Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean

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Revelations of torture and rendition at Diego Garcia, in the Chagos Archipelago, over which the UK claims sovereignty, are the latest twist in a history of colonial dispossession, international unlawfulness, and willing capitulation to U.S. strategic demands. At a critical time – the US lease expiring in 2016 – this article examines the validity of the UK's claim to sovereignty. Analysis of the pre-independence colonial history of the region, the unlawful severance of the Chagos Islands, and the questionable consent given by Mauritian authorities, shows that the UK's claim to sovereignty over the Chagos Islands is weaker than that of Mauritius. The UK's deceitful justification for the forced removal of the Chagossians ensured that the US military base was built in breach of their right to self-determination. But the UK has been complicit in U.S. breaches of international law and recent evidence points to its direct involvement in the use of Diego Garcia to "render" a Libyan dissident to torture in Tripoli. The UK strives to deny effective remedies for its unlawful behaviour: do its victims - and its counter-claimant to sovereignty, the government of Mauritius - have any avenues for redress?

INTRODUCTION

The sixty-four coral islands of the Chagos Archipelago, situated in the middle of the Indian Ocean, have attracted international attention by virtue of the legally and morally questionable conduct, in and about them, by two great powers. Britain, when the colonial master, deliberately misled the United Nations in order to deny the birthrights of the Chagossian people, whom it uprooted and sent into bitter exile to make way for a new tenant, the United States. The US procured this breach of international law and then insisted on taking the entire area to secure its base on Diego Garcia, which it has used unlawfully for "rendition" flights (conveying prisoners to torture) and, it has been credibly alleged, to subject them to forms of ill treatment such as water-boarding. In 2011, documents found in the rubble of the Libyan Intelligence Ministry proved that MI6 worked with the CIA to use Diego Garcia as a staging post for the illegal rendition to Tripoli of a

Gaddafi opponent who had been apprehended in Thailand. It is not my purpose to dwell on these examples of great power misconduct, but rather to examine a question that, had it been answered correctly, would have avoided them ever happening; namely whether Britain's claim to ownership of the archipelago is good as a matter of international law. In my opinion that claim is unwarranted: the islands rightfully belong to Mauritius and should be returned to that nation by the time the American lease expires in 2016. It would then be for the Government of Mauritius, once it has retrieved possession of the islands, to decide the future of the base at Diego Garcia, and how to arrange for the return of the Chagossians. The claim of Mauritius to title over the Chagos Islands derives from the rules of succession in international law, applied to the history of the islands and the treaties which have been negotiated in relation to Mauritius. Chagos always was part of Mauritius, and was generally recognised as being so, until the UK purported to split it off in 1965, prior to Mauritian independence in 1968, so as to deliver on a secret deal with the US to make Diego Garcia available to it for a naval base. In so doing, the UK breached international law as well as repeated UN resolutions, which required

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decolonisers to grant independence to their colonies as a whole territorial unit, and not carve them up for profit (the US although paying no rent, secretly rewarded the UK by providing a discount on its purchase of the Polaris nuclear missile). The UK has sought to justify its action by claiming consent from a Mauritian delegation at a Lancaster House meeting in 1965, but this seems to have been extracted by an ultimatum ("either you give up Chagos or we will not give you independence") and in any event that delegation had no legal or practical mandate to surrender Mauritian territory.

It would, therefore, follow that the fifty-year lease granted to the US for Diego Garcia is invalid, and legal title to the islands remains in the State of Mauritius. In any event, this lease violates the right of self-determination of the Chagossian people, and is void for that additional reason since this right has attained the binding status of jus cogens in international law. It follows that the UK bears international responsibility for the wrongs it has committed and/or permitted in violation of Mauritian sovereignty, and has an international obligation to terminate the US lease and to hand the islands back to Mauritius. That lease expires in any event in 2016, which is the time when the islands' return has been promised by the UK, although this promise is conditional upon the UK's view of its defence needs, which, under American pressure, will certainly lead to a long extension of US domination. The condition is entirely subjective and impermissibly vague. Even if the UK could claim to have "defence needs" in the middle of the Indian Ocean such as to justify the lease of Diego Garcia to the US for a further period,

these could not stretch to include the other, now uninhabited islands that are over 100 miles distant from the US base.

PRIOR TO DECOLONISATION, CHAGOS WAS PART OF MAURITIUS.

Mauritius is 800 miles southwest of the Chagos Archipelago, but is nonetheless the nearest state to these islands. (The Seychelles is 1,000 miles to the west, and India 1,000 miles to the north). The island of Mauritius was first settled by the Dutch, who were replaced by the French in 1721 (when it was renamed Ile de France). The French had previously colonized Reunion Island, to the west, and then settled Rodrigues to the east and by 1742 the Seychelles, much further to the North. For France, these islands had not only strategic value but commercial potential: sugar cane and slaves, the story of the Caribbean, was soon re-enacted in this part of the Indian Ocean with a viciousness that even today provokes resentment. (Under the Code Noir (The Slave Code) runaways were branded and had their ears lopped off: if they had evaded capture for more than a month, their hamstring muscle was cut as well. A second escape meant execution.)

The slaves were initially bought from the very same West Indian traders who were supplying the Caribbean, and were then acquired more conveniently from Mozambique and Madagascar. It was from these countries that slaves were first brought by French planters to work the coconut plantations on the larger islands of the Chagos Archipelago. Peros Banhos, a hundred miles away from Diego Garcia, was claimed by France in 1744 and was probably the site of the first slave colony; Diego Garcia was claimed in 1769 and settled by a concession from the colonial government of Mauritius to a French planter, Pierre Marie Normande, in 1783. Some living Chagossians can trace their roots on the islands back for two centuries, and the graves of parents and grandparents remain on the larger islands, Peros Banhos and Diego Garcia.

Soon these Indian Ocean islands became prizes in the seesawing struggle between France and Britain. In 1786 a party from the British East India Company landed on Diego Garcia and claimed the Chagos Islands for Britain: Normande scampered back to Mauritius, and its French Governor sent a warship to reclaim the island. But French hegemony was soon overthrown – the British captured the Seychelles in 1794 and Mauritius itself in 1810. Victory in the Indian Ocean was recognized by the Treaty of Paris of 1814, under which France ceded to Britain the entirety of Mauritius and its dependencies – namely Seychelles and the Chagos Islands. This Treaty is the first step in the legal argument for sovereignty over Chagos today belonging to Mauritius.

That the Treaty recognized the Chagos Archipelago as part of the colony of Mauritius, and transferred it as such to Great Britain, is undisputed and has been recognized by the UK courts.[1]

The islands that the UK took into its possession, as part of greater Mauritius, were administered by the Crown from Mauritius as its "lesser dependencies".[2] They were populated by several hundred slaves, operating fishing settlements and coconut plantations. The climate, only eight degrees from the equator, was reckoned to be ideal for coconut cultivation, and cyclones in the area were unknown. Slave settlements had developed on Diego Garcia, Peros Banhos, Three Brothers, Eagle and Salomon Islands and Six Islands. Chagos "had all the major features of the plantation world": an enslaved labour force, and an agrarian based economy run by foreign plantation owners, with political control exercised by a distant foreign government through the provincial government in Mauritius. However, slaves were at least allowed to maintain a "petite plantation" (a small garden) to raise crops and animals and sell them for private profit – described as "the beginnings of formal Chagossian land tenure".[3] As the anthropologist David Vine puts it, "Chagos was a colony of a colony, a dependency of a dependency: Chagos helped meet Mauritius's oil needs to keep its mono-crop sugar industry satisfying Europe's growing sweet tooth".[4]

On becoming British by virtue of the 1814 Treaty of Paris, Mauritians retained their French language (other than for courtrooms, where English was and remains compulsory) and their French laws, although the final appeal was (and still is, after forty-two years of independence) to the Privy Council in London, comprised of English judges who have recently taken to making an annual visit to sit as the island's court of final appeal. Slavery was not abolished until 1835, to be replaced by importation of cheap Indian indentured labour, who were first treated little better than the slaves (at this time some freed slaves from the sugar plantations on the mainland of Mauritius emigrated to work on Diego Garcia). The 'Britification' of Mauritius did not in any way alter the territory of Mauritius, which included the Chagossian Islands. In fact, the links with Chagos became closer in 1880 with the establishment of a Mauritian police post, to protect coconut plantations from plunder by passengers from passing steamships and to settle disturbances in the workforce. This by now was one thousand strong, helping the islands to produce, as well as copra and coconut oil, a range of products including honey, salt fish, vegetables, timber and the model balsa wood boats that are a Mauritian tourist

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1. R (Bancourt) v Secretary of State, [2001] QB 1067; Chagos Islanders v Attorney General [2003] EWHC 2222 (QB) (9 October 2003, Mr. Justice Ouseley).
2. Chagos Islanders v Attorney General [2003] EWHC 2222 (QB) at [2] ("the Chagos Island ers case").
3. See Vine D Island of Shame. The Secret History of the U.S. Military Base on Diego Garcia (2009) Princeton University Press at 25
4. Ibid, at 26

prize today. They spoke Chagos Creole - closely related to the Creole dialect in Mauritius and the Seychelles - and called themselves (and were called) by the collective name Ilios.

In the course of the nineteenth century, almost all freeholds on the islands passed into the hands of private companies, mostly run from Mauritius, which provided their workers with food rations and basic medical attention, together with educational facilities and a priest.[5] The Mauritius Government subsidized a transport ship which took pregnant women to Port Louis (the Mauritius capital) to have their babies, together with others needing serious medical attention, and brought back rations (as well as the babies).

In the twentieth century, British rule over the islands continued through Mauritius, the only point of departure for passenger boats to Chagos. There were few until a regular steamship connection was established in 1935. (In 1915 the German raider Emden had been provisioned by the management at Diego Garcia before it was even known that Britain was at war with Germany). In both World Wars, Mauritius and its dependencies were automatically engaged on the allied side (there was a troop detachment and an RAF landing strip at Diego Garcia). Law and order was the responsibility of the colony of Mauritius: after a workers' rebellion in 1931, a Mauritian magistrate arrived at Peros Banhos with twelve Mauritian police officers to restore order and punish offenders, and a number of them were taken to serve terms of imprisonment in Mauritius.[6]

In 1962 a Mauritius/Seychelles company, Chagos Aqalega Ltd, acquired almost all the freeholds on the islands from the Mauritian companies. "Its managers acted as justices of the peace, and although it ran the islands in feudal style, each family had a house and garden to grow their own vegetables and run animals, and there was full employment for both men and women in the copra industry, together with boat building, fishing and construction. They had a rich community life, the Roman Catholic religion and their own distinctive dialect derived (like those of Mauritius and the Seychelles) from the French." [7]

It was into this idyllic world that, as Lord Hoffman put it, "there intruded, in the 1960's, the brutal reality of global politics"[8]. Before it did so, and caused the UK to attempt to sever the Chagos Archipelago from Mauritius in order to lease Diego Garcia to America for use as a military base, the position relating to ownership of the islands was as plain as the proverbial pikestaff. They were part of the territory of Mauritius, having been ceded as such by France to the UK in 1814, and having

5. Chagos Islanders case above n 2 at [6].
6. Vine, n 3 at 33
7. R (Bancoult) v Secretary of State (No 2) (2009) A.C. 453 at [5] per Lord Hoffman.
8. Ibid at [6].

always been legally connected to and governed from Mauritius. This is not in doubt: it has been accepted at all levels in the British courts, and was conceded by the UK government in the very statutory instrument by which it sought to separate Chagos from Mauritius in 1965. The explanatory note to the British Indian Ocean Territory Order (S.I/ No 1 of 1965) reads:

> This Order makes provision for the constitution of the British Indian Ocean Territory consisting of certain islands hitherto included in the Dependencies of Mauritius….

The text of this instrument, in para 3(a), referred to "the Chagos Archipelago, being islands which immediately before the date of this Order were included in the Dependencies of Mauritius…" The "Chagos Archipelago" is defined in schedule 2 of the Order as Diego Garcia, Peros Banhos, Egmont or Six Islands, Salomon Islands, Eagle Island and Trois Frères.

The undisputed and indisputable position is that Chagos was, for centuries before 1965, a part of Mauritius as a matter of fact and of law. In that year the UK attempted to change this position with a 'statutory instrument' - (a government order that is not subject to approval by Parliament) – which purported to sever the islands and place them under UK sovereignty. The pre-1965 position needs to be emphasized, because it is the starting point for the application of the international law principles which relate to decolonisation, i.e. the granting of independence to territories which had been seized and subjected to sovereignty by foreign powers. Mauritius in the 1960s was preparing – and being prepared – for the independence which was finally granted in 1968. The UK foreshadowed it with a Westminster-style constitution in 1964 (which applied to all of Mauritius, including Chagos) and had permitted the development of an elected local government led by Sir Seewoosagar Ramgoolam. This government, exercised through a Council of Ministers, had very limited powers, and was subject to the override of its chairman, the British Governor. So the crucial question is whether in the run up to independence the UK was legally entitled to sever the Chagos Islands from Mauritius and keep them for itself, in order to profit from a secret deal by which they were to be leased to the US?

INTERNATIONAL LAW REQUIRES INDEPENDENCE FOR UNDIVIDED TERRITORIES.

The first formal – albeit secret – approach to the UK authorities by the US government to acquire Diego Garcia came in 1961, after a US navy survey had reported that the island was ideal for an Indian Ocean military base: it was strategically placed but isolated, with a tiny population and was "among the most neglected minor backwaters of the world"[9].

9. Vine n 3 at 61

The US State Department then proposed 'confidential talks with the UK regarding the detachment of Diego Garcia from the Mauritius group before the granting of self government"[10]. The Kennedy administration's Secretary of State, Robert McNamara, made the proposal to a British Foreign Colonial Office (FCO) Minister, who was enthusiastic, although his first response mentioned that "HMG might feel it necessary to consider the impact of a large military installation on a few inhabitants of this small island"[11]. The disgraceful story of how the UK contrived to ignore these inhabitants – the Chagossian people – by pretending they were merely 'transient labourers' worthy of no more consideration than the birdlife, has been authoritatively told in court judgments in the UK, exhibiting contemporaneous memoranda. It was a means to an illegitimate end: the carving up of a country – Mauritius - prior to granting independence.

Why did the US, in its anxiety to acquire a safe haven for its navy and a prime site for its satellite communications, feel it essential to make a clandestine "gentleman's agreement" with the UK to ensure that the Chagos Archipelago was detached from Mauritius before independence so that possession of it could be retained by the UK? The answer is simple: it did not trust democracy in Mauritius to produce a government that would be as compliant to its will as the British. Although Ramgoolam was a sound and respected Labour Party leader, some other local politicians (Paul Berenger, at that time, in particular) had pronounced Marxist views. The UK was a safe and trusted ally during the Cold War, and it had permitted several dozen US air force bases in Britain – ostensibly joint facilities, but usually boasting only one British official ("the Group Captain in charge of sitting in the window"). For this reason, America wanted to be free of any tie with independent Mauritius – it did not know how democracy there would turn out. And why did it want the entire Archipelago? The closest island to Diego Garcia was still over one hundred miles distant, and settlement there would give no rational reason for concern. The US said at the time that all the islands were required for extra security and perhaps for other naval sites, but its demand really reflected the depth of the distrust of independent Mauritius – a fear that Monsieur Berenger, were he to gain power, might lease Peros Banhos, the closest island to Diego Garcia, (although over one hundred miles away from it) to the Soviet Union. As the judge in the first case brought by the Chagos islanders found, as a fact, "the US did not wish its facilities to be dependent on the goodwill and stability of such newly independent countries, whose views of American defence facilities in the Indian Ocean may not have coincided with its own. It proposed that the islands be detached from Mauritius…[12]

10. Ibid. at 69

11. Ibid. at 75

12. Chagos Islanders case, n.2 at [15]. The US demand for the entire Archipelago is recorded in Appendix A to the judgment of Mr. Justice Ouseley at [28]..

The proposal was made by the US in earnest in 1964. The secret deal required Britain to do all the dirty work: not only to get rid of the Chagossians, but to sever their islands from Mauritius prior to granting independence. In 1965 the UK's new Prime Minister, Harold Wilson, emphasized to the US Secretary of State Dean Rusk that Britain would "pay a price" at the UN for these actions. He was, of course, seeking a national kick-back (it later came in the form of a discount in the price of a Polaris missile) but it was a price – condemnation for breaching international law – that he was perfectly prepared to pay. Realpolitik ruled, and the U.K. would strive to accommodate the U.S. at a time when international law was overridden by the exigencies of the Cold War. That does not retrospectively excuse what the UK did in 1965, nor mean that it should be honoured by the UK's coalition government today.

Five years before, in 1960, the UN had recognized the right of peoples to self-determination in a famous resolution, (number 1514)[13] which reads (in part) as follows:

> The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
>
> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development…
>
> Immediate steps shall be taken, in Trust and Non-Self Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire…. in order to enable them to enjoy complete independence and freedom.
>
> Any attempt aimed 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.

This Declaration not only required de-colonisation, but by paragraph 6 explicitly required a de-colonising state to maintain the territorial integrity of any colonies of which it was divesting itself. When a new state is formed from a former colony, the values both of continuity and stability require that the new state should possess the same territory that it was recognized as comprising when it was a colony. This reflects what international lawyers, (with their preference for Latin), call the doctrine of Uti Possidetis, namely that the boundaries of a state must be as they were in law at the declaration of independence. Although Mauritius did not formally obtain that independence until 1968, the duty to grant it devolved on the

13. Resolution 1514 (XIV) adopted by General Assembly on 14th December 1960.

UK much earlier – at least since Resolution 1514 in 1960 – because of the principle of self-determination. But that duty did not pre-exist in some sort of vacuum, or apply to Mauritius only and not to its dependencies: the duty arises with respect to a particular territory and population, i.e. to what is called "the relevant unit of self-determination". How is that unit identified? By history and geography, of course, but more importantly by the recognition (or non-recognition) of the unit by states up to, and especially at the time of, independence.

There is no doubt that the great majority of states recognised that Mauritius included the Chagos Archipelago, and did so before, at, and after, independence. In 1961[14] and 1962[15] the General Assembly passed resolutions which specifically applied Resolution 1514 to Mauritius and its colonial dependencies and in December 1965, after the Statutory Instrument excising Chagos had been approved and the plans for a U.S. base had leaked out, the General Assembly passed, too late, Resolution 2066[16]

> noting with deep concern that any step taken by the administering Power (i.e. the UK) to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration (1514) and in particular paragraph 6 thereof.

Resolution 2066 continued relentlessly to reaffirm the 'inalienable right' to independence of all the people in the Mauritian "unit of self-determination", and invited the UK – as the 'administering Power' of a country it was under a duty to bring to independence, "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity"

14. Resolution 1654 (XIV) 27 November 1961
15. Resolution 1810 (XVII) 17 December 1962
16. Resolution 2066 (XX) 16 December 1965

In other words, most nations of the world recognized the UK's act of dismembering the territory of Mauritius in 1965 as unlawful and contrary to the UN Charter. They did so in further resolutions in 1966[17] and 1967[18], which re-iterated that any dislocation of territorial integrity in the decolonising process would be contrary to the UN Charter. The voting on these motions demonstrated the extent of state recognition of the Mauritian self-determination unit: Resolution 2066 passed by 89 votes to 0 (18 abstentions) the 1966 Resolution was adopted by 93 votes to 0 (24 abstentions) and the 1967 Resolution by 86 votes to 0 (27 abstentions). No state was prepared to defy Resolution 1514 and make an exception for Mauritius – the abstainers were countries which did not want to join expressly in condemnation of Britain, but did not approve of its actions in dismembering the territory of Mauritius prior to independence. They may not have abstained had they been aware of the dishonesty and double-dealing that secretly attended the UK's excision of the Chagos Archipelago.

There can be no doubt that the FCO well knew it was acting in defiance of international law. An internal FCO minute of 11 May 1964 admitted, according to Justice Ouseley, that:

> The partial disruption of a nations' territorial integrity was incompatible with the UN Charter. Article 73 of the Charter…required "non-self-governing territories" to be administered according to the principle that the interests of the inhabitants were paramount.[19]

As the UK was well aware, it could hardly serve the interests of the inhabitants to send them into exile. The UN Committee (No 24) dealing with decolonization, had to be fobbed off with the pretence that there were no permanent inhabitants in the Chagos islands, only peripatetic labourers. Over the next few years, this pretence would be maintained, despite the FCO's knowledge that it was a false statement made to avoid the legal and political consequences of acknowledging the birthrights of the Chagossians.

In short, the 1965 excision of the Chagos Islands from the territory of Mauritius by the UK government through a statutory instrument involved a breach of the UN Charter and the principle of self-determination, as interpreted by Resolution 1514. It was also deviously devised to facilitate the infringement of the human rights of the Chagossians, as it was a necessary prelude to forcing them to leave their homeland. The UK action, rightly condemned by a majority of UN member states, was unlawful and cannot have had the effect for which the UK government contends, namely to extinguish permanently the claim of Mauritius to possession of the Chagos Archipelago.

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17. Resolution 2232 (XXI) 20 December 1966
18. Resolution 2357 (XXII) 19 December 1967
19. Chagos Islanders Case n 2 at [6].

DID MAURITIUS CONSENT TO UK RETENTION OF CHAGOS?

By September, 1965 it had been secretly agreed that the UK would make Diego Garcia available for US use as a naval base, and Robert McNamara had signed off on a proposal to compensate Britain in the sum of $US14 million to cover its expenses of paying off the plantation owners and giving independent Mauritius what one Foreign Office diplomat described as a "platinum handshake" for taking care of the displaced Chagossians. This plan was carefully kept from the Mauritian delegates who came to Lancaster House to negotiate the terms for independence: whilst they met with British Ministers on 23rd and 24th September 1965 to be told that Britain intended to 'detach' Chagos for a defence facility, in another part of London a US State and Defence Department delegation was secretly meeting with their British counterparts to finalise the plans to remove all Chagossians to make way for a US base – plans that were, of course, kept from the representatives of Mauritius.

Many years later, when taxed with the illegality of its 'detachment' of Chagos, the UK would justify its action by reference to the position of the Mauritian representatives at the Lancaster House meeting. Thus the UN was told, in 1973, that "the Archipelago was detached from Mauritius in 1965 with the full agreement of the Mauritian Council of Ministers…."[20]. A few years later, the official story slightly changed: the House of Lords was told that "the maintenance of British sovereignty over the Chagos Archipelago was made after full consultation with the pre-independence government of Mauritius"[21]. There is, of course, an important difference between 'agreement' and 'full consultation': my study of the available documents indicates that there was no voluntary "agreement" and that the consultation was certainly not "full." In any event, the Mauritian delegation was not from an independent 'government' and held no legal power to agree the excision.

Any suggestion that the excision was the result of freely-given consent is dispelled by the minutes of the Lancaster House meeting, which reveal that the delegates from Mauritius – who had come with the overriding objective of winning early independence from their colonial masters – were presented with an ultimatum, namely that this would be contingent upon Britain retaining the Chagos Islands for as long as a defence facility might be needed there, whereupon they would be returned to Mauritius. There was no 'full consultation' – the representatives were simply presented with the UK proposal (sweetened by a multi-million dollar cash inducement and a promise of an import concession for the island's sugar)

20. British Year Book, Vol 60, (1984) at 518-9

21. Hansard House of Lords Debates, Mauritius Republic Bill, Baroness Chalker of Wallasey, 19 May 1992, Vol 537, Cols 584-5,

which they could take or leave (and if they left it, the UK would still separate the Archipelago from Mauritius,, but delay independence). In these circumstances, it can be understood why the Ramgoolam delegation acquiesced. They were not thereby relinquishing their putative right to sovereignty over the islands, but accepting, as a condition of independence, that the UK would use the islands for its defence needs, which would be temporary and that sovereignty would then revert to Mauritius. As Sir Seewoosagar understood it, the UK was actually accepting the Mauritian position: "apart from the claim for sovereignty over Chagos, all the other points were agreeable to the British government including a proposition that, in the event of excision, the islands would be returned to Mauritius when not needed by the UK government"[22]. Other representatives have said that the delegation was not aware of US involvement in the deal,[23] although the British record of the meeting does refer to a UK offer to request the American government to use Mauritian labour "for construction work in the islands" from which it should have been inferred that a joint UK/US defence facility was in prospect.

The colonial office subsequently transmitted the minutes of the meeting to the Mauritius "government" – i.e. the Council of Ministers - which approved them in a telegram of 5 November 1965. Importantly, this approval was subject to HMG's confirmation that the Chagos islands should be returned to Mauritius "if the need for facilities on the islands disappeared" and that the islands would not in the meantime be subject to "sale or transfer by HMG to third party". In a telegram from the Secretary of State for the Colonies on 19 November 1965 the Mauritians were told that this assurance they sought over Chagos was given, "provided it is made clear that a decision about the need to retain the islands must rest entirely with the United Kingdom government". This assurance is not denied by the UK, and has been repeated on its behalf on many subsequent occasions as HMG policy, that "in the event of the islands no longer being required for defence purposes, they should revert to Mauritius".[24] The Mauritians were given to understand the 'defence purposes' concerned were the defence purposes of the UK (which had at the time continuing colonial responsibilities in the Indian Ocean area, in relation e.g. to the Seychelles, Aden, Malawi and Rhodesia) and not the global policing interests of the US. The UK government also insisted on keeping the mineral rights in the islands – a provision which indicated its belief that the islands belonged to Mauritius, and were being made available to the US for a finite time.[25]

22. See evidence of the Select Committee chaired by Jean Claude de l'Estrac, 6 December 1982
23. Ibid: evidence of Sir Satcam Boolell.
24. Hansard House of Commons Debates, Prime Minister Margaret Thatcher, 11 July 1980, vol 988 at c314W.
25. Above n 12 See Appendix at [35]

The fact that the UK has subsequently been obliged to rely so heavily upon the alleged "agreement" of the Mauritian delegation at Lancaster House in September 1965 is an indication of the weakness of its case for possession of the islands. In the first place, the delegation was not from a sovereign government: its three members were from a pre-independence council chaired by the British Governor and possessing very limited powers. Although described as "the government of Mauritius", the Council lacked the sovereign power necessary to agree to give away the territory of the people it represented. (It is of some interest to note that the opposition party (the Mauritian Social Democratic Party (PMSD)) had Ministers on the Council who dissented and refused to sign the agreement of November 5). Secondly, even had the pre-independence council of Ministers been representative and competent, its members could not validly consent to, or validate, an action that was, so resolution 1514 made clear, a breach of the UN Charter. The simple fact which emerges from the record is that leading politicians from a pre-independence colony council came to London and were suddenly confronted with an item that had not been on the agenda: the temporary excision of Chagos from the future State of Mauritius, in return for an expeditious move to independence, various financial inducements, and a promise to restore Chagos to Mauritius when the need for UK defence facilities in the Indian ocean had receded.

The fact that the UK promised to return the islands at a later date worked as an inducement on the Mauritian delegates, as was certainly intended. But it has a wider significance, as an implied admission that the islands 'belonged' to Mauritius. Had they belonged to Britain it would have maintained them or sold them to the US or leased them to the US in perpetuity, but it accepted an obligation to return them that it has repeatedly stated its intention to honour, although the language of this promise has oscillated. In 1980 the UK Prime Minister promised, in the same language that was used in the 1965 exchanges, that Chagos should 'revert' to Mauritius. But a few years later, the General Assembly was informed by the British Ambassador that his government's undertaking was to 'cede' Chagos to a Mauritius of whose territory they had never been part, although they had "for convenience been administered by its colonial government". This equivocal language has been deployed by the UK ever since, although Robin Cooke when Foreign Secretary occasionally used the language of "return". That was, of course, the language used in the original, minuted "agreement" on 23rd September 1965, viz

> vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius

It was to this paragraph vii) that the Council of Ministers gave its acquiescence on 5th November, (adding the condition that it precluded "sale or transfer by HMG to third party"). The crafty displacement of this original 1965 language much later by the concept of "ceding sovereignty" was meant, of course, to suggest

that sovereignty had always reposed in the UK. But the language of the original promise cannot be brushed aside in this way. If the legal argument set out above is correct the UK has no title to cede, and some support for this view is to be found in the original language of 'return' and 'reversion' of the title in the islands to Mauritius. Furthermore, the original undertaking undoubtedly operated, as intended, on the minds of the Mauritian Council of Ministers: loss of Chagos was easy to swallow because it would only be temporary, and so not worth making into an issue that would delay independence.

In international, as in national, law a government may be bound by its promises, certainly where other states have acted upon them to their detriment. It is therefore arguable that the UK may be held to its undertaking when the 50 year US lease runs out in 2016. The original promise was made in the context of British defence interests, at a time when it still possessed the Seychelles and was in the process of granting independence to the states of East Africa. Today, its own "defence interests" in that part of the Indian Ocean are negligible, other than its attempts through NATO to combat Somali pirates, an exercise in which the US at present appears to play no significant part. There can be no "defence interest" of the UK that justifies the continuation of the lease. The International Court of Justice, in the Nuclear Tests Case, emphasized that the principle of good faith could give a binding character to an international obligation assumed by unilateral declarations such as the repeated promises to 'return' Chagos':

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration…..
>
> Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound – the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."[26]

In my view the language of the minute of the 23rd September Lancaster House meeting as agreed (with the condition accepted by the UK on 19 November) on 5 November by the Council of Ministers did evince and was intended to evince a willingness to be bound, and this has the character of a binding undertaking in international law. This is notwithstanding the later, and devious, change in the

26. Nuclear Tests Case (Australia v. France), International Court of Justice (ICJ), 20 December 1974, available at: http://www.unhcr.org/refworld/docid/4023a57c7.html [accessed 5 August 2011] at [43] - [44]

language of the promise, from 'returning' to "ceding sovereignty". Whilst the UK made clear in its telegram of 19 November 1965 that the decision about the need to retain the islands "must rest entirely on the UK", that decision must be made by the UK in good faith – it cannot be irrational or unreasonable or made for an ulterior motive (such as currying favour with the US) when there is no UK defence interest that requires the renewal of the lease. That appears to be the case now, and is likely to remain the case in 2016.

The moment that the Council of Ministers evinced its agreement – i.e. on November 5th 1965 – the colonial secretary told Prime Minister Harold Wilson of the political hostility likely to greet the establishment of the British Indian Ocean Territory (BIOT) at the UN and "the pressure that would be placed on Mauritius to withdraw its consent" unless it could be made a fait accompli. Three days later, before the UN Committee had scheduled its discussion of Indian Ocean islands, BIOT was created by Order-in-Council, made with the Royal Prerogative and not by Parliament, which was told about it two days later.[27] There had been no consultation with or vote by the Chagossians, and no referendum on the matter in Mauritius (although the order provided that Mauritian law would continue to operate). To fool the UN, an announcement was made that there was no local population – only labourers from Mauritius and the Seychelles would be affected.

FURTHER ILLEGALITY: THE BETRAYAL OF THE CHAGOSSIANS.

The betrayal of the Chagossians, in the period between 1965-8 is one of the most shaming policies in the post-war history of the FCO. Deliberately, deviously and deceptively its officials and ministers set out to mislead the world by misleading the UN, pretending that the Chagos Archipelago was unpopulated, or had no "permanent" inhabitants because those living there were merely itinerant workers from Mauritius and the Seychelles. This contrivance was necessary in order that the US base could go ahead as the Americans required, without any Chagossian living within 800 miles of it, i.e. living anywhere on the Archipelago. The problem to be overcome was Article 73 of the UN Charter, which engaged the UK as a member state which administered a non self-governing territory: as such, the UK was bound to "recognize the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote (their) well-being.[28] The UK had secretly agreed to dishonour its 'sacred trust', uproot all the Chagossians and deport them to live in poverty in Mauritius. A set of morally unattractive internal FCO memos reveal that it well knew some islanders to be second and third generation Chagossians, yet they would not be recognized as permanent inhabitants – their fate would be to "be evacuated as and when defence interests required". The FCO legal advisor ended his legal advice by

27. Above n 12, see Appendix A

28. FCO Memo, 28 July 1965, from TC Jerrold.

claiming "we are able to make up the rules as we go along and treat the inhabitants of BIOT as not 'belonging' to it in any sense… the local people are only a floating population".[29] There were many more memos between FCO officials in the same vein, cynically likening the Chagossians to migratory birds and congratulating themselves on how their ruse had worked and the UK had avoided UN scrutiny over its planned breach of Article 73 of the Charter.

The sad saga of the forcible deportation of the Chagossians from their homeland is not directly relevant to the issue of whether the UK or Mauritius has sovereignty over the islands, but the extent of its deliberate misrepresentation about the islanders is evidence that creates a presumption that the UK was acting in bad faith in respect of the islands at the relevant time. It was deliberately breaching the UN Charter in both cases, and for the same reason – to profit from the secret US offer of a financial reward if permitted to build a base at an unpopulated Diego Garcia.

According to the private exchange of notes between the two nations, the deal was that the UK would make all islands in the Archipelago available to the US for 50 years "without charge", with the option to extend for an additional 20 years. There would be no rent, but the US would pay $US14 million towards the cost of getting rid of the Chagossians and buying out the planters' company. (There may have been a secret "understanding" about a British share of the construction contracts, because much later – in 1987 – a US/UK agreement specified that at least 20% of procurement contracts for Diego Garcia would go to British firms.)[30] There was to be another reward for the UK, described in several of its private internal memos:

> Besides the published Agreement there is also a secret agreement under which...the US effectively, but indirectly, contributed half the estimated cost of establishing the territory (£10m). This was done by means of a reduction of £5m in the research and development surcharge due from Britain for the Polaris missile. Special measures were taken by both the US and UK Governments to maintain the secrecy of this arrangement.[31]

This was so secret that the deal was to be kept from the US Congress:

> The second point, and of even more importance to us, is the American insistence that the financial arrangements must remain secret…The Americans attach great importance to secrecy because the United States Government has, for cogent political reasons of its own, chosen to conceal from Congress the substantial financial assistance which we are to get in the form of a remission of Polaris Research and Development dues.[32]

29. Minute by A.I. Aust, FCO legal adviser, 28 October 1968 and written advice, 16 January 1970
30. Sand P The Chagos Archipelago - Footprint of Empire, or World Heritage? (2010) 40 Environ mental Policy and Law 232 at footnote 6
31. FCO letter, by T.J. Brack, April 20 1971
32. BIOT Memorandum, 14 December 1966. See Vine above n 3 at 87-8

The internal memoranda generated at the FCO in this period are distasteful in the extreme – even the cautious English judge, Mr. Justice Ouseley, commented that they "present the FCO in a light which does it no credit".[33] They show just how cynical UK officials had become in the course of 'doing the dirty work' for the Americans. As one memo put it:

> We detach these islands – in itself a matter which is criticized. We then find apart from the transients, up to 240 'ilois' whom we propose either to resettle (with how much vigour or 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., 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 make it empty.[34]

The reply came from Sir Paul Gore-Booth, Permanent, Under–Secretary in the Foreign Office:

> We must surely be very tough about this. The object of the exercise was to get some rocks which will remain ours; there will be no indigenous population except seagulls who have not yet got a Committee (the Status of Women Committee does not cover the rights of Birds)."[35]

Below Gore-Booth's note, D.A. Greenhill (later Baron Greenhill of Harrow) wrote,

> Unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc. When this has been done, I agree we must be very tough.[36]

The UK eventually agreed "to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population". This was sufficient to keep Article 73 of the Charter, and the UN Committee on Decolonisation that supervised it, at bay. The UK then, in March 1967, as the next stage of clearing the ground for the American occupation, bought the plantations from Chagos-Agalega Ltd, although it immediately leased the property back so that the company (rather than UK officials) could supervise the miserable work of deporting Chagossians from their homeland. In 1968, the US Deputy Secretary of Defence, Paul Nitze, approved plans for a $US26 million facility on Diego Garcia, and the US proposal for the base was approved on 3rd September by way of a letter which "re-iterated that there were no permanent inhabitants on Diego Garcia and none owned land or houses".[37] This, as the UK well knew, was a lie, devised "more or less

33. Above n 12, see Appendix at [74].
34. Above n 3 Vine at 91
35. R v Secretary of State, ex parte Bancourt, (2006) EWHC Admin 1038 at [27]
36. Ibid.
37. Above n 12 see Appendix A at [162]

fraudulently" as a cover story to mislead the UN, but there is ample evidence that the US must also have known the truth: it had carefully inspected Diego Garcia, and had discussed with the U.K.how to get around potential UN concern about the problem of the Chagossians.

There is some difficulty in identifying the exact terms and conditions of the UK/US agreement over Chagos. In law, it probably amounts to an oral agreement for a lease, with commitment made in discussions in 1965-66 and then again in 1968, although on 19 October of that year the US threw a temporary spanner into the works by announcing that the project would need the approval of the new administration after the Presidential elections the following month. Whether a democrat in the White House would have proceeded in breach of international law and by ignoring the claims of Mauritius must remain hypothetical, because the new Nixon administration did not hesitate to move ahead, subject to congressional approval (which a proposed "austere naval communications centre" on Diego Garcia finally received in December 1970). In the meantime, the US insisted that the island be cleared of its inhabitants. In a brief moment of decency the FCO asked if they could be moved to the outer islands – Peros Banhos and Salomon – for the next twenty years, but the US refused to agree to allow these outer islands to be or remain populated. On 22 February 1969 this UK request was rejected by the US, on the basis that it would "seriously derogate" from the "1966 agreements" which the US interpreted as imposing on the UK an obligation to remove all inhabitants, at its own expense, from every island in the Archipelago.[38]

What is notable, in surveying US/UK communications over the base in this period, is the utter subjugation of the UK to US demands, desires and whims. There was no rational basis for the Americans to veto the UK proposal to relocate the Chagossians on other Chagos islands over a hundred miles from Diego Garcia. They seem to have dismissed with contempt the UK's request that they use some Chagossian labour to build the base – so much for the UK's promise to the Mauritians at Lancaster House. There would have been no prospect at all of Mauritius claiming the mining rights that the UK purported to afford it. If this was a landlord/tenant relationship, it was one in which the tenant pulled all the strings. This US hegemony no doubt reflects the cold war realities of the time, but it must be emphasized that as a matter of international (and national) law, the UK had physical possession of the islands over which it dubiously asserted sovereignty: the US occupied Diego Garcia by way of a fifty year lease (with an option to extend for twenty years) that arose from discussions and decisions which always envisaged that the arrangement was determinable by the UK. If the Mauritius claim to sovereignty were ever to be upheld, then the terms on which the base was allowed to remain (and whether it was to be allowed to remain) would have to be renegotiated between the US and Mauritius.

38. Ibid at [220]

On December 7, 1970 the crunch duly came: the Nixon administration Secretary of State William Rogers told the US embassy in London to tell the British that it was time to remove the Chagossians. He put it more delicately: it was time "for the UK to accomplish relocation of the present residents of Diego Garcia" before construction of the base started in four months time. A week later – on December 15, 1970 – the White House announced publicly, for the first time, its plans for a base "to close a gap in our worldwide communications system and to provide communications support to US or UK ships and aircraft in the Indian Ocean".

This White House press statement adopted the British-devised deception about the Chagossian people: "the population consists of a small number of contract labourers from the Seychelles and Mauritius engaged to work on the copra plantations. Arrangements will be made for the contracts to be terminated at the appropriate time and for their return to Mauritius and Seychelles." (Five years later the Washington Post would expose this as a deliberate lie, in a front-page story about the ilios who had inhabited Chagos since the late eighteenth century, and their deportation from their homes and from the cemeteries containing the remains of great-grandparents.) But for the present, the Nixon administration's wish was the UK's command, and the FCO directed Chagos-agalega Limited, the company owning most of the freeholds, to give the inhabitants their marching – or sailing – orders. Any recalcitrants were threatened with starvation if they did not leave, and the BIOT Commissioner himself, Sir Bruce Greatbatch, sent an order to the company to kill all the Chagossians' pet dogs, and any other dogs on the island, to make it safe for the incoming US Seabees. He gave the Chagossians no alternative – they were stashed in overcrowded boats bound for Mauritius. Greatbatch, a kind of parody of the blimpish and knighted colonial Commissar, ordered that horses should be given the best places on boat decks whilst the Chagossians were crammed in the hold with the copra and the bird excrement (guano), for the rough voyage. When the boats stopped at the Seychelles en route, the company management was housed in luxury hotels and the Chagossians in the local prison.

The conditions awaiting the Chagossians in Mauritius were not much better. There had been no arrangements made by the UK or the US with the new sovereign government, which regarded the islands as part of Mauritius but had been powerless to stop the deportation of its citizens. The money - £4 million – promised for resettlement had been diverted (mainly to building a new airport in the Seychelles, which until its independence in 1976 remained under British rule as part of BIOT). In 1972 the British finally stumped up £650,000 for the resettlement, and washed its hands of the Chagossians who were doomed to live in the slums of Port Louis for the next forty years, during which many of the group (about 1,000 strong) and their offspring would drift away – mainly to England. In 1982 their plight resulted in a payment of £4 million 'conscience money' by Mrs Thatcher's government. This was accepted by the Mauritian government as trust funds for the purchase of land and provision of services

for the Chagossians, but the UK insisted it was an ex gratia payment to settle Chagossian claims, so it cannot be construed as any sort of waiver of the Mauritian claim to sovereignty over the Archipelago. (This, and the previous compensation payments can, however gratuitous, be interpreted as a recognition by the UK of its unconscionable behaviour.) Shamefully and again in breach of international law, the Chagossians were not permitted by the UK to return even to tend the graves of their relatives and ancestors or to visit the churches where they were baptised. (In 2006, finally, a voyage for this purpose was allowed and hundreds of Chagossians spent a week on Chagos).

The fate of the Chagossians at the hands of the UK (with the US pulling its diplomatic strings) amounted to a breach of international law which was attended by deliberate misrepresentation and witting breach of trust. UK policy was to serve US defence interests by two unlawful actions: excising the Chagos Archipelago from Mauritius, and then by expelling its permanent residents. These unlawful actions, intended to pave the way for the American base, were procured by a secret reward (the Polaris discount) – a transaction which would be kept from Parliament and from the US Congress. The unlawful deportation of the Chagossians is evidence that the dismemberment of Mauritius as a unit of self-determination (by excising Chagos) was part of a wider plan, intentionally devised by the UK (incited and rewarded by the US) to breach the UN Charter and flout international law by depriving the State of Mauritius of a part of its territory. The UK must take the main blame for implementing the plan, but its misconduct was deliberately procured by the US, in full knowledge of its illegality. The US, too, may well have obligations under the law of state responsibility to provide reparations to the Chagossians.

UNLAWFUL USE OF DIEGO GARCIA BY THE US -WITH U.K. COMPLICITY.

A very serious issue of illegality has recently come to light, namely the use of the base at Diego Garcia by the U.S. for "special rendition" flights, and allegations that warships anchored there have been the venue for the notorious "waterboarding" of terrorist suspects. The U.S. formally "confessed" to rendition flights to the Foreign Office in early 2008, and the Foreign Secretary, David Milliband in turn confessed to Parliament that his previous answers, denying rendition, had been unwittingly untrue. But was his answer yet another deception? In 2011, documents came to light in Libya which demonstrated that MI6 not only knew, but actually assisted and encouraged, the CIA rendition through Diego Garcia of a Libyan asylum-seeker, earmarked for torture in Tripoli. Such use of the island for illegal purposes has legal consequences for Britain.

This was first hinted at by Lord Hoffman, in the course of his leading judgment against the Chagossians in the Bancourt case:[39]

> On 21 February 2008 the Foreign Secretary told the House of Commons that, contrary to previous assurances, Diego Garcia had been used as a base for two extraordinary rendition flights in 2002 (Hansard (HC Debates), cols 547-548). There are allegations, which the US authorities have denied, that Diego Garcia or a ship in the waters around it have been used as a prison in which suspects have been tortured. The idea that such conduct on British territory, touching the honour of the United Kingdom, could be legitimated by executive fiat, is not something which I would find acceptable.[40]

It has since been alleged – and supported by evidence at the Guantanamo trials – that torture of detainees, in particular by the process of "water boarding" took place on or within the maritime boundaries of Diego Garcia. This was contrary to UK law (and to the law of the BIOT incorporating UK law) which makes torture a serious crime. Contrary to its duties under the Torture Convention, the UK has taken no steps to investigate and prosecute – obviously because a flying visit to Diego Garcia from a Scotland Yard flying squad would be unacceptable to America. But the issue raises much more than just the prospect of a criminal investigation. The U.S. is, in law, a leaseholder of the property on which the base is built, and it is property over which its lessor, the UK, claims to have sovereignty. Notwithstanding the secret commission (by way of a deduction on the cost to the UK of Polaris) given by the US in consideration of being permitted to occupy and use the island for 50 years (with a possible 20 year extension) it seems to me that any serious breach of British and international law by the US – using the leased land between 2002-8 to render and possibly torture prisoners – imposes a duty on the UK to end the lease. Otherwise its knowledge of such crimes would fix it, as well as the US, with liability for the ill-treatment and rendition - if indeed it does not have a landlord's strict liability for these crimes already, by virtue of its insouciance over whether they were taking place. The ramifications need careful consideration.

The English domestic law approach to criminal liability of a landlord for illegal or immoral misbehavior has been worked out mainly in respect of prostitution and drug use: depending on the wording of the relevant statute, an intention that the offence be committed will be required,[41] or at least the turning of a blind eye to the obvious.[42] Putting aside for the moment the evidence of UK complicity in the Belhadj extradition through Diego Garcia in 2004 (see below), the UK has showed not the slightest concern about what the US might be doing in Chagos. Now that

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39. Regina v (Bancourt) v Secretary of State for Foreign & Commonwealth Office (No.2) (2009) 1AC 453
40. Ibid at [35]
41. Sweet v Parsley (1969) 2 WLR 470, per Lords Reid, Wilberforce and Diplock.
42. R v Malin and Anor [2008] EWCA 1787 (Court of Appeal)

it does have that knowledge, it plainly has a duty to investigate and ensure that such conduct never happens again, although there has been no step taken by the UK to seek any US assurances to this end. If in 2016 the lease were simply to be orally renewed, without any clause prohibiting such unlawful behavior, it would arguably be void at common law,[43] although the consequence would be merely to preclude the UK, as landlord, recovering any rent. A more helpful analogy can be found in the civil law of nuisance, which provides for liability of a landlord who expressly or impliedly authorizes misbehavior that impacts deleteriously on others. The duty to abate the nuisance is quite strict if it is caused by the activity of licencees rather than of tenants: the landlord may be required to serve notice to terminate the licence, and evict the misbehaving occupiers.[44] This principle can apply to US occupation of Diego Garcia, which is by permission and apparently without any formal lease or other document. Obliterating what the US describes as one of its "footprints of freedom" – constructed at a cost of over $US3 billion – may seem an excessive penalty for using torture, or at least illegally transporting people to places where they are to be tortured. But the US always knew that its license to occupy Chagos would be up for renewal in 2016, and it chose to run the risk that its British landlord would remain supine and complaisant if the truth were to emerge about how it had used the base for rendition. In any event, if the lease were determined by Britain in 2016 and the islands transferred to Mauritius, no doubt an agreement with the US could be reached permitting continued use of the base under a proper lease with suitable written guarantees that it would not be used for illegal purposes.

That the UK may have been complicit in the use of Diego Garcia as a rendition base emerged from documents discovered by a Human Rights Watch researcher in the abandoned Tripoli office of Mousa Kousa, Libya's Foreign Minister until he defected during the NATO attacks in 2011. They dated from 2004, after Gaddafi was visited by Tony Blair and "brought in from the cold", to a relationship the warmth of which had never been made public. It apparently extended to MI6 assistance to Libya to capture certain members of the Libyan Islamic Fighting Group – an anti-Gaddafi organization of dissidents the Colonel termed "stray dogs" whom he wanted to hunt down. One was Abdul Hakim Belhadj, who with his pregnant wife had applied in Bangkok for asylum in the UK. MI6 arranged for the couple to be accepted for a direct flight to London, but had them apprehended at the airport by the CIA. Belhadj was in effect kidnapped, and put aboard a CIA flight to Diego Garcia, from where he was despatched to Libya for what MI6 must have known would be several years of torture. Embarrassingly for Britain, he emerged from prison to become one of the most valiant leaders in the Libyan

43. As a contract that permitted illegal activity - see Jennings v Throgmorton [1825] EngR 591

44. See for example Page Motors v Epson and Ewell BC [1980] JPL 396, where a council was required to obtain a possession order to evict the nuisance – causied by gypsies whom it had permitted to occupy Council land.

revolution and a member of the country's transitional government. The documents included letters to Mousa Kousa (a killer declared persona non grata by Britain in 1982) from Sir Mark Allen, a senior MI6 official, boasting of Britain's role in so cleverly capturing and returning one of Gaddafi's "most wanted": Allen wrote, boastfully, "It was the least we could do for you and Libya".[45] In April 2012 Belhadj brought a civil action against Allen and the administrator of BIOT (in legal effect, the UK's landlord of Diego Garcia). Allen's friends in MI6 let it be known to the media (whether truthfully or not) that Foreign Minister Jack Straw had approved the operation, so he was added as a defendant.[46]

There has been no dispute about the authenticity of documents that MI6 would normally ensure never see the light of day, at least for 50 years. They seem to show – contrary to David Milliband's assurances and re-assurances to Parliament in 2008 - that the UK was not only aware of the illegal use of Diego Garcia, but in 2004 actually instigated one such use. The Belhadj case is particularly outrageous, because it appears a deliberate breach of one of the most fundamental rules of international law, against the 'refoulement' of refugees, i.e. their forced return to the country where they will face persecution. It must have been known to MI6 that their victim would be tortured, if not killed, in Libya, and they must have put some pressure on the CIA, rather less enamoured of Gaddafi, to co-operate in conducting the actual rendition. The full facts have yet to emerge (and may not: the British government has announced plans to hold such civil cases in secret) but enough is known to fix Britain not just with knowledge, but with complicity, in the use of Diego Garcia for illegal rendition. It bears joint responsibility, at very least, for use of the island to send an anti-Gaddafi dissident to certain torture and possible death. The British government has now ordered a Scotland Yard enquiry, although no-one thinks that its notoriously deferential and plodding policemen will be any match for former Ministers and top MI6 officials. Mr. Belhadj has brought a civil action, which may well bring him some financial compensation, but his case really demonstrates the UK's moral unfitness to hold its disputed sovereignty over the Chagos Archipelago any longer.

Under international law, the lease might well be interpreted as a treaty, ie an agreement between two states, which would be void if it conflicts with a peremptory norm of international law,[47] such as the prohibition against torture or

45. See the Mail on Sunday, April 22 2012, p9" "Straw's phone call authorised rendition of anti-Gaddafi rebel"

46. See James Grant, New Statesman, 30 April 2012, "Truth Brings its own Justice" p27. If Straw did "authorise" the Belhadj rendition, he may have done so under Section 7 of the 1994 Intelligence Services Act, but this would only provide MI6 officials with immunity from prosecution in UK courts. It could not immune them from prosecution – e.g. before the Inter national Criminal Court – for breaches of international criminal law.

47. See Articles 53 and 64 of the Vienna Convention on the Law of Treaties which provides that treaties are void if they conflict with peremptory norms, either at the time of the agreement (Article 64)

the violation of the right to self determination. There is no question that the rules against refoulement and torture have attained the status of a peremptory norm[48]. There is some doubt as to whether the right of self-determination has achieved jus cogens status, although this is the better view.[49] And there is no doubt that the UK failed to consult with the Mauritians and ignored the Chagossians entirely when it concluded the lease agreement with the US, so it could be argued that this failure voided the lease ab initio by breaching their right to self-determination. The alternative approach is simply to argue that the UK may be held responsible under international law for illegal acts committed by the US as its tenant, or acts which it has instigated or aided and abetted.

Refoulement, rendition and torture are acts which are incompatible with lawful sovereignty. There is no difficulty in recognizing that one state may be responsible for the wrongs of another, where for example they act together (as alleged in *Belhadj*) or in situations where one state places another in the position to act wrongly, with foresight of that consequence – by "rendering" a person to face torture or a drawn out death penalty.[50] However, a state may be required to remedy a wrongful act of another state if it adopted or knew of it – as in the *Corfu Channel* case where Albania was ordered to clear the channel of mines laid by Yugoslavia, and compensate the UK for failure to warn it of their presence. In the Chagos situation, if the UK connived in, or else recklessly failed to enquire into the allegations of rendition crimes and torture – ie if it simply turned a blind eye to the real prospect that the US was using Diego Garcia for illegal purposes – then its willful blindness would amount to complicity. Its international responsibility in these circumstances should be discharged by determining the US lease and "reverting" sovereignty to with an appropriate appropriate compensation for expelling the Chagossians.

Questions of international responsibility depend on the extent of the UK's knowledge of the crimes committed at the base (or in the case of water boarding, on ships that were offshore). The authenticity of the *Belhadj* documents has not been challenged, and they show knowledge (and indeed instigation) by MI6. It is suspicious that the UK has refused to extend the Convention Against Torture (ratified by the UK in 1988) to the BIOT when it was extended to most other UK dependant territories by declaration on 9 December 1992. Was this oversight in fact a recognition that the US might want to use the base for torture? Similarly the Statute of the International Criminal Court, (ICC) which the UK ratified in October 2001, has not been extended to the BIOT. This would also suggest that the UK deliberately allowed for the prospect that Chagos would be used for illegal

48. See Prosecutor v Furundzija [1998] ICTY 3 (10 December 1998) at [155] and R v Bow Street Stipendiary Magistrate. Ex p Pinochet Ugarte (No.3) [2000] 1 A.C. 147 at 197 - 199

49. Brownlie, Principles of Public International Law, 7th edn, (Oxford 2010) p 511

50. As in Soering v UK (1989) at [85] – [91].

actions and even crimes against humanity, or else severely buckled under US pressure to avoid ICC consequences if it was.

Further suspicious behavior by the UK – deliberately excluding the US from legitimate international obligations under treaties by creating a "black hole" for BIOT - is demonstrated by its refusal to extend to BIOT a number of environmental Conventions which it has ratified but the US has not. These include the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, (known as the Basel Convention), The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, (the Aarhus Convention) and the Convention on Biological Diversity, as well as the Kyoto Protocol.[51] Such omissions suggest a determined policy to protect the US – if not the Chagos Islands – from the operation of international law. This policy is exemplified by the UK's refusal to investigate credible allegations that large quantities of land mines are being stockpiled on board US ships anchored at Diego Garcia, in breach of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on their Destruction. The UK in 2003 erroneously claimed that landmines on US naval ships inside British territorial waters "are not on UK territory provided they remain on the ship" – a legal howler that the Red Cross pointed out would "undermine the object and purpose of the [Convention] … and contradict its prohibition on assisting anyone in the stockpiling of anti-personnel mines".[52]

In International law, torture is strictly prohibited and this prohibition has attained the status of a peremptory norm, that cannot be breached by any State in any circumstances. The UK is a signatory to the UN Convention Against Torture ("the CAT"). Article 2 of the CAT states:

> Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
>
> No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.
>
> An order from a superior officer or a public authority may not be invoked as a justification of torture.

51. Sand n 30, , at 235.

52. Ibid at 236 – 237 and footnote 114.

More recently, the International Criminal Tribunal of the Former Yugoslavia ("the ICTY") confirmed the international legal status of torture in Prosecutor v Furundzija,[53] saying "torture is prohibited by a peremptory norm of international law".[54] This status has been recognised by the House of Lords, and was recited by Lord Bingham of Cornhill in *A v Secretary of State for the Home Department (No.2)*[55] who relied upon *Prosecutor v Furundzija, and R v Bow Street Stipendiary Magistrate. Ex p Pinochet Ugarte (No.3)*,[56] as authority supporting the erga omnes nature of the international prohibition on torture. Obligations erga omnes are obligations owed to all States, with each having a correlative duty to insist on compliance. They are of sufficient force to cover rendition, which amounts to a conspiracy of torture, or at least an act of aiding and abetting it, since the object of the flight into and out of Diego Garcia is to convey a prisoner in secret to a place where he will, to the knowledge and intention of the conveyors, be made a victim of interrogation by forms of torture. The UK now it has been made aware of the illegal use of Diego Garcia has a duty not to renew the lease. It could and, in law should return possession and control to Mauritius, and allow that nation to take responsibility for guarding against further misconduct rather more effectively than the UK has done in the past.

HOW SHOULD–AND CAN–BRITAIN'S UNLAWFUL EXPROPRIATION BE REMEDIED?

What hope does international law offer Mauritius to recover a possession wrongfully taken from it just before independence? This State has never ceased to claim sovereignty over the Archipelago, and its claim is supported by the African Union (formerly the Organisation of African Unity), by the non-aligned group of states and by India, the largest regional power. The Mauritius Constitution adopted at independence in 1968 defines the nation to include "the Chagos Archipelago, including Diego Garcia"[57] and provides that every person born "in the territories which were comprised in the former colony of Mauritius" (i.e. in Diego Garcia and the other islands) shall be citizens of Mauritius.[58] In 1984 Mauritius declared a 200 mile "exclusive economic zone" around the Archipelago which was recognized in 1989 in a "Fishing in Mauritius Waters" agreement with the European Economic Community. But force is with the UK: it has made millions of dollars from licence fees it demands for tuna fishing in those Mauritian waters which it subjects to BIOT environmental zones, the most recent approved (but not yet implemented) to win 'green' votes at its 2010 election.

53. [1998] ICTY 3 (10 December 1998) at [155] – Trial Chamber II
54. Ibid
55. [2006] 2 AC 221 at 259
56. [2000] 1 AC 147 at 197 - 199
57. Section iii (i)
58. Section 20(1) and (4)

The UK's devious change of language, from its promise that Chagos would "revert" to Mauritius to a promise to "cede sovereignty" over Chagos to Mauritius, could fool nobody – certainly not the judges of an international court. Besides, when the Seychelles gained independence in 1976, the UK recognized the Uti Posseidetis principle of the integrity of the relevant unit of self-determination by returning the Aldabra group and Desroches, islands previously included in the invented BIOT, to the new nation. Mauritius has not yet taken action in the UK courts or in any international fora to reclaim its Chagossian inheritance, but the time has come – and should come before the US lease runs out in 2016 – to have the issue decided authoritatively. As a matter of international law, there is a powerful argument that it should be decided in favour of Mauritius.

The Chagossian people have been active in British courts, with varying success, in arguing for their right to return to their homeland. These cases have been important in disclosing the secret machinations of British and American governments and the internal FCO documents referred to earlier in this opinion, but have not raised, directly or indirectly, the issue of whether sovereignty over the islands in fact reposes in Mauritius. Indeed, these cases have all been decided on the assumption that Britain owns and controls the islands, and the forthcoming European court decision will proceed on that dubious assumption. That is the significance of the Mauritian sovereignty issue – its claim is correct, all these cases have been decided, whether for or against the Chagossians, on a fundamental misunderstanding. The UK may have possession and control of Chagos, but ownership resides in Mauritius and possession must be returned to it – together with reparations and a reciprocal duty to do the right thing by the Chagossians.

The initial litigation by the Chagossian families was successful in 2000,[59] when the expulsion of the Chagossians was ruled illegal under UK law by the High Court. Foreign Secretary Robin Cook called the 1965 episode "one of the most sordid and morally indefensible I have ever known" and ordered a feasibility study as to how the Chagossians might be enabled to return (but not to Diego Garcia, where the Americans were too firmly ensconced). In 2002, they were accorded a right to British passports, and many came to live in England. Under American pressure after Mr. Cook's untimely death, the UK government in 2004 overturned the High Court's verdict by another Order in Council (made again without reference to Parliament) which extinguished their right to return. The Americans were duly grateful for this abuse of executive power. Their statement read:

> We believe that an attempt to resettle any of the islands on the Chagos Archipelago would severely compromise Diego Garcia's unparalleled security and have a deleterious impact on our military operations, and we appreciate the steps taken by HMG to prevent such resettlement"

59. [2001] QB 1067

The Chagossians went back to court again, seeking a declaration that the 2004 Order was unlawful because it betrayed Robin Cook's promise in 2000 that they would be entitled to return and that, without the authority of Parliament, it had purported to remove their right to return. They succeeded before two High Court judges and three judges of the Court of Appeal, but lost 2-3 in the final UK court, the House of Lords. Their case, supported overall by seven judgments against three, now languishes in the European Court of Human Rights, which is taking its time to decide the initial jurisdictional point of whether the European Convention applies to UK actions in BIOT. Whilst all judgments so far delivered in the case condemn the UK's diplomatic deceit and the "callous disregard" of the interests of the Chagossians, none have examined the Mauritian claim to sovereignty over the islands. In the course of the case the most distinguished of the judges, Lord Bingham, memorably shredded the U.S. claim that settlement on the outer Chagos islands would threaten the security of Diego Garcia:

> Despite highly imaginative letters written by American officials to strengthen the Secretary of State's hand in this litigation, there was no credible reason to apprehend that the security situation had changed. It was not said that the criminal conspiracy headed by Osama bin Laden was, or was planning to be, active in the middle of the Indian Ocean[60]

The only criminal conspiracy currently active in the Eastern part of the Indian Ocean involves Somali pirates, who dare not come within striking distance of the US base. Occupation of the outer islands would certainly pose no threat to the US facility at Diego Garcia, and they cannot be used for any UK defence interest. There can be no grounds, therefore, to prevent the outer islands reverting to Mauritius in 2016, since they are irrelevant to US defence requirements and therefore to any indirect UK defence needs. For Britain to renege on her promise in this respect would be irrational, and hence judicially reviewable. Diego Garcia itself might be considered useful for US operations – it was used for the "shock and awe" attack on Iraq in 2003, an exercise of questionable legality in which the UK participated. Only if the UK's defence needs are conflated with those of the US can the condition which might preclude the promise to return Diego Garcia to Mauritius in 2016 apply, and the strategic importance of this Indian Ocean base to the US will in any event diminish once it sets up its alternative Indian Ocean base on the Cocos islands, recently vouchsafed it by the government of Australia.

The final episode of British perfidy in relation to Chagos came in April 2010, when without consultation with Mauritius (or with the Chagossians) the UK purported to establish a 'marine protected area' for 200 miles around the Chagos Achipelago – an area of more than half a million square miles. This act of

60. Regina (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No.2) (2009) 1 A.C. 453,at [72]

environmental imperialism was once again done by an Order in Council, the British government's favourite tactic for avoiding democratic debate. Although several environmental organisations, through naivety (or, in the most notable case, with financial interest) hailed this as "the world's largest marine park", the real purpose of the zoning was revealed by a cable published by Wikileaks, from the FCO to the US State Department: "establishing a marine park would, in effect, put paid to the resettlement claims of the Archipelago's former residents". This cable reveals the cynicism that still infects the FCO officials in their attitudes to the Chagossians (and the Mauritians) – in their secret meetings with US embassy officials they actually used the same distasteful language as their predecessors in the sixties: "We do not regret the removal of the population" and "there would be no human footprints" and no "Man Fridays" on the islands if the marine protection zone went ahead, because "the environmental lobby is far more powerful than the Chagossians' advocates".[61]

These FCO officials went cap-in-hand to the Americans for approval, and made it obvious that their political masters (Gordon Brown's Labour Government) wanted to announce the 'Marine Park' a few weeks before the 2010 general election, as a political sop to the environmental lobby in the quest for 'green' votes. The Americans were reluctant to give their approval – they thought there was a danger, as they put it, that "both the British public and policy makers would come to see the existence of a marine reserve as inherently inconsistent with the military use of Diego Garcia". However, they were persuaded that "Establishing a marine reserve might … be the most effective long-term way to prevent any of the Chagos islands' former inhabitants or their descendants from resettling in the BIOT". If one thing is clear from the Wikileaks cables it is that the US wants to keep Diego Garcia – indeed, all the islands – for much longer than 2016, and for much longer than 20 years thereafter, because it views them as permanent US possessions. This is truly indefensible, but likely to be the case so long as the UK's claim to sovereignty is permitted to stand. Mauritius would prove a better sovereign, in the sense at least that it could not be worse. How can it assert its rights to Chagos, as a prelude to negotiating on a sovereign basis with the US over the lawful conditions upon which its base could be maintained,?

The most obvious way for Mauritius to assert its deferred title to Chagos is to bring an action against the UK in the International Court of Justice (ICJ). This is a pre-eminent court that both countries respect and whose jurisdiction they have made declarations to accept. The problem, - and it is an insoluble problem – is that their declarations both contain reservations that preclude them from suing, or being sued by, another Commonwealth country. This last gasp of colonialism

61. See the US diplomatic cables published by WikiLeaks which comment upon Mauritius' claim to the Chagos Islands:
"http://www.cablegatesearch.net/search.php?q=Diego+Garcia&sort=1" http://www.cablegatesearch.net/search.php?q=Diego+Garcia&sort=1.

is an example of how, at independence, a country can be prevailed upon to give up its right to international remedies against the motherland, irrespective of the injuries the latter has done. Thus Mauritius in 1968 declared its acceptance of ICJ jurisdiction in all disputes other than:

> (ii) disputes with the Government of any other country which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such a manner as the parties have agreed or shall agree.

The UK, similarly, accepts ICJ jurisdiction to all disputes other than:

> (ii) disputes with the Government of any other country which is a member of the British Commonwealth with regard to situations or facts existing before 1 January 1969.

Snap! These carefully calibrated declarations (the UK's is dated just three months after that of Mauritius) ensures that there can be no case of Mauritius v UK (or vice versa) in the ICJ, unless Mauritius leaves the Commonwealth.

That this position is profoundly unsatisfactory is demonstrated by the UK's complacent and indeed arrogant refusal to consider, properly or at all, the Mauritian claim. When asked about it in Parliament, the Under Secretary of State at the FCO replied on 10 January 2011:

> The UK has no doubt about its sovereignty over the British Indian Ocean Territory which was ceded to Britain in 1814 and has been a British dependency ever since.

It is precisely the 1814 settlement which made the Chagos Archipelago a part of Mauritius, hence the illegality of excising it in the run-up to its independence. The UK bases its "sovereignty" on a false argument, which could be exposed in any courtroom and unfairly denies to its opponents any courtroom in which it would be exposed.

The Government of Mauritius, having had its claims to sovereignty over Chagos rebuffed or simply ignored by the UK, has recently taken two legal initiatives in which these claims are asserted. On December 21st 2010 it announced that it had filed a claim against the UK with the International Tribunal of the Law of the Sea, on the ground that the Marine Protection Area Declaration was a breach of the 1982 Convention on the Law of the Sea, since its real purpose (exposed by Wikileaks cables) was to prevent the resettlement of the Chagossians. The following year it invoked CERD – the Convention on the Elimination of all Forms of Racial Discrimination – for a claim that the forcible removal of the Chagossians

and the refusal to facilitate or recognize their right of return amounted to a Convention violation which calls for compensation.[62]
These actions may be resolved without either the ICLOS Tribunal or a CERD Committee necessarily determining the sovereignty issue, and the UK government has raised technical admissibility objections in both cases. Very much more embarrassing to the UK government is the above-mentioned civil claim brought in the UK High Court in 2012 by Abdul Hakim Belhadj against the BIOT administrator, the MI6 official Sir Mark Allen, and former Foreign Minister Jack Straw, alleging complicity in his kidnap in Thailand and subsequent rendition through Diego Garcia to torture in Libya. This case will spotlight the anomalous position of Diego Garcia, and may well establish (the documents are obviously authentic) that the UK was co-operating, through MI6, with the CIA in use of the island for illegal rendition. But this action will not directly raise the issue of whether Mauritius is entitled to sovereignty over Chagos.

Since the UK put pressure on Mauritius at Independence to give up its legal right to take the UK to the International Court of Justice, it has at least a moral duty to offer to settle the dispute by way of a binding arbitration. There is an accepted process for setting up such dispute resolution through the Permanent Court of Arbitration, but it requires both parties to consent and co-operate, and Britain regards its sovereignty claim over Chagos as non-negotiable. Mauritius has recourse to the UN General Assembly, which has the right to request an advisory opinion from the ICJ on issues of principle. Just as it requested an opinion on the legality of the "Israeli Wall", so it could request an advisory opinion on sovereignty over the Chagos Archipelago, both in principle and with respect to whether the UK's promise that deferred sovereignty would revert to Mauritius in due course is binding. The UK would in all probability regard itself as honour bound by an advisory opinion of the ICJ. The U.S. in that event, would doubtless persuade the government of Mauritius to enter into a lease for the Diego Garcia base, but ultimately (and rightly) that would be a decision for Mauritius, bearing in mind – for the first time – the interests of the Chagossians, and the rules of international human rights law.

62. Letter from the Minister of Foreign Affairs, Mauritius, to the British High Commissioner on 20 October 2011 and 21 March 2012; and diplomatic note No 69/2011 of 22 November 2011 from the British High Commissioner.