3

Zulu Political Prisoners, 1872–1897

During the frontier wars, the Cape Colony used martial law trials to sentence and imprison rebels against its authority, but it did not resort to *ad hominem* legislation for this purpose. When such legislation was passed at the Cape, in 1874 and 1880, its purpose was to authorise the detention of prisoners sent from elsewhere in southern Africa. The first was Langalibalele, the Hlubi chief who was tried for rebellion against the authorities in Natal in an ad hoc 'customary' court in Pietermaritzburg; the second was the Zulu king Cetshwayo, who was taken prisoner by imperial forces at the end of the Anglo-Zulu war in 1879. In both of these cases, detention was used as a form of 'lawfare', a means of subduing potential African resistance to imperial rule.

The political and legal contexts in which these detentions took place contrasted strongly with the Cape. White settlement of Natal began only in 1824, and only in 1843 did Natal became a British colony, peopled by British settlers. These settlers were heavily outnumbered by an African population, to whom (under legislation introduced in 1849, which was amended in 1875) a distinct system of 'native' customary law applied, and who were denied the political rights given to whites.[1]

[1] Ordinance No. 3 of 1849; Law No. 26 of 1875. For the background to the 1849 measure, see PP 1850 (1292) XXXVIII. 501 sub-encs. 1–8 to enc. 7 in No. 9, pp. 38–48. For the restriction of political rights, see Law No. 11 of 1865.

Under the Secretary of Native Affairs, Theophilus Shepstone, a form of indirect rule was introduced, through a hierarchy of chiefs he patronised.[2] Consequently, in Natal, 'Europeans inhabited a separate privileged world legally removed from the majority of the population.'[3] The system of government introduced in Natal – and the political culture underpinning it – was thus significantly less liberal than that found at the Cape. Its illiberal nature was clearly exposed in the authorities' reaction to Langalibalele's apparent defiance, when he was tried under a hybrid form of customary law in which the Governor presided as supreme chief, and various measures were enacted to break up his tribe, after the colonial forces had taken brutal revenge against his people. In his trial, a form of law – quite unknown to metropolitan lawyers' idea of the rule of law – was used to exert colonial power over this chief.

Whereas Langalibalele's imprisonment was the work of colonial officials, Cetshwayo's was part of an imperial project. In the aftermath of the crisis in Natal, Lord Carnarvon at the Colonial Office turned his mind to the creation of a confederation in South Africa which would include the colonies and Boer Republics. For proponents of confederation, including Sir Bartle Frere (High Commissioner for South Africa) and Theophilus Shepstone (administrator of the newly annexed Transvaal), the project was threatened by the risk of African kingdoms uniting against them; a risk which could only be countered by extending British power over them. The Zulu kingdom was perceived to be one of the main threats, and so an ultimatum was issued in December 1878 to the Zulu king Cetshwayo to dismantle the military organisation on which his kingdom was built. In setting impossible demands, the bellicose British paved the way for the Anglo-Zulu war of 1879.[4] When the ultimatum expired, British soldiers invaded from Natal. The war ended with the capture of the king and his imprisonment at the Cape, with his

[2] Thomas V. McClendon, *White Chiefs, Black Lords: Shepstone and the Colonial State in Natal, South Africa, 1845–1878* (Rochester, University of Rochester Press, 2010).

[3] Norman Etherington, Patrick Harries and Bernard K. Mbenga, 'From Colonial Hegemonies to Imperial Conquest, 1840–1880', in Carolyn Hamilton, Bernard K. Mbenga and Robert Ross (eds.), *The Cambridge History of South Africa, Vol. I: From Early Times to 1885* (Cambridge, Cambridge University Press, 2009), p. 365.

[4] See Richard L. Cope, *Ploughshare of War: The Origins of the Anglo-Zulu War of 1879* (Pietermaritzburg, University of Natal Press, 1999).

incarceration under an *ad hominem* statute being an exertion of British sovereign power over this defeated king.

The treatment of Langalibalele and Cetshwayo bore the hallmarks of the use of exceptional powers to cement imperial rule. At the same time, the use of these powers did not remain unquestioned. Although Natal lacked the kind of liberal political culture found at the Cape, it did have one prominent family – that of Bishop J. W. Colenso – who took up these cases, both in local courts and on the imperial political stage. Officials in London, under pressure from a public opinion whose interest had been aroused by Colenso's campaigning, were also uncomfortable at the denial of due process, particularly to Langalibalele. The cases of these leaders attracted much attention in the metropolis, where the imperial authorities sought to put pressure on the colonial ones to ensure that the rule of law was observed. How effective that pressure would be depended in part on political needs within the colonies: as shall be seen, Langalibalele did not benefit from any pangs of conscience felt in London, though Cetshwayo was able to use his own political position to secure his freedom. At the same time, the experience of these detentions in the late 1870s helped shape the authorities' reaction to the next major conflict in the region: when Cetshwayo's son Dinuzulu was arrested in 1888, the authorities strove to stage a form of trial which would not attract the same kinds of criticisms as had been levelled at Langalibalele's. Like Napoleon, Dinuzulu would be exiled to St. Helena; but only after a trial and procedure which satisfied the Privy Council of its legality.

The Trial and Detention of Langalibalele

The clash which took place at Bushman's River Pass in the Drakensberg mountains in 1873, as Langalibalele led his followers out of the colony, may have been a minor skirmish, but it triggered a violent backlash, for this was the first time that white soldiers had been killed by Africans in Natal.[5] Langalibalele's amaHlubi people – numbering

[5] For histories, see McClendon, *White Chiefs, Black Lords*; Norman Herd, *The Bent Pine* (Johannesburg, Ravan Press, 1976); W. R. Guest, *Langalibalele: The Crisis in*

some 7,000 – had settled in Natal in 1848.[6] Their migration from Zululand was a result of its complex politics in the era of king Shaka and his successors. Once the dominant chiefdom in the region, the Hlubi's power had diminished, and when Langalibalele was installed as chief in 1836 or 1837, it was as a tributary of the Zulu monarch. This was a highly volatile political world, with rulers frequently being assassinated by their rivals. Although Langalibalele managed to navigate these difficult political waters well, by the late 1840s he fell foul of the Zulu king Mpande. Seeking refuge in Natal, the Hlubi initially settled on land on the Klip River, but after one year were removed to land near Champagne Castle. This unpopulated land was chosen for them by the British so that they would provide a buffer against bushmen raids. Land was also allocated to 5,000 Putini people, who were seen as vassals of the Hlubi.

Langalibalele was a co-operative ruler, who was prepared to supply warriors when called upon by the colonial authorities. One such episode would have a strong impact on his later views of colonial authority. In 1858, he contributed to a force sent against the Sithole leader Matshana, who was suspected of killing a man accused of witchcraft. After Matshana failed to answer a summons, John Shepstone (brother of the Secretary of Native Affairs, Theophilus) attempted to lure the chief into a trap, by persuading his followers to leave their weapons behind, and then using his own armed troops to seize Matshana. The plan did not succeed, for Matshana escaped, after twenty-five of his men had been shot dead, and Shepstone himself had been severely injured by an assegai.[7] The episode left a lasting distrust of the authorities in the minds of many Africans.

It was not until the early 1870s that Langalibalele's relations with the authorities began to deteriorate, in particular over the imposition of a marriage tax in 1869 and the requirement that Africans had to register their firearms.[8] Although Langalibalele's followers were not

Natal 1873–1875 (Durban, University of Natal, 1976); John Wright and Andrew Manson, *The Hlubi Chiefdom in Zululand-Natal: A History* (Ladysmith, Ladysmith Historical Society, 1983); and Jeff Guy, *The Heretic: A Study of the Life of John William Colenso, 1814–1883* (Scottsville, University of Natal Press, 1983).

[6] Wright and Manson, *The Hlubi Chiefdom*, ch. 3.

[7] Herd, *The Bent Pine*, ch. 7; CO 879/9/1, enc. 5 in No. 3, p. 232.

[8] See McClendon, *White Chiefs, Black Lords*, pp. 86–95; Wright and Manson, *The Hlubi Chiefdom*, p. 48; Guest, *Langalibalele*, pp. 34–35; PP 1874 (c. 1025) XLV. 415, No. 45, p. 69; PP 1875 (c. 1141) LII. 455, p. 21; PP 1875 (c. 1119) LIII. 229, pp. 26ff.

the only ones who failed to register their guns, he was singled out in particular for compliance. In March 1873, he was summoned to see the Resident Magistrate, John Macfarlane, in Estcourt. However, he failed to come, claiming to be too unwell to be able to travel.[9] Regarding this as defiance, Macfarlane referred the matter to Theophilus Shepstone in Pietermaritzburg. Over the next six months, Langalibalele would be summoned three times to see Shepstone, and would fail to comply on all three occasions. Langalibalele's reluctance to travel was the product not (as he claimed) of ill-health, but of fear. For only two chiefs had been summoned in this way in recent memory – Sidoi and Matshana – and both ended with their tribes being 'eaten up'.[10]

After the second summons in May – when he was warned that the Hlubi 'would cease to be a tribe' if he did not respond[11] – the pressure on Langalibalele relented, as Shepstone went to Zululand for the installation of Cetshwayo as king. In the meantime, Langalibalele was rumoured to have made contact with Molapo, son of the Basuto king Moshoeshoe, and Adam Kok, the ruler of Griqualand East, to ask them to shelter him in case of need. In an effort to lower the temperature, he also sent men to pay his overdue tax, and expressed his willingness to meet Macfarlane in Estcourt. Macfarlane was in no mood to compromise, however: he wanted the Hlubi's escape routes to Basutoland blocked, and for Langalibalele to be deposed and imprisoned.[12] The third and final summons was sent at the beginning of October, after Shepstone's return. In his message, Shepstone told Langalibalele that the 'Supreme Chief' – the Lieutenant-Governor, Sir Benjamin Pine – was astonished to hear 'that you had asked the Basuto Chiefs to receive your cattle under their protection, while you resisted an order of the Natal Government, which you expected would be made and enforced', and instructed him to come to Pietermaritzburg within fourteen days of receiving the message.[13] Shepstone sent two Africans – Umyembe and Mahoiza – to convey his message. They later claimed to have been humiliated when they got to the chief's kraal, by being

[9] PP 1875 (c. 1141), p. 21.
[10] See further Thomas McClendon, 'You Are What You Eat Up: Deposing Chiefs in Early Colonial Natal, 1857–58', *Journal of African History*, vol. 47:2 (2006), pp. 259–279.
[11] PP 1875 (c. 1025), p. 54. [12] Wright and Manson, *The Hlubi Chiefdom*, pp. 55–57.
[13] PP 1874 (c. 1025), p. 65.

forced to strip naked, so that they could be searched for hidden weapons.[14] They reported that Langalibalele refused to obey the summons, recalling his own brother's murder when answering a summons from the Zulu king Dingane. He was, however, willing to pay a fine, and sent a messenger to Pietermaritzburg with a bag of gold as an instalment.[15] When the messenger got to the capital, the money was rejected, but the messenger was kept overnight, to allow the Natal authorities to prepare an expedition against Langalibalele without his receiving advance notice of it.

By now, Shepstone had decided to remove the Hlubi from their present location and to resettle them as labourers on white farms.[16] On 27 October 1873, the decision was taken to arrest Langalibalele. Pine decided to lead a military expedition against the chief, who was given an ultimatum of 3 November to surrender.[17] Meanwhile, the Hlubi lands were cordoned off by troops to prevent them migrating to Basutoland, and the remaining inhabitants were told to surrender or be treated as rebels. The military expedition turned out to be disastrous. Pine's plan had been for two sets of troops to meet at Bushman's River Pass at the top of the escarpment, where they would cut off the Hlubi. Because of poor maps, Captain Albert Allison's troops never reached the pass, while Major Anthony Durnford's were delayed by bad weather. By the time Durnford reached the pass, Langalibalele was already in Basutoland. When Durnford attempted to persuade the 200 Hlubi at the top of the pass to return, tensions mounted. With the thirty-seven-strong volunteer force heavily outnumbered and under instructions from Pine not to fire the first shot, the colonial forces withdrew.[18] As they descended the pass, they were fired on, with three men being killed. The official reaction to this clash was fierce. Pine proclaimed martial law in the locations occupied by the Hlubi and Putini tribes. Langalibalele and his people were declared to be rebels, and proclamations were issued breaking up both the Hlubi tribe and

[14] PP 1874 (c. 1025), p. 57. [15] PP 1875 (c. 1141), p. 29.
[16] PP. 1874 (c. 1025), enc. 2 in No. 35, p. 33.
[17] PP 1874 (c. 1025), No. 6, p. 6; Proclamation, 2 November 1873, ibid., enc. 3 in No 35, p. 35.
[18] PP 1874 (c. 1025), No. 11, p. 9.

the Putini tribe, and confiscating their lands.[19] Violent retribution followed, with as many as 200 being killed by the end of the month.

Capture and Trial

The leaders Langalibalele hoped would shelter him assisted the colonial forces in effecting his capture, and at the end of December, he was marched in chains into Pietermaritzburg.[20] Martial law had been revoked on 22 November 1873, and the decision was taken to try prisoners 'under native law or under the common law, as circumstances require'.[21] Langalibalele was put on trial on 16 January 1874, just over a fortnight after his capture. He was to be tried under native law in a court presided over by Pine, in his capacity of Supreme Chief, accompanied by members of the Executive Council, as well as a number of nominated chiefs.[22] This was hardly an unbiased panel, including as it did both Pine and Theophilus Shepstone, who had already proclaimed Langalibalele a rebel, and D. Erskine, the Colonial Secretary, whose son was one the three men killed at the Bushman's River Pass. Furthermore, any appeal from its decision would go to the Executive Council, whose members were part of the panel.

The charges were an amalgam of notions vaguely drawn from English and African law. 'Langalibalele and the Hlubi tribe' were charged firstly with seditiously conspiring to leave the colony, 'well knowing that so to do was a defiant contravention of the law under which they live, and rebellion against the authority of the Supreme Chief'. This charge was premised on the assumption that any attempt to leave the territory of the Supreme Chief was regarded as rebellion under African customary law. Secondly, they were charged with killing the Queen's subjects in carrying out this design. Thirdly, Langalibalele was charged with encouraging his people to procure firearms, with the intention of resisting the authority of the Supreme Chief. Put together, in Pine's view, these charges amounted to 'high treason – for rebellion against the authority of Her Majesty the Queen'.

[19] PP 1874 (c. 1025), encs. in No. 1, pp. 13–14; No. 36, p. 36.
[20] Herd, *The Bent Pine*, pp. 42ff.; Wright and Manson, *The Hlubi Chiefdom*, pp. 69ff.
[21] PP 1874 (c. 1025), No. 12, p. 14; Proclamation, PP 1874 (c. 1025), p. 15.
[22] For a detailed account, see Herd, *The Bent Pine*, chs. 4–6.

The Lieutenant-Governor's powers relating to native law derived from an ordinance of 1849.[23] It conferred on him all the authority enjoyed under African customary law by the Supreme Chief, but did not specify exactly what his powers were. In fact, customary law was not monolithic. According to one manual drawn up for colonists, criminal matters were for the chief, but customary law was not bloodthirsty. Penal sanctions for most criminal cases – including murder – consisted of fines, with all the property of the accused being taken in the most serious cases.[24] These manuals did not dwell on crimes like rebellion – perhaps because it was evident enough from the sanguinary history of the Zulu nation that in such cases the response would be bloodthirsty. However, they did discuss the fact that it was common for Africans to seek refuge with another chief. 'When a Kafir wishes to leave his own chief and join another', the Tambookie agent wrote in 1856, 'he can only do so by flying at night in the most stealthy manner, if he has any live stock; for should his intention become known, he would most certainly be "eaten up"' – which meant the complete confiscation of his property.[25] At the same time, such compendia explained that the custom was for a chief to receive and protect any refugee who came to him – a custom which 'has greatly kept in check any arbitrary and oppressive conduct which the chiefs might have felt disposed to exercise towards their people'. If the refugee had committed a wrong, such as taking his neighbour's cattle with him, the receiving chief would return the cattle; but the refugee himself was protected.[26] The 'customary' law which Pine purported to exercise was thus rather indeterminate. Instead of acknowledging this, he began the hearing against Langalibalele by asserting that 'under their own law, if strictly administered, the prisoner would not be alive now'. He went on to declare that he would temper native law with Christian mercy, for Christians did not 'like to put men to death', at least without 'a fair and impartial trial'.[27]

[23] Ordinance No. 3 of 1849, which repealed so much of an Ordinance of 1845 (introducing Roman-Dutch law into Natal) which had supplanted African customary law.
[24] Col. C. B. Maclean, *A Compendium of Kafir Laws and Customs* (Cape Town, Saul Solomon & Co., 1866), pp. 23, 32, 35–40, 58–59.
[25] Quoted in Maclean, *Compendium*, p. 73.
[26] Maclean, *Compendium*, p. 116. Cf. Colenso's citation in PP 1875 (c. 1141), p. 2.
[27] PP 1874 (c. 1025), pp. 48–49.

In fact, the trial was highly irregular. As soon as the charges had been read out, Langalibalele was asked to plead. According to some reports, the chief (speaking in Zulu) denied committing murder or burglary, which suggested that he did not understand the charges.[28] He admitted going over the Drakensberg mountains with his people, and accepted that he had treated the Supreme Chief's messengers with disrespect, albeit out of fear. However, he denied asking his followers to procure weapons. He also laid the blame for the killings at Bushman's River Pass on his headman, Mabuhle, who was present at the spot. Once he had spoken, Pine observed that the chief's fear of the government's potential treachery was itself an 'aggravation of the insult' and then called on the chiefs present to express their views on his plea. Each of these men condemned Langalibalele. According to one of them, Mafingo, he was in the position of a dog, 'which if it bit its master, would be killed with little consideration'. The session ended with Pine reminding Langalibalele of the principle of collective responsibility in customary law which made the chief responsible for the acts of his tribe. Since the court regarded Langalibalele's statement as a guilty plea, evidence against him was heard only on the second day, 'for the purpose of placing on record the extent of the prisoner's crime'.[29] It was not until the third day that Pine agreed to allow a lawyer to appear for Langalibalele, though his lawyer – Harry Escombe – declined to proceed after being told that he could only make arguments in extenuation of Langalibalele's guilt. On the fourth day, Pine announced that the members of the Executive Council – who had been present so far 'to look on and assist with their advice' – would not appear on the following day, 'because, not forming a part of the Court, they cannot take part in judgment'.[30]

Pine handed down his judgment, convicting Langalibalele on all charges, on the sixth day. The judgment was grounded neither on any specific principles of African customary law nor on the criminal law of Natal, but rested on a mingling of Pine's assumptions about customary law with his perception of what English ideas relating to

[28] Herd, *The Bent Pine,* p. 52. [29] PP 1874 (c. 1025), pp. 51, 53.
[30] PP 1874 (c. 1025), p. 68.

public order would require.[31] Thus, he noted that Langalibalele's defiance of magisterial authority, while not serious enough 'to warrant the use of forcible coercion according to our laws and custom', was 'perfectly clear and significant according to native law and custom', and was 'dangerous as an example to other natives and to the peace of the Colony'.[32] Similarly, while the colonial government had never treated the mere removal of a tribe as treason and rebellion, even though it was so regarded in native law, his attempts to take his cattle out of the colony under an armed escort manifested 'a determination to resist the Government with force and arms'. Turning to the clash at Bushman's River Pass, which had occurred in Langalibalele's absence, Pine declared that, since Mabuhle was his most trusted *induna*, who rejoined and remained with him after the killings, Langalibalele was to be taken to have identified himself with the murders and to be responsible for them. Langalibalele's apparent *ex post facto* complicity in the killings played a central part in Pine's determination, though it was an inference which was open to challenge. Indeed, during a second trial which began before the judgment was given, in which Langalibalele's seven sons and three *indunas* were tried, evidence was presented that Langalibalele had given special instructions to Mabuhle not to shoot first in any clash.[33] Although Pine stated that Langalibalele was liable to the death penalty, he sentenced him to banishment or life transportation, after taking into account extenuating circumstances.[34] This was a sentence unrecognised by African customary law and not authorised by colonial law.

Bishop Colenso's Appeals

As Bishop Colenso observed the trial, he became increasingly aware of flaws in the case against Langalibalele. For the bishop, the treatment of the chief raised vital matters of principle, which he felt morally compelled to take up, even though it would alienate him from the

[31] Compare this with his explanation to Carnarvon that the proclamation breaking up the tribe 'was drawn up by Mr Harding the late Chief Justice and myself with the English law books before us defining the circumstances under which persons were guilty of aiding and abetting treasonable practices': CO 179/115/815.

[32] PP 1874 (c. 1025), p. 74. [33] PP 1875 (c. 1119), p. 14. [34] PP 1874 (c. 1025), p. 75.

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majority of his white Natal congregation, and lead to the end of his close friendship with Shepstone. With Colenso's aid, Langalibalele first lodged an appeal to the Executive Council, under the 1849 ordinance. His petition challenged Pine's power to constitute the court which tried the chief, and argued that only a colonial court had the jurisdiction to deal with offences (such as the killings at Bushman's River Pass) which occurred outside the colonial borders. The petition claimed that the proceedings had been conducted in an irregular manner, and also asked for new evidence to be taken into account, notably that presented at the trial of his sons. Finally, it was argued that the sentence was *ultra vires* under the 1849 Ordinance, which gave the Supreme Chief only the power to depose.[35]

Since this was a political body a number of whose members had participated in the trial, it could have come as no surprise that the Executive Council rejected all the arguments in the petition.[36] In its view, the fact that serious crimes had hitherto been tried in the colonial courts did not oust the Supreme Chief's native jurisdiction, particularly in cases involving offences with which the colonial courts could not deal, such as the removal of a tribe. In making its pronouncements on the nature of native law, the Executive Council both rejected and drew on the Cape compendium of native law cited by Colenso, as suited its arguments.[37] It held that a Supreme Chief, who had a power of life and death, also had the power to banish. Nor was the absence of legal representation a ground for objection, since native law knew no such thing as a professional lawyer. As for the fact that Pine had already expressed a view on the chief's guilt before the trial, '[p]rejudice in the mind of a judge does not render a judgment invalid.'[38] With all of Langalibalele's arguments rejected and the conviction confirmed, the public in attendance burst into applause.

Having failed to persuade Pine of the illegality of his initial decision, Colenso made a second attempt to challenge the sentence against the chief, by applying to the Supreme Court for an interdict to prevent his

[35] See PP 1875 (c. 1141), pp. 137ff.; *Natal Witness*, 26 June 1874, p. 3; 14 July 1874, pp. 2–3.
[36] *Natal Witness*, 17 July 1874, p. 6. Colenso also printed the judgment with his own answers: PP 1875 (c. 1141), pp. 149ff.
[37] See minute by E. Fairfield, dated 5 September 1874, CO 179/115/10411.
[38] *Natal Witness*, 17 July 1874, p. 6.

removal.[39] Colenso's efforts failed again, when the court rejected the argument that there was no power to deport anyone from the colony save under imperial legislation regulating the removal of prisoners, by instead holding that native chiefs had the power to transport inferior chiefs to any place they wished. Acting Chief Justice Sir Henry Connor added for good measure that the court would never issue an interdict against the Governor.[40] Colenso was exasperated by the result, particularly when he discovered that Pine already knew that London felt his powers were constrained by the Colonial Prisoners Removal Act of 1869.[41] With the application to forbid his removal having been dismissed, Langalibalele and his son were put on a steamer on 3 August 1874 and sent to the Cape, where legislation had been passed in July at Pine's request to authorise their detention, just as if they had been sentenced by the Supreme Court of that colony.[42]

In fact, Pine had asked the Cape government to hold Langalibalele on Robben Island after his conviction even before his trial had begun.[43] His request for legislation shows that the Lieutenant-Governor was aware that, even if he had the power to banish the chief, there was no legal authority to imprison him at the Cape without the kind of legislation passed to detain Napoleon at St Helena. The bill proved controversial in the Cape, where it was strongly opposed by Saul Solomon and John X. Merriman, but its passage gave legal authority of the most formal kind for his incarceration.[44] Pine thus appeared to have succeeded in his use of 'lawfare' – using an improvised form of 'native law', endorsed by the Supreme Court of Natal, and then secured by *ad hominem* legislation – to subdue this troublesome chief, and give a signal to the African population of Natal of the power of the colonial state. It now remained to be seen how the Colonial Office would react.

[39] *Natal Witness*, 17 July 1874, p. 7; PP 1875 (c. 1141), p. 163.

[40] *Natal Witness*, 17 July 1874, p. 7. A native of Dublin, Connor practised as a barrister there from 1841 to 1854, before commencing a judicial career in the Gold Coast and Natal: see Steven D. Girvin, 'The Architects of the Mixed Legal System', in Reinhard Zimmermann and Daniel Visser (eds.), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford, Clarendon Press, 1996), pp. 110–111.

[41] 22 & 23 Vict. c. 10. [42] Cape Act No. 3 of 1874. [43] PP 1874 (c. 1025), No. 39, p. 38.

[44] Herd, *The Bent Pine*, p. 83; Phyllis Lewsen, *John X. Merriman: Paradoxical South African Statesman* (New Haven, Yale University Press, 1982), pp. 44ff.

Reactions in London

While settler opinion in Natal stood strongly behind Pine, Colenso strove to ensure that the public conscience in the motherland would be pricked. By the time Langalibalele's trial was in progress, organisations such as the Anti-Slavery Society, the Peace Society and the Aborigines Protection Society were already publicising the recent 'Atrocities in Natal' in the press, and putting pressure on the government for a full investigation, on the lines of the Jamaica inquiry.[45] Colenso wrote his own account, *Langalibalele and the Amahlubi Tribe*, which was presented to parliament in January 1875.[46] Public opinion in England was also informed by the publication of a series of Blue Books containing the correspondence between London and Natal. Commenting on this material at the end of 1874, the lawyer John Westlake described the trial of the chief as a 'farce'.[47] For Thomas Gibson Bowles, the case raised the question of whether men who were appointed to administer the law were to be allowed to place themselves above the law.[48] There was consequently strong pressure on the metropolitan authorities to ensure that the rule of law was observed in their colony.

The Colonial Office also began to take a closer interest in the case after February 1874, when the Earl of Carnarvon returned to the post he had held during the Jamaica crisis, after the fall of the Liberal government. Both Carnarvon and his officials were troubled by the trial and sentence.[49] One of these officials, the barrister Edward Fairfield, was particularly sceptical about the applicability of native law in this case, commenting that 'it is only by the fiction of considering

[45] *Glasgow Herald*, 22 January 1874, p. 2; PP 1874 (c. 1025), No. 22, p. 22; No. 44, p. 42.

[46] This was written in answer to *The Kafir Revolt in Natal in the Year 1873, Being an Account of the Revolt of the Ama-Hlubi Tribe under the Chief Langalibalele, and the Measures Taken to Vindicate the Authority of the Government, Together with the Official Record of the Trial of the Chief and Some of His Sons and Indunas* (Pietermaritzburg, Keith & Co., 1874).

[47] John Westlake, 'The Kafir Revolt of 1873', *Fortnightly Review*, vol. 22 (December 1874), pp. 701–713 at p. 707.

[48] T. G. Bowles, 'The Case of Langalibalele', *Macmillan's Magazine*, vol . 31 (1875), pp. 331–339 at pp. 331, 339.

[49] PP 1874 (c. 1025), No. 47, p. 78; No. 50, p. 79; PP 1875 (c. 1121) LIII. 295, No. 5, p. 4; enc. 1 in No. 5, p. 8.

Sir B. Pine a Native "whose ignorance and habits unfit him for civilized life" that a crime against him is thought within Native Law at all'.[50] He also doubted that Pine had an inherent power as Supreme Chief to impose penalties unknown to native law.[51] Officials were also concerned about the passage of the Cape Act to legalise Langalibalele's detention, which appeared to by-pass the provisions of the Colonial Prisoners Removal Act. William Malcolm thought that the Cape act was *ultra vires*, in recognising and punishing an offence committed outside the colony, and should be disallowed. The view in Downing Street was that Langalibalele's punishment should be commuted and he should be allowed to resettle in the colony.[52]

In seeking a solution to the problem of Langalibalele's detention which would satisfy metropolitan demands for the rule of law to be observed without antagonising opinion in the colonies, Carnarvon consulted Colenso and Shepstone, both of whom had come to London to lobby for their view. A despatch was then drafted which set out the Secretary of State's own view of the case. It was clear that Carnarvon did not see Langalibalele's conduct as constituting any kind of rebellion. As he saw it, neither Langalibalele's recalcitrance in complying with the new marriage regulations nor his failure get to his people to register their arms were serious matters; though his refusal to appear when summoned was an offence to which the government was bound to respond. At the same time, he accepted that the chief's failure to appear had been driven by fear and that the crisis might not have occurred if matters had been handled differently. Instead, if greater pains had been taken to 'sift the rumours' then 'a truer conception of his attitude towards the Government would have been formed'. Unlike Pine, Carnarvon did not see Langalibalele's flight as an act of treason. He was also critical of the trial, which he felt should have been conducted under the ordinary law. Although he accepted that Langlibalele deserved punishment for failing to appear when summoned, he thought the sentence should be reduced.[53]

[50] Minute dated 5 September 1874, CO 179/115/10411.
[51] Minute dated 7 September 1874, CO 179/115/10414; see also Note by W. R. Malcolm (assistant under-secretary of state), 7 September 1874, CO 179/115/10411.
[52] Minutes by Fairfield and Malcolm, 7 September 1874, CO 179/115/10414.
[53] Draft despatch, November 1874, CO 879/7/6.

While Carnarvon was pondering his options, the Law Officers gave their opinions on two matters. First, they reported that the Cape Act authorising his detention was not void for being repugnant to the Colonial Prisoners Removal Act: although the Natal court had no power to deport Langalibalele, he was in legal custody in the Cape by virtue of their legislation.[54] Secondly, they agreed with Carnarvon that the best way to deal with him would be to offer him a pardon on condition that he remained in the Cape, even though it would be legally impossible to enforce the condition.[55] Since the sentence of the Natal court was void, the crown had no power to commute it into a sentence of banishment in the Cape; and since he was in prison 'only by reason of fictitious sentence for some imaginary crime' declared by the Cape legislature, the crown had no power to impose a penalty beyond that provided for by the Cape's lawmakers. This advice having been given, Colenso was called to the Colonial Office and told that Langalibalele would be allowed to leave Robben Island, but would not be permitted to return to Natal. Instead, a location would be provided for him in the Cape, where his followers could join him.[56] Two days later, a despatch based on the November draft was sent to Pine, who was to be recalled. After giving a detailed review of the proceedings, almost in the manner of a court of appeal, Carnarvon concluded that 'the guarantees which every English Court of Law desires for its own sake and in the ends of justice to secure' had not been accorded to Langalibalele. Nonetheless, since he merited some punishment for his disobedience, he was to be moved to a location in the Cape, with strict instructions not to re-enter Natal.[57]

Colenso returned to the Cape, expecting to be able to tell the chief the news of his imminent release. However, by the time he reached Cape Town, the Cape government had decided not to release Langalibalele, since they felt it would be impossible to control him if he were released from Robben Island.[58] They also informed the Colonial Office that, if the Act authorising Langalibalele's detention were disallowed, they would have no option but to return him to Natal. This response disappointed Carnarvon, who wanted the matter settled without a major debate in parliament; but he remained

[54] Opinion dated 12 November 1874, CO 885/12.
[55] Opinion dated 27 November 1874, CO 885/12. [56] Guy, *The Heretic*, p. 228.
[57] PP 1875 (c. 1121), No. 26, p. 86.
[58] PP 1875 (c. 1158) LIII. 401, No. 1, p. 1 with enclosures.

conscious of the need to respect the autonomy of ministers in a responsible government. He advised the Cape government to pass legislation which would allow them to remove Langalibalele from Robben Island while still restricting his movements outside the location to which he would be settled. In the meantime, he delayed disallowing the Act.[59]

The matter came before the House of Lords in April 1875, in a debate which pitched past and present secretaries of state against each other. In the debate, it was the members of the Conservative government who sought to defend an imperial vision of the rule of law, while the recently ousted Liberal leaders defended the rights of the responsible government at the Cape to deal with this question. The Liberals took the view that the Colonial Office should defer to local knowledge and not seek to overturn the views of the Cape assembly and the Natal Supreme Court.[60] As Grey saw it, colonial Governors had to be allowed to act in a vigorous way if 'the obedience of an almost barbarous people many times out-numbering the White population was to be preserved'.[61] Kimberley also thought that his successor in office had no power to order the Cape to move the chief. Carnarvon, however, vigorously defended his policy, condemning the trial and sentence and observing that the so-called 'rebellion' only merited the name of a 'disturbance, which a few policemen would have effectually dealt with'. He felt the Cape legislation could not stand, since it implemented an illegal sentence on a man entitled to all the rights of a British subject. Indeed, it was the duty of the imperial authorities to condemn injustices committed in any part of the empire.[62] Lord Chancellor Cairns agreed: 'England exercises too wide a sway, has too large an Empire, and interests much too high at stake, to allow or tolerate that which is an absolute and thorough injustice to be perpetrated with impunity in any part of her dominions.'[63]

Such fine words masked the fact that the government's policy was not to liberate Langalibalele, but to move him to another location. Pine's successor, Sir Garnet Wolseley, was determined that Langalibalele should not return to Natal, since it would 'unsettle the minds' of the

[59] PP 1875 (c. 1158), No. 2, p. 5. [60] *Manchester Guardian*, 14 April 1875, p. 5.
[61] *Parl. Debs.*, 3rd ser. vol. 223, col. 671 (12 April 1875).
[62] *Parl. Debs.*, 3rd ser. vol. 223, cols. 683, 688 (12 April 1875).
[63] *Parl. Debs.*, 3rd ser. vol. 223, col. 699 (12 April 1875).

Africans, and increase the influence of a chief with reputed supernatural powers who had defied the government. In his view, if the Cape could not accommodate him, he should be sent somewhere distant like St Helena. Wolseley was also worried about the impact of public opinion in England on the Secretary of State, and warned him not to be taken in by 'sensational narratives'.[64] In the meantime, the Cape parliament began to debate legislation to permit the further detention of the chief. The bill proved controversial, and generated strong opposition, but eventually passed at the beginning of June. It repealed Act No. 3 authorising Langalibalele's detention, and made provision for a location to be defined where Langalibalele, his son and his followers could live under regulations restricting them to the location. The legislation presumed that Langalibalele was to be held for the period of his sentence – a life term – but it gave power to the Governor, acting on advice from the Executive Council, to release him.[65] Land was chosen at Uitvlugt, on the Cape Flats, where he was moved in August.[66]

As the Colonial Office perceived, Langalibalale's removal and detention involved the use of exceptional powers by a Governor determined to make a very public example of those who defied his authority. His use of 'lawfare' raised serious questions in London about how such uses of power could be reconciled with metropolitan understandings of the rule of law. In the end, however, the chief's detention was made legally bullet-proof not by the claims of the Governor to act in his capacity of a supreme African chief, but by *ad hominem* legislation at the Cape. However concerned they may have been about due process not having been followed in Langalibalele's case, the Colonial Office was more swayed by the hawkish Wolseley's insistence that the chief be kept out of Natal, and by the practical impossibility of coming to any other legal arrangement which would suffice. Put into a constitutionally legitimate form by statute, Carnarvon was prepared for political reasons to accept Langalibalele's exceptional treatment. In 1880, the Colonial Office, with Kimberley back at the helm, made inquiries as to whether he could be released,[67] but Natal's Legislative Council remained

[64] PP 1875 (c. 1342–1), No. 25, p. 27. [65] PP 1875 (c. 1342–1), enc. 1 in No. 30, p. 33.
[66] As Malcolm minuted on 23 June 1875, 'if the bill now in progress at the Cape becomes Law the difficulty of settling the Kafir chief will be met': CO 179/117/7028.
[67] CO 879/17/19, pp. 5, 9; CO 48/494/10200. His son Malambule was sent back to Natal in August 1878, on medical advice: CO 48/494/1480.

strongly opposed to his release.[68] He was not to return to Natal until 1887, when he was restricted to an area near Pietermaritzburg.

Cetshwayo's Capture and Detention

One reason for Langalibalele's continued detention in the Cape was that, by the early 1880s, the Zulu king Cetshwayo was also being held there, and there were fears that, if Langalibalele were freed, Cetshwayo's family would 'intrigue for his release'.[69] Cetshwayo had been captured on 31 August 1879 at the end of the Anglo-Zulu War, and was removed to Cape Town, where he arrived on 15 September.[70] The Zulu king had been captured as a prisoner of war, but it was soon evident that his continued detention was essential for British imperial policy, which required his deposition from the throne, and the division of his country into separate chieftainships.[71] Like Napoleon, this was a ruler who needed to be kept away from his kingdom.

With the decision having been taken to hold Cetshwayo as a state prisoner at the Cape, there was some discussion over whether special legislation was needed to authorise his detention.[72] According to the Cape's Attorney-General, Thomas Upington, the king could be held as an alien enemy without such legislation, since he was at war with the empire of which the Cape was a part.[73] Invoking Vattel, he argued that the liberation of prisoners was one of the articles of peace, and that prisoners could be held until a formal peace had been concluded.[74]

[68] PP 1880 (c. 2695) LI. 449, No. 24, p. 54; PP 1881 (c. 2950) LXVII. 301, enc. 2 in No. 3, p. 4. See also PP 1880 (c. 2695), enc. 2 in No. 33, p. 74. By 1883, the Executive Council was no longer opposed to his return, at least under certain conditions, but the Legislative Council remained opposed: CO 879/20/5, pp. 7, 26.

[69] CO 879/18/5, p. 133.

[70] On Cetshwayo, see further Jeff Guy, *The Destruction of the Zulu Kingdom: The Civil War in Zululand, 1879–1884* (Pietermaritzburg, University of Natal Press, 1994 [1979]); and C. T. Binns, *The Last Zulu King: The Life and Death of Cetshwayo* (Longmans, London, 1963).

[71] CO 879/16/5, sub-enc. 2 in No. 10, p. 28; enc. in No. 70, p. 135.

[72] This was the recommendation of Wolseley: PP 1880 (c. 2695), enc. 2 in No. 6, p. 4.

[73] CO 879/16/5, enc. 13 in No. 116, p. 281.

[74] PP 1880 (c. 2695), enc. 3 in No. 7, p. 7. Upington did, however, ask for a warrant be issued to authorise the detention, fearing that without one an application for such

However, the Law Officers in London, who had in mind the Napoleonic precedent, advised that legislation would be necessary to authorise his continued detention after the *status belli* had ended.[75] Secretary of State Sir Michael Hicks Beach duly asked the Cape government to introduce legislation as soon as possible, which should also include indemnity provisions. In the meantime, Cetshwayo was to be held in military custody.[76]

It was not only the Zulu king whom Wolseley wanted detained at the Cape. After having defeated Cetshwayo, he had resumed the campaign against the Pedi chief Sekhukhune, another of the African leaders who was perceived to stand in the way of imperial interests after the British annexation of the Transvaal in 1877. The campaign against Sekhukhune was interrupted by the Anglo-Zulu war, but in December 1879, Wolseley (who had returned to South Africa as commander-in-chief) defeated the Pedi and brought their leader to Pretoria. Just as Wolseley wanted Cetshwayo far away from Zululand, so he wanted Sekhukhune far away from Transvaal.[77] The Colonial Office concurred with this plan, and saw financial benefits in detaining both leaders on the same farm as Langalibalele.[78] Legislation was accordingly passed in Natal to allow Sekhukhune to be moved through that colony on the way to the Cape, without any risk of a habeas corpus application being brought to free him there.[79] In the event, this legislation was not needed for Sekhukhune, who remained in Pretoria until he was freed under the terms of the Pretoria Convention of 3 August 1881, at the end of the war which re-established the

a writ might succeed. CO 879/16/5, enc. 13 in No. 115, p. 281; enc. 7 in No. 140, p. 332. Secretary of State Hicks Beach expressed some concern at the issue of a warrant which gave it a 'quasi-civil character', rather than moving Cetshwayo simply under military auspices: CO 48/491/15570.

[75] Law Officers' opinion, 20 October 1879, CO 885/12, No. 210.

[76] CO 879/16/5, No. 178, p. 381. For Hicks Beach's awareness of the difference between military and civil custody, see also CO 879/16/5, No. 283, p. 581.

[77] PP 1880 (c. 2695), enc. 3 in No. 10, p. 9.

[78] PP 1880 (c. 2695), No. 15, p. 17.

[79] *Natal Witness*, 29 January 1880, p. 3; Act No. 20 passed in March 1880. Although amended to allow only the detention of anyone convicted of a crime, or being deported 'with the object of being brought to trial, or being prisoners of war, or otherwise legally deported', it also declared the colonial courts incompetent to inquire into the circumstances under which such person was detained or apprehended.

South African Republic, under British suzerainty.[80] It remained on the books, however, and would be drawn on in future.

Throughout the first half of 1880, Cetshwayo was kept as a military prisoner of war in the castle at Cape Town, pending legislation to allow his civilian detention. No legal challenge was made to his detention, though the ex-king did write letters both to Frere and to the Queen asking to be sent back to Zululand as a private person.[81] While neither the High Commissioner nor the Colonial Office would countenance this,[82] they felt that he should be allowed greater personal freedom than was permitted to Langalibalele, given that he had not resisted British authority, but had been an enemy.[83] Legislation was introduced in the Cape House of Assembly in June to permit the government to continue to keep Cetshwayo and Sekhukhune as prisoners of war.[84] Officials in London at first worried that the bill contained no indemnity clause, which caused concern since Cetshwayo's 'military' detention hitherto might not have been lawful, and '[t]here are some partisans in England who will prosecute [Frere] if they get a chance.'[85] The bill was consequently amended to include an indemnity provision.

According to the act which passed, Cetshwayo and Sekhukhune would be detained 'during the pleasure of the Governor'. This left it unclear whether the decision to free them would lie in the hands of the imperial authorities or in those of the Cape's responsible government.[86] In Langalibalele's case, the Cape's legislation had

[80] See Peter Delius, *The Land Belongs to Us: The Pedi Polity, the Boers and the British in Nineteenth-Century Transvaal* (Berkeley, University of California Press, 1984), p. 251.

[81] PP 1880 (c. 2695), enc. in No. 18, p. 31; enc. 2 in No. 20, p. 48.

[82] At the Colonial Office, Herbert noted that 'we have entered into engagements with the Zulu Chiefs, wholly inconsistent with the return of Ketchwayo to Zululand': Minute 10 June 1880, CO 48/494/8342.

[83] PP 1880 (c. 2695), No. 25, pp. 55–56; No. 36, p. 76. [84] PP 1880 (c. 2695), No. 29, p. 57.

[85] Minute dated 11 June 1880, CO 48/494/8621.

[86] When the bill was debated in Cape Town, Saul Solomon objected to the wording and argued that it should be made clear that they were held during Her Majesty's pleasure; but his opponents argued that he wanted to leave the power to release Cetshwayo in London's hands, so that the Aborigines Protection Society could pressure the government there to order his release. PP 1880 (c. 2695), enc. 2 in No. 29, p. 58.

empowered the Governor to release 'with the advice of the Executive Council'; but this phrase was omitted in the bill relating to Cetshwayo, which suggested that the Governor could act without ministerial advice, on the direction of the crown.[87] From London's point of view, while the Cape was to host Cetshwayo, he was to remain an imperial prisoner. The act was duly passed in July, with the proviso that it would take effect only on a date named by the Governor in a proclamation. In the meantime, he remained a military prisoner of war.[88] The Colonial Office now began to pressure the Cape authorities to move Cetshwayo to a civilian location where he might have greater liberty.[89] Arrangements were made for Cetshwayo and his followers to be located on a farm at Oude Molen which would adjoin the land on which Langalibalele was located, and, after the requisite proclamation had been issued, he was moved there at the beginning of February 1881.[90]

Like Langalibalele, Cetshwayo had the strong support of Bishop Colenso. In November 1880, he visited Cetshwayo, and suggested that he petition the crown to be allowed to present his case in England.[91] The following March, Cetshwayo requested permission to lay his case before the Queen and the British parliament.[92] Secretary of State Kimberley's response was not encouraging. Since it was impossible to undo the settlement reached in Zululand, Cetshwayo could not hope to be 'released from the detention which paramount considerations of policy render unavoidable'.[93] Soon

[87] Officials at the Colonial Office, who had spotted this, were sure that the ministers did not wish to leave the power in London's hands, 'and are not aware of the trap which this bad drafting is laying for themselves'. Minute 14 July 1880, CO 48/494/10200.

[88] Act No. 6 of 1880, in PP 1881 (c. 2950), enc. 1 in No. 10, p. 25. It was implemented by proclamation in the *Government Gazette* on 25 January 1881: PP 1881 (c. 2950), No. 10, p. 26.

[89] PP 1881 (c. 2740) LXVI. 1, No. 25, p. 30; PP 1881 (c. 2950), No. 1, p. 1.

[90] Robinson to Kimberley, 1 February 1881, PP 1881 (c. 2950), No. 6, p. 18. For the regulations imposed on him at Oude Molen, see PP 1881 (c. 2950), enc. 9 in No. 8, p. 23.

[91] Guy, *Destruction of the Zulu Kingdom*, p. 126.

[92] PP 1881 (c. 2950), enc. 2 in No. 42, pp. 129, 138. See also PP 1881 (c. 2866) LXVII. 67, enc. 2 in No. 95, p. 185.

[93] PP 1881 (c. 2950), No. 69, p. 189 at p. 190.

after this news reached Cetshwayo, Deputy Governor Smyth visited the ex-king, and found him 'in a very depressed condition', contemplating suicide.[94] Cetshwayo continued to plead his case, asking the Governor, Sir Hercules Robinson, '[b]y what law of nations am I kept here without even a chance of seeing the people that have talked so untruthfully against me[?]'[95] His entreaties eventually pricked the consciences of both Kimberley and Gladstone, who were uneasy about the Zulu war, and who were under increasing pressure from growing Liberal sympathy in England for the ex-king. In September, Robinson was informed that the government was willing to entertain Cetshwayo's request to visit England.[96] Cetshwayo began to plan his visit for March 1882, writing letters to the Queen and the Prince of Wales.[97]

However, there remained some legal complications to be resolved before he left. According to the legal advice received at the Cape, once he was released, Cetshwayo could not be detained there again without fresh legislation.[98] The Law Officers in London confirmed this, but noted that Cetshwayo could still be regarded as being a prisoner of war, both during his visit to England and thereafter. To signal his continuing status as such, they suggested putting him back into imperial military custody at the castle in the Cape, prior to his trip to England.[99] Kimberley gave the necessary instructions, and also asked Robinson about the possibility of passing a second act at the Cape to provide for his detention on his return.[100] When the Cape government responded that they would not support a second act,[101] Cetshwayo was told that it might become necessary after his trip to England to send him elsewhere, such as Mauritius.[102] Cetshwayo's travels were delayed further when the new Governor of Natal, Sir Henry Bulwer, asked for the trip to be postponed, since the visit was being used 'for purposes of agitation in Zululand'.[103]

[94] PP 1882 (c. 3247) XLVII. 1, No. 1, p. 1.
[95] PP 1882 (c. 3247), enc. in No. 6, p. 5.
[96] PP 1882 (c. 3247), No. 4, p. 3; Guy, *Destruction of the Zulu Kingdom*, p. 130.
[97] Letters dated 27 December 1881, PP 1882 (c. 3247), encs. in No. 21, p. 15.
[98] Opinion of A. W. Cole, January 1882, PP 1882 (c. 3247), enc. 2 in No. 24, p. 17.
[99] Opinion dated March 1882, CO 885/12, No. 274.
[100] Kimberley also wanted to secure assurances from the ex-king that he would obey all instructions given to him when he left the Cape. PP 1882 (c. 3247), No. 31, p. 22.
[101] Robinson to Kimberley, 3 May 1882, PP 1882 (c. 3247), No. 56, p. 47.
[102] PP 1882 (c. 3247), No. 57, p. 47; No. 83, p. 78.
[103] PP 1882 (c. 3247), 10 May 1882, No. 59, p. 50; No. 90, p. 86.

Once it became evident to the Colonial Office that this was not the case, Kimberley felt that the trip had to proceed, since it might make the long-term settlement of Zululand more difficult if the promise to the king were not kept.[104] In July, Cetshwayo duly sailed from Cape Town with three chiefs, bound for London.

If the British authorities had been keen to ensure that Cetshwayo would still be regarded as a prisoner of war when he left South Africa, they hardly treated him as one when he arrived in England. He was lodged in a house in Kensington, and given tours of Woolwich Arsenal and the London Docks – to impress him with Britain's military power – and was also taken to parliament and to meet the Queen.[105] Cetshwayo's visit attracted much attention in the British press, which found the Zulu king to be a very different figure from the savage uncivilised warrior he was portrayed to be during the war.[106] Nor did the Colonial Office see the purpose of the visit as simply giving an eminent African detainee the opportunity to ask for mercy. By the summer of 1882, it was clear that the settlement which Wolseley had imposed on Zululand after defeating Cetshwayo was not working.[107] In dividing Zululand into thirteen small chieftainships, Wolseley, and his adviser John Shepstone, believed that they had set up a system where each chief would guard his independence from the others, and maintain a balance among various Zulu factions. In practice, it had the reverse effect, since neither the territories defined nor the chiefs appointed reflected the preceding structures of Zulu politics and society. In September 1881, as he contemplated allowing Cetshwayo to visit London, Kimberley had noted that 'we neither control the affairs of Zululand, nor are we free from responsibilities for them'. Had the British either annexed Zululand, or left Cetshwayo on the

[104] PP 1882 (c. 3270) XLVII. 101, No. 5, p. 19; PP 1883 (c. 3466) XLIX. 49, No. 49, p. 81.

[105] Guy, *Destruction of the Zulu Kingdom*, p. 152.

[106] See Catherine E. Anderson, 'A Zulu King in Victorian London: Race, Royalty and Imperialist Aesthetics in Late Nineteenth-Century Britain', *Visual Resources*, vol. 24:3 (2008), pp. 299–319.

[107] Under the plan thirteen independent chiefs were to rule Zululand, which would not be annexed to the British crown, though a British Resident would be appointed. See Guy, *Destruction of the Zulu Kingdom*, pp. 69–78.

throne, their policy would have been coherent.[108] As it was, the system under which great power was given to the appointed chiefs – particularly John Dunn and Zibhebhu – greatly antagonised the Usuthu chiefs who had lost out in the settlement and who remained loyal to their king, threatening civil war. The Colonial Office realised that Zululand would remain unsettled without a recognised paramount authority, and that unless the British themselves assumed that authority – which they did not want to do – the only alternative was the restoration of Cetshwayo. At the same time, they felt duty bound to assign separate lands to those chiefs they had dealt with who were not willing to be ruled by Cetshwayo.[109] Consequently, when Kimberley met Cetshwayo shortly after his arrival, and was asked by the ex-king what he had done wrong, the Secretary of State said that it was no use to talk of the past.[110] He saw the meeting as an opportunity for the British government to lay down terms for the future administration of Zululand, and Cetshwayo's part in it. Kimberley's proposal was that he would be allowed to return to Zululand, but that 'a portion of the country' would not be under his control, but would be 'reserved for other purposes'. Additionally, he would have to accept a British Resident.[111] Although Cetshwayo was unhappy at the partition of his country – and at continuing British support for the perfidious chiefs – he agreed to the terms of his restoration.

It was decided that Cetshwayo should return to Oude Molen pending the completion of arrangements for his restoration. However, on this occasion, he was not to be regarded as a prisoner, and the only restrictions imposed on him would be the ones he had agreed to observe when coming to England. There was consequently no need to pass another act at the Cape, and the local government were happy to host him in the interim.[112] At the beginning of September, Cetshwayo sailed back for Cape Town. He remained there while the

[108] CO 179/138/15682, f. 175, 6 September 1881, quoted in Guy, *Destruction of the Zulu Kingdom*, p. 131.
[109] PP 1883 (c. 3466), No. 114, p. 216. [110] PP 1883 (c. 3466), enc. 1 in No. 61, pp. 105ff.
[111] PP 1883 (c. 3466), enc. 1 in No. 61, p. 107.
[112] PP 1883 (c. 3466), No. 68, p. 115; No. 76, p. 132.

Colonial Office and the Natal authorities figured out the details of the arrangement. In the event, the plans for Zululand were far from settled when Cetshwayo returned to the Cape, and he would take no part in shaping them. The settlement agreed between Kimberley and Sir Henry Bulwer was that Zululand would be partitioned into three parts, only one part of which would be under the king's control. Land to the north of his territory was allocated to Zibhebhu, chief of the Mandlakazi, and land to the south became a 'Zulu Native Reserve', where those chiefs wishing to escape the king's chiefs could settle.[113] Cetshwayo was very dissatisfied with the amount of territory which was reserved, but had no choice but to accept the partition of his kingdom.[114] In January 1883, the king sailed back towards Zululand.

In the case of the Zulu king, his detention at the Cape was a continuing part of Britain's war of conquest in Zululand, conducted by means of law. Although he had been defeated on the battlefield, he remained a danger to British plans for the area, and so had to be kept incarcerated. The British had no jurisdiction to hold Cetshwayo. As the war with the Zulus had ended, he could no longer legitimately be regarded as a prisoner of war. Nor was he a subject, who had committed any kind of offence against the crown: he was the ruler of a neighbouring kingdom, which at the end of the war the British opted not to annex. Aware of the support that he enjoyed – and the risk that his friends might seek a habeas corpus application – legal cover was given to his detention by means of a statute. If this suggested that London was no less averse to using exceptional measures to detain African leaders when they felt it necessary than administrators in the colonies, it was also the case that the tools of 'lawfare' were not always fit for purpose. The detained Cetshwayo himself was able to put pressure on the British, who soon found that they needed him more as a figure of authority in Zululand than as a prisoner at the Cape.

The examples of Langalibalele and Cetshwayo showed that while 'exceptional' measures could be used to detain political opponents, there were costs involved in using them. Such measures could serve as much to discredit imperial rule as to bolster it. The lesson was learned

[113] Guy, *Destruction of the Zulu Kingdom*, pp. 160–161.
[114] PP 1883 (c. 3466), No. 138, pp. 240ff.

in Natal, for in the next major conflict, involving Cetshwayo's son Dinuzulu, the imperial authorities were insistent that the rule of law would be seen to have been followed.

Dinuzulu's Trial and Exile

Dinuzulu's 'Rebellion'

Cetshwayo's return to his home did not turn out to be a happy one. By 1883, relations between Cetshwayo's Usuthu branch of the royal house and Zibhebhu's Mandlakazi branch had descended into a civil war which had been brewing since the middle of 1881. In July, Zibhebhu attacked the king's capital at Ulundi, slaughtering hundreds.[115] Cetshwayo himself was injured, but escaped. He died in February 1884 at Eshowe, where he had lived for four months under the protection of the Resident Commissioner. The conflict between the Usuthu and the Mandlakazi continued after Cetshwayo's death. Soon after his father's death, Dinuzulu allied with the Boers, who offered him support in exchange for the promise of land in which they could create a new self-governing republic. In June, the Usuthu and Boers attacked the Mandlakazi and inflicted a crushing defeat on Zibhebhu, who sought refuge in the Zulu Native Reserve. Given the young king's promises of land for the Boers, this victory hardly strengthened his power, for it prompted the British to set limits to Boer expansion. In 1887, having agreed a boundary with the New Republic, Zululand was annexed as a British colony, whose Governor (also the Governor of Natal) was to be Supreme Chief.

The new colonial government was not slow to assert its authority over Dinuzulu, who was summoned (along with his uncle Ndabuko) to appear before Governor Sir Arthur Havelock, who accused him of disloyalty and misconduct, in again communicating with the New Republic. While accepting Dinuzulu's denial of any treasonable intent,[116] Havelock chided him for presenting himself as the

[115] Guy, *Destruction of the Zulu Kingdom*, pp. 200–204.

[116] PP 1887 (c. 5331), No. 37, p. 57 at p. 58. It had been planned to charge them with treason-felony if they did not appear when summoned: PP 1887 (c. 5331), No. 33, p. 50.

successor to the Zulu kings,[117] telling him that the Queen who had conquered Cetshwayo was now the ruler of Zululand. The House of Shaka was dead: 'It is like water spilt on the ground.'[118] At the same time, Havelock was happy to allow the anti-Usuthu chiefs Zibhebhu and Sokwetshata to return to the lands they had previously occupied in northern Zululand and on the coast, in order (as Theophilus Shepstone put it) to 'throw the balance of Zulu power into the hands of the Government'.[119]

If Havelock expected that Zibhebhu's return would create a stable balance of power in the area, it was a massive miscalculation. Given their memories of the slaughter of Ulundi, the Usuthu were hardly likely to wish to live peacefully alongside the Mandlakazi. To make matters worse, much of the land in the area was occupied by Usuthu, who were brutally driven off it by Zibhebhu.[120] Many of them sought refuge with Dinuzulu at Ivuna, in the Ndwandwe district. The refugees' movements alarmed the authorities, who feared that Dinuzulu was preparing a force to attack Zibhebhu, which (the young king was told) would be considered as an attack on the government. Although Havelock came to realise that Dinuzulu's behaviour might be due to 'fear and suspicion [of Zibhebhu] and to defensive rather than aggressive intention',[121] the Resident Commissioner, Melmoth Osborn, felt that the main obstacle to British rule in Zululand was the fact that Dinuzulu 'would not settle down as a subject of the Queen and live under the law'. As he saw it, the return of Zibhebhu simply gave Dinuzulu a pretext for discontent. Nothing short of 'severe measures' would suffice to put a stop to his intrigues.[122]

Viewed from this perspective, Dinuzulu's defensive move to Ceza on the border with the New Republic in May 1888 was interpreted as

[117] PP 1887 (c. 5331), enc. 1 in No. 30, p. 44 at p. 45.
[118] PP 1887 (c. 5331), enc. 2 in No. 37, p. 64. See also Guy, *Destruction of the Zulu Kingdom*, p. 237.
[119] PP 1887 (c. 5331), No. 9, p. 23; enc. 4 in No. 9, pp. 27–29.
[120] PP 1887 (c. 5522) LXXV. 533, enc. 2 in No. 6, p. 15. Furthermore, officials set a boundary for Zibhebhu's territory which allocated much more land to him than his tribe had previously occupied. PP 1888 (c. 5522), No. 6, p. 11. See further John Laband, 'British Boundary Adjustments and the uSuthu–Mandlakazi Conflict in Zululand, 1879–1904', *South African Historical Journal*, vol. 30:1 (1994), pp. 33–60 at pp. 46–48.
[121] PP 1887 (c. 5331), No. 53, p. 84. [122] PP 1888 (c. 5522), enc. 1 in No. 16, p. 27 at p. 28.

aggressive 'open defiance of Government'.[123] After reports were received that Dinuzulu had been involved in cattle stealing, Osborn was instructed to send a force to arrest him and bring him to Eshowe to face charges for that offence.[124] However, the attempt to apprehend him ended in a clash in which two soldiers and over 100 Usuthu were killed. The colonial police and troops retreated without making their arrest.[125] Young Usuthu warriors then went on the rampage, killing two white storekeepers. The authorities were further alarmed when Shingana, another of Dinuzulu's uncles (who had been thought to be loyal), went over to Dinuzulu's side, taking 250 followers into the mountains at Hlophekhulu.[126] The conflict escalated when, on 12 June 1888, Zibhebhu's men attacked the kraal of chief Msutshwana – who had aligned himself with Dinuzulu – and killed the chief, in revenge for an attack by his son on some of Zibhebhu's followers.[127] The murder was brutal and it elicited a fierce response from the Usuthu. On 23 June, they attacked Ndunu Hill, killing 250 of Zibhebhu's men, including nine of his brothers.[128] The colonial authorities reacted to the Usuthu victory with some alarm,[129] which only increased at the end of the month when Usuthu on the Lower Mfolosi led by Somkhele launched an attack on Sokwetshata, which appeared to show that the coastal chiefs were openly joining what was now seen as Dinuzulu's rebellion.[130] In fact, the unrest was soon quelled. At the beginning of July, the colonial forces launched an attack on Shingana, who had taken his followers to the mountains at Hlophekhulu, with a view to intercepting him before he could join Dinuzulu at Ceza.[131] After six hours of fighting (and seven fatalities on the colonial side), Shingana – for whom a warrant had been issued – escaped. The colonial forces then turned their sights on Ceza itself. With the troops on his tail, and a warrant against him on

[123] The phrase is Osborn's, quoted PP 1888 (c. 5522), No. 24, p. 42 at p. 43.
[124] PP 1888 (c. 5522), No. 27, p. 45. He was to be charged under Law 10 of 1876.
[125] PP 1888 (c. 5522), enc. 2 in No. 38, p. 62. [126] PP 1888 (c. 5522), No. 43 with enc., p. 66.
[127] See the evidence in *Reg* v. *Usibebu Ka Mapita* in PP 1890 (c. 5892) LII. 421, sub-enc. 2 in enc. 9 in No. 190, p. 352; PP 1888 (c. 5522), enc. in No. 72, p. 117; Jeff Guy, *The View across the River: Harriette Colenso and the Zulu Struggle against Imperialism* (Charlottesville, University of Virginia Press), p. 227.
[128] J. P. C. Laband, 'The Battle of Ivuna (or Ndunu Hill)', *Natalia*, vol. 10 (1980), pp. 16–22.
[129] PP 1888 (c. 5522), enc. 2 in No. 52, p. 90. [130] PP 1888 (c. 5522), enc. in No. 67, p. 109.
[131] PP 1888 (c. 5522), p. 57, No. 36; No. 66, p. 103; enc. 4 in No. 66, p. 107.

charges of murder, cattle-stealing and public violence, Dinuzulu headed for the Transvaal. What had looked to the British like a rebellion had clearly been crushed by the end of July.

Dinuzulu's Arrest and Rendition

With peace restored, the colonial authorities determined to put the rebels on trial. Preliminary investigations began when Ndabuko surrendered in September 1888.[132] However, Dinuzulu remained at large until the day when the first of the trials of seventeen men for their part in the rebellion began on 15 November at Eshowe. After he had fled to the South African Republic, Governor Havelock wanted to request Dinuzulu's extradition,[133] but the Colonial Office (fully aware that a political offender would not be extradited) was content to see him interned in the Republic at a distance from the border.[134] Dinuzulu eventually returned to Pietermaritzburg in November, thanks to the influence of Harriette Colenso, the daughter of the bishop, who advised him to surrender to the authorities, even though it would mean facing a charge similar to that faced by Langalibalele.[135] Harriette – known to the Zulus as 'Udhlwedhlwe', the 'walking stick' and support of her father – would remain a tireless champion of the Zulu king, seeking to keep his case ever present in the eyes of the British public, even as she became an outcast in white Natalian society.

Having escaped from the Republic's police force, Dinuzulu made his way to the Colenso home at Bishopstowe, from where he sent a message to the Governor. A force of policemen was sent to arrest him on a charge for murder, for which a warrant had been issued in Zululand. Since Zululand was a neighbouring colony, the Secretary of Native Affairs, Henrique Shepstone, also issued a provisional warrant

[132] PP 1890 (c. 5892), No 19, p. 28; No. 44, p. 76.
[133] PP 1890 (c. 5892), enc. 1 in No. 5, p. 10; CO 879/30/2, No. 7, with encs. p. 15.
[134] Minute by R. H. Meade, 12 September 1888, CO 427/2/18234; PP 1888 (c. 5522), No. 63, p. 101; CO 879/30/2, No. 15, p. 31; CO 879/30/2, No. 55, p. 90; PP 1890 (c. 5892), No. 47, p. 78; CO 879/30/2, p. 53 (No. 40); PP 1890 (c. 5892), No. 7, p. 11. See also Fairfield Minute, 11 September 1888, CO 427/2/18234.
[135] PP 1890 (c. 5892), enc. 2 in No. 3, p. 5; PP 1890 (c. 5892), enc. 1 in No. 3, p. 3. See also Guy, *View across the River*, ch. 17.

under the 1881 Fugitive Offenders Act; but as Dinuzulu was willing to come voluntarily, the warrant was not executed.[136] Since the relevant paperwork had not yet arrived from Zululand, Shepstone asked him to sign a paper consenting to be sent to Eshowe without going through the formalities of the 1881 Act. Dinuzulu, however, declined to agree, insisting that he had not come to Pietermaritzburg in order to be sent to Zululand for trial for murder.[137] He also took legal steps to prevent his removal. On the basis of an *ex parte* application on 17 November, the Natal Supreme Court granted a fifteen-day interdict to prevent his removal, on the ground that the provisions of the 1881 Act had not been complied with.[138] Instead of releasing Dinuzulu, however, the Governor issued another warrant under Law 20 of 1880, the legislation which had been passed to facilitate the passage of Sekhukhune through Natal, but which had never been used. This was designed to trump the restrictions of the Fugitive Offenders Act.

When the case returned to the Supreme Court on 20 November, the court set aside the interdict, rejecting the argument of Dinuzulu's lawyer (G. A. de Roquefeuil Labistour) that Law 20 had no application in a case like this and that the provisions of the 1881 Act had to be complied with. While admitting that this kind of case was not contemplated by those who passed Law 20, Chief Justice Connor – who had upheld Governor Pine's sentence against Langalibalele – construed the statute in such a way as to allow Dinuzulu to fall within its provisions.[139] Connor was clearly disturbed by the prospect that Dinuzulu might escape his projected trial. During argument, he opined that '[i]t would he absurd to say that Dinizulu having come here cannot be touched in any way', and speculated that he might even be tried for his offence in Natal under the common law.[140] In the wake of this decision, Havelock lost no time in moving Dinuzulu to Eshowe and commencing preliminary proceedings against him, which led to his being committed for trial on charges of treason, rebellion and public violence, though not for murder, the charge for

[136] PP 1890 (c. 5892), No. 70, p. 107; No. 76, p. 112. See also Guy, *View across the River*, p. 260.
[137] PP 1890 (c. 5892), p. 135.
[138] See his petition to the Privy Council in PP 1890 (c. 5892), p. 139.
[139] *In re Dinizulu* (1888) *Natal Law Reports*, new ser. Vol. IX, p. 257 at p. 259.
[140] *In re Dinizulu* (1888) *Natal Law Reports*, new ser. Vol. IX, p. 257 at p. 258.

which he had originally been held.[141] However, Dinuzulu's lawyers immediately gave notice of their intention to appeal against Connor's decision to the Judicial Committee of the Privy Council, and Harry Escombe (who was in London on a pre-arranged trip) prepared the paperwork for this.[142] The point of this appeal was not simply to challenge the legality of his rendition: it was also intended to discredit the proceedings in Natal and Zululand, and to pave the way for a wider inquiry into the causes of the disturbances in 1888.[143]

On 22 January 1889, the Judicial Committee granted Dinuzulu leave to appeal.[144] On the same day, the Law Officers responded to the Colonial Office's queries about the legality of Dinuzulu's arrest and the effect any reversal by the Privy Council of the Natal's Supreme Court's judgment would have on a trial of Dinuzulu in Zululand. While they considered that Dinuzulu was not within the class of people covered by the Law of 1880 (and so might have a cause of action against those who had deported him illegally from Natal), the Law Officers advised that an adverse decision by the Privy Council would not affect the competency of the Zululand court to try him. At the same time, they thought that the Judicial Committee might refuse to intervene, on the grounds that a lawful warrant might have been issued at the time under section 35 of the Fugitive Offenders Act, and that the deportation had now taken place.[145] Before receiving this advice, officials in London had contemplated sending Dinuzulu back to Natal, in order to comply with the requirements of the Fugitive Offenders Act.[146] When it was pointed out that Dinuzulu's lawyers would resist any attempt to remove him to Natal, Havelock asked whether he should be removed by '*force majeure* and

[141] PP 1890 (c. 5892), No. 76, p. 112; No 107, p. 155.
[142] PP 1890 (c. 5892), No. 86, p. 122; No. 90, p. 126.
[143] Guy, *View across the River*, pp. 276–277.
[144] *The Times*, 23 January 1889, p. 3. The Order in Council approving the report of the Judicial Committee is in CO 879/30/5, enc. in No. 6, p. 5.
[145] Law Officers' opinion, 23 January 1889, CO 885/13. Bramston was himself of the same view, taking *R.* v. *Sattler* (1858) Dearsly and Bell's Crown Cases Reserved 525 at pp. 546–547 as his authority: CO 427/4/4557.
[146] CO 879/30/2, No. 143, p. 198; Nos. 150, 151, p. 207. Indeed, before the Privy Council hearing, Bramston informed members of the judicial committee that this would be his advice to the Secretary of State, so that 'possibly they would hear no more of the matter': CO 427/3/1773.

surreptitiously'.[147] The Law Officers' reassurance allowed such exceptional contingency plans to be abandoned.[148]

This left the question of whether Dinuzulu's trial could proceed before the Privy Council had come to a final decision on his appeal. Although the judicial committee had not made any order suspending any proceedings against Dinuzulu (which had been requested), Lord Chancellor Halsbury was reported to have said that anyone who proceeded to try Dinuzulu, in light of the leave given, would be guilty of 'a very grave dereliction of duty', since the offence was a capital one.[149] However, both the Governor and his crown prosecutor wanted the trial to proceed without waiting for the decision of the Privy Council, fearing that Dinuzulu would resume his activities if he were released on bail.[150] Havelock was so concerned by this prospect that he proposed passing an ordinance for Dinuzulu's detention and deportation. By contrast, neither ministers nor their officials were troubled by Halsbury's words[151] – since no capital sentence could be executed until it had been reviewed in London[152] – and so the Colonial Office authorised the trial to proceed.[153]

The Trials of the Rebels

It was clear from the moment that the rebellion was suppressed that the authorities wished to hold the rebels to account in 'ordinary' trials, for they were conscious of the criticisms which had been made of Langalibalele's trial, where judicial and political offices had been mixed together. To avoid having the men tried in a court presided

[147] CO 879/30/5, No. 2, p. 1. As a result of an editorial error by Fairfield, a reference to this despatch was inadvertently printed in a Blue Book (PP 1890 (c. 5892), No. 127, p. 191), leading to a question in the Commons: *Parl. Debs.*, 3rd ser., vol. 344, col. 1573 (22 May 1890); see also CO 427/10/9488.

[148] CO 879/30/5, No. 5, p. 5.

[149] *The Standard*, 3 March 1889, p. 2. See also the letter from Charles Hancock (a supporter and correspondent of Harriette Colenso's, who strove to keep the Eshowe trials before the British public) in *Daily News*, 4 March 1889, p. 6. See also his letters in *Daily News*, 9 February 1889, p. 3; 11 April 1889, p. 2.

[150] CO 879/30/5, No. 8, p. 8.

[151] As Bramston noted, 'The Lord Chancellor's obiter dictum would I feel sure not be repeated after argument': CO 427/4/4557.

[152] *Parl. Debs.*, 3rd ser, vol. 333, col. 1288 (8 March 1889). [153] CO 879/30/5, No. 9, p. 8.

over by Osborn – who as chief magistrate was the designated person under the applicable law in Zululand – Natal's Attorney General Sir Michael Gallwey proposed appointing Justice Walter Wragg, senior puisne judge of the Supreme Court of Natal, together with two magistrates from Natal to hear the cases.[154] The Colonial Office was also keen for this to be seen as a regular trial. For the Secretary of State, Knutsford, African confidence in the system had to be earned by showing it to be impartial and independent.[155] Mindful of the fact that Langalibalele's case had ended in 'a gross miscarriage of justice principally through the Court accepting false evidence without testing it', the Colonial Office was also keen to ensure that the rebels would be defended by counsel.[156] It was also agreed that all the evidence should be transmitted to London, and that no sentence should be carried out until it had been reviewed by Her Majesty's Government at home.

The decision was taken to set up a special commission, under the Governor of Zululand's existing power to appoint magistrates, to try only offences connected with the rebellion.[157] The court was appointed by proclamation on 16 October 1888; at the same time that Gallwey was appointed Attorney General for Zululand.[158] The proclamation's wording (about which London was not consulted) was not felicitous. As Dinuzulu's lawyers pointed out, it denied witnesses the right to refuse to answer questions which might incriminate them, and its preamble seemed to presume guilt.[159] Despite these flaws, the Colonial Office was confident that the court would investigate the central question of guilt. Nine indictments were prepared against seventeen men. Dinuzulu and Ndabuko faced charges of treason, rebellion and public violence. The acts of treason they were charged with included a clash on 26 April 1888, when police sent to arrest four men and collect a cattle fine were resisted; Dinuzulu's withdrawal to Ceza in May; the clash on 2 June, when two soldiers were killed; the attack on Zibhebhu on 23 June; and the collision with the police and

[154] PP 1890 (c. 5892), No. 24, p. 32. [155] PP 1890 (c. 5892), No. 31, p. 43.
[156] Minutes by Fairfield and Herbert, 27–28 September 1888, CO 427/2/19214. See further Guy, *View across the River*, pp. 241–242, 246.
[157] For a discussion of the kind of tribunal to establish, see Minutes dated 2 October 1888, CO 427/2/19214.
[158] PP 1890 (c. 5982), No. 61, p. 90.
[159] Minute by Fairfield, CO 427/4/6639, 5 March 1889; PP 1890 (c. 5892), enc. 1 in No. 134, p. 197.

troops at Hlophekhulu in July. The coastal chiefs also faced charges connected with the attack on Sokotshana on 30 June.[160]

The lawyers assembled by Harriette Colenso for the defence intended to call into question the policy of the colonial authorities, in order to lay the blame for the unrest on the maladministration of government. They intended to engage in their own kind of 'lawfare'. Aware that it would take time to assemble the necessary documentation and witnesses to prepare the defence, they protested both about the speed of the proceedings and about the fact that they were taking place at Eshowe, where the authorities were able to exert official influence. When the court refused a request from Ndabuko's lawyer, W. Y. Campbell, for a postponement, he withdrew from the case, claiming that the proceedings would be 'a farce as far as the ends of justice were concerned'.[161] Faced with a barrage of criticism from Dinuzulu's supporters, the Colonial Office agreed that a postponement was needed to ensure that there could be no question of the inquiry not having been fair.[162] Justice Wragg duly granted a seven-week adjournment, though he had to be persuaded to withdraw a resignation tendered in protest at the Secretary of State's interference in a trial which had already begun.[163]

While seeking to ensure that Dinuzulu would enjoy the kind of regular legal procedures denied to Langalibalele, some officials in London were uncomfortable with the very policy of dealing with the disturbances through these political trials. Even before court had been constituted, Edward Fairfield proposed setting up a hybrid tribunal which would not only investigate all the charges made against the Usuthu leaders (and sentence them for any criminal offences) but also make good the promise which had been held out to Dinuzulu and Ndabuko to investigate their complaints. Fairfield worried that if the trials went ahead first, the leaders might be sentenced to death and hanged, only for a later inquiry to find them to 'have been more sinned

[160] For the details of these events, see Guy, *View across the River*, pp. 209–236. See the indictments against Ndabuko and Somhlolo in PP 1890 (c. 5892), enc. 2 in No. 59, p. 86. See also 'The Zululand Trials. By a Reporter', [George Burgess] in Bodleian Library, MSS. Brit. Emp. s. 22/G12.

[161] PP 1890 (c. 5892), enc. 1 in No. 108, p. 157; enc. 1 in No. 77, p. 113.

[162] Fairfield minute 26 December 1888, CO 427/3/24979; Knutsford to Havelock, 3 December 1888, CO 879/30/2, No. 90, p. 127.

[163] CO 879/30/2, Nos. 93–94, pp. 138–139; No. 101, p. 146; CO 427/3/24049.

against than sinning'.[164] This proposal went nowhere, but he again voiced his unease about the trials after the defence had been given more time to prepare. He now suggested that the crown should accept guilty pleas from the chiefs on the lesser charges of public violence, which would be acted on only after a broader political inquiry had been held. In his view, a political tribunal, which could consider whether they had a good moral defence, would be able to consider 'the only real question – which is what, as a matter of political expediency, ought to be done with Dinuzulu and the other leaders in the next few years'.[165] Fairfield's suggestions – which were not far from what Escombe wanted[166] – were not taken up by Knutsford;[167] and his liberal views on how to deal with the Usuthu were criticised by his colleague Bramston, who attributed the problems in Zululand to the underhand work of 'the Colenso faction', and who was quite happy to see Dinuzulu and Ndabuko hanged. Between these two views was that of Knutsford, who thought the likeliest outcome was that Dinuzulu and Ndabuko would have to be 'interned somewhere in Natal'.[168]

Commencing on 14 March 1889, Dinuzulu's trial was the fifth of the trials, following those of Somhlolo,[169] Somkhele, Ndabuko and Shingana.[170] In his defence, which took the court through the history of Zululand, Escombe sought to show that Dinuzulu had no hostile intent against the crown which could be construed as treason, and that 'the fight was against [Zibhebhu] and not against the Queen'.[171]

[164] Minute dated 26 September 1888, CO 427/2/19214. To show that this would accord with Zulu ideas of justice, Fairfield had (perhaps mischievously) referred his colleagues to a 'Memorandum on Native Affairs' drawn up by Shepstone in 1874 (to justify the hybrid procedure used in Langalibalele's case): CO 879/7/8.

[165] Fairfield minute, 7 December 1888, CO 427/3/24094; PP 1890 (c. 5892), No. 69, p. 105.

[166] Escombe wanted an inquiry after the men had given security for good behaviour and been pardoned: PP 1890 (c. 5892), No. 78, p. 118.

[167] PP 1890 (c. 5892), No. 71, p. 109; cf. Knutsford's minute 10 December, CO 427/3/24094.

[168] Minutes, 15 March 1889, CO 427/4/5164.

[169] Lacking legal representation, Somhlolo tried to explain his actions, only to find himself dealt with by prosecutor and judge 'as an accused person in France is dealt with by the *juge d'instruction*', eliciting such information as they felt would convict not only him, but also the other chiefs yet to be tried. 'The Zululand Trials. By a Reporter' [George Burgess] in Bodleian Library, MSS. Brit. Emp. s. 22/G12, ts p. 5.

[170] Guy, *View across the River*, pp. 268–270.

[171] Speech of Escombe, in Bodleian Library, MSS. Brit. Emp. s. 22/G12, ts p. 134.

However, Dinuzulu was convicted, the court finding that he had endeavoured 'to regain that power to which annexation by Her Majesty had put an end', with the intention of overthrowing 'the existing form of Government in Zululand'.[172] Since there was no jury to address, there was no summing up of the evidence. Consequently, as George Burgess (who observed the trials) pointed out, the judges shed little light on whether the disturbances were due to treason (as alleged by the crown) or to official mismanagement (as claimed by the defence). As he put it, '[t]he trials were conducted throughout as if the decision was a foregone conclusion.'[173] On 27 April, the sentences against the three main chiefs were handed down: Ndabuko was given fifteen years, Shingana twelve years and Dinuzulu ten.

After the trial ended, Dinuzulu's lawyers lodged protests with the Colonial Office, itemising the flaws in the trials, which were said to be so unfair as to amount to a denial of justice.[174] They also returned to the Privy Council. The record of the Natal Supreme Court's proceedings had arrived in London in April 1889, but – with the expense of the case falling heavily on Miss Colenso's limited means – the appellants had yet to deposit the £300 security for costs required for the case could be heard. They were advised that as long as the conviction of Dinuzulu stood, the Privy Council would think the appeal would have no practical effect, since his irregular removal to Zululand would not invalidate the conviction. The only way forward was to seek leave to appeal against the conviction, asking the court at the same time to waive the security for costs in the case already before it pertaining to Dinuzulu's removal, so that all the issues at stake could be discussed together.[175] The combined cases came before the Privy Council at the end of July, where Lord Chancellor Halsbury displayed a robust lack of sympathy for the arguments put for the Zulu leader. Refusing leave to appeal from the decision of the Special Commission, Halsbury rejected the argument that the Governor of Zululand had no authority to create the Special Commission by

[172] Harry Escombe and Frank Campbell Dumat, *A Remonstrance on Behalf of the Zulu Chiefs* (Pietermaritzburg, 1889), p. 1. This pamphlet was based on their defence.
[173] 'The Zululand Trials. By a Reporter' [George Burgess] in Bodleian Library, MSS. Brit. Emp. s. 22/G12, ts p. 3.
[174] CO 879/30/5, enc. 1 in No. 82, p. 122; enc. in No. 84, p. 160.
[175] Memorandum and Opinion, MSS. Brit. Emp. s. 22/G12.

proclamation.[176] Nor did he feel it necessary to consider whether there had been any violation of procedural rights (such as failure to follow the necessary forms of an indictment). As Halsbury explained, leave to appeal could only be given where there was 'some real foundation for the suggestion that the ordinary principles of justice have not been observed', and not to satisfy merely technical objections.[177] In his view, nothing could be more destructive of the administration of criminal justice than the idea that appeals could be brought to London on merely technical points.[178] The court also refused to waive the need for security for costs in the appeal against the Natal Supreme Court's decision. This was a crushing blow for Dinuzulu's supporters, who had hoped that a positive outcome from the Privy Council might open the way for a broader inquiry; though, as Harriette Colenso told her brother, 'We here have never had much faith in Lord Halsbury.'[179] The appeal against Dinuzulu's unlawful removal was finally dropped in March 1890.[180]

Dinuzulu's Removal

Although it would take months for the evidence to arrive and be sifted prior to a formal decision being made on whether to confirm the sentences, less than a week after the end of his trial, Havelock recommended that Dinuzulu and his uncles be removed from Zululand if their sentences were confirmed. Since he doubted that the Cape or Natal would pass the legislation necessary for their detention there, he suggested St Helena as a suitable place for exile.[181] Knutsford was not keen on the site of Napoleon's incarceration – since 'we should never hear the last of it either here or in France'[182] – and suggested the Seychelles; but Havelock pointed out that the climate there would be unsuitable for the Zulu chiefs. The legal minds at the Colonial Office

[176] *The Times*, 31 July 1889, p. 3.
[177] He followed the Privy Council's decision in *The Queen* v. *Joykissen Mookerjee* (1862) 9 Moore Indian Appeals 172.
[178] Judgment of the Privy Council, 30 July 1889, PP 1889 (c. 5892), enc. 2 in No. 182, p. 335.
[179] Quoted in Guy, *View across the River*, p. 302.
[180] PP 1890 (c. 6070), No. 8, p. 23.
[181] CO 879/30/5, No. 46, p. 65; Minute by Fairfield, 11 July 1889, CO 427/5/12417. Cf. PP 1890 (c. 5892), No. 162, p. 248.
[182] CO 427/5/9017, minute dated 3 May 1889.

now began to chew over the best instrument to be used to remove them. They concluded that the prisoners fell within the provisions of the 1884 Colonial Prisoners Removal Act, in part because there was no prison in Zululand suitable for these long-term prisoners. No special legislation would be needed therefore to send the men to the Seychelles or St Helena or another African possession. Once again, in contrast with the cases of Langalibalele and his father, Dinuzulu would be dealt with by regular legal procedures.

Dinuzulu's supporters, who were aware that London would review the evidence, and who hoped that this might entail a larger inquiry, continued to press their case, supported by the Aborigines Protection Society.[183] His lawyers also sent extensive commentaries on the trials and the broader wrongs suffered by the Usuthu.[184] Reading this material in July, Fairfield commented that 'really it is all "much-a-do about nothing"' since 'no formidable or humiliating form of imprisonment is contemplated as regards the Chiefs'. At the same time, he added that it 'might save worry to explain this privately to the members [of parliament] who are having their feelings harrowed by Messrs Escombe & Dumat'.[185] In the end the Colonial Office decided there would be no further inquiry.[186] By November, the notes of evidence from the special commission had all arrived in London, and had been printed. There was much debate in official circles whether to publish this material as a 'Trial Blue Book', but, given the extent of the material, the cost of printing it and the disputes over which budget was to bear the cost, it was decided simply to deposit copies in the libraries of the Houses of Parliament.[187]

Having reviewed the evidence, Knutsford decided not to remit any part of the sentences of Dinuzulu and his uncles,[188] though the sentences against the other chiefs were reduced.[189] In preparing the

[183] See PP 1890 (c. 5892), No. 143, p. 208; No. 180, p. 333.
[184] PP 1890 (c. 5892), No. 170, p. 256; No. 172, p. 294. Questions were also raised in parliament: *Parl. Debs.*, 3rd ser. vol. 337, col. 9 (17 June 1889).
[185] Minute dated 19 July 1889, CO 427/5/13106.
[186] Fairfield to Bramston, 27 January 1890, CO 427/10/1991.
[187] CO 879/30/5, p. 23n. See further CO 427/4/5997, *Parl. Debs.*, 3rd ser. vol. 341, col. 303 (14 February 1890).
[188] PP 1890 (c. 5893), No. 2, p. 6.
[189] PP 1890 (c. 6070), No. 2, p. 17; No. 4, p. 19; PP 1890 (c. 5893), No. 4, p. 8; No. 5, p. 8. Wragg wrote a report on the trials while in London, which was drawn on by the

paperwork to remove them to St Helena, the Colonial Office remained anxious lest legal proceedings be undertaken by Harriette Colenso to challenge their removal. Plans were initially made to embark the men at Port Durnford, in Zululand, to avoid what Herbert called the 'very great risk of complications if we sent the prisoners through Natal'. Even though the Colonial Office was confident of their legal powers, they feared Escombe might cause trouble by attempting to bring a habeas corpus application, while 'Miss Colenso may demand interviews with them & counsel them to attempt escape.'[190] However, given the real risk that the men might be drowned in any hazardous embarkation attempt here, it was decided to send them via Durban. The chiefs themselves were not told until 19 January 1890 that they were to be deported, eight and a half months after Havelock had begun to plan for it. On 3 February they were taken from Eshowe gaol to Durban in both secrecy and haste.[191]

After Dinuzulu's exile, Harriette Colenso worked hard to keep his case before the public eye, remaining in England between 1890 and 1893, giving speeches, writing articles and putting pressure on the Colonial Office. Dinuzulu's case was also debated on a number of occasions in parliament, but on each occasion the Undersecretary of State, Baron Henry De Worms, batted away complaints by asserting that Dinuzulu had been found guilty by a properly constituted court.[192] With the return of the Liberals to power in August 1892, policy towards the Zulus began to change. The following May, Osborn retired, and was replaced by Sir Marshal Clarke, who was asked to report on the condition of Zululand and particularly to consider the position of Dinuzulu. In Secretary of State Ripon's view, it was appropriate to adopt 'a policy of clemency and oblivion' when a country had quieted down after an insurrection. Ripon was equally clear that Dinuzulu was no ordinary criminal, for, as he put it, 'the question . . . is not one of releasing a convicted prisoner from jail, but of

Colonial Office: Minute dated 30 July 1889, CO 427/6/15002; PP 1890 (c. 6070), No. 1, p. 1.

[190] Minute dated 3 December 1889: CO 427/6/23331; CO 879/32/4, No. 2, p. 4.

[191] For the preparations, see CO 427/8/3639. See further Guy, *View across the River*, pp. 334–335.

[192] *Parl. Debs.*, 3rd ser., vol. 348, cols. 789, 801–802 (12 August 1890), on which see Guy, *View across the River*, pp. 318–321; *Parl. Debs.*, 3rd ser., vol. 355, cols. 950, 954 (10 July 1891); *Parl. Debs.*, 4th ser., vol. 2, cols. 1259–1260 (18 March 1892).

allowing an exile to return, under proper conditions, to his country'.[193] In January 1893, Clarke recommended that Dinuzulu be allowed to return; and that he should be appointed as an *induna*, or salaried government adviser.[194] Governor Walter Hely-Hutchinson of Natal was happy for him to return on these terms. In his view, if the chief were detained at St Helena until his imprisonment expired, he would not be as 'amenable to reason' on his return as he would be if he were liberated as an act of grace. By the end of July, Ripon had decided that he would implement Clarke's recommendation,[195] though insisting that all be kept secret until all the arrangements had been put in place.

In the event, the return of Dinuzulu was postponed for another three years, thanks to the politics of Natal. Natal, which had gained responsible government in 1893, had long looked to the African territories on its borders both to supply more land for white settlement and as a location from which to draw African labour and to which to relocate surplus African population. White opinion in Natal was not pleased by the incorporation of part of Zululand into the South African Republic in 1887, nor by the incorporation of Pondoland into the Cape in 1894, both of which seemed to diminish the colony's potential hinterland. In 1894, the two questions of Dinuzulu's return and the incorporation of Zululand into Natal became inextricably linked as it became clear that a promise that Zululand might eventually be incorporated into Natal would help remove opposition to the chiefs' return.[196] Within the Natal Government, two positions had emerged. On the one side, Harry Escombe, now Attorney General, argued for Dinuzulu's immediate return, with Zululand being incorporated into Natal after his return. On the other, Prime Minister Sir John Robinson wanted Zululand to be incorporated before Dinuzulu's return, and thought that Zululand needed a couple of years to settle down before incorporation.[197]

[193] CO 879/41/4, No. 1, p. 1 at p. 2.

[194] CO 879/41/4, enc. in No. 3, p. 9. This suggestion was not far from the proposal made in print by Miss Colenso in March: but she remained unaware of the new policy which was being developed in strict secrecy. See H. E. Colenso, *The Present Position among the Zulus, 1893, with Some Suggestions for the Future* (London, Burt and Sons, 1893).

[195] This was reported to the Cabinet on 26 July 1894: CO 879/42/3.

[196] CO 879/41/4, No. 11, p. 17; No. 27, p. 31.

[197] CO 879/41/4, No. 16, p. 20; 3 May 1894, CO 879/41/4, No. 14, p. 19; No. 18, p. 21.

When Hely-Hutchinson saw that Robinson would not actively dissent from his proposal to repatriate the chiefs, plans were made for their imminent return. However, these plans were kept secret from the ministry in Natal, even as the Governor of St Helena was sent a document which would inform Dinuzulu of the conditions of his return.[198] As these secret plans were being made to return Dinuzulu in February, Harry Escombe dropped a bombshell, telling the Governor that Harriette Colenso (who was planning to visit Dinuzulu in St Helena) had told him that she was strongly in favour of the incorporation of Zululand into Natal before Dinuzulu returned, and that she had sent a telegram to the Aborigines Protection Society to this effect. He added that she would proceed from St Helena to London to argue this case.[199] Having received this information, London telegraphed St Helena to cancel Dinuzulu's return. This was an extraordinary intervention on Harriette Colenso's part, for it prevented the liberation of the men whose case she had fought for nearly five years. It also paved the way for the annexation of Zululand by Natal, whose effect could only be to weaken the traditional chiefs she had spent her life supporting.[200] In fact, as Jeff Guy has demonstrated, it was Escombe who persuaded her – at a time when she was in the dark as to the government's real plans – that the incorporation of Zululand into Natal was a necessary preliminary to Dinuzulu's return.[201] Escombe – soon to be Natal's Prime Minister – was more interested in incorporation than in Dinuzulu's fate, and may have perceived that London's desire to return the king might force an issue on which the Colonial Office appeared to be dragging its heels. With the two issues now inextricably bound together, and with Ripon determined not to be bullied into agreeing to immediate incorporation, Dinuzulu's return was postponed.[202] It would not be until the end of

[198] CO 879/41/4, No. 41, p. 40. [199] CO 879/41/4, No. 44, p. 42.

[200] She had wanted Clarke to remain Resident Commissioner under a reformed, non-Shepstonian system, but, when it became clear that Zululand might be annexed to Natal, Clarke made it clear that he would not accept what would be demotion to a colonial position outside the imperial service: CO 879/41/4, No. 93, p. 69.

[201] Guy, *View across the River*, pp. 375–376. See also [H. E. Colenso], *Zululand, the Exiled Chiefs, Natal, and the Colonial Office: 1893–5* (London [1895]), pp. 9, 12–13.

[202] CO 879/41/4, No. 123, p. 93; and Guy, *View across the River*, p. 394.

1897, after the passing of the Zululand Annexation Act, that Dinuzulu and his uncles returned.[203]

With memories of Langalibalele's case still fresh in official minds, the authorities sought to deal with Dinuzulu not through extraordinary legislation empowering his detention, but in mounting a political trial in which the accused would be given the benefit of more regular legal procedures. The aim was still to remove a troublesome opponent, but the means were different. In Dinuzulu's case, an 'ordinary' trial was to be used to brand him (and the other chiefs) a rebel, and to construct an official narrative of events in 1888. By allowing the defendants the full benefit of counsel, who were able to challenge the proceedings of the court up to the Privy Council, the imperial authorities sought to give a legitimacy to the process which went beyond the legislative fiat used elsewhere. There were many flaws in this process. As George Burgess pointed out, serious questions remained about the fairness of the trials these chiefs received. Equally, the Judicial Committee of the Privy Council was – not for the last time – less than punctilious in ensuring that legal procedures had been properly followed. Nonetheless, the form of trial Dinuzulu was given was much more in accordance with metropolitan common lawyers' ideas of what the rule of law required than the treatment given to Langalibalele and Cetshwayo. It was the political response to those detentions which shaped the kind of treatment Dinuzulu would get, just as it was politics which would determine how and when he would be released.

Conclusion

Langalibalele, Cetshwayo and Dinuzulu were all political leaders whom the colonial authorities wished to subdue and control, for fear that they could rally support against colonial rule. However, the instruments used against them varied and developed over time, as pressure increased on the local authorities to follow a form which would satisfy the demands of the rule of law. Each of these leaders

[203] Dinuzulu would again be tried and convicted for treason in 1908 in the aftermath of Bambatha's rebellion: see Shula Marks, *Reluctant Rebellion: The 1906–1908 Disturbances in Natal* (Oxford, Clarendon Press, 1970).

was treated in his own way as a rebel, though whether they could properly be seen as such was questionable. Langalibalele's act of 'rebellion' was to lead his people out of the colony to seek fresh pastures, the very thing he had done twenty-five years earlier when entering the colony. This was no crime under the common law of Natal, and Governor Pine's response to try him under what he understood to be native law in a tribunal of his own making was an attempt to give his decision to exile the chief a veneer of legality. Although it satisfied some – including Natal's Supreme Court – it fell short of Carnarvon's understanding of what the rule of law required, informed as it was by the recent Jamaica debates. But practical politics put limits on the Colonial Office's commitment to the principles of Magna Carta. If Langalibalele's detention in the Cape was formally validated by legislation, it was because the Secretary of State persuaded himself that the chief needed punishment for refusing to obey a summons, and because the authorities in Natal and the Cape considered his continued imprisonment to be politically necessary. The substantive principles of the rule of law had to give way to expediency.

Langalibalele was joined for a time by Cetshwayo. Cetshwayo was not a rebel, but a defeated enemy, whose country had been conquered, but he was held at the Cape under similar *ad hominem* legislation as that under which Langalibalele was held. Although a precedent for such a detention could be found in the statute which authorised Napoleon's detention in St Helena, the motivations for incarcerating the Zulu king were very different. In his case, there was no international convention requesting Britain to keep him prisoner, nor was there a list of crimes which the Zulu king might have committed to justify imprisonment, as had been so widely discussed in the case of Napoleon. Instead, he needed to be removed because his presence might interfere with the post-conquest arrangement which had been made for a territory effectively under British control, albeit not yet annexed. In other words, he needed to be prevented from becoming a rebel against that settlement. In dealing with this leader, the colonial authorities sought to satisfy themselves at every stage that they had lawful authority to detain him – either under a (stretched) interpretation of military rights over prisoners of war or under local legislation. In the event, of course,

Cetshwayo proved to be too important to be left at the Cape, and it was the British need to resettle Zululand which trumped the legislation.

The treatment of Dinuzulu suggests that, when dealing with this part of the empire, the colonial authorities became increasingly concerned to follow the rule of law. How far Dinuzulu was a rebel could be questioned: his conflict with Zibhebhu was part of a continuing Zulu civil war (stoked by British maladministration), rather than a campaign against the brand new imperial power. But as a subject of the British colony of Zululand who had led warlike forces in the colony, he was – as his lawyers admitted – amenable to its laws. In dealing with the young king, the colonial authorities did not want another Langalibalele, and wanted to be seen to follow the ordinary rules of law as closely as they could. This was of course a political trial of political prisoners, and questions could be raised about how far either the trial court or the Privy Council protected rights they might have expected under the rule of law. Nonetheless, it is clear that, with a leader as politically important as Dinuzulu, the authorities both in Pietermaritzburg and in London realised that a proper legal trial had to be conducted.

The Colonial Office's increasing concern that the rule of law be observed in these cases was in no small part due to the fact that these men enjoyed the support of people like the Colensos, who had the means both to organise legal challenges, in Natal and in London, and to rally support from other groups in the metropolis. The legal challenges themselves often failed, as judges both in Pietermaritzburg and in Whitehall showed themselves less enthusiastic for a Diceyan vision of the rule of law than the plaintiffs might have desired. Nonetheless, the constant stream of articles in the metropolitan press and questions in parliament kept the issue firmly in the minds of officials, who would need to justify their actions in this court of public opinion.