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THE CHAGOS DEBACLE: A CRITIQUE OF THE BRITISH GOVERNMENT'S SHIFTING RATIONALES

A Policy Exchange Research Note

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Foreword by Rt Hon Tom Tugendhat MBE VR MP

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Foreword

The Rt Hon Tom Tugendhat MBE VR MP, former Minister of State for Security and former Chair of the Foreign Affairs Select Committee

One by one, like dominoes, the British Government's arguments for its proposed deal to cede sovereignty over the Chagos Islands to Mauritius have fallen.

First, the Government claimed it had no choice, the judgments were binding – or soon would be. As Policy Exchange's first report published two years ago made clear, they're not. These advisory judgments are just that. And coming from judges who have condemned Britain's presence in the Indian Ocean but refused to condemn Russia's occupation of Ukraine. They show a political, not legal resolve.

Second, it was that Mauritius would be a trustworthy partner which could be counted on to support the operation of the Diego Garcia military base. Then the newly elected Mauritian Government tore up the original deal in a bid to shorten the lease agreement for the base, to strip the UK of a right of renewal, and to extract more cash from the British taxpayer. And now the Prime Minister who negotiated the deal is accused of money laundering.

Most recently, the Government claimed that the real urgency for striking a deal is that, without one, our Chagos military satellite communications system is in jeopardy. As this vital new Policy Exchange report makes devastatingly clear, this latest rationale cannot stand up even to minimal scrutiny.

And to cap it all, the Government claimed that the US supported the deal. Then Donald Trump won the presidential election, bringing with him a team of officials from the Secretary of State and the National Security Advisor down who have opposed British surrender of the Chagos Islands, and who hold a different attitude when it comes to how to handle intimidation by international courts.

As Security Minister during the last Government, I was critical of the negotiations with Mauritius and objected to a deal. It was wrong to begin the talks and Lord Cameron was right to stop them.

The International Telecommunication Union (ITU), which addresses global communications technology by consensus, has absolutely no authority to interfere in – let alone shut down – our satellite facilities on Diego Garcia. Even one of the Government's own Ministers admitted as much last week, conceding that "the ITU cannot challenge the UK's use of civilian or military spectrum."

The main threat to the future of our military base in the Indian Ocean, therefore, is not some unilateral punitive action of an international body. It is simply the Government's distorted interpretation of the UK's legal obligations, and its willingness to surrender meekly to a Mauritian shakedown.

As the authors of this report show, every single defence of the deal put forward by the British Government – whether strategic or legal – has proved to be baseless. It is past time for the Government to come to its senses, to remember its duty to defend the UK's vital strategic interests, and to walk away from the deal.

Executive summary

- The British Government has recently set out a series of rationales for the proposed surrender of the British Indian Ocean Territory (BIOT), also known as the Chagos Islands, to Mauritius, as part of a deal that will see the UK making hefty payments to Mauritius for the continued use, for the time being, of Diego Garcia. None of these rationales stand up to scrutiny.

- Ministers have publicly stated that unless a deal with Mauritius is reached the International Telecommunication Union (ITU), a UN agency, could decide that Mauritius is sovereign over the Chagos Islands and then proceed to deprive the UK and the US of the use of the radio spectrum associated with the islands. However, these claims—which have in fact already been publicly contradicted by another Minister—have no basis in reality.

- The ITU simply does not have the power to prevent the UK and the US from using the radio spectrum associated with the BIOT, and it does not have mechanisms to enforce its decisions. The ITU does not physically control any radio spectrum, but is rather in the nature of a clearinghouse which depends on the goodwill of states. In the past, ITU rulings have been ignored by the United States on national interest grounds, to no consequences whatsoever.

- If Mauritius were to attempt to interfere with Diego Garcia's transmissions, in the course of its campaign of lawfare against British sovereignty over the Chagos, by for instance attempting to jam signals from and to Diego Garcia, or by allowing a foreign power to use the spectrum associated with the British Indian Ocean Territory, it would make itself into a hostile state against the UK and US, and would be subject to a commensurate response.

- For the UK to undertake to follow all ITU decisions, no matter how groundless, would be to significantly undermine national security and to set a very dangerous precedent. On this approach, if a majority of the United Nations General Assembly asked the International Court of Justice (ICJ) to issue an advisory opinion, the ICJ and the ITU could purport to outlaw, for example, the transmission of military information on satellites.

There is no sound basis in international law for such an approach, which the UK should firmly rebuff.

- The absurdity of surrendering national security to the ITU is confirmed by the fact that the agency has been the target of institutional capture efforts from illiberal regimes, notably China, which now seeks to use the ITU to advance its Belt and Road Initiative and measures such as greater governmental control over the Internet. To surrender the Chagos to a foreign power on the basis of anticipation of possible future ITU action would only embolden China to continue to infiltrate multilateral bodies.

- Other Mauritian lawfare efforts through multilateral organizations have proven ineffective. Apart from having BIOT stamps de-recognised—which is of no significance since postal services for the territory is provided by military means—Mauritius's lawfare has not amounted to anything except a nuisance in no way affecting the operation of Diego Garcia.

- Ministers have also stated publicly that a deal with Mauritius is needed before a binding court judgment is inevitably secured against the UK, which would force the cession of the Chagos without guarantees for the continuing operation of Diego Garcia. While Ministers seem to assume that the court in question would be the ICJ, neither that court nor any other has the jurisdiction to make a binding ruling to that effect unless the UK chose to consent to adjudication.

- The Government's apparent fear of a binding judgment is indicative of its deeply troubling approach toward assessing legal risk in an international law context. Under guidelines proclaimed by the Attorney General, Lord Hermer KC, government lawyers are directed to give advice on the assumption that there is an international court capable of issuing a binding ruling even when no such courts exists. There are strong reasons to think that this misconceived approach forms the basis on which the Government decided to agree to the deal to cede the Islands to Mauritius.

Introduction

This is our fourth paper on the proposed surrender of the British Indian Ocean Territory (BIOT), also known as the Chagos Islands, to the Republic of Mauritius. In *Sovereignty and Security in the Indian Ocean* (2023), we offered the first sustained critique of the negotiations to surrender the Chagos Islands to Mauritius, which we criticised on both legal and strategic grounds. In *Intimidation as Foreign Policy* (2024), we highlighted the repressive, extraterritorial legislation that Mauritius adopted to intimidate critics of its sovereignty claim over the Chagos Islands. In *Averting a Strategic Misstep* (2025), we urged the new British government to walk away from the draft agreement that it announced in October 2024 had been reached, after elections in Mauritius and the United States in November 2024 returned governments that were each hostile, in quite different ways, to the deal.

Since our last paper on the subject, the British government has renegotiated the terms of its earlier draft agreement with the new government of Mauritius. Although the British Government has refused to divulge details of the new draft, indications gleaned from Mauritian officials are that the new deal severely disfavours the United Kingdom and the United States: Mauritius has reportedly obtained a veto on the renewal of the lease for the base on Diego Garcia, which was one of its key demands and clearly makes the deal worse for the United Kingdom and the United States. Meanwhile, according to unconfirmed reports, payments promised to Mauritius under the deal have substantially increased.

It is no surprise, particularly at a time of severe pressures on Britain's public finances, these revelations have provoked cross-party outcry, as well as intensified the opposition of Chagossians to the deal, which they see as colonialism by another name. Senior officials in the new American Administration, including National Security Advisor Mike Waltz and Secretary of State Marco Rubio, had, before the November 2024 election, expressed concerns that the deal would undermine American security, concerns which have since been restated on the floor of the United States Senate by Senator John Kennedy, and in the pages of the Wall Street Journal.

In response to these criticisms and concerns, the British Government has voiced ever-changing rationales in an on-going attempt to justify the deal. Some of the rationales are legal, others are strategic, and yet others are a mix of both legal

and strategic. The most prominent of these is that, in the absence of a deal with Mauritius, the UK and the US could see their exclusive access to the electromagnetic spectrum around Diego Garcia altered, or terminated altogether, by the International Telecommunication Union (the ITU) – the UN agency which regulates international communications technology. Extraordinarily, a Government minister appeared to have repudiated, whether by accident or otherwise, this argument within days of it being made, which neatly illustrates the Government's confusion as to why it is making the deal with Mauritius in the first place.[1]

Other rationales have surfaced as well, for example that Mauritius might go to the Council of the International Civil Aviation Organization (ICAO) to stop civil aviation to and from the Chagos Islands, or start an Annex VII proceeding against the UK under UNCLOS, invoking the 'airspace' and 'other rules of international law' provisions of UNCLOS Article 2 in order to interfere with aviation access and airspace management in the BIOT. This research note examines the British Government's stated justifications for the deal and demonstrates that none stand up to scrutiny.

The Government's newly-stated reasons for giving away the Chagos are in striking tension with the Government's earlier and repeated claims that Mauritius is a bulwark against Chinese influence in the Indo-Pacific, and that Mauritius is a reliable security and defence partner for the West. The justifications that the Government now advances to rationalise the Chagos deal depend upon the premise that Mauritius, if that country does not get what it demands, will resort to lawfare tactics against the United Kingdom and the United States. But *that* premise baldly contradicts the earlier one—namely, that we have nothing to worry about Mauritius exercising sovereign control over the Chagos, because Mauritius is (supposedly) an intrinsically friendly country.[2] The British Government evidently believes that Mauritius is prepared to escalate. Yet, now the British Government tells us we have nothing to fear if Mauritius takes over this critical strategic asset. The two propositions are impossible to reconcile. Moreover, Mauritius is improving its relationship with China, as

[1] UK Parliament, Radio Frequences: Question for Department for Science, Innovation and Technology, 7 February 2025, link.

[2] UK Parliament, British Indian Ocean Territory: Sovereignty, Volume 759: debated on Wednesday 18 December 2024, link

witnessed in a bilateral Free Trade Agreement and Chinese state champion-company Huawei's acquisition of various energy and telecommunication infrastructure contracts in the Indian Ocean state. Mauritius's own conduct thus also contradicts the premise that Mauritius is a long-term and reliable partner.

If Mauritius is willing to try to disrupt Diego Garcia's telecommunications at the behest of China if it does not obtain full sovereignty over the Chagos Islands, and is not paid handsomely for the continued use of Diego Garcia for military ends, it is self-evident that Mauritius cannot be a reliable partner for the West, and that its promises as to Diego Garcia's future under the sovereignty of Mauritius must be discounted accordingly. A real partner would not side with an existential opponent of its allies if it does not get what it wants from them. The tactics that Mauritius has deployed thus far and the apparent risk that it will go further in attempting to frustrate the operation of Diego Garcia, a risk on which the Government bases its case for concluding a treaty of cession, means that the UK should not cede the Islands to Mauritius, not least to deter blackmail against the West's security interests.

The British Government's latest defence of the deal validates our previous argument, namely that no legal or national security risk exists which overrides the central fact that the UK is not legally bound to implement the ICJ advisory opinion on the Chagos. Indeed, the Government's weak grasp of the UK's position is confirmed by an extraordinary op-ed penned by Stephen Doughty, an FCDO Minister, in recent days, clearly written in the hopes of imparting the deal the credibility it sorely lacks—but the op-ed performs a *volte face*, resiling from the Government's previous arguments about genuine legal risk. Mr. Doughty deepens the self-inflicted confusion surrounding the Government's hand-over policy, for in his op-ed he concedes that handing over the Chagos was never for purposes of mitigating genuine legal risk but, instead, only about deflecting Mauritius's present-day and anticipated future lawfare.

If concluded, the cession of the Chagos Islands to Mauritius, a country which has never had control over the Chagos and which only claimed sovereignty over them long after it had agreed to Britain's sovereignty over them, would do irreparable damage to Western security interests. It would undermine the UK's defence relationship with the US, discredit international law, and hand a victory to an unreliable government which has used objectionable techniques in order to intimidate its critics, not least the Chagossians whose displacement it has

cynically used to further its own ends. It also would sanctify the abusive resort to advisory procedure at the International Court of Justice (ICJ) and set a precedent of reflexive UK compliance with non-binding advisory opinions, a precedent that would become all the more dangerous as the ICJ adopts ever more far-reaching and quasi-legislative judgments without party consent. For these reasons, the British Government should not sign a treaty of cession with Mauritius and Parliament should refuse to ratify any such treaty.

The International Telecommunication Union and Threats Against Diego Garcia's Radiotelecommunications

The most eye-catching of the recent arguments floated by the British Government in defence of its proposed deal is that British and American exclusive and unrestricted access to an electromagnetic spectrum situated on Diego Garcia is in jeopardy due to legal uncertainty.[3] According to a Downing Street spokesman, "the electromagnetic spectrum at the Diego Garcia base would not be able to continue to operate without a deal".[4] This is an appeal to concrete national security exigencies – a notable divergence from previous legal justifications, which were much less specific, and from the vague assertion that the military base would be "more secure under the agreement than without it."[5] It is also, as we show below, nonsense.

The International Telecommunication Union (ITU), a UN agency based in Geneva, governs and coordinates global satellite communications. The Government's argument seems to be that there is a risk that the ITU might accept that Mauritius is sovereign over the Chagos Islands, such that Mauritius is entitled to exclusive usage of the electromagnetic spectrum over the Islands, and might intervene and disrupt our exclusive usage of the electromagnetic spectrum, which serves as a platform for sensitive military satellite communications. The Government is also reportedly concerned that defence and technology companies involved in Diego Garcia's satellite communications would be negatively affected by the unfurling of such a future scenario.

The Government has suggested that the trigger for such ITU action might be a future binding court ruling, presumably handed down by the International Court of Justice (the ICJ), in favour of Mauritius' claim that British sovereignty over the Chagos Islands is illegal. The Government perhaps also believes that the ITU would follow the approach taken by a chamber of the International Tribunal on

[3] Alex Wickham, Control of US-UK Military Satellite System Is Key to Chagos Deal, *Bloomberg*, 5 February 2025, link.

[4] Tony Diver and Jack Maidment, "Starmer's excuse for Chagos deal 'blown out the water' – by his own minister", *The Telegraph*, 13 February 2025, link.

[5] HMG, Foreign Secretary's statement on the Chagos Islands, 7 October 2024, link.

the Law of the Sea (ITLOS), which in 2021 in a dispute between Mauritius and Maldives, referred to the ICJ's 2019 *Chagos* advisory opinion and interpreted that opinion as having already established that Mauritius is sovereign over the Chagos Islands—this, despite the United Kingdom not being party to the Mauritius/Maldives case (and international adjudicators having no power to bind countries not party to a proceeding) and despite the ICJ's advisory opinion having no binding effect in respect of any bilateral dispute between the United Kingdom and Mauritius. The ITLOS Special Chamber's ruling in the Mauritius/Maldives case was misconceived, for these reasons, which we elaborated in our 2023 paper, and cannot establish that the UK is not sovereign over the Chagos Islands, not least since the UK was not a party to the case.

There are good reasons to doubt that the Government's decision to cede the Chagos Islands to Mauritius is truly driven by this alleged legal risk to our satellite operations. In particular, former British ministers who were briefed on the subject have publicly denied its credibility. For example, Ben Wallace, the former Secretary of State for Defence, wrote that "this is a totally fabricated excuse by the Cabinet office" and that "the potential threat to our operations is a total fiction".[6] Tom Tugendhat, who was Security Minister during the former Conservative government's negotiations with Mauritius, called the argument "nonsense".[7] Former Number 10 Chief of Staff Dominic Cummings stated in a punchy X post that "'all this 'classified satellites' briefing is ludicrous spin and the whole deep state knows it."[8] Indeed, as will be discussed below, a serving Minister has since then all but repudiated the ITU argument in response to a parliamentary question, in which he admitted that the ITU lacks the legal authority or the ability to challenge the UK's use of radio spectrum.

While these criticisms are consistent with the new Government taking a much more cautious view of legal risk than the Government that initiated negotiations with Mauritius in 2022, there are strong reasons to think that the new Government is committed to ceding the Islands regardless of the extent and seriousness of the supposed risk, which, as several former officials have acknowledged and on the better view of the law and facts, is minimal indeed.

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[6] @BenWallace70, *X*, 5 February 2025, link.

[7] @TomTugendhat, *X*, 6 February 2025, link.

[8] @Dominic2306, *X*, 5 February 2025, link.

In publicly alleging that the continued operation of the satellite communications system in the Chagos is at legal risk, the Government has identified no plausible ground for concern about the legal position of the base and its operations. Even if the ITU were to attempt to alter or disrupt British and American satellite communications, which is unlikely, it has no enforcement mechanisms should we choose not to comply. By contrast, the UK and US have meaningful tools to exert counter-pressure—on either Mauritius or the ITU or on both—if one or the other or both were to jeopardise our national security by interfering with the operations at Diego Garcia. In any case, the ITU, similar to a range of intergovernmental organisations, has been subjected to a methodical Chinese capture operation in recent years, and so any future attempt by the body to interfere in the base's satellite system would amount to lawfare. The Government must therefore not set a precedent of relenting to such a ploy.

The ITU

The ITU is a specialised UN agency with a broad remit covering global telecommunications, radio, satellite, internet, telephone, and optical communications. It is responsible for promoting and shaping shared usage practice and technical standards, and improving infrastructure in the developing world. It is also responsible for allocating global radio spectra and satellite orbits. 194 states and more than 1000 companies, universities, and international and regional organisations make up the ITU.[9]

The ITU is structured into three sectors. The Radiocommunications Sector (ITU-R) oversees how international radiocommunication services (including satellites) use the radio-frequency spectrum. The Standardisation Sector (ITU-T) is the standard-setting body for all elements of the global information infrastructure and communication technologies – anything from television, to broadband, to Bluetooth, and telegraphy. Lastly, the Development Sector (ITU-D) promotes international cooperation in providing the developing world with technical assistance to develop and improve telecommunication and ICT equipment.[10]

[9] About International Telecommunication Union (ITU), *ITU*, link.

[10] The ITU: a brief explainer, *Global Partners Digital*, 26 September 2022, link.

For 2024, the ITU's biennial budget was around 165 million Swiss francs (just over £146 million today): 78.6% from Member State contributions, and from the fees of nongovernment members and sector associates, and the rest provided by the revenues from sales and services.[11] Member States' contributions are measured in 'units', with the most given by the U.S. (35 units - £10.8 million), followed by Japan (30 units – £8.4 million), Germany (25 units – £7 million), France (21 units – £6 million), China (20 units – £5.8 million), Italy and Russian (15 units each – £4.2 million), Australia and Saudi Arabia (13 units each – £3.6 million), and Canada (11 units – £3.1 million).

The ITU issues three types of rulings in order to regulate and set standards for global telecommunication: International Telecommunication Regulations (ITRs); Radio Regulations (RRs); and Recommendations. ITRs and RRs both come into force via treaties, at which point any ratifying Member State is bound by international law to implement them. However, Member States which opt not to sign the treaty are not obliged in any way to adhere to it. Recommendations are even less binding, and no Member State is legally obliged to follow them. As is obvious from its functions and constitutive instruments, the ITU is a specialized, sectoral organization, and its powers and responsibilities are confined accordingly.

The ITU: A Toothless Tiger

The Government has not provided details to the public as to how they think Mauritius can affect the operation of Diego Garcia through the ITU, but the broad outline of its case appears to be something like this. The ITU, like other UN specialised agencies, will eventually be asked to accept that Mauritius is the lawful owner of the Chagos Islands and will then take action against the UK accordingly. The argument seems to be that this may arise in, or involve, one or more of the following scenarios:

(1) The ITU takes action against the UK on the basis that the 2019 ICJ advisory opinion confirmed Mauritian sovereignty over the Chagos

[11] How is ITU funded?, *ITU*, link.

(which the ICJ explicitly did *not* do, but which was the approach taken by ITLOS in 2021);

(2) Mauritius seeks a binding judgment against the UK to "confirm" its purported sovereignty of the Chagos Islands in some international court, most likely the ICJ, which then leads to ITU action against the UK;

(3) The ITU applies to the ICJ for an advisory opinion about its obligations vis-à-vis the Chagos and acts on the basis of the new advisory opinion.

The result will be that, in the words of Mauritius's lawyer Philippe Sands KC, "We can expect the ITU to resolve that UK authorised telecommunications services operating from Chagos are unlawful."[12]

This, so the argument goes, will in turn affect the telecommunications to and from Diego Garcia, as Mauritius will be able to use the radio spectrum reserved for the British Indian Ocean Territory, as well as authorise other states, including hostile foreign states, to use the spectrum. Meanwhile, private companies in the sector will be the subject of Mauritian lawfare designed to stop them from servicing equipment in Diego Garcia, as Mauritius will claim that their continued operation in Diego Garcia without a Mauritian licence is a crime under Mauritian law.

If Mauritius were somehow able to disrupt Diego Garcia's radiotelecommunications in this manner, or to launch criminal prosecutions against companies servicing Diego Garcia, this would indeed constitute a threat to the continued operation of the base. Acting in this way, or even publicly threatening to act in this way, would instantly warrant the US and UK treating Mauritius as a hostile state, with all the attending consequences, such as sanctions against Mauritian officials, travel restrictions for Mauritians, the withdrawal of foreign aid and international assistance, and much else besides. All these measures would be justified against a state which, whilst presenting itself as a friendly state, had attacked the core security interests of the United Kingdom and the United States.

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[12] Philippe Sands, 'Chagos", in *The International Legal Order in the XXI[st] Century*, (Brill Nijhoff, 2023), 164.

However, the threat that Mauritius might interfere with Diego Garcia's telecommunications using the ITU, which the British Government has now deployed as a rationale for surrendering sovereignty over the Chagos, has little bite in reality. This is because the ITU simply does not have the power to prevent the United Kingdom and the United States from using the spectrum currently assigned to the British Indian Ocean Territory. The ITU, in the words of its own spokesman, "has no international enforcement mechanism. It is more a gentleman's agreement". [13] The ITU cannot actually stop anyone from transmitting on a given spectrum because it does not physically control the radio spectrum. It is rather in the nature of a clearinghouse which depends on the collaboration and goodwill of states.

Mauritius, meanwhile, can transmit on the spectrum reserved for the BIOT regardless of whether the ITU gives it nominal title over that spectrum (subject to its technical ability to do so), so that the determining factor remains whether Mauritius would be willing to suffer the sanctions that will inevitably follow its attempt at performing a hostile takeover of the BIOT's radio spectrum. As to the possibility of Mauritius allowing unfriendly foreign countries to transmit on the spectrum allocated for the BIOT, the same holds true. It is unlikely in the extreme that a country such as China, which respects raw power in international relations, would seek an early confrontation with the world's most powerful country, on the basis that the ITU has declared Mauritius to have 'control' over the spectrum allocated to the BIOT.

Indeed, as this paper was being prepared for publication, a British Minister has admitted what was obvious to anyone who took an interest in the subject, namely that the ITU lacks the power to control the UK's use of its radio spectrum. This is a major blow to the Government's attempt to justify the cession of the Chagos Islands. On 12 February 2025, Sir Chris Bryant, the Minister of State for Data Protection and Telecoms, wrote in response to a parliamentary question that:

[13] Thomas Brewster, The UK Was Ignored In 'Egregious' ITU Internet Treaty Talks, *Silicon*, 23 December 2012, link.

> Individual countries have the sovereign right to manage and use the radio spectrum, within their borders, the way they wish, subject to not causing interference with other countries.
>
> This right is recognised in the Radio Regulations. The Radio Regulations are the international framework for the use of spectrum by radiocommunication services, defined and managed by the International Telecommunications Union (ITU). **Individual countries, not the ITU, make their own sovereign spectrum assignments in accordance with the Radio Regulations. The ITU has no legal authority over these assignments regardless of the country's civilian or military classification of spectrum.**
>
> The ITU cannot challenge the UK's use of civilian or military spectrum. It is possible that one country could challenge another's spectrum use, for instance if it should cause harmful interference across borders, and if unresolved bilaterally could seek arbitration through an ITU body (Radio Regulations Board).
>
> [Emphasis added].[14]

It is difficult to square the Minister's admission that the control of spectrum assignments is part and parcel of a sovereign state's prerogative with the contention that Mauritius could simply take over the Chagos's radio spectrum by the simple expedient of having the ITU side with it. Indeed, it was only one day before Sir Chris Bryant's reply that his ministerial colleague Stephen Doughty wrote (in the op-ed that we mentioned above) that "[w]ithout a deal… [i]t would erode our ability to operate key frequencies [in the Chagos Islands] — vital for our own communication and to counter hostile states".[15] Along similar lines to Stephen Doughty's op-ed, and equally in discord with the Minister of State for Data Protection and Telecoms, a No 10 spokesman recently told journalists that "the electromagnetic spectrum at the Diego Garcia base would not be able to

[14] "Radio Frequencies", UIN 29880, https://questions-statements.parliament.uk/written-questions/detail/2025-02-07/29880

[15] "Chagos Islands deal will prevent serious confrontation, says minister", The *Times*, 11 February 2025, link.

continue to operate without a deal".[16] The Government's confusion is palpable here.

The limits to the ITU's power to compel state action can be seen from its controversial attempt in 2012 to regulate global internet usage through a global telecommunications treaty, which proved a critical moment for the organisation. The agency's efforts to set global standards depend on the unanimous buy-in of its signatories. As the UK, the U.S., Canada, and Australia – together with other advocates of open internet access – opposed the proposed attempt to bring internet usage under treaty control, they were and remain under no obligation to implement the treaty and its attendant ITRs. That the ITU represents a club which fundamentally depends on state consensus, rather than enforcement measures, is relevant to the British Government's assertion that the UK and the U.S. could be left isolated and exposed over the Diego Garcia electromagnetic spectrum. It would instead be the ITU that isolated and exposed itself if it attempted another such overreach.

There are additional examples of the ITU's inability to overrule the wishes and actions of powerful states such as the U.S. In 2010, Sudan filed a complaint to the ITU in relation to the restriction of certain websites in the country. This was the result of a previous U.S. Treasury Department move to impose sanctions on illiberal countries, including Cuba and Iran. The ITU remained powerless to roll back the American move, and indeed it was only when the Treasury Department eased sanctions that some internet usage returned to Sudan (as well as North Korea, Iran, Syria, and Cuba).[17] During the episode, it was reported that Google and other providers refused to restore internet access out of fear of violating U.S. laws.[18]

The ITU's irrelevance in the face of unilateral American actions in the global communications space is also on display today in Iran. During the 2022 Mahsa Amini protests in Iran, the U.S. eased restrictions on Space X's Starlink satellite service in order to provide the Iranian people with censorship-circumventing

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[16] Tony Diver and Jack Maidment, "Starmer's excuse for Chagos deal 'blown out the water' – by his own minister", *The Telegraph*, 13 February 2025, link.

[17] John Campbell, The Push to Lift U.S. Communication Technology Sanctions on Sudan, *Council on Foreign Relations*, 28 January 2014, link.

[18] Sudan to lodge complaint against ITU over blocked internet sites, *Sudan Tribune*, 25 April 2010, link.

internet access. The Iranian government filed a complaint with the ITU, arguing that:

> "Unauthorised Starlink transmissions within the Islamic Republic of Iran's territory violate pertinent ITU regulations and resolutions… The Islamic Republic of Iran reaffirms its dedication to resolving this matter under the applicable international laws, including those outlined by the ITU."[19]

In October 2023 and March 2024, the ITU ruled in favour of Iran,[20] spurring Iranian official media channels to call for SpaceX to "urgently conform their actions to Iran's internal rules and to obtain a license to operate in Iran through the regulatory authorities of this country."[21] To this day, however, Starlink has not been deactivated, and the U.S. and Norway – who administer Starlink collaboratively – continue to ignore the ITU's ruling. It is indicative of the *de facto* hierarchy of global internet regulation that Elon Musk felt it necessary to defer not to the ITU over Starlink's activities in Gaza, but rather to the U.S. and Israeli governments.[22] This, incidentally, disposes of the argument that an adverse ITU decision would mean that radiotelecommunications service providers would no longer service Diego Garcia if the ITU made a negative ruling.

These examples offer several pertinent lessons for today's concerns over the ITU and Diego Garcia's spectrum. The agency has never once displayed the appetite or ability to override American actions in the global communications space. Even if the ITU were to attempt to alter or restrict American and British usage of the Diego Garcia electromagnetic spectrum, without their dual consent this would surely induce retaliation – not least as the U.S. and its partners are the overwhelmingly largest contributors to the agency's budget.

It is worth pondering the consequences, if the United Kingdom and the United States were to hand over the Chagos simply because of speculative

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[19] Permanent Mission of the Islamic Republic of Iran to the United Nations Office and other International Organisations in Vienna, Statement by the Delegation of the Islamic Republic of Iran, 19 June 2024, 3.

[20] Will Starlink comply with ruling to engage with Iranian authorities?, *Amwaj*, 31 October 2023, link.

[21] Starlink obliged to coop. with Iran on satellite internet, *Mehr News Agency*, 28 October 2023, link.

[22] @elonmusk, *X*, 28 October 2023, link.

apprehensions over possible future ITU action. It would mean that, as long as a majority of the United Nations General Assembly—or indeed the governing body of any of the UN specialised agencies having the authority to do so[23]—made a request for an advisory opinion to the ICJ and obtained a favourable opinion, they could disrupt the lawful activities of other states.

What if, for example, a majority of the UN General Assembly asked the ICJ to decide whether allowing Israel to use American satellites to transmit military information breached a putative international human rights rule? If the ICJ gave an opinion that declared the transmission of such information to be unlawful—and the ITU subsequently endorsed the opinion and purported to apply it—would the U.S. need to comply with the ITU's directives on the matter?

Questions such as this are not academic for a country such as the United Kingdom which, under its current Government, seems poised to treat any and all ICJ pronouncements as constraints and directives that the country must observe and obey. The ICJ has repeatedly thrown caution to the winds and allowed the General Assembly to instigate advisory proceedings on matters that are, at best, ill-suited to the ICJ's judicial function and, quite arguably, blatant violations of the principle that the Court shall not settle disputes between states without their consent. The 2004 and 2024 anti-Israel advisory opinions are the most conspicuous examples; the 2019 *Chagos* advisory opinion is another.

Future advisory opinions can be envisaged with little effort at imagination. An advisory opinion on *Obligations of States in respect of Climate Change* is forthcoming.[24] A range of grievances and causes might well supply impetus for further advisory requests; practically anything on the agenda of the General Assembly—from natural resource use to pollution to the 'right to development' to slavery (modern and historic)—might find its way through an advisory request onto the docket of the ICJ.

If it becomes the policy of the United Kingdom that an ICJ opinion of that kind—non-binding though it is—must be implemented fastidiously, then the United Kingdom soon shall find its international position on a vast range of issues

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[23] See *Judgment No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Rep. 2012 p. 10, p. 20, para. 21 (1 Feb.).

[24] See ICJ Press Release 2024/81 (13 Dec. 2024).

practically untenable and even its domestic policies in many areas subject to doubt. In 1996, the ICJ opined, in response to a General Assembly advisory request, that the use of nuclear weapons in *most* circumstances would be unlawful.[25] In the ensuing thirty years of nuclear disarmament discourse, has even that small aperture for lawful nuclear deterrence stayed open? If the General Assembly asked the ICJ to re-visit the question, and the ICJ said, no, even for purposes of protecting the existential interests of the nation, nuclear weapons are illegal, would Sir Keir Starmer's government relinquish the nuclear deterrent?

The Chagos, a strategic asset that has been under British sovereignty since 1814, almost surely would not be the last we hear of ICJ advisory proceedings, if the United Kingdom accedes to the demand to turn the Islands over to Mauritius because international lawyers say the ICJ said we must. This is a precedent that simply cannot be allow to exist.

The ITU's capture by China and illiberal states

There is an additional reason why the UK and U.S. should not bow to the hypothetical threat posed by the ITU to the future security of our operations on Diego Garcia: the agency has gradually been captured by China, and is increasingly under pressure to promote a mode of global communications governance favoured by authoritarian regimes. The ongoing Chagos episode is therefore a crucial test of the UK's steadfastness in the face of adversarial lawfare.

The Chinese Communist Party (CCP) launched the Digital Silk Road (DSR) in 2015, which constitutes one pillar of its better-known Belt and Road Initiative (BRI). Ostensibly, the DSR aims to spread and improve global digital infrastructure across the developing world – serving, in the words of China's foreign policy chief Wang Yi, as an "engine of the common development of all countries and an accelerator for the modernisation of the whole world."[26]

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[25] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. p.226, p. 266, para. 105(2)(E) (8 July).

[26] Wang Yi on High-Quality Belt and Road Cooperation, Chinese Ministry of Foreign Affairs, 7 March 2024, link.

In reality, the DSR seeks to deepen the CCP's global leverage over other states by embedding Chinese government-affiliated companies in the critical national infrastructure of the digital age – most infamously represented by Huawei – and to transition Beijing from a 'rule taker' to a 'rule maker' in global digital governance.[27] This second ambition aspires to disseminate and install international communications norms and practices which support the CCP's authoritarian governance model.

Since the 2010s, the ITU has come into the crosshairs of the DSR. One analysis describes China's expansion of presence and activity in the agency as a "deluge", linking it to the 'China Standards 2035' component of the DSR.[28] Between 2015 and 2022, the Chinese engineer Zhau Houlin was the ITU's Secretary-General, who spent his tenure promoting and pursuing CCP objectives – rather than adhering to the Secretary-General oath to "regulate my conduct with the interest of the Union only in view."[29]

Thus, in 2015, Chinese Premier Li Keqiang in a meeting with Zhao communicated his expectation that the new ITU Secretary-General would "help promote the development of technology and a high standard of information and communication in China."[30] In 2017, Zhao explicitly connected the ITU to the BRI: "we hope to enhance our ability to deliver services and help with ICT development around the globe by cooperating with China through the Initiative."[31] In 2020, the *Financial Times* reported that Chinese influence on the ITU is clear, posing a future risk of a "radical change to the way the internet works… which critics say will also bake authoritarianism into the architecture underpinning the web."[32]

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[27] For more, see The Digital Silk Road: Expanding China's Digital Footprint, *Eurasia Group*, 8 April 2020, link.

[28] China Standards 2035 is the subcategory of the DSR pertaining to standard setting in global digital governance.

[29] Brett Schaefer and Danielle Pletka, Countering China's Growing Influence at the International Telecommunication Union, *The Heritage Foundation*, 7 March 2022, link.

[30] Premier Li meets ITU secretary-general, *The State Council of the People's Republic of China*, 23 January 2015, link.

[31] Kong Wenzheng, ITU vows to join hands with China, *China Daily*, 24 April 2019, link.

[32] Anna Gross and Madhumita Murgia, China and Huawei propose reinvention of the internet, *FT*, 27 March 2020, link.

The key method employed by the CCP to influence the ITU has been to instruct Chinese companies and organisations to promote government agendas in the Union's study groups – which propose practice and standard alterations for vote. As Policy Exchange's report *The Myth of the 'Global South'* demonstrated,[33] this borrows from the CCP's influence tool book in the UN – where Chinese representatives endeavour to shape attitudes via 'corridor lobbying' before General Assembly votes. One focus has been on 5G standard setting, when Chinese delegates were instructed by the CCP to vote *en masse*, and bring their phones into the booth to prove their loyalty.[34]

The threat of the ITU being dominated by adversarial interests – and, as a function, of the UK and its partners being coerced by the agency – is magnified by growing cooperation between Beijing and Moscow in the digital domain. China and Russia issued a joint statement in 2021 which pledged "their unity on issues related to Internet governance… [and emphasised] the need to enhance the role of the International Telecommunication Union and strengthen the representation of the two countries in its governing bodies."[35] A fundamental motive for this partnership is the promotion and extension of 'intergovernmental' governance of international communications. This translates as greater state control – a *sine qua non* of authoritarianism – in contrast to the existing 'multi-stakeholder' approach, which affords a greater say to private companies and civil society. The ITU's receptiveness to such influence was already demonstrated by the 2012 treaty vote discussed above, which saw the agency propose 'intergovernmental' amendments to internet governance.

How the UK and its liberal democratic partners should respond to these threats is beyond the scope of this Research Note. The salient point, however, is that the British Government must be attuned to the battle underway over the direction of the ITU and other such multilateral institutions, and the means by which our adversaries aim to co-opt them to their advantage. Rather than

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[33] Marcus Solarz Hendriks, Jay Mens and Harry Halem, The Myth of the 'Global South': A Flawed Foreign Policy Construct, *Policy Exchange*, 22 October 2024, 76-77, link.

[34] Valentina Pop et al., From Lightbulbs to 5G: China Battles West for Control of Vital Technology Standards, *The Wall Street Journal*, 7 February 2021, link.

[35] Joint Statement of the Russian Federation and the People's Republic of China on the Twentieth Anniversary of the Treaty of Good Neighbourliness and Friendly Cooperation between the Russian Federation and the People's Republic of China, The Embassy of the Russian Federation to the United Kingdom of Great Britain and Northern Ireland, 28 June 2021, link.

succumb to what is in effect lawfare, the UK must reject spurious legal arguments which magnify the power of international bodies – which may be compromised – and favour interpretations of our legal obligations which do not trample over our national interests. The so-called risk posed by the ITU to our satellite communication system on Diego Garcia is one such example.

The Failure of Mauritius's Lawfare Against the British Indian Ocean Territory

Mauritius has already used the lawfare tactic described in the preceding section in relation to other UN specialised agencies on numerous occasions. It has celebrated its actions in the press. However, none of Mauritius's claimed 'successes' in UN specialised agencies have had any significant effect on the operation of the base on Diego Garcia or the United Kingdom's sovereignty over the British Indian Ocean Territory. The following discussion reviews past instances of Mauritian lawfare and demonstrates their irrelevance.

Universal Postal Union

Of Mauritius's lawfare manoeuvres against the United Kingdom, the request to the Universal Postal Union (UPU) to stop recognizing BIOT postage stamps particularly illustrates the practical limits of such action. Upon the request of Mauritius, the UPU in 2021 decided to de-recognise BIOT stamps and to refuse to transmit postal matters franked with them. The BIOT government subsequently ceased to produce BIOT stamps.

The de-recognition of BIOT stamps by the UPU has no impact whatsoever on the operation of Diego Garcia nor on the United Kingdom's sovereignty over the Chagos. This is because, before they were de-recognised by the UPU, BIOT stamps were not regularly used to pay for postal services between the BIOT and the rest of the world. Diego Garcia is home to a large United States military postal facility, which uses US postage and which is responsible for handling the vast majority of the mail going in and out of Diego Garcia, while the British armed forces have also maintained at various times a modest military mail capacity. Moreover, while it was theoretically possible to post items using BIOT stamps on Diego Garcia, in practice their use was rare and confined to philatelic memorabilia, postcards, and the like.

Moreover, there is a fundamental difference between what Mauritius was able to achieve at the UPU and what it could achieve at the ITU. The recognition of BIOT stamps by other UPU members required a positive action on their part, namely the transmission of BIOT-franked mail onwards. The same is in no way true of the ITU. Hence, the outcome that Mauritius obtained at the UPU is simply impossible to replicate at the ITU.

Thus, the de-recognition of BIOT stamps by the UPU, which were almost exclusively produced for the benefit of stamp collectors, could not have had any impact on the operation of the facilities on Diego Garcia, nor could they affect the United Kingdom's ability to exercise its sovereignty over the BIOT. Indeed, the fact that this is the only concrete measure that Mauritius has convinced a specialised agency to take against the United Kingdom neatly illustrates the irrelevance of post-ICJ *Chagos* opinion lawfare. The risk from such lawfare is not from what intergovernmental bodies and other states might do to the United Kingdom; the risk is, instead, from what the United Kingdom, in the misconceived hyper-legalism of the current Government, is doing to itself. We will return, below, to the Attorney General's new legal risk guidance, which we argue has muddled the advice government lawyers give to Ministers on international law questions—and deepened the Government's confusion over the Chagos.

Fisheries

Another area in which Mauritius has engaged in petty lawfare against the UK has been in the field of fisheries. According to Mauritius's lawyer Philippe Sands KC, after Brexit, the United Nations Food and Agriculture Organisation (FAO) "declined to recognise Britain's claim to be the Chagos coastal state for fisheries purposes". Meanwhile, Mauritius has objected to the United Kingdom's participation in the Indian Ocean Tuna Commission on the grounds that the UK has no coast in the Indian Ocean since the BIOT is Mauritian territory.

Again, just as would lawfare at the ITU, Mauritius's demarches at the FAO and Tuna Commission have no bearing on the UK's exercise of sovereignty over the BIOT, including its Marine Protected Area. Fishing boats which operate within the BIOT's waters with Mauritian, instead of BIOT permits would still be committing offences under BIOT law, enforced in the usual manner. Mauritius possesses no armed forces; and its coast guard lacks the capacity to patrol BIOT waters—and if it did so it would be subject to any measures that the United Kingdom and the United States would impose. Whether the FAO or the Tuna Commission recognises the UK as a coastal state is of no practical consequence.

Finally, we may note that, under the 1965 agreement for the detachment of the Chagos Islands, Mauritius retains limited fishing rights in the Chagos archipelago, the extent of which was the subject of an arbitration conducted under Annex VII

of the United Nations Convention on the Law of the Sea (UNCLOS) in 2015.[36] These rights would remain unaffected by the discontinuation of the negotiations by the United Kingdom.

Civil Aviation

Philippe Sands KC, who in addition to his service as legal counsel has been a vocal public advocate for Mauritius's claim over the Chagos Islands, has also suggested that the International Civil Aviation Organization (ICAO) may interfere with civilian aviation activities in relation to the Chagos. In 2023, Sands wrote that "[w]e can expect the ICAO to decide that the UK has no right to regulate flights in and out of Chagos, or over its vast territory."[37] British Foreign Office minister Stephen Doughty also wrote recently that "overflight clearances" could be affected by a binding judgment against the UK in an international court.

The fact basis, however, for Professor Sands's admonitions and Mr. Doughty's professed alarm about the ICAO is lacking. As a military base, Diego Garcia sends and receives few, if any, flights that are not military or otherwise in government service. Flights to and from the base are excluded from the scope of the ICAO's purview, as the organisation only deals with civilian aviation. The Convention on International Civil Aviation defines any "aircraft used in military, customs and police services" as "state aircraft", which are excluded from the ICAO's mandate.[38] This means that even chartered civilian planes, as long as they are used for a military purpose, are not affected by ICAO regulations.

As to civilian overflights, since the BIOT is far away from major air routes, the number of such overflights must necessarily be limited; and as Diego Garcia is an active military base, the likelihood of issues arising from some sort of ICAO de-recognition of the BIOT is minimal. The idea that civilian air operators will refuse to obtain overflight clearances from the BIOT authorities, which control the

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[36] Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, 18 March 2015, https://legal.un.org/riaa/cases/vol_XXXI/359-606.pdf.

[37] Philippe Sands, "Chagos", in Jorge E. Viñuales, Andrew Clapham, Laurence Boisson de Chazournes, and Mamadou Hébié (eds.), *The International Legal Order in the XXIst Century / L'ordre juridique international au XXIeme siècle / El órden jurídico internacional en el siglo XXI: Essays in Honour of Professor Marcelo Gustavo Kohen / Ecrits en l'honneur du Professeur Marcelo Gustavo Kohen / Estudios en honor del Profesor Marcelo Gustavo Kohen* (Leiden: Brill | Nijhoff, 2023), p. 164.

[38] Art. 3, Convention on International Civil Aviation. 15 UNTS at 298 (concluded 7 Dec. 1944; entered into force 4 April 1947).

territory's only airstrip and all of the region's air navigation equipment, and instead apply to the Mauritian authorities, is far-fetched to say the least.

Flawed Ministerial Arguments in Defence of the Chagos Deal

Since its announcement of the draft deal last year, the British Government has made a series of ever-changing and sometimes internally inconsistent claims about why it simply *had to* give up the Chagos Islands to Mauritius with a large payment to the latter. At various times, it has argued that it was bound by the ICJ *Chagos* advisory opinion to do so, that it was to stop China from building bases in the Chagos, that Mauritius could cripple Diego Garcia's operation through lawfare, or even that it was necessary to encourage 'Global South' countries to support Ukraine.[39] But in recent weeks, it has coalesced around a new set of arguments, to which we now turn.

The clearest public statement of the British Government's case for the cession deal comes from the op-ed that we mentioned earlier. This ran in *The Times* (of London) on 11 February 2025 under the byline of Stephen Doughty MP, the United Kingdom's Minister of State for Europe, North America and Overseas Territories.[40] In it, Mr. Doughty claims that the lack of a deal with Mauritius would "erode our ability to operate key frequencies". We have debunked this theory above already. In addition, Mr. Doughty denies that the British government "negotiated this deal solely because of the 2019 ICJ advisory opinion".[41] Instead, he says, "Without a deal Mauritius would inevitably pursue a legally binding judgment.... "Provisional measures", themselves legally binding, could be introduced within weeks, affecting our ability to patrol the Chagos Archipelago waters." So, according to the Minister of State, it is not the *Chagos*

[39] Foreign Secretary's statement on the Chagos Islands, 7 October 2024, link.

[40] "Chagos Islands deal will prevent serious confrontation, says minister", The *Times*, 11 February 2025, link.

[41] We note that this form of words is inadvertently revealing insofar as it discloses that at least part of the reason the Government intends to cede the Islands to Mauritius is because of the ICJ's non-binding 2019 advisory opinion, which was procured in breach of the principle of non-circumvention. This is consistent with the speech that Mr Doughty MP made in the House of Commons on 7 December 2022 – when he was Shadow Minister for Foreign and Commonwealth Affairs and International Development. In that speech, Mr Doughty took for granted that the ICJ's 2019 opinion and the ITLOS 2021 ruling were compelling reasons to cede the Islands to Mauritius and indeed that our failure so to do undermined the UK's criticism of China's actions in the South China Sea. We pointed out the problems with Mr Doughty's reasoning in our 2023 paper at pp 40-42.

advisory opinion *as such* that impels the handover of the Chagos but future judgements in law suits which have not yet been brought and the legal basis for which would be doubtful.

This is an astonishing argument which is nonsensical on its own premises. Every international court and tribunal functions on the basis of state consent, which is at the core of international law. As we argued in our 2023 paper on the Chagos, if the United Kingdom continues to withhold consent from a court adjudicating its dispute with Mauritius about the Chagos—which the United Kingdom has steadfastly done for decades—there is no way a court will make a binding judgment ordering the United Kingdom to hand over the Chagos to Mauritius or to anyone else.

Mr Doughty does not identify the court which he says we should fear will issue a legally binding hand-over judgment, but from his allusion to "provisional measures" we infer that the Government has either the ICJ or ITLOS in mind (as these are courts that issue such measures, but only when they find, *prima facie*, that they have jurisdiction to decide a dispute, which requires the consent that the UK has never given). But ITLOS, under the prevailing view since 2015, when the UNCLOS Annex VII tribunal in *Mauritius v. United Kingdom* said so, has no power to decide a dispute which is chiefly a dispute over territorial sovereignty. In the *South China Sea* arbitration between the Philippines and China, the Philippines carefully avoided questions of territorial sovereignty altogether, for the same reason: it knew that the Annex VII tribunal in that arbitration would be loath to tackle such questions. The number of international courts is very limited; and the only one which could plausibly decide on a sovereignty dispute of this sort is the ICJ.

However, the fact is that the ICJ has no jurisdiction over the dispute over the Chagos: the United Kingdom, in its acceptance of the ICJ's jurisdiction, specifically excludes "any dispute with the government of any other country which is or has been a Member of the Commonwealth".[42] Indeed, Mauritius's own acceptance of the ICJ's jurisdiction also excludes "disputes with the

[42] Declarations recognizing the jurisdiction of the Court as compulsory (United Kingdom of Great Britain and Northern Ireland) (22 Feb. 2017): https://www.icj-cij.org/declarations/gb

Government of any other country which is a Member of the British Commonwealth of Nations".[43]

If there had been a basis upon which Mauritius could have sought a binding ICJ judgment against the UK, it would have done so already. The fact is that no such basis exists or has ever existed, which is why Mauritius was forced to use the advisory opinion route to obtain a non-binding advisory opinion. Its bargaining position would be far stronger if it had a binding ruling against the UK; the fact that it has chosen to negotiate without seeking such a ruling obviously indicates that it knows that there is no way in which it can get a binding ruling unless the UK consents to it, something that it is long-standing UK policy not to do, and which the UK has no obligation, legal or moral, to do. An astute negotiator who had understood this state of affairs would not have declared, just before opening negotiations, that the United Kingdom was afraid of future legal claims, when, in truth, it is Mauritius that does not have a legal leg to stand on.

There are other basic logical flaws in Mr Doughty's article. The Minister writes:

> "A financial element was crucial. If we don't pay, someone else will. Our adversaries would jump at the chance to establish outposts on the outer islands, with a guise of legality on their side, we would have no basis to remove them and efforts to do so could spark a serious confrontation."

In this passage, Doughty invokes a hypothetical scenario in which the UK cedes sovereignty over the Chagos Islands to Mauritius *without* financial payment. He asserts that this would open the door to other states to "establish outposts" on outer Chagossian islands – in other words, that Mauritius would likely violate the terms of the agreement reached with the UK. By this logic, the Minister concedes that *any* deal which involves the transfer of sovereignty jeopardises the future of the base, as Mauritian compliance is contingent on sufficient financial inducement—and Mauritius, if Mr. Doughty is correct, will constantly re-visit and re-define how much shall suffice.

On the Minister's own reasoning, it would be open to Mauritius to extort further payments from the UK by threatening to allow the UK's adversaries to establish outposts on the outer islands. The Minister, by plain implication, understands

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[43] Declarations recognizing the jurisdiction of the Court as compulsory (Mauritius) (23 Sept. 1968): https://www.icj-cij.org/declarations/mu

Mauritius to be so narrowly transactional in its international dealings that practically *no* agreement with the country is worth the paper it is written on. And, yet, he and the Government of which he is part insist that the United Kingdom *must* conclude an agreement handing over the Islands, because *without* an agreement (and a large financial concession to Mauritius), we risk arbitrary lawfare attacks by Mauritius. For the reasons we already have set out, above, the lawfare risk is irrelevant. As for the changing rationales that have emerged from the Government so far, these are a mess of self-contradiction. As for China, the country most interested in enlarging its influence in the Indian Ocean, the legally binding award in the *South China Sea* arbitration in 2016 did nothing to halt China's base-building in places where nobody thinks China is sovereign (and where even China fails to articulate a clear sovereign claim)[44] and on submerged reefs where *no* state under modern international law could ever be sovereign.[45] To the extent that the Minister suggests that nicely-drawn legal agreements between the UK and Mauritius would dissuade China from intruding in the Chagos, he ignores China's expansive ambitions. In any case, it simply strains credulity that a power such as China would risk confrontation or even war with the United States on the basis of an agreement with Mauritius when the latter does not actually have either a title or possession of the Chagos Islands.

It follows that the Government does not think that the transfer of sovereignty would protect the Diego Garcia base, but that surrendering to Mauritian extortion would. This is reinforced by Mr. Doughty's assertion that "if we don't pay" other states would be able to establish outposts "with a guise of legality". Thus, again, the implication is that *it is not the cession of sovereignty which would secure the United Kingdom's interests in the Indian Ocean, but rather the financial element*. In the words of a representative of the Government – and in direct contradiction to previous arguments that it is 'legal uncertainty' which endangers the military base – the UK is thus more concerned about future Mauritian unilateral action than it is about legal compliance.

It is true that countries that never had a sure legal basis to be present in a territory have had difficulty maintaining their presence after international political and judicial organs applied well-established rules under applicable

[44] *South China Sea Arbitration (Philippines v. China)*, Award on Jurisdiction and Admissibility, 29 Oct. 2015, para. 160.

[45] See, e.g., *South China Sea Arbitration*, Award, 12 July 2016, para 1040.

procedures calling on them to withdraw. But Morocco in Western Sahara and Turkey in northern Cyprus have weathered the difficulty for decades. In any event, their experience differs too much from the United Kingdom's to offer a meaningful comparison. The legal basis of the United Kingdom's presence in the Chagos, unlike theirs in the territories in question, has sure footing. UK sovereignty is reflected in nearly two centuries' practice, including the express consent of the pre-independence Mauritius authorities in 1965, the acceptance of that sovereignty by independent Mauritius in 1968, and the absence of any complaint by Mauritius for many years after independence. Moreover, the United Kingdom, unlike illegal occupants, acknowledges the legal rights and obligations contained in its relationship with the neighbouring state. Rather than defending their Chagos deal on faulty and speculative legal premises and declaring that there was no choice but to enter negotiations for a handover on Mauritius's terms, Government Ministers should have defended the United Kingdom's sovereignty in the Chagos.

Misjudging Legal Risk: Lord Hermer's Flawed Legal Risk Guidance and Bad Advice to Ministers Over the Chagos Deal

Why did the Minister place such emphasis on the possibility of a binding ruling when no court with the jurisdiction to make such a ruling exists? We venture to suggest that this is not the result of bad legal advice, but part of the current Government's misconceived approach to international law, which ignores the substantive content of international law rules in favour of an abstract conception of an international "rule of law".

Earlier this year, Lord Hermer KC, the Attorney General, promulgated new guidance for government lawyers advising on legal risk. These guidelines were the subject of a critical Policy Exchange paper.[46] The following passages from the new guidance are instructive (emphasis in the original):

> 6. The principal factor for legal risk is the **likelihood of a legal challenge being successful (assuming one were brought).** Some legal issues will not, or are unlikely to, be tested before a court. For example, they may not be justiciable before a domestic court or possible claimants may be unlikely to bring a legal challenge. Nevertheless, for the purpose of assessing legal risk, you should assume that a challenge will be brought and consider what a court would be likely to decide…
>
> 13. […] States are not automatically obliged to submit their disputes with other States to courts or tribunals and are, in principle, subject to such mechanisms only with their consent. The legal risks need to be assessed in their specific context or system, considering the extent to which states involved have submitted to a dispute settlement mechanism at the international level. Policies or actions which have little or no chance of being tested before a court and which are assessed as carrying a high risk under international law should be scrutinised very carefully by government lawyers.

[46] Conor Casey and Yuan Yi Zhu, *From the Rule of Law to the Rule of Lawyers? The Problem with the Attorney General's New Legal Risk Guidelines*, Policy Exchange, 2024, link.

> The UK attaches great importance to its compliance and respect for international law and its reputation for doing so. This must be a critical factor in legal advice in this area… An assessment of the risks of a breach of international law will require legal and policy assessments of the reputational, diplomatic and Parliamentary impact to be put clearly to Ministers. It will also require an assessment of the likely response of the actors to which the UK owes the international obligation, the likely response of the international community as a whole and any broader implications for the application and development of international law.

These guidelines encourage government lawyers to give muddled advice about the risk that the UK will be held to have acted in breach of its obligations and, relatedly, to ignore, or downplay, the procedural protections on which the UK may rely in avoiding an adverse judgment. Normally, if a client asks, "what are my legal risks for such and such a course of action?", the answer will be "none whatsoever" if there are no competent courts which are able to rule on the matter. For instance, if the American Ambassador to the United Kingdom is sued in a British court, the legal advice would be that he enjoys legal immunity unless that immunity is waived by the United States; if the US does not waive immunity, the Ambassador cannot be sued in a British court, and the relevant advice would end here.

Lord Hermer's guidance asks lawyers assessing legal risk "to assume that a challenge will be brought", even when there is no court competent to hear the challenge. Indeed, this point is emphasised again in the section dealing specifically with international law, which asks government lawyers to scrutinise "very carefully" "[p]olicies or actions which have little or no chance of being tested before a court and which are assessed as carrying a high risk under international law", based on highly uncertain criteria such as "any broader implications for the application and development of international law".

In other words, it seems very likely that government lawyers will have assessed the legal risk involved with the Chagos Islands by assuming that there is a court where a challenge could be brought, even though no such court exists (if any court did have jurisdiction, the government would doubtless have named it to journalists to justify its decision. This is a badly misguided approach to the provision of legal advice, and any advice the Government has received that has been framed on this basis will be worse than useless unless it has also been

made clear to them that, as long as the UK does not accept the jurisdiction of the ICJ over the Chagos sovereignty dispute, the prospects of a binding judgment against Britain are non-existent.

This is not conjecture. On 8 February 2025, Alex Wickham of Bloomberg reported that:

> "as part of his reforms updating the so-called 'legal risk guidance' given to ministers by government lawyers, Hermer gave a clearer steer that without a deal the UK would likely lose a future case and have to give up the islands to comply with such a ruling. Starmer accepted that upgraded advice and concluded the negotiations with Mauritius that started under the Tories… Some Labour sources now wish they had taken a similar approach [as the Tories, who say they would have ignored a court ruling if one existed], blaming Hermer for tying Starmer's hands with black and white advice."[47]

In other words, what led to this advice is not an assessment of legal risks as they actually exist, but an imaginary exercise in which state consent is assumed away and in which international law is untethered from the control of sovereign states. Insofar as the British Government is proceeding on this understanding of legal risk, its rationale for ceding the Chagos Islands to Mauritius is wholly untenable and should be rejected out of hand by Parliament.

Over a century ago, the American jurist Oliver Wendell Holmes, Jr. spoke about a symbolic 'bad man' who 'does not care two straws for the axioms or deductions' of law.[48] We do not believe that a nation should not care about international law. However, when Holmes said that his definition of the law consisted of '[t]he prophecies of what the courts will do in fact, and nothing more pretentious', he necessarily meant what courts *can* do in fact. The British Government should not surrender sovereignty over a vital strategic asset out of ill-defined apprehensions about what *no* court can do.

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[47] @AlexWickham, *X*, 8 February 2025, link.

[48] Oliver Wendell Holmes. Jr., 'The Path of the Law,' (1896-1897) 10 *Harvard Law Review* 457, 460-461.