

African Nuclear-Weapon-Free Zone in Force: What Next for Diego Garcia?

By [Peter H. Sand](#)



A little-noticed recent development in multilateral treaty law may have potentially explosive consequences for U.S. and British foreign relations: on July 15, 2009, the so-called “Treaty of Pelindaba” for an *African Nuclear-Weapon-Free Zone* (ANWFZ, opened for signature at Cairo on April 11, 1996)^[1] finally entered into force, following the deposit of the 28th instrument of ratification by Burundi.^[1] The

treaty is the last of five regional agreements in force banning nuclear weapons in their area of application: the other four are the 1959 Antarctic Treaty, the 1967 Treaty of Tlatelolco (for Latin America and the Caribbean), the 1985 Treaty of Rarotonga (for the South Pacific), the 1995 Treaty of Bangkok (for Southeast Asia), and the 2006 Treaty of Semipalatinsk (for Central Asia).^[3]

The Pelindaba Treaty – named for the former South African nuclear weapons facility near Pretoria – requires each party “to prohibit in its territory the stationing of any nuclear explosive devices”, while allowing parties to authorize visits or transits by foreign nuclear-armed ships or aircraft (article 4). Furthermore, two of the supplementary protocols to the treaty that are open to “extra-zonal” (non-African) nuclear powers only (ratified by China, France, and the United Kingdom – and now in force, too)^[4] require parties not to “contribute to any act which constitutes a violation of this treaty or protocol” (article 2). The U.S. Government co-signed the protocols under the Clinton Administration in 1996, but after a heated political debate did not submit them to the Senate for ratification.^[5]

One of the reasons why the Pelindaba Treaty creates a serious dilemma for the United States is its geographical application to the islands surrounding the African continent. According to the map appended to it as Annex I, the treaty explicitly covers the “Chagos Archipelago – Diego Garcia”, albeit with a footnote (inserted at the request of the United Kingdom) stating that the territory “appears without prejudice to the question of sovereignty”^[6] – a reference to the long-standing diplomatic dispute between the UK and Mauritius over the archipelago.^[7] The tortuous negotiations leading to this disclaimer footnote are fully documented by the chairman of the drafting committee, former Nigerian Foreign Minister Adeniji.^[8]

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Diego Garcia, a coral atoll in the *British Indian Ocean Territory* (BIOT, last-born of British colonies, established by order-in-council in 1965),^[9] happens to be the site of one of the most valuable (and most secretive) U.S. military bases overseas, strategically situated at the center of the Indian Ocean, close to the Middle East and to its vital oil supply routes.^[10] Following a series of UK-U.S. bilateral agreements since 1966,^[11] the island was developed from an “austere communications facility” into a naval support facility, a satellite tracking station, and a bomber forward operating location, under a \$2.5 billion construction program.^[12] The Diego Garcia airfield – with the world’s longest slipform-paved runway built on crushed coral (12,000 feet, also designated as an emergency landing site for the U.S. space shuttle) – played a central role in all offensive combat missions against Iraq and Afghanistan from 1991 to 2006,^[13] and was used as a staging area for twenty B-52 bombers prominently deployed as “calculated-ambiguous” tactical nuclear deterrent against any chemical or biological weapons use by Iraq against U.S. forces.^[14] The Diego Garcia internal lagoon – a gigantic natural harbor, 48 square miles wide and dredged to a depth of 40 feet as turning basin for aircraft carriers and nuclear submarines – is currently being upgraded under a \$200 million, 5-year construction program to accommodate the U.S. Navy’s new SSGN (nuclear-powered, guided-missile) attack submarines and a 23,000-ton submarine tender.^[15] The Diego Garcia base has also been confirmed by the U.S. Central Intelligence Agency as destination/transit point for several “extraordinary rendition flights” delivering suspected terrorists.^[16] (While the BIOT is subject to British colonial legislation, neither the UK Human Rights Act, nor Britain’s ratifications of the Geneva Conventions or the UN Convention against Torture are applicable to the territory).^[17]

While it is clear from the drafting history of the Pelindaba Treaty that all participating African countries agreed to include the Chagos Archipelago in the treaty zone regardless of the sovereignty dispute,^[18] the UK Foreign and Commonwealth Office (FCO) interprets the footnote under the Pelindaba treaty map liberally as meaning that the United Kingdom did not accept any legal obligations in respect of that territory by its adherence to protocols I and II of the treaty. In a diplomatic note upon signature of the protocols in 1996, the FCO stated that it had no doubt as to its sovereignty over the British Indian Ocean Territory and did “not accept the inclusion of that Territory within the *African nuclear-weapon-free zone*” without the consent of the UK Government.^[19]

That unilateral interpretation of the footnote was supported by the United States and France only.^[20] Russia refused to sign the protocols because of the ambiguous status of Diego Garcia.^[21] The United States noted that “the United Kingdom was not eligible to become a party either to the Treaty or to Protocol III. Thus, neither the Treaty nor Protocol III applied to the activities of the United Kingdom, the United States or any other State not party to the Treaty on the island of Diego Garcia or elsewhere in the British Indian Ocean territories. Accordingly, no change is required in United States armed forces operations in Diego Garcia and elsewhere in the British Indian Ocean territories”.^[22] As explained by a representative of the U.S. Arms Control and Disarmament Agency, the Diego Garcia footnote was adequate to “protect U.S. interests because any resolution of the [sovereignty] issue will occur

outside the framework of the treaty”.^[23]

Reassuring as that assertion was intended to sound, it may have been somewhat overly confident. Mauritius ratified the Pelindaba Treaty as early as April 24, 1996, and is now legally bound by its provisions like the UK, though not by the FCO’s idiosyncratic interpretation of the disclaimer footnote. The United Kingdom in turn may run into internal contradictions of its own with the footnote, given that the 1959 Antarctic Treaty also contains a disclaimer for sovereignty issues,^[24] which nobody so far at least seems to have interpreted as excluding the British Antarctic Territory from the geographical scope of that treaty.^[25] Be that as it may, a recent editorial in the *Mauritius Times* now calls on the government to broaden its ongoing bilateral negotiations with the FCO on the Chagos Archipelago (which will resume in London in October, 2009)^[26] so as to include the U.S. authorities, with a view to making Diego Garcia “nuclear-weapon-free” in order to enable Mauritius to meet its treaty obligations.^[27] The article specifically refers to President Obama’s Prague initiative for a world free of nuclear weapons.

The Pelindaba Treaty is unique among multilateral disarmament agreements in that it requires the establishment of a regional organization, the *African Commission on Nuclear Energy* (AFCONE, article 12 and Annex III), to implement the agreement and to promote cooperation for the peaceful uses of nuclear science and technology among its member states, and with outside states. Annex IV provides that, in the event of a complaint by any one Party that another Party or a Party to Protocol II is in breach of its obligations under the treaty, the Commission may request the International Atomic Energy Agency (IAEA) to conduct a “special inspection”. On the basis of the IAEA report, the Commission will report to the member states, who in an extraordinary session may then address recommendations on compliance to the Party held in breach and to the OAU [African Union], which in turn may refer the matter to the UN Security Council.^[28]

The entry into force of the Pelindaba Treaty should indeed mark the beginning of a momentous new process in Africa.^[29] It will also give a boost to preparations for the forthcoming review conference on the *Nuclear Non-Proliferation Treaty* in 2010. Hopefully, then, the ominous Diego Garcia footnote will not stand in the way of these developments. For even though there was a time when the U.S. base at Diego Garcia was considered “politically invulnerable”^[30] – that time is over.

About the Author

Peter H. Sand, an ASIL member, is lecturer in international environmental law at the University of Munich, Germany, and a former legal adviser for the UN Environment Programme and the World Bank. He is co-editor of *International Environmental Agreements: Politics, Law and Economics*. His latest book, ***United States and Britain in Diego Garcia: The Future of a Controversial Base***, was just published by Palgrave Macmillan, New York.

Endnotes

^[1] African Nuclear-Weapon-Free Zone Treaty, April 11, 1996, 35 I.L.M. 698.

[2] Press Release, International Atomic Energy Agency, Africa Renounces Nukes: Treaty's Entry into Force Makes Entire Southern Hemisphere Free of Nuclear Weapons (Aug. 14, 2009), available at <http://www.iaea.org/NewsCenter/News/2009/africarenonces.html> (last visited Aug. 26, 2009). The 28 parties to the treaty are Algeria, Benin, Botswana, Burkina Faso, Burundi, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Gambia, Guinea, Kenya, Lesotho, Libyan Arab Jamahiriya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Nigeria, Rwanda, Senegal, South Africa, Swaziland, Togo, United Republic of Tanzania, and Zimbabwe.

[3] For more on these treaties, read MICHAEL HAMEL-GREEN, REGIONAL INITIATIVES ON NUCLEAR- AND WMD-FREE ZONES: COOPERATIVE APPROACHES TO ARMS CONTROL AND NON-PROLIFERATION (2005).

[4] On the UK ratification of March 19, 2001, see the Explanatory Memorandum submitted to Parliament by the Foreign and Commonwealth Office. *Explanatory Memorandum for the Africa Nuclear-Weapon-free-Zone Treaty (The Treaty of Pelindaba)*, Cmnd. Paper 3498 (2000) available at <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2000e/pelindaba> (last visited Aug. 26, 2009).

[5] For background see JANNE E. NOLAN, AN ELUSIVE CONSENSUS: NUCLEAR WEAPONS AND AMERICAN SECURITY AFTER THE COLD WAR 77-84 (1999). See also Karl K. Schonberg, *The Generals' Diplomacy: U.S. Military Influence in the Treaty Process, 1992-2000*, 3 SETON HALL J. DIPL. & INT'L REL. 68, 80 (2002). The principal obstacle to U.S. ratification was the impending threat of Libya's nuclear weapons program, which has since been defused. Elvira Sánchez Mateos, *Libya's Return to the International Scene*, 10 MEDITERRANEAN POL. 439 (2005).

[6] See Sola Ogunbanwo, *The Treaty of Pelindaba: Africa is Nuclear-Weapon-Free*, 27 SECURITY DIALOGUE 185, 192 (1996); Norbert Pelzer, *Nuclear-Free Zones*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 705, 712 (Rudolf Bernhardt ed., 1997); JOZEF GOLDBLAT, ARMS CONTROL: THE NEW GUIDE TO NEGOTIATIONS AND AGREEMENTS 210 (2nd ed. 2002); THIERRY OLLIVRY, DIEGO GARCIA: ENJEUX STRATÉGIQUES, DIPLOMATIQUES ET HUMANITAIRES 93 (2008).

[7] See André Oraison, *Le contentieux territorial anglo-mauricien sur l'archipel des Chagos revisité*, 83 REVUE DE DROIT INTERNATIONAL ET DE SCIENCES DIPLOMATIQUES ET POLITIQUES 109 (2005). See also *infra* note 18.

[8] See generally OLUYEMI ADENIJI, THE TREATY OF PELINDABA ON THE AFRICAN NUCLEAR-WEAPON-FREE ZONE (2002).

[9] British Indian Ocean Territory Order 1965 (S.I. 1965/1920) and Royal Instructions of 8 November 1965 (S.I. 1965 III, 6440), as amended S.I. 1968/11, S.I. 1976/893, S.I. 1983/1888.

[10] For historical background read PETER H. SAND, UNITED STATES AND BRITAIN IN DIEGO GARCIA: THE FUTURE OF A CONTROVERSIAL BASE

(2009). Much of the information on the base is still classified for security reasons, which explains why Diego Garcia has remained virtually “unknown in the US”. NOAM CHOMSKY, *HEGEMONY OR SURVIVAL: AMERICA'S QUEST FOR GLOBAL DOMINANCE* 162 (2003).

[11] Starting with an exchange of notes of Dec. 30, 1966, on the Availability for Defense Purposes of the British Indian Ocean Territory, Dec. 30, 1966, 18 U.S.T. 28, 603 U.N.T.S. 273; followed by supplementary agreements and amendments in 1972, 1976, 1982, 1987, 1999, 2001, 2002 and 2004; texts in Sand, *supra* note 10, at 69-121.

[12] See VYTAUTAS B. BANDJUNIS, *DIEGO GARCIA: CREATION OF THE INDIAN OCEAN BASE* (2001). According to the U.S. Department of Defense, the total plant replacement value of Diego Garcia amounts to \$2.514 billion. U.S. DEPARTMENT OF DEFENSE, *BASE STRUCTURE REPORT: FISCAL YEAR 2007 BASELINE 78* (2007) available at http://www.defenselink.mil/pubs/BSR_2007_Baseline.pdf (last visited Aug. 26, 2009)

[13] See RICHARD EDIS, *PEAK OF LIMURIA: THE STORY OF DIEGO GARCIA AND THE CHAGOS ARCHIPELAGO* 94-97 (2004).

[14] William M. Arkin, *Calculated Ambiguity: Nuclear Weapons and the Gulf War*, 19 WASH. Q. 3, 10 (1996) (quoting former U.S. Secretary of State James Baker). See also NOLAN, *supra* note 5, at 75.

[15] See Andrew S. Erickson *et al.*, Paper presented at the annual meeting of the American Political Science Association: Diego Garcia's Strategic Past, Present and Future (Aug. 28, 2008), available at http://www.allacademic.com/meta/p279108_index.html (last visited Aug. 26, 2009).

[16] Press Release, Central Intelligence Agency, Director's Statement on the Past Use of Diego Garcia, (Feb. 21, 2008) available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archieve-2008/past-use-of-diego-garcia.html> (last visited Aug. 29, 2009). See also David Miliband, *Terrorist Suspects (Renditions)*, Statement by the Secretary of State for Foreign and Commonwealth Affairs, 472 HOUSE OF COMMONS DEBATES col. 547 (Feb. 21, 2008).

[17] See *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] UKHL 61, 4 All E.R. 1055 (2008), 103:2 AJIL 317, 320 (2009); and Peter H. Sand, *Diego Garcia: British-American Legal Black Hole in the Indian Ocean?*, 21 J. ENVTL. L. 113 (2009).

[18] ADENIJI, *supra* note 8, at 149-50. An earlier British-French proposal for a note stating that the disputed area “is not included in the zone” was not accepted by the drafting meeting in Johannesburg in May-June 1995. *Id.* at 283. See also Letter from the Mauritian Foreign Minister to the OAU Secretary General in *id.* at 285; Olu Adeniji, *The African Nuclear-Weapon-Free Zone Treaty*, 19 DISARMAMENT 1, 9 (1996) (stating that “[f]or Africa, however, the Chagos Archipelago is part of the territory of Mauritius, whose claim has been endorsed by OAU”).

[19] Letter from the British Ambassador to the OAU Secretary General (Cairo,

April 11, 1996) in ADENIJI, *supra* note 8, at 157, 299.

[20] *Id.* at 148.

[21] Letter from the Russian Ambassador to the OAU Secretary General (Addis Ababa, Nov. 5, 1996). See GOLDBLAT, *supra* note 6, at 211; Liviu Horovitz, *African Nuclear-Weapon-Free Zone Enters Into Force*, CNS FEATURE STORIES (Monterey/CA, Aug. 12, 2009), available at http://cns.miis.edu/stories/090812_africa_nwz.htm (last visited Aug. 26, 2009).

[22] Declarations and Understandings; text in ADENIJI, *supra* note 8, at 157, 301. See also Jozef Goldblat, *Nuclear-Weapon-Free Zones: A History and Assessment*, 4 NONPROLIFERATION REV. 18, 26 (1997); Stephen J. Forsberg, *Island at the Edge of Everywhere: A History of Diego Garcia* 53 (2005) (unpublished MA thesis, Sam Houston State University) available at <http://www.zianet.com/tedmorris/dg/realhistory-2.html> (last visited Aug. 26, 2009).

[23] David Fischer, *The Pelindaba Treaty: Africa Joins the Nuclear Free World*, 25:10 ARMS CONTROL TODAY 9, 10 (1995). See also Mark E. Rosen, *Nuclear-Weapon-Free Zones: Time for a Fresh Look*, 8 DUKE J. COMP. & INT'L L. 29, 48 (1997).

[24] Antarctic Treaty, art. IV, Dec. 1, 1959, 12 U.S.T. 794, 19 I.L.M. 860 (1980).

[25] See Peter H. Sand, *Diego Garcia: nouveau "trou noir" dans l'océan Indien?*, 113 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 365, 372 (2009). Territorial sovereignty over the so-called British Antarctic Territory (which – like the British Indian Ocean Territory – is administered as a crown colony by the Foreign and Commonwealth Office) is contested by Chile and Argentina.

[26] *Joint Communiqué* of the Mauritian and British Governments on their second round of talks on the Chagos Archipelago / British Indian Ocean Territory (Port Louis, July 21, 2009).

[27] R.V., *Diego Garcia in Nuclear Weapons Free Zone*, MAURITIUS TIMES, Aug. 21, 2009, available at <http://www.mauritiustimes.com/210809r.v.htm> (last visited Aug. 26, 2009).

[28] See African Nuclear-Weapon-Free Zone Treaty, *supra* note 1, at Annex IV art. 4(g).

[29] See Benson N.C. Agu, *Denuclearization: Enhancing African Regional Cooperation in Peaceful Nuclear Applications*, 19 DISARMAMENT 21 (1996).

[30] KENT E. CALDER, *EMBATTLED GARRISONS: COMPARATIVE BASE POLITICS AND AMERICAN GLOBALISM* 231 (2007). See also ALVIN J. COTTRELL & THOMAS H MOORER, *SEAPOWERS AND STRATEGY IN THE INDIAN OCEAN* 125 (1981); Robert E. Harkavy, *Thinking about Basing, in REPOSTURING THE FORCE: U.S. OVERSEAS PRESENCE IN THE*

