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Stealing the Islands of Chagos: Another Forgotten Story of Colonial Injustice

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For more than a decade, the UNROW Human Rights Impact Litigation Clinic at the American University Washington College of Law (UNROW) has been part of a global effort to seek justice for the Chagossians, the indigenous inhabitants of the Chagos Islands in the Indian Ocean. The Chagossians’ plight is not well-known, yet it repeats a familiar narrative from the history of colonialism. The most well-known and stark example is perhaps the Trail of Tears, when the U.S. government ordered the forced removal of the Native American nations residing in the southeastern parts of North America. The world stood by as the U.S. government forcefully and violently expelled tens of thousands of Native Americans from their homes on a death march—to be resettled in lands west of the Mississippi and never to return. Less well-known is that merely a few decades ago, in 1967, history would repeat itself when the U.K. forcibly expelled thousands of indigenous people of the Chagos Archipelago from their homeland to make way for a U.S. military base.

Upon learning of the Chagossians’ efforts for justice through the U.K. judicial system, as will be discussed below, UNROW sought to hold the U.S. government accountable for its involvement in the forced removal of the Chagossians by spearheading numerous initiatives in the United States based on the three pillars of the clinic’s work: litigation, advocacy, and education. UNROW seeks to address human rights violations through litigation, help clients challenge limitations on redress for human rights violations in courts, and increase compliance with human rights norms and practices. The Clinic’s essential mission is to address human rights violations through the model of impact litigation, which seeks redress for clients while having a positive effect on broader policy issues beyond the immediate scope of the litigation. The Chagossian case is an ideal impact case for UNROW because it has far-reaching transnational effects and implications for any population forcefully removed from its territory.

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Having exhausted all the litigation possibilities in the United States, UNROW initiated an advocacy campaign to seek a political response to the Chagossians’ struggle. Fortunately, UNROW’s advocacy campaign garnered the attention of the Congressional Black Caucus (CBC), an organization representing the black members of the U.S. Congress, because of the colonial nature of the Chagossians’ removal and because the Chagossians were primarily of African descent. For two years, UNROW met with legislators from the CBC with the aim of creating a congressional resolution that would establish a claims tribunal to review claims of Chagossians harmed in the course of their forced removal. UNROW made enormous progress with the help of former CBC chairman Representative Donald Payne, who became a champion for the Chagossians’ cause in Congress. Unfortunately, Representative Payne passed away shortly before he was set to present the resolution before Congress, and other representatives from the CBC, who had previously expressed interest, quickly dropped out seemingly due to the lack of political will and public support for assisting a population the United States had helped displace.

Nevertheless, UNROW’s advocacy and education efforts on the Chagossians’ behalf did not end there. UNROW organized many community events to raise awareness about the Chagossians, including teach-ins and film screenings, and clinic members traveled to Mauritius numerous times to meet with...
the exiled Chagossian community. UNROW also continued to support the litigation and political advocacy efforts of our partners abroad. In support of a domestic U.K. case before the House of Lords, R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2), for example, UNROW members traveled to London at the invitation of the U.K. Parliament to make a presentation to the Law Lords and address the House of Commons.

Believing that the plight of the Chagossians represents the quintessential impact litigation case, UNROW continues to take part in a global network advocating for the Chagossians. Most recently, UNROW filed an online “We the People” petition with the White House, asking the U.S. government to address the plight of the Chagossians.1 More than 30,000 people signed the petition within the thirty-day time limit. Yet, despite this overwhelming support for the Chagossians, the U.S. government failed to take any responsibility for its role in ousting the entire population from its homeland.2 The U.S. government waited until December 21, 2012, more than eight months, before responding to the petition, while, in comparison, it responded within a mere two months to a petition seeking funding for a Death Star.3 The response to the Chagossians’ petition almost immediately followed the European Court of Human Rights’s (ECtHR or “Court”) decision in Chagos Islanders v. the United Kingdom, issued December 20, 2012, that dismissed the Chagossians’ claims as inadmissible. ECtHR decisions are influential in informing the international community on the development of human rights law, so it is likely not a coincidence that the U.S. government’s response to the petition followed the ECtHR’s decision so closely. Had the Court decided on the merits of the case in the Chagossians’ favor, the U.S. government may not have issued a dismissive response due to a risk of political embarrassment. Due to the the prominence of the ECtHR, the Court’s decision in this case has a significant impact on the global effort to seek justice on behalf of the Chagossians and could have widespread impacts on the claims of indigenous peoples and others forcibly removed from their homelands.

The ECtHR is the sole transeuropean judicial organ with jurisdiction to hear petitions regarding state violations of the European Convention on Human Rights. The Court’s decisions are binding on all members of the Council of Europe, including the U.K. However, because of the sheer number of petitions for review and the delicate balance with the Member States’ sovereignty concerns, the Court will only hear cases that meet certain pre-conditions for jurisdiction. In the Chagos Islanders case, the Court found that the pre-conditions had not been met, and refused to hear the merits of the Chagossians’ claims, finding the case inadmissible. This article will argue that the Court based its decision on rationales that threaten to not only undermine the global campaign of the Chagossians and their allies, but also damage the effort to strengthen international law and hold governments accountable for human rights abuses. It will further describe why the claim of the Chagossians to their homeland has vast potential for impact, the crux of UNROW’s mission, due to the relatively few decisions in the ECtHR on indigenous peoples’ rights and the Courts’ limited jurisprudence on collective rights to redress.

**HISTORY OF THE CHAGOS ISLANDS**

The Chagos Archipelago comprises 55 islands and is currently claimed by the U.K. as a British Indian Ocean Territory (BIOT).4 From the 1500s to the 1960s, the Chagossian population consisted of families of African, Malagasy, and Indian origin, mostly brought over as slaves to work on plantations.5 These families and their descendents made Chagos their home and by the 1960s even the U.K. government recognized the Chagossians as indigenous to the land.6 Nevertheless, in the 1960s the U.K. made an agreement with the U.S. government to forcibly deport the Chagossians in order to grant the United States access to Diego Garcia, the largest island, for a fifty-year term with the possibility of a twenty-year extension, to use as a military base.7 The authorities employed brutal tactics to force thousands of the Chagossians from their homes, including an embargo aimed at starving the population, the mass extermination of the Chagossians’ pet dogs, and even death threats to any opposition groups.8 Today most Chagossians live in abject poverty on the island nations of Mauritius and the Seychelles because they were forcibly removed from their home with little to no compensation and no ability to return.9

Following their violent removal, the Chagossians have made several unsuccessful attempts to regain control of their homeland.10 For example, in 1975 a Chagossian named Michel Ventacassen brought a case in the High Court in London concerning the expulsions.11 The Ventacassen case settled in 1982, and over the next two years, 1,344 Chagossians in Mauritius, only a part of the exiled Chagossian population, received GBP 2,976 each in compensation, a derisory amount in light of the magnitude of their loss.12 In addition, several families received no compensation and many staged hunger strikes to show their disapproval of the failure of the U.K. government to truly provide redress for their loss.13 The approximately 500 Chagossians in the Seychelles who did not participate in the negotiations received nothing.14 To receive the funds, the
Chagossians were required to sign renunciation forms written in English, a language most of them did not understand. In pursuit of full and adequate compensation and recognition of their struggle after the disappointing 1975 judgement, the Chagossians brought forced expulsion claims in a separate litigation through the domestic U.K. courts, attempting to gain a remedy and recognition. In a rare victory for the Chagossians, in 2004 the U.K. court held that the orders, removing the Chagossians from their land, were beyond the lawful powers of the sovereign. In 2007, the Court of Appeals ruled that the decision to pass the 2004 British Indian Ocean Territory Orders was an abuse of power by the Crown. In 2008, however, the majority of the House of Lords decided that the Queen had the power to exile the entire population of the Chagos archipelago because the British Indian Ocean Territory was not a settled colony. In 2010, ECtHR began the investigation into the case of the Chagossians right of return, yet this attempt proved to be another disappointment.

The ECtHR Decision: Chagos Islanders v. the United Kingdom—The Latest Denial of the Chagossians’ Fight for Justice

In Chagos Islanders v. the United Kingdom, the ECtHR delared the case inadmissible and thus declined to consider the merits of the Chagossians’ claims. The ECtHR will only hear arguments on the merits of a petition if applicants meet certain preconditions of admissability. First, the cases can only be brought to the Court after domestic remedies, such as attempts for justice through national judicial systems, have been exhausted. Secondly, the applicant must be a victim who has suffered significant harm, and this harm must concern one of the rights protected under the European Convention on Human Rights (Convention). If an act or omission at issue directly affects the applicant then he or she is considered a victim under the Convention. Third, the applicant must bring the case within six months of the last domestic decision and the claims must be related to a right guaranteed by the Convention.

The ECtHR found the Chagossian case inadmissible for several reasons. First, the Court held that because 471 of the applicants had participated in the Ventacassen case and already accepted and received compensation in the Ventacassen case, none of the applicants could claim victim status. Second, the Court held that the applicants who were not among the 471 who received compensation should have been aware of the proceedings and made the appropriate claims; therefore, they failed to exhaust domestic remedies. Third, the Court found that applicants who were not born at the time of the settlement were not residents of the island and accordingly had no claims to “victim status” arising out of the expulsions. Finally, the Court did not find any indication of arbitrariness or unfairness in the national court proceedings that could be construed as a denial of access to court; therefore, the Court found the application inadmissible.

The impact of the ECtHR’s decision reaches far beyond the Chagossians. The ECtHR could have set a precedent that would protect the rights of indigenous peoples who have been expelled from their land by colonial powers and provide them an avenue for redress. Instead, this decision failed to protect the collective population’s rights and set a precedent indicating that if certain members of a harmed population receive compensation, then all other current and future members are barred from recovery. Beyond that, this decision indicated that colonial powers’ expulsion of indigenous or aboriginal populations would escape the Court’s scrutiny as long as the colonial power makes a nominal payment to the removed population with the condition that acceptance of the payment functions as a waiver of the right to return. This type of decision is particularly harmful to impact litigators because it completely bars certain groups of victims from ever receiving reparations.

The Court Found the Case Inadmissible because it did not Grant Victim Status to the Chagossians

The ECtHR based its finding of inadmissibility largely on its determination that the Chagossians did not qualify as victims. Under Article 34 of the European Convention, all individuals who consider themselves victims of a breach of the Convention can complain to the Court. To qualify as a direct victim, the act or omission at issue must directly affect the applicant. The Court has held that “[w]here applicants accept a sum of compensation in settlement of civil claims and renounce further use of local remedies, . . . they will generally no longer be able to claim to be a victim in respect of those matters.” However, the Court has previously applied this standard to individual applicants rather than groups. The Court’s decision created a disappointing precedent that extends this individual standard to group litigants without taking into account the special circumstances of a group claim.

As an impact litigation clinic, UNROW often advocates for courts to apply legal standards that either do not yet exist or are not widely used. In the present case, UNROW argues that the Court should have developed a new legal standard to evaluate victim status for group litigants rather than apply the rule that denies victim status when an individual has participated in a past settlement agreement. By failing to develop a rule based on the unique circumstance of group litigants, the Court denied hundreds of Chagossians the opportunity to seek redress merely because some members of the group had previously received nominal compensation.

The Court’s failure to take into consideration the unique circumstances of group litigants does not only affect the
Chagossians—it also severely limits all group litigants’ ability to seek redress in the future. The Court denied the Chagossians victim status because 471 of the 1,786 applicants received compensation in the 1982 Ventacassen settlement.32 In reaching this decision, the Court relied on previous judgements that involved individual rather than group applicants. For example, in Caraher v. the United Kingdom, where the Court found that the applicant did not qualify as a victim because she had accepted a settlement offer in the civil proceedings for the death of her husband.33 However, the distinction between cases like Caraher and that of the Chagossians is more significant than the Court gave credit. In Caraher the party in question did receive some form of compensation yet only 471 of the 1,786 applicant Chagossians participated in the earlier settlement agreement34—the remaining 1,315 applicants never received compensation and some did not even participate.35 UNROW contends that instead of applying a narrow ruling that previously applied to whether individual victims were compensated, the Court should have either identified a distinct rationale specific to large groups of victims or, more appropriately, taken into account individuals who never received any compensation.

Second, UNROW contends that when the Court denied the applicants victim status by giving undue deference to the Chagossians’ supposed waiver of their right to pursue claims against the U.K. government, the Court acted inconsistent with the European Convention’s purpose of protecting and defending fundamental rights and freedoms. The Court upheld the validity of the renunciation forms some of the Chagossians signed in the Ventacassen settlement even though many of the signers were, in the words of the ECtHR, “illiterate, Creole-speaking and vulnerable and did not appreciate what they were signing.”36 The Court deferred to the U.K. High Court’s earlier rejection of the Chagossians’ arguments, despite the High Court’s recognition that many of the Chagossians were illiterate, “lacked significant education,” and that “[l]egal concepts were, not surprisingly, poorly understood.”37 By refusing to evaluate the validity of the Chagossians’ waiver of their rights, the Court opened the door for future groups to take advantage of vulnerable populations. UNROW advocates for a more thorough evaluation of whether the Chagossians’ waiver was knowing and intelligent.

Finally, the Court caused significant harm to the new generation of applicants, who are descendents of those expelled from the island, by failing to view them as victims in this case. As stated in the Court’s practical guide on admissibility criteria, “[T]he Court may accept an individual application from a person considered an indirect victim, where there is a personal and specific link between the direct victim and the applicant.”38 The Court has developed a complicated jurisprudence for which it is difficult to prescribe with precision what a “specific link” means, but it is clear that family relationships play a significant role39 and the Court could have construed a broad definition of “indirect victim” to include the “specific link” of the descendants. This decision has serious implications for future generations of displaced persons because denying these Chagossians access to the Court creates a legal standard for admissibility rulings that will inevitably disfavor other groups seeking redress.

The Court’s decision on this issue presents an important advocacy opportunity because applying the Court’s narrow understanding of who qualifies as an indirect victim would restrict the rights of other such individuals or groups attempting to gain access to the Court. Under this standard, the rights of descendant family members of direct victims to access the Court would be severely limited. Furthermore, if the Court is presented with future cases in which an entire population has been forcefully removed from its territory, only members of the population who actually resided on the territory at the time of removal would be authorized to bring claims before the Court. The Court could better serve victims by utilizing a broader reading of the definition of victim in the practical guide to provide access to justice to all who qualify, as the current ruling is harmful to the Chagossians and will certainly affect future victims attempting to obtain justice through the Court.

**The Court could better serve victims by utilizing a broader reading of the definition of victim.[.]**

**The Court Should Have Protected the Chagossians’ Unique Rights as Indigenous Peoples**

UNROW also uses impact litigation and advocacy to strengthen compliance with international law. In that capacity, UNROW argues that the Court in the present case would better serve its role in defending victims by providing the Chagossians the special protection developed under international law to protect indigenous peoples, as the Chagossians are the native inhabitants of the Chagos Islands.40 International law, specifically the provisions of the Convention on the Rights of the Child and the work of the UN Committee on the Elimination of Racial Discrimination as expressed in General Recommendation XXIII on Indigenous Peoples, has widely recognized the rights of indigenous peoples.41 In 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples (Declaration).42 Notably, 143 states, including the U.K., voted in favor of the Declaration.43 Although the Declaration is not legally binding, it serves as a benchmark for customary international law, and as “a guide for the actions of the international human rights treaty bodies.”44 The Declaration includes the “right not to be forcibly removed from land or territories” and “the right to redress for lands, territories, and resources which have been taken.”45 UNROW asserts that these principles of international law would be effective guides for the Court to develop its jurisprudence toward indigenous peoples.

The Court had persuasive authority for interpretation of the European Convention on Human Rights (ECHR) in the work of other regional courts, which have issued decisions that offer a differing representation of these developing international norms. For example, the Inter-American Court of Human Rights (IACtHR), another regional human rights court that can hear individual petitions against a state, has incorporated the Declaration in its jurisprudence to provide indigenous peoples the special rights required under customary international law.46 The IACtHR has read Article 21 of the American Convention
on Human Rights to recognize the “close relationship between indigenous people and their lands,” and has expanded on this to protect the rights of indigenous people, despite the lack of a clear statement of what those rights entail under the American Convention.\(^5\) In *Kichwa People of Sarayaku v. Ecuador*, the IACtHR found that “the Ecuadorian state violated the [Sarayaku Indigenous] community’s right to be consulted, as well as their community property rights and their cultural identity.”\(^4\) The IACtHR’s ruling was based in part on the right to property laid out in the American Convention on Human Rights, which states, “No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and . . . according to the forms established by law.”\(^4\) The European Convention provides an almost identical right to property and thus the IACtHR standards would provide an effective template for interpretation of customary international law.\(^5\)

By incorporating the special protection that international law affords indigenous peoples in its jurisprudence, the ECtHR would ensure that Chagossians and other indigenous groups have access to redress for the full extent of the harm inflicted against them. Similar to the IACtHR, the ECtHR has the responsibility to recognize the importance of indigenous communities’ right to be consulted and communally owned property.\(^5\) Expanding the ECtHR’s current interpretation of property rights would benefit the Chagossians as well as other indigenous groups seeking recognition of their unique and longstanding rights related to their territory.

The Court’s decision not to consider the Chagossians’ rights as indigenous people once again demonstrates the case’s importance within an impact litigation setting. The ECtHR has had much less opportunity develop standards than the Inter-American System, for which indigenous rights is one of its more developed subjects. Much of the international guidance on indigenous rights has come within the last decade, and this case presented the ECtHR with a chance to follow the example of the IACtHR and incorporate these relatively new principles of customary international law into its jurisprudence. The Court, however, failed to take advantage of this opportunity and instead demonstrated its reluctance to strengthen customary international law and guarantee indigenous rights.

### The Court’s Decision Implicitly Endorses a Continuing Colonial Mentality Because the Court Fails to Take the Claims of the Chagossians Into Consideration

Another troubling aspect of the Court’s decision, particularly given the deference afforded to the U.K.’s supposed “compensation,” settlement of the Chagossians’ claims, and the failure to recognize the protection that should be afforded to indigenous populations, is the Court’s tacit endorsement of the underlying colonial mentality. Although the Court noted the “callous and shameful treatment which [the Chagossians] suffered,”\(^5\) the Court found that the Chagossians “could no longer claim to be victims” merely because the U.K. government offered them incomplete and nominal compensation. While the Chagossians accepted the compensation, the harm done to them has yet to be sufficiently redressed.

In reaching this decision, the Court emphasized the supposed adequate compensation given to some of the Chagossians, many of which were not part of the ECtHR litigation, as well as their supposed renunciation of their right to return to their homeland. The situation echoed familiar narratives from the colonial era in European history, when indigenous populations were offered nominal and incomplete compensation, in the absence of choice, for the forceful taking of their homelands. Once this payment was accepted—even if absent choice or consensus from the entire populace—the colonial power treated the indigenous population as having renounced their rights to return to their homeland. By ruling that the U.K.’s nominal payment to only part of the forcibly removed population is sufficient to preempt the Chagossians from bringing their claim before the ECtHR, the Court’s ruling essentially endorsed this colonial mentality and behavior.

Under this ruling, a colonial power, such as the U.K., could legally remove an indigenous population from its homeland as long as the colonial power makes a symbolic payment, even if this payment does not actually remedy the losses, damages, or injuries incurred. Furthermore, this ruling allows the colonial power to bar the victims’ claims by assuming informed consent where the victims accepted payment and waiver, and does not require the Court to take into account the factual circumstances such as a lack of comprehension due to language barriers, and does not require the Court to look at the amount of payment offered compared to the amount of harm done. Under this ruling, a colonial power can make a waiver of claims a condition for accepting the payment, as the U.K. did with the Chagossians, even if the payees do not fully understand what they are signing away because the Court will presume informed consent where payment, waiver, and counsel were present. A better standard would be to presume a lack of informed consent in these situations given the historic willingness of colonial powers to overtake lands regardless of interests of the indigenous people. This is a troubling ruling, considering the prevalence of wrongs that were committed against indigenous peoples throughout history in this context. The Court’s callous disregard for the Chagossians who never received any compensation makes this decision all the more disconcerting.

Furthermore, the Court’s decision suggests that any colonial power could simply give nominal compensation for the forceful removal of a population and, in doing so, effectively foreclose any claims that the victims would have otherwise been entitled to under the Convention. This is a troubling holding that greatly undermines the protection of human rights under the Convention.
Despite international recognition that forcefully removing a population from its territory violates international law, the Court implicitly endorsed a continuation of an all too familiar colonial narrative. In reaching its short-shrift decision ruling the case inadmissible, the Court found that an entire population had relinquished their right to their homeland simply because the colonial power had given them a nominal amount of compensation that came attached with an unknown waiver.

The Court should correct its approach and bring its jurisprudence in line with customary international law and other regional courts to avoid further injustice. Indigenous populations receive special protection under customary international law, and greater injustice could result if the Court overlooks the problems in this decision and fails to adapt its approach to conform with international standards. The Court will face new claims from indigenous populations and other group applicants and should change its analysis to ensure that other groups are not denied the ability to obtain justice.

This case is not the end of the legal road for the Chagossians, nor the end of their struggle to return home. For example, the lease on the Chagos Islands is coming up for review in 2016, which presents an opportunity for the global community to rally behind the Chagossians and inform the U.S. and U.K. governments that they must not continue this unacceptable colonial practice. This grievous injustice needs attention, and it is up to the relevant bodies to ensure that similar subsequent cases do not follow this troubling piece of jurisprudence. Unfortunately, world leaders can now point to this ECtHR decision and declare that the Chagossians’ claims are, as ruled by the Court, invalid. It is in situations like these that advocates of human rights must persevere in the effort to advance the development of international human rights law in a direction that leads to greater protection for all individuals—including the little-known and disenfranchised Chagossians who hailed from a forgotten island in the center of the Indian Ocean.

Endnotes

5 Id.
21 ECHR ADMISSIBILITY GUIDE, supra note 20 at 16.
22 Id. at 12–14.
23 Id. at 25.
24 ECHR, supra note 20, at art. 35 § 1, § 3(a).
26 Id.
27 Id.
28 Id.
29 ECHR ADMISSIBILITY GUIDE, supra note 20, at ¶ 22.
30 Id. at ¶ 25.
32 Id. at ¶ 3.
34 Chagos v. U.K., at ¶¶ 1, 12, 53.
35 Id. at ¶ 53, 81.
36 Id. at ¶ 53.
38 ECHR ADMISSIBILITY GUIDE, supra note 20 at ¶ 30.
39 Id. at ¶ 31 (noting, for example, that in one case a nephew was ruled an indirect victim but in another a son was ruled not an indirect victim).
41 Id. at ¶15.
42 Id. at ¶ 16, (citing General Assembly Resolution 61/295, 13 September 2007).
43 Id.
44 Id. (citing Rodolfo Stavenhagen, former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples).
45 Id. at ¶ 18.
46 Id. at ¶ 15, 17-18.
50 Compare ECHR, supra note 20, at Protocol, art. 1 (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”), with American Convention, supra note 49, at art. 21.2 (“No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”).
51 See AMNESTY INT’L, supra note 48.
53 Chagos islanders’ case inadmissible because they accepted compensation and waived the right to bring any further claims before the U.K. national courts, Press Release, ECHR 460 ¶ 4 (Dec. 20, 2012).