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Diego Garcia: Competing Claims to a Strategic Isle

by Timothy P. Lynch*

I. INTRODUCTION

Soviet intervention in Afghanistan, Ethiopia and Angola in the last decade has been viewed with concern by the U.S. government.¹ This anxiety is heightened by the fact that the Soviet Union is actively seeking military bases in the Indian Ocean to service its warships.² At present, the Soviets have arrangements with the South Yemen, Ethiopian and Vietnamese governments to maintain outposts in their territories.³ In response to this situation, the U.S. government has expended several hundred million dollars for the purpose of improving its military installations in Oman, Kenya, Egypt, Somalia and on the island of Diego Garcia.⁴ The

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The author has dedicated this note to Joanne Birnberg, his friend and editor, without whose support it could not have been written.

¹ Kaufman, *U.S. Naval Buildup is Challenging Soviet Advances in Asia and Africa*, N.Y. Times, Apr. 19, 1981, at 1, col. 4 [hereinafter cited as *U.S. Naval Buildup*]. This article is the first in a series entitled *Supremacy at Sea: The Race in the Indian Ocean* concerning U.S. military strategy in the Indian Ocean. See also *Ports and Oil Spur Naval Buildup by U.S. and Soviet*, N.Y. Times, Apr. 20, 1981, at 1, col. 4 [hereinafter cited as *Ports and Oil*]; *As Armadas Intrude on "Zone of Peace," Region Watches with Mixed Feelings*, N.Y. Times, Apr. 21, 1981, at 8, col. 1 [hereinafter cited as *As Armadas Intrude*].

² Admiral Robert L.J. Long, Commander-in-Chief of American forces in the Pacific, testified before the House Armed Services Committee in February 1981 that: "The Soviets [are] maneuver[ing] for control over Persian Gulf oil and for access to warm-water ports. With a large military force in Afghanistan, use of port and air facilities in Ethiopia and South Yemen and ready access to other ports in the region, the Soviets are developing a substantial presence around the Indian Ocean." *Ports and Oil*, *supra* note 1, at 1, col. 6.

³ In South Yemen, the Soviets make use of the old British port of Aden and an installation on the island of Socotra in the Arabian Sea. On Ethiopian islands, the Soviet Union has established bases at Perim, on the mouth of the Red Sea, and in the Dahlak Archipelago. On the Dahlak islands, the Soviets have reportedly built submarine pens as well as missile repair and storage silos. *U.S. Naval Buildup*, *supra* note 1, at 12, cols. 4-5. In late 1979, the U.S.S.R. obtained port facilities at Cam Ranh Bay in Vietnam. *Ports and Oil*, *supra* note 1, at 12, col. 1. These bases are an effective encroachment upon the Indian Ocean. In addition, the Soviets have unsuccessfully attempted to obtain bases on Madagascar and the Maldives Islands. *U.S. Naval Buildup*, *supra* note 1, at 12, cols. 5-6.

⁴ *U.S. Naval Buildup*, *supra* note 1, at 12, col. 6.

Indian Ocean region has now become an area of primary strategic concern to the United States.⁵

The United States maintains a military presence in the Indian Ocean as a consequence of the United Kingdom's withdrawal of armed forces east of the Suez a decade ago.⁶ The United States moved into the region to replace the British as the stabilizing force in the area.⁷ The major U.S. naval base in the Indian Ocean is located on the island of Diego Garcia.⁸ The U.S. government leases this atoll from the United Kingdom.⁹ The terms of the treaty allow the U.S. military use of the island until the year 2016.¹⁰ Additionally, the agreement contains an extension clause which could permit the U.S. navy to remain on Diego Garcia until 2036.¹¹

Diego Garcia is a small, oppressively hot island in the Chagos Archipelago.¹² The island's importance arises from its strategic location: Diego Garcia lies southeast of Sri Lanka and approaches the center of the Indian Ocean.¹³ The island is therefore an ideal support facility¹⁴ for tactical aircraft and ships moving from the Philippines to the Middle East or Persian Gulf.¹⁵ The American presence on Diego Garcia also serves as a deterrent to Soviet adventurism in the Indian Ocean.¹⁶

The country of Mauritius claims ownership of the Chagos Archipelago and seeks to evict the United States from Diego Garcia.¹⁷ Mauritius is

⁵ *Id.* at 1, col. 5 (opinion of Capt. William Carlson, commander of the aircraft carrier *Midway*).

⁶ *Id.* at 12, col. 4.

⁷ *Id.* at 12, col. 6.

⁸ *Id.* at 1, col. 5.

⁹ Naval Support Facility on Diego Garcia, Feb. 25, 1976, United States-United Kingdom, 27 U.S.T. 315, T.I.A.S. No. 8230; Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, United States-United Kingdom, 18 U.S.T. 28, T.I.A.S. No. 6196. *See also* Naval Communications Facility on Diego Garcia, Oct. 24, 1972, United States-United Kingdom, 23 U.S.T. 3087, T.I.A.S. No. 7481. This agreement authorized only the construction of a communications facility on Diego Garcia. *Id.*, 23 U.S.T. at 3088, T.I.A.S. No. 7481. It was superseded by the 1976 treaty, which allowed substantial expansion of the installation. Naval Support Facility on Diego Garcia, *supra*, 27 U.S.T. at 316-17, T.I.A.S. No. 8230.

¹⁰ Availability of Certain Indian Ocean Islands for Defense Purposes, *supra* note 9, 18 U.S.T. at 31, T.I.A.S. No. 6196.

¹¹ *Id.*

¹² The Chagos Archipelago lies between 4° 44' and 7° 39' south, and between 70° 50' and 72° 44' east. A. TOUSSAINT, HISTORY OF MAURITIUS 11 (1977). The total area of these islands is about 47-½ square miles. Many are coral atolls covered with coconut palms, while some of the islands are little more than sand banks. C. WRIGHT, MAURITIUS 166 (1974).

¹³ A. TOUSSAINT, *supra* note 12.

¹⁴ A naval support facility is a refueling and major repair station for tactical aircraft and ships. Harrison, *Diego Garcia*, U.S. NAVAL INSTITUTE PROCEEDINGS 55 (Aug. 1979).

¹⁵ U.S. Naval Buildup, *supra* note 1, at 12, col. 3.

¹⁶ *See generally* B. BLECHMAN & S. KAPLAN, FORCE WITHOUT WAR 71-74 (1978).

¹⁷ *See infra* notes 77-81 and accompanying text.

a former British Colony of which the Chagos Archipelago was a part.¹⁸ Prior to the colony's independence, the United Kingdom made an arrangement with the government of Mauritius for new administration of the island chain.¹⁹ Along with three islands from Britain's Seychelles colony,²⁰ the Archipelago was designated the British Indian Ocean Territory.²¹ This territory was administered by a separate commissioner and became a new colonial unit.²² The negotiations which resulted in the transfer of the Chagos Archipelago were conducted in private between Mauritian leaders and the British Colonial Office.²³ The sale was effectuated by an oral agreement between Mauritius and the United Kingdom.²⁴ Mauritius contends that this transaction violated international law and the islands should therefore be restored to Mauritian control.²⁵

The government of Mauritius contends that the negotiations which culminated in the island transfer were tainted by fraud²⁶ and duress.²⁷ Therefore, it is asserted that the transaction is void under principles of customary international law.²⁸ Mauritius also contends that the transfer constituted a disruption of the colony's territorial integrity.²⁹ As such, the Mauritians maintain that the transfer violated their right to self-determination and, therefore, should be regarded as invalid.³⁰ The United Kingdom asserts that the transfer negotiations were completed in good faith.³¹ The British also declare that the transfer was voluntarily negotiated between the two countries and, therefore, was not a violation of self-determination.³²

> The government of Mauritius intends to present these issues to the International Court of Justice (ICJ).³³ The scenario which spawned this controversy is not unique to Mauritius; the Seychelles Islands possess vir-

¹⁸ See *infra* notes 47-54 and accompanying text.

¹⁹ UNITED KINGDOM COLONIAL OFFICE, ANNUAL REPORT ON MAURITIUS 4 (1965) [hereinafter cited as COLONIAL OFFICE REPORT].

²⁰ The Seychelles Islands are located approximately 940 miles north of Mauritius, between 3° 40' and 6° 5' south. A. TOUSSAINT, *supra* note 12, at 9-10.

²¹ COLONIAL OFFICE REPORT, *supra* note 19.

²² *Id.*

²³ A. SIMMONS, MODERN MAURITIUS: THE POLITICS OF DECOLONIZATION 173 (1982).

²⁴ *Id.* See *infra* notes 55-59 and accompanying text.

²⁵ See *infra* notes 26-30 and accompanying text.

²⁶ See *infra* note 141 and accompanying text.

²⁷ See *infra* notes 170-72 and accompanying text.

²⁸ See *infra* notes 133-40, 154-69 and accompanying text.

²⁹ See *infra* notes 91-92 and accompanying text.

³⁰ See *infra* notes 84-90 and accompanying text.

³¹ See *infra* notes 142, 177 and accompanying text.

³² See *infra* notes 103-04 and accompanying text.

³³ N.Y. Times, June 20, 1982, at 10, col. 4.

tually identical claims.³⁴ Mauritius could potentially advance five contentions in support of its position: (1) self-determination; (2) termination for breach;³⁵ (3) duress; (4) error;³⁶ and, (5) fraud. These latter two claims have never been analyzed by international tribunals.³⁷ An adjudication of this controversy by the ICJ would have considerable effect on the international community.

This comment evaluates the competing claims of Mauritius and the United Kingdom to the Chagos Archipelago. First, the background of the controversy will be examined. The manner in which Mauritius obtained possession of the Chagos Archipelago, and the United Kingdom of Mauritius, will be discussed. The transfer of the Archipelago will be scrutinized and the claims to the islands will be identified. These claims will be analyzed in light of the right of self-determination and the customary international law theories of fraud, duress, error and termination. A proposal regarding the adjudication of this controversy by the International Court of Justice will then be presented.

II. BACKGROUND OF THE CONTROVERSY

Mauritius was uninhabited³⁸ before the Dutch arrived and colonized the island in 1598.³⁹ This settlement, however, did not prosper and was abandoned in 1710.⁴⁰ The French East India Company laid claim to the island in 1715.⁴¹ Their colony flourished, and the company eventually expanded further into the Indian Ocean.⁴² During the latter part of the eighteenth century, commercial companies from Mauritius developed the Chagos Archipelago and other islands in the Indian Ocean.⁴³ These islands became possessions of the French East India Company.⁴⁴ By 1767, the company had gone bankrupt and it sold the colony to the King of France.⁴⁵ This sale vested legal title to Mauritius and the Chagos Archi-

³⁴ See *supra* note 20 and accompanying text. The creation of the British Indian Ocean Territory included the islands of Aldabra, Farquhar and Desroches which had formerly been part of the Seychelles. A. TOUSSAINT, *supra* note 12, at 90. See also COLONIAL OFFICE REPORT, *supra* note 19.

³⁵ See *infra* notes 220-21 and accompanying text.

³⁶ See *infra* note 183 and accompanying text.

³⁷ See *infra* notes 134, 189 and accompanying text.

³⁸ B. BENEDICT, MAURITIUS: PROBLEMS OF A PLURAL SOCIETY 9 (1965).

³⁹ C. WRIGHT, *supra* note 12, at 20.

⁴⁰ B. BENEDICT, *supra* note 38, at 9. Abandonment relinquishes all legal claims to a territory. See *infra* note 123.

⁴¹ C. WRIGHT, *supra* note 12, at 21.

⁴² B. BENEDICT, *supra* note 38, at 10-11.

⁴³ A. TOUSSAINT, *supra* note 12, at 44.

⁴⁴ B. BENEDICT, *supra* note 38, at 10-11.

⁴⁵ *Id.*

pelago in the government of France.⁴⁶

During the Napoleonic Wars, Mauritius frequently served as a base of operations against the British in both the Indian Ocean and India.⁴⁷ In 1810, the British Fleet seized Mauritius from France.⁴⁸ The Treaty of Paris of 1814,⁴⁹ which was confirmed by the Treaty of Vienna of 1815,⁵⁰ gave the United Kingdom legal title to Mauritius and its dependencies.⁵¹ At this time, the Chagos Archipelago had thus become a dependency of Mauritius.⁵²

The United Kingdom governed Mauritius until the colony was granted independence on March 12, 1968.⁵³ The colony included the island of Mauritius, the islands of Agalega and Rodrigues, and the Chagos Archipelago.⁵⁴ During November of 1965, the British government negotiated a settlement with Mauritius for the Chagos Archipelago.⁵⁵ This settlement was reached at a constitutional conference designed to prepare the colony for independence.⁵⁶ The elected representatives of Mauritius agreed to transfer the Chagos Archipelago to the United Kingdom in return for £3 million (U.K.).⁵⁷ The transaction was concluded orally be-

⁴⁶ Occupation of a territory that has been abandoned establishes a legal claim under customary international law. 2 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1030-61 (1963).

⁴⁷ The settlement of the Caribbean had driven many pirates eastward into the Indian Ocean. A great deal of these buccaneers settled on Mauritius and the nearby islands. The wars with Great Britain encouraged privateering against British merchantmen. Between the years 1793 and 1802 over £2 million in pirated booty passed through Mauritius' capital of Port Louis. C. WRIGHT, *supra* note 12, at 24.

⁴⁸ W. MATHIESON, *BRITISH SLAVE EMANCIPATION 1838-1849*, at 208 (1967); W. SIMNETT, *THE BRITISH COLONIAL EMPIRE* 138 (1942).

⁴⁹ Definitive Treaty of Peace and Amity, May 30, 1814, 63 Parry's T.S. 171-97.

⁵⁰ Territorial Treaty, May 20, 1815, 64 Parry's T.S. 309-21. At this time the United Kingdom re-ceded many islands back to France because they were considered worthless as military bases. One of these was the island of Reunion, 100 nautical miles from Mauritius. *Id.* at 309-21; A. TOUSSAINT, *supra* note 12, at 6, 59. Britain retained full sovereignty over Mauritius and the Seychelles which were governed as the same colonial unit until the early twentieth century. *Id.* at 79.

⁵¹ A dependency is a "geographically separate territorial unit under the jurisdiction of but not formally annexed by a nation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (1971).

⁵² C. CARRINGTON, *THE BRITISH OVERSEAS* 635 (1950).

⁵³ Smith, *Mauritius: Constitutionalism in a Plural Society*, 31 MOD. L. REV. 601 (1968).

⁵⁴ Agalega and Rodrigues are both dependencies of Mauritius today. Agalega is 580 miles northwest of Mauritius, and Rodrigues is 360 miles east. C. WRIGHT, *supra* note 12, at 166-67.

⁵⁵ COLONIAL OFFICE REPORT, *supra* note 19.

⁵⁶ A. SIMMONS, *supra* note 23, at 173.

⁵⁷ *Id.* The University of Mauritius was founded with the help of this money and a gift of £3000 worth of books from the British government. C. WRIGHT, *supra* note 12, at 62. Compensation was also provided to the private interests involved. The transfer of the

tween the British Colonial Office and Mauritius.⁵⁸ Therefore, there is no record of the sale conferences and there was no exchange of documents.⁵⁹ The day after the transfer was announced, a Mauritian political party withdrew from the country's coalition government in protest.⁶⁰ The party's leader explained that while they were "not against the principle of the transfer of the Chagos Archipelago for the purpose in view, they considered that Mauritius should have obtained better compensation."⁶¹

The transfer was condemned by a resolution of the United Nations General Assembly.⁶² The resolution was adopted on the advice of the Special Committee appointed to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁶³ and declared the event a violation of Mauritius' territorial integrity.⁶⁴ General Assembly disapproval of the transaction was repeated in 1966⁶⁵ and 1967.⁶⁶ When Mauritius became independent in 1968, the question was no longer considered.⁶⁷ The Special Committee was concerned only with non-self-governing and trust territories and therefore discontinued monitoring this situation when the colony achieved nation status.⁶⁸ The Special Committee's final report on Mauritius reiterated disapproval of the

Chagos Archipelago displaced about 1600 people living on Diego Garcia. The United Kingdom provided the equivalent of \$1.5 million for their welfare. As it became evident that this amount was insufficient, another settlement, the equivalent of \$7.24 million, was negotiated with the Mauritian government in 1981. N.Y. Times, *supra* note 33, at 10, col. 3.

⁵⁸ A. SIMMONS, *supra* note 23.

⁵⁹ *Id.*

⁶⁰ COLONIAL OFFICE REPORT, *supra* note 19; A. SIMMONS, *supra* note 23, at 173-74.

⁶¹ COLONIAL OFFICE REPORT, *supra* note 19. See also *infra* notes 115-18 and accompanying text.

⁶² G.A. Res. 2066, 20 U.N. GAOR Supp. (No. 14) at 57, U.N. Doc. A/6160 (1965).

⁶³ This committee, created by General Assembly Resolution 1654, is composed of Australia, Cambodia, Ethiopia, India, Italy, Madagascar, Mali, Poland, Syria, Tanganyika, Tunisia, U.S.S.R., United Kingdom, United States, Uruguay, Venezuela and Yugoslavia. G.A. Res. 1654, 16 U.N. GAOR Supp. (No. 17) at 65, U.N. Doc. A/L. 336 and Add. 1-3 (1961). The committee monitors and reports on the progress of all trust and non-self-governing territories' movement toward independence. *Id.*

⁶⁴ G.A. Res. 2066, *supra* note 62. The resolution stated that any step taken by the administering power to detach islands from the colony for the purpose of establishing a military base would be in contravention of paragraph six of Resolution 1514. *Id.* See *infra* notes 87-89 and accompanying text. Paragraph six of Resolution 1514 reads: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/L. 323 and Add. 1-6 (1960). For a discussion of the binding effect of a General Assembly resolution, see *infra* note 108 and accompanying text.

⁶⁵ G.A. Res. 2232, 21 U.N. GAOR Supp. (No. 16) at 74, U.N. Doc. A/6628 (1966).

⁶⁶ G.A. Res. 2357, 22 U.N. GAOR Supp. (No. 16) at 55, U.N. Doc. A/7013 (1967).

⁶⁷ See *supra* note 63.

⁶⁸ *Id.*

transaction.⁶⁹ The Special Committee continued to consider the question of the British Indian Ocean Territory with regard to the Seychelles Islands until 1972.⁷⁰ Each year from 1968 to 1972, the General Assembly, on the advice of the Special Committee, adopted a resolution deploring the severance of a territory and the construction of military bases in the Indian Ocean.⁷¹

The chief negotiator for Mauritius at the transfer conference became the country's first Prime Minister in 1968.⁷² His party governed Mauritius until he was voted out of office in 1982.⁷³ Throughout the 1970's, the ownership of Diego Garcia was an important Mauritian campaign issue.⁷⁴ Opposition parties accused the government of encouraging nuclear war by permitting the installation of military facilities on the island.⁷⁵ In June of 1982 the Movement Militant Mauricien (MMM) was overwhelmingly elected to power in Mauritius.⁷⁶ Unlike the preceding pro-western government, the MMM favors neither U.S. nor Soviet policy, but is instead closely aligned with the New Delhi-initiated movement to turn the Indian Ocean into a demilitarized zone.⁷⁷ This "zone of peace" movement seeks the removal of all foreign military personnel from the area.⁷⁸ One of the MMM's campaign promises was to evict the U.S. Navy from Diego Garcia

⁶⁹ 23 U.N. GAOR C.4 (1791st mtg.) at 36, U.N. Doc. A/7200/Rev. 1/Ch. XI (1968).

⁷⁰ See *infra* note 71 and accompanying text.

⁷¹ G.A. Res. 2984, 27 U.N. GAOR Supp. (No. 30) at 85, U.N. Doc. A/8955 (1972); G.A. Res. 2869, 26 U.N. GAOR Supp. (No. 29) at 103, U.N. Doc. A/8616 (1971); G.A. Res. 2709, 25 U.N. GAOR Supp. (No. 28) at 99, U.N. Doc. A/8248 (1970); G.A. Res. 2592, 24 U.N. GAOR Supp. (No. 30) at 74, U.N. Doc. A/7896 (1969); G.A. Res. 2430, 23 U.N. GAOR Supp. (No. 18) at 64, U.N. Doc. A/7419 (1968). The United Kingdom abstained from voting on these resolutions and those cited *supra* notes 62, 65 and 66. For a discussion of the binding effect of a General Assembly resolution, see *infra* note 108 and accompanying text.

⁷² A. SIMMONS, *supra* note 23, at 190-91.

⁷³ N.Y. Times, *supra* note 33, at 10, cols. 1, 3.

⁷⁴ Carter, *Foreward* to A. SIMMONS, MODERN MAURITIUS: THE POLITICS OF DECOLONIZATION at viii (1982); A. MANNICK, MAURITIUS: THE DEVELOPMENT OF A PLURAL SOCIETY 161 (1979); L. RIVIERE, HISTORICAL DICTIONARY OF MAURITIUS 36 (1982); A. SIMMONS, *supra* note 23, at 191; *As Armadas Intrude*, *supra* note 1, at 8, col. 5.

⁷⁵ A. SIMMONS, *supra* note 23, at 191.

⁷⁶ N.Y. Times, *supra* note 33, at 10, col. 1.

⁷⁷ *Id.* at 10, col. 4. The MMM has already announced plans to close Port Louis, the capital of Mauritius, to both U.S. and Soviet warships. *As Armadas Intrude*, *supra* note 1, at 8, col. 5. This is by no means a token gesture as the city is a favorite liberty spot and American sailors spend literally millions of dollars there every year. McDowell, *Crosscurrents Sweep a Strategic Sea*, 160 NATIONAL GEOGRAPHIC 442 (1981).

⁷⁸ This movement was responsible for the United Nations' Declaration of the Indian Ocean as a zone of peace. *As Armadas Intrude*, *supra* note 1, at 8, cols. 2-3. This resolution called upon the superpowers to remove all warships and military aircraft from the area. G.A. Res. 2832, 26 U.N. GAOR Supp. (No. 23) at 105, U.N. Doc. A/8429 (1971). The United States abstained from voting on this resolution. For a discussion of the binding effect of a General Assembly resolution, see *infra* note 108 and accompanying text.

in furtherance of this goal.⁷⁹

The MMM claims that historically the Chagos Archipelago is Mauritian Territory,⁸⁰ and that the islands were wrongfully taken from Mauritius.⁸¹ The United Kingdom contends that no such historical basis exists⁸² and that the transfer resulted from free negotiation.⁸³ These claims will now be considered in light of the international right of self-determination and principles of customary international law.

III. APPLICATION OF INTERNATIONAL LAW TO THE COMPETING CLAIMS

A. *Self-Determination*

The principle of self-determination holds that all peoples have the inalienable right to freely pursue political, economic, social and cultural development.⁸⁴ Recognition of this principle is enumerated in the United Nations Charter as a fundamental purpose of the organization.⁸⁵ The doctrine of self-determination has developed considerably in the past three decades.⁸⁶ This development is reflected by the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514).⁸⁷ The General Assembly adopted Resolution 1514 in 1960 as a condemnation of colonialism in all forms.⁸⁸ This declaration reaffirmed the doctrine of self-determination and deplored "[a]ny attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country."⁸⁹ Today, the doctrine of self-determination is recognized as a rule of international law.⁹⁰

Mauritius contends that the creation of the British Indian Ocean Territory was a violation of territorial integrity.⁹¹ The country's chief negotiator at the transfer conference claims that the settlement was not a product of open bargaining.⁹² This contention is supported by the Gen-

⁷⁹ As *Armadas Intrude*, *supra* note 1, at 8, col. 5; Carter, *supra* note 74.

⁸⁰ See *supra* notes 43-46 and accompanying text.

⁸¹ See *infra* notes 91-94, 139-41, 168-70 and accompanying text.

⁸² See *infra* notes 97-102 and accompanying text.

⁸³ See *infra* notes 103-04, 177 and accompanying text.

⁸⁴ R. HINGORANI, *MODERN INTERNATIONAL LAW* 243 (1979).

⁸⁵ U.N. CHARTER art. 1, para. 2. This principle is reiterated in Article 55. U.N. CHARTER art. 55.

⁸⁶ See generally W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* (1977); A. SURDEA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (1973).

⁸⁷ G.A. Res. 1514, *supra* note 64.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ W. OFUATEY-KODJOE, *supra* note 86, at 147.

⁹¹ L. RIVIERE, *supra* note 74.

⁹² *Id.*

eral Assembly's resolutions condemning the British Indian Ocean Territory as a disruption of territorial integrity.⁹³ The MMM asserts that since a disruption of territorial integrity is violative of a colony's self-determination, the transfer is void.⁹⁴ If the creation of the British Indian Ocean Territory was a disruption of Mauritius' territorial sovereignty, then it was a violation of the colony's self-determination.⁹⁵ If this scenario is the case the transaction would be void.⁹⁶

The United Kingdom contends that the creation of the British Indian Ocean Territory did not involve the disruption of natural territorial units.⁹⁷ The term natural territorial units is not defined by Resolution 1514,⁹⁸ and the British submit that it was not intended to include islands 1200 miles apart.⁹⁹ The United Kingdom maintains that the island chain was essentially a commercial venture and had been uninhabited when the British acquired possession of the colony.¹⁰⁰ The British further contend that Mauritius and the Archipelago were administered as the same colonial unit merely for convenience.¹⁰¹ The United Kingdom therefore asserts that Mauritius has no natural connection with the Chagos Archipelago.¹⁰² The United Kingdom also maintains that the transfer settlement was an agreement negotiated with the elected representatives of Mauritius.¹⁰³ The British contend that such a freely-negotiated settlement is not a violation of self-determination.¹⁰⁴ If the creation of the British Indian Ocean Territory was not a disruption of Mauritian territorial integrity, then it was not a violation of the colony's right of self-determination.¹⁰⁵

The United Kingdom has the more persuasive argument on this issue. Mauritius asserts that the transfer settlement was forced upon the colony,¹⁰⁶ as evidenced by the General Assembly's resolutions condemning

⁹³ See *supra* notes 62-71 and accompanying text.

⁹⁴ See *supra* notes 84-90 and accompanying text.

⁹⁵ *Id.*

⁹⁶ See *supra* note 90 and accompanying text.

⁹⁷ 20 U.N. GAOR C.4 (1558th mtg.) at 240, U.N. Doc. A/6000/Rev.1, Ch. XIII (1965).

⁹⁸ G.A. Res. 1514, *supra* note 64.

⁹⁹ *Supra* note 97.

¹⁰⁰ *Id.* See also A. TOUSSAINT, *supra* note 12, at 66; C. WRIGHT, *supra* note 12, at 166-67. The inhabitants of Diego Garcia arrived some time after the British gained control of the Chagos Archipelago. They were laborers imported from Mauritius to work on a coconut plantation. N.Y. Times, *supra* note 33, at 10, col. 1.

¹⁰¹ *Questions Relating to Trust and Non Self-Governing Territories and the Declaration on Granting Independence*, U.N.Y.B. 531, 586 (1965).

¹⁰² See *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* notes 84-90 and accompanying text.

¹⁰⁶ See *supra* notes 91-92 and accompanying text.

the transfer.¹⁰⁷ These resolutions are only the opinion of a majority of the General Assembly.¹⁰⁸ They were adopted upon the advice of the Special Committee established to implement Resolution 1514.¹⁰⁹ This resolution is designed to end colonialism¹¹⁰ and deplores pre-independence severances of territory.¹¹¹ The policy underlying this condemnation is that all peoples possess the right to determine their own economic development.¹¹²

The United Kingdom contends that the transfer was the result of open negotiation between the Colonial Office and the elected representatives of Mauritius.¹¹³ The British position is supported by the negotiation process and the events which transpired following it.¹¹⁴ No charges of over-reaching were made against the United Kingdom until Diego Garcia became a controversial Mauritian political issue in the mid-1970's.¹¹⁵ Events of the period suggest that it was politically unwise to support the transfer.¹¹⁶ The only protest to the transfer in 1965 was made by a Mauritian political party which felt that the country had been inadequately compensated.¹¹⁷ The remainder of Mauritius' five-party government,

¹⁰⁷ See *supra* notes 62-71 and accompanying text.

¹⁰⁸ General Assembly resolutions are an expression of a majority of the organization's opinion on a particular issue. Members who are in disagreement with a resolution, or refrain from voting on it, are not bound by the opinion. L. GOODRICH, *THE UNITED NATIONS* 282 (1959). The United Kingdom refrained from voting on any of these resolutions. See *supra* notes 62, 65, 66 and 71. Therefore, the British cannot be deemed to have acquiesced to Mauritius' claim that the colony's right to self-determination was violated.

¹⁰⁹ See *supra* notes 62-71 and accompanying text.

¹¹⁰ The preamble to 1514 contains the following language:

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law

G.A. Res. 1514, *supra* note 64.

¹¹¹ Paragraph 6 of Resolution 1514 reads: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." *Id.*

¹¹² See *supra* note 110.

¹¹³ See *supra* notes 103-04 and accompanying text.

¹¹⁴ See *infra* notes 177-80 and accompanying text.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See *supra* notes 60-61 and accompanying text.

however, felt that the settlement was appropriate.¹¹⁸ The Diego Garcians displaced by the transfer were also adequately compensated by the British government.¹¹⁹ The essence of the right of the self-determination is the principle that all people have the right to freely determine their political and economic development.¹²⁰ A compensated transfer of territory favored by the majority of a people's elected representatives is a free determination of economic development.¹²¹

In the absence of a treaty or other written agreement, the legality of territorial acquisition is analyzed under principles of customary international law.¹²² Therefore, the competing claims to the Chagos Archipelago will now be analyzed under the customary international law theories of fraud, duress, error and termination.

B. Customary International Law

Transfers of territory between nations are referred to as cessions in international law.¹²³ Cession may be accomplished in any mode agreeable to the parties,¹²⁴ and there is no requirement that the agreement be in writing.¹²⁵ The only criterion is that the transfer take place "with the full consent of the Governments concerned."¹²⁶ Such agreements are voidable, or void ab initio, if it can be shown they were concluded as a result of fraud,¹²⁷ duress¹²⁸ or error.¹²⁹ The policy behind this rule is that such consent is not considered voluntary.¹³⁰ Mauritius contends that if the transfer of the Chagos Archipelago is considered a cession, as the United Kingdom asserts,¹³¹ then this transaction is void due to fraud and duress.¹³² These contentions, as well as possible claims of error and termination for breach, will now be examined.

¹¹⁸ COLONIAL OFFICE REPORT, *supra* note 19; A. SIMMONS, *supra* note 23, at 173.

¹¹⁹ See *supra* note 57.

¹²⁰ See *supra* note 110.

¹²¹ *Id.*

¹²² W. BISHOP, INTERNATIONAL LAW 400-21 (1971); J. BRIERLY, LAW OF NATIONS 162-81 (6th ed. 1963); C. RHYNE, INTERNATIONAL LAW 102 (1971); G. VON GLAHN, LAW AMONG NATIONS 273-76 (1976); 2 M. WHITEMAN, *supra* note 46, at 1028-31.

¹²³ 2 M. WHITEMAN, *supra* note 46, at 1088.

¹²⁴ *Id.*

¹²⁵ G. VON GLAHN, *supra* note 122, at 445; 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 5 (1971).

¹²⁶ 2 M. WHITEMAN, *supra* note 46, at 1088.

¹²⁷ See *infra* notes 133-35 and accompanying text.

¹²⁸ See *infra* notes 154-59 and accompanying text.

¹²⁹ See *infra* notes 184-88 and accompanying text.

¹³⁰ G. VON GLAHN, *supra* note 122, at 442-43; 14 M. WHITEMAN, *supra* note 125, at 262-63.

¹³¹ See *infra* note 143 and accompanying text.

¹³² See *infra* notes 141, 170-72 and accompanying text.

1. Fraud

International legal scholars are in general accord that an agreement whose negotiation involved fraud is invalid.¹³³ There are no recorded instances of fraud in the history of treaty negotiation.¹³⁴ Fears that deception could be used led to the inclusion of provisions dealing with this possibility in international treaty conventions.¹³⁵

Fraud is defined as a "false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive."¹³⁶ In order to constitute fraud the false representation must be made at the time of the actual negotiation process with knowledge of its falsity.¹³⁷ An unwitting or unintended misstatement is not actionable as fraud, nor is the mere failure to disclose facts.¹³⁸ Fraudulent misrepresentations must be substantial in order to void an agreement.¹³⁹ Only deliberate misrepresentations, such as the use of inaccurate maps or documents or false statements as to facts, have the effect of invalidating an agreement.¹⁴⁰

The MMM contend that the British deceived their country's representative by promising that Diego Garcia would only be used as a communications center.¹⁴¹ The United Kingdom asserts that no firm plans had been made concerning the Chagos Archipelago in 1965.¹⁴² If the British promised that Diego Garcia would only be used for communications purposes, while intending to make greater military use of the island, Mauritius was defrauded¹⁴³ and the transaction is void.¹⁴⁴ However, if no promises were made, or if the United Kingdom only intended to use the island for a communications center when it so pledged, the doctrine of

¹³³ W. GOULD, *INTERNATIONAL LAW* 320-21 (1957); 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 159-60 (1943); G. VON GLAHN, *supra* note 122, at 442-43; 14 M. WHITEMAN, *supra* note 125, at 262.

¹³⁴ W. GOULD, *supra* note 133, at 320; 5 G. HACKWORTH, *supra* note 133, at 159-60.

¹³⁵ 14 M. WHITEMAN, *supra* note 125, at 266; *Draft Convention on Law of Treaties (with comment)*, 29 AM. J. INT'L L. SUPP. 657, 1144-48 (1935) [hereinafter cited as *Draft Convention*]. Chief among these is the Vienna Convention, Article 49. 14 M. WHITEMAN, *supra* note 125, at 266.

¹³⁶ BLACK'S LAW DICTIONARY 594 (rev. 5th ed. 1979).

¹³⁷ See *supra* note 133.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ A. MANNICK, *supra* note 74, at 161; L. RIVIERE, *supra* note 74, at 36; A. SIMMONS, *supra* note 23, at 173.

¹⁴² COLONIAL OFFICE REPORT, *supra* note 19.

¹⁴³ See *supra* notes 136-37, 139 and accompanying text.

¹⁴⁴ See *supra* note 133 and accompanying text.

fraud does not apply.¹⁴⁵

The United Kingdom's contention that no false representations were made is more persuasive. The British position is supported by the treaties between the United States and the United Kingdom concerning the uses of Diego Garcia.¹⁴⁶ The 1972 treaty authorized only the construction of a communications center, an anchorage and an airstrip.¹⁴⁷ These are precisely the facilities which the MMM contend the United Kingdom negotiated in 1965.¹⁴⁸ The U.S. development of a full naval support facility was not sanctioned by the British until 1976.¹⁴⁹ The concept of fraud applies to the actual negotiation process.¹⁵⁰ At the time of the transfer negotiations, a communications center may have been the only use that the United Kingdom contemplated for Diego Garcia.¹⁵¹ Subsequent military strategy changes in the Indian Ocean are the reasons for the 1976 expansion of the facility.¹⁵² This shift in policy, occurring eleven years after the transfer of the Chagos Archipelago, could not have been foreseen by the British government in 1965.¹⁵³ Under this analysis, the United Kingdom did not defraud Mauritius because it only intended to construct a communications facility on Diego Garcia when the transfer was negotiated.

2. Duress

Duress is pressure upon the will of another inducing the commission of an act the person would not ordinarily consider.¹⁵⁴ Freedom of consent is an essential element of a binding international agreement.¹⁵⁵ An agreement is invalid under customary international law when duress has been brought to bear on one party¹⁵⁶ because such pacts are considered one-

¹⁴⁵ See *supra* note 138 and accompanying text.

¹⁴⁶ See *supra* note 9.

¹⁴⁷ *Id.*

¹⁴⁸ A. SIMMONS, *supra* note 23, at 173.

¹⁴⁹ See *supra* note 9.

¹⁵⁰ See *supra* notes 133, 137 and accompanying text.

¹⁵¹ See *supra* note 9. See also A. SIMMONS, *supra* note 23, at 173.

¹⁵² See *supra* notes 1-7 and accompanying text.

¹⁵³ *Id.* Mauritius would have a much stronger claim on this issue had the transaction been reduced to writing. A treaty or written agreement would be binding on future changed circumstances. See G. VON GLAHN, *supra* note 122, at 445. At issue in this discussion is the claim of fraud in the negotiation process, not the breach of an agreement. See *supra* note 141 and accompanying text.

¹⁵⁴ BLACK'S LAW DICTIONARY, *supra* note 136, at 452.

¹⁵⁵ *Draft Convention*, *supra* note 135, at 1148-49.

¹⁵⁶ 5 G. HACKWORTH, *supra* note 133, at 158-59; G. VON GLAHN, *supra* note 122, at 441-42; 14 M. WHITEMAN, *supra* note 125, at 268-75. This is with the exception of peace treaties with aggressor states. These treaties are generally imposed on the defeated nation and are considered unique under international law. J. BRIERLY, *supra* note 122, at 319.

sided and unfairly negotiated.¹⁵⁷ Traditionally, duress has taken the form of either threats of violence or the actual use of force.¹⁵⁸ International law recognizes that duress arises in two situations: (1) when pressure is employed against the negotiator, and, (2) when pressure is employed against the state itself.¹⁵⁹

The last century has seen many instances of duress in international relations.¹⁶⁰ The two most prominent examples involve the abdication of Ferdinand VII of Spain and the establishment of the German protectorate over Bohemia in 1939.¹⁶¹ The King of Spain's abdication under pressure from Napoleon is considered the classic example of duress against an individual.¹⁶² Napoleon threatened to have Ferdinand tried for treason unless he relinquished his throne.¹⁶³ Following France's defeat at the Battle of Leipzig, this agreement was universally recognized as invalid.¹⁶⁴ The German-Czech Treaty of March 1939 is a striking instance of intimidation against a state.¹⁶⁵ Adolph Hitler extorted the Czechoslovakian president's agreement to the treaty with threats of German bombing.¹⁶⁶ The International Military Tribunal at Nuremberg regarded the situation as an instance of aggression.¹⁶⁷

The international legal community has increasingly recognized and condemned other forms of pressure as well.¹⁶⁸ The United Nations Conference on the Law of Treaties particularly deplored the "threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent."¹⁶⁹

The weakest contention of Mauritius is that the agreement which relinquished control of the Chagos Archipelago is a product of duress.¹⁷⁰ Specifically, the chief negotiator at the transfer conference subsequently

¹⁵⁷ G. VON GLAHN, *supra* note 122, at 441-42.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See supra* note 156.

¹⁶¹ G. VON GLAHN, *supra* note 122, at 442.

¹⁶² *Id.*; W. GOULD, *supra* note 133, at 323.

¹⁶³ G. VON GLAHN, *supra* note 122, at 442.

¹⁶⁴ *Id.*; W. GOULD, *supra* note 133, at 323.

¹⁶⁵ W. GOULD, *supra* note 133, at 321.

¹⁶⁶ G. VON GLAHN, *supra* note 122, at 442.

¹⁶⁷ W. GOULD, *supra* note 133, at 321.

¹⁶⁸ *See generally* Malawer, *Imposed Treaties and International Law*, 7 CAL. W. INT'L L.J. 1 (1977).

¹⁶⁹ Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, U.N. Conference on the Law of Treaties, Official Records and Documents of the Conference (1968-1969) at 285, U.N. Doc. A/Conf. 39/1/Add. 2 (1971).

¹⁷⁰ *As Armadas Intrude*, *supra* note 1, at 8, col. 5.

claimed that he had no input into the settlement,¹⁷¹ and that it was forced upon Mauritius as a condition of independence.¹⁷² The traditional forms of duress involve either actual violence or the threat of abuse.¹⁷³ Mauritius does not claim that the settlement was coerced by violent means; this transaction is, therefore, not a case of traditional duress.¹⁷⁴

Mauritius' claim of duress falls within the Law of Treaties disapprobation of political pressure.¹⁷⁵ Under the United Nations' analysis, if the United Kingdom imposed the transfer of the Chagos Archipelago as a condition for Mauritian independence, the transaction is void *ab initio*.¹⁷⁶

The British contend that the settlement was freely negotiated between the Colonial Office and Mauritius' representatives.¹⁷⁷ If the settlement were a product of open negotiation, the doctrine of duress would not apply.¹⁷⁸

The United Kingdom has the more persuasive argument on this issue as well. The negotiator claiming duress did not raise this issue until the mid-1970's.¹⁷⁹ Ownership of the Chagos Archipelago has been a key Mauritian political issue for the last decade.¹⁸⁰ During this period, Mauritius' chief negotiator at the transfer conference was the country's Prime Minister.¹⁸¹ As it became politically unwise to support the transfer, the Prime Minister began to support the ownership claim, stating that the settlement had been forced on Mauritius.¹⁸² Analyzed in this manner, Mauritius' contention of duress is an unfounded claim, the basis of which is rooted in the country's internal politics.

3. Error

Mauritius does not contend that the agreement transferring possession of the Chagos Archipelago is void for error. An analysis of the country's assertion of fraud, however, reveals the possibility that such a claim exists.¹⁸³

¹⁷¹ L. RIVIERE, *supra* note 74, at 36.

¹⁷² *As Armadas Intrude*, *supra* note 1, at 8, col. 5.

¹⁷³ *See supra* note 158 and accompanying text.

¹⁷⁴ *Id.*

¹⁷⁵ *See supra* note 169 and accompanying text.

¹⁷⁶ *See supra* notes 155-57 and accompanying text.

¹⁷⁷ *Supra* note 97.

¹⁷⁸ *See supra* note 154 and accompanying text.

¹⁷⁹ L. RIVIERE, *supra* note 74, at 36.

¹⁸⁰ *See supra* note 74.

¹⁸¹ A. SIMMONS, *supra* note 23.

¹⁸² *As Armadas Intrude*, *supra* note 1, at 8, col. 5; L. RIVIERE, *supra* note 74, at 36. The Prime Minister also stated that Mauritius would be willing to continue Britain's policy of leasing Diego Garcia to the United States. *Id.*

¹⁸³ *See supra* notes 138, 141-42 and accompanying text.

Agreements which are concluded as a result of substantial error concerning the facts are voidable under customary international law.¹⁸⁴ In order for such error to be excusable, the claimant must not have contributed to the mistake in any way.¹⁸⁵ An excusable error goes to the root of a transaction, so that, but for its existence, the mistaken party would not have made the agreement.¹⁸⁶ This doctrine does not apply if the circumstances of a transaction put the state on notice of a possible error.¹⁸⁷ The only instances in which error has been invoked to rescind or modify an international agreement have involved incorrect maps and other geographical descriptions.¹⁸⁸

No cases directly involving the effect of error on an international agreement have come before the International Court of Justice (ICJ).¹⁸⁹ The ICJ's predecessor, the Permanent Court of International Justice (PCIJ),¹⁹⁰ however, did express a willingness to consider this doctrine.¹⁹¹ In *Legal Status of Eastern Greenland*, two judges utilized such an error analysis.¹⁹² At issue in the proceedings was the ownership and control of the eastern portion of Greenland.¹⁹³ Denmark claimed sovereignty over the area, while Norway challenged such exclusive possession.¹⁹⁴ The Danes relied on statements of the Norwegian Minister of Foreign Affairs stating that his government acquiesced to Denmark's economic exploitation of Greenland as a recognition of Danish sovereignty.¹⁹⁵ Although the PCIJ did not feel this declaration amounted to recognition, the statement was considered an awareness of Denmark's superior interest.¹⁹⁶

In his dissent to the PCIJ's judgment in *Eastern Greenland*, Judge Vogt felt that the Norwegian Minister was "labouring under a fundamental and excusable misapprehension."¹⁹⁷ Judge Vogt questioned whether the Minister knew that Denmark expected exclusive economic possession of Greenland, and he felt that the promise was invalidated by this er-

¹⁸⁴ G. VON GLAHN, *supra* note 122, at 443.

¹⁸⁵ L. MCNAIR, *LAW OF TREATIES* 211 (1961).

¹⁸⁶ *Id.*

¹⁸⁷ Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 48, U.N. Doc. A/Conf. 39/27, *reprinted in* 8 I.L.M. 679, 697-98 (1969).

¹⁸⁸ *Draft Convention, supra* note 135, at 1127.

¹⁸⁹ *Id.* at 1130.

¹⁹⁰ The PCIJ was a creation of the League of Nations. ICJ PUBLICATIONS, *THE INTERNATIONAL COURT OF JUSTICE* (1976).

¹⁹¹ *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J., ser. A/B, No. 53 (Judgment of Apr. 5, 1933).

¹⁹² *Id.* at 92-93; *id.* at 117-22.

¹⁹³ *Id.* at 23.

¹⁹⁴ *Id.* at 44.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 69-73.

¹⁹⁷ *Id.* at 118.

ror.¹⁹⁸ Judge Vogt's analysis follows the customary rule that an error is excusable if it goes to the root of a transaction, and the mistaken party would not have agreed but for the misconception.¹⁹⁹

Judge Anzilotti also dissented from the PCIJ's opinion, however, he felt the case was free from error.²⁰⁰ Judge Anzilotti wrote:

If mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty; I would add that, of all the governments in the world, that of Norway was the least likely to be ignorant of the Danish methods of administration in Greenland²⁰¹

In applying an error analysis, Judge Anzilotti adhered to the customary rule that a claimant must not have contributed to the mistake.²⁰² Thus, from the foregoing opinions, it is possible that the International Court of Justice would be willing to apply a customary error analysis.

This error analysis may apply to the Chagos Archipelago agreement. The MMM claims that Mauritius agreed to the transfer of the islands because its negotiator believed that the territory would only be used for communications purposes.²⁰³ The United Kingdom maintains that it had no definite plans for the Archipelago in 1965.²⁰⁴ If Mauritius believed the transfer was subject to the provision that Diego Garcia only be used for communications, while the British were of the impression that no such condition existed, the agreement would be void for error.²⁰⁵ If no such misunderstanding between the parties occurred, this analysis would not apply.²⁰⁶

An argument that the sale of the Chagos Archipelago did not involve error would be the more persuasive contention. The United Kingdom's interest in Mauritius has always been militarily motivated.²⁰⁷ At the end of the Napoleonic wars, most captured French territory was returned to King Louis XVIII.²⁰⁸ The retained islands were kept solely for strategic reasons.²⁰⁹ The United Kingdom's aim was to militarily occupy these is-

¹⁹⁸ *Id.* at 117-22.

¹⁹⁹ *See supra* note 186 and accompanying text.

²⁰⁰ 1933 P.C.I.J., ser. A/B, No. 53, at 92-93.

²⁰¹ *Id.* at 92.

²⁰² *See supra* note 185 and accompanying text.

²⁰³ A. SIMMONS, *supra* note 23, at 173.

²⁰⁴ COLONIAL OFFICE REPORT *supra* note 19.

²⁰⁵ *See supra* notes 184-88 and accompanying text.

²⁰⁶ *Id.*

²⁰⁷ C. CARRINGTON, *THE BRITISH OVERSEAS* 256 (1950); A. TOUSSAINT, *supra* note 12, at 59.

²⁰⁸ C. CARRINGTON, *supra* note 207. *See also supra* note 50.

²⁰⁹ C. CARRINGTON, *supra* note 207.

lands in order to provide security for British trade.²¹⁰ Mauritius and its dependencies were retained specifically for this purpose.²¹¹ British use of the Archipelago was sporadic,²¹² but as late as the Second World War, Diego Garcia was frequently utilized as a refueling and repair station.²¹³ This type of use is not inconsistent with the U.S. Navy's present facility on the atoll.²¹⁴

In order for a substantial error to be excusable, the nation claiming mistake must not have been on notice of a possible misconception.²¹⁵ Mauritius was constructively on notice of Britain's use of the Chagos Archipelago. The history of British use of the Chagos Archipelago clearly demonstrates that it is a strategic possession, the purposes of which change with world circumstances.²¹⁶ To utilize Judge Anzilotti's analysis: "[O]f all the governments in the world, that of [Mauritius] was the least likely to be ignorant of the [United Kingdom's uses of Diego Garcia]."²¹⁷ Mauritius was in a position to know that the United Kingdom's conceivable uses of Diego Garcia could be greater than communications²¹⁸ and was therefore on notice of possible error. Under this analysis, the Mauritians would be precluded from advancing a claim of error, as they contributed to the mistake by being on notice and failing to act appropriately.²¹⁹

4. Termination

If the negotiations which resulted in the transfer of the Chagos Archipelago did not invalidate the transaction, Mauritius may argue that the United Kingdom breached the agreement. The breach of a fundamental element of an international agreement justifies termination of the accord.²²⁰

²¹⁰ *Id.*

²¹¹ *Id.*; A. TOUSSAINT, *supra* note 12, at 59. This situation has been referred to as a case of "passive imperialism" because Britain had no real use for the islands. The country's main aim was to prevent France from using them to launch attacks on India. *Id.*

²¹² A. TOUSSAINT, *supra* note 12, at 66.

²¹³ Harrison, *supra* note 14, at 54.

²¹⁴ See *supra* note 14.

²¹⁵ See *supra* note 187 and accompanying text.

²¹⁶ See *supra* notes 208-13 and accompanying text.

²¹⁷ See *supra* note 201 and accompanying text.

²¹⁸ See *supra* notes 208-13 and accompanying text.

²¹⁹ An appropriate act would have been a clarification that Diego Garcia always be used for communications purposes and a reduction of the agreement to writing. See *supra* note 153.

²²⁰ M. SORENSON, *MANUAL OF PUBLIC INTERNATIONAL LAW* 239 (1968). A fundamental element is an essential provision of the agreement, the violation of which renders the transaction voidable at the discretion of the other party. W. LEVI, *CONTEMPORARY INTERNATIONAL LAW* 230 (1979). Breach of a fundamental element of an international agreement is one of six ways an accord can be terminated. Termination may also result from: (1) the terms of

Mauritius contends that the United Kingdom agreed to use Diego Garcia solely for communications purposes.²²¹ The Mauritians assert that this condition was a fundamental element of the transaction.²²² The British subsequently allowed the United States to make more extensive use of the island.²²³ If the United Kingdom promised to construct only communications facilities on Diego Garcia, expansion of the installation into a naval support facility was a breach of the sale agreement.²²⁴ The transaction would therefore be voidable at the will of Mauritius.²²⁵

The British have a more advantageous position on the issue. The United Kingdom claims that it had no firm plans for Diego Garcia when the Chagos Archipelago was purchased.²²⁶ If there were no conditions on the sale agreement, the transaction was concluded with Britain's £3 million payment for the archipelagos²²⁷ and title to the islands passed to the United Kingdom.²²⁸

Cession agreements are concluded when the purchasing state pays for the territory.²²⁹ Title to the area is then transferred and the agreement is terminated.²³⁰ The transaction is evidenced by the documents which concluded the sale.²³¹ Although a written instrument is not required to cede territory,²³² documentation is preferable to a verbal agreement.²³³ Written agreements are an invaluable aid to the determination of subsequent disputes.²³⁴ There is no documentation of the transfer of the Chagos Archipelago.²³⁵ Consequently, the actual understandings of the parties is a disputed issue of fact.²³⁶ Therefore, Mauritius must prove, first, that a use agreement was made with the United Kingdom, and, secondly, that this accord was to bind the British indefinitely.

Mauritius' position is supported by the 1972 United Kingdom-United

the agreement; (2) an explicit or tacit understanding of the parties; (3) a change in the fundamental circumstances; (4) impossibility of performance; or (5) the extinction of one of the parties. G. VON GLAHN, *supra* note 122, at 447-50.

²²¹ See *supra* note 141 and accompanying text.

²²² *Id.*

²²³ See *supra* notes 147-49 and accompanying text. See also *supra* note 9.

²²⁴ See *supra* note 220 and accompanying text.

²²⁵ *Id.*

²²⁶ COLONIAL OFFICE REPORT, *supra* note 19.

²²⁷ See *infra* note 230 and accompanying text.

²²⁸ See *infra* note 231 and accompanying text.

²²⁹ G. VON GLAHN, *supra* note 122, at 447.

²³⁰ *Id.*

²³¹ *Id.*

²³² See *supra* note 125 and accompanying text.

²³³ G. VON GLAHN, *supra* note 122, at 445.

²³⁴ *Id.* at 445, 447.

²³⁵ See *supra* notes 58-59 and accompanying text.

²³⁶ A. SIMMONS, *supra* note 23.

States treaty which authorized only the construction of a communications center.²³⁷ This agreement could be interpreted as proof of Britain's alleged promise to Mauritius.²³⁸ Assuming that the 1972 treaty is so construed, Mauritius must then prove that this condition was intended to be permanent. Without a written treaty or memoranda of the transaction, this proof will depend upon oral testimony.²³⁹

The MMM's position is weakened considerably by statements of Mauritius' former Prime Minister,²⁴⁰ the chief negotiator at the transfer conference in 1965.²⁴¹ The ownership of Diego Garcia was an important Mauritian political issue throughout the 1970's.²⁴² During this period, the Prime Minister began to support the claim that the Chagos Archipelago is Mauritian territory.²⁴³ However, he also stated that Mauritius would allow the U.S. naval facility to remain on Diego Garcia so long as rent was remitted to the Mauritian government.²⁴⁴ If a covenant on Diego Garcia existed, this statement could be interpreted as either renunciation or recognition that it had expired. Other interpretations of this situation are possible,²⁴⁵ but the burden of pleading and proof rests on Mauritius.²⁴⁶ Proof of a covenant on Diego Garcia would be an extremely onerous task without a written promise.²⁴⁷ Therefore, termination for breach would not be a strong argument for Mauritius.

IV. PROPOSAL

The government of Mauritius intends to present its claim to the Chagos Archipelago to the International Court of Justice (ICJ).²⁴⁸ The ICJ is the principal judicial organ of the United Nations.²⁴⁹ The ICJ is open to all states which are parties to the Statute of the Court²⁵⁰ and is

²³⁷ Naval Communications Facility on Diego Garcia, *supra* note 9.

²³⁸ See *supra* notes 146-47 and accompanying text.

²³⁹ See *supra* notes 232-34 and accompanying text.

²⁴⁰ See *supra* note 182.

²⁴¹ See *supra* note 181 and accompanying text.

²⁴² See *supra* note 180 and accompanying text.

²⁴³ See *supra* note 182 and accompanying text.

²⁴⁴ *Id.*

²⁴⁵ See *supra* notes 141, 170-72, 203-05 and accompanying text.

²⁴⁶ ICJ PUBLICATIONS, *supra* note 190, at 43-54.

²⁴⁷ See *supra* notes 232-34 and accompanying text.

²⁴⁸ N.Y. Times, *supra* note 33, at 10, col. 4.

²⁴⁹ U.N. CHARTER art. 92.

²⁵⁰ STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 35 [hereinafter cited as STATUTE OF THE I.C.J.]. States which are not members of the United Nations may litigate in the ICJ if they accept the conditions set out by the General Assembly on the recommendations of the Security Council. All states which are members of the United Nations are parties to the Statute of the Court. G. ELIAN, THE INTERNATIONAL COURT OF JUSTICE 45 (1971).

competent to adjudicate all legal claims brought before it.²⁵¹ In adjudicating these claims, the ICJ applies international conventions, international customs and general principles of law recognized by civilized nations.²⁵² To a limited extent, the ICJ will also consider other judicial decisions and scholarly writings.²⁵³ All judgments of the ICJ are final and unappealable.²⁵⁴

Jurisdiction²⁵⁵ is conferred upon the ICJ in two ways.²⁵⁶ One method is by agreement between the nations involved in the dispute.²⁵⁷ There are no formal requirements governing these agreements.²⁵⁸ The ICJ has deliberately kept this aspect informal to encourage states to utilize the Court to resolve their disputes.²⁵⁹ The other way in which jurisdiction is conferred is by unilateral declaration.²⁶⁰ Many nations have declared that they recognize compulsory jurisdiction of the ICJ in certain legal disputes.²⁶¹ These are controversies concerning: (1) the interpretation of a treaty; (2) any question of international law; (3) the existence of any fact which, if established, would constitute a breach of an international obligation; and, (4) the nature or extent of the reparation to be made for the breach of an international obligation.²⁶² Most of these declarations accept compulsory jurisdiction in an extremely restricted manner.²⁶³

The United Nations Charter authorizes the Security Council or General Assembly to request the ICJ to issue an advisory opinion on any legal question.²⁶⁴ Advisory opinions are not binding and do not have the force

²⁵¹ STATUTE OF THE I.C.J. art. 36.

²⁵² *Id.* art. 38.

²⁵³ *Id.*

²⁵⁴ *Id.* art. 60.

²⁵⁵ Jurisdiction is the power of a court to render a binding decision on the merits of a case. BLACK'S LAW DICTIONARY, *supra* note 136, at 766.

²⁵⁶ S. ROSENNE, *THE WORLD COURT* 76 (1963).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ STATUTE OF THE I.C.J. art. 36(2).

²⁶¹ See generally S. ROSENNE, *DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE* 345-416 (1979).

²⁶² STATUTE OF THE I.C.J. art. 36(2).

²⁶³ S. ROSENNE, *supra* note 256, at 82-83. Many states accept compulsory jurisdiction of the ICJ subject to certain limitations known as reservations. The most common reservation excludes disputes which are within the domestic jurisdiction of the state, as determined by the state. Other common reservations limit jurisdiction to disputes arising after a certain date, to disputes for which a solution is not reached through diplomatic means or for which the parties have not agreed upon another method of settlement, and exclude disputes relating to events occurring in time of war. *Id.* at 82.

²⁶⁴ U.N. CHARTER art. 96. Article 96 also authorizes "[o]ther organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly" to request advisory opinions on legal questions arising out of the scope of their

of law.²⁶⁵ These opinions are persuasive, however, and states are unlikely to act contrary to them.²⁶⁶

Mauritius is a member of the United Nations,²⁶⁷ as is the United Kingdom.²⁶⁸ Therefore, both states may litigate in the ICJ.²⁶⁹ Both states must, however, consent to the ICJ's jurisdiction.²⁷⁰ Mauritius has indicated a willingness to have this controversy adjudicated by the ICJ.²⁷¹ The United Kingdom has been silent on this issue. Great Britain has made a unilateral declaration accepting compulsory jurisdiction of the ICJ.²⁷² This declaration is extremely narrow and retains the right to amend or withdraw any reservations.²⁷³ Therefore, utilizing the United Kingdom's unilateral declaration to compel the British to adjudicate is not a viable option for Mauritius.²⁷⁴

In the event that the United Kingdom does not agree to adjudicate this controversy, Mauritius could petition the United Nations General Assembly to request an advisory opinion.²⁷⁵ Considering the numerous resolutions concerning the British Indian Ocean Territory, it is conceivable that the General Assembly would support such a plan.²⁷⁶ Advisory

activities. *Id.*

²⁶⁵ D. PRATAP, *THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT* 227 (1972).

²⁶⁶ See *International Status of South-West Africa*, 1950 I.C.J. 128 (advisory opinion of July 11, 1950). Although South Africa refused to implement the Court's opinions, it did refrain from absorbing the territory. The ICJ declared that such an action would be illegal. D. PRATAP, *supra* note 265, at 228.

²⁶⁷ *Questions Relating to the United Nations Charter and Membership of the United Nations*, U.N.Y.B. 315-16, 1037 (1968).

²⁶⁸ The United Kingdom is a founding member of the United Nations. Britain filed its instrument of ratification on October 24, 1945. U.N. DEP'T OF PUBLIC INFORMATION, *EVERYONE'S UNITED NATIONS* 6 (9th ed. 1979).

²⁶⁹ See *supra* note 250.

²⁷⁰ See *supra* notes 256-61 and accompanying text.

²⁷¹ See *supra* note 248 and accompanying text.

²⁷² Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, Jan. 1, 1969, United Kingdom-United Nations, 654 U.N.T.S. 335.

²⁷³ *Id.* at 338. Mauritius' declaration is also narrowly drawn and reserves "disputes with the Government of any other country which is a Member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree." The declaration is a product of Mauritius' former government. It contains the same withdrawal clause as the United Kingdom's, as such this reservation can be deleted. The declaration states that such a deletion will be effective upon notification of the Secretary-General of the United Nations. Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, Sept. 4, 1968, Mauritius-United Nations, 646 U.N.T.S. 171.

²⁷⁴ See *supra* notes 261-63 and accompanying text.

²⁷⁵ See *supra* note 264 and accompanying text.

²⁷⁶ See *supra* notes 62-71 and accompanying text.

opinions, however, are not legally binding.²⁷⁷ Therefore, although this course of action would bring Mauritius' claim before the ICJ, the binding decision which the country seeks would not be realized.²⁷⁸ A final determination of this controversy could only be accomplished by the agreement of the United Kingdom to submit this case to the ICJ.²⁷⁹

One means of conferring jurisdiction upon the ICJ is through a special agreement between the parties involved.²⁸⁰ A special agreement refers a controversy to the ICJ on a defined issue.²⁸¹ In 1950, a special agreement between the United Kingdom and France requested the ICJ to determine the *Legal Status of the Minquiers and Ecrehos Groups*.²⁸² This special agreement narrowly defined the following issue: "The Court is requested to determine whether the sovereignty over the islets and rocks (insofar as they are incapable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic."²⁸³ A special agreement drawn along these lines would perfectly define the issue in this controversy.

V. CONCLUSION

The United Kingdom should agree to adjudicate the legal status of the Chagos Archipelago before the ICJ. The British government's position is not highly regarded by the international community in this situation.²⁸⁴ The United Nations General Assembly has condemned the country for violating a colony's right to self-determination.²⁸⁵ Analyzed in light of this right to self-determination and under principles of customary international law, however, the United Kingdom is in legitimate possession of the Chagos Archipelago.²⁸⁶ A decision by the ICJ in favor of the United Kingdom would vindicate British possession of the islands; therefore, the United Kingdom should not hesitate to support its claim.

²⁷⁷ See *supra* note 265 and accompanying text.

²⁷⁸ See *supra* notes 77-79 and accompanying text.

²⁷⁹ See *supra* notes 255-60 and accompanying text.

²⁸⁰ S. ROSENNE, *supra* note 256, at 77.

²⁸¹ *Id.* Eleven cases were brought before the PCIJ in such a manner. Three have been brought to the present Court on special agreements. *Id.*

²⁸² The Minquiers and Ecrehos Case (U.K. v. Fr.), 1953 I.C.J. 47, 49 (Judgment of Nov. 17, 1953).

²⁸³ *Id.* at 49.

²⁸⁴ See *supra* notes 62-71 and accompanying text.

²⁸⁵ *Id.*

²⁸⁶ See *supra* notes 106-21, 146-53, 179-82, 207-19, 235-47 and accompanying text.

