

# The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics

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## Abstract

This note summarizes past and current case law concerning one of the last-born colonies of our times, the British Indian Ocean Territory (BIOT). Created—and depopulated—for the sole purpose of accommodating a strategic US military base, the territory has since generated extensive litigation in the national courts of the United Kingdom and the United States, as well as proceedings in the European Court of Human Rights, an ongoing arbitration under Annex VII of the Convention on the Law of the Sea (*Mauritius v. UK*) and a potential dispute over continental shelf claims (the United Kingdom, Mauritius and the Maldives). The principal actors, besides the governments involved, have been the Chagos islanders, whose exile from their home archipelago has now lasted more than forty years. The material analysed and referenced in this note covers a range of legal and historical sources documenting the underlying disputes.

**Keywords:** Decolonization; denuclearization; depopulation; fortress conservation; human rights; law of the sea; marine reserve; military base; trusteeship; Wikileaks.

## I. Imperial Recolonization in the Indian Ocean

The Chagos Archipelago is a cluster of coral atolls in the middle of the Indian Ocean, ceded to Britain by France under the terms of the 1814 Peace Treaty of Paris,<sup>1</sup> as part of the “lesser dependencies of Mauritius”.<sup>2</sup> The archipelago “is considered to have the most pristine tropical marine environment on the planet and to be by far the richest area of marine biodiversity of the United Kingdom and its Overseas Territories”.<sup>3</sup> At the same time, its central geographical location in the

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1 May 30, 1814; 63 CONSOLIDATED TREATY SERIES 171 (Clive Parry ed., 1969). See Garth Abraham, *Paradise Claimed: Disputed Sovereignty over the Chagos Archipelago*, 128 SOUTH AFRICAN LAW JOURNAL 63 (2011); and Ebrahim Afsah, *Diego Garcia (British Indian Ocean Territory)*, in 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 93 (Rüdiger Wolfrum ed., 2012).

2 See generally ROBERT SCOTT, LIMURIA: THE LESSER DEPENDENCIES OF MAURITIUS (1961, rev. ed., 1976); RICHARD EDIS, PEAK OF LIMURIA: THE STORY OF DIEGO GARCIA AND THE CHAGOS ARCHIPELAGO (rev. ed., 2004); and the informative website by Richard P. Dunne, available at <<https://sites.google.com/site/thechagosarchipelagofacts/home>>.

3 Chagos Conservation Trust, submission to the HOUSE OF COMMONS SELECT COMMITTEE ON FOREIGN AFFAIRS, OVERSEAS TERRITORIES: SEVENTH REPORT OF SESSION 2007–08, HC 147-II (2008), at 354. Curri-

maritime region between Africa, the Near East, South Asia and Australia gives the archipelago's largest island, Diego Garcia, a unique strategic importance: In the words of Admiral John S. McCain, "as Malta is to the Mediterranean, Diego Garcia is to the Indian Ocean—equidistant from all points."<sup>4</sup> That is why Diego Garcia has since 1966 been turned into one of the largest, most costly and most secretive US military bases overseas.<sup>5</sup>

Following preliminary UK-US negotiations during Cold War years from 1963 onwards,<sup>6</sup> and a secret commitment by the Pentagon in June 1965 to contribute up to US\$14 million to "the British costs of detaching certain islands in the Indian Ocean from their present administrative authorities",<sup>7</sup> UK Prime Minister Harold Wilson persuaded Mauritian Premier Seewoosagur Ramgoolam in September 1965 to agree to the "excision" of the Chagos Islands from the colonial territory of Mauritius, as a condition for the future independence of the country.<sup>8</sup> Part of the deal was a lump-sum payment of US\$8.4 million (£3 million) as "detachment costs",<sup>9</sup> together with a bilateral defence funding agreement, financial compensation for plantation owners on the islands, and removal of the islands' indigenous population.<sup>10</sup> A similar deal was struck with Premier James R. Mancham of the

ously, though, the Chagos Archipelago is one of the very few overseas territories to which the United Kingdom did *not* extend its ratification of the Convention on Biological Diversity (June 5, 1992, 1760 UNTS 79), and which consequently does not appear in any UK national reports to the Conferences of the Parties. On the likely political reasons for this omission (and other gaps in environmental treaty coverage), see Peter H. Sand, *The Chagos Archipelago: Footprint of Empire, or World Heritage?*, 40 ENVIRONMENTAL POLICY AND LAW 232 (2010), at 235.

- 4 (1884–1945), US Naval Commander in the Pacific; cited in RAUL RAIS, *THE INDIAN OCEAN AND THE SUPERPOWERS* 76 (1987), and ANITA BHATT, *THE STRATEGIC ROLE OF THE INDIAN OCEAN IN WORLD POLITICS: THE CASE OF DIEGO GARCIA* 7 (1992). See also Andrew S. Erickson, Walter C. Ladwig III & Justin D. Mikolay, *Diego Garcia and the United States' Emerging Indian Ocean Strategy*, 6 ASIAN SECURITY 214 (2010), at 221; and *Id.*, *Diego Garcia: Anchoring America's Future Presence in the Indo-Pacific*, 15 HARVARD ASIA QUARTERLY 20 (2013).
- 5 See DAVID S. VINE, *ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE ON DIEGO GARCIA* (2009, rev. ed., 2011); PETER H. SAND, *UNITED STATES AND BRITAIN IN DIEGO GARCIA: THE FUTURE OF A CONTROVERSIAL BASE* (2009, rev. German ed., 2011); and Mark B. Salter & Can E. Mutlu, *Securitization and Diego Garcia*, 39 REVIEW OF INTERNATIONAL STUDIES 815 (2013).
- 6 Documented in 21 FOREIGN RELATIONS OF THE UNITED STATES, 1964–1965 (Nina D. Howland ed., 2000), at 83–117. On earlier exploratory Diego Garcia visits by US Admirals Jerauld Wright and Jack Grantham (in 1957 and 1961), see JOHN PILGER, *FREEDOM NEXT TIME: RESISTING THE EMPIRE* 20 (2007), at 23.
- 7 Memorandum from US Secretary of Defense Robert S. McNamara to Secretary of the Air Force Eugene Zucker (June 14, 1965, marked "secret"); text in Howland, *supra* note 6, at 39.
- 8 See John O. Wright, *Record of a Conversation between Prime Minister Harold Wilson and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No.10 Downing Street at 10 a.m. on Thursday, September 23, 1965*, Records of the Prime Minister's Office (1965), PREM 13/3320, Kew National Archives.
- 9 See US GENERAL ACCOUNTING OFFICE (GAO), *FINANCIAL AND LEGAL ASPECTS OF THE AGREEMENT ON THE AVAILABILITY OF CERTAIN INDIAN OCEAN ISLANDS FOR DEFENSE PURPOSES*, B-184915 (1976). On the use made of these funds (by the British colonial administration), see Colonial Office: Pacific and Indian Ocean Department, *Agreed Projects Financed from the £3 Million Compensation for the Chagos Islands*, PAC 796/13/02 (1966), CO 1036/1650, Kew National Archives.
- 10 See André Oraison, *À propos du litige anglo-mauricien sur l'archipel des Chagos (la succession d'États sur les îles Diego Garcia, Peros Banhos et Salomon)*, 23 REVUE BELGE DE DROIT INTERNATIONAL 5 (1990), at 57; *Id.*, *Le contentieux territorial anglo-mauricien sur l'archipel des Chagos revisité*, 83 REVUE DE

Seychelles, excising the neighbouring western islands of Aldabra, Farqhar and Desroches.<sup>11</sup>

As a result, the UK government issued an order in November 1965, proclaiming a new “separate colony which shall be known as the British Indian Ocean Territory (BIOT)”, consisting of the Chagos Islands, Aldabra, Farqhar and Desroches.<sup>12</sup> The order was enacted by simple executive law-making under “royal prerogative powers”, without parliamentary approval or control.<sup>13</sup> One year later, the United Kingdom concluded a bilateral agreement with the United States on the “Availability for Defence Purposes of the British Indian Ocean Territory”,<sup>14</sup> followed by supplementary agreements and amendments in 1972, 1976, 1982, 1987 and 1999, and by subsequent exchanges of letters in 2001–2004.<sup>15</sup> These agreements regulated the establishment and step-by-step expansion of US military installations from naval communications (radio signals intelligence),<sup>16</sup> to support facilities for pre-positioned supply vessels, aircraft carriers and nuclear submarines; a long-range bomber forward operating airport; a satellite tracking station; as well as electronic, hydro-acoustic and seismic monitoring facilities for the Indian Ocean region.<sup>17</sup> Cumulative military construction costs at the Navy Support Facility

DROIT INTERNATIONAL ET DE SCIENCES DIPLOMATIQUES ET POLITIQUES 109 (2005), at 151; and JEAN CLAUDE DE L'ESTRAC, *L'AN PROCHAIN À DIEGO GARCIA...* (2011), at 59–75.

- 11 See JAMES R. MANCHAM, *WAR ON AMERICA SEEN FROM THE INDIAN OCEAN* (2001), at 42. Detachment costs in the case of the Seychelles included construction of the Mah airport (at approximately US\$16.8 million) and compensation for private lands on the islands of Farqhar (which happened to be owned by a member of the Seychelles cabinet, principal shareholder of the Chagos copra plantations) and Desroches, at about half a million US dollars each; see Maurice Denuzière, *Les Seychelles au plus près du bonheur: demain l'indépendance*, LE MONDE (May 26, 1976), at 6.
- 12 British Indian Ocean Territory Order 1965 (Nov. 8, 1965), STATUTORY INSTRUMENTS [1965] No. 1920, as amended in STATUTORY INSTRUMENTS [1968] No. 111; see ROBERT ALDRICH & JOHN CONNELL, *THE LAST COLONIES* (1998), at 178–182.
- 13 Pursuant to the Colonial Laws Validity Act, 28 & 29 Vict. (1865), chapter 63. See DAVID B. SWINFEN, *IMPERIAL CONTROL OF COLONIAL LEGISLATION 1813–1865: A STUDY OF BRITISH POLICY TOWARDS COLONIAL LEGISLATION POWERS* (1970); Thomas Poole, *The Royal Prerogative*, 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 146 (2010); Ronan Cormacain, *Prerogative Legislation as the Paradigm of Bad Law-Making: The Chagos Islands*, 39 COMMONWEALTH LAW BULLETIN 487 (2013); and notes 58–62 *infra*.
- 14 Exchange of Notes (Dec. 30, 1966), 603 UNTS 273; text reproduced in SAND, *supra* note 5, at 69, together with unpublished “agreed confidential minutes” (*id.*, at 81) and a secret side-note containing financial arrangements (*id.*, at 6), both declassified on Nov. 16, 2005, as file FO 93/8/401 in the UK National Archives at Kew.
- 15 Texts in SAND, *supra* note 5, at 84–121.
- 16 On the National Security Agency’s transfer of some of its regional signal interception activities from Kagnev/Eritrea to Diego Garcia in the 1970s, see Monty Rich, *NSA Diego Garcia: The Prelude*, 21 CRYPTOLOGY: NEWSLETTER OF THE NAVAL CRYPTOLOGY VETERANS ASSOCIATION 1(2000); and Matthew M. Aid, *The National Security Agency and the Cold War*, in *SECRETS OF SIGNALS INTELLIGENCE DURING THE COLD WAR AND BEYOND* 27 (Matthew M. Aid & Cees Wiebes eds., 2001). See also JEFFREY T. RICHELSON & DESMOND BALL, *THE TIES THAT BIND: INTELLIGENCE COOPERATION BETWEEN THE UKUSA COUNTRIES—UNITED KINGDOM, UNITED STATES OF AMERICA, CANADA, AUSTRALIA AND NEW ZEALAND* (1985), at 204–206; and JAMES BAMFORD, *BODY OF SECRETS* (2001), at 160–165.
- 17 See PATRICK R. KEEFE, *CHATTER: DISPATCHES FROM THE SECRET WORLD OF GLOBAL EAVESDROPPING* (2005), at 72–76 and 115–121. Secrecy at the Naval Ocean Surveillance Station in Diego Garcia did not prevent one of the naval radio technicians there from selling cryptography material to the Soviet KGB, which enabled the Russians to monitor all radio traffic between US naval headquarters and ships around the world—a scoop later ranked by a top KGB veteran as “the greatest achievement of Soviet intelligence at the time of the Cold War”; BAMFORD, *supra* note 16,

(NSF) Diego Garcia so established since 1971 are estimated at over US\$3 billion,<sup>18</sup> with a further US\$200 million upgrade programme currently underway.<sup>19</sup> As the Diego Garcia atoll—with its huge lagoon providing a Pearl-Harbor-size natural port—turned out to be sufficient for the requirements of the base, the three western islands were returned to the Seychelles upon independence in 1976.<sup>20</sup> The 1965 Order-in-Council and the 1966 UK-US bilateral agreement were amended accordingly, so that the BIOT at present covers the Chagos Archipelago only.<sup>21</sup> As one of the 14 non-self-governing British “overseas territories”, the islands are governed by the UK Foreign and Commonwealth Office (FCO), with the Director of the FCO Overseas Territories Department in London serving as BIOT Commissioner, and a Royal Navy Commander as local resident and magistrate.<sup>22</sup>

Yet, all post-independence Mauritian governments reclaimed sovereignty over the Chagos, pointing to the 1965 “excision” as a violation of the UN General Assembly’s Decolonization Resolutions 1514 (XV) and 2066 (XX),<sup>23</sup> and of the *uti possidetis*

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at 277, quoting Major General Oleg Kalugin, former deputy chief of KGB at the Washington Embassy. The navy spy was sentenced to a life-time prison term; *United States v. Whitworth* (9th Cir., Nov. 13, 1987), 856 F.2d 1268.

- 18 See US DEPARTMENT OF DEFENSE, *BASE STRUCTURE REPORT: FISCAL YEAR 2012 BASELINE 80* (2013), which puts the current total “plant replacement value” of the Diego Garcia base at US\$3.23 billion; see also VYTAUTAS B. BANDJUNIS, *DIEGO GARCIA: CREATION OF THE INDIAN OCEAN BASE* (2001), Appendix 5, at 309–310 (table of congressional appropriations for Diego Garcia military construction, 1970–1987).
- 19 See Erickson *et al.*, *supra* note 4, at 224. *Inter alia*, the US Navy plans to station several of its new Triton drones (MQ-4C) at Diego Garcia by 2015, for broad area maritime surveillance (BAMS) of the Indian Ocean region; as reported by Mark Corcoran, ABC NEWS (Australian Broadcasting Corporation, Sept. 4, 2012).
- 20 After several condemnatory requests by the UN General Assembly’s “Committee of 24”, calling on “the administrative Power to respect the territorial integrity of the Seychelles and to return immediately to that Territory the islands detached from it in 1965”; 7:8 UNITED NATIONS MONTHLY CHRONICLE 54 (1970); see ANDRÉS RIGO SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION: A CASE STUDY OF U.N. PRACTICE* (1973), at 202 n. 1.
- 21 Statutory Instruments [1976] No. 893; and Exchange of Notes (June 25, 1976), 1032 UNTS 323.
- 22 See IAN HENDRY & SUSAN DICKSON, *BRITISH OVERSEAS TERRITORIES LAW* (2011), at 2–4, 301 and 304.
- 23 GA Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960), excluded the imposition of “any conditions” for the granting of independence, and cautioned that “any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” Subsequently, GA Res. 2066 (XX) (Dec. 16, 1965) specifically called on the United Kingdom “to take no action which would dismember the territory of Mauritius and violate its territorial integrity.” On the recurrent Chagos debates in the UN General Assembly, see MIHAI MARTOIU TICU, *CHAGOS: WHERE INTERNATIONAL LAW STOPS* (LL.M. thesis, Utrecht University, 2012), at 7–12 and 33–49, and the Mauritian statements (1980–2013) in the official records; e.g., UN Docs. A/35/PV.30, p. 590; A/38/711, p. 1; A/42/32, p. 48; A/43/28, p. 38; A/56/46, p. 17; and A/68/PV (Sept. 28, 2013). See also Jean Claude de l’Estrac, *Diego Garcia: Mauritius Battles a Superpower to Reclaim a Cold War Hostage*, 72 JOURNAL OF THE PARLIAMENTS OF THE COMMONWEALTH 267 (1991); Rachael Bradley, *Diego Garcia: Britain in the Dock*, 7 BOUNDARY AND SECURITY BULLETIN 82, 87 (1999); THIERRY OLLIVRY, *DIEGO GARCIA: ENJEUX STRATÉGIQUES, DIPLOMATIQUES ET HUMANITAIRES* (2008), at 76; Geoffrey Robertson, *Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean*, 36 UNIVERSITY OF WESTERN AUSTRALIA LAW REVIEW No. 1 (2012); and Tor Sellstörn, *Re-colonization in the Indian Ocean: Chagos and Mayotte*, Paper for Panel 27 of the Fourth European Conference on African Studies (Uppsala, June 15–18, 2011).

rule applied to colonial boundaries in international jurisprudence.<sup>24</sup> Claims for the excision “to have been accepted, at least as a temporary measure”,<sup>25</sup> do not seem to be supported by evidence of acquiescence. On the contrary, Article 111 of the Mauritian Constitution, as amended in 1991, declares “the Chagos Archipelago including Diego Garcia” part of the national territory of Mauritius.<sup>26</sup> The Mauritian claims have been supported by the African Union (AU) since 1980,<sup>27</sup> and by a ministerial declaration of the Group of 77 and China at the 2012 UN Conference on Trade and Development (UNCTAD) in Doha.<sup>28</sup> For its part, the UK government invariably rejected the claims, while conceding that the islands would eventually be “ceded” to Mauritius at some unspecified future time “when they are no longer needed for defence purposes, and in accordance with international law.”<sup>29</sup>

The sovereignty dispute also affects the application of international disarmament instruments to the archipelago. Mauritius is a party to the 1995 African Nuclear-Weapons-Free-Zone Treaty (“Pelindaba Treaty”),<sup>30</sup> which requires it “to prohibit in its territory the stationing of any nuclear explosive devices” while allowing parties to authorize visits or transits by foreign nuclear-armed ships or aircraft.<sup>31</sup> The United Kingdom is a party to Protocols I and II of the treaty, which require it not

- 24 See Malcolm N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRITISH YEARBOOK OF INTERNATIONAL LAW 75 (1996); Suzanne Lalonde, *Uti Possidetis: Its Colonial Past Revisited*, 34 REVUE BELGE DE DROIT INTERNATIONAL 23 (2001); JOSHUA CASTELLINO & STEVE ALLEN, TITLE TO TERRITORY IN INTERNATIONAL LAW: A TEMPORAL ANALYSIS (2003), at 7–28; and Mi Yung Yoon, *European Colonialism and Territorial Disputes in Africa: The Gulf of Guinea and the Indian Ocean*, 20 MEDITERRANEAN QUARTERLY 77 (2009), at 89–92.
- 25 As suggested by MALCOLM N. SHAW, TITLE TO TERRITORY IN AFRICA (1986), at 132; JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2nd ed., 2006), at 337; and Stephen Allen, *Looking Beyond the Bancoult Case: International Law and the Prospect of Resettling the Chagos Islands*, 7 HUMAN RIGHTS LAW REVIEW 441 (2007), at 454.
- 26 Constitutional Amendment Act No. 48 of Dec. 17, 1991, LEGAL SUPPLEMENT TO THE GOVERNMENT GAZETTE OF MAURITIUS No. 131 (Dec. 23, 1991), revising the 1968 text; 12 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 81 (Gisbert Flanz ed., 1998), at 98.
- 27 17th session of the Organization of African Unity (OAU) Assembly of Heads of State and Government (Freetown, July 4, 1980), Res. AHG/99(XVII) on Diego Garcia; 74th session of the OAU Council of Ministers (Lusaka, July 8, 2001), Decision CM/26(LXXIV) on the Chagos Archipelago including Diego Garcia; 15th AU Assembly (Kampala, July 27, 2010), Decision 331(XV) on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago; and 16th AU Assembly (Addis Ababa, Jan. 31, 2011), Res. AU/1 (XVI) on the Chagos Archipelago including Diego Garcia. The AU Commission lists the Chagos islands among “African territories under foreign occupation”; see the STRATEGIC PLAN OF THE AFRICAN UNION COMMISSION 1 (Alpha O. Komaré ed., 2004), Annex 3, at 43.
- 28 United Nations Conference on Trade and Development, 13th Session, UNCTAD Doc. TD/468 (Apr. 23, 2012), para. 20.
- 29 E.g., see statements in the UN General Assembly in 1983 and 2002, 55 BRITISH YEARBOOK OF INTERNATIONAL LAW 519 (1984) and 73 BRITISH YEARBOOK OF INTERNATIONAL LAW 701 (2002). See also the FCO White Paper, *Partnership for Progress and Prosperity: Britain and the Overseas Territories*, Cm. 4264 (1999), at 51; and JON LUNN & CLAIRE MILLS, DISPUTES OVER THE BRITISH INDIAN OCEAN TERRITORY: A SURVEY, House of Commons Library Research Paper RP13/31 (May 22, 2013), at 5.
- 30 Adopted by the Organization for African Unity (OAU, now the African Union, AU) at Cairo (June 23, 1995; in force July 15, 2009), 35 ILM 698 (1996).
- 31 *Id.*, Article 4.

to “contribute to any act which constitutes a violation of this treaty or protocol”.<sup>32</sup> According to the map annexed to it, the treaty explicitly covers, along with other islands off the East-African coast, the “Chagos Archipelago—Diego Garcia”, albeit with a footnote (inserted at the request of the United Kingdom) stating that the territory “appears without prejudice to the question of sovereignty”. While it is clear from the drafting history that all participating African countries thus agreed to include the Chagos in the geographical scope of the treaty regardless of the sovereignty dispute,<sup>33</sup> the United Kingdom interprets the footnote as meaning that it did “not accept the inclusion of that Territory within the African nuclear-weapon-free zone”.<sup>34</sup> Likewise, the United States (which co-signed the protocols in 1996, but so far did not ratify) maintains that “neither the Treaty nor Protocol III [*sic*] applied to the activities of the United Kingdom, the United States or any other State not party to the Treaty on the island of Diego Garcia or elsewhere in the British Indian Ocean territories”,<sup>35</sup> and with explicit reference to these divergent interpretations, the Russian Federation has since declared (upon its ratification of Protocols I and II in 2011) that it considers the treaty inapplicable to Diego Garcia.<sup>36</sup> In practice, US nuclear-armed submarines (SSBNs) regularly dock in Diego Garcia for crew exchanges and for servicing of their equipment and weapons systems by the submarine tender USS *Emory S. Land*.<sup>37</sup> And although the 2010 US-Russian START-2 Treaty<sup>38</sup> provides

32 *Id.*, Protocol I, Article 2. The United Kingdom ratified both protocols on March 19, 2001; see also the FCO’s *Explanatory Memorandum on the Pelindaba Treaty*, Command Paper 3498 (2000).

33 See OLUYEMI ADENIJI, THE TREATY OF PELINDABA ON THE AFRICAN NUCLEAR-WEAPON-FREE ZONE (2002), at 149–150; Peter H. Sand, *African Nuclear-Weapon-Free Zone in Force: What Next for Diego Garcia?*, 13 AMERICAN SOCIETY OF INTERNATIONAL LAW: ASIL INSIGHTS No. 12 (Aug. 28, 2009); and *Id.*, *Diego Garcia: A Thorn in the Side of Africa’s Nuclear-Weapon-Free Zone*, 65 BULLETIN OF THE ATOMIC SCIENTISTS No. 6 (Oct. 8, 2009).

34 Letter from the British Ambassador to the OAU Secretary-General (Cairo, Apr. 11, 1996), reprinted in ADENIJI, *supra* note 33, at 157, 299. By contrast, the FCO treats the 1959 Antarctic Treaty (402 UNTS 71), Article IV(1) of which also reserves the question of territorial sovereignty over certain areas claimed both by the United Kingdom and other states, as fully applicable to the disputed areas concerned.

35 *Id.*, at 157, 301. For background see Karl K. Schonberg, *The Generals’ Diplomacy: U.S. Military Influence in the Treaty Process, 1992–2000*, 3 SETON HALL JOURNAL OF DIPLOMACY AND INTERNATIONAL RELATIONS 68, 80 (2002).

36 The Russian reservation upon ratification (Apr. 5, 2011) reads as follows: “The Russian Federation, assuming that in accordance with Article I of the Treaty, ‘African nuclear-weapon-free-zone’ means the territory of the continent of Africa, insular Member States of the African Union and other adjoining islands considered by the African Union in its resolutions as a part of Africa, does not however consider itself legally bound under Protocol I in respect of such territories, provided (as long as) these territories have military bases of nuclear powers, as well as of territories in respect of which other nuclear states consider themselves legally unbound under Protocol I” (translation by the UN Office for Disarmament Affairs, available at <[http://disarmament.un.org/treaties/a/pelindaba\\_1/russianfederation/rat/cairo](http://disarmament.un.org/treaties/a/pelindaba_1/russianfederation/rat/cairo)>).

37 See US Navy Press Release No. NNS091203-01 (Dec. 3, 2009). The *Emory S. Land* was previously stationed at the US naval base of Santo Stefano in the Mediterranean, but had to leave in September 2007 in the wake of public protests over radioactive contamination in the adjoining marine park of La Maddalena, which resulted in closure of the base in 2008; see Massimo Zucchetti & Fabrizio Aumento, *Accidents in Nuclear-Powered Submarines and Their Effects on Environmental Marine Pollution*, 7 JOURNAL OF ENVIRONMENTAL PROTECTION AND ECOLOGY 176 (2006).

38 Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (Prague, Apr. 8, 2010), 50 ILM 340 (2011), Article IV(11); see THE NEW START TREATY BETWEEN THE U.S. AND RUSSIA (Alisa L. Rebane ed., 2011).

that “strategic offensive arms [such as the *Trident II-D5* ballistic missiles on board the SSBNs] shall not be based outside the national territory of each Party”, “visits of submarines to ports of third States” [such as Diego Garcia] are exempt.

Furthermore, both the United Kingdom and Mauritius—though not the United States—are parties to the 1997 Ottawa Convention on Landmines, which prohibits the use, stockpiling and transfer of anti-personnel mines in the territories of the contracting parties;<sup>39</sup> however, with regard to the prohibited landmine cluster units stored on chartered US freight vessels in the Diego Garcia lagoon (i.e., in UK internal waters),<sup>40</sup> the UK Foreign Office takes the view that any mines aboard US naval ships inside British territorial waters “are not on UK territory provided they remain on the ships”.<sup>41</sup> The same presumably applies to prisoners temporarily held on US vessels in the lagoon, in the course of “rendition flights” routed through Diego Garcia, several of which have been confirmed in the past.<sup>42</sup>

39 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Sept. 18, 1997), 2056 UNTS 211; ratified by Mauritius on Dec. 3, 1997, and by the United Kingdom on July 31, 1998, extended to British overseas territories (including BIOT) on Dec. 4, 2001.

40 According to the non-governmental “International Campaign to Ban Landmines” (ICBL, co-laureate of the 1997 Nobel Peace Prize), the United States kept major quantities of anti-personnel landmines on supply vessels anchored in the Diego Garcia lagoon, including some 10,000 mines in cluster bomb units such as the *Aerojet Gator* (CBU-89/B); see LANDMINE MONITOR REPORT 1999: TOWARD A MINE-FREE WORLD (1999), at 328–334, citing official US sources. While the use and stockpiling of these weapons is strictly prohibited by the Ottawa Convention (*supra* note 39), a so-called NATO declaration made by the United Kingdom upon signature exempts any “military activity conducted in combination with the armed forces of states not party to the Convention which engage in activity prohibited under the Convention”; see Knut Dörmann, *Land Mines*, in Wolfrum, *supra* note 1, vol. 6, 670, at para. 18. The UK Ministry of Defence therefore takes the position that the Convention “does not prevent the US from continuing to stockpile cluster munitions on its bases on UK territory (including Diego Garcia)”; written answer by Bob Ainsworth, Minister of State for the Armed Forces, 476 HANSARD: HOUSE OF COMMONS DEBATES col. 1061W (June 5, 2008).

41 *General Status and Operation of the Convention: UK Intervention on Article 1*, Statement by Ambassador David Broucher to the Ottawa Convention Standing Committee meeting in Geneva, May 2003; as quoted in Christopher W. Jacobs, *Taking the Next Step: An Analysis of the Effects the Ottawa Convention May Have on the Interoperability of United States Forces with the Armed Forces of Australia, Great Britain and Canada*, 180 MILITARY LAW REVIEW 49 (2004), at 67. But see the contrary opinion by the Legal Office of the International Committee of the Red Cross, in the 1999 ICBL LANDMINE MONITOR REPORT (*supra* note 40), Annex, at 1005; and Stuart Maslen, COMMENTARIES ON ARMS CONTROL TREATIES: THE CONVENTION ON THE PROHIBITION OF THE USE, STOCKPILING, PRODUCTION AND TRANSFER OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION (2004), at 100.

42 See the statement by Foreign Secretary David Miliband, *Terrorist Suspects (Rendition)*, in 472 HOUSE OF COMMONS DEBATES, col. cs547 (Feb. 21, 2008), 79 BRITISH YEARBOOK OF INTERNATIONAL LAW 649, 667 (2008); and US Central Intelligence Agency (CIA) Press Release, *Director’s Statement on the Past Use of Diego Garcia* (Feb. 21, 2008). See also the submission by Clive A. Stafford Smith, *Renditions and Secret Imprisonment in Diego Garcia*, in the 2008 Report of the HOUSE OF COMMONS FOREIGN AFFAIRS SELECT COMMITTEE, *supra* note 3, at 305–307; *Id.*, BAD MEN: GUANTÁNAMO BAY AND THE SECRET PRISONS (2007), at 246–248; Aude Vasseur, *Royaume-Uni/États-Unis: transit d’avions transportant des détenus de la CIA sur l’île de Diego Garcia*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 142 (Mar. 23, 2008); and the report to the UN Human Rights Council by Martin Scheinin, Manfred Nowak, Shaheen Sardar Ali & Jeremy Sarkin, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, UN Doc. A/HRC/13/42 (Feb. 19, 2010), at 46, 57, 72, 149 and 174.

## II. Depopulation by Prerogative Powers

In 1967, all privately-owned copra plantations in the Chagos islands were expropriated or bought out to become British crown land,<sup>43</sup> and by 1973, the entire resident population of the islands was “relocated” to make place for the military base, where US naval construction had started in March 1971.<sup>44</sup> The deportation, carried out with US assistance, was based on a BIOT Immigration Ordinance enacted under royal prerogative powers in April 1971,<sup>45</sup> which made it unlawful for any person (other than members of the armed forces or public servants) to enter or remain in the Territory without an official permit, and authorized the BIOT Commissioner to make an order directing those persons to “be removed from and remain out of the Territory”.<sup>46</sup> Calculations of the precise number of people concerned vary, owing to a paucity of records and to the difficulty of distinguishing indigenous *Îlois* (including many families established on the islands for several generations) and temporary migrant workers from other islands, compounded by deliberate manipulation of demographic statistics by the colonial authorities,<sup>47</sup> and the insertion of a tailor-made “Chagos natives clause” in the 1968 Mauritian Constitution by the FCO’s Constitutional Commissioner.<sup>48</sup> The best recent estimate puts the number of Chagossians involuntarily moved to Mauritius at between 1,328 and 1,522; and the number so moved to the Seychelles at 232.<sup>49</sup>

43 BIOT Ordinance No. 1 of 1967 (Feb. 8, 1967: *Compulsory Acquisition of Land for Public Purposes*) and No. 2 of 1967 (Mar. 22, 1967: *Acquisition of Land for Public Purposes, Private Treaty*); superseded by a 1983 ordinance declaring all land Crown property.

44 HENDRY & DICKSON, *supra* note 22, at 303. See also JOHN PILGER, *FREEDOM NEXT TIME* (2006), at 19–60; David R. Snoxell, *Anglo/American Complicity in the Removal of the Inhabitants of the Chagos Islands, 1964–73*, 37 *JOURNAL OF IMPERIAL AND COMMONWEALTH HISTORY* 127 (2009); and SAND, *supra* note 5, at 18–24.

45 See text at note 13 *supra*; BIOT Ordinance No. 1 of 1971 (Apr. 16, 1971: *Immigration and Residence in the Territory*), amended by Ordinances No. 8 of 1981, No. 9 of 1994, and No. 5 of 1997.

46 *Id.*, sections 9 and 10.

47 In an advisory opinion of Jan. 16, 1970, FCO Assistant Legal Adviser Anthony I. Aust had recommended “to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population”, in order to bolster the argument “that the territory has no indigenous population”; as quoted by Lord Justice Laws in *The Queen (ex parte Bancoult) v. Foreign and Commonwealth Office*, Nov. 3, 2000, [2001] Q. B. 1067, at 1086; 123 *INTERNATIONAL LAW REPORTS* 555 (2003). Accordingly, various population estimates by FCO officials categorized most or all Chagossians as “temporary migrant workers” from Mauritius or the Seychelles, notwithstanding evidence such as family tombstones in island cemeteries.

48 The principal author of the 1968 Constitution of Mauritius (*supra* note 26) was an expert consultant seconded by the FCO to the Mauritian Legislative Assembly in the 1960s, Prof. Stanley Alexander de Smith from the London School of Economics. Article 20(4) of the Constitution reads as follows: “A person shall be regarded as having been born in Mauritius if he was born in the territories which were comprised in the former Colony of Mauritius immediately before 8 November 1965 [the date of the BIOT “excision”] but were not so comprised immediately before 12 March 1968 [the date of Mauritian independence] unless either of his parents was born in the territories which were comprised in the Colony of Seychelles immediately before 8 November 1965.”

49 Richard Gifford & Richard P. Dunne, *A Dispossessed People: The Depopulation of the Chagos Archipelago 1965–1973*, 20 *POPULATION, SPACE AND PLACE* 37 (2014), .



Faced with the prospect of litigation and international media attention to the miserable fate of the exiled islanders,<sup>50</sup> the UK government later negotiated agreements with Mauritius for compensation totalling US\$10 million (US\$1.4 million in 1972, and US\$8.6 million in 1982), “*ex gratia* with no admission of liability”, and “in full and final settlement of all claims whatsoever” by or on behalf of the *Îlois* against the UK government.<sup>51</sup> Attempts by the Chagossians to obtain compensation from the United States under the *Alien Tort Claims Act* were dismissed by the D.C. Circuit Court of Appeals in 2006,<sup>52</sup> on the grounds that the establishment of the US base on Diego Garcia was a “non-justiciable act” at the Executive’s discretion, and that the individual defendants named (ex-secretaries of defense McNamara, Rumsfeld, Laird and Schlesinger) enjoyed state immunity for obeying superior orders.<sup>53</sup>

- 50 Contradicting the official description of the Chagos islands as “unpopulated” (in US congressional hearings in 1974–75), critical articles in the *Washington Post*, the *Sunday Times* and *Le Monde* in September 1975 drew public attention to the plight of the deported islanders, and (coinciding with the first private lawsuits by Chagossians in the London High Court) prompted several sociological field surveys: M. ALBERT R. G. PROSSER, MAURITIUS: RESETTLEMENT OF PERSONS TRANSFERRED FROM CHAGOS ARCHIPELAGO (1976); HERVÉ SYLVA, REPORT ON THE SURVEY ON THE CONDITIONS OF LIVING OF THE ÎLOIS COMMUNITY DISPLACED FROM THE CHAGOS ARCHIPELAGO (1981); STEFFEN F. JOHANNESSEN, CONTESTED ROOTS: THE CONTEMPORARY EXILE OF THE CHAGOSSIAN COMMUNITY IN MAURITIUS (Master thesis, Oslo University, 2005); and David S. Vine, *Chagossians Twice Forgotten: Exile in the Seychelles*, in *EVICION FROM THE CHAGOS ISLANDS: DISPLACEMENT AND STRUGGLE FOR IDENTITY AGAINST TWO WORLD POWERS* 105 (Sandra J. T. M. Evers & Marry Kooy eds., 2011).
- 51 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius concerning the *Îlois* from the Chagos Archipelago (July 7, 1982), 1316 UNTS 127, Article 1. For background see JOHN MADELEY, DIEGO GARCIA: A CONTRAST TO THE FALKLANDS (1985), at 5, 15; and DE L’ÉSTRAC, *supra* note 10, at 157–161.
- 52 *Olivier Bancoult et al. v. Robert S. McNamara et al.*, Judgment by Judge Janice R. Brown (Apr. 21, 2006), 445 F.3rd 427 (D.C. Cir. 2006); *certiorari* denied, Jan. 16, 2007, 127 Sup. Ct. 1225 (2007). The US government had initially applied to the Mauritian courts for an injunction against the suit, which the Supreme Court of Mauritius refused (*De Chazal du Mée v. Olivier Bancoult et al.*, Judgment by Chief Justice Matadeen (Aug. 7, 2002)), allowing the plaintiffs to proceed. See the case notes by Christian Nauvel, *A Return from Exile in Sight? The Chagossians and Their Struggle*, 5 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 96 (2006); John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 692 (2006); and 120 HARVARD LAW REVIEW 860 (2007).
- 53 Under the Federal Employees Liability Reform and Tort Compensation Act (Westfall Act), 102 Stat. 4563 (1988); see Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUMBIA LAW REVIEW 1718 (2008). Judge Brown’s sweeping exemption of “political questions” from judicial review (which parallels an argument later recurring in the British courts, see text at note 63 *infra*) is not uncontroversial; see Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE LAW JOURNAL 517 (1966); THOMAS FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE LAW JOURNAL 1457 (2005), at 1465; and R. H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARVARD LAW REVIEW 1694 (2008).

Undeterred, the Chagos islanders—most of whom had since been granted UK (and hence EU) citizenship,<sup>54</sup> albeit under discriminatory limitations,<sup>55</sup>—turned to the UK High Court to claim the right of abode in their homeland, initially recognized by a judgment in 2000 annulling the 1971 BIOT Immigration Ordinance,<sup>56</sup> but denied again by subsequent Orders-in-Council in 2004.<sup>57</sup> When a High Court judgment in 2006 (confirmed on appeal in 2007) once again struck down the sections of the new Orders prohibiting the return of the islanders,<sup>58</sup> the FCO launched a final appeal to the Appellate Committee of the House of Lords, which in October 2008 by a narrow 3–2 decision upheld the legality of the expulsion and of the

54 After initial refusal by UK administrative authorities, as reported in 70 BRITISH YEARBOOK OF INTERNATIONAL LAW 456 (1999), section 6 of the British Overseas Territories Act of 2002 confirmed the citizenship rights of the Chagossians (*Ilois*); see 73 BRITISH YEARBOOK OF INTERNATIONAL LAW 593 (2002). However, in order to avoid individual claims before British courts, the islanders were purposely not informed of their citizenship entitlement; see MARK CURTIS, *WEB OF DECEIT: BRITAIN'S ROLE IN THE WORLD* (2003), at 7.

55 On the citizenship and “belonger” status of the Chagossians, see HENDRY & DICKSON, *supra* note 22, at 202–203, 205 and 271 (no EU citizenship for those BIOT islanders who are “solely British overseas territories citizens”). See also Laura Jeffery, “Unusual Immigrants”, or, *Chagos Islanders and Their Confrontations with British Citizenship*, 18 ANTHROPOLOGY IN ACTION 33 (2011). Unlike other UK nationals, Chagossians cannot pass on their personal citizenship to future generations; on unsuccessful attempts at abolishing this exceptional clause (in the course of parliamentary debate of the 2009 UK Borders, Citizenship and Immigration Act), see LUNN & MILLS, *supra* note 29, at 21–22.

56 *The Queen (ex parte Bancoult) v. Foreign and Commonwealth Office*, *supra* note 47. See the notes by Michael Byers, 71 BRITISH YEARBOOK OF INTERNATIONAL LAW 433 (2000); Louis Balmont, *Chronique des faits internationaux: Grande Bretagne/Îles Chagos*, 104 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 186 (2000); Stephanie Palmer, “They Made a Desert and Called It Peace”: *Banishment and the Royal Prerogative*, 60 CAMBRIDGE LAW JOURNAL 234 (2001); Adam Tomkins, *Magna Carta, Crown and Colonies*, 44 PUBLIC LAW 571 (2001); and Hakim Malaisé, *Exil forcé loin de Diego Garcia*, 48 No. 573 LE MONDE DIPLOMATIQUE 21 (Dec. 2001). However, a High Court decision by Justice Ouseley (*Chagos Islanders v. Attorney General and BIOT Commissioner* (Oct. 9, 2003), [2003] E.W.H.C./Q.B. 2222), upheld by the Court of Appeal ([2004] E.W.C.A./Civ. 997) then dismissed further civil claims for compensation, in light of the 1982 UK-Mauritian Agreement, *supra* note 51; see the notes by Roger O’Keefe, 74 BRITISH YEARBOOK OF INTERNATIONAL LAW 486 (2003); Sulina Bangaroo, *A Short Analysis of the Exile of an Indigenous Population from Beginning to End*, 3 No. 1 HERTFORDSHIRE LAW JOURNAL 3 (2005); and Laura Jeffery, *Historical Narrative and Legal Evidence: Judging Chagossians’ High Court Testimony*, 29 POLITICAL AND LEGAL ANTHROPOLOGY REVIEW 228 (2006).

57 BIOT Constitution Order and BIOT Immigration Order (June 10, 2004), excerpts in 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 664 (2004), and in HENDRY & DICKSON, *supra* note 22, at 305–310. For background see Stephen Allen, *Responsibility and Redress: The Chagossian Litigation in the English Courts*, in Evers & Kooy, *supra* note 50, 127, at 136.

58 *The Queen (ex parte Bancoult) v. Foreign and Commonwealth Office* (May 11, 2006), [2006] E.W.H.C./Divisional Court 1038; upheld on appeal (May 23, 2007), [2007] E.W.C.A./Civ. 498. See the notes by Sue Farran, *Prerogative Rights, Human Rights and Island People: The Pitcairn and Chagos Island Cases*, 50 PUBLIC LAW 414 (2007); and Richard Moules, *Judicial Review of Prerogative Orders in Council: Recognising the Constitutional Reality of Executive Legislation*, 67 CAMBRIDGE LAW JOURNAL 12 (2008).

2004 Orders-in-Council.<sup>59</sup> By virtue of the royal prerogative,<sup>60</sup> the majority opinion declared the provisions of the British Human Rights Act—intended “to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights” (ECHR)<sup>61</sup>—inapplicable to the BIOT,<sup>62</sup> and denied the Chagossians the right of abode in their home islands on the grounds of overriding governmental security and economic interests not subject to judicial review, *inter alia* by reference to an FCO feasibility study highlighting the risk of sea-level rise due to global warming, considered to “make the cost of inhabitation prohibitive”.<sup>63</sup>

The islanders then turned to the European Court of Human Rights in Strasbourg, directly invoking the ECHR. In December 2012, however, the Fourth Section of the Strasbourg Court by a majority decision declared the claims of the Chagos islanders inadmissible. While noting “the callous and shameful treatment” suffered by the claimants “expelled from, or barred from return to, their homes on the islands, and the hardships which immediately flowed from that”, the judges considered the claims to have been definitely settled in the domestic courts, thereby disqualifying the claimants as “victims” under ECHR Article 34.<sup>64</sup> The Court cautiously

- 59 The Queen (on the application of Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (Bancoult No. 2), House of Lords (Oct. 22, 2008), [2008] U.K.H.L. 61, [2009] A.C. 453, 138 INTERNATIONAL LAW REPORTS 628 (2010). Case comments by Philippe Weckel, *Le jugement de la Chambre des Lords britannique fait obstacle au retour des populations des Chagos*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 164 (Oct. 26, 2008); Peter H. Sand, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 317 (2009); Renan Le Mestre, *L'archipel du chagrin ou la lutte des habitants des îles Chagos pour gagner un droit au retour sur leur terre*, 28 ANNUAIRE DE DROIT MARITIME ET OCÉANIQUE 197 (2010); and *infra* notes 60 and 62.
- 60 See text at note 13 *supra*; see also Stephen Allen, *Reviewing the Prerogative of Colonial Governance*, 14 JUDICIAL REVIEW 119 (2009); and Margit Cohn, *Judicial Review of Non-Statutory Executive Powers after Bancoult: A Unified Anxious Approach*, 52 PUBLIC LAW 260 (2009).
- 61 1998 STATUTES Ch. 42 (Nov. 9, 1998); referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950), 213 UNTS 221, in force for the United Kingdom since Sept. 3, 1953, and extended to most British overseas territories (at that time including Mauritius).
- 62 *Bancoult No. 2* (*supra* note 59), Lord Justice Hoffmann’s opinion for the majority, paras. 42–45 and 64–65; but see also the forceful dissenting opinions (by Lord Justice Bingham of Cornhill, *id.*, paras. 68–74, and Lord Justice Mance, paras. 137–186), and the critical case comments by Mark Elliott & Amanda Perreau-Saussine, *Pyrrhic Public Law: Bancoult and the Sources, Status and Content of Common Law Limitations on Prerogative Power*, 52 PUBLIC LAW 697 (2009); Anne Twomey, *Fundamental Common Law Principles as Limitations upon Legislative Powers*, 9 OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 47 (2009); and Julie McBride, “*The Law Gives It and the Law May Take It Away*”: *The Repercussions of Bancoult* (No. 2), 5 CAMBRIDGE STUDENT LAW REVIEW 190 (2009).
- 63 Lord Justice Hoffmann, *id.*, paras. 23 and 58. See the FEASIBILITY STUDY FOR THE RESETTLEMENT OF THE CHAGOS ARCHIPELAGO: PHASE 2B (Posford Haskoning Consultants, 2002), extracts in 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 663, 668 (2004), and 77 BRITISH YEARBOOK OF INTERNATIONAL LAW 638 (2006); for critical comments see Stephen Allen, *International Law and the Resettlement of the (Outer) Chagos Islands*, 8 HUMAN RIGHTS LAW REVIEW 683 (2008), at 687–689. The alleged scientific evidence of sea-level rise in the area is disputed by Richard Dunne *et al.*, *Contemporary Sea Level in the Chagos Archipelago*, 82–83 GLOBAL AND PLANETARY CHANGE 25 (2012); and *Id.*, *Sharks on the Lawn at Diego Garcia—But Is Rising Sea-Level to Blame?*, 20 OCEAN CHALLENGE 36 (2013).
- 64 ECtHR, *Chagos Islanders v. United Kingdom*, Application No. 35622/04, Decision (Dec. 11, 2012), paras. 81–83; see the notes by Anne-Claire Dumouchel, *CEDH/affaire des Chagos: décision d’irrecevabilité, les Chagossiens déboutés*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 332 (Jan. 29, 2013); Claire Grandison, Siema N. Kabada & Andy Woo, *Stealing*

avoided a ruling on the extra-territorial effects of ECHR Article 1,<sup>65</sup> but with regard to jurisdiction *ratione loci* in essence accepted the (controversial) majority opinion of the Law Lords excluding application of the UK Human Rights Act in the BIOT because the European Convention had not expressly been extended to the Territory under ECHR Article 56.<sup>66</sup>

What the Court did not (and indeed did not need to) mention is that, by the same token, the FCO continues to treat most of the international human rights and humanitarian instruments signed and ratified by the United Kingdom as inapplicable in the Chagos and Diego Garcia, since “by reason of the absence of any permanent population” they were never formally extended to the BIOT.<sup>67</sup> These include the 1966 UN Covenants on Human Rights;<sup>68</sup> the 1949 Geneva Conventions III and IV (Treatment of Prisoners of War, and Protection of Civilian Persons in Time of War);<sup>69</sup> the 1984 UN Convention against Torture;<sup>70</sup> the 1987 European Convention against Torture;<sup>71</sup> the 1998 Statute of the International Criminal Court;<sup>72</sup>

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*the Islands of Chagos: Another Forgotten Story of Colonial Injustice*, 20 No. 3 HUMAN RIGHTS BRIEF 37 (2013); Peter Harris, *Dead End or Crossroads? The Chagossians Fail in Strasbourg*, 29 No. 3 ANTHROPOLOGY TODAY 26 (2013); and Jean-Marie G. Le Clézio, *Les îlois des Chagos contre le Royaume Uni, suite et fin?*, LIBÉRATION (May 16, 2013). On the day following the announcement of the Strasbourg decision, the US State Department also dismissed a petition with over 30,000 signatures that had been submitted by the Chagos Islanders to President Obama in April 2012 (“Redressing Wrongs Against the Chagossians”); see *The Chagos Archipelago: Latest Developments*, 43 ENVIRONMENTAL POLICY AND LAW 50 (2013).

- 65 *Id.*, para. 76. See generally Syméon Karagiannis, *The Territorial Application of Treaties*, in THE OXFORD GUIDE TO TREATIES 305 (Duncan B. Hollis ed., 2012); and Marko Milanovic, *The Spatial Dimension: Treaties and Territory*, in RESEARCH HANDBOOK ON THE LAW OF TREATIES (Christian J. Tams, Antonios Tzanakopoulos & Andreas Zimmermann eds., 2013).
- 66 ECtHR, *Chagos Islanders v. The United Kingdom*, *supra* note 64, paras. 30 and 61–62; see text at notes 61–62 *supra*. See also Antenor Hallo de Wolf, *Benign Territorial Human Rights Colonialism? The Application of Human Rights Treaties in Overseas Countries and Territories*, in EU LAW OF THE OVERSEAS: OUTERMOST REGIONS, ASSOCIATED OVERSEAS COUNTRIES AND TERRITORIES, TERRITORIES SUI GENERIS 323 (Dimitry Kochenov ed., 2011), at 330.
- 67 See Ed Bates, *Avoiding Legal Obligations Created by Human Rights Treaties*, 57 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 751 (2008), at 753; and TICU, *supra* note 23, at 12.
- 68 993 UNTS 3, and 999 UNTS 171 (Dec. 16, 1966); ratified by Mauritius on Dec. 12, 1973, and by the United Kingdom on May 20, 1976. On UK resistance to the right of self-determination recognized in the Covenants, see HENDRY & DICKSON, *supra* note 22, at 251–253.
- 69 75 UNTS 135 and 287 (Aug. 12, 1949); ratified by the United Kingdom on Sept. 23, 1957, and acceded to by Mauritius on Aug. 17, 1970. By contrast, Protocols I and II of the Geneva Conventions (International and Non-International Armed Conflicts, June 8, 1977; 1125 UNTS 3 and 609; ratified by the United Kingdom on Jan. 28, 1998) were extended to the BIOT by declaration on July 2, 2002. See the Geneva Convention (Amendment) Act (Overseas Territories) Order of Apr. 17, 2002, [2002] STATUTORY INSTRUMENTS 1076.
- 70 1465 UNTS 85 (Dec. 10, 1984); ratified by the United Kingdom on Dec. 8, 1988, extended to most British Overseas Territories (except BIOT) by declaration on Dec. 9, 1992; ratified by Mauritius on Dec. 9, 1992. See MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY (2008), at 196; and David Weissbrodt & Amy Bergquist, *Extraordinary Rendition and the Torture Convention*, 46 VIRGINIA JOURNAL OF INTERNATIONAL LAW 585 (2006).
- 71 1561 UNTS 363 (Nov. 26, 1987); ratified by the United Kingdom on June 24, 1988, and extended to Gibraltar and Guernsey by declaration on Nov. 8, 1994.
- 72 2187 UNTS 3 (July 17, 1998), ratified by the United Kingdom on Oct. 4, 2001, and extended to most British overseas territories (except BIOT) by declaration on Mar. 11, 2010; signed, but not ratified by the United States. Mauritius ratified the Statute on March 5, 2002, but on June 25,

and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.<sup>73</sup> Moreover, the FCO persistently refuses to include the BIOT in its periodic reports to the UN Human Rights Committee.<sup>74</sup> Not surprisingly therefore, the Territory has been referred to as an international legal “blackhole”,<sup>75</sup> comparable to—albeit far larger than—the US base in Guantánamo Bay.<sup>76</sup>

One of the perplexing aspects of the Strasbourg decision is the fact that it was rendered by a seven-member chamber composed of European judges (from Albania, Cyprus, Finland, Iceland, Montenegro, Poland and the United Kingdom)—denying a predominantly African ethnic group<sup>77</sup> the right to return to its homeland in an archipelago off the coast of East Africa. It is true, of course, that this was the sole judicial instance open to the islanders after they had exhausted all local remedies, considering that the UK government is not subject to the jurisdiction of the African Court on Human and Peoples’ Rights established in 2006.<sup>78</sup> Mauritius in turn was unable to bring the case before the International Court of Justice (ICJ), after the United Kingdom in 2004 changed its optional jurisdiction clause under Article 36(2) of the ICJ Statute so as to exclude pre-1974 disputes with current “or former” commonwealth member states.<sup>79</sup> The avowed purpose of that amendment was “to

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2003, signed a bilateral immunity agreement with the United States, exempting US personnel on its territory from the jurisdiction of the International Criminal Court; see Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non-Surrender Agreements*, 101 AMERICAN POLITICAL SCIENCE REVIEW 573 (2007).

- 73 2161 UNTS 447 (June 25, 1998), ratified by the United Kingdom on Feb. 23, 2005. In the view of the FCO, the treaty has no practical relevance to BIOT, because “BIOT has no permanent residents”; e-mail message to the author from BIOT Administrator Joanne Yeadon (Nov. 26, 2008).
- 74 E.g., see the Committee’s comments on the UK report at its 93rd session (Geneva, July 2008), UN Doc. CCPR/C/GBR/CO/6 (July 30, 2008), at 6; see also Allen, *supra* note 25, at 462–463.
- 75 Louise Moor & A. W. Brian Simpson, *Ghosts of Colonialism in the European Convention on Human Rights*, 26 BRITISH YEARBOOK OF INTERNATIONAL LAW 121 (2005), at 162, 188, 193; Peter H. Sand, *British-American Legal Blackhole in the Indian Ocean?*, 21 JOURNAL OF ENVIRONMENTAL LAW 113 (2009); *Id.*, *Diego Garcia Legal Black Hole: A Response to Sheppard et al.*, 21 JOURNAL OF ENVIRONMENTAL LAW 295 (2009); *Id.*, *Diego Garcia: nouveau “trou noir” dans l’océan Indien?*, 2 REVUE GÉNÉRALE DE DROIT INTERNATIONAL 365 (2009); *Id.*, *Diego Garcia: Schwarzes Loch im Indischen Ozean?*, 2 ZEITSCHRIFT FÜR AUSSEN- UND SICHERHEITSPOLITIK 403 (2009); and David Vine, *Britain’s Own Guantánamo*, THE GUARDIAN (July 28, 2009).
- 76 See Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1 (2004); Ralph Wilde, *Legal “Black Hole”? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 MICHIGAN JOURNAL OF INTERNATIONAL LAW 739 (2005), at 744, 749; PHILIPPE SANDS, *LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES* (2006), at 143–173; Neal R. Sonnett, *Guantánamo: Still a Legal Black Hole*, 33 HUMAN RIGHTS 8 (2006); Stafford Smith, *supra* note 42, at 243; and FLEUR JOHNS, *NON-LEGALITY IN INTERNATIONAL LAW: UNRULY LAW* (2013), at 69–108 (“black holes and the outside within”).
- 77 See JAMES MINAHAN, *ENCYCLOPEDIA OF THE STATELESS NATIONS: ETHNIC AND NATIONAL GROUPS AROUND THE WORLD* 413 (2002); and JON LUNN, *THE CHAGOS ISLANDERS*, House of Commons Library: Standard Notice SN/IA/4463 (updated June 2, 2010).
- 78 Following the entry into force of the 1998 Protocol to the African Charter on Human and Peoples’ Rights in 2004; see Scott Lyons, *The African Court on Human and Peoples’ Rights*, 10 AMERICAN SOCIETY OF INTERNATIONAL LAW: ASIL INSIGHTS No. 24 (Sept. 19, 2006); and Githu Muigai, *From the African Court on Human and Peoples’ Rights to the African Court of Justice and Human Rights*, ch. 13 in *THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM* (Manisuli Ssenyonjo ed., 2011).
- 79 Amended optional clause declaration (July 5, 2004), 2271 UNTS 285.

forestall the possibility of the withdrawal of Mauritius from the Commonwealth as a preliminary to its bringing a case against the UK related to British Indian Ocean Territory”.<sup>80</sup>

### III. Fortress Conservation and the Law of the Sea

Under the circumstances, the dispute settlement options remaining for Mauritius practically narrowed down to action under the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>81</sup> Mauritius had ratified the Convention on Nov. 4, 1994. The United Kingdom only acceded on July 25, 1997,<sup>82</sup> but on Dec. 4, 1995, signed the UNCLOS Implementation Agreement on Straddling Fish Stocks “on behalf of” UK overseas territories including the BIOT.<sup>83</sup> When Mauritius for its part acceded to the 1995 Agreement (on March 25, 1997), it had objected to the United Kingdom’s signature on behalf of the BIOT by a declaration reaffirming its “sovereignty and sovereign rights over these islands, namely the Chagos Archipelago which form an integral part of the national territory of Mauritius, and over their surrounding maritime spaces.” The United Kingdom defended its position by a counter-declaration on July 30, 1997, and (following UK ratification of the 1995 Agreement “in respect of” the BIOT on Dec. 3, 1999, registered by the UN Secretariat after an interpretative declaration from the United Kingdom on Dec. 10, 2002) Mauritius reiterated its objection by a further declaration on Feb. 8, 2002.

Since December 1984, Mauritius has declared a 200-mile exclusive economic zone (EEZ) around the Chagos Archipelago pursuant to UNCLOS Article 75, based on a 12-mile territorial sea,<sup>84</sup> with geographical coordinates submitted to the UN Secretariat in 2008, albeit contested by the United Kingdom in an exchange of notes in 2009.<sup>85</sup> In May 2009, Mauritius also submitted to the UN Commission on the Limits of the Continental Shelf (CLCS) a preliminary claim to an extended conti-

80 As noted by Colin Warbrick, 75 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 804 (2004); confirmed by the FCO’s former assistant legal adviser, ANTHONY I. AUST, *HANDBOOK OF INTERNATIONAL LAW* (2nd ed., 2010), at 419.

81 1833 UNTS 3 (Dec. 10, 1982). Another option suggested by Mauritian lawyers was action under the Statute of the International Criminal Court (ICC), *supra* note 72; see Parvez Dookhy, *Diego Garcia: l’aspect criminel de la déportation*, *L’EXPRESS MAURITIUS* (Jan. 22, 2008), and *Id.*, *La déportation des Chagossiens est un crime contre l’humanité*, *LE MAURICIEN* (June 5, 2011). However, Article 11 of the ICC Statute excludes crimes committed prior to 2002, and potential US defendants would benefit from the US-Mauritian immunity agreement, *supra* note 72.

82 With a declaration extending the Convention to overseas territories including the BIOT.

83 2167 UNTS 3 (Aug. 4, 1995); see HENDRY & DICKSON, *supra* note 22, at 256.

84 Maritime Zones Regulations No. 199 of 1984, table C1.T165; see AGGREY K. L. J. MLIMUKA, *THE EASTERN AFRICAN STATES AND THE EXCLUSIVE ECONOMIC ZONE: THE CASE OF EEZ PROCLAMATIONS, MARITIME BOUNDARIES AND FISHERIES* (1998), 100–101. The Mauritian EEZ was recognized in the Agreement between the European Economic Community and the Government of Mauritius on Fishing in Mauritian Waters (June 10, 1989), [1989] *OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES* L 159/2, defining the area of application as “the waters over which Mauritius has sovereignty or jurisdiction in respect of fisheries . . . in accordance with the provisions of UNCLOS” (preamble and Article 10).

85 Mauritius Governmental Notice No. 126, Maritime Zones (Baselines and Delineating Lines) Regulations of Aug. 5, 2005, implementing the Maritime Zones Act No. 2 of Feb. 28, 2005, 62 *UN LAW OF THE SEA BULLETIN*; EEZ coordinates notified to the UN Secretariat on June 20, 2008, in 67 *UN LAW OF THE SEA BULLETIN* 13 (2008), at 20 (“Chagos Archipelago Basepoints: Diego Garcia”), followed by a diplomatic protest from the United Kingdom on March 19, 2009 (Note No. 26/09).

mental shelf area (measuring about 180,000 km<sup>2</sup>) beyond the southern part of the Chagos EEZ.<sup>86</sup>

The United Kingdom in turn proclaimed a 200-mile BIOT Fisheries Conservation and Management Zone on Oct. 1, 1991, and a BIOT Environment (Protection and Preservation) Zone on Sept. 17, 2003, with geographical coordinates notified to the UN Secretariat under UNCLOS Article 75(2) on March 12, 2004.<sup>87</sup> According to the FCO, the area so claimed is not an exclusive economic zone, but an “exclusive fisheries zone”, most likely in order to avoid a duty under UNCLOS Article 62(2) to provide geographically disadvantaged developing countries with access to the surplus of the allowable catch in EEZs.<sup>88</sup>

In April 2010, the FCO announced the establishment of “the world’s largest no-take marine protected area” (MPA) in the Chagos Archipelago,<sup>89</sup> covering the 200-mile zone surrounding Diego Garcia and the outer islands.<sup>90</sup> The declared role model for the new BIOT marine reserve were the large “marine national monuments” proclaimed in 2006–2009 by then US President George W. Bush in American EEZs in the Pacific (mostly surrounding current or former military bases),<sup>91</sup>

of the UK Mission to the UN), and a rejoinder by Mauritius on June 9, 2009, both reprinted in 69 UN LAW OF THE SEA BULLETIN 110 (2009) and 70 UN LAW OF THE SEA BULLETIN 59 (2009).

- 86 Preliminary Information Submitted by the Republic of Mauritius Concerning the Extended Continental Shelf in the Chagos Archipelago Region Pursuant to the Decision Contained in SPLOS/1983, MCS-PI-DOC (May 2009); final claim to be submitted by June 2014.
- 87 62 BRITISH YEARBOOK OF INTERNATIONAL LAW 648 (1991), and 74 BRITISH YEARBOOK OF INTERNATIONAL LAW 680 (2003); 54 UN LAW OF THE SEA BULLETIN 99 (2004). A BIOT Fisheries (Conservation and Management) Ordinance No. 5 of Dec. 21, 2007, with Fishing Regulations (BIOT Statutory Instrument No. 4 of 2007), has been in force since 2008.
- 88 See Shalva Kvinikhidze, *Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EEZ*, 23 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 271 (2008), at 286 and 295 (table III, fn. 7), though considering this interpretation doubtful and “open for discussion” (at 287). In the view of FCO Parliamentary Under Secretary of State Mark Simmonds, “the UK in right of the BIOT did not establish a full EEZ”; 567 HANSARD: HOUSE OF COMMONS DEBATES col. 291W (Sept. 2, 2013). Yet, according to an earlier ministerial statement in 659 HANSARD: HOUSE OF LORDS DEBATES col. WS62 (Mar. 31, 2004), the 2003 BIOT Environment Protection and Preservation Zone was proclaimed “under article 75 of UNCLOS”, hence as an EEZ; confirmed by the UK diplomatic note of March 19, 2009 (*supra*, note 85: established “pursuant to article 75, paragraph 2 of the Convention”).
- 89 *New Protection for the Marine Life of the British Indian Ocean Territory*, FCO Press Statement (Apr. 1, 2010); see Charles R. C. Sheppard *et al.*, *Reefs and Islands of the Chagos Archipelago, Indian Ocean: Why It Is the World’s Largest No-Take Marine Protected Area*, 22 AQUATIC CONSERVATION 232 (2012); and Richard P. Dunne *et al.*, *The Creation of the Chagos Marine Protected Area: A Fisheries Perspective*, in ADVANCES IN MARINE BIOLOGY (Magnus Johnson ed., forthcoming, July 2014). Interchangeably referred to as marine parks or marine reserves, there is no agreed definition of the “haphazard MPA label”, with globally over 4,000 separate areas so designated; Dalal A. Abdulrazzak & Stephen C. Trombulak, *Classifying Levels of Protection in Marine Protected Areas*, 36 MARINE POLICY 576 (2012); see also Alexander Gillespie, *Defining Internationally Protected Areas*, 12 JOURNAL OF INTERNATIONAL WILDLIFE LAW AND POLICY 229 (2009), at 246.
- 90 The FCO initially gave the size of the area as 544,000 km<sup>2</sup> (more than double the territory of the United Kingdom), but in April 2012 corrected the figure upwards to 640,000 km<sup>2</sup>, citing a clerical error by the UK Hydrographic Office; see 13 MPA NEWS No. 6 (2012).
- 91 US Presidential Proclamations No. 8031 (June 26, 2006), 71 Federal Register 36,443, amended by No. 8112 (Mar. 6, 2007), 72 Federal Register 10,031; and Nos. 8335-8337 (Jan. 6, 2009), 74 Federal Register 1555 (Jan. 12, 2009). See Alison Rieser & Jon M. Van Dyke, *New Marine National Monuments Settle Issues*, 24 NATURAL RESOURCES AND ENVIRONMENT 50 (2009); Alison Rieser, *The*

under executive law-making powers pursuant to the 1906 Antiquities Act.<sup>92</sup> There is indeed a notorious contemporary trend to expand “creeping jurisdiction” by unilateral “green enclosure” of ocean space,<sup>93</sup> even though the establishment of national MPAs in areas beyond territorial waters is not foreseen in UNCLOS, and considered incompatible with the Convention by some authors.<sup>94</sup> By contrast to the unilaterally declared Chagos MPA, however, the US government did apply for and obtain multilateral designation of their marine national monument in the Northwest Hawaiian Islands EEZ (adjoining Pearl Harbor) as a “particularly sensitive sea area” by the Marine Environment Protection Committee of the International

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*Papahānaumokuākea Precedent: Ecosystem-Scale Marine Protected Areas in the EEZ*, 13 *ASIAN-PACIFIC LAW AND POLICY JOURNAL* 210 (2012); and the reference to the US marine monuments in the FCO Consultation Document (*infra* note 101), at 10. Most of the “green zones” so established extend about 38 miles (70 km) beyond US territorial waters into the EEZ.

- 92 Act for the Preservation of American Antiquities (June 8, 1906), 34 U.S. Statutes 225. See Jeff Brax, *Zoning the Oceans: Using the National Marine Sanctuaries Act and the Antiquities Act to Establish Marine Reserves in America*, 29 *ECOLOGY LAW QUARTERLY* 71 (2002); Robin K. Craig, *Are National Monuments Better Than National Marine Sanctuaries? U.S. Ocean Policy, Marine Protected Areas, and the Northwestern Hawaiian Islands*, 7 *SUSTAINABLE DEVELOPMENT LAW AND POLICY* 27 (2006); Joseph Brigggett, *An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf*, 22 *TULANE ENVIRONMENTAL LAW REVIEW* 403 (2009); James P. Walsh & Gwen Fanger, *Presidential Bans on Commercial Fishing in Pacific Marine Protected Areas: A Politically Popular But Unlawful Regulatory Action*, 12 No. 3 *AMERICAN BAR ASSOCIATION MARINE RESOURCES COMMITTEE NEWSLETTER* 1 (2009); and Mark Laemmle, *Monumentally Inadequate: Conservation at Any Cost Under the Antiquities Act*, 21 *VILLANOVA ENVIRONMENTAL LAW JOURNAL* 111 (2010).
- 93 See Garry R. Russ & Dirk C. Zeller, *From Mare Liberum to Mare Reservarum*, 27 *MARINE POLICY* 75 (2003); Erik Franckx, *The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage*, 48 *GERMAN YEARBOOK OF INTERNATIONAL LAW* 117 (2005); Bernard Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 830 (2006); and Peter H. Sand, *Green Enclosure of Ocean Space: Déjà Vu?*, 54 *MARINE POLLUTION BULLETIN* 374 (2007). Less than a year after proclaiming the BIOT marine protected area, the United Kingdom unilaterally declared yet another MPA covering 1.07 million km<sup>2</sup> (albeit not fully “no-take”) in the 200-mile zone surrounding the South Georgia and South Sandwich Islands in the Antarctic Southern Sea (an uninhabited area also claimed by Argentina, governed by the FCO under royal prerogative powers), by Marine Protected Areas Order of Feb. 23, 2012, S.R. & O. No. X of 2012, reprinted in *SOUTH GEORGIA AND THE SOUTH SANDWICH ISLANDS MARINE PROTECTED AREA MANAGEMENT PLAN* (2012), at 42 (Appendix III). Conversely, an earlier MPA established by the United Kingdom off the neighbouring South Orkney Islands (on Nov. 10, 2009) had been based on *multilateral* designation and prior negotiation with other states in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); see Peter H. Sand, *Marine Protected Areas' off UK Overseas Territories: Comparing the South Orkneys Shelf and the Chagos Archipelago*, 178 *GEOGRAPHICAL JOURNAL* 201 (2012).
- 94 During the UNCLOS negotiations, a Canadian proposal to authorize coastal countries to establish a 100-mile “environmental protection zone” was opposed (not least by the United States) as an encroachment on the customary freedom of navigation, and was rejected except as regards jurisdiction over ice-covered areas (not an immediate prospect in the Chagos). On the need to ensure compatibility of environmental restrictions in EEZs with rights of passage under UNCLOS Articles 58(1), 211(5) and 220, see Angelo Meriardi, *Legal Restraints on Navigation in Marine Specially Protected Areas*, in *MARINE SPECIALLY PROTECTED AREAS* 29 (Tullio Scovazzi ed., 1999), at 34; Rainer Lagoni, *Marine Protected Areas in the Exclusive Economic Zone*, in *INTERNATIONAL MARINE ENVIRONMENTAL LAW: INSTITUTIONS, IMPLICATIONS AND INNOVATIONS* 157 (Andree Kirchner ed., 2003); and Jon M. Van Dyke, *The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone*, 29 *MARINE POLICY* 107 (2005).



Maritime Organization (IMO),<sup>95</sup> and as a “world heritage site” by the UNESCO World Heritage Committee.<sup>96</sup>

The Chagos MPA proclamation had been preceded and prepared by confidential consultations in May 2009 with the US State Department (subsequently disclosed through the secret US diplomatic cables released by *Wikileaks*)<sup>97</sup> and with a select group of British and American non-governmental environmental organizations,<sup>98</sup> followed by an FCO public consultation from November 2009 to March 2010.<sup>99</sup> In the end, all marine fishing activities in the Chagos Archipelago were terminated as of Nov. 1, 2010, including not only the long-distance tuna fisheries previously licensed to foreign fleets through a contractor, the *Marine Resources Assessment Group*,<sup>100</sup> but also all small-scale/artisanal coastal fisheries (prompting critics to denounce the move as “fortress conservation” in colonial style).<sup>101</sup> The only zone exempted from the new MPA is the three-mile exclave around the Diego Garcia base (also the single most important source of environmental pollution, coral

95 Designation on April 3, 2008, pursuant to the 1991 IMO Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas (PSSA), as revised in 2001 and 2005. See 73 US Federal Register 73,593 (Dec. 3, 2008); Rieser, *supra* note 91, at 214 and 243; and MARKUS J. KACHEL, PARTICULARLY SENSITIVE SEA AREAS: THE IMO'S ROLE IN PROTECTING VULNERABLE MARINE AREAS (2008).

96 Designation on July 30, 2010, pursuant to the Convention for the Protection of the World Cultural and Natural Heritage (Nov. 16, 1972), 1037 UNTS 151, US ratification on Dec. 7, 1973. The Convention was also ratified by the United Kingdom on May 29, 1984, with an extension to all overseas territories *except* the BIOT.

97 Cable No. 001156, marked “Confidential/NOFORN [no foreigners]”, from US Embassy London to US State Department (May 15, 2009); see *US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders*, THE GUARDIAN (Dec. 2, 2010), reprinted in LE MATINAL (Dec. 2, 2010).

98 The *Chagos Environment Network*, consisting of the Chagos Conservation Trust, London; Linnean Society of London; Pew Environment Group, Washington/DC; Royal Botanical Gardens, Kew; Royal Society for the Protection of Birds; Zoological Society of London; and Professor Charles Sheppard, University of Warwick; available at <<http://www.protect.chagos.org>>.

99 FCO Consultation Document, *Whether to Establish a Marine Protected Area in the British Indian Ocean Territory* (Nov. 10, 2009); and ROSEMARY STEVENSON, CONSULTATION REPORT: WHETHER TO ESTABLISH A MARINE PROTECTED AREA IN THE BRITISH INDIAN OCEAN TERRITORY (2010). For an analysis of responses to the consultation, see Wendy Paratian, *The Complexities Surrounding the Marine Protected Area in the Chagos Archipelago* (Master thesis, Geneva Graduate Institute of International and Development Studies, 2011), at 22–25.

100 MRAG Ltd., owned by Professor John R. Beddington, until 2013 the UK government's Chief Scientific Adviser. According to the MRAG reports on BIOT to the Indian Ocean Tuna Commission (IOTC) of the Food and Agriculture Organization of the United Nations (FAO), annual catches were about 25,000 tonnes, earning approximately £1 million in licence fees per year for the UK government. See the report of the 11th session of the IOTC Scientific Committee (Dec. 1–5, 2008), FAO Doc. IOTC-2008-SC-R[IE], at 62; and the revenue tables for the period until 2006 in 423 HANSARD: HOUSE OF COMMONS DEBATES col. 1415W (May 22, 2006).

101 Elizabeth M. de Santo, Peter J. S. Jones & Alice M. M. Miller, *Fortress Conservation at Sea: A Commentary on the Chagos Protected Area*, 35 MARINE POLICY 258 (2011); and Peter H. Sand, *Fortress Conservation Trumps Human Rights?*, 21 JOURNAL OF ENVIRONMENT AND DEVELOPMENT 36 (2012). The term was coined by DANIEL BROCKINGTON, *Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania* (2002); see also DANIEL BROCKINGTON, ROSALEEN DUFFY & JIM IGOE, *Nature Unbound: Conservation, Capitalism and the Future of Protected Areas* (2008), and MARK DOWIE, *Conservation Refugees: The Hundred-Year Conflict Between Conservation and Native People* (2009).

destruction and introduction of invasive plant species in the archipelago),<sup>102</sup> where recreational fishing by US personnel is still permitted.<sup>103</sup> Nonetheless, the entire Diego Garcia lagoon (where all US and UK vessels are stationed) has since 2001 been listed as part of a nature reserve under the 1971 Ramsar Convention on Wetlands of International Importance,<sup>104</sup> thus making it the world's only internationally registered nature protection site that also serves as habitat for nuclear submarines, ammunition supply vessels, and possibly prison ships.<sup>105</sup>

The Chagos islanders in exile reacted by public protests against the “no-take” MPA fishing ban, which deprived them of an important economic prerequisite for their livelihood in the event of future resettlement of the islands; and while affirming their support for conservation of the archipelago's environmental heritage, initiated a judicial review of the MPA proclamation in the Administrative Division of the England and Wales High Court. According to them, the proclamation (and the consequential denial of their artisanal/coastal fishing rights) was based on inadequate and legally flawed consultations by the FCO, and in reality had an improper “ulterior motive” (revealed by *Wikileaks* in December 2010),<sup>106</sup> namely to prevent their return and sustainable resettlement. In particular, the leaked US embassy cable of May 15, 2009, contained minutes of a confidential meeting of UK and US diplomats in the London embassy on May 12, 2009, during which BIOT Commissioner Colin Roberts was reported to have “asserted that establishing a

102 See Sand, *supra* note 3, at 235–237; and *supra* note 5, at 51–58. In order to construct the world's longest slipform-paved airport runway (3.6 km) built on crushed coral, a total of more than 4.5 million m<sup>3</sup> of “coral fill” was “harvested” (i.e., dynamited and dredged) from the lagoon and the reef, affecting an area of 31.3 km<sup>2</sup>; see T. Tucker & B. T. Doughty, *Naval Facilities, Diego Garcia, British Indian Ocean Territory: Management and Administration*, 84 PROCEEDINGS OF THE INSTITUTION OF CIVIL ENGINEERS: MARITIME ENGINEERING GROUP 191 (1988), at 21; and US Naval Facility Engineering Command/Pacific Division, INTEGRATED NATURAL RESOURCES MANAGEMENT PLAN: DIEGO GARCIA, BRITISH INDIAN OCEAN TERRITORY (2005), at 3–4. Requests for public disclosure of BIOT pollution data, under the United Kingdom's Environmental Information Regulations (EIRs, STATUTORY INSTRUMENTS 2004, No. 3391) have been declined by the FCO on the grounds that the EIRs do not extend to overseas territories, and that disclosure of such data would not be in the public interest. An appeal against the FCO refusal is expected to be heard by the Information Rights Tribunal in April 2014 (*Sand v. Information Commissioner and FCO*, Case No. EA/2012/0196).

103 Exclusion of the US base from the BIOT marine protected area was confirmed by the FCO ministerial statement of Sept. 2, 2013, *supra* note 88. The annual catch in the base area is about 46 tonnes; see the 2008 MRAG report to IOTC, *supra* note 100, and Charles Sheppard *et al.*, *British Indian Ocean Territory (the Chagos Archipelago): Setting, Connections and the Marine Protected Area*, in CORAL REEFS OF THE UNITED KINGDOM OVERSEAS TERRITORIES 223 (Charles Sheppard ed., 2013), at 232.

104 996 UNTS 245 (Feb. 2, 1971), ratified by the United Kingdom on May 5, 1976, and by the United States on Apr. 18, 1987; extended to the BIOT by FCO declaration on Sept. 8, 1998. The Diego Garcia site was listed under the Convention by declaration of July 4, 2001, as Ramsar site no. 1077 (2UK001). See MICHAEL W. PIENKOWSKI, REVIEW OF EXISTING AND PROPOSED RAMSAR SITES IN UK OVERSEAS TERRITORIES AND CROWN DEPENDENCIES (2005), at 98–101; map at 865, reprinted in SAND, *supra* note 5, at 60 (Map 3).

105 See text at notes 40 and 42, *supra*. The UK declaration upon registration expressly excludes “the area set aside for military uses as a U.S. naval support facility”; however, as shown by the official map (*supra* note 104, also reproduced in the international database of the Ramsar Convention Secretariat), that exclusion only covers the *land* area of the Diego Garcia base and clearly leaves the entire lagoon within the protected site, as confirmed by the size of the site, indicated as 354.24 km<sup>2</sup>.

106 *Supra* note 97.

marine park would, in effect, put paid to resettlement claims of the archipelago's former residents".<sup>107</sup>

In response, the Court in July 2012 ordered cross-examination of the former commissioner (since promoted to governor of the Falkland Islands) and of the former BIOT Administrator with regard to these statements,<sup>108</sup> and in November 2012, the Court admitted further new evidence (based on FCO documents recently released to the UK public archives) purporting to show that the no-take MPA disregarded traditional fishing rights of Mauritius and was also in breach of the United Kingdom's obligations under EU law with regard to the association of overseas territories.<sup>109</sup> At the trial meeting held in April 2013, however, the former commissioner and administrator refused under cross-examination either to confirm or deny the accuracy of the embassy cables disclosed through *Wikileaks*.<sup>110</sup> In June 2013, the Court declared the cables inadmissible as evidence, on the basis of the 1964 Diplomatic Privileges Act implementing the 1961 Vienna Convention on Diplomatic Relations,<sup>111</sup> which protects documents and correspondence of diplomatic missions.<sup>112</sup> The judgment went on to dismiss the Chagossians' procedural objections to the conduct of the FCO consultations, and upheld the legality of the no-take MPA under applicable UK and EU law.<sup>113</sup> An appeal against the judgment has been granted by the High Court and is to be heard on March 31, 2014.

Not unexpectedly, the Mauritian government (which had not been consulted in advance) also protested against the MPA proclamation, and in December 2010 submitted the case to arbitration under UNCLOS Annex VII, disputing the compatibility of the MPA with UNCLOS and the competence of the United Kingdom to

107 *Id.*, at para. 7.

108 *The Queen (ex parte Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (July 25, 2012), preliminary ruling by Lord Justice Burnton, [2012] E.W.H.C./Admin. 2115.

109 Under Article 198 of the Lisbon Treaty on the Functioning of the European Union, Dec. 12, 2007, [2012] OFFICIAL JOURNAL OF THE EUROPEAN UNION C 326/47; see HENDRY & DICKSON, *supra* note 22, at 266. Following complaints by the Chagossians to the EU Commission in 2009–2011, however, the Directorate-General for Development and Cooperation/EuropeAid had already decided on Jan. 24, 2013, to close the file on the grounds that the alleged deprivation of fishing rights had occurred prior to the United Kingdom's accession to the European Union.

110 Standard FCO practice ("neither confirm nor deny", NCND) to avoid the risk of perjury in proceedings under oath.

111 500 UNTS 95 (Apr. 14, 1961), ratified by the United Kingdom on May 9, 1972.

112 *The Queen (ex parte Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs* (June 11, 2013), judgment by Lord Justice Richards and Justice Mitting, [2013] E.W.H.C./Admin. 1502, citing Articles 24 and 27(2) of the Convention and holding that "the inviolability of diplomatic communications requires that judicial authorities of states parties to the 1961 Convention should, in the absence of consent by the sending state, exclude illicitly obtained diplomatic documents and correspondence from judicial proceedings" (at para. 51).

113 See the critical case comments by Anne-Claire Dumouchel, *Affaire des Chagos: Jugement de la Haute Cour de Justice du Royaume-Uni*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 355 (July 7, 2013); and David Hart, *The Chagossian Wikileaks Cable Judgment, Fishing Rights and a Dose of EU Law*, UK HUMAN RIGHTS BLOG (June 11, 2013), available at <<http://ukhumanrightsblog.com/2013/06/11/the-chagossian-wikileaks-cable-judgment-fishing-rights-and-a-dose-of-eu-law/>>.

establish it.<sup>114</sup> On March 25, 2011, the president of the International Tribunal for the Law of the Sea (ITLOS) announced the appointment of an arbitral tribunal under the auspices of the Permanent Court of Arbitration (PCA), composed of Professor Ivan Shearer (Australia) as chairman; ITLOS Judges Albert Hoffmann (South Africa) and James Kateka (Tanzania); Professor Rüdiger Wolfrum (Germany), appointed by Mauritius; and ICJ Judge Sir Christopher Greenwood, appointed by the United Kingdom. In November 2011, the UNCLOS/PCA tribunal dismissed a challenge by Mauritius to the appointment of the UK arbitrator,<sup>115</sup> and by a procedural order in January 2013 rejected a request by the United Kingdom to deal separately with preliminary jurisdictional objections.<sup>116</sup> Hearings on the merits are expected to begin in April 2014.

An award by the tribunal could also affect neighbouring countries such as the Maldives, in view of the fact that the northern boundary of the Chagos MPA is still undetermined.<sup>117</sup> Although the geographical coordinates communicated by the United Kingdom to the United Nations in 2004 show an equidistant “median line” vis-à-vis the EEZ claimed by the Maldives, a draft bilateral delimitation agreement negotiated at a technical level in 1992 was never signed and is not in force.<sup>118</sup> The continental shelf claimed by the Maldives in their submission to the UN Commission on the Limits of the Continental Shelf (CLCS) in July 2010 overlaps with both British *and* Mauritian claims of a 200-mile zone in the Chagos,<sup>119</sup> prompting a

114 Notification and Statement of Claim (Dec. 20, 2010) in JUST CONSERVATION (Jan. 27, 2011), available at <<http://www.justconservation.org/mauritius-sues-the-uk-government-over-the-imposition-of-worlds-largest-marine-protected-area>>. See Florina Costica, *Réserve des Chagos: Requête introduite par Maurice pour la constitution d'un tribunal arbitral sous l'Annexe VII de la Convention de Montego Bay*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 250 (Jan. 16, 2011); Peter Prows, *Mauritius Brings UNCLOS Arbitration Against the United Kingdom over the Chagos Archipelago*, 15:8 AMERICAN SOCIETY OF INTERNATIONAL LAW: ASIL INSIGHTS (Apr. 5, 2011); and Irini Papanicolopulu, *Mauritius/United Kingdom [Submission to Arbitration of the Dispute on the Marine Protected Area around the Chagos Archipelago]*, 26 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 667 (2011).

115 Reasoned Decision (Nov. 30, 2011); text in 51 ILM 350 (2012), introductory note by Jeremy K. Sharpe. See Anne-Claire Dumouchel, *Chagos, différend Royaume-Uni/le Maurice: décision sur la contestation d'un arbitre*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 289 (Jan. 15, 2012).

116 Permanent Court of Arbitration, Procedural Order No. 2 (Jan. 15, 2013), available at <[http://www.pca-cpa.org/showpage.asp?pag\\_id=1429](http://www.pca-cpa.org/showpage.asp?pag_id=1429)>; see Anne-Claire Dumouchel, *Chagos, différend RU/Maurice: le tribunal arbitral rend une première ordonnance*, SENTINELLE: BULLETIN DE LA SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL No. 333 (Feb. 3, 2013).

117 Maritime boundary disputes are in principle subject to compulsory binding settlement under UNCLOS, “even where they also involve disputed sovereignty over islands or other land territory”; Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 37 (1997), at 44. Although UNCLOS Article 298(1)(a)(i) allows states to opt out of jurisdiction in disputes over “sea boundary delimitation”, neither the United Kingdom nor Mauritius or the Maldives have exercised that option.

118 Written answer by FCO Minister of State Dr. Kim Howells, 470 HANSARD: HOUSE OF COMMONS DEBATES col. 559W (Jan. 9, 2008), 79 BRITISH YEARBOOK OF INTERNATIONAL LAW 727 (2008).

119 Continental Shelf Notification CLCS.53.2010.LOS (July 28, 2010); and Submission by the Republic of the Maldives: Executive Summary, MAL-ES-DOC (July 2010).

diplomatic protest by the United Kingdom in August 2010,<sup>120</sup> followed in turn by formal objections from Mauritius against the British counter-claim and the submission of the Maldives.<sup>121</sup>

The Maldivian opposition to a median-line delimitation is based on the contention that the only inhabited island of the Chagos Archipelago is Diego Garcia, whereas the smaller atolls some 200 km to the north (such as Peros Banhos and Salomon, included in the baseline of the current coordinates of the Chagos MPA) are all uninhabited, and according to official FCO statements their long-term resettlement is economically unsustainable.<sup>122</sup> Consequently, UNCLOS Article 121(3) would apply (as in the case of Rockall Island in the Atlantic),<sup>123</sup> which provides that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. In the absence of any agreement or settlement with the Maldives under UNCLOS Article 74, that would leave Diego Garcia as the sole valid base-point for a BIOT 200-mile zone; and considering that a 200-mile arc around Diego Garcia alone measures only about 484,000 km<sup>2</sup>, the Chagos MPA could consequently shrink by at least 24 percent.<sup>124</sup>

According to an interim decision by the CLCS, consideration of the disputed claims has been deferred for the time being.<sup>125</sup> Following bilateral talks between Mauritius and the Maldives, the two countries now envisage a joint submission for an extended continental shelf area in the northern part of the Chagos Archipelago, similar to the joint claim by Mauritius and the Seychelles submitted to the CLCS in 2008.<sup>126</sup> Meanwhile, the FCO has officially announced its intention to commission

120 Note Verbale No. 1717/10 (Aug. 9, 2010) to the UN Secretariat; see Owen Bowcott, *Chagos Islands Exiles Amazed by Speed of Foreign Office's Opposition to Seabed Claim by Maldives*, THE GUARDIAN (Sept. 27, 2010).

121 Notes Verbales No. 10887/10 (Oct. 29, 2010) and No. 11031/11 (Mar. 24, 2011) to the UN Secretariat.

122 See the 2002 FCO FEASIBILITY STUDY, *supra* note 63, and the statement by Parliamentary Under-secretary of State Bill Rammell in 423 HANSARD: HOUSE OF COMMONS DEBATES col. 292WH (July 7, 2004), 75 BRITISH YEARBOOK OF INTERNATIONAL LAW 669 (2004), to the effect that “settlement is not feasible”.

123 In 1997, the United Kingdom abandoned its claim to an EEZ around the uninhabitable island of Rockall (400 km off the coast of Scotland), citing UNCLOS Article 121(3); see 298 HANSARD: HOUSE OF COMMONS DEBATES col. 397 (July 21, 1997); Jonathan I. Charney, *Rocks That Cannot Sustain Human Habitation*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 863 (1999), at 866 n. 21; and Fraser MacDonald, *The Last Outpost of Empire: Rockall and the Cold War*, 32 JOURNAL OF HISTORICAL GEOGRAPHY 32 (2006).

124 See Sand, *supra* note 3, at 233; *Id.*, *Empreinte de l'Empire: la base aéronavale de Diego Garcia face au changement climatique*, in LIBER AMICORUM ANNE PETITPIERRE-SAUVIN: ÉCONOMIE, ENVIRONNEMENT, ÉTHIQUE—DE LA RESPONSABILITÉ SOCIALE ET SOCIÉTALE 327 (Rita Trigo Trindade, Henry Peter & Christian Bovet eds., 2009), at 329; and Barbara Kwiatkowska & Alfred H. A. Soons, *Some Reflections on the Ever Puzzling Rocks-Principle Under UNCLOS Article 121(3)*, 11 GLOBAL COMMUNITY YILJ 111 (2011-I), at 139–140 and 146–147. Similar questions have been raised with regard to the baselines for uninhabited/uninhabitable parts of some of the US “marine national monuments” in the Pacific; see Rieser, *supra* note 91, at 240, 249.

125 Statement by the Chairperson, 27th Session, UN Doc. CLCS/70 (May 11, 2011), para. 30.

126 Statement by Mauritian Foreign Minister Arvin Boolell, as quoted in *Chagos: opposition et inquiétudes des Maldives*, LE MAURICIEN (Feb. 19, 2010).

a second study on the feasibility of Chagos resettlement,<sup>127</sup> which is likely to come up with new UNCLOS-proof wording for the northern “outer islands” that would no longer preclude sustainable habitation, so as to minimize the risk of further territorial quandaries.<sup>128</sup>

#### IV. Conclusion: Whither the Sacred Trust?

The Chagos Archipelago disputes inexorably revert to the problem of decolonization. On the basis of legal advice from the FCO,<sup>129</sup> the United Kingdom has persistently refused to report on the BIOT to the UN General Assembly’s Special Political and Decolonization Committee under Article 73 of the UN Charter, which defines the responsibility of administering colonial powers for the well-being of peoples in non-self-governing territories as “a sacred trust”.<sup>130</sup> The FCO’s contention that the article is not applicable to the territory, “by reason of the absence of any permanent population”,<sup>131</sup> is manifestly not *bona fide*, the indigenous inhabitants having been removed on purpose to depopulate the archipelago for military use.<sup>132</sup> Yet the Chagossians, over 40 years in exile, preserved their identity as a people.<sup>133</sup>

127 Written statement by FCO Parliamentary Under-Secretary of State Mark Simmonds, 566 HANSARD: HOUSE OF COMMONS DEBATES col. 3WS (July 8, 2013). The new feasibility study is to be completed early in 2015 (terms of reference released by the FCO on Nov. 19, 2013); see also 749 HANSARD: HOUSE OF LORDS DEBATES col. 1490–1504 (Nov. 27, 2013).

128 UNCLOS Article 121(3) is notorious as “a perfect recipe for confusion and conflict”; EDWARD D. BROWN, *THE INTERNATIONAL LAW OF THE SEA* vol. 1 (1994), at 151. See also Roberto Lavallo, *Not Quite a Sure Thing: The Maritime Areas of Rocks and Low-Tide Elevations under the U.N. Law of the Sea Convention*, 19 INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW 43 (2004); and Kwiatkowska & Soons, *supra* note 124. The United Kingdom had unsuccessfully opposed the article during UNCLOS negotiations; see Jon M. Van Dyke & Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean’s Resources*, 12 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 265 (1983).

129 See the declassified FCO documents (1966–1969) quoted in TICU, *supra* note 23, at 43–46 and 64–67; the 1970 FCO legal opinion by Anthony I. Aust (*supra* note 47); and a secret FCO Memorandum of Jan. 26, 1971, from Ian Watt (Atlantic and Indian Ocean Department) to Sir David Aubrey Scott (assistant private secretary to the Secretary of State), on *Resettlement of the Inhabitants of the Chagos Archipelago*, advising that “if BIOT is to fulfill the defence purposes for which it was created, there should be no permanent or even semi-permanent population in respect of which we might in time incur, under Chapter XI of the UN Charter, a variety of obligations including the ‘sacred trust’ . . . to develop self-government (para. 5); certified copy filed on April 22, 2002, with the US District of Columbia District Court, as supplementary evidence in *Olivier Bancoult et al. v. Robert McNamara et al.* (*supra* note 52).

130 See HENDRY & DICKSON, *supra* note 22, at 246–250. In contrast to UK practice regarding the BIOT, the United States regularly includes the island of Guam—situated in the Mariana Islands “marine national monument”, one of the role models for the Chagos MPA (see text at note 91 *supra*)—in its reports to the UN General Assembly under Article 73(e) of the UN Charter; e.g., see GA Res. 67/132 (Dec. 18, 2012), Appendix VI. For a discussion of human rights and self-government claims by the indigenous Chamorro population in the Marianas, see R. Douglas K. Herman, *Inscribing Empire: Guam and the War in the Pacific National Historical Park*, 27 POLITICAL GEOGRAPHY 630 (2008), at 650.

131 Hazel Fox, *United Kingdom of Great Britain and Northern Ireland: Dependent Territories*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1025 (Rudolf Bernhardt ed., 2000), at 1026. See also para. 55 of Lord Hoffmann’s opinion in *Bancoult No. 2*, *supra* note 59, which would make resettlement a prerequisite for applying Article 73 to the Chagossians.

132 As documented in notes 44 and 129 *supra*.

133 See IAIN WALKER, *THE COMPLETE GUIDE TO THE SOUTHWEST INDIAN OCEAN* (1993), at 566; MAUREEN K. TONG, *THE RIGHT TO SELF-DETERMINATION AND RESTITUTION: THE MATTER OF THE PEOPLE OF THE CHAGOS ARCHIPELAGO (BRITISH INDIAN OCEAN TERRITORY)* (PhD thesis, Strasbourg University, 2009), at 173;

According to historians of international law, US President Woodrow Wilson's concept of the "sacred trust of civilization", on which Article 73 is based,<sup>134</sup> "replaced formal European imperialism as the perspective from which international law conceived Europe's outside".<sup>135</sup> While the United Kingdom (and the United States) had still abstained from the UN General Assembly's Decolonization Resolution 1514 (XV) in 1960,<sup>136</sup> the United Kingdom has since accepted the underlying principle of self-determination as a right of peoples in its overseas territories,<sup>137</sup> and the principle is now generally considered customary *ius cogens*.<sup>138</sup> It follows that the excision and depopulation of the Chagos Archipelago in 1965–1973, undertaken without any consultation of the people concerned (either by the UK or the Mauritian authorities at the time), was a breach of international law.<sup>139</sup>

The legal consequences may be viewed in terms of residual financial liability, taking into account General Assembly Resolution 60/147 of Dec. 16, 2005, which laid down "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law". The damage suffered by the Chagos islanders to date far exceeds the earlier *ex gratia* payments,<sup>140</sup> and has recently been estimated as ranging between US\$5.4 billion and 13.2 billion.<sup>141</sup> The crucial question today, however, is how to move forward from a historical injustice

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Allen, *supra* note 25, at 459; Sandra J. T. M. Evers & Marry Kooy, *Redundancy on the Instalment Plan: Chagossians and the Right to be Called a People*, in Evers & Kooy, *supra* note 50, at 1–10; and LAURA JEFFERY, CHAGOS ISLANDERS IN MAURITIUS AND THE UK: FORCED DISPLACEMENT AND ONWARD MIGRATION (2011). See also the novels by PETER BENSON, *A LESSER DEPENDENCY* (1989), and SHENAZ PATEL, *LE SILENCE DES CHAGOS* (2005).

- 134 As one of his famous "fourteen points", which found its way into Article 22 of the League of Nations Covenant, 225 Consolidated Treaty Series 195, at 203. See Nele Matz, *Civilization and the Mandate System under the League of Nations as Origins of Trusteeship*, 9 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 47 (2005), at 50, 71; ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005), at 122; and Mark Mazower, *An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century*, 82 INTERNATIONAL AFFAIRS 553 (2006), at 560.
- 135 MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002), at 171.
- 136 *Supra* note 23; see David A. Kay, *The United Nations and Decolonization*, in *THE UNITED NATIONS: PAST, PRESENT AND FUTURE* 143 (James Barros ed., 1972), at 152.
- 137 HENDRY & DICKSON, *supra* note 22, at 251–253.
- 138 See ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (1998); CRAWFORD, *supra* note 25, at 114–128; and Malcolm N. Shaw, *Self-Determination, Human Rights, and the Attribution of Territory*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 590 (Ulrich Fastenrath et al. eds., 2011), at 599, citing the ICJ, *East Timor Case* (June 30, 1995), 1995 ICJ REPORTS 90, at 102.
- 139 In the view of SHAW, *supra* note 25, at 132, "to permit the administrative authority to alter the territorial composition of the colonial entity upon independence would be to undermine the concept of self-determination." See also CRAWFORD, *supra* note 25, at 645.
- 140 See text at note 51 *supra*. Payments made by the UK government only reached some of the Chagossians in Mauritius, and none in the Seychelles.
- 141 David Vine, Philip Harvey & S. Wojciech Sokolowski, *Compensating a People for the Loss of Their Homeland: Diego Garcia, the Chagossians, and the Human Rights Standards Damages Model*, 11 NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS 149 (2012), at 182.

recognized as such,<sup>142</sup> and from the ensuing entanglement of seemingly irreconcilable legal and political positions.<sup>143</sup> A potential model could be the 2010 Franco-Mauritian Framework Agreement on the (uninhabited) island of Tromelin,<sup>144</sup> Article 2 of which expressly leaves the issue of territorial sovereignty in abeyance,<sup>145</sup> The agreement includes joint management (*cogestion*) arrangements for environmental conservation, scientific research, and fishery resources in the island's 200-mile EEZ, but has not yet been ratified, in the face of parliamentary opposition in France. A similar option would have been joint UK-Mauritian nomination of the Chagos Archipelago as a natural heritage site under the 1972 World Heritage Convention, which is also "without prejudice" to territorial sovereignty rights;<sup>146</sup> that option, however, has been rejected by the Mauritian government as "premature and inappropriate".<sup>147</sup> The only remaining alternative, therefore, would be the UK government's commitment to a negotiated cession of the territory "when it is no

142 E.g., see the statements by FCO Under-Secretaries of State Bill Rammell in 2004 (*supra* note 122: "The decisions made by successive governments in the 1960s and 1970s to depopulate the islands do not, to say the least, constitute the finest hour of UK foreign policy"), and Mark Simmonds in 2013 (*supra* note 127: "This Government has expressed its regrets about the way resettlement of BIOT was carried out in the late 1960s and early 1970; we do not seek to justify these actions or excuse the conduct of an earlier generation"); and by US Senators Edward M. Kennedy and John C. Culver during congressional hearings in 1975, as quoted by Simon Winchester, *Diego Garcia*, 73 GRANTA: THE MAGAZINE OF NEW WRITING 207 (2001), at 224 (conduct "oblivious to violations of human rights"). See also former UK High Commissioner to Mauritius David R. Snoxell, *Letter to the Editors*, THE TIMES (May 26, 2007), at 22 ("one of the worst violations of human rights perpetrated by the UK in the 20th century"); Nobel laureate Jean-Marie G. Le Clézio, *Lavez l'injustice faite aux Chagossiens: lettre ouverte au Président Obama*, LE MONDE (Oct. 18–19, 2009); and former US diplomat Gerald Loftus, *Diego Garcia: Freedom's Footprint, or Enduring Injustice?*, 87 FOREIGN SERVICE JOURNAL 12 (2010).

143 Accumulated legal costs of the UK government for litigation over Chagos for the period 2000–2007 amounted to US\$4 million (£2.171); see FOREIGN AND COMMONWEALTH OFFICE: MANAGING RISKS IN THE OVERSEAS TERRITORIES, 7th Report of the House of Commons Committee of Public Accounts, Session 2007–08, HC 176 (2008), at 22. With subsequent judicial proceedings in the House of Lords, the European Court of Human Rights, and the UNCLOS Arbitration, that figure has probably doubled by 2014. Legal costs of the US government for Chagos litigation from 2001 to 2007 (up to the US Supreme Court, *supra* notes 52–53) are not public, but are likely to be in a comparable range.

144 *Accord-cadre sur la cogestion économique, scientifique et environnementale relative à l'île de Tromelin et à ses espaces maritimes environnantes* (June 7, 2010); text annexed to Doc. No. 299, SÉNAT: SESSION ORDINAIRE DE 2011–2012 (Jan. 25, 2012). For background see André Oraison, *À propos du conflit franco-mauricien sur le récif de Tromelin (la succession d'États sur l'ancienne Île de Sable)*, 65 REVUE DE DROIT INTERNATIONAL ET DE SCIENCES DIPLOMATIQUES ET POLITIQUES 85 (1987); and MLIMUKA, *supra* note 84, at 99–100. See also LUNN & MILLS, *supra* note 29, at 16.

145 *Id.*, Article 2; not unlike Article IV(1) of the Antarctic Treaty (*supra* notes 34–36) and the identical disclaimer in Article IV(2) of the Convention on the Conservation of Antarctic Marine Living Resources (May 20, 1980), 1329 UNTS 47.

146 *Supra* note 96, Article 11(3); see Tullio Scovazzi, *World Heritage Committee and World Heritage List*, in THE 1972 WORLD HERITAGE CONVENTION: A COMMENTARY 147 (Francesco Francioni & Federico Lenzerini eds., 2008), at 172.

147 Note Verbale No. 258/2012 (Sept. 12, 2012) from the Permanent Mission of Mauritius in Geneva to the International Union for Conservation of Nature (IUCN), requesting withdrawal of a motion recommending joint world heritage nomination of the Chagos Archipelago at the 5th World Conservation Congress in Jeju/Korea (Sept. 2012); see 43 ENVIRONMENTAL POLICY AND LAW 50 (2013).



longer needed for defence purposes, and in accordance with international law”<sup>148</sup> While that hypothesis is unlikely to materialize for the Diego Garcia base in the foreseeable future,<sup>149</sup> there have been suggestions to initiate such negotiations, at least for the “outer islands” of the archipelago (such as Peros Banhos), possibly in the course of diplomatic preparations for the 24th Commonwealth Heads of Government Meeting to be hosted by Mauritius in 2015.<sup>150</sup>

Even though initiatives to resolve the Chagos disputes will necessarily have to come from the governments concerned, they cannot ignore the interests of the ultimate beneficiaries of the “sacred trust”—the Chagossian people (albeit now in exile), to whom governments remain accountable.<sup>151</sup> The fiduciary duty to fulfill the Chagossians’ right of self-determination falls not only on the UK government, as the sole administrative power currently in a position to ensure any public participation in the governance of the BIOT,<sup>152</sup> but also on the Mauritian government, which in the event of a future “cession” of sovereignty will have to ensure an appropriate measure of self-government for the Chagos islanders.<sup>153</sup> Moreover, if the right to self-determination can indeed be considered international *ius cogens*,<sup>154</sup> it may also oblige the UNCLOS arbitral tribunal to take the will of the Chagossians duly into account in reaching its decision on the merits in the pending proceedings.<sup>155</sup>

148 *Supra* note 29.

149 Pursuant to Article 11 of the bilateral UK-US agreement on Diego Garcia (*supra* note 14), it is contemplated that “the islands shall remain available to meet the possible defence needs of the two Governments for an indefinitely long period.” The agreement will automatically be renewed for another 20 years in 2016, unless terminated by notice prior to December 2014; see LUNN & MILLS, *supra* note 29, at 3. See also Peter Harris, *Decolonizing the Special Relationship: Diego Garcia, the Chagossians, and Anglo-American Relations*, 39 REVIEW OF INTERNATIONAL STUDIES 707 (2013).

150 Proposals voiced, in particular, by the Chagos Islands (BIOT) All-Party Parliamentary Group and its coordinator, David R. Snoxell, *Chagos Islands: Resolving the Sovereignty Issue*, MAURITIUS TIMES (Feb. 15–21, 2013), at 1, 5. See also LUNN & MILLS (*supra* note 29), at 22–24.

151 The UN Charter’s trusteeship metaphor (*supra* note 134) places the administering authorities in the role of trustees, and the peoples of non-self-governing territories in the role of beneficiaries, with the natural and cultural resources of the territories as the *corpus* of the trust. See also generally Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW 295 (2013); and, in an environmental context, PETER H. SAND, THE RISE OF PUBLIC TRUSTEESHIP IN INTERNATIONAL ENVIRONMENTAL LAW, Tel Aviv University Faculty of Law: Global Trust Working Paper (03/2013) (2013).

152 E.g., the *Environment Charter* adopted for the BIOT on Sept. 26, 2001, commits both the UK government and the government of the BIOT to “abide by the principles set out in the Rio Declaration on Environment and Development”. Principle 10 of the Rio Declaration (June 13, 1992, 31 ILM 874) provides that at the national level, each individual shall have “the opportunity to participate in decision-making processes”.

153 Possibly along the lines of partial self-government, as accorded by the Mauritius National Assembly to the semi-autonomous island of Rodrigues on Nov. 20, 2002; for the constitutional history of Rodrigues, and its step-by-step transition to self-rule, see Fiona Berry & Anthony Angelo, *From Pirates’ Lair to Federal Partner*, 4 REVUE JURIDIQUE POLYNÉSIIENNE 317 (2004).

154 See text at note 138 *supra*; and TICU, *supra* note 23, at 71.

155 *Supra* notes 114–116.