Research Method

In this contribution we will explore the use of history in human rights arguments. History proliferates throughout law. Precedent is the most obvious example, but knowledge and understanding of how law developed and the context in which certain laws were made and have been applied is vital to the argumentative practice of any lawyer. What we are interested in here however is a more self-conscious use of history that considers what history is and how it is used by lawyers. Before we can consider the case at hand, we need to clarify an occasionally contentious set of methodological questions: first, the unconscious use of history in normal legal practice; second, the use of history by legal historians; and third, the use of history by historically conscious lawyers, what is sometimes referred to as critical legal history[1] or historical jurisprudence.[2] The point is to use the past to explain why things are the way they are and how they could have been different, and to escape a Panglossian presentation of law and modernity.

All lawyers use history in some way, but it is generally used without reflection on how to understand the past, and its relationship with the present. Robert Gordon describes this dominant vision of legal history as 'evolutionary functionalism … that the natural and proper evolution of a society is towards a type of liberal capitalism seen in the advanced Western nations and that the natural and proper function of a legal system is to facilitate such an evolution'.[3] This way of thinking accepts the past as settled and unchanging, and the present as necessary and inevitable. It explains legal change by reference to social change, law as a rational, functional response to the problem of organising society. Any lawyer studying the past today is unlikely to fall into these assumptions, but such versions of legal history still populate textbooks and can even be found in judgments.[4]

Legal historians can be distinguished as a specialist group of scholars, neither historians interested in law nor lawyers interested in history, but specialists at both, working at the uncovering of better knowledge about the history of the law. The work of the Selden Society for example, in translating and publishing historic legal texts,[5] or legal history as set out in texts such as John Baker's *An Introduction to English Legal History*, aim to expand and develop the

[1] R Gordon, 'Critical Legal Histories', (1984) 36 *Stanford Law Review*, 57.
[2] R Lesaffer, 'Law and History: Law between Past and Present' in B van Klink and S Taekema (eds), *Law and Method: Interdisciplinary Research into Law* (Tubingen: Mohr Siebeck, 2011) 133.
[3] Gordon, (n 1) 59.
[4] The legal history rehearsed in the domestic Chagos cases discussed below is a good example, another provocative example of this trite performance of can be seen in the discussion of prerogative powers and the UK Constitution in the Miller case: *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5 [40-46].
[5] For a list of publications see http://www.selden-society.qmw.ac.uk/

archive of legal history.[6] F W Maitland, who can be regarded as one of the first to take a serious interest in the history of the common law, believed that it would be possible to write a complete account of the development of the law in England.[7] As Baker himself notes, in his response one hundred years later, the modern legal historian knows this to be impossible, and instead aims to add as much richness and complexity to the historical account as possible.[8] This is useful and important work, often involving careful exploration of archives and the adoption of strict methodology. However, it is not necessarily this history which is put to use in legal argument.

The use of history in legal argument is our concern here. Some academics apply a different label when talking of using history, 'historical jurisprudence'.[9] The distinction rests on how we understand the past's relationship with the present. For the legal historian, the aim is to better understand the working of past law. Legal history is thus a descriptive exercise, seeking to fill the gaps in the narrative of how the whole legal system came to be. Historical jurisprudence describes a more critical endeavour. If we are instead more interested in how the past has shaped the present law, taking an interest in the historical form of and limits to legal thinking and legal argument, then this is historical jurisprudence. The approach taken here is interested in how the past has limited and shaped the present, and what possibilities there are for things to be different.[10]

History as a method, as a form of legal practice, is part of the routine practice of all lawyers. Lawyers make use of the past to supply arguments, as precedent most obviously, but also in the way that facts are presented. This is the first point to make about history as a human rights research method – it is tempting to think that better history will provide better arguments, but that is to reify history and the past. The past is actually much more open to contestation. As lawyers, we routinely look to the past to provide different forms of argument.[11] As Anne Orford has argued in relation to her own use of history in legal arguments, this is a politically engaged study of law, and that to separate out and professionalise the history, philosophy and practice of law is a conservative move which disengages from the social reality of law.[12]

If legal historians primarily concern themselves with what the law was in the past, lawyers using history primarily concern themselves with how the past influences the present. Professional historians seem largely unaware of the first, reserving vituperous criticism for the second. Contemporary history departments in leading Western universities are dominated by an approach to history called contextualism. This methodology has its own radical roots,

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[6] J Baker, *An Introduction to English Legal History* (4th edition, OUP, 2006).
[7] F W Maitland, *Why the History of English Law is Not Written* (CUP, 1888)
[8] J Baker, 'Why the History of the English law has not been Finished' (2000) 59 *The Cambridge Law Journal*, 62.
[9] Lesaffer, (n 2) 11.
[10] The best introduction to critical legal history remains Gordon, 'Critical Legal Histories' (n 1). For the descriptive/narrative form of legal history, a good starting point remains Baker, *An Introduction to English Legal History* (n 6).
[11] A Orford, 'International Law and the Limits of History' in W Werner, A Galan and M de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, Cambridge: 2016).
[12] Ibid.

growing out of a group of Cambridge scholars in the 1960s.[13] A rejection of grand narratives, both from the left and the right, was the foundation of their political project, and a dogmatic insistence on context against anachronism the method of achieving it.[14] Those most closely associated with the Cambridge School are less dogmatic than some of their followers. For example, James Tully, a leading Cambridge School historian, has engaged extensively with the historical method of Michel Foucault, an historian with a highly idiosyncratic method.[15] However, followers of the Cambridge school have recently been highly critical of the use of history by lawyers. Ian Hunter, in his direct criticism of the work of critical historians of international law, particularly Anthony Anghie, condemns them absolutely for anachronism.[16] He argues that it does not make sense to criticise an early modern writer such as Vitoria, a 16th century Spanish jurist, for laying the groundwork of an imperialist international law that he would never know. He instead seeks to isolate early modern law of nations writings from a post-colonial critique.[17] It is this dogmatic methodology that Orford describes and criticises.[18] Instead, she argues that lawyers *must* be anachronistic, as lawyers are constantly reaching into the past to pluck out ideas and arguments to apply in a different context.[19] The historical context of a legal idea is always only one way of using the argument. Legal ideas travel through time, even if their authors obviously do not.

Orford advocates for the potential contained in new histories of international law, written with an historical consciousness absent in the traditional, progressive account still found in textbooks.[20] Responding to criticism of this work from professional historians insistent on context, she defends the anachronism of lawyers. Orford contends that law is an inherently anachronistic discipline, constantly applying past laws to present facts, and often applying new laws to historic situations. The work of legal history is then to trace these movements so as better to understand and make legal arguments. An insistence against anachronism, and upon the reading of authors in context, may well be suitable for a certain type of professional

[13] As such, this is often referred to as the Cambridge School.

[14] The leading figure was Quentin Skinner, see his 'Meaning and Understanding in the History of Ideas' 8 *History and Theory* (1969) 3. This article is a sort of manifesto. Other important Cambridge historians include David Armitage, Richard Tuck and James Tully. Associated North American historians include J.G.A. Pocock and more indirectly, Hayden White.

[15] J Tully, *An Approach to Political Philosophy: Locke in Contexts* (Chicago University Press, 1993) Chapter 4.

[16] I Hunter, 'Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations' in S Dorsett & I Hunter (eds) *Law and Politics in British Colonial Thought* (Palgrave Macmillan, New York: 2016).

[17] Ibid.

[18] Orford (n 11).

[19] 'While some legal historians identify as historians, and preach against the sin of anachronism, in a sense lawyers are and must be sinners in this sense. Law necessarily has to reckon with obligations that are not solely derived from the current rulers of a state – in that sense whatever the felt urgency of breaking with the past, the past persists in custom and precedent and legal tradition. The difficulty then lies in knowing (or perhaps choosing) which precedents should be invoked to make the present intelligible.', A Orford, 'The Past as Law or History?' (2011) *IILJ Working Paper 2012/2 (History and Theory of International Law Series)* Finalized June 2012, 9.

[20] Orford has now written extensively on the question of historical method in international law. See variously A Orford 'Scientific Reason and the Discipline of International Law' (2014) 25 *European Journal of International Law* 369; A Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166; A Orford, 'The past as law or history?'(2011) *IILJ Working Paper 2012/2 (History and Theory of International Law Series)* available at SSRN: https://ssrn.com/abstract=2090434.

historical practice. Hunter may well be correct in his attempt to save Vitoria from the criticism of imperialism, as Vitoria knew no other world than Europe. However, that is not the lawyer's task; the critical lawyer's aim is instead to resist an ongoing imperialism and eurocentrism in a discipline where many still draw inspiration from these early modern works.

This debate also excludes other approaches to history, perhaps less dominant at the present moment but certainly useful to lawyers. As Orford again argues, in its origins 'history in its heyday *was* theory'. History is a particular way of thinking about the world.[21] Orford and others are strongly influenced by the linguistic turn in the humanities from the end of the 20th century, particularly the historical work of Michel Foucault. A Foucauldian history is distinguished by two methodological choices. First, a focus on practices, on action rather than ideas.[22] In Paul Veyne's words, 'what is made, the *object*, is explained by what went into its making at each moment of history'.[23] Second, a focus on the present, on contemporary political struggles. Foucault's history is a 'history of the present'[24]. This means to look at the past consciously from the present, to acknowledge and embrace that our perspective on the past is shaped by our present context. Unlike the contextualist approach, this approach embraces anachronism as not only inescapable but also part of the point. Foucault was interested in understanding how historical processes had produced the present. He writes history consciously from his present. History addresses the present by exposing the limits to our understanding and experience that are historically constructed. Critical history is an attempt to break these limits. As Foucault puts it: 'It's a matter of shaking this false self-evidence, of demonstrating [the object's/practice's] precariousness, of making visible not its arbitrariness but its complex interconnection with a multiplicity of historical processes'.[25]

Another important historical methodology for the purposes of using the past to change the present is the method often associated with Marxist politics, historical materialism. There are many different groups and generations of Marxist and non-Marxist historical materialists, but one short exposition of the method will serve our purposes here.[26] Eric Hobsbawm, a leading Marxist historian, wrote a methodological text called *On History*.[27] For Hobsbawm, three things mark out a materialist approach to history: an opposition to empiricism, to the treatment of history as a science; a focus on structures and social systems, and the internal tensions and contradictions of these systems; and third, a focus on how societies change, how these tensions are productive, what is termed in the specialist literature a dialectical model of history.[28] A new

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[21] The historian Reinhardt Koselleck argued that the historical mode of thinking is connected to modernity, emerging in the 17th century. See R Koselleck, *The Practice of Conceptual History* (Stanford University Press, 2002).

[22] M Foucault, 'Questions of Method' in *Power: Essential Works of Foucault 1954 – 1984 volume 3* (James D. Faubion ed., Penguin: London, 2002).

[23] P Veyne, 'Foucault Revolutionises History 'in *Foucault and his Interlocutors* (Arnold I. Davidson ed., University of Chicago Press, 1997) at 160.

[24] See M Roth, 'Foucault's "History of the Present", 20 History *and Theory* (1981) 32-46.

[25] Foucault (n 22) 225.

[26] See further the chapter by Rob Knox in this volume, '…'

[27] E Hobsbawm, *On History* (Abacus, London: 1999).

[28] E Hobsbawm, 'What do historians owe to Karl Marx?' in ibid, at 192. Dialectical means the simultaneous existence of stabilising and disruptive elements in society.

materialism in the humanities can be identified, particularly after the 2007/8 global financial crisis, but it is not always a return to Marxism.[29] What it does mean for law and history is a new attention to law's materiality, to its role in social production and re-production. Therefore as lawyers engaging with the past, we should be aware of law's relationship with production, its use by power as a stabilising or disciplining force, and also the potential to use law as a disruptive force against the powerful.

The historian Edward P Thompson is a final writer worth mentioning, a radical historian who became deeply fascinated by law. As he put it: 'I found that law did not keep politely to a level but was at every bloody level'.[30] By this he meant that law could not simply be classed as ideology, or as superstructure, although it clearly was functioning there, nor is law simply the tool of the powerful used to control the masses, although again it clearly is. But law is also found in the struggles Thompson was studying, in his histories of the English working class and their struggles to keep their old rights and custom. Here Thompson found that law 'above all, afforded an arena for class struggle, within which alternative notions of law were fought out'.[31] It is this idea of legal history as an arena of struggle that we must look to in using history as a human rights argument.

The intention in this contribution is to separate out and consider the different forms of the history of the Chagos Islanders. It proposes a specific human rights history, distinct from a legal history, professional history, or history of human rights.[32] This will also, given the case study, be an indigenous rights and decolonisation history. Overall it is a politically engaged history of the wrongs done, told with the purpose of making political action more possible, particularly in the form of the political action of taking these cases to court.[33]

Summary of the Case

[29] In law, new attention has been drawn to law's materiality, through work such as M Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Abingdon: Routledge, 2017); G Painter, 'When is a Haida Sphinx: Thinking about the Law with Things', *Northern Ireland Legal Quarterly* 63, 3 (2017); A Philippopoulos-Mihalopoulos*, Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2015); A Pottage, 'The Materiality of What?' *Journal of Law and Society*, 39, 1 (March 2012); B Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Cambridge: Polity Press, 2010); C Tomlins, 'Toward a Materialist Jurisprudence', in Alfred Brophy and Daniel Hamilton (eds.), *Transformations in American Legal History: Law, Ideology, and Methods – Essays in Honor of Morton J. Horwitz, Volume II* (Cambridge MA: Harvard University Press, 2010).

[30] E P Thompson, *The Poverty of Theory and Other Essays* (Merlin, 1978) 96.

[31] Ibid.

[32] The history of human rights is a distinct historical project which has proliferated over the past decade, particularly in American scholarship. This is a focus on human rights institutions and their historical origins. The leading figure in this movement is Samuel Moyn. See S Moyn, *The Last Utopia* (Harvard University Press, 2010).

[33] For further reading, R Gordon, 'The Past as Authority and as Social Critic: Stabilising and Destabilising Functions of History in Legal Argument' in R Gordon, *Taming the Past* (CUP 2017) is an excellent essay which explores these arguments further, particularly in an American context. See also on history in international law H Jones, 'The Radical Use of History in the Study of International Law', (2016) *Finnish Yearbook of International Law* 23: 309.

The *Chagos Islanders v UK* application was lodged before the European Court of Human Rights (ECtHR) in 2004. It alleged a number of violations of the European Convention on Human Rights (ECHR) arising out of the previous, private law, litigation in *Chagos Islanders v Attorney General and HM BIOT Commissioner*. The Chagos Archipelago is in the Indian Ocean, about 300 miles south of the Maldives, 1200 miles north east of Mauritius, and 1000 miles north of the Seychelles. Known in Maldivian oral history, the Islands were first known to Europeans after Portuguese discovery in 1512-13. They were first colonised by the French as part of the colony of Mauritius, and then transferred to British rule in the Paris Peace Conference of 1814. The islands were administered as part of Mauritius until 1965. At that time the administration of the islands was transferred to a newly created colony, the British Indian Ocean Territory (BIOT).

The complaints brought to the ECtHR concerned the removal of the Chagossians from the islands between 1967 and 1973. Some islanders were prevented from returning after visits elsewhere, others were forcibly transferred to Mauritius or the Seychelles. The United States was given a lease over the largest island, Diego Garcia, to build a military base. When the US construction teams arrived, the Islanders were told that the company employing them had shut down, their houses were demolished, and if they refused transportation elsewhere they would be left without supplies. In 1973, the UK gave the government of Mauritius £650,000 in compensation, and this was divided between 595 families resettled in Mauritius in 1977.[34]

Meanwhile in the UK, in 1975, Michel Vencatassen, a Chagossian who had been forced to leave Diego Garcia in 1971, brought a series of private law claims to the UK High Court. In 1978, the UK government offered to settle all the claims of the Islanders. In 1982, a settlement was reached in which the UK agreed to pay £4 million to the Mauritian government, which in turn agreed to provide £1 million's worth of land on which the Chagossains could settle. Between 1982 and 1984, 1,344 Chagossians in Mauritius received approximately £3,300 payment each. They subsequently claimed that they had not realised that this involved surrendering their right to return to their homeland, but 12 identified Chagossians had made a mark on renunciation forms written in English, a language they did not understand.

In separate litigation, some years later, the Chagossian Oliver Bancoult challenged in 1998 the 1971 Immigration Ordinance which excluded the islanders from BIOT. The ordinance was found to be ultra vires and set aside by the Divisional Court in 2000. A new BIOT Immigration Ordinance 2000 allowed for Chagossians to return to BIOT, excluding Diego Garcia. In 2002, representatives of a group of 4,466 islanders brought private law proceedings against the UK Attorney General, seeking compensation for past and continuing wrongs. In 2003, Mr Justice Ouseley struck out the action on three grounds: that the claim for further compensation after the *Vencatassen* case was an abuse of process; that the facts did not give rise to any arguable causes of action in private law; and finally, that in any event all claims were statute barred. In 2004 the Court of Appeal refused permission to appeal.

[34] The most detailed account of these events is found in the Appendix to the judgment in *Chagos Islanders v Attorney General and HM BIOT Commissioner* [2003] EWHC 2222 (QB).

Also in 2004, the BIOT Immigration Order 2004 repealed the 2000 order, which had given permission for Chagossians to return to the Islands. This was justified on the basis of an unpublished feasibility report into resettlement. This led to the *Bancoult 2* cases, challenging the validity of this new Order. Despite success in the Administrative Court and the Court of Appeal, in 2008 the House of Lords upheld the Secretary of State's appeal, finding that the Islanders had no legitimate expectation of resettlement on the Islands, the Human Rights Act did not apply to BIOT, the Crown prerogative was not limited to acts in the interest of the inhabitants, and the orders were not irrational. These events formed the basis of the application to the ECtHR, the hearing of which was delayed until after the House of Lords decision in *Bancoult 2*.

With UK public law seemingly exhausted, and unwilling to see the forced removal of a people from their homeland as anything other than a reasonable exercise of prerogative power, the Chagossians turned to the European Court of Human Rights, hoping that the Convention offered better protection than the common law right of abode. The application, amended following *Bancoult 2*, alleged breaches of Article 3 (inhuman and degrading treatment); Article 6 (the absence of a fair hearing); Article 8 (respect for family and private life); Article 13 (lack of an effective remedy); and Article 1 of Protocol 1 to the Convention (the violation of property rights).

The first preliminary question was one of jurisdiction, with the Court finding that the ECHR did not apply; first, because the UK had not included BIOT in any declaration under Article 56 and, second, because the Court refused to accept an extension of the UK's jurisdiction based on effective control of the territory because that test is exceptional and only applies to military action. The Court raised, but did not answer, the question as to whether the exceptional events leading to the Chagos Islanders' complaints would amount to an exercise of effective control, preferring ultimately to dismiss the Islanders' case after brief consideration on the merits. On the merits, the Court held that the Chagossians had lost their victim status under Article 13 of the Convention due to the settlement reached in the *Vencatassen* litigation. This was the 1982 settlement in which £4 million was paid out by the UK for resettlement on land in Mauritius. In finding this, the Court agreed briefly and directly with the UK High Court version of history set out in *Chagos Islanders v Attorney General and HM BIOT*.

In turning to the question of legal history, the struggles of the Chagos Islanders are more historicised than most. First, there is the history of how they came to live on the Islands in the first place, of how they came to be subjects in the British Empire, of the rights they had, the relationship with place, and then of how these islands were packaged up as territory within the Empire, first as Mauritius (and partly the Seychelles), and then as the British Indian Ocean Territory (BIOT). To this point, the ECtHR treats this as a pre-history, an historical vignette at the start of the judgment: background stops and history begins with the creation of BIOT. The history of the dispute the Court tells starts in 1969 with the slow forced removal of the Chagossians, which takes about four years to complete. Then there are various settlements – including payments to Mauritius of £3 million in February 1966 and the provision of an airport to the Seychelles. In 1972, the UK paid a further £650,000 specifically for the resettling of

Chagossians in Mauritius, in 1982 there was the Vencatassen settlement and the signing of renunciation forms in English.

The ECtHR gives a brief overview of the history, with the emphasis on the legal developments rather than the wrongs experienced. In particular, it emphasises that progress of the claims of the Chagossians through the UK Courts. In 1998, the discovery that the Chagossians were actually British citizens opened up the series of public law claims known as *Bancoult 1, 2 & 3*.[35] The first case concerned the initial order to remove the Chagossians, which was set aside as ultra vires; Bancoult 2 concerned a subsequent Order in Council, which was not overturned; and Bancoult 3 was about the Marine Protection Area. Meanwhile, private claims were brought unsuccessfully as *Chagos Islanders v AG & Her Majesty's British Indian Ocean Territory Commissioner*, and international law claims concerning the Marine Protection Area were brought by Mauritius to an UNCLOS Annex VII Arbitration. In 2004, an application was submitted to the European Court of Human Rights based on human rights violations arising out of the *Chagos Islanders v AG & HM BIOT Commissioner* case. The application was deferred until the conclusion of the *Bancoult* litigation and modified in light of the House of Lords decision in *Bancoult 2*. This case again was unsuccessful, primarily on jurisdictional grounds, but also on the merits; the ECtHR agreed with the High Court version of history in the *Chagos Islanders v AG & HM BIOT Commissioner* case. Crucially, this version of the history understands the Chagossians as individuals rather than a group, and understands the legal formalities as more compelling than the complaints. In revisiting the history of the Chagossians, if a different argument is to be compelling, it is these two conclusions which need to be overturned.

This series of cases show that the past is very present in contemporary legal disputes, particularly human rights disputes, where an appreciation of imperialism, its history and continuance, as well as the material forms it took, are vital both to making a legal argument and reaching a legal decision that are responsive to the facts. The following critique seeks to make the history of this dispute alive and uncertain, to demonstrate how the complaints can be re-characterised and re-understood, and to demonstrate that a particular choice was taken about how to understand the past in each of these cases.

Case Critique

This case critique consists of two parts: the first is to go through the case law leading up to the ECtHR decision in more detail, focusing in on the historical arguments used; the second is to critique the ECtHR judgment and the use of history in these cases more generally. The history of the cases themselves and the history of the Chagos Islanders told within those cases both require elaboration to understand why the recourse to the ECtHR failed. The second part elaborates the practical usefulness of history in legal argument by looking at alternative

[35] For an account of this archival work see R Gifford, 'The Chagos Islands - The Land Where Human Rights hardly Ever Existed', *Law, Social Justice & Global Development Journal* 2004 (1). Gifford discovered in 1998 that the Chagossians were dual Mauritian/British citizens as they were born in a British colony which was still a British territory.

emphasis in the history of the dispute, in particular emphasising the potential in viewing the Chagossians as a people, capable of self-determination.

The History of the Case(s)

The first legal challenge to the removal of the Chagossians from the Islands was begun in 1975, by Michel Vencatassen who had been forced to leave Diego Garcia in 1971. He began a private law action against the UK government for a number of private law wrongs, including intimidation, false imprisonment, and assault. In 1982, the UK and Mauritian governments established a trust fund to assist the resettlement of the Chagossian community in Mauritius, under the terms of the Mauritian *Ilois* Trust Fund Act 1982. The fund was distributed between 1344 individuals, who received approximately £3300 each. Some Chagossians were provided with small plots of land. These negotiations were carried out in English, which was not the first language of the Chagossians, and the agreement, in which they were required to renounce any claims against the UK government, was presented in writing to this largely illiterate community.[36] It was only in 1997 through archival research conducted by Richard Gifford, Olivier Bancoult's solicitor, that it was discovered that any person born on the Chagos islands was a British Citizen under the British Nationality Act 1981, and the British Nationality Act 1948 at the time of their exile.[37]

Bancoult 1 – A Public Law Challenge

Born in the Chagos Island of Peros Banhos in 1964, Olivier Bancoult and his family were denied return and excluded from BIOT after they visited Mauritius for medical reasons in 1968. In *Bancoult 1*, he challenged the decision to remove the Chagossians from BIOT. Section 11 of the 1965 BIOT Order in Council empowered the BIOT Commissioner to legislate for BIOT's 'peace, order and good government'. The BIOT Commissioner had enacted the 1971 Immigration Ordinance, section 4 of which provided that no person was allowed to enter BIOT or remain on the territory without a permit. The Divisional Court held that this Ordinance, despite being an exercise of prerogative powers, was ultra vires, because removal of the Chagossians was beyond governing – '*governed*: not removed', and it was quashed.[38]

This case involves a series of legal history arguments, and features some of the biggest names from English legal history paraded out on both sides. This illustrates from the beginning the way that legal history can be uncritically performed in everyday legal argument. The first was from the claimants, whose leading argument was that the expulsion of the Chagossians breached Magna Carta, specifically chapter 29 which forbids the exile of a subject except by law of the land, which is generally considered 'fatal to any royal claim to expel obnoxious subjects from the land without trial and verdict'.[39] Despite its 'beguiling simplicity', Laws LJ ultimately found the argument 'barren'.[40] He did, however, find that Magna Carta was the first

[36] S Allen, *The Chagos Islanders and International Law* (Hart, 2014) 12.
[37] Gifford (n 35) 1.
[38] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] 1 QB 1067, [57] (*Bancoult 1*) (emphasis in the original).
[39] W Craies, 'Compulsion of Subjects to Leave the Realm' [1890] 6 *Law Quarterly Review* 388, 393.
[40] *Bancoult 1* [31], [34].

declaration of the principle of the rule of law itself. The next historical argument is taken from Blackstone, an 18th century jurist and author of *Commentaries on the Laws of England*, that the government cannot expel a citizen from the land. Joseph Chitty, an early 19th century legal writer and father to something of a dynasty of legal scholars, is cited in support.[41]

The Government had its own legal history to tell, putting great emphasis on the 1865 Colonial Laws Validity Act. This Act established that colonial laws had to be valid under any statute explicitly extended to that territory and not valid under the laws of England in general. The Government claimed that the Immigration Ordinance was created by the Government of BIOT and so was not reviewable by the courts of England and Wales. This history emphasises legislation over scholarly writings, puts forward a strongly positivist version of legally history and contains within it an unspoken ideological commitment to a version of the British Constitution in which the Crown retains the power to make laws, and that such prerogative acts are non-justiciable.

As Frost and Murray make very clear, in finding for the appellant, Bancoult, Laws LJ employed his own particular view of the history of empire. Laws rejected the government's argument, which was supported by a significant amount of precedent, that the phrase 'peace, order, and good government' connoted 'the widest law-making powers appropriate to a sovereign'; he did so not by disagreeing with it, but by holding that governed referred to the people of the territory, not the territory itself.[42] In this way, Laws LJ was choosing to view the British empire as a liberal empire, the purpose of which was the good governance of colonial subjects, and the worst excesses of which could be, and historically had been, curbed by the rule of law. Furthermore, his is a rule of law that is more than simply procedural, it is principled: 'the Queen has an interest in all her subjects, who rightly look to the Crown - today, to the rule of law which is given in the Queen's name - for the security of their homeland within the Queen's dominions'.[43] There is no doubt here that Laws LJ accepted that Britain was still an Empire, but it was somehow a principled Empire. This case was a victory for the Chagossians, but within the limits of a liberal imperialist rule of law.

The Chagos Islanders case – Private wrongs

Bancoult 1, although a victory, did not produce any form of compensation. In 2002, Chagossian representatives brought a claim against the government in tort, specifically for misfeasance in public office, unlawful exile, and deceit. The case was heard in the High Court by Ouseley J in 2003.[44] In this judgment, Ouseley characterised the Chagossian claim as a claim for compensation after a final settlement, in reference to the signed forms from 1982 renouncing private law entitlements after the establishment of the trust fund. Ouseley gives a long history of the Chagossian claims, both in the more than 700 paragraph judgement and the more than 700 paragraph appendix specifically detailing the background of the claim, but sticks rigidly to the claim that they had signed away their rights. The counter history, that the Chagossians

[41] *Ibid* [39]
[42] *Ibid* [54]
[43] *Ibid* [57]
[44] *Chagos Islanders v The Attorney General & BIOT Commissioner* [2003] EWHC 2222 (QB).

had been misrepresented at this time and did not understand what they were agreeing to, is not considered. There is a further historical problem in the conflation of individual suffering into a group narrative, and the court here was unable to comprehend this evidence as presented, explicitly rejecting what Ouseley J called '"folk memory"'.[45]

The dismissed 'folk memory' is the collective suffering. This argument put forward for the Chagossians by council was that they experienced the suffering as a group. The account offered by witnesses of what had happen was not necessarily limited to what had happened to them individually, but was a collective harm, remembered collectively. The Chagossians use the creole word *dérasiné,* derived from *déraciner* in French and related to deracinate in English, to name their removal from their homeland. This word has two meanings to the Chagossian people, first to uproot or tear away, in reference to the physical removal, and a second meaning of to eradicate, indicating the existential threat the removal has on the Chagossians as a people.[46] Ouseley repeatedly finds this gap between individual experience and group memory to undermine the witnesses, and he dismisses each one in turn on this basis, that he cannot accept that they have both suffered as individuals and as a group.

The Chagossians as such lost on every claim. The judgment remains essential though as it gives the most extended history of the dispute, a history which is relied upon in all subsequent Chagos island disputes, and, vitally, is the one accepted by the ECtHR. While the detail of the account in the appendix is impressive, the structure of it and historical choices it makes raise questions and ultimately shaped the possible outcome of the case. Ouseley begins his history of the Chagossians in 1962, in a setting of steady and inevitable economic and population decline.[47] It then accepts as natural, neutral, and essential the national security argument for building a US military base on Diego Garcia. It also reports as fact that if there was a specific Chagossian culture or people, it was in decline, and by far the majority of islanders were contract workers. Taking these three interpretations as the starting point of the dispute, it is not possible to understand the dispute as the forceful removal of a people from their homeland by a colonial power. Instead, this becomes what Ouseley saw it as, a dispute between individual contract workers and a government acting in the national interest. Any wrongs done had been compensated. To complain further was simply 'vexatious'.[48]

The Court of Appeal agreed with Ouseley, accepting the High Court version of the history, in particular emphasising that the ministers at the time of the expulsion did not know that the 1971 Ordinance was illegal.[49] In fact, the Court of Appeal claimed it was widely believed that the authority to legislate for 'peace, order, and good government' was unlimited before it was ruled otherwise in *Bancoult 1*.[50] The deceit claim was dismissed for the same reason, although it was

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[45] *Ibid* [161] see further L Jeffery, 'Historical Narrative and Legal Evidence: Judging Chagossians' High Court Testimonies' (2006) 29 *Political and Legal Anthropology Review* 228.
[46] D Vine, S Wojciech Sokolowski and P Harvey, *Dérasiné: The Expulsion and Impoverishment of the Chagossian People* (draft report, 11 April 2005 available at: https://auislandora.wrlc.org/islandora/object/auislandora%3A63796/datastream/PDF/view) 48-9.
[47] *Chagos Islanders v Attorney General* appendix A [1].
[48] *Ibid* [748].
[49] *Chagos Islanders v The Attorney General & BIOT Commissioner* [2004] EWCA Civ 997 (Court of Appeal)
[50] *Ibid* [28]

noted that no decision was taken on the misleading of the United Nations.[51] They found unlawful exile was not a form of action recognised in English private law. Finally, they upheld the High Court's ruling that the action was time barred, again reasserting the history as told by Ouseley.

Bancoult 2

After the decision in *Bancoult 1*, the UK government conducted a feasibility study on the question of permanent resettlement, publishing part 1 in June 2000, and part 2 in July 2002. In June 2004 UK government enacted the BIOT Constitution Order in Council 2004 and the BIOT Immigration Order in Council 2004, ensuring full immigration controls over BIOT were reinstated and that displaced Chagossians had no right of abode. It should be noted that the Foreign Secretary at the time of *Bancoult 1* was Robin Cook, a member of the All Party Parliamentary Group on the Chagos Islands. Cook resigned as Foreign Secretary in protest during the build up to the Iraq war, and the Orders in Council were made by his successor, Jack Straw.

The *Bancoult 2* litigation raised fundamental questions of UK constitutional law. Whereas *Bancoult 1* had concerned a challenge to secondary legislation, *Bancoult 2* concerned primary legislation and the extent of the prerogative power of colonial governance. Both the High Court and the Court of Appeal found the 2004 Orders *ultra vires*, but the House of Lords allowed the appeal. The Secretary of State argued in appealing to the House of Lords that: i) the Queen in Council's power to legislate for a ceded colony is an expression of sovereign legislative authority; ii) alternatively, the Queen in Council could legislate without restraint in the absence of authority to the contrary; and (iii), the decision to enact the 2004 Orders was a legislative act and thus not subject to review.

The House of Lords unanimously rejected the argument that prerogative legislation should not be subject to review. The majority did however agree that the formulation 'peace, order, and good government' did not limit the Queen in Council's legislative authority as the UK and its dependent territories constitute an 'undivided realm'.[52] The Queen in Council was therefore entitled to give primacy to UK interests. Again, Bancoult argued that Magna Carta protected the Chagossians and gave them a right of abode. Lord Hoffman held that 'the right of abode is a creature of the law. The law gives it and the law may take it away'.[53] The majority rejected the argument that this was a right of any fundamental character which might limit executive power: the question of imperial security was paramount, they held, and the UK Government was within its powers in preferring the national interest of the UK over the interests of the individual Chagossians.

The minority felt that certain fundamental rights did apply. This split is characterised by Frost and Murray as the split between different views of empire, as utilitarian (the majority) or

[51] *Ibid* [36-7]
[52] *R (on the application of Bancoult v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 (*Bancoult 2*) [47]
[53] *Ibid* [45]

liberal.[54] But the legal reasoning either way is still operating within the paradigm of a colonial empire, either legislating for the benefit of its subjects as a whole or individually. As TT Arvind argues, these judgments dress up a political choice made by the judges in the language of formalism, a formalism which is demonstrably false.[55] The claim that the courts can determine the extent of the Crown's prerogative powers is not novel; it has its own history going back at least to Coke. Lords Rodger and Carswell held that an Order in Council could not be reviewed on the basis that it violated fundamental principles; Lord Hoffman thought it could, but that the right to abode was not such a principle. Both positions are at the least significant departures from the law as it was prior to the case. The argument of Rodger and Carswell gave unlimited powers to the executive in the administration of colonies, taking the British constitution back to the time of James I. Lord Hoffman's argument, that the right to abode was not fundamental, is similarly problematic: it amounts to arguing that although the Crown by prerogative could not make a law denying the Chagossians right of abode, it can make a Constitution which does that. Hoffman tried to argue that in colonial administration the Crown has whatever powers Parliament has. Again, this reasoning can be strongly questioned by reference to considerable precedent.[56]

The Chagos Islanders at the ECtHR

As has already been discussed, the application to the ECtHR failed on two grounds. First, the Court found that it did not have jurisdiction on the basis of effective control as found in *Al Skeini*,[57] as that applied to a 'clearly separate and distinct' set of circumstances.[58] What applied to the Chagos Islands was the traditional Article 56 question of declarations. Article 56 of the Convention allows for States to declare that the Convention extends to 'all or any of the territories for whose international relations it is responsible'.[59] The UK had not included the BIOT in its declaration, and so the Court's jurisdiction did not extend to this territory. The Court accepted that this was a frustrating outcome: 'anachronistic as colonial remnants may be, the meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice.'[60] The Court also found that the case would have failed on the merits, as the claimants were not victims under article 13 as they had been compensated in 1982. Here the ECtHR accepted the individualised history of Ouseley LJ.

Frost and Murray emphasise that the ECHR was written and signed at a time when the British Empire, although rapidly disintegrating, was still very much in existence. The Convention was 'crafted in such a way as to facilitate the management of overseas empires by the colonial

[54] T Frost & C Murray, 'The Chagos Islands cases: the empire strikes back' 66 *Northern Ireland Legal Quarterly* (2015) 263.
[55] TT Arvind, '"Though it shocks one very much": Formalism and Pragmatism in the *Zong* and *Bancoult*' 32 *Oxford Journal of Legal Studies* (2012) 113.
[56] *Ibid.*
[57] *Al-Skeini and Others v The United Kingdom* [2011] ECHR 1093.
[58] *Chagos Islanders v UK* [73]
[59] Article 56 *European Convention on Human Rights as Amended by Protocols Nos. 11 and 14*.
[60] *Chagos Islanders v UK* [74]

powers of Europe'.[61] Without the explicit extension of the right of individual petition to the territory, the UK was insulated from the ECHR provisions being applied to BIOT.

This judgment can be questioned in terms of the Court's two jurisdictional modes, personal and spatial, which clash. The Court sees itself as having jurisdiction over individuals, Article 1 demanding the protection of the rights of 'everyone within their jurisdiction'. But these individuals must be within a defined territory, a spatial limit upon its effects. It does not matter, it seems, that the relevant decisions were taken in the UK, or that the harmed individuals were UK citizens, there remains a double threshold of being an individual victim who is also within the territorial jurisdiction. This is both a result of the historical specificity of the ECHR being created at a time of declining European empires and of the form of historical narrative the Court is able to present and process. As with the UK Divisional court in a private law hearing, the ECtHR, for all its public law character, remained deaf to the Chagossians as a group and could only hear them as individuals who had been compensated and signed away their rights.

Bancoult 3

Bancoult 3 concerned the 2010 decision to create a Marine Protected Area (MPA) in BIOT. By this point the history of the dispute given in the judgment is very brief, and the language of the courts has changed to express irritation and weariness with the claimants. Frost and Murray highlight the repetition 'yet another chapter in the history of the litigation arising out of the removal and subsequent exclusion of the native population from the Chagos Archipelago'.[62] Bancoult's claim was primarily that creation of the MPA was done for an improper motive, simply to further ensure the exclusion of the Chagossians from their home, as revealed in a leaked cable of 2009. The US diplomatic cable quoted Colin Roberts, the then BIOT Commissioner, explaining the benefits of the proposed MPA:

> …there would be 'no human footprints' or 'Man Fridays' on the BIOT's uninhabited islands. [Roberts] asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents … the UK's 'environmental lobby is far more powerful than the Chagossians' advocates'.[63]

The Divisional Court would not admit the cable as evidence; although the Court of Appeal allowed it, it decided that the motivations of the FCO officials could not be attributed to the Secretary of State. The second ground was that the public consultation did not properly highlight the impact on the Chagossians, an argument the Court of Appeal rejected on the basis that the Consultation was open and the potential impact was obvious, essentially blaming the Chagossians for not properly engaging with the issue. In a final insult in the retelling of the history of the Chagossians, and revealing fundamentally a refusal to accept the scale of the harm done, the Court of Appeal simply asserts that the Chagossians 'left' the islands by May 1973. As Frost and Murray conclude: 'Once the London courts consider imperial justice to

[61] Frost and Murray (n 54) 281.
[62] *Bancoult 3 (DC) [1]* and *Bancoult 3 (CA) [2]*.
[63] Wikileaks, UK-US Official Meeting on BIOT (15 May 2009) [7].

have been done, woe to the colonial litigant who dares to ask for more'.[64] This decision was appealed to the Supreme Court, who rejected the appeal.

Chagos UNCLOS Arbitration

In April 2010, the UK declared a Marine Protected Area (MPA) around the Chagos Archipelago, extending to 200 nautical miles from the baselines of the archipelago and covering an area of more the half a million square kilometres. Mauritius objected to the establishment of this zone on three grounds: that the UK was not the coastal state for the purposes of the United Nations Convention on the Law of the Sea (UNCLOS); that the declaration of the MPA breached UNCLOS by infringing on Mauritius' fishing rights under UNCLOS and because the UK breached its duty of consultation and cooperation; finally, that Mauritius was entitled to submit claims over the continental shelf of the archipelago. The Tribunal decided in Mauritius' favour on all three points. What is crucial for us is that they gave a full retelling of the history of the Chagos Archipelago which focused on the moment of decolonisation, rather than of population transfer.

The Tribunal's history situates the decolonisation of Mauritius in the context of the decline of the British Empire and of the rise of the United States. The separation of the Chagos Archipelago from Mauritius is clearly understood as action taken to allow the United States to construct its military base on Diego Garcia. The Tribunal's decision turns on a constitutional conference in London in 1965 between the British government and the Mauritian Premier. The agreement reached then is known as the Lancaster House Undertakings.

In these Undertakings, the Mauritian Council of Ministers agreed the detachment of the Chagos Archipelago from Mauritius, but also that when no longer required for defence purposes, the islands would be returned to Mauritius.[65] When the agreement was made public, it instantly attracted the attention of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. General Assembly Resolution 2066 (XX) noted 'deep concern that any step taken by the administering Power to detach certain islands form the Territory of Mauritius for the Purpose of establishing a military base would be in contravention of the Declaration'.[66] This agreement, and subsequent assurances that the islands would be returned to Mauritius, were the foundation for the Tribunal finding that the UK could not unilaterally create the MPA around the Chagos Archipelago.

The Legal History of the Chagos Islands

The narrative to here is a critical retelling of the judgments. The following sub-sections will draw out the alternatives offered by a focus on history. First, let us consider the legal history, the history that the judges in these various different cases considered. There are two shortcomings of the legal history approach. The first is that it puts the history of the law first,

[64] Frost & Murray (n 54) 285.
[65] UNCLOS Arbitration paras 78-85.
[66] General Assembly Resolution 2066 (XX), *Question of Mauritius*, adopted 1398th Plenary Meeting, New York, 16th December 1965.

in priority over the history of the wrong suffered. This means that the search for a narrative of legal development occupies far more time and space than a search for an accurate account of the harm. From *Bancoult 1* onwards, the actual events are given a brief and uncontroversial gloss. The second is that the law then fails to comprehend the wrong done, the actual history of what happened, because it does not fit into the legal history.

The legal history has a particular non-human perspective. Not just non-human rights, but non-human. It is a history of land ownership, colonial administration, and public law. It is one reason why the Chagossians had to return to the courts in *Chagos Islanders* raising tort claims, as their pyrrhic victory in *Bancoult 1* came with no compensation. The UK courts, both in hearing the public law challenge and the tortious claim, are dealing with a legal narrative which treats the Chagossians themselves as peripheral, as mere objects. For example, the question in *Bancoult 1* was whether the Commissioner of BIOT had the power to remove the Chagossians, or whether this action was *ultra vires*. Even in this decision which seemed to be in favour of the Islanders they are portrayed as passive, they are a people to be governed, they do not take an active legal role themselves. As Frost and Murray argue, this is a question of what sort of colonial authority the British were, not a question of the fundamental rights of the individual.

In *Chagos Islanders* we see a different history of the events. The Chagossians tried to bring a claim for the wrong done to them for compensation. However, in attempting to turn their history into something understandable for a tort claim, the actual harm done was lost. The Chagossians may well have suffered as individuals, being forcibly removed, denied due process or proper compensation, but their biggest suffering was as a group. The judgment of Ouseley is full of complaints that the Chagossians were not properly presenting their claims, that they were literally hard for the law to understand.

By *Bancoult 2 & 3,* as well as the Court losing interest in the plight of the Chagossians, they also reassert a strict legal reasoning, this time that the administration of colonies is a prerogative power, relegating the interests of the Chagossians even lower. The people being governed have no say over the legal status of the land. Whilst their fundamental rights, particularly of abode, were given careful and serious consideration, the individuals' right of abode could not restrain a reasonable decision taken by the executive. Furthermore, the question of group rights of self-determination was briefly and entirely dismissed as having no application to 'a purely domestic law such as the Constitution Order'.[67] The UK government and the UK courts simply cannot understand a version of the complaint that treats the Chagossians as anything other than a group of individuals under colonial governance. All other aspects mean nothing for the domestic legal history. The judges do not ignore the historical arguments. Magna Carta, Coke, Blackstone, all get a mention. But it is a history of law itself, a history of the UK Constitution and the role of the courts, not a history of the Chagossians, of Empire, or of human rights.

The history told does not value anything beyond a strict, impersonal, law. This view is captured neatly in an argument of the UK Government in the UNCLOS arbitration: 'in any event, economic, social and cultural ties between the Chagos Archipelago and Mauritius during this

[67] *Bancoult 2* (HL) [66].

period are irrelevant to the Archipelago's legal status'.[68] There is a clash here between the UK legal view of this as a question of territory and land ownership, and a perspective of decolonisation and self-determination. In UK law, the separation of the Chagos Archipelago was perfectly legitimate, but in international law, the breaking up of a non-self-governing territory went against the process of decolonisation.

The closest the legal history comes to capturing the experience of the Chagossians is in the judgment of Ouseley LJ in *Chagos Islanders*. Here we see the actual islanders, and what happened to them as individuals. However, it is the breaking down of the Chagossians into individuals with individual complaints that leads the law to view their claims as unfounded. The removal from their homeland was suffered as a collective wrong, and tort law has no tools to understand, never mind remedy, an historic collective harm. This is a good point to turn to human rights and see if it can offer an alternative history of the Chagos Islanders which contains a remedy.

The Human Rights History of the Chagossians

A human rights history of this dispute takes a fundamentally different starting point: the people involved. This was the motivation for bringing the *Bancoult* litigation, if not the basis of the judgments. In seeking judicial review, Bancoult brought a rights based history to the court, rooted in Magna Carta and colonial administration, as well as an examination of the historical record of the expulsion of the Chagossians which was focused on them as a people not as mere contract workers. Bancoult's argument, framed as a human rights history, started from *Magna Carta*. While the historical accuracy of regarding *Magna Carta* as a human rights document is questionable to say the least,[69] it is a powerful historical argument and a good place to start from in arguing for a particular interpretation of the legal history.

The next human rights history argument Bancoult made was to turn to Blackstone for authority for the proposition that no State can exclude its own citizens; this is a constitutional right to reside or to return. Again, as with the *Magna Carta* argument, this is putting forward a version of legal history which emphasises the rights of the individual, regardless of historical context. It is these arguments, that there exists a fundamental right at work here, which undermines the otherwise strong precedent offered by the government that the crown's powers over its dominions were near enough unlimited. By telling the history that way the issue was raised above standard public law questions and made about rights.

The reason this is a human rights history, rather than just a history, is that the context of *Magna Carta* or Blackstone has nothing to do with rights. This is not an objective reading of these authorities, it is shaped by a human rights perspective. When *Magna Carta* refers to 'freemen', in 13th century England this only meant noble men. When Blackstone refers to 'subjects' in the

[68] *Chagos Marine Protected Area Aribtraiton (Mauritius v UK)* PCA 2015 [62].

[69] For interesting critiques of the use of Magna Carta in human rights arguments see: Lord Sumption, 'Magna Carta Then and Now' Address to the Friends of the British Library (9th March 2015) available at https://www.supremecourt.uk/docs/speech-150309.pdf; and C Murray 'The Magna Carta's Tainted Legacy: Historic Justifications for a British Bill of Rights and the case against the Human Rights Act' in F Cowell, ed. *Critically Examining the Case Against the 1998 Human Rights Act* (Oxford: Routledge, 2018) 35.

18th century, he only means property owning men. However the human rights history elides this context to provide a powerful narrative of a liberal Empire which protected individual rights. Now while the judgment in *Bancoult 1* does not mention human rights properly so called, Bancoult's argument, and to some extent the judgment, is framed in terms of rights. It is rights which fall away in telling a stricter legal history in *Chagos Islanders*.

The applicants again made arguments from a human rights perspective in the private law case. Ouseley refers in his outline of the history to the Chagossians 'contending … violation of their human rights'.[70] Reference is also made to UN Human Rights Committee evidence. However, in the appendix history, it is clear that Ouseley regarded human rights as what the claimants mistakenly thought they had, and refers several times to this as a mistake and that they had needed better legal advice in relation to the tort claim. The judgment itself is a strict legal history, and it has no place for fundamental rights, only the question of specific individual harms attributable to the UK government.

Bancoult 2 raised several new questions, around the feasibility of resettlement and national security arguments. In terms of human rights, it might seem significant that the Human Rights Act 1998 had come into force in the intervening period. However, the Act does not override primary legislation, such as the Orders in Council being challenged by the litigation, only allowing for a declaration of incompatibility.[71] Geographically, too, the HRA is found not to apply to BIOT, as BIOT 'is not part of the United Kingdom', with Lord Hoffman declaring hyperbolically that the Human Rights Act has as much relevance for BIOT as 'a local government statute for Birmingham'.[72] This was reasoning which the ECtHR would follow. As a result, the argument was refought on the grounds of the right to abode and the ability of the court to review executive actions in colonies.

Lords Rodger and Carswell found that the court had no power to review colonial exercises of prerogative powers.[73] This argument is historically derived, from the Colonial Laws Validity Act 1865, which limited the powers of colonial courts to review legislation. Lord Hoffman rejected this argument because the law was not a colonial law; it was an Order in Council. The turning point for Lord Hoffman was instead that the requirement of 'peace, order, and good government' could be of the Empire as a whole, not the specific territory or people. Frost and Murray describe this as a conflict between liberal and utilitarian imperial jurisprudence, with the utilitarian needs of the United Kingdom winning out over the needs of the individuals. The right of abode was recognised, but it was overcome by the needs of the United Kingdom.

The argument taken to the ECtHR faced similar obstacles but from an international perspective. As has been said, the UK had made no declaration to include BIOT in the jurisdiction of the ECtHR. To argue this the Chagossians turned to geography, arguing first that BIOT was included in the Art 56 declaration made over the Colony of Mauritius, second that the colony was so totally under the control of the UK as to be properly regarded as part of it, third that the

[70] At [84]
[71] HRA s 21(1)(f).
[72] At [65]
[73] At [109] and [126]

acts in question took place within the UK, and fourth that the Convention applied extraterritorially where there was effective control over the area. The Chagossians put forward a history of the geography of the islands to argue that the Court had jurisdiction. This history emphasised the UK's responsibility for the islands, being continuous from when they were grouped together as part of the colony of Mauritius. The final, extraterritoriality point, on which the Court did not give an opinion, rests on the idea that the UK was in effective control – on the ordinary meaning of this words having the power to remove an entire people from their homeland strikes one as being a pretty effective level of control.[74] The argument of the Chagossians relies on seeing the governance of people as more significant than the governance of territory. The UK government, and ultimately the Court in refusing to find jurisdiction, prioritises the governance of territory. This again is a clash between a legal history and a human rights perspective on the history. The ECtHR rejected this and relied upon the governance of territory as being the dominant legal history.

We can see from the case law that the human rights history arguments were made and had potential, and in *Bancoult 1* can be seen is partly successful. However, the human rights history has a fundamental flaw as a legal argument, as seen most clearly in *Chagos Islanders v AG & HM BIOT Commissioner*. The human rights history approach individualises the experience. It struggles to communicate this as a group experience in a way that was legally persuasive. As such it is worth pushing human rights a bit further, and exploring this as an indigenous rights history, which takes us back to the first discovery and inhabitation of these islands, the part of the history heretofore glossed as background.

The Post-colonial History of the Chagossians

With domestic public law and European human rights avenues seemingly closed to the Chagossians, the best remaining legal claims are from international law. First is the question of the decolonisation of Mauritius and the Seychelles, a question posed by the UN General Assembly to the International Court of Justice.[75] This is the argument that the UK did not properly complete the decolonisation of Mauritius and the Seychelles. The second is the claim that the Chagos islands, even with their inhabitants currently absent, are a non-self-governing territory with a people capable of self-determination. These arguments will again require us to retell the history of the Chagos islands, now with a focus on colonial and post-colonial history.

For the first claim, the question of whether the creation of BIOT was a breach of Mauritius' right to self-determination of is crucial. Mauritius and the Seychelles were both identified by the UK as non-self-governing territories in 1946. The right of colonial self-determination was proclaimed in the 1960 Colonial Declaration, although as a General Assembly resolution this does not have any binding effect in international law, it is merely evidence of customary law. By 1970 and the adoption of the Friendly Relations Declaration, self-determination is clearly

[74] There is an extensive literature on this area, M Milanovic *Extraterritorial Application of Human Rights Treaties* (OUP, 2011) is a good place to start, if a little dated.

[75] *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)* At the time of writing this Opinion is still in the preliminary stages.

customary international law. The BIOT was created in 1965, meaning that it is difficult to argue that the right of self-determination was customary international law by this stage.

The Colonial Declaration paragraph 6 reads: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'. The removal of the Chagos Islands from the territory of Mauritius was completed with the agreement of elected officials governing the colony in the 1965 Lancaster House Agreement.[76] However, the General Assembly was unconvinced by this, and in December 1965 adopted resolution 2066(XX), which condemned the UK's failure to follow the Colonial Declaration, reasserted the right of the people of Mauritius to freedom, self-determination, and territorial integrity, and criticised the attempt to 'dismember' Mauritius by the removal of the Chagos Islands from the territory.[77] Since the early 1980s, the government of Mauritius has relied on these declarations and others in maintaining a claim over the Chagos Islands as Mauritian territory wrongly annexed on the eve of independence in gross violation of the right to self-determination. The UK Government's position in the Lancaster House Agreement, and in various statements since then, has been that the Islands will revert to being part of Mauritius once they are no longer needed for defence purposes.

The second argument is that BIOT should itself be regarded as a non-self-governing territory with the right of self-determination. A non-self-governing territory is defined in Chapter XI of the UN Charter very loosely as 'territories whose peoples have not yet attained a full measure of self-government'. Due to the vagueness of the principles contained in Chapter XI, the General Assembly produced a series of declarations which gave more substance to how to identify these territories and how they could achieve self-government.[78] After the Colonial Declaration, in 1961 the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples was established, generally known as the Committee of 24. By the 1970 Declaration on Friendly Relations, self-determination was customary international law, as confirmed by the ICJ in the *Namibia* and *Western Sahara* advisory opinions.

Allen views the difficulties thrown up by self-determination not having clearly been recognised as customary international law in 1965 as a very significant impediment to the Mauritian argument that international law was breached in the creation of BIOT. He sees far more potential in the argument that BIOT is itself a non-self-governing territory. From the start, the UK argued that the Chagossians' were only contract labourers. As such the Islands did not have a permanent population in order to qualify as a non-self-governing territory.

However, as revealed in the *Bancoult* litigation, the UK Government at the time knew this to be false. A series of Foreign Office notes, summarised in *Bancoult (2) (Divisional Court)*, indicate that the UK knew that 'under the Charter … the territory is a non-self-governing

[76] Allen argues convincingly that this agreement was coerced, see Allen, (n 36) chapter 4.
[77] UNGA Res 2066(XX) (1965), 16 December 1965.
[78] See UNGA resolutions 567(VI)(1951), 648(VII)(1952) and 742(VII)(1953). The crucial resolution is 1541(XV)(1960), the Colonial Declaration.

territory and there is a civilian population even though it is small.' The FCO official advised a policy of 'quiet disregard', of not raising the issue unless challenged. There was an explicit attempt to avoid the Committee of 24, the Commissioner of BIOT explicitly advising to avoid anything which makes the islands fall within the purview of the Committee. He recognises it may be 'rather transparent', but the UK should claim all the Chagossians are Mauritian or Seychellois.[79]

It should be taken very seriously how hard the UK tried to maintain that BIOT was not a non-self-governing territory. In 1965, in a report to the General Assembly, the UK government strenuously denied that the Chagos Islands could be regarded as such, describing the population as 'under 1,500 who, apart from a few officials and estate managers, consisted of labourers from Mauritius and Seychelles … together with their dependants'.[80] Frost and Murray demonstrate the continuation of this deception. In a 1970 FCO Briefing note, it is remarked that calling the Chagossians contract labourers 'does not give away the existence of the Ilois but it is at the same time strictly factual'.[81] The same arguments were used again in the 1980s, when the Falklands/Malvinas conflict raised the question of the Chagos Islands again. Foreign Secretary Francis Pym reiterated that the Chagossians were 'transit workers … employed on a contract basis'.[82]

However, by the 1980s this argument was less compelling. As the Minority Rights Group put it in their 1982 report, 'the chief reason for the "paramount" treatment offered to the Falkland islanders is simply that their skins are white'.[83] The UK then set about rewriting the history of the Chagos Islanders. The first part of this, as explained by Frost and Murray, is that the Chagossians were not a people, were not distinct from Mauritius, and whilst resident in the Chagos Islands, had not developed any sort of civil society there. The second part was to argue that any rights they had, whether self-determination or the right to abode, were trumped by defence interests. This is Frost and Murray's Imperial Constitutionalism in action, and in particular what they call Utilitarian Imperialism, prioritising the good of the Empire as a whole over individual subjects. It is this reasoning, based as it is in a flawed and invented legal history, which has proved persuasive in a majority of domestic litigation.

But it remains possible to attack this argument where it is weakest – its history. Let's return to the start, and give the history of the Chagos islands, but take it seriously as history relevant to the dispute, not just background. The legal effect of this is first to establish the Chagossians as a people, possessing the right of self-determination, and second to reconsider what human rights apply to them as a people, rather than as individuals. To establish if they are a people it

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[79] FCO records summarised in *Bancoult (2) (Divisional Court)* [28-35].
[80] UK report to the General Assembly's Fourth Committee (16 November 1965) as quoted in *Bancoult 2* (DC) [29].
[81] As quoted in Frost and Murray (n 54) 271.
[82] FCO Telegram from Francis Pym as quoted in C Murray & T Frost 'The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism' in S Allen and C Monaghan (eds) *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer, 2018) 147-174.
[83] J Madeley, *Diego Garcia – A Contrast to the Falklands* (Minority Rights Group 1982) as quoted in Frost and Murray *Ibid*

is useful to consider if they satisfy the generally accepted description from the UNESCO group of experts that peoplehood means:

> A group of individual human beings who enjoy some or all of the following features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; a common economic life.[84]

The starting point must be their connection to their homeland. The Islands were uninhabited, although known about in Maldivian oral history,[85] until French colonisation of Isle de France, modern day Mauritius, in 1715. The French established coconut plantations on the Chagos archipelago in the mid-18th century. The islands, along with the colonies of Mauritius and Seychelles, became part of the British Empire in 1814 Treaty of Paris. What is key for the Chagossian history is that in the second half of the 18th century, the establishment of coconut plantations meant the transport of slaves to the islands. These are the first permanent inhabitants of the territory. Some Chagossians can trace their ancestry back to this first generation of slaves, and their graves remain on the islands.

By 1900, there were 426 families living on the Islands, about 1000 individuals. About 60% were descended from the original slave population, the other 40 being descended from indentured labourers brought over from the Indian sub-continent by British authorities after emancipation. Between 1895 and 1965 there were 2970 births on the Chagos Islands. At the time of expulsion, there were around 1800 people living there.[86] This heritage is the first step in establishing the Chagossians as a distinct people. They also have a particularly strong connection to the land, as evidenced in the harm felt by their removal. This feeling of loss, which continues to this day, is best documented in the *Dérasiné* report,[87] which describes the feelings of bereavement felt by the Chagossians at being removed from their homeland. In exile, the Chagossians have developed specific creole words to explain the loss experienced, which often explains illness and death in the community.

Other historical facts which demonstrate the Chagos Islanders as a separate people include that they have their own creole, their own music and dance traditions, their own spiritual practices, and an economic system of sharing and bartering. All of this evidences a distinctive group identity.[88] Furthermore, the exile experienced has both heightened the group identity and the existence of this identity has increased the loss and suffering of exile. What is more is that this suffering has been ongoing since the end of the 1960s until today.

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[84] International Meeting of Experts on Further study of the Concept of the Rights of Peoples, 1989, SHS-89/CONF602/7 7.

[85] X Romero-Frias, *Folk Tales of the Maldives* (Nias Press, 2012) Chapter 48.

[86] Accurate census information was never kept. These figures are the result of archival research conducted by the Minority Rights Group: J Madeley, *Diego Garcia – A Contrast to the Falklands* (Minority Rights Group 1982) as quoted in Frost and Murray (n 82).

[87] D Vine, S Wojciech Sokolowski and P Harvey, *Dérasiné: The Expulsion and Impoverishment of the Chagossian People* (draft report, 11 April 2005 available at: https://auislandora.wrlc.org/islandora/object/auislandora%3A63796/datastream/PDF/view)

[88] Ibid 232-38.

By telling the history this way, focusing on the Chagossians as a group, allows us to return to human rights arguments with a different perspective. The International Covenant on Civil and Political Rights (ICCPR) is intended under Article 2(1) to have universal effect. The UK has attempted to avoid this by first claiming that BIOT was not listed in the territorial declaration made by the UK when it ratified the Covenant, and second that the Chagossians were not resident in BIOT when it came into force. It has been argued that the UK not upholding the Chagossian's rights under the ICCPR constitutes an internationally wrongful act.[89] More concrete is that the Human Rights Committee did not find these arguments persuasive in its observations on the UK's 2001 report. It recommended that the UK should make the right of return practicable, compensate the people for the long denial of the right of abode, and provide further information on the territory. These recommendations have been repeated in observations on two subsequent reports, which continue not to include BIOT.

Under the International Covenant on Economic, Social and Cultural Rights, which also has universal scope, the UK is required to secure adequate and improving standard of living, especially in terms of housing, welfare, health, education and culture. Allen argues that these obligations apply to the resettlement of the islanders, that the UK has an international legal obligation to ensure that there would be an adequate standard of living for the resettled Chagosians. A further argument of Allen's is that the International Convention on the Elimination of All Forms of Racial Discrimination also applies. Again, the Committee on the Elimination of Racial Discrimination has repeatedly complained that the UK does not included BIOT in its periodic reports. The denial of the right of abode to the Chagossians is clearly within the Convention definition of racial discrimination.

One final possibility that arises from recognising the Chagossians as a people is the argument that they are Indigenous. Whilst definitions of indigenous peoples have been developed,[90] indigenous peoples themselves have rejected attempts at formal definition.[91] Commentators such as Patrick Thornbury or Benedict Kingsbury have offered descriptive criteria of indigeneity, whilst also endorsing the idea of self-identification. Both emphasise an historical connection with a place and cultural distinctiveness. The one difficulty in describing the Chagossians as indigenous is the question of historical precedence, they were not the original occupiers of the land as the islands were first settled by French colonisers who brought the ancestors of the Chagossians there as slaves. Nevertheless, they have an historical connection to the land that certainly precedes any other possible claim, including that of the UK.

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[89] Allen (n 36) 264.

[90] The best known is that of the Special Rapporteur, J Martinez-Cobo, *Study of the Problem of Discrimination Against Indigenous Populations,* E/CN4/Sub2/1986/7/Add 4 379.

[91] An example of the position of indigenous representatives is listed in the 1996 report of the Working Group (UN Doc. E/CN.4/Sub.2/1996/21) as follows:
"We, the Indigenous Peoples present at the Indigenous Peoples Preparatory Meeting on Saturday, 27 July 1996, at the World Council of Churches, have reached a consensus on the issue of defining Indigenous Peoples and have unanimously endorsed Sub-Commission resolution 1995/32. We categorically reject any attempts that Governments define Indigenous Peoples. We further endorse the Martinez Cobo report (E/CN.4/Sub.2/1986/Add.4) in regard to the concept of "indigenous". Also, we acknowledge the conclusions and recommendations by Chairperson-Rapporteur Madame Erica Daes in her working paper on the concept of indigenous peoples (E/CN.4/Sub.2/AC.4/1996/2)."

Conclusion

The purpose of the chapter was primarily to illustrate that legal history is not a settled field. It is malleable and arguable, open to interpretation and emphasis. The legal history of the Chagossians can be told in different ways. These different histories open up different claims. Nothing in this analysis is definitive or conclusive; the purpose is to show the potential of history. As lawyers, we should appreciate both that historical arguments have persuasive power, and also that historical legal concepts remain potent long after their historical context has passed. In the UK courts, the historical context of the British Empire repeatedly triumphs over more modern concerns for de-colonisation and human rights. Even the European Court of Human Rights reveals itself to be limited by colonial legalism. Only by turning to international human rights, and telling the history of the Chagossians as a people, did new avenues for appeal open up. At the time of writing, the General Assembly has put the question of the decolonisation of Mauritius and the Chagos Islands before the International Court of Justice. This will demand another retelling of the history of the Chagosians.