An ICJ Advisory Opinion, basis for a negotiated settlement on the issues concerning the future of the Chagos Islanders and of the British Indian Ocean Territory

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1. *Introduction*

Behind the diplomatic and legal language of the United Nations (UNGA) resolution requesting the International Court of Justice (ICJ) for an 'Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' lie two relatively straightforward political issues – resettlement and sovereignty. Ultimately these can only be resolved by negotiation based on compromise between the United Kingdom, Mauritius, the United States and the Chagossians.

An Opinion that was favourable to Mauritius would be a strong incentive to the UK to engage with Mauritius in reaching an overall settlement. But even if the ICJ declined to give one, the matter will return to the UNGA to decide what to do. It could adopt a resolution inscribing the British Indian Ocean Territory (BIOT) on the list of Non-Self-Governing Territories (NSGT) of the Committee of 24 (Decolonisation Committee). Its purpose is to monitor the implementation of UNGA resolution 1514 (XV) of 14 December 1960, known as the Declaration on Decolonisation, and review annual reports by the colonial power on the development of the Territories and the well-being of their inhabitants. This would maintain UN focus on Chagos and pressure on the UK to negotiate a settlement, including resettlement which both the UK and Mauritius might jointly sponsor. Whatever the legal outcome the profile of Chagos and its former inhabitants has been substantially raised and is now back on the UN agenda after 52 years. 17 NSGTs are listed by the Committee of which ten are British.

[*] Co-ordinator Chagos Islands (BIOT) All-Party Parliamentary Group. This paper updates D Snoxell 'The Politics of Chagos: Part Played by Parliament and the Courts Towards Resolving the Chagos Tragedy', in S Allen, C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory. Legal Perspectives* (Springer 2018) 359.

There are, however, decades of distrust and obfuscation to be peeled away. Past experience shows that the US is likely to go along with whatever the British Government decides providing the integrity and security of the base is safeguarded and the costs are borne by the UK.

2. *A 1966 view by Henry Darwin, a Foreign Office Legal Adviser*

First a view from 1966. Henry Darwin commented in an internal minute of 24 May 1966:[1]

> 'This is really fairly unsatisfactory. We detach these islands – in itself a matter which is criticised. We then find, apart from the transients, up to 240 '*Ilois*', whom we propose either to resettle (with how much vigour of persuasion?) or to certify, more or less fraudulently, as belonging somewhere else. This all seems difficult to reconcile with the '*sacred trust*' of Art 73 [of the UN Charter], however convenient we or the US might find it from the viewpoint of defence. It is one thing to use '*empty real estate*'; another to find squatters in it and to make it empty'.

Darwin was incorrect about the number of Ilois – there were about 1,500 Chagos born Ilois who were removed[2] and they were not 'squatters'. But the point is well made and stands in sharp contrast to another legal adviser who in January 1970 drafted an Immigration Ordinance providing for the deportation of the Chagos Islanders 'to maintain the fiction that the inhabitants are not a permanent or semi-permanent population'[3] in order to avoid UN scrutiny.

[1] See Ouseley J in *Chagos Islanders v Attorney General & HM BIOT Commissioner* [2003] EWHC 222(QB) para 70.

[2] For a discussion see R Gifford R, RP Dunne, 'A Dispossessed People: the Depopulation of the Chagos Archipelago 1965-1973' (2014) 20 Population, Space and Place 37.

[3] A Aust, 'Immigration legislation for BIOT' in folio 6 file FCO 32/725 (National Archives, London, 16 January 1970).

3. *US, defence and security arguments*

Defence and security have inevitably been persuasive arguments against resettlement, especially in the light of the 9/11 terrorist attacks on New York on 11 September 2001 although it has long been known that the Outer Islands are not, and will never be required for defence purposes. The US has never said publicly that they were opposed to resettlement although at the behest of the Foreign and Commonwealth Office (FCO) letters from the State Department were concocted for use in the litigation which even Lord Hoffman described as 'fanciful speculations'.[4] The idea that a small number of Chagossians could be any more of a security threat to the base than the nearly 2,500 contract workers, mostly Filipino, who work there, was to put it mildly, over egging the argument.

The US wanted Diego Garcia free of a permanent population but even that position changed in 2015. Had they been against resettlement near the base the US would have vetoed the inclusion of Diego in the 2014/15 KPMG resettlement feasibility study. KPMG's preferred option was a pilot resettlement on Diego. In April 2016 when President Obama, on his farewell visit to the UK was asked by Prime Minister Cameron and at a later meeting by the Leader of the Opposition, Jeremy Corbyn about resettlement, he did not object. Over the years the US position has fluctuated within the Administration according to personality and the state of the Special Relationship but the US has remained steadfast in its public position that resettlement and sovereignty are for the UK, not the US to resolve. They sit on the fence and say nothing in public though have occasionally been ventriloquised to come to the FCO's aid with letters for use in the litigation. The US will not make a statement supporting the exile of the Chagossians, nor will they make one condemning it – the UK is their closest ally after all. But the policy goes against the American anti-colonial ethos and human rights values. Naturally the US supported the UK in the debate on the UNGA resolution and at the ICJ.

In February 2007 I re-entered the fray with a letter in *The Times*[5] ending with the question 'Is it not time that HMG brought together the Chagossian leaders, Mauritius and the US to sort out this relic of the Cold

[4] See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 para 57.

[5] Letter 'Justice for the Chagos Islands' *The Times* (12 February 2007).

War and rectify one of the worst violations of fundamental human rights perpetrated by the UK in the twentieth century?'

4. *Avoiding substantive discussions with Mauritius on the future of BIOT*

The UK's standard right of reply, when ever Mauritius raised Chagos in international fora, was 'We remain open to discussions regarding arrangements governing BIOT and the future of the Territory'. There have been desultory discussions with Mauritius over the last 40 years but on each occasion it was soon apparent that the UK was not really willing to discuss BIOT's future. The closest was a paltry UK offer in 2017 to discuss a framework for joint management in environment and scientific study of the islands, clearly in the hope of staving off an UNGA resolution. In March 2002, at the Commonwealth Heads of Government Meeting (CHOGM) in Coolum, Australia, the Mauritian Prime Minister Sir Anerood Jugnauth was due to meet Tony Blair to discuss Chagos. This meeting had been loudly heralded in the Mauritian press but just before the meeting the UK side cancelled on the grounds that Blair had to deal with urgent matters, making Jugnauth feel rather uncomfortable on his return to Mauritius, confronted as he was by a challenging press and Parliament.

There was a similar scenario when Prime Minister Berenger flew to London in early July 2004 to see Don McKinnon, Commonwealth Secretary General, to discuss Mauritius leaving the Commonwealth in the wake of the Orders in Council banning the return of Chagossians and the UK's refusal to discuss sovereignty. After the meeting McKinnon put out a statement strongly supporting the Mauritian position. A meeting with Blair was in the offing but the door of Number Ten remained firmly shut. Berenger was instead offered a telephone call with junior Foreign and Commonwealth minister Bill Rammell, which he did not take up. Commonwealth Prime Ministers usually meet their opposite numbers. Mauritius subsequently withdrew the threat to leave the Commonwealth and postponed tabling a resolution at the September 2004 UNGA, pending discussions with the UK.

In March 2004 Prime Minister Berenger summoned me (I was then British High Commissioner in Mauritius) to tell me of the advice from the late Sir Iain Brownlie QC that to take its case to the ICJ Mauritius

might have to leave the Commonwealth. The Mauritian government had evaluated the options of seeking an international legal determination of its sovereignty claim, either by adjudication before the ICJ, or of less effect, by way of an ICJ Advisory Opinion for which it would be necessary to obtain a UNGA resolution. Pursuing the first option Berenger let it be known publicly following the June 2004 Orders in Council, that by seceding from the Commonwealth, Mauritius would avoid the block on Commonwealth members litigating each other in the ICJ. But in a fast legal move the FCO amended the UK's submission to the jurisdiction of the ICJ by excluding disputes with 'former' Commonwealth members. At the recent ICJ hearings the UK and US claimed that seeking an Advisory Opinion was an attempt by Mauritius to take a bilateral dispute to the ICJ although Mauritius had abandoned it following the UK's exclusion of former Commonwealth members.

Five years later at CHOGM in November 2009 the next Mauritian Prime Minister Dr Ramgoolam met the British PM, Gordon Brown, for the first prime ministerial meeting since 1994. Dr Ramgoolam said that Brown had agreed to put the proposed Marine Protected Area (MPA) 'on hold'. After the formation of the UK Coalition government Ramgoolam had an encouraging meeting in London with Foreign Secretary William Hague on 4 June 2010 at which Hague indicated that he was reviewing all aspects of policy towards Chagos. But on 20 December 2010, in the absence of any progress, Mauritius initiated proceedings against the UK under the United Nations Convention on the Law of the Sea to challenge the legality of the MPA. On 8 June 2012 Dr Ramgoolan had a meeting with David Cameron at No Ten Downing Street. On return to Mauritius he told Parliament that it was agreed that talks would be held on the future use of Chagos but this was later denied by the FCO. The meeting achieved nothing tangible.

5. *Mauritian decision to take the decolonisation issue to the ICJ for an advisory opinion*

In 2015, emboldened by the Arbitral Tribunal Award, the new Prime Minister, Sir Anerood Jugnauth, in his sixth term of office, decided to pursue Brownlie's second option – an UNGA resolution seeking an ICJ

Advisory Opinion. This was a course of action that previous prime ministers had considered but not pursued, in the hope that negotiation with the UK would lead to a compromise on sovereignty, but Her Majesty's Government (HMG) continued to duck the issue. An exchange of correspondence between the two prime ministers in the summer of 2015 about a possible 'constructive engagement' led to bilateral talks in November 2015 in London and in May 2016 in Port Louis but no progress was reported. In July 2016 Sir Anerood announced that Mauritius would seek an UNGA resolution unless agreement was reached with the UK concerning a date for a handover of the Archipelago to Mauritius and on the joint management of Chagos pending its return to Mauritius. He also confirmed that Mauritius had no objection to the continued use of Diego Garcia by the US as a military base.

Mauritius, in consultation with the African Union, duly drafted a resolution for consideration at the UNGA. Following a meeting in New York in September 2016 between Sir Anerood and the new Foreign Secretary, Boris Johnson, Mauritius agreed to hold off tabling the draft resolution until further discussions between the UK and Mauritius could be arranged, with a deadline of June 2017. Three rounds of talks took place between November and March 2017 without any communiqué or apparent result.

The unexpected announcement in late April 2017 that there would be a UK general election on 8 June made further delay inevitable. So 13 years after it had served notice that it was considering taking the matter to UNGA, with a view to a resolution referring the matter to the ICJ, the Government of Mauritius lost patience and on 31 May informed the President of the General Assembly that it wanted its draft resolution considered by the current UNGA. The last time the issue had come before the UNGA was on 16 December 1965, soon after the creation of BIOT on 8 November, when it adopted Resolution 2066 (Question of Mauritius). That resolution had invited 'the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity'. The UK argues that as this is a bilateral dispute it is inappropriate for the ICJ to give an Advisory Opinion and that it should be resolved in bilateral talks. But this argument ignores fundamental UN principles, namely decolonisation, territorial integrity, self-determination of peoples and human rights.

6. *UNGA resolution requesting an ICJ Advisory Opinion, June 2017*

On 22 June 2017 a plenary session of the UN General Assembly in New York considered the Mauritian resolution which was co-sponsored by the 55 Group of African States and six South American states. 174 member states were present of which some 25 spoke in the debate. The resolution[6] was carried by 94 in favour, 15 against and 65 abstentions. Only two permanent members of the Security Council (UK, US) and one non-permanent member (Japan), 4 EU members (Bulgaria, Croatia, Hungary and Lithuania), Australia, New Zealand and six others voted against the resolution. To gain the support of only 14 members of the 193 UN member states was a crushing defeat for the UK and sent a clear message that the UN expects the UK to bring this relic of the Cold War to an end.

It was a decisive outcome for Mauritius and the Chagossians whose Leader Olivier Bancoult was a member of the Mauritian delegation. The resolution specifically drew attention to 'the forcible removal by the UK of all the inhabitants of the Chagos Archipelago' and asked the ICJ to consider the consequences under international law 'with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals in particular those of Chagossian origin'. The arguments of both sides are set out in the UK statement by Matthew Rycroft, Sir Anerood Jugnauth's statement, the Mauritian Explanatory Memorandum of July 2016 and in its aide memoire of May 2017. In three articles in July 2017 published by *Weekly* in Mauritius[7] I set out a rebuttal and textual analysis of the UK statement to the UNGA, describing it as a patchwork of spin, omission, economy with the truth and a misrepresentation of the historical background to the excision of the Archipelago in 1965. In my article in *Weekly*[8] of 13 September 2018 I argued that the UK and US were wrong in claiming to the ICJ that the people of Mauritius had given consent to the detachment of the Chagos Archipelago.

[6] UNGA Res 71/292 (22 June 2017) UN Doc A/RES/71/292.
[7] In *Weekly* (editions of 29 June, 6 July, 13 July 2017 published in Mauritius).
[8] 'The ICJ and the Chagos Islands question' *Weekly* (13 September 2018).

7. *Establishment of the Chagos Islands (BIOT) All-Party Parliamentary Group 2008*

I now turn to the role played by the Chagos Islands (BIOT) All-Party Parliamentary Group (APPG). Following the House of Lords judgment in October 2008 the late Lord Avebury asked me to help establish a Chagos APPG. At its first meeting in December the Group elected Jeremy Corbyn MP as Chairman and I was invited to be the Coordinator. When Corbyn became Leader of the Opposition in 2015 he was elected Honorary President and Andrew Rosindell MP (Conservative) succeeded him as Chairman. At its first meeting the Group decided that its purpose should be 'to help bring about a resolution of the issues concerning the future of the Chagos Islands and of the Chagossian people'.[9]

In 2018 the Group consists of 50 members of both Houses, from all seven political parties in Westminster, the only APPG ever to have achieved complete all-party membership. Members have included five former FCO ministers who had responsibility for Chagos, a former Deputy Prime Minister, Leader of the Liberal Party and three members of the Foreign Affairs Committee, including its chairman. There are 15 Conservative, 19 Labour, 4 SNP and 6 Lib Dem members. The others are Green Party, Plaid Cymru, DUP and cross bench peers. To date the Group has held 70 meetings. Since 2008 the Group has tabled numerous Parliamentary Questions and secured several debates including two urgent debates in both Houses in 2010 following the Declaration of the MPA and in November 2016 following the ministerial statement rejecting resettlement, and five Westminster Hall debates. The Group considers all aspects of BIOT – human rights, humanitarian, defence, security, sovereignty, legal, nature conservation, environmental factors, and Commonwealth, US and Mauritian interests, the UN, the AU, the EU and the European Parliament. There is a regular exchange of correspondence with Ministers who have from time to time attended meetings with the Group.

[9] Register of All-Party Parliamentary Groups as at October 2016 <www.parliament.uk/mps-lords-and-offices/standards-and-financial-interests/parliamentary-commissioner-for-standards/registers-of-interests/register-of-all-party-party-parliamentary-groups/>.

8. *HMG rejects resettlement November 2016*

On 16 November 2016 the Group met collectively the Ministers of States at the FCO, Ministry of Defence and Department for International Development for a discussion regarding the issues concerning resettlement. This discussion had, however, been pre-empted by a ministerial statement in the House of Commons that afternoon, rejecting resettlement. The Guardian had already carried a report by its diplomatic correspondent anticipating the content of the statement[10]. Not surprisingly the meeting prompted a strong statement from the Group challenging HMG's decision.[11]

To mark Human Rights Day on 10 December 2016 The Times published the following letter from the Group:[12]

> 'UN human rights day today marks the anniversary of the 1948 universal declaration of human rights. This year's theme is 'Stand up for someone's rights today'. The government's decision last month not to allow resettlement of the Chagos Islands is a human rights travesty for Chagossians. This decision was strongly contested in debates in parliament the next day. Chagossians have campaigned to return home since the 1970s. In 2000, their right of abode was restored by the High Court but they lacked the means to return. The cruel exercise of the royal prerogative in 2004 banned them once again. The recent KPMG report has shown resettlement to be feasible, but the government has chosen not to implement it, instead offering enhanced project assistance and an apology. This cannot be a substitute for one of the most basic of human rights — to live in one's homeland. In any case the right of abode can and should be restituted'.

9. *APPG meeting with Prime Minister of Mauritius, April 2018*

At the first meeting of a Mauritian prime minister with a UK Parliamentary Group a useful exchange of views took place between Pravind

[10] Patrick Wintour, 'Chagos Islanders denied right to return home' *The Guardian* (16 November 2016).

[11] APPG statements can be obtained from drsnoxell@gmail.com.

[12] Jeremy Corbyn (and 32 further signatories), 'Justice for Chagos' *The Times* (10 December 2016).

Jugnauth and the APPG on 16 April 2018. The PM began with a detailed statement of the history and views of Mauritius on Chagos. The discussion which followed focused on the UNGA request to the ICJ for an Advisory Opinion. Mr Jugnauth emphasised Mauritian support for the former inhabitants of the Chagos Archipelago who are Mauritian citizens. Once the decolonisation process was complete they would be able to go home. Members asked how Mauritius would resettle those who wanted to return and what arrangements there would be for their constitutional status, governance and political representation. The PM said that they would have the same rights as the inhabitants of Rodrigues and Agalega and that Mauritius saw no difficulty in facilitating and funding resettlement.

The PM hoped that the UK would abide by any Advisory Opinion given by the ICJ which could conclude that the process of decolonisation had not been completed and that the Archipelago was therefore part of Mauritius. Members discussed with the PM what more the Group could do to help bring about a resolution. The PM said it was important for the APPG to continue to sensitise Parliament and the public on the issues and suggested that members might benefit from visiting Chagos and Mauritius. It was thought that the Group could have a vital role to play in ensuring that the UK respected an ICJ Advisory Opinion. It would be difficult for the UK to regain its seat on the ICJ in future elections if it were seen to ignore an Advisory Opinion because it did not agree with it.

10. *Views of the APPG on the need for compromise building on an ICJ Advisory Opinion*

In the face of the Government's rejection of resettlement in November 2016 the APPG resolved to continue the struggle until a pilot resettlement was achieved and Chagossians can exercise their right to determine their own future. But it will continue to look for ways of finding a compromise acceptable to both the Chagossians and the Government. One such compromise would be the restoration of the right of abode. Following the High Court judgment in November 2000 the Foreign Secretary, Robin Cook accepted the right of abode and allowed Chagossians the right to return, with the exception of Diego Garcia. So between November 2000 and the Orders in Council of June 2004, which once again

banned the Chagossians from entering BIOT, the right of abode was operative. It could have been exercised had there been available transport to and facilities in the Outer Islands. As Lord Bingham (presiding Law Lord) put it in his 2008 judgment[13] 'It cannot be doubted that the right [of abode] was of intangible value, and the smaller its practical value the less reason to take it away'.

There is nothing to stop the FCO restoring the right of abode without being obliged to support resettlement. It would demonstrate that the Government is serious about wanting to meet some of the aspirations of the Chagossian people and also show goodwill towards them and respect for fundamental human rights. Although restoring the right of abode could raise expectations, it would cost the FCO nothing while redressing its damaged human rights record and reputation. But the Government is likely to fall back on the ever convenient argument that the current litigation must first run its course.

The Group has focussed on the UNGA request to the ICJ for an Advisory Opinion as a potential way forward and a solid basis for settling the issues. On 6 December 2017 members issued a statement hoping that an Advisory Opinion would inspire the General Assembly to work with the parties directly concerned to bring an end to the exile of the Chagossian people and contribute to the process of decolonisation. At its meeting on 13 June 2018 a further statement was issued. Members urged that a compromise by all the parties was essential and recommended that in the meantime they consider the concessions they could envisage to achieve an overall settlement. The Group thought it unlikely, that the UK, a founding pillar of the ICJ and international legal system, would ignore an Opinion of the 'World's Court'.

At a time when the UK's standing and future in the world is uncertain the APPG wants to see an end to 53 years of human rights violation, failed policies and stratagems, futile diplomatic exchanges, media coverage, international opprobrium, judicial strictures and 19 years of costly litigation, culminating in October 2017 with the loss of the UK seat on the ICJ. An ICJ Opinion offers a way forward with the potential for compromise and negotiation. If the UK tried to ignore an ICJ Advisory Opin-

[13] See *R (Bancoult)* (n 4) para 72.

ion this would be a matter for Parliament. The APPG, through Parliament, will need to ensure that the UK respects and implements the Court's findings.

11. *Possible elements of an overall settlement*

Confidence building steps to reduce distrust and obfuscation are fundamental to breaking the political impasse and reaching an overall settlement. I suggest for consideration the following elements:

a) a meeting of the two Prime Ministers and a joint declaration to agree objectives for an overall settlement;

b) a consensual resolution of the UNGA endorsing the ICJ's Opinion (if they give one) and any other measures recommended by UNGA;

c) restoration by HMG of the Chagos Islanders' right to return and right of abode;

d) a pilot resettlement, work opportunities and conservation training (as recommended by the APPG in its statement of 26 April 2017) for those who want to return, which could be established under UK sovereignty and as bilateral discussions developed continue under joint management and or Mauritian sovereignty;

e) agreement on measures to implement the 2015 Arbitral Tribunal Award on the MPA which determined that Mauritius has an interest in significant decisions that bear upon possible future uses of the Archipelago;

f) a timetable for the staged involvement of Mauritius in the management of the Outer Islands concerning environmental and scientific matters (as offered in the June 2017 UK UNGA statement) including the MPA, culminating in a deadline for transfer of sovereignty of the Outer Islands to Mauritius;

g) discussions on strategic and tactical forms of bilateral security cooperation (as offered in the 2017 UK UNGA statement);

h) a separate agreement for the future of Diego Garcia, providing for the security and integrity of the base and ultimate sovereignty of Mauritius with a deadline of 2036 when the 1966 UK/US Agreement terminates, though earlier if all parties can agree.