

The Chagos Islands cases: the empire strikes back

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Abstract

Good governance requires the accommodation of multiple interests in the cause of decision-making. However, undue regard for particular sectional interests can take its toll upon public faith in government administration. Historically, broad conceptions of the good of the commonwealth were employed to outweigh the interests of groups that resisted colonisation. In the decision-making of the British Empire, the standard approach for justifying the marginalisation of the interests of colonised groups was that they were uncivilised and that particular hardships were the price to be paid for bringing to them the imperial dividend of industrial society. It is widely assumed that with the dismantling of the British Empire, such impulses and their accompanying jurisprudence became a thing of the past. Even as decolonisation proceeded apace after the Second World War, however, the UK maintained control of strategically important islands with a view towards sustaining its global role. In an infamous example from this twilight period of empire, in the 1960s imperial interests were used to justify the expulsion of the Chagos islanders from the British Indian Ocean Territory (BIOT). Into the twenty-first century, this forced elision of the UK's interests with the imperial 'common good' continues to take centre stage in courtroom battles over the islanders' rights, being cited before domestic and international tribunals in order to maintain the Chagossians' exclusion from their homeland. This article considers the new jurisprudence of imperialism which has emerged in a string of decisions which have continued to marginalise the Chagossians' interests.

Keywords: Chagos Islands; enforced removal; imperialism; national security; human rights; WikiLeaks

Introduction: from old to new imperialism

From the 1970s onwards the debate over colonialism has been winding down. Once the major elements of the European empires had been broken up, the UN Committee of 24 on decolonisation,¹ in the 1960s one of the mainstays of the UN's institutional apparatus, became a backwater of international relations. Attention turned to manifestations of neo-imperialism, from disadvantageous trade deals foisted on newly

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1 Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples, established in 1961 to implement UN General Assembly Resolution 1514 (XV) (14 December 1960).

independent countries to bouts of military adventurism under the auspices of the Cold War and, subsequently, neo-conservatism.

The remnants of the British Empire, and with them traditional imperial paradigms, nonetheless continue to influence UK policy-making and jurisprudence. From the earliest days of empire the Privy Council heard appeals from cases arising in the colonies, with the function of ensuring that law as promulgated in the colonies was not 'repugnant to the laws of England'.² The courts of England and Wales were also often prepared to stretch their jurisdiction to ensure, in the words of Lord Mansfield, that a colonial subject 'has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell'.³ By such claims, the London courts held themselves out as a refuge for victims of colonial misrule when colonial courts often administered 'only a very weak dilution of English law'.⁴ But just as Richard Cobden fretted in the 1860s that UK politics 'may become corrupted'⁵ through the backwash of practices expedient in the colonies, so too could these cases enmesh the domestic courts in the imperial project.

This article critically analyses the Chagos Islands cases as exemplifying the dilemmas the domestic courts face in maintaining legal principles in the face of the demands of an imperial project. When Michel Foucault considered constitutional law, he saw governance arrangements as remainders of past conflicts between factions within society, with the challenge being to find 'the blood which has dried in the legal codes'.⁶ The Chagos cases are so significant precisely because they confront the courts not with dried blood but a still-open wound and have required judges to consider imperial jurisprudence not as a relic but as a living area of law. As such, we read these cases as fitting into, rather than striking out afresh from, this imperial record. In common with the Pitcairn Island litigation⁷ and cases on act of state doctrine,⁸ the Chagos cases have required judges to 'confront'⁹ the fissure between long-established imperial doctrines and twenty-first-century public law principles.¹⁰

The impact of imperial jurisprudence has been marginalised by competing accounts of the split House of Lords decision in *Bancoult (No 2)*,¹¹ the centrepiece of the Chagos litigation. The Law Lords upheld a 2004 Order in Council issued by the UK government which prevented the Chagossians from returning to their homeland. The majority reasoned that because the Chagos Islands were part of a conquered/ceded colony, they were subject to the prerogative powers of the Crown, which included a power to prevent resettlement. Cautioning against confusing 'history with adjudication',¹² Mark Elliot and Amanda Perreau-Saussine foreground the constitutional principles at play in the case: '*Bancoult* is a

2 For an example of this oversight, see *Ashbury v Ellis* [1893] AC 339, 341 (Lord Hobhouse).

3 *Mostyn v Fabrigas* (1775) 1 Cowp 161, 171.

4 *The Times*, 8 December 1891, 9. See *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529, [65] (Lord Hoffmann).

5 J Morley, *The Life of Richard Cobden* (Chapman & Hall 1879) vol II, 361.

6 M Foucault, *Il faut défendre la société: Cours au Collège de France (1975–1976)* (Seuil/Gallimard 1997) 48.

7 See *Christian v The Queen* [2006] UKPC 47; [2007] 2 WLR 120, [33] (Lord Woolf).

8 See *Al Jeddah v Secretary of State for Defence* [2010] EWCA Civ 758; [2011] 2 WLR 225.

9 A Perreau-Saussine, 'British Acts of State in English Courts' (2007) 78 *British Yearbook of International Law* 176, 243.

10 See S Farran, 'Prerogative Rights, Human Rights and Island People: The Pitcairn and Chagos Island Cases' [2007] *Public Law* 414, 418.

11 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453.

12 M Elliott and A Perreau-Saussine, 'Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common Law Limitations on Prerogative Power' [2009] *Public Law* 697, 701–02.

pyrrhic victory for those who regard executive power as constrained by the rule of law'.¹³ T T Arvind, in turn, regards the majority judgments as being packaged in a formalist manner but driven by inherently pragmatic concerns.¹⁴ He supports this claim by tracing broad trends in contemporary appellate judgments which define and restrict the scope of judicial authority over the state and public bodies.¹⁵ Read alongside cases like *Gillan*¹⁶ and *Austin*,¹⁷ Arvind sees the House of Lords in *Bancoult (No 2)* as being 'disinclined 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'.¹⁸ Arvind does acknowledge that there are recent cases, like *HM Treasury v Ahmed*,¹⁹ where the UK's apex court has placed limits upon executive action,²⁰ but considers that the overall narrative permits 'islands of principled rules . . . [to] survive in a sea of pragmatic standards'.²¹

Such accounts locate *Bancoult* within modern public law concerns. Whilst these insights are undoubtedly important, we consider that the Chagos litigation must be understood in the context of broader jurisprudence on the management of the empire. The expulsion of the Chagos islanders following the establishment of the BIOT as a defence colony does not of itself, we should note from the outset, differentiate the UK from the contemporary practices of other major colonial powers.²² Despite their developed conceptions of freedom and justice, a succession of Western legal orders became despotic when exported through waves of imperial expansion between the eighteenth and twentieth centuries.²³ Many small island colonies were treated as having particular defence significance in the aftermath of the Second World War, including the nuclear weapon testing by the USA at Bikini Atoll and by France at Moruroa Atoll. The former instance involved expulsions of the population of affected islands which were broadly comparable to the UK's treatment of the Chagossians.²⁴

Using the British Empire as a foil we explain *how* colonial projects came to be justified and maintained through the self-same legal orders employed in the colonising states. We reassess the Chagos litigation in light of the mass of new documentation released to the National Archives in 2012. These documents tell the story of the Chagos Islands from the viewpoint of the islands' administrators, as distinct from the previously published Whitehall records. As such, these records allow us to re-examine both the strategic significance of the islands that underpins the 50-year partnership between the UK and the USA and the

13 Ibid 717.

14 T T Arvind, "'Though it Shocks One Very Much': Formalism and Pragmatism in the Zong and Bancoult' (2012) 32 Oxford Journal of Legal Studies 113, 146.

15 Arvind notes that Lord Hoffmann identified this trend in recent judgments in his extra-judicial writings; L Hoffmann, 'The COMBAR Lecture 2001: Separation of Powers' (2002) Judicial Review 137, 137.

16 R (*Gillan*) v Metropolitan Police Commissioner [2006] UKHL 12; (2006) 2 AC 307.

17 *Austin v Commissioner of Police for the Metropolis* [2009] UKHL 5; (2009) 1 AC 564.

18 Arvind (n 14) 145.

19 *HM Treasury v Ahmed* [2010] UKSC 2; (2010) 2 AC 534.

20 Arvind (n 14) 145–6.

21 Ibid 146, citing R Posner, *Law, Pragmatism and Democracy* (Harvard University Press 2003) 61–71.

22 For instance, Belgian colonialism in the Congo (via Joseph Conrad) led to Francis Ford Coppola's musings on American Imperialism in his 1979 film, *Apocalypse Now*. See J Conrad, *Heart of Darkness and Other Stories* (Wordsworth Classics 1995). Likewise, German colonialism, and colonial oppression, in south-west Africa has been recently documented by scholars. See G Krüger, 'Coming to Terms with the Past' (2005) 37 GHI Bulletin 45 and C Erichsen and D Olusoga, *The Kaiser's Holocaust: Germany's Forgotten Genocide and the Colonial Roots of Nazism* (Faber & Faber 2011).

23 P Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 107.

24 See J Niedenthal, *For the Good of Mankind: A History of the People of Bikini and their Islands* (2nd edn Bravo 2013).

approach to the common good in an imperial context which animated UK policy towards the Chagos Islands and the Chagossians.²⁵ We show that the imperial common good is riven by competing theoretical justifications for empire: one, based in liberal imperialism, emphasises the civilising nature of empire and focuses on the good governance of colonies; the other, based in a utilitarian imperialism, instead focuses on how to best appropriate colonial possessions for the benefit of the imperial power. In this context it is hardly surprising that ‘confusion about the relationship between imperial and local good (and imperial and colonial law) continues to pervade judicial and scholarly discussion’.²⁶ At every turn, the Chagossians’ efforts to protect their interests by judicial review have confronted the UK government with this imperial legacy and the competing justifications for that legacy. This legacy cannot ultimately be wished away, and it showcases the continued significance of empire within public law and even under the European Convention on Human Rights (ECHR).²⁷

The UK–USA partnership and the BIOT’s creation

The ambition amongst many of the ‘empire builders’ who brought the British Empire towards the zenith of its power had been to ‘unite the settler colonies into an integrated and enduring global polity’.²⁸ Half a century after Queen Victoria’s death, however, burgeoning independence movements, the financial burdens of two world wars and international pressure for decolonisation had stifled such ambitions. But even as decolonisation gathered pace in the 1950s, a Cold-War vision of imperial retrenchment held sway over UK policymakers. As Prime Minister Harold Macmillan told Foreign Secretary Selwyn Lloyd in 1959, ‘we only need our Gibaltars’.²⁹ In other words, expensive commitments over whole swathes of territory which could not be maintained could be substituted for control of strategic outposts; unsinkable aircraft carriers enabling the UK to continue to project power in regions far removed from its shores. At this juncture in the Cold War control of strategically important islands came to be regarded as more important than direct control of extensive colonial possessions. This was because their value for global power projection was not offset by the need to manage extensive hinterlands or the self-determination demands of sizeable populations.

Even as this policy was being articulated, however, it was already becoming beyond the UK’s means. The UK’s pretensions of ‘great power’ status had been hobbled by the Suez Crisis, which highlighted its inability to act on the global stage without the sanction of the USA. The USA, by contrast, enjoyed both the capacity to militarise islands ‘east of Suez’ and, in the Cold-War context, was increasingly eager to dominate the Indian Ocean ‘by controlling every available piece of territory, or at least by denying their use to the Soviet Union and China’.³⁰ The USA and UK began the coordinated evaluation of the UK’s island

25 Legal action over colonial-era atrocities in Kenya brought to light a store of archival material on colonies, including the BIOT, which had not been released to the UK National Archives (UKNA); see *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), [48]–[54]. In May 2011 the Foreign Secretary informed Parliament that this material was being prepared for public release; W Hague, HC Deb 5 May 2011, vol 527, col 24WS. The files, subsequently transferred in April 2012 (under the code FCO 141), enable a fresh analysis of executive action during the formation of the BIOT and the Chagossians’ expulsion.

26 R Ekins, ‘Constitutional Principle in the Laws of the Commonwealth’ in J Keown and R P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 396, 404.

27 European Convention on Human Rights and Fundamental Freedoms, 213 UNTS 222 (1953).

28 D Bell, ‘From Ancient to Modern in Victorian Imperial Thought’ (2006) 49 *Historical Journal* 735, 738.

29 A Horne, *Macmillan, 1957–1986* (Macmillan 1989) vol II, 691.

30 D Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press 2009) 60.

colonies for potential sites for a strategic hub in the Indian Ocean. Amongst these sites were the Chagos islands, hitherto administered from Mauritius. Located in the centre of the Indian Ocean the Chagos archipelago provided a potential staging post for operations in Africa, the Middle East, the Indian sub-continent and Australasia. Diego Garcia, the largest of the Chagos islands, was central to the UK–USA bilateral agreement concluded in 1966.³¹ This agreement provided that the UK would procure the land and the USA would finance, construct and operate the planned defence facilities. The UK's outlay was compensated by a secret \$14m mark-down on the Polaris missile technology shared by the USA, which enabled the UK to maintain its nuclear deterrent.³² The official line was that the USA had made no direct payments to the UK but had 'shared certain costs in setting up BIOT'.³³ The stakes were raised by the Soviet Union's gradual build-up of assets in the Indian Ocean from March 1968, including its placing of mooring buoys for a cluster of auxiliary ships – a 'floating base' – in international waters near the Chagos archipelago.³⁴

Before ground could be broken on the new base, however, the UK would have to navigate a series of late-colonial problems (in the midst of the reorganisations which would see the Colonial Office rebranded as the Commonwealth Office in 1966 and merged with the Foreign Office by 1968). The first of these problems was how to repackage the UK's Indian Ocean colonies in the face of the rapid movement of Mauritius and the Seychelles towards independence. Colonies had previously been carved up or parcelled off on the basis of imperial interests, with scant regard for the affected populace.³⁵ When parliamentary questions were asked about whether the Heligoland population had consented to the island's transfer to Germany as part of a colony-swap deal in the 1890s, the Leader of the House of Commons responded with equanimity that the government did not believe that the islanders would be 'dissatisfied with the change'.³⁶ Just as the opposition charged that Heligoland and its population were being treated as 'mere objects of barter',³⁷ the formation of the BIOT was regarded as one element of an 'inter-state' arrangement with the prospective leaders of the soon-to-be independent colonies. In November 1965 the most promising sites were severed from their parent colonies, the Seychelles and Mauritius, to form the BIOT.³⁸ In return the Seychelles gained a new civil airport, which

31 Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America Concerning the Availability for Defense Purposes of the British Indian Ocean Territory (30 December 1966) Cmnd 3231; 603 UNTS 273.

32 See UKNA, FCO 141/1428, A B Urwick (FCO) to J C Moberley (UK Embassy, Washington DC) (24 June 1970).

33 UKNA, FCO 141/1411, M Stewart (UK Foreign Secretary) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (1 December 1969). Even the opaque claim that the USA 'made some adjustments in other fields which are more favourable to UK than would otherwise have been the case' was deemed to touch too closely upon the Polaris arrangement; UKNA, FCO 141/1411, M Stewart (UK Foreign Secretary) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (26 November 1969).

34 See V B Bandjunis, *Diego Garcia: Creation of the Indian Ocean Base* (Universe 2001) 97.

35 See S Allen, *The Chagos Islands and International Law* (Hart 2014) 120.

36 W H Smith, HC Deb 19 June 1890, vol 345, col 1369.

37 F Channing, HC Deb 28 July 1890, vol 347, col 1079.

38 BIOT Order SI 1965/1920, passed under the Colonial Boundaries Act 1895, s 1(1). See S A De Smith, 'Mauritius: Constitutionalism in a Plural Society' (1968) 31 *Modern Law Review* 601, 609.

would open in 1972, to further its ambitions as a holiday destination.³⁹ Mauritius received direct payment of £3m in February 1966.⁴⁰

International opinion presented more of a problem. Earlier efforts to repackage colonies had not faced the attention of the UN. The dismemberment of these Indian Ocean colonies to permit the creation of 'foreign bases' had attracted considerable criticism at the UN from its earliest phases,⁴¹ including a UN General Assembly Resolution asserting that, prior to granting Mauritius independence, the UK should 'take no action which would . . . violate its territorial integrity'.⁴² Diego Garcia's part in the scheme was presented as hosting an 'austere communications facility' in order to deflect criticisms that the Indian Ocean was being militarised.⁴³

Acquiring copra plantations in the Chagos archipelago proved to be the least complicated element of the plan to implement. Almost all of the land was owned by the Chagos Agalega Company. Its plantations were secured by the UK government in a single transaction under the authority of the BIOT Order in Council⁴⁴ and leased back to the former owners whilst preparations for establishing defence facilities continued.⁴⁵ The USA, however, had been chastened by previous agreements with the UK over military bases. In 1940, the USA had exchanged 50 obsolete destroyers for a slew of bases in the Atlantic and Caribbean, in what had at the time seemed like a favourable deal. Less than a decade later, however, almost all of these facilities were gone. As they gained their independence 'countries like Trinidad and Tobago evicted the United States from bases in their territories'.⁴⁶ The US government was determined not to repeat this experience and made the 1966 Agreement conditional upon the requirement that the entire colony be free of population.⁴⁷ Excluding the population would serve the threefold purposes of ensuring base security, preventing oversight of the BIOT by the UN Committee on Decolonisation and negating the possibility that an independence movement would once again cost the USA its investment.⁴⁸

UK officials were initially confident of their ability to fulfil this aspect of the agreement. Much of the population was assessed to be made up of migrant Mauritian and Seychellois copra plantation workers, who could be returned to their home islands once

39 Many UK officials believed that the £5.5m Seychelles airport was a white elephant, with one declaring that no 'blue-haired American widow' would regard the Seychelles as an attractive holiday destination. UKNA, FCO 141/1424, Sir Arthur Galsworthy Memorandum (26 October 1967) para 2.

40 As confirmation that they had struck a hard bargain, the UK government could point to the walkout of Parti Mauricien ministers from the Mauritius self-government over the inadequacy of this compensation. See De Smith (n 38) 609.

41 Ibid 611.

42 GA Res 2066 (XX Session) (16 December 1965) (89 votes to 0 (18 abstentions)). See also, for UK notes on later resolutions condemning dismemberment and militarisation, UKNA, FCO 141/1428, B L Barder (UK Mission to the UN), 'Committee of 24: Mauritius, Seychelles, St Helena' (8 August 1967).

43 For early discussion of the base in these terms, see UKNA, CO 1036/1343, Colonial Secretary (Anthony Greenwood) to Governors of Mauritius and the Seychelles (19 July 1965) para 10. For its part, the US military needed to play a long game, securing congressional approval and then steadily expanding commitments. See Vine (n 30) 96–8, 120–2.

44 BIOT Order 1965 SI 1965/1920, s 3.

45 See UKNA, FCO 141/1458, Seychelles Supreme Court Registry, 'Distribution of Sale Price of the Chagos Archipelago' (6 May 1967).

46 Vine (n 30) 59.

47 See UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 1: General Background' (March 1969) para 8.

48 Vine (n 30) 78–9.

the plantations were closed. Amongst these workers, however, lived the islands' permanent residents, the Chagossians.⁴⁹ Known to colonial administrators as the Ilois, some of these islanders could 'trace their roots on the islands back for two centuries'.⁵⁰ The Chagossians' numbers could well be downplayed, but acknowledging their very existence triggered the long-standing principle that, in administering any part of the British Empire, 'a colonial government cannot in any ordinary cases direct transportation . . . [to] a particular place outside their jurisdiction'.⁵¹ The Colonial Office's institutional memory, however, provided precedents, as recent as 1945, for circumventing this principle in the context of island populations.⁵² Such exclusions had not drawn international attention⁵³ and officials initially maintained that 'if it becomes necessary to transfer the whole population there will be no problem'.⁵⁴ London assured the Seychelles administration that 'only Diego Garcia is likely to be taken over at once for defence purposes' and that this meant that the outer islands (especially Peros Banhos) could absorb the displaced population.⁵⁵ The blithe assertion of one senior Foreign Office official that '[u]nfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc',⁵⁶ to this day casts the department 'in a light which does it no credit'.⁵⁷

The world of the mid-1960s, however, was far removed from the confusion of the immediate post-war period. The UN Charter began to generate considerable official concern. The distinct nature of the Chagos community, separated from Mauritius by 800 miles of ocean, brought into play the 'sacred trust' Article 73 of the Charter imposed on colonial authorities regarding the treatment of indigenous non-self-governing peoples. With the islands already on the UN's radar, the concern grew within the now-reorganised Foreign and Commonwealth Office (FCO) that the expulsion of the Chagossians 'may well attract considerable attention'.⁵⁸ Officials prevaricated, hoping that base security was the US government's main concern and that the Americans 'will not raise any objection to the

49 Population returns for the islands show considerable fluctuation in population between 800 and 1100 in the 1960s, in line not only with the hiring of a migrant element within the plantation workforce, but also with the movement of many Chagossians to Mauritius and the Seychelles to visit family or access services (especially medical services unavailable on the islands). See UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 3: The Problem of the People Living in the Chagos Archipelago' (April 1969) paras 10 and 13.

50 G Robertson, 'Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean' (2012) 36 *University of Western Australia Law Review* 1, 3.

51 W Craies, 'Compulsion of Subjects to Leave the Realm' [1890] 6 *Law Quarterly Review* 388, 407.

52 The Banabans, for example, were not permitted to return to their phosphate-rich island home following their brutal relocation at the hands of Japanese forces during the Second World War. The island was subsequently mined out. See *Tito v Waddell* [1977] Ch 106 and J McAdam, 'Historical Cross-Border Relocations in the Pacific: Lessons for Planned Relocations in the Context of Climate Change' (2014) 49 *Journal of Pacific History* 301.

53 See K Roberts-Wray, 'Human Rights in the Commonwealth' [1968] *International and Comparative Law Quarterly* 908, 913–14.

54 UKNA, FCO 141/1422, R Newton, 'Survey Report' (23 September 1964) para 26.

55 UKNA, FCO 141/1406, Colonial Office to G P Lloyd (Colonial Secretary, Seychelles) (18 May 1965) para 4.

56 UKNA, FO 371/190790, D A Greenhill (Foreign Office Deputy Under-Secretary) to P Gore-Booth (Foreign Office Permanent Under-Secretary) (24 August 1966).

57 *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB) [A74] (Ouseley J).

58 UKNA, FCO 141/1428, A S Papadopoulos (FCO), 'Briefing Note: BIOT and the Committee of 24' (28 August 1970) para 2.

relocation of people from Diego Garcia in Peros Banhos'.⁵⁹ With delays in congressional approval for base funding and a temporary waning in the US interest in Diego Garcia at the height of the Vietnam War, the islands remained populated long after the creation of the BIOT in 1965 and for more than five years after Mauritian independence in March 1968, ultimately enabling the islanders to claim UK citizenship through the BIOT.⁶⁰ In this period the US government raised 'no objection' to continued settlement in the outer islands.⁶¹ At this crucial juncture the archival record becomes somewhat muddled. The generally accepted account is that the Nixon administration, on the basis of Article 73 concerns, reasserted the demand that the entire archipelago be cleared before work on the base would commence.⁶² Seemingly faced with the risk of the scheme collapsing, the colonial authorities implemented a depopulation plan on the basis that all remaining islanders were migrant labourers and that the Chagossians, even if islanders for many generations, were 'mostly Mauritian in origin'.⁶³

But perhaps this account does the UK too much credit. After all, Whitehall officials had advised from the outset that the Chagossians' very existence as a distinct people would have 'to be ducked if possible'.⁶⁴ Moreover, the Diego Garcia Agreement itself speaks only of restricting access of non-military personnel to Diego Garcia and its lagoon,⁶⁵ and not the remaining islands, something which accords with the large number of yachts which moor annually at the outer islands.⁶⁶ In August 1977 UK government legal advisers noted that the reasons behind the 1969 decision to clear the islands 'were financial and administrative although potentially Anglo-US defence needs underlay them'.⁶⁷ US 'demands' might well have been a useful canard, enabling the UK government to explain the expulsions to its own reluctant colonial administrators and subsequently to the courts.

The isolation of the islands aided the authorities in the expulsions. After slavery was abolished throughout the colony of Mauritius in 1835, the Chagossians became and

59 UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 1: General Background' (March 1969) para 12. Officials on the ground continued to labour under this misapprehension as late as 1971; see UKNA, FCO 141/1355, B Greatbach (Governor of the Seychelles and BIOT Commissioner), Hand-written Note (29 January 1971).

60 See R Gifford, 'The Chagos Islands: The Land where Human Rights Hardly Happen' [2004] *Law, Social Justice and Global Development Journal* 1, 7. UK officials acknowledged that the Chagossians had citizenship of the UK and colonies during the evictions; UKNA, FCO 141/1355, P Carter (UK High Commissioner in Mauritius) to E J Emory (FCO) (13 January 1971) para 2.

61 UKNA, FCO 141/1416, G Oplinger (US Embassy, London) to R Johnstone (FCO Defence (Policy) Department) (22 November 1968) para 1.

62 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to A B Urwick (Defence Department, FCO) (2 November 1970) para 6.

63 UKNA, FCO 141/1421, R C Arnold (Acting BIOT Administrator) to B Greatbach (Governor of the Seychelles and BIOT Commissioner) (2 April 1969) para 2.

64 *Chagos Islanders v Attorney General* (n 57) [A44] (Ouseley J). See UKNA, FCO 141/1415, Lord Longford (Colonial Secretary) to H Norman-Walker (Governor of the Seychelles and BIOT Commissioner) (25 February 1966) para 3.

65 Exchange of Notes Constituting an Agreement Supplementing the Above-Mentioned Agreement, Concerning a United States Naval Support Facility on Diego Garcia, British Indian Ocean Territory and Replacing the Supplementary Agreement of 24 October 1972 (with annexed plan) (25 February 1976) 1018 UNTS 372, para 4.

66 Vine (n 30) 15.

67 UKNA, FCO 31/2193, J D P Bickford (FCO Legal Adviser) to G E Gammie (Treasury Solicitors' Department) (4 August 1977) para 6.

remained serfs.⁶⁸ When the UK government purchased the copra plantations in 1967 the islanders remained contract labourers with no property interests beyond mere licences. Treating the expulsion of the entire population as an up-scaled property issue, the islanders' lack of formal land holdings allowed the UK government to assert that 'no-one has any right to reside permanently on the islands'.⁶⁹ Responding to questions about the islands' population with the assertion that every person on the islands was a contract labourer was, as FCO officials recognised at the time, a textbook exercise in legalism; 'it does not give away the existence of the Ilois but is at the same time strictly factual'.⁷⁰ A twentieth-century audience, alien to the near-feudal arrangement of the Chagos copra plantations, simply accepted that some contract labourers could be not separated out from the migrant labour employed on the plantations as 'belongers' on the islands.

Under the cover of this semantic umbrella, from the late 1960s administrators had attempted to gradually reduce the islands' population by preventing individuals and families who left the islands for Mauritius or the Seychelles from returning, rather than enforcing evictions. Many families and individuals were separated or stranded during this protracted running down of the islands, with Olivier Bancoult and his family being amongst those prevented from returning after they travelled to Mauritius because of a medical emergency.⁷¹ The last of the Chagossians were not expelled from Diego Garcia until October 1971, months after construction teams from the US military had started work on the island. Several hundred inhabitants would remain on the outer Chagos islands until May 1973.⁷² Some islanders were transferred to the copra plantations on Agalega. The majority were deposited on Mauritius at the end of a six-day voyage, the ultimate logic of the fiction that they were, after all, Mauritian citizens. At the time, however, even liberal UK newspapers did little to dispute these arrangements, with *The Observer* merely expressing the hope that 'some money will be devoted to resettling the thousand or so inhabitants'.⁷³

Meanwhile, on Diego Garcia, by the spring of 1973 barracks and a 2500m runway had been completed, to be followed a year later by a pool hall and bowling alley as facilities rapidly expanded.⁷⁴ The USA, with its 50-year renewable agreement secured, quickly abandoned the pretence that Naval Support Facility Diego Garcia would be a 'modest' outpost which 'will in no way constitute a base'.⁷⁵ The island became 'a naval "prepositioning" port and "bomber forward operating location" subsequently used for all US missions against Iraq and Afghanistan',⁷⁶ cementing the USA's strategic position in the

68 In the words of one particularly patronising briefing, the Chagossians were 'simple islanders, not versed in the obscure problems of their national status'; UKNA, FCO 141/1416, FCO Pacific & Indian Ocean Department, 'BIOT Working Paper 3: The Problem of the People Living in the Chagos Archipelago' (April 1969) para 22.

69 UKNA, FCO 141/1415, J R Todd (BIOT Administrator) to G Thomson (Secretary of State for Commonwealth Affairs) (4 June 1968).

70 UKNA, FCO 141/1428, A S Papadopoulos, 'Briefing Note: BIOT and the Committee of 24' (28 August 1970) para 3.

71 *Chagos Islanders v Attorney General* (n 57) [A130] (Ouseley J).

72 See UKNA, FCO 141/1418, J R Todd (BIOT Administrator) to S G Hinton (FCO) (14 April 1973). For one of the most thorough narrative histories of the expulsion process, see the following judgment, and its accompanying appendix: *Chagos Islanders v Attorney General* (n 57) [29]–[49] (Ouseley J).

73 'Somewhere East of Suez' *The Observer*, 22 November 1970.

74 See UKNA, FCO 141/1360, Diego Garcia Construction Schedule 1971–1974.

75 See UKNA, FCO 141/1355, A Douglas Home, Foreign Office Circular: Diego Garcia (14 January 1971) para 2.

76 P Sands, 'Diego Garcia: British–American Legal Black Hole in the Indian Ocean?' (2009) 21 *Journal of Environmental Law* 113, 114.

Indian Ocean. In the aftermath of the 9/11 attacks, it would be used as a hub for extraordinary rendition flights.⁷⁷ The UK's sovereignty over the BIOT accorded it few privileges on Diego Garcia,⁷⁸ but successive governments would continue to manage the fall-out amongst its imperial subjects. Following the end of the relocations, the Chagossians undertook a decade-long struggle to get access to meaningful compensation.⁷⁹ The Crown paid out £4m in compensation on the basis that the recipients renounced all claims for return to the Chagos Islands.⁸⁰ Moreover, despite officials recognising that the Chagossians were entitled to UK citizenship at the time of the expulsions,⁸¹ the islanders were not informed of their ability to apply for passports and general citizenship claims were not recognised until 2002.⁸²

The management of colonies for the imperial good

Colonialism involves an assertion of dominance, both of the metropolis over the colony and the settler over the native. This much was evident to Cicero when he considered republican Rome's control over Marseilles: '[e]ven though our clients the people of Marseilles are ruled with the greatest justice by chosen leading citizens, that condition of the people still involves a form of slavery'.⁸³ The effect of this power imbalance, simultaneously underpinning and undermining imperial relationships, is often magnified by an empire's need to accommodate budgetary and security concerns.⁸⁴ These tensions are prominent in the UK's treatment of the Chagossians. Before we examine the courtroom battles over the Chagossians' treatment, we must therefore account for the conflicting narratives of empire to which those cases would give expression. This conflict centres on a liberal ideal of good order and governance of a colony, civilisation coming through the application of a higher (European) legal order, and a utilitarian principle of governance that ensured a colony's resources could be exploited for the benefit of the empire at large. The irony remains that the Chagossians were expelled as part of a wider policy driven by anti-imperialism and cost-saving.⁸⁵ Within five years of the start of construction at Diego Garcia, UK bases in the Maldives, Singapore and Malaysia all closed.⁸⁶ The Wilson and Heath governments were all too aware that the USA was ultimately assuming the cost of

77 See *Bancoult (No 2)* (n 11) [35] (Lord Hoffmann).

78 With UK rights over the territory limited to consultation, the first Royal Navy representative at the base found that the extent of UK sovereignty ran to disputing whether the layout of buoyage in the lagoon should be in accordance with UK or US standards. See UKNA, FCO 141/1360, Lt-Cdr J Canter (RN) to J R Todd (BIOT Administrator) (21 March 1972).

79 The full story of the Chagossians' fight for compensation, spearheaded by the Vencatassen claim issued in 1975 and resolved in 1982, is beyond the scope of this article. See Allen (n 35) 11–12.

80 See *Chagos Islanders v Attorney General* (n 57) [490]–[491] (Ouseley J).

81 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to E J Emery (Pacific and Indian Ocean Department, FCO) (13 January 1971) para 2.

82 British Overseas Territory Act 2002, s 6. See *Chagos Islanders v Attorney General* (n 57) [448] (Ouseley J).

83 M T Cicero, *On the Commonwealth and On the Laws* J E G Zetzel (ed) (CUP 1999) 19.

84 In the aftermath of the First World War, as the British Empire was expanding in the Middle East, the then Foreign Secretary Arthur Balfour noted caustically that for all the talk of 'advantage to the natives [and] advantage to our prestige . . . money and men I have never seen referred to, and they seem to me to be the governing considerations'. British Library, India Office Records, Curzon Papers (Mss Eur F112/274), Eastern Committee Minutes 43 (16 December 1918).

85 See J Pickering, 'Politics and "Black Tuesday": Shifting Power in the Cabinet and the Decision to Withdraw from East of Suez, November 1967–January 1968' (2002) 38 *20th Century British History* 144.

86 See P H Pham, *Ending East of Suez: The British Decision to Withdraw from Malaysia and Singapore, 1964–1968* (OUP 2010).

maintaining the West's strategic interests in the Indian Ocean and could therefore afford to push its own 'demands, desires and whims' with regard to the islanders.⁸⁷

The division between natural and political societies in Thomas Hobbes' *Leviathan*⁸⁸ looms large in justifications for the British Empire. Hobbes's state of nature is one in which people are guided by their emotions, preventing effective government by normative structures.⁸⁹ Within the state of nature conflict develops between individuals over scant resources. Individuals are free to attack one another for their own safety or a sense of glory,⁹⁰ producing conditions of perpetual war 'of every man, against every man'.⁹¹ The state of nature is not completely lawless. Natural laws enable individuals to 'plant, sow, build or possess a convenient seat'.⁹² But these natural laws do not provide for effective covenanting, mutual restraint and personal protection.⁹³ For Hobbes, the state of nature is something that needs to be overcome if an orderly society is to be established. Inhabitants of the state of nature can do so by covenanting amongst themselves to create a Leviathan.⁹⁴ Hobbes' Leviathan amounts to a supreme sovereign which has the power to declare war and make peace as it sees fit and to respond to crises in any way it deems necessary. Public safety must be achieved through promulgating laws and establishing institutions which exist for the good of the people.⁹⁵ The *salus populi*, or security of the general populous, is thus the primary concern of government in a political society.⁹⁶

Leviathan established a bipolar opposition between two societal orders; the lower order of the state of nature and the higher order of political state.⁹⁷ This divide metamorphosed into a point of division between the 'civilised' and 'uncivilised' worlds which would sustain imperial thought into the twentieth century.⁹⁸ John Austin identified natural society in the 'savage societies which subsist by hunting or fishing in the woods or on the coasts of New Holland'⁹⁹ and in the peoples which 'range in the forests or plains of the North American continent'.¹⁰⁰ His contemporary Joseph Chitty endowed the Crown with the qualities and duties of the sovereign Leviathan; 'The Queen has an interest in all her subjects, who rightly

87 Robertson (n 50) 18.

88 T Hobbes, *Leviathan* R Tuck (ed) (CUP 2004) ch 17.

89 N C Lazar, 'Must Exceptionalism Prove the Rule?' (2006) 34 *Politics and Society* 245, 259.

90 Hobbes (n 88) 87–8.

91 Ibid 87–8.

92 Ibid 86.

93 P Fitzpatrick, *Modernism and the Grounds of Law* (Routledge 2001) 94.

94 Hobbes (n 88) chs 15 and 18. This is the basis for critiques of the theory of social contracts. See S Veitch, 'Doing Justice to Particulars' in E Christodoulidis (ed), *Communitarianism and Citizenship* (Ashgate 1998) 220, 226. See also D Hume, *Essays Moral, Political and Literary* (Liberty Classics 1987) 471, 474.

95 Hobbes (n 88) 240.

96 See R Ullman, 'Redefining Security' (1983) 8 *International Security* 129, 130.

97 See D Kishik, *The Power of Life: Agamben and the Coming Politics* (Stanford University Press 2012) 24. See also C Shore, 'Inventing the "People's Europe": Critical Approaches to European Community "Cultural Policy"' (1993) 28 *Man* 779, 782.

98 More subtle distinctions came to overlay Hobbes' dichotomy, whilst reinforcing its basic premise. Henry Maine, for example, distinguished 'primitive law' from the state of nature but maintained that '[t]he rigidity of primitive law . . . has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form'; H Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (John Murray 1861) 77.

99 J Austin, *The Province of Jurisprudence Determined, 2nd edn and Lectures on Jurisprudence* (John Murray 1861) 179. See also, vol II, 258.

100 Ibid vol I, 184.

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.¹⁰¹

Nineteenth-century liberal defences of the British Empire's 'civilising mission' developed from this dichotomy.¹⁰² Until the nineteenth century, liberal thought in the UK was predominantly anti-imperialist. Adam Smith was of the view that trade with a far-flung empire meant higher profits for the few, whilst undermining the UK's overall competitive position in trade with other foreign countries.¹⁰³ Both Jeremy Bentham and James Mill regarded the UK's colonies as a major cause of wars with other European powers and a political liability.¹⁰⁴ John Stuart Mill, however, considered that maintaining an empire served the UK's economic and political interests.¹⁰⁵ To soften the centrality of trade and profit motive to the British Empire he also recast the empire as a historically distinctive development.

The younger Mill's view of the nineteenth-century British Empire was necessarily nuanced. The empire was, after all, composed of settler colonies and non-settler dependencies across the Americas, Asia, Africa, Oceania and Europe. Different colonies were governed under different models depending upon their perceived civilisation and the governance arrangements which the imperial authorities had inherited.¹⁰⁶ Mill favoured home rule for colonies that had majority European populations, such as Canada, Australia and New Zealand.¹⁰⁷ For as long as the peoples of Asia and Africa remained unable to govern themselves, however, Mill considered that they would have to remain subject to the benevolent despotism of colonial administrators.¹⁰⁸ The empire's 'civilising mission' was to govern 'uncivilised' peoples and bring improvement to their lives:

It is already a common, and is rapidly tending to become the universal, condition of the more backward populations, to be either held in direct subjugation by the more advanced, or to be under their complete political ascendancy; there are in this age . . . few more important problems, than how to organise this rule, so as to make it a good instead of an evil to the subject people.¹⁰⁹

Because they were steeped in the ethos of an advanced political society, the colonial officials dispatched from London to administer conquered or ceded colonies could therefore know and represent the natives better than they could themselves.¹¹⁰ Their duty to forge

101 J Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (Butterworth 1820) 18, 21.

102 See K Mantena, *Alibis for Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press 2010) 22–30.

103 See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* E Cannan (ed) (University of California Press 1976) vol II, 122–3 and 130–2.

104 See J Bentham, 'Emancipate your Colonies' in J Bowring (ed), *The Works of Jeremy Bentham* (Russell & Russell 1962) vol IV and J Mill, 'Colony' in *Essays on Government, Jurisprudence, Liberty of the Press and Law of Nations* (Innes 1828) 32. See also Bell (n 28) 755.

105 E P Sullivan, 'Liberalism and Imperialism: J S Mill's Defense of the British Empire' (1983) 44 *Journal of the History of Ideas* 599, 605.

106 *Ibid* 605–06.

107 J S Mill, 'Lord Durham's Return' (1838) 32 *Westminster Review* 254.

108 J S Mill, 'Considerations on Representative Government' in *On Liberty and Other Essays*, J Gray (ed) (OUP 1998) 260. Contemporary international law theorists sustained these imperialistic attitudes; see M Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2004) 98–104.

109 *Ibid* 454. In this regard, Mill followed in the footsteps of his father, who had justified the maintenance of the UK's colonial possessions in India to enable the barbarous natives to achieve a higher stage of civilisation; see J S Mill, *The History of British India* (Baldwin, Cradock & Joy 1817) vol I, 'Preface'.

110 See Bell (n 28) 758.

civilisation and order out of disorder required the importation of the home political society's institutional infrastructure.¹¹¹ Administrators confidently usurped existing legal cultures with familiar rules and processes: 'Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.'¹¹² The New Zealand Constitution Act 1852, for example, gave New Zealand's legislature the power 'to make Laws for the Peace, Order, and good Government of New Zealand, provided that no such Laws be repugnant to the Laws of England'.¹¹³ This formula embedded the 'fundamental principles' of the UK's ancient constitution in the governance arrangements of self-governing colonies,¹¹⁴ without the need for London's approval for new colonial enactments.¹¹⁵ Leading liberal imperialists considered the terms of the repugnancy clause to be 'sacramental words'¹¹⁶ which tied the administration of the whole empire to its underlying 'civilising mission'. Self-governing colonial administrations, however, bridled that this 'vague doctrine' was a recipe for judicial challenges to the validity of their enactments.¹¹⁷ The Colonial Laws Validity Act 1865 abandoned the traditional formula,¹¹⁸ declaring that for the provisions of colonial law to be void for repugnancy it would have to run contrary to an imperial statute which extended to the colony.¹¹⁹ Orders in Council making law for a territory would also have to conform to such overarching statutes.¹²⁰

The London courts were often prepared to set aside even this truncated oversight function in the interests of imperial expediency, developing a broadly utilitarian jurisprudence. In *Nyali Ltd v Attorney General*,¹²¹ for example, the London courts refused to accept a challenge to an exemption for bridge tolls for military traffic in 1950s colonial Kenya. Denning LJ insisted that '[o]nce jurisdiction is exercised by the Crown the courts will not permit it to be challenged'.¹²² Despite the banal subject matter of the case, the dispute took place against the backdrop of the Mau Mau rebellion. Without mentioning the rising, the London courts were signalling their disinclination to entertain challenges to abuses of power by the authorities in Kenya.¹²³ The London courts also developed firewalls within imperial jurisprudence, such as the theory of multiple Crowns, to restrict the ability of colonial subjects to challenge actions taken by colonial authorities as actions of the UK government. In rejecting a legal action against the UK government by the Banabans over their relocation from Ocean Island in 1945, Megarry V-C maintained that 'the government of the United Kingdom was not the government of the Gilbert and Ellice Islands Colony

111 See J Roach, 'James Fitzjames Stephen (1829–94)' (1956) 88(1–2) *Journal of the Royal Asiatic Society* 1, 6. For an explanation of how the BIOT Courts Ordinance 1983 usurped forgoing private law arrangements on the BIOT, see *Bancoult (No 2)* (HL) (n 11) [154] (Lord Mance).

112 J F Stephen, quoted in E Stokes, *The English Utilitarians and India* (OUP 1959) 302.

113 New Zealand Constitution Act 1852 (15 & 16 Vict c 72), s 53.

114 *Campbell v Hall* (1774) 1 Cowp 204, 209 (Lord Mansfield).

115 W Gladstone HC Deb 21 May 1852, vol 121, col 958.

116 J Morgan, 'Legal and Political Unity of the Empire' [1914] 30 *Law Quarterly Review* 393, 397.

117 *Liyanga v The Queen* (1967) 1 AC 259 (PC), 284, quoting with approval K C Wheare, *The Statute of Westminster and Dominion Status* (4th edn OUP 1949) 75–7.

118 Colonial Laws Validity Act 1865, s 3 (28 & 29 Vict c 63).

119 *Ibid* s 2. The ethos of the reform is summed up in the words of one colonial secretary; it was 'more important to a country to be self-governed than well-governed'; L Harcourt, HC Deb 12 February 1914, vol 58, col 370.

120 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2006] EWHC 1038 (Admin); [2006] ACD 81 at [143] (Hooper LJ). See I Hendry and S Dickson, *British Overseas Territories Law* (Hart 2011) 69.

121 *Nyali Ltd v Attorney General* (1956) 1 QB 1 (CA) and [1957] AC 253 (HL).

122 *Ibid* (CA) 15.

123 For an alternate reading of the decision, see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2007] 3 WLR 768; [2007] EWCA Civ 498, [39] (Sedley LJ).

at any material time'.¹²⁴ This approach to dividing the Crown would be further extended to the legislation of the Crown in Council in *Quark Fishing*.¹²⁵

Liberal imperialism can therefore be seen vying with utilitarian conceptions of efficient colonial administration, and the demands of colonial self-governance, to inform the direction of imperial governance. Many leading nineteenth-century liberal imperialists were also avowedly utilitarian in their outlook, an inconsistency only revealed when these doctrines came into conflict. Both approaches can be traced to Hobbes' binary distinction between natural and political societies. Utilitarianism's prioritisation of the common good was enthusiastically incorporated into a model of imperial administration whereby colonies could justifiably be used to serve the ends of the imperial whole (directed by the UK's needs as the 'hub' political society). Parliamentarians appreciated that defence powers to 'raise fleets and armies and build forts' were exercised by the Crown 'for the government of the British empire as one body'.¹²⁶ Adam Smith maintained that colonies could justifiably be required to contribute to imperial defence: 'public debt has been contracted in the defence, not of Great Britain alone, but of all the different provinces of the empire'.¹²⁷ Thus in the early twentieth century the Earl of Cromer defended the benefits which the UK derived from its subject colonies:

An Imperial Power naturally expects to derive some benefits for itself from its Imperialism. There can be no doubt as to the quarter to which the Romans looked for their profit. They exacted heavy tributes from their dependencies . . . England has regarded trade with India, and not tribute from India, as the financial asset which counterbalances the burden of governing the country.¹²⁸

Despite these protestations of the centrality of trade to the British Empire, colonial possessions were, and are still, *prima facie* expected to contribute to the imperial whole. The UK government's denial, in the early 1990s, that it had any 'selfish strategic or economic interest' in Northern Ireland was significant precisely because it set this region apart from this imperial norm.¹²⁹ When the imperial order and security were at issue, Victorian imperialists broadly accepted 'that the empire could not everywhere and all the time be governed by recourse only to civilian legal norms'.¹³⁰ Amidst uprisings against imperial rule in the latter half of the nineteenth century, liberal imperialism, for all of its rhetorical force, began to lose ground to the rival accounts of empire, including the 'scientific' accounts of racial superiority unleashed by social Darwinism.¹³¹

In summary, colonial administrators under London's direction considered themselves better placed than the Chagossians to administer the BIOT and maximise its benefit for the 'undivided'¹³² *imperium*. The islanders' expulsion could be justified so long as it was cloaked in legal authority in a hat tip to liberal imperialism, as their contribution to the realisation of imperial security. As Foucault recognised, the particular security pressures of the twentieth century reinforced broad conceptions of the common good: '[w]ars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence

124 *Tito v Waddell* (n 52) 255.

125 See *Quark Fishing* (n 4), [19] (Lord Bingham) and [64] (Lord Hoffmann).

126 W Molesworth, HC Deb 6 May 1850, vol 110, cols 1172 and 1176.

127 Smith (n 103) 483.

128 E Baring, *Ancient and Modern Imperialism* (Longmans 1910) 41.

129 See E Mallie and D McKittrick, *Fight for Peace: Secret Story behind the Irish Peace Process* (William Heinemann 1996) 107.

130 R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (OUP 2005) 486.

131 See Mantena (n 102) 37–55 and Bell (n 28) 756.

132 Ekins (n 26) 404.

of all'.¹³³ Under the Cold War's impetus, the militarisation of island colonies was pursued on the basis not merely of imperial good, but of the wider interests of the Western military alliance. The particular harm suffered by the Chagossians in their expulsion from their homeland was, in the view of the Wilson and Heath governments, more than offset by the wider benefits to imperial defence. As soon as this conclusion was reached, and the Crown's allotted compensation provided, the only avenue by which the islanders could challenge these dispensations was in a plea to the 'conscience' of the imperial order embodied by the London courts.

The Chagos Islands cases as imperial jurisprudence

In 2000 Oliver Bancoult, a native Chagossian and leader of the Chagos Refugees Group, brought a judicial review claim challenging the legality of the Immigration Ordinance 1971, issued under the authority of the BIOT Order 1965, which prevented any return by the Chagossians to their homeland.¹³⁴ The Crown's effort to claim that the Immigration Ordinance was created by the government of BIOT and therefore outside the jurisdiction of the courts of England and Wales was decried by Laws LJ as 'an abject surrender of substance to form'.¹³⁵ The Ordinance was issued at the direction of the UK government and as such the court had the ability to review its validity and the validity of decisions made subject to it.¹³⁶ The islanders' difficulty, however, remained that the BIOT had been created under the royal prerogative and the impugned actions were exercises of prerogative powers. Any effort to review such decisions seemed to conflict with the general injunctions against the courts' reviewing exercises of the prerogative in the spheres of foreign policy and national security.¹³⁷

In the Divisional Court Bancoult's legal team made explicit the claim that the exiling of the Chagossians was void under chapter 29 of Magna Carta. Magna Carta, which 'followed the flag' to the BIOT,¹³⁸ was the centrepiece of the UK's legal inheritance to its colonies touted by liberal imperialists. As a statute of the imperial Parliament, the claimants argued that it could be relied upon as the basis of a challenge to the validity of a colonial law under the terms of the Colonial Laws Validity Act 1865. Chapter 29 states that no freeman shall be exiled except by the law of the land and had long been considered 'fatal to any royal claim to expel obnoxious subjects from the realm without trial and verdict'.¹³⁹ Laws LJ considered that this argument, with its capacity to circumvent restrictions on the review of prerogative powers, possessed a 'beguiling simplicity'.¹⁴⁰ Ultimately, however, he recognised that if a lawmaker has the authority to make a law removing the islanders, then actions pursuant to that law cannot be repugnant for breaching the Magna Carta.¹⁴¹ This conclusion did not mean that he was immune to the allure of the Magna Carta argument. He instead heralded it as the jurisdiction's first

133 M Foucault, *Histoire de la sexualité 1: La Volonté de Savoir* (Gallimard 1976) 180.

134 Immigration Ordinance 1971, s 4.

135 R (*Bancoult*) v *Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067; [2000] EWHC 413 (Admin), [28].

136 Ibid [28].

137 *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418 (Lord Roskill).

138 *Bancoult (No 1)* (n 135), [34].

139 W Craies, 'Compulsion of Subjects to Leave the Realm' [1890] 6 Law Quarterly Review 388, 393.

140 *Bancoult (No 1)* (n 135) [31].

141 Ibid [35]. Numerous examples exist of colonial administrators using emergency powers to exclude individuals from a particular colony on security grounds even when they are 'belongers', including the forced removal of Archbishop Makarios from Cyprus in 1956. See A W B Simpson, 'The Exile of Archbishop Makarios III' (1996) 4 European Human Rights Law Review 391.

proclamation of the rule of law, requiring the authorities to establish that the expulsion of the Chagossians was ‘done according to law’.¹⁴²

The BIOT Commissioner was appointed under the prerogative to govern the territory severed from Mauritius, holding powers to make law for ‘peace, order and good government’ on the islands.¹⁴³ It was under these powers that the islanders had been exiled and the military base built and it was the supposed extent of these powers which concerned the Divisional Court. Powers to be exercised for the ‘peace, order and good government’ of a colony have a long history and previous authority had strongly indicated that the phrase was to be read generously.¹⁴⁴ Parliament’s statutes provided the only limitations historically recognised upon such powers. Laws LJ, however, ruled that while the power to act for peace, order and good government ‘may be a very large tapestry . . . every tapestry has a border’.¹⁴⁵ Not even these broad powers were capable of conferring upon a BIOT Commissioner the powers to exclude the Chagossians from their homeland. The Chagossians, he declared, ‘are to be *governed*: not removed’.¹⁴⁶ In ruling the islanders’ exclusion to be *ultra vires* he side-stepped the national security argument in play, stating that the reasons of military security said to underpin the Commissioner’s policy were ‘good reasons certainly’, but that they were ‘not reasons which may reasonably be said to touch the peace, order and good government of BIOT . . . whether the test is to be found in our domestic public law . . . or in a more, or less, intrusive approach’.¹⁴⁷ As such, the Divisional Court held that ‘peace, order and good government’ was a formula grounded in the vision of liberal imperialism which could not be reconciled with the exclusion of a people from their homeland for extraneous purposes.

Laws LJ’s judgment challenged and restricted the Crown’s prerogative power, evoking the spirit of the British Empire as an empire of law in which decisions about colonies and their populations must be made in accordance not simply of bare legal authority, but with extended principles of legality. Adam Tomkins trumpeted the judgment as a ‘bold and welcome’ example of the courts of England and Wales countering the scandals and excesses of empire in the time-honoured manner:

[A] case decided on what might be called traditional administrative, rather than newer constitutional, grounds: a relatively straightforward case of legality and *vires*, rather than one of rights and neo-constitutional review.¹⁴⁸

Following the Divisional Court’s judgment in *Bancoult (No 1)*, the Labour government gave the Chagossians a theoretical right to return to the islands other than Diego Garcia. The then Foreign Secretary Robin Cook accepted the ruling and issued the Immigration Ordinance 2000 which repealed the 1971 ordinance in its entirety.¹⁴⁹ Return, however, depended upon a series of feasibility studies concerning the resettlement of the Chagos Islands by the Chagossians. In 2002, after receiving the findings of the first study, the government announced that resettlement of the outer islands was not feasible. In 2004 two Orders in Council to this effect were issued under the royal prerogative on the basis that life

142 *Bancoult (No 1)* (n 135) [36].

143 BIOT Order 1965 SI 1965/1920, s 11(1).

144 *Riel v R* (1885) 10 App Cas 675 (PC).

145 *Bancoult (No 1)* (n 135) [55].

146 *Ibid* [57] (emphasis in original).

147 *Ibid*.

148 A Tomkins, ‘Magna Carta, Crown and Colonies’ [2001] Public Law 571, 574–5.

149 From his election to Parliament Robin Cook questioned ministers on the militarisation of Diego Garcia; see HC Deb 9 July 1975, vol 895, col 602.

there would be too precarious to be sustained and that a depopulated Diego Garcia remained necessary for defence purposes.¹⁵⁰ As a form of primary legislation, at least for the purposes of the Human Rights Act 1998 (HRA), these Orders in Council could not be overturned on human rights grounds.¹⁵¹ The Crown's intention was to create a legal block, so that the Divisional Court's decision that the expulsions were invalid would not prevent the Chagossians' continued exclusion from the islands.

Bancoult challenged the legality of these new Orders in Council, claiming that only Parliament could authorise the removal of the Chagos Islanders from BIOT. *Bancoult (No 2)*¹⁵² might have concerned the new arrangements instituted by the Crown in 2004, but the islanders considered this a continuation of the historic injustices they had suffered. The Crown regrouped from its earlier setbacks, with Laws LJ being accused of 'historical amnesia' in his decision that the BIOT Commissioner's powers were limited to securing 'peace, order and good government' for the Chagossians; the UK's Sovereign Base Area in Cyprus indicated that other colonial possessions have been maintained for the purpose of supporting the UK's defence interests.¹⁵³ This assault on the Divisional Court's reasoning in *Bancoult (No 1)* exposed the divide between the liberal and utilitarian rationales for empire. The liberal ideal of maintaining good governance could not be resolved with the utilitarian need to exploit a colony and its resources for the good of the empire. Nonetheless, both the Divisional Court and the Court of Appeal accepted that use of the prerogative power of colonial governance did not enjoy generic immunity from judicial review.¹⁵⁴ In a judgment that owed much to Laws LJ's decision in *Bancoult (No 1)*, the Court of Appeal accepted that there was nothing in the character of the Orders in Council which made them non-justiciable on the grounds that their subject matter concerned national security:

[W]hile a natural or man-made disaster could warrant the temporary, perhaps even indefinite, removal of a population for its own safety and so rank as an act of governance, the permanent exclusion of an entire population from its homeland for reasons unconnected with their collective wellbeing cannot have that character and accordingly cannot be lawfully accomplished by use of the prerogative power of governance.¹⁵⁵

A measure enacted to protect the security demands of the US military, for Sedley LJ, therefore 'lies beyond the[se] objects, whether expressed in terms of peace, order and good government or in terms of the legitimate purposes of colonial governance'.¹⁵⁶

By contrast the House of Lords dwelt at length on whether its jurisdiction was effectively ousted by the Colonial Laws Validity Act 1865. Ultimately, only three of the five judges considered that the Orders in Council could even be assessed on their own merits. Lords Rodger and Carswell were of the opinion that the courts had no power to inquire into whether colonial exercises of the prerogative were in fact for the peace, order and good government of the inhabitants of the territory.¹⁵⁷ The remaining judges were willing to review exclusion under the prerogative, with Lord Hoffmann recognising that the firewalls

150 BIOT (Constitution) Order 2004; BIOT (Immigration) Order 2004.

151 HRA, s 21(1)(f).

152 *Bancoult (No 2)* (HC) (n 120).

153 *Ibid* [116].

154 *Bancoult (No 2)* (CA) (n 123) [46] (Sedley LJ).

155 *Ibid* [67].

156 *Ibid* [69].

157 *Bancoult (No 2)* (HL) (n 11) [109] (Lord Rodger) and [126] (Lord Carswell).

around colonial administration which he had helped to extend in *Quark Fishing*¹⁵⁸ were misplaced.¹⁵⁹ Having gone to such lengths to open up a space for judicial oversight, however, he placed considerable emphasis upon the policy concerns at play. He noted that it was ‘quite impossible to say’ that excluding the islanders from the BIOT was unreasonable or an abuse of power.¹⁶⁰ This is because prerogative powers governing a colony can be used in the interests of the Queen’s undivided realm. He further rejected the proposition that, in ruling a colony under the prerogative, the authorities had to have regard only, or even predominantly, to its inhabitants’ interests:

Her Majesty in Council is . . . entitled to legislate for a colony in the interests of the United Kingdom. No doubt she is also required to take into account the interests of the colony (in the absence of any previous case of judicial review of prerogative colonial legislation, there is of course no authority on the point) but there seems to me no doubt that in the event of a conflict of interest, she is entitled . . . to prefer the interests of the United Kingdom. I would therefore entirely reject the reasoning of the Divisional Court which held the Constitution Order invalid because it was not in the interests of the Chagossians.¹⁶¹

Analysed from a familiar public law perspective, the majority’s characterisation of ‘the colonial governance power as a plenary one’ may well seem ‘perplexing’ in the leeway it gives to the executive.¹⁶² The majority did not carefully disaggregate the separate issue of the power to exile of a people, unlike the dissents and their ‘meticulous examination of the legal principles which justify the grant by the common law to one of power over another’.¹⁶³

The majority judgments are not, however, an aberration. They might well be pragmatic in their effect¹⁶⁴ and parts may be under-reasoned,¹⁶⁵ but they remain modern manifestations of imperial jurisprudence. The Crown considered the establishment of a base on Diego Garcia necessary for imperial defence. The ongoing exclusion of the islanders amounted to their contribution to the imperial good. Lord Hoffmann openly acknowledged that the security uncertainties of the Cold War and its aftermath require a collective approach to defence which must be maintained even if it causes specific hardship.¹⁶⁶ In a conflict of interest between the imperial whole and individual colonies, he considered that the government is entitled to ‘prefer the interests of the United Kingdom’.¹⁶⁷ The House of Lords decision in *Bancoult (No 2)* cannot therefore be castigated for neglecting legal principle and developing the law in a manner which went ‘against the express words of the very authorities they cited in support of their decision’.¹⁶⁸ The utilitarian strands of the imperial legal framework are more than capable of sustaining the majority’s position. As Denning LJ declared in *Nyali*, it was impossible to transplant the common law to the colonial context and ‘expect it to retain the tough character which it has

158 See *Quark Fishing* (n 4) [64].

159 *Bancoult (No 2)* (HL) (n 11) [48].

160 *Ibid* [58].

161 *Ibid* [49].

162 Elliott and Perreau-Saussine (n 12) 720.

163 Arvind (n 14) 138.

164 Arvind, indeed, characterises the pragmatism as ‘untrammelled and unmitigated’; *ibid* 151.

165 Beyond excluding torture, Lord Hoffmann did not elaborate any ‘red lines’ in terms of the islanders’ interests that cannot be crossed in pursuit of the imperial good. See Elliott and Perreau-Saussine (n 12) 720.

166 *Bancoult (No 2)* (HL) (n 11) [57].

167 *Ibid* [49].

168 Arvind (n 14) 135.

in England'.¹⁶⁹ Despite this 'triumph' of utilitarian imperialism, the tension between the rationale behind empire continued. Judicial review principles might be traduced in the colonial context but the liberal justification of empire remained, in its most bare form, in place. The exclusion of the Chagossians from their territory was sanctioned in law. In return for their homeland they received the majesty of due legal process.

The Chagossians' legal battle continues

Elliott and Perreau-Saussine called *Bancoult (No 2)* 'pyrrhic public law',¹⁷⁰ for the majority's willingness to circumvent the ouster clause contained in the Colonial Laws Validity Act 1865 and review the continued exclusion of the Chagossians, but not to ultimately uphold their claims and strike down the Orders in Council. The positive effect for public law of the court's recognition of its 'jurisdiction to review the limits of the prerogative of colonial governance' is all but undone by the majority's failure to constrain prerogative lawmaking on the basis of 'a fundamental right of abode'.¹⁷¹ This leaves us to question, however, whether the outcome for the Chagossians would really have been any better had the judicial review succeeded. Even if the courts had denied the lawfulness of their exclusion as a matter of immigration law, Sedley LJ recognised that 'the Crown has rights as landowner which are capable, for the present, of answering any attempt to resettle there'.¹⁷²

Whilst a majority of Law Lords recognised that the BIOT is covered by a governance order informed by substantive principles, none of the accounts presented an order comparable to those of the UK's domestic jurisdictions. Whilst Lords Bingham and Mance would have struck down the Orders in Council, neither considered that the ECHR extended to the Chagos archipelago.¹⁷³ As such, their judgments recognised 'no legal obligation to facilitate this entry or presence'.¹⁷⁴ Without the full panoply of internationally recognised rights protections in play, the islanders ultimately enjoyed no legal avenue by which to assail the Crown's freehold, which Lord Mance recognised could, even had his judgment been in the majority, 'prevent any private initiative to settle'.¹⁷⁵ Well might he assert that the 'symbolism' of accepting the islanders' claim would have remained important notwithstanding this outcome,¹⁷⁶ but the benefit might have been more for the court's conception of its role than for the islanders.

With the sympathy of the Law Lords ringing in their ears, the islanders proceeded to Strasbourg in what seemed like a final effort to unlock the human rights grounds which could provide a substantive basis for challenging their exclusion. From the outset, the omens were not good. The ECHR, drafted in the aftermath of the Second World War and ratified by the UK at a time when the British Empire was rapidly disintegrating, was nonetheless crafted in such a way as to facilitate the management of overseas empires by the colonial powers of Europe. Article 56 ECHR requires contracting states to explicitly extend the ECHR's protections to colonised territories, something which the UK did not

169 *Nyali Ltd* (n 121) 16.

170 Elliott and Perreau-Saussine (n 12) 697.

171 *Ibid* 722.

172 *Bancoult (No 2)* (CA) (n 123) [71] (Sedley LJ).

173 *Bancoult (No 2)* (HL) (n 11) [68] (Lord Bingham) and [142] (Lord Mance).

174 *Ibid* [160] (Lord Mance).

175 *Ibid* [160].

176 *Ibid* [172].

do with regard to the BIOT.¹⁷⁷ Similarly, when the UK ratified the International Covenant on Civil and Political Rights (ICCPR)¹⁷⁸ it ‘reserved the right not just to apply the Convention separately to each of the territories of the UK and Colonies, but also to apply such immigration legislation in each of its territories as it thought fit’.¹⁷⁹ The House of Lords had previously ruled that the ECHR’s ambit was not extended simply because, in reaching a decision with human rights consequences, ‘the contracting state government attached weight primarily or solely to the interests of the contracting state as distinct from the interests of its overseas territory’.¹⁸⁰

From the 1970s onwards the UK government’s legal advisors were confident that the administration of the BIOT was insulated from an ECHR application.¹⁸¹ And so it was to prove. For all that the European Court abhorred ‘the callous and shameful treatment’ of the Chagossians,¹⁸² it was forced to accept that the ECHR offered no refuge, as it was ‘incontrovertible that at no time was the right of individual petition extended to BIOT’.¹⁸³ Moreover, ‘[a]nachronistic 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’.¹⁸⁴ The court consoled itself with the conclusion that compensation claims over expulsion had been ‘raised in the domestic courts and settled, definitively’ and that all subsequent cases amounted to an effort by the islanders ‘to bring pressure to bear on Government policy rather than disclosing any new situation giving rise to fresh claims under the Convention’.¹⁸⁵

Even under the ECHR, therefore, ‘the needs of the inhabitants of a colony are often secondary to that of the colonial power’.¹⁸⁶ This observation is particularly pertinent when considered in light of the April 2010 decision by the UK government to establish a Marine Protected Area (MPA) around the Chagos archipelago, ostensibly to protect the environment and advance scientific research.¹⁸⁷ In negotiations with the US government, revealed during the 2010 WikiLeaks release of US diplomatic cables, Colin Roberts (the then BIOT Commissioner) talked up the ancillary security benefits of establishing the MPA:

Roberts stated that . . . 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

177 The UK had extended the ECHR to Mauritius and so it applied to the Chagos Islands up until the separation of the BIOT from the parent colony in November 1965, but as the European Court would note, this separation occurred before the UK ratified the right of individual petition (applying to the UK only) in January 1966; *Chagos Islanders v UK* (2013) 56 EHRR SE15, [61]. Nor was the BIOT covered when individual petition was extended to some overseas territories in September 1967.

178 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

179 *Chagos Islanders v Attorney General* (n 57) [380] (Ouseley J).

180 *Quark Fishing* (n 4) [42] (Lord Nicholls).

181 UKNA, FCO 31/2193, J D P Bickford (FCO Legal Adviser) to G E Gammie (Treasury Solicitors’ Department) (4 August 1977) paras 14–18.

182 *Chagos Islanders v UK* (n 177) [83].

183 *Ibid* [62]. The court refused to accept that the fact that the key decisions were undertaken in the UK affected this outcome; [65].

184 *Ibid* [74].

185 *Ibid* [83].

186 C Monaghan, ‘The Chagossians Go to Strasbourg: Convention Rights and the Chagos Islands – *Chagos Islanders v United Kingdom* (Application No 35622/04)’ [2013] European Human Rights Law Review 314, 324.

187 BIOT Commissioner, Proclamation No 1 of 2010. For the text of the UK Foreign Secretary’s press release, ‘instructing’ the BIOT Commissioner, see *R (Banoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 3) [2013] EWHC 1502 (Admin), [73] (Richards LJ).

residents . . . [because] the UK's 'environmental lobby is far more powerful than the Chagossians' advocates'.¹⁸⁸

He added "[w]e do not regret the removal of the population" since removal was necessary for the BIOT to fulfill [sic] its strategic purpose.¹⁸⁹ The analysis of this proposal by US Embassy officials suggested that the US government was increasingly concerned about the possibility of resettlement.¹⁹⁰ The cable release was an unexpected boon for the Chagossians' legal strategy, allowing them to mount a fresh challenge to UK policy on the basis that the MPA had been established on the basis of an improper motive.¹⁹¹ The MPA's hasty unveiling, barely a month before a general election, accorded with US government concerns that should the Conservatives take office they might 'go soft' on the Chagossians.¹⁹² In the course of the judicial review hearings, Roberts accepted that he had advanced the MPA on the basis that 'there should be no human footprint in the Chagos Archipelago other than on Diego Garcia' and that he had conveyed the UK government's support for an MPA on the basis that it 'would create a serious obstacle to resettlement'.¹⁹³

The Chagossians claimed that this leaked record revealed that an improper motive, preventing them from ever resettling the islands, explained the foundation of the MPA rather than the environmental concerns which provided the public basis for its creation. The crux of such a challenge is that powers conferred for public purposes 'can validly be used only in the right and proper way',¹⁹⁴ with the difficulty where mixed motivations are in play being for the courts to assess whether the valid purpose (here environmental protection) is dominant.¹⁹⁵

Neither the Divisional Court nor the Court of Appeal¹⁹⁶ would consider the substance of this claim in any depth, with both devoting the bulk of their attention to whether the leaked cables were even admissible as evidence. Under the Diplomatic Privileges Act 1964 the UK maintains that official correspondence of diplomatic missions such as the US Embassy are 'inviolable'.¹⁹⁷ The Divisional Court accepted that this provision prevented the WikiLeaks cables from being admissible evidence and curtailed any cross-examination of FCO officials on the basis of the cables.¹⁹⁸ Even though the cables were in the public domain, the government maintained that the courts should close their minds to them entirely, as consideration 'would be damaging to international relations and defence'.¹⁹⁹ The Court of Appeal, concerned that this stance opened the courts to ridicule, recognised that the cable should have been admitted:

188 WikiLeaks, UK–US Official Meeting on BIOT (15 May 2009) para 7 <<http://www.guardian.co.uk/world/us-embassy-cables-documents/207149>>.

189 *ibid* para 8.

190 *ibid* para 15.

191 Claims regarding the inadequacy of the consultation process and EU law provided ancillary grounds for review which will not be considered in this article.

192 WikiLeaks (n 188) para 15.

193 *Bancoult (No 3)* (DC) (n 187) [59] (Richards LJ). Roberts, however, 'adamantly denied making any reference to "Man Fridays"'. In this assertion he was supported by the other FCO official present at the meeting, Joanne Yeadon (BIOT Administrator), at [60].

194 *R v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] AC 858, 872 (Lord Bridge).

195 See *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, [144] (Lord Scott).

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

197 Diplomatic Privileges Act 1964, s 2(1), incorporating the Vienna Convention on Diplomatic Relations (14 April 1961) 500 UNTS 95, Articles 24 and 27.

198 *Bancoult (No 3)* (DC) (n 187) [51] (Richards LJ).

199 *Bancoult (No 3)* (CA) (n 196) [91] (Lord Dyson MR). See Official Secrets Act 1989, s 6.

[T]he documents were sent from the US mission in London to Washington with the consent of the sending state and were communicated to the world by a third party. Mr Bancoult was not implicated in the removal of the documents from the mission or their publication to the world.²⁰⁰

Despite this concession the court refused to accept that the Divisional Court's stance had impeded the presentation of the Chagossians' case. Nor did they move beyond a cursory consideration of their claim of improper motive.²⁰¹ The judges' main concern seemed to be to avoid dwelling, if at all possible, on the content of the cables. Rather than treating them as affirming the utilitarian dominance of the security rationale underpinning the BIOT's existence, and that environmental concerns provided a convenient ruse for adding a further layer of difficulty to the Chagossians' return, the Divisional Court described this account as being an 'unconvincing plot for a novel'.²⁰² Given all the history of official duplicity surrounding the BIOT, such assertions mark a singular failure of judicial imagination. In any event, an improper motive on the part of officials disclosed by the cables could not, both courts found, be imputed to the Foreign Secretary who took the ultimate decision to establish the MPA.²⁰³ The courts took David Milliband's acknowledgment that the MPA would be reconsidered if the Chagossians' application succeeded before the European Court as important evidence of his good faith.²⁰⁴ Given the insurmountable procedural hurdles faced by this application, this supposed concession should have been dismissed as mere window dressing. No judge attempted to explain how the WikiLeaks cable (broadly accepted as accurate by Colin Roberts' evidence, with the exception of the 'Man Friday' comment) fits within this account.

These two decisions are markedly different in tone from previous *Bancoult* judgments. Both open with an identical formula; that this case 'is a further chapter in the history of litigation arising out of the removal and subsequent exclusion of the native population from the Chagos Archipelago'.²⁰⁵ This formula at once fails to blame any party for the 'removal and subsequent exclusion' and creates the impression that the islanders have overstayed their welcome in the Royal Courts of Justice. The islanders have gone from being claimants entertained with sympathy to being viewed with suspicion as serial litigants.²⁰⁶ Both courts studiously avoid expressing any sympathy towards the Chagossians, lest such statements be employed outside the courtroom as part of a strategy to embarrass the UK government into concessions.²⁰⁷ Both courts even try to rewrite the history of the dispute and litigation in an effort to mitigate any embarrassment. A clear signal that the Divisional Court regarded the Chagossians as having been over-indulged from the outset is the description of the

200 *Bancoult (No 3)* (CA) (n 196) [63].

201 *Ibid* [88].

202 *Bancoult (No 3)* (DC) (n 187) [76] (Richards LJ).

203 *Ibid* [74] (Richards LJ) and *Bancoult (No 3)* (CA) (n 196), [91] (Lord Dyson MR).

204 *Bancoult (No 3)* (DC) (n187) [75] (Richards LJ), repeated at *Bancoult (No 3)* (CA) (n 196) [79] (Lord Dyson).

205 *Bancoult (No 3)* (DC) (n 187) [1] (Richards LJ) and *Bancoult (No 3)* (CA) (n 196) [2] (Lord Dyson MR).

206 Although outside the scope of this article, the Permanent Court of Arbitration (PCA) has ruled that the MPA's creation was illegal. Although the majority did not dwell on the WikiLeaks cables, concluding that the UK's motives in establishing the MPA had not been improper, two judges found that the UK's motives were improper and supported an evaluation of the cables; *In the Matter of the Chagos Marine Protection Area Arbitration (Mauritius v UK)* (Award of 18 March 2015) [494], [542]–[543], and the Dissenting and Concurring Opinion of Judges Kateka and Wolfrum [89] <www.pca-cpa.org/MU-UK%2020150318%20Award4b1.pdf?fil_id=2899>.

207 See, for example, the discussion of this 'apparently interminable litigation' in the House of Lords in 2011: Earl of Selbourne, HL Deb 10 March 2011, vol 725, col 1785.

Bancoult (No 1) challenge as being 'long out of time'.²⁰⁸ If only, the court seems to be suggesting, time limits had been observed from the outset, then this whole train of litigation would never have been set in motion. Flying in the face of the repeatedly traversed record of the expulsion, the Court of Appeal's factual history of the dispute blandly asserts that the Chagossians 'left' the islands by the end of May 1973, as if there was an element of choice in the matter.²⁰⁹ Once the London courts consider imperial justice to have been done, woe to the colonial litigant who dares to ask for more.

Conclusion: the phoenix and the ashes

Considered in isolation, the description of the Chagossians as 'Man Fridays' at the time of their expulsion and its association with the MPA's creation fully 40 years later suggests that the whole saga can be characterised by UK officialdom's persistent callous indifference towards the islanders. When the fresh archival materials are considered as a whole, however, official accounts of the Chagossians' expulsion display widespread despondency and uncertainty over BIOT policy. Many officials, reflecting liberal imperialist views, regretted and even resented the manner in which the Chagossians were 'chucked out of UK territory'.²¹⁰ The repeated delays upon the expulsion policy, which was only executed some four years after travel restrictions to the BIOT had been initiated, reflect the protracted efforts by officials on the ground to circumvent demands that the entire archipelago be free of population. Even when Sir Bruce Greatbatch characterised the islanders as 'untrainable', he did so with the aim of slowing the expulsion process.²¹¹ If the Man Fridays epithet illustrates London officials' attitudes of imperial and even racial superiority over the Chagossians, then this internal resistance nonetheless indicates the extent to which many colonial administrators could not reconcile the expulsion policy with the concomitant obligations they felt towards a colonised population. Monetary compensation would ultimately be provided, even if so belatedly as to suggest that it was intended more to assuage the authorities' concern for the precepts of liberal imperialism than to provide meaningful recompense.

The consistent stonewalling of the Chagossians' claims, however, may point to a conclusion that either the Crown considers its obligations fulfilled and/or that the belief in liberal imperialism, so pervasive amongst the last generation of administrators of the 'old' empire, no longer holds much sway over policymakers. 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. Responsible government, for Richard Ekins a theory 'central to the imperial constitution',²¹² becomes a matter of form rather than substance. And yet, despite the defeat of successive waves of the Chagossians' litigation, these legal challenges were not without positive impact. The discovery processes in these cases highlighted the injustices inherent in the BIOT's administration,²¹³ leading the UK Coalition government to commission a 2014 study which

208 *Bancoult (No 3)* (DC) (n 187) [7] (Richards LJ).

209 *Bancoult (No 3)* (CA) (n 196) [4] (Lord Dyson MR).

210 See UKNA, FCO 141/1355, P A Carter (UK High Commissioner, Mauritius) to A B Urwick (Defence Department, FCO) (2 November 1970) para 5.

211 UKNA, FCO 141/1417, B Greatbatch (Governor of the Seychelles and BIOT Commissioner) to D A Scott (FCO) (25 March 1971) paras 2 and 8.

212 Ekins (n 26) 401.

213 Documents released through the domestic court cases formed the backbone of historical evidence in the arbitration over the MPA before the PCA; *Mauritius v UK* (n 206) [35].

accepted the feasibility of resettlement centred upon Diego Garcia.²¹⁴ With the 50-year window for the renewal of the base arrangements providing an opportunity for maintaining pressure on the state parties, the Chagossians and the US military could well be persuaded to share the territory (especially as Mauritius, if it gained sovereignty over the archipelago, would not oppose the maintenance of the US base).²¹⁵ Such a move would not change the significance of the BIOT for defence, but it would potentially bring its administration into alignment with other colonies which continue to serve ‘military purposes’,²¹⁶ including Ascension Island, the Falkland Islands and Gibraltar.

If the resettlement report holds out the potential for a phoenix, then what of the ashes? The litigation challenging the legality of the expulsions cannot, in the final analysis, be reduced to a clash between pragmatic formalism and the fundamental principles of public law. Even if public law principles had ultimately carried the day for the Chagossians, as they had in the Court of Appeal (and may yet in the Supreme Court),²¹⁷ the Crown could continue to exercise its private law rights of property ownership over the islands to exclude the islanders. Nor do these decisions mark a clash between imperialism and anti-imperialism within the highest courts of England and Wales. No matter how favourably disposed individual judges might have been towards the Chagossians, no judge was able to sunder the imperial relationship underpinning this case. Even the European Court found its jurisdiction circumscribed by the imperial context in which the ECHR was created. Instead, the choice in these cases was between liberal imperialism and utilitarian conceptions of the imperial common good. The Chagossians expulsion from their homeland was driven by an imperial account of the common good which prioritised the interests of the imperial whole over the needs of a particular group of subjects; ‘[I]ooming over all considerations were the twin issues of prohibitive cost and the United Kingdom’s interests in co-operation with an important ally in maintaining a secure defence installation’.²¹⁸ This vision of empire was contested, in the course of both official discussions and court cases, by liberal imperialism, with its emphasis in the Chagossians’ context upon imperial stewardship over a precarious island community which would face supposedly insurmountable difficulties in exercising self-governance.

For centuries the UK’s domestic courts acted as an important safety valve within the empire, being seen as the last refuge for victims of imperial injustices.²¹⁹ In the *Bancoult* litigation, however, the judges tasked with deciding upon this particular late-imperial injustice were trapped in a double bind. Many of them also found that the empire’s legal architecture prevented them from addressing the islanders’ claims. Faced with this realisation, judges like Lord Rodger and Lord Carswell sympathised with the ‘disgraceful’ treatment of the islanders,²²⁰ even tacitly apologised for their judgments,²²¹ but ultimately

214 KPMG, *Draft Report: Feasibility Study for the Resettlement of the British Indian Ocean Territory* (13 November 2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/301530/BIOT_Resettlement_Study_Final_Inception_Report_07-04-14.pdf.

215 A resettlement of 1500 Chagossians over six years would be estimated to cost £413.9m: *ibid* 70.

216 *Bancoult (No 2)* (HL) (n 11) [157] (Lord Mance).

217 The Supreme Court reconsidered the House of Lords decision in *Bancoult (No 2)* in June 2015, assessing whether the decision should be set aside on the basis of the Foreign Secretary’s failure to disclose documents relating to the 2002 resettlement feasibility study. Judgment was pending as of September 2015 when this article was finalised. See Owen Bowcott, ‘Chagos Islanders ask Supreme Court to overturn House of Lords Decision’ *The Guardian*, 22 June 2015 <www.theguardian.com/law/2015/jun/22/chagos-islanders-supremecourt-house-lords-decision>.

218 *Bancoult (No 2)* (HL) (n 11) [132] (Lord Carswell).

219 See J Epstein, ‘Politics of Colonial Sensation’ (2007) 112 *American Historical Review* 712, 739.

220 *Bancoult (No 2)* (HL) (n 11) [75] (Lord Rodger).

221 *Ibid* [136] (Lord Carswell).

did not (or as they would have it, could not) accept the islanders' claims. Alongside their judgments, Lord Hoffmann acknowledged that a choice between the liberal and utilitarian faces of imperialism did rest with the court, and decisively affirmed the utilitarian importance of the imperial interests at stake in light of 'the brutal realities of global politics'.²²² His distaste for the islanders' litigation strategy,²²³ which he saw as trying to force open a settled dispute, in which 'the deed has been done, the wrong confessed, compensation agreed and paid', was scarcely concealed.²²⁴ At this uncomfortable end of the legal process, the majority in the House of Lords accepted that their decision reflected the imperial commonweal.

Rather than shedding the imperial jurisprudence of old, even the judges who would have found for the islanders, including Lord Bingham, Lord Mance, Laws LJ and Sedley LJ, remained trapped within a liberal-imperialist approach towards the governance of the BIOT. Striking down the 2004 Orders in Council might well have embarrassed the UK government, but it would not, as Lord Hoffmann pointed out, have obliged it to facilitate the return of the islanders,²²⁵ still less to govern the islands in accordance with human rights norms. Such efforts to oblige the Crown to use its powers over the BIOT in adherence to a bare conception of 'good governance' do not deny the imperial domination of the islands. Moreover, jurisprudence in this vein comes with all of the baggage of asserting the UK's superiority as a civilisation. Before the First World War, the Earl of Cromer posited that the British Empire 'must rest on one of two bases – an extensive military occupation or the principle of nationality', lamenting that the UK had been unable to choose between these options.²²⁶ The alternative judicial path in the Chagos judicial reviews would have aggrandised the courts and might even have given some solace to the islanders (or for Lord Mance, would at least not 'add insult to injury'),²²⁷ but imperial governance in the archipelago would have continued on the model of military occupation to the exclusion of the islanders.

By the time of the WikiLeaks case, this dilemma had either become so embarrassing, or the characterisation of the Chagossians as politically motivated litigants so pervasive, that the Divisional Court and Court of Appeal did all that they could to avoid ruling on the content of the cables. Even when judges have declared themselves unable to tackle the underlying imperial injustice in the Chagos cases their value to imperial administration as a nominal check on power has not diminished; ministers have consistently deflected awkward parliamentary questions regarding the islands by asserting that 'the UK courts have considered the issues very carefully'.²²⁸ The approach of the courts has therefore cloaked UK policy in a protective veil of legalism. Perhaps the ultimate lesson of the *Bancoult* litigation is that the UK must face up to an uncomfortable reality. In its relationship towards the BIOT it is not a postcolonial state, but has remained a colonising power in the interests of retaining its capacity (even if outsourced to the USA) for power projection across the Indian Ocean. Official acts which would be considered illegal if ever contemplated within the UK remain, despite appeals to human rights, colour-blind justice, the rule of law and the undivided realm, legally defensible when applied within this colonial sphere.

222 Ibid [6].

223 Ibid [55].

224 Ibid [53].

225 Ibid [55].

226 Baring (n 128) 118.

227 *Bancoult (No 2)* (HL) (n 11) [172].

228 Lord Howells, HL Deb 10 March 2011, vol 725, cols 1794–5.

