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Commentary

'Marine protected areas' off UK overseas territories: comparing the South Orkneys Shelf and the Chagos Archipelago

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In the wake of the designation of two new 'marine protected areas' adjacent to the coastal waters of the South Orkney Islands (British Antarctic Territory) and the Chagos Archipelago (British Indian Ocean Territory), this commentary considers some of the geographical, legal and political implications of these unilateral declarations – taking into account competing claims of jurisdiction by Mauritius and the Maldives; human rights claims of the Chagos islanders; strategic interests of the United States in the Indian Ocean; and shared legislative competences of the European Union in the field of marine fisheries. The two case studies also raise questions of global arms control, diplomatic efforts at 'greening' imperialism, and contemporary state practice with regard to the 'sacred trust of civilisation' for dependent territories, as spelled out in the United Nations Charter.

KEY WORDS: marine conservation, international law, human rights

Introduction

On 10 November 2009, the UK Foreign and Commonwealth Office (FCO) announced the establishment (effective May 2010) of 'the world's first high-seas marine protected area', covering 94 000 km^2 south of the South Orkney Islands in the *British Antarctic Territory* (CCAMLR 2009; see Figure 1).

On 1 April 2010, the FCO Commissioner for the *British Indian Ocean Territory* declared 'a marine reserve to be known as the Marine Protected Area' within that territory's Environment Protection and Preservation Zone proclaimed on 17 September 2003, covering 544 000 km^2 (i.e. twice the size of the UK) in the Chagos Archipelago (BIOT 2010; see Figure 2).

Marine scientists and environmental organisations have long called for the creation of a global system of marine protected areas (MPAs) well beyond national territorial waters. At the World Summit on Sustainable Development in Johannesburg 2002, governments made commitments – reiterated at the Conference on Biological Diversity in Nagoya 2010 – to put in place ecologically representative networks of MPAs by 2012 and to conserve at least 10% of each of the world's marine and coastal ecological regions (Spalding *et al*. 2010). Creation of the South Orkneys Shelf and the Chagos Archipelago MPAs thus goes a long way towards meeting those commitments in two important ecological regions.

There are a number of parallels – as well as significant differences – between these two areas, which the present commentary will address.

Jurisdiction issues

In the case of the South Orkneys Southern Shelf (a high-seas area some 70–350 km south of the South Orkney Islands), jurisdiction is contested between the UK and Argentina. However, as recognised in Article IV of the 1959 Antarctic Treaty (to which both countries are parties), all claims of coastal state jurisdiction over the area are held in abeyance. The designation of the South Orkneys Southern Shelf MPA having been adopted multilaterally – with the consent of Argentina – by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), territorial sovereignty is not an issue in this MPA.

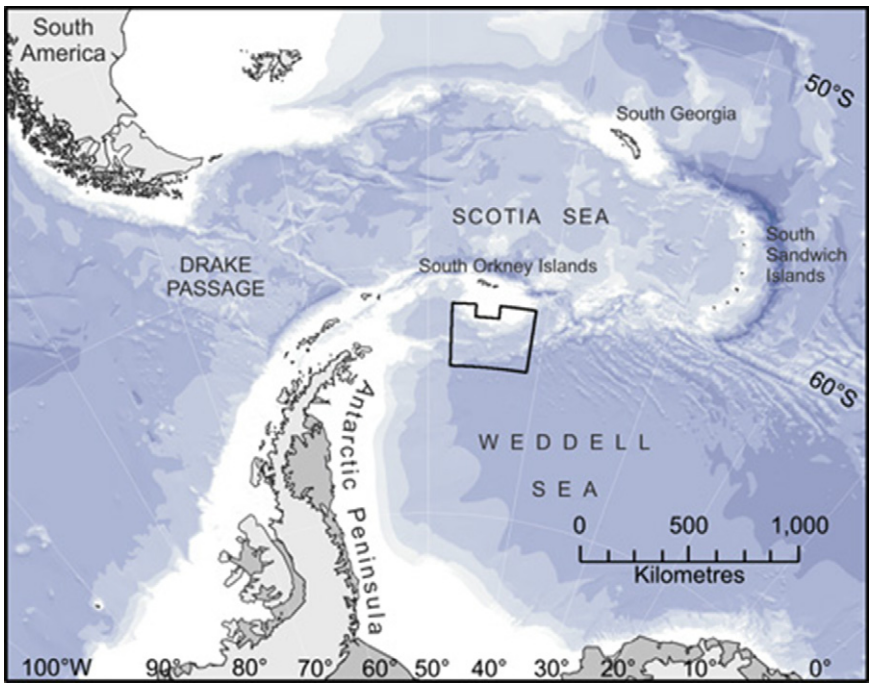

Figure 1 South Orkneys Shelf MPA
Source: UK Overseas Territories Conservation Forum (2010, 23)

In the case of the Chagos Archipelago MPA, jurisdiction is contested between the UK, Mauritius and (as regards the northern boundary of the MPA) the Maldives. Following the 'excision' of the British Indian Ocean Territory (BIOT) in 1965, from what was formerly part of the colony of Mauritius (Abraham 2011), the Mauritian Government has consistently asserted its claim of sovereignty over the archipelago (Bradley 1999). In December 1984, Mauritius declared an exclusive economic zone of 200 nautical miles adjacent to its coastal waters, including the Chagos Archipelago; and even amended Article 111 of its Constitution to read: 'Mauritius includes . . . the Chagos Archipelago, including Diego Garcia and any other island comprised in the state of Mauritius' (Mauritius 1991). The UK Government in turn proclaimed a Fisheries Conservation and Management Zone of 200 nautical miles in the BIOT in October 1991, followed by a BIOT Environment Protection and Preservation Zone with identical geographical coordinates in September 2003, 'under Article 75 of the UN Convention on the Law of the Sea' (Symons 2004).

The UK and Mauritius have communicated the coordinates of their competing/conflicting 200 mile zones to the UN Secretariat, along with a series of mutual protest notes. On 20 December 2010, Mauritius initiated international arbitration proceedings against the UK under Article 287 of the UN Convention on the Law of the Sea, to have the BIOT marine protected area declared 'incompatible with the Convention and without legal effect'. An arbitral tribunal has since been constituted (Prows 2011), but so far has not met due to a challenge by Mauritius against the appointment of a British arbitrator (on grounds of a conflict of interests).

The Government of the Maldives, whose own exclusive economic zone overlaps with the northern boundary both of the UK and the Mauritian zones in the Chagos, submitted different geographical coordinates to the UN in July 2010, but after objections by both countries agreed in March 2011 to defer the issue (UN/CLCS 2011).

Human rights issues

Unlike the unpopulated South Orkney Shelf, the Chagos Archipelago at the time of the creation of the British Indian Ocean Territory in 1965 had a population of over 1500 people (some having settled there for three or more generations), all of whom were deported by the UK authorities until 1973 in order to make way for the establishment of a US military base, under a 1966 bilateral Agreement on the Availability for Defence Purposes of the British Indian Ocean Territory (Snoxell 2009; Vine 2011).

Figure 2 Chagos Archipelago MPA
Source: Pew Environment Group (www.pewenvironment.org/uploadedFiles/PEG/Publications/Other_Resource/Chagos%20Archipelago%20Marine%20Reserve%20Map.pdf) Accessed 4 July 2011

The vast majority of the expelled islanders ended up destitute in Mauritius (having been granted Mauritian citizenship upon the colony's independence in 1968) and others in the Seychelles; a small exile community settled in the UK after they were granted British citizenship in 2002 (Edward 2010). While 1340 Chagossians eventually received lump-sum compensation payments under an arrangement between the UK and Mauritian governments – against signed renunciations of their right of return – a core group continued legal action before US and UK courts until October 2008, when a controversial House of Lords decision reversed an earlier High Court judgment (Dodds 2007) and confirmed the legality of the Order-in-Council of 2004 denying their resettlement in the BIOT (Allen 2011). The Chagos islanders have since taken their case against the UK Government to the European Court of Human Rights, where hearings are expected to be scheduled in the fall (Lunn 2011).

Under Article 73 of the UN Charter, the UK had accepted 'as a sacred trust' the obligation to promote the well-being of the inhabitants of its non-self-governing overseas territories, and to submit regular reports on them to the UN General Assembly. Yet, with regard to the British Indian Ocean Territory, the FCO takes the position that it is not subject to the reporting obligations of Article 73 'by reason of the absence of any permanent population' (Fox 2000, 1026). On the same grounds, the UK Government contends that its 1976 ratification of the UN Covenants on Human Rights does not extend to the territory – a view flatly contested by the UN Human Rights Committee, which has repeatedly indicated that it considers the Covenants applicable to the BIOT, and urged the UK 'to include the territory in its next periodic report' (UN/HRC 2008). Not surprisingly perhaps, the BIOT has been referred to as a 'human rights black-hole' (Moor and Simpson 2005).

It may well be, as noted by the BIOT's Conservation Advisor, that 'the present uninhabited nature of these islands is the main reason for the richness and unimpacted nature of the marine habitat' (Sheppard 2000). Surely, however, this arguable *de facto* assertion cannot be turned into a rationale for the continued *de jure* exclusion of the exiled Chagos islanders from their homeland (De Santo *et al*. 2011).

Strategic issues

In the Southern Ocean, whilst Article I of the 1959 Antarctic Treaty prohibits 'any measures of a military nature' on land and on ice shelves, the use of military personnel and equipment for scientific research or for any other peaceful purposes is permitted; moreover, Article VI expressly reserves the exercise by all states of rights 'with regard to the high seas within that area' (Su 2010, 155). However, no military use of the South Orkney islands or of their southern shelf has been reported.

In the Chagos Archipelago MPA, by contrast, the predominant contemporary use of the main island of Diego Garcia is military, under the terms of the 1966 UK–US bilateral agreement and its subsequent revisions and supplements which upgraded the US base step-by-step from a signals intelligence/communications and hydro-acoustic/electronic surveillance facility to a naval support 'prepositioning' site, bomber forward operating location, and satellite tracking station (Sand 2011). A gigantic military construction programme – at a total cost of over US$3 billion to date – has produced a Pearl-Harbor-size naval port which can accommodate all sizes of naval vessels, including aircraft carriers and SSGN/SSBN nuclear submarines; the base also boasts the world's longest slipform-paved airport runway built on crushed coral. Diego Garcia played a central role in the bombing both of Iraq – from operations *Desert Storm* 1991 to *Iraqi Freedom* 2003 – and of Afghanistan (Edis 2004). The current resident population of the base includes some 2000 US military personnel, a civilian workforce of about 1500 labourers (mainly from the Philippines, Sri Lanka, and Mauritius), and less than 50 UK military staff. Some analysts consider Diego Garcia the single most important US military facility overseas today, given its proximity to the Horn of Africa and the Middle East (Erickson *et al*. 2010), and in view of the growing strategic importance of the Indian Ocean as a nexus of potential power conflicts (Kaplan 2010).

Under these circumstances, it comes as no surprise that the creation of the BIOT 'marine protected area' also had ulterior strategic motives other than nature conservation. According to statements made by the BIOT Commissioner during advance consultations with the US Embassy in London on 12 May 2009 (summarised in a diplomatic cable later disclosed by *Wikileaks*), 'establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents' (Roberts 2009). Consequently, the US diplomats informed the State Department that 'establishing a marine reserve might indeed, as the FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands' former inhabitants or their descendants from resettling in the BIOT' (Roberts 2009). The FCO also assured the US Embassy that the MPA 'would have no impact on how Diego Garcia is administered as a base'; and reportedly envisages excluding 'Diego Garcia and its territorial waters' from the MPA (Mees *et al*. 2010).

Similar exemptions had previously been conceded when the UK Government registered the Diego Garcia atoll as a protected site under the 1971 Ramsar Convention on Wetlands of International Importance (to which both the UK and the USA are parties), on 4 July 2001: the Convention thus applies to Diego Garcia *except for* 'the area set aside for military uses as a US naval support facility'. The site map published by the Ramsar Secretariat and by the UK Government

(Pienkowski 2005) shows the protected site as excluding the land area of the base, though *including* the entire lagoon of the atoll; that is, the naval port area which had been dynamited and deep-dredged so as to accommodate the US Fifth Fleet's warships and prepositioning vessels. As a result, the Diego Garcia lagoon must be the world's only internationally registered nature reserve that also serves as 'habitat' to aircraft carriers, nuclear submarines, ordnance supply vessels, and possibly prison ships (on the CIA's 'extraordinary renditions' through Diego Garcia, see Stafford-Smith 2008; Nowak *et al*. 2010).

The 'species' so protected are anything but benign. According to the International Campaign to Ban Landmines (co-laureate of the Nobel Peace Prize 1997), the USA keeps some 10 000 antipersonnel mines on chartered supply vessels in the BIOT (ICBL 1999), the use and stockpiling of which is strictly prohibited by the 1997 Ottawa Convention on Landmines and by the 2008 Dublin Convention on Cluster Bombs (both ratified by the UK, though not by the USA). In response to parliamentary questions, however, the FCO has stated that 'there are no US antipersonnel mines *on* Diego Garcia. We understand that the US stores munitions of various kinds on US warships anchored *off* Diego Garcia. Such vessels enjoy State immunity and are therefore outside the UK's jurisdiction and control' (Cook 2000); and 'there are no US cluster munitions *on* Diego Garcia' (Howell 2010, emphasis added).

As far back as 1971, the UN General Assembly – at the initiative of India and Sri Lanka – had declared the Indian Ocean a 'zone of peace', calling on the great powers to enter into immediate consultations with the littoral States for the purpose of 'eliminating from the Indian Ocean all bases, military installations and logistical supply facilities, the disposition of nuclear weapons and weapons of mass destruction' (Braun 1983). In 2001, the UK ratified protocols I and II to the 1996 African Nuclear-Weapon-Free-Zone ('Pelindaba') Treaty, which requires all parties 'to prohibit in its territory the stationing of any nuclear explosive devices'. The treaty explicitly covers the 'Chagos Archipelago-Diego Garcia', albeit with a footnote under the map in Annex I (inserted at the request of the FCO) stating that the territory 'appears without prejudice to the question of sovereignty'. While it is clear from the drafting history of the Pelindaba Treaty that all participating African countries agreed to include the Chagos in the geographical scope of the treaty regardless of the sovereignty dispute, the FCO understands its footnote to mean that it did 'not accept the inclusion of that Territory within the African nuclear-weapon-free zone' (Adeniji 2002, 299). That unilateral interpretation is diametrically opposed to the FCO's interpretation of Article IV of the Antarctic Treaty, which also kept the question of sovereignty in abeyance but – as mentioned above – is nonetheless considered applicable to the Southern Orkneys Shelf MPA (Sand 2010). Explicitly citing the new ambiguity so introduced by the UK in the Pelindaba Treaty, Russia has now ratified (on 14 March 2011) protocols I and II of the treaty with a formal reservation regarding its application to the Chagos Archipelago (Crail 2011).

Diego Garcia was not listed among the 'inspectable sites' of the 1991 US–Russian Strategic Arms Reduction Treaty (START-1) which expired in 2009. In the view of Russian observers, therefore, the 'forward deployment' of nuclear-tipped ballistic missiles (SLBMs, such as the *Trident* II-D5) on board US Navy submarines stationed or transiting in Diego Garcia 'avoided violating the legal language of START-1 while undermining its spirit' (Diakov and Miasnikov 2006, 9). The new US–Russian Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on 8 April 2010, provides in Article IV(11) that 'strategic offensive arms subject to this treaty [i.e. SLBMs] shall not be based outside the national territory of each Party'; but then goes on to state that 'the obligations provided in this paragraph shall not affect the Parties' rights in accordance with generally recognized principles and rules of international law relating to the passage of submarines or flights of aircraft, or relating to visits of submarines to ports of third States'. The Diego Garcia port thus remains a treaty-proof arms control loophole.

Legislative issues and prospects

In terms of UK administrative law, both the South Orkneys Shelf MPA and the Chagos Archipelago MPA were constituted by simple executive orders issued by the FCO, without parliamentary approval, under the Victorian 'royal prerogative' based on the 1865 Colonial Laws Validity Act (Elliott and Perreau-Saussine 2009; Hendry and Dickson 2011). Implementing regulations are expected to be enacted at the same level, including the geographical coordinates to be communicated to the UN Secetariat, with a view to their international recognition. In the case of the South Orkneys, the coordinates were agreed multilaterally by CCAMLR, vindicating the FCO's carefully planned diplomatic preparations for the MPA. By contrast, coordinates for the Chagos MPA – unilaterally and somewhat precipitously proclaimed as part of a pre-election campaign in April 2010 – are as yet undetermined, and hence internationally unenforceable.

What seems to be holding up regulatory implementation in both MPAs is the concurrent legislative competence of the European Union (with regard to the CCAMLR area: Rumble 2011). Under Article 4(2)(d–e) of the Lisbon Treaty (TFEU 2007), legislative competences are *shared* between the EU and its member states as regards fisheries and environmental matters in particular. In these areas, pursuant to Article 2(2) of the Treaty, a member state may legislate and

adopt legally binding acts only to the extent the EU has not exercised its competence.

In the case of the South Orkneys MPA, both the UK and the EU are members of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), under whose auspices the MPA was established, following a joint EU/UK submission to this effect. The EU Council has since 2004 laid down control measures applicable to fishing activities in the area covered by CCAMLR (EU 2004). Given that the new MPA was deliberately designed to exclude areas where licensed fishing activities are currently carried out (CCAMLR 2009), joint regulatory implementation is likely to be uncontroversial.

In the case of the Chagos MPA, both the EU and the UK are members of the Indian Ocean Tuna Commission, operating under the auspices of the Food and Agriculture Organisation of the United Nations (FAO/IOTC 1993). The EU has already laid down technical measures for the conservation of certain stocks of highly migratory species – such as tuna – for the Indian Ocean region ('area 2'), including limitations on vessel tonnage and restrictions on by-catch of merlin sharks and marine turtles (EU 2007). Yet, it appears as though prior to the FCO announcement of the Chagos MPA there was little or no coordination with the EU's General Directorate VII for Maritime Affairs and Fisheries, which was first alerted to the issue by a circular from the IOTC (FAO/IOTC 2009).

On 31 October 2010, all commercial fishing licences in the BIOT (which since 2003 had netted annual revenues of up to £1 million for the FCO, mainly from foreign distant-water tuna fishing fleets from Japan, Taiwan, Spain and France) were terminated. While past licensing was indeed within the FCO's administrative discretion, the announced enactment of general 'no-take' regulations for the Chagos MPA also raises the question of compatibility with Article 56(2) of the UN Convention on the Law of the Sea, which obliges coastal states to exercise their rights in an exclusive economic zone with 'due regard for the rights and duties of other states'. Accordingly, there will be a need for consultations not only with the EU but also with neighbouring countries affected in the region, inevitably including Mauritius and the Maldives.

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