The British Indian Ocean Territory: International legal black hole?

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1. Introduction

Decolonization has changed the map of the world – creating not only more than a hundred newly independent States, but also new territorial units below the State level that continue to raise irritant questions of international law. One of those novel geographical and geopolitical constructs is the British Indian Ocean Territory (BIOT) in the Chagos Archipelago, ‘excised’ in 1965 from the former British crown colony of Mauritius just prior to its independence,1 for the specific purpose of hosting a projected joint UK-US military base on the principal island of Diego


Garcia. In the process, the entire population of the archipelago was forcibly ‘relocated’ and now survives with its descendants in exile, primarily in Mauritius, the Seychelles and the United Kingdom. The remarks which follow will address some of the international legal issues involved, particularly in the fields of (i) human rights; (ii) disarmament; (iii) environment; and (iv) law of the sea.

2. Human Rights

Most of the history of the establishment and concomitant depopulation of the BIOT is well documented, especially in the voluminous proceedings of a series of legal actions brought since the 1980s by exiled Chagossians in the courts of Mauritius, the United Kingdom and the United States, and in the related intergovernmental arbitration proceedings between Mauritius and the United Kingdom in 2010-15. Even


3 See L Jeffery, Chagos Islanders in Mauritius and the UK: Forced Displacement and Onward Migration (Manchester UP 2011); SJ TM Evers, M Kooy (eds), Eviction from the Chagos Islands: Displacement and Struggle for Identity Against Two World Powers (Brill 2011).


6 In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), Permanent Court of Arbitration, Case No 2011-03 (final award 18 March
though there is reliable evidence that the original inhabitants of the archipelago – mostly descended from African slaves brought to the islands in the 18th and 19th century – had settled there for at least four or five generations, the British Foreign and Commonwealth Office (FCO) persistently ‘maintained the fiction’ of a non-permanent population composed of temporary plantation workers from Mauritius and the Seychelles, following legal advice to avoid ‘the risk of our being accused of setting up a mini-colony about which we would have to report to the United Nations under Article 73 of the Charter’. From the outset, therefore, the FCO has taken the position that the BIOT, ‘by reason of the absence of any permanent population’, is not subject to the reporting obligations for non-self-governing territories under Article 73 of the UN Charter. It is noteworthy that, by contrast, the United States has for the past 20 years regularly reported under Article 73(e) to the UN General Assembly’s Special Political and Decolonization Committee (known as the ‘Committee of 24’) on its administration of the non-self-governing Guam Island territory (Guåhån). At the recent 72nd UNGA session, however, the representative of the new US Administration (together with the UK and seven other countries) voted for the first time against a resolution on the ‘Question of Guam’ that called for specific action towards future self-determination for the territory’s indigenous Chamorro population and for a report on environmental impacts of the US military base


on the island (resolution adopted on 8 November 2017, by a vote of 80 in favour, 9 against and 62 abstentions). On the same grounds, the UK contends that its ratification (on 20 May 1976) of the 1966 United Nations Covenants on Human Rights does not extend to the BIOT, – a view categorically contested by the UN Human Rights Committee. Prompted by allegations of human rights abuses against detainees of the US military forces on or off the island of Diego Garcia, the UN Committee has repeatedly indicated that it considers the Covenants to be applicable to the BIOT, and in its concluding observations on the UK national report in 2008 urged the UK ‘to include the territory in its next periodic report’. At the same time, though, the House of Lords’ Appellate Committee in the 2008 Bancoult 2 case held that even the British Human Rights Act (1998 c. 42) does not apply to the BIOT because the UK had not formally extended its ratification of the

12 Fox (n 9) at 1029.
13 In its General Comment No 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), the UN Human Rights Committee stated that ‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party’; UN Doc CCPR/C/21/Add.13 (2004).
1950 European Convention on Human Rights (213 UNTS 221, in force 3 September 1953) to the territory.\(^{16}\)

Similarly, UK ratification (on 24 June 1988) of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1561 UNTS 363, in force 1 February 1989) was extended to Gibraltar and Guernsey (on 5 September 1988 and 8 November 1994, respectively), but not to the BIOT. The 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85, in force 26 June 1987), ratified by the UK on 8 December 1988, was extended to most UK overseas territories except the BIOT, on 9 December 1992. So was the 1998 Rome Statute of the International Criminal Court (ICC, 2187 UNTS 3, in force 1 July 2002), ratified by the UK on 4 October 2001 and extended by an overseas extension list on 11 March 2010 which curiously omits the BIOT.\(^{17}\) Whether or not these omissions and exemptions were purposely designed to shield the US military base on Diego Garcia from the risk of international legal responsibility for some of its activities,\(^{18}\)


\(^{18}\) Note, however, that the 1966 UK-US Agreement (n 2) expressly reserves to the UK authorities ‘exclusive jurisdiction over members of the United States forces with respect to offences, including offences relating to security, punishable by law in the territory but not by the law of the United States’; Appendix I, Annex II, art 1(b)(ii). The provision is modeled after art VII(2)(a) of the NATO Status of Forces Agreement (SOFA, 199 UNTS 67, adopted in London on 19 June 1951, in force 23 August 1953); see JH Rouse and GB Baldwin, ‘The Exercise of Criminal Jurisdiction Under the NATO Status of Forces Agreement’ (1957) 51 AJIL 29-62; and J Woodliffe, The Peacetime Use of Foreign Military Installations under Modern International Law (Nijhoff 1992) at 173.
they effectively turned the territory into what has been referred to as a ‘black hole in the world of human rights’. 19

3. Disarmament

As far back as 1971, the UN General Assembly had declared the Indian Ocean a ‘zone of peace’, calling on the great powers to enter into immediate consultations with the littoral States for the purpose of ‘eliminating from the Indian Ocean all bases, military installations and logistical support facilities, the disposition of nuclear weapons and weapons of mass destruction’. 20 Both Mauritius and the UK became parties to the so-called ‘Pelindaba Treaty’ and its protocols concluded under the auspices of the African Union in 1995, in force since 2009, 21 requiring each party to prohibit in its territory the stationing of any nuclear explosive devices (Article 4), though allowing parties to authorize visits or transits by foreign nuclear-armed ships or aircraft; moreover, Protocols I and II require parties not to ‘contribute to any act which constitutes a violation of this treaty or protocol’ (Article 2). According to Article 1(b) and the map appended as Annex I, the treaty explicitly covers the ‘Chagos Archipelago – Diego Garcia’, albeit with a footnote (inserted at the request of the

FCO) stating that the territory ‘appears without prejudice to the question of sovereignty’.  

While it is clear from the drafting history of the Pelindaba Treaty that all participating African countries – including Mauritius – agreed to include the Chagos in the geographical scope of the treaty regardless of the sovereignty dispute, the UK interprets the footnote on the sovereignty question broadly as meaning that it did ‘not accept the inclusion of that Territory within the African nuclear-weapon-free zone’; in the view of the US State Department, ‘Diego Garcia is under the sovereign control of the United Kingdom of Great Britain and Northern Ireland as part of the British Indian Ocean Territories and is not part of the ‘territory’ of the Zone as defined in the Treaty; therefore, neither the Treaty nor its Protocols applies to U.S. operations there’. Which in turn prompted the Russian Federation, with explicit reference to these divergent interpretations, to declare upon its own ratification of Protocols I and II, that it ‘does not consider itself legally bound under Protocol I in respect of territories which 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’.

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24 Letter from the British Ambassador to the Secretary General of the Organization for African Unity (Cairo, 11 April 1996), reprinted in Adeniji (n 23) at 157, 299. By contrast, the FCO treats the 1959 Antarctic Treaty (402 UNTS 71), which also reserves the question of territorial sovereignty over certain areas claimed both by the UK and other States (art IV), as fully applicable to the disputed areas concerned.
26 Russian reservation upon ratification (5 April 2011), as translated by the UN Office for Disarmament Affairs, available at <disarmament.un.org/treaties/a/pelindaba_/russianfederation/rat/cairo>; see Sand (n 5) 130 n 36. According to a statement by Deputy Foreign Minister S Ryabkov, ‘this is an important reservation, which allows us to fully maintain our own security in hypothetical situations of the emergence [of] crises or
During the first Gulf War in 1990-91, Diego Garcia was in fact used as a staging area for 20 B-52 bombers deployed as ‘calculated-ambiguous tactical nuclear deterrent’ against any chemical or biological weapons that might have been used by Iraq against US forces.\(^{27}\) In response to parliamentary questions regarding the storage of US nuclear or other weapons in Diego Garcia, an FCO Minister of State replied in 2010 – somewhat obliquely – ‘that the general policy is that we allow the United States to store only what we ourselves would store’.\(^{28}\) ‘That statement has ominous implications for the entire stock of US weaponry in Diego Garcia. According to the non-governmental network International Campaign to Ban Landmines (ICBL, 1997 co-laureate of the Nobel Peace Prize),\(^{29}\) the United States kept major quantities of anti-personnel landmines on supply vessels in the BIOT (some 10,000 mines in cluster bomb units such as the Aerojet Gator),\(^{30}\) the use and stockpiling of which is strictly prohibited by the 1997 UN Landmines Convention (‘Ottawa Convention’), to which both the UK and Mauritius – though not the USA – are conflicts in which the potential use of nuclear weapons is possible’; as cited by N Stott, ‘The Treaty of Pelindaba: Towards the Full Implementation of the African NWFZ Treaty’ (2011) 2 UNIDIR Disarmament Forum 15, at 20.


The FCO claims, however, that ‘there are no US antipersonnel mines on Diego Garcia. We understand that the US stores munitions of various kinds on US warships anchored off Diego Garcia. Such vessels enjoy State immunity and are therefore outside the UK’s jurisdiction and control’. The UK representative at the Ottawa Convention’s Standing Committee meeting in May 2003 even affirmed that landmines on US naval ships inside British territorial waters ‘are not on UK territory provided they remain on the ships’, an interpretation flatly contested by the Legal Office of the International Committee for the Red Cross (ICRC).

As a matter of fact, much of the ordnance in the Diego Garcia lagoon (ie, in British internal waters) is not stored on US warships, but on com-


33 Ambassador David Broucher, ‘General Status and Operation of the Convention: UK Intervention on Article 1’; as quoted in Jacobs (n 32) at 67.

34 ‘Permitting the transit of antipersonnel mines through the territory of a State Party would undermine the object and purpose of the [Convention]… and contradict its prohibition on assisting anyone in the stockpiling and use of antipersonnel mines’, ICBL Landmine Monitor Report 1999 (n 30) at 1005-06; and see P Carter (chair of the British Bar Human Rights Committee), letter dated 19 November 2003 to the UK Foreign Secretary, as quoted by Jacobs (n 32) at 95: ‘If anti-personnel mines were offloaded onto land, eg, to be transferred from ship to aircraft, this would not be consistent with our Ottawa Convention obligations’. On the obligation under art 1(1)(c) not ‘to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention’, see also S Maslen, Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production and Transfers of Anti-Personnel Mines and Their Destruction (OUP 2004) 100.
mmercial freighters time-chartered by the US Navy’s Military Sealift Command (MSC).\textsuperscript{35} The same is true for cluster-bomb (sub-munitions ordnance) stockpiles prohibited under the 2008 Dublin Convention,\textsuperscript{36} rati-
ified by the UK on 4 May 2010 (not extended to overseas territories), though not by the United States.\textsuperscript{37} Although both treaties oblige each party to submit annual reports regarding the total of all stockpiled prohibited munitions ‘under its jurisdiction and control’,\textsuperscript{38} the FCO has refused (in response to parliamentary questions) to disclose information on the amounts of US cluster munitions in Diego Garcia, on the grounds that ‘disclosure would or would be likely to prejudice relations between the United Kingdom and the United States’,\textsuperscript{39} and ‘while US stockpiles on UK territory are under UK jurisdiction, they are not under our control’.\textsuperscript{40} Accordingly, British annual reports to the UN Office for Disarma-
ment Affairs (UNODA) merely state that ‘all UK cluster munitions were disposed of by the end of 2013’\textsuperscript{41}

\textsuperscript{35} Eg, see the US$46.5 million contract awarded to Sealift Inc. of Oyster Bay/NY for time charter of its cargo vessel \textit{MV Fisher} to ‘preposition’ ammunition in and around Diego Garcia from November 2009 to September 2014; contract N00033-09-C-3301, \textit{Defense Industry Daily} (14 July 2009), following earlier similar time charters since 1998. On ship-based ammunition storage in the Diego Garcia lagoon (within designated ‘explosive safety quantity distance’ arcs, ESQD) see generally EJ Labs, \textit{The Future of the Navy’s Amphibious and Maritime Prepositioning} (US Congressional Budget Office, November 2004) 6.


\textsuperscript{38} Art 7(1)(b), similar to the corresponding article of the Ottawa Convention.

\textsuperscript{39} Written answer by Baroness Taylor of Bolton, Minister for International Defence and Security, \textit{Hansard: House of Lords Debates} 718 col 385WA (6 April 2010).

\textsuperscript{40} Statement by FCO Minister Baroness Kinnock of Holyhead, \textit{Hansard: House of Lords Debates} 715 col 1020 (8 December 2009); see also the written answer by FCO Minister Bill Rammell, \textit{Hansard: House of Commons Debates} 508 col 1306W (8 April 2010).

\textsuperscript{41} UK Report under Article 7 for the year 2016, Form B (Stockpiles and Destruction), reiterating as ‘unchanged’ the information submitted in the report for the year 2013.
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Under Article 1(1)(c) of both the Ottawa and the Dublin Conventions, the States Parties undertake not ‘to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention’. However, Article 21(3) then provides that, ‘notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party’. Upon its ratification of the Ottawa Convention, the UK therefore declared its understanding ‘that the mere participation in the planning or execution of operations, exercises or other military activity by the United Kingdom’s Armed Forces, or individual United Kingdom nationals, conducted in combination with the armed forces of States not party to the [said Convention], which engage in activity prohibited under that Convention, is not, by itself, assistance, encouragement or inducement for the purposes of Article 1, paragraph (c) of the Convention’. Hence the UK Ministry of Defence 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)’.

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42 So-called ‘NATO clause’, introduced at the request of Germany and other NATO member countries; on the ‘interoperability’ issue, see also Boothby (n 31) at 274.
43 Similar unilateral statements were made by Australia, Canada, the Czech Republic, Montenegro, Poland and Serbia, but were contested at subsequent treaty meetings by other parties including Brazil, Mexico and Switzerland; on this unresolved controversy see M Hayashi, ‘The Ottawa Convention on Landmines in Two Perspectives: International Humanitarian Law and Disarmament’, in SF Krishna-Hensel (ed), Global Cooperation: Challenges and Opportunities in the Twenty-First Century (Ashgate 2006), 75-108 at 97-100; and K Dörmann, ‘Land Mines’, in R Wolfrum (ed), Max Planck Encyclopedia of Public International Law 6 (OUP 2012) 670 (updated online 2015), reprinted in F Lachenmann, R Wolfrum (eds), The Law of Armed Conflict and the Use of Force (OUP 2017) 629-37, at para 18.
44 Written answer by B Ainsworth, Minister of State for the Armed Forces, Hansard: House of Commons Debates 476 col 1061W (5 June 2008). See also R Evans, D Leight, ‘UK secretly allowed US to keep cluster bombs at base’ The Guardian (London, 2 December 2010) 1-2, quoting ‘temporary exceptions’ granted by N Pickard, head of the FCO’s security policy unit, according to US Embassy cables revealed by Wikileaks. – By contrast, Norway successfully insisted on the immediate removal of all prohibited ordnance from the American bases on its territory.
In the context of bilateral disarmament agreements, Diego Garcia was not listed among the ‘inspectable sites’ of the 1991 US-Russian Strategic Arms Reduction Treaty (‘START-1’) which expired in 2009.\textsuperscript{45} In the view of Russian observers, therefore, ‘forward deployment’ of nuclear-tipped ballistic missiles (SLBMs, such as the Trident II-D5) on board the US Navy’s SSGN and SSBN submarines stationed or transiting in Diego Garcia ‘avoided violating the language of START-1 while undermining its spirit’.\textsuperscript{46} The subsequent 2010 US-Russian Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (‘New START’) provides in paragraph 11 of Article IV that ‘strategic offensive arms subject to this Treaty shall not be based outside the national territory of each Party’; but then goes on to state that ‘the obligations provided for in this paragraph shall not affect the Parties’ rights in accordance with generally recognized principles and rules of international law relating to the passage of submarines or flights of aircraft, or relating to visits of submarines to ports of third States’.\textsuperscript{47} The Diego Garcia base thus remains – apart from its other legal exceptionalisms – an official arms control loophole.

4. Environment

According to the 2001 BIOT Environment Charter, the British Government is to ‘facilitate the extension of the UK’s ratification of multilateral environmental agreements of benefit to the BIOT and which the BIOT has the capacity to implement’.\textsuperscript{48} To date, however, only a few multilateral treaties have been extended to the territory:

– The 1946 \textit{International Convention for the Regulation of Whaling} applies to UK dependent territories by virtue of its ratification by Britain


on 17 June 1947. The entire Chagos Archipelago is indeed part of the ‘Indian Ocean Sanctuary’ declared by the International Whaling Commission (IWC) in 1979, with known local populations of endangered whale species. British and US cetologists have long expressed serious concerns over the harmful and possibly lethal effects for cetaceans caused by the undersea noise pollution generated by the US Navy’s use of SONAR (‘sound navigation and ranging’) devices in anti-submarine monitoring. Yet, whereas the deployment of low-to-medium frequency naval SONAR in critical cetacean habitats in US territorial waters is subject to environmental impact assessments and restrictions, no comparable US or UK regulations apply in the BIOT.

– The 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, ratified by the UK on 5 May 1976 and extended to the BIOT on 8 September 1998, has been applied

47 Adopted in Washington on 2 December 1946 (161 UNTS 74, in force 10 November 1948); according to the Chagos Conservation Management Plan (London: FCO 2003) 14, the Convention applies to the BIOT.


to the island of Diego Garcia (including its lagoon and part of its territorial waters) since 4 July 2001, save for ‘the area set aside for military uses as a U.S. naval support facility’. 54

– The three other multilateral environmental treaty regimes currently applicable to the BIOT are the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 55 the 1979 Convention on the Conservation of Migratory Species of Wild Animals (CMS), 56 and the 1985 Vienna Convention on the Protection of the Ozone Layer, 57 although the periodic UK reports on national compliance with these latter agreements to date make no specific reference to their practical implementation in the BIOT.

Among the UK’s multilateral environmental agreements not extended to the BIOT so far, there are at least five that were never ratified by the United States, and which the FCO therefore seems to view as potential irritants for UK-US relations with regard to operation of the military base in Diego Garcia:

– The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 58 ratified by the UK on 7

54 Ramsar site no. 1077 (354.2 km²); map in MW Pienkowski, Review of Existing and Proposed Ramsar Sites in UK Overseas Territories and Crown Dependencies (Department of Environment, Food and Rural Affairs 2005) 865.


February 1994 and extended to the British Antarctic Territory and other UK dependent territories, though not to the BIOT. The US base on Diego Garcia generates some 200 tons of solid waste annually, most of which is incinerated and/or land-filled on the island. Following a 1982 UK-US supplementary agreement, hazardous wastes have been exported by sea, initially to the Philippines, in 2006 traded to Dubai, and periodically shipped to disposal sites in the United States. An extension of the Basel Convention to the BIOT would inevitably subject those exports to mandatory licensing (and potential prohibition) by the UK authorities.

– The 1992 Convention on Biological Diversity (CBD), ratified by the UK on 3 June 1994, with an extension to the British Virgin Islands, the Cayman Islands and St. Helena. Any extension to the BIOT continues to be vetoed by the FCO; as a result, the only parts of the world where that Convention – with 196 Parties, a universally accepted environmental treaty – is not applicable today are the United States (with its

59 According to the 1998-2001 job description (Director of Public Works) for the Diego Garcia base operating contract DG21/LLC, a joint venture of First Support Services Inc. (Dallas/TX) and WS Atkins plc (Epson/UK).
60 Further Supplementary Arrangements on Diego Garcia (concluded by exchange of notes, Washington/DC, 13 December 1982), para. 4.
62 In 2006, the US Navy sold 4,400 tons of scrap metal and other waste material accumulated in Diego Garcia to a consortium of British, US and Philippine companies; the shipment was auctioned off in Dubai. See JE Davis, ‘Diego Garcia Earns $133,000 From Selling Scrap’ US Navy Press Release NNS061013-09 (13 October 2006).
63 While the 1976 US Toxic Substances Control Act prohibits imports of hazardous wastes to the continental United States, wastes generated in overseas military bases may be returned for disposal in facilities approved by the US Environmental Protection Agency, under exemption procedures detailed in 63 US Federal Register 35384 (29 June 1998).
Pacific territories, such as Guam) and five UK overseas territories (BIOT, Bermuda, the Falklands, Pitcairn, and the British Antarctic Territory). Given that the Chagos Archipelago boasts ‘a greater marine biodiversity than the rest of the UK and its other territories combined’, and that the FCO invokes ‘the interest of the biodiversity of the planet’ as the main rationale for its BIOT marine protected area, the continuing exclusion of the territory from the Convention borders on the absurd.

– The 1992 UN Framework Convention on Climate Change (UNFCCC), ratified by the UK on 8 December 1993; with its 1997 Kyoto Protocol, ratified by the UK on 31 May 2002 and extended on 7 March 2007 to Bermuda, the Cayman Islands and the Falklands, though not to the BIOT. The United States had ratified the UNFCCC on 15 October 1992, but has since announced its withdrawal with effect from 4 November 2020. Ironically perhaps, the Diego Garcia atoll has been singled out – because of its low average elevation of four feet (1.3 m) above sea-level – as the US overseas base most immediately threatened by global warming.

– The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, ratified by the UK on 23 February 2005, but still boycotted by the US State Department. In the view of the FCO, the Convention has ‘no

67 Parliamentary statement by FCO Minister Chris Bryant, Hansard: House of Commons Debates 508 col 822 (6 April 2010).
70 Note, however, the 2016 Annual Report of the BIOT Chief Scientific Adviser (Mark Spalding 2017, on file with the author), recommending that ‘BIOT should be formally brought under UK commitments under UNFCCC’ and the 2015 Paris Agreement within two years (at 3 and 19).
73 The United States did not ratify the treaty, and in 2001 withdrew from follow-up negotiations; see also the statement in UN Doc ECE/MP.PP/2 (Geneva: UN Economic Commission for Europe, 17 December 2002), reprinted in (2003) 33 Environmental Policy and L 178-79.
practical relevance to BIOT’ because ‘BIOT has no permanent residents’, and ‘will therefore not be extended to the territory’.74

– The 2001 Stockholm Convention on Persistent Organic Pollutants (2256 UNTS 119, in force 17 May 2004),75 ratified by the UK on 17 January 2005 (without extension to overseas territories), not ratified by the United States. Considering that the Chagos Archipelago is potentially vulnerable to certain persistent organic pollutants still used on the US base in Diego Garcia (such as perfluorooctane sulfonate, PFOS, a toxic ingredient of fire-fighting foam banned under the Stockholm Convention since 2009), or airborne dioxins emitted by the two waste incineration plants on the island,76 the FCO’s exclusion of the BIOT from the geographical scope of the treaty is particularly unfortunate.

As regards the 1972 Convention for the Protection of the World Cultural and Natural Heritage (1037 UNTS 151, in force 17 December 1975), ratified by the UK on 25 May 1984 (extending it to all British overseas territories except the BIOT),77 a 1997 BIOT Conservation Policy Statement declares that ‘the islands will be treated with no less strict regard for natural heritage consideration than places actually nominated as World Heritage sites, subject only to defence requirements’ [emphasis

74 E-mail message to the author from BIOT Administrator J Yeadon (26 November 2008), adding that ‘as this position is unlikely to change in the foreseeable future, there are no plans to enact legislation or ratify the Aarhus Convention in respect of BIOT’. Note, however, that the UK Environmental Information Regulations (EIRs, Statutory Instruments [2004] No. 3391) – which implement parts of the Aarhus Convention pursuant to the European Union’s Council Directive 2003/4/EC on Public Access to Environmental Information – have been held to apply in the BIOT ‘with such modifications as may be required to enable local enforcement’, according to an appellate ruling of the UK First-Tier Tribunal for Information Rights (FTT-IR) dated 28 July 2014; see Sand v. Information Commissioner and Foreign & Commonwealth Office, Case No. EA/2012/0196, paras 39 and 52. What will happen to the EIRs after Brexit remains to be seen.

75 With 182 Contracting Parties as of October 2018, including the European Union and Mauritius (which ratified the Convention on 13 July 2004, and the amendments to Annexes A and C on 28 November 2017).

76 Spalding (n 70 at 17-18) highlights the urgent need to replace the existing waste incinerators on Diego Garcia, and the pollution hazard created by continuing use of PFOS aircraft firefighting foam (strictly prohibited under current EU regulations).  

77 Administered by the World Heritage Centre (WHC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in Paris. Also ratified by the United States on 7 December 1973; however, the United States has since announced its withdrawal from UNESCO and the World Heritage Fund with effect from 31 December 2018.
added]. Mauritius ratified the treaty on 19 September 1995, and the non-governmental Mauritius Marine Conservation Society (MMCS) has since 1996 called (albeit unsuccessfully) for designation of the Chagos Archipelago as a world heritage site under Article 11 of the Convention; so in turn did the Chagos Islands (BIOT) All-Party Parliamentary Group (APPG) of the British Parliament in February 2012. In the course of preparations for the 5th World Conservation Congress of the International Union for Conservation of Nature (IUCN) at Jeju/Korea in September 2012, a coalition of 11 non-governmental organizations submitted a motion to invite the governments of Mauritius and the UK to ‘jointly nominate the Chagos Archipelago for World Heritage Listing to ensure the integrity and protection required for its marine and coastal ecosystems and ecological processes in the long term’. Article 11(3) of the World Heritage Convention does indeed provide that ‘the inclusion of a property situated in a territory, sovereignty or jurisdiction of which is claimed by more than one State, shall in no way prejudice the rights of the parties to the dispute’. Yet, following a Note Verbale by Mauritius objecting to the draft motion as ‘premature and inappropriate’ in view of the then pending UNCLOS arbitration proceedings (see below) between Mauritius and the UK, the draft motion was withdrawn by the IUCN Secretariat.

78 BIOT Administration, *The British Indian Ocean Territory Conservation Policy* (London: FCO 1997) 1. The Diego Garcia lagoon thus must be the world’s only strict nature protection site simultaneously serving as a habitat for ammunition vessels and nuclear submarines.


80 27th Meeting of the Chagos APPG (1 February 2012), Coordinator’s Summary, though emphasizing that such a designation would have to be done ‘in conjunction with Mauritius and the Chagossian people’.

81 ‘Conserving the Marine Environment of the Chagos Archipelago’, Draft Motion No 177 (2012).

82 See Sand (n 2) at 121.

There also is a regional environmental agreement directly relevant to the Chagos Archipelago: the 1985/2010 Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (in force 30 May 1996), with its three protocols (on protected areas, marine pollution emergencies, and land-based pollution sources), adopted/administered under the auspices of the UNEP Regional Seas Programme. Although Mauritius has confirmed that its ratification (of 3 July 2000) applies to the Chagos Archipelago, no follow-up activities for the archipelago have been reported.

5. Law of the sea

The unilateral proclamation of the British Indian Ocean Territory in 1965 – in defiance of several UN resolutions on decolonization – opened a Pandora’s box of international legal problems in the field of ocean governance, as narrated in the 2010-2015 arbitration proceedings (In the Matter of the Chagos Marine Protected Area, Mauritius v. United Kingdom) under the auspices of the Permanent Court of Arbitration (PCA).

Mauritius ratified the 1982 UN Convention on the Law of the Sea (UNCLOS, 1833 UNTS 397, in force 16 November 1994) on 4 November 1994; but it had already – after obtaining independent statehood in 1968 – adopted on 27 December 1984 a ‘Maritime Zones (Exclusive Economic Zones) Regulation No. 199’ in the terms of UNCLOS Articles 55-56, setting out, inter alia, the coordinates of a 200-mile Exclusive Economic Zone (EEZ) surrounding the Chagos Archipelago on the basis of...
a 12-mile territorial sea.\textsuperscript{88} Although the United Kingdom protested against this action by \textit{Note Verbale} of 18 February 1985,\textsuperscript{89} the Mauritian EEZ was formally recognized by the European Community in its Agreement with Mauritius on Fishing in Mauritian Waters of 10 June 1989,\textsuperscript{90} and subsequently confirmed in connection with EU approval on 15 October 2008 of the 2006 \textit{Southern Indian Ocean Fisheries Agreement} (SIOFA, in force 21 June 2012) under the auspices of the Food and Agriculture Organization of the United Nations (FAO).\textsuperscript{91}

The 1993 \textit{Agreement for the Establishment of the Indian Ocean Tuna Commission} (IOTC, in force 27 March 1996), also adopted under FAO auspices, deals with the conservation and management of fishery resources located in, or migrating in or out of, the area mapped in Annex A of the Agreement, which includes the Chagos Archipelago and the island of Tromelin claimed by both France and Mauritius.\textsuperscript{92} The IOTC Agreement was formally accepted by Mauritius (on 27 December 1994), the United Kingdom (on 31 March 1995), and the European Union (on

\textsuperscript{88} Table C1.T165, pursuant to its Maritime Zones Act 1977; see AKLJ Mlimuka, \textit{The Eastern African States and the Exclusive Economic Zone: The Case of EEZ Proclamations, Maritime Boundaries and Fisheries} (LIT Verlag 1998) 100-101.

\textsuperscript{89} See the PCA Award (n 6) 39 para 105.

\textsuperscript{90} \textit{Official Journal of the European Communities} [1989] L 159/2. The preamble of the Agreement recalls the Mauritian declaration of a 200-mile EEZ in accordance with the Law of the Sea Convention; and art 1 defines the waters of Mauritius as ‘the waters over which Mauritius has sovereignty or jurisdiction in respect of fisheries…. in accordance with the provisions of the United Nations Convention on the Law of the Sea’.\textsuperscript{91}

27 October 1995). The UK is represented in the Commission by a consultant firm (Marine Resources Assessment Group, MRAG Ltd.) which also manages fisheries in other UK overseas territories including the South Georgia, South Sandwich and Falkland Islands. At the 21st session of the IOTC (in Yogyakarta/Indonesia, on 22-26 May 2017), however, Mauritius re-asserted its sovereignty over the Chagos Archipelago and Tromelin; declared that it does not recognize the BIOT; and challenged the credentials of the UK delegation, stating ‘that the UK is not entitled to be a member of the IOTC as it is not a coastal State situated wholly or partly within the area of competence of the Commission’. The British and French delegations responded, affirming their sovereign rights, and the ensuing exchange of statements regarding issues of sovereignty is attached to the meeting report.\(^9\)

On 4 December 1995, the UK signed the 1995 UNCLOS Implementation Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (2167 UNTS 3) ‘on behalf of’ British overseas territories including the BIOT,\(^9\) to which Mauritius objected upon its own accession to the Agreement on 25 March 1997, 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’.\(^9\) The UK defended its position by a declaration on 30 July 1997; after the UK ratification of the Agreement on 3 December 1999, Mauritius reiterated its objection by a further declaration on 8 February 2002.

On 17 September 2003, the UK issued BIOT Proclamation No. 1 of 2003, establishing a ‘BIOT Environmental Protection and Conservation Zone (EPCZ)’ encompassing the same 200-mile geographical area surrounding the Chagos Archipelago (on the basis of a 3-mile territorial sea)


\(^9\) UK signature and ratification of UNCLOS and the related 1994 and 1995 Implementing Agreements on behalf of its metropolitan territory was delayed due to the requirements of the country’s EU membership, and subsequently completed through EU signature (on 27 June 1996) and ratification (on 19 December 2003).

\(^9\) See PCA Award (n 6) 39.
as previously delineated in a ‘BIOT Fisheries Conservation and Management Zone (FCMZ)’ proclaimed on 1 October 1991.\(^6\) When the UK deposited these geographical coordinates with the UN Secretariat on 12 March 2004,\(^7\) Mauritius protested on 14 and 20 April 2004.\(^8\) On 5 August 2005, Mauritius in turn adopted new Maritime Zones (Baselines and Delineating Lines) Regulations No. 126,\(^9\) again setting out geographical coordinates for the baselines of, *inter alia*, the Chagos Archipelago, which it then conveyed to the UN Secretariat by *Note Verbale* No. 4678/06 of 26 July 2006, followed by a further deposit of charts and geographical coordinates on 27 June 2008.\(^10\) On 19 March 2009, the United Kingdom protested against the Mauritian deposit of information in respect of the Chagos Archipelago; and on 9 June 2009, Mauritius reiterated its non-recognition of the BIOT.\(^10\)

Further controversies arose over the delimitation of the continental shelf of the Chagos Archipelago, under the auspices of the UN Commission on the Limits of the Continental Shelf (CLCS). The 1994 *Implementation Agreement on Part XI of UNCLOS* (1836 UNTS 3, provisionally in force since 16 November 1994) has been ratified both by Mauritius (on 4 November 1994) and by the UK (on 25 July 1997). With regard to the outer limits of the Chagos shelf, Mauritius submitted preliminary information to the CLCS on 9 May 2009, claiming an extended continental shelf area (measuring approximately 180,000 km) some 170 miles beyond the southern part of the Chagos EEZ.\(^10\) Following bilateral talks between

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\(^6\) With a ‘Fisheries (Conservation and Management) Ordinance 1991’, replacing the Ordinance of 12 August 1984 (which in turn had superseded an earlier 1971 Ordinance).


\(^8\) *Note Verbale* No. 4780/04 to the UN Secretariat, and *Note Verbale* MHCL 886/i/03 to the FCO.

\(^9\) Implementing the Maritime Zones Act No. 2 of 28 February 2005; see *UN Law of the Sea Bulletin* No 62.


\(^10\)* CLCS, *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). On 24 December 2015, Mauritius informed the CLCS that it intended to make a coordinated submission with the UK after further consultations during the following year.
Mauritius and the Maldives, the two countries envisaged a joint submission for an extended continental shelf area in the northern part of the Chagos Archipelago, similar to the joint claim submitted by Mauritius and the Seychelles, which ultimately led to their two bilateral treaties concerning the Joint Exercise of Sovereign Rights Over and Joint Management of the Continental Shelf in the Mascarene Plateau Region. In July 2010, however, the Government of the Maldives submitted a unilateral claim for a continental shelf with coordinates overlapping both the British and the Mauritian claims of a 200-mile zone in the Chagos Archipelago, prompting a diplomatic protest by the UK on 20 August 2010, followed in turn by formal objections from Mauritius against the British counter-claim and the submission of the Maldives. According to an interim decision by the CLCS, consideration of the disputed claims has been deferred for the time being.

In the meantime, the northern boundary of the Chagos EEZ (or EPCZ) remains undetermined. Although the geographical coordinates communicated by the UK to the UN Secretariat 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. The opposition of the Maldives 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 both of the Mauritian EEZ and the British EPCZ) have in fact all been uninhabited for

103 Statement by Mauritian Foreign Minister Arvin Boolell, as quoted in ‘Chagos: opposition et inquiétudes des Maldives’ Le Mauricien (19 February 2010).
105 CLCS, Continental Shelf Notification 53.2010.LOS (28 July 2010); and Submission by the Republic of the Maldives, Executive Summary, MAL-ES-DOC (July 2010).
106 Note Verbale No 1717/10 (9 August 2010); see O Bowcott, ‘Chagos Island Exiles Amazed by Speed of Foreign Office’s Opposition to Seabed Claim by Maldives’ The Guardian (27 September 2010).
107 Notes Verbales No 10887/10 (29 October 2010) and No 11031 (24 March 2011) to the UN Secretariat.
108 Statement by the Chairperson, 27th Session, UN Doc CLCS/70 (11 May 2011), paragraph 30.
almost half a century now, and according to FCO statements their long-term resettlement is economically unsustainable. Consequently, Article 121(3) of UNCLOS could apply (as in the case of Rockall Island in the Atlantic), which provides that 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'.

By the same token, the controversial 200-mile ‘BIOT Marine Protected Area (MPA)’ surrounding the archipelago, unilaterally proclaimed by the UK Government on 1 April 2010, has since been held to have been established in violation of UNCLOS, and in light of the 2015 Chagos arbitration award must be considered as unenforceable against other States under international law. Nor is it enforced internally within the 3-mile territorial waters zone around Diego Garcia (470 km²), expressly carved out from the MPA so as to ensure the unhindered operation of the UK/US naval base. The ‘military exclusion zone’ so created has indeed been compared to the infamous US base at Guantánamo Bay in

111 In 1997, the UK abandoned its claim to an EEZ around the uninhabited island of Rockall in the Atlantic (400 km off the coast of Scotland), citing UNCLOS art 121(3); see the statement by Foreign Secretary Robin Cook, Hansard: House of Commons Debates 298 col 397 (21 July 1997); and F MacDonald, ‘The Last Outpost of Empire: Rockall and the Cold War’ (2006) 32 Journal of Historical Geography 622-647.
113 BIOT Proclamation No 1 of 2010 (1 April 2010); see PH Sand, ‘Fortress Conservation Trumps Human Rights? The “Marine Protected Area” in the Chagos Archipelago’ (invited editorial) (2012) J of Environment and Development 36-39. The FCO initially gave the size of the area as 544,000 km² (ie, more than double the territory of the United Kingdom), but in April 2012 corrected the figure upwards to 640,000 km², citing a clerical error by the UK Hydrographic Office; see Marine Protected Area News No 6 (2012).
114 See Waibel (n 6).
Cuba,\textsuperscript{116} which critical observers do not hesitate to describe as an international legal ‘black hole’.\textsuperscript{117}
