussion highlights salient aspects of the continuing debate on the scientific value and social implications of MPA designations, especially those surrounding remote islands. This discussion draws from the debate that is taking place both within the scientific community, as well as between this community and civil society organizations. Second, following a summary of the historical and factual background leading to the dispute between Mauritius and the United Kingdom over this MPA designation around the Chagos Archipelago, the jurisdictional, procedural and substantive issues of the *Chagos* MPA Award will be assessed.

[1] Full title: IN THE MATTER OF THE CHAGOS MARINE PROTECTED AREA ARBITRATION, Mauritius/UK, 15 March, 2015. Hereinafter, Chagos MPA Award. This Award was delivered by a five person Arbitral Tribunal established under Annex VII of the 1982 UN Convention on the Law of the Sea (UNCLOS) It is generally accessible from the Permanent Court of Arbitration (PCA) website at: <http://www.pca-cpa.org/> and specifically, at: <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf> accessed 16 November 2017.

[2] The Chagos MPA was designated by a UK Order in Council on 1 April 2010 by the then Foreign Secretary of the UK Government, David Miliband.

D. M. Ong (✉)
Nottingham Law School, Nottingham Trent University, Nottingham, UK
e-mail: davidm.ong@ntu.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*, The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_11

These issues include (a) the typological designation of the dispute between Mauritius and the UK as an 'environmental' dispute between these two parties of the 1982 UN Convention on the Law of the Sea (UNCLOS) for the purpose of triggering the compulsory and binding dispute settlement provisions under Part XV of this Convention; and (b) the Tribunal's interpretation and application of relevant procedural and substantive UNCLOS provisions prescribing consultations between interested States over any MPA designation. Third, the implications of this Award will be considered specifically in light of the future of the Chagos MPA in the Indian Ocean, as well as other United Kingdom—proposed MPA designations, for example, around the Pitcairn Islands in the South Pacific.[3] In particular, the interests of the threatened human populations in these island groups—whether by displacement from the Chagos, or depletion in the Pitcairn—will be juxtaposed against the natural environmental protection interests that justify the MPA designations in the seas around them.[4] Finally, some conclusions will be drawn from international legal developments for the future of MPA designation and management in general.

11.2 Background: The Scientific Value and Social Implications of Marine Protected Areas

This discussion draws from and highlights the current debate within the marine scientific community on the ecological value of so-called 'no-take' zones within designated Marine Protected Areas (MPAs), in which no fishing is allowed at all. As Sand observes, 'Marine scientists and environmental organisations have long called for the creation of a global system of marine protected areas (MPAs) well beyond national territorial waters.'[5] For example, Bohnsack *et al*. 'provide 17 reasons why there is a strong scientific, management, and public interest in using no-take marine reserves to build sustainable fisheries and protect marine ecosystems.'[6] These calls were increasingly backed-up by scientific evidence in favour of MPAs in general. A holistic evaluation of scientific data from over 200 studies carried out on 120 marine reserves across the globe, showed that on average, biodiversity increases by 21% and biomass by 446%, inside reserves boundaries. Furthermore, the same study showed some organisms were up to 161% more abundant and 28% larger within

[3] In March 2015, the United Kingdom declared the Pitcairn Islands Marine Reserve in the South Pacific Ocean. The Pitcairn Islands Marine Reserve spans 834,334 km^2 (322,138 square miles). Together with the Chagos Marine Reserve in the Indian Ocean, designated in 2010, the United Kingdom has created the world's two biggest fully protected marine areas, totalling 1,474,334 km^2 (569,243 square miles). Information accessed from Pew Charitable Trusts (2015).

[4] For a succinct introduction to the issues arising from the apparent clash between environmental protection and human interests, see: Sand (2012a), p. 36.

[5] Sand (2012b), p. 201.

[6] Bohnsak et al. (2004), p. 185.

marine reserves.[7] These calls from the scientific community have in turn been heeded by the international community and increasingly acted upon as well, such that: 'At the World Summit on Sustainable Development in Johannesburg (2002), governments made commitments – reiterated at the Conference on Biological Diversity in Nagoya (2010) – to put in place ecologically representative networks of MPAs by 2012 and to conserve at least 10% of each of the world's marine and coastal ecological regions.'[8]

A step change in this campaign for MPAs in general came with the championing of 'no-take' zones by civil society organizations. Within the United Kingdom, for example, the Marine Reserves Coalition was established in 2011 with a single goal: to secure the designation of marine reserves in UK waters; fully protected, no-take marine areas, closed to all extractive and potentially damaging activities. Marine Reserves are defined by the Coalition as 'fully protected areas that prohibit all activities which may potentially disturb or change the ecosystem from its natural state, including for example fishing, dredging, drilling for oil, construction or development.'[9] The Coalition goes on to justify its goal by citing evidence from the following scientific research studies: 'If left alone, over time many marine habitats can recover and become productive again, as proven by the science undertaken in Marine Protected Areas in the Irish Sea (Isle of Man closed area),[10] Georges Bank (USA),[11] and Cabo Pulmo (Mexico).[12] A review study of the potential benefits of such 'no-take' MPAs for the prospective Chagos MPA first highlights this well-established evidence of their benefits for coral-dwelling species, while initially acknowledging the continuing uncertainty of their effects on pelagic migratory species.[13] However, it then goes on to show that positive and measurable effects also exist for pelagic populations and migratory species from 'no-take' marine reserves.[14] Several studies by Sheppard *et al*., provide further scientific evidence of the ecological value of this designation for the (then) largest 'no-take' MPA around the Chagos Archipelago.[15]

On the other hand, a more recent contribution has highlighted the fact that: 'Marine protected areas are an important and increasing component of marine conservation strategy, but their effectiveness is variable and much debated.'[16] Edgar

[7] Lester et al. (2009), p. 33.

[8] Sand (2012b), p. 201, citing Spalding et al. (2010), p. 25.

[9] Marine Reserves Coalition website, accessible at: http://www.marinereservescoalition.org/files/2012/07/MRC-science-rationale-for-marine-reserves-FINAL.pdf accessed 16 November 2017.

[10] Bradshaw et al. (2001), p. 129.

[11] Fogharty and Murawski (1 February 2005).

[12] Aburto-Oropeza et al. (2011), accessed on 16 November 2017.

[13] Koldewey et al. (2010), p. 1906.

[14] ibid.

[15] Sheppard et al. (2012), p. 232.

[16] Edgar et al. (2014), p. 216.

et al. assembled data from a global sample of fished regions and 87 marine protected areas worldwide.[17] This demonstrated that the effectiveness of a protected area depends on five key properties: how much fishing is allowed, enforcement levels, how long protection has been in place, area and degree of isolation.[18] Specifically, the conservation benefits of these investigated MPAs were found to increase exponentially with the accumulation of five key features: (1) no take, (2) well enforced, (3) old (>10 years), (4) large (>100 km^2), and (5) isolated by deep water or sand. This research concluded that conservation is assured only when all five of these boxes have been ticked.[19] Similarly, Herrera *et al*. initially espouse the 'no-take' option as a way forward for fisheries conservation: 'One way in which fish stocks—and their habitats—can be protected is through the establishment of marine reserves, areas that are closed to fishing.'[20] However, they then acknowledge that the effective management of marine fisheries is an on-going challenge at the intersection of biology, economics, and policy, such that although the potential economic benefits of such reserves have been shown for single-owner fisheries, their implementation quickly becomes complicated when more than one non-cooperating harvester is involved in fishery management, which is the case on the high seas.'[21]

Focussing on larger MPAs similar to that of Chagos, more recent research initially notes that: 'Large marine protected areas (>3000 km^2) have a high profile in marine conservation, yet their contribution to conservation is contested.'[22] However, these large MPAs are able to 'capture' and 'grow' a larger range of species such that their '[c]umulative impacts were significantly higher within large marine protected areas than outside, refuting the critique that they only occur in pristine areas.'[23] Davies *et al*., therefore recommend that future large marine protected areas (LMPAs) be sited based on systematic conservation planning practices where possible and include areas beyond national jurisdiction, and provide five key recommendations to improve the long-term representation of all species to meet critical global policy goals, for example, the Convention on Biological Diversity's Aichi Target 11, and the Sustainable Development Goal 14.5, that together call for at least 10% of marine and costal areas to be conserved. These recommendations can be summarised here as follows: (1) Provide protection for species currently under-represented; (2) Explicitly consider climate change; (3) Represent species with varying distributions; (4) Explicitly consider threats in priority setting processes; and finally, (5) Move from opportunistic to systematic identification of LMPAs. The ultimate goal

[17] ibid.

[18] ibid.

[19] ibid.

[20] Herrera et al. (2016), p. 3767, Accessible at: http://www.pnas.org/content/113/14/3767.full.pdf accessed on 16 November 2017.

[21] ibid.

[22] Davies et al. (2017), 9569. Accessible at: <https://www.nature.com/articles/s41598-017-08758-5.pdf> accessed 16 November 2017.

[23] ibid.

of these recommendations is to achieve the *effective* and *equitable* management of LMPAs.[24] The authors conclude, *inter alia*, that:

> Representation of species ranges indicates the potential contribution LMPAs are able to make to marine biodiversity conservation. However, in order to be effective, sites need to be effectively and equitably managed. LMPAs are an important conservation strategy that have brought the 10% protection goal within reach, but they are not a panacea. Complementary strategies that enhance these efforts, including smaller MPAs and appropriate fisheries management, remain critical.[25]

Compelling as such evidence for MPA designation might be from a mainly natural science perspective, it is worth noting that other studies that take on a more explicitly 'human/environment' interactional view of the designation of 'no-take' MPAs have arrived at more nuanced and mixed assessments as to their overall benefits. For example, Gruby *et al.* note that: 'Large marine protected areas (LMPAs) are a high-profile trend in global marine conservation. Although the social sciences have become well integrated into marine protected area research and practice, human dimensions considerations have not been an early priority in the development of many LMPAs.'[26] In this regard, Dunne *et al.*, have raised specific questions about the viability of the Chagos MPA designation for migratory species and pelagic species protection, while also highlighting the significant social impacts on (former) Chagos Islanders and Mauritian fish communities both pre- and post-Chagos MPA designation.[27]

What emerges from this debate on the overall scientific value of MPAs relative to their social implications is that a crucial factor for judging the success or otherwise of such MPAs is the comparative dependence levels of local human populations on the fisheries captured therein. Within this context, criticism has also been aimed at the propensity for international fora to establish numerical targets for MPAs, thereby inadvertently forsaking the achievement of *qualitative* goals, in favour of *quantitative* goals in this regard. As De Santo initially observes, '[w]hilst targets play an important role in building momentum for conservation, they are also responsible for the recent designation of several extremely large no-take MPAs, which pose significant long-term monitoring and enforcement challenges.'[28] She then:

> [A]rgues that focusing on global protected area targets risks undermining the achievement of sustainable long-term conservation objectives in two key ways. Firstly, focusing on percentage targets may weaken the science-policy interface in environmental decision-making by prioritizing 'political' over 'ecological' networks of protected areas and/or ecological information over socioeconomic data. Secondly, by encouraging the designation of increasingly large MPAs closed to any human use, percentage targets may also undermine social justice in global biodiversity conservation, resulting in stakeholder distrust, which in turn

[24] ibid, pp. 4–5.

[25] ibid.

[26] Gruby et al. (2016), p. 153.

[27] RP Dunne et al. (2014), pp. 79–114.

[28] De Santo (2013), p. 137.

> can lead to infringements in the protected area down the line as well as future opposition to the designation of MPAs.[29]

De Santo goes on to highlight the underlying risks that this global push for the achievement of quantity over quality in MPA targets raises for social justice issues, *inter alia*, within the context of the Millennium Development Goals.[30] As she concludes, such risks carry potentially negative 'repercussions for international protected area politics with respect to (1) the science-policy interface in environmental decision-making, and (2) social justice concerns in global biodiversity conservation.'[31]

This problem becomes acute when progress towards achieving numerical targets on MPAs and MPA networks is deemed lacking. For example, MPA targets set by the 2002 World Summit on Sustainable Development and United Nations Convention on Biological Diversity (hereinafter, CBD) failed to meet their 2012 deadline and have now been extended to 2020. Undeterred, the latter (Biodiversity) Convention also adopted the Aichi Biodiversity Targets (agreed by all 193 Parties to the CBD). Target No.11 of Aichi requires at least 10% of coastal and marine areas to be 'conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas' by 2020.[32] It is towards this target that the UK government has committed itself to achieving, in large part through its MPA designations for United Kingdom Overseas Territories (UKOTs), including those surrounding the Chagos Archipelago, the Pitcairn Islands, as well as those located close to other islands that the UK claims, such as the South Orkney Islands in the Southern/Antarctic Oceans.[33] The Chagos Archipelago is composed of a number of coral atolls in the central portion of the Indian Ocean, whereas the Pitcairn islands are located in the Southern Pacific Ocean.

A further distinguishing factor between these MPAs (around Chagos & Pitcairn) as opposed to others, such as that located south of the South Orkney Islands, is the presence of human communities in these former (Chagos & Pitcairn) islands. This factor underpins Sand's implicit criticism of the two successive MPA initiatives launched by the UK government in late 2009/early 2010 as follows:

> On 10 November 2009, the UK Foreign and Commonwealth Office (FCO) announced the establishment (effective May 2010) of 'the world's first high-seas marine protected area',

---

[29] ibid, p. 137.

[30] ibid, pp. 143–144. The Millennium Goals.

[31] ibid, p. 137.

[32] United Nations, Convention on Biological Diversity, Strategic Plan for Biodiversity 2011–2020, Aichi Biodiversity Target 11.

[33] The United Kingdom claims the South Orkney Islands as part of British Antarctic Territory since 1962, which in turn is one of its 14 British Overseas Territories, of which it is by far the largest by area. The South Orkney Islands Southern Shelf MPA (as it is formally designated) is managed by the Commission for the Convention on Conservation of Antarctic Marine Living resources (CCAMLR) under the Antarctic treaty system. Further information on this exclusively 'high seas' MPA is available at: <https://www.protectedplanet.net/south-orkney-islands-southern-shelf-marine-protected-area-marine-protected-area-ccamlr> accessed 16 November 2017.

> covering 94 000 km2 south of the South Orkney Islands in the British Antarctic Territory. On 1 April 2010, the FCO Commissioner for the British Indian Ocean Territory declared 'a marine reserve to be known as the Marine Protected Area' within that territory's Environment Protection and Preservation Zone proclaimed on 17 September 2003, covering 544 000 km2 (*i.e.* twice the size of the UK) in the Chagos Archipelago.[34]

As he then notes acerbically:

> [U]nlike the unpopulated South Orkney Shelf, the Chagos Archipelago at the time of the creation of the British Indian Ocean Territory (BIOT) in 1965 had a population of over 1500 people (some having settled there for three or more generations), all of whom were deported by the UK authorities until 1973 in order to make way for the establishment of a US military base, under a 1966 bilateral Agreement on the Availability for Defence Purposes of the British Indian Ocean Territory.[35]

11.3 Implications of the Chagos Marine Protected Area (MPA) Arbitral Award (*Mauritius/UK*): Jurisdictional, Procedural and Substantive Issues

The Chagos MPA arbitration between Mauritius and the UK arose from the UK government's declaration on 1 April 2010 of an MPA in the waters surrounding the Chagos Archipelago. It has been administered by the United Kingdom since 1965 as the British Indian Ocean Territory (BIOT). Prior to 1965, the Chagos Archipelago was administered as a dependency of the then-colony of Mauritius. The Archipelago was detached from the colony of Mauritius on 8 November 1965. This followed from a series of meetings with certain Mauritian political leaders, leading ultimately to the agreement of the Mauritius Council of Ministers to detachment. In exchange for Mauritian agreement, the United Kingdom made certain undertakings, including (1) that it would provide compensation to Mauritius; (2) that fishing rights would remain available to Mauritius as far as practicable; (3) that the Archipelago would be returned to Mauritius when no longer needed for defence purposes; and (4) that the benefit of any oil or minerals discovered would be preserved for Mauritius. These meetings between Mauritian leaders and the United Kingdom on the issue of Chagos detachment from Mauritius coincided with the 1965 Constitutional Conference that led to the independence of Mauritius on 12 March 1968.

In the course of the arbitration, the two Parties disagreed as to whether the issue of detachment was linked to independence and whether Mauritian consent to detachment was given voluntarily. Following detachment of the Chagos archipelago, the resident population of these islands, known as Chagossians, was removed. As noted above by Sand, the archipelago then became the site of a U.S. military installation on the island of Diego Garcia through an Exchange of Notes between the United States and the United Kingdom on 30 December 1966. Since at least

[34] Sand (2012b), p. 201.

[35] ibid, p. 202, citing Snoxell (2009), p. 127 and Vine (2011).

1980, Mauritius has asserted in a variety of fora that detachment was improper and that it has sovereignty over the Chagos Archipelago. The United Kingdom has rejected these claims. Additionally, since 1975, the Chagossian population and their descendants have pursued a series of legal claims in the courts of England and Wales and before the European Court of Human Rights, seeking compensation for their removal from the Archipelago and a right to return.[36]

When the United Kingdom began to consider declaring an MPA surrounding the Chagos Archipelago in which all fishing would be prohibited in early 2009, the proposed MPA was the subject of limited discussion during bilateral talks between Mauritius and the United Kingdom in July 2009. In these diplomatic exchanges between the two governments, Mauritius indicated its opposition to the proposal. Between November 2009 and March 2010, the United Kingdom conducted a public consultation on the proposed MPA. Shortly after receiving the results of the public consultation, the United Kingdom declared the MPA on 1 April 2010. On 20 December 2010, Mauritius commenced this arbitration.

11.3.1 Jurisdiction Issues for the Chagos MPA Arbitral Tribunal: When Is a Dispute 'Environmental' in Nature?

Mauritius made four submissions in these arbitral proceedings, requesting the Tribunal to find that:

1. the United Kingdom (UK) is not entitled to declare an MPA or other maritime zones because it is not the 'coastal State' for the purposes of the 1982 United Nations Convention on the Law of the Sea (UNCLOS);
2. given the commitments that the UK made to Mauritius, it is not entitled unilaterally to declare an MPA or other maritime zones because Mauritius has rights as a 'coastal State' for the purposes of the (above) Convention;
3. the UK may not prevent the Commission on the Limits of the Continental Shelf (CLCS) from acting on any submission that Mauritius may make regarding the Chagos Archipelago; and
4. the MPA is incompatible with the UK's substantive and procedural obligations under the (above) Convention and the UN Fish Stocks Agreement.

In response, the United Kingdom initially submitted that the Tribunal lacked jurisdiction to consider any of Mauritius' four submissions and also opposed each of Mauritius' submissions on the merits. Specifically, with respect to Mauritius'

[36] The passage and outcomes of this UK-based litigation are charted by Chris Monaghan in Chap. 6 of this edited volume, entitled: 'An imperfect legacy: the significance of the *Bancoult* litigation on the development of domestic constitutional jurisprudence' and by Richard in Chap. 4 of this edited volume, entitled 'How Public Law has not been able to provide the Chagossians with a Remedy'.

Fourth Submission noted above, the United Kingdom objected to the jurisdiction of the Tribunal, *inter alia*, on the grounds that the MPA was a fisheries measure and that the Convention excludes disputes over fisheries from compulsory dispute settlement, under Section 2 of Part XV of the Convention, when it is deemed that such disputes relate to the coastal State's 'sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.'[37] In response, Mauritius argued that the MPA was an environmental measure and that the Convention expressly provides for the Tribunal's jurisdiction over disputes relating to the protection of the marine environment, under Article 297(1)(c) of the 1982 Convention.

In its Award issued on 18 March 2015,[38] it is worth noting that the Tribunal initially declined jurisdiction on Mauritius' first two submissions (above). Specifically, it did not accept the Mauritius claims in relation first, as to whether the United Kingdom should be considered a 'coastal State' for the purposes of the application of the 1982 UN Convention on the Law of the Sea (hereinafter, UNCLOS) and second, whether Mauritius itself has the status of a 'coastal State' under the UNCLOS for the purposes of making its claims against the United Kingdom. Despite declining jurisdiction on initial claims by Mauritius to be recognised as the 'coastal State' under UNCLOS—which the Tribunal characterised as being related to sovereignty over the Chagos archipelago and therefore, beyond its jurisdiction to consider—the Tribunal nevertheless contrived to find jurisdiction on environmental grounds. The Arbitral Tribunal thus found that it did ultimately have jurisdiction to consider the claim by Mauritius (in its Fourth Submission) that the UK's declaration of the MPA was not compatible with the United Kingdom's obligations under the Convention. The Tribunal held that despite its claims to the contrary, the United Kingdom had repeatedly justified the Chagos MPA designation on broad environmental grounds, in particular in relation to the protection of coral. Therefore, it was not open to the United Kingdom to attempt to exclude the Tribunal's jurisdiction with the argument that the MPA was merely a fisheries measure. The Tribunal also held that Mauritius' rights in the waters of the Chagos Archipelago were not limited to fishing, noting in particular that the United Kingdom's undertaking to eventually return the Archipelago gives Mauritius a significant interest in whether or not the Archipelago will be covered by an MPA.

In reaching this decision on its jurisdiction, the Tribunal analysed the scope of the various provisions of the Convention providing for the compulsory and binding settlement of disputes under Section 2 of Part XV of the Convention (entitled: Compulsory Procedures Entailing Binding Decisions) but eventually focused on Section 3 of Part XV (entitled: Limitations and Exceptions to Applicability of

[37] See: Article 297(3)(a) of UNCLOS.

[38] Chagos Marine Protected Area Arbitration (Mauritius/United Kingdom) Final Award, 18 March 2015, on the website of the Permanent Court of Arbitration at <www.pca-cpa.org> accessed 16 November 2017.

Section 2) and specifically, Article 297 of UNCLOS (entitled: Limitations on Applicability of Section 2) to consider the jurisdictional issues raised by this case. In summary, Article 297(1) sets out to distinguish the actions of a coastal State 'in the exercise of its sovereign rights or jurisdiction' that *are* subject to the compulsory and binding dispute settlement procedures contained in section 2 of Part XV, whereas Articles 297(2) and 297(3) covers those coastal State actions that are *not* subject to such compulsory and binding dispute settlement procedures. These exceptions relate specifically to certain aspects of the coastal State's exercise of its sovereign rights and jurisdiction on marine scientific research under Article 297(2) and fisheries under Article 297(3).

As Allen initially observes, despite its organizational shortcomings and somewhat convoluted structure, 'article 297 was widely felt to limit the scope of mandatory jurisdiction in recognition of the authority of a coastal state to exercise its sovereign rights and jurisdiction in its extended maritime areas.'[39] On the other hand, he later accepts that 'it could be argued that the provision does not exclude or limit the applicability of section 2 procedures at all.'[40] Nevertheless, he cautions that such a 'positive' assessment of this provision, 'would require an overlooking of the consequences of the positive formulation of the first paragraph. The key question here is, what happens in cases other than those enumerated in subparagraphs (a)–(c)? Is a coastal state free from the obligation to submit to section 2 procedures in any other dispute involving the exercise of its sovereign rights or jurisdiction in its extended maritime areas?'[41] As Allen then notes, 'It was widely thought that, other than in the cases enumerated in Article 297(1)(a–c), a coastal state was immune from challenge with regard to the exercise of its sovereignty rights and jurisdiction, as far as section 2 of Part XV was concerned.'[42] However, he then observes that the validity of this hitherto orthodox reading of Article 297 has been thrown into doubt as a result of the Arbitral Tribunal's reasoning in the Chagos MPA Award.[43] Specifically:

> [T]he Tribunal reached the conclusion not only that Article 297(1) did confer mandatory jurisdiction in the three enumerated cases, thereby affirming jurisdiction in such situations, but that courts and tribunals retain compulsory jurisdiction pursuant to section 2 in all other cases, as long as a dispute concerns the interpretation or application of the Convention and the explicit automatic restrictions on jurisdiction contain in Article 297(2) or (3) are not engaged.[44]

Earlier on in his analysis, Allen had already highlighted the fact that the Chagos Award identified three ways in which Article 297 could be used to facilitate and extend, rather than limit, the jurisdiction of an UNCLOS-established tribunal, as follows: First, the Tribunal favoured a construction of Article 297(1) that dramatically

[39] Allen (2017), p. 2.

[40] ibid, p. 4.

[41] ibid, p.4.

[42] ibid, p. 4, citing Churchill and Lowe (1999), p. 455.

[43] ibid, p. 4.

[44] ibid, pp. 4–5, citing the *Chagos MPA* Award, at [317].

extends the scope for the exercise of mandatory jurisdiction in cases that were not expressly provided for in Article 297(1).[45] Second, the Tribunal acknowledged the existence and potential effect of the inclusion of certain terms in Article 297 that provide *renvoi* to sources beyond the Convention.[46] In this regard, the Tribunal noted that Article 297(1)(a) refers to 'other internationally lawful uses of the sea specified in Article 58 of [LOSC].'[47] Third, the Tribunal also observed that Article 297(1)(c)—which provides for compulsory jurisdiction in instances where it is claimed that a coastal state has contravened international norms for the protection and preservation of the marine environment in the extended maritime zones—permits reference not only to norms contained in the Convention but also to those rules and principles established by other international instruments. In these circumstances, the Tribunal concluded that 'Article 297(1) thus expressly expands the Tribunal's jurisdiction to certain disputes involving the contravention of legal instruments beyond the four corners of the Convention itself.'[48]

As Allen notes, the Tribunal then had to characterize the *type* of this dispute between Mauritius and the UK for the purpose of finding whether it did after all have jurisdiction over this dispute. This exercise required the Tribunal to determine the intended, or prevailing, effect of the creation of the Chagos MPA. In essence, if Mauritius' challenge qualified as a dispute concerning the protection and preservation of the marine environment in accordance with Article 297(1)(c), then the Tribunal would have jurisdiction. Alternatively, if it was characterized as a fisheries dispute then the Tribunal would have to decline jurisdiction. This is because Article 297(3)(a) provides that a coastal state is not obligated to submit to section 2 procedures in cases where a dispute relating to the exercise of its sovereign rights in respect of those living resources located in its exclusive economic zone (EEZ).[49] In the event, the Tribunal had little difficulty holding that the Chagos MPA had been designated mainly environmental purposes.

Both the Chagos MPA Award, as well as a subsequent case between the Philippines and China over their South China Sea (SCS) dispute,[50] highlight the importance of specifying the categories of disputes to enable the jurisdiction of an UNCLOS tribunal to be triggered. Significantly, the South China Sea (Philippines/China) Arbitral Award on Jurisdiction and Admissibility (delivered on 29 October, 2015) that followed shortly after the Chagos MPA Award (on March, 2015) appeared

[45] *Chagos MPA* Award, [307]–[314] and [317].

[46] ibid, [316].

[47] See *Chagos MPA* Award, [316]. As Allen (2017) also notes, UNCLOS Article 58(2) contains a *renvoi* referring to other pertinent rules of international law applicable in relation to the EEZ that are not incompatible with Part V of the Convention.

[48] ibid.

[49] Allen (2017), p. 2.

[50] See: In the matter of South China Sea (Philippines/China) Arbitral Award on Jurisdiction and Admissibility (29 October, 2015) and Final Award on 16 July, 2016. PCA Case No 2013-19. ARE ITALICS NEEDED? Both available at: <https://www.pcacases.com/web/sendAttach/2086> accessed 16 November 2017.

to endorse the wider jurisdictional scope that disputes over ostensibly 'environmental' matters provide for UNCLOS tribunals. Indeed, Talmon has speculated that in the later, South China Sea case, 'The Philippines, probably encouraged by the broad reading given to the category of environmental disputes by the arbitral tribunal in the Chagos MPA Arbitration in its Award of 18 March 2015.'[51] The Arbitral Tribunal in the South China Sea (SCS) Award on Jurisdiction and Admissibility observed that the *Chagos MPA* Tribunal had recently declined to endorse this restrictive interpretation of the jurisdiction of UNCLOS tribunals.[52] The relevant deliberations by the SCS Tribunal on this jurisdictional issue is summarized in the following passages.

The Philippines' Submission No. 11 in the South China Sea Arbitration reflected a dispute concerning the protection and preservation of the marine environment at Scarborough Shoal and Second Thomas Shoal and the application of Articles 192 and 194 of the Convention. This is not a dispute concerning sovereignty or maritime boundary delimitation, nor is it barred from the Tribunal's consideration by any requirement of Section 1 of Part XV. Depending on the Tribunal's ultimate decision on the status of these features, the basis for its jurisdiction may differ: (a) To the extent that the alleged harmful activities took place in the territorial sea surrounding Scarborough Shoal, or in any territorial sea generated by Second Thomas Shoal, the Tribunal noted that the environmental provisions of the Convention impose obligations on States Parties including in the territorial sea; and (b) To the extent that the alleged harmful activities took place in the exclusive economic zone of the Philippines, of China, or in an area of overlapping entitlements, the Tribunal noted that Article 297(1)(c) expressly affirms the Tribunal's jurisdiction over disputes concerning the alleged violation of 'specified international rules and standards for the protection and preservation of the marine environment' in the EEZ. Under neither circumstance, however, is jurisdiction precluded. Accordingly, the Tribunal concluded that it has jurisdiction to address the matters raised in the Philippines' Submission No. 11.[53]

11.3.2 Legal Status of UK Undertakings to Mauritius Delegation in Lancaster Agreement

Having seen how the Chagos MPA Tribunal was able to surmount the initial obstacle of ascertaining its jurisdiction to adjudicate on this dispute, arguably by adopting an expansive approach to the scope of its jurisdiction in relation to environmental matters, the next issue that the Tribunal had to consider was whether Mauritius had any traditional maritime freedoms that were negatively affected within the United

[51] Talmon (2016b), pp. 309–364.

[52] Philippines/China Award on Jurisdiction and Admissibility (2015) at [358].

[53] ibid, [408].

Kingdom designated Chagos MPA. This question was especially relevant given that Mauritius had already been denied its claim to be considered as the 'coastal State' in relation to its sovereign rights within the Chagos MPA. On this issue, Mauritius reverted to the set of undertakings that the United Kingdom had made at the time of the (now disputed) agreement with relevant Mauritian authorities on the detachment of the Chagos archipelago from Mauritius. A preliminary set of inter-related questions related to the legal status of these United Kingdom undertakings therefore arose in this regard.

The main legal question is whether the Lancaster House agreement between the representatives of the fledgling Mauritian government and representative ministers and officials of the United Kingdom Colonial Office constituted a treaty under international law. However, an *a priori* question that needed to be addressed in this context was whether the Mauritian delegation that attended the Lancaster House meetings were representative of a fledgling government and therefore the new State of Mauritius. Allen notes that the answer to this prior legal question is a crucial factor in the final determination as to whether the Lancaster House undertakings can be considered a treaty, as a positive answer to this prior question would determine that the Mauritian delegation had official capacity as representatives of a new international legal personality in the making, namely, the State of Mauritius.[54] At this juncture, reference can also be made to the 2001 Draft Articles on State Responsibility, Article 10(2) of which provides for the international responsibility of the conduct of an insurrectional or other movement that succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration under international law. This suggests that the doctrine of State responsibility applies to decisions and actions of the fledgling government of a prospective new State, which in turn can be argued to imbue this entity with international legal personality. Allen then invokes the ICJ decision in the *Territorial and Maritime Delimitation (Qatar v Bahrain)* case to buttress the notion that Lancaster House undertakings can be considered a binding treaty between the UK and the then fledgling State of Mauritius.[55]

Significantly, the Tribunal also recognized the authority and legally-binding nature of the Lancaster House undertakings by the United Kingdom government on the eve of Mauritian independence in 1965, thereby confirming, as Cassimatis notes, Mauritius' reversionary interests in the Chagos Archipelago.[56] The Tribunal then went on to find unanimously that, as a result of the repeated undertakings given by the United Kingdom, Mauritius now holds legally binding rights to fish in the waters surrounding the Chagos Archipelago. These undertakings also included, *inter alia*, the eventual return of the Chagos Archipelago to Mauritius when no longer needed for defence purposes, and the preservation of the benefit of any minerals

[54] Allen (2014), pp. 121–122.

[55] ibid.

[56] Anthony E Cassimatis, 'The Chagos UNCLOS Arbitration: Maritime, Fishing and Human Rights Issues and General International Law', TC Beirne School of Law, University of Queensland, Australia. Seminar presentation slides (unpublished), 14. Accessible at: www.law.uq.edu.au/documents/cpicl/MASLU-CPICL-ILA-Seminar.pdf accessed 16 November 2016.

or oil discovered in or near the Chagos Archipelago, pending its eventual return. These findings by the Tribunal on this significant *a priori* issue in turn allowed the Tribunal to hold that in declaring the MPA, the United Kingdom failed to give 'due regard' to these rights of Mauritius in relation to the Chagos Archipelago and declare that the United Kingdom had breached its obligations under the Convention. The Tribunal's justification for engagement with the applicable rules in both UNCLOS and general international law is discussed below.

11.3.3 Interaction Between the Substantive and Procedural Obligations in the Chagos MPA Award: 'Due Regard' and 'Other Rules of International Law'

Following its acceptance of jurisdiction over this dispute, and its recognition of Mauritian navigational, and especially, fishing rights within the Chagos MPA, the next set of questions that the Tribunal needed to tackle related to the applicable rules of international law that applied to this dispute. Specifically, was the Tribunal constrained only to apply the UNCLOS provisions or could it apply other, relevant rules of international law? The Chagos MPA Arbitral Tribunal moved to consider both the procedural and substantive obligations applicable to both States in this context. Two significant phrases that were subject to interpretation and application by the Tribunal in ways that will also have considerable application to MPA designations across the world are that of 'other rules of international law', and 'due regard', as they are found in Articles 2(3) and 56(2) of the 1982 UNCLOS, respectively. According to Mauritius, Article 2(3) of the 1982 UNCLOS imposed an obligation of compliance that requires the United Kingdom to exercise its sovereignty 'limited by' obligations arising out of the Convention and 'other rules of international law.' Mauritius submitted that this interpretation is based on the ordinary meaning of the provision, and is consistent with the intention of the drafters of the 1958 Convention on the Territorial Sea and the Contiguous Zone, as well as the 1982 Convention.[57]

Turning now to the interpretation of the phrase: 'other rules of international law', Mauritius argued that these are 'broad and open-ended words', which are neither intended to be limitative, nor expressly qualified. Mauritius submitted that the four categories of those 'other rules of international law', are as follows: (1) the rules of international law that require a coastal State to respect traditional fishing rights, as affirmed in the UK's undertakings; (2) the rule of international law that requires a State to respect its undertakings more generally, including those that protect fishing and mineral rights; (3) the rule of international law that requires a State to comply with a commitment it has given, through its head of government, to the head of government of another State; and (4) the rule of international law that requires a coastal State to consult in regard to matters that can affect the rights of another

[57] *Chagos MPA* Award, [460].

State. All of these 'other rules of international law', referenced by Article 2(3) were allegedly breached by the United Kingdom, according to Mauritius.[58]

On the specific question of the United Kingdom's obligations under the 1982 UNCLOS, Mauritius first argued that the Convention required the UK to have *due regard* for Mauritian rights and to comply with its undertakings to Mauritius when taking actions with respect to the Chagos Archipelago. Mauritius contended that the United Kingdom breached these obligations by neglecting to provide Mauritius with information regarding the proposed MPA, by declining to consult with Mauritius, and by failing to respect its undertakings to Mauritius. Mauritius also argued that the United Kingdom had not acted in good faith in that the MPA was not actually declared in pursuit of environmental objectives but in reality designed to exclude any possibility of return for the Chagossians that had been moved following detachment of the Chagos archipelago from Mauritius. In response, the United Kingdom denied that the Convention requires it to comply with any undertakings it may have made and emphasized that paying due regard to Mauritian rights is not the same as giving effect to those rights. The United Kingdom further argued that its extensive exchanges with Mauritius and the public consultation sufficed to meet any obligation to consult with Mauritius. The United Kingdom also denied that it had any improper purpose in declaring the MPA. The United Kingdom further rejected the existence of a customary law obligation to consult with other States that would apply by way of Article 2(3). Unlike established precedents requiring consultation, the United Kingdom noted that the present case does not concern shared natural resources or common property resources, or relate to transboundary harm. The United Kingdom considered that even in the event that the Tribunal were to accept an obligation to consult in the present circumstances, the scope of such an obligation would be limited. According to the United Kingdom, the nearest analogy would be the rule on consultation in cases of transboundary harm codified by Principle 19 of the Rio Declaration on Environment and Development, which requires no more than the provision of prior and timely notification and relevant information, and consultation in good faith at an early stage.[59]

The Tribunal found unanimously that the 1982 Convention, specifically Articles 2(3) and 56(2), required the United Kingdom to have due regard for Mauritian rights and to act in good faith with respect to its undertakings to Mauritius. The Tribunal first noted that Article 2(3) of the Convention provides that '[t]he sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.' Turning to the implications of this provision in the present case, the Tribunal initially held that it did not consider that the Lancaster House undertakings represent part of the general rules of international law for which the Convention creates an obligation of compliance.[60] The Tribunal did, however, consider that general international law requires the United Kingdom to act in good faith in its relations with Mauritius, including with respect to its undertakings. Among these

[58] ibid. [462].

[59] ibid, [468].

[60] ibid, [517].

undertakings are fishing rights practised by Mauritians (and others) traditionally practised within the territorial sea of the Chagos archipelago now located within the designated MPA. The Tribunal held that these Mauritian traditional fishing rights constituted a vested right. Moreover, the Tribunal considered the rules of international law on the treatment of such vested rights of foreign nationals to fall squarely within the 'other rules of international law' applicable in the territorial sea under Article 2(3) of UNCLOS.[61] The Tribunal concluded that the obligation in Article 2(3) is limited to exercising sovereignty in the territorial sea subject to the general rules of international law, which in this case required consultations with Mauritius on its vested fishing rights in the Chagos territorial sea prior to the United Kingdom MPA designation around the Chagos archipelago.[62] Whether this requirement had been met by the UK in the creation of the MPA was then evaluated by the Tribunal and ultimately held to be inadequate.

In contrast to Article 2(3), the Tribunal held that the English text of Article 56(2) left no doubt that the provision imposes an obligation on the coastal State: 'In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.' As the Tribunal then notes, 'the difference between the Parties, therefore, concerns what is meant by "due regard" and the extent to which this implies an obligation to consult, or even of non-impairment.'[63] In the Tribunal's view, the ordinary meaning of 'due regard' called for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. However, the Tribunal declined to find in this formulation any universal rule of conduct. The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention depended upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.[64] At this point, it is important to note that in its final Award, the South China Sea Arbitral Tribunal referenced this interpretation of the 'due regard' provisions of UNCLOS with approval, citing the relevant paragraph of the Chagos Award.[65]

The Tribunal further considered that the United Kingdom's obligation to act in good faith and to have 'due regard' to Mauritius' rights and interests arising out of the Lancaster House undertakings, as reaffirmed after 1968, entailed at least, both consultation and a balancing exercise with its own rights and interests. Reviewing

[61] ibid, [521].

[62] ibid, [519].

[63] ibid, [518].

[64] ibid, [519].

[65] SCS Arbitral Tribunal, Final Award (2016), [742].

the detailed record of events from February 2009 to April 2010, the Tribunal found that the bilateral consultations that took place were characterized by a lack of full information regarding the proposed MPA and the absence of sufficiently reasoned exchanges between the Parties. Thus, the Tribunal did not accept that the United Kingdom had fulfilled the basic purpose of consulting.[66] The Tribunal noted, in contrast, that the UK engaged far less with Mauritius than it did with the United States, as another State with international strategic and security interests in the Chagos Archipelago in the form of its base at Diego Garcia within the Archipelago. Here, it is possible to speculate that despite the Tribunal's entirely understandable reluctance to establish and apply a universal standard for consultations between the Parties, it nevertheless applies a useful, *comparative* standard to the required level of consultations by the initiating State in each disputed case. Thus, by comparing the United Kingdom's approach on bilateral consultations between Mauritius and the USA in an unfavourable light for Mauritius, the Tribunal established a *minimum legal threshold* for consultations on this specific issue.

Moreover, while the Tribunal does not fully articulate the international legal *threshold* for inter-governmental consultations over proposed changes to the *status quo* of shared interests in common marine spaces that would meet a universal due diligence requirement for such consultations, it appears to have applied a variant of the Most Favoured Nation (MFN) principle more commonly utilized in international trade and investment law. Simply put, the MFN principle requires that any improved international trade benefits afforded on a bilateral basis by one State (A) to another State (B) immediately engages the former State (A) to the MFN requirement to provide the same improved benefits to all of State A's other States (C, D, E, etc) trading partners. Applying this well-known and generally accepted international trade law principle to the present situation, I would suggest that the Chagos MPA Tribunal in this case was concerned to ensure that at least the same international standard for consultation would prevail for the UK in its negotiations between Mauritius and the USA on this issue. This argument for parity of treatment between different parties also accords with the well-known English phrase, colloquially articulated as: 'What's sauce for the goose, is (also) sauce for the gander.' Specifically, the Tribunal applied this comparative international procedural standard by requiring the United Kingdom to fulfil its duties to inform and consult the relevant Mauritian authorities about its Chagos MPA proposal to at least the same level of detail, frequency and concern as shown in the United Kingdom's communications with their US counterparts.

Furthermore, the United Kingdom's statements and conduct created reasonable expectations on the part of Mauritius that there would be further opportunities to respond and exchange views. However, these expectations had not been met and were therefore frustrated on 1 April 2010, when the MPA declaration was made by the United Kingdom.[67] The Tribunal also concluded that the United Kingdom failed properly to balance its own rights and interests with Mauritius' rights arising from

[66] *Chagos MPA* Award, [534].

[67] ibid, [534].

the Lancaster House Undertakings. Not only did the United Kingdom proceed on the flawed basis that Mauritius had no fishing rights in the territorial sea of the Chagos Archipelago, it presumed to conclude—without ever confirming with Mauritius—that the MPA was in Mauritius' interest.[68] Accordingly, the Tribunal concluded that the United Kingdom has breached Articles 2(3) and 56(2) and therefore held that the proclamation of the MPA was incompatible with the Convention.[69] The Tribunal declined, however, to find any improper purpose in the declaration of the MPA that was suggestive of a lack of good faith on the part of the United Kingdom.

11.3.4 Interpretation and Application of Article 194 of UNCLOS

Having pinned the United Kingdom to its undertakings in the Lancaster House agreement to take into account of continuing Mauritian rights and interests in the Chagos archipelago and its surrounding seas, even following its detachment from Mauritius; the Tribunal elaborated on the nature of these undertakings by reference to Articles 2(3) and 56(2) of UNCLOS as embodying the duty to consult with Mauritius. The Tribunal then proceeded to buttress this duty by further reference to Article 194 of the Convention.

The Chagos MPA Tribunal began its analysis of the applicability of Article 194 by observing that this Article sets out two provisions that potentially bear on the declaration of the MPA. Article 194(1) provides that: 'States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.' Article 194(4) then provides that: 'In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.' The Tribunal initially noted that the two Parties differed as to whether the former provision gives rise to an obligation and whether the latter has any bearing on the Chagos MPA designation by the United Kingdom.[70]

The Tribunal went on to state that in its view, the Parties' disagreement regarding the scope of Article 194 is answered by the fifth provision of that Article, namely, Article 194(5) which expressly provides that, 'The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile

[68] ibid, [535].

[69] ibid, [536].

[70] ibid, [537].

ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.' Accordingly, the Tribunal noted that Article 194 is not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems.[71] The Tribunal further noted that prior to this dispute, the United Kingdom had repeatedly justified the Chagos MPA as an ecosystem protection measure.[72] At this juncture, it is also significant to note that the Arbitral Tribunal cited this paragraph of the Chagos MPA Award with approval in its own final Award, adding as follows, 'The fifth paragraph of Article 194 covers all measures under Part XII of the Convention (whether taken by States or those acting under their jurisdiction and control) that are necessary to protect and preserve "rare or fragile ecosystems" as well as the habitats of endangered species.'[73]

The Chagos Tribunal thus concluded that in establishing the MPA, the United Kingdom was under an obligation to 'endeavour to harmonize' its policies with Mauritius. Noting, however, that Article 194(1) is prospective and requires only the United Kingdom's best efforts, the Tribunal held that, 'It does not require that such attempts precede any action with respect to the marine environment, nor does it impose any particular deadline.'[74] The Tribunal therefore did not find that the United Kingdom has violated its obligation pursuant to Article 194(1) in the limited life of the MPA to date.[75] On the other hand, according to the Tribunal, Article 194(4) imposes a different type of obligation. The Tribunal considered the requirement that the United Kingdom 'refrain from unjustifiable interference' to be functionally equivalent to the obligation to give 'due regard', set out in Article 56(2), or the obligation of good faith that follows from Article 2(3). The Tribunal held that like those provisions, Article 194(4) required a balancing act between the competing rights of the United Kingdom and Mauritius, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue. Article 194(4) differs, however, in that it facially applies only to the 'activities carried out by other States' pursuant to their rights, rather than to the rights themselves. Here the Tribunal noted that Mauritius' rights to the eventual return of the Archipelago and to the benefit of oil and minerals are prospective in nature: there were no Mauritian activities being carried out pursuant to these undertakings. Accordingly, the Tribunal considered that Article 194(4) is applicable only to Mauritian fishing rights, which in turn the Tribunal is considering only in respect of the territorial sea.[76] The Tribunal did not exclude the possibility that environmental considerations could potentially justify, for the purposes of Article 194(4), the infringement of Mauritian fishing rights in the territorial sea. Such justification, however, would require significant engagement with Mauritius to explain the need

[71] ibid, [538].

[72] ibid.

[73] SCS Arbitral Tribunal, Final Award (2016), [945].

[74] *Chagos MPA* Award, [539].

[75] ibid.

[76] ibid, [540].

for the measure and to explore less restrictive alternatives. This engagement was nowhere evident in the record. Accordingly, and also for the reasons set out previously (above) in its discussion of the application of Articles 2(3) and 56(2) to this dispute, the Tribunal concluded that the United Kingdom's MPA declaration around the Chagos archipelago was not compatible with Article 194(4) and Mauritian fishing activities in the territorial sea.

On the other hand, Mauritian claims of lack of good faith and abuse of rights by the United Kingdom government in its designation of the Chagos MPA were not engaged by the Tribunal.[77] Having already concluded that the declaration of the MPA was not in keeping with the Convention, the Tribunal saw no need to comment further on Article 300 of UNCLOS requiring good faith and non-abuse of rights.[78] Indeed, while concluding that the declaration of the MPA was not in accordance with Articles 2(3), 56(2), and 194(4) of the Convention, the Tribunal took no view on the substantive quality or nature of the MPA or on the importance of environmental protection.[79] The Tribunal's concern was with the manner in which the MPA was established, rather than its substance. Thus, it is now open to the Parties to enter into the negotiations that the Tribunal would have expected prior to the proclamation of the MPA, with a view to achieving a mutually satisfactory arrangement for protecting the marine environment.[80]

By way of relevant background international legal developments, it should also be noted that the pronouncements by the arbitral tribunal in the Chagos MPA award on the United Kingdom's requirements to adequately notify, inform and consult Mauritius about its intention to declare an MPA in the waters around the Chagos archipelago arguably represent the latest judicial articulations of these international procedural obligations between States, following a long line of international case law going back at least to the 1957 *Lac Lanoux* arbitration and dealt with fairly comprehensively in the *Pulp Mills* case before the ICJ (2010) as well.[81] This is despite the initial United Kingdom objections (noted above) to such a prior obligation of consultation being applicable to the UK's Chagos MPA designation and the limited scope of such an obligation even if it is found to exist in this case.

Within this context, the ICJ decision in the *Whaling in the Antarctic* (Australia v Japan) case (2013) includes the most recent discussion prior to the Chagos MPA Award of the nature of these international procedural obligations owed by a State that is proposing to undertake activities that may impinge on the interests of another State. This case relates to Australia's allegation of non-compliance by Japan with its obligations under paragraph 30 of the Schedule to the International Whaling Convention. As the Court summarizes, this provision requires Contracting Governments to make proposed permits available to the IWC Secretary before they

[77] ibid, [541].

[78] ibid, [543].

[79] ibid, [543].

[80] ibid, [544].

[81] For a more in-depth discussion of the relevant international case law, as applied to the (is)land reclamation disputes in the South China Sea, see: Ong (2015), p. 578.

are issued, in sufficient time to permit review and comment by the Scientific Committee, and sets out a list of items that is to be included in proposed permits. Paragraph 30 (of the IWC Schedule) states that the proposed permits should specify: the objectives of the research, the number, sex, size and stock of the animals to be taken; opportunities for participation in the research by scientists of other nations; and the possible effect on conservation of the stock.[82] Specifically, Australia raised two complaints with regard to paragraph 30: (a) that Japan had failed to provide proposed permits for review prior to the commencement of each season of JARPA II and (b) that the annual permits did not contain the information required by paragraph 30.[83]

However, the Court observed that Japan had submitted the JARPA II Research Plan for review by the Scientific Committee in advance of granting the first permit for the programme. The Court noted that subsequent permits granted on the basis of that proposal must be submitted to the Commission pursuant to Article VIII, paragraph 1, of the Convention, which states that '[e]ach Contracting Government shall report at once to the Commission all such authorizations which it has granted'. The Court noted that Australia did not contest the fact that Japan has done so with regard to each permit that has been granted for JARPA II.[84] Moreover, as regards these substantive requirements of paragraph 30, the Court finds that the JARPA II Research Plan, which constitutes the proposal for the grant of special permits, sets forth the information specified by that provision. The lack of detail in the permits themselves is consistent with the fact that the programme is a multi-year programme, as described in the JARPA II Research Plan. Japan's approach accords with the practice of the Scientific Committee.[85]

Finally, the Court held that paragraph 30 and the related Guidelines regarding the submission of proposed permits and the review by the Scientific Committee (currently, Annex P) must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention, which was recognized by both Parties and the intervening State. In this context, the Court observed that the implementation of the JARPA II Research Plan differs in significant respects from the original design of the JARPA II programme submitted to the IWC Scientific Committee. According to the Court, this revision of the original design of the research programme by a State party (Japan) demonstrated co-operation by this State party with the Scientific Committee.[86] For all these reasons, the Court concluded that Japan has met the requirements of paragraph 30 as far as JARPA II is concerned.[87] Albeit within the scope of a specific treaty context, namely, the International Whaling Convention, the ICJ's findings of a general co-operative requirement to inform, when coupled with the specific requirements as

[82] *Whaling in the Antarctic (Australia/Japan)* ICJ Rep. (2013), [234].

[83] ibid, [236].

[84] ibid, [238].

[85] ibid, [239].

[86] ibid, [240].

[87] ibid, [242].

to the types of information to be communicated is notable as a further refinement of this procedural international legal obligation.

11.4 Implications of the Chagos MPA Award for the Future of UK MPAs

Utilizing the Chagos MPA Award as an international lens through which to examine the domestic success (or otherwise) of United Kingdom State practice on MPAs, it is notable that the United Kingdom government is ostensibly successful at meeting its largely self-imposed numerical targets for MPA coverage; with 50 Marine Conservation Zones (MCZs) and 267 Marine Protected Areas (MPAs) currently designated that meet at least one of the ecological criteria outlined under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR).[88] Within this context, a United Kingdom Parliamentary Committee report recognised that the United Kingdom could make a substantial contribution to this target by designating more MPAs in the so-called United Kingdom Overseas Territories (UKOTs).[89] Thus, MPAs have also been created in some of the United Kingdom's 14 UKOTs. These UKOT MPAs contain diverse marine habitats and an estimated 90% of the biodiversity found within the UK and the Territories combined.[90] In this regard, MPAs have to date been established in the British Antarctic Territory, the British Indian Ocean Territory, South Georgia and the South Sandwich Islands and the Pitcairn Islands. In September 2016, St Helena declared a sustainable-use MPA, whilst the Ascension Island Government has agreed to establish an MPA that covers at least half of its maritime zone by 2019.[91]

Nevertheless, the Environmental Audit Committee of the United Kingdom Parliament has recently concluded an inquiry entitled: 'Marine Protected Areas Revisited',[92] which follows on from the same Committee's previous reports into *Sustainability in the UK Overseas Territories,*[93] and into *Marine Protected Areas (MPAs)*.[94] The Committee's initial MPAs report criticised the slow pace of designation and lack of ambition in the first tranche of MCZs.[95] In its latest report from this

[88] UK Joint Nature Conservation Committee, The UK OSPAR Marine Protected Area Network.

[89] Environmental Audit Committee, *Sustainability in the UK Overseas Territories* (HC 2013-14, 332), 43.

[90] Foreign and Commonwealth Office, *Overseas Territories: Security, Success and Sustainability*, (2012) 8.

[91] Environmental Audit Committee, *Marine Protected Areas Revisited*, (HC 2016-17, 597), [5].

[92] Environmental Audit Committee, *Marine Protected Areas Revisited Inquiry, Status: Concluded, Information & Reports etc.*

[93] Environmental Audit Committee, *Sustainability in the United Kingdom Overseas Territories Inquiry* (HC 2013-14, 332), 43.

[94] Environmental Audit Committee, *Marine Protected Areas Inquiry* (HC 2014-15, 221).

[95] ibid.

MPAs (revisited) inquiry, the Environmental Audit Committee noted that inadequate consultation was also considered to be an issue in the designated MPAs surrounding UK Overseas Territories (UKOTs) across the world. The Committee held that: 'To achieve buy-in and widespread support for MPAs it is important that the Government consults extensively with the Overseas Territories',[96] citing a civil society group—the UK Overseas Territories Conservation Forum (which) argued: 'It is obviously particularly top-down and that will not … work in coastal communities. It just is not going to happen, so there has to be some feeding-in of civil society into this exercise.'[97] The Committee thus concluded: 'To gain support for the MPA network, the Government must ensure that it consults more effectively and transparently with Governments and local communities in the Overseas Territories. It should ensure that any concerns of the UKOTs are given due consideration before designating MPAs in their waters.'[98] The domestic consultation deficiencies identified by this United Kingdom Parliamentary Committee underpin the poor consultation record of the United Kingdom government generally on such MPAs, which was criticised at the international level by the Chagos MPA Award (discussed above).

Aside from the international and domestic consultation issues arising from MPA designation noted above, more practical implementation, surveillance, enforcement and management concerns are also manifest in UKOT MPAs. Specifically, the Environmental Audit Committee's 'MPAs (Revisited)' report stated that:

> [T]he designation of such large scale and remote MPAs presents surveillance and enforcement challenges. We heard that management measures in the Overseas Territories had been variable. Catherine Wensink of the UK Overseas Territories Conservation Forum argued that 'in some cases they are … not being effectively managed and support is needed, be that technical or financial resources.' For example, we heard that in Turks and Caicos MPA resources are 'so low that even fuel for taking boats out just isn't there.'[99]

According to the Committee:

> Technological advances in satellite tracking could be used to improve surveillance in the UKOTs. For example, Project Eyes on the Seas (EOS) was trialled in Pitcairn reserve from January 2015 to March 2016. The Pew Trusts explained that this technology works by merging 'satellite tracking and imagery with other sources of information, such as fishing vessel databases and oceanographic data' enabling enforcement agencies to identify and monitor unlawful activities in global waters' giving enforcement agencies more actionable intelligence.[100]

According to the Pew Trusts, 'this is helping officials detect illegal fishing activity more effectively, and indeed more cheaply, than reliance solely on physical assets, such as patrol vessels.'[101] However, the Committed also heard that although these technologies can improve monitoring and surveillance, they 'are not a silver

[96] Environmental Audit Committee, *Marine Protected Areas Revisited Inquiry, Final Report*, [55].

[97] ibid.

[98] ibid, [56].

[99] Environmental Audit Committee, *Marine Protected Areas Revisited*, (HC 2016-17, 597), [58].

[100] ibid, [59], citing the written evidence of the Pew Trusts submitted to the Inquiry.

[101] ibid.

bullet', as there is a need to follow up effectively on enforcement for MPAs to be effectively protected. As the Committee then observes: 'To deter illegal activity in MPAs, it is essential to have strong enforcement mechanisms in place.'[102] In written evidence to the Committee, the Zoological Society of London noted that although surveillance of MPAs in the UKOTs is already producing actionable intelligence 'follow-up enforcement is required, needing government support and capacity.'[103] Based on the written evidence submitted to its Inquiry, the Committee concluded as follows:

> '60.**Designation of an MPA is only the first step. MPAs will only be effective if they are properly resourced, managed, monitored and enforced. Many UKOTs lack the necessary resources to effectively manage their MPAs.**
>
> 61.The Government must provide support to the UKOTs to help them properly detect and deter illegal activities. The Government must explore ways of strengthening surveillance and monitoring, to help detect illegal fishing activities in resource-poor UKOTs.'[104]

Many of these issues initially arose with the Chagos MPA designation but then returned to the fore in relation to the Pitcairns MPA, summarized here as follows: In 2013, The Pew Charitable Trusts and The National Geographic Society joined the local government, the Pitcairn Island Council, in submitting a proposal calling for the creation of a marine reserve to protect these spectacular waters. In March 2015, the United Kingdom declared the (then) world's largest fully protected marine reserve in the remote waters surrounding the Pitcairn Islands in the South Pacific Ocean. Along with the Chagos Marine Reserve in the Indian Ocean, the United Kingdom has now created the world's two biggest fully protected marine areas. However, the United Kingdom government also noted that the designation of a MPA around Pitcairn was dependent upon reaching agreement with NGOs on satellite monitoring and with authorities in relevant ports to prevent landing of illegal catch, as well as on identifying a practical naval method of enforcing the MPA at a cost that can be accommodated within existing departmental expenditure limits.[105]According to the Pew Trusts, the Pitcairn Islands Marine Reserve designation also marks the first time any government has combined the creation of a fully protected marine area with detailed plans for surveillance and enforcement.[106] As noted above by the United Kingdom Parliamentary Environmental Audit Committee, this includes use of the most up-to-date technology available, in the form of the Project Eyes on the Seas,[107] a system that enables government officials and analysts

[102] ibid, [59].

[103] ibid, [59], citing the written evidence of the Zoological Society of London.

[104] Ibid, [60]–[61].

[105] UK Government Budget Announcement, March 2015, HC 1093, [2.259].

[106] Pew Trusts, A Vision to Create a British Ocean Legacy: Large, fully protected marine reserves in the United Kingdom's overseas territories – A Pew Trusts fact sheet (July, 2016) Accessible at: <http://www.pewtrusts.org/~/media/assets/2016/07/a_vision_to_create_a_british_ocean_legacy.pdf> accessed 16 November 2017.

[107] To help eliminate a major global threat to healthy, sustainable fisheries, the Pew Charitable Trusts approached Ocean Mind (as the Satellite Applications Catapult) to capture and analyse

to identify and monitor unlawful activities in global waters thereby setting a new standard for the comprehensive monitoring of protected areas. In the aftermath of the Chagos MPA designation and subsequent international litigation, it may be observed that: Pitcairn Islands MPA designation requires '*significant engagement'* with States that have *current*, as opposed to *putative,* exercise of legitimate uses of the sea by other States in the waters around Pitcairn. In this regard, two legitimate uses of the sea are fisheries and navigation but Pitcairn is far away from international shipping lanes and commercial fisheries potential is low.[108]

11.5 Conclusions

The tension between the 'no–take' principle based on conservation science underpinning the Chagos MPA designation and subsequent criticism of this allegedly monolithic approach to nature protection from the social sciences perspective has now been played out on the international law stage in the form of the Chagos MPA litigation between Mauritius and the United Kingdom. Following the result of the Chagos Award, future MPAs sited in close proximity to human-inhabited insular features will need to be more cognizant of the rights and interests of such human communities. Specifically, States proposing to designate an MPA within any of its maritime jurisdiction zones will need to take into account the traditional maritime activities practiced by other States. This is especially the case where these activities such as navigation and especially fishing, are enshrined by the 1982 UNCLOS, as well as general international law. Significantly, both the expansive jurisdictional scope adopted by the Chagos Tribunal under article 297 of UNCLOS, as well as its wide interpretation of Article 194 of UNCLOS to encompass procedural environmental obligations.

As Parlett notes, 'in several recent Awards, Arbitral Tribunals established under Annex VII of Part XV of UNCLOS have been called upon to decide claims based on rights and obligations that find their source in a treaty, agreement, or otherwise

satellite imagery to detect, track and prosecute illegal fishers through "Project Eyes on the Seas".

"Project Eyes on the Seas" was born from a cutting-edge technology platform that combines satellite monitoring and imagery data with other information, such as fishing vessel databases and oceanographic data, to help authorities detect suspicious fishing activity. Project Eyes on the Seas resulted in a system designed for The Pew Charitable Trusts as a cost-effective global fisheries monitoring and enforcement tool for governments around the world, including the most resource-poor enforcement agencies, to monitor and detect illegal fishing and related activities.

The UK government has successfully used this system to monitor fisheries and marine reserves around Ascension Island and the Pitcairn Islands, and the project is committed to continue this work with other governments across the world. More information is available at: <http://www.oceanmind.global/work-initiatives/initiatives/the-pew-charitable-trusts/> accessed 16 November 2017.

[108] See: Pew Charitable Trusts, *Is Offshore Commercial Fishing a Prospect in the Pitcairn Islands?* Report for Pew Charitable Trusts, prepared by D Zeller (May, 2013) Accessible at.

binding instrument other than the Convention itself, or on customary international law.'[109] After considering the extent to which such claims fall properly within the jurisdiction of a Part XV tribunal, either on the basis of the applicable law provision in Article 293(1) of the Convention, or on the basis of provisions of the Convention that make reference to other relevant rights and obligations, Parlett concludes that:

> [T]he recent Awards in the Annex VII arbitrations between Mauritius and the United Kingdom and between the Philippines and China confirm that the reference provisions of the LOSC have the potential to expand the scope of jurisdiction of a Part XV tribunal to involve the determination of claims relying on rights and obligations well beyond the scope of those set out in the Convention. The natural reading of some the provisions of the LOSC is that other international rights, obligations, and rules are incorporated into the LOSC, such that it should be uncontroversial that whether there is a breach of these incorporated rights, obligations, and rules is justiciable before a Part XV tribunal.[110]

Thus, the fact that the Chagos MPA Tribunal accepted jurisdiction over this dispute on such an environmental basis is testimony to the growing significance of environmental issues generally within international relations and international law, and specifically within the international law of the sea.[111] On the other hand, the fact that the Tribunal also felt able to pronounce on the procedural and substantive obligations owed by the UK to Mauritius, both under UNCLOS as well as general international law, is arguably an expression of its concerns over the rightful place of such environmental issues within the general discourse on the rights and obligations of *all* States in the maritime sphere governed by UNCLOS. Notably in this regard, the Chagos Award did not accept such MPA designation in isolation of traditional maritime freedoms, including fishing and navigation among these, despite the obvious nature conservation benefits conveyed by such an MPA designation. Moreover, the pronouncements by the Chagos Tribunal on the correct balance between the scientific basis for MPAs and their implication for maritime freedoms traditionally practised in such MPAs are arguably applicable to non-parties to UNCLOS as well, as a matter of customary international law.

Moving from the international legal implications of this requirement for consultation between States, to that between States and their own communities, we find that concepts such as sovereignty, especially in relation to the autonomy this conveys to States, raise a further complicating issue. Jeffery, for example, applies Ingold's conceptualization of environmental outlooks ranging from the 'globe' to the 'sphere'[112] to explore human-environment relations and debates about the future of the Chagos Archipelago, both as a returning, renascent, community, as well as a continuing, nature conservation site in the Indian Ocean. According to Ingold's conceptions of these environmental outlooks, Jeffery postulates that Chagossians and conservationists broadly represent the two extremes of the 'engaged lifeworld

[109] Parlett (2017), pp. 284–299.

[110] ibid, 12.

[111] Cf. Talmon (2016a), p. 927.

[112] Jeffery (2013), p. 300, citing Ingold (1993), pp. 31–42.

of the sphere' and the 'detached worldview of the globe', respectively, However, Jeffery argues that these two extremes do not necessarily determine their environmental outlooks for the future. It is not simply the case either that Chagossians uniformly advocate resettlement of Chagos or that conservationists uniformly oppose resettlement. Instead, she notes that '[w]ithin each group two distinct environmental outlooks are identified: engagement versus withdrawal amongst Chagossians, and *exclusion versus participation amongst conservationists.*'[113] Jeffery thus demonstrates, that environmental outlooks 'are influenced not only by understandings of human-environment relations but also by practical and ideological considerations.'[114]

These insights return us to the debate surrounding the ecological and social values of mere numerical additions to the global MPAs network. As MPAs—whether local, national, international or regional—are basically exercises in marine and coastal governance, they consist of a bilateral relationship between two systems, a 'governing system' and a 'system-to-be-governed.'[115] According to Jentoft *et al.*:

> The former system is social: it is made up of institutions and steering mechanisms. The latter system is partly natural, partly social: it consists of an ecosystem, and the resources that this harbours, as well as a system of users and stakeholders who, among themselves, form political coalitions and institutions. … Governance theory argues that both systems and their interactions share similar attributes—they are diverse, complex, dynamic and vulnerable. This raises serious concerns as to their governability. There may be limits to what the governing system can do, limits attributed to one or all three systems. But such limits are themselves issues and concerns for planning and institutional design.

In other words, MPAs cannot be conceived as once-and-for-all arrangements. In particular, prior to expansion or designation of new MPAs, the capacity of each of these new MPAs 'needs to be considered and maintained in the long-term to ensure such areas are able to deliver on the ecological and social benefits they are designed to produce.'[116] A holistic marine governance-based approach works best with regard to both the natural scientific and social scientific complexities involved in the designation and management of MPAs. However, as Jentoft *et al.* conclude in relation to MPAs: 'They are regulators and facilitators of human action and interaction. MPAs are what users and stakeholders make of them. Governability is therefore as much about the social process as the structural design of MPAs.'[117] The challenge for both international and national legal systems is in finding the means to scope, identify and effectively integrate the myriad of natural scientific and social scientific factors into the design, implementation and continuing management of future successful MPAs.

---

[113] Jeffery (2013), p. 300 (emphasis added).

[114] ibid, p. 305.

[115] Jentoft et al. (2007), p. 611.

[116] Davies et al. (2017), p. 5.

[117] Jentoft et al. (2007), p. 619.

References

Aburto-Oropeza O, Erisman B, Galland GR, Mascareñas-Osorio I, Sala E, Ezcurra EE (2011) Large recovery of fish biomass in a no-take marine reserve. PLoS ONE 6(8). https://doi.org/10.1371/journal.pone.0023601

Allen S (2014) The Chagos Islanders and international law. Hart, Oxford

Allen S (2017) Article 297 of the United Nations Convention on the law of the sea and the scope of mandatory jurisdiction. Ocean Dev Int Law 48(3–4):313–330

Bohnsak JA, Ault JS, Causey B (2004) Why have no-take marine protected areas. Am Fish Soc Symp 42:185

Bradshaw C, Veale LO, Hill AS, Brand AR (2001) The effect of scallop dredging on Irish Sea benthos: experiments using a closed area. Hydrobiologia 465(1):129

Churchill R, Lowe V (1999) The law of the sea, 3rd edn. Manchester University Press, Manchester

Davies TE, Maxwell SM, Kaschner K, Garilao C, Ban NC (2017) Large marine protected areas represent biodiversity now and under climate change. Nat Sci Rep 7:9569

De Santo EM (2013) Missing marine protected area (MPA) targets: how the push for quantity over quality undermines sustainability and social justice. J Environ Manag 124:137

Dunne RP, Polunin NV, Sand PH, Johnson ML (2014) The creation of the Chagos marine protected area: a fisheries perspective. Adv Mar Biol 69:79–127

Edgar GJ et al (2014) Global conservation outcomes depend on marine protected areas with five key features. Nature 506:216

Environmental Audit Committee, *Sustainability in the UK Overseas Territories* (HC 2013–14, 332)

Fogharty MJ, Murawski SA (2005) Do Marine protected areas really work? Georges Bank experiment provides dues to longstanding questions about closing areas to fishing. Oceanus. www.whoi.edu/oceanus/viewArticle.do?id=3782. Accessed 16 Nov 2017

Gruby RL, Gray NJ, Campbell LM, Acton L (2016) Toward a social science research Agenda for large marine protected areas. Conserv Lett 9(3):153

Herrera GE, Moeller HV, Neubert MG (2016) High-seas fish wars generate marine reserves. Proc (US) Natl Acad Sci (PNAS) 113(4):3767

Ingold T (1993) Globes and spheres: the topology of environmentalism. In: Milton K (ed) Environmentalism: the view from anthropology. Routledge, London, pp 31–42

Jeffery L (2013) "We are the true guardians of the environment": human-environment relations and debates about the future of the Chagos Archipelago. J R Anthropol Inst 19(2):300

Jentoft S, Van Son TC, Bjørkan M (2007) Marine protected areas: a governance system analysis. Hum Ecol 35:611

Koldewey HJ, Curnick D, Harding S, Harrison LR, Gollock M (2010) Potential benefits to fisheries and biodiversity of the Chagos archipelago/British Indian Ocean Territory as a no-take marine reserve. Mar Pollut Bull 60(11):1906

Lester SE, Halpern BS, Grorud-Colvert K, Lubchenco J, Ruttenberg I, Gaines SD, Airamé S, Warner RR (2009) Biological effects within no-take marine reserves: a global synthesis. Mar Ecol Prog Ser 384:33

Marine Reserves Coalition Website. http://www.marinereservescoalition.org/files/2012/07/MRC-science-rationale-for-marine-reserves-FINAL.pdf. Accessed 16 Nov 2017

Ong DM (2015) A bridge too far? Assessing the prospects for international environmental law to resolve the South China Sea disputes. Int J Minor Group Rights 22:578

Parlett K (2017) Beyond the four corners of the convention: expanding the scope of jurisdiction of law of the sea tribunals. Ocean Dev Int Law 48(3–4):284–299

Pew Charitable Trusts (2015) Global Ocean Legacy website. http://www.pewtrusts.org. Accessed 16 Nov 2017

Sand PH (2012a) Fortress conservation trumps human rights? The "marine protected area" in the Chagos archipelago. J Environ Dev 21(1):36

Sand PH (2012b) "Marine protected areas" off UK overseas territories: comparing the South Orkneys Shelf and the Chagos Archipelago. Geogr J 178(3):201

Sheppard CRC et al (2012) Reefs and islands of the Chagos Archipelago, Indian Ocean: why it is the world's largest no-take marine protected area. Aquat Conserv 22(2):232

Snoxell DR (2009) Anglo/American complicity in the removal of the inhabitants of the Chagos islands. J Imp Commonw Hist 37:127

Spalding M, Wood L, Fitzgerald C, Gjerde K (2010) The 10% target: where do we stand? In: Toropova C, Meliane I, Laffoley D, Matthews E, Spalding M (eds) Global ocean protection: present status and future possibilities. International Union for Conservation of Nature and Natural Resources, p 25

Talmon S (2016a) The Chagos Marine protected area arbitration: expansion of the jurisdiction of UNCLOS Part XV Courts and tribunals. Int Comp Law Q 65:927

Talmon S (2016b) The South China Sea arbitration: observations on the award on jurisdiction and admissibility. China J Int Law 15:309–364

Vine DS (2011) Island of shame: the secret history of the U.S. military base in Diego Garcia, Rev Paperback edn. Princeton University Press, New York

Chapter 12
Learning from Chagos, Lessons for Pitcairn?

Sue Farran

12.1 Introduction

The 2016 decision in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)*,[1] upheld, albeit somewhat indirectly, the House of Lords' decision in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.2)*[2] to deny the Chagossians the right to resettle the British Indian Ocean Territory. In reaching the decision the Secretary of State relied on a report prepared by consultants regarding the feasibility of re-settlement (the Posford 2B report).[3] This report concluded that 'whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining the long-term inhabitation are likely to be prohibitive'.[4] In the Supreme Court the reliability of this report was challenged.[5] Among the grounds of challenge was the lack of objectivity in the 2B report, including criticism of the government's environmental specialist that 'as a coral reef specialist well-known to be strongly dedicated to their

[1] [2016] UKSC 35 (Hereafter *Bancoult* [2016]).

[2] [2008] UKHL 61, [2009] AC 453 (Hereafter *Bancoult* [2008]).

[3] This was prepared by Posford Haskoning Ltd and published in July 2002. The contract for the report was between the Commissioner for BIOT and Posford Duvivier Environment. See *Bancoult [2016]* [29] (n 1).

[4] Para 1.11 General Conclusions. Contrary views were expressed by one of the consultants involved in a BIOT site visit in 2001, Mr Akester, who felt that resettlement obstacles could have been overcome: *Bancoult* [2016] [67] (n 1).

[5] For a summary of the grounds of challenge see *Bancoult* [2016] [133] (n 1).

S. Farran (✉)
Northumbria University, Newcastle upon Tyne, UK
e-mail: sue.farran@northumbria.ac.uk

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_12

conservation, there (was) "concern" whether he could reasonably be regarded as an objective assessor on the issue of reintroducing human settlement'.[6]

Although the majority of the Supreme Court rejected the criticism of the 2B report raised by the appellants,[7] what emerges from the recent Chagos litigation is the intertwining of political, economic and environmental considerations. The political dimension was clearly the arrangements with the United States of America and the defence base located at Diego Garcia, the economic dimension was the cost of resettlement and the burden on the British treasury, while the environmental considerations were wide ranging covering unpredictable weather events, climate change, water contamination and shortage, fishing stock depletion and coral reef bleaching—indeed many aspects which affect islanders living on atolls across the world's oceans particularly in the Pacific region.[8] Towards the end of his judgment Lord Mance referred to the Marine Protected Area (MPA) declared in 2010 over the high seas around the BIOT.[9] This development has been subject to a number of legal challenges,[10] but Lord Mance drew attention to the Secretary of State's notice of objection of 6 February 2015 to the latest Bancoult challenge, which states inter alia 'The MPA does not preclude resettlement in the event that Her Majesty's government concludes that it is appropriate to permit and/or support resettlement of the islands'.[11]

It is this association of the MPA and settlement of the islands which is the focus of this chapter, because the former is driven by broad global concerns in which international non-state agencies play a key role. The link is also significant in so far as the MPA in BIOT foreshadowed that declared for the Pitcairn islands which is also an overseas British territory, heavily dependent on financial support from the United Kingdom (UK) treasury and where the population is considerably smaller than that considered for possible resettlement on BIOT (66 versus 1500).[12] In many respects the fate of the Chagossians and the Pitcairners is symptomatic of the 'people versus planet' debate, but one taking place on the margins of public consciousness about climate change, the safeguarding of biodiversity and the importance of the global commons. In an internationally competitive environment to gain green

[6] *Bancoult* [2016] [25] (n 1). See also an alternative point of view presented as new evidence and considered at [69]: the report of Professor Paul Kench of the University of Auckland. See also the KPMG Report 2014/15, considered below, which factually supersedes the 2B report.

[7] See in particular *Bancoult* [2016] [59] (n 1).

[8] See *Bancoult* [2016] [44] (n 1) which refers to the section on vulnerability in the 2B report.

[9] See *Bancoult* [2016] [44] (n 1).

[10] See *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2013] EWHC 1502 (Admin), [2014] EWCA Civ 708.

[11] Quoted at *Bancoult* [2016] [74] (n 1).

[12] A report of the House of Commons Environment Audit Committee, *Sustainability in the UK Overseas Territories* (HC 2013-14, 332-I) para 3, (hereafter 'Sustainability Report 2014'), states, 'Taken together, the total population of the UKOTs amounts to some 250,000 people, which is loosely equivalent to that of Nottingham', a figure which appears to have been taken from Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (White Paper, Cm 8374, 2012).

credentials by creating 'blue corridors' across the oceans and/or 'blue belts' around coasts,[13] remote islands and their communities are easy targets, especially where, as in the case of BIOT and Pitcairn, laws can be made under prerogative powers and MPAs declared with minimal or—in the case of BIOT, no democratic involvement. To use an analogy with which former colonies are familiar, saving the planet through grand environmental schemes is rather like the proselytising of Christianity: a belief in the greater, (greener) good excuses a good deal of trampling over other considerations.

This contribution looks at the global context behind the creation of marine protected areas, the agencies and forces shaping the justification for these, and the legal framework for establishing them. Attention is drawn to the competing interests at play here and the ways in which remote islands and atolls may be little more than pawns in a larger game of one-upmanship in 'saving the planet'.[14]

12.2 The Global Context

The establishment of marine protected areas is integral to the strategic plan for biodiversity 2011–2020 which was adopted in 2010 in Nagoya, Japan. This included 20 Aichi targets, aimed at five strategic goals. Target 11 which falls under Strategic Goal C is: *to improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity*, and states:

> By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.

Although neither the Convention on Biological Diversity or the Aichi target specifies Marine Protected Areas, both have been used as a motivation and justification for MPAs. Peter Jones and Elizabeth De Santo, writing in *The Conversation* in September 2016, state, for example: 'Under the UN's Convention on Biological Diversity, signed by almost every country in the world, one of the agreed targets is to designate 10% of the area of the world's oceans as MPA by 2020'.[15] Similarly,

[13] Apparently one of the manifesto commitments of the conservative party—currently in power, was to 'create a "blue belt" of marine protected zones around the 14 overseas territories' of the UK. Matt Ridley, 'Protecting the Sea' (*Mattridley Online*, 27 March 2016) <http://www.rationaloptimist.com/blog/marine-protected-areas/> accessed 9 February 2017.

[14] Although all G20 countries are expected to participate in the creation of marine protected areas and no-take areas competition seems fiercest between the UK and the USA. See Atlas of Marine Protection 'How much of our ocean is protected' < http://www.mpatlas.org/> accessed 23 June 2017.

[15] Jones and De Santo (2016).

Dame Caroline Spelman addressing the House of Commons in a debate about Global Biodiversity on 1 November 2016, stated:

> The Government made the ground breaking decision to create the largest marine reserve in the world around the Pitcairn Islands and are on their way to doing the same for Ascension Island, South Georgia, St Helena and Tristan da Cunha … That would make a significant contribution to Aichi target 11, which is on marine protected areas.[16]

This 10% ties in with the Sustainable Development goals, which aim for the conservation of at least 10% of coastal and marine areas.[17] In 2012 the World Summit on Sustainable Development proposed deadlines for the establishment MPAs to meet obligations of states under the Convention on Bio-Diversity.[18] The aim is for parties to strive to declare 10% of their oceans—encompassed in their EEZ's, as MPAs or other area based mechanisms by 2020. In 2014, the World Parks Congress increased the recommendation of strict protection extending it to 20–30% of each marine habitat, and to 30% in no-take reserves by 2020,[19] and in September 2016 the World Conservation Congress proposed that 30% of the world's seas should be MPAs.[20] The ambition of such a project is apparent when one considers that in February 2017 only 1% of the world's oceans was protected by no-take reserves.[21]

It should also be noted, that 'the protection of large remote areas makes up the vast majority of no-take areas … the vast majority of their (UK's) no-take area is found in the distant British Overseas Territories'.[22] According to Dame Caroline Spelman, 'In fact 90% of the biodiversity of UK territory is situated in overseas territories'.[23] As all sixteen of the world's non-self-governing territories are islands this means that islands such as BIOT and Pitcairn are prime targets for MPAs.[24] In some respects therefore, it might be argued that this exercise in international obligations

[16] HC Deb 1 November 2016, vol 616, column 314WH.

[17] UN 2014. See also the Aarhus Convention 1998, UN Framework Convention on Climate Change 1992, the Durban Accord 2005, and the Rio +20 Sustainable Development Goals 2012.

[18] The Convention opened for signature on 5 June 1992 at the Rio 'Earth Summit' and remained open for signature until 4 June 1993. It entered into force on 29 December 1993.

[19] For progress up until 2012 see De Santo (2013), pp. 137, 139–140.

[20] See Resolution WCC-2016-Res-050. The resolution suggests that this 30% would have 'no extractive activities' https://portals.iucn.org/library/sites/library/files/documents/IUCN-WCC-6th-005.pdf. accessed 9 February 2017.

[21] 'How much of our ocean is protected?' (*MPAtlas*) <http://www.mpatlas.org/> accessed 9 February 2017.

[22] Shugart-Schmidt et al. (2015), pp. 25, 27.

[23] HC Deb 1 November 2016, vol 616, col 314WH. This figure is also stated in the Sustainability Report 2014 (n 12), 3. <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/332/332.pdf> accessed 22 June 2017.

[24] Conservationists and various celebrities for example, called for marine protected areas not only around Pitcairn in the Pacific but also Ascension Island and the South Sandwich Islands in the Atlantic – Vidal (2015). Similarly, Chile plan to create an MPA around Easter Island—regardless of the contention that exist over its claim to the island and New Zealand is proposing one around the Kermandec Islands. See Vaughan (2015a).

compliance is a twenty-first century illustration of continuing imperial influence comparable to, and indeed overlapping in the case of BIOT, with the use of islands for military purposes.[25] It is however framed in the more palatable discourse of conservation of bio-diversity, the global commons and the heritage of mankind to which small islands, through the use of their EEZs, can be presented as making a major contribution while enhancing the global reputation of countries championing environmental conservation. For example, in a Foreign and Commonwealth Office paper entitled 'The Overseas Territories, Security, Success and Sustainability' under the banner heading 'Cherishing the Environment' it is stated:

> The UK aims to be a world leader in environmental management of its uninhabited territories which cover many millions of square kilometres. We are developing a strategic approach to large-scale marine management including through the establishment of the world's largest Marine Protected Area.[26]

Perhaps someone had forgotten Pitcairn was still inhabited, or that the Chagossians were seeking to return to BIOT, but given that the largest UK MPA prior to Pitcairn was BIOT, and is now around Pitcairn, the wording is telling. It has moreover, been suggested that 'Colonies and dependencies continue to be viewed more as resources to be exploited for the good of the undivided (and UK-centred) realm over and above the needs of their individuated populaces,'[27] and on 25 October 2016, in the context of discussions about the cost of permitting resettlement on BIOT, Andrew Rosindell MP asked 'Is the former minister suggesting that we go round the world and perhaps depopulate lots of other British overseas territories such as Pitcairn, St Helenas and Tristan da Cunha?'. The response from James Duddridge MP was, 'Certainly if Tristan da Cunha or Pitcairn were unpopulated I think it would be wrong to repopulate these islands'.[28] Of course one does not know how widely this view is shared or by whom, but such remarks do suggests that the declaration of marine protected areas may also answer another quandary regarding overseas territories, namely what to do with them?

One answer is to leave this to the courts, as demonstrated in the ongoing litigation surrounding BIOT,[29] the other is to delegate to the conservation lobby. For example, Charles Clover, a spokesperson for a coalition of INGOs and NGOs,[30] quoted in *The Guardian* in February 2015 stated: 'The Foreign Office is at a crossroads in dealing with overseas territories… As it is, these areas are being plundered and are not being monitored at all, even though they contain 94% of all the UK's biodiveristy'.[31] The influence of the conservation lobby is also evident in remarks

[25] See Frost and Murray (2015), pp. 263, 265.

[26] Foreign and Commonwealth Office, *The Overseas Territories Security, Success and Sustainability* (Cm 8374, 2012) Executive Summary, 8 (Emphasis added).

[27] Frost and Murray (2015), p. 285.

[28] HC Deb 25 October 2016, vol 616, col 69WH.

[29] See Frost and Murray (2015), but also the continuing litigation regarding Pitcairn.

[30] Including Greenpeace UK, the RSPB, The Blue Marine Foundation, National Geographical Society and the Pew Charitable Trusts.

[31] Vidal (2015).

made by Sir John Randall on the designation of the MPA around Pitcairn, namely that securing this 'is a tribute to the many non-governmental organisations' and specific named individual MPs (not it might be noted representatives of the Pitcairn people).[32] Similarly in the latest Environmental Audit Committee initiative to examine MPAs, the stakeholders with which the government is engaging include the Blue Marine Foundation and Pew Trusts, not the islanders of the islands around which MPAs are being declared.[33] In the case of MPAs this is an example of what Koskenniemi describes as 'the law (deferring) to the politics of expertise'.[34]

Government self-congratulation on meeting or moving towards Aichi targets or SDGs is not the only consideration. The international framework underpinning conservation obligations—including marine conservation, derives from the Convention on Biodiversity (CBD). The UK became a signatory to the CBD in 1992 and ratified it in 1994 thereby becoming a party to the Convention. The UK included the following Overseas Territories (OTS) and Crown Dependencies (CDs) in its ratification of the CBD in 1994: British Virgin Islands, Cayman Islands, Gibraltar, Isle of Man, Jersey, St Helena, Ascension Island and Tristan da Cunha. Neither the British Indian Ocean Territory (BIOT) nor Pitcairn Islands were included. This is significant in so far as the Pitcairn constitution includes a list of non-justiciable 'partnership values', one of which is 'compliance with applicable international obligations of the UK and Pitcairn'.[35] By not extending the CBD to Pitcairn it would appear that the UK is under no CBD obligations in respect of these islands, although the Pitcairn Constitution 2010 includes environmental rights within its provisions.[36] However, in the comparable case of the BIOT Environment Charter the FCO has argued that this is 'just empty words',[37] which perhaps does not inspire great confidence in similar statements in other UKOTs. In its 2014 Sustainability Report the Environmental Audit Committee stated:

> *The UK must fulfil its core environmental obligations to the UN under the CBD in order to maintain its international reputation as an environmentally responsible nation state. The FCO must agree a timetable to extend ratification of the CBD with all inhabited UKOTs where this has not yet taken place. That may entail preparations in the UKOTs, which must be clearly timetabled. The FCO must immediately extend ratification of the CBD to all uninhabited UKOTs.*[38]

---

[32] HC Deb 20 March 2015, vol 594, col 1048.

[33] 'Marine Protected Areas examined with stakeholders and NGOs' Commons Select Committee, 5 January 2017 <http://www.parliament.uk/business/committees/committees-a-z/commons-select/environmental-audit-committee/news-parliament-2015/marine-protected-areas-revisited-ev2-16-17/> accessed 9 February 2017.

[34] Koskenniemi (2007), pp. 1, 10.

[35] Pitcairn Constitution (h).

[36] For a critical analysis of the Constitution see Eshleman (2012), p. 21.

[37] *Sand v IC and FCO* 1 May 2014, Appeal No: EA/2012/0196, [26].

[38] Bold and italics in original para 19, page 12. House of Commons Environmental Audit Committee 10th Report 'Sustainability in the U.K. Overseas Territories' <https://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvaud/332/33202.htm> accessed 23 June 2017.

The UK, despite having signed it (in 2011) is also not a party to the subsequent Nagoya Protocol on Access and Benefit-sharing although one of the Aichi targets—Target 16, is that:

> By 2015, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization is in force and operational, consistent with national legislation.

The non-ratification of the Protocol is perhaps significant in so far as there is little evidence to suggest that the inhabitants of some of those OTs with the greatest MPAs are in fact benefitting from this sacrifice to the global commons. This is particularly the case where a category one MPA is created which limits opportunities for tourism, commercial fishing or marine resource processing, and any natural resource extraction. In fact the creation of MPAs is about non-utilisation, despite Foreign and Commonwealth Office diplomatic policy statements including reference to 'fostering economic development'[39] and a 'firm commitment from the UK to help the Territories develop economically …'.[40] Indeed the latest Joint Ministerial communique states that 'We reiterated out shared commitment to ensuring that the Territories reach their full potential as open, dynamic and sustainable economies, delivering growth, prosperity and employment for their citizens'.[41]

A further area of uncertainty regarding the international law applicable to overseas territories concerns the Aarhus Convention.[42] As United Kingdom Overseas Territories (UKOTs) lack jurisdiction to enter treaties, these are usually extended to them by the UK under Article 29 of the 1969 Vienna Convention on the Law of Treaties. However, it seems unclear, in the case of the Aarhus Convention whether UKOTs were included through failure of the UK to specifically exclude them at ratification.[43] The question of whether the Aarhus Convention applies to BIOT has been challenged. The FCO has argued that the UK's ratification 'practice' is to tacitly exclude extension to UKOTs unless they are expressly included—contrary to the provisions of Article 29 of the Vienna Convention.[44] This claim appears to have been upheld in 2014 in an Information Rights Tribunal appeal.[45] The Aarhus Convention

[39] Foreign and Commonwealth Office *Partnership for Progress and Prosperity: Britain and Overseas Territories* (Cm 4264, 1999) cited in Eshleman (2012) 2.7.

[40] Foreign and Commonwealth Office, *Seventh Report of the Foreign Affairs Committee Session 2007-08* (Cm 7473).

[41] UK-Overseas Territories Joint Ministerial Council '2016 Communique' para 5. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565228/Overseas_Territories_Joint_Ministerial_Council_2016_Communique.pdf> accessed 9 February 2017.

[42] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998. The Convention entered into force on 30 October 2001. The UK signed it on 25 June 1998 and ratified it on 23 February 2005. No specific exclusions were noted for the UK compared to, for example, Denmark and France.

[43] See the discussion in the Sustainability Report 2014 (n 12) paras 22–25.

[44] The Vienna Convention on the Law of Treaties No 18232, 23 May 1969.

[45] *Sands v IC and FCO* EA/12/0196 [30].

is significant in the case of MPAs because it grants the public the right to access information on governmental decision-making in relation to the environment. Arguably, in the case of UKOTs this should include the people of those islands subject to MPAs – whether living on them, or as members of the voluntary, or forced diaspora. It has also been suggested that 'the extension of the Aarhus Convention to the UKOTs would usefully increase transparency around planning and development'.[46] Several attempts have been made to access information about activities on BIOT through the Environmental Information Regulations 2004.[47] Although the Information Rights Tribunal has held that the Freedom of Information Act 2000 and the Environmental Information Regulations apply under the BIOT Courts Ordinance 1983,[48] it has interpreted the BIOT Courts Ordinance to exclude the English or UK regulatory authorities, including the Information Commissioner and the relevant tribunal. By so limiting the jurisdiction of the Information Rights Tribunal, effectively any application for information about activities carried out by those based in BIOT is frustrated. In Pitcairn, where there is a Freedom of Information Ordinance 2012, such information must pertain to a 'public authority'—which would exclude private contractors, charities and non-governmental organisations and by cross-reference information which is exempt under the Freedom of Information Act 2000 (UK). Under the Freedom of Information Ordinance 2012, review or appeal, is to an Ombudsman established under the Ombudsman Ordinance 2012.[49]

12.3 Strategies for Bio-Diversity Conservation

The UK government has a national strategy and action plan for the wildlife and ecosystems of England (Biodiversity 2020: A strategy for England's wildlife and ecosystems services, published by Defra; and the UK Post-2010 Biodiversity Framework[50]). There is a separate plan for Scotland. Within the UK, responsibility for inshore waters and offshore waters around England, Wales and Northern Ireland, lies with Defra. This department is also responsible for Marine Conservation Zones

[46] Sustainability Report 2014 (n 12) para 38.

[47] *Chagos Refugees Group v IC and FCO* EA/2011/0300; *Dunne v IC and FCO* EA/2012/0257 and *Sand v IC and FCO* EA/2012/0196.

[48] This, as is common in UKOTs and indeed former colonies, applies English law 'in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary'.

[49] Cap 46 2013, Revised Edition of the Laws of Pitcairn.

[50] Earlier iterations are 'Conserving biodiversity – the UK Approach' 2007 and the UK 'Biodiversity Plan' 1994.

(MCZs)—a type of MPA—in those areas. The establishment and management of these is facilitated by the Marine and Coastal Access Act 2009.[51]

The UK has separate plans as regards biodiversity in respect of the rest of the UK and its Overseas Territories and Crown Dependencies, and the UK states on its website (UK Clearing House Mechanism for Biodiversity) that, 'Whilst primary responsibility for biodiversity conservation lies with the respective OT and CD governments, the UK government retains some responsibility for external relations and the international treaties'. The UK Post-2010 Biodiversity Framework applies to those countries listed above which became parties to the CBD (British Virgin Islands, Cayman Islands, Gibraltar, Isle of Man, Jersey, St Helena, Ascension Island and Tristan da Cunha). By default, therefore, this Framework does not apply to BIOT or to Pitcairn. However, the Foreign and Commonwealth Office assert that 'The UK and Overseas Territories have a shared ambition to set world standards in stewardship of the Territories unique natural environments'.[52]

BIOT and Pitcairn therefore (together with the other omitted OTs[53]) fall under the Foreign and Commonwealth Office, and other government departments including the Department for International Development, the Department for Environment, Food and Rural Affairs (Defra) and the Ministry of Defence. Together these oversee various initiatives - such as the Darwin Plus scheme, which provides overseas funding for environment and conservation projects,[54] manage the Overseas Development Aid budget, and the Overseas Territories Programme Fund.

The previous Conservative government does not appear to have published a policy paper on the OTs. The 2010–2015 policy paper of the Coalition government[55] includes the following statement: 'The Territories play host to globally significant environmental assets, including an estimated 90% of the Biodiversity found within the UK and Territories combined' and cites BIOT as the leading example. It goes on to state:

> Each of the Territories depends on these assets in some way e.g. for fisheries or tourism. This unique environmental wealth brings responsibilities for its sustainable management. The UK is working together with territory governments, non-governmental organisations,

[51] See House of Commons Environmental Audit Committee, *Marine Protected Area (first report)* (HC 2014-15, 221) paras 2–5.

[52] 2016 Communique, para 13.

[53] Anguilla, Bermuda, British Antarctic Territory, Falkland Islands, Gibraltar, Montserrat, South Georgia and the South Sandwich Islands, Sovereign Base Areas, Akrotiri and Dhekelia on Cyprus, and the Turks and Caicos Islands.

[54] Pitcairn was a base for a Darwin project secured by Professor T Dawson (Dundee University) on sustainable marine resources (£25,000) 2010–2011. It was claimed that the project would provide training and development of a community-led marine management action plan, although it is certainly not clear who received this training or what systems were developed.

[55] Department for Environment, Food and Rural Affairs, Department for International Development, Foreign and Commonwealth Office and Ministry of Defence '2010–2015 government policy: UK Overseas Territories' updated 8 May 2015.

> civil society groups and the private sector to preserve the Territories' rich environmental heritage and address the challenges they face.[56]

It has been stated that 'Effective conservation of biodiversity in the OTs is essential if the UK is to meet the 2020 Biodiversity Targets as well as commitments under other relevant Multilateral Environment Agreements (MEAs).'[57] One way of doing this is to establish MPAs as evidenced in a workshop report preceding the establishment of the BIOT MPA, in which it was stated that 'MPA designation would greatly increase the coherence and overall value of existing BIOT conservation policies, providing a very cost-effective demonstration of UK governments' commitment to environmental stewardship and halting biodiversity loss'.[58] In this task the government is assisted and advised by a standing committee: the Joint Nature Conservation Committee (JNCC). Among other things the JNCC is responsible for identifying and providing conservation advice on MPAs in offshore waters.

Like Pitcairn, BIOT falls under UK sovereignty. OTs like Pitcairn have their own government and legislature, although laws are also made for these territories by the UK Parliament or by Order in Council. Unlike Pitcairn however, which falls under the British Settlements Acts 1887 and 1945, BIOT was ceded to UK. It is governed by Orders in Council—under the royal prerogative, or by way of a specific Act of Parliament. There is scope for Orders in Council to be laid before Parliament for scrutiny, but this is not obligatory unless Parliament has made it so under statute,[59] and this has not been done in the past in respect of BIOT.[60] Although Lord Reid described the retention of prerogative powers as a 'relic of a past age',[61] recent case law affirms the continued use of these powers in respect of overseas territories.[62] Currently the constitutional status of BIOT is governed by the British Indian Ocean Territory (Constitution) Order 2004. This provides for the office of a Commissioner who exercises power over BIOT for the Crown and has the power to make laws for the 'peace, order and good government of the territory'.[63] It has been stated that: 'The most fundamental principle of the relationship between the UKOTs and the United Kingdom is the supremacy of Parliament.'[64] Quoted in the 2014 Environment

---

[56] ibid.

[57] ibid, p. iv.

[58] 'Marine conservation in the British Indian Ocean Territory (BIOT): science issues and opportunities' Report of workshop 5–6 August 2009 (Chagos Trust) <http://chagos-trust.org/marine-conservation-british-indian-ocean-territory-biot-science-issues-and-opportunities-2009> accessed 9 February 2017.

[59] Confirmed recently by Lord Reed in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [161] (hereafter *Miller*).

[60] See Eg British Indian Ocean Territory Constitution Order 2004.

[61] In *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75* at 101. A sentiment reiterated by Lord Bingham in *Bancoult* [2008] [69] (n 2).

[62] *Miller* (n 59), citing with approval Lord Hoffmann in *Bancoult* [2008] [44] (n 2).

[63] The Commissioner is a post held by a senior civil servant in the FCO who is assisted by an Administrator.

[64] Hendry and Dickson (2011), p. 12.

Audit Report, Parliamentary Under-Secretary of State, Mark Simmonds MP, stated: 'In theory, we could impose from the outside environmental legislation on the Overseas Territories but we do not think that that would be constructive.'[65] It is then perhaps ironic that in the case of BIOT and Pitcairn the MPAs appear to have been created exactly in this fashion. It might also be noted that although it has been stated that: 'territory governments are constitutionally responsible for the environment, for environmental protection and for conservation of their natural environments. While each constitution is different, in all cases in all inhabited Overseas Territories they are responsible',[66] elsewhere it has been suggested that the 'majority of protected areas have been designated in nations where governance is weak'.[67]

12.4 Marine Protected Areas

A protected area is defined by the International Union for Conservation of Nature (IUCN) as 'A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.[68] The protected area can be terrestrial or marine. The IUCN lists six possible categories for protected areas, at the top of the list in category one is 'strict nature reserve/wilderness area' the main characteristics of which are that it is:

- Strictly protected
- As undisturbed as possible to preserve its natural condition
- Has very limited visitor access
- No commercial extraction of living or non-living resources i.e. is a fully no-take zone

The effectiveness of MPAs is debated not least because of the pelagic nature of many fish species and the uneven spread of bio-diversity across the world's oceans. Dunne and others, for example concluded in respect of the BIOT MPA that:

> [W]hat now emerges from the scientific evidence is that the MPA is likely to confer no meaningful benefit for the protection of Indian Ocean tropical tuna stocks, or for other species which comprise the fisheries by-catch. For the coral reefs and their associated well-managed commercial reef fishery, which are widely acknowledged to be in a "near pristine" state, the MPA adds no additional protection over and above that which already existed under domestic and international law since 2003.[69]

[65] 2014 Environment Audit Report, 8.

[66] The FCO Minister Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability,* CM 8374, June 2012.

[67] Pearce (2005), pp. 57–69.

[68] A similar definition is used in the CBD.

[69] Dunne et al. (2014), pp. 79, 119.

Research reported in Nature, suggests that MPAs are most effective where they are no-take, this is effectively enforced, the area is large and isolated and the MPAs have been established for some time.[70] Dunne and others, however, suggest that sustainability can be achieved by effective licencing regimes and point out there is little evidence to suggest that fixed area MPAs protect highly migratory species and De Santos suggests that balancing 'conservation with other marine uses will have greater success at achieving conservation objectives than a target-driven global focus on enormous no-take MPAs that does not adequately take long-term monitoring and enforcement into account'.[71] Insufficient evidence has been one of the obstacles to progressing MCAs in domestic waters, with environmental groups arguing for reliance on best evidence available, while other groups have argued for better evidence and data.[72] In the case of MPAs around UKOTs it has been acknowledged that, 'It is impossible accurately to calculate the number of globally threatened species in the UKOTs, due to the lack of basic survey data … The available data on marine biodiversity are less developed than those for terrestrial biodiversity … **Defra cannot accurately report to the CBD on the full extent of biodiversity in the UKOTs and therefore measure progress towards the UN 2020 target to halt biodiversity loss**'.[73] It is clear therefore that the scientific evidence for MPAs is either not available or, where it is available, suggests that MPAs may not be the answer. Consequently, along with the removal of the Chagossians, the establishment of an MPA around BIOT has proved controversial. First, however let us consider how the BIOT MPA was established.[74]

In April 2010, shortly before the UK general election of that year, and despite caution being expressed about the strength of the scientific case, a MPA was declared over 640,000 km^2 of sea surrounding BIOT.[75] The Proclamation indicated that further legislation and regulations would be put in place to govern fishing and other activities. To date these have not appeared and the laws which govern the MPA are the 2007 Fisheries (Conservation and Management) Ordinance and supporting statutory instruments. Commenting on the Proclamation, Appleby suggests that it did no more than emphasise 'the duty to protect and preserve the marine environment' creating, at best, 'a "paper park" with no management measures'.[76]

---

[70] Edgar et al. (2014), p. 216. <http://www.nature.com/nature/journal/v506/n7487/full/nature13022.html> accessed 9 February 2017.

[71] De Santos (2013), pp. 137, 141. For an alternative approach see H Govan 'Status and potential of locally-managed marine areas in the south Pacific: meeting nature conservation and sustainable livelihood targets through wide-spread implementation of LMMAs' IDEAS <https://mpra.ub.uni-meunchen.de/23818/1/MPRA_paper_23828.pdf> accessed 9 February 2017.

[72] See Report of First Session 2014–2015 above.

[73] Sustainability Report 2014 (n 12) paras 30–31, emphasis in original.

[74] For background and earlier initiatives see Dunne et al. (2014).

[75] Achieved by way of the British Indian Ocean Territory Proclamation No 1 of 2010, issued by the Commissioner for BIOT on behalf of her Majesty acting through the Secretary for State.

[76] Appleby (2015), p. 529.

The declaration of an MPA was not unexpected. There had been a number of research expeditions to the area over the preceding decade,[77] including an assessment of the relative values of use and non-use of the environmental resources in the BIOT area. Criteria for values which were considered were things like tourism, fisheries, research, reef recovery, reef restoration, biodiversity, spiritual and cultural values, alongside value-laden descriptors such as iconic, pristine, and unique. In the end non-use values trumped use values with reef recovery and restoration seen as having long term bequest value (presumably to mankind), and the preservation of biodiversity and the 'pristine' and 'unique' environment all being of higher value than tourism, fisheries or shoreline protection.[78] In 2001 the UK government signed the BIOT Environment Charter, setting out the government vision for protecting the environment of BIOT. In 2003 an Environment (Protection and Preservation) Zone was established by the Commissioner of BIOT, which encompassed waters between the territorial waters to the 200 nautical mile limit. The 2010 MPA fell within this more extensive area.

Significantly, the BIOT MPA, with the exception of Diego Garcia where 'recreational fishing' is permitted,[79] is a no-take zone.[80] This has several possible consequences: firstly, fishing may increase on the margins of the no-take zone—thereby creating over-fishing in these areas and consequentially bio-impact; secondly, a total ban on fishing requires extensive policing of the main threat to fisheries which is illegal, unregulated and unreported (IUU) fishing. Without revenue generated from licenced fishing the costs of fishing administration soar, and without legitimate fishing vessels in the MPA, IUU fishing is difficult to detect or report.

This total ban was ruled illegal and contrary to the UNCLOS by the Arbitration Tribunal in 2015,[81] not because it banned fishing but because it had not followed the necessary procedures as set out in the Lancaster House Undertakings of 1965 and breached UNCLOS Articles 56(2) and 194(4) in respect of Mauritius. In fact, as pointed out by Appleby, there was already in place laws for regulating the issuance

[77] See e.g. 'Chagos 2006' which was a marine research expedition, involving scientists from UK, America, Kenya, South Africa, Seychelles, and Switzerland. Bangor University. 'Ecology and conservation of the Chagos Archipelago, British Indian Ocean Territory' <http://www.bangor.ac.uk/oceansciences/research/projects/421> accessed 9 February 2017.

[78] Chagos Conservation Trust 'Marine conservation in the British Indian Ocean Territory (BIOT): science issues and opportunities', Report of workshop held 5–6 August 2009 at National Oceanography Centre Southampton supported by the NERC Strategic Ocean Funding Initiative (SOFI), Table 3, page 6 <chagos-trust.org/sites/default/files/images/southampton-BIOT-workshop.pdf> accessed 9 February 2017.

[79] Those who are lawfully in the islands can fish without licences, and although recreational fishing is intended to be limited to fish for consumption is seems rather unlikely the 3000 or so military personal and support staff are needing to 'fish for their suppers.' Much more likely is trophy fishing and Dunne et al. (2014) refer to some evidence for this together with the adverse environmental impact on terrestrial and marine resources caused by the military base.

[80] Governed by the Fisheries (Conservation and Management) Ordinance 2007 and related Statutory Instruments from 2007.

[81] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* [2015] Permanent Court of Arbitration.

of fishing licences within BIOT waters and scope to protect the marine environment under UNCLOS 194(4). Had the UK government proceeded to negotiate with Mauritius in accordance with the Lancaster House Undertakings, the Arbitration ruling that the proclamation of the BIOT MPA was incompatible with the UNCLOS might not have been necessary. From the UK government's perspective, what the Court of Arbitration did not do was to rule the MPA illegal.

Secondly, the establishment of the MPA and the emphasis on the preservation of bio-diversity has meant that from the outset it has been argued that commercial tourism would 'risk ecological damage and disturbance'.[82] Leaving aside the considerations of the defence activities on Diego Garcia, it was also argued that limited land availability (less than 16 km^2), limited freshwater supply and potential problems with waste disposal would all combine to make tourism unadvisable. Tourists could enjoy the MPA via 'virtual' online visits.[83] Exempt from this constraint were research scientists, although the number of scientists who have visited BIOT prior to it becoming an MPA seems to have been small.[84] This factor links directly with considerations of whether resettlement would be feasible and also sits uneasily with arguments put forward for an MPA around Pitcairn islands: that this would be beneficial to tourism and scientific research in the islands. It also appears to be inconsistent with statements made in the 2012 White Paper that 'The UK Government will continue to work with the Territories to help them develop their economies',[85] while at the same time it has been acknowledged, at least in the domestic context of Marine Conservation Zones, that 'There is a significant gap in the economic evidence base regarding benefits of designation. While it is possible to describe the broad ecosystem benefits qualitatively, little evidence exists to enable more detailed quantification'.[86] It is also clear in the domestic context that the designation of MCZs have not progressed as rapidly as might have been hoped due to conflicting interests of environmentalists and commercial interests, and this is in a context where both have the resources to be well represented and reasonably informed. In its conclusions this same report stated 'To be credible and attract support from all quarters, the Government needs to be able to demonstrate that the choice of sites strikes an appropriate balance between environmental, business and leisure interest'.[87] Translate that to situations where local interests are poorly represented or, in the case of BIOT not represented at all, and where access to balanced and objective information is limited, the likelihood of the stronger environmental lobby winning is all the greater. As indeed has been the case with the MPAs considered

[82] Chagos Conservation Trust Report, above, 8.

[83] In February 2015 The Chagos Conservation Trust, working with Google Street View created a virtual tour of a number of the islands and reefs.

[84] Less than 50 in the previous 25 years.

[85] Foreign and Commonwealth Office, 'The Overseas Territories: Security, Success and Sustainability', CM 8374, June 2012, 31. Pitcairn was specifically mentioned as being not economically self-sufficient.

[86] Report of First Session 2014–15 para 16 quoting Defra (MPA0027), para 34.

[87] ibid, p. 27 para 2.

here. Indeed Dunne and others suggest that the creation of the MPA around BIOT 'was the result of aggressive advocacy from NGOs and selected scientists, and a government anxious to claim a green legacy.'[88] The same might equally be said of the MPA around Pitcairn Islands.

12.5 From BIOT to Pitcairn

Perhaps ironically the Arbitration decision referred to above, appeared the same day that the government announced its intention to similarly create an MPA around Pitcairn Islands.[89] As in the case of the BIOT MPA this proposal had been on the cards for a few years. In 2012, the National Geographic Society and the Global Ocean Legacy had undertaken an underwater survey around the islands and presented the findings to people living on Pitcairn island (the only inhabited island of the three making up Pitcairn Islands). The following year the Zoological Society of London (ZSL), the University of Dundee and Sea-Scope undertook at three year Darwin funded project to strengthen 'the scientific evidence-base for Pitcairn's marine environment'.[90] The purpose of this research was to make recommendations for a management-plan for the marine environment of Pitcairn Islands, and, working with the Pitcairn Island Council and the UK government, use this plan 'to inform and enhance tourism opportunities and increase global awareness of Pitcairn's incredible marine biodiversity'. It is not known to what extent these various charitable-scientific bodies worked in competition or collaboration,[91] but in 2013, Pew, the National Geographic Society and the Pitcairn Island Committee submitted a proposal to create a marine reserve. The proposed MPA would cover 834,334 km^2. Commitment to the MPA was made by the coalition government, but seems to have been confirmed by the conservative government through inclusion in the March 2015 budget.[92] By March 2015, the Pitcairn website presented the MPA as a fait accompli declaring that 'A large no-take reserve, while allowing for traditional small-scale uses, conserves this unique environment, attracts scientific and conservation interest in studying and protecting the area, and also increases tourism to the islands, all of which benefit the local economy'[93] and there appears to have been an

[88] Dunne et al. (2014), p. 119.

[89] 18 March 2015. Announced in The Budget (HM Treasury HC 1093, 2015) 97, para 2.259.

[90] 'Pitcairn Islands' (ZSL) <https://www.zsl.org/regions/uk-overseas-territories/pitcairn-islands> accessed 9 February 2017. The Darwin Trust is supported by the UK government.

[91] A number are members of the Marine Reserves Coalition.

[92] Vaughan (2015b).

[93] Pitcairn Islands Tourism <http://www.visitpitcarin.pn/marine_reserve/index.html> accessed 9 February 2017. See similarly Howard (2015), which suggests that the then Prime Minister David Cameron could do this by simply announcing it. <http://news.nationalgeographic.com/2015/03/150318-pitcairn-marine-reserve-protected-area-ocean-conservation/> accessed 9 February 2017.

announcement in March 2016 of the creation of the MPA.[94] In fact the Pitcairn Islands Marine Protected Area was made by Ordinance on 12 September 2016.[95] All laws made for Pitcairn Islands are called ordinances (s 37(2)) and the power to make these lies with the Governor, who is appointed by Her Majesty. The Governor is also the British High Commissioner to New Zealand, based in Wellington.[96] The Governor acts for Her Majesty as the Constitution reserves to Her Majesty 'full power to make laws from time to time for the peace, order and good government of Pitcairn' (s 10). The Governor carries out any function conferred or imposed on him 'and such other functions as her Majesty may from time to time be pleases to assign to him or her through the Secretary of State (s 27). In making laws the Governor does not have to consult with the Island Council if so instructed by Her Majesty through the Secretary of State (s 33). While there was discussion on Pitcairn about the MPA, led primarily by conservation lobby groups, and there may have been consultation on the drafting of the Ordinance, clearly its final drafting and declaration took place in Whitehall. Implementation of the Ordinance is dependent on the passing of regulations and until such time a number of its provisions are ineffective including restrictions on fishing. Indeed, even once these regulations are passed it is generally acknowledged that 'Enforcement to prevent illegal fishing and to regulate legal fishing is challenging in remote marine areas … marine monitoring and enforcement in the UKOTs is conducted only in BIOT, South Georgia and the South Sandwich Islands and Falkland Islands'. Dunne and others, however suggests that in the case of BIOT enforcement is weak and at the time of their research – 2006–2011, the one patrol vessel spent only 54.5% of its time on patrol at sea.[97] The 2014 Sustainability Report suggested that '3,400,000 km2 of ocean in the UKOTs is currently unpatrolled. Licensed fishing takes place in those waters with no monitoring, which may mean that the marine environment in the UKOTs is being illegally degraded. Satellite tracking may make a cost-effective contribution to addressing that problem, although it cannot substitute for marine patrols'.[98] Dunne and others estimate that the running costs of an MPA the size of that around BIOT is about £11.8 million a year.[99] If Pitcairn's EEZ of 836,000 km^2 is added to this, the practical challenge is even greater.

[94] 'New Marine Protected Area in the Pitcairn islands' <https://specialrelationship.uk/2016/03/30/new-marine-protected-area-in-the-pitcairn-islands/> accessed 22 June 2017.

[95] Pitcairn Islands Marine Protected Area Ordinance 2016, No 3 2016.

[96] The governor signing the Ordinance was Governor Jonathan Sinclair. In a statement reported in the Pacific Islands Report, 15 September 2016, Governor Sinclair was reported as saying 'it is hoped that the reserve will boost eco-tourism on Pitcairn' Pacific Islands Report <http://www.pireport.org/articles/2016/09/15/pitcairn-island-establishes-massive-marine-reserve> accessed 22 June 2017.

[97] Dunne et al. (2014), p. 86.

[98] Sustainability Report 2014 (n 12) para 46.

[99] Dunne et al. (2014), p. 88.

12.6 The Role of National and International Non-Government Organisations

As indicated at the outset, politics, economic costs and environmental concerns are interlinked in the case of BIOT, and the main focus in litigation has been on the right of Chagossians to return and settle on the islands. Lord Mance in the 2016 case referred to the possible need to re-visit this issue following the KPMG report of 2014–2015 which had overtaken the 2B Report.[100] In this more recent resettlement appraisal it is stated that 'in order to facilitate a resettlement … this is likely to involve a comprehensive consultation with the Chagossians and *other interested parties* (italics added).'[101] Who, it might be asked are these others? Clearly the Arbitration decision on the validity of the MPA suggests Mauritius may now be one, but this arbitral decision was not made until after the KPMG report. There is a clue as to the identity of these 'others' in the leaked cables concerning BIOT in which the BIOT Commissioner states that 'the UK's environmental lobby is far more powerful than the Chagossian advocates'.[102] While it is understandable that the UK government and indeed the governments in OTs, especially where these are small and lack their own environmental or conservation experts, need to ask for expert advice and input, it is becoming increasingly clear that the driving force behind MPAs—alongside the UK government's desire to meet its international obligations, are the agendas of these non-state agencies. Indeed, in February 2015, the Marine Reserves Coalition consisting of the Zoological Society of London (ZSL), Greenpeace, Pew Trusts, the Marine Conservation Society, Blue Marine Foundation and the Royal Society for the Protection of Birds (RSPB), launched a 'Great British Oceans' campaign with the key aim of trying to secure marine reserves around UK Overseas territories,[103] and in fact the role of non-governmental organisations in securing the Pitcairn MPA was openly acknowledged.[104]

Similarly, one of the strongest advocates for the BIOT MPA, was the American charitable foundation Pew Charitable Trusts (Pew). Pew is a collection of trusts dedicated to 'Improving public policy, informing the public and invigorating civic life' according to its website. Given the political link between the UK and America regarding BIOT, especially the American presence on Diego Garcia, one might be forgiven for being a little cynical about the motivation for selecting this particularly area of the Indian Ocean.[105] The global thrust of Pew is well documented. In a

[100] *Bancoult* [2016] (n 1).

[101] KPMG (2015), p. 34.

[102] Carey (2010).

[103] 'Happy birthday Great British Oceans!' (*Marine Reserves Coalition*) <http://www.marinereservescoaltion.org/2016/02/16/happy-birthday-great-british-oceans/> accessed 9 February 2017.

[104] Sir John Randall, HC Deb 20 March 2015, vol 594, col 1048.

[105] *WikiLeaks* suggests that the MPA was a deliberate ploy to prevent Chagossians from returning: 'US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders', *The Guardian (London,* 15 May 2009) <https://www.theguardian.com/world/us-embassy-cables-documents/207100> accessed 9 February 2017. Appleby (2015), p. 538, points out that the Arbitration

BIOT/Chagos Conservation Framework Discussion Paper,[106] the trust is noted as stating:

> The Ocean Legacy *project is looking at opportunities to protected surviving world-class marine* systems. The Chagos Archipelago is a rare gem in an increasingly populated region whose shores and waters are already over-exploited and heavily degraded (emphasis added).

It was also Pew which provided evidence to the House of Commons Environmental Audit Committee which was relied on to assert 'Pitcairn Islanders have requested that the greater part of its exclusive economic zone should be declared a fully protected no-take marine reserve, which would become the largest such reserve in the world'.[107]

Pew is not alone. A number of these lobby groups, many of which have charitable status which—at least under English law, would preclude them from engaging in political lobbying, work closely with government.[108] The alliance of conservation and environmental organisations and scientists under the Great British Oceans campaign have the explicit aim to establish marine reserves in the UK Overseas territories, and to increase the percentage of oceans currently listed as marine protected areas from the current 3 to 30%.

In the case of Pitcairn, the driving forces have been National Geographic, Pew and the Royal Society for the Protection of Birds (RSPB). For them the Pitcairn Islands represent a marine and ornithological laboratory. In the 2015 *Guardian* report referred to above, it was indicated inter alia that the government had said: 'the MPA "will be dependent upon reaching agreement with NGOs on satellite monitoring …"'[109], further cementing the alliance between government and these influential environmental lobby groups. No mention is made of the Pitcairn islanders and indeed, while their work—especially that of the National Geographic Society, has brought attention to Pitcairn, it has not brought any equitable division of financial benefits. For example, the Pitcairn Island Council received a tiny fraction of the price charged to charter a boat and take fee-paying researchers to the territorial seas of Pitcairn.[110] Indeed there seems to be uncertainty as to what the benefits, if any, from the declaration of an MPA will be for Pitcairners in terms of building tourism or, more importantly, enhancing long term employment opportunities on the islands

---

Tribunal paid scant attention to these cables or the suggestion that the MPA was established to prevent Chagossians from returning, pointing out that there was a proposal to use Chagossians as wardens of the MPA.

[106] Chagos Conservation Trust, 'Conservation Framework Discussion Paper' 1/05/2008.

[107] Sustainability Report 2014 (n 12) para 48.

[108] See for example guidance by the Charity Commission for England and Wales 'Campaigning and political activity guidance for charities, 1 March 2008 <https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities> accessed 22 June 2017.

[109] Vaughan (2015c).

[110] Personal interview with Jacqui Christian, Pitcairn representative to the Overseas Countries and Territories Association to the European Union, St Andrews, Scotland, 29 January 2015.

which will boost population numbers. Certainly in the case of BIOT arguments about lack of employment opportunities were thrown into the mix of reasons against re-settlement, despite the fact that Philippino are employed on Diego Garcia.

State partnerships with INGOs and NGOs can of course be beneficial. The later can leverage private donations which can be used to supplement limited government budgets,[111] but questions may arise as to the mandate of these non-state funded interventions. For example, while the carrying out of drone and satellite monitoring by Pew's Project 'Eyes of the Seas' in conjunction with the Satellite Applications Catapult at Hendon, UK, with the assistance of five-year funding from the Bertarelli Foundation, might be non-intrusive, what of the intervention of the Sea Shepherd Society in the Galapagos Marine Reserve? The Society has hired personnel and police dogs to assist in surveillance albeit actual enforcement is still carried out by the Ecuadorean Navy.[112] The Bertarelli Foundation also offered to compensate for lost fishing licence revenue when the MPA was declared around BIOT, and the Pew Environment Group arranged with the US government for the provision of fuel for patrol boats, although it appears not to have honoured this.[113]

There is moreover cause for concern with current proposals by the United Nations General Assembly under Resolution 69/22 on the 'Development of an internationally legally-binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.' Of course UNCLOS already governs waters beyond EEZs and indeed application of the rules under UNCLOS have been relevant to the BIOT case. What is of concern is not possible amendments to UNCLOS but the proposals of Pew on how such MPAs beyond national jurisdiction should be managed. In an issue brief of March 2016 Pew diagramised a 'Sample Process for Creating an MPA in Areas Beyond National Jurisdiction.'[114] The process suggests five stages: 1. Identification of an appropriate MPA and submission of its candidature; 2. Evaluation; 3. Adoption; 4. Implementation and 5. Reporting, monitoring and compliance. Clearly there is scope for input and influence from non-state bodies at all of these stages. Historically it has been the consortium of scientists and non-state bodies that have identified and suggested/lobbied for particular areas to be declared MPAs, and, as is evident in the BIOT case, government may be complicit in this for a range of reasons. Similarly, at the evaluation stage, as this lies outside the scope of most governments—especially of smaller nations, so the dialogue is going to be dominated by either states aligned through treaties (as has happened in the Arctic[115] and Antarctic[116]) and/or Ocean alliances which are likely to play a role

[111] BIOT's MPA is patrolled by one vessel for example. See De Santos (2013), p. 142.

[112] De Santos (2013), p. 142.

[113] Dunne et al. (2014), p. 88.

[114] 'Marine Protected Areas Beyond National Jurisdiction' Issue Brief *(The Pew Charitable Trusts*, 15 March 2016). <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/03/marine-protected-areas-beyond-national-jurisdiction> accessed 9 February 2017.

[115] See Jacobsen (2016).

[116] 'CCAMLR to create world's largest Marine Protected Area' (*Commission for the Conservation*

in the proposed 'consultation with regional and other stakeholders' and the proposed 'Scientific committee' which evaluates the proposal. While the process suggests that implementation will be by states, where the identified area falls outside the national jurisdiction of states this can only be done via controls over flag-bearing vessels and nationals. Other measures will fall to 'existing sectoral or regional organizations' i.e. non-state actors. Reporting is similarly proposed to be to regional and by sectoral organizations including scientific committees and a 'compliance committee'. This is only a proposal and much will need to be worked out if the convention materialises. However, the thrust of the proposals seems to be moving further and further away from the involvement of local people, the equitable distribution of benefits or even the control of law makers.

12.7 Fishing and MPAs

The BIOT Arbitration decision: *In the Matter of the Chagos Marine Protected Area Arbitration* 18 March 2015, challenges the no-take fishing restriction in that MPA, although it leaves open the possibility that this could be implemented by agreement with Mauritius under UNCLOS if a no-take restriction was deemed to be in the best interests of the marine environment. The situation is somewhat different in the case of Pitcairn as there is no third party state involved. Arguably therefore, it has been less problematic to establish a full no-take area—as was the case in BIOT. Under the 2016 Ordinance, despite some evidence that pelagic species such as tuna are returning to these waters, any commercial fishing by Pitcairners or others is prohibited,[117] thereby closing the door on the possibility of fishing licence fees as a way of generating income for Pitcairn—as is the case in other Pacific islands. Although the argument that declaring a no-take MPA 'put paid to Chaggosian resettlement claims',[118] has been dismissed by some, in the case of the sustainable livelihoods of Pitcairners the impact of creating an MPA on artisanal fishing and EEZ fishing, and self-feed catch has to be considered, particularly if, as Pitcairners hope, the MPA leads to a population increase. The issue of social justice in the context of MPAs has been considered by Elizabeth de Santos and defined as 'the fair allocation of adequate access to fishing or other activities that people depended on for their economic sustainability prior to the MPA's designation'.[119] This may mean permitting continued subsistence fishing although areas for this seem to vary.[120] In the case of Pitcairn, the

of Antarctic Marine Living Resources (CCAMLR)) <https://www.ccamlr.org/en/news/2016/ccamlr-create-worlds-largest-marine-protected-area> accessed 9 February 2017.

[117] See for example similar restrictions on commercial fishing being proposed for an MPA for Ascension Island.

[118] Chagos Environmental Network.

[119] De Santos (2013), p. 143.

[120] In Pitcairn for example it is suggested as 12 km whereas around Easter Island the suggestion is 50 km.

Ordinance—which covers all the Pitcairn Islands, includes provisions for 'the preservation of customary fishing practices of Pitcairn residents' (sec. 5(e)). This is enlarged upon in section 9, which provides exceptions to the extensive prohibitions on activities listed in section 8. Under section 9 fishing by lawful residents of Pitcairn is permitted provided that fishing is:

(a) Conducted while in transit to or from other islands in or outside the Pitcairn Islands Marine Protected Area, for consumption during that trip;
(b) By an attended line (whether or not with a rod); and
(c) Conducted in accordance with any Marine Conservation Regulations and Fisheries Management Plan[121]

This maintenance of the status quo ante may be just what the islanders impacted by an MPA do not want, not least because it precludes any future economic return from fishing. It may however, be symptomatic of a trend to which de Santos draws attention, which is 'to declare these areas to be entirely no-take and/or to phase out human activity if it exists'. If this happens in Pitcairn waters then it is difficult to see how the Secretariat of the Pacific Community's proposal that the Pitcairn community develop commercial reef fisheries could progress.[122] This of course is what happened in BIOT. In Pitcairn support for the MPA has been premised on the belief that it will offer an alternative and better economic future, for example through ecotourism, diving, and hosting researchers. Indeed in its 2014 Report, the Secretariat of the Pacific Community refers to the national development goals of Pitcairn as being: the promotion of tourism development, the promotion of sustainable environmental conservation (primarily addressing coastal soil erosion and landslides), and the sustainable development of fisheries and agriculture.[123] Not only is it unclear how fishing will be permitted to expand, or even modernise, but diving is also prohibited under section 10 of the Pitcairn Marine Protected Area Ordinance 2016, 'except in accordance with and to the extent permitted by Marine Conservation Regulations' (yet to be put in place). This would seem to frustrate, at least for the moment, any chances of this pristine marine environment becoming a popular destination for dive-tourism.

So, it is perhaps ironic that while news was announced that 'the UK government is to create the world's largest marine reserve around the Pitcairn islands'[124] the HM Treasury, in a reply to questions on 7 July 2015, stated 'current plans are underway to revitalise Pitcairn Islands with plans to create a Marine Protected Area.' Quite how the islands are to be 're-vitalised' by the declaration of the MPA is unclear. If one draws on the comparative BIOT experience it would seem that Pitcairn faces much greater problems of land mass for sustainable habitation—taking into account

[121] These have not yet been published. Whether they will be remains a mute point as further regulations for the BIOT MPA seem not to have materialised.

[122] Referred to by the coalition.

[123] Secretariat of the Pacific Community 'Pitcairn Islands Programme: 2014 Report', Noumea 2014 <http://www.spc.int/crga/sites/default/files/annex_upload/Pitcarin.pdf> accessed 9 February 2017.

[124] Marine Conservation Society 18 March 2015.

fresh water supply and waste disposal, especially as Pitcairn is tiny at 5 km^2 compared to the size of BIOT. Similarly, when the MPA in BIOT was considered, tourism, other than 'virtual tourism' was ruled out, even though BIOT is considerably more accessible than Pitcairn Islands. Similarly, although fisheries and agriculture have been noted as being important in Pitcairn in the coalition government's Overseas Territories report on Pitcairn, the enlargement or development of these activities is unlikely to sit comfortably with the environmental/marine lobby. While, as was mooted in the case of BIOT, MPA wardens may be one way of deploying the indigenous population, the proposals for surveillance drones and satellite technology would seem to preclude this. Similarly, it is not entirely clear if 'revitalising' Pitcairn Islands refers to the livelihoods of those who currently struggle to live there, or something rather more ephemeral, such as Pitcairn Islands as the 'jewel in the crown' of UK marine preservation, and global leadership in the MPA league table.

12.8 Conclusion

Lord Kerr in his critical dissenting judgment[125] drew attention to the importance of the House of Lords reliance on the 2B report, mentioned at the outset of this chapter, in concluding that resettlement was not a viable option for the Chagossians and therefore the 2004 Order which excluded them from doing so was valid. This highlights the significance of evidence presented by consultants and others and in this case strongly informed by environmental scientists. While not intending to engage in a witch-hunt of environmental lobbyists, what this contribution to this collection of papers has sought to do is to draw attention to the role and influence of different interest groups in informing initiatives for marine protected areas and the possible consequences of these on the lives of islanders. In the 2002 2B Report one of the key factors against resettlement was the possible impact of human resettlement on the terrestrial and marine environment—in itself ironic given the negative consequences of continued occupation of Diego Garcia by US personnel. There is of course much more awareness of the environment and climate change today than in the 1960s and 1970s when the Chagossians were removed from their islands. There may also be, at least from a global north perspective, different perceptions of what is required for viable living standards—although it might be pointed out that the obstacles presented in the 2B report as preventing resettlement are ones encountered by islanders on a daily basis in many low-lying atolls. The key question however is whether concern about the environment should be allowed to either trump what may be difficult lives for island dwellers, or be used to cloak or buttress other priorities, such as economic cost or international diplomatic relations? Is the declaration of an MPA legitimate in a legal sense and also as regard the involvement and identification of stakeholders? In the notes on implementation of Target 11, the CBD website states: 'Protected areas should also be established and managed in close collaboration

[125] *Bancoult* [2016] (n 1).

with, and through equitable processes that recognise and respect the rights of indigenous and local communities, and vulnerable populations. These communities should be fully engaged in governing and managing protected areas and should not bear inequitable costs'.[126] The Aarhus Convention would also seem to require transparency and communication to those most affected so that they can participate in making a fully informed decision. Clearly this did not happen in the case of BIOT and it is questionable in the case of Pitcairn.

The use of prerogative powers to establish MPAs is also questionable. In a recent scrutiny of the exercise of these in the context of international treaties in the case of *Miller*,[127] reference was made to the extent to which prerogative powers could be used to alter existing rights. Lord Reed in his dissenting judgment reminded the court that in the *Case of Proclamations*:[128]

> Coke CJ had stated that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm" (p 75). Those three categories were exhaustive of English law: "the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them" (ibid). It followed that "the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law" (ibid).[129]

Most commonly this is used in respect of the prerogative seeking to change rights or processes governed by existing statutory law. That however loses sight of the three parts of the law: common law (cases); statute; and custom. Arguably, the declaration of a no-take MPA over waters where island people have historically exercised an unfettered right to fish and harvest marine resources changes the customs of those people.

In the broader sense of social justice, the experience of BIOT suggests lack of legitimacy whatever the rulings of the courts. Is the experience of Pitcairn any better? Certainly the Pitcairn Island Council have been involved and the small population of Pitcairn canvassed and impressed with awesome film footage by the National Geographic Society and promises of bright futures linked to the MPA. It should not be forgotten however that small isolated island communities may be vulnerable to all sorts of persuasive pressures. And where UKOTs are geographically remote the full panoply of representative views may not be heard. The 2014 Sustainability Report for example decries the failure of Defra staff to visit UKOTs. Conversely, scientific expeditions supported by research grants and charitable foundations may be better placed to travel to these remote areas. Similarly, where consultations are heard in London, island representatives may be unable to attend, whereas those from the large charities

---

[126] Convention on Biological Diversity Target 11—Technical Rationale extended (provided in document COP/10/INF/12/Rev.1) In a note to this text it is observed that an 'In-depth review of the implementation … identified … slow progress … particularly of element 2 concerning governance, participation, equity and benefit-sharing'.

[127] *Miller* (n 59).

[128] (1611) 12 Co Rep 74.

[129] *Miller* [165] (n 59). For comment on *Miller* which is beyond the scope of this chapter see Elliot (2017).

and environmental lobby groups are likely to have a presence. The concern of this article has been to explore some of the dynamics behind the establishment of MPAs especially the role of non-islanders and non-state entities. Clearly there is a challenge to balancing environmental concerns at a global level with local, human concerns.[130] This challenge becomes particularly acute in the case of island communities versus national goal scoring on international targets. The 2016 Communiqué of the Joint Ministerial Council, which met in London in early November 2016, states:

> We welcome the recent announcement of the designation of a no-take Marine Protected area (MPA) around Pitcairn and a sustainable use MPA around St Helena and the commitment of Tristan da Cunha to establish a regime for protecting the waters across its entire maritime zone by 2020. This, together with an evidence-based MPA around Ascension by 2019, will more than double the protected ocean around the Overseas Territories to an area of around 4 million square kilometres by 2020.[131]

Four million square kilometres of protected ocean versus approximately 5200 people living on these islands.[132] Will history show the fate of the Chagossians to be simply a precursor of how islands were depopulated for the greater good of the global commons?

References

Appleby T (2015) The Chagos Marine protected arbitration – a battle of four losers? J Environ Law 27:529

Burmah Oil Co (Burma Trading) Ltd v Lord Advocate [1965] AC 75

Carey S (2010) Wiki leaks, a forgotten people, and the record-breaking marine reserve. New Statesman (London, 8 December 2010). http://www.newstateman.com/blog/the-staggers/2010/12/british-government-mauritius. Accessed 9 Feb 2017

Chagos Conservation Trust (2009) Marine conservation in the British Indian Ocean Territory (BIOT): science issues and opportunities. Report of workshop held at National Oceanography Centre Southampton. chagos-trust.org/sites/default/files/images/southampton-BIOT-workshop.pdf. Accessed 9 Feb 2017

Chagos Conservation Trust, 'Conservation Framework Discussion Paper' 1/05/2008

Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) [2015] Permanent Court of Arbitration

De Santo E (2013) Missing marine protected area (MPA) targets: how the push for quantity over quality undermines sustainability and social justice. J Environ Manag 124:137

Dunne R, Polunin N, Sands P, Johnson M (2014) The creation of the Chagos Marine protected area: a fisheries perspective. In: Johnson M, Sandell J (eds) Advances in marine biology, vol 69. Academic, Cambridge, pp 79–119

Edgar G et al (2014) Global conservation outcomes depend on marine protected areas with five key features. Nature 506:216

[130] This dilemma is reflected and in some cases aggravated by the role of UNESCO in inscribing MPAs as world heritage sites, further constraining economic activities which can be undertaken by locals. See De Santos (2013), p. 145.

[131] Communiqué of the Joint Ministerial Council, [14].

[132] Zero on BIOT, 880 on Ascension Island, 264 on Tristan da Cuhna, 2002 on St Helena and 66 on Pitcairn.

Elliot M (2017) The Supreme Court's Judgment in Miller: in search of constitutional principle. Camb Law J 76(2):257–288
Eshleman M (2012) The New Pitcairn Islands constitution: strong empty words for Britain's smallest colony. Pace Int Law Rev 24(1):21
Foreign and Commonwealth Office (2012) The overseas territories: security, success and sustainability. CM 8374
Foreign and Commonwealth Office, The Overseas Territories: Security, Success and Sustainability (White Paper, Cm 8374, 2012)
Frost T, Murray CRG (2015) The Chagos Islands cases: the empire strikes back. North Irel Leg Q 66(3):263
Hendry I, Dickson S (2011) British overseas territories law. Hart, Oxford
Howard BC (2015) World's largest single marine reserve created in Pacific. National Geographic, 18 March. http://news.nationalgeographic.com/2015/03/150318-pitcairn-marine-reserve-protected-area-ocean-conservation/. Accessed 9 Feb 2017
Jacobsen IU (2016) Marine protected areas in international law – an arctic perspective. Brill, Leiden
Jones P, De Santo E (2016) The race for vast remote "marine protected areas" may be a diversion. The Conversation. September 1. https://theconversation.com/the-race-for-vast-remote-marine-protected-areas-may-be-a-diversion-64705. Accessed 9 Feb 2017
Koskenniemi M (2007) The fate of public international law - between technique and politics. Mod Law Rev 1(7):1
KPMG (2015, January 31) Feasibility study for the resettlement of the British Indian Ocean Territory. 1:34
Pearce D (2005) Paradoxes in biodiversity conservation. World Econ 6(3):57–69
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 1) [2016] UKSC 35
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2008] UKHL 61, [2009] AC 453
R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3) [2013] EWHC 1502 (Admin), [2014] EWCA Civ 708
R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5
Sand v IC and FCO 1 May 2014, Appeal No: EA/2012/0196
Secretariat of the Pacific Community (2014) Pitcairn Islands Programme: 2014 Report. http://www.spc.int/crga/sites/default/files/annex_upload/Pitcarin.pdf. Accessed 9 Feb 2017
Shugart-Schmidt K, Pike E, Moffitt R, Saccomanno V, Magier S, Morgan L (2015) Sea States G20 2014: how much of the seas are G20 nations really protecting? Ocean Coast Manag 115:25
The Guardian (2009) US embassy cables: foreign office does not regret evicting Chagos Islanders. 15 May. https://www.theguardian.com/world/us-embassy-cables-documents/207100. Accessed 9 Feb 2017
The Pew Charitable Trusts (2016) Marine Protected Areas Beyond National Jurisdiction. http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/03/marine-protected-areas-beyond-national-jurisdiction. Accessed 9 Feb 2017
Vaughan A (2015a) Chile to create one of the world's largest marine parks around Easter Island. The Guardian. 5 October. https://www.theguardian.com/environment/2015/oct/05/chile-creates-one-of-worlds-largest-marine-parks-around-easter-island. Accessed 9 Feb 2017
Vaughan A (2015b) Jonathan Amos 'Budget 2015: Pitcairn Islands get huge marine reserve'. BBC News, 18 March. http://www.bbc.co.uk/news/science-environemnt-31943633. Accessed 9 Feb 2017
Vaughan A (2015c) Pitcairn Islands to get world's largest single marine reserve. The Guardian. London, 18 March. https://www.theguardian.com/environment/2015/mar/18/pitcairn-islands-marine-reserve-budget-2015. Accessed 9 Feb 2017
Vidal J (2015) Conservationists call for UK to create world's largest marine reserve. The Guardian. 10 February. https://www.theguardian.com/environment/2015/feb/10/conservationists-call-for-uk-to-create-worlds-largest-marine-reserve. Accessed 9 Feb 2017

Chapter 13
International Law and Indigenous Peoples' Rights: What Next for the Chagossians

Amy Schwebel

13.1 Introduction

Indigenous peoples' rights have developed significantly since the United Nations (UN) first commissioned a detailed study into the discrimination of indigenous peoples in 1986. This chapter will examine key concepts concerning indigenous peoples' rights, particularly with respect to land rights, and their relevance to the experience of the Chagossians in their ongoing struggle to secure a right of return to the Chagos Islands.

A key milestone in indigenous peoples' rights was the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007. UNDRIP is widely acknowledged as a highly authoritative consolidation of indigenous peoples' rights in a universal framework. In parallel, UN treaty bodies and regional mechanisms have considered the rights of indigenous peoples. Cases at the regional level, in particular, provide clear jurisprudence on indigenous peoples' right to land. Informed by this jurisprudence, there is a strong basis under international law upon which advocacy on the right of return can be built.

Recent developments—including the outcome document of the 2014 World Conference on Indigenous Peoples, the Sustainable Development Goals and recognition of the requirements of free, prior and informed (FPIC) consent by states and

Minority Rights Group International. Minority Rights Group International campaigns worldwide with around 130 partners in over 60 countries to ensure that disadvantaged minorities and indigenous peoples, often the poorest of the poor, can make their voices heard. This chapter was prepared following a presentation by Carl Söderbergh, Director of Policy & Communications at Minority Right Groups International, on the same topic at the closed expert workshop on 12 November 2015 to mark the fiftieth anniversary of the creation of the British Indian Ocean Territory.

A. Schwebel (✉)
Minority Rights Group International, London, UK

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*,
The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_13

international organisations—suggest a growing acceptance and agreement with respect to the rights of indigenous peoples when a policy or project may affect ancestral lands. Even with these positive developments, however, indigenous peoples continue to experience significant challenges in implementation.

Future advocacy, though, is strengthened by these international commitments and the developing jurisprudence. They make clear that the Chagossians have a right to an effective remedy and reparation for the violations of their human rights. It is now a question of how the United Kingdom (UK) will address the situation and give effect to the rights of the Chagossians, as required in international law.

13.2 The Definition of Indigenous Peoples

In 1986, the UN Special Rapporteur for the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Martínez Cobo, developed a working definition of 'indigenous' in his comprehensive study on discrimination against indigenous peoples:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[1]

There is continuity in elements of Cobo's working definition with the first formal definition of indigenous peoples, drafted three decades earlier, in International Labour Organisation (ILO) Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi Tribal Populations in Independent Countries.[2] Both focus, for example, on the distinct characteristics of indigenous populations. Article 1 of ILO Convention No. 107 refers to the distinct 'customs or traditions' of tribal groups.[3]

The 'crucial and fundamental importance'[4] indigenous peoples place on retaining a relationship with ancestral lands or territories was recognised in ILO Convention No. 107 and remains central in Cobo's working definition. Article 1 of

[1] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Study of the Problem of Discrimination Against Indigenous Populations, Report of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities' (1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4.

[2] International Labour Organisation 'Convention No. 107: Indigenous and Tribal Populations Convention' (40th ILC session Geneva, 26 June 1957).

[3] ibid, Article 1.

[4] Mick Dodson cited in United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Report of the Working Group on Indigenous populations' (10 June 1996a) UN Doc E/CN/4/Sub/2/AC.4/1996/2, [35].

ILO Convention No. 107 defines some 'tribal peoples' as 'indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation'.[5] This focus on colonised populations reflects the push for decolonisation that was gaining wide support at the time of drafting.[6] Cobo recognises the ongoing importance indigenous peoples place on the connection to land, a connection which pre-dates the arrival of non-indigenous people, when he states 'land forms part of their [indigenous communities'] existence'.[7] He goes on to write:

> The preservation of this cultural and spiritual relationship with the land and the recovery of sacred land which has been lost and is in the possession of others is of deep spiritual significance…Indigenous peoples have a natural and inalienable right to keep the territories they possess and to claim the land of which they have been deprived.[8]

There has been criticism, however, of earlier definitions that place too great an emphasis on indigenous peoples as the original or pre-colonial inhabitants of the land, as such a requirement may not be relevant or particularly helpful.[9] Rodolfo Stavenhagen, when UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, reflected that the question is not 'who came first' but indigenous peoples' shared experience of dispossession and marginalisation.[10] In identifying factors relevant to an understanding of 'indigenous peoples', Erica-Irene Daes, then chairperson of the UN Working Group on Indigenous Populations, preferred to focus (the first of four factors) on 'priority in time with respect to the occupation and use of a specific territory'.[11]

The African Court on Human and Peoples' Rights (the African Court) in its most significant decision on indigenous peoples' rights in the African human rights system to date, the *African Commission on Human and Peoples' Rights v Republic of*

---

[5] International Labour Organisation Convention No. 107 (n 2), Article 1.

[6] See, for example, United Nations General Assembly Resolution 1514 (XV) (14 December 1990) Declaration on the Granting of Independence to Colonial Countries and Peoples; United Nations General Assembly Resolution 2625 (XXV) (24 October 1970) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

[7] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Study of the Problem of Discrimination Against Indigenous Populations, Report of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities' (n 1) [51].

[8] ibid, [74].

[9] African Commission on Human and Peoples' Rights 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Research and Information Visit to Kenya, 1–19 March 2010′ (2012), p. 35.

[10] United Nations Human Rights Council 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, Addendum: Mission to Kenya' (2007b) UN Doc A/HRC/4/32/Add.3, [9].

[11] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous peoples"' (10 June 1996b) UN Doc E/CN.4/Sub.2/AC.4/1996/2, [69].

Kenya (discussed further in Sect. 13.5), adopted the language of 'priority in time' and the continued subjugation and marginalisation of the Ogiek by the Kenyan Government when considering whether to recognise the Ogiek as an indigenous population.[12]

A significant development in Cobo's working definition of indigenous peoples is the emphasis placed on collective rights. Collective rights are well established in international human rights instruments. The UN Charter begins with the phrase 'We the peoples of the United Nations'.[13] Common Article 1(3) of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) refers to the right of self-determination.[14] The UN Human Rights Committee has explained that this right is a right of 'all peoples'.[15]

Cobo's attention to collective rights also acknowledges the importance of indigenous identity as voluntary: an indigenous person is 'one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group)'.[16] Self-identification without interference as a distinct people or collectivity has remained a central pillar of any modern understanding of indigenous peoples.[17] Article 33 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) states: 'indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions'.[18] In General Recommendation VIII, the UN Committee on the Elimination of Racial Discrimination stresses that membership in a group 'shall, if no justification exists to the contrary, be based on self identification by the individual concerned'.[19]

---

[12] *African Commission on Human and Peoples' Rights v Republic of Kenya*, African Court on Human and Peoples' Rights Application No. 006/2012 (26 May 2017), para 109 and 110.

[13] United Nations 'Charter of the United Nations' (24 October 1945) 1 UNTS XVI, preamble.

[14] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976) 999 UNTS 3.

[15] United Nations Human Rights Committee 'General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-Determination of Peoples' in 'General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (13 March 1984) UN Doc HRI/GEN/1/Rev.6 (12 May 2003), p. 134.

[16] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Study of the Problem of Discrimination Against Indigenous Populations, Report of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities' (n 1), [381], [382].

[17] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous peoples"' (n 12), [35].

[18] United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295 (2 October 2007) UN Doc A/RES/61295, Article 33(1).

[19] United Nations Committee on the Elimination of Racial Discrimination 'General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention' in 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2003) UN Doc HRI/GEN/1/Rev.6, p. 200.

In considering a complaint against the Kenyan Government brought by the Endorois community (discussed further in Sect. 13.5), for example, the African Commission on Human and Peoples' Rights (the African Commission) agreed with the Endorois who 'consider[s] themselves to be a distinct people, sharing a common history, culture and religion'.[20] As such the African Commission was 'satisfied that the Endorois are a *people*, a status that entitles them to benefit from provisions of the African Charter on Human and Peoples' Rights [African Charter] that protect collective rights'.[21]

Cobo's working definition remains widely cited today. The UN, considering the diversity of indigenous peoples, has not adopted an official definition of 'indigenous'. This approach has been supported by many indigenous organisations. For example, representations by indigenous organisations at the Working Group on Indigenous Populations, established in 1982 by the Commission on Prevention of Discrimination and Protection of Minorities, showed support for the 'concept' of indigenous drafted by Cobo but 'categorically rejected any attempts that Governments define indigenous peoples'.[22] Rather, many representatives were of the view that it was 'neither desirable nor necessary to arrive at a universal definition'.[23]

More recently, Thornberry has reflected that attempts to secure agreement on a 'universal' formula may be misguided:

> The level of abstraction required for international legal principles, the dynamic nature of the system, the need to be receptive to inputs from the variety of national practice and the openness of its prescriptions, makes parts of the human rights system in particular unsuitable for the imposition of definitions as a kind of *deus ex machina.*[24]

Some indigenous representatives have expressed concern, however, about the negative consequences that could flow from the absence of an agreed upon definition. It was argued that 'a definition was an essential step in institutionalising guarantees for safeguarding the rights of indigenous people'.[25] In particular, 'the ambiguity or absence of criteria could be a convenient cover for States to deny or grant recognition of indigenous status, since there would be no international standard to go by'.[26]

---

[20] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* African Commission on Human and Peoples' Rights Application 276/2003 (4 February 2010), [162].

[21] ibid.

[22] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Report of the Working Group on Indigenous Populations on its fourteen session' (16 August 1996b) E/CN.4/Sub.2/AC.4/1996/21, [31].

[23] ibid, para 28.

[24] Thornberry (2002).

[25] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Report of the Working Group on Indigenous Populations on its fourteen session' (n 23), [34].

[26] ibid.

A balance was struck in the proposal of the Chairperson-Rapporteur of the Working Group on Indigenous Populations in 1996. She cautioned against a precise definition of 'indigenous peoples' and took the view that a list of elements underpinning the concept of 'indigenous' would leave 'room for the reasonable evolution and regional specificity of the concept of 'indigenous' in practice'.[27]

It is this approach that has borne out in practice. Identification, rather than definition, of indigenous peoples is the UN's preferred approach.[28] The United Nations Permanent Forum on Indigenous Issues developed a modern understanding of the term indigenous peoples based on:

(a) Self-identification as indigenous peoples at the individual level and accepted by the community as their member;
(b) Historical continuity with pre-colonial and/or pre-settler societies;
(c) Strong link to territories and surrounding natural resources;
(d) Distinct social, economic or political systems;
(e) Distinct language, culture and beliefs;
(f) Form non-dominant groups of society; and
(g) Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[29]

The Chagossians self-identify as an indigenous people with a distinct socio-cultural identity, a common language, culture, religion and history. The Chagossians speak their own Creole dialect, practice religion together and practiced a way of life unique to the islands including culinary traditions, festivities and games. In the application to the European Court of Human Rights in *Chagos Islanders v United Kingdom*,[30] the Chagos Islanders self-identified as indigenous people. Representatives of the Chagos Islanders have attended the Working Group on Indigenous Populations. The self-identification by the Chagossians as indigenous in these fora has been accepted by the international indigenous peoples' movement, which Allen describes as having a 'vested interest in maintaining the integrity of the concept of indigeneity'.[31]

There also has been external recognition of their identity as an indigenous people, most significantly, by the government of the UK. Written advice by a Foreign and Commonwealth Office legal adviser in the lead up to the removal of the Chagossians from the islands, recommended timely action by the UK government

[27] United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) 'Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous peoples"' (n 12), [74].

[28] See, for example, Thornberry's four stands of indigeneity in Thornberry (2002), pp. 37–40.

[29] United Nations Permanent Forum on Indigenous Issues, 'Factsheet: Who are indigenous peoples?' (2006) <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 26 April 2017.

[30] *Chagos Islanders v United Kingdom*, European Court of Human Rights Application No. 35622/04 (11 December 2012).

[31] Allen (2014), p. 275.

if the UK were to maintain the fiction of the Chagos Islands being uninhabited, despite the UK's knowledge of the community living on the islands. This would avoid, then, the invocation of duties on the UK under Article 73 of the UN Charter:

> The longer that such a population remains, and perhaps increases, the greater the risk of being accused of setting up a mini-colony about which we would have to report to the United Nations under Article 73 of the Charter. Therefore, strict immigration legislation giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no indigenous population.[32]

In more recent times, the Chagos Islanders have also been recognised by UK courts as indigenous peoples.[33]

The Chagossians have a strong connection to the islands. This was recognised by Laws LJ in *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* when describing the Chagossians' continuous connection to the islands:

> They were indigenous people: they were born there, as were one or both of their parents, in many cases one or more of their grandparents, in some cases (it is said) one or more of their great-grandparents. Some may perhaps have tracked an earlier indigenous ancestry.[34]

The Chagossians, when living on the islands, habitually paid their respects at the graves of ancestors, a practice that has been made impossible by their removal. Since their removal, the Chagossians have sought to secure access and the right of return to the islands through domestic and international advocacy and litigation.

13.3 Recognising the Rights of Indigenous Peoples

The rights of indigenous peoples have been recognised at the international level in a number of ways. Initially, UN and regional human rights mechanisms created specialist bodies to provide expert advice on the concerns of indigenous peoples. These bodies have produced comments and descriptions of indigenous rights in practice, both generally and in specific cases. These comments have contributed to the developing international law on the rights of indigenous peoples; with the jurisprudence on discrimination, land rights, and consultation with indigenous peoples including the requirement of FPIC of particular relevance to the situation of the Chagossians. Second, indigenous peoples and advocates have sought to use existing human rights protections to give special protection to indigenous peoples.

---

[32] Cited in *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office (No. 1)* [2000] EWHC 413 (Admin) [18].

[33] ibid; and *R (on the application of Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2016] UKSC 35.

[34] *Bancoult (No. 1)* (n 33), [1].

This section will consider the specialist bodies of the UN and the protections afforded to indigenous peoples under existing human rights instruments and its relevance to the experience of the Chagossians.

13.3.1 Specialist Bodies at the United Nations

13.3.1.1 Expert Mechanism on the Rights of Indigenous Peoples

The Expert Mechanism on the Rights of Indigenous Peoples, established in 2007,[35] is a subsidiary of the UN Human Rights Council and is made up of five independent experts. The Special Rapporteur on the Rights of Indigenous Peoples and a member of the Permanent Forum on Indigenous Issues (both discussed in more detail below) are also invited to attend the sessions of the Expert Mechanism.

The Expert Mechanism replaced the Working Group on Indigenous Populations, which was established in 1982 to provide a forum for indigenous peoples to share their experiences and raise concerns with respect to the promotion and protection of the human rights of indigenous populations.[36] The Working Group became a focal point for action on issues of concern for indigenous peoples and fostered constructive dialogue between indigenous peoples and governments. One of its greatest successes was the production of a draft declaration on indigenous rights for eventual adoption by the General Assembly in 2007 (UNDRIP is discussed in further detail in Sect. 13.4).

A particular strength of the Working Group was its openness to representatives of all indigenous peoples and their communities. Representatives of the Chagos Islanders including the Chagos Refugee Group and the United Kingdom Chagos Support Association attended Working Grouping sessions. The report of the seventeenth session held in 1999, for example, includes a summary of the intervention provided by a representative of the Chagossians on the 'removal of his people to Mauritius' and 'the hope that they could return to their home lands'.[37]

The Expert Mechanism provides the UN Human Rights Council with thematic expertise in the form of advice, studies and research; which constitute authoritative interpretations of indigenous peoples' rights. An example of this work is the Expert Mechanism's study, in 2011, on indigenous peoples and the right to participate in decision-making. The study identifies indicators of good practice including practices that allow and enhance indigenous peoples' participation in decision-making, allow indigenous peoples to influence the outcome of decisions that affect them,

[35] United Nations Human Rights Council 'Expert mechanism on the rights of indigenous peoples' (14 December 2007a) Resolution 6/36.

[36] United Nations Economic and Social Council 'Study of the problem of discrimination against indigenous populations' (7 May 1982) Resolution 1982/34, [1].

[37] United Nations Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) 'Report of the Working Group on Indigenous Populations on its seventeen session' (12 August 1999) UN Doc E/CN.4/Sub.2/1999, [63].

realise indigenous peoples' right to self-determination, and includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples' FPIC.[38] The study concludes with advice to States on how to implement their obligations on the right of indigenous peoples to participate in decision-making.

The increased focus on meaningful participation of, and consultation with, indigenous peoples is relevant given the absence of both in most UK decisions affecting the Chagossians to date.

13.3.1.2 Permanent Forum on Indigenous Issues

The Permanent Forum on Indigenous Issues was established in 2000. Its establishment augments the work of the Expert Mechanism and Special Rapporteur. The Forum acts as a high-level advisory body to the UN Economic and Social Council through its discussions on indigenous issues within the Council's mandate; which encompasses economic and social development, culture, the environment, education, and health and human rights.[39]

The Forum meets annually. The Special Theme of the 2007 Forum was 'Territories, Lands and Natural Resources' in recognition of the 'fundamental importance to indigenous peoples since they constitute the basis of their life, existence and economic livelihood, and are the sources of their spiritual, cultural and social identity'.[40] The report of the Forum goes on to acknowledge protection of the right to land, territories and natural resources as a key demand of indigenous peoples' movements in response to:

> Policies and actions that have undermined and discriminated against their customary land tenure and resource management systems, expropriated their land, extracted their resources without their consent and led to their displacement and dispossession from their territories.[41]

The scope, ambition and visibility of the Forum has done much to strengthen the voice of indigenous peoples as well as the credibility of indigenous peoples' rights.

13.3.1.3 Special Rapporteur on Indigenous Peoples

In 2001, the Commission on Human Rights appointed a Special Rapporteur on Indigenous Peoples. Special Rapporteurs are experts with mandates to report and

---

[38] Human Rights Council 'Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 August 2011) UN Doc A/HRC/18/42.

[39] United Nations Economic and Social Council 'Establishment of a Permanent Forum on Indigenous Issues' (28 July 2000) Resolution 2000/22, [2].

[40] United Nations Economic and Social Council 'Permanent Forum on Indigenous Issues – Report on the sixth session, 14–25 May 2007' (2007) UN Doc E/C.19/2007/12, [2].

[41] ibid, [5].

advise on human rights from a thematic and country-specific perspective.[42] The Special Rapporteur on Indigenous Peoples also works closely with the Permanent Forum on Indigenous Issues including through participation in its annual session and to engage in cooperative dialogue with all relevant actors.[43]

In her most recent report to the General Assembly, Victoria Tauli-Corpuz, the current Special Rapporteur focused on the impact of conservation initiatives on indigenous peoples, particularly given the geographic overlap of indigenous peoples' land and areas with the highest levels of biodiversity.[44] Her report raises concerns of individual and collective human rights violations including the expropriation of land, forced displacement, denial of self-governance, lack of access to livelihoods and loss of culture and access to spiritual sites, non-recognition of indigenous peoples authorities and denial of access to justice and reparations.[45] This work is of relevance given the litigation in the UK courts challenging the declaration in 2010 of a Marine Protected Area in the British Indian Ocean Territory (BIOT), the formal name of the Chagos Islands used by the UK.[46]

13.3.2 Special Protection to Indigenous Peoples Under Existing Human Rights Instruments

13.3.2.1 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination[47] is silent on indigenous peoples. In General Recommendation XXIII, however, the UN Committee on the Elimination of Racial Discrimination affirmed that 'discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination'.[48] The Committee goes on to emphasise the importance of State Parties recognising and protecting:

---

[42] United Nations Commission on Human Rights 'Human rights and indigenous issues' (24 April 2001a) UN Doc E/CN.4/RES/2001/57, [1].

[43] United Nations Human Rights Council 'Human rights and indigenous peoples: Mandate of the Special Rapporteur on the rights of indigenous peoples' (6 October 2010) Un Doc A/HRC/RES/15/14.

[44] United Nations General Assembly 'Rights of indigenous peoples: Note by the Secretary General' (29 July 2016) Un Doc A/71/229, [8], [14].

[45] ibid, [9].

[46] British Indian Ocean Territory, 'Marine Protected Area' <http://biot.gov.io/environment/marine-protected-area/> accessed 26 April 2017.

[47] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195.

[48] United Nations Committee on the Elimination of Racial Discrimination 'General recommendation XXIII on the rights of indigenous peoples' in 'Report of the Committee on the Elimination of

> The rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[49]

The Committee has considered the situation of the Chagos Islands in its Concluding Observations on the UK. In 2011, the Committee expressed deep concern with the UK's view that the Convention on the Elimination of All Forms of Racial Discrimination did not apply to the BIOT and reminded the UK that it has 'an obligation to ensure that the Convention is applicable in all territories under its control'.[50] This includes the Chagos Islands. Furthermore, the Committee recommended that the UK remove all discriminatory restrictions preventing Chagossians from entering Diego Garcia or the other islands of the archipelago.[51]

Five years later, in 2016, the Committee expressed regret that the UK had made no progress in implementing its earlier recommendations to address the forcible eviction of the Chagossians.[52] The Committee reiterated its previous recommendations and urged the UK to 'hold full and meaningful consultations with the Chagossians to facilitate their return to their islands and to provide them with an effective remedy, including compensation'.[53]

13.3.2.2 International Covenant on Civil and Political Rights

Similarly, the International Covenant on Civil and Political Rights is silent on indigenous peoples. Many cases, however, submitted under Article 27 of the Covenant, have been brought by indigenous peoples. Article 27 protects ethnic, religious or linguist minorities, from measures that deny persons belonging to such minorities, in community with other members of group, from enjoying their own culture, from professing and practicing their religion, or using their own language.[54] The UN Human Rights Committee has noted that 'culture manifests itself in many forms'

Racial Discrimination to the United Nations General Assembly' (26 September 1997b) UN Doc A/52/18, [1].

[49] ibid, [5].

[50] United Nations Committee on the Elimination of Racial Discrimination 'Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland' (14 September 2011) Un Doc CERD/C/GBR/CO/18-20, [12].

[51] ibid.

[52] United Nations Committee on the Elimination of Racial Discrimination 'Concluding observations of the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland' (3 October 2016) Un Doc CERD/C/GBR/CO/21-23, [40].

[53] ibid, [41].

[54] International Covenant on Civil and Political Rights (n 15), Article 27.

and includes 'particular way[s] of life associated with the use of land resources, especially in the case of indigenous peoples'.[55]

The Committee, in its concluding observations on the UK, has considered the situation of the Chagos Islanders. In 2001, the Committee noted the UK's 'acceptance that its prohibition of the return of Ilois [Chagossians] who had left or been removed from the territory was unlawful'[56] and concluded that the UK:

> Should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable. It should consider compensation for the denial of this right over an extended period. It should include the territory in its next periodic report.[57]

In the absence of action by the UK, the Committee in 2008 again concluded that the UK should ensure the Chagos Islanders can exercise their right of return and consider compensation for the denial of this right over an extended period of time.[58]

13.4 United Nations Declaration on the Rights of Indigenous Peoples

Significantly, in 2007, the UN General Assembly adopted UNDRIP, first proposed by the UN Working Group in 1985.[59] The Chair of the UN Permanent Forum on Indigenous Issues described its adoption as a 'historical milestone' in a 'long history of developing and establishing international human rights standards'.[60]

UNDRIP sets out indigenous peoples' rights across a number of areas and in many respects adopts more precise language and gives greater prominence to collective rights than any previous international instrument. The preamble, for example, recognises and reaffirms that:

---

[55] United Nations Human Rights Committee 'General Comment 23 (Article 27)' (26 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, [7].

[56] United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland' (6 December 2001) UN Doc CCPR/CO/73/UKOT, [38].

[57] ibid.

[58] United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (30 July 2008) UN Doc CCPR/C/GBR/CO/6, [22].

[59] United Nations Declaration on the Rights of Indigenous Peoples (n 19).

[60] United Nations Permanent Forum on Indigenous Issues 'Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples' (New York, 61st Session of the United Nations General Assembly, 13 September 2007).

> Indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.[61]

While UNDRIP is not a legally binding treaty, it is an important source for developing customary international law. It represents, at the very least, a consolidation of the law protecting indigenous peoples in a universal framework.

The preamble to UNDRIP acknowledges the suffering that indigenous peoples have experienced as a result of historic injustices including colonisation and dispossession of their lands, territories and resources. The inclusion of collective rights in UNDRIP recognises the values of collective responsibility embodied in many indigenous cultures and the role of larger communal and social institutions for indigenous peoples.[62] UN treaty bodies and the Expert Mechanism have since provided subsequent comments on collective rights, including indigenous peoples' right to collectively own property.[63]

13.4.1 Key Provisions of UNDRIP

A number of the articles, particularly those relating to non-discrimination, participation, consultation and land, in UNDRIP are of particular relevance to the experience of the Chagossians.

13.4.1.1 Equality and Non-discrimination

Article 1 outlines the right to equality: 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms'.[64] Article 2 protects against discrimination: 'Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination'.[65] The right to equality and non-discrimination imposes a duty on States to prevent both formal and *de facto* forms of discrimination.

The Expert Mechanism has advised States that in some circumstances it may be necessary to treat indigenous peoples as a distinct group experiencing unique

---

[61] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Preamble.

[62] United Nations Office of the High Commissioner for Human Rights, 'The United Nations Declaration on the Rights of Indigenous Peoples: A manual for national human rights institution' (Indigenous Peoples and Minorities Section Geneva 2010), p. 79.

[63] See, for example, United Nations Committee on Economic, Social and Cultural Rights 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Argentina' (2 December 2011) UN Doc E/C.12/ARG/CO/3, [25].

[64] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 1.

[65] ibid, Article 2.

circumstances.[66] The principle of equality allows for this because the standard does not prohibit States from treating one group differently in order to achieve substantive equality. The UN Committee on the Elimination of Racial Discrimination explains:

> To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons who situations are objectively the same.[67]

13.4.1.2 The Requirements of Participation and Consultation

Article 18 provides indigenous peoples with the right to 'participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.[68] Furthermore, Article 19 requires States to 'consult and cooperate in good faith' with indigenous peoples 'in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.[69]

Where a State has not fully supported the participation of indigenous peoples in decision-making processes, the Special Rapporteur on the Rights of Indigenous Peoples has recommended the adoption of measures to improve participation.[70] The type of consultations required will depend on the circumstances but should be consistent with good faith principles and designed with the aim of achieving agreement or consent.[71] In General Comment No. 21 on the right of everyone to take part in cultural life, the UN Committee on Economic, Social and Cultural Rights emphasises the obligation on States:

> To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior

---

[66] United Nations Human Rights Council 'Expert Mechanism on the Rights of Indigenous Peoples: Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples' (30 April 2012) UN Doc A/HRC/EMRIP/2012/4, [77].

[67] United Nations Committee on the Elimination of Racial Discrimination 'General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination' (24 September 2009) UN Doc CERD/C/GC/32, [8].

[68] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 18.

[69] ibid, Article 19.

[70] See, for example, United Nations Human Rights Council 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the Republic of the Congo' (11 July 2011) UN Doc A/HRC/18/35/Add.5, [83].

[71] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 19, 32 and 46; See also United Nations Human Rights Council 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya' (15 July 2009) UN Doc A/HRC/12/34, [46]–[53].

> consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[72]

This extends to participation in decision-making with respect to land, as the General Comment makes clear:

> The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[73]

13.4.1.3 The Right to Land

Article 26 of UNDRIP states: 'indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.[74] This is in recognition of the significance of land to indigenous peoples:

> Land is the foundation of the lives and cultures of indigenous peoples all over the world… Without access to and respect for their rights over their lands, territories and natural resources, the survival of indigenous peoples' particular distinct cultures is threatened.[75]

Yet the failure of States to 'recognise the existence of indigenous use, occupancy and ownership' of land or 'accord appropriate legal status, juridical capacity and other legal rights in connection with indigenous peoples' ownership of land' is widespread.[76]

Where there is a proposal to relocate indigenous people, Article 10 makes clear that 'indigenous peoples shall not be forcibly removed from their lands or territories'.[77] The article is particularly valuable in its strong expression of indigenous peoples' right to FPIC when it states:

> No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.[78]

---

[72] UN Committee on Economic, Social and Cultural Rights 'General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)' (21 December 2009) UN Doc E/C.12/GC/21, [55(e)].

[73] ibid, [36].

[74] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 26.

[75] United Nations Economic and Social Council 'Permanent Forum on Indigenous Issues – Report on the sixth session (n 41), [5].

[76] United Nations Commission on Human Rights (Sub-Commission on the Promotion and Protection of Human Rights) 'Prevention of discrimination and protection of indigenous peoples and minorities: Indigenous peoples and their relationship to land – Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes' (11 June 2001b) UN Doc E/CN.4/Sub.2/2001/21, [34].

[77] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 10.

[78] ibid.

Where there is a land, territory or resource dispute, Article 27 requires States to:

> Establish and implement…a fair, independent, impartial, open and transparent process…to recognise and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.[79]

If land has been confiscated, taken, occupied, used or damaged without FPIC, indigenous peoples have 'the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation'.[80]

13.4.2 UK Position on UNDRIP

UNDRIP was adopted by a majority of States at the UN General Assembly; 143 states, including the UK, voted in favour of adopting the Declaration. Four states—the US, Canada, Australia and New Zealand—voted against the Declaration and eleven states abstained.[81] The states that voted against have now, however, expressed support for UNDRIP.

Immediately following the adoption of UNDRIP, the UK delivered an interpretative statement to the UN General Assembly in which it welcomed UNDRIP 'as an important tool in helping to enhance the promotion and protection of the rights of indigenous peoples' and emphasised that 'human rights are universal and equal to all'.[82]

Despite this, the UK went on to claim that:

> National minority groups and other ethnic groups within the territory of the United Kingdom and its overseas territories do not fall within the scope of the indigenous peoples to which this Declaration applies.[83]

While not explicitly referring to the Chagossians, it can be presumed that this statement is intended to cover the Chagossians. Yet, as explained above (in Sect. 13.2) self-identification is now widely recognised as a central pillar of any modern understanding of indigenous peoples. As such, a unilateral statement of this kind is

---

[79] United Nations Declaration on the Rights of Indigenous Peoples (n 19), Article 27.

[80] ibid, Article 28.

[81] Countries that abstained: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine. See United Nations High Commissioner for Human Rights, 'Declaration on the rights of indigenous peoples' <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> accessed 26 April 2017.

[82] United Kingdom of Great Britain and Northern Ireland 'Interpretive statement on the Declaration on the Rights of Indigenous Peoples (13 September 2007) <http://www.fns.bc.ca/info/UNDeclaration/Stmnts%20Made%20by%20States%20Before%20and%20After%20the%20Vote/United%20Kingdom%20of%20Great%20Britain%20and%20Northern%20Ireland.pdf> accessed 26 April 2017.

[83] ibid.

not determinative of whether a group of people identify (or not) as indigenous peoples.

13.5 The Land Rights of Indigenous Peoples

As explained above, UNDRIP recognises the rights of indigenous peoples to land, territories and natural resources, and requires States to adopt a range of measures that uphold and promote this right. While UNDRIP is not enforceable, it reflects the growing understanding and acceptance of indigenous peoples' land rights in international law. Furthermore, UNDRIP is being used as a tool for interpreting and giving effect to indigenous peoples' rights. The African Court, for example, when considering the situation of the Ogiek in Kenya relied on UNDRIP when interpreting the right to property and the right to development under the African Charter.[84] At a domestic level, the Supreme Court of Belize in *Aurelio Cal and Maya Village of Santa Cruz v Basilio Teul et al., the Attorney General of Belize, and Minister of Natural Resources and Environment Defendants*,[85] the court relied upon UNDRIP in a claim for recognition of indigenous land rights.

ILO Convention No. 169 on the Rights of Indigenous and Tribal Peoples in Independent Countries,[86] adopted in 1989, is considered the most advanced international treaty focused on the advancement of indigenous peoples' rights, including the right to land.[87] Articles 13 and 14 require State Parties to respect the relationship of indigenous peoples to land and recognise, as well as give effective protection, to the right of ownership and possession of traditionally occupied land.[88]

Importantly, land rights are based on traditional occupation and use of land, not eventual formal registration of ownership.[89] ILO Convention No. 169 prevents the removal of indigenous peoples from their lands. If a State Party considers it necessary to relocate indigenous peoples, free and informed consent is required. Absent

[84] *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 13) [128], [209].

[85] *Aurelio Cal and Maya Village of Santa Cruz v Basilio Teul et al, the Attorney General of Belize, and Minister of Natural Resources and Environment Defendants* Supreme Court of Belize (18 October 2007), [131]–[134].

[86] International Labour Organisation Convention No. 169: Indigenous and Tribal Peoples Convention (76th ILC session Geneva 27 June 1989) ('ILO Convention No. 169').

[87] United Nations High Commissioner for Human Rights 'Normative Framework' <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/NormativeFramework.aspx> accessed 26 April 2017.

[88] International Labour Organisation Convention No. 169: Indigenous and Tribal Peoples Convention (n 87), Articles 13 and 14.

[89] See International Labour Organisation 'Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (International Labour Standards Department Geneva 2013), p. 21.

free and informed consent, relocation should only occur after public inquiries that have provided an opportunity for those affected to raise their concerns.[90]

The reach, and thus impact, of ILO Convention No. 169 has been limited, however, by a low ratification rate. Only 22 countries have ratified the convention and key countries such as Canada, Russia, Sweden, the United States *and* the UK have not ratified the convention. Having said that, the convention has influenced the development of jurisprudence on indigenous peoples' land rights. The Inter-American Commission of Human Rights made reference to ILO Convention No. 169 in *Mayan Communities in the District of Toledo v Belize,* even though Belize had not ratified the convention:

> The inter-American system has previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments…Pertinent developments have also been drawn from the provisions of other multilateral treaties adopted inside and outside of the framework of the inter-American system, including…and, of particular pertinence to the present case, ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries.[91]

The Commission went on to refer to ILO Convention No. 169 when considering the land rights of the complainant:

> The jurisprudence of the [inter-American human rights] system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition…This interpretive approach is supported by the terms of other international instruments and deliberations, which serve as further indicia of international attitudes on the role of traditional system of land tenure in modern systems of human rights protection. The ILO Convention (No. 169) concerning Indigenous and Tribal Peoples, for example, affirms indigenous peoples' rights of ownership and possession of the lands they traditionally occupy, and requires governments to safeguard those rights and to provide adequate procedures to resolve land claim.[92]

Importantly, in the 30 year period since the adoption of ILO Convention No. 169, legal security of tenure and protection against forced evictions have been recognised as key elements of the right to adequate housing in Article 11(1) of ICESCR.[93] Furthermore, it is now well-established that property can be acquired through traditional occupation of lands, rather than requiring indigenous peoples to have held the land in accordance with conventional domestic legal systems such as real title recognised by a title deed.[94]

---

[90] ibid, 22.

[91] *Mayan Communities in the District of Toledo v Belize* Inter-American Commission on Human Rights Case 12.053 Report No. 40/4 (2004) [87].

[92] ibid, [117], [118].

[93] Committee on Economic, Social and Cultural Rights 'General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)' (13 December 1991) UN Doc E/1992/23, annex III, [8], [18].

[94] See, for example, *Doğan and others v Turkey,* European Court of Human Rights Application No. 8803-8811/02, 8813/02 and 8815-8819/02 (2004).

It is in this context that the Chagossians are advocating for the right of return after their removal from the Chagos Islands and the denial of access to their communal territorial resources.[95] The remainder of this section will examine the key elements of indigenous land rights before turning to their application, in Sect. 13.6, to the situation of the Chagossians.

13.5.1 Connection to Land

In one of the leading cases on indigenous land rights, the *Case of the Mayagna (Sumo) Awas Tingni v Nicaragua*,[96] the Inter-American Commission on Human Rights on behalf of the Mayagna Awas Tingni Community filed a suit at the Inter-American Court on Human Rights (Inter-American Court) in response to Nicaragua's failure to adopt measures, including demarcation of land, to protect the community's rights over its ancestral land. The Inter-American Court found Nicaragua to have restricted the right of the members of the Mayagna Awas Tingni Community to use and enjoy their land as protected by Article 21 of the American Convention on Human Rights.[97]

In considering the case, the Inter-American Court recognised the close connection of indigenous peoples to land, the role of land in culture, spiritual life, community integrity and economic survival, and the communal concept of property in indigenous communities.[98] Informed by this understanding of land, the Inter-American Court went on to hold that 'as a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property'.[99]

There is no express reference to indigenous peoples or to a collective right to land in the American Convention on Human Rights. Article 21 states: 'Everyone has the right to the use and enjoyment of his property'.[100] Nevertheless, the Inter-American Court has adopted:

> An evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention – which precludes a restrictive interpretation of rights – [therefore] it is the opinion of this Court that article 21…protects the right to property in a sense which

[95] Allen (2014), p. 257.

[96] *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights Series C No 79 (31 August 2001).

[97] ibid, [153].

[98] ibid, [149].

[99] ibid, [151].

[100] American Convention on Human Rights, adopted by the Inter-American Specialized Conference on Human Rights (San José, Costa Rica, 22 November 1969).

includes, among others, the rights of members of the indigenous communities within the framework of communal property.[101]

Since, the Inter-American Court has consistently interpreted rights in the American Convention on Human Rights so as to recognise and address the particular needs, customs and history of indigenous peoples and that this history needs to be respected and protected, including through the restoration of historic lands to indigenous peoples.[102] This precedent was applied 6 years later in *The Case of the Saramaka People v Suriname*,[103] which considered the granting of logging and mining concessions within the traditional lands of the Saramaka People. The Inter-American Court concluded that the Saramaka People had been 'deprived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival'.[104]

At the domestic level, national courts have also recognised indigenous peoples' historic association and that this association should be considered a 'property' right that continues long after the seizure of their lands. Such decisions have been made by the United Kingdom Privy Council as far back as 1921[105] and by the Canadian Supreme Court.[106] In the decision of *Mabo v Queensland,* the High Court of Australia rejected the idea that Australia was *terra nullius* at the time of colonisation and held that indigenous customs and laws (including those relating to land ownership) would continue (unless expressly extinguished) after colonisation.[107] In the *Richtersveld* case, the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.[108]

13.5.2 Communal Ownership

The *Case of the Moiwana Community v Suriname* is illustrative of the importance of a communal concept of property rights in the deepening understanding and acceptance of indigenous peoples' land rights. The Inter-American Court found the

[101] *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 97), [148].

[102] See also The Council of Europe 'Framework Convention for the Protection of National Minorities' (February 1995) H(95)10, Article 5(1) which states 'The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity namely their religion, language, traditions and cultural heritage'.

[103] *The Case of the Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights (28 November 2007).

[104] ibid, [96].

[105] *Amodu Tijani v. Southern Nigeria* [1921] 2 AC 399, (PC).

[106] *Calder et al. v. Attorney-General of British Columbia* 34 D.L.R. (3d) 145 (1973).

[107] *Mabo v. Queensland* (1992) 175 CLR 1.

[108] *Alexkor Ltd v Richtersveld Community* CCT 19/03, (2003).

relationship with the land to be one held by the community as a whole not by individuals:

> The relationship of an indigenous community with its land must be recognised and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival. For such peoples, their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations.[109]

This was reaffirmed by the Inter-American Court in the *Case of the Saramaka People v Suriname*, in which the Inter-American Court concluded that 'members of the Saramaka people make up a tribal community protected by international human rights law that secures the right to the communal territory they have traditionally used and occupied'.[110]

Also at the regional level, but in Africa, is the significant *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*[111] decision concerning the land rights of a semi-nomadic pastoralist community. The Endorois lived by Lake Bogoria for time immemorial but were forcibly displaced in 1973 following the creation of a national reserve by the Kenyan Government. This prevented the Endorois from maintaining their religious and cultural practices and threatened their way of life.[112] The decision, the first of its kind in the African human rights system, recognised indigenous peoples' rights over traditionally owned land.

The African Commission concluded Kenya had 'a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system'.[113] This was required notwithstanding the absence of an express reference to collective rights or indigenous peoples' rights in Article 14 (guaranteeing the right to property) of the African Charter.[114]

The decision of the African Court in the *African Commission on Human and Peoples' Rights v Republic of Kenya* confirmed that the right to property guaranteed by Article 14 of the African Charter can be individual or collective; and therefore may apply to groups or communities.[115] The African Court went on to explain that the right to property must be read in light of UNDRIP, thus the Ogiek have a right to occupy their ancestral lands as well as to use and enjoy their land. This was a key finding of the African Court's landmark judgment which held that the Kenyan

---

[109] *The Case of the Moiwana Community v Suriname (Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights (15 June 2005), [131].

[110] *The Case of the Saramaka People v Suriname* (n 104), [96].

[111] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21).

[112] ibid, [173], [251].

[113] ibid, [196].

[114] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

[115] *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 13). [123].

Government had violated seven separate articles of the African Charter, with the violations amounting to a persistent denial of Ogiek—a forest-dwelling hunter-gatherer community—land rights and their religious and cultural and hunter-gather practices.

13.6 Ways Forward for the Chagossians

It is in this maturing body of international law on indigenous peoples' land rights that the Chagossians can claim, as a community, their right to return to their land in response to steps by the UK to remove the Chagossians from the islands in 1967 by, *inter alia*, refusing to let them return from visits to Mauritius and closing down the plantations which provided for their employment. By 1973, the last Chagossians were expelled from the islands following an Immigration Ordinance in 1971 requiring the compulsory removal of any remaining population and preventing any person from re-entering the islands without a permit.

The 1971 Immigration Ordinance was held unlawful in domestic legal proceedings.[116] The subsequent Order in Council prohibiting residence on the islands, adopted in 2004, has withstood judicial review. Under international law, however, it is a question of whether the removal of the Chagossians from the islands and denial of the islands to the community, the resulting loss of their non-movable possessions on the land and lack of access to cultural sites, the lack of prompt and full compensation to the Chagossians for the loss of their ability to use and benefit from the islands, the denial of benefit, use of and interests in the islands since eviction, and the granting of use to the islands by the US government are permissible encroachments.

The UK has responsibilities under international law even though it has not ratified ILO Convention No. 169 given the developments in indigenous land rights jurisprudence since its drafting (discussed in Sect. 13.5) and despite arguments made by the UK that its duties under UN treaties, such as the Convention on the Elimination of All Forms of Racial Discrimination, do not apply to the BIOT.[117] Of particular concern is the position of the UK on the latter. The BIOT is an overseas territory under the control of the UK. The UK has made no reservations to the Convention on the Elimination of All Forms of Racial Discrimination. Even if such a reservation had been sought, it would offend peremptory norms and would not be compatible with the objective and purpose of a UN human rights treaty.

The UN Human Rights Committee and the Committee on the Elimination of Racial Discrimination have made clear that the UK's position is incorrect and that the UK 'has an obligation to ensure that the Convention is applicable in all territories

[116] *Bancoult (No. 1)* (n 33).

[117] United Nations Committee on the Elimination of Racial Discrimination 'Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland' (n 51), [12].

under its control', which would include the BIOT.[118] Nor can the UK argue that its human rights obligations do not apply to the BIOT because it had removed the Chagossians from the BIOT.[119] In its 2016 Concluding Observations on the UK, the Committee on the Elimination of Racial Discrimination expressed regret that the UK had made no progress in applying the Convention to the BIOT and reiterated its position on the application of the Convention.[120]

The admissibility decision of the European Court of Human Rights in *Chagos Islanders v the United Kingdom*[121] does not close the door for the Chagossians to continue arguing that the UK has obligations in international law apply to the BIOT and that the UK has fallen short of its obligations under international law. Minority Rights Group International and Human Rights Watch intervened in the case and provided a detailed submission on indigenous peoples' rights. While the Court ruled the application inadmissible, this decision was on technical grounds not the substantive merits of the case. Furthermore, analysis by Minority Rights Group International is critical of the Court's incomplete analysis of the law on jurisdiction.[122] The approach of the Court in the decision was also inconsistent with the conclusions of UN treaty bodies discussed above, which have repeatedly called on the UK to remove barriers preventing the right of return and address the human rights violations experienced by the Chagossians.[123]

Furthermore, the UK cannot avoid its obligations under international human rights law by joining with those, such as the Mauritanian Government, that are of the view that the status of the Chagossians as indigenous peoples can be challenged based on the history of the community's arrival to the islands.[124] The Chagossians do not purport to have inhabited the islands from time immemorial; rather, the archipelago was occupied by French settlers prior to their arrival. Recall, though, the relationship between indigenous people and land in the modern understanding of indigenous peoples (discussed in Sect. 13.2), in particular the modern focus on 'priority in time' rather than original inhabitation of an area of land and the shared

[118] ibid; United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland' (n 57), [38]; United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (n 59), [22].

[119] United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland' (n 59), [22].

[120] f United Nations Committee on the Elimination of Racial Discrimination 'Concluding observations of the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland' (n 53), [40].

[121] *Chagos Islanders v United Kingdom* (n 31).

[122] Raoof (2014), p. 5.

[123] ibid, 6.

[124] The Mauritian Government, for example, is of the view that the Chagossians are a minority of the Mauritian people, not an indigenous people.

experience of dispossession from land that to which the community has an enduring social attachment.[125]

The *Case of the Moiwana Community v Suriname* is also relevant. The Inter-American Court was of the view that the Moiwana were not indigenous to the region, but a tribal community that had settled in Suriname in the seventeenth and eighteenth century. Despite this, the Court recognised the 'profound and all encompassing relationship' of the Moiwana to their ancestral lands,[126] and its likeness to the 'unique and enduring ties that bind indigenous communities to their ancestral territory'.[127] The special relationship and the communal approach to ownership led the Inter-American Court to apply the jurisprudence regarding indigenous peoples and the right to land to the tribal Moiwana community.[128]

13.6.1 The Forced Removal of the Chagossians

It is open to the Chagossians to argue that the actions of the UK fall short of the test used to date to determine whether an encroachment of land rights is permissible. The analysis by the African Commission in the Endorois case provides guidance.[129]

In considering whether Kenya's actions were 'in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'[130] the African Commission found Kenya to fail on both elements of this two-pronged test.[131] The African Commission questioned whether it was necessary for Kenya to remove the Endorois from the established conservation area given the African Commission's view that the ancestral guardians of the land are best-equipped to maintain the ecosystem and the preparedness of the Endorois community to continue the conservation work begun by the government. Furthermore, the African Commission was of the view that the negative impacts arising from the creation of the reserve to be disproportionate, given the threat to the cultural survival of the Endorois way of life from continued dispossession.[132]

---

[125] See discussion of this issue in Allen (2014), p. 276.

[126] *The Case of the Moiwana Community v Suriname (Preliminary Objections, Merits, Reparations and Costs)* (n 110), [132].

[127] ibid, [131].

[128] ibid, [133].

[129] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [267]; This issue was also considered in *The Case of Yayke Axa Indigenous Community v Paraguay (Merits, Reparations and Costs)* The Inter-American Court of Human Rights (17 June 2005), [144].

[130] ibid.

[131] ibid.

[132] ibid, [235].

In applying the principles derived from the Endorois decision to the situation of the Chagossians, first, it is unclear how the removal of the Chagossians was designed to deliver a legitimate aim or serve a public need. The UK's decision to remove the Chagossians from the islands was not in response to a pressing social need or a state of emergency. There has been no evidence presented to suggest that the ongoing habitation of the islands by the Chagossians presented a threat to the establishment of the US military base on the main island of Diego Garcia or the ongoing security of the military base.[133] In *Bancoult (No. 2),* for example, the UK 'could not establish a legally valid reason to deny' the Chagossians the right of return to the outer islands.[134]

Second, the removal of the Chagossians was not undertaken in accordance with appropriate laws, as required by the second limb of the test. In *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Office* the High Court held that that 1971 Ordinance was ultra vires.[135] The removal was also contrary to international law, which requires the affording of positive measures to protect indigenous communities from violations of human rights. Rather the UK sought to 'avoid, if at all possible, any suggestion that BIOT had settled inhabitants' in the 1960s and 1970s.[136] Furthermore, forced evictions are 'prima facie incompatible with the requirements of the Covenant [on Economic, Social and Cultural Rights] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law'.[137] The African Commission has pointed out the nature of forced evictions mean they cannot satisfy the 'in accordance with…international law' element of the exemption given the requirements under international law on consultation with, and consent from, indigenous peoples (outlined in Sect. 13.4 on UNDRIP). With respect to the situation of the Chagossians, they were neither consulted, nor was consent given, prior to their removal from the islands.

While prima facie the first and second elements of the test can be made out, they must be considered through the lens of a proportionality principle. The proportionality principle is well established in international law and jurisprudence. According to the European Court of Human Rights, for example, any conditions or restriction must be 'proportionate to the legitimate aim pursued'.[138] This requires States to

---

[133] Minority Rights Group International 'Submission to the 58th Session of the Committee on Economic, Social and Cultural Rights on the United Kingdom of Great Britain and Northern Ireland' (2016), p. 6.

[134] See discussion of the Court of Appeal in R (on the application of *Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2007] EWCA Civ 498*)* in Allen (2014), p. 280.

[135] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2008] 3 WLR 955.

[136] ibid, [169].

[137] Committee on Economic, Social and Cultural Rights 'General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)' (n 94) [18].

[138] See, for example, *Handyside v United Kingdom* European Court of Human Rights Application No. 5493/72 (7 December 1976), [49]; *X & Y v Argentina* Inter-American Court of Human Rights Case 10. 506 Report No. 38/96 (1997), [60].

adopt the least restrictive measure possible. Thus, the African Court in considering the violation of human rights by the Kenyan Government against the Ogiek, for example, found no evidence that the continued presence of the Ogiek in the forest was the main cause of environmental degradation, particularly logging, of the forest and therefore the 'continued denial of access to and eviction from the Mau Forest of the Ogiek population' could not be considered 'necessary or proportionate to achieve the purported justification [put forward by the Kenyan Government] of preserving the natural ecosystem the Mau Forest'.[139]

The negative impact of the removal of the Chagossians on their human rights is disproportionate, given the interrelationship between the removal and violations of other human rights. In General Comment No. 7 on Forced Evictions, the UN Committee on Economic, Social and Cultural Rights provides guidance on this interrelationship.[140] A forced eviction may breach the right to an adequate standard of living, the right to life, the right to security of person, or the right to peaceful enjoyment of property. This intersection was considered in *Selçuk and Asker v Turkey*,[141] with the European Court of Human Rights ultimately finding a violation of the prohibition on torture (Article 3) and the right to respect for private and family life and homes (Article 8) under the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the protection of property (Article 1) under the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. With respect to the violation of Article 3, the Court held:

> Bearing in mind in particular the manner in which the applicants' homes were destroyed… and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.[142]

General Comment No. 7 acknowledges that indigenous peoples are often affected disproportionately by forced evictions.[143] It is essential, therefore, that States adopt measures to ensure that evictions, where they do occur, are not discriminatory.[144]

With respect to the experience of the Chagossians, their exile and ongoing precarious situation falls short of the right to adequate housing. The Chagossians have been deprived of their land and livelihoods. Many live in poverty and marginalisation in Mauritius, the Seychelles and the UK. The UK has not adequately provided for their housing, feeding, employment, health care and social needs.

---

[139] *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 13) [130].

[140] Committee on Economic, Social and Cultural Rights 'General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)' (n 94) [4].

[141] *Selçuk and Asker v Turkey* European Court of Human Rights Application Nos. 12/1997/796/998-999 (24 April 1998).

[142] ibid, [78].

[143] Committee on Economic, Social and Cultural Rights 'General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant)' (n 94) [10].

[144] ibid.

The decision to remove the Chagossians from the islands was made without consultation or the involvement of the Chagossians, in violation of the right to self-determination.[145] Since, the Chagossians have not been able to freely and actively pursue their economic, social and cultural development.

Furthermore, restrictions on access to the Chagos Islands violate the right of the Chagossians to enjoy freedom of movement.[146] The Chagossians are prevented from returning to the islands. The restrictions directly target the Chagossians. Armed forces and public servants are exempt from the restriction. Listed contractors working on the US military base are deemed to possess a permit. As such, the restriction is also discriminatory in nature.[147]

13.6.2 An Effective Remedy and the Requirement to Adopt Special Measures

Reparations must, as far as possible, remedy all the consequences arising from the human rights violation, and re-establish the situation which would, in all probability, have existed if the act had not been committed. The UN Basic Principles and Guidelines stipulate that any award of reparation should be 'Adequate, effective and prompt and intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered'.[148]

In each of the cases discussed in Sect. 13.5 above, the State in violation of the right to land has been ordered to redress the violation. With respect to the Mayagna Awas Tingni Community, for example, Nicaragua was ordered to carry out the delimitation, demarcation and titling of the territory belonging to the Awas Tingni Community. Furthermore, Nicaragua was ordered not to take any measures or permit a third party 'to affect the existence, value, use or enjoyment of the [community] property'.[149]

---

[145] Minority Rights Group International 'Submission to the 58th Session of the Committee on Economic, Social and Cultural Rights on the United Kingdom of Great Britain and Northern Ireland' (n 134), 9.

[146] Minority Rights Group International 'Submission to the 90th Session of the Committee on the Elimination of Racial Discrimination on the United Kingdom of Great Britain and Northern Ireland' (2016), p. 12.

[147] ibid.

[148] United Nations General Assembly 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' by United Nations General Assembly resolution 60/147 (16 December 2005), Principle IX.

[149] *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 97), [153].

In the case of the *Case of the Saramaka People v Suriname*, the Inter-American Court followed the approach of the Court in *The Mayagna (Sumo) Awas Tingni v Nicaragua*, in particular that:

> Members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival.[150]

In the Endorois case, the African Commission rejected Kenya's position that it would be sufficient to grant the Endorois privileges such as restricted access to ceremonial sites.[151] Rather, international law requires Kenya to adopt measures in order to guarantee permanent use and enjoyment of the land by the Endorois.[152] This is because owners have 'the right to undisturbed possession, use and control of their property however they deem fit'.[153] The same approach was taken by the Inter-American Court in the *Case of the Saramaka People v Suriname,* which made clear that 'mere access or de facto ownership of land is not compatible with principles of international law. Only de jure ownership can guarantee indigenous peoples' effective protection'.[154]

The African Commission stressed Kenya's duty to recognise the land rights of the Endorois community 'within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such [property] right recognised in the Charter and international law',[155] in response to oral arguments by Kenya that 'legislation or special treatment in favour of the Endorois might be perceived as being discriminatory'.[156]

The position presented by Kenya was incorrect, however, in international law. Recall, the recommendation of the UN Committee on the Elimination of Racial Discrimination (in Sect. 13.4). Unequal treatment of persons in unequal situations does not necessarily amount to impermissible discrimination.[157] Rather, the International Convention on the Elimination of All Forms of Racial Discrimination states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order

---

[150] *The Case of the Saramaka People v Suriname* (n 104), [85].

[151] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [206].

[152] ibid.

[153] *Huri – Laws v Nigeria* African Commission on Human and Peoples' Rights Application 225/98 (2000), [52].

[154] *The Case of the Saramaka People v Suriname* (n 104), [560].

[155] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [196].

[156] ibid.

[157] United Nations Committee on the Elimination of Racial Discrimination 'General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination' (n 68) [8].

> to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination.[158]

In *Connors v The United Kingdom,*[159] the European Court of Human Rights considered the special needs of Gypsy and Travellers and the positive obligation on the State to facilitate the gypsy way of life as a way to provide equality under the law.[160] General Recommendation No. 23, prepared by UN Committee on the Elimination of Racial Discrimination, explains to States that certain measures may be needed and can be taken if indigenous peoples' rights are to be fully realised.[161] This is the approach taken by the African Commission in concluding that special measures would be needed to address the discrimination experienced by the Endorois people living under a property system that does not recognise communal property rights.[162] The Inter-American Court also consistently orders special measures to guarantee that indigenous peoples can fully exercise their land rights.[163]

This jurisprudence supports calls by the Chagossians for the repeal of the 2004 Orders in Council restricting the right of return and UK support to facilitate their return to the islands. The adoption of measures to support the right of return are available to the UK in light of a feasibility study commissioned by the UK to assist with the decision on the right of return. The feasibility study concluded that there is no fundamental legal obstacles that would prevent resettlement and environmental and infrastructure issues are not an insurmountable impediment to resettlement.[164] Once the right of return is recognised, principles of self-determination require respect for the internal decision-making processes of the Chagossians on how their ancestral land would be resettled and the communal territorial resources used by the community.

13.6.3 Adequate Compensation

In the Endorois decision, Kenya was ordered to 'pay adequate compensation to the community for all the loss suffered'.[165] The Inter-American Court has adopted a practice of assessing and ordering damages. In the *Case of the Saramaka People v Suriname,* for example, the Inter-American Court ordered US$75,000 in material

---

[158] International Convention on the Elimination of All Forms of Racial Discrimination (n 42), Article 1(4).

[159] *Connors v United Kingdom* European Court of Human Rights Application No. 66746/01 (2004).

[160] ibid.

[161] United Nations Committee on the Elimination of Racial Discrimination 'General Recommendation No. 23: Indigenous Peoples' (18 August 1997a) UN Doc A/52/18, annex V, [4].

[162] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [187].

[163] *The Case of the Saramaka People v Suriname* (n 104), [84].

[164] KPMG, Feasibility study for the resettlement of the British Indian Ocean Territory – Vol I (31 January 2015).

[165] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [567].

damages and ordered Suriname to allocate US$600,000 for a community development fund to resource reparations.[166]

According to the UN Basic Principles and Guidelines, compensation should be awarded for:

> Any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case…such as: (i) physical or mental harm; (ii) lost opportunities such as employment, education or social benefit; (iii) material damages including loss of earning potential; (iv) moral damage; and (v) any costs incurred for legal assistance, medical services, and psychological and social services.[167]

The UN Human Rights Committee has advised States that they are under an obligation to provide an appropriate level of compensation, not purely 'symbolic' amounts of compensation.[168] Based on these principles, it is incorrect to suggest that the payment of £2976 per person to 1344 Chagossians in 1972 was adequate following the forcible removal of the Chagossians from the islands. The need for payment of further compensation to the Chagossians has been recognised by the UN Human Rights Council.[169]

13.7 Challenges and Opportunities Ahead

While developments in the jurisprudence on indigenous peoples' land rights are positive, challenges remain. Even where there have been positive decisions, implementation has been mixed. In the Endorois case, for example, the Kenyan Government announced, after 4 years, a taskforce to 'study the decision…provide guidance…examine the potential impacts…[and] the practicability of restitution'.[170] No Endorois were appointed to the taskforce, nor was the taskforce given resources to undertake its work. Its mandate has now expired, with no formal progress on implementation. Progress on the implementation required by the decision in the *Case of the Saramaka People v Suriname* is similar. There have been a few positive

[166] *The Case of the Saramaka People v Suriname* (n 104), [201].

[167] United Nations General Assembly 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147, [18].

[168] See, for example, UN Human Rights Committee, *Bozize v Central African Republic* Communication No. 449/1990 (1994) UN Doc CCPR/C/50/D/428/1990; *Mojica v Dominican Republic* Communication No. 449/1991 (1994) UN Doc CCPR/C/51/D/449/1991; *Griffin v Spain* Communication No. 493/1992 (1995) Un Doc CCPR/C/53/D/493/1992.

[169] United Nations Human Rights Committee 'Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland' (n 57), [38].

[170] President of Kenya, Taskforce on the Implementation of the Decision of the African Commission on Human and Peoples' Rights Contained in Communication No. 276/2003, Gazette No. 6708, 19 September 2014.

but minor steps, but overall a constant threat hangs over the population with new mining concessions being granted by the government.

There are nevertheless grounds for optimism. It is clear that the international community now generally accepts indigenous peoples' rights (albeit the continuing presence of some outlier states) and there are some strong voices championing indigenous peoples' rights internationally.[171] This is illustrated, for example, by the UN General Assembly's adoption of the outcome document from the 2014 World Conference on Indigenous Peoples, which reaffirmed the commitment of States to UNDRIP and in particular the right of indigenous peoples to FPIC before legislative or administrative measures that many affect them are adopted or implemented.[172]

The Sustainable Development Goals (SDGs), adopted in 2015, incorporate six direct references to indigenous peoples. For example, Goal 2 (focused on ending hunger, achieving food security and improving nutrition and promoting sustainable agriculture) seeks to improve the agricultural productivity and incomes of indigenous peoples and the importance of securing equal access to land if the target is to be achieved.[173] With respect to land rights more generally, Goal 1 (on ending poverty) incorporates a target focused on securing 'equal rights to economic resources, as well as…ownership and control over land'.[174] The agreed to indicator of progress is the proportion of the total adult population with secure tenure rights, with legally recognised documentation and who perceive their rights to land as secure, by sex and by type of tenure.

Goal 10, while not including a specific reference to indigenous peoples, is relevant to the experience of indigenous peoples. It is focused on reducing inequality within and among countries. Indicator 10.2 will track progress on efforts to empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.[175] This brings a human rights approach into the SDGs where none existed in the Millennium Development Goals, which preceded the SDGs.

---

[171] See, for example, Canada's statement to the 2016 Permanent Forum on Indigenous Issues available at Government of Canada, 'Speech delivered at the United Nations Permanent Forum on Indigenous Issues (10 May 2016) <http://news.gc.ca/web/article-en.do?nid=1064009> accessed 27 April 2017.

[172] United Nations General Assembly 'Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples' (25 September 2014) UN Doc A/RES/69/2, [3].

[173] United Nations Sustainable Development Knowledge Platform, 'Sustainable Development Goal 2' <https://sustainabledevelopment.un.org/sdg2> accessed 26 April 2017.

[174] United Nations Sustainable Development Knowledge Platform, 'Sustainable Development Goal 1' <https://sustainabledevelopment.un.org/sdg1> accessed 26 April 2017.

[175] United Nations Sustainable Development Knowledge Platform, 'Sustainable Development Goal 10' <https://sustainabledevelopment.un.org/sdg10> accessed 26 April 2017.

13.7.1 Free, Prior and Informed Consent

In General Recommendation XXIII Concerning Indigenous Peoples prepared in 1997, the UN Committee on the Elimination of Racial Discrimination has emphasised that no decisions directly relating to the rights or interests of indigenous people should be taken without their 'informed consent'.[176] Since, the Committee has reiterated this duty to States.[177]

The UN Committee on Economic, Social and Cultural Rights has also reminded States of the requirement on them to 'consult and seek the consent of the indigenous peoples concerned prior to the implementation of…any public policy affecting them'[178] and has emphasised that, at a minimum, a State should be negotiating with the intent of seeking consent.[179]

More recently, Rodolfo Stavenhagen, when UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples, explained that 'free, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects'[180] given the profound social and economic changes that are likely when the development is in areas occupied by indigenous peoples. The prior UN Special Rapporteur on Indigenous Peoples, James Anaya, explained further:

> A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration [on Indigenous Peoples Rights] recognises two situations in which a State is under an obligation to obtain the

[176] United Nations Committee on the Elimination of Racial Discrimination 'General recommendation XXIII on the rights of indigenous peoples' (n 49) [4(d)].

[177] See, for example, United Nations Committee on the Elimination of Racial Discrimination 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: Costa Rica' (4–22 March 2002) UN Doc CERD/C/60/CO/3, [13]; United Nations Committee on the Elimination of Racial Discrimination 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States' (2001) UN Doc CERD/A/56/18, [380]–[407]; United Nations Committee on the Elimination of Racial Discrimination 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia (2000) UN Doc CERD/C/304/Add.101, [9].

[178] United Nations Committee on Economic, Social and Cultural Rights, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia', (2001) UN Doc E/C.12/Add.1/74, [33].

[179] United Nations Committee on Economic, Social and Cultural Rights 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia' (2001) UN Doc CERD/E/C.12/Add.1/74, para 33.

[180] United Nations Human Rights Committee, 'Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya' 26 February 2007) UN Doc A/HRC/4/32/Add.3, [66].

> consent of the indigenous peoples concerned…These situations include when the project will result in the relocation of a group from its traditional lands.[181]

The duty on States to obtain the FPIC of indigenous peoples affected by any public policy measure affecting them is included at Article 19 of UNDRIP. The four states that voted against UNDRIP (as explained in Sect. 13.4) have now shown their support for UNDRIP. The United States, in announcing its support for UNDRIP, recognised 'the significance of the Declaration's provisions on free, prior and informed consent'.[182] The Outcome Document of the 2014 World Conference on Indigenous Peoples, adopted by the General Assembly, reaffirms the commitment of States:

> To consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them, in accordance with the applicable principles of the Declaration.[183]

The requirement of FPIC is also confirmed by the case law of the Inter-American Commission on Human Rights. In *Mary and Carrie Dann v USA*, the Commission was of the view that meetings convened with the community 14 years after proceedings to extinguish title did not meet the requirements of prior nor effective participation. The Inter-American Commission went on to state that a process of consent that is fully informed 'requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as a collectives'.[184]

Subsequently, in the *Case of the Saramaka People v Suriname* the Inter-American Court addressed the need for FPIC when a development project touches on indigenous property rights.[185] The Inter-American Court found the State to have 'a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions'.[186]

The decision of the UN Human Rights Committee in *Poma Poma v Peru*[187] is also instructive. The author in the communication and her children were descendants of

---

[181] United Nations Human Rights Council 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya' (n 72), [47].

[182] US Government, 'Statement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples' (2012) <http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf> accessed 28 June 2017.

[183] United Nations General Assembly 'Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples' (n 173), [3].

[184] *Mary and Carrie Dann v United States,* Inter-American Court of Human Rights Case 11.140 Report No. 75/02 (2002).

[185] *The Case of the Saramaka People v Suriname* (n 104), [134].

[186] ibid.

[187] *Poma Poma v Peru,* United Nations Human Rights Committee, Communication No. 1457/2006 (27 March 2009) UN Doc CCPR/C/95/D/1457/2006.

the Aymara people. They owned an alpaca farm and raised alpacas, llamas and other small animals in accordance with traditional customs. The farm covered pasture land and wetlands. Over many years the Peruvian Government had supported projects that diverted the river and authorised the drilling of wells that caused the gradual drying out of the wetlands, causing significance losses of livestock.

The Committee, in assessing the case against the right to enjoy one's culture in community with others, found that the 'enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.[188] Furthermore, the Committee considered 'participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community'.[189]

Similarly in the Endorois and Ogiek cases, the African Commission and the African Court respectively required respect for FPIC. In the former, the African Commission required FPIC according to the customs and traditions of the community where any development or investment project would have 'a major impact' within the territory of an indigenous people.[190] In the Ogiek case, the African Court held that the repeated expulsion of the Ogiek 'from their ancestral lands against their will, without prior consultation' that is 'effective' violated their rights to land and to development.[191] Therefore, the point at which the consent of an affected community is required is where the project would have a 'major impact'. While the African Commission provided no guidance on how to assess the scale of 'major', the situations addressed in the case law to date suggest that consideration should be given to, at least, the cultural and physical life of the indigenous community that may be impacted.

The jurisprudence on FPIC has now informed the operating principles of the World Bank. The World Bank's Environmental and Social Framework (adopted in August 2016), which sets out the World Bank's commitment to sustainable development, includes Environmental and Social Standards for borrowers. Environmental and Social Standard No. 7 focuses on the risks for, and impact on, indigenous peoples arising from World Bank supported projects. The Standard requires borrowers to obtain the FPIC of indigenous peoples affected by a World Bank-supported project. The inclusion of a FPIC requirement by the World Bank is a major development and a significant achievement for indigenous peoples and their allies[192] following the World Bank management board rejecting the application of FPIC in 2004 and

[188] ibid, [7.2].

[189] ibid, [7.6].

[190] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (n 21), [129].

[191] *African Commission on Human and Peoples' Rights v Republic of Kenya* (n 13). [131], [210].

[192] For more detailed analysis see Minority Rights Group, 'Comments Regarding the World Bank's Environmental and Social Framework' (16 September 2016) <http://minorityrights.org/advocacy-statements/comments-regarding-world-banks-environmental-social-framework/> accessed 26 April 2017.

instead applying 'free, prior and informed consultation' as an alternative and weaker measurement of borrower compliance.[193]

Significantly, the requirement of FPIC under Environmental and Social Standard No. 7 applies to situations where indigenous peoples 'who, during the lifetime of members of the community or group, have lost collective attachment to distinct habitats or ancestral territories in the project area, because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area'. This is in line with UN treaty body comments in response to the UK's position that treaty obligations do not apply to the Chagos Islands because it had removed the Chagossians from the BIOT.

With FPIC now well established in international law, there is a sound base on which the Chagossians can argue for improved UK practices with respect to consultation and engagement with the Chagossians; rather than the absence of consultation, which has plagued the initial decision to remove the Chagossians from the islands and decisions since about the future of the Chagossians and their right to return.

13.8 Conclusion

This chapter has summarised the international law concerning indigenous peoples' rights. It is in this context that it can be strongly argued that the UK is required to recognise the human rights violations the Chagossians have endured since removal from the islands, remove the discriminatory restrictions on Chagossians from entering the islands, immediately facilitate the Chagossians' right to return, and provide the Chagossians with an effective remedy including adequate compensation. These steps should be taken with the effective and meaningful participation, fully meeting the requirements of FPIC, of the Chagossians.

The establishment of UN mechanisms, including the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples as well as the mandate of the Special Rapporteur, provide avenues and fora for the Chagossians and their supporters to continue advocacy efforts in order to secure their rights.

References

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58

African Commission on Human and Peoples' Rights (2012) Report of the African Commission's Working Group on indigenous populations/communities: research and information visit to Kenya, 1–19 March 2010

[193] See World Bank, 'OPCS Working Paper: Implementation of the World Bank's Indigenous Peoples' Policy: A learning review (FY 2006–2008)' (OPCS Working Paper, August 2011), p. 2.

African Commission on Human and Peoples' Rights v Republic of Kenya (2017) African Court on Human and Peoples' Rights Application No. 006/2012
Alexkor Ltd v Richtersveld Community CCT 19/03 (2003)
Allen S (2014) The Chagos islanders and international law. Hart Publishing, Oxford
Amodu Tijani v. Southern Nigeria [1921] 2 AC 399, (PC)
Aurelio Cal and Maya Village of Santa Cruz v Basilio Teul et al, the Attorney General of Belize, and Minister of Natural Resources and Environment Defendants Supreme Court of Belize (18 October 2007)
Bozize v Central African Republic Communication No. 449/1990 (1994) UN Doc CCPR/C/50/D/428/1990
Calder et al v. Attorney-General of British Columbia 34 D.L.R. (3d) 145 (1973)
Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and Peoples' Rights Application 276/2003 (4 February 2010)
Chagos Islanders v United Kingdom European Court of Human Rights Application No. 35622/04
Committee on Economic, Social and Cultural Rights (1991) General comment No. 4: The right to adequate housing (art. 11(1) of the Covenant). UN Doc E/1992/23, annex III
Connors v United Kingdom European Court of Human Rights Application No. 66746/01 (2004)
Doğan and others v Turkey European Court of Human Rights Application No. 8803-8811/02, 8813/02 and 8815-8819/02 (2004)
Griffin v Spain Communication No. 493/1992 (1995) Un Doc CCPR/C/53/D/493/1992
Handyside v United Kingdom European Court of Human Rights Application No. 5493/72 (7 December 1976)
Human Rights Council (2011) Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples. UN Doc A/HRC/18/42
Huri – Laws v Nigeria African Commission on Human and Peoples' Rights Application 225/98 (2000)
International Covenant on Civil and Political Rights. (Adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
International Covenant on Economic, Social and Cultural Rights (16 December 1966, entered into force 3 January 1976) 999 UNTS 3
International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195
International Labour Organisation (1957) Convention No. 107: Indigenous and Tribal Populations Convention. 40th ILC session Geneva, 26 June
International Labour Organisation (1989) Handbook for ILO Tripartite Constituents: Understanding the Indigenous and Tribal Peoples Convention, (No. 169). International Labour Standards Department Geneva 2013
International Labour Organisation Convention No. 169: Indigenous and Tribal Peoples Convention (76th ILC session Geneva 27 June 1989) ('ILO Convention No. 169')
KPMG (2015) Feasibility study for the resettlement of the British Indian Ocean Territory – Vol I
Mojica v Dominican Republic Communication No. 449/1991 (1994) UN Doc CCPR/C/51/D/449/1991
Mabo v. Queensland (1992) 175 CLR 1
Mary and Carrie Dann v United States, Inter-American Court of Human Rights Case 11.140 Report No. 75/02 (2002)
Mayan Communities in the District of Toledo v Belize Inter-American Commission on Human Rights Case 12.053 Report No. 40/4 (2004)
Minority Rights Group (2016) Comments regarding the World Bank's environmental and social framework. http://minorityrights.org/advocacy-statements/comments-regarding-world-banks-environmental-social-framework/. Accessed 26 Apr 2017

Minority Rights Group International (2016) Submission to the 58th session of the committee on economic, social and cultural rights on the United Kingdom of Great Britain and Northern Ireland

Poma Poma v Peru, United Nations Human Rights Committee, Communication No. 1457/2006 (27 March 2009) UN Doc CCPR/C/95/D/1457/2006

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61; [2008] 3 WLR 955

R (on the application of Bancoult v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2016] UKSC 35

R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office (No. 1) [2000] EWHC 413 (Admin)

Raoof A (2014) Briefing: still dispossessed – the battle of the Chagos islanders to return to their homeland. Minority Rights Group International, London

Selçuk and Asker v Turkey European Court of Human Rights Application Nos. 12/1997/796/998-999 (24 Apr 1998)

The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua Inter-American Court of Human Rights Series C No 79 (31 August 2001)

The Case of the Moiwana Community v Suriname (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights (15 June 2005)

The Case of the Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights (28 November 2007)

The Case of Yayke Axa Indigenous Community v Paraguay (Merits, Reparations and Costs) The Inter-American Court of Human Rights (17 June 2005)

The Council of Europe (1995) Framework convention for the protection of national minorities. H(95)10

Thornberry P (2002) Indigenous peoples and human rights. Manchester University Press, Manchester

United Nations 'Charter of the United Nations' 24 October 1945

United Nations Commission on Human Rights (1986) Study of the problem of discrimination against indigenous populations, report of the special rapporteur of the sub-commission on the prevention of discrimination and the protection of minorities. UN Doc E/CN.4/Sub.2/1986/7/Add.4

United Nations Commission on Human Rights (1996a) Report of the Working Group on Indigenous populations. UN Doc E/CN/4/Sub/2/AC.4/1996/2

United Nations Commission on Human Rights (1996b) Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous peoples". UN Doc E/CN.4/Sub.2/AC.4/1996/2

United Nations Commission on Human Rights (1999) Report of the Working Group on Indigenous Populations on its seventeen session. UN Doc E/CN.4/Sub.2/1999

United Nations Commission on Human Rights (2001a) Human rights and indigenous issues. UN Doc E/CN.4/RES/2001/57

United Nations Commission on Human Rights (2001b) Prevention of discrimination and protection of indigenous peoples and minorities: Indigenous peoples and their relationship to land – Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes. UN Doc E/CN.4/Sub.2/2001/21

United Nations Committee on Economic, Social and Cultural Rights (2001) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia'. UN Doc E/C.12/Add.1/74

United Nations Committee on Economic, Social and Cultural Rights (2009) General Comment No. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights). UN Doc E/C.12/GC/21

United Nations Committee on Economic, Social and Cultural Rights (2011) Concluding observations of the committee on economic, social and cultural rights: Argentina. UN Doc E/C.12/ARG/CO/3

United Nations Committee on the Elimination of Racial Discrimination (1997a) General Recommendation No. 23: Indigenous Peoples. UN Doc A/52/18, annex V
United Nations Committee on the Elimination of Racial Discrimination (1997b) General recommendation XXIII on the rights of indigenous peoples' in 'Report of the Committee on the Elimination of Racial Discrimination to the United Nations General Assembly. UN Doc A/52/18
United Nations Committee on the Elimination of Racial Discrimination (2000) Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia. UN Doc CERD/C/304/Add.101
United Nations Committee on the Elimination of Racial Discrimination (2001) Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States. UN Doc CERD/A/56/18
United Nations Committee on the Elimination of Racial Discrimination (2002) Consideration of Reports Submitted by States Parties under Article 9 of the Convention – Concluding Observations of the Committee on the Elimination of Racial Discrimination: Costa Rica. UN Doc CERD/C/60/CO/3
United Nations Committee on the Elimination of Racial Discrimination (2003) General Recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the Convention. In: Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. UN Doc HRI/GEN/1/Rev.6, 200
United Nations Committee on the Elimination of Racial Discrimination (2009) General recommendation No. 32: the meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination. UN Doc CERD/C/GC/32
United Nations Committee on the Elimination of Racial Discrimination (2011) Concluding observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland. Un Doc CERD/C/GBR/CO/18-20
United Nations Committee on the Elimination of Racial Discrimination (2016) Concluding observations of the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland. Un Doc CERD/C/GBR/CO/21-23
United Nations Declaration on the Rights of Indigenous Peoples, United Nations General Assembly Resolution 61/295 (2 October 2007) UN Doc A/RES/61295
United Nations Economic and Social Council (1982) Study of the problem of discrimination against indigenous populations. Resolution 1982/34
United Nations Economic and Social Council (2000) Establishment of a permanent forum on indigenous issues. Resolution 2000/22
United Nations Economic and Social Council (2007) Permanent forum on indigenous issues – report on the sixth session, 14–25 May 2007. UN Doc E/C.19/2007/12
United Nations General Assembly (2006) Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. UN Doc A/RES/60/147
United Nations General Assembly (2014) Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples. UN Doc A/RES/69/2
United Nations General Assembly (2016) Rights of indigenous peoples: Note by the Secretary General. Un Doc A/71/229
United Nations General Assembly Resolution 1514 (XV) (14 December 1990) Declaration on the granting of independence to colonial countries and peoples
United Nations General Assembly Resolution 2625 (XXV) (24 October 1970) Declaration on principles of international law concerning friendly relations and co-operation among states in accordance with the charter of the United Nations
United Nations General Assembly Resolution 60/147 (2005) Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law

United Nations High Commissioner for Human Rights. Normative Framework. http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/NormativeFramework.aspx. Accessed 26 Apr 2017

United Nations Human Rights Committee (1984) General comment No. 12: Article 1 (Right to Self-determination), the right to self-determination of peoples. In: General comments and general recommendations adopted by human rights treaty bodies. UN Doc HRI/GEN/1/Rev.6

United Nations Human Rights Committee (1994) General Comment 23 (Article 27). UN Doc CCPR/C/21/Rev.1/Add.5

United Nations Human Rights Committee (2001) Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland and Overseas Territories of the United Kingdom of Great Britain and Northern Ireland. UN Doc CCPR/CO/73/UKOT

United Nations Human Rights Committee (2007) Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya. UN Doc A/HRC/4/32/Add.3

United Nations Human Rights Committee (2008) Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland. UN Doc CCPR/C/GBR/CO/6

United Nations Human Rights Council (2007a) Expert mechanism on the rights of indigenous peoples. Resolution 6/36

United Nations Human Rights Council (2007b) Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, Addendum: Mission to Kenya. UN Doc A/HRC/4/32/Add.3

United Nations Human Rights Council (2009) Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. UN Doc A/HRC/12/34

United Nations Human Rights Council (2010) Human rights and indigenous peoples: Mandate of the Special Rapporteur on the rights of indigenous peoples. Un Doc A/HRC/RES/15/14

United Nations Human Rights Council (2011) Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the Republic of the Congo. UN Doc A/HRC/18/35/Add.5

United Nations Human Rights Council (2012) Expert Mechanism on the Rights of Indigenous Peoples: Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples. UN Doc A/HRC/EMRIP/2012/4

United Nations Office of the High Commissioner for Human Rights (2010) The United Nations declaration on the rights of indigenous peoples: a manual for national human rights institution. Indigenous Peoples and Minorities Section Geneva

United Nations Permanent Forum on Indigenous Issues (2006) Factsheet: Who are indigenous peoples? http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf. Accessed 26 Apr 2017

United Nations Permanent Forum on Indigenous Issues (2007) Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on indigenous issues on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples. New York, 61st Session of the United Nations General Assembly

United Nations Sustainable Development Knowledge Platform. https://sustainabledevelopment.un.org/sdg2. Accessed 26 Apr 2017

World Bank (2011) OPCS Working Paper: Implementation of the World Bank's Indigenous Peoples' Policy: A learning review (FY 2006–2008). OPCS Working Paper

X & Y v Argentina Inter-American Court of Human Rights Case 10. 506 Report No. 38/96 (1997)

Chapter 14
The Politics of Chagos: Part Played by Parliament and the Courts Towards Resolving the Chagos Tragedy

David Snoxell

14.1 Introduction

I have been involved with Chagos issues for over 20 years, as Deputy Commissioner of the British Indian Ocean Territory (BIOT) (1995–1997), High Commissioner to Mauritius (2000–2004) and from 2008 as Coordinator of the Chagos Islands (BIOT) All-Party Parliamentary Group (APPG).

In this essay I will discuss the myths about Chagos, the main policy failures and the tortuous way in which Chagos issues have been conducted, and show how a combination of political and legal pressure is the only way to bring about an overall settlement. This is not to deny that pressure from the former Chagos Islanders (Chagossians, formerly called Ilois) themselves, their support groups, Non-Governmental Organisations (NGOs), the media and the international community also play a vital role.

14.2 Historical Background

BIOT was created over 50 years ago for the purpose of providing a UK/US base on Diego Garcia. At the height of decolonisation it was ironical timing to create Britain's first new colony since the First World War. But it soon became clear that the UK intention was that this new colony should be uninhabited (in an attempt to avoid UN scrutiny) although the US was asking only for the population to be

Chagos Islands (BIOT) All-Party Parliamentary Group

D. Snoxell (✉)
High Wycombe, UK

S. Allen, C. Monaghan (eds.), *Fifty Years of the British Indian Ocean Territory*, The World of Small States 4, https://doi.org/10.1007/978-3-319-78541-7_14

removed from Diego Garcia, not from the other islands in the Chagos Archipelago.[1] So here is the first myth. It was the Foreign and Commonwealth Office (FCO) alone that decided on the clean sweep of all the islands, not the US. That is clear from UK Government documents now in the National Archives, neatly encapsulated in a letter from M W Hewitt, East Africa Department, FCO of 4 December 1980 to W A Ward, the British High Commissioner in Mauritius:

> I am sure the Americans do not want to get mixed up in this. They look to us to sort it out and I should think they consider in private that we made a hash of the Diego Garcia clearance. Our agreement with them leading to the 1966 Exchange of Notes required only Diego Garcia to be empty. They had no objections to the other Chagos Islands remaining populated; it was our decision to clear the lot and resettle in Mauritius.[2]

As is now well known, to achieve the expulsion of the Chagossians, Parliament, the public and the UN were deceived into believing that the population were contract workers from Mauritius and the Seychelles.[3] One further quote by an FCO legal adviser, Anthony Aust, from 1970 will suffice:

> Purpose of Immigration Ordinance:
>
> to provide legal power to deport people who will not leave voluntarily;
> to prevent people entering;
> to maintain the fiction that the inhabitants are not a permanent or semi-permanent population.
> I will consider these separately
>
> 6. Maintaining the fiction
>
> As long as only part of BIOT is evacuated the British Government will have to continue to argue that the local people are only a floating population. This may be easier in the case of the non-Chagos part of BIOT – Aldabra, Des Roches and Farquhar – where most of the people are Seychellois labourers and their families. However, the longer that such a population remains, and perhaps increases, the greater the risk of our being accused of setting up a mini-colony about which we would have to report to the United Nations under Article 73 of the Charter. Therefore strict immigration legislation giving such labourers and their families very restricted rights of residence would bolster our arguments that the territory has no indigenous or settled population.[4]

Here was the second myth—some of the Ilois went back five generations on the Islands to the late eighteenth century when the French brought slaves from Madagascar to establish coconut plantations. There were, however, in the mid-seventies a few British Members of Parliament that had their suspicions, fuelled by a Washington Post report 'Islanders were evicted for US base'[5] and an editorial in

[1] Snoxell (2009).

[2] Hewitt (1980).

[3] Aust (1968).

[4] Aust (1970).

[5] Ottaway (1975).

September 1975,[6] followed by US Congressional hearings into Diego Garcia[7] and the Island's former inhabitants, and also subsequent reports in *The Guardian* and *Sunday Times*. The late Tam Dalyell MP and Jeremy Corbyn MP raised the matter several times in Parliament in the seventies. The international community, however, remained mostly oblivious to the plight of the Chagossians until 1999, following the release of the papers to the National Archives under the 30 year rule which led to the first in a long series of litigation (*R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office (No. 1)*[8]) which revealed the full story of what had happened in the 1960s. Olivier Bancoult's lawyers were then able to apply for judicial review of the 1971 Immigration Ordinance which prevented the Chagossians from returning without permission of the BIOT Commissioner. The archives revealed a tangled web of deception. Without this case we would not have the insight that we have today into what went on between 1965 and 1973.

14.3 Administration of BIOT Since 1965

BIOT was first administered by the BIOT Commissioner who was also Governor of Seychelles until independence in 1976, when the Territory moved to Hong Kong and Indian Ocean Department of the FCO in London. This new territory was clearly the Cinderella of the colonies and was shunted around the FCO thereafter, first to East Africa Department, then Equatorial Africa Department, then Southern Africa Department and finally in 1999 to a newly created Overseas Territories Department. I was Deputy Head of Southern Africa Department when BIOT landed on my desk. The Head of Department became the BIOT Commissioner and I was the Deputy Commissioner from 1995 to 1997. BIOT was administered by an Administrator in a three person section, which I supervised together with an external honorary legal adviser. It was largely self-sufficient rarely reporting to ministers. At that stage officialdom was only dimly aware of what an earlier generation of FCO officials had done to the Chagossians.

[6] Editorial (1975).

[7] US House of Representatives, 'Diego Garcia 1975: the Debate over the Base and the Island's former inhabitants', Hearings before the Special Subcommittee on Investigations of the Committee on International Relations, House of Representatives, Ninety-fourth Congress, first session, June 5 and November 4, 1975.

[8] [2000] EWHC 413 (Admin); [2001] WLR 1219.

14.4 Five Policy Failures

The twenty-first century was to produce five major policy debacles in dealing with BIOT and its rightful former inhabitants—the 2002 feasibility study; the 2004 Orders in Council; the 2010 declaration of the Marine Protected Area; the 2016 rejection of the KPMG feasibility study; and the automatic rollover for a further 20 years of the 1966 UK/US Agreement on 30 December 2016. The Chagos Islands All-Party Parliamentary Group (APPG) had argued that a condition of rollover should be a commitment by both parties to support and facilitate resettlement. This litany of policy failures has its origins in the subterfuge of the sixties and early seventies which was due to a combination of a culture of colonial superiority and secrecy, a disregard for ethical and moral values and low public awareness. In recent years there has been a lack of political will and foresight, against a background of successive international crises, low level handling of the issues, lack of ministerial engagement, official zeal, defending past mistakes, buying time through the legal process and a constant turnover of staff and ministers. There have been 14 ministers responsible for BIOT since 1998.

14.5 Restoration of Right of Abode, 2000

From the start of the *Bancoult* litigation in 1999 the FCO acted with integrity, if tardily, towards the Chagossians and initially officials and ministers seemed committed to making resettlement possible with an on-going feasibility study. I believe that officials began the process in good faith. It was the litigation which had revived interest in the Chagossians and obliged the FCO to allow access to as yet unreleased government documents. This brought about an awareness of what had taken place and thus triggered further parliamentary and public engagement. Following the High Court judgement in *Bancoult (No. 1)*[9] in November 2000 Robin Cook, the Foreign Secretary, decided against the advice of FCO legal advisers not to appeal and restored the right to return to and reside in the 53 Outer Islands, excluding, for defence reasons Diego Garcia, some 140 miles to the south. Thus from November 2000 to June 2004 (3 years, 7 months) the Chagossians recovered their right to return although they did not have the means of exercising it, getting there, even less living there. I was by then British High Commissioner to Mauritius where a third of my time was spent dealing with the fall-out from Chagos issues, resettlement as much as sovereignty. Indeed a few days after the High Court judgment it fell to me to hold a meeting at the High Commission with representatives of the Chagos Refugees Group (CRG) and its leader Olivier Bancoult and explain the Foreign Secretary's decision and that they could return.

[9] ibid.

14.6 The 2002 Flawed Feasibility Study

It has now been shown from the documents, released during the MPA judicial review,[10] that crucial scientific aspects of the 2002 study were fundamentally flawed and that the study also reflected the views of officials who, partly out of inertia and exhaustion, had decided that because of the considerable administrative challenge that resettlement could pose it was just too difficult. This attitude stands in stark contrast to British administration of the empire that at the time of the creation of BIOT still administered some 30 colonies. Hence the 'quick win' in the shape of a tactical legal coup—the June 2004 Orders in Council, a stratagem conceived by the BIOT legal adviser as the ultimate knockout. And so it has so far proved to be, having been found lawful by a 3:2 majority in both the House of Lords in 2008[11] and the Supreme Court in 2016.[12]

14.7 The 2004 Orders Banning Return

As High Commissioner to Mauritius I became aware in April 2004 of a plan being considered in the FCO to deprive the Chagossians of their right of abode by using the Royal Prerogative. I argued strongly against this proposed stratagem on the grounds of human rights, Britain's reputation, the damage to Anglo-Mauritian relations and the likely international reaction. My views were largely ignored. I left Mauritius in November 2004 and in my valedictory despatch noted that the bilateral damage was bad enough but more serious were the international human rights and parliamentary implications which were landing the UK with costly legal processes and higher compensation. The Orders only served to crystallise demands for return to the homeland and fuel the Chagossian cause. I urged that to reduce further damage and costs a radical re-think of BIOT policy was essential.

---

[10] Lawyers for Bancoult had since 2005 requested access to correspondence and drafts of the 2002 feasibility study. The FCO claimed that these had all been destroyed. In May 2012 during the course of a judicial review into the creation of the MPA (see *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2012] EWHC 2155 (Admin), *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2012] EWHC 3281 (Admin), *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2013] EWHC 1502 (Admin) *and R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* [2014] EWCA Civ 708; [2014] 1 WLR 2921) a thick file of relevant material was disclosed by the Treasury Solicitor with no explanation. This resulted in an application to the Supreme Court during which evidence of the flawed science was submitted. The hearing took place before the Supreme Court on 28–29 June 20–17.

[11] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; [2008] 3 WLR 955.

[12] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2016] UKSC 35; [2016] 3 WLR 157.

The Orders were kept secret for 5 days after they were enacted until officials were ready to reveal them to Parliament in a Written Ministerial Statement on 15 June 2004.[13] This was a sledgehammer and unnecessary. I had argued for negotiation and diplomacy involving Mauritius but the handful of officials dealing with BIOT was persuaded that it would be the cleanest, quickest and easiest way of disposing of the problem for good. In a series of submissions the FCO minister for the Overseas Territories was brought on board and Jack Straw, the Foreign Secretary finally rubber-stamped the draft Orders before they were sent to the Privy Council for enactment. Parliamentarians protested in a Westminster Hall debate on 7 July 2004,[14] at the use of this archaic Tudor device for overturning a High Court judgment and bypassing Parliament. It was a short-sighted tactic which has led to 12 years of litigation. If officials could have foreseen the consequences they would not have proposed it. Although the idea emanated from the BIOT Legal Adviser, to their credit FCO Legal Advisers cautioned against going down this road. For them this was a political issue which was amenable to discussion and compromise and should be dealt with by diplomatic, not legal means.

14.8 Defence, Security and Cost Arguments

Defence and security were inevitably persuasive arguments against resettlement, especially in the light of the 9/11 terrorist attacks on New York on 11 September 2001. All available arguments, however flimsy, were pressed into service. In a debate[15] on the use of Privy Council Orders to exile the Chagossians, secured by Jeremy Corbyn MP on 7 July 2004, FCO Minister Bill Rammell was more transparent: 'If one is prepared to sign a blank cheque for resettlement one can repopulate'.[16] (But it was not a blank cheque). Rammell also told MPs that 'we believe that the initial resettlement costs would be of the order of £5m in start-up costs and £3m to £5m annually thereafter'.[17] This sentiment was echoed in the majority opinion of Lord Hoffmann in October 2008: 'It may not be too late to make return possible, but such an outcome is a function of economic resources and political will, not adjudication'[18] and 'Funding is the subtext of what this case is about'.[19] The FCO, however, continued to imply that the US would never allow resettlement. Here then was another myth. The US had never said publically that they were opposed to resettlement although at the behest of the FCO letters from the State Department were concocted for use in the litigation which even Lord Hoffmann described as 'fanciful

[13] HC Deb 15 June 2004, vol 422, col 32WS.

[14] HC Deb 7 July 2004, vol 423, col 272WH.

[15] ibid.

[16] HC Deb 7 July 2004, vol 423, col 292WH.

[17] ibid.

[18] *Bancoult (No. 2)* (n 11) [22] (Lord Hoffmann).

[19] ibid [55].

speculations'.[20] And the idea that a small number of Chagossians could be any more of a security threat to the base than the nearly 2500 contract workers, mostly Filipino, who work there was to put it mildly, over egging the argument.

14.9 US Position

The US had always wanted Diego Garcia free of a permanent population but even that position changed in 2015. Had they been against resettlement near the base the US would have vetoed the inclusion of Diego in the 2014/15 KPMG resettlement feasibility study. KPMG's preferred option was a pilot resettlement on Diego. In April 2016 when President Obama, on his farewell visit to the UK was asked by Prime Minister Cameron and at a later meeting by the Leader of the Opposition, Jeremy Corbyn about resettlement, he did not object. My take on the US position, which fluctuates within the Administration according to personality and the state of the Special Relationship, is that the Americans see that they were complicit in, though not responsible for, the expulsion of the Chagossians. They sit on the fence and say nothing in public though have occasionally been ventriloquised to come to the FCO's aid with letters for use in the litigation. The US will not make a statement supporting the exile of the Chagossians, nor will they make one condemning it—we are their closest ally after all. But the policy goes against their anti-colonial ethos and human rights values. Some US officials find it difficult to understand why the UK has held out for so long. The US would much rather see the UK resolve its own conscience and bring about an honourable settlement of the issues.

In February 2007 I re-entered the fray with a letter to *The Times*[21] ending with the question 'Is it not time that HMG brought together the Chagossian leaders, Mauritius and the US to sort out this relic of the Cold War and rectify one of the worst violations of fundamental human rights perpetrated by the UK in the twentieth century?'

14.10 Promulgation of the MPA and *WikiLeaks*, 2010

It was the House of Lords majority verdict in October 2008 and what at the time was assumed to be the exhaustion of the domestic legal process that led to the formation of the Chagos Islands APPG. It looked as if Chagos was moving back from the courts to Parliament where it properly belonged. But Chagos had already spawned the application to the European Court of Human Rights.[22] Also the declaration of the MPA, on the eve of the Easter recess in 2010, was to trigger a new string of liti-

[20] ibid [57].

[21] Snoxell (2007).

[22] See *Chagos Islanders v the United Kingdom* App no 35622/04 [2009] ECHR 410.

gation, revealing yet more underhand guile. The publication in December 2010 by *WikiLeaks* of cables from the US Embassy in London to Washington in 2009 showed the FCO officials responsible for BIOT as having an ulterior motive in promoting the concept of an MPA as a means of preventing resettlement. The BIOT Administrator was quoted as urging the US embassy to 'affirm that the US requires the entire BIOT for defence purposes',[23] as a way of countering the argument that 'resettlement on the Outer Islands would have no impact on Diego Garcia'. The US has never done so. However internal FCO exchanges, disclosed for the MPA litigation, showed officials as recommending to the Foreign Secretary that the MPA should be declared only after Mauritius and the Chagossians were brought on board.

The conservation and environmental arguments against resettlement were beginning to emerge in 2008 from the Chagos Conservation Trust (CCT) although at the time its Chairman pointed out that 'the proposals for a Chagos conservation framework could provide some good employment related to science and conservation'.[24] Attitudes hardened against resettlement when a powerful American environmental lobby organisation, the Pew Environment Group launched a proposal, inspired by CCT in 2009, to create a fully no-take Marine Protected Area. The campaign was based upon pseudo-scientific claims and a lack of factual information.[25] CCT and its scientific adviser, who was also conservation adviser to BIOT, played a crucial role in selling the idea to a Labour Foreign Secretary, David Miliband, who saw it as an attractive green legacy in the run up to the May 2010 general election. Following an equally flawed and rushed FCO consultation with 'stake holders', in order to meet the election deadline, OTD officials recommended to ministers the declaration of an MPA. An underlying motive appears to have been that an MPA was a useful way of 'putting paid' to resettlement and making it impossible for the Chagossians to pursue their claim. 'The UK's environment lobby is far more powerful than the Chagossians' advocates' the BIOT Commissioner was reported as telling US Embassy officials, who commented 'Establishing an MPA might indeed be the most effective long-term way to prevent the Chagossians or their descendants from resettling in BIOT'.[26]

Eight years later the creation of an MPA seems more of a symbolic political gesture than a means of strengthening conservation. It has not generated any additional legislative or practical protection and there is no scientific evidence that it has conferred any conservation benefit beyond that which already existed in law in 2007. To make matters worse it has led to a bilateral legal dispute with Mauritius which has established the rights of Mauritius to fish in Chagos waters and further

[23] 'US embassy cables: Foreign Office does not regret evicting Chagos islanders' *The Guardian* (London, 1 December 2010).

[24] Chagos Conservation Trust, Chairman's report 2008 (unpublished).

[25] See for example the analysis in Dunne et al. (2014), p. 79.

[26] See Norton-Taylor and Evans (2010) and Jones (2011).

litigation in *Bancoult (No. 3)*[27] which was heard by the Supreme Court on 28–29 June 2017. The MPA has been an ill-conceived and ill-considered policy failure, tarnishing the FCO's image yet further. During the consultation some NGOs warned FCO that this could be the result if the views of Mauritius and the Chagossians were ignored.

14.11 The 2015 KPMG Study and Rejection of Resettlement, November 2016

In the wake of the European Court of Human Rights' ruling in December 2012[28] that the Chagossian case was inadmissible the Foreign Secretary, William Hague, announced that the Government would 'take stock of our policies towards the resettlement of BIOT'. This led to an announcement by the Government in July 2013 of a new feasibility study but it took until March 2014 for KPMG to be appointed to carry out a 'feasibility study for the resettlement of BIOT'. Their report was published in February 2015. It showed that resettlement was feasible and proposed five possible scenarios. But the May 2015 general election put off consideration of it by the Government. David Cameron seems to have supported the pilot resettlement, recommended by KPMG, but Hague had resigned in July 2014 and the new Foreign Secretary was Philip Hammond. Ministers decided cautiously on a further consultation with the Chagossians on the question of how many wanted to return and under what conditions. It was a delaying tactic which added little to the KPMG findings that most Chagossians supported resettlement. Inevitably the conditions remained unclear. This served further to postpone a decision which could have been taken soon after the report was published. By then a new generation of FCO officials seemed to be in favour of a pilot resettlement. By the time the FCO consultation had reported it was getting close to the Brexit referendum, so once again a decision was put off to the next Government. Another 6 months went by and on 16 November 2016 the May Government announced[29] its decision against resettlement in a written ministerial statement. Again the Chagossians had fallen victim to the electoral timetable. Had Cameron and Hague remained in office then the decision would probably have been for a pilot resettlement on Diego Garcia.

[27] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3)* 28–29 June 2017.

[28] *Chagos Islanders v the United Kingdom* App no 35622/04 [2012] ECHR 2094.

[29] HC Deb 16 November 2016, vol 617, col 11WS; HL Deb 17 November 2016, vol 776, col 1536.

14.12 Establishment of the Chagos Islands (BIOT) All-Party Parliamentary Group (APPG) 2008

Following the House of Lords' judgment in October 2008 the late Lord Avebury asked me to help establish a Chagos Islands APPG and at its first meeting in December I was asked to be the Coordinator. The Group elected Jeremy Corbyn MP as Chairman. After becoming the Leader of the Opposition in 2015 Andrew Rosindell MP succeeded him, while Corbyn became the Honorary President. Both Corbyn and Rosindell had visited Mauritius and the Chagossians when I was High Commissioner. The Group decided that its purpose should be 'to help bring about a resolution of the issues concerning the future of the Chagos Islands and of the Chagossian people'.[30]

On 16 November 2016 the Group met collectively with the Ministers of States at the FCO, MOD and DFID for a discussion regarding the issues concerning resettlement. This discussion had, however, been pre-empted by a ministerial statement in the Commons that afternoon, rejecting resettlement. *The Guardian* had already carried a report by its diplomatic correspondent anticipating the content of the statement.[31] Not surprisingly the meeting prompted a strong statement from the Group which is attached at Annex A.

To mark Human Rights Day on 10 December 2016 *The Times* published the following letter from the Group[32]:

> UN human rights day today marks the anniversary of the 1948 universal declaration of human rights. This year's theme is 'Stand up for someone's rights today'. The government's decision last month not to allow resettlement of the Chagos Islands is a human rights travesty for Chagossians. This decision was strongly contested in debates in parliament the next day. Chagossians have campaigned to return home since the 1970s. In 2000, their right of abode was restored by the High Court but they lacked the means to return. The cruel exercise of the royal prerogative in 2004 banned them once again. The recent KPMG report has shown resettlement to be feasible, but the government has chosen not to implement it, instead offering enhanced project assistance and an apology. This cannot be a substitute for one of the most basic of human rights — to live in one's homeland. In any case the right of abode can and should be restituted.

In 2018 the Group consists of 49 members of both Houses, from all seven political parties in Westminster, the only APPG ever to have achieved complete all-party membership. Members have included five former FCO ministers who had responsibility for Chagos, a former Deputy Prime Minister and Leader of the Liberal Party, three members of the Foreign Affairs Committee, including its chairman and the chairman of the Treasury Select Committee. There were 14 Conservative, 19

[30] Register of All-Party Parliamentary Groups as at October 2016 <https://www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-all-party-party-parliamentary-groups/> accessed 3 July 2017.

[31] Wintour (2016).

[32] Corbyn (2016).

Labour, 4 SNP and 6 Lib Dem members. The others are Green Party, Plaid Cymru, DUP, and cross bench peers. To date the Group has held 67 meetings. Since 2008 the Group has tabled numerous PQs and Questions and secured several debates including two urgent debates in both Houses in 2010 following the Declaration of the MPA and in November 2016 following the ministerial statement rejecting resettlement, and five Westminster Hall debates. The Group considers all aspects of BIOT—human rights, humanitarian, defence, security, sovereignty, legal, nature conservation, environmental factors, FOI, Commonwealth, Anglo/American and Anglo-Mauritian, the UN, the AU, the EU and the European Parliament. There is a regular flow of correspondence with Ministers who have from time to time attended meetings with the Group. The APPG was re-constituted in the new Parliament in July 2017.

14.13 APPG Achievements?

So what has the Group achieved in 9 years? It has kept official feet to the fire and raised parliamentary and public awareness. It steers a middle road, based on morality, humanity, legality and common sense. It got close to a settlement in the run up to the 2010 general election when leading politicians, including William Hague and Nick Clegg, strongly supported a return of the Chagossians. William Hague wrote to a member of the public on 23 March 2010 'I can assure you that if elected to serve as the next British Government we will work to ensure a fair settlement of this long-standing dispute'. Four months into the Coalition Government the Business Secretary, Vince Cable, wrote to a constituent on 9 September 2010 'The Foreign Secretary William Hague is also committed to a fair settlement of this long standing dispute. Steps have already been taken to ensure their return. The Coalition Government is dropping the case in ECHR, opting instead for a friendly settlement'. Within a few days Cable retracted the statement in a further letter to the constituent. Following the formation of the Coalition Government in May 2010 officials had steadily eroded the pre-election Conservative and Lib-Dem commitment to justice for the Chagossians.

One achievement, a result of APPG lobbying, was the KPMG feasibility study. From its inception the Group had advocated the need for a new feasibility study to re-visit the findings of the 2002 study. This was finally conceded by the Foreign Secretary, William Hague in 2013 but it took well over a year to get off the ground. The APPG has been persistent in analysing the fluctuating arguments deployed by FCO against resettlement and in exposing inconsistency. The FCO's arguments have over time included cost, infeasibility, defence, security, treaty obligations to the US, child safeguarding, climate change, erosion, rising sea levels and conservation. The tide in Chagos affairs ebbs and flows, according to personalities and other pressures, at times getting close to a decision in favour of resettlement but then turning. Sometimes officials are opposed while ministers are in favour; at other times the roles are reversed.

I see the APPG as having a broader appreciation and historical perspective of the UK's wider interests and international reputation concerning Chagos, than does the FCO, constrained as it has been by bureaucracy and oblivion of past mistakes. Officialdom often suffers from long term memory loss and then repeats the mistakes and mantras of the past. Even short term memory goes back only for as long as officials have been in their jobs, usually 2–3 years. So inherited myths and mantra become accepted wisdom and are served up in response to debates, PQs and letters. It is made worse by the revolving door of staff and ministers and an almost reckless determination that regardless of the cost (probably around £6 million when staff costs in FCO and other departments are included) litigation must be pursued to the bitter end, rather than as the European Court of Human Rights and the APPG have urged, out of court settlements.

14.14 Supreme Court Judgment, June 2016

It is noticeable that the 16 November decision ignored the strictures of the Supreme Court's judgment of 29 June 2016.[33] The judges described the FCO conduct in not disclosing important documents relating to the flawed 2002 feasibility study as 'highly regrettable' (Lord Mance), 'reprehensible' (Lord Kerr) and 'deeply unfair' (Lady Hale). They said that in the light of the KPMG study maintaining the ban on Chagossian return may no longer be lawful and that if the Government failed to restore the right of abode it would be open to the Chagossians to mount a new challenge by way of judicial review on the grounds of irrationality, unreasonableness and/or disproportionality. That judicial review is now underway. The Mauritian Prime Minister reacted forcefully to the 16 November 2016 ministerial statement, 'a manifest breach of international law which outrageously flouts their human rights' and 'no amount of money and no public apology by the UK Government can make lawful what is unlawful. Mauritius fully supports their relentless struggle to remove all obstacles to the full enjoyment of their human rights'.[34]

14.15 Looking for a Compromise

In the face of the Government's rejection of resettlement the APPG 'resolved to continue the struggle until a pilot resettlement is achieved and Chagossians can exercise their right to determine their own future'. But it will continue to look for ways of finding a compromise acceptable to both the Chagossians and the Government. One such compromise would be the restoration of the right of abode.

[33] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2016] UKSC 35.

[34] Communiqué issued by the Prime Minister's Office, Port Louis, 17 November 2016.

The then Foreign Secretary, Robin Cook, had restored the right of abode following the High Court judgment in *Bancoult (No. 1)*,[35] while excluding Diego Garcia. So between November 2000 and the Orders in Council of June 2004, which once again banned the Chagossians from entering BIOT, the right of abode was operative and could have been exercised had there been available transport to and facilities in the Outer Islands. As Lord Bingham (the Senior Law Lord) put it in his 2008 dissenting judgment 'It cannot be doubted that the right (of abode) was of intangible value, and the smaller its practical value the less reason to take it away'.[36] There is nothing to stop the FCO restoring the right of abode even though the ban on resettlement remains. It would demonstrate that the Government is serious about wanting to meet the aspirations of the Chagossian people and also show goodwill towards them and respect for fundamental human rights. Although restoring the right of abode could raise expectations, it would cost the FCO nothing while redressing its damaged human rights record and reputation. But the Government is likely to fall back on the ever convenient argument that it always deploys that it cannot do so until the current litigation has run its course. This could be some years away.

The APPG also decided that until this or a future government was willing to try out a pilot resettlement, as recommended by KPMG, the Group should identify incremental ways of strengthening the bonds between the Chagossians and their homeland. They considered the scope for compromise in the face of the Government's rejection of resettlement. Employment on the base as contract workers, without their families, was not a substitute. Rather Chagossians could live and work on the islands in a variety of capacities such as MPA management, undertaking conservation, monitoring of marine and bird life and environmental changes, services to scientific expeditions, staffing a scientific station and leisure activities for base personnel. This could, for example, be running boat trips, snorkelling, diving, fishing, guided walks, sports, making handicrafts for sale. Also there was work concerning the history and heritage of the Islanders such as establishing and staffing a heritage centre/museum, restoring ruins and clearing graveyards. In time this could develop into a local tourism industry for the 3000 or so staff on the base, some of whom might like to work with Chagossians in a voluntary capacity. Members felt that would appeal at least to the 41 British personnel stationed there. The Group considered that this would make an ideal programme for the £40 million 'assistance package' over the next decade and commended these suggestions to Chagossians, the MOD, FCO and DIFID. The Group Chairman sent a list of potential employment roles for Chagossians willing to work on the islands, including Diego Garcia, in a temporary capacity, to the FCO minister for consideration. At its meeting on 26 April 2017 the Group issued a statement (Annex B) on prospects for resettlement and ways of strengthening the bonds between the Chagossians and their homeland.

[35] *Bancoult (No. 1)* (n 8).

[36] *Bancoult (No. 2)* (n 11) [72] (Lord Bingham).

14.16 Arbitral Tribunal Award to Mauritius 2015 and UK/ Mauritius Talks

While proclaiming the sanctity of international law the FCO tends to be economical with its duty of candour[37] to the courts, cherry pick and split hairs where it conflicts with its entrenched policies. Just because the UN General Assembly (UNGA) passes a resolution or an international tribunal finds the UK in breach of international law does not mean that the FCO will change its policy. The Arbitral Tribunal Award on 19 March 2015,[38] concerning the MPA is a case in point. It found that the undertaking given in 1965 by the UK to cede sovereignty to Mauritius once BIOT was no longer needed for defence purposes was binding in international law and that in declaring the MPA the UK failed to give due regard to the rights of Mauritius and that the UK had breached its obligations under the UNCLOS Convention. The Tribunal also upheld Mauritius' rights to fish in Chagos waters and to the benefit of any mineral or oil discovered. It ruled that Mauritius had an 'interest in significant decisions that bear upon the possible use of the Archipelago' but by a 3:2 majority it decided that it did not have jurisdiction to consider sovereignty. The FCO has remained in public denial, interpreting the findings minimally. It seems to be asserting that as the UK courts have not said that the MPA was unlawful, international law does not apply. The half-hearted and minimalist offer to Mauritius to discuss joint management in environment and scientific study of the Outer Islands comes nowhere near what Mauritius has consistently asked for since 2000—discussions about the future of BIOT to include sovereignty and now the MPA.

Although the UK's standard right of reply in the UN used to state 'We remain open to discussions regarding arrangements governing BIOT and the future of the Territory', the UK has in fact strung Mauritius along since the last century. In March 2002, at the Commonwealth Heads of Government Meeting (CHOGM) in Coolum, Australia, the Mauritian Prime Minister Sir Anerood Jugnauth was due to meet Tony Blair to discuss Chagos. This meeting had been loudly heralded in the Mauritian press but just before the meeting the UK side cancelled on the grounds that Blair had to deal with urgent matters, making Jugnauth feel slighted and looking rather uncomfortable on his return to Mauritius, confronted as he was by a challenging press and Parliament. The same happened when Prime Minister Berenger

[37] Treasury Solicitor's Department, 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings', January 2010: 'A public authority's duty must not be to win the litigation at all costs but to assist the court in reaching the correct result and thereby to improve standards in public administration.' 'It is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of cards will start in the authority's hands.' 'As a civil servant you must act in accordance with the core values of the Civil Service: integrity, honesty, objectivity and impartiality.' <http://webarchive.nationalarchives.gov.uk/20130704203515/http:/www.tsol.gov.uk/Publications/Guidance_on_Discharging_the_Duty_of_Candour.pdf> accessed 3 July 2017.

[38] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (2015) Permanent Court of Arbitration <https://www.pcacases.com/web/view/11> accessed 3 July 2017.

flew to London in early July 2004 to see Don McKinnon, Commonwealth Secretary General, to discuss Mauritius leaving the Commonwealth in the wake of the Orders in Council banning the return of Chagossians and the UK's refusal to discuss sovereignty. After the meeting McKinnon put out a statement strongly supporting the Mauritian position. A meeting with Blair was in the offing but the door of Number Ten remained firmly shut. Prime Minister Berenger was instead offered a telephone call with junior FCO minister Bill Rammell, which he did not take up. Commonwealth Prime Ministers usually meet their opposite numbers. Mauritius subsequently withdrew the threat to leave the Commonwealth and also postponed tabling a resolution at the September 2004 UNGA, pending discussions with the UK.

In March 2004 Berenger summoned me to tell me of the advice from the late Sir Ian Brownlie QC that to take its case to the International Court of Justice (ICJ) Mauritius might have to leave the Commonwealth. The Mauritian government had evaluated the options of seeking an international legal determination of its sovereignty claim, either by adjudication before the ICJ, or of less effect, by way of an ICJ Advisory Opinion for which it would be necessary to obtain a UNGA resolution. Pursuing the first option Berenger let it be known publically following the June Orders in Council, that by seceding from the Commonwealth, Mauritius would avoid the block on Commonwealth members litigating each other in the ICJ. But in a fast legal move the FCO amended the UK's submission to the jurisdiction of the ICJ by excluding disputes with 'former' Commonwealth members. In any case ICJ jurisdiction being consensual the Court could not consider the case from Mauritius without the consent of the UK.

Five years later at CHOGM in November 2009 the next Mauritian Prime minister Dr Ramgoolam met Gordon Brown for the first prime ministerial meeting since 1994. Dr Ramgoolam said that Brown had agreed to put the proposed MPA on the back burner. After the formation of the Coalition government Ramgoolam had an encouraging meeting in London with William Hague on 4 June 2010 at which Hague indicated that he was reviewing all aspects of policy towards Chagos. On 20 December 2010 Mauritius initiated proceedings against the UK under UNCLOS to challenge the legality of the MPA. On 8 June 2012 Dr Ramgoolam had a meeting with David Cameron at Number Ten Downing Street. On return to Mauritius he told Parliament that it was agreed that talks would be held on the future use of Chagos but this was later denied by the FCO. The meeting achieved nothing tangible.

14.17 Mauritian Decision to Take the Sovereignty Issue to the ICJ for an Advisory Opinion

In 2015, emboldened by the Arbitral Tribunal Award, the new Prime Minister, Sir Anerood Jugnauth, now in his sixth term of office, decided to pursue Brownlie's second option—an UNGA resolution seeking an ICJ Advisory Opinion. This was a course of action that previous prime ministers had considered but not pursued, in the

hope that negotiation with the UK would lead to a compromise on sovereignty, but HMG continued to duck the issue. An exchange of correspondence between the two prime ministers in the summer of 2015 about a possible 'constructive engagement' led to bilateral talks in November 2015 in London and in May 2016 in Port Louis but no progress was made. In July 2016 Sir Anerood announced that he would seek a UNGA resolution unless agreement was reached with the UK concerning a date for a handover of the Archipelago to Mauritius and on the joint management of Chagos pending its return to Mauritius. He also confirmed that Mauritius had no objection to the continued use of Diego Garcia by the US as a military base. Mauritius duly drafted a resolution for consideration at the UNGA. Following a meeting in New York in September 2016 between Sir Anerood and the new Foreign Secretary, Boris Johnson, Mauritius agreed to hold off tabling the draft resolution until further discussions between the UK and Mauritius could be arranged, with a deadline of June 2017. Three rounds of talks took place between November and March 2017 without any communiqué or apparent result.

The unexpected announcement in late April 2017 that there would be a UK general election on 8 June made further delay inevitable. So 13 years after it had served notice that it would take the matter to the UN and ICJ the Government of Mauritius lost patience and on 31 May informed the President of the General Assembly that it wanted its draft resolution considered by the current UNGA. The last time the issue had come before the UNGA was on 16 December 1965, soon after the creation of BIOT on 8 November, when it adopted Resolution 2066 (Question of Mauritius). That resolution had invited 'the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity'.

On 22 June 2017 a plenary session of the UN General Assembly in New York considered the Mauritian resolution which was co-sponsored by the Group of African States and six South American states. 174 member states were present of which some 25 spoke in the debate. The resolution[39] was carried by 94 in favour, 15 against and 65 abstentions. Only two permanent members of the Security Council (UK, US) and one non-permanent member (Japan), 4 EU members (Bulgaria, Croatia, Hungary and Lithuania), Australia, New Zealand and six others voted against the resolution. To gain the support of only 14 members of the 193 UN member states was a crushing defeat for the UK and sent a clear message that the UN expects the UK to bring this relic of the Cold War to an end. It was a brilliant outcome for Mauritius and the Chagossians whose leader Olivier Bancoult was a member of the Mauritian delegation. The resolution specifically drew attention to 'the forcible removal by the UK of all the inhabitants of the Chagos Archipelago' and asked the ICJ to consider the consequences under international law 'with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals in particular those of Chagossian origin'. The

[39] *Resolution A/RES71/292 adopted by the General Assembly on 22 June* 2017 *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1975. 71*st *session, agenda item 87.*

arguments of both sides are set out in the UK statement by Matthew Rycroft,[40] Sir Anerood Jugnauth's statement, the Mauritian Explanatory Memorandum of July 2016 and in its aide memoire of May 2017.[41] Analysis of these documents and the debate will be the starting point for the next chapter in the Chagos saga. There was widespread media coverage of which Owen Bowcott's report[42] in *The Guardian* of 22 June provides a balanced example.

The ICJ is the 'World's Court' on important issues of international law. It is the principal judicial organ of the UN and arbiter of international law. Although advisory opinions are not legally binding, the findings contained in them carry great legal and moral authority. It is the UN Secretary General who conveys the request of UNGA to the Registrar of the Court. The ICJ then invites written submissions from the relevant states and international organisations. It may thereafter hold an oral hearing. Unless an urgent consideration is requested it can take up to 2 years for the Court to deliver an Opinion and there can be dissenting opinions. The ICJ does not require the consent of any state to provide an advisory opinion, nor can a state prevent an advisory opinion being given. The Court can only address a legal question, not the political motives and implications of a request.

14.18 Litigation and Politics Go Hand in Hand

The UK was one of the main architects of the international legal system and remains a strident champion of international law, though not always when the UK is found in breach. It is hard to think of another British example of a wholesale denial of fundamental human rights which is still on-going and unresolved. Recent governments have acknowledged that what happened to the Chagossians was wrong, and the Courts have condemned this 'callous disregard'[43] and the treatment of the Chagossians.

Neither litigation nor politics alone can achieve a resolution of the issues. Chagos is a case where both the courts and the political process need to be engaged in parallel, though fully conscious of each other. When there is an absence of political initiative and imagination, litigation can redress the political deficit. Political will and leadership, courage and determination to grasp this nettle have been in short supply. There have been opportunities to change course arising in part from the litigation in

[40] See M Rycroft's speech Gov.UK <https://www.gov.uk/government/speeches/questions-on-the-british-indian-ocean-territory> accessed 3 July 2017. I have described the speech as a patchwork of spin, omission, economy with the truth and a misrepresentation of the historical background to the excision of the Archipelago in 1965. I have responded to the speech in a point-to-point rebuttal in *Weekly*. See Snoxell (2017a, b, c).

[41] Republic of Mauritius, Aide Memoire, Item 87 of the Agenda of the 71st Session of the UN General Assembly, May 2017.

[42] Bowcott (2017).

[43] *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61, [10].

2000, 2008, 2015 (KPMG study) and in 2016. There will still be further opportunities—an Advisory Opinion of the ICJ, and the forthcoming judicial review of the government's decision not to allow resettlement. One authority asserts that 'negotiation often take place in the shadow of the law'.[44] Often it does though I argue that political negotiation should have scant need of the law. It is only when officials and politicians fail to agree a compromise that the parties resort to the law. Thanks to the current political impasse legal experts are provided with a gold mine of litigation, conferences and learned publications of which this book is a good example.

Britain's foreign policy remains essentially pragmatic, asserting British interests as perceived by the FCO. Hopefully a future government will heed the United Nations, their parliamentary colleagues and public opinion, bring an end to the Chagos tragedy and restore the UK's reputation for respect for human rights and international law. In 2007 the Foreign Affairs Committee considered Chagos and concluded that there was 'a strong moral case for the UK permitting and supporting resettlement'.[45] Ministers would do well to recall what William Hague said in 2010 'It is not in our character as a nation to have a foreign policy without a conscience; neither is it in our interests'.[46] Parliamentary, domestic and international pressure, including litigation is bound to continue until a just and fair settlement emerges.

14.19 Appreciations

In conclusion I should like to commend the determination of the lawyers acting for the Chagossians, in particular Richard Gifford, Olivier Bancoult's Solicitor and Richard Dunne, sometimes in the face of seeming defeat, to press on when they could so easily have given up. Eventually their efforts will succeed, leaving important landmarks in the legal, constitutional and human rights history of this country. I should also like to pay tribute to the Parliamentarians who over decades have striven to bring justice to the Chagossians, in particular the late Tam Dalyell MP, Jeremy Corbyn MP, Lord Luce, a former FCO Minister, and the late Lord Avebury who as Vice Chairman of the APPG was relentless in exposing myths and deceptions in letters to ministers and in debates. And not least the members of the APPG, too numerous to name. They have done much to hold successive governments to account over the treatment of the Chagos Islanders and will continue to do so.

[44] Echandi (2013), p. 275.

[45] Foreign Affairs Committee, *Seventh Report, Overseas Territories, Response of the Secretary of State for Foreign and Commonwealth Affairs* (Cm 7473, 2007-08) para 14.3 and Foreign Affairs Committee, *Overseas Territories, Seventh Report* (HC 2007-08 147-I), para 3.

[46] Hague (2010).

Annex A: Statement by the Chagos Islands (BIOT) APPG on 16 November 2016

The APPG was established in 2008 and has 51 members representing all ten political parties in Parliament. The Group held its 58th meeting on 16 November and considered the written ministerial statement issued 2 h earlier, concerning the Government's decision not to allow the Chagossians to resettle in their homeland. Three ministers of state from the FCO (Baroness Anelay), Defence (Earl Howe) and Department of International Development (Lord Bates) had several weeks earlier been invited for a discussion on the issues regarding resettlement. Members were shocked to discover that this discussion had been pre-empted by the written statement. The Government had been telling Parliament that a decision on resettlement would not be announced until the end of the year. The reason for announcing it on 16 November could only be to close off discussion of the issues. This looked like a fait accompli. Members also expressed indignation that the decision had been leaked to the Guardian the day before it was made available to Parliament.

Members expressed much disappointment at this decision. They felt it had ignored the arguments put by the Group and experts over the years concerning viability, sustainability, cost, funding, defence and security, international human rights obligations and the views of the Courts which since 2000 had deplored the treatment of the Chagossians. They did not accept the Government's premise that feasibility, defence and security interests and cost were sufficient grounds for not agreeing to a pilot resettlement, recommended by the KPMG feasibility study. The written statement lacked any reasoned argument as to why resettlement could not be implemented.

Members appealed to ministers to think again on the basis of other studies, the KPMG report and further discussions with the Group. They were well aware that the US was not opposed to resettlement and that any security concerns were easily manageable. Given that, with the agreement of the US, the KPMG consultants had visited Diego Garcia and that this island was their preferred option it was not logical to deploy defence and security as a reason against resettlement.

The APPG felt that the costs and style of resettlement had been significantly exaggerated and that in any case the Overseas Territories were a first call on the Aid Programme. The British tax payer would not fund the entire cost as the ministerial statement had implied. The US, who do not pay rent for the base would no doubt contribute. The Group took the view that the continuing damage to the UK's reputation for the promotion of human rights far outweighed the cost and difficulties of trying out a resettlement.

The Group questioned whether the Government had properly considered the Supreme Court conclusions that in the light of the KPMG study maintaining the ban on Chagossian return may no longer be lawful, and that if the Government failed to restore the right of abode it would be open to Chagossians to mount a new challenge by way of judicial review. They noted that the ministerial statement had not referred to the right of abode which should be restored whether or not resettlement was

allowed. Some Chagossians would only wish to visit their homeland and should be able to do so whenever they wanted.

Members questioned if it was really in the tax payers' interest to prolong litigation for several more years. 17 years of expensive litigation, amounting to several million pounds, not to mention the cost of Whitehall staff and resources, could have gone towards the cost of resettlement. They also thought that it was not in the national interest for the international and national campaigns in support of the Chagossians, to continue with increasing opprobrium and negative publicity for the UK. This undermined the UK's human rights record and the British sense of fair play. Why should Chagossians, who are British, be treated any differently from other British nationals of Overseas Territories? Members noted that on 24 October, UN Day, Baroness Anelay had referred to the UK's "unwavering commitment to human rights".

The Group also felt that the £40 million of project money that was being offered to the Chagossians would be better spent on funding resettlement. This was nearly twice the capital cost of resettlement estimated in 2008 by Dr John Howell, former Director of the Overseas Development Institute. But it was for Chagossians to decide. The Group would wait to hear their reactions before supporting anything less than a pilot resettlement.

Annex B: Statement on 26 April 2017 by the Chagos Islands (BIOT) APPG on Prospects for Resettlement and Ways of Strengthening the Bonds Between the Chagossians and Their Homeland

The Chagos Islands (BIOT) All-Party Parliamentary Group was established in December 2008 to help bring about a resolution of the issues concerning the future of the Chagossian people and the Chagos Islands. On 26 April, at its 62nd and final meeting of this Parliament, the Group considered the prospects for the Chagossian people.

On 16 November 2016 the Government rejected resettlement and announced a 10 year £40 million package (to include visits to the Islands) for Chagossian communities where ever they are established. In Mauritius the offer is interpreted as an incentive to Chagossians to remain in exile. The Chagos Refugees Group has therefore said it will not participate in the organised visit being planned by the FCO for later this year because it will be funded from the package which it rejects. After 5 months little or no progress appears to have been made on agreeing and spending the package. In the face of the Government's rejection of resettlement the APPG resolved to continue the struggle until a pilot resettlement is achieved and Chagossians can exercise their right to determine their own future. But it would continue to look for ways of finding a compromise acceptable to both the Chagossians and the Government.

One such compromise was the restoration of the right of abode. Foreign Secretary Robin Cook had restored the right of abode following the High Court judgment of November 2000, while excluding Diego Garcia. So between November 2000 and the Orders in Council of June 2004, which once again banned the Chagossians from entering BIOT, the right of abode was operative and could have been exercised had there been available transport to and facilities in the Outer Islands. As Lord Bingham (presiding Law Lord) put it in his 2008 judgment "It cannot be doubted that the right (of abode) was of intangible value, and the smaller its practical value the less reason to take it away". There is nothing to stop the FCO restoring the right of abode as distinct from the right of resettlement. It would demonstrate that the Government is serious about wanting to meet the aspirations of the Chagossian people and also its goodwill towards them and respect for fundamental human rights. It would cost the FCO nothing while redressing its damaged human rights record and reputation. The APPG urges the Government not to let the ongoing litigation be an excuse for not restoring the right of abode on moral, ethical and political grounds.

In December the APPG decided that until a future government was willing to support a pilot resettlement, as recommended by KPMG, the Group should identify incremental ways of strengthening the bonds between the Chagossians and their homeland. They considered the scope for compromise in the face of the Government's rejection of resettlement. Employment on the base as contract workers, without their families, was not a substitute. Rather Chagossians could live and work in the islands in a variety of capacities such as MPA management, undertaking conservation, monitoring of marine and bird life and environmental changes, services to scientific expeditions, staffing a scientific station and leisure activities for base personnel. This could, for example, be running boat trips, snorkelling, diving, fishing, guided walks, sports, making handicrafts for sale. Also there was work concerning the history and heritage of the Islanders, such as establishing and staffing a heritage centre/museum, restoring ruins and clearing graveyards. In time this could develop into a local tourism industry for the 4000 staff on the base, some of whom might like to work with Chagossians in a voluntary capacity. Members felt that this would appeal at least to the 41 British personnel stationed there. The Group considered that it would make an ideal programme for the £40 million assistance package over the next decade and commended these suggestions to Chagossians, FCO, MOD and DFID.

The APPG will be re-established after the election and continue to promote its aim of enabling the Chagossians to return to their homeland. It expresses the hope that in their manifestos the political parties will support justice for the Chagossians and that the next Government will give priority to bringing an end to their 50 year exile.

References

Aust A (1968) Legal aspects of BIOT immigration. In: Folio 2 file FCO 32/490. National Archives, London

Aust A (1970) Immigration legislation for BIOT. In: Folio 6 file FCO 32/725. National Archives, London

Bowcott O (2017) UN vote backing Chagos Islands a blow for UK. The Guardian, 22 June. https://www.theguardian.com/world/2017/jun/22/un-vote-backing-chagos-islands-a-blow-for-uk. Accessed 7 Jan 2018

Chagos Islanders v the United Kingdom App no 35622/04 [2009] ECHR 410

Chagos Islanders v the United Kingdom App no 35622/04 [2012] ECHR 2094

Chagos Marine Protected Area Arbitration (2015) (Mauritius v United Kingdom) Permanent Court of Arbitration. https://www.pcacases.com/web/view/11. Accessed 3 July 2017

Corbyn J (and 32 further signatories) (2016) Justice for Chagos. *The Times*, London, 10 December 2016

Dunne RP, Polunin NV, Sand PH, Johnson ML (2014) The creation of the Chagos marine protected area: a fisheries perspective. Adv Mar Biol 69:79

Echandi R (2013) A novel approach towards addressing investor-state conflicts: development of investor-state dispute prevention mechanisms. In: Echandi R, Sauve P (eds) Prospects in International Investment Law and Policy. Cambridge University Press, p 275

Editorial (1975) The Diego Garcians. *Washington Post,* Washington, 11 September 1975

Foreign Affairs Committee (2007) Seventh Report. Overseas Territories, Response of the Secretary of State for Foreign and Commonwealth Affairs. Cm 7473

Hague W (2010) Foreign Secretary speech on Britain's values in a networked world, 1 July 2010. https://www.gov.uk/government/news/foreign-secretary-speech-on-britains-values-in-a-networked-world. Accessed 3 July 2017

Hewitt M (1980) Vencatassen and the Ilois. In: Folio 119 file FCO 31/2770. National Archives, London

Jones S (2011) Banished Chagos islanders insist: we are not at point of no return. The Guardian, 19 May. https://www.theguardian.com/environment/2011/may/19/chagos-islands-resettlement-campaign. Accessed 3 July 2017

Norton-Taylor R, Evans R (2010) WikiLeaks Cables: Mauritius sues UK for control of the Chagos islands. The Guardian, 21 December. https://www.theguardian.com/world/2010/dec/21/mauritius-uk-chagos-islands. Accessed 3 July 2017

Ottaway D (1975) Islanders were evicted for US base. Washington Post, Washington, 9 September 1975

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61; [2008] 3 WLR 955

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2016] UKSC 35; [2016] 3 WLR 157

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2012] EWHC 3281 (Admin)

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2013] EWHC 1502 (Admin)

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 3) [2014] EWCA Civ 708; [2014] 1 WLR 2921

R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3) [2012] EWHC 2155 (Admin)

Snoxell D (2007) Letter 'Justice for the Chagos Islands'. *The Times,* London, 12 February 2007

Snoxell D (2009) Anglo/American complicity in the removal of the inhabitants of the Chagos Islands, 1964–73. J Imp Commonw Hist 37:127–134

Snoxell D (2017a) A rebuttal of the UK's case (Part I). *Weekly*, 29 June 2017

Snoxell D (2017b) A rebuttal of the UK's case (Part II). *Weekly*, 6 July 2017

Snoxell D (2017c) A rebuttal of the UK's case (Part III). *Weekly*, 13 July 2017
United Nations General Assembly Resolution A/RES71/292 adopted by the General Assembly on 22 June 2017
Wintour P (2016) Chagos Islanders denied right to return home. The Guardian, 16 November. https://www.theguardian.com/world/2016/nov/16/chagos-islanders-denied-right-to-return-home. Accessed 5 Jan 2017