A short analysis of the exile of an indigenous population from beginning to end

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This paper considers the exile of an indigenous population, namely the natives of the British Indian Ocean Territory. It produces a summary starting from the time the Chagos Islands (“Chagossians”) were founded to the current state of affairs. The main focus of this paper is on the three main cases related to the plight of the Chagossians. The rights of the British Constitution under the Magna Carta will also be examined to see why the Court refused to apply the Magna Carta to the British Indian Overseas Territory. There will also be a discussion on the ruling of the Court to strike out all the claims of the Chagossians. Finally, to conclude, certain articles are examined from the Foreign and Commonwealth Office website which provides an update of where the Chagossians stand today and whether their standing lies in the hands of the law or in the political arena?

The Chagos Archipelago is a group of small islands situated in the Indian Ocean which were founded by the Portuguese in the early 16th century. Two centuries later, the French took possession of the Chagos Archipelago, Mauritius and the Seychelles only to be ceded to Britain in 1814 by the Treaty of Paris. In 1903, the Seychelles were detached and formed a separate Crown Colony. However, the Chagos Islands were a dependency of Mauritius and therefore, continued to be governed by the latter.1

The main source of income was the production of copra.2 The islanders worked on the plantations and although many were uneducated and illiterate, they enjoyed their way of life from the early 1960s. By this time, the abolition of slavery was well established and the economy was making good progress. Little did they know that their way of life was about to be destroyed.

In 1964, the United Kingdom (“UK”) and the United States (“US”) entered into discussions regarding the setting up of defence facilities in the Chagos Archipelago. In order to carry out this great task they needed to separate the dependencies of Mauritius and some of the islands from the Seychelles and form a separate dependant territory. Mauritius and the Seychelles agreed to the detachment for a compensation payment. Mauritius was to be paid £3 million for the loss of the islands and a further £650,000 to help with the resettlement costs for the soon to be exiled Chagossians. In addition to this, the UK was to grant Mauritius independence and also to provide the Seychelles with a new airport on Mahe.3

In 1965, the British Indian Ocean Territory Order in Council was made which formed a new colony; The British Indian Ocean Territory.4 The new colony was made up of

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1 The Chagos Archipelago are also known as the Chagos Islands.
2 The dried white flesh from coconut from which coconut oil is extracted.
3 Mahe is the largest of the Seychelles Islands.
4 The British Indian Ocean Territory Order 1965/1920.
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the Chagos Archipelago, Desroches, Aldabra and Farquhar. Mauritius was granted independence in 1968, after the detachment of the islands. Those that were born in the Chagos Archipelago had dual nationality, that of Mauritius and British citizenship, however, the Chagossians did not know of this information at that time.

In the same year, the US had made the decision that it was going to construct the defence facilities on the largest island of the Chagos Archipelago, namely Diego Garcia and in 1970, told the UK Government that it required the complete evacuation of Diego Garcia by July 1971. In April 1971, the Immigration Ordinance was enacted. It made it unlawful for someone to enter or remain in the territory without a permit; it provided for the Commissioner to make an order directing that person’s removal from the territory. The inhabitants, therefore, had to be evacuated as soon as possible in order to accommodate the primacy of defence considerations.

The treatment of the population was in some cases, inhumane. Even the horses were better treated than the people. After having been moved around, the Chagossians were eventually taken to Mauritius where they were left in great poverty. The £650,000 given by the UK Government to Mauritius for resettlement costs was not enough to relieve them of poverty.

In 1975, a member of the Chagossian Community, Michal Vencatessen, issued a writ in the High Court to claim for damages for his maltreatment on evacuation from Diego Garcia and subsequent events. The Chagossians formed a large group and started to press for their rights over their homeland. The UK Government decided that if they were to pay a compensation amount of £4 million, all the Chagossians were required to sign quittance forms regarding their claims and Mr Vencatessen also had to withdraw his action. Once agreed, a trust fund was set up for the Chagossians and governed by the Mauritius Government. However, the money soon diminished and they were once again left with nothing.

In 1998, one of the leaders of the Chagos Refugee Group, Olivier Bancoult, asked for judicial review of the 1971 Immigration Ordinance. He insisted that the removal of the inhabitants was unlawful. The case came before the Divisional Court and a decision was made by Laws LJ and Gibbs J in November 2000 holding that section 4 of the 1971 Ordinance was ultra vires. Section 4(1) provided that “no person shall enter the Territory, or being in the Territory, shall be present or remain in the Territory, unless he is in possession of a permit”. Section 10(1) also provided “the Commissioner may make an order directing that any person whose presence within the Territory is, under the provisions of this Ordinance, unlawful, shall be removed from and remain out of the Territory, either indefinitely or for a period to be specified.” However, this was contrary to section 11 of the 1965 Order which provided that the “Commissioner may make laws for the peace, order and good government of the Territory.”

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5 See BBC News Website Mauritius stakes claim for Chagos (Online) http://news.bbc.co.uk/1/hi/world/africa/3583927.stm for more information regarding the alleged illegality of the detachment of the islands.
6 Immigration Ordinance 1971.
7 Chagos Islanders v The Attorney General [2003] EWHC 2222, para 34
8 ibid. para 38
9 R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2001] QB 1067
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There appears to have been a contradiction made by section 4 of the 1971 Ordinance with section 11 of the 1965 Order as excluding people from their homeland was definitely not a law made for peace, order and good government. On the contrary, the use of the prerogative here was an illustration that created havoc, disorder and bad governance over the Chagossians.

One of the main issues discussed in Bancoult was that of the Magna Carta. Chapter 29 of the Magna Carta states: “No freeman shall be taken or imprisoned or be disseised of his freehold or liberties or free customs or be outlawed or exiled or any other wise destroyed; ...but ...by the law of the land.”

The question was: does the Magna Carta extend to the British Indian Ocean Territory? In Alberta Indians, Lord Denning stated that the “Magna Carta follows the flag”. This means that prima facie, the Magna Carta would extend to the British Indian Ocean Territory being a British colony. However, the Magna Carta was held not to extend to the British Indian Ocean Territory as it was not a settled colony, but was ceded; it was surrendered to the British by France and the Treaty of Paris 1814. Chapter 29 of the Magna Carta also provided that exile would be allowed if there was a law stating so. The questions here were: did the 1971 Ordinance amount to the law of the land and was the law a valid law? Laws LJ stated the people are to be “governed, not removed.” It was held that as the law was not made for peace, order and good government, it was ultra vires the British Indian Ocean Territory Constitution.

Holt stated that in “1215 the Magna Carta was a failure as it was intended as a peace and it provoked war...it promoted disagreement and contention.” It appears that the Magna Carta still has this negative effect today as illustrated in Bancoult.

In October 2003, a group of Chagossians attempted to seek compensation for their unlawful removal and for the exclusion from their homeland. They also tried to claim for the restoration for their property rights and also for their rights to return to their homeland. Unfortunately for the Chagossians all the claims put forward were struck out by Ouseley J. It was held that there was no tort of unlawful exile as the Chagossians could not prove that there was misfeasance in public office. They could not show that the defendants enacted the 1971 Immigration Ordinance knowing that, or being reckless as to whether, it was unlawful or that any removal or prevention of return, whether before or after 1973, was unlawful. Secondly, there may have been a duty of care owed to the Chagossians when they were removed from their homeland, however this duty was not a continuing one and was statute barred by section 11 of

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10 Magna Carta, Chapter 29 1297 version.
11 R v Secretary of State for the Foreign and Commonwealth Office, ex parte Indian Association of Alberta [1982] QB 892 at 912
12 See Magna Carta, Crown and Colonies P.L. 2001, AUT, 571-585, Adam Tomkins, for a discussion on the “apparent inconsistency in the court’s reasoning” towards the application of the Magna Carta to the British Indian Ocean Territory.
13 Bancoult Supra n.9, at para 57.
14 J.C. Holt, ‘Magna Carta’ Cambridge University Press, 1965, page 1
15 Chagos Islanders 2003, supra n7
16 ibid. para 739
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the Limitation Act 1980. Thirdly, The Chagossians had no property rights due to the enactment of the 1983 Ordinance which stated: "Whereas all land in the Territory is Crown Land... it is hereby confirmed and declared that all land in the Territory is Crown Land."\(^{17}\) There were also no rights to property under the Mauritius Constitution. Fourthly, there was no tort of deceit as the Chagossians did not act to their detriment regarding any of the ‘false statements’ that were made to third parties and not to themselves or to their agents. Ouseley J also mentioned that there was an abuse of the process by all those who had already signed renunciation forms knowingly and conscionably.\(^{18}\) Therefore, all the claims brought by the Chagossians failed.

In July 2004, the Claimants were not in accord with Lord Ouseley’s judgment to strike out all their claims against the United Kingdom Government for damages for expelling them from their homeland and therefore, made an application for appeal.\(^{19}\) The application was refused and the reasons for striking out the entirety of their claims were upheld.

In Bancoult, Ouseley J rejected the idea that the Mauritius Constitution applied to the British Indian Ocean Territory. However, in Chagos Islanders 2004, Sedley LJ stated: “It is not in fact strange that a newly created territory should be given as its patrimony the body of laws previously in force there. There is in reality no other way of providing continuity of governance...”\(^{20}\)

According to a BBC article, Mauritius has never made a claim for the Chagos Islands but for fear of disrupting diplomatic ties with Britain.\(^{21}\) The Mauritius Government has been seeking advice and international lawyers have stated that International law does not allow for the separation of the Chagos Islands from Mauritius before independence was granted. Therefore, this process carried out by the UK may prove to be illegal.\(^{22}\)

The Immigration Ordinance 1971 was amended after Bancoult in 2000 to allow the return of the islanders to Peros Banhos and to the Salomon Islands. It appeared to be a sign of progress. However, any hope of returning to the islands has now been shattered. The reports conducted by independent experts stated that although it may be feasible to resettle for the short term, it will not be feasible over the long term and events such as flooding may be a danger to life.\(^{23}\)

Two new Orders in Council have been made so that the UK may have full immigration control over all the islands in the British Indian Ocean Territory and to

\(^{17}\) Acquisition of Land for Public Purposes (Repeal) Ordinance 1983
\(^{18}\) Chagos Islanders 2003, supra n7, para 494
\(^{19}\) Chagos Islanders v The Attorney General [2004] EWCA Civ 997
\(^{20}\) ibid. para 41
\(^{21}\) Supra n.5.
\(^{22}\) ibid
\(^{23}\) Select Committee on Foreign Affairs, Written Evidence, Letter to the Chairman of the Committee from the Secretary of State for Foreign and Commonwealth Affairs, 15 June 2004 (online) http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmfaff/115/115we05.htm
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prevent any resettlement of the Chagossians.24 The Constitution Order states that no person has the right of abode in the Territory or has unrestricted access to any part of it. The Immigration Order sets out the necessary immigration controls.

In November 2004, Bill Rammell MP, Parliamentary Under Secretary of State at the Foreign and Commonwealth Office stated that the British Government would allow a number of Chagos Islanders to visit the graves of their relatives in Diego Garcia. Permission to visit graves on the outer islands had already been granted.25 Mr Rammell made a visit to the Chagossian Community in Mauritius in January 2005. He was informed by the Mauritian Government that plans to take the islanders to visit the graves of their relatives in April has now been cancelled.26 No reason for the cancellation has been given by the Mauritius Government at this time.

The 2004 judgement “brings to an end the quest of the displaced inhabitants of the Chagos Islands and their descendants for legal redress against the state directly responsible for expelling them from their homeland”.27 The Chagossians have no constitutional fundamental rights under the Magna Carta as it does not extend to the British Indian Ocean Territory. “The colonial control and the mischief of the typically imperial ‘one rule for us but an inferior one for them’ continue-even into the twenty-first century.”28 The future of the Chagossians unfortunately continues to lie in the political arena and not in the hands of the law. As Sedley LJ rightly stated: “Defence may have replaced agricultural improvement…but the pauperisation and expulsion of the weak in the interests of the powerful still gives little to be proud of.”29

24 British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004
26 Foreign and Commonwealth Office, Mauritius – Bill Rammell visits Chagossian Community (14/01/05) (online) http://www.fco.gov.uk/servlet/ Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1013618138305&a=KArticle&aid=1101400385720
27 Chagos Islanders 2004, supra n.19, para 54, per Sedley LJ
29 Chagos Islanders 2004, supra n.19, para 6
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