

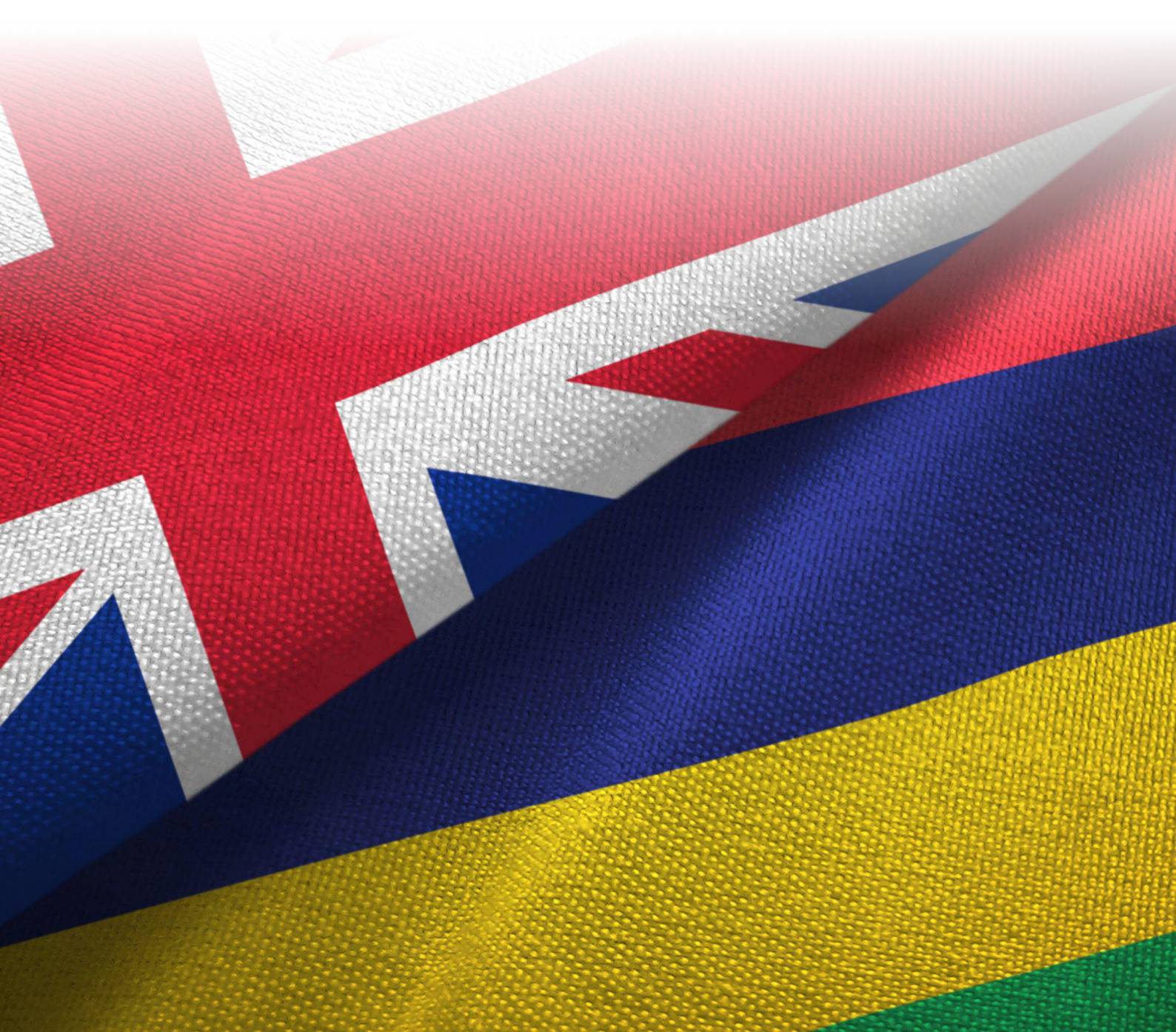
Intimidation as Foreign Policy



How Mauritius has attempted to criminalise UK
sovereignty over the Chagos Islands

Dr Yuan Yi Zhu

Foreword by the Rt Hon Sir Robert Buckland KBE KC MP



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About the Author

Dr Yuan Yi Zhu is Assistant Professor (universitair docent) of International Relations and International Law at Leiden University

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Foreword

By Rt Hon Sir Robert Buckland KBE KC MP

The past, present and future of the British Indian Ocean Territory, otherwise known as the Chagos Islands, is a matter in which I have taken a close interest for some years. Back in 2018, as Solicitor General, I led for the United Kingdom at the International Court of Justice in the case brought against this country by the Republic of Mauritius.

As I stated to the Court then, the legal situation could not be clearer. The islands had only been connected to the former British Territory of Mauritius for administrative purposes. There were no cultural ties between them. It was clear from the documentary evidence that the creation of the British Indian Ocean Territory in 1965, three years before Mauritian independence, was perfectly lawful and it was well within the UK's remit to do so. Regrettably, in an advisory opinion, the Court overlooked key evidence that warranted rejection of Mauritius' specious claim. The Government at the time rightly held to its long-standing position, which has long enjoyed cross-party support: that the islands are British until they are no longer needed for military purposes, as was agreed in 1965.

In 2021, Mauritius took the extraordinary and offensive step of passing legislation that criminalises alleged misrepresentations of Mauritian sovereignty, made in any part of the world. This law, of breathtaking ambit, is a clear attempt to shut down legitimate debate about the future of the Chagos Islands. It represents a threat to freedom of expression, including freedom of speech within the Westminster Parliament, and is a monstrous example of overreach.

I wholeheartedly commend Dr Yuan Yi Zhu's new paper for Policy Exchange bringing to light this deeply shocking legislation that has inexplicably largely escaped public notice in the UK. It builds on Dr Zhu's previous Policy Exchange paper which addressed the question of sovereignty over the Chagos Islands, providing crucial context around the archipelago's history and the UK's relationship with it, which has lasted since 1814.

As this new paper makes clear, Mauritius' Criminal Code (Amendment) Act 2021 is not simply a piece of overtly draconian domestic legislation, but a brazen act of intimidation dressed as foreign policy, which merits comparisons with Hong Kong's 2020 National Security Law. This is a damning indictment for a democratic country and member of the Commonwealth.

A transfer of sovereignty is not in the interests of the Chagossians. Further, a transfer is not in the interests of the environment (given that the UK currently protects 250,000 square miles of ocean around the

islands) and it is certainly not in the interests of international security in this important region.

Thankfully the Government appears to be listening to the concerns raised by Policy Exchange, members of the security services and members of the Chagossian diaspora – and now seems to be looking to change course. On a recent visit to the United States, Lord Cameron described the Chagos Islands as “vital”, and Secretary Blinken reiterated American support for British sovereignty over the islands. I hope that the UK will stand firm in the face of this blatant attempt to stifle debate and to intimidate those who express a different view from that of Mauritius. For normal relations to resume, that legislation must be repealed.

The Rt Hon Sir Robert Buckland KBE KC MP is Conservative MP for South Swindon and Chair of the Commons Northern Ireland Affairs Select Committee. He is a former Lord Chancellor, Secretary of State for Wales and Solicitor General.

Executive summary

As part of the Republic of Mauritius' international legal campaign against the United Kingdom's sovereignty over the Chagos Islands, which it sold to the United Kingdom for cash in 1965, Mauritius enacted in 2021 legislation which criminalises “misrepresenting the sovereignty of Mauritius over any part of its territory”.

The new legislation makes it illegal for anyone, anywhere in the world, to “misrepresent” “the sovereignty of Mauritius over any part of its territory” if they are doing so with even indirect financial support of the United Kingdom. Anyone in breach of the new law is liable to 10 years' imprisonment—the same maximum sentence Mauritian law provides for torture by governmental officials and inciting rebellion.

In other words, any UK official, parliamentarian, contractor, or even academic who writes anything expressing support for the United Kingdom's sovereignty over the Chagos Islands—a sovereignty which has been exercised uninterrupted since 1814, is enshrined in UK law, and which was acknowledged by the post-independence government of Mauritius until 1984, when it sought to renege on its 1965 agreement to sell the Chagos Islands—is liable to be prosecuted and, if convicted, imprisoned for up to a decade.

The law has already been used—successfully—to intimidate a small British business producing pound sterling coins under a contract with the United Kingdom government. It is also used to intimidate Chagossian activists who oppose Mauritius' sovereignty claim over the Chagos Islands, activists who are regularly accused by Mauritius of being stooges of the British government.

The Mauritian law constitutes an audacious and offensive effort to intimidate UK officials and parliamentarians, as well as Chagossian activists—many of whom are UK nationals—who oppose Mauritius' territorial ambitions over the Chagos Islands. Much like Hong Kong's National Security Law, it seeks to silence both at home and abroad any criticism of its government's claim to sovereignty over the Chagos islands, a claim which the UK rightly rejects as incompatible with the agreements made to detach the Chagos from Mauritius in 1965.

As long as it is left unchallenged, the Mauritian law provides a template for other foreign governments who actively claim territories under the sovereignty of the United Kingdom.

The United Kingdom government should:

- Denounce the 2021 Mauritian law as an effort to intimidate UK officials, businesses, and members of the Chagossian diaspora critical of Mauritius, an intimidation that is in breach of international comity, and violates the legal duty of non-aggravation of international disputes;
- Provide guarantees to UK officials and parliamentarians working on the Chagos that the UK government will support their right to write freely on the future of the islands, without fearing foreign intimidation;
- Limit high-level contacts with the government of Mauritius that are in any way connected with the Chagos Islands until Mauritius has repealed the 2021 act, as well as consider suspending foreign aid to Mauritius.

“Misrepresenting the sovereignty of Mauritius over any part of its territory”: The Criminal Code (Amendment) Act 2021

After completing all its stages in the Legislative Assembly of Mauritius without any recorded dissent and amid enthusiastic expressions of support from all parties, the Criminal Code (Amendment) Act 2021 received the assent of the acting president of Mauritius and became law on 29 November 2021.

The Act adds a new section, 76B, to Title I (“Offences Against the State”) of the Criminal Code of Mauritius. Section 76B creates a new criminal offence, “Misrepresenting the sovereignty of Mauritius over any part of its territory”. Section 76B (1) defines the new crime in the following terms:

- (1) Any person who acting under the authority or instructions of, or pursuant to a contract with, or with the direct or indirect financial support of, a foreign State or any organ or agency of such a State –
 - a. produces, distributes, supplies or markets any coin, stamp, official map or other official object or document which, in any manner, misrepresents, or conveys misleading information to, the public about the sovereignty of Mauritius over any part of its territory; or
 - b. gives any instruction to another person for the production, distribution, supply or marketing of any such coin, stamp, official map or other official object or document,

shall commit an offence.

The ambit of the new offence is, as will be seen, extraordinarily broad. The language of the provision encompasses, among others, British civil servants and parliamentarians who may, as part of their official duties, assert the United Kingdom’s sovereignty over the British Indian Ocean Territory, among others.

To leave no doubt whatsoever that this new offence was introduced with the explicit aim of intimidating the United Kingdom, its government, entities and citizens, as well as anyone anywhere who supports UK

sovereignty over the Chagos – or who even acknowledges the present United Kingdom sovereignty over the Islands – Section 76B (2) explicitly defines “foreign State” as:

a State which has been subject to a determination by any international court or tribunal that it has no valid claim to sovereignty over any part of the territory of Mauritius.

As many Mauritian MPs remarked in the Legislative Assembly, this definition unambiguously targets the United Kingdom, the only country which comes under the Act’s definition of “foreign State”. The “determinations” in question, at least according to the Mauritian government, are (a) an 2015 arbitral award under the United Nations Convention on the Law of the Sea; (b) a non-binding 2019 International Court of Justice advisory opinion and (c) a 2021 ruling by the International Tribunal for the Law of the Sea.

As Richard Ekins KC (Hon), Thomas D. Grant, and I argue in a separate report for Policy Exchange, the “determinations” in question do not state that Mauritius has sovereignty over the Chagos Islands.¹ The 2015 arbitral award under the United Nations Convention on the Law of the Sea specifically declined to rule on the sovereignty over the Chagos Islands. The 2019 ICJ advisory is not legally binding and did not adjudicate the sovereignty dispute. To the extent that the 2021 ITLOS ruling proceeded on the basis that the 2019 ICJ advisory opinion settled the sovereignty question, it is clearly mistaken in law.

Yet, in the 2021 law, Mauritius has chosen to misrepresent these opinions as “determinations” that sovereignty over the Chagos Islands is Mauritian, a stance which Mauritius only adopted in 1982, after almost two decades of denying that the Chagos were Mauritian territory.

The new criminal offence is backed with draconian criminal punishments. Under Section 76B (3), any person convicted of the offence is liable to be imprisoned for 10 years and to pay a fine of 5 million Mauritian rupees (approximately £92,000).

To illustrate the severity of the punishment prescribed in comparative perspective, 10 years’ imprisonment is the maximum term of imprisonment prescribed by the Mauritian Criminal Code for offences such as torture by a public official (Section 78), taking part in riot (Section 143), and inciting rebellion (Section 152). A previous version of the bill provided for five years’ imprisonment; clearly, the Mauritian government did not consider the earlier version, which was withdrawn, to be draconian enough.

1. Yuan Yi Zhu, Tom Grant, and Richard Ekins, *Sovereignty and Security in the Indian Ocean Why the UK should not cede the Chagos Islands to Mauritius* (London: Policy Exchange, 2023). Available at <https://policyexchange.org.uk/wp-content/uploads/Sovereignty-and-Security-in-the-Indian-Ocean.pdf>

The 2021 Act's Extraterritoriality Provisions

Even more extraordinarily, Mauritius has chosen to make the offence an extra-territorial one. Section 76B (4) of the Criminal Code now states that:

Any act alleged to constitute an offence under subsection (1) and which is committed outside Mauritius by a person shall, regardless of whether or not the act constitutes an offence at the place of commission, be deemed to have been committed in Mauritius also.

In other words, anyone, anywhere in the world can be prosecuted by Mauritius for “misrepresenting the sovereignty of Mauritius” over the Chagos Islands and, on conviction, be imprisoned for 10 years.

As a general rule, criminal legislation only applies within the boundaries of the enacting state unless the contrary is specifically provided. Under international law, there are a number of bases for extraterritorial criminal jurisdiction which are commonly accepted. For instance, it is generally accepted that states may exercise criminal jurisdiction over acts committed by their citizens abroad, or against persons who have harmed the state’s nationals abroad.² But none of the above-mentioned considerations apply to the Mauritian legislation, which covers citizens and foreigners alike, regardless of where they are situated.

The only possible justification, under international law, for Mauritius’ assertion of extraterritorial jurisdiction is the so-called protective principle, whereby states “may exercise jurisdiction over aliens who have committed an act abroad which is deemed prejudicial to the security of the particular state concerned”.³ But it is typically deployed against crimes such as counterfeiting and espionage, not the exercise of free speech in a friendly foreign state.

In fact, there are disturbing similarities between the 2021 Mauritian law and Hong Kong’s 2020 National Security Law (NSL), which has been used to suppress freedom of speech, criticism of the Chinese and Hong Kong governments, and political activities by pro-democracy groups. Like the Mauritian act, Article 38 of the NSL also applies extraterritorially, regardless of a person’s citizenship, thus effectively criminalising criticism of the CCP and of the Hong Kong government anywhere in the world, a provision which the Hong Kong government has also justified under the protective principle.⁴

2. See generally Malcolm Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017), 488 *et seq.*

3. Shaw, *International Law*, 499.

4. The Government of the Hong Kong Special Administrative Region, “The jurisdiction of Hong Kong National Security Law accords with international norms and double-standard criticisms are for an ulterior motive”, 6 July 2023. Available at <https://www.info.gov.hk/gia/general/202307/06/P2023070600680.htm>.

Intimidation as Foreign Policy: The Effects of the 2021 Mauritian Law

Another feature of the Mauritian law is the breadth of the activities it seeks to criminalise. Consider the following scenarios:

- A British civil servant based in in the Foreign, Commonwealth and Development Office (FCDO) in London writes a memorandum which asserts, as part of their official duties, that the United Kingdom considers the British Indian Ocean Territory to be under the sovereignty of the United Kingdom;
- A British minister makes a statement in Parliament that the British Indian Ocean Territory is under the sovereignty of the United Kingdom;
- A British company produces commemorative coins for the BIOT at the behest of the United Kingdom government;
- A staff member of the House of Commons Library produces a report on the Chagos dispute which states the official position of the United Kingdom in relation to the dispute;
- An academic in receipt of a UK government grant writes a paper arguing that as a matter of international law the International Court of Justice’s Chagos advisory opinion does not have the effect that sovereignty over the Chagos islands belongs to Mauritius.

In each of the above cases, the person concerned will have committed an offence under the 2021 Mauritian law because they, “acting under the authority or instructions of, or pursuant to a contract with, or with the direct or indirect financial support of” a “foreign state” as defined by section 76B (2), committed an act of “misrepresenting the sovereignty of Mauritius over any part of its territory”.

In doing so, they will render themselves liable to 10 years’ imprisonment for the crime of asserting the long-standing position of the United Kingdom about its sovereignty in respect of the Chagos Islands. In the case of MPs and peers, their freedom of speech in relation to parliamentary proceedings guaranteed by Article IX of the Bill of Rights 1689 will not shield them, as the Mauritian law does not recognise their immunity.

For the last scenario, it is interesting to note that an earlier version of the legislation, introduced in 2020, contained a specific exemption for “scholarly or an academic writing”. It was removed from the version which was ultimately enacted, so that the threat of criminal prosecution now extends to academics who write about the legal questions surrounding the sovereignty of the Chagos.

As almost all university-based UK academics receive the “indirect financial support of a foreign State” in the words of section 76B (1), this provision is clearly aiming at chilling even academic discussion of Mauritius’ position vis-à-vis the Chagos Islands, an unacceptable infringement of the basic principles of both freedom of speech and of academic freedom.

If these scenarios seem far-fetched, it is important to note that Mauritius has already used the 2021 law to intimidate United Kingdom citizens performing lawful activities in the United Kingdom at the best of the UK government.

For instance, in 2022, the Attorney-General of Mauritius threatened the directors of the Pobjoy Mint, based in Kingswood, Surrey, with criminal prosecution for producing Nemo-themed pound sterling coins for the British Indian Ocean Territory under contract with the United Kingdom government.⁵ As a result of these legal threats, these coins have been withdrawn from sale.

Moreover, although the law does not specifically target them, it has had a chilling effect on the Chagossian diaspora, many of whose members oppose the transfer of the Chagos to Mauritius due to the country’s long record of mistreatment of Chagossians and its refusal to allow Chagossians to have a say over the future of their homeland.

Senior Mauritian figures and the Mauritian press add to the climate of fear within the Chagossian diaspora by regularly attacking Chagos islanders critical of Mauritius by alleging that they are acting as British stooges, manipulated by or collaborating with the British government to sabotage Mauritius’ sovereignty campaign.⁶

As Rosy Levesque, a Chagossian activist who is a British citizen living in the United Kingdom, and who has been critical of Mauritius, told the *Financial Times* last year, because of the Mauritian law, “I don’t think we’re safe...I have so many cousins in Mauritius...I haven’t seen my family [there] in nearly 10 years.”⁷ Such concerns are often shared among Chagossians in private, though most do not wish going on the record for fear of the consequences of criticising Mauritius.

Another Chagossian activist, Pascalina Nellan, has recently testified to the United Nations Human Rights Council that the 2021 law “has intimidated many Chagossians into avoiding public disagreement with the Government [of Mauritius]”. She also notes that “Recent high-profile cases in Mauritius have also heightened perceptions that public disagreement with the Government can lead to arbitrary arrest or detention.”⁸

Regrettably, self-appointed champions of the Chagossians’ interests, including high-profile members of the English bar, have so far remained silent over Mauritius’ intimidation of the Chagossian diaspora, in the United Kingdom and elsewhere, as well as Mauritius’ blatant attempt at intimidating British officials and parliamentarians. There can be no starker illustration of the fact that, in the matter of the future of the Chagos Islands, the interests of the Chagossians are not the same as the interests of Mauritius.

5. Owen Boycott and Bruno Rinvoluceri, “Mauritius warns UK firm over ‘Nemo’ coins in Chagos Islands dispute”, *The Guardian*, 10 February 2022, <https://www.theguardian.com/world/2022/feb/10/mauritius-warns-uk-firm-over-coins-amid-chagos-islands-dispute>.

6. See Zhu, Grant, and Ekins, *Sovereignty and Security in the Indian Ocean Why the UK should not cede the Chagos Islands to Mauritius*, 29.

7. Joseph Cotterill, “Chagos islanders push Mauritius and UK to heal history’s wounds”, *Financial Times*, 1 April 2022. Available at <https://www.ft.com/content/9e09d51f-80d2-41c2-ac5e-ffcd1bdc125>.

8. Statement to Pre-session, Universal Periodic Review, Mauritius by Pascalina Nellan, 28 November 2023. https://www.upr-info.org/sites/default/files/country-document/2023-11/Statement_Chagossian_Voices.pdf.

Recommendations

The Mauritian law is a blatant attempt to intimidate UK officials and the Chagossian diaspora and a violation of basic human rights norms. Moreover, at international law, its enactment is a breach of international comity and arguably a breach of the international legal duty of non-aggravation of disputes, whereby states are required to “avoid actions that might inflame an international dispute”,⁹ a principle enshrined in the Charter of the United Nations. A strong response from the United Kingdom is both warranted and necessary.

First, the United Kingdom government, which has so far been silent about the 2021 Mauritian law as well as its use to intimidate UK-based persons, should condemn in the strongest possible terms the law’s enactment and continuance in force. As recently as July 2023, a government minister told the House of Commons that:

*Any attempt by any foreign power to intimidate, harass or harm individuals or communities in the UK will not be tolerated. That is an insidious threat to our democracy and fundamental human rights.*¹⁰

This statement was made in the context of Hong Kong, but has universal application. Just as ministers condemned on multiple occasions Hong Kong’s National Security Law, the UK government should make it clear that this intimidatory tactic from Mauritius is not acceptable under any circumstances, and especially not against officials and inhabitants of a friendly state and fellow member of the Commonwealth of Nations.

More concretely, the United Kingdom government should limit high-level contacts with Mauritius in relation to the Chagos Islands, including but not limited to contacts in relation to the ongoing talks concerning the sovereignty of the Chagos. The UK government should also consider additional measures, such as the recall of the British High Commissioner to Mauritius for consultations and the suspension of British foreign aid to Mauritius, which amounts to £3.1m for the 2023/2024 fiscal year.

The UK government should make it clear that normal bilateral relations will not be restored until the 2021 Mauritian law is repealed—with the proviso that this should be without prejudice to the continuation of UK sovereignty over the Chagos Islands after such a repeal. To do otherwise would be to implicitly endorse and reward Mauritius’ thuggish tactics of extraterritorial legal intimidation.

The United Kingdom government should also provide public guarantees to all those involved with discussions surrounding the future of the Chagos islands—officials, parliamentarians, but also contractors and especially

9. Steven Ratner, “The Aggravating Duty of Non-Aggravation”, *European Journal of International Law* 31(4) (November 2020), 1307–1342, at 1307.

10. HC Deb 13 July 2023, vol 736, col 535.

members of the Chagossian diaspora—that the UK government will in all circumstances support and protect their right, already guaranteed under UK law, to speak freely about the future of the Chagos, without the fear of intimidation from foreign governments.

Urgent legal clarity is needed to ensure that foreign government officials and their agents in the United Kingdom cannot intimidate persons on UK soil with impunity. Otherwise, other states which have outstanding international disputes, including territorial disputes, with the United Kingdom may be emboldened by Mauritius' conduct to enact their own intimidatory legislation, under the guise of protecting their national interest but in reality as naked exercises of lawfare.



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Policy Exchange
1 Old Queen Street
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