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CASE NOTE

Ndiku Mutua, et al. v The Foreign and Commonwealth Office

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Abstract
In 2009 five Kenyans filed a tort action seeking damages against the Foreign and Commonwealth Office (the FCO), a department of the United Kingdom (the UK), for abuse suffered in Kenyan detention camps during the colonial period. While the FCO denied liability, the claimants produced historical evidence from three academic historians to dispute the FCO's stand. With both sides unable to agree on the FCO's liability, the Court, as a non-expert in historical research, was called to pass judgment. In light of this contested liability, this case note shows that when historians, who are 'experts' in their field, present evidence to the Court, the latter is better equipped to understand the liability of the FCO, and by extension the UK Government, for colonial-era crimes.

Keywords Colonial crimes · Court · Cultural expertise · Historians · United Kingdom

1 Introduction: A contested case

Between 2008 and 2011, three academic historians, Caroline Elkins, David Anderson, and Huw C Bennett prepared expert statements derived from archival documents and oral testimonies.[1] Their expert statements supported a legal action taken by five Kenyans against the Foreign and Commonwealth Office, United Kingdom (UK) (FCO–also referred to as 'the UK government or defendant') before the High Court of Justice, Queen's Bench Division (the Court). The five Kenyan individuals asserted claims for personal injuries resulting from the systemic abuse, ill-treatment, and torture inflicted by the Colonial Office, the British and military forces, during the violent suppression of the Mau Mau uprising in the final years of British colonial rule.

[1] Corydon Ireland, 'Putting History on Trial' (*The Harvard Gazette,* 7 February 2012). https://news.harvard.edu/gazette/story/2012/02/putting-history-on-trial/. Accessed 4 November 2022.

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The Mau Mau uprising was a response to British colonial practices in Kenya.[2] In the early 1920s, British settlers arrived in Kenya, leading to discriminatory policies and practices against the native Kikuyu population.[3] Those included forced labour and land confiscation, which threatened the livelihoods and traditional way of life of the Kikuyu people. In the face of the injustice practices, the Kikuyu and other indigenous groups rose against British rule, forming a resistance movement known as the Mau Mau.[4] To counter the growing violence and unrest caused by the Mau Mau revolt against the British, Governor Sir Evelyn Baring declared a state of emergency in 1952, which remained in effect until 1960.[5] During this period, the Colonial Office enacted Emergency Regulations 1952, granting wide-ranging powers to arrest and detain several individuals suspected of involvement in the Mau Mau rebellion.[6] The Colonial Office established detention camps to detain those deemed connected to the Mau Mau. The claimants alleged, they were held as Mau Mau members in the detention camps and tortured, in varying periods between 1954 and 1959.[7]

The FCO did not dispute the nature of the abuse but raised two arguments contesting its liability for the alleged abuses. Firstly, they asserted that the period of limitations to seek redress for the crimes had expired, rendering the claims non-triable due to the passage of time. Secondly, they contended that the Colonial Office and Administration in Kenya was separate and distinct from the current FCO.[8] Thus, the liability for those alleged acts had transferred to the Kenyan government upon independence.[9]

Given the nature of the claim and defence, the Court had to adjudicate upon 'technical legal argument, as well as a historical assertion regarding the British government's level of awareness of, and complicity towards, the use of violence in Kenya prior to decolonisation'.[10] While courts do hear claims of past liability, but when requested to review colonial-era historical documents, they often lack the expertise to identify and understand the relevance of each document to the historical context.[11] That is where historians can play a crucial role in assisting the court by identifying and interpreting these documents in such situations.

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2 Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Henry Holt 2005) 12–30.

3 'The Colonization of Kenya' (*Black History Month*, 28 June 2020). https://www.blackhistorymonth.org.uk/article/section/african-history/the-colonisation-of-kenya/. Accessed 23 October 2022.

4 Martin Meredith, *The State of Africa: A History of Continent Since Independence* (Simon & Schuster 2011) 113.

5 'The Colonization of Kenya' (n 3). Governor Baring requested permission from the Colonial Office in Britain to declare a state of Emergency, which was granted.

6 Meredith, *The State of Africa* (n 4) 116.

7 See *Ndiku Mutua, Paula Nzili, Wambugu Nyingi, Jane Muthani Mara & Susan Ngondi v The Foreign and Commonwealth Office* (2011) EWHC 1913 (QB) [1] (*Ndiku Mutua* case).

8 ibid [11].

9 ibid [5, 11, 56]. However, Justice McCombe declared such an attempt to have the case dismissed on a legal technicality 'dishonorable', see [154].

10 Juliana Appiah, et al., 'Architecture of Denial: Imperial Violence, the Construction of Law and Historical Knowledge during the Mau Mau Uprising, 1952–1960' (2021) 14(1) *African Journal of Legal Studies* 3, 5.

11 Stephen E Patterson, 'Historians and the Courts' (1998) 28(1) *Acadiensis* 18, 22.

In the *Mau Mau* case, the three historians studied relevant historical documents and systemically shed light upon Britain's constitutional and administrative structure in Kenya and its role in facilitating brutality within the Mau Mau detention camps. Their expert statement helped the Court determine that there existed a 'substantial body of evidence' suggesting that both Governments (British and local administration) knew the detention camps were inhumane.[12] However, the extent of the historians' contribution in the proceedings before the Court is insufficiently explored in the existing literature.[13] To bridge this gap, this case note aims to outline the role of the historians in the case, including when they became involved, the individuals they collaborated with, and how their work was internally distributed (Section 2). Additionally, a brief description of the final judgment is provided, followed by an analysis of the impact of the historians on the court's decision (Section 3).

2 Historians in court: The 'Hanslope Disclosure' and exposing the skeleton argument

In preparation of the claim, the claimants' lawyer, Leigh Day, enlisted the assistance of Elkins in 2008, a year before filing the claim.[14] The foundation of the claim largely relied on Elkins' historical evidence presented in *Imperial Reckoning*.[15] Subsequently, in 2010 and 2011, Leigh Day sought the expertise of Anderson and Bennett, respectively.[16] Each historian was called upon due to their specialised knowledge of specific aspects of the case. Elkins focused on the 'detention and villagisation'[17] system, which pertained to the civilian side of the war.[18] Anderson's expertise centred on capital cases and the forest war,[19] while Bennett examined the role of the British Military in counterinsurgency operations during the Emergency

[12] *Ndiku Mutua* (n 7) [148], the Court sent the case to trial.

[13] On the contrary, authors are often critical of the historical evidence presented in the Court, see Pascal James Imperato, 'Differing Perspective on Mau Mau' (2005) 48(3) *African Studies Review* 147. Imperato has reviewed the following works in the review essay: Caroline Elkins, *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya* (Henry Holt 2005), David Anderson, *Histories of the Hanged: The Dirty War in Kenya and the End of Empire* (WW Norton 2005), and David Lovatt Smith, *Kenya, the Kikuyu and Mau Mau* (Anthony Rowe Ltd. 2005). In another article, Balint analysed the case from the perspective of colonial crimes, see Jennifer Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment' (2016) 3(3) *Critical Analysis Review* 261.

[14] Caroline Elkins, 'Looking Beyond Mau Mau: Archiving Violence in the Era of Decolonisation' (2015) 120(3) *The American Historical Review* 852, 856.

[15] Elkins, *Imperial Reckoning* (n 2).

[16] Elkins, 'Looking Beyond Mau Mau' (n 14) 856.

[17] Villagisation refers to the process through the detainees are removed from their homes and forcibly relocated to other sites, see *Ndiku Mutua* (n 7) [42].

[18] Elkins, *Imperial Reckoning* (n 2).

[19] David Anderson, *Histories of the Hanged: Britain's Dirty War in Kenya and the End of Empire* (Orion Publishing Co 2011).

period.[20] Collectively, their expertise provided the Court with a comprehensive range of historical perspectives to evaluate the FCI's defence.

For example, early on during the judicial proceedings, the historians played a pivotal role in helping the Court to source historical documents and present a summary of those documents, which were voluminous.[21] Their collective testimony led to the revelation of a cache of over 300 boxes taken from Kenya and secretly returned to Britain prior to decolonisation in 1963.[22] These documents exposed the endorsement and implementation of systematic human rights abuses by the highest levels of British administration during the Emergency.[23] While the Court acknowledged that the defendant's delayed disclosure of these documents did not violate any court rules or orders,[24] their discovery was made possible solely through the historians' evidence. Consequently, Elkins, Anderson, and Bennett's interpretation of these documents, known as the 'Hanslope Disclosure' formed the bedrock for the claimants to debunk the defendant's case.[25]

The historians played a crucial role in not just uncovering the 'Hanslope Disclosure' but also exposing Britain's complicity in authorising and implementing a systematic regime of torture and abuse during the Kenyan Emergency.[26] For example, the FCO's skeleton argument was that the brutalities were isolated incidents or were committed by 'bad apples' or 'dispositional individuals'.[27] Contrary to FCO's claims Elkins extensively documented widespread abuses committed by British colonial

[20] Huw Bennett of University of Wales was completing a PhD detailing the British army's involvement, and later published as Huw Bennett, *Fighting the Mau Mau: The British Army and Counter-Insurgency in the Kenya Emergency* (Cambridge University Press 2012).

[21] *Ndiku Mutua* case (n 7) [35].

[22] Anthony Badger, 'Historians, A Legacy of Suspicion and the "Migrated Archive"' (2012) 23(4) *Small Wars & Insurgencies* 800.

[23] David M Anderson, 'British Abuse and Torture in Kenya's Counter-insurgency, 1952–1960' (2012) 23 *Small Wars & Insurgencies* 700.

[24] *Ndiku Mutua* case (n 7) [34]; David M Anderson, 'Mau Mau in the High Court and the "Lost" British Empire Archives: Colonial Conspiracy or Bureacuratic Bungle' (2011) 39(5) *The Journal of Imperial and Commonwealth History* 699. While the Court did not find the FCO responsible for the delayed disclosure of the Hanslope Disclosure, Anderson states that 'the process by which documents were released to the Prosecution team was highly unsatisfactory. We were only permitted access to documents once they have been reviewed first by the FCO and then by the legal team working for the Defence. This caused considerable delay. Furthermore, the order in which documents were disclosed to the Prosecution appeared to be random, with no clear effort to follow a logical sequence in the files. This made the coherent analysis of the files exceedingly difficult.' 709.

[25] Elkins, 'Looking Beyond Mau Mau' (n 14) 856; See *Ndiku Mutua* case (n 7), The Court noted that after the historians review the 'Hanslope Disclosure' there was a 'major dispute of facts between the parties.' Furthermore, Elkins argued that 'In the brief time I have had to review the Hanslope Disclosure, the documents suggest that the defendant's claims as outlined in paragraph 229 and 234 are incorrect.' [46].

[26] Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State' (n 13) 284.

[27] David M Anderson, 'British Abuse and Torture in Kenya's Counter-Insurgency' (n 23) 701; Matthew Hughes, 'Introduction: British Ways of Counter-Insurgency' (2012) 23 *Small Wars & Insurgencies* 580.

authorities in Kenya, through detention techniques: 'villagisation',[28] 'screening',[29] and 'dilution'[30] She highlighted the role of John Cowan, the senior Prisons Officer of the Mwea Camps,[31] in devising the dilution technique. This technique was subsequently systematised under the leadership of Terence Gavaghan in the Mwea Camps, with its methods disclosed to the Colonial Office in March 1957. Notably, the Colonial Secretary approved using the dilution technique and 'compelling force'.[32]

Furthermore, Elkins countered the FCO's claim that Governor Baring took steps to end the brutality. She argued that most of the Defendant's public declarations to cease the abuses occurred early in the Emergency, specifically in 1953.[33] These declarations preceded the substantial documentary and witness evidence highlighting the brutalities committed by British colonial administration and security forces members. Elkins also emphasised deliberate efforts by Baring and the Colonial Office to make the detention camp Pipeline increasingly brutal over time.[34] This systematic violence culminated in the Cowan Plan, as supported by the evidence in her initial witness statement.[35] Thus, the historical evidence was able to successfully countered the FCO's skeleton argument, teaching the Court, through the litigation process, about the complicity of the UK Government in the alleged acts of torture.[36]

3 Impact of historians

The three expert statements exerted significant influence on multiple dimensions of the case. Firstly, the research conducted played a pivotal role in bolstering the claimants' position. Secondly, it facilitated the Court in ascertaining potential liability on the part of the FCO. Lastly, it effectively challenged and refuted the prevailing public narrative of their innocence during the Emergency, propagated by the UK, thereby prompting consequential political measures. This section will provide a detailed explication of these three consequential impacts.

[28] 'Professor Elkins describes the 'villagisation' process as follows: "June 1954. The War Council mandated forced villagization throughout the Kikuyu reserves (i.e. Kimabu, Fort Hall, Nyeri and Embu Districts). By the end of 1955 1,050,899 Kikuyu were removed from their scattered homesteads and forcibly relocated into one of 804 villages, comprising some 230,000 huts. Emergency villages were highly restrictive: they were surrounded by barbed wire, spiked trenches, and twenty-four-hour guard. Villagers were forced to labor on communal projects"', see *Ndiku Mutua* case (n 7) [42].

[29] 'Screening' was a form of interrogation where the detainees were screened at the time of the arrest. Elkins alleged that civilian and military person carried out screening, see *Ndiku Mutua* case (n 7) [43].

[30] According to Elkins, 'dilution' was conceived by John Cowan, a senior prison officer at the Mwea Camp. This technique involved isolating small numbers of detainees from a large group and systemically using force to exact compliance, see *Ndiku Mutua* case (n 7) [45].

[31] PTI, 'Shameful Legacy' (*The Guardian,* 13 October 2006). https://www.theguardian.com/politics/2006/oct/13/kenya.foreignpolicy. Accessed 12 June 2023.

[32] *Ndiku Mutua* case (n 7) [35].

[33] ibid.

[34] ibid.

[35] ibid.

[36] Donald J Bourgeois, 'The Role of the Historian in the Litigation Process' (1986) 67(2) *Canadian Historical Review* 202, 205.

First, to pursue claims of reparation or compensation for colonial-era wrongs in a court of law, such as a tort claim for personal injuries in the *Mau Mau* case, it is necessary to provide strong supporting historical evidence.[37] Such evidence must tell a story of what happened, how it happened, when it happened, and who was responsible for the alleged wrong. Here, historians typically gather this evidence by meticulously searching through archives and conducting oral interviews, a well-established research methodology in historical work.[38] When presented with this evidence, judges gain a deeper understanding of the historical context and factual scenario surrounding the claim, which may have been previously unknown to them.[39] In the *Mau Mau* case, for example, the Court acknowledged that 'the factual presentation of the case [...] has been based principally upon the statements of the three academic historians'.[40] This statement begins to highlight historians' crucial role in providing valuable evidence to support legal claims.

Second, regarding the impact of the expert evidence on the issue of the FCO's liability, Elkins' historical work successfully presented a shortcoming in the FCO's reliance on the skeleton argument to absolve itself of any liability. The Court acknowledged the 'stark evidential dispute' between the parties, as evidenced by the contrasting submissions on the facts presented in the defendant's skeleton argument and the statements provided by the three historians.[41] However, the weight of the expert evidence proved compelling and impossible for the Court to not make some preliminary remarks. The Court stated that even in the limited papers it had reviewed and bearing the judgment was only a summary application, there was ample evidence suggesting the existence of systematic torture of detainees during the Emergency. For example, given that the Commander-in-Chief possessed sufficient power and resources to intervene and prevent such abuses, the Court found it untenable to argue that a trial court could not conclude that the Commander had played a role in instigating or procuring the torture as part of a common design. At the current stage of the case, a court meeting such a conclusion was deemed implausible.[42] Such preliminary remarks, though not binding on the trial court, could have only been made with the support of historical evidence.[43]

Finally, the historians' expert statement paved the way for the consequential unearthing of the 'Hanslope Disclosure', which Howe contends could be viewed as one of the most significant instances of historians directly influencing the trajectory

[37] Berber Bevernage, 'Cleaning Up the Mess of Empire? Evidence, Time and Memory in "Historic Justice" Cases Concerning the Former British Empire (2000–Present)' in Baosheng Zhang et al., *A Dialogue Between Law and History* (Springer 2021) 231, 245.

[38] Caroline Elkins, 'Alchemy of Evidence: Mau Mau, the British Empire, and the High Court of Justice' (2011) 39(5) *The Journal of Imperial and Commonwealth History* 731, 736; Jonathan D Martin, 'Historian at the Fate: Accommodating Expert Historical Testimony in Federal Court' (2003) 78 *New York University Law Review* 1518, 1534.

[39] Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State' (n 13) 276.

[40] *Ndiku Mutua* case (n 7) [35].

[41] ibid [120].

[42] ibid [125].

[43] Elkins, 'Looking Beyond Mau Mau' (n 14) 858; Appiah, et al., 'Architecture of Denial' (n 10) 5.

of history or exerting a noticeable impact on legal and political systems.[44] The revelation of the 'Hanslope Discloure' brought about substantial embarrassment and media scrutiny, prompting the UK's Foreign Secretary, William Hague, to publicly declare a renewed dedication to transparency.[45] Swiftly thereafter, efforts were made to release the documents to the public through The National Archives (TNA).

4 Conclusion

The *Mau Mau* case stands as a counterargument to the notion that a judicial forum may not be suitable for litigating colonial-era crimes due to the difference between historical and legal arguments and a lack of historical expertise. First, both history and courtroom arguments deal with past events, especially when both have to 'grapple' with colonial-era crimes. Second, while historians cannot 'monopolise' the study of history, but they sure have techniques that can help courts to make sense of historical events and put those in context.[46]

In conclusion, despite the case settling without a trial,[47] the invaluable contributions of three historians demonstrated the atrocities committed during colonialism before the Court and to the public. Through their expert evidence, meticulously recorded in the Court's judgment, a lasting record of these crimes was established and, via its public accessibility, ensures the crimes would not be forgotten.[48] Although the *Mau Mau* case primarily concerned individual tort liability, its underlying public interest exposed the 'fault lines in the belief in the benevolence of Empire'.[49] This significant impact could only be achieved through the dedicated efforts of historians who unearthed vital documents and presented indisputable historical facts to the Court.

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[44] Stephen Howe, 'Flakking the Mau Mau Catchers' (2011) 39(5) *The Journal of Imperial and Commonwealth History* 695.

[45] Hague quoted in Mandy Banton, 'Destroy? Migrate? Conceal? British Strategies for the Disposal of Sensitive Records of Colonial Administrations at Independence' (2012) 40(2) *The Journal of Imperial and Commonwealth History* 324.

[46] John G Reid, et al., 'History, Native Issues and the Courts: A Forum' (1998) 28(1) *Acadiensis* 3, 7.

[47] Foreign & Commonwealth Office and The Rt Hon William Hague, 'Statement to Parliament on Settlement of Mau Mau Claims' (*gov.uk*, 6 June 2013). https://www.gov.uk/government/news/statement-to-parliament-on-settlement-of-mau-mau-claims#:~:text=The%20British%20government%20sincerely%20regrets,dignity%20which%20we%20unreservedly%20condemn. Accessed 10 October 2022. The agreement includes payment of a settlement sum in respect of 5,228 claimants and the UK government will support the construction of a memorial in Nairobi to the victims of torture and ill-treatment during the colonial era.

[48] Patterson, 'Historians and the Courts' (n 11) 20.

[49] Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State' (n 13) 284.

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Conflict of interest The author has no conflict of interest to declare that are relevant to the content of this article.

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