

RESPONSIBILITY FOR ACTS IN VIOLATION OF INTERNATIONAL LAW IN THE BRITISH INDIAN OCEAN TERRITORY*

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1. This paper considers some aspects of international law which may arise in the *Bancoult* litigation when it is heard before the House of Lords.
2. In an earlier and longer version of this paper, I undertook a relatively detailed analysis of all the avenues by which the UK can be held to be responsible for its actions in international law. Because time is limited, and the focus is on the *Bancoult* litigation, I will focus on two areas which I think are problematic. (i) the UK's responsibility for acts in violation of both the Covenant on Civil and Political Rights (CCPR or 'the Covenant') and customary international law and (ii) the potential for these standards to be justiciable in the House of Lords. Overall, I want to take the position of someone wanting to argue that the UK government is responsible in a domestic court for violations of standards under international law and try to highlight the difficulties that he may face.

Establishing responsibility for the acts of the UK and its government in violation of international law

3. Substantively, there are a variety of obligations in the CCPR which the UK can be said to have violated.¹
4. Responsibility for violations of these rights are subject to territorial and temporal restrictions. For example, the UK could not normally be held to account for abuses of Covenant rights on territories over which it does not have effective control.² Furthermore, such obligations do not have a retroactive effect. I'll focus on the issue of territorial scope.

(ii) Territorial scope of the CCPR

5. Article 2 of the CCPR is a territorial clause; the UK is responsible for all those violations of Covenant rights which occur within its territory OR jurisdiction.³

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¹ These include the right of self-determination (A1(1) and esp A1(3)); freedom from inhuman and degrading treatment (A7); right to dignity (A10); freedom from interference with family life (A17); equal protection before the law (A26); right to an effective remedy (A(2)(3)).

² For example, see *Loizidou v. Turkey* (1996) and *Bankovic* (2001).

³ Article 2(1) '...each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' See also MacGoldrick and Novak commentaries.

So, it is necessary to ascertain whether the BIOT falls within the UK's jurisdiction for the purposes of Article 2(1).

6. Article 2(1) clearly requires that the Covenant applies to all of the territory of the UK. This does not solve the problem of territorial scope. This is because in May 1976, the UK Government ratified the Covenant with an accompanying list of 'reservations and declarations'.⁴ This applies the Covenant to a range of overseas territories (e.g. Jersey) but does not mention the BIOT, SGSSI and SBTs. By not mentioning these BOTs, the list prevents the extension of rights in the Covenant being extended to them.
7. One ground for excluding the BIOT from this list was that no one permanently lived there when the Covenant was ratified. However, this line of reasoning could equally apply to Rockall or those Outer Hebrides which are uninhabited. It is inconceivable that the UK Government would accept that the Covenant would not apply in these parts of its territory because they are uninhabited. Therefore, the absence of population cannot be a conclusive reason for the Covenant not applying in the BIOT.
8. But even if this list does exclude the BIOT from the territory to which the Covenant extends, it is questionable whether it could be relied upon by the UK Government. This is because the list is likely to be an invalid reservation to article 2(1) because it is contrary to the point and purpose of the Covenant.⁵
9. Also, by virtue of GC24, the HRC claims the competence (a) to consider the validity of a reservation, and (b) to sever it if it is incompatible with the point and purpose of the Covenant. In GC24, the HRC determined that reservations to article 2 of the CCPR which are discriminatory, are invalid. This is, it should be pointed out, not *quite* the same thing as restricting its territorial scope. But it would be discriminatory if the British Government refused to afford Covenant rights to the Chagossians, who are British subjects, by virtue of the fact that they have connection to a particular territory under UK jurisdiction.
10. But on the other hand, for the HRC to claim these two competences is highly controversial from the perspective of the law of treaties given their consensual basis.
11. Another line of argument is that the UK does have effective control over the BIOT (i.e. parallel to European Court of Human Rights' reasoning in

⁴ See AWB Simpson, 'Territorial Application of the ICCPR' (unpublished article); Simpson and Moor 'Ghosts of Colonialism in the European Convention on Human Rights.' (2005) 76 *BYIL* 121-93.

⁵ The FCO seemed to acknowledge this to be the case in two telegrams made in 1967 and 1974. The FCO said in these telegrams that 'It is not possible wholly to exclude any particular territory from the application of the Covenants' because it would have to be categorised as a reservation which is incompatible with the point and purpose of the CCPR. At the Cambridge conference, Nuala Mole argued that 'the list' was a nullity. It seems to me that if the government seeks to rely upon the list, the question then arises whether 'the list' is a reservation or not. If it is not, then it is, indeed, invalid, or, a nullity. But it seems to me that the question of whether it is a valid reservation or otherwise is to do with the arguments made by the state, and not a given state of affairs independent of adjudicative determination.

*Lozidou*⁶) and it is *de facto* a non-autonomous territory. Both of these reasons might allow the BIOT to be construed as being entirely subject to UK jurisdiction under the proper meaning of article 2(1) regardless of ‘the list’⁷ The problem with this line of argument is the decision in *Quark*:⁸ that as far as the ECHR is concerned a list of this type does determine the extent of the UK’s obligations under the Convention with regard to its Overseas Territories. However, the ECHR has a ‘colonial clause’ in it (article 56) which affords state the competence to extend its territorial scope through their consent. The CCPR does not have a ‘colonial clause’ and the relevant factor is territory and jurisdiction under A2(1).

(ii) Temporal Scope of the CCPR

12. Many of the alleged rights violations took place before the ratification of the CCPR by the UK in May 1976. Presumably, applying the intertemporal principle,⁹ the original deportation or the excision of the BIOT from Mauritius cannot attract responsibility from the perspective of convention rights. This said, articles 14 and 15 of the Articles on State Responsibility¹⁰ deal with continuing and composite wrongful acts.¹¹ Applying this reasoning to the BIOT, we can say, then, that the right of self-determination was originally violated by the deportation. But the refusal to allow the Chagossians to return must equally qualify as a rights violation in itself or as an element in a composite or continuing violation.¹² The first of the composite acts which

⁶ See *Lozidou*, note 2, above.

⁷ Note that the ECHR does apply to the SGSSI and SBTs but not to BAT or BIOT. The first protocol does not apply to any of these areas and the Isle of Man according to various lists purporting to extend the territorial scope of the ECHR.

⁸ *R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57.

⁹ See dicta of Judge Huber in , *The Island of Palmas Case* 2 U.N. Rep. Intl. Arb. Awards 829)and commentaries to article 13 ASR. Article 64 of the VCLT also contemplates that it applies to emerging norms of jus cogens.

¹⁰ Examples given are the maintenance of legislative provisions in violation of the Convention, unlawful detention or unlawful occupation of embassies, maintenance by force of colonial domination, unlawful occupation, stationing of armed forces in another state without consent. See also *Blake v Guatemala* (Decision of the Inter-American Court of Human Rights, 1998) and Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002) 135-137.

¹¹ A relevant example is *Lovelace v Canada* (HRC 1981) which concerned Canadian legislation which denied membership of an Indian Group to Lovelace prior to Canada’s ratification of the Covenant. In its decision, the HRC said that it could not consider abuses before Canada’s ratification. However, if other related abuses were committed post-ratification, or the original acts continued to have effects after ratification, the HRC could consider any alleged violations. The HRC said that it ‘...was not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol...In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status...at the time of her marriage in 1970....The Committee recognizes, however, that the situation may be different if the alleged violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date’. Crawford then says: ‘It found that the continuing impact of Canadian legislation, in preventing Lovelace from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the Covenant after that date.’

¹² See Crawford, note 11, above, at 141.

occur after ratification constitutes the ‘first breach’ for the purposes of attributing responsibility.¹³

(iii) Violations of customary international law

13. It is relatively clear that the *principle* of self-determination, as applied to ‘peoples’, has existed in customary international law since 1945.¹⁴ Some think (i.e. Jennings) that this principle is essentially an unclear political aspiration. But it can be safely said by virtue of GA resolution 1541 (1960) (Res 2625 and 2066) that it has now coalesced into a relatively determinate set of rights and duties. This said, there are two ways of conceiving of the right-holder:¹⁷
14. (i) By excising the Chagos Islands and forming the BIOT the UK has violated Mauritius’ rights. In Res 1514 (1960)¹⁸ the UNGA declared that the excision of territory as part of the decolonisation process constituted a violation of the right of self-determination. In Res 2066 (1965) the UNGA declared that UK’s excision of the Chagos Islands constituted a violation of 1514.
15. (ii) By deporting the population and preventing the return of the Chagossians their right as a people has been violated.¹⁹
16. In principle, any potential claim by Mauritius to sovereignty over the Chagos Islands is subordinate to the right to self-determination of the Chagossians themselves. This priority was established in the *Western Sahara Case*.²⁰ Furthermore, according to the UK Government, Mauritius’ claim has always been tenuous given that the administration of Chagos Islands from Mauritius was always one of convenience rather than based upon any claims of national unity. Against this, Mauritius’ claim has been well-supported in the UNGA, OAS and NAM.
17. But this line of argument depends upon the Chagos Islanders being constituted as a ‘people’ for the purposes of international law.²¹ The inhabitants of the

¹³ This would not mean that the original deportation would be ignored, but could be employed by any tribunal considering violations after ratification. *Ibid.*, p. 144. ‘This need not prevent a court taking into account earlier actions or omissions for other purposes (e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent).

¹⁴ Crawford, *The Creation of States in International Law* (OUP, 2006, 2nd ed) 114-128.

¹⁷ *Ibid.* 115

¹⁸ which states: ‘Any attempt at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the UN Charter.’ If this is the case then Mauritius is a direct victim which can invoke the responsibility of the UK. [See also Res 2066]

¹⁹ As such, they are the direct victim of the wrong and Mauritius is either an indirect victim or a ‘co-victim’ See also ICJ judgments in *South-West Africa, Western Sahara, E. Timor, Palestinian Wall Cases*.

²⁰ (1975) ICJ Reports 121-122.

²¹ Further, the involuntary displacement and the actions of the UK and Mauritius have ensured that the Chagossian societal group has become a people for the purpose of the exercise of the right to self-determination. If the Chagos Islands had not been excised from the colony of Mauritius, the Chagossian community would have remained a minority within the wider Mauritian national unit, they would not have been the beneficiaries of the right. See S. Allen, ‘Looking Beyond the Bancoult Cases: International Law and the Prospect of Resettling the Islands’ [2007] 7 *HRLR* 441-482

Chagos Islands were certainly not ‘indigenous’. But then neither are the inhabitants of the Falkland Islands, and the UK does accept that the Falkland Islanders were a ‘people’ for this purpose.²² Although it refused to acknowledge this in the 1960s, the UK Government could hardly claim now that the Chagos Islanders did not constitute a ‘unit of self-determination’ if it is prepared to extend this category to the Falkland Islanders.²³

18. In this section I’ve attempted to highlight some of the main substantive violations of international law and various contentious areas by which responsibility can be attributed and obligations owed.

B. International standards in domestic courts

19. I now want to consider whether such standards are justiciable in an English court. In considering this point, I’ll deal with this the other way round to the previous section: customary international law first and then treaty law.

(i) Customary international law

20. Orthodoxy must be that the right of self-determination, like any other right in customary international law, is automatically incorporated as part of English law. I can think of at least two potential challenges to this claim. (i) that the right of self-determination is inchoate and (ii) that the orthodox position is wrong.
21. (i) seems to arise in the foregoing discussion concerning the ambiguity of the principle of self-determination and its related rights and duties. Inchoateness according to Lauterpacht, is why Cockburn CJ refused to apply a putative maritime delimitation rule in *The Franconia* and the same line, I think, can be seen in the High Court’s decision in *Jones and Milling*.²⁴
22. Regarding (ii), the opinion of the House of Lords in *Jones and Milling* does appear to undermine any straightforward principle of automatic incorporation. I have argued elsewhere that this authority does seem to be restricted to the creation of new criminal offences and the House of Lords. Furthermore, the HL has shown a willingness to apply the prohibition of aggression in international law as a standard in other areas of English law; e.g. *Kuwait Airways (4 and 5)*.²⁵

²² Crawford, note 14, 125.

²³ This is especially this case given that the Chagos Islanders have no say in the way the territory is run. This is a difficult claim to sustain through given that they do not reside there. See *Ibid.*, 127.

²⁴ See however, Marston, ‘The Centenary of the *Franconia* Case – The Prosecution of Ferdinand Keyn’ (1976) 92 *LQR* 93 Lauterpacht, *Private Law Analogies in International Law* (London: Longman, 1927) 76 and Holdsworth, *A History of English Law* (London: Sweet and Maxwell, 1964) 28-29.

²⁵ At the Cambridge conference, there was some disquiet about this claim. Looking back at the case, it is clear that the repugnancy doctrine employed in *Oppenheimer v Catermole* [1976] AC 249 was employed to prevent the normal application of conflicts rules. However, in order to determine the repugnancy of Iraqi tort law various standards in international law were invoked. One of these was the illegality of acts of aggression by states. I agree with comments that this is some way from the idea that the crime of aggression was a standard in English law which could, for instance, give rise to a cause of

(ii) Treaty law.

23. It is generally understood that treaties must be transformed by legislation before they can give rise to justiciable standards in UK courts. Such a claim is at least overly simplistic and might now be under threat. I cannot develop this point in detail here, but I will offer some rough comments which may help to structure debate.
24. The House of Lords might want to consider three related questions which all revolve around the multifaceted concept of justiciability: (i) can the Court determine the UK's obligations under international treaties? (ii) do treaties give rise to justiciable standards in English law? (iii) Can the Court determine whether the executive has violated such standards when pursuing its policy in the BIOT?²⁷
25. Regarding (i), the central point of discussion concerns the validity of 'the list' as a reservation. I can't think of any examples where English courts have considered the question of the validity of reservations to human rights treaties. However, in *Quark*, the validity of a 'list' concerning the territorial scope of the ECHR was held to be valid and to determine the UK's obligations. Furthermore, the HL also took into account Strasbourg decisions to delimit the territorial scope of the ECHR (See *Bui Van Thanh*²⁸). But as I said earlier (i) the CCPR does not have a 'colonial clause' and (ii) under GC24 of the HRC, the list is likely to be invalid.²⁹
26. Regarding (ii) legislation and the common law will normally be interpreted in a way that is compatible with those treaties which are binding on the UK. This would presumably also apply to orders-in-council *regardless* of whether they

action. However, it does, in my view, suggest that English courts are prepared to use customary international law in various ways which have a significant impact on the outcome of cases.

²⁷ All of the foregoing argument is otiose for the *Bancoult* litigation if the House of Lords finds that Orders-in-Council are indeed unreviewable, thus reversing the decision of the CA. The author of the section of Halsbury's Laws on the overseas territories can not only say that when 'legislating for the peace, order and good government of the territory' the Crown can make laws which are repugnant to '(1) the common law; or (2) to UK statutes which are in force in the territory...or (3) to any principles or rules of natural justice'. To this can be added (4) rules of international law which are binding in English law. For this to be a correct statement of UK law throws into question the extent to which it can be said to be a 'civilized nation' in the way it legislates for its overseas territories.

²⁸ [full citation]

²⁹ Even more controversially, the HC in *Al-Jedda* ([2007] UKHL 58) felt able to deny a British-Iraqi joint national rights under the ECHR by interpreting the right to fair trial in light of A103 of the UNC which, in turn, gave primacy to SC resolutions.

were construed as Acts of State.³⁰ But this obviously cannot entail that the Covenant gives rise to justiciable standards and it would only apply to the extent that there is an ambiguity in the orders-in-council, which there is probably not.

27. A stronger line of argument, which was established by the ICJ in the *Nicaragua Case*,³¹ is that human rights standards found in treaties often exist in parallel in customary international law. Presumably, the CCPR is automatically incorporated this way?
28. Finally, here are two potential routes and tenuous routes by which the state can be held to account against standards contained in the CCPR (as in (iii)).
29. In paragraph 68 of *A*, Lord Bingham was prepared to employ standards in the CCPR when considering executive orders which derogated from the HRA. This is by a circuitous route: the HRA is to be interpreted in light of the ECHR. The derogation provision in S14 of the HRA, then, should be read in light of A15 of the ECHR. A15 holds that derogating measures must not be inconsistent with the UK's 'other obligations under international law' which, according to Lord Bingham, include those found in the CCPR.
30. The courts may consider that the ratification of the CCPR gives rise to a legitimate expectation that the executive will comply with its substantive content unless it declares otherwise. However, can the 2004 Orders-in-Council be construed this way?³² I'll leave this question to for the public lawyers.

Conclusions

31. To conclude, for a long time it has been recognised that domestic courts play an essential role in the enforcement of international law standards against the state of which they are a part. Kelsen, Jellinek and Scelle, for instance, all recognised this. The ability of British courts to undertake this role has been seriously hampered in all kinds of ways by the prerogative powers of the state. Pragmatically, Sedley LJ is right to not consider international law standards in a 'pragmatic endeavour to keep the litigation within bounds' [para 49]. But it is the case that the House of Lords have, in the *Bancoult* litigation, the chance to fundamentally alter the role of domestic courts with regard to the responsibility of the executive for violations of standards in international law.

³⁰ Halsbury's laws suggests otherwise; But see A. Perreau-Saussine, 'British Acts of State in British Courts' (forthcoming, BYIL).

³¹ (1986) ICJ Reports.

³² The Australian courts have retrenched from this position since *Teoh in Lam* (2003) 195 CLR 502.

Two English decisions have adopted a position which adopts the tenor of the *Teoh* approach; *Ahmed and Patel* [1999] Imm AR 22 (CA) and *Adini* [2001] QB 667. It strikes me that the House of Lords can potentially develop this area of law in the *Bancoult* litigation. Progress in developing this approach has been restricted in *Roma Rights* [2003] EWCA, *Kebilene* [2000] 2 AC 326 and *Chundawadra* [1988] Imm AR 161 (CA). Also, there is no question of legitimate expectations arising in cases where there is clear legislative intention; would this apply to Orders-in-Council.