REGIONAL AFFAIRS

The Chagos Archipelago
– Footprint of Empire, or World Heritage? –

by Peter Sand*

On 1 April 2010, the UK Foreign and Commonwealth Office (FCO) announced the establishment of a marine protected area (MPA) in the British Indian Ocean Territory (BIOT),[1] to be enacted by ordinance of the Director of the FCO Overseas Territories Department, acting as BIOT Commissioner in exercise of the Government's colonial "prerogative powers" (*i.e.*, without parliamentary approval, pursuant to the 1865 *Colonial Laws Validity Act*).[2] The new marine reserve[3] is to cover the entire 200-mile exclusive economic zone (EEZ) around the territorial waters of the Chagos Archipelago,[4] approximately 544,000 km^2 (more than double the size of the United Kingdom). The only geographical exception will be the inner sector around the main island of the archipelago, the coral atoll of Diego Garcia with its lagoon and three-mile territorial sea (approximately 470 km^2).[5] The island happens to be the site of one of the largest and most secretive US bases overseas – proudly labelled "footprint of freedom" by its current occupants – constructed and upgraded at a cost of over US$3 billion,[6] and home port to a sizable fleet of long-range bombers, nuclear submarines and naval supply vessels;[7] in the science-fiction movie *Transformers II: Revenge of the Fallen* (M. Bay and S. Spielberg, Paramount Pictures 2009), Diego Garcia even figures as secret operations and training facility for assorted robots and American heroes who save the Earth from extraterrestrial invaders. Within the new BIOT MPA, the US base now becomes a legally-exempt military enclave effectively surrounded by a 200-mile "green zone".[8]

The UK Government's decision to enclose this huge ocean area for ecological reasons – even though widely acclaimed by conservationists and environmental organisations as creating the world's largest nature reserve to date[9] – generated a considerable amount of controversy in Parliament and in the media,[10] mainly because of its perceived interference with pending litigation before the European Court of Human Rights in Strasbourg, instituted since 2004 by native Chagos Islanders who were forcibly expelled to make way for the US base and who are now seeking the right to return.[11] Designation of the area as a restricted marine park at this stage constitutes a *fait accompli* in open defiance of the Strasbourg proceedings (scheduled for adjudication by October 2010), not withstanding repeated FCO assurances to the effect that "should circumstances change, all the options for a marine protected area may need to be reconsidered".[12] In the view of many critical observers,[13] the unilateral enclosure of the Chagos Archipelago is either an anachronistic example of "environmental imperialism",[14] or evidence of an equally outdated variant of "fortress conservation" that disregards human rights under the noble guise of nature protection.[15]

Quite apart from the public law issue of the Chagossians' minority rights, however, the new BIOT MPA also raises a number of broader international legal questions, which the present note will address in turn:

- competing claims to sovereignty and jurisdiction, by Mauritius and the Maldives;
- compatibility with the United Nations Convention on the Law of the Sea (UNCLOS), and related regional instruments; and
- applicability of other multilateral agreements.

Disputed Sovereignty and Jurisdiction

After acceding to independence in 1968, Mauritius has continuously contested UK territorial sovereignty over the Chagos, claiming that the archipelago had been "excised" from the former British colony of Mauritius in violation of several UN resolutions on decolonisation.[16] According to Article 111 of the Mauritian Constitution, "Mauritius includes … the Chagos Archipelago, including Diego Garcia".[17] There is no evidence for the BIOT excision "to have been accepted, at least as a temporary measure" by Mauritius;[18] on the contrary, the country repeatedly affirmed its claim to sovereignty over the territory in the UN General Assembly[19] and in numerous declarations upon signature, ratification or accession to international treaties.[20] In December 1984, Mauritius declared a 200-mile EEZ around the Chagos Archipelago pursuant to UNCLOS Article 75,[21] based on a twelve-mile territorial sea,[22] with geographical coordinates submitted to the UN Division for Ocean Affairs and the Law of the Sea on 20 June 2008;[23] and in May 2009 submitted a further preliminary claim to an extended continental shelf area (measuring approximately 180,000 km^2) some 170 miles beyond the southern part of the Chagos EEZ.[24] The Mauritian EEZ was recognised in the "Agreement between the European Economic Community and the Government of Mauritius on Fishing in Mauritian Waters", of 10 June 1989;[25] and the Organization for African Unity (now the African Union) unanimously endorsed the sovereignty of Mauritius over the Chagos Archipelago in 1980, 2001 and 2010.[26]

The UK has persistently disputed Mauritian claims to sovereignty over the Chagos and to jurisdiction over its surrounding waters, while conceding that the islands would eventually be "ceded" to Mauritius at some

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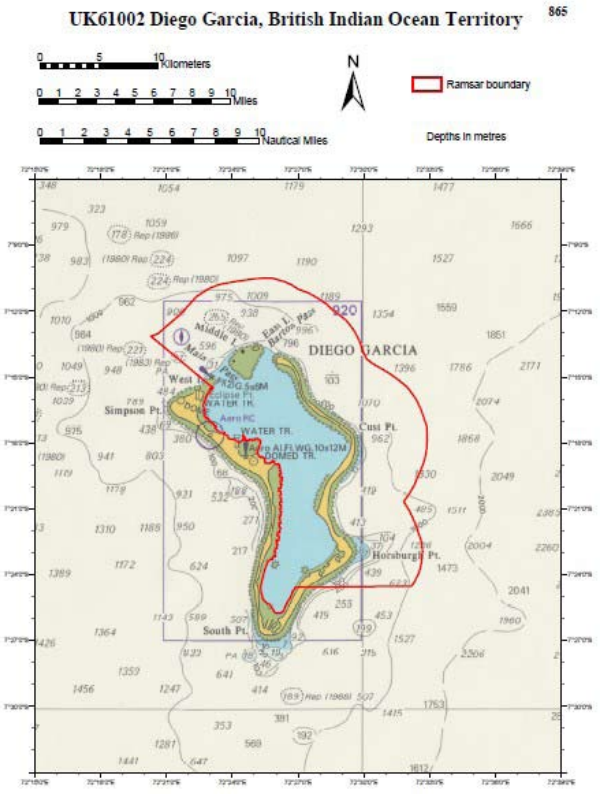
unspecified future time "when they are no longer needed for defence purposes".[27] On 1 October 1991, the FCO in turn proclaimed a 200-mile BIOT Fisheries Conservation and Management Zone, and on 17 September 2003 a BIOT Environment (Protection and Preservation) Zone, based on a three-mile territorial sea, with geographical coordinates notified to the UN Secretariat under Article 75(2) on 12 March 2004.[28] The northern boundary of the zone remains legally undetermined, however, in view of competing claims of jurisdiction in the sector overlapping with the 200-mile zone of the Maldives.[29] Although the coordinates of the EEZ communicated to the United Nations by the FCO show an equidistant "median line" boundary between these competing claims,[30] a draft delimitation agreement negotiated with the Maldives at a technical level in 1992 was never signed and is not in force.[31] Following bilateral talks between Mauritius and the Maldives in February 2010, the Mauritian Foreign Ministry now envisages a joint claim to an extended continental shelf area in the northern part of the Chagos Archipelago,[32] similar to the joint claim with the Seychelles submitted on 1 December 2008.[33]

The Maldivian objection 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 "outer islands" islands to the north (such as Peros Banhos and Salomon, included in the current coordinates of the BIOT 200-mile zone) are uninhabited; and according to official FCO statements, their long-term re-settlement would be economically unsustainable.[34] Consequently, UNCLOS Article 121(3) applies (as in the notorious case of Rockall Island),[35] which provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". Indeed, if the FCO's own conclusions are correct ("settlement is not feasible"),[36] a national MPA in the Chagos Archipelago would be restricted to the 200-mile arc around Diego Garcia, which with approximately 484,000 km^2 is at least 10 percent smaller than the EEZ now claimed by the UK – and its equivalent BIOT "fisheries conservation and management zone", in which the FCO has since 2003 collected a total of over US$8 million in licence fees from foreign tuna-fishing companies.[37]

Compatibility with UNCLOS and Related Instruments

The 1982 UN Convention on the Law of the Sea makes no explicit provision for MPAs in the 200-mile EEZ. In the course of negotiations for the treaty, proposals to grant coastal States the option to establish a 100-mile "environmental protection zone" were opposed – not least by the United States – as an encroachment on the customary freedom of navigation,[38] and were rejected except as regards jurisdiction over ice-covered areas (Article 234, not an immediate prospect in the Chagos).

Subsequent unilateral attempts by certain coastal States to establish "ecological protection zones" beyond territorial sea limits in the Mediterranean (France, Croatia, Slovenia and Italy, 2003–2006) have remained controversial.[39] According to UNCLOS Article 56(2), a coastal State exercising its environmental protection jurisdiction in the EEZ "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention". UNCLOS Article 211(6)(a) thus allows the creation of pollution prevention and control areas in a coastal State's EEZ solely on the basis of "appropriate consultations through the competent international organizations with any other States concerned".[40] *A fortiori*, therefore, the establishment and enforcement of fully-fledged marine conservation areas beyond a coastal State's territorial waters are subject to multilateral consultations and designation through the international bodies so empowered.[41] Significantly, all four examples cited as "comparable" role models for the BIOT MPA[42] – Australia's Great Barrier Reef



Diego Garcia Ramsar Site, 2001

Courtesy: Ramsar Convention Secretariat

Marine Park; Ecuador's Galapagos Marine Reserve; Kiribati's Phoenix Islands Protected Area; and the US Northwestern Hawaiian Islands Marine National Monument – happen to be designated *multilaterally*: (a) as "World Heritage sites", by decision of the UNESCO World Heritage Committee (WHC);[43] and/or (b) as "particularly sensitive sea areas", by decision of the International Maritime Organization's Marine Environment Protection Committee (MEPC).[44] Now that a similar status is envisaged for the Chagos Archipelago, the FCO will be expected to initiate appropriate steps for this purpose on the basis of intergovernmental consultations with other countries in the Indian Ocean region, inevitably including Mauritius and the Maldives.[45] ➤➤

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The Chagos Archipelago also falls within the geographical scope of several regional legal regimes relevant to living resource management and conservation in the BIOT.

Indian Ocean Tuna Commission and the Southern Indian Ocean Fisheries Agreement

Both Mauritius and the UK are members of the Indian Ocean Tuna Commission (IOTC) established under the auspices of the Food and Agriculture Organization of the United Nations (FAO) in Rome in 1993,[46] with headquarters in the Seychelles. Pursuant to UNCLOS Article 64, management of the "highly migratory species" of tuna in the Chagos EEZ requires cooperation with the other member States through IOTC, with a view to conservation and optimum utilisation of the species. Whether coastal States have a right to ban all fishing in the EEZ ("no take") is doubtful,[47] and will necessitate prior consultation in the Commission. The UK is represented on the IOTC by a consultancy firm (Marine Resources Assessment Group, MRAG Ltd) owned by the FCO Chief Scientific Adviser;[48] on 10 November 2009, MRAG Ltd thus alerted the Commission to the proposed BIOT MPA.[49]

Furthermore, the UK is due to become a party to the Southern Indian Ocean Fisheries Agreement (SIOFA) adopted under FAO auspices in Rome on 7 July 2006 and approved by the European Union on 15 October 2008, once that Agreement enters into force.[50] While Article 3 excludes "waters under national jurisdiction" [such as the Chagos EEZ] from the geographical area covered by the Agreement, Article 6(g) goes on to stipulate that the Meeting of the Parties shall "promote cooperation and coordination among Contracting Parties to ensure that conservation and management measures for straddling stocks occurring in waters under national jurisdiction adjacent to the Area and measures adopted by the Meeting of the Parties for the fishery resources are compatible". There is no doubt that the straddling tuna stocks in the proposed BIOT MPA fit that definition, and hence will require intergovernmental consultations under SIOFA.

Indian Ocean Commission and the Nairobi Convention

In the field of marine conservation, Mauritius is a member of the Indian Ocean Commission (IOC) established in 1984 (with funding from the European Union, currently to the tune of 18 million Euros for the period 2006–2011), and provides headquarters for the IOC "Regional Programme for the Sustainable Management of the Coastal Zones of the Indian Ocean".[51] The country is also a party to the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (the Nairobi Convention), concluded under the auspices of the United Nations Environment Programme (UNEP) in Nairobi in 1985 and amended in 2010.[52] Mauritius has made it clear that its ratification of the Convention (on 3 July 2000) applies to the Chagos Archipelago;[53] and there is nothing to prevent the Mauritian government from declaring the Chagos a MPA of its own under Article 8 of the 1985 Nairobi Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, thereby also securing inclusion in the United Nations List of Protected Areas.[54]

Indian Ocean Whale Sanctuary

The entire Chagos Archipelago is part of the Indian Ocean Whale Sanctuary established in 1979 by the International Whaling Commission (IWC),[55] initially for a ten-year period and renewed in 1989, 1992 and 2002. The sanctuary regime, which evolved from a simple ban on commercial whaling towards a comprehensive protection concept,[56] has at least provided a legal safe haven for the endangered species concerned, although there is a manifest lack of current data on the conservation status of cetaceans in the BIOT, which have never been surveyed systematically.[57] There also is virtually no public information on new conservation risks for marine mammals in the region as a result of the massive "undersea noise pollution" by the US Navy's use of low-to-medium-frequency *sonar* ("sound navigation and ranging") in Diego Garcia, for purposes of anti-submarine monitoring and long-range underwater sound propagation tests.[58] The well established harmful and possibly lethal effects of sonar on cetaceans – especially Cuvier's beaked whales (*Ziphius cavirostris*), a native species in the Chagos[59] – have prompted British cetologists to call for a moratorium on the peacetime deployment and development of new military sonar systems in UK waters, and for critical cetacean habitat to be "made off-limits to naval vessels using mid and low frequency sonar systems, at least until the effects can be properly assessed and it can be proven or at least is known that it is highly likely that sonar will not impact cetaceans".[60] Under these circumstances, the continuing failure of the UK and US authorities to undertake environmental impact assessments for the deployment of those very systems in the BIOT is disturbing, to say the least.[61]

Applicability of Other International Agreements

As a UK overseas territory, the BIOT is not automatically covered by international treaties to which Britain is a party. In keeping with standard FCO practice,[62] geographical extension of any treaty ratified by the UK to any of the territories concerned is determined case by case. That practice, sometimes described as a kind of "atavistic dualism",[63] was indeed vindicated by the 2008 decision of the House of Lords' Appellate Committee in *Bancoult 2*, holding that the 1998 British *Human Rights Act* does not apply to the BIOT because the UK had not formally extended ratification of the 1950 European Convention on Human Rights (ECHR) to the territory.[64] In the case of the BIOT, treaty extensions continue to be withheld for political reasons, as illustrated not only in human rights law, but also in the fields of environment and disarmament.

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Human Rights

From the outset, the FCO took 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(e) of the UN Charter.[65] On the same grounds, the United Kingdom contends that its ratification (on 20 May 1976) of the 1966 UN Covenants on Human Rights[66] does not extend to the BIOT[67] – a view contested by the UN Human Rights Committee, which has repeatedly indicated that it considers the Covenants to apply to the BIOT, and in its concluding observations on the UK report in 2008 urged the United Kingdom "to include the territory in its next periodic report".[68] The 1949 Geneva Conventions III and IV (Treatment of Prisoners of War, and Protection of Civilian Persons in Time of War,[69] ratified by the UK on 23 September 1957) were never extended to the overseas territories;[70] neither was the 1998 Statute of the International Criminal Court (ratified by the UK on 4 October 2001).[71] The 1984 UN Convention against Torture (ratified by the UK on 8 December 1988) was extended to most UK dependent territories *except* the BIOT by declaration on 9 December 1992.[72] Not surprisingly therefore, the BIOT has been referred to as a "human rights black hole".[73]

Diego Garcia, island cemetery of the expelled Chagossians, 2006 Courtesy: Chagos Refugees Group

Environment

According to the 2001 *BIOT Environment Charter*, the UK 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".[74] To date, however, only five global agreements have been extended to the territory: viz., the 1946 International Whaling Convention; the 1971 Wetlands (Ramsar) Convention; the 1973 Convention on Trade in Endangered Species (CITES); the 1979 Migratory Species (Bonn) Convention; and the 1985 Ozone Layer (Vienna) Convention with its 1987 (Montreal) Protocol.[75]

Among the environmental treaties *not* so extended, there are five that were never ratified by the United States, and which the FCO therefore seems to consider as potential irritants for UK-US relations regarding operation of the military base in Diego Garcia:

i) The 1989 Basel Convention on Transboundary Movements of Hazardous Wastes, ratified by the UK on 7 February 1994, with an extension to the British Antarctic Territory,[76] though not to the BIOT. The US base on Diego Garcia generates some 200 tons of solid waste annually,[77] most of which is incinerated and land-filled on the island. Following a 1982 UK-US supplementary agreement,[78] hazardous wastes have been exported by sea, initially to the Philippines,[79] in 2006 traded to Dubai,[80] and periodically shipped to disposal sites in the United States.[81] Extension of the Basel Convention to the BIOT would subject those exports to mandatory licensing (and potential prohibition) by the UK authorities.

ii) 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. Extension to the BIOT continues to be vetoed by the FCO;[82] as a result, the only parts of the world where that Convention – with 192 member countries, a universally accepted environmental treaty – is not applicable today are the United States, Andorra and five UK overseas territories (BIOT, Bermuda, Falkland Islands, Pitcairn Islands and British Antarctic Territory). Given that the BIOT boasts "a greater marine biodiversity than the rest of the UK and its other territories combined",[83] and that the FCO invokes "the interest of the biodiversity of the planet" as the main rationale for its BIOT MPA,[84] the continuing exclusion of the territory from the CBD borders on the absurd.

iii) The 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change, ratified by the UK on 31 May 2002, and extended (on 7 March 2007) to Bermuda, the Cayman Islands and the Falkland Islands, but not to BIOT.[85] Ironically perhaps, Diego Garcia has since been singled out – because of its low average elevation of four feet (1.3 m) above sea-level – as the US base most immediately threatened by global warming.[86]

iv) The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,[87] ratified by the UK on 23 February 2005, but still boycotted by the US State Department.[88] In the view of the FCO, the Convention has "no practical relevance to BIOT" because "BIOT has no permanent residents", and will therefore not be extended to the territory.[89]

v) The 2001 Stockholm Convention on Persistent Organic Pollutants,[90] ratified by the UK on 17 January 2005 (without extension to overseas territories), but not ratified by the United States. Considering that the

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Chagos Archipelago is potentially vulnerable to certain persistent organic pollutants used on the US base in Diego Garcia (such as perfluorooctane sulfonate, a toxic ingredient of fire-fighting foam listed on the Stockholm Convention annex since 2009, or airborne dioxins emitted by the two waste incineration plants on the island),[91] the FCO's exclusion of the BIOT from the geographical scope of the treaty is particularly unfortunate.

As regards the 1972 World Heritage Convention (ratified by the UK on 25 May 1984, with a declaration extending it to all British overseas territories *except* the BIOT),[92] a 1997 BIOT Conservation Policy Statement declares that "the islands will be treated with no less strict regard for natural heritage considerations than places actually nominated as World Heritage sites, *subject only to defence requirements*" [emphasis added]. The 1971 Ramsar Convention on Wetlands of International Importance (ratified by the UK with effect from 5 May 1976 and extended to the BIOT on 8 September 1998) applies to Diego Garcia *except* for "the area set aside for military uses as a US naval support facility".[93] Doubts remain as to whether the on-going military uses of the Diego Garcia lagoon (which was not so set aside, and hence is part of the internationally protected site, as shown in the official Ramsar map) by a large fleet of US naval supply vessels and nuclear submarines are compatible with the purposes of a nature reserve. In particular, there has been a series of major fuel spills at the US base in 1984, 1991, 1997 and 1998 (totalling more than 1.3 million gallons of JP-5 jet fuel),[94] which had still not been cleaned up by 2004,[95] but which were never reported to the Ramsar Secretariat under Article 3(2) of the Convention and its "Montreux Record",[96] or to any other "competent international organizations" under UNCLOS Articles 204–205 for that matter.

Furthermore, the transit of 550 tonnes of uranium "yellow-cake" from Iraq in May-June 2008, which the US Department of Defense flew to Diego Garcia in 37 cargo planeloads for trans-shipment to Canada by sea,[97] raises questions of radionuclide contamination risks for the lagoon. So does the announcement by the US 5th Pacific Fleet Command that, from 2010 onwards, Diego Garcia will serve as home port for a fleet of nuclear-powered fast-attack submarines (SSNs) and guided-missile submarines (SSGNs),[98] to be serviced by the very same submarine tender (*USS Emory S. Land*) which in 2007 had to leave her previous home port in the Mediterranean after public protests over massive radioactive pollution of an adjacent MPA.[99] Rather surprisingly, the US Navy claims that it "does not have any records regarding radionuclide monitoring carried out in the Diego Garcia lagoon and adjoining territorial waters";[100] and the only radioactivity survey ever undertaken in Diego Garcia by the UK authorities dates back to 2006.[101] In turn, the FCO's Conservation Adviser for the BIOT affirms: "Basically, radiation is outside my remit. I do not monitor it… for details you would need to ask the navies concerned, not me".[102]

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 supply facilities, the disposition of nuclear weapons and weapons of mass destruction".[103] Indeed, both Mauritius and the UK are parties to the so-called "Pelindaba Treaty" and/or its protocols concluded under the auspices of the African Union in 1995, in force since 15 July 2009,[104] requiring each party "to prohibit in its territory the stationing of any nuclear explosive devices" (Article 4); moreover, Protocols I and II require parties not to "contribute to any act which constitutes a violation of this treaty or protocol". According to the map appended to it 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,[105] the UK interprets the footnote broadly as meaning that it did "not accept the inclusion of that Territory within the African nuclear-weapon-free zone";[106] hence, in the view of the US State Department also, "neither the Treaty nor Protocol III applied to the activities of the United Kingdom, the United States or any other State not party to the Treaty on the island of Diego Garcia or elsewhere in the British Indian Ocean territories".[107] In response to recent parliamentary questions regarding storage of US nuclear or other weapons in Diego Garcia, an FCO Minister of State replied on 6 April 2010 – somewhat obliquely – "that the general policy is that we allow the United States to store only what we ourselves would store".[108]

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),[109] the United States has 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),[110] the use and stockpiling of which is strictly prohibited by the 1997 Ottawa Landmines Convention, to which both the UK and Mauritius – though not the USA – are parties.[111] 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".[112] Along the same lines, the UK representative at the Ottawa Convention's Standing Committee meeting in May 2003 affirmed that landmines on US naval ships inside British territorial waters "are not on UK territory provided they remain on the ships"[113] – a

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unilateral interpretation flatly contested by the International Committee for the Red Cross (ICRC).[114]

As a matter of fact, much of the ordnance in the Diego Garcia lagoon (*i.e.*, in British internal waters) is not stored on board US warships but on commercial freighters time-chartered by the US Navy's Military Sealift Command (MSC).[115] The same is true for cluster bomb (sub-munitions ordnance) stockpiles prohibited under the new 2008 Dublin Convention (ratified by the UK on 4 May 2010, in force as from 1 August 2010).[116] In response to parliamentary questions, however, the FCO has refused 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".[117] The FCO makes reference to US plans to remove some of these munitions from all UK territories by 2013, and meanwhile takes the position that "while US stockpiles on UK territory are under UK jurisdiction, they are not under our control".[118] (By contrast, Norway successfully insisted on the immediate removal of all prohibited ordnance from the American bases on its territory).

Diego Garcia was not listed among the "inspectable sites" of the 1991 US-Russian Strategic Arms Reduction Treaty (START-1) which expired in 2009.[119] 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 legal language of START-1 while undermining its spirit".[120] The new US-Russian Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, signed in Prague on 8 April 2010,[121] provides in Article IV (paragraph 11) 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". The Diego Garcia base thus remains – apart from its other legal exceptionalisms – a prime arms control loophole.

Conclusions

In its 1999 report on biodiversity in the British overseas territories, the UK Joint Nature Conservation Committee boldly claimed that "because of its military status, the whole of BIOT acts as a *de facto* protected area".[122] Similar claims of a "sanctuary effect" have occasionally been put forward by the US Department of Defense, contending that natural areas under exclusive military control (*i.e.*, without interference from resident civilian populations, in line with the Pentagon's "white space" policy to select isolated sites for its overseas bases)[123] enjoy an optimal conservation status[124] – even though critics have long drawn attention to the dubious environmental legacy left behind by the US military in the Philippines and Okinawa,[125] and in some Pacific islands (such as Guam, Johnston Atoll and Wake Island) that were subsequently converted into "wildlife refuges" and "marine national monuments".[126] Diego Garcia is no exception: in order to construct the world's longest slipform-paved airport runway (3.6 km) built on crushed coral,[127] a total of more than 4.5 million m^3 of "coral fill" was "harvested" (*i.e.*, dynamited and dredged),[128] thereby irreparably damaging the reef.[129] If the FCO's own calculations are correct,[130] that collateral damage could amount to about US$3–18 million per year.[131]

It may well be, as noted by the BIOT's Conservation Advisor, that "the present uninhabited nature of most of these islands is the main reason for the richness and unimpacted nature of the marine habitat".[132] Yet, this arguable *de facto* assertion can hardly be turned into a rationale for the continued *de jure* exclusion of the exiled indigenous islanders from their homeland. It is to be hoped that the BIOT Administration – regardless of the outcome of the case now pending before the Strasbourg Court of Human Rights – will eventually integrate the Chagos Islanders in any future governance arrangements for this unique marine area, which unquestionably deserves recognition and protection as global natural heritage.

The most judicious way forward at this stage would probably be joint nomination of the Chagos by the UK and Mauritius under the 1972 UNESCO World Heritage Convention.[133] Article 11(3) of the Convention makes it clear that the inclusion of a site "in a territory, sovereignty or jurisdiction over which is claimed by more than one State, shall in no way prejudice the rights of the parties to the dispute". The (non-governmental) *Mauritian Marine Conservation Society* (MMCS) has since 1996 already called for designation of the Chagos Archipelago as a World Heritage site;[134] and there are indeed precedents for joint nomination of sites, usually in boundary areas[135] – as in the case of the Wadden Sea (shared by Denmark, Germany and the Netherlands),[136] or in the French-Italian MPAs of Bonifacio/La Maddalena in the Mediterranean.[137] By the same token, nothing would prevent the UK and Mauritius from submitting a joint nomination of the Chagos Archipelago for multilateral designation as a "particularly sensitive sea area" (PSSA) through the International Maritime Organization, as was done jointly by Australia and Papua New Guinea for the extension of the Great Barrier Reef reserve to the Torres Strait Area in 2005.[138]

It is noteworthy in this context that, on 7 June 2010, the governments of Mauritius and France signed a bilateral agreement on joint environmental management (*co-gestion*) of the Indian Ocean island of Tromelin and its EEZ, jurisdiction over which continues to be claimed by both countries.[139] The Tromelin framework agreement explicitly provides (Article 2) that it is without prejudice to those claims – not unlike Article IV(1) of the 1959 Antarctic Treaty, which effectively "freezes" all concurrent territorial claims.[140] In contrast, however, to the peculiar interpretation of the Pelindaba Treaty by the FCO and the State Department,[141] the purpose and legal effect of that clause is to *include* – rather than exclude – the territory concerned within the geographical scope of the

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treaty. The lesson for the Chagos Archipelago, therefore, seems clear enough: rival claims of sovereignty need not prevent joint international action to protect a common natural heritage.

Notes

1 'New Protection for the Marine Life of the British Indian Ocean Territory', FCO Press Statement (1 April 2010). The announcement was preceded by a public 'Consultation on Whether to Establish a Marine Protected Area in the British Indian Ocean Territory', FCO Consultation Document (10 November 2009). In response to parliamentary questions, and unimpressed by Mauritian protests, the FCO has since confirmed its "intention to go ahead" with the marine protected area, to be co-financed by US and Swiss charities (Pew Charitable Trusts and Bertarelli Foundation) until 2013; see Hansard: House of Lords Debates 719 col. 1653 (29 June 2010), and Hansard: House of Commons Foreign Affairs Committee HC 438-i (8 September 2010).

2 'An Act to Remove Doubts as to the Validity of Colonial Laws', *28 & 29 Vict.* (1865), chapter 63; see D.B. Swinfen, *Imperial Control of Colonial Legislation 1813-1865: A Study of British Policy towards Colonial Legislation Powers* (Clarendon Press: Oxford 1970). On previous exercise of prerogative powers in the BIOT see R. Moules, 'Judicial Review of Prerogative Orders in Council: Recognising the Constitutional Reality of Executive Legislation', *Cambridge Law Journal* 67 (2008) 12–15; S. Allen, 'Reviewing the Prerogative of Colonial Governance', *Judicial Review* 14 (2009) 119–128; M. Elliott and A. Perreau-Saussine, 'Pyrrhic Public Law: *Bancoult* and the Sources, Status and Content of Common Law Limitations on Prerogative Power', *Public Law* 52 (2009) 697–722; and T. Poole, 'The Royal Prerogative', *International Journal of Constitutional Law* 8 (2001) 146–155.

3 There is no generally accepted definition of a "marine protected area", even though broad categories of protected areas have been recommended since 1994/2003 by the International Union for Conservation of Nature (IUCN); see A. Gillespie, 'Defining Internationally Protected Areas', *Journal of International Wildlife Law and Policy* 12 (2009) 229–247, 246; S. Wells and J. Day, 'Application of the IUCN Protected Area Management Categories in the Marine Environment', *Parks Magazine* 28 (2004) 28–38.

4 Unlike the 12-mile territorial waters of the British isles, the extent of the BIOT territorial sea has remained at three nautical miles, as defined in the BIOT Fishery Limits Ordinance of 1 October 1991; *British Yearbook of International Law* 62 (1991) 648.

5 See FCO Consultation Document, *supra* note 1, at 12.

6 See the tables in V.B. Bandjunis, *Diego Garcia: Creation of the Indian Ocean Base* (Writer's Showcase: San José/CA 2001) 309–310; and US Department of Defense, *Base Structure Report: Fiscal Year 2007 Baseline* (Government Printing Office: Washington/DC 2007) 78. According to a 1987 UK-US Agreement on Operations and Construction Contracts on Diego Garcia (1576 *UNTS* 179), at least 20 percent of all contractual procurement goes to British firms. For example, UK engineering consultants W.S. Atkins PLC of Epsom/Surrey have long held a lucrative 24.5 percent share in joint venture DG 21 LLC, for servicing the US base at Diego Garcia under contract with the US Department of Defense. The cumulative value of the contract (No. N6242-06-D-4501, renewed on 30 July 2010) currently stands at US$479 million, with a share of over US$117 million for the British partner firm, one of whose directors is retired Admiral Baron Boyce, former First Sea Lord of the Royal Navy.

7 See E. Afsah, 'Diego Garcia (British Indian Ocean Territory)', in R. Wolfrum (Ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press: Oxford, online September 2009 at http://www.mpepil.com); and P.H. Sand, *United States and Britain in Diego Garcia: The Future of a Controversial Base* (Palgrave Macmillan: New York 2009) 35–49, with Appendices I–IX (UK-US bilateral agreements on Diego Garcia, 1966–2004) 69–121.

8 Analogous to the new "marine national monuments" proclaimed by US President G.W. Bush in 2006 and 2009 (creating 50-mile "conservation zones" around several current and former US military bases in the Pacific); see D. Vine and M. Pemberton, 'Marine Protection as Empire Expansion', *Foreign Policy in Focus* (online 6 May 2009 at http://www.fpif.org/articles/marine_protection_as_empire_expansion); D. Vine, 'Environmental Protection of Bases?', *Foreign Policy in Focus* (online 22 April 2010 at http://www.fpif.org/articles/environmental_protectionof_bases); and *infra* note 126.

9 J. Nelson and H. Bradner (Pew Environment Group), 'The Case for Establishing Ecosystem-Scale Marine Reserves', *Marine Pollution Bulletin* 60 (2010) 635–637, the journal edited by BIOT Conservation Adviser C.R.C. Sheppard. According to the FCO, its initiative was supported by over 221,000 electronic signatures collected by the US-based online advocacy network *Avaaz*, which covered "responses from 223 countries" [*i.e.*, rather amazingly, 31 more than the current UN membership]; see R. Stevenson, *Whether to Establish a Marine Protected Area in the British Indian Ocean Territory: Consultation Report* (FCO: London 2010) 10 (para. 19).

10 See *Hansard: House of Commons Debates* 508 cols. 819–825 (6 April 2010); and J. Vidal, 'Chagos Islands Marine Protection Plan Comes Under Fire From Three Sides', *The Guardian* (6 April 2010).

11 *Chagos Islanders vs United Kingdom*, application No. 35622/04, [2009] ECHR 410 (20 February 2009), on appeal against the Law Lords' controversial decision in *R (on the application of Bancoult) vs Secretary of State for Foreign and Commonwealth Affairs (Bancoult 2)*, [2008] UKHL 61, *All England Law Reports* 4 (2008) 1055, *International Law Reports* 138 (2010) 628; case note in *American Journal of International Law* 103 (2009) 317–324. For background see J. Minahan, *Encyclopedia of the Stateless Nations: Ethnic and National Groups Around the World* (Greenwood Press: Westport/CT: 2002) 413–417; L. Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Earthscan: London 2008) 109–111, 167–168; D.R. Snoxell, 'Anglo-American Complicity in the Removal of the Inhabitants of the Chagos Islands', *Journal of Imperial and Commonwealth History* 37 (2009) 127–134; L. Jeffery, 'Forced Displacement, Onward Migration and Reformulation of "Home" by Chagossians in Crawley, UK', *Journal of Ethnic and Migration Studies* 36 (2010) 1099–1117; and J. Lunn, 'The Chagos Islanders', *Standard Notice* SN/IA/4463 (House of Commons Library: London, updated 2 June 2010).

12 FCO Consultation Document, *supra* note 1, at 7; and parliamentary statements by FCO Minister Baroness Kinnock of Holyhead, *Hansard: House of Lords Debates* 716 col. 307WA (26 January 2010), and 718 col. 1364 (6 April 2010).

13 *E.g.*, see D.S. Vine, *Island of Shame: The Secret History of the U.S. Military Base in Diego Garcia* (Princeton University Press: Princeton/NJ 2009); and G. Loftus, 'Diego Garcia: Freedom's Footprint, or Enduring Injustice?', [US] *Foreign Service Journal* 87:6 (2010) 13–14. See also the open letter by Nobel laureate Jean-Marie G. Le Clézio to US President Barack Obama, 'Lavez l'injustice faite aux Chagossiens', *Le Monde* (Paris, 19 October 2009).

14 See F. Pearce, 'Conservation at the Expense of Homes?', *New Scientist* 201: 2696 (21 February 2009) 10; C.R.C. Sheppard and J. Turner, 'Eco-Imperialism', letter to the editor, *New Scientist* 201:2700 (21 March 2009); and A. Boolell, 'No to Hypocrisy and Eco-Imperialism', *L'Express Weekly* (Port Louis/Mauritius, 19 February 2010) 32–33. For historical antecedents see R.H. Grove, *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600–1860* (Cambridge University Press: Cambridge 1996).

15 See E.M. de Santo *et al.*, 'Fortress Conservation at Sea: A Commentary on the Chagos Marine Protected Area', Marine Policy 34 (2010, forthcoming); H. Siurua, 'Nature Above People', *Ethics and Environment* 11 (2006) 71–96; D. Brockington *et al.*, *Nature Unbound: Conservation, Capitalism and the Future of Protected Areas* (Earthscan: London 2008) 83, 87; and M. Dowie, *Conservation Refugees: The Hundred-Year Conflict Between Conservation and Indigenous People* (MIT Press: Cambridge/MA 2009). See also D. Laffoley (Ed.), *Towards Networks of Marine Protected Areas: The MPA Plan of Action for IUCN's World Commission of Protected Areas* (IUCN: Gland 2008) at 8 ("any efforts to establish MPAs and MPA networks should, from the outset, involve communities and interested parties in a meaningful way"); the *Conservation and Human Rights Framework* signed by a consortium of international conservation NGOs in February 2010, at http://cms.iucn.org/about/work/programmes/social_policy/scpl; and the special IUCN website "Consultation on the Future of the Chagos Archipelago/British Indian Ocean Territory", at http://www.iucn.org/about/union/members/resources/news/?4727/.

16 *Declaration on the Granting of Independence to Colonial Countries and People*, UN General Assembly Resolution 1514 (XV) of 14 December 1960, UN doc. A/38/711 ("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"); and *Question of Mauritius*, UN General Assembly Resolution 2066 (XX) of 16 December 1965, UN doc. A/6014/57 (calling on the UK "to take no action which would dismember the territory of Mauritius and violate its territorial integrity"). See also A. Oraison, 'Le contentieux territorial anglo-mauricien sur l'archipel des Chagos revisité', *Revue de Droit International et de Sciences Diplomatiques et Politiques* 83 (2005) 109–208; T. Ollivry, *Diego Garcia: Enjeux stratégiques, diplomatiques et humanitaires* (L'Harmattan: Paris 2008) 91; Mi Yung Yoon, 'European Colonialism and Territorial Disputes in Africa: The Gulf of Guinea and the Indian Ocean', *Mediterranean Quarterly* 20 (2009) 77–94, at 89–92; and House of Commons Select Committee on Foreign Affairs, Session 2009-10, *Overseas Territories*: Written Evidence by Mauritian High Commissioner Abhimanu Kundasamy on the UK proposal for the establishment of a marine protected area around the Chagos Archipelago, OT 423 (Her Majesty's Stationery Office: London, 4 February 2010).

17 Constitution of the Republic of Mauritius, as amended by Act No. 48 of 17 December 1991, *Legal Supplement to the Government Gazette of Mauritius* No. 131 (23 December 1991) 231; see G.H. Flanz (Ed.), *Constitutions of the Countries of the World* 12 (Oceana: Dobbs Ferry/NY 1998) 81, 95.

18 J. Crawford, *The Creation of States in International Law* (2nd edn., Clarendon: Oxford 2006) 337.

19 *E.g.*, see the statements of 5 December 1983, 9 October 1987, 12 October 1988 and 11 November 2001; UN docs. A/35/PV.30, 590; A/38/711, 1; A/42/32, 48; A/43/28, 38; and A/56/46, 17. See also J.C. de l'Estrac, 'Diego Garcia: Mauritius Battles a Superpower to Reclaim a Cold War Hostage', *Parliamentarian: Journal of the Parliaments of the Commonwealth* 72 (1991) 267–270; and R. Bradley, 'Diego

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Garcia: Britain in the Dock', *Boundary and Security Bulletin* 7 (1999) 82–88, at 87.

20 *E.g.*, see the Mauritian declaration of accession (18 August 1992) to the 1985 Vienna Convention for the Protection of the Ozone Layer (1513 *UNTS* 293) and the 1987 Montreal Protocol on Ozone-Depleting Substances (1522 *UNTS* 3), followed by a diplomatic protest from the UK, *British Yearbook of International Law* 68 (1997) 485.

21 1833 *UNTS* 3, ratified by Mauritius on 4 November 1994 (accession by the UK on 25 July 1997, with an extension to the BIOT). Upon acceding to the 1995 Implementation Agreement on Straddling Fish Stocks (2167 *UNTS* 3), Mauritius objected (by a declaration on 25 March 1997) to Britain's extension of the Agreement to the BIOT, reaffirming its "sovereignty and sovereign rights over these islands, namely the Chagos Archipelago which form an integral part of the national territory of Mauritius, and over their surrounding maritime spaces". The UK defended its position by a declaration on 30 July 1997, and (following UK ratification of the Agreement on behalf of the BIOT on 3 December 1999) Mauritius reiterated its objection by a further declaration on 8 February 2002. See also A.K.L.J. Mlimuka, *The Eastern African States and the Exclusive Economic Zone: The Case of EEZ Proclamations, Maritime Boundaries and Fisheries* (LIT Verlag: Hamburg 1998) 100–101.

22 Maritime Zones Regulations No. 199 (table C1.T165), based on the Territorial Seas Act No. 4 of 1970; superseded by the Maritime Zones Regulations No. 126 of 5 August 2005 implementing the Maritime Zones Act of 28 February 2005.

23 Maritime Zones (Baselines and Delineating Lines) Regulations of 5 August 2005, as notified to the UN Secretariat on 20 June 2008, see *Law of the Sea Bulletin* 67 (2008) 13; followed by a diplomatic protest from the UK on 19 March 2009 and a rejoinder by Mauritius, published in *Law of the Sea Bulletin* 69 (2009) 110 and 70 (2009) 59.

24 UN Commission on the Limits of the Continental Shelf (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); geographical coordinates to be finalised by 2012.

25 *Official Journal of the European Communities* [1989] L 159/2. The preamble recalls the Mauritian declaration of a 200-mile EEZ in accordance with the Law of the Sea Convention; Article 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"; and Article 10 confirms that the Agreement applies "to the territory of Mauritius".

26 17th session of the OAU Assembly of Heads of State and Government (Freetown, 4 July 1980), Resolution AHG/99 (XVII) on Diego Garcia; 74th session of the OAU Council of Ministers (Lusaka, 8 July 2001), Decision CM/26 (LXXIV) on the Chagos Archipelago including Diego Garcia; and 15th AU Assembly (Kampala, 27 July 2010), Decision 331(XV) on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago. The African Union lists the Chagos Islands among "African territories under foreign occupation"; see A.O. Komaré (Ed.), *Strategic Plan of the African Union Commission* 1 (African Union: Addis Ababa, May 2004) Annex 3, at 43.

27 See statements in the UN General Assembly in 1983 and 2002; *British Yearbook of International Law* 55 (1984) 519 and 73 (2002) 701.

28 *British Yearbook of International Law* 62 (1991) 648 and 74 (2003) 680; *Law of the Sea Bulletin* 54 (2004) 99.

29 See M. O'Shea, 'Serious Questions Over Sea Boundaries Between Maldives and British Indian Ocean Territory', at http://www.malidivesculture.com (20 December 2007).

30 Article 2 of BIOT Proclamation No. 1 of 17 September 2003, *Law of the Sea Bulletin, supra* note 28.

31 Written answer by FCO Minister of State Kim Howells, *Hansard: House of Commons Debates* 470 col. 559W (9 January 2008), *British Yearbook of International Law* 79 (2008) 727; see also the statement by Maldivian Foreign Minister Ahmed Shaheed, 'Maldives Express Concern on UK's "Environment Protection Zone" in Diego Garcia', *Miadhu News* (Male, 9 May 2010).

32 Statement by Mauritian Foreign Minister Arvin Boolell, as quoted in 'Chagos: opposition et inquiétudes des Maldives', *Le Mauricien* (Port Louis, 19 February 2010). Given that both the Maldives and Mauritius have a 12-mile territorial sea (*supra* notes 22–23), as distinct from the three miles of the BIOT (*supra* note 4), the new northern "median line" boundary of the Chagos EEZ will be different.

33 UN Commission on the Limits of the Continental Shelf (CLCS), *Joint Submission by the Republic of Mauritius and the Republic of Seychelles* (UN Division for Ocean Affairs and the Law of the Sea: New York 2008).

34 See the *Feasibility Study for the Resettlement of the Chagos Archipelago: Phase 2B* (Posford Haskoning: Peterborough 2002), a consultant study commissioned and "redacted" by the FCO, cited in *British Yearbook of International Law* 75 (2004) 663, and 77 (2006) 638; also submitted to the European Court of Human Rights on 31 July 2009, as Exhibit V of the UK Government's observations on the admissibility and merits of application 35662/04 (*Chagos Islanders vs UK*, *supra* note 11).

35 In 1997, the UK abandoned its claim to an EEZ around the uninhabitable island of Rockall in the Atlantic (400 km off the coast of Scotland), citing UNCLOS Article 121(3); see the statement by Foreign Secretary Robin Cook, *Hansard: House of Commons Debates* 298 col. 397 (21 July 1997); J.I. Charney, 'Rocks That Cannot Sustain Human Habitation', *American Journal of International Law* 93 (1999) 863–878, at 866 n. 21; and F. MacDonald, 'The Last Outpost of Empire: Rockall and the Cold War', *Journal of Historical Geography* 32 (2006) 627–647.

36 Statement by FCO Parliamentary Undersecretary of State Bill Rammell, *Hansard: House of Commons Debates* 423 col. 292WH (7 July 2004), *British Yearbook of International Law* 75 (2004) 669.

37 For the period until 2006, see the tables in *Hansard: House of Commons Debates* 446 col. 1415W (22 May 2006); current FCO revenues from fishing licences in the BIOT (to fishing companies from France, Japan, Mauritius, Spain and Taiwan) are given as approximately one million pounds sterling per year, mainly for tuna fisheries. According to the UK report to the Indian Ocean Tuna Commission (*infra* note 46), total annual catches in 2008–2009 were 15,358 tonnes; see Doc. IOTC-2009-SC-R[E] 60.

38 On the US position see B. Wilson and J. Kraska, 'American Security and Law of the Sea', *Ocean Development and International Law* 40 (2009) 268–290, 282.

39 See B.H. Oxman, 'The Territorial Temptation: A Siren Song at Sea', *American Journal of International Law* 100 (2006) 830–851; and P.H. Sand, '"Green" Enclosure of Ocean Space: *Déjà Vu*?', *Marine Pollution Bulletin* 54 (2007) 374–376.

40 In the view of A. Merialdi, 'Legal Restraints on Navigation in Marine Specially Protected Areas', in T. Scovazzi (Ed.), *Marine Specially Protected Areas* (Kluwer Law International: The Hague 1999) 29–34, 34, "Article 211(6) rules out any right of coastal States to act unilaterally for the special protection of marine areas in the EEZ. Coastal States, in fact, are only given a power of initiative; *i.e.*, they can put forward proposals to the competent international organization for the designation of a special area".

41 See R. Lagoni, 'Marine Protected Areas in the Exclusive Economic Zone', in A. Kirchner (Ed.), *International Marine Environmental Law: Institutions, Implications and Innovations* (Kluwer Law International: The Hague 2003) 157–168.

42 See W. Marsden (Ed.), *The Chagos Archipelago: Its Nature and the Future* (Chagos Conservation Trust/Pew Environment Group: London 2009) at 5, quoted as reference source in the FCO Consultation Document, *supra* note 1, at 3, 7 and 11.

43 Pursuant to the 1972 *Convention for the Protection of the World Cultural and Natural Heritage*, 1037 *UNTS* 151. The Galapagos Marine Reserve was so designated by the WHC in 1978, the Great Barrier Reef Marine Park in 1981, the Phoenix Islands Protected Area and the Papahānaumokuākea (Northwestern Hawaiian Islands) Marine National Monument on 30 July 2010.

44 Pursuant to the 1991 IMO "Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas (PSSA)", as revised in 2001 and 2005. See J.P. Roberts, *Marine Environment Protection and Biodiversity Conservation: The Application and Future Development of the IMO's Particularly Sensitive Sea Area Concept* (Springer: Berlin 2006); and M.J. Kachel, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas* (Springer: Berlin 2008). The Great Barrier Reef Marine Park was so designated by the MEPC in 1990; the Galapagos Marine Reserve in 2005; and the Papahānaumokuākea Marine National Monument on 3 April 2008, see 73 *US Federal Register* 73593 (3 December 2008).

45 For precedents of joint WHC and MEPC nominations see notes 135–138 *infra*.

46 *Agreement for the Establishment of the Indian Ocean Tuna Commission*, adopted by the FAO Council on 25 November 1993, in force March 1996; text in *Yearbook of International Environmental Law* 4 (1993) doc. 17. The Maldives are committed to ratify the agreement in the near future; see Doc. IOTC-2010-S14-CoC20 (10 November 2009).

47 P. Birnie *et al.*, *International Law and the Environment* (3rd edn, Oxford University Press: Oxford 2009) 717. On the US position that would exclude tuna from the jurisdiction of coastal States in the EEZ altogether, see I. Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press: Oxford 2009) 201 ("difficult to substantiate").

48 See F. Pope, 'Chief Scientist's Enterprise Blocks Indian Ocean Haven', *The Times* (London, 22 January 2010) 30–31. MRAG Ltd (whose US affiliate is *MRAG Americas Inc.*, closely connected to the Pew Environment Group's *Lenfest Ocean Program*) also manages fisheries in other UK overseas territories including South Georgia, South Sandwich Islands and the Falkland Islands.

49 See Indian Ocean Tuna Commission, *IOTC Circular* 36 (13 November 2009) 2.

50 Southern Indian Ocean Fisheries Agreement, *Official Journal of the European Union* [2006] L 196/15, EU Council approval in *Official Journal* [2008] L 268/27. Mauritius signed the agreement with a declaration reserving its "rights to exercise complete and full sovereignty over its territory, including the territory and maritime zones of the Chagos Archipelago and Tromelin as defined in the Constitution of Mauritius". Following ratification by the Seychelles and the EU, the Agreement now needs only two further ratifications by Indian Ocean coastal States to enter into force.

51 RECOMAP (see http://www.recomap-io.org) in Quatre-Bornes/Mauritius also

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serves as coordinating centre for the IOC regional marine protected area network (*Réseau des aires marines protégées des pays de la COI*) based in Madagascar; see K. Tetzlaff, 'Indian Ocean Commission', *Yearbook of International Environmental Law* 18 (2007) 659–663, at 661.

52 Convention and Protocols for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern Africa Region (Nairobi, 21 June 1985), *Official Journal of the European Communities* [1986] C 253/10; and the Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean adopted (with a supplementary protocol) by the 6th Conference of the Parties at Nairobi on 31 March 2010; text in Doc. UNEP(DEPI)/EAF/CPP.6/8a.Suppl (2010).

53 See *Nairobi Convention: National Status Report on the Marine and Coastal Environment* (Ministry of Environment and National Development Unit: Port Louis, October 2007) 14, 23.

54 See S. Chape *et al.* (Eds), *The 2003 United Nations List of Protected Areas* (IUCN and UNEP World Conservation Monitoring Centre: Cambridge 2003).

55 Under the 1946 International Convention for the Regulation of Whaling (161 *UNTS* 72, ratified by the UK and the USA with effect from 10 November 1948); see S.J. Holt, 'The Indian Ocean Whale Sanctuary', *Ambio* 13 (1983) 345–347. The Convention applies to the BIOT, according to C.R.C. Sheppard and M. Spalding (Eds), *Chagos Conservation Management Plan* (Foreign and Commonwealth Office: London, October 2003) 14.

56 E. Morgera, 'Whale Sanctuaries: An Evolving Concept within the International Whaling Commission', *Ocean Development and International Law* 35 (2004) 319–338.

57 There is very scant information on the Chagos Archipelago in the reviews undertaken by S. Leatherwood and G.P. Donovan (Eds), *Cetaceans and Cetacean Research in the Indian Ocean Sanctuary* (United Nations Environment Programme: Nairobi 1991), and M.N. de Boer *et al.* (Eds), *Cetaceans in the Indian Ocean Sanctuary: A Review* (Whale and Dolphin Conservation Society: Chippenham 2003).

58 For a description of these (partly classified) programmes see J.M. Van Dyke *et al.*, 'Whales, Submarines, and Active Sonar', *Ocean Yearbook* 18 (2004) 330–363; J.M. Di Mento, *Beyond the Water's Edge: United States National Security and the Ocean Environment* (Fletcher School of Law and Diplomacy thesis: Medford/MA 2006) 256, 294, 532; and D.K. Blackman *et al.*, 'Testing Low/Very Low Frequency Acoustic Sources for Basin-Wide Propagation in the Indian Ocean', *Journal of the Acoustic Society of America* 116 (2004) 2057–2066 (referring to the participation of Diego Garcia as a receptor station). In a court-enforced settlement on 27 December 2008, the US Navy agreed to disclose previously classified information on its sonar use, and to prepare environmental statements for sonar exercises and ranges around the world; see J.R. Reynolds *et al.*, 'No Whale of a Tale: Legal Implications of *Winter v. NRDC*', *Ecology Law Quarterly* 36 (2009) 753–773; and R.K. Craig, 'The Military and the Environment in the USA: Exemptions, Injunctions, and *Winter v. Natural Resources Defense Council*', *Review of European Community and International Environmental Law* 18 (2009) 100–103.

59 According to the IWC Scientific Committee, "there is now compelling evidence implicating military sonar as a direct impact on beaked whales in particular"; *IWC Report* 56 (2004), Annex K, paragraph 6.4. See also Resolution 3.068 on Undersea Noise Pollution, adopted by the 3rd IUCN World Conservation Congress (IUCN, Bangkok, 25 November 2004); and Resolution 9.19 adopted by the 9th Conference of the Parties to the Convention on Migratory Species (Rome, 5 December 2008).

60 E.C.M. Parsons *et al.*, 'The Conservation of British Cetaceans: A Review of the Threats and Protection Afforded to Whales, Dolphins, and Porpoises in UK Waters', *Journal of International Wildlife Law and Policy* 13 (2010) 1–62 (Part 1) 61; and 99–175 (Part 2) 169.

61 In response to requests for records (under the *Freedom-of-Information Act*, FOIA) on environmental impact assessments of those programmes at the Diego Garcia base, the US Navy replied that "a diligent search was conducted, but no records were found" (FOIA FY-09-08, 16 April 2009); and the BIOT Administration replied that "we have no knowledge of US Navy carrying out underwater sound propagation programmes in Diego Garcia" (FOIA 0801-09, 14 October 2009). Yet, all new SSGN submarines forward-deployed to Diego Garcia since 2009 (*infra* note 98) are known to be fitted with active and passive bow-mounted sonar.

62 See A.I. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge University Press: Cambridge 2007) 206.

63 M. Hunt, *Using Human Rights in English Courts* (Hart Publishing: Oxford 1997) 25; see also A.I. Aust, *Handbook of International Law* (Cambridge University Press: Cambridge 2005) 81–83.

64 Lord Hoffmann for the majority, in *Bancoult 2*, *supra* note 11, paragraph 64.

65 See H. Fox, 'United Kingdom of Great Britain and Northern Ireland: Dependent Territories', in R. Bernhardt (Ed.), *Encyclopedia of Public International Law* 4 (Elsevier: Amsterdam 2000) 1025–1029, 1026. See also the FCO legal advice of 16 January 1970 (by A.I. Aust) to "maintain the fiction" of a non-permanent population, in order 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 art 73 of the Charter"; as quoted by Lord Justice Laws in *The Queen (ex parte Bancoult) vs Foreign and Commonwealth Office*, Queen's Bench Reports [2001] 1080, 1086.

66 993 *UNTS* 3 and 999 *UNTS* 171.

67 See Fox, *supra* note 65, at 1029.

68 Report of the Committee on its 93rd Session (Geneva, 7–25 July 2008), UN doc. CCPR/C/GBR/CO/6 (30 July 2008) 6; see also S. Allen, 'International Law and the Resettlement of the (Outer) Chagos Islands', *Human Rights Law Review* 8 (2008) 683–702.

69 75 *UNTS* 135 and 287.

70 By contrast, Protocols I and II of 1977 (International and Non-International Armed Conflicts, 1125 *UNTS* 3 and 609, ratified by the UK on 28 January 1998) were extended to the BIOT by declaration on 2 July 2002; see the Geneva Convention (Amendment) Act (Overseas Territories) Order of 17 April 2002, *Statutory Instruments* [2002] 1076.

71 2187 *UNTS* 3. Mauritius also ratified the ICC Statute on 5 March 2002, but later signed a bilateral immunity agreement with the United States (on 25 June 2003, not yet ratified) exempting US personnel on its territory from ICC jurisdiction; see J. Kelley, 'Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements', *American Political Science Review* 101 (2007) 573–589.

72 1465 *UNTS* 85.

73 L. Moor and A.W.B. Simpson, 'Ghosts of Colonialism in the European Convention on Human Rights', *British Yearbook of International Law* 26 (2005) 121–193, 162, 188, 193. See also P.H. Sand, 'Diego Garcia: British-American Legal Blackhole in the Indian Ocean', *Journal of Environmental Law* 21 (2009) 113–139; *id.*, 'Diego Garcia: nouveau "trou noir" dans l'océan Indien', *Revue Générale de Droit International Public* 113 (2009) 365–374.

74 *Environment Charter: British Indian Ocean Territory*, Commitments paragraph 3 (Foreign and Commonwealth Office: London, 26 September 2001); see M. Pienkowski (Ed.), *Measures of Performance by 2007 of UKOTs and UK Government in Implementing the 2001 Environment Charters or Their Equivalents* (UK Overseas Territories Conservation Forum: Peterborough 2007) 14.

75 *Supra* note 20.

76 1673 *UNTS* 57. Mauritius ratified on 24 November 1992.

77 See 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.(Epsom/London), at http://www.richardchase.com/resume.htm.

78 Further Supplementary Arrangements on Diego Garcia (13 December 1982), 2001 *UNTS* 397, paragraph 4.

79 See T. Tucker and B.T. Doughty, 'Naval Facilities, Diego Garcia, British Indian Ocean Territory: Management and Administration', *Proceedings of the Institution of Civil Engineers: Maritime Engineering Group* 84 (1988) 191–215, at 214.

80 In October 2006, the US Navy sold 4,400 tons of accumulated 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 J.E. Davis, 'Diego Garcia Earns $133,000 From Selling Scrap', *US Navy Press Release* NNS061013-09 (13 October 2006).

81 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); on the legal controversy over military PCB imports in particular, see *Sierra Club vs EPA*, 9th Circuit Court of Appeals, 118 F.3d 1324 (1997).

82 1760 *UNTS* 79; on the FCO veto see F. Pearce, 'Britain's Abandoned Empire', *New Scientist* 142:1922 (23 April 1994) 26. The United States signed the Convention on 4 June 1994, but never ratified it. Mauritius ratified on 4 September 1992, and has made it clear that its ratification applies to the Chagos Archipelago and Diego Garcia; see National Parks and Conservation Service, *First National Report to the Convention on Biological Diversity* (Ministry of Agriculture, Food Technology and Natural Resources: Port Louis 2000) 8, 27.

83 C.R.C. Sheppard, 'British Indian Ocean Territory (Chagos Archipelago): Our Global Opportunity', *Science in Parliament* 66:4 (2009) 30–31, at 30.

84 Parliamentary statement by FCO Minister Chris Bryant, *Hansard: House of Commons Debates* 508 col. 822 (6 April 2010).

85 2303 *UNTS* 148; also ratified by Mauritius on 22 July 2005.

86 S. Goodman (Ed.), *National Security and the Threat of Climate Change* (Center for Naval Analyses: Alexandria/VA 2007) 48; see also C. Bouchard, 'Climate Change, Sea Level Rise, and Development in Small Island States and Territories of the Indian Ocean', in T. Doyle and M. Risely (Eds), *Crucible for Survival: Environmental Security and Justice in the Indian Ocean* (Rutgers University Press: New Brunswick/NJ 2008) 258–272, at 270 note 2.

87 Adopted at Aarhus/Denmark on 25 June 1998, 2161 *UNTS* 447.

88 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 (United Nations Economic Commission for Europe: Geneva, 17 December 2002), reprinted in *Environmental Policy and Law* 33 (2003) 178–179.

89 E-mail message to the author from BIOT Administrator Joanne 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".

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90 2256 *UNTS* 119 , ratified by 171 countries (including Mauritius on 13 July 2004) and the European Union.

91 See A. Price, 'Rapid Coastal Environmental Assessment', *Chagos News* 36 (July 2010) 23–26, at 25 (suggesting that PFOS use at the Diego Garcia military base might be a possible local source of entry in the Chagos).

92 Convention for the Protection of the World Cultural and Natural Heritage (Paris, 16 November 1972), 1037 *UNTS* 151 (*supra* note 43); also ratified by the United States on 7 December 1973, and by Mauritius on 19 September 1995.

93 Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, 2 February 1971), 996 *UNTS* 245; also ratified by the United States with effect from 18 April 1987, and by Mauritius with effect from 30 September 2001. The Diego Garcia site (No. 1077, *2UK001*) was listed by the UK on 4 July 2001; see D. Taylor *et al.* (Eds), *Ramsar Sites Directory and Overview* (8th edn, Wetlands International: Wageningen 2005); and the map in M.W. Pienkowski, *Review of Existing and Proposed Ramsar Sites in UK Overseas Territories and Crown Dependences* (Department of Environment, Food and Rural Affairs: London 2005) 98, 865.

94 See J.E. Hansen, *Cleanup Plan for Fuel Spills at Air Operations Ramp, Diego Garcia, British Indian Ocean Territory*, Pentagon Report A87824 (US Air Force Center for Environmental Excellence: Brooks City/TX, 25 May 1999); J.E. Hansen and D. Kampbell, 'Large-Scale Bioslurping Operations Used for Fuel Recovery', *Environmental Protection Agency Technology News and Trends* 8 (2003) 2–3. Even though the spills far exceeded those reported from other US overseas bases, they were not widely publicised, and there is no reference to them in the otherwise comprehensive worldwide *Incident News* website maintained by the US National Oceanic and Atmospheric Administration (NOAA).

95 See R. Edis, *Peak of Limuria: The Story of Diego Garcia and the Chagos Archipelago* (Chagos Conservation Trust: London, rev. edn 2004) 103.

96 The so-called "Montreux Record", established by Ramsar Conference Resolutions 4.8 (1990) and 5.4 (1993), lists sites where an adverse change in ecological character (such as pollution) has occurred, is occurring, or is likely to occur; see M.J. Bowman, 'The Ramsar Convention Comes of Age', *Netherlands International Law Review* 42 (1995) 1–52, note 71. However, according to the "Montreux Guidelines" adopted by Conference Resolution 6.1 (1996), a site can only be included in the Record with the approval of the Contracting Party concerned; as was the case, *e.g.*, in the United Kingdom, for the Dee Estuary (in 1990) and the Ouse Washes (in 2000).

97 Press statement by Pentagon spokesman B. Whitman, *CNN-Online* (7 July 2008). The material originated from the remnants of Iraq's former nuclear facility in Tuwaitha (bombed out of operation by Israel in 1981), sold by the Government of Iraq to Cameco Corp., Ontario, for enrichment processing and use in nuclear power plants; see M. Lugo, 'U.S. Removes Uranium From Iraqi Nuclear Site', *Arms Control Today* 38 (online, September 2008); and R.K. Chesser *et al.*, 'Piecing Together Iraq's Nuclear Legacy', *Bulletin of the Atomic Scientists* 65:3 (2009) 19–33.

98 Statement by Rear Admiral Douglas McAneny, *US Navy Press Release* NNS09120301 (Pearl Harbor, 3 December 2009) See also A. Erickson *et al.*, 'Diego Garcia and America's Emerging Indian Ocean Strategy', Asian Security 6 (2010) 221.

99 See M. Zucchetti and F. Aumento, 'Accidents in Nuclear Powered Submarines and Their Effects on Environmental Marine Pollution', *Journal of Environmental Protection and Ecology* 1 (2006) 176–185; F. Aumento *et al.*, 'Nuclear Powered Submarines as Hazards for the Marine Environment', *Fresenius Environmental Bulletin* 15:9A (2006) 1068–1075; and *Hansard: House of Lords Debates* 719 col. 1653 (29 June 2010). After media allegations that radioactive coolant water had illegally been discharged in Italian territorial waters by *USS Emory S. Land*, the tender departed on 29 September 2007, and the US Navy finally closed the base in February 2008.

100 Karen Sumida, Naval Facilities Engineering Command Pacific, Response to Freedom-of-Information Request CNFJ 10-27 (Pearl Harbor, 25 January 2010).

101 A. Davidson and L. Sunley, *Marine Environmental Radioactivity Surveys at Nuclear Submarine Berths 2006* (Defence Science and Technology Laboratory, HMSO: London 2008) Paragraph 8.8, Tables 39-40 and Figures 27–29.

102 Prof. Charles R.C. Sheppard, University of Warwick, e-mail to the author (24 March 2010).

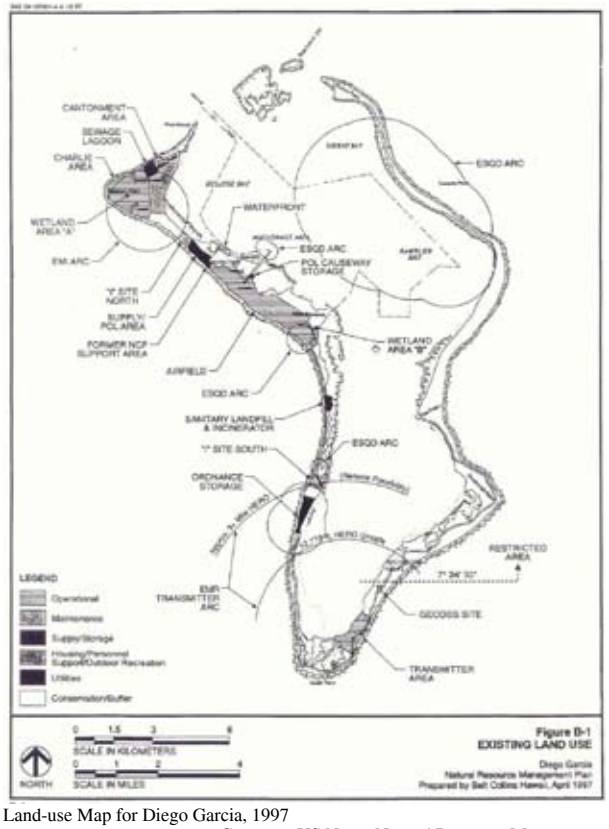
103 UN General Assembly Resolution 2832 (XXVI) of 16 December 1971; implemented by Resolution 2992 (XXVII) of 15 December 1972. See K.S. Jawatkar, *Diego Garcia in International Diplomacy* (Popular Prakash: Bombay 1983) 215–225; D. Braun, *The Indian Ocean: Region of Conflict or Zone of Peace?* (Hurst: London 1983); and P. McAlister-Smith, 'Zones of Peace', in R. Bernhardt (Ed.), *Encyclopedia of Public International Law* 4 (Elsevier: Amsterdam 2000) 1621–1633, at 1625.

104 Named for the former South African nuclear weapons facility near Pretoria, and opened for signature at Cairo on 11 April 1996, *International Legal Materials* 35 (1996) 698; treaty map in C. Poitevin, *Le traité de Pelindaba: l'Afrique face au défi de la prolifération nucléaire* (Groupe de recherche et d'information sur la paix et la sécurité: Brussels 2009) 31. See P.H. Sand, 'African Nuclear-Weapon-Free Zone in Force: What Next for Diego Garcia?', *American Society of International Law: Insights* 13 (28 August 2009) 12; and *id.*, 'Diego Garcia: A Thorn in the Side of Africa's Nuclear-Weapon-Free Zone', *Bulletin of the Atomic Scientists* 65 (op-ed, 8 October 2009). On protocols I and II, ratified by the UK on 19 March 2001, see the *Explanatory Memorandum for the African Nuclear-Weapon-Free Zone Treaty (The Treaty of Pelindaba)*, Command Paper 3498 (Her Majesty's Stationery Office: London 2000).

105 O. Adeniji, *The Treaty of Pelindaba on the African Nuclear-Weapon-Free Zone* (United Nations Institute for Disarmament Research: Geneva 2002) 149–150; with a letter from the Mauritian Foreign Minister to the OAU Secretary General, *ibid.* 285.

106 Letter from the British Ambassador to the OAU Secretary General (Cairo, 11 April 1996), reprinted in Adeniji (*supra* note 105) 157, 299.

107 Declarations and understandings reprinted in Adeniji (*supra* note 105) 157, 301. The US Government co-signed the protocols under the Clinton Administration in 1996, but after a heated debate did not submit them to the Senate for ratification; see J.E. Nolan, *An Elusive Consensus: Nuclear Weapons and American Security After the Cold War* (Brookings Institution: Washington/DC 1999) 77–84; and



Land-use Map for Diego Garcia, 1997
Courtesy: US Navy, Natural Resource Management Plan Diego Garcia (declassified 2007)

K.K. Schonberg, 'The Generals' Diplomacy: U.S. Military Influence in the Treaty Process, 1992–2000', *Seton Hall Journal of Diplomacy and International Relations* 3 (2002) 68–86, at 80.

108 Baroness Kinnock of Holyhead, Private Notice Questions, *Hansard: House of Lords Debates* 718 col. 1364 (6 April 2010).

109 On the role of ICBL see K. Lawand, 'The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention)', in G. Ulfstein (Ed.), *Making Treaties Work: Human Rights, Environment and Arms Control* (Cambridge University Press: Cambridge 2007) 324–350, at 342.

110 *Landmine Monitor Report 1999: Toward a Mine-Free World* (ICBL: London 1999) 328–334, citing official US sources for Diego Garcia stocks as of 1997; see also C.W. Jacobs, 'Taking the Next Step: An Analysis of the Effects the Ottawa Convention May Have on the Interoperability of United States Forces with the Armed Forces of Australia, Great Britain and Canada', *Military Law Review* 180 (2004) 49–114, at 67; and US General Accounting Office, *Military Operations: Information on U.S. Use of Land Mines in the Persian Gulf War* (GAO-02-1003: Washington/DC, 30 September 2002) 39 (Table 7, showing a total of at least 10.3 million antipersonnel landmines stockpiled by the US Department of Defense).

111 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted at Ottawa on 18 September 1997, 2056 *UNTS* 211; ratified by Mauritius on 3 December 1997, and by the UK on 31 July 1998 (extended to overseas territories, explicitly including the BIOT, on 4 December 2001). ➳

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112 Written answer by Foreign Secretary Robin Cook [emphasis added], *Hansard: House of Commons Debates* 345 col. 504W (6 March 2000); see also the letter dated 25 February 2003 from Adam Ingram, Minister of State for the Armed Forces, to the Diana Princess of Wales Memorial Fund and the ICBL, quoted in Jacobs, *supra* note 110, at 95 note 182.

113 Statement by Ambassador David Broucher, 'General Status and Operation of the Convention: United Kingdom Intervention on Article 1', as quoted in Jacobs, *supra* note 110, at 96.

114 "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"; ICRC Legal Office, in ICBL 1999 (*supra* note 110) Annex, 1005–1006; see also S. Maslen, *Commentaries on Arms Control Treaties: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction* (Oxford University Press: Oxford 2004) 100.

115 *E.g.*, see the US$46.5 million contract awarded to Sealift Inc. of Oyster Bay/NY for time-charter of its cargo ship *MV Fisher* to "preposition" ammunition in and around Diego Garcia from November 2009 to September 2014; contract N00033-09-C-3301, *Defense Industry Daily* (14 July 2009), following earlier similar time-charters since 1998. On ship-based ammunition storage at Diego Garcia (within designated "explosive safety quantity distance" arcs in the lagoon) see generally E.J. Labs, *The Future of the Navy's Amphibious and Maritime Prepositioning* (U.S. Congressional Budget Office: Washington/DC, November 2004) 6.

116 Convention on Cluster Munitions, adopted at Dublin on 30 May 2008, International Legal Materials 48 (2009) 354, ratified by 39 States (not including the USA) to date; see G. Nystuen and S. Casey-Maslen (Eds), The Convention on Cluster Munitions: A Commentary (Oxford University Press: Oxford 2010). So far, the Convention has not been extended to the BIOT; see section 33 of the *Cluster Munitions (Prohibitions) Act* of 25 March 2010 (2010 Public Acts, chapter 11). Note that section 9 of the Act (the so-called NATO clause) exempts "international military operations" involving "members of the armed forces of a State that is not a party to the Convention" from section 2 (possession and transfer of prohibited munitions), a provision similar to section 5(5) of the UK *Landmines Act* of 28 July 1998 (1998 Public Acts, chapter 33). The UK Ministry of Defence therefore takes the position that the Convention "does not prevent the US from continuing to stockpile cluster munitions on its bases on UK territory (including Diego Garcia)"; written answer by Bob Ainsworth, Minister of State for the Armed Forces, *Hansard: House of Commons Debates* 476 col. 1061W (5 June 2008).

117 Written answer by Baroness Taylor of Bolton, Minister for International Defence and Security, *Hansard: House of Lords Debates* 718 col. 385WA (6 April 2010).

118 Statement by FCO Minister Baroness Kinnock of Holyhead, *Hansard: House of Lords Debates* 715 col. 1020 (8 December 2009); see also the written answer by FCO Minister Bill Rammell, *Hansard: House of Commons Debates* 508 col. 1506W (8 April 2010). Note that according to Article 7(1)(b) of the Dublin Convention (which is identical to a corresponding provision of the Ottawa Convention), the UK must submit annual reports regarding the total of all stockpiled prohibited munitions "under its jurisdiction and control" [emphasis supplied]; see Maslen, *supra* note 114, at 203.

119 *International Legal Materials* 31 (1992) 246; see Federation of American Scientists, *Strategic Arms Reduction Treaty (START) Inspectable Sites in the United States* (FAS: Washington/DC, online 1997 at http://www.fas.org/nuke/control/start1/news/stus97.html).

120 A. Diakov and E. Miasnikov, 'RESTART: The Need for a New U.S. Russian Strategic Arms Agreement', *Arms Control Today* 36:7 (2006) 6–11, at 9.

121 Text in American Society of International Law, *Developments in International Law* (Washington/DC, online 9 April 2010).

122 D. Proctor and L.V. Fleming (Eds), *Biodiversity: The UK Overseas Territories* (Joint Nature Conservation Committee: Peterborough 1999) 38; statement reiterated in H. Berends and J. Pears (Eds), *Overseas Countries and Territories: Final Report to the European Commission/Europe Aid Cooperation Office*, Part 2 Section B: Indian Ocean Region (NIRAS/PINSISI Consultants: Brussels 2007) 36.

123 See M.M. Gillem, *America Town: Building the Outposts of Empire* (University of Minnesota Press: Minneapolis 2007) 263.

124 See K.J.P. Deslarzes *et al.*, 'The Condition of Fringing Reefs Off Former Military Training Areas at Isla de Culebra and Isla de Vieques, Puerto Rico: Preliminary Results', in *Proceedings of the 10th International Coral Reef Symposium, Okinawa 2004* (Reefbase: Penang 2006) 1152–1159; and D. Havlick, 'Logics of Change for Military-to-Wildlife Conversions in the United States', *Geo Journal* 69 (2007) 151–164; but see also J.P. Dudley *et al.*, 'Effects of War and Civil Strife on Wildlife and Wildlife Habitats', *Conservation Biology* 16 (2002) 319–329 ("modern technology and chemical agents have more negative than positive effects on wildlife in military areas").

125 K.D. Chanbonpin, 'Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines', *Asia-Pacific Law and Policy Journal* 4 (2003) 320–380; T.M. Proechel, 'Solving International Environmental Crimes: The International Environmental Military Base Reconstruction Act, a Proposal and a Solution', *Loyola at Los Angeles International and Comparative Law Review* 29 (2007) 121–151; H. Kiminori *et al.*, 'Overcoming American Military Base Pollution in Asia: Japan, Okinawa, Philippines', *Asia-Pacific Journal: Japan Focus Newsletter* 28 (2009) 2–10 (online, 13 July 2009).

126 See N. Maclellan, 'Toxic Bases in the Pacific', *Pacific News Bulletin* (Pacific Concerns Resource Centre: Suva/Fiji 2000), reprinted by *Austral Peace and Security Network* (Royal Melbourne Institute of Technology: Melbourne 2005) at http://rmit.nautilus.org/forum-reports/ToxicbasesinthePacific.doc. On the persistent environmental and human rights problems of Guam, see K. Paik, 'Living at the "Tip of the Spear"', *The Nation* (New York, online 15 April 2010). The Guam base is included in the Marianas Trench Marine National Monument, and the former Johnston and Wake bases are included in the Pacific Remote Islands Marine National Monument, both established on 6 January 2009 by President George W. Bush's executive proclamations 8335 and 8337 under the 1906 Act for the Preservation of American Antiquities (16 *US Code* 431); see 74 *US Federal Register* 1555 (12 January 2009), and J. Briggett, 'An Ocean of Executive Authority: Courts Should Limit the President's Antiquities Act Power to Designate Monuments in the Outer Continental Shelf', *Tulane Environmental Law Review* 22 (2009) 403–422.

127 12,000 ft (3.6 km); see Oraison, *supra* note 16, at 140, and A.S. Erickson *et al.*, *Diego Garcia's Strategic Past, Present and Future*, paper presented at the annual meeting of the American Political Science Association (Boston/MA, 28 August 2008) 16.

128 See Tucker and Doughty, *supra* note 79, at 213.

129 See Sheppard and Spalding, *supra* note 55, at 30.

130 FCO Consultation Document, *supra* note 1, Annex A, at 11 (economic value of coral reefs estimated at about US$100,000–600,000 per km^2 per year).

131 According to the US Navy's *Integrated Natural Resources Management Plan, Diego Garcia, British Indian Ocean Territory* (Naval Facility Engineering Command Pacific: Pearl Harbor, September 2005) chapter 3, at 3–4, "an estimated 11.9 square miles (30.8 km^2) of lagoon and 0.2 square miles (0.5 km^2) of reef flat were dredged".

132 C.R.C. Sheppard, 'The Chagos Archipelago, Central Indian Ocean', in C.R.C. Sheppard (Ed.), *Seas at the Millennium: An Environmental Evaluation* 2 (Pergamon: Amsterdam 2000) 221–232, at 221.

133 *Supra* notes 43 and 92; and T. Scovazzi, 'World Heritage Committee and World Heritage List', in F. Francioni and F. Lenzerini (Eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press: Oxford 2008) 147–174, at 172.

134 See Ollivry, *supra* note 16, at 30. In coalition with 14 other Mauritian NGOs (*Platform Moris Lanvironman*, PML), the MMCS has also floated a proposal for a "zoned marine protected area" that would make provision for sustainable resettlement of the Chagos Islanders; see S. Bhagmal-Cadervaloo, 'Environmental Group Plea for the Chagossians', *News Now* (Port Louis, online 17 June 2010).

135 See A.H. Westing (Ed.), *Transfrontier Reserves for Peace and Nature: A Contribution to Human Security* (United Nations Environment Programme: Nairobi 1993); and T. Sandwith *et al.* (Eds), *Transboundary Protected Areas for Peace and Co-operation* (IUCN: Gland and Cambridge 2001). A recent example is the Swiss-Italian boundary site of Monte San Giorgio, extension approved by UNESCO in 2010.

136 Jointly listed both as an IMO particularly sensitive sea area (*supra* note 40) in 2002, and as a UNESCO World Heritage site in 2009.

137 Inscribed on the World Heritage Tentative List (site No. 2028) on 6 January 2006, after the US Department of Defense decided to close its former naval base at San Stefano. On radioactive contamination of the area alleged to have been caused by the base, see *supra* note 98, and F. Aumento *et al.*, 'Transuranium Radionuclide Pollution in the Waters of the La Maddalena National Marine Park', *Journal of Environmental Radioactivity* 82 (2005) 81–93.

138 Approved by IMO Marine Environment Protection Committee Resolution 53 (July 2005).

139 Agence France Press, 'Maurice-France: signature d'un accord-cadre de cogestion de l'Île Tromelin', *La Tribune de Genève* (Geneva, online 8 June 2010); summary of the agreement in *Hansard: Mauritian Parliamentary Debates*, 4th National Assembly, Private Notice Questions (18 January 2010). For background see Mlimuka, *supra* note 21, at 99–100; A. Oraison, 'À propos du conflit franco-mauricien sur le récif de Tromelin (La succession d'États sur l'ancienne Île de Sable)', *Revue de Droit International et de Sciences Diplomatiques et Politiques* 65 (1987) 85–139; *id.*, 'Réflexions générales sur la protection de l'environnement terrestre et marin des petites îles françaises de la zone Sud-Ouest de l'océan Indien et du canal de Mozambique à la lumière de la législation française, du droit communautaire et du droit international public (Le cas des îles éparses: Tromelin, Glorieuses, Juan de Nova, Europa et Bassas da India)', *Revue de Droit International et de Sciences Diplomatiques et Politiques* 79 (2001) 85–139; J.P. Quéneudec, 'La France et le droit de la mer', in T. Treves (Ed.), *The Law of the Sea: The European Union and Its Member States* (Nijhoff: The Hague 1997) 151–198, at 173 ; and Y. Daudet, 'La revendication de Maurice sur l'île de Tromelin', *Annuaire du Droit de la Mer* 3 (1998) 151.

140 402 *UNTS* 71; ratified by the UK on 31 May 1960. *E.g.*, even though a sector of the British Antarctic Territory (between 25°W and 74°W) is also claimed by Argentina, both countries recognise the treaty as applicable to that sector.

141 *Supra* notes 106 and 107.

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