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# A Return from Exile in Sight? The Chagossians and Their Struggle

Christian Nauvel\*

“No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties... or exiled...but by the law of the land...” The Magna Carta.

“Everyone has the right to leave any country, including his own, and to return to his country.” The Universal Declaration of Human Rights.

“No one shall be arbitrarily deprived of the right to enter his own country.” The International Covenant on Civil and Political Rights.

## I. INTRODUCTION

### A. *Scope and Purpose*

¶1 The right to remain in one’s own country is a basic human right that has existed in one form or another since the times of King John and the Magna Carta. Although nowadays the term “exile” is likely to conjure up images of those bygone days, it unfortunately remains a current issue. In fact, recent history abounds with instances of forcible relocation – essentially, exile – being perpetrated by even those who would be the champions of human rights. This Note will present one such instance: the story of a small group of Indian Ocean islanders who were forced to leave the place they called home and prevented from ever returning. More specifically, this Note will examine the legal battles they waged against the U.K., the U.S. and giant corporations, such as Halliburton.

¶2 The principal goals in this endeavor are: (1) to popularize the facts surrounding the Chagos Islanders’ forcible relocation; (2) to present and analyze the rulings handed down by the various courts involved; (3) to propose alternative forums where the Chagossians can take their case next; and (4) to generally make a case for the liability of both the U.S and the U.K. governments. Regarding this last point, this Note will focus on the British High Court of Justice’s ruling in *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*.<sup>1</sup> This Note argues that, along with a more recent case dealing with substantially the same issues,<sup>2</sup> *Bancoult* stands for the principle

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\* Christian J. Nauvel, 2007 J.D. Candidate, Northwestern University School of Law; B.S. *magna cum laude* in Physics and Political Science, Bates College, 2002. I would like to dedicate this article to my parents for all their support and sacrifices over the years. I specifically want to thank my father, Jacques C. Nauvel for (ever so subtly) stimulating my interest in this issue by painstakingly sending me newspaper clippings over the past eight years.

<sup>1</sup> [2001] Q.B. 1067.

<sup>2</sup> *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 1038 Admin. 4093.

that the Chagos Islanders' forced displacement was an infringement on their basic human rights. In other words, the decisions were simply a roundabout way of granting redress for human rights violations. This Note also contends that the results in the British *Bancoult* cases create a principle of customary international law, according to which monetary damages are due to plaintiffs who have prevailed against a State for the violation of their right not to be displaced; as long as the case is viewed in conjunction with the monetary settlement paid by the British government soon after the islanders' displacement.

### B. *The Chagos Archipelago Today*

¶3 The Chagos Archipelago (“the Chagos”) is a small group of coral atolls in the Indian Ocean, lying south of the equator, about halfway between India and Africa. Like many of the surrounding island groups, it has been blessed with tropical weather, beautiful sandy beaches, warm blue lagoons and lush vegetation. But the idyllic setting is deceiving – for, far from being the next big tourist destination, the archipelago's largest island, Diego Garcia, is the site of the region's principal U.S. Naval base. The island's airstrips can easily accommodate a full fleet of fighter planes, and its harbor often provides shelter for some of the largest military vessels in the world.<sup>3</sup> But Diego Garcia's principal asset is clearly its location, being almost equidistant from several geopolitical hotspots. A letter from the U.S. Department of State, dated 21 June 2000, described the base as an “all but indispensable platform” for the fulfillment of defense and security responsibilities in the Arabian Gulf, the Middle East, South Asia and East Africa.<sup>4</sup> Diego Garcia has played a vital role in several key military endeavors: like the 1991 Gulf War, when it served as the starting point for most aerial missions;<sup>5</sup> and more recently, the campaigns in Afghanistan and Iraq, when it was used as a central support facility.<sup>6</sup>

¶4 The politics of the Chagos is a complicated affair, involving several players on the international stage. The archipelago is currently under joint American and British control, with the tiny Republic of Mauritius claiming sovereignty (somewhat half-heartedly) in the background. As can be imagined, governance under such conditions is a delicate process. On the ground, the Americans control the base itself, while the British are in charge of all the administrative aspects (the police, the court system, as well as work and entry permits).<sup>7</sup> Services are provided by another increasingly important (though unofficial) player – the Base Operating Service Contractor (“BOSC”). The BOSC is typically a multi-national corporation that is awarded a highly lucrative

<sup>3</sup> Anonymous Contributors, *Diego Garcia Under Occupation*, in DIEGO GARCIA IN TIMES OF GLOBALIZATION 158 (Ledikasyon pu Travayer, 2002).

<sup>4</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1075.

<sup>5</sup> See the United States Navy Support Facility Diego Garcia website, [http://www.dg.navy.mil/2005/html/island\\_history.htm](http://www.dg.navy.mil/2005/html/island_history.htm) (last visited Aug. 10, 2005).

<sup>6</sup> Globalsecurity.org Website, Military, Diego Garcia “Camp Justice” 7°20'S 72°25'E, Diego Garcia History, <http://www.globalsecurity.org/military/facility/diego-garcia.htm> (last visited November 13, 2005) (“Coalition aircraft at Diego Garcia dropped more ordnance on Taliban and Al Qaeda forces in Afghanistan than any other unit during the war on terror”).

<sup>7</sup> *Diego Garcia Under Occupation*, *supra* note 3, at 157-158.

contract<sup>8</sup> to do everything from serving food to building roads. Companies filling the role of Diego Garcia's BOSC have included international heavyweights such as BJS International and Halliburton.<sup>9</sup> As for the island's population, there are no longer any permanent residents; everyone there being involved with the base in some way or other.<sup>10</sup>

### C. *The Chagossians and their Plight*

¶5 Before the arrival of the B-52s and aircraft carriers, the Chagos was a peaceful cluster of islands whose inhabitants (known as the "Chagos Islanders" or "Chagossians") lived on Diego Garcia and two other atolls: Peros Banhos and Salomon.<sup>11</sup> The exact number of Chagossians who resided there is still disputed to this day, but estimates range from 800 to 1500.<sup>12</sup> They lived simple lives, dividing their time between fishing and working on the coconut plantations where copra<sup>13</sup> was produced. Though none of them owned any land,<sup>14</sup> they had been in the Chagos for two, three or even four generations.<sup>15</sup> It therefore came as a shock to most Chagossians when, on an otherwise normal morning in 1971, they were suddenly informed that they would be required to permanently leave their homes in order to make way for the U.S. military base. The majority of those living on Diego Garcia were shipped to Mauritius against their will, within days of receiving the news. By 1973, even the islands of Peros Banhos and Solomon had been completely evacuated.<sup>16</sup>

¶6 It soon became clear that the decision had long been made to remove them. For years, the Chagossians suspected that they had been the victims of an elaborate scheme, concocted to give their removal the semblance of legality.<sup>17</sup> This suspicion was all but confirmed thirty years later, when British Foreign Office documents regarding their removal were unclassified. See, for example, this excerpt from a 1966 confidential missive from the Secretary of State for the Colonies to the Commissioner of the BIOT in the Seychelles:

"We are taking steps to acquire ownership of the land on the islands and consider that it would be desirable... for the inhabitants to be given some form of temporary residence permit. We could then more effectively take the line in discussion that these people are Mauritians and Seychellois;

<sup>8</sup> Currently BOSC contracts are seven years long. *Id.* at 158.

<sup>9</sup> *Id.*

<sup>10</sup> In 2002, the island had around 6500 occupants: 3500 American military personnel, 1600 civilians (American and British) and 1400 foreign workers (Filipino and Mauritian). *Id.* at 155.

<sup>11</sup> Some of the older literature still calls them "Ilois," which means "island people" in Mauritian Creole, but this term is no longer used, being considered derogatory.

<sup>12</sup> See *Regina v. Secretary of State for the Foreign and Commonwealth Office*, *Ex parte Bancoult*, [2001] Q.B. 1067, 1078-1079.

<sup>13</sup> A tough multi-purpose fiber extracted from coconut trees.

<sup>14</sup> Because it was impossible for them to do so with the plantation company (Chagos Agalega Ltd.) having been vested with title to the lands as a matter of private law. The history of the British Empire abounds with examples of private companies owning islands or even whole countries in this way; the most famous example is probably the British East India Company. *Ex parte Bancoult*, [2001] Q.B. 1067, 1079.

<sup>15</sup> *Id.* at 1075.

<sup>16</sup> *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 1038 Admin. 4093, §§ 58-67.

<sup>17</sup> *Ex parte Bancoult*, [2001] Q.B. 1067.

that they are temporarily resident in BIOT for the purpose of making a living on the basis of contract or day to day employment with the companies engaged in exploiting the islands.”<sup>18</sup>

The fact that plans were being made for the islanders’ removal a whole five years before it took place, shows how carefully the British were thinking about it. The tone of this particular excerpt also shows that government officials were concerned about how this procedure would be viewed by the outside world. The element of obfuscation is evident.

¶7 Upon their arrival in Mauritius, most Chagossians had nowhere to go, no money and no employment prospects.<sup>19</sup> The hardships they endured, as well as the forced removal itself, have served as the basis for legal action in both British and American courts. The islanders have also sued for the authorities’ refusal to allow their return to the Chagos, and the base contractors’ refusal to hire them. The actual claims presented range from forced displacement to torture and genocide, via employment discrimination and a multitude of torts. But these lawsuits have all emerged as part of the ongoing struggle to obtain redress for what the Chagossians viewed as blatant violations of their human rights.

#### D. Political and Historical Context of the Base’s Creation

¶8 In the mid-1960s, at the height of the cold war, the U.S. was in dire need of a naval and military base that could provide quick access to the Middle East, South Asia and Eastern Africa. With the communist threat rearing its head, the U.S. needed to make its presence felt in the region.<sup>20</sup> The U.K., keen to reinforce its trans-Atlantic alliance,<sup>21</sup> held secret talks with the U.S. about providing a location for such a base. In return, the American government offered the British an \$11 million subsidy on the Polaris submarine nuclear deterrent.<sup>22</sup>

¶9 Given its size and location, the Chagos Archipelago was an obvious choice for such a project.<sup>23</sup> On top of the presence of the Chagossians on the islands, there were a few potential political problems, but none of them were considered insurmountable. For example, the U.S. wanted a long term deal, while the British had already committed to decolonizing the region. Since the Chagos Archipelago was technically part of Mauritius

<sup>18</sup> *Id.* at 1082.

<sup>19</sup> *Chagos Islanders v. The Attorney General, Her Majesty’s British Indian Ocean territory Commissioner*, [2003] EWHC 2222, § 48.

<sup>20</sup> Globalsecurity.org Website, Military, *supra* note 6, (“In the 1960s, America’s naval policy in the Indian Ocean had many ingredients. The foremost was to deter Russia from interrupting the flow of oil from the Persian Gulf countries to America and Europe... It entailed maintaining a naval presence in the Persian Gulf and, and wherever possible, in the countries on the rim of the Indian Ocean, not only to secure the sea lines of communication which criss-crossed the Indian Ocean but also to inject military force from seaward if required.”)

<sup>21</sup> Many of the discussions on this topic took place (maybe unofficially) in the context of NATO. *See Regina v. Secretary of State for the Foreign and Commonwealth Office Ex parte Bancoult*, 1080-81.

<sup>22</sup> *The Chagos Islands: A sordid tale*, BBC News World Edition (Nov. 3, 2000), [http://www.news.bbc.co.uk/uk\\_news/politics1005064.stm](http://www.news.bbc.co.uk/uk_news/politics1005064.stm) (last visited Nov. 8, 2005).

<sup>23</sup> Although possibly not the first choice, since some documents point to the island of Aldebra, north of Madagascar, as the number one pick. This idea was ultimately abandoned, however, because Aldebra is the breeding ground for rare giant tortoises, whose mating habits would probably have been upset by the military base. The authorities were clearly afraid of the negative publicity that ecologists would probably have caused, had Aldebra been chosen. *Id.*

(which was heading towards independence), acquiescing to the U.S.'s demands meant that the islands would have to be separated, which was contrary to existing U.N. Resolutions.<sup>24</sup> But separation was the favored solution because it was also a way to avoid potential claims for sovereignty by Mauritius, which both the U.S. and the U.K. wanted to steer clear of.<sup>25</sup> Rather than find mutually acceptable solutions to these problems, one official advised a "policy of 'quiet disregard,' in other words, let's forget about this one until the United Nations challenge us on it."<sup>26</sup> Since such a challenge never took place, the plans for the construction of an American base on Diego Garcia continued, unaffected.

### *E. The Mechanics of the Chagossians' Removal*

¶10 For nearly 200 years, the Chagos had been governed as part of the British Colony of Mauritius, despite the distance (about 800 miles) that separated one from the other.<sup>27</sup> But in November of 1965, on the eve of Mauritius's independence, the archipelago was unceremoniously carved away to create a separate entity, the British Indian Ocean Territory ("BIOT"). This was accomplished by order of Her Majesty, the Queen of England, through the issuance of what has become known as the "BIOT Order."<sup>28</sup> Though highly irregular, the British defended this decision by citing to their own domestic laws,<sup>29</sup> which gave them close to unfettered discretion as to the make-up of colonial boundaries.<sup>30</sup> The practical result of the Order was that, while Mauritius gained its independence in 1968, the Chagos remained British (as did its population).

¶11 Amongst other things, the BIOT Order created the position of Commissioner. Section 11 of the Order empowered the Commissioner to "make laws for the peace, order and good governance of the Territory."<sup>31</sup> But instead, he used this authority to promulgate BIOT Ordinance No. 1 of 1971 (also known as the "Immigration Ordinance 1971"). Section 4 of this ordinance provided for the compulsory removal of the whole existing civilian population, for not possessing a government issued permit.<sup>32</sup> In order to ensure minimal publicity, the Ordinance was published only in the BIOT Gazette, which

<sup>24</sup> Paragraph 6 of U.N. Resolution No. 1514 (Dec., 1960) reads that: "[a]ny attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the United Nations." *Id.*

<sup>25</sup> A document, dated 20 October 1964, and entitled "Defense Interests in the Indian Ocean" makes it clear that: "It would be unacceptable to both the British and the American defense authorities if facilities of the kind proposed were in any way to be subject to the political control of Ministers of a newly emergent independent state (Mauritius is expected to become independent some time after 1966)... it is hoped that the Mauritius Government may agree to have the islands being detached and directly administered by Britain." *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> The Chagos Archipelago Islands were ceded by France to Great Britain by the Treaty of Paris in 1814 and from then until 1965, they were governed as part of the colony of Mauritius. Lindsey Collen & Ragini Kistnasamy, *How Diego Garcia was Depopulated and Stolen*, in DIEGO GARCIA IN TIMES OF GLOBALIZATION 26 (Ledikasyon pu Travayer, 2002).

<sup>28</sup> *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, 1076.

<sup>29</sup> More specifically, to the Colonial Boundaries Act of 1895 which regulates the alteration of colonial boundaries.

<sup>30</sup> *Ex parte Bancoult*, [2001] Q.B. at 1076.

<sup>31</sup> *Id.* (quoting § 11(1) of the BIOT Order of 1965).

<sup>32</sup> *Id.* at 1077.

had a very limited circulation.<sup>33</sup> Once the “immigration” procedure had been completed, the British entered into a long term lease agreement with the U.S., and effectively transferred possession of the Chagos in 1971. Despite the public outcry that this caused in the newly independent state of Mauritius, the country’s leadership caused very little fuss on the diplomatic front.<sup>34</sup> Whereas within the U.S. and the U.K, one was (and still is) hard pressed to find anyone – other than active or former servicemen – who has even heard of the Chagos Archipelago, let alone of the plight of its former inhabitants.

#### F. *The Official Line*

¶12 The official line from both the American and the British governments is that there were no indigenous inhabitants on the Chagos, only contract workers. Hence, there was no relocation, and the islanders were simply returned to their home countries after the termination of their contracts. Although this sounds very plausible, the truth of this position is belied by a collection of formerly classified documents. One such document is a minute from a 1966 meeting involving the BIOT Commissioner and staff from the British Colonial Office:

“[The Colonial Office wishes] to avoid using the phrase ‘permanent inhabitants’ in relation to any of the islands in the territory because to recognize that there are permanent inhabitants will imply that there is a population whose democratic rights will have to be safeguarded and which will therefore be deemed by the UN Committee of Twentyfour to come within its purview... it may be necessary to issue [the inhabitants] with documents making it clear that they are ‘belongers’ of Mauritius or the Seychelles and only temporarily resident in the BIOT. This device, though rather transparent, would at least give us a defensible position to take up in the Committee of Twentyfour... It would be highly embarrassing to us if, after giving the Americans to understand that the islands in the BIOT would be available to them for defense purposes, we then had to tell them that we proposed to admit that they fell within the purview of the Committee of Twentyfour.”<sup>35</sup>

It would have been hard to contradict their publicly taken position in a blunter fashion. Further examination of the recently unclassified documents shows that the British were well aware of two major flaws in their official stance.

¶13 First, the Chagossians had been there for generations; as can be seen from the following 1965 British Foreign Office memorandum:

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<sup>33</sup> *Id.* at 1086.

<sup>34</sup> Over the years, several possible explanations have been proposed for this passivity. One of them is that Mauritian leaders were intimidated by the formidable stature of its adversaries. Another is that they were appeased by preferential trade agreements – for at the time, Mauritius’ sole source of income was from the sugar that it produced and it was still very much dependent on its former colonizers in this respect. More than likely, the true reason is some mixture of the two. Given the country’s continued economic ties to both the U.K. (in terms of sugar and tourism) and the U.S (a major market for its textiles) the situation is the same nowadays.

<sup>35</sup> *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, 1082.

“Our understanding is that... a small number of the people [on the islands] were born there and, in some cases, their parents were born there too. The intention is, however that none of them should be regarded as being permanent inhabitants of the islands... [they] will be evacuated as and when defence [sic] interests require this....”<sup>36</sup>

¶14 Second, at least a few British officials had realized property rights have little to do with the right to remain in one’s own country. In a 1967 missive to the Secretary of State for Commonwealth Affairs, the Officer Administering the Government of Mauritius wrote:

“I am not sure myself about the validity of the argument that the Ilois have lived in Chagos ‘only on sufferance of the owners,’ since the point at issue is ‘belonging’ in a national sense rather than rights of residence on private property.”<sup>37</sup>

Hence, the circumstances under which the islands were prepared for the construction of the military facility are highly contentious, to say the least.

## II. THE BRITISH CASES

### A. *The Lawsuit*

¶15 The Chagossians were long frustrated in their attempts to obtain legal redress for all of their grievances, mainly because of British secrecy laws. But in 1998, after some of the relevant documents had finally been made public, a Chagossian by the name of Olivier Bancoult filed suit in England.<sup>38</sup> In his complaint, he requested that the Commissioner (on behalf of the Foreign and Commonwealth Office) declare unlawful both the Ordinance and the policy which had prevented him from returning to and residing in the Chagos.<sup>39</sup> The judges on the Queen’s Bench Division (Administrative Court) ruled in his favor, quashing part of the 1971 Ordinance and theoretically allowing the Chagossians to return home. However, in practice, many barriers remained, such as getting the U.S. to alter the terms of its lease.

#### 1. The Parties and their Claims

¶16 The applicant was a BIOT citizen and a former inhabitant of Peros Banhos in the Chagos Archipelago.<sup>40</sup> He was born in there, as were his parents before him. In 1967, his family took an extended trip to Mauritius in order to seek medical treatment for his younger sister who had been injured in an accident. They did not return before the Immigration Ordinance of 1971 was passed, after which they were prevented from doing

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<sup>36</sup> *Id.* at 1081.

<sup>37</sup> *Id.* at 1085.

<sup>38</sup> *Id.* at 1067.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1070.

so. Hence, Mr. Bancoult has never returned to the archipelago, and still resides in Mauritius.

¶17 Mr. Bancoult’s first step was to seek a determination by the BIOT Commissioner on the legality of the Immigration Ordinance (which purported to authorize the banishment of all BIOT citizens) and the policy adopted under the Ordinance (which prevented them from returning). In June and August of 1998, on behalf of the Foreign and Commonwealth Office, the Commissioner ruled that both the ordinance and the resulting policy were indeed valid.<sup>41</sup> Not to be so easily deterred, in March of the following year Mr. Bancoult sought an order of certiorari to quash the Commissioner’s decisions.

¶18 Though too lengthy to elaborate on in this Note, the arguments made in this application remain the clearest and most complete articulation of the Chagossians’ case to date. Amongst other things, it was argued that the Crown could not exclude a British citizen from a British territory, because save in times of war, the Queen had no power to abridge the liberty of her subjects without the authority of a valid statute or an established common law prerogative.<sup>42</sup> It was also argued that a British subject had a fundamental (or constitutional) right to reside in the territory of which he was a citizen and that such a right could be abrogated by neither the general words of the BIOT Order<sup>43</sup> nor any action of the Commissioner, whose legislative powers were only delegated.<sup>44</sup> Alternatively, it was argued that the policy followed after the enactment of the BIOT order was unlawful and disproportionate, because the words “for the peace, order and good government”<sup>45</sup> limited the Commissioner’s otherwise plenary powers. Since the removal of a territory’s entire population could hardly be for its “good government,” the ordinance was *ultra vires*.<sup>46</sup> Mr. Bancoult’s attorneys also argued that the legislation was repugnant to Article 29 of the Magna Carta,<sup>47</sup> and was an affront to articles 3, 8 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention on Human Rights “ECHR”).<sup>48</sup>

¶19 The respondents in this case were the Foreign & Commonwealth Office and the Commissioner for the BIOT, both located in London, England. They opposed each one of the applicant’s claims and added several arguments of their own. They first argued that English courts had no jurisdiction over the case because the Crown was divisible and

<sup>41</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1070.

<sup>42</sup> *Id.* at 1071 (citing Entick v. Carrington (1765) 19 State Tr. 1029).

<sup>43</sup> *Id.* (citing Nissan v. Attorney General [1970] AC 179 and Rayner (J H) (Mincing Lane) Ltd v. Department of Trade and Industry [1989] Ch 72).

<sup>44</sup> *Id.* at 1072 (citing R. v. Lord Chancellor, *Ex parte Witham* [1998] QB 575).

<sup>45</sup> As required by the British Settlements Act, 50 & 51 Vict. C 54 (1887), which applies because a population of U.K. citizens was residing in the Chagos by the time the BIOT was created.

<sup>46</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067.

<sup>47</sup> *Id.* (citing the Magna Carta, 25 Edw. 1 c 1, Art. 29 (1297)(U.K.) (according to which no freeman can be outlawed or exiled except by the law of the land – meaning an act of parliament or common law rule – not an executive order from a Governor or Commissioner)).

<sup>48</sup> Which provided for a “right to protection from inhuman and degrading treatment, [a] right to respect for [one’s] private and family life and home, and [a] right to [the] liberty and security of [one’s] person. *Id.* at 1072 (citing the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222 (1953)).

was to be treated as a separate sovereign entity in every single territory<sup>49</sup> and the BIOT had its own courts of competent jurisdiction.<sup>50</sup> According to them, the use of an English court would raise the possibility of conflicting judicial opinions being issued, since an appeal would ultimately lead to the House of Lords, while an appeal from the BIOT Supreme Court is to the Judicial Committee of the Privy Council.<sup>51</sup>

¶20 Regarding the substantive issues in the case, the respondents claimed (amongst other things) that the population of the Chagos had no absolute right to reside there since they had no proprietary interest in the land. Because the plantation owners had been relieved of their freehold by the Crown, this put the applicant in the same position as someone who was forced to move upon the appropriation of his land for public purposes.<sup>52</sup> Even if a fundamental right to reside in the Chagos was found to exist, the respondents argued that the Commissioner was empowered to enact the 1971 Ordinance, in spite of any conflicts this created with English or international law.<sup>53</sup> The reasoning behind this was that: if a special rule of construction (which protects fundamental or constitutional rights) were to be applied, it would undercut the Colonial Laws Validity Act of 1865 (“CLVA”), which provides that colonial laws are void only to the extent that they are repugnant to an Act of Parliament, specifically applicable to that colony.<sup>54</sup>

¶21 With respect to the *vires* of the BIOT Order, the respondents claimed that the words “make laws for the peace, order and good government of the Territory” gave the Commissioner the widest law-making powers.<sup>55</sup> As for the Magna Carta, they argued that it did not apply to the BIOT because it was not an “Act of Parliament” within the meaning of the CLVA, which in turn meant that it did not extend beyond England.<sup>56</sup> The respondents also argued that the applicant could obtain no relief under international law because: (i) he had no rights under the European Convention on Human Rights (since the U.K. had not declared it to apply to the BIOT);<sup>57</sup> and (ii) he had no rights under the Universal Declaration of Human Rights of 1948 or even the International Covenant on Civil and Political Rights of 1977 (as they had not been ratified by the U.K. with respect to the BIOT). Finally, the respondents argued that the English Court could not require the U.K. to breach its treaty obligations to the U.S. by invalidating the Order.<sup>58</sup>

## 2. The Court’s Holdings

¶22 The High Court of Justice delivered its judgment on November 3, 2000. The judges on the panel were Lord Justice Laws (who wrote the majority of the opinion) and

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<sup>49</sup> One of the many legal fictions that enabled the British to have different standards of governance at home and in the colonies.

<sup>50</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1072 (citing R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Indian Association of Alberta [1982] QB 892).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1074.

<sup>53</sup> *Id.* at 1073 (citing Phillips v. Eyre (1870) LR 6 QB 1).

<sup>54</sup> *Id.* (citing Liyanage v. the Queen [1967] 1 AC 259).

<sup>55</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1073-1074 (citing Ibralebbe v. The Queen (1885) 10 App. Cas. 675).

<sup>56</sup> *Id.* (citing the Colonial Laws Validity Act of 1865, 28 & 29 Vict. c 63, § 2 (1865)(U.K.) and the Magna Carta, 25 Edw. 1 c 1, Art. 29 (1297)(U.K.)).

<sup>57</sup> *Id.* at 1074 (citing Bui van Thanh v. U.K. (unreported) 12 March 1990).

<sup>58</sup> *Id.* (citing Blackburn v. Attorney General [1971] 1 WLR 1037).

Mr. Justice Gibbs. They ruled upon three main issues. The first of these was procedural – dealing with whether the court had jurisdiction to hear the case. The second issue was more substantive, for it asked whether the Ordinance infringed on the applicant’s constitutional rights (with respect to the Magna Carta and a citizen’s fundamental right to reside in his or her country of “belonging”). The third issue concerned the validity of the 1971 Ordinance.

¶23 With respect to jurisdiction, the court ruled that while the proceedings were indeed directed against an act of the BIOT legislature and the Crown was indeed “divisible,” the combination of these two factors did not establish that the Court had no power to determine the Ordinance’s legality.<sup>59</sup> All that the respondents did, in the court’s opinion, was make an argument of *discretion*, in an attempt to persuade the judges that the BIOT Supreme Court would be the most convenient forum for the resolution of this dispute.<sup>60</sup> But Lord Justice Laws was not persuaded, describing another of the respondents’ arguments (the possibility of conflicting judicial opinion at the highest level) as “more apparent than real.”<sup>61</sup> After weighing all the elements involved, the court concluded that it had “ample jurisdiction” over the case, describing the respondents’ arguments as “an abject surrender of substance to form.”<sup>62</sup> Although it upheld the constitutional principle that the Crown was indeed divisible, the court reasoned that the Ordinance was quite clearly the work of the British government – since the BIOT government’s every move was choreographed from the Foreign Office in London.<sup>63</sup>

¶24 The court then turned to the substantive question of whether to quash the Ordinance or not. The first issue considered was whether the Ordinance ran contrary to the rights and liberties enshrined in the Magna Carta.<sup>64</sup> The respondents had argued that the Magna Carta did not apply to a foreign territory such as the BIOT. The court disagreed, finding that the document was “the nearest approach to an irrevocable ‘fundamental statute’ that England has ever had... For in brief it means this, that the King is and shall be below the law.”<sup>65</sup> However, despite his belief that the Magna Carta “followed the flag” abroad, Lord Justice Laws did not think that it resolved this case in the applicant’s favor – for it could not condemn an act that was done in accordance with the law.<sup>66</sup> And although there were questions as to the Ordinance’s *vires*, if they were to be resolved in the respondents’ favor, the Magna Carta would be powerless.

¶25 The second substantive issue taken up by the court was whether the applicant enjoyed a constitutional right to reside in or to return to that part of the Queen’s dominions of which he was a citizen or a “belonger,” and if it existed, whether this right

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<sup>59</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1086.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1087.

<sup>62</sup> *Id.*

<sup>63</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1087.

<sup>64</sup> The relevant portion of which states that: “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; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land...” *Id.* (citing the Magna Carta, 25 Edw. 1 c 1, Art. 29 (1297)(U.K.) (modernized version) in Halsbury’s Statutes of England and Wales, 4<sup>th</sup> Ed. Vol. 10 (1995)).

<sup>65</sup> *Id.* at 1095 (citing Pollock & Maitland, *The History of English Law*, 2<sup>nd</sup> Ed. Vol. 1, 173 (1923)).

<sup>66</sup> *Id.* at 1094-1095.

could be infringed upon by such general words as those present in §11 of the BIOT Order.<sup>67</sup> The Court held if a constitutional right were to be found in this case, the State would not be authorized to abrogate it, save by specific parliamentary provision.<sup>68</sup> However, while Lord Justice Laws stated that “[f]or my part, I would certainly accept that a British subject enjoys a constitutional right to reside in or return to that part of the Queen’s dominions of which he is a citizen,” he did not rule in favor of the applicant on this issue.<sup>69</sup>

¶26 The reasons behind his decision tie back to the concept that the Crown is divisible. The court agreed with the respondents that under the ordinary rules of constitutional construction, colonial legislators were given free reign to create laws on any subject, as long as they did not offend that territory’s fundamental principles – which were separate from those constitutional rights protected in England.<sup>70</sup> In most cases, because the colonies adopted written constitutions that mirrored the rights guaranteed in England, there would be no practical difference. However, the BIOT was an exception in that it had no such written constitution.<sup>71</sup> The court also agreed with the respondents that the CLVA did not permit any special rule of construction that would allow for the protection of fundamental English rights in a colony – which allowed them to prevail on this issue.<sup>72</sup>

¶27 The final set of substantive issues dealt with by the court was related to the legal nature of the 1971 Ordinance. The court first held that it was “elementary” that “a legislature created by a measure passed by a body which is legally prior to it must act within the confines of the power thereby conferred.”<sup>73</sup> In other words, the BIOT “government” (i.e. the Commissioner) could only wield as much power as was granted to it by the BIOT Order. The contrary “would invite our entry into a barbarous world where there is no rule of law.”<sup>74</sup> Hence, the Ordinance could be challenged as *ultra vires* if it was found not to be for the “peace, order and good government of the territory,” which was the upper limit of the Commissioner’s lawmaking power.

¶28 This issue of whether the §11 of BIOT Order empowered §4 of the Ordinance turned out to be determinative of the case.<sup>75</sup> The respondent argued that in colonial laws, the phrase “peace, order, and good government” should be taken as having the widest possible intendment.<sup>76</sup> However, the court found that despite being so broadly empowered, the Commissioner had exceeded the bounds of his authority. In other words, there was no conceivable standard under which §4 of the Ordinance could be considered

<sup>67</sup> *Id.* at 1095-1096.

<sup>68</sup> This is called the “principle of legality,” which forces Parliament to take responsibility for its actions by accepting the political costs involved. Such a principle is a necessity in common law countries where legislative supremacy continues to be accorded, allowing Parliament to legally create legislation that blatantly contradicts fundamental principles of human rights if it so chooses. Hence, the only real check on the legislature in the British system of parliamentary sovereignty is the public. *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, [2001] Q.B. 1067,1096.

<sup>69</sup> *Id.* at 1097.

<sup>70</sup> *Id.* at 1098 (citing *Liyanage v. The Queen* [1967] 1 AC 259, 283).

<sup>71</sup> *Id.* at 1099-1100.

<sup>72</sup> *Id.* at 1098-1100.

<sup>73</sup> *Id.* at 1100.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1102.

<sup>76</sup> *Id.* at 1102-1103 (citing *Riel v. The Queen*, [1885] 10 App. Cas. 675).

to advance the “peace, order, and good government” of the BIOT.<sup>77</sup> So, despite understanding the political and security-based reasons behind the inhabitants’ removal, the court quashed §4 of the 1971 Ordinance.

## B. *Analysis of the Holdings and International Human Rights Implications*

### 1. General Views

¶29 Though the High Court’s ultimate holding was probably the right one, readers might be forgiven for being a little disappointed. The opinion certainly begs the question of whether the protection of rights as fundamental as those at stake in this case, must be such an intricate, procedurally heavy affair. After all, the facts were clear. As Justice Gibbs put it in his concurring opinion: “[i]t is beyond argument that the purposes of the BIOT Order and Ordinance were to facilitate the use of Diego Garcia as a strategic military base and to restrict the use and occupation of that and the other islands within that territory to the extent necessary to ensure the effectiveness and security of the base.”<sup>78</sup> British government employees demonstrated not only “official zeal... [that] went beyond any proper limits,” but also an awareness of the moral turpitude involved in their actions, which they tried to hide from both the public and the U.N.<sup>79</sup> But in spite of these strong statements, an astute reader will have no doubt come to the following conclusion: had the BIOT Order been more explicit in terms of the absolute power it intended to confer on the Commissioner, the High Court would probably have declared the Ordinance valid; flying in the face of every major human rights instrument ever signed by the British government.

### 2. Continued Adherence to the Colonial Laws Validity Act

¶30 To those who feel very strongly about the protection of human rights, several aspects of the court’s reasoning may be quite troubling. The continued support given to legislation such as the CLVA is a prominent example. The Act is a remnant of British imperialism that, some would argue, has no place in this day and age. It was enacted in 1865,<sup>80</sup> and basically provides that colonial laws should only be voided to the extent that they are repugnant to an Act of the British parliament that is specifically applicable to that colony.<sup>81</sup> It also stood for the rule that colonial laws should not be voided on the grounds of repugnancy to the law of England.<sup>82</sup>

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<sup>77</sup> This is because every such standard had to be judged from the perspective of the territory’s population – making it impossible to imagine how removing the inhabitants from the place they called home could be an example of “good government” (other than if there had been some disaster that rendered the land uninhabitable). *Id.* at 1104.

<sup>78</sup> *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, [2001] Q.B. 1067, 1106.

<sup>79</sup> *Id.* at 1107.

<sup>80</sup> After “considerable difficulties had been caused by the over-insistence of a colonial judge in South Australia that colonial legislative acts must not be repugnant to English law... [The] Act was intended to and did overcome the difficulties.” *Id.* at 1098, citing to Sir Kenneth Wheare, *The Statute of Westminster and Dominion Status*, 4<sup>th</sup> Ed. (1949), pp. 75, 76, 77.

<sup>81</sup> Colonial Laws Validity Act of 1865, 28 & 29 Vict. c 63, § 2 (1865)(U.K.).

<sup>82</sup> *Id.* at § 3.

¶31 The court essentially reaffirmed the ability of colonial governments to ignore the rights guaranteed by either “the common law or English traditions of fair treatment.”<sup>83</sup> That the English court felt obliged to grant such a law as the CLVA so much deference, should be concerning to anyone with even a fleeting interest in human rights. Of course, part of the logic behind the court’s conclusion was that fundamental rights would normally be protected by a colony’s own written constitution. However, the justices stuck to their conclusion, despite acknowledging that the BIOT had adopted no such document. After having (quite rightly) accused the respondents of “an abject surrender of substance to form” on the question of jurisdiction, the court unfortunately seemed to engage in similar behavior on this issue.<sup>84</sup>

¶32 One explanation for the court’s conclusion may have been the feeling that it was unnecessary to upset settled law when the Ordinance could be invalidated on other grounds. Clearly, the judges were unwilling to dismantle centuries of colonial jurisprudence – most notably the fiction according to which the Crown is “divisible”– despite the fact that this allowed colonial legislation to violate basic human rights. Another explanation may have been the desire to protect the administration of the remaining British territories, while also shielding the U.K. from the potential liability represented by thousands of former colonial subjects.

¶33 Whatever the reasons behind it, continued adherence to the laws such as the CLVA has the potential to be disastrous to the protection of human rights – allowing the British government to accept very little responsibility for the inhumane laws passed in its colonies. The court’s decision would have been improved immensely, had it discredited the CLVA and other laws like it.<sup>85</sup> The judges could have done so by citing to the numerous potential conflicts with other Acts of Parliament (aimed at protecting all British citizens irrespective of where they live) and to the contradictory commitments made by the British government on the international level.<sup>86</sup>

### 3. The Legitimacy of the BIOT Order

¶34 The court accorded relief to the appellant by invalidating §4 of the 1971 Ordinance, while leaving the BIOT Order intact. Another, more intellectually honest, way of coming to the same conclusion could have been to hold that no matter how it was worded, the BIOT Order could never authorize such a violation of the Chagossians’ rights. This issue was skirted around many times in the opinion, but never addressed with any finality.<sup>87</sup> Both Lord Justice Laws and Justice Gibbs agreed that the BIOT Order was made under the powers of the royal prerogative.<sup>88</sup> The Court then came very close to accepting the applicant’s argument that this prerogative did not permit the Chagossians’ exile.<sup>89</sup> But

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<sup>83</sup> *Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, [2001] Q.B. 1067, 1103.

<sup>84</sup> *Id.* at 1092.

<sup>85</sup> I say “discredit,” because I recognize how hard it would be for the Court to repeal the Act completely.

<sup>86</sup> For example, the ratification of instruments such as the UDHR and the ICCPR

<sup>87</sup> *See Regina v. Secretary of State for the Foreign and Commonwealth Office, Ex parte Bancoult*, [2001] Q.B. 1067, 1105-1106.

<sup>88</sup> *Id.* at 1106.

<sup>89</sup> *Id.* at 1105 (“... I entertain considerable doubt whether the prerogative power extends so far as to permit the Queen in Council to exile her subjects from the territory to which they belong”).

despite having uncovered sufficient authority to do so,<sup>90</sup> and despite confidently declaring in another portion of the opinion that “the King is and shall be below the law,”<sup>91</sup> it shied away at the last moment.

¶35 Yet another argument that the court did not entertain was that the BIOT Order might be illegal, for violating U.N. procedure and policy. It is understandable that the English court did not want to act as the enforcer of U.N. agreements, especially when the organization itself had made no formal complaints. Nevertheless, the court could have found that the violation of an international agreement approved by Parliament (in this case, the U.N. Charter<sup>92</sup>) and the misrepresentation involved in creating the law (to both the public and to the international community) were sufficient to put the validity of the Order in doubt.

¶36 As will be seen later on in this Note, the High Court’s failure to rule on the legality of the BIOT Order itself has had a devastating (but somewhat predictable) effect on the Chagossians’ victory in *Bancoult*.

#### 4. *Bancoult* as a Principle of Customary International Law

¶37 Despite the High Court’s reluctance to confront its government’s actions head on, it could not turn a blind eye on the evidence; which pointed to British defense interests being put ahead of the basic human rights of its citizens. Hence, it ruled in favor of the applicant. The fact that the British government decided to accept the Court’s decision without appealing might say something about how just the outcome was. Perhaps part of the reason why the decision feels so “just” is that it does more than simply invalidate an ordinance. Reading between the lines, the decision seems to be a roundabout way of granting redress for human rights violations, without explicitly accusing the British government of such infringements.

¶38 According to scholars such as Myres McDougal and Norbert Schlei, International law is not static or absolute, but rather “a living, growing, customary law, grounded in the claims, practices and sanctioning expectations of nation-states...”<sup>93</sup> In their seminal article, “*The Hydrogen Bomb Tests in Perspective Lawful Measures for Security*,” they argued that the 1954 Nuclear tests conducted by the U.S. in the Marshall Islands were lawful under the laws of the sea and thus international law.<sup>94</sup> Their conclusions were essentially based upon a test of reasonableness which drew liberally from the doctrine of self-defense.<sup>95</sup> The article caused shock-waves of its own amongst international legal scholars of the time – both because of its unilateral defense of actions that seemed to

<sup>90</sup> *Id.* (“I have in mind those passages in Blackstone’s Commentaries, vol. 1, p 137 and Chitty’s treatise, pp 18,21, and the argument of Dr. Plender in International Migration Law, ch 4, p 133...”).

<sup>91</sup> *Id.* at 1095 (citing Pollock & Maitland, *The History of English Law*, 2<sup>nd</sup> Ed. Vol. 1, 173 (1923)).

<sup>92</sup> Article 73 requires (amongst other things) that the interests of the inhabitants of non-self-governing territories be “paramount.” The governing nation has the obligation to ensure the population’s “just treatment, and their protection against abuses.” The nation is also required to “develop self-government” amongst the people living in such a territory.

<sup>93</sup> See Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 648-663, 682-688 (1955) in INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE, W. Michael Reisman et al. 39 (Foundation Press, 2004) (specifically referring to the laws of the sea).

<sup>94</sup> *Id.* at 37-44.

<sup>95</sup> *Id.*

violate U.N. policy, and because of its ultra-flexible interpretation of international law. The authors saw sources of international law as lying not only in “international conventions” that established expressly recognized rules, but also in “international custom, as evidence of a general practice accepted as law....”<sup>96</sup> They claimed that State action sometimes spoke even louder than the words embodied in legal texts. Sure enough, when the Soviet Union conducted its own hydrogen bomb tests over the Pacific, several commentators noticed this very effect on international customary law.<sup>97</sup>

¶39 Though McDougal and Schlei would probably shudder at this application of their theory, scholars, such as Anthony D’Amato have suggested that other forms of State action can also be seen to create legal precedent in this way.<sup>98</sup> For example, during the same 1954 U.S. nuclear tests, some unfortunate Japanese fishermen wandered into the “cordoned off” zone and were irradiated.<sup>99</sup> Under the table, the U.S. gave the fishermen millions of dollars, labeling it a “gift” and refusing to accept any liability.<sup>100</sup> Commentators such as D’Amato argue that although there was never even an opinion issued in that case, such an action by the U.S. government established that they were, in fact liable.<sup>101</sup>

¶40 Using similar logic, this Note argues that the British *Bancoult* case can be used as an international precedent against forced relocation. As will be discussed in more detail below, significant compensation has been paid to the Chagossians by the British government over the years; although not in connection with a court ruling of liability.<sup>102</sup> *Bancoult* is the ruling that was missing in order to connect the payments made by the U.K. to specific acts. Hence, one can make the argument that States which infringe this customary rule should be liable for monetary damages.

### C. Repercussions of the British *Bancoult* Ruling

#### 1. Lack of Practical Results

¶41 The practical results of the Chagossians’ victory in *Bancoult* have unfortunately been few and far between. Despite deciding to accept the court’s decision, the British government was only prepared to let people return to the Chagos Archipelago’s outer islands (not Diego Garcia), due to “security considerations.”<sup>103</sup> This presented an

<sup>96</sup> *Id.* at 40.

<sup>97</sup> Falk, for e.g. wrote that the nuclear testing “created permissive precedents that are very difficult to repudiate.” Richard A. Falk, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 452 (Princeton University Press, 1970).

<sup>98</sup> Notes from Anthony D’Amato’s Spring 2005 International Law Class at the Northwestern University School of Law, Chicago, IL.

<sup>99</sup> See the statement of Lewis L. Strauss, Chairman of the Atomic Energy Commission, regarding the miscalculation of the test’s effects, *N.Y. Times*, Apr. 1, 1954, at 20.

<sup>100</sup> See 32 Dept. St. Bull. 90 (1955) (reprinting the note of Jan. 4, 1955, from U.S. Ambassador John M. Allison to Japanese Deputy Prime Minister and Foreign Minister Mamoru Shigemitsu).

<sup>101</sup> D’Amato, *supra* note 98.

<sup>102</sup> In 1973, the British government paid the sum of £650,000 to the Mauritian government, which in turn distributed it amongst the Chagossians. In 1982, the sum of £4 million was disbursed in a similar fashion. See *Chagos Islanders v. The Attorney General, Her Majesty’s British Indian Ocean Territory Commissioner*, [2003] EWHC 2222, §§ 51-80.

<sup>103</sup> Ragini Kistnasamy & Lindsay Collen, *Sityasyon Chagosyen Zordi*, in *DIEGO GARCIA IN TIMES OF GLOBALIZATION* 135 (Ledikasyon pu Travayer, 2002) (citing the Q&A session in the British Parliament on 13 November, 2000).

immediate problem, for other than Diego Garcia, the islands have been uninhabited for 30 years. They therefore lack all basic amenities and infrastructure. With this in mind, the U.K. parliament commissioned a “feasibility study” on the subject of the Chagossians’ return, but progress was slow.<sup>104</sup> A preliminary feasibility study was produced on 20 June 2000; and following the collection of data, a more complete report was published on 10 July 2002.<sup>105</sup> It concluded that while resettlement on a short-term subsistence basis was possible, long term resettlement would be “precarious and costly.”<sup>106</sup> The Chagossians decided that something more needed to be done in order to prevent their struggle from stalling indefinitely.

## 2. The Chagos Islanders Case for Compensation

¶42 A group of Chagos Islanders provided the necessary impetus by filing a class action tort suit in the British High Court of Justice (Queen’s Bench Division), in April 2002.<sup>107</sup> This presented them with the opportunity to finally have their day in court and to give oral evidence about the circumstances of their removal.<sup>108</sup> In essence, the claimants sought “(i) compensation and restoration of their property rights, in respect to their unlawful removal or exclusion from the Chagos islands... and, (ii) declarations of their entitlement to return to all Chagos islands and to measures facilitating their return.”<sup>109</sup> They alleged that the Attorney General and the BIOT Commissioner had committed six separate wrongs: misfeasance in public office, unlawful exile, negligence, infringement of property rights, infringement of rights under the Mauritian constitution and deceit.<sup>110</sup>

¶43 The defendants sought summary judgment, arguing that there were no reasonable grounds for the claims. They contended that the claimants did not satisfy the requirements of the pleaded cause of action, pleaded causes that were unknown to English law, or relied on the laws of Mauritius, which were irrelevant to the BIOT. The defendants also argued that the claimants were barred by the statute of limitations and that their claims constituted an abuse of process.<sup>111</sup>

¶44 The abuse of process argument especially, proved to be a major stumbling block to the Chagossians’ case. The argument arose because of the following facts: in 1982, a settlement agreement was signed between representatives of the Chagossians and the U.K. The impetus for this agreement came from a case filed in the High Court in London by a Chagossian by the name of Michel Vencatessen, in 1975. He had alleged damages in connection with his departure from Diego Garcia, the voyage and subsequent events. The action led to the recognition that the Chagossians needed to be offered some sort of

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<sup>104</sup> *Id.*

<sup>105</sup> *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 1038 Admin. 4093, § 84.

<sup>106</sup> *Id.*

<sup>107</sup> The claimants were split into two sub-groups: those residing in Mauritius and Agalega (represented by the Chagos Refugees Group, chaired by Olivier Bancoult) and those residing in the Seychelles (represented by the Chagos Social Committee, chaired by Jeanette Alexis). See *Chagos Islanders*, [2003] EWHC 2222, § 99.

<sup>108</sup> *Id.* at §§ 164-213.

<sup>109</sup> *Id.* at § 98.

<sup>110</sup> *Id.* at § 102.

<sup>111</sup> *Chagos Islanders v. The Attorney General, Her Majesty's British Indian Ocean territory Commissioner*, [2003] EWHC 2222, § 124.

group compensation. Several organizations were formed (in Mauritius) to represent the interests of the Chagossians, which led to a lot of confusion and a very slow negotiation process. The British government made several settlement offers (starting with £500,000 in 1978) before eventually agreeing to pay the sum of £4 million (in addition to £650,000 that had already paid to the Chagossians back in 1977-1978). This figure was accepted by the Chagossians representatives (the Ilois Trust Fund Board) and the Mauritian government. The understanding, at least on the British side, was that this payment would settle all the Chagossians' claims both present and future and Mr. Vencatessen withdrew his damages suit.<sup>112</sup>

¶45 Hence, the Chagos Islanders case was the first time that a court was called upon to rule on the issue of compensation. In late 2003, the British High Court handed down its judgment. In an extensive opinion, Mr. Justice Ouseley retraced the entire history of the litigation, analyzing 15 principal issues and eventually finding against the claimants on every single one. The court held that despite the unlawfulness of the 1971 Ordinance, there was no prospect of the claimants showing that the defendants had been reckless in enacting it, or that they knew it was unlawful during enforcement.<sup>113</sup> The court also ruled that there was neither an arguable tort of unlawful exile, nor a duty of care to take reasonable steps for the well-being of the claimants.<sup>114</sup> It held that the claimants had no remaining property interests, for any such rights had either been acquired by the Crown for a public purpose or extinguished by a later Ordinance.<sup>115</sup> The Constitution of Mauritius was found to be inapplicable to any part of the BIOT and therefore powerless to override BIOT legislation.<sup>116</sup> The court also remained unconvinced that the elements of the tort of deceit could ever be proven.<sup>117</sup> On top of everything else, the judges believed that the claimants had no prospects of recovery in view of the Limitation Act of 1980 (equivalent to a U.S. statute of limitations), and the fact that the proceedings involved an abuse of process for at least some of the claimants.<sup>118</sup> Finally, the court held that the questions raised by the defendant did not specifically cover the right to return to Diego Garcia, the right to receive assistance in doing so, or the right to achieve a certain lifestyle there.<sup>119</sup> Hence, the defendants' application for summary judgment was granted.<sup>120</sup>

¶46 The result of this case, though discouraging for the Chagossians, does not adversely affect the theoretical argument that the British *Bancoult* case could be used as a principle of international customary law. This is because the *Chagos Islanders* case was conducted completely within the sphere of British tort law. Though the Court did not accept the existence of a tort of unlawful exile, it did not rule that forced displacement

<sup>112</sup> *Id.* at §§ 54-56, 60-69.

<sup>113</sup> *Id.* at §§ 738-39.

<sup>114</sup> *Id.* at § 740-41.

<sup>115</sup> Although the Court did not rule out that the claimants may well have had some property interests prior to 1967. *Id.* at § 742.

<sup>116</sup> *Id.* at § 743.

<sup>117</sup> For even though the defendants had arguably made false statements, it could not be proven that they had been made so that the claimants would act upon them to their detriment. *Chagos Islanders v. The Attorney General, Her Majesty's British Indian Ocean territory Commissioner*, [2003] EWHC 2222, § 744.

<sup>118</sup> The Court found that some of them had knowingly signed away their right to litigate on these issues in 1982. *Id.* at §§ 745-746.

<sup>119</sup> Such rights were found to be unarguable on the basis pleaded. *Id.* at § 747.

<sup>120</sup> *Id.* at § 748.

was legal. Nor does the result affect the contention that compensation is required for a finding of forced displacement, because as previously mentioned, one of the principal reasons why the tort action failed was that compensation had already been paid by the British government.

### 3. The Second British *Bancoult* Case: An End of the Legal Battle in the U.K?

¶47 The *Chagos Islanders* case was heard on appeal in July of 2004. Unfortunately for the claimants, the judgment of the lower court was upheld, bringing “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.”<sup>121</sup> However, this statement was not an accurate prediction, for the state’s subsequent actions were to cause at least one more lawsuit in the U.K.

¶48 The appellate court’s decision in the *Chagos Islanders* case came about a month after an equally large (if not larger) setback. On 10 June 2004, Her Majesty in Council promulgated the British Indian Ocean Territory Order 2004 (“Constitution Order”). The similarities to the 1971 Ordinance were striking. It declared that “no person has the right of abode in BIOT nor the right without authorisation [sic] to enter and remain there.”<sup>122</sup> The Constitution Order also made it an offence (punishable by three years of imprisonment) to be present in the territory without a permit.<sup>123</sup>

¶49 Readers will recall that in the original *Bancoult* case the High Court shied away (at the last minute) from invalidating the BIOT Order and from holding that the Royal prerogative did not include the right to exile the Queen’s subjects from the territory to which they belonged. Hence, this new Order was consistent with prior caselaw, yet it was able to nullify any concrete gains made by the original *Bancoult* case. The Chagossians were thus exiled once again; and since this time, they had been banished by an actual Order from the Queen of England (as opposed to an Ordinance issued by the BIOT Commissioner) it was presumed to be legal, pursuant to the Royal prerogative.<sup>124</sup>

¶50 The Constitution Order was challenged by Mr. Bancoult in 2006 in front of the Queen’s Bench Division (Divisional Court).<sup>125</sup> He argued that “the making of the impugned Orders was unjustified and irrational in June 2004 given that the Foreign Secretary had stated four years previously that the Chagossians would be allowed to return to the outer islands consistently with the UK’s Treaty obligations. Nothing has been put before the court to justify the alteration of that position in the intervening years.”<sup>126</sup> The court liked this argument, seeing “no good public law reason why [it could not] assess irrationality in a case of this kind....”<sup>127</sup> Furthermore, it decided that irrationality had to be judged by reference to the interests of BIOT as opposed to those of

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<sup>121</sup> *Chagos Islanders v. The Attorney General, Her Majesty's British Indian Ocean territory Commissioner*, [2004] EWCA Civ. 997, § 54.

<sup>122</sup> *R (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2006] EWHC 1038 Admin. 4093, § 3.

<sup>123</sup> *Id.* at § 9.

<sup>124</sup> *Id.* at § 5.

<sup>125</sup> *See generally Id.*

<sup>126</sup> *Id.* at § 103.

<sup>127</sup> *Id.* at § 118.

the U.K.<sup>128</sup> Those interests “must be or must primarily be those whose right of abode and unrestricted right to enter and remain was being in effect removed.”<sup>129</sup>

¶51 Amongst other things, the government relied (once again) on the CLVA as a defense, submitting that “it defeats any challenge to the Order.”<sup>130</sup> But the court disagreed. It found that according to the modern approach to the judicial review of executive action, the Constitution Order could be challenged.<sup>131</sup> The CLVA did not preclude Bancoult’s public law irrationality challenge, since it “is not based on repugnancy to the principles of English law but on vires.”<sup>132</sup> Hence, the Chagossians regained their right (in principle) to return home, which was essence of the original *Bancoult* ruling.

¶52 It is also worthwhile to briefly note that Mr. Bancoult’s counsel once again put forward a number of reasons why the order should be invalidated based on the ECHR and customary international law.<sup>133</sup> But the English court did not find it necessary to address these issues, given its ultimate conclusion.<sup>134</sup> However, given this conclusion, the second *Bancoult* case only reinforces our theory with respect to the creation of a customary rule of international law. Once again, reading between the lines of the English Court’s decision, we discover embarrassment (revulsion even) as to its government’s actions. Though not mentioned explicitly in the opinion, it is possible to view the result as a judgment against the British government for the violation of international human rights.

¶53 Though the above rulings may indeed be the end of the road for the Chagossians’ in terms of litigation against the U.K. in its national courts, by the time the opinions were issued, the islanders had already turned their sights elsewhere. They had realized that several key issues could only be resolved in the U.S. For example, even if they have the right to return to the Chagos, now that the plantations are gone, they have no employment prospects – other than to work on the military base. However, the facility (run by Halliburton) has never accepted job applications from Chagossians and a change in policy has not been forthcoming. If the base were to be decommissioned, other avenues could be explored, such as a return to agriculture or even a shift to tourism. The next logical step for the Chagossians was therefore to file suit in the United States.

### III. THE AMERICAN CASE

#### A. *Background and Procedural History*

##### 1. Introduction

¶54 In 2001, a group of Chagossians filed a civil suit for damages in the U.S. In December of 2004, the case was dismissed by the District Court for the District of Columbia on several grounds, but most notably that the issue was a “political question” and therefore non-justiciable.<sup>135</sup> In April of 2006 the case’s dismissal was affirmed on

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at § 165.

<sup>131</sup> *Id.* at §§ 144, 168-69.

<sup>132</sup> *Id.* at §§ 168-69.

<sup>133</sup> *Id.* at § 107.

<sup>134</sup> *Id.* at § 108.

<sup>135</sup> *Bancoult et al. v. McNamara et al.*, 370 F.Supp.2d 1, 3 (D.D.C. 2004).

appeal.<sup>136</sup> This case presented the Chagossians with a whole different set of issues and in some ways was even more discouraging than the failed British tort suit, for here they were not even allowed to present their substantive claims. However, the silver lining to this cloud may well be that because there was no jurisdiction, the gains of the *British Bancoult* cases (in terms of it potentially being a principle of customary international law) remain unaltered. All we are left with is an American court that refused to apply international law domestically.

## 2. The Parties and Their Arguments

¶55 Though Mr. Bancoult was again at the forefront of the Chagossian cause, the plaintiffs in this action actually included a total of three individuals and two organizations. One of the individual plaintiffs was Mrs. Mein, a native Chagossian who claimed that in 1971 and 1972, persons acting on behalf of the U.S. and British governments forced her family to board a vessel from Diego Garcia to Peros Banhos and, later to the Seychelles.<sup>137</sup> She alleged that the harsh conditions she was subjected to during this whole process caused her to miscarry. The other individual plaintiff was Mrs. France-Charlot, a first generation descendant of Chagossians who were originally from Salomon Island. She alleged that as a result of the poverty her family suffered in Mauritius, she suffered social, cultural and economic oppression.<sup>138</sup> Mr. Bancoult had similar allegations. Mr. Bancoult also claimed that he had also had several job applications rejected from the Diego Garcia base.

¶56 The original complaint was filed in December 2001 against the U.S., De Chazal Du Mée & Co. (“DCDM”),<sup>139</sup> various current and former officials of the Departments of State and Defense, and the Halliburton Corporation.<sup>140</sup> The plaintiffs alleged forced relocation, torture, racial discrimination, cruel, inhuman, and degrading treatment, genocide, intentional infliction of emotional distress, negligence and trespass.<sup>141</sup> The plaintiffs also moved for a preliminary injunction to bar the U.S. and DCDM from engaging in allegedly discriminatory employment policies.<sup>142</sup> In response to a court order directing them to clarify their claims,<sup>143</sup> the plaintiffs filed a supplemental memorandum in which they stated that their claims were based on customary international law and the Alien Tort Claims Act (ATCA).<sup>144</sup> They made it clear that they were seeking declaratory relief, injunctive relief and restitution. In this memorandum, the plaintiffs also alleged that the Administrative Procedure Act (APA) provides a waiver of sovereign immunity for cases

<sup>136</sup> *Bancoult et al. v. McNamara et al.*, 445 F.3d 427, 429 (D.C. Cir. 2006).

<sup>137</sup> Complaint at ¶ 31, *Bancoult et al. v. McNamara et al.*, 227 F.Supp.2d 144 (D.D.C. 2002) (No. 01-2629 RMU).

<sup>138</sup> *Id.* at ¶ 33.

<sup>139</sup> A Mauritian Corporation

<sup>140</sup> *Bancoult et al. v. McNamara et al.*, 227 F.Supp.2d 144, 146 (D.D.C. 2002).

<sup>141</sup> Complaint at ¶¶ 59-101, *Bancoult et al. v. McNamara et al.*, 227 F.Supp.2d 144 (D.D.C. 2002) (No. 01-2629 RMU).

<sup>142</sup> For denying the Chagossians employment opportunities on the Diego Garcia base. *Bancoult*, F.Supp.2d at 146.

<sup>143</sup> See *Bancoult et al. v. McNamara et al.*, 227 F.Supp.2d 144, 148 (D.D.C. 2002).

<sup>144</sup> The Alien Tort Claims Act of 1789, 28 U.S.C. 85 § 1350 (1789).

such as this; and furthermore that no waiver of sovereign immunity was necessary for the violation of *jus cogens* norms.<sup>145</sup>

¶57 The defendants all responded by filing motions to dismiss. The U.S. argued that the court lacked subject-matter jurisdiction because of the doctrines of sovereign immunity and political question, while also claiming that the plaintiffs lacked standing.<sup>146</sup> DCDM on the other hand, contended that they were ineffectively served with summons, and that the plaintiffs had failed to allege either a statutory or a constitutional basis for personal jurisdiction.<sup>147</sup> The individual defendants moved to dismiss based on the statutory immunity granted to federal officers under the Federal Employee Liability Reform and Tort Compensation Act (the “Westfall Act”),<sup>148</sup> a lack of subject matter jurisdiction based on the political question doctrine, and statute of limitation grounds.<sup>149</sup>

### 3. Initial Court Rulings

¶58 In September of 2002, the court issued a memorandum opinion with three principal holdings. It ordered further briefing on the U.S.’s motion to dismiss because “neither the complaint nor the plaintiffs’ subsequent submissions provided sufficient clarity about the pending claims to allow [the] court to determine [the existence of] subject matter jurisdiction.”<sup>150</sup> It granted DCDM’s motion to dismiss<sup>151</sup> because the plaintiffs failed to file a memorandum in opposition.<sup>152</sup> It also denied the plaintiffs’ motion for a preliminary injunction because it concluded that they did not demonstrate a substantial likelihood of success on the merits.<sup>153</sup> This in turn was based on three arguments. First was the U.S.’s subject-matter jurisdiction concerns, *i.e.*, that there is no such jurisdiction without a clear waiver of sovereign immunity (which the U.S. did not grant). Second was the contention that the plaintiffs could not satisfy certain elements of standing (more specifically the conditions of causation and redressability), because the U.S. did not have the power to grant or deny access to the Chagos. Third was the argument that the issues presented by the case constituted a non-justiciable political question.

¶59 From November of 2002 until December of 2004, the parties and the court engaged in a procedural ballet at the end of which only two defendants remained.<sup>154</sup> The final

<sup>145</sup> Bancoult et al. v. McNamara et al., 370 F.Supp.2d 1, 5 (D.D.C. 2004).

<sup>146</sup> Defendant U.S.’s Motion to dismiss at 1-2, Bancoult et al. v. McNamara et al., 227 F.Supp.2d 144 (D.D.C. 2002) (No. 01-2629 RMU).

<sup>147</sup> Defendant DCDM’s Motion to dismiss at 5, 23-24, Bancoult et al. v. McNamara et al., 227 F.Supp.2d 144 (D.D.C. 2002) (No. 01-2629 RMU).

<sup>148</sup> The Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. §§2671-2680.

<sup>149</sup> *Bancoult*, 370 F.Supp.2d at 3.

<sup>150</sup> Bancoult et al. v. McNamara et al., 227 F.Supp.2d 144, 148 (D.D.C. 2002).

<sup>151</sup> The motion argued that: (1) the plaintiffs’ attempted service in D.C. was ineffective because it had no “office, officer, managing agent, general agent or other agent authorized to receive process” there; and (2) the efforts made at service in Mauritius were ineffective because the plaintiffs had failed to deliver copy of the summons along with the complaint. *Id.* at 150 (citing Fed.R.Civ.P. 4(h)).

<sup>152</sup> Instead they filed a motion for leave to conduct discovery and for enlargement of time to respond – neither of which satisfied the requirements of Local Civil Rule 7.1(b). *Id.* at 150.

<sup>153</sup> *Id.* at 148-53.

<sup>154</sup> The plaintiffs moved for leave to amend their complaint, to reinstate DCDM as a defendant and to add Brown & Root (a subsidiary of Halliburton). Bancoult et al. v. McNamara et al., 214 F.R.D. 5, 7 (D.D.C. 2003). The court granted leave to amend the complaint, and to add Brown & Root, however, it denied the reinstatement of DCDM, for lack of personal jurisdiction. *Id.* at 8. Next, the plaintiffs moved to

noteworthy procedural event happened in January of 2004, when the plaintiffs moved to stay the case, pending the Supreme Court decision in *Sosa v. Alvarez-Machain*, 542 U.S. 296 (2004).<sup>155</sup> With the consent of both parties, this motion was granted. After the *Sosa* decision, the stay was lifted and the parties were directed to submit further briefing on the impact of the Supreme Court case.

### B. The Court's Holdings

¶60 All remaining motions were ruled upon by Judge Urbina, in December of 2004. Because of the plaintiffs' failure to rebut the Attorney General's certification that the individual defendants had acted within the scope of their employment, the court held that they were immune to suit under the Westfall Act<sup>156</sup> and substituted the U.S. in their place, making it the sole remaining defendant. The court then granted the defendant's motion to dismiss, because it agreed that the suit raised nonjusticiable political questions that precluded its review.<sup>157</sup>

¶61 In this case, the Attorney General's certification that the individuals had indeed acted within the scope of their employment was given *prima facie* effect.<sup>158</sup> In other words, it became the plaintiffs' burden to prove by a preponderance of the evidence that this was not true. The plaintiffs argued that violations of *jus cogens* norms and fundamental human rights could not possibly be within the scope of any employment.<sup>159</sup> However, the court did not agree with this characterization, concluding that the individuals were only acting to further national (not personal) interests.<sup>160</sup> It was their job to establish a military base on Diego Garcia, hence everything they did within the scope of these orders was in an official capacity.<sup>161</sup>

¶62 The plaintiffs then argued that their claims, which had been brought under the Alien Tort Claims Act ("ATCA")<sup>162</sup> and international law, fell within an exception to the Westfall Act.<sup>163</sup> This exception saved those actions brought "for a violation of a Statute of the United States" that authorizes such actions against an individual.<sup>164</sup> The plaintiffs contended that the individual defendants had violated the ATCA by committing torts "in

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permit discovery and to enlarge time, but this was also denied. The plaintiffs subsequently moved to dismiss Halliburton and Brown & Root because of parallel litigation in the U.K. and this motion was granted. The plaintiffs then filed a second motion for a preliminary injunction, seeking to enjoin the U.S. from denying the plaintiffs' request for a limited visit to the Chagos.

<sup>155</sup> This case concerned the utilization of international norms as the basis of claims in federal court. More specifically, it sought to clarify the exact scope of the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.* ("FTCA") and the Alien Tort Statute ("ATS").

<sup>156</sup> The Westfall Act generally confers immunity upon all federal officers and employees for their "negligent or wrongful act[s] or omission[s]" while acting within the scope of their office or employment. Upon certification by the Attorney General that these conditions are met, the U.S. is substituted as the defendant in the action in question. *Bancoult et al. v. McNamara et al.*, 370 F.Supp.2d 1, 6 (D.D.C. 2004) (citing the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. §§ 2671-2680).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 7.

<sup>159</sup> *Id.* at 7-8.

<sup>160</sup> *Id.* at 8.

<sup>161</sup> *Id.*

<sup>162</sup> 28 U.S.C. § 1350.

<sup>163</sup> *Bancoult*, 370 F.Supp.2d at 9.

<sup>164</sup> *Id.* (citing 28 U.S.C. § 2679(b)(2)(B)).

violation of the law of nations.”<sup>165</sup> The court did not agree, finding that the ATCA was “strictly a jurisdictional statute available to enforce a small number of international norms.”<sup>166</sup> Interpreting the statute in such a way as to trigger the Westfall Act’s exception would mean that the ATCA confers substantive rights and imposes obligations or duties, which, according to the court was not the case.<sup>167</sup> The plaintiffs then argued that their claims fell within the exception because “violations of international law ‘arise under’ the laws of the United States for purposes of jurisdiction under 28 U.S.C. 1331.”<sup>168</sup> In other words, the plaintiffs argued that their claims presented a federal question since “federal common law incorporates international law.”<sup>169</sup> However, the court did not accept this argument, holding that the Westfall Act is explicit in allowing an exception only for violations of a statute or the U.S. Constitution – not federal common law or international law. Hence, the court granted the individual defendants’ motion to dismiss.

¶63 Once the federal employees had been removed from the case, the sole remedy available was to pursue an action against the U.S. under the FTCA.<sup>170</sup> The FCTA “grants federal district courts jurisdiction over claims arising from certain torts committed by federal employees in the scope of their employment, and waives the government’s sovereign immunity from such claims.”<sup>171</sup> However, it also bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.<sup>172</sup> The U.S. claimed that the plaintiffs had failed to do so and should therefore be barred from bringing suit.<sup>173</sup> The plaintiffs found themselves in a bind, having initially conceded that they had not exhausted all administrative remedies. Though they subsequently tried to retract the statement,<sup>174</sup> the court sided with the defendant, holding that there was no waiver of immunity under the FTCA.<sup>175</sup>

¶64 Though the case was technically resolved at this point, the court nevertheless turned its attention to the question of subject matter jurisdiction, which was raised by the defendant’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). The basis for the defendant’s motion was the political question doctrine. This doctrine bars judicial review when there are “controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”<sup>176</sup>

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<sup>165</sup> Bancoult et al. v. McNamara et al., 370 F.Supp.2d 1, 9 (D.D.C. 2004) (citing the Plaintiff’s Opposition to the Individual Defendants’ Motion to Dismiss, at 12).

<sup>166</sup> *Id.* at 9-10 (citing to *Sosa*, 124 S.Ct. at 2755, 2764).

<sup>167</sup> *Id.* at 10.

<sup>168</sup> *Id.* (citing the Plaintiff’s Opposition to the Individual Defendants’ Motion to Dismiss, at 14).

<sup>169</sup> *Id.* (citing to the Plaintiff’s Opposition to the Individual Defendants’ Motion to Dismiss, at 15).

<sup>170</sup> *Id.* at 10 (referring to 28 U.S.C. §§ 1346, 2679).

<sup>171</sup> *Id.* (citing to *Sloan v. Dep’t of Housing and Urban Dev.*, 236 F.3d 756, 759 (D.C. Cir. 2001)).

<sup>172</sup> *Id.* (referring to *McNeil v. United States*, 508 U.S. 106, 113 (1993)). Exhausting one’s administrative remedies involves presenting the appropriate federal agency with a claim describing the alleged injury with particularity and setting forth a “sum certain” of damages, and waiting for the agency to (1) deny the claim in writing or (2) fail to provide a final disposition within six months. *Bancoult et al. v. McNamara et al.*, 370 F.Supp.2d 1, 10-11 (D.D.C. 2004) (citing the Federal Tort Claims Act, 28 U.S.C. § 2675(a)).

<sup>173</sup> *Id.* at 11.

<sup>174</sup> By claiming that the administrative remedies had been exhausted when the U.S. filed its motion to dismiss.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

¶65 To determine whether there was a political question, the court considered the six criteria laid out in *Baker v. Carr*, 369 U.S. 186, 217 (1962).<sup>177</sup> These criteria are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding it without an initial policy determination of a nonjudicial kind; or (4) the impossibility of a court's undertaking independent resolution without expressing a lack of respect to other branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>178</sup> In *Baker*, the Supreme Court held that if any of these criteria were found to be met, then the case would be nonjusticiable.<sup>179</sup>

¶66 The plaintiffs argued that “they did not seek to adjudicate the lawfulness or political wisdom of the United States’ decision to negotiate with the United Kingdom, nor to establish a military base on Diego Garcia” but rather to assess the legality of the policy’s implementation.<sup>180</sup> But the court disagreed. According to Judge Urbina, the plaintiffs were really asking the court to assess the reasonableness of the Executive Branch’s decision to depopulate the Chagos islands and ensure that the military base there remains off-limits to non-authorized civilians.<sup>181</sup> The court concluded that since the matter involved the U.S. government’s entry into (and execution of) an international treaty, the political question doctrine precluded review.<sup>182</sup> The court reasoned that “the Executive and Legislative Branches’ conduct of military operations and foreign policy complained of in this case, which raise national security concerns” are the exclusive province of the President and Congress, and are therefore non-justiciable.<sup>183</sup>

¶67 With respect to *Baker*, the court believed that the second, third, fifth and sixth criteria were met. In regards to moving beyond the areas of judicial expertise, the court reasoned that “[n]either federal law nor customary international law provide standards by which the court can measure and balance the foreign policy considerations at play, such as the containment of the Soviet Union in the Indian Ocean thirty years ago... and the support of military operations in the Middle east [today].”<sup>184</sup> It added that adjudication of the case would demand it to “second guess the initial and continuing decisions of the executive and legislative branches....”<sup>185</sup> Concerning policy determinations reserved for nonjudicial decision-makers, the court ruled that the plaintiffs were in effect asking it to “substitute its judgment for that of the political branches and determine the national defense needs of the U.S. military in the Indian Ocean.”<sup>186</sup> Regarding the necessary adherence to political decisions already made, the court found that the political branches “decided thirty years ago to build and expand their military operations on Diego Garcia,

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<sup>177</sup> *Id.* at 12-13 (referring to *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 13-14 (citing the Plaintiff’s Opposition to the Defendants’ Motion to Dismiss, at 10).

<sup>181</sup> *Bancoult et al. v. McNamara et al.*, 370 F.Supp.2d 1, 14 (D.D.C. 2004).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 15.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 15-16.

despite its impact on the population.”<sup>187</sup> Examination of the Congressional record also showed that both Congress and the Executive were well aware of the potential consequences of their actions.<sup>188</sup> The Court also found that the potential for embarrassment from multifarious pronouncements by various departments was also present for similar reasons. Accordingly, the court granted the defendant’s motion to dismiss the case.

### C. Analysis of the American Bancoult Case

¶68 As convinced one might be of the human rights violations involved in (and the shared responsibility of the U.S. government for) the Chagossians’ forced removal, it would be hard to fault the District of Columbia district court’s final conclusion (and hence its affirmance on appeal). However, this does not mean that the courts involved were acting in the best interests of justice. But as a district court judge bound both by Circuit and Supreme Court precedent, Mr. Urbina had very little wriggle-room. What is clear from this case is that the deck is (almost impossibly) stacked against foreign parties wishing to obtain relief against either the U.S. or its employees.

#### 1. What the Westfall Act and the FTCA Really Mean for International Plaintiffs

¶69 With respect to the potential liability of federal employees, the Westfall Act is a practically impenetrable shield, providing for the substitution of the U.S. in the place of individual defendants. The only two ways around it concern constitutional violations and statutory violations, coupled with explicit congressional authorization for individual tort liability.<sup>189</sup> However, this is not necessarily a bad thing – for after all it is nothing but a statutory reincarnation of the Anglo-Saxon theory of *respondeat superior* – modified slightly for the governmental context. What is truly troubling, however, is the way that U.S. laws and jurisprudence combine to allow the federal government to escape its responsibilities in the face of clear human rights violations.

¶70 The availability of the FTCA seems like a significant boon for international plaintiffs, but in practice, the exceptions to the Act’s applicability cripple it almost to the point of rendering it useless. The exhaustion of administrative remedies criterion, for example, seems fairly harmless – but in conjunction with an unsympathetic court, it can easily be transformed into a method for revoking FTCA’s waiver of sovereign immunity. The exception makes good theoretical sense, since the contrary would probably lead to inefficiency and might even undermine administrative agencies in general. However, there needs to be some kind of reality check. The D.C. court did not even mention the type of administrative remedies the plaintiffs should have sought before bringing suit. One can only hypothesize that it would have involved some sort of petition to a Department of Defense Agency for the right to return. Given that Chagossians were consistently denied the right to work on Diego Garcia, it is highly unlikely that they would have been allowed to return for any other reason. Judges from common law countries are famed for their “balancing tests,” and this would have been an ideal setting

<sup>187</sup> *Id.* at 16-17.

<sup>188</sup> *Id.* at 17.

<sup>189</sup> *Bancoult et al. v. McNamara et al.*, 370 F.Supp.2d 1, 9 (D.D.C. 2004)

for one. The interests of the plaintiffs should have been balanced against any administrative concerns (such as efficiency).

## 2. The Political Question Doctrine Obsolete?

¶71 In terms of the application of the political question doctrine, encapsulated by the directives in the seminal *Baker v. Carr*,<sup>190</sup> the D.C. district court cannot be faulted. Of course, the six criteria are so vast that anything could potentially be a “political question.” Considerations such as ensuring that the case’s resolution does not express a “lack of respect” for a coordinate branch of government – are overly broad to say the least. Through decisions such as *Baker*, the Supreme Court has granted lower courts far too much discretion, should they wish to simply remove the case from the docket.<sup>191</sup> Hence, an important issue is whether the Supreme Court should consider narrowing the *Baker* factors to create a more reasonable test. Another underlying question is whether there should even be a political question doctrine at all. Though proponents of the doctrine defend it on separation of powers grounds, critics argue that it is unsafe to leave some constitutional provisions solely to the political branches; for the Constitution itself was meant to insulate certain matters from the political process. Hence, leaving some provisions solely to elected officials may not be the wisest policy.

¶72 The D.C circuit’s affirmance of the district court’s ruling in *Bancoult* was a definite setback for the Chagossian cause.<sup>192</sup> In terms of obtaining monetary compensation from the U.S. government, through the U.S court system, the door may have been shut. Although the Chagossians are considering an appeal to the Supreme Court, their chances of being heard (let alone of succeeding) remain very slim. It would therefore be wise for the Chagossians to consider an alternate forum for their grievances; somewhere where there will not be as many obstacles to the airing of their substantive claims.

## IV. ESTABLISHING LIABILITY FOR THE VIOLATION OF INTERNATIONAL HUMAN RIGHTS

¶73 The result of the American *Bancoult* case proves that there is still a long way to go in terms of obtaining legal relief for the Chagossians. Since the success of the British cases, their cause has fared for the worse, with monetary damages proving to be a sticking point for national courts on both sides of the Atlantic. In order to establish the liability of at least the U.K and the U.S. governments, alternative routes will probably have to be taken.

### A. *Liability of Corporations in National Courts*

¶74 The potential liability of non-governmental third parties is one area that has not been fully explored in the domestic courts (both British and American). The potential certainly exists for success in this field (even in the U.S.), as can be seen from cases like *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289 (S.D.N.Y 2003). In this case, current and former residents of the Republic of the Sudan brought a

<sup>190</sup> 369 U.S. 186 (1962).

<sup>191</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>192</sup> *See Bancoult et al. v. McNamara et al.*, 445 F.3d 427, 429 (D.C. Cir. 2006).

class action suit under the ATCA, alleging that a Canadian energy company had collaborated with the Sudanese government in a policy of ethnic cleansing; whereby civilians were killed in order to facilitate oil exploration activities.<sup>193</sup> Especially relevant is the fact that several of the substantive claims were similar to those of the Chagossians (forcible displacement, property confiscation and destruction, kidnapping, and genocide).<sup>194</sup>

¶75 The court analyzed both domestic and international precedent on this issue, before concluding that: (i) it had subject matter jurisdiction; (ii) the complaint sufficiently alleged that the company had conspired with the Sudan to commit violations of the law of nations; (iii) the complaint sufficiently alleged acts of torture, enslavement, war crimes, and genocide; (iv) the Sudanese government's actions could be imputed to the company; and (v) the company was subject to personal jurisdiction in New York. The underlying message was that corporations (foreign or domestic) could indeed be held liable for *jus cogens* violations in federal court.<sup>195</sup> However, a word of warning is necessary. With respect to the facts of the Chagossian case, one can only assume that liability would be harder to prove than in *Talisman Energy*, given that the U.K. and U.S. were the principal perpetrators (as opposed to a Canadian energy company). For, as we have already discussed, federal courts seem to be more amenable to finding corporations liable than they do national governments.

### B. *Liability of States in International Courts*

¶76 Another alternative for the Chagossians could be attempting to establish the States' liability in International Courts and Arbitral Tribunals. The U.N. Human Rights Commission and the various other monitoring bodies established under human rights treaties generally do not have the power to render binding decisions. Exceptions are regional institutions such as the European and the Inter-American Courts of Human Rights, which were set up to ensure enforcement of the UDHR. The former might well be a good option. The International Court of Justice (ICJ) might be another, although it may be harder for the Chagossians to get standing.

#### 1. The European Court of Human Rights

¶77 The European Court of Human Rights is an international court based in Strasbourg, France. It can only hear matters pertaining to direct victims of human rights abuses committed by members of the Council of Europe,<sup>196</sup> within the jurisdiction of the said State. An additional requirement is that complainants must have used up all their remedies on the national level – which, as has been discussed above, the Chagossians seem to have done in the U.K.

¶78 Simply put, the European Court applies the ECHR, with a view to ensuring that national governments respect the rights and guarantees set out therein. It does so by examining complaints (known as “applications”) lodged by individuals or, sometimes, by

<sup>193</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 296 (S.D.N.Y. 2003).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 305-307.

<sup>196</sup> That have also ratified the ECHR. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222 (1953).

States. Where it finds that a member has violated these rights and guarantees, the Court delivers a binding judgment and monetary damages may be awarded.<sup>197</sup> Amongst the many rights protected, is the right to respect for private and family life;<sup>198</sup> and among the prohibitions are “the expulsion by a State of its own nationals or its refusing them entry.”<sup>199</sup>

¶79 The Chagossians currently have an application pending before the court with respect to the human rights violations committed by the British Government. Essentially they argue that the European Court has jurisdiction because the U.K. violated the rights which the ECHR was designed to protect; and should therefore be held accountable. A detailed analysis of the Chagossians’ claims and chances their of success in the European Court goes beyond the scope of this Note; but it is hoped that a court designed to deal with human rights abuses will be more willing to tackle such substantive issues head-on.

## 2. The ICJ and the Arguments that Could Be Heard There

¶80 Yet another potential venue for the Chagossians could be the ICJ. It is the principal judicial organ of the United Nations, and it has a dual role: (1) to settle in accordance with international law the legal disputes submitted to it by States; and (2) to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.<sup>200</sup> Though the ICJ does not ordinarily provide standing to individuals, it is possible to have a State present a claim on behalf of its citizens, provided that certain conditions are met. For example, there needs to be a “genuine link” (often more than just citizenship) between the individual and the State presenting his or her claim.<sup>201</sup> The only State that fits the bill and could possibly agree to do so would be Mauritius. The Chagossians should have no problem demonstrating a genuine link to this country since they have resided there for over 30 years and hold citizenship. It is of course up in the air as to whether Mauritius would be willing to risk compromising its relationship with two global powers for the sake of a few of its most destitute citizens. But assuming that they do, the Chagossians could well have a valid case.

¶81 At the time the Chagossians were relocated, the British relied on the vagueness of international law with respect to forcible displacement to justify their position. See, for example, the following excerpt from a 1968 minute, written by a Foreign Office legal adviser:

“There is nothing wrong in law or in principle to enacting an immigration law which enables the Commissioner to deport inhabitants of the BIOT. Even in international law there is no established rule that a citizen has a right to enter or remain in his country of origin/birth/nationality etc. A provision to this effect is contained in Protocol No 4 to the European

<sup>197</sup> European Court of Human Rights Website, Frequently Asked Questions, <http://www.echr.coe.int/ECHR/EN/Header/Applicants/Information+for+applicants/Frequently+asked+questions/> (last visited November 28, 2005).

<sup>198</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 222 (1953) at Art. 8.

<sup>199</sup> European Court of Human Rights Website, *supra* note 197.

<sup>200</sup> International Court of Justice Website, General Information – The Court at a Glance, <http://www.icj-cij.org/icjwww/igeneralinformation/icjgnot.html> (last visited November 28, 2005).

<sup>201</sup> See the *Nottebohm* case (*Liechtenstein v. Guatemala*), 1955 I.C.J. 4.

Convention on Human Rights but that has not been ratified by us and thus we do not regard the UK as bound by such a rule. In this respect 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.”<sup>202</sup>

Even if such vagueness existed at the time (and it is highly doubtful that it did), the Chagossians should be able to mount a significant case that this no longer holds true. In addition to our suggested use of the British *Bancoult* cases as an international standard, the existing norms of customary international law with respect to forced displacement are very favorable to the Chagossians. See for example, the commentaries of scholars such as Marco Simons, who wrote that “[t]he law of internally displaced persons is beginning to recognize the notion that people have a right not to be displaced by their government and international criminal law has now firmly embraced the idea that arbitrary forced relocation may amount to a crime against humanity.”<sup>203</sup> Although “few express international legal norms exist which protect people against individual or collective eviction and displacement or transfer,” existing international law norms “point to a general rule according to which forced displacement may not be effected in a discriminatory way or arbitrarily imposed.”<sup>204</sup>

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In cases such as that of the Chagossians, where there is uncertainty, courts often look to scholars and commentators’ opinions in order to determine what the law is.<sup>205</sup> Hence, though a norm against arbitrary forced relocation has not been expressly articulated in major human rights instruments, “several analogous norms and fundamental freedoms point to [such] a general prohibition.”<sup>206</sup> For example: arbitrary forced relocation is manifestly a gross violation of the freedom of movement and residence, because individuals subject to it are denied the right to remain in (and often to return to) their homes.<sup>207</sup> Article 13(1) of the UDHR guarantees “the right to freedom of movement and residence within the borders of each State,” and is a guarantee that is repeated in several other major human rights treaties.<sup>208</sup> A prohibition against forced displacement is also subsumed within the right to freedom from arbitrary interference with privacy and home life, and can be found within the same set of human rights agreements.<sup>209</sup> Add to this the principle that (we argue) is embodied by the British

<sup>202</sup> Regina v. Secretary of State for the Foreign and Commonwealth Office, *Ex parte Bancoult*, [2001] Q.B. 1067, 1085.

<sup>203</sup> Marco Simons, The Emergence of a Norm Against Arbitrary Forced Relocation, 34 COLUM. HUM. RTS. L. REV. 95, 119 (2002).

<sup>204</sup> *Id.* at 122-123.

<sup>205</sup> See e.g., *Paquette Habana*, 175 U.S. 677 (1900), in which the Supreme Court held that “where there is no treaty, and no controlling or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves particularly acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”

<sup>206</sup> Simons, *supra* note 203, at 122.

<sup>207</sup> *Id.* at 125.

<sup>208</sup> Including: the ICCPR at Art. 12(1) (Everyone lawfully within the territory of a State shall, within that territory have the right to liberty of movement and freedom to choose his residence), and Art. 12(4) (No one shall be arbitrarily deprived of the right to enter his own country); the American Convention on Human Rights at Art. 22; and the Fourth Protocol to the ECHR at 2. *Id.* at 126.

<sup>209</sup> For example, Article 12 of the UDHR provides that “no one shall be subjected to arbitrary

*Bancoult* cases, and there is no doubt that some measure of protection against forced displacement has attained the status of customary international law.<sup>210</sup>

¶83 Recently, there has also emerged a clear trend of establishing criminal liability for arbitrary relocation, especially across international borders, and during times of war. Though the Chagossians' relocation did not happen during a time of open conflict, it certainly took place in the context of the Cold War, and across international borders; for the BIOT was essentially part of the U.K., while Mauritius had gained independence by the time of the Immigration Ordinance. If criminal liability seems a little far-fetched, consider the following: relocations across international borders could constitute war crimes under the Charters of the Nuremberg and Tokyo Tribunals.<sup>211</sup> Similar provisions can be found in the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda.<sup>212</sup> Since then, in recognition of the internal nature of many modern conflicts, the ICTY has found that the forced relocation of individuals within a single country may also constitute a crime against humanity.<sup>213</sup> There is also a significant body of law built up on the topic of stateless people.<sup>214</sup> Though this was one of Mr. Bancoult's claims in the original British case (i.e. that he had been rendered stateless), it will be a tough one to argue in the ICJ, given that the Chagossians have always held dual citizenship with both the U.K and Mauritius.

## V. CONCLUSION

¶84 The Chagossians have come a long way (both literally and figuratively) in their search for justice. They have been fighting for over thirty years, yet they remain as determined as ever. Though the initial success of their litigation has been tempered by recent setbacks, they remain convinced that they will eventually prevail. Many believe that it is partly a matter of finding the right forum. Though national courts may well be adequate for establishing the liability of corporations, they are not the easiest place to defeat a State. This Note has proposed two alternate forums, where there will hopefully be less resistance to hearing the plaintiffs' substantive claims; and therefore a greater chance to establish State liability. I have also suggested that the Chagossians should use their combined victories in the British *Bancoult* cases as a principle of customary international law when arguing for monetary damages in the future.

¶85 One final aspect of the Chagossians' struggle that has not been discussed much in this Note is politics. Despite our focus on the legal battles, political support for their cause is vital to the Chagossians' ultimate success. In more than one way, the District of Columbia courts were not completely misguided when they labeled the issue a "political question." Given the national defense and the corporate interests involved, this is one of those cases where the remedy is equally likely to be achieved via the political sphere. But this will not happen without the Chagossians popularizing their cause and making

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interference with his privacy, family, home or correspondence." *Id.*

<sup>210</sup> *Id.* at 125-126.

<sup>211</sup> *Id.* at 119.

<sup>212</sup> *Id.* at 129-130.

<sup>213</sup> *Id.* at 130.

<sup>214</sup> See for example, the 1951 Convention relating to the Status of Stateless Persons 30 UNTS 117, entered into force on 6 June 1960; and the 1961 Convention on the Reduction of Statelessness, UN doc. A/Conf.9/15, 30 Aug. 1961, entered into force on 13 Dec. 1975.

their presence felt (in Mauritius, the U.K. and the U.S.). If through this Note I have helped but a little in this respect, I will consider it a success.