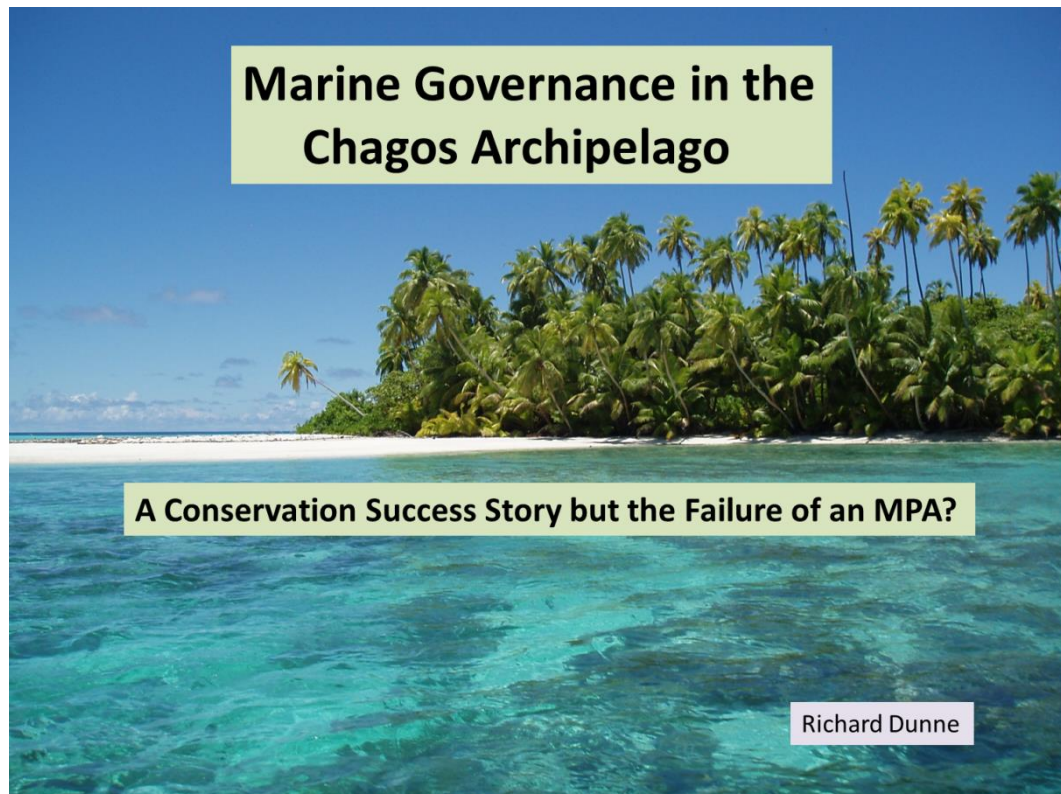


Bristol University 25 September 2015

ESRC Symposium on Marine Conservation and Governance: MPAs and beyond



ABSTRACT

On 1 April 2010 a marine reserve was established in the waters of the Chagos Archipelago (British Indian Ocean Territory) extending out to 200 nautical miles.

This presentation discusses why the Chagos Marine Protected Area (MPA), once hailed by conservationists as the world's largest 'no-take' MPA, was immediately so controversial. Against the history of marine governance in the Chagos it considers whether the announcement of the MPA was necessary to further conservation aims; whether it was established in good faith; to what extent it ignored the former inhabitants of the islands; and how it infringed the rights of Mauritius. It draws on the challenges it has caused in the English courts, and the consequences of the MPA in international law.

It concludes with an apparent conundrum: How can the Chagos represent a conservation success and yet be an example of a failed MPA?

Richard Dunne

BA (Cantab), Barrister

BRIEF HISTORICAL PERSPECTIVE



Fig 1. The Chagos Archipelago and the Indian Ocean

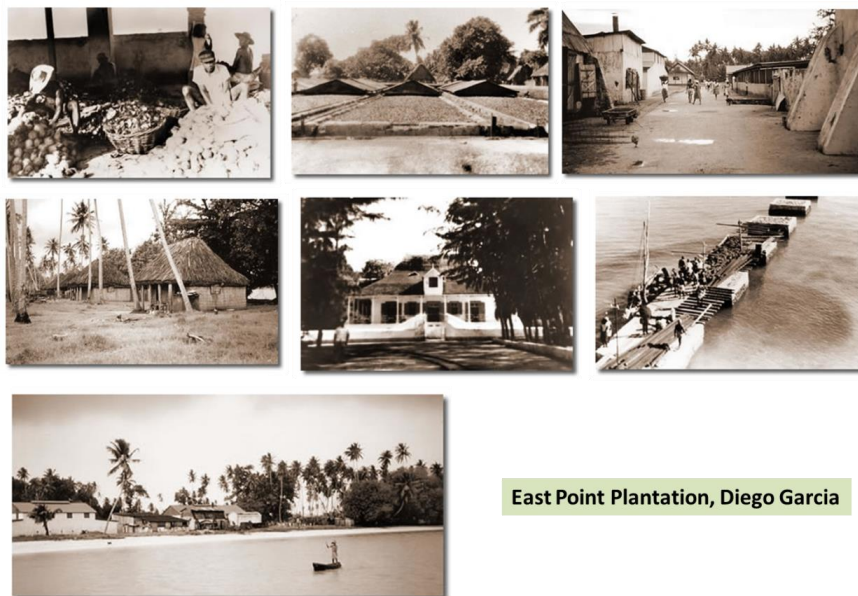
The Chagos Archipelago lies almost in the middle of the Indian Ocean. It was settled in the late 1700s when the Islands were at that time French territory, a dependency of Mauritius. In 1810 the British captured Mauritius and it and its dependencies were ceded to the British Crown.

The first visual record of the Settlement on the largest island, Diego Garcia, is in a print from 1819. The islands were worked as coconut plantations using slave labour from Mozambique or Madagascar. The language was an adopted Creole, a dialect of French with African overtones. This language never changed and remains the mother tongue of the exiled islanders, the Ilois or Chagossians, today.



Fig 2. Diego Garcia – East Point Plantation 1819

Slavery was abolished in the mid-18thC. In the next century little changed, and the population grew until the early 20th century, thereafter fluctuating at around 1,000 persons¹.



East Point Plantation, Diego Garcia

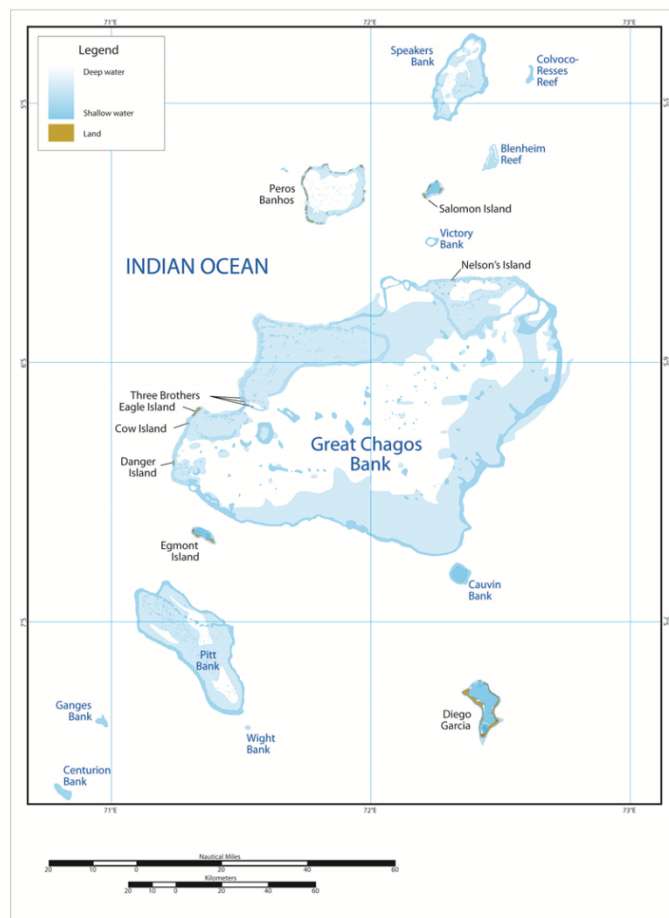
Fig 3. East Point Plantation in 1971.

By the 1960s some of the inhabitants of the Chagos were now moving away to the bright lights of Mauritius, and single male contract labourers from the Seychelles were brought in to replace them. The future of the plantation economy also became more difficult as the copra industry was in decline worldwide².

¹ Gifford, R., and Dunne, R. P. (2014). A Dispossessed People: the Depopulation of the Chagos Archipelago 1965–1973. *Population, Space and Place* **20**, 37-49.

² Other islands in the Chagos had already become untenable – Three Brothers in the 1850s, and Egmont and Eagle Islands in the 1930s.

This decline, however, was not to be the principle reason for the ending of the plantations and life on these islands.



British Indian Ocean Territory - BIOT



Fig 4. Part of the British Indian Ocean Territory (BIOT) showing the Chagos Archipelago

In 1960, the US proposed that Britain detach the Chagos from the colony of Mauritius to create a new colony (the British Indian Ocean Territory) to ensure stability for future US/UK military use³. Mauritius was seeking independence (it achieved this in 1968) and in 1965 the UK told it that this detachment would happen with or without its agreement⁴. It was carried out under a prerogative Order in Council (an archaic power held by the Sovereign but which nowadays is exercised by a Government Minister and which circumvents Parliament or democratic scrutiny) on 8 November 1965.

³ In October 1960 the US Chief of Naval Operations, Admiral Burke, raised the subject of Diego Garcia with the British First Sea Lord Admiral Sir Caspar John. He proposed that the British Government detach Diego Garcia and the rest of the Chagos from colonial Mauritius to create a new territory that would ensure basing rights for future US/UK military use. Caspar John liked the idea. In Sept 1962 US Defence Secretary Robert McNamara and British Minister of Defence, Peter Thorneycroft began formal diplomatic negotiations on a "possible joint Indian Ocean base".

⁴ PREM 13/3320 (1965). Record of a conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No 10 Downing Street at 10am on Thursday, September 23, 1965. National Archives, London.

A year later a treaty was signed with the US making the islands available for defence purposes for an indefinite period, initially to be 50 years with automatic renewal for a further 20 years⁵. The first 50 year period ends in December 2016.

So why should this detachment have attracted such controversy, if not at the time, certainly 20 or so years later when the facts became more widely known?

The answer is several-fold.

1. It ran counter to the principles of the post 2nd World War de-colonialisation, enumerated in a UN General Assembly Resolution of 1960⁶ whereby former colonies should not be dismembered and ignored a subsequent Resolution calling for the detachment to be stopped⁷.
2. The US had stipulated that the population be removed.
3. In order to achieve depopulation the UK then mounted an international deception that there was no native population – reclassifying the Ilois/Chagossians as contract workers from Seychelles and Mauritius⁸.
4. The Chagossians were dumped on the docks of Mauritius or Seychelles with no money, no compensation, no housing, no jobs, no welfare support. They were largely illiterate, and were the lowest of all social classes in Mauritius. They lived and died in the slums – some of them still live in poverty today.



Fig 5. Chagossian housing Mauritius - '*tombe dan mizer*' - miserable, abject poverty

⁵ Exchange of Notes (1966). Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America concerning the Availability for Defence Purposes of the British Indian Ocean Territory. Treaty Series No 15 (1967).

⁶ United Nations (1960). 1514 (XV) Declaration on the granting of independence to colonial countries and peoples. United Nations, New York.

⁷ United Nations (1965). UN General Assembly, Resolution 2066 (XX) *Question of Mauritius*, 16 December 1965. Resolution 2066 XX.

⁸ Aust, A. (1968). Secret Minute dated 23 October 1968: "we are able to make up the rules as we go along and treat the inhabitants of BIOT as not 'belonging' to it in any sense". *The Queen (ex parte Bancoult) v Foreign and Commonwealth Office*, Law Reports: Queen's Bench Division [2001] p 1085, London.

DEFENCE USE OF CHAGOS 1971 – PRESENT DAY

In 1971 the construction of US military facilities on the island of Diego Garcia began, and since then over \$3 billion has been spent⁹. The base was used to launch the air and sea offensive on Iraq and Afghanistan. It is the intention of both the US and UK is to allow the defence treaty to renew in December 2016.



Fig 6. Diego Garcia US Military Base

⁹ US Department of Defense (2013). Base Structure Report: Fiscal Year 2012 Baseline. Government Printing Office, Washington, DC.

THE CHAGOSSIAN STRUGGLE



Fig 7. Chagossians and their legal team – UK Supreme Court 22 June 2015

Culminating in the UK Supreme Court in June of this year for which 2 judgments are awaited, the Chagossians have had a long history of attempting to right the wrongs that have been imposed on them by the UK Government and FCO and to demand the right of return to their islands.

In 1975 Michel Vincatassen, a Diego Garcian, issued a writ in the High Court in London against the British Government. Anxious to avoid a court case which would have disclosed what had happened in the 1960s the Government offered to settle with the payment of £4M in 1982. This sum was paid into a Trust Fund from where it was used to finance housing and to be paid out to the Chagossians¹⁰.

To obtain payment, Chagossians were required to sign, or more realistically put their thumbprint to a form renouncing their right to go back to Chagos and accepting the money as final compensation. No-one was present to translate this from legal English into Creole or explain what it meant, even so, remarkably 12 refused to sign¹¹.

¹⁰ Note: the total in today's terms of about £16M as stated by Ivan Lewis in the HC debate 10 March 2010 if divided equally between all 1,344 Chagossians would amount to about £12,000 each. That is about equivalent to 2 years median monthly salary in Mauritius. Alternatively it would rent a 1 bed apartment in Port Louis outside the city centre for 5 years.

¹¹ I,,
of age, an Ilois, Residing at
In consideration of the compensation paid to me by the Ilois Trust Fund and of my resettlement in Mauritius, do by these presents declare that I **renounce to all claims, present or future, that I may have against the Government of the United Kingdom**, the Crown in right of the United Kingdom, the Crown in right of any British possession, their servants, agents or contractors, in respect of anyone or more of the following –
(a) all acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, my departure or removal from there, loss of employment by reason of the termination of contract or otherwise, my transfer and settlement in Mauritius and my preclusion from returning to the Chagos Archipelago;
(b) any incidents, facts or situation, whether past, present or future, occurring in the course of anyone or more of the events hereinbefore referred to or arising out of the consequences of such events.

This was not the end of the matter however. In 1983 the Chagos Refugees Group was founded and still exists today. One of its founding leaders was Olivier Bancoult, then 21 years old.

In 1998 the London law firm of Sheridans was instructed by Olivier Bancoult to challenge the legality of the 1971 BIOT Ordinance which had banned them from the Chagos. On 3 November 2000 the Divisional Court ruled that the Ordinance had been *ultra vires* the BIOT Constitution which only gave power to legislate for “*peace, order and good government*” which was held not to permit legislation which excluded the population from the territory¹².

The Foreign Secretary at the time, Robin Cook, accepted the judgement and the BIOT Constitution was amended to allow the Chagossians a right of return¹³. As a result of the litigation, the Foreign and Commonwealth Office (FCO) had also commissioned a Feasibility Study into the Resettlement of the Outer Islands (not including Diego Garcia).

The Chagossians lacked the funds to enable them to return to the Chagos so they applied to the High Court for compensation and the restoration of property rights. On 9 October 2003 the court dismissed this on the grounds that no tort at common law had been committed by their removal and further compensation was precluded by the Limitation Act 1980 and the renunciations made in 1982¹⁴.

The British Government then terminated the Feasibility Study and once more banned the Chagossians from returning. This time in order to overcome any claim that the BIOT Commissioner (the Governor of the territory) had exceeded his authority, as happened in 2000, the legislation was enacted by an Order in Council using the Royal Prerogative¹⁵.

The Chagossians again challenged the legality of the new 2004 Immigration Order.

Both the High Court and Court of Appeal ruled unanimously in favour of the Chagossians. The Government petitioned the House of Lords for a ruling on whether the courts had the legal right to overturn an Order in Council and secondly that the decision by the Government to prevent the return of the Chagossians was a rational one because both defence considerations and the unfeasibility of resettlement precluded this. On these grounds the Lords ruled on 22 October 2008 by a 3-2 majority that the new Order in Council was not unlawful and the decision rational. Once again the Chagossians were banned from their homeland¹⁶.

Made and subscribed on the1983,
Signature/Right thumbprint of Ilois

¹² Bancoult (1) (2000). R v Secretary of State for the Foreign and Commonwealth Office [2000] WL 1629583.

¹³ He also stated that “*This Government has not defended what was done or said 30 years ago*”. He went on to say in an interview that he considered this episode to have been “*one of the most sordid and morally indefensible I have ever known*”.

¹⁴ Chagos Islanders (2003). Chagos Islanders and The Attorney General and Her Majesty's British Indian Ocean Territory Commissioner [2003] EWHC 2222 (QB). High Court of Justice, Queens Bnch Division, London.

¹⁵ BIOT Constitution Order (2004). British Indian Ocean Territory (Constitution) Order.

¹⁶ Bancoult (2) (2008). R v Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61.

Having now exhausted their domestic legal remedies, the Chagossians then turned to the ECtHR in Strasbourg¹⁷. That court decided in 2012 that the claim was inadmissible again because of the 1982 renunciations.

I will come shortly to why the matter returned to the UK Supreme Court earlier this year.

DISPUTES OVER SOVEREIGNTY

Meanwhile it is appropriate to consider the Chagos on an international stage.

In 1965 the UK had given its colony of Mauritius little option but to agree to detachment of the Chagos islands. Mauritius was given independence in 1968. In the first years of its existence it faced severe difficulties as a new state and little consideration was given to the Chagos and the manner of detachment.

In 1982 the Chagos was formally incorporated into the definition of Mauritius for the purposes of Mauritian Law and from 1980 it had also started to assert its rights in international fora over the Chagos. Under its Maritime Zones (Exclusive Economic Zones) Regulations 1984 it then declared co-ordinates of the Exclusive Economic Zone (EEZ) surrounding Chagos relying on the recently concluded 1982 United Nations Convention on the Law of the Sea (UNCLOS)¹⁸.

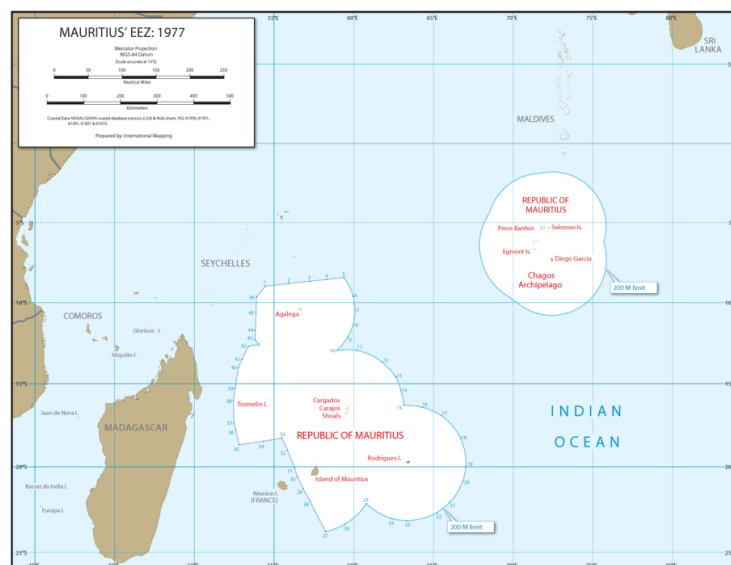


Fig 8. The 200 nm Exclusive Economic Zone (EEZ) of Mauritius declared in 1984 (shown by the white areas)

Thirteen years later on 25 July 1997 the UK acceded to UNCLOS and included an extension of the treaty to the BIOT, thus exercising its claim to sovereignty.

In 2005 Mauritius replaced the earlier legislation and once more claimed baselines for the Territorial Sea and EEZ¹⁹ and deposited these with the UN in 2006 and 2008.

¹⁷ This was on the basis that their rights have been violated under Articles 3, 8, 6 and 13 of the European Convention on Human Rights.

¹⁸ Republic of Mauritius (1984). Maritime Zones (Exclusive Economic Zones) Regulations 1984. Port Louis, Mauritius.

¹⁹ Mauritius Act No 2 (2005). Maritime Zones Act 2005.

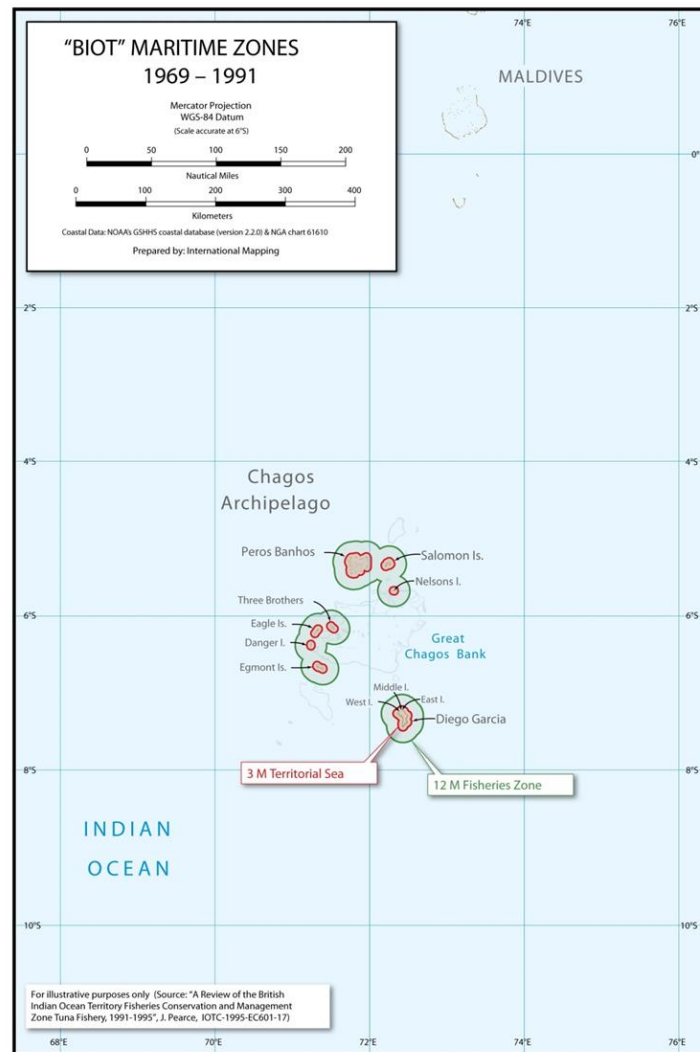


Fig 9. UK Maritime zones in the Chagos 1965-1991. The 3 nautical mile Territorial Sea (red lines around islands), and the 1969 contiguous fishery zone of 9 nautical miles (green line).

Since the creation of the new colony of BIOT in 1965, the UK has also made claims to sovereignty and jurisdiction over the sea areas of the Chagos.

From the outset it has claimed full sovereignty over the Territorial Sea which in 1965 extended to 3 nautical miles (nm) under customary international law. Although up to 12 nm is permissible under UNCLOS the UK still only claims 3nm for BIOT. In 1969 a Fisheries Zone of 9nm from the seaward limit of the Territorial Sea was established, also in accordance with customary international law.

In 1991 the UK extended the fishery limits out to 200nm and declared a Fisheries Conservation and Management Zone (FCMZ). Although UNCLOS was by now gradually becoming the norm for law of the sea, this FCMZ reflected the general worldwide extension of fishing limits under customary international law and the rights claimed by the UK were simply in respect of regulating fishing.

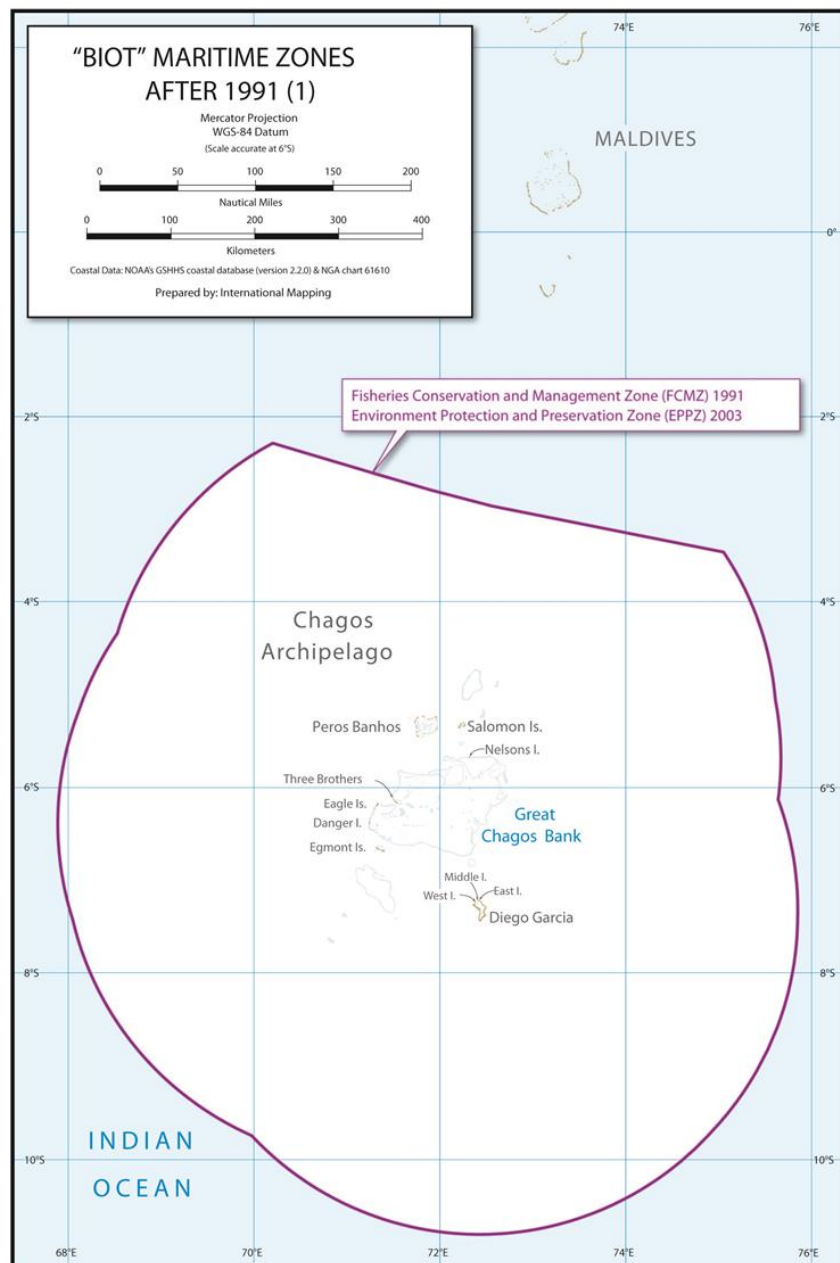


Fig 10. UK Maritime zones in the Chagos, post 1991. 200nm FCMZ declared in 1991, and the 200nm EPPZ declared in 2003.

Finally in 2003 the UK claimed an Environmental Protection and Preservation Zone (EPPZ) encompassing the same geographical area as the FCMZ which it notified to the UN. The purpose of this declaration was said at the time to be *"in order to help preserve and protect the environment of the Great Chagos Bank"*. One can see why this is so by looking at the Great Chagos Bank in more detail.



Fig 11. The Great Chagos Bank, a submerged coral atoll (light grey outline), the Territorial Sea and 1969 fishery zone.

The Great Chagos Bank (GCB) is a submerged coral atoll of considerable size, but it only has a few islands on its rim (Nelson, Three Brothers, Eagle, and Danger) which generate Territorial Seas over which the coastal state can exercise sovereignty. The remainder of the GCB is international waters (or the High Seas as correctly termed).

So in 2009 there was a situation where both the UK and Mauritius were claiming sovereign rights over the Chagos and the sea areas around the islands.

THE MARINE PROTECTED AREA (MPA) PROPOSAL

What then happened was that conservation bodies, principally the Chagos Conservation Trust, Chagos Environment Network, and the US Pew Environment Group launched a campaign to have a 200nm 'no-take' MPA declared in the Chagos²⁰ and the FCO held a short public consultation in late 2009. On 1 April 2010, the Foreign Secretary, David Miliband declared the MPA under a Press Release "*New Protection for the Marine Life of the BIOT*"²¹.

²⁰ Chagos Conservation Trust (2009). *The Chagos Archipelago: Its Nature and the Future*. Chagos Conservation Trust, London.

²¹ BIOT Proclamation (2010). Proclamation No 1 of 2010. FCO, London.



Fig 12. Chagos underwater and the conservation organisations in the Chagos Environment Network 2009

CHALLENGES – CHAGOSSAINS

This immediately led to challenges first from the Chagossians who had been prevented from returning to their islands by the 2004 Order in Council.

They claimed that in creating the MPA there had been little or no consultation with them and that the MPA was being used to add to the pressure to prevent them ever returning. In August 2010 a Judicial Review of the MPA declaration was lodged in the English Courts in the case known as Bancoult 3.

As preparation of the case progressed a WikiLeaks Cable was released dated 15 May 2009²². This was from the US Embassy in London to the Secretary of State in Washington and recorded a meeting between US Embassy staff and FCO Officials held 3 days earlier where FCO officials had told their American counterparts that one of the purposes of the MPA was indeed to prevent them returning and that the powerful conservation lobby could be used to help them achieve this.

Following further research work a further ground was added, namely that the MPA declaration had ignored historical fishing rights of both Mauritius and the Chagossians. Finally a ground was included that the decision was contrary to European Union law because it prevented the economic development of the BIOT.

²² US Embassy (London) (2009). HMG floats proposal for marine reserve covering the Chagos Archipelago (British Indian Ocean Territory) - CONFIDENTIAL. To: Secretary of State Washington. dated 15 May 2009.



US embassy cables: Foreign Office does not regret evicting Chagos islanders

guardian.co.uk, Wednesday 1 December 2010 21:30 GMT

A [home](#) / [mobile](#)

Friday, 15 May 2009, 07:00

C O N F I D E N T I A L LONDON 001156

NOFORN

SIPDIS

EO 12958 DECL: 05/13/2029

TAGS MARR, MOPS, SENV, UK, IO, MP, EFIS, EWWT, PGOV, PREL

SUBJECT: HMG FLOATS PROPOSAL FOR MARINE RESERVE COVERING
THE CHAGOS ARCHIPELAGO (BRITISH INDIAN OCEAN TERRITORY)

REF: 08 LONDON 2667 (NOTAL)

Classified By: Political Counselor Richard Mills for reasons 1.4 b and d

Summary

More than 2,000 islanders were evicted during the Cold War to make way for a huge US military base. The islanders have fought a long battle to be allowed to return. British Foreign Office and American officials discuss plans to establish a marine park on Diego Garcia and the surrounding islands, which they say would effectively end the islanders resettlement claims. Key section highlighted in yellow

Read related article

1. (C/NF) Summary. HMG would like to establish a "marine park" or "reserve" providing comprehensive environmental protection to the reefs and waters of the British Indian Ocean Territory (BIOT), a senior Foreign and Commonwealth Office (FCO) official informed Polcouns on May 12. The official insisted that the establishment of a marine park -- the world's largest -- would in no way impinge on USG use of the BIOT, including Diego Garcia, for military purposes. He agreed that the UK and U.S. should carefully negotiate the details of the marine reserve to assure that U.S. interests were safeguarded and the strategic value of BIOT was upheld. **He said that the BIOT's former inhabitants would find it difficult, if not impossible, to pursue their claim for resettlement on the islands if the entire Chagos Archipelago were a marine reserve.** End Summary.

Fig 13. WikiLeaks Cable 15 May 2009 – from US Embassy London to US Secretary of State, Washington

In April 2013 the High Court ruled that the Cable was inadmissible in evidence, and dismissed the claim²³.

The next year the Appeal Court reversed the decision on the admissibility but did not overturn the High Court decision²⁴.

On 22 June of this year the Supreme Court considered an application to appeal that decision and their judgment is awaited.

CHALLENGES – MAURITIUS

On 22 December 2010, the Republic of Mauritius also announced its intention to challenge the legality of the MPA under UNCLOS and International Law. The case was heard over a 2 week period in Istanbul in April and May 2014 by an Arbitral Tribunal convened under the auspices of UNCLOS.

²³ Bancoult (3) (2013). R v Secretary of State for Foreign and Commonwealth Affairs [2013] EWHC 1502 (Admin).

²⁴ Bancoult (3) (2012). R v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 2115.



Fig 14. International Law of the Sea Arbitral Tribunal Judges (front row) and members of the UK and Mauritius Legal Teams – Istanbul 22 April – 9 May 2014

The Tribunal issued its judgment (called an Award) on 18 March of this year²⁵. Both the UK and Mauritius had agreed that the Tribunal's decision would be binding on them.

Mauritius' main arguments were that that the MPA violated UNCLOS because Mauritius is the 'coastal state' and not the UK; alternatively that the MPA violates certain undertakings given by the UK to Mauritius in 1965 concerning fishing and other rights.

The UK's principle argument was that the whole claim was based on the issue of sovereignty which the Tribunal did not have the jurisdiction to decide. As to the undertakings it said that these were mere political promises and were unenforceable under international law. It was clear from the outset that the UK expected that the entire claim would be dismissed.

Although the majority of the Tribunal (3:2) considered that it did not have jurisdiction to resolve the 'coastal state' and thus sovereignty question, it nonetheless unanimously found in Mauritius' favour with respect to the undertakings and in so doing declared the MPA unlawful.

In addition, of the 5 judges, two considered that they had jurisdiction concerning sovereignty and both declared Mauritius to be the legitimate coastal state.

This was undoubtedly a considerable blow to the UK.

²⁵ Permanent Court of Arbitration (2014). *The Republic of Mauritius v. The United Kingdom of Great Britain and Northern Ireland* [Online]. The Hague: Permanent Court of Arbitration. Available: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

DOES THE MPA STILL EXIST?

As a result of the Tribunal decision, does the MPA still have a continuing legal or practical existence?

The answer to this question is a far from clear. There are the differing contexts of international law and the domestic law of the UK to consider.

International Law

International Law first. Since international law is a matter of State practice we should consider how the UK and Mauritius view the Tribunal Award. The UK's position can be gleaned from its pleadings in the domestic case of Bancoult 3 before the UK Supreme Court.

In a nutshell it says that:

1. The Tribunal did not specify the action if any, needed to remedy the breach of UNCLOS.
2. The breaches of UNCLOS only require the UK to have “*due regard*” and “*exercise good faith*” for Mauritius’ rights which requires consultation and a balancing act between competing rights and interests.
3. It argues that there is no requirement to avoid any impairment of Mauritius’ rights.
4. It claims that it has since the Tribunal Award extended an invitation to Mauritius “*to discuss protecting the marine environment around BIOT*” and gives the appearance that this is all that it must do for now.

Mauritius position concerning the Award can be found in a statement to the Indian Ocean Tuna Commission (IOTC) dated 20 April 2015 where it has said that “*since the [aforementioned] 'MPA' purportedly established by the United Kingdom around the Chagos Archipelago has been held to be in breach of international law, it is legally invalid*”²⁶.

In response to this, the UK on 21 April 2015 categorically denied that the MPA is legally invalid and that the Award “*does not have the effect of rendering the MPA void*”²⁷.

However the carefully drafted language which follows is interesting “*The UK believes that establishing a Marine Protected Area continues to be the best way to protect the marine life around BIOT from the serious overfishing that takes place elsewhere in the Indian Ocean. As the Tribunal suggests, we do wish to work with Mauritius to achieve a mutually satisfactory arrangement for protecting the marine environment*”.

The use of those underlined words do not appear to recognise a *fait accompli*, an MPA which has already been in existence for 5 years. They use the present tense and merely express a ‘belief’.

Certainly from a realistic perspective, the MPA in its current form is unlikely to survive a proper re-negotiation with Mauritius.

²⁶ IOTC Circular (2015a). IOTC Circular 2015-044: Statement by Mauritius on the ruling of the Arbitral Tribunal in the case of the Republic of Mauritius versus the United Kingdom. IOTC, Victoria, Seychelles.

²⁷ IOTC Circular (2015b). IOTC Circular 2015-045: Statement by UK (OT) on the ruling of the Arbitral Tribunal in the case of Mauritius vs United Kingdom. Victoria, Seychelles.

We should also look at the position of other foreign states. To date we have the view of the 54 states of the African Union in a resolution in June of this year that the MPA was “*unlawfully established*” and ruled “*illegal*” by the Arbitral Tribunal²⁸.

Domestic UK Law

While the MPA may have no effect in international law due to the lack of consultation, it does not mean that the MPA ceases to exist in English law.

The FCO claims that:

1. Tribunal Award is directory, takes effect at the level of international law and produces no directly applicable rights under domestic law.
2. The defect in consultation found by the Tribunal was in relation to the UK’s consultation with the Mauritian Government and not the public consultation in 2009.
3. Furthermore, the domestic courts should not potentially interfere in matters of international relations.

In other words it says that the Tribunal has no bearing on the domestic Judicial Review in Bancoult 3 which you will recall had decided that the MPA had not been created with an improper purpose in mind, that there were no Chagossian/Mauritian fishing rights, and no EU law breach. Certainly as regards the factual question of fishing rights we have a situation where International Law and UK Domestic Law seem now to be out of step, and as regards Improper Purpose there is the dichotomy between the almost unimpeachable US Cable and the testimony of two FCO Officials whose motives would appear questionable.

Given the status of the Tribunal and its findings it seems unlikely that the UK Supreme Court will not take its findings into account.

WHY IS CHAGOS A CONSERVATION SUCCESS?

Why might Chagos nonetheless be considered a conservation success story? Certainly not because of the recent announcement of an MPA.

²⁸ **Resolution on Chagos Archipelago Doc EX.CL/901(XXVII) – 14/15 June 2015**

Noting that the purported “MPA” has been ruled to be illegal by the Arbitral Tribunal

WELCOMES the Award of the Arbitral Tribunal and the confirmation that the purported “MPA” has been unlawfully established under international law;



Fig 15. The Chagos 1971 – a pirogue (left) and a parrotfish catch (right)

A very brief return to its history will tell us why.

Firstly, the population that resided there from late 1700s to 1973 and the use of the islands during that period has led to a 'light touch' when it came to any influence over the marine natural environment. It was relatively small – on average about 1,000 persons for much of the 20th Century²⁹. Most of the use of the marine resources was artisanal and for internal consumption.

Secondly, between 1965 and 2009 there were numerous local laws (called Ordinances) and regulations controlling the use of the environment and the protection of nature.

And thirdly from 1991 the fisheries of the territory out to 200nm have been carefully regulated under a licensing system both for the pelagic tuna and also the demersal inshore fishery and the area has been patrolled and the regime enforced, albeit with rather meagre resources.



Fig 16. The BIOT Fishery Protection vessel – the Pacific Marlin

²⁹ Gifford, R., and Dunne, R. P. (2014). A Dispossessed People: the Depopulation of the Chagos Archipelago 1965–1973. *Population, Space and Place* **20**, 37-49.

Since the declaration of the MPA there has not been one single new piece of legislation a point that was made clear by Mauritius to the ITLOS Tribunal.

It is true to say that following the declaration of the MPA commercial fishing licences have ceased to be issued as of 1 November 2010 but that power already existed under the earlier legislation, it did not need an MPA for its enforcement.

Also if we look at individual islands of the Chagos, there are a total of 1,374 square km of Strict Nature Reserves which have been in existence since 1998 where both the land and the Territorial Sea are given a very high level of protection.

And of course probably the greatest influence in recent times on the conservation of the marine environment has been the remoteness of the Chagos and the fact that both the US and UK have attempted as best they could to restrict access to the archipelago – “**Fortress Conservation**” as it has been called³⁰.

Without doubt the Chagos marine environment thrived when the Chagossians lived there and has continued to do so during its period of depopulation and isolation from the world. Its designation as an MPA in 2010 did not change anything.

So to conclude, there was no need to declare an MPA. This was an area of the world where conservation and management of the natural resources was working very well. As a result of the ensuing legal cases we also now know that David Miliband in proclaiming the MPA went against the advice of his officials. The MPA was purely a political and greenwashing move for a Labour Government which was about to leave office, and we know that officials also considered that it would help them resist calls for the displaced Chagossians to be allowed to return.

The declaration of the MPA has spectacularly backfired in all respects.

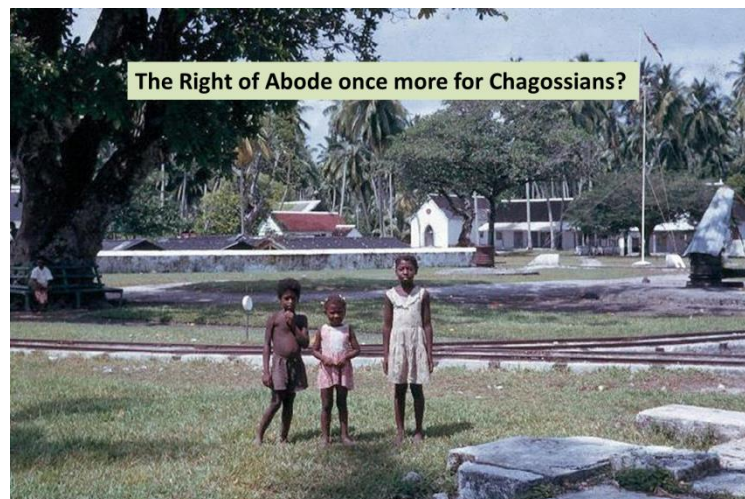
1. It has cost the UK taxpayer many millions in legal dispute fees.
2. It has renewed interest in the Chagos and in the plight of the Chagossians and led to further calls for resettlement studies that have had to be heeded by the Government³¹.
3. It has provided a vehicle for Mauritius to challenge the UK's claim to sovereignty over the territory, albeit unsuccessfully as yet.
4. It has enshrined in international law the undertakings given to Mauritius in 1965.
5. It has revealed the naivety and misguided interference by conservation groups and individuals who have failed to appreciate the past history of a complex scenario involving not just the conservation of a natural environment but also human rights and injustices.
6. And finally, during Bancoult 3, papers were at last disclosed which showed that the FCO had concealed documents from the Chagossian legal team during the judicial review of the 2004 Orders in Council in Bancoult 2.

³⁰ Sand, P. H. (2012). Fortress Conservation Trumps Human Rights? The 'Marine Protected Area' in the Chagos Archipelago. *Journal of Environment and Development* **21**, 36-39.

De Santo, E. M., Jones, P. J. S., and Miller, A. M. M. (2011). Fortress conservation at sea: A commentary on the Chagos marine protected area. *Mar. Policy* **35**, 258-260.

³¹ KPMG (2015). Feasibility study for the resettlement of the British Indian Ocean Territory - Volume 1. London.

In addition to the application to the UK Supreme Court in *Bancoult 3*, there is also an application to overturn the 2008 House of Lords decision on the basis of this concealment. If that is successful it will once again give the displaced Chagossians the right of abode, and like the success of Mauritius before the ITLOS Tribunal have further implications for how the Chagos and its marine environment will be conserved. There are those mainly from the hardline conservation groups who say that any return of the Chagossians will not be good for the environment but the reality is that they could do much good to restore and maintain it in good health.



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